

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2020–0042;
FXES1111090FEDR–245–FF09E21000]

RIN 1018–BD94

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Peñasco Least Chipmunk and Designation of Critical Habitat**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), list the Peñasco least chipmunk (*Neotamias minimus atristriatus*), a mammal from New Mexico, as an endangered species under the Endangered Species Act of 1973 (Act), as amended. We also designate critical habitat. In total, approximately 1,774 hectares (4,386 acres) in Lincoln County, New Mexico, fall within the boundaries of the critical habitat designation. This rule extends the protections of the Act to this species and its designated critical habitat.

DATES: This rule is effective January 9, 2025.

ADDRESSES: This final rule, the proposed rule, comments and materials we received on the proposed rule, and supporting materials we used in preparing this rule, such as the species status assessment report, are all available on the internet at <https://www.regulations.gov> at Docket No. FWS–R2–ES–2020–0042.

For the critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are also available at <https://www.regulations.gov> at Docket No. FWS–R2–ES–2020–0042.

FOR FURTHER INFORMATION CONTACT: Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Road NE, Albuquerque, NM 87113; telephone 505–346–2525. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:**Executive Summary**

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the Peñasco least chipmunk meets the definition of an endangered species; therefore, we are listing it as such and finalizing a designation of its critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. This rule lists the Peñasco least chipmunk (*Neotamias minimus atristriatus*) as an endangered species under the Endangered Species Act. We are also designating critical habitat for this species in three units, on public property totaling 1,774 hectares (4,386 acres) in Lincoln County, New Mexico.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the Peñasco least chipmunk is endangered due to the following threats: vegetation shifts, wildfire, forest encroachment, recreation, development, and land use (Factor A), disease (Factor C), nonnative species (Factors A and C), and small population size and lack of connectivity (Factor E).

Although small population size is the primary stressor to the Peñasco least chipmunk, *Risk Factors for Peñasco Least Chipmunk*, below, presents a broader discussion of the threats. We have found that existing regulatory mechanisms do not adequately reduce the threats acting on the species to eliminate the risk of extinction (Factor D).

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

Previous Federal Actions

Please refer to the proposed listing and critical habitat rule (86 FR 53583) for the Peñasco least chipmunk published on September 28, 2021, for a detailed description of previous Federal actions concerning this species.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the Peñasco least chipmunk (Service 2024, entire). The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

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 in listing and recovery actions under the Act, we solicited independent scientific review of the information contained in the Peñasco least chipmunk SSA report. As discussed in the proposed rule, we sent the SSA report to five independent peer reviewers and received three responses. The peer reviews can be found at <https://www.regulations.gov> in Docket No. FWS–R2–ES–2020–0042.

In preparing the proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which was the foundation for the

proposed rule and this final rule. A summary of the peer review comments and our responses can be found in the proposed rule (86 FR 53583; September 28, 2021).

Summary of Changes From the Proposed Rule

We reviewed the comments related to our proposed listing determination and critical habitat for the Peñasco least chipmunk (see Summary of Comments and Recommendations, below), completed our analysis of areas considered for exclusion under section 4(b)(2) of the Act, and reviewed our analysis of the physical or biological features essential to the conservation of the Peñasco least chipmunk. We incorporated new information provided during the comment period into the SSA report, which is available as version 1.1 (Service 2024, entire). This final rule incorporates changes from our 2021 proposed listing and critical habitat rule (86 FR 53583; September 28, 2021) based on the comments that we received and have responded to in this document and considers efforts to conserve the Peñasco least chipmunk. We make several minor revisions in this rule to clarify some information, and we update or add new references.

Based on information we received in comments regarding the critical habitat for the Peñasco least chipmunk, we added details to the list of physical or biological features essential to the conservation of the species to more accurately reflect the chipmunk's need for habitat containing widely spaced large-diameter conifers, such as Engelmann spruce (*Picea engelmannii*) or ponderosa pine (*Pinus ponderosa*), intermixed in low densities with the meadow/grassland vegetation. These habitat features provide shade that protects the understory habitat, provide chipmunks cover from aerial predators, and support the species' life history. Additionally, we added discussion regarding the Peñasco least chipmunk's taxonomy, which has been the subject of several scientific articles released since publication of our proposed rule to list the species.

In 2023, we received a request from the Mescalero Apache Tribe to exclude portions of the proposed critical habitat from Unit 3—Sierra Blanca in southern New Mexico. The area proposed for designation as critical habitat included subalpine habitat located within the Lincoln National Forest, the Lincoln National Forest Wilderness Area, and Mescalero Apache Tribal Reservation land. A portion of the Sierra Blanca Unit known as the Ski Apache Resort is managed by the U.S. Forest Service as

part of the Lincoln National Forest and operated under a special use permit by the Mescalero Apache Tribe. The Tribe requested that the Reservation land and the Ski Apache Resort be excluded from the designation.

We found that the benefits of including these two portions of the Sierra Blanca Unit are outweighed by the more substantial benefits of excluding them regarding (1) the advancement and support of our Federal Indian Trust obligations and the maintenance of effective collaboration and cooperation to promote the conservation of Peñasco least chipmunk; (2) the maintenance of effective working relationships and an existing partnership between the Tribe and the U.S. Forest Service to promote the conservation of the Peñasco least chipmunk and its habitat; (3) allowance for continued meaningful collaboration and cooperation with the Tribe to implement natural resource conservation; and (4) provision of future conservation efforts that would benefit other listed species and their habitats. Based on our analysis, we are excluding the Reservation land and the Ski Apache Resort from Unit 3—Sierra Blanca, a net decrease of 886 hectares (2,189 acres) from the proposed rule (see table 4, below). While the area proposed for critical habitat was in Lincoln and Otero Counties, the area in Otero County is now being excluded. The critical habitat in this final designation is entirely within Lincoln County. More information can be found below in *Exclusions Based on Other Relevant Impacts*.

Summary of Comments and Recommendations

In the proposed rule published on September 28, 2021, we requested that all interested parties submit written comments on the proposal by November 29, 2021. We also contacted appropriate Federal and State agencies, Tribal entities, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Albuquerque Journal. We did not receive any requests for a public hearing. All substantive information received during the comment period has either been incorporated directly into this final determination, has been used to clarify the information in the SSA report, or is addressed below.

Comments From States

(1) *Comment:* Multiple commenters cited the recent challenge to the

taxonomic certainty of the Peñasco least chipmunk in a peer-reviewed scientific publication (Puckett et al. 2021). Several commenters, including the New Mexico Department of Game and Fish, challenged the results of the new publication and disagreed with the article's recommendation that the Peñasco least chipmunk be regarded as part of a different subspecies.

Our response: We considered the best scientific and commercial data available regarding the Peñasco least chipmunk to evaluate its status under the Act. We evaluated the status of the species just prior to the publication of an article by Puckett et al. (2021) that challenged the taxonomic status of the Peñasco least chipmunk. Based on an analysis of genomic data of Peñasco least chipmunks within the White and Sacramento Mountains of southeastern New Mexico in comparison to other *Neotamias minimus* subspecies throughout the Southwest United States, the researchers suggested that the current taxonomic structure of *Neotamias minimus* subspecies should be revised. That taxonomic revision would result in the Peñasco least chipmunk becoming part of *N. m. operarius*, a subspecies with a much larger range. We considered the information presented in Puckett et al. (2021) in our review of the best available science, and we considered that the interpretation of the genomic data in that article has been disputed by others in the scientific community (see Hope and Frey 2021), and the discussion is ongoing with the weight of scientific research balancing in favor of retaining the current subspecies classification. The committee with primary responsibility for evaluating and accepting changes to the taxonomy of the Peñasco least chipmunk is the American Society of Mammalogists, which has not changed the taxonomy of the Peñasco least chipmunk, and the Service does not typically play a role in those decisions. At the time of publication of the proposed rule, the taxonomic status of the Peñasco least chipmunk as *N. m. atristriatus* was supported as valid by the scientific community, and it continues to be regarded as *N. m. atristriatus* to this day.

Science is a cumulative process, and the body of knowledge is ever-growing. In light of this, the Service has taken and will always take new research into consideration. The Service will consider any new taxonomic research in the future and whether the new information may support a revision of entity.

Public Comments

(2) *Comment:* Several commenters expressed concern that the listing of the Peñasco least chipmunk with critical habitat would result in restrictions to recreational use on public lands.

Our response: The listing of the Peñasco least chipmunk with designation of critical habitat does not prevent access to any land, whether private, Tribal, State, or Federal. The species 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 jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Critical habitat for the Peñasco least chipmunk occurs entirely on lands managed by the U.S. Forest Service. We have no information that would indicate that a possible outcome of a section 7 consultation in response to the listing and designation of critical habitat for the Peñasco least chipmunk would be closures to public access or restrictions to currently permissible activities such as recreation on U.S. Forest Service lands or lands owned or managed by any other entity. This is because designation of critical habitat does not affect land ownership, establish any closures, or impose restrictions on use of or access to the designated areas. Critical habitat designation also does not establish specific land management standards or prescriptions.

(3) *Comment:* One commenter stated that there was a lack of attempt to protect the Peñasco least chipmunk and its habitat through voluntary measures prior to proposing that the species be listed. The commenter also suggested that listing the species would impact private landowner rights by interfering with their ability to make best use of their land.

Our response: We are required to make our determination based on the best scientific and commercial data available at the time of our rulemaking. The listing of a species does not obstruct the development of conservation agreements or partnerships to conserve the species. Once a species is listed as either an endangered or threatened species, it is subject to many tools the Act provides to advance the conservation of listed species. Conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities, including the voluntary cooperation of non-Federal landowners. Building partnerships and

promoting cooperation of landowners are essential to understanding the status of species on non-Federal lands and may be necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection. Once a species is listed, private or other non-Federal property owners may enter into voluntary conservation benefit agreements that can contribute to the recovery of species, habitat conservation plans that allow activities (e.g., grazing) to proceed while minimizing effects to species, funding through the Partners for Fish and Wildlife Program to help promote conservation actions, and grants to the States under section 6 of the Act.

These plans or agreements provide for the conservation of the listed species while providing the landowner with a permit for incidental take of the species during the course of otherwise lawful activities. These plans and agreements are voluntary and ensure respect for private property rights. We encourage any landowners with Peñasco least chipmunks or other listed species present on their property and who think they carry out activities that may negatively impact that listed species to work with the Service.

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, establish any closures, or impose restrictions on use of or access to the designated areas. Critical habitat designation also does not establish specific land management standards or prescriptions. Federal agencies are required to consult with the Service on any action they authorize, fund, or carry out to ensure it does not result in the destruction or adverse modification of critical habitat.

For the Peñasco least chipmunk, designation of critical habitat will not affect private landowners since there is no critical habitat designated on private land. All critical habitat is on U.S. Forest Service land on the Lincoln National Forest. The Federal land will be managed for species conservation and critical habitat protection as required under the Act.

(4) *Comment:* One commenter requested that the effects of recreational activities, with a focus on mountain biking, be specifically studied prior to listing the Peñasco least chipmunk with critical habitat. The commenter suggested that the Peñasco least chipmunk is known to feed on sunflower seeds (Frey and Hays 2017, p. 34) and thus would benefit from human

recreation due to a potential increase in annual sunflowers (*Helianthus annuus*), which proliferate along disturbed trails and roadways (USDA 2006, p. 3).

Our response: We considered the best scientific and commercial data available regarding the Peñasco least chipmunk to evaluate its status under the Act. We solicited peer review of our evaluation of the available data and scientific literature in making our determination, and our peer reviewers supported our analysis. At the time of publication of the proposed rule, we had not found any scientific or commercial data or other information pertaining to the benefits of recreational activities or development of recreational access to the habitat of the Peñasco least chipmunk. Further, the rationale posed by this commenter is not supported by the current literature. Frey and Hays (2017) do not suggest that sunflowers along trails and roadways are a critical need for this species, but simply state that seeds and flowers of various forbs, including those from the Asteraceae family, which includes sunflowers, are an important food source for the chipmunks in their subalpine habitat. The Annual Sunflower Plant Guide developed by the Natural Resources Conservation Service (USDA 2006, p. 3) states only that the species is a “common and widespread roadside weed,” which is an indication that the species is often observed there. It does not suggest that trails or roadways cause an increase in annual sunflowers and instead states that the species is “common in open sites in many different habitats” (USDA 2006, p. 3). We do not consider the increase in any food source for the chipmunk along roadways to be beneficial to the conservation and recovery of the species, owing to a likely increase in mortalities from vehicles resulting from increased feeding activity along roadways.

Science is a cumulative process, and the body of knowledge is ever-growing. In light of this, the Service will always take new research into consideration and incorporate it into our recovery planning efforts for the species.

(5) *Comment:* Some commenters expressed concern that the proposed critical habitat on the Mescalero Apache Tribal lands should not be excluded in the final rule because the species has historically occurred there.

Our response: The Act specifically requires the Service to designate critical habitat for listed species to the maximum extent prudent and determinable and does not restrict such designation to particular land ownership. Rather, areas that meet the

definition of critical habitat, as determined on the basis of the best scientific data available, are proposed for designation. However, section 4(b)(2) of the Act further provides that the Secretary, in designating critical habitat and making revisions, shall take into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may then choose to exercise her discretion to exclude any area from critical habitat if she determines that the benefits of exclusion outweigh the benefits of specifying such areas as part of the critical habitat unless that exclusion would result in the extinction of the species.

In this final rule, the Secretary has exercised her discretion to exclude critical habitat on the Mescalero Apache Tribe's land and on an adjacent parcel of U.S. Forest Service land operated by the Tribe under a special use permit. This decision was based upon (1) the advancement and support of our Federal Indian Trust obligations and the maintenance of effective collaboration and cooperation to promote the conservation of Peñasco least chipmunk; (2) the maintenance of effective working relationships and an existing partnership between the Tribe and U.S. Forest Service to promote the conservation of the Peñasco least chipmunk and its habitat; (3) allowance for continued meaningful collaboration and cooperation with the Tribe to implement natural resource conservation; and (4) provision of future conservation efforts that would benefit other listed species and their habitats. Exclusion should never be interpreted as meaning that such areas are unimportant to the conservation of the species. Exclusion is based upon a determination by the Secretary that the benefit of excluding these areas outweighs the benefit of including them in critical habitat. We readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We therefore have taken these directives into consideration in our determination.

(6) *Comment:* A commenter stated that the critical habitat for the Peñasco least chipmunk should not be restricted to the current known occupied habitat in the White Mountains of New Mexico but should also include historically occupied habitat in the James Canyon

and Sacramento Lookout areas of the South Sacramento Mountains.

Our response: Areas proposed for Peñasco least chipmunk critical habitat were identified as such because they either currently provide the essential physical or biological features, if occupied, or were otherwise determined to be essential for the conservation of the species, if unoccupied. The James Canyon and Sacramento Lookout areas of the South Sacramento Mountains are outside the known current range of the species. These historically occupied areas have not had any detections of the species since 1966. The habitat in these locations has been significantly altered from historical natural conditions and is no longer suitable for the species. The commenter did not provide additional information or state how these areas are essential for the conservation of the species. Therefore, we concluded that these comments did not provide new or additional information to consider in this final listing rule of the Peñasco least chipmunk.

(7) *Comment:* We received multiple comments regarding the need to incorporate the recently published research findings regarding Peñasco least chipmunk habitat use and population status as the basis for considering additional critical habitat areas in the South Sacramento Mountains region. The new research cited in these comments indicated that Peñasco least chipmunks were found in habitat conditions that differed to some degree from our descriptions in the proposed critical habitat. Individuals were found in intermingled meadows and sparse trees commonly found in forest openings and edges and generally characterized by robust understory of herbaceous plants and shrubs that provide visual obstruction for cover (McKibben and Frey 2020, pp. 33–34; McKibben 2022, p. 129). Other research indicated that the loss of historical populations in the South Sacramento Mountains was due to the loss of suitable microhabitat conditions in that historically occupied habitat in recent decades (Jacobson et al. 2021, pp. 32–33).

Our response: The Service will always take new research into consideration for listing and critical habitat determinations. The scientific information we received from these commenters provides new and useful information for the Service to consider incorporating into our recovery planning and development of a recovery implementation strategy for the Peñasco least chipmunk and it has been incorporated into version 1.1 of the SSA report (Service 2024). However, this

new information does not change our critical habitat designation. Surveys indicated that Peñasco least chipmunks do not occupy the South Sacramento Restoration Project area where the research was conducted, an area outside the known current range of the species, because the habitat is not suitable for the species (Jacobson et al. 2021, p. 2). High-elevation habitat in the South Sacramento Restoration Project area may contain many of the conditions supportive of the species (*i.e.*, Engelmann spruce stands with deciduous shrubs), but the appropriate understory microhabitat conditions do not exist. Therefore, the area is not habitat for the Peñasco least chipmunk, and we cannot designate it as critical habitat.

(8) *Comment:* Several commenters requested that we consider new information from recent analyses of climate change effects to the Peñasco least chipmunk in our proposed rule (see Service 2024 and McKibben and Frey 2020).

Our response: In our proposed rule, we cited our analysis of the effects of climate change on the Peñasco least chipmunk and its habitat that was included in our species status assessment (Service 2024, entire). The information we used in our analysis was the best available at that time. We framed our climate change analysis to show how changes in precipitation or temperature would most likely affect the biological or natural history needs of the subspecies. We assessed changes in air temperature and snow pack in the winter that could impact the overwintering of the Peñasco least chipmunk (less snow could impact temperature stability in underground burrows over winter), summer precipitation and temperature that could affect food resources for the Peñasco least chipmunk, as well as how changes to summer precipitation and temperatures could potentially influence disease dynamics and outbreaks. The results of our model showed that for the time period of 2025 through 2049 in the Sacramento and White Mountains, we expect there to be less than one millimeter change in annual precipitation, less than 2 millimeters change in snow precipitation in winter months, and less than 1.5 °C change in temperature minimums and maximums. The effect of these changes that could relate to Peñasco least chipmunk resources or stressors appears to be mild. Therefore, although the impacts of climate change on the Peñasco least chipmunk are expected to be negative, our analysis did not find it to be one of the most

significant risk factors for the subspecies and its habitat over the next 30-year period.

In our proposed rule to list the species, we determined that stressors affecting the viability of the Peñasco least chipmunk include vegetation shifts, wildfire, forest encroachment, recreation, development, and land use (Factor A), disease (Factor C), nonnative species (Factors A and C), and small population size and lack of connectivity (Factor E). The influence of climate change on these stressors is expected to be negative, though minor, compared to other influences. For example, the magnitude, frequency, and intensity of wildfire in the Sacramento and White Mountains is likely to be influenced by reduction of precipitation and warmer temperatures resulting from climate change, causing fires to be more severe than they were historically. Our analysis found the severity of wildfire is most highly influenced by the vegetation shifts that have occurred, and the reduction of precipitation and warmer temperatures may add to the level of severity.

We are required under the Act to make our determination based on the best scientific and commercial data available at the time of our rulemaking to evaluate the status of the Peñasco least chipmunk under the Act. We reviewed the new climate change information provided, and it does not change our current finding that the species is endangered, nor does it change our critical habitat designations. We will consider incorporating the new information into our recovery planning and the development of a recovery implementation strategy for the Peñasco least chipmunk.

I. Final Listing Determination Background

The Peñasco least chipmunk (*Neotamias minimus atristriatus*) is currently recognized as one of 17 subspecies of least chipmunk (*Neotamias* [= *Tamias*] *minimus*) (Wilson and Reeder 2005, p. 815). Least chipmunks are smaller than most other chipmunk species and belong to the family Sciuridae. The Peñasco least chipmunk is known from the Sacramento Mountains and White Mountains in Lincoln and Otero Counties in southern New Mexico.

Peñasco least chipmunks are grayish-brown mixed with cinnamon-buff on the rump and thighs (Sullivan 1993, p. 1), with a blackish head with white and cinnamon, and a whitish patch behind each ear. The sides of their bodies are light brown, and underparts are whitish with buff; their feet are light pink-

cinnamon; the tail is blackish or brown with pinkish-cinnamon; and dark stripes on the back and head are blackish to blackish-brown, edged with tawny along the spine, and bordered with white on the face and sides (Sullivan 1993, pp. 1–2). The Peñasco least chipmunk has pale yellowish-orange hindfeet, a light beige, yellowish, or orange belly, and dark underfur (Frey 2010, p. 11). A full species description and description of its habitat can be found in chapter 2 of the SSA report (version 1.1; Service 2024, pp. 13–21).

The Peñasco least chipmunk was first described as a new species, *Eutamias atristriatus*, in 1913 based on 10 specimens collected from ponderosa pine forest in the Sacramento Mountains in 1902 (Bailey 1913, entire). This taxonomy has been revised multiple times as the taxonomy of chipmunks and least chipmunks changed, including use of the synonyms *Eutamias* and *Tamias* for *Neotamias*. Howell (1929, entire) designated the taxon a subspecies of least chipmunk, *Tamias minimus atristriatus*.

Conley (1970, entire) purported that the Sacramento Mountains population was the only population of least chipmunks in New Mexico worthy of nomenclatural distinction based on morphological distinctiveness. However, Sullivan and Peterson (1988, p. 21) recommended the retention of *N. m. atristriatus* as a subspecies that included both the New Mexico White Mountains and Sacramento Mountains, based on more in-depth morphological and genetic analyses. Despite recent discussions about the species' taxonomy (Puckett et al. 2021, entire; Hope and Frey 2021, entire), as described in the comments section above, *N. m. atristriatus* is currently recognized as a valid subspecies of *N. minimus*.

Habitat occupied by Peñasco least chipmunk varies by population between the Sacramento and White Mountains. In the Sacramento Mountains, Peñasco least chipmunk habitat use was generally in mature, open ponderosa pine forest savanna and adjacent valley meadows (Frey and Hays 2017, p. 1). Specimens of the Peñasco least chipmunk from the Sacramento Mountains were originally described from the yellow pine zone (= ponderosa pine) (Bailey 1913, p. 130) and within the transition zone from the juncture of yellow pines and junipers up to the edge of spruce-fir forest (Bailey 1931, p. 91). However, the Peñasco least chipmunk has not been detected in the Sacramento Mountains since 1966, so our understanding of habitat use and distribution in that area is limited to historical records and reports.

In the White Mountains, the Peñasco least chipmunk is associated with the high-elevation subalpine Thurber's fescue meadow biotic community (Frey and Hays 2017, p. 34). This habitat is distinctly different from the lower elevation, montane meadow grassland communities within mixed conifer and ponderosa pine forest zones (Dyer and Moffett 1999, entire; Dick-Peddie 1993, pp. 101, 104), as would be found in the Sacramento Mountains. In the White Mountains, its habitat contains widely spaced large-diameter conifers, such as Engelmann spruce or ponderosa pine, intermixed in low densities with the meadow/grassland vegetation (McKibben and Frey 2020, p. 33). These features provide shade that protects the understory habitat, provide chipmunks cover from aerial predators, and support the species' life history.

Least chipmunks forage mainly on the ground or in shrubs (Hoffmeister 1986, p. 15). They eat a variety of seeds of shrubs, forbs, and some conifers, and other plant parts and fungi as their main food sources; they also feed on animal foods such as arthropods, carrion, and bird eggs (Bailey 1931, p. 91; Vaughn 1974, pp. 770–772; Reid 2006, p. 212). The least chipmunk does not develop additional fat deposits in the fall but relies primarily on brief periods of activity to consume cached food for survival over the winter (Verts and Carraway 2001, p. 7), hibernating (in this case, overwintering with periods of both torpor and activity) in special underground chambers (Reid 2006, p. 212). Peñasco least chipmunks in the White Mountains likely forage primarily on the seeds and flowers of forbs, particularly species of Asteraceae (Frey and Hays 2017, p. 34). Bailey (1931, p. 91) observed the subspecies foraging on sunflower (*Helianthus* spp.) seeds along fencelines and on wheat (*Triticum* spp.) and oats (*Avena sativa*) at the edges of agricultural fields in the Sacramento Mountains. The diet also includes flowers and fruits of gooseberry (*Ribes* spp.) and wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, insects, and other items (Sullivan 1993, p. 3). Like other least chipmunks, the Peñasco least chipmunk likely has relatively low water requirements, which may allow it to exploit the drier conditions of open subalpine meadows (Frey and Hays 2017, p. 34).

Least chipmunk breeding takes place soon after emergence from the hibernation chambers (Reid 2006, p. 212). In spring, females typically produce one litter of four to five pups (Skryja 1974, p. 223), but the size of the litter can range from three to eight, with

young being born in May or June (Reid 2006, p. 212). For Peñasco least chipmunks, young are thought to be born in mid- to late-summer, as half-grown juveniles were observed historically in early September in the Sacramento Mountains (Bailey 1931, p. 91). The average lifespan of least chipmunks overall is 0.7 years (Erlien and Tester 1984, p. 2), but individuals have been known to live up to 6 years (Reid 2006, p. 212).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. On April 5, 2024, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and what criteria we apply when designating listed species' critical habitat (89 FR 24300). On the same day, the Service published a final rule revising our protections for endangered species and threatened species at 50 CFR part 17 (89 FR 23919). These final rules are now in effect and are incorporated into current regulations. Our analysis for this final decision applied our current regulations. Given that we proposed listing and designating critical habitat for this species under our prior regulations (revised in 2019), we have also undertaken an analysis of whether our decision would be different if we had continued to apply the 2019 regulations; we concluded that the decision would have been the same. The analyses under both the regulations currently in effect and the 2019 regulations are available on <https://www.regulations.gov>.

The Act defines a "species" as including any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. The Act defines an "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range, and a "threatened species" as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act

requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term "threat" to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term "threat" includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term "threat" may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an "endangered species" or a "threatened species." In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an "endangered species" or a "threatened species" only after conducting this cumulative analysis and describing the expected effect on the species.

The Act does not define the term "foreseeable future," which appears in the statutory definition of "threatened species." Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis, which is further described in the 2009 Memorandum Opinion on the foreseeable future from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; "M-Opinion," available online at <https://www.doi.gov/sites/doi.opengov.O=xlzibmcloud.com/files/uploads/M-37021.pdf>). The foreseeable future extends as far into the future as the U.S. Fish and Wildlife Service and National Marine Fisheries Service (hereafter, the Services) can make reasonably reliable predictions about the threats to the species and the species' responses to those threats. We need not identify the foreseeable future in terms of a specific period of time. We will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. In other words, the foreseeable future is the period of time over which we can make reasonably reliable predictions. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be listed as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess Peñasco least chipmunk viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability

of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time, which we then used to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS-R2-ES-2020-0042 on <https://www.regulations.gov>.

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability.

Summary of Analysis

To evaluate the current and future viability of the Peñasco least chipmunk, we assessed a range of conditions to allow us to consider the species' resiliency, representation, and redundancy. To maintain long-term viability, the Peñasco least chipmunk requires multiple (redundancy) self-sustaining populations (resiliency) distributed across the landscape (representation). Maintaining representation in the form of genetic or ecological diversity is important to maintain the Peñasco least chipmunk's capacity to adapt to future environmental changes.

To have healthy demography, Peñasco least chipmunk populations should have high abundance, multiple subpopulations within each population, low rates of predation, low incidence of disease, and connectivity between habitats for genetic exchange. Peñasco least chipmunk needs healthy populations that have all of these factors in order to have high resiliency and be able to withstand environmental stochasticity.

Suitable Peñasco least chipmunk habitat in the White Mountains includes widely spaced large-diameter conifers, such as Engelmann spruce or ponderosa pine, intermixed in low densities with the meadow/grassland vegetation. Peñasco least chipmunk populations need abundant food sources (*e.g.*, sunflower, gooseberry, wild strawberry, pinyon nuts, acorns, and insects) occurring in open areas, vegetation that allows for cover in open areas (*i.e.*, meadow/grassland plant communities), and substrate that allows for sentinel perching, nesting, and overwintering (*i.e.*, rock outcrops or talus).

Redundancy is a species' ability to withstand catastrophic events based on the number and distribution of its populations. Redundancy reduces the risk that a species as a whole will be negatively impacted if an area of the species' range is negatively affected by a catastrophic natural or anthropogenic event at a given point in time and increases the probability of maintaining natural gene flow and ecological processes (Wolf et al. 2015, pp. 205–206). Species that are well-distributed across their historical range are less susceptible to the risk of extinction as a result of a local catastrophic event than species confined to smaller areas of their range. To have sufficient redundancy, Peñasco least chipmunk needs a sufficient number and distribution of healthy populations to withstand catastrophic events.

Representation is the ability of the species to adapt to physical (*e.g.*, climate conditions, habitat conditions or structure across large areas) and biological changes (*e.g.*, novel diseases, pathogens, predators) in its environment presently and into the future. To have sufficient representation, Peñasco least chipmunk needs healthy populations distributed across the range to capture the breadth of genetic, climate, elevation, and habitat diversity, and sufficient connectivity for periodic genetic exchange across the range of the species.

In summary, viability is the ability of the species to sustain populations in the wild over time. The Peñasco least chipmunk needs a sufficient number

and distribution of healthy populations to withstand environmental stochasticity (resiliency), catastrophes (redundancy), and changes in its environment (representation).

Factors Influencing Species Viability

We evaluated the past, current, and future stressors that affect the Peñasco least chipmunk's needs for long-term viability. Additionally, we evaluated several potential stressor sources that are not described here because the stressor source is predicted to have low impact on Peñasco least chipmunk viability. More information on these stressors, including interspecific competition, scientific collection, and climate change can be found in the SSA (Service 2024, pp. 52–55).

Stressors affecting the viability of the Peñasco least chipmunk include vegetation shifts, wildfire, forest encroachment, recreation, development, and land use (Factor A), disease (Factor C), nonnative species (Factors A and C), and small population size and lack of connectivity (Factor E). Considerations regarding the existing regulatory mechanisms (Factor D) are described below.

Peñasco least chipmunk habitat is afforded some protection under the Wilderness Act of 1964 (16 U.S.C. 1131–1136). Within the White Mountains, approximately 54 percent of the current range of the Peñasco least chipmunk is within the Lincoln National Forest White Mountain Wilderness Area. This designation limits management options and conservation efforts in designated wilderness areas to some degree. The Wilderness Act states that wilderness should be managed to preserve its natural conditions and yet remain untrammeled by man and defines wilderness “as an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation” (16 U.S.C. 1131–1136). Within designated wilderness areas, no commercial activities are permitted, no permanent or temporary roads, no motorized equipment or any form of mechanical transport, and no structures (16 U.S.C. 1131–1136). Habitat for the Peñasco least chipmunk appears to be relatively unaltered in the White Mountains Wilderness Area, except for the encroachment of trees into meadows (Service 2024, p. 35).

Additionally, the range of the Peñasco least chipmunk overlaps with designated Mexican spotted owl (*Strix occidentalis lucida*) critical habitat; the management of that habitat for the Mexican spotted owl does allow for some level of grazing. This activity may

result in changes to the plant community that do not adversely affect the prey base of the Mexican spotted owl but is detrimental to the specific plant community needs of the Peñasco least chipmunk (Service 2024, pp. 41–43).

Vegetation Shifts, Wildfire, and Forest Encroachment

Over the last ~150 years, land management practices have shifted the vegetative components of Peñasco least chipmunk habitat in the Sacramento Mountains, resulting in an overall lack of suitable habitat for the subspecies. The historically open, park-like stands of ponderosa pine forest that comprised Peñasco least chipmunk habitat have been replaced with high-density, small-diameter ponderosa pine, with encroaching Douglas fir (*Pseudotsuga menziesii*) and white fir (*Abies concolor*), and a lack of native grass meadow habitat (Service 2024, pp. 41–43).

These changes in vegetation composition (inclusion of less fire-tolerant species of trees such as Douglas fir and white fir) and structure (from low-density, large-diameter trees with few low branches to high-density, small-diameter trees with many low branches), coupled with the loss and conversion of native to nonnative grass meadows, alter the suitability of the habitat for the Peñasco least chipmunk in the Sacramento Mountains. Effective fire exclusion and suppression actions in the Sacramento Mountains have also contributed to the changes in forest composition and structure and have resulted in the additional stressor source of altered fire regimes. The South Fork Fire burned approximately 2 hectares (6 acres) of the Peñasco least chipmunk's habitat in the Sacramento Mountains before containment in July of 2024. In the White Mountains, periodic wildfire (e.g., Little Bear Fire in 2012 and Three Rivers Fire in 2021) has occurred; despite this occurrence, high-density, small-diameter trees have encroached into Peñasco least chipmunk habitat there as well.

Forest encroachment into grasslands is occurring in both the Sacramento Mountains and in the White Mountains, although the causes for each are likely different. The causes for tree encroachment into meadows in the Sacramento Mountains is likely related to land use and land management practices, while the White Mountains are influenced by climatic events and successional encroachment processes. While some landscape restoration projects are planned (i.e., the South Sacramento Forest Restoration Project)

that may address some areas of meadow encroachment, no additional projects are planned within the historical range of the Peñasco least chipmunk either in the Sacramento Mountains or the White Mountains to control or limit tree encroachment into meadow habitat.

Recreation, Development, Land Use, and Land Management

Agricultural land use in the Sacramento Mountains appears to have shifted from cultivation in the early part of the 20th century to pasture use. This conversion likely affected a potentially significant food resource (i.e., wheat and oat crops) for Peñasco least chipmunks in the Sacramento Mountains, specifically James Canyon (Service 2024, p. 44). It is likely that the high-quality, abundant food resource of wheat and oat fields drew Peñasco least chipmunks to the fields and roads where the animals were easily observable, as early records noted that Peñasco least chipmunks were especially abundant along rail fences, eating oats and wheat at field edges (Bailey 1931, p. 91). However, Peñasco least chipmunks were also abundant in the open, mature ponderosa pine forests (Bailey 1931, p. 91). Peñasco least chipmunks were noted as abundant throughout the Sacramento Mountains during the early 1900s, in both natural open habitat and near agricultural fields (Service 2024, p. 45). The change in land use from crop fields to pasture for livestock likely impacted Peñasco least chipmunks by decreasing the availability of an abundant, high-quality food source. Grasslands in the bottom of canyons that are currently used for pasture or livestock are likely not usable by the Peñasco least chipmunk because the grasses are likely not tall enough to provide shelter and cover (Service 2024, p. 45).

U.S. Forest Service lands are managed for multiple uses. In the Sacramento Mountains, these uses currently include recreation, livestock grazing, and special use permits for a variety of actions. Recreational use includes camping, hiking, biking, and motorized vehicle use, among other activities. The historical role of livestock grazing and timber harvest is described in the SSA report (Service 2024, pp. 30–38) in terms of altering forest composition, structure, and fire regimes. However, grazing within the White Mountains Wilderness Allotment has been closed for 20 years and will remain closed (Williams, 2020 pers. comm.).

The most significant recreational, development, and land use activities likely to affect the Peñasco least chipmunk in the White Mountains are

related to the opening, operation, and maintenance of the Ski Apache Resort on Lookout Mountain (Service 2024, p. 46). Access roads to Ski Apache and the adjacent Buck Mountain were constructed in 1960 (Dyer and Moffett 1999, p. 451). The Resort opened in 1961 and has since been owned and operated by the Mescalero Apache Tribe (Ski Apache Resort 2018, entire) on U.S. Forest Service land. Ski Apache hosts both winter and summer recreation, operating under a special use permit issued by the U.S. Forest Service. Some of the activities also occur on the Mescalero Apache Tribe Reservation immediately adjacent to the U.S. Forest Service land. Summer use of Ski Apache Resort includes gondola rides, mountain biking, hiking, and zip-lining (Service 2024, p. 46).

In 2016, three Peñasco least chipmunks were observed on two survey trap lines on Lookout Mountain within Ski Apache Resort (Service 2024, p. 47). Lookout Mountain was selected to survey for several reasons, the main one being that it is located in the same large patch of subalpine meadow/tundra as that of Sierra Blanca Peak (Frey and Hays 2017, p. 9), where many historical records show that Peñasco least chipmunk were located. Two of the three Peñasco least chipmunk observations in 2016 were located just off the access road that leads to, and is in close proximity to, the Ski Apache zip line infrastructure. Vehicle use on the access road and human use for the zip line have the potential to be a stressor to the Peñasco least chipmunk due to vehicle strikes and disturbance from human presence.

Disease

A variety of pathogens and diseases have the potential to affect or have affected the Peñasco least chipmunk. Of these, sylvatic plague has the greatest likelihood of being a stressor to the subspecies (Service 2024, p. 48). The plague is caused by the bacteria *Yersinia pestis*, a highly virulent organism that can quickly cause lethal disease in susceptible mammals (Abbott and Rocke 2012, p. 7). Transmission of *Y. pestis* typically occurs through fleas, whereby fleas feed on infected hosts and move to new hosts. The plague is most commonly transmitted through fleas, but can also be transferred through inhalation, eating of infected animals, or through bites, scratches, or direct contact with infected animals, tissues, or fluids (Abbott and Rocke 2012, p. 18). Modes of transmission of *Y. pestis* in wildlife are likely similar, whereby flea transmission is most common, but other avenues may also occur.

The *Y. pestis* organism likely arrived in New Mexico at a time that is approximately coincident with observed declines of Peñasco least chipmunk populations (that is, beginning in the early 1950s through the 1960s). Chipmunks, in general, and least chipmunks more specifically, have been tested in the laboratory and are susceptible to plague (Quan and Kartman 1962, p. 128). Some epizootics caused by plague have been observed in chipmunks and other ground squirrels (Smith et al. 2010, entire).

Rodents are the major group of animals infected by *Y. pestis*, and some species may act as a reservoir or as an “amplifying host” for the organism (Abbott and Rocke 2012, p. 18). Generally, an amplifying host is a host in which disease agents, such as viruses or bacteria, increase in number (Abbott and Rocke 2012, p. 71); in this case, “amplifying hosts” also applies to hosts that are more uniformly susceptible to plague and undergo dramatic die-offs during outbreaks of plague (Abbott and Rocke 2012, p. 17). It is unknown if plague has affected the Peñasco least chipmunk in the past, is currently affecting the subspecies now, or will in the future. However, there is supporting evidence that suggests that plague is a potential stressor to the viability of Peñasco least chipmunk (Service 2024, p. 47).

Nonnative Species

Feral hogs have become established as a nuisance species in New Mexico and elsewhere in the United States (USDA Wildlife Services 2010, entire). In New Mexico, feral hogs occur within Lincoln and Otero Counties. One of the last remaining locations in New Mexico with significant feral hog numbers is the Lincoln National Forest, including the 47,000-acre USFS White Mountain Wilderness Area (USDA 2019, pp. 112–114). This area includes the majority of the known locations of recent Peñasco least chipmunk occurrences (Service 2024, pp. 49–50). Feral hogs are voracious, flexible, and opportunistic omnivores (USDA Wildlife Services 2010, p. 6) and will persistently root in an area until the resources are depleted (USDA Wildlife Services 2010, p. 7).

Rooting can be extremely destructive to habitat. Feral hogs cause long-term degradation of native ecosystems and plant communities and spread of invasive weeds through their rooting behavior (USDA Wildlife Services 2010, pp. 10–12, 19–20). In addition to influencing habitat, feral hogs consume a multitude of vertebrate and invertebrate species (USDA Wildlife Services 2010, p. 13). In 2010, USDA

Wildlife Services (2010, p. 14) reported that 90 percent of the small mammal species listed under the Act were in areas of expanding feral hog populations and documented how feral hogs could influence small mammal populations through heavy and persistent predatory activities. In addition to direct predation, feral hogs can strip an area of food resources and are competitors with native species for food and water resources (USDA Wildlife Services 2010, pp. 12–13). An active feral hog population control program in the White and Sacramento Mountains of New Mexico by the U.S. Department of Agriculture ended in 2018. It is anticipated that the feral hog population in the White Mountains, including within the range of the chipmunk, will exponentially increase as a result.

Additionally, feral hogs are susceptible to at least 30 viral and bacteriological diseases, 20 of which can be transmitted from non-human animals to humans, and at least 37 parasites have been identified (USDA Wildlife Services 2010, p. 15). Among the many diseases, pathogens, and parasites that feral hogs carry, in New Mexico feral hogs have tested positive for swine brucellosis and pseudorabies. While the ability of feral hogs to transfer disease to wildlife is not well-studied, pseudorabies virus is highly contagious, and rodents are reported as being susceptible (USDA Wildlife Services 2010, p. 15). The prevalence of antibodies of *Y. pestis* was reported for 17 species of mammals from the western United States (Abbott and Rocke 2012, p. 26); of those, feral hogs had the highest prevalence rate at 74 percent. Although the sample size for this assessment was relatively low (18 out of 23 were positive), these data demonstrate that feral hogs in both the Sacramento Mountains and White Mountains could contribute to disease dynamics in the small mammal communities in these mountain ranges (Abbott and Rocke 2012, p. 26).

Impacts from feral hogs may include rooting, predation, spreading diseases and parasites, spreading invasive weed species, and competition with native species for water and food resources (Service 2024, p. 50). We lack specific data demonstrating overlap of feral hog occurrence with Peñasco least chipmunk occurrence; however, feral hogs are known to occur in the vicinity of Peñasco least chipmunk habitat or areas formerly known to be occupied by the Peñasco least chipmunk (Service 2024, p. 50).

Small Population Size and Lack of Connectivity

Compared to large populations, small populations are more vulnerable to extirpation from environmental, demographic, and genetic stochasticity (random natural occurrences), and unforeseen natural or unnatural catastrophes (Shaffer 1981, p. 131). Small populations are less able to recover from losses caused by random environmental changes (Shaffer and Stein 2000, pp. 308–310), such as fluctuations in reproduction (demographic stochasticity), sweeping losses from disease events, or changes in the frequency or severity of wildfires (environmental stochasticity).

Another type of random fluctuation, genetic stochasticity, results from: (1) changes in gene frequencies due to the founder effect, which is the loss of genetic variation that occurs when a new population is established by a small number of individuals (Hedrick 2000, p. 226); (2) random fixation, or the complete loss of all but one allele at a locus (Hedrick 2000, p. 258); or (3) inbreeding depression, which is the loss of fitness or vigor due to mating among relatives (Hedrick 2000, p. 208). Additionally, small populations generally have an increased chance of genetic drift, or random changes in gene frequencies from generation to generation that can lead to a loss of variation, and inbreeding (Ellstrand and Elam 1993, p. 225). Allee effects, when there is a positive relationship between any component of individual fitness and either numbers or density of conspecifics (Stephens et al. 1999, p. 186), may also occur when a population is in decline (Dennis 1989, pp. 481–538). In a declining population, an extinction threshold or “Allee threshold” (Berec et al. 2007, pp. 185–191) may be crossed, in which adults in the population either cease to breed or the population becomes so compromised that breeding does not contribute to population growth. Allee effects typically fall into three broad categories (Courchamp et al. 1999, pp. 405–410): lack of facilitation (including low mate detection and loss of breeding cues), demographic stochasticity, and loss of heterozygosity. Environmental stochasticity amplifies Allee effects (Dennis 1989, pp. 481–538; Dennis 2002, pp. 389–401). In Peñasco least chipmunks, random fixation and loss of heterozygosity have been observed (Sullivan 1985, pp. 431–433). The extinction risk for a subspecies represented by few small populations is magnified when those populations are isolated from one another, as is the case

for the White Mountains and the Sacramento Mountains (Service 2024, p. 52).

It is suspected that the White Mountains and Sacramento Mountains populations may have been physically separated over a long time period with little to no genetic interchange, based on morphometric differences in collected specimens (Sullivan 1985, pp. 424–425). However, connectivity could play an important role as it relates to the overall viability to the subspecies if it is found to be present in the Sacramento Mountains in the future. Connectivity between White Mountains and Sacramento Mountains populations would contribute to the number of reproductively active individuals in a population; mitigate the genetic, demographic, and environmental effects of small population size; and recolonize extirpated areas (Service 2024, pp. 50–51). Additionally, the fewer the populations a species or subspecies has, the greater the risk of extinction. The combination of a very small population in the White Mountains, a likely extirpated population in the Sacramento Mountains, and no population connectivity between the mountain ranges, synergistically interacting with the other stressors and potential stressors described above, greatly increases extinction risk for the Peñasco least chipmunk (Service 2024, p. 52).

Synergistic Effects

Many of the above-summarized risk factors may act synergistically or additively on the Peñasco least chipmunk. The combined impact of multiple stressors is likely more harmful than a single stressor acting alone. For the Peñasco least chipmunk, the compounding factor of having a small population size currently is likely to work in conjunction with each of the other stressors to limit the species' ability to recover from catastrophes (*e.g.*, disease outbreaks, wildfires, drought) or to expand the population when conditions are good (*e.g.*, by capitalizing

on new habitat patches or food resources). For a full explanation of the impact of stressors on the viability of the species, see chapter 4 of the SSA report (Service 2024, pp. 41–55).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

Conservation Efforts and Regulatory Mechanisms

The White Mountains Wilderness Area within the Lincoln National Forest is currently closed to grazing and will remain closed for the recovery and protection of the Peñasco least chipmunk (Williams, 2020 pers. comm.). In 2018, the U.S. Forest Service announced a plan called the Ski Apache Vegetation Restoration Project which will restore habitat features that favor the Peñasco least chipmunk on the Ski Apache Resort (USDA 2018, entire). Work on the project began in 2019 and will continue in fiscal year 2024 (Brennan, 2024 pers. comm.) (see *Exclusions Based on Other Relevant Impacts*, below). Additionally, we have begun collaborating with the Mescalero Apache Tribe to offer technical assistance by training their resource management staff on how to survey for the Peñasco least chipmunk and enhance habitat for the species on the Reservation.

As part of the SSA, we also developed multiple future scenarios to capture the

range of uncertainties regarding future threats and the projected responses by the Peñasco least chipmunk. Our scenarios included a continuing conditions scenario, which incorporated the current risk factors continuing on the same trajectory that they are on now. We also evaluated an optimistic scenario and a scenario with increased stressors. Because we determined that the current condition of the Peñasco least chipmunk is consistent with an endangered species (see Determination of Peñasco Least Chipmunk Status, below), we are not presenting the results of the future scenarios in this final rule. Please refer to the SSA report (version 1.1; Service 2024, entire) for the full analysis of future scenarios.

Subspecies Condition

To analyze population-level resiliency, we identified and described the demographic and habitat conditions needed for sufficiently resilient populations of Peñasco least chipmunk (table 1). The demographic factors we analyzed include trap rate (surrogate for density), population trends, connectivity between populations, and number of subpopulations within populations. The habitat factors we analyzed include suitable habitat size to support population viability, habitat availability trends, and habitat condition. For each of these demographic and habitat factors, we characterized the condition (High, Moderate, Low, and Very Low/Extirpated) of each factor for each population (table 1) to assess overall population resiliency. Where more data were available, we assigned scores (High = 1, Moderate = 0, Low = -1, and Very Low/Extirpated = -2) to each demographic and habitat factor and calculated an overall score for each population. We averaged all of the demographic and habitat condition category scores for each population to determine the overall resiliency score for that population (Service 2024, p. 65).

TABLE 1—POPULATION RESILIENCY CATEGORY DEFINITIONS FOR PEÑASCO LEAST CHIPMUNK (WITH ASSIGNED SCORES)

High (1)	Moderate (0)	Low (– 1)	Very low/extirpated (– 2)
<ul style="list-style-type: none"> • density or relative abundance is high. • population is increasing over time. • there is connectivity between the populations. • the number of subpopulations is high, spatially dispersed, and able to withstand or recover from stochastic events. • large, contiguous areas of increasing availability of suitable habitat with no detectable impacts from land use or management. 	<ul style="list-style-type: none"> • density or relative abundance is moderate. • population is stable over time ... • populations are adjacent to each other, but unsuitable habitat precludes dispersal. • multiple subpopulations, allowing for some ability to withstand or recover from stochastic events. • areas of moderately sized habitat with some isolated habitat patches. • land use or management occurs but does not significantly limit chipmunk resources. 	<ul style="list-style-type: none"> • density or relative abundance is low. • population is decreasing over time but still extant. • populations are extremely isolated from one another. • two subpopulations allow for some, but limited, ability to withstand or recover from stochastic events. • habitat occurs as small isolated patches. • land use or management reduces chipmunk resources. 	<ul style="list-style-type: none"> • abundance decreases over time, such that population may be extirpated completely. • no connectivity with other populations exists. • if extant, no subpopulation structure occurs. • little to no suitable habitat is available. • if patches exist, they are small and isolated and will lead or have led to high probability of extirpation. • land use or management removes chipmunk resources.

The current condition of each demographic and habitat factor and the overall condition of each population of the Peñasco least chipmunk is displayed in table 2. Historically, there were two known populations of Peñasco least chipmunk, the Sacramento Mountains population and the White Mountains population. Based on the demographic and habitat factors discussed in detail in the SSA (Service 2024, pp. 61–64), the Sacramento Mountains population is considered to be in Very Low/Extirpated overall condition. There have been no detections of Peñasco least chipmunk in the Sacramento Mountains since 1966, despite extensive survey effort, indicating that this population is likely extirpated. Even if it is still extant, it has no known connectivity with other populations and likely no subpopulation structure (Service 2024, p. 11). The Sacramento Mountains have little to no remaining suitable habitat, and land use and management have severely decreased the condition of the resources upon which Peñasco least chipmunks depend.

For the White Mountains population, current habitat availability is moderate. Habitat has experienced a moderate change from historical conditions, and land use or management is not known to significantly reduce Peñasco least chipmunk resources. However, in terms of demographic factors, the White Mountains population has a low density

and decreasing population trend. This population is the only remaining known population of the subspecies and has no known subpopulation structure. Given these Low and Very Low condition demographic factors, the White Mountains population is in Low overall condition. The current resiliency of Peñasco least chipmunk is Low to Very Low, with one population likely extirpated and the remaining population isolated with no subpopulation structure.

Maintaining representation in the form of genetic or ecological diversity is important to preserve the capacity of the Peñasco least chipmunk to adapt to future environmental changes. Because one of the two populations of Peñasco least chipmunk is likely extirpated, and the extant population persists in extremely low numbers, genetic diversity is likely extremely low. Peñasco least chipmunks in the White Mountains showed the lowest levels of within-population genetic variation out of nine least chipmunk populations in New Mexico, Arizona, and Colorado (Sullivan 1985, pp. 431–433). In addition, the subspecies has a historical distribution in two very different ecological settings: one in a high-elevation subalpine meadow zone in the White Mountains and one in a lower elevation ponderosa pine zone in the Sacramento Mountains. Because the Sacramento Mountains may no longer

support the subspecies, the Peñasco least chipmunk has already lost ecological representation across its range. Low genetic variation and the loss of one ecological setting results in low representation for the Peñasco least chipmunk (Service 2024, p. 66).

To be robust in the face of stochastic events, the Peñasco least chipmunk needs to have at least two sufficiently resilient populations (Service 2024, p. 66). Historically, there were only two known populations, one each in the White and Sacramento Mountains. Generally, the more populations a species has, and the wider the distribution of those populations, the more redundancy the species will exhibit. Redundancy reduces the risk that a large portion of the species' range will be negatively affected by a catastrophic natural or anthropogenic event (e.g., wildfire) at a given point in time. Species (or subspecies) that are well-distributed across a wide geographic range are less susceptible to extinction and more likely to be viable than taxa that are confined to small areas where stochastic events are likely to affect all of the individuals simultaneously (Carroll et al. 2010, entire). Since one of the two populations of Peñasco least chipmunk is likely extirpated, the Peñasco least chipmunk currently lacks any redundancy (Service 2024, p. 66).

TABLE 2—CURRENT RESILIENCY OF THE PEÑASCO LEAST CHIPMUNK POPULATIONS
[With numeric scores for demographic and habitat factors and condition]

Population	Demographic factors				Habitat factors			Condition category
	Trap rate (number individuals/trap hour) surrogate for density	Population trends	Population connectivity	Subpopulations within populations	Available suitable habitat to support population persistence	Habitat availability trends	Habitat condition with land use or management	
White Mountains	Low -1.5	Low -1	Very Low -2	Very Low -2	Moderate 0	Moderate 0	Moderate 0	Low -1
Sacramento Mountains	Very Low -2	Very Low -2	Very Low -2	Very Low -2	Very Low -2	Very Low -2	Very Low -2	Very Low -2

See the SSA report for the complete current condition analysis for the Peñasco least chipmunk (Service 2024, pp. 56–66).

Determination of Peñasco Least Chipmunk Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an “endangered species” as a species in danger of extinction throughout all or a significant portion of its range and a “threatened species” as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of endangered species or threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

The range of the Peñasco least chipmunk once included the Sacramento and White Mountains in Lincoln and Otero Counties in New Mexico. The Peñasco least chipmunk is now found in only one isolated population within the White Mountains. The one remaining population has low resiliency, meaning that the population has a low probability of remaining extant and withstanding periodic or stochastic disturbances under its current condition. Representation is low, with the loss of one of two populations within its historical range. Species-level genetic and ecological diversity is likely extremely low, as one population (Sacramento Mountains) is likely

extirpated and the remaining population (White Mountains) is small.

Redundancy has declined dramatically because the Peñasco least chipmunk remains on the landscape in only one population. As such, the Peñasco least chipmunk is at greater risk of extinction due to a catastrophic event when compared to historical conditions.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we determined that the Peñasco least chipmunk faces threats that put it at risk of extinction, including vegetation shifts, wildfire, forest encroachment, recreation, development, land use, and land management (Factor A), nonnative species (Factors A and C), disease (Factor C), and small population size and lack of connectivity (Factor E). We found small population size to be the main threat to the species currently. The current population is small and isolated, making it vulnerable to catastrophic or stochastic events. The risk of species extinction from a disease outbreak, large wildfire, or extreme drought is high. The one remaining population is currently small and isolated, and we expect it to remain so in the future. Thus, after assessing the best available information, we determine that Peñasco least chipmunk is in danger of extinction throughout all of its range. We do not find that the species meets the Act’s definition of a threatened species because the species has already shown low levels in current resiliency, redundancy, and representation due to the threats discussed above resulting in the species being in danger of extinction throughout its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the Peñasco least

chipmunk is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portions of its range. Because the Peñasco least chipmunk warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity v. Everson*, 435 F. Supp. 3d 69 (D.D.C. 2020), because that decision related to significant portion of the range analyses for species that warrant listing as threatened, not endangered, throughout all of their range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the Peñasco least chipmunk meets the definition of an endangered species. Therefore, we are listing the Peñasco least chipmunk as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, foreign governments, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective

measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened ("downlisting") or removal from protected status ("delisting"), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (<https://www.fws.gov/program/endangered-species>), or from our New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed, funding for recovery actions will be available from

a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of New Mexico will be eligible for Federal funds to implement management actions that promote the protection or recovery of the Peñasco least chipmunk. Information on our grant programs that are available to aid species recovery can be found at: <https://www.fws.gov/service/financial-assistance>.

Please let us know if you are interested in participating in recovery efforts for the Peñasco least chipmunk. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled Interagency Cooperation and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion, containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

Examples of discretionary actions for the Peñasco least chipmunk that may be subject to consultation procedures under section 7 are land management or other landscape-altering activities on Federal lands administered by the U.S. Forest Service as well as 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 the 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. Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions on section 7 consultation and conference requirements.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, and the Service's implementing regulations codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed any of the following acts with regard to any endangered wildlife: (1) import into, or export from, the United States; (2) take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect) within the United States, within the territorial sea of the United States, or on the high seas; (3) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such wildlife that has been taken illegally; (4) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity; or (5) sell or offer for sale in interstate or foreign commerce. Certain exceptions to these prohibitions apply to employees or agents of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits for endangered wildlife are codified at 50 CFR 17.22, and general Service permitting regulations are codified at 50 CFR part 13. With regard to endangered wildlife, a permit may be issued for scientific purposes, for enhancing the propagation or survival of the species, or for take incidental to otherwise lawful activities. The statute also contains certain exemptions from the prohibitions,

which are found in sections 9 and 10 of the Act.

It is the policy of the Services, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 of the Act. To the extent possible, activities that will be considered likely to result in violation will also be identified in as specific a manner as possible. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of the species.

As discussed above, certain activities that are prohibited under section 9 may be permitted under section 10 of the Act. In addition, to the extent currently known, the following activities will not be considered likely to result in violation of section 9 of the Act:

- (1) Winter activities at the ski resort;
- (2) Hiking on established trails; and
- (3) Routine road maintenance.

This list is intended to be illustrative and not exhaustive; additional activities that will not be considered likely to result in violation of section 9 of the Act may be identified during coordination with the local field office, and in some instances (*e.g.*, with new information), the Service may conclude that one or more activities identified here will be considered likely to result in violation of section 9.

To the extent currently known, the following is a list of examples of activities that will be considered likely to result in violation of section 9 of the Act in addition to what is already clear from the descriptions of the prohibitions found at 50 CFR 17.21:

- (1) Unauthorized handling or collection of the species;
- (2) Creation and modification of trails;
- (3) Ski resort maintenance during summer months; and
- (4) Organized mountain bike races.

This list is intended to be illustrative and not exhaustive; additional activities that will be considered likely to result in violation of section 9 of the Act may be identified during coordination with the local field office, and in some instances (*e.g.*, with new or site-specific information), the Service may conclude that one or more activities identified here will not be considered likely to result in violation of section 9.

Questions regarding whether specific activities would constitute violation of section 9 of the Act should be directed to the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. Critical habitat is defined in section 3 of the Act as:

- (1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features
 - (a) Essential to the conservation of the species, and
 - (b) Which may require special management considerations or protection; and
- (2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

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

This critical habitat designation was proposed when the regulations defining "habitat" (85 FR 81411; December 16, 2020) and governing the section 4(b)(2) exclusion process for the Service (85 FR 82376; December 18, 2020) were in place and in effect. However, those two regulations have been rescinded (87 FR 37757, June 24, 2022; and 87 FR 43433, July 21, 2022) and no longer apply to any designations of critical habitat. Therefore, for this final rule designating critical habitat for the Peñasco least chipmunk, we apply the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the "2016 Policy"; 81 FR 7226, February 11, 2016).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and translocation, and, in the

extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency 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 designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal action agency would have already been required to consult with the Service even absent the critical habitat designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to 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 data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

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.

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 compiled in the SSA report and 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; 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, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act

for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best scientific data available 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 these planning efforts calls for a different outcome.

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 as 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 which 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, alkaline 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 absence of 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, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

We derive the specific physical or biological features essential to the conservation of the Peñasco least chipmunk from studies of the species' habitat, ecology, and life history. Peñasco least chipmunk habitat is characterized as high-elevation subalpine habitat in the White Mountains, composed of Thurber's fescue (*Festuca thurberi*) meadows, where rock outcrops or talus are present (Frey and Hays 2017, p. 34). Subalpine Thurber's fescue meadow/grassland community occurs within openings in high-elevation spruce-fir forest and above tree line in the glacial cirque. These Thurber's fescue grasslands contain tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs (Frey and Hays 2017, pp. 2–3). Widely spaced conifers, such as Engelmann spruce or ponderosa pine, intermixed with bunchgrasses and forbs, and some rock outcrops and talus, provide cover from predators. The trees also provide shade that contributes to moisture levels in the understory habitat. Rock outcrops provide observation points for predator vigilance and are often associated with burrows for nesting or hibernation (Bihr and Smith 1998, p. 359). The elevation of subalpine habitat in the White Mountains ranges from 2,500 to 3,597 meters (8,200 to 11,800 feet). Forage for Peñasco least chipmunks consists of the seeds and flowers of forbs, particularly species of Asteraceae (Frey and Hays 2017, p. 34). The diet also includes flowers and fruits of gooseberry (*Ribes* spp.) and wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns,

insects, and other items (Sullivan 1993, p. 3).

The Peñasco least chipmunk is likely extirpated from the Sacramento Mountains, and the habitat no longer supports the species; therefore, we did not include the Sacramento Mountains in our critical habitat designation or analysis of physical or biological features.

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of Peñasco least chipmunk from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the SSA report (version 1.1; Service 2024, entire) available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2020-0042. We have determined that the following physical or biological features are essential to the conservation of the Peñasco least chipmunk:

- (1) Areas within the White Mountains that:
 - (a) Are between elevations of 2,500–3,597 meters (m) (8,200–11,800 feet (ft));
 - (b) Contain rock outcrops or talus;
 - (c) Are subalpine Thurber's fescue meadow/grassland communities found within openings of spruce-fir forest, above treeline in the glacial cirque, containing tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs; and
 - (d) Contain widely spaced large-diameter conifers, such as Engelmann spruce or ponderosa pine, intermixed in low densities with the meadow/grassland vegetation.
- (2) Forage, including species of Asteraceae, flowers and fruits of gooseberry (*Ribes* spp.), wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, and insects.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Peñasco least chipmunk may require special management considerations or protections to reduce the following threats: (1) forest encroachment due to altered fire regime; (2) recreation, development, land use, and land management; and (3) destruction of habitat by nonnative species (feral hogs).

Management activities that could ameliorate these threats include, but are not limited to, prescribed fire and forest

management to maintain the open subalpine meadows with native vegetation; continued closure of the encompassing U.S. Forest Service allotment to grazing; and feral hog management.

In summary, we find that the occupied areas we are proposing to designate as critical habitat contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Special management considerations or protection may be required in designated critical habitat in order to eliminate, or to reduce to negligible levels, the threats affecting the physical and biological features of the unit.

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 designating critical habitat in areas within the geographical area occupied by the species at the time of listing. We also are designating specific areas outside the geographical area occupied by the species because we have determined those areas are essential for the conservation of the species. We conclude that the unoccupied area is essential for the conservation of the species and that it constitutes habitat for the species because it contains one or more of the physical or biological features essential to the conservation of the species (see *Areas Outside the Geographic Area Occupied at the Time of Listing*, below).

The current distribution of the Peñasco least chipmunk is much reduced from its historical range. We anticipate that recovery will require continued protection of the existing population and its habitat, and potentially reintroduction of Peñasco least chipmunk into other areas, ensuring there are adequate numbers multiple locations. This strategy will help to ensure that catastrophic events, such as the effects of fire, cannot simultaneously affect all known populations. Rangeland recovery considerations, such as maintaining

existing genetic diversity and striving for connectivity within portions of the species' current range to allow adequate movement to ensure genetic diversity, were considered in formulating this critical habitat.

Sources of data for this critical habitat designation include multiple reports and discussions with species experts, including the New Mexico Department of Game and Fish (see SSA report). We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information on habitat requirements include studies conducted at occupied sites and published in peer-reviewed articles and agency reports, and data collected during monitoring efforts.

Areas Occupied at the Time of Listing

The critical habitat designation does not include all areas known to have been occupied by the Peñasco least chipmunk historically; instead, it focuses on the currently occupied area within the historical range that retains the necessary physical or biological features that will allow for the maintenance and expansion of the existing population. We are not designating any critical habitat in the Sacramento Mountains because we conclude that the area no longer has the appropriate habitat to support the species.

In summary, for areas within the geographical area occupied by the species at the time of listing, we delineated critical habitat unit boundaries using the following criteria:

First, we compiled all known Peñasco least chipmunk observations (*i.e.*, captures) in the White Mountains from 1931 through 2018, mapped their locations, and eliminated duplicate records. This process provided a bounded estimate of the subspecies' known range.

Using existing U.S. Forest Service vegetation mapping for the Lincoln National Forest, we identified and exported all vegetation classes that coincided with the known observations. The vegetation classes included (1) mixed grass-forb and (2) Gambel oak, which are consistent with physical habitat descriptions for the subspecies in the White Mountains. Vegetation characterized by meadow/grassland community within openings of spruce-fir forest are one of the physical or biological features essential to the conservation of the Peñasco least chipmunk.

Next, we determined the elevation interval in which the White Mountains population has been observed. We used that interval to further define the extent

of the grass-forb and Gambel oak vegetation classes. Although the upper limit of the occupied interval did not extend to the highest points within the critical habitat units, we assumed that the Peñasco least chipmunk is capable of occupying these higher elevations as the difference (roughly 100 meters or 330 feet) is not substantial. Therefore, we extended the interval to include the highest peaks within each unit. This process resulted in a basic model of potential habitat.

Finally, we refined the output of step 3 (above) through aerial photo interpretation in order to correct for the coarse resolution imparted by the vegetation mapping. Essentially, this process allows the model to be more accurate and applicable at a finer scale.

The critical habitat area was mapped using ArcMap version 10.6.1 (Environmental Systems Research Institute, Inc. 2018), a Geographic Information Systems (GIS) computer application. We identified two critical habitat units in the White Mountains known to be occupied by Peñasco least chipmunks as of 2019. For one of these units, we are finalizing a designation that is roughly half the size of the unit that was described in the proposed rule because the other half is being excluded under section 4(b)(2) of the Act (see Consideration of Impacts Under Section 4(b)(2) of the Act, below). We identified a third critical habitat unit between these two occupied units that has the physical and biological features essential for the conservation of the Peñasco least chipmunk but has not yet been surveyed for occupancy.

Areas Outside the Geographic Area Occupied at the Time of Listing

We evaluated whether any unoccupied areas are essential for the conservation of the species. Because there is only one remaining population, which has low resiliency and no redundancy, making it vulnerable to catastrophic or stochastic events and further compounding the risks of small population sizes, we are designating unoccupied areas that are essential for the conservation of the Peñasco least chipmunk. The risk of subspecies extinction from a disease outbreak, large wildfire, or extreme drought is high. A low-resiliency single population provides no redundancy for the species, and a single catastrophic event could cause species extinction.

Based on our evaluation, we are designating as critical habitat one unit situated between the two known occupied units that is currently considered unoccupied because of a lack of survey data. A small portion of this area was surveyed in 2018 and no Peñasco least chipmunks were detected, but a more thorough survey effort would be needed to determine if the area is truly unoccupied. We have determined that it is essential for the conservation of the species as it provides important connectivity between the two occupied units and could support population expansion into this area, if not populated already. Limited functional habitat exists within the White Mountains, and connectivity between known locations of Peñasco least chipmunk is essential for the conservation of the subspecies because it provides more of the habitat upon which the subspecies depends for feeding, sheltering and reproducing. This unit provides a link between the two known occupied units. The unit has all of the physical or biological features essential for the conservation of the Peñasco least chipmunk: It is in the White Mountains, at elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrop, and appropriate vegetation characteristics. Therefore, we conclude that this area is habitat for the subspecies.

Small, isolated populations of animals with restricted movement and low genetic diversity are more likely to become extirpated than larger populations with greater movement between subpopulations within them and greater genetic diversity. Due to the small population sizes found within the two occupied units, either or both could become extirpated from local catastrophic events or the deleterious effects of genetic bottlenecks resulting from inbreeding that reduces the viability of a population, if they had no connectivity. The unoccupied unit in between these two known occupied units has never been surveyed for Peñasco least chipmunk, due to its remoteness and difficulty to access. It does, however, maintain all the physical or biological features of the occupied areas. We analyzed this area using remote GIS vegetation and landscape feature data from the U.S. Forest Service and the U.S. Department of Agriculture's National Agricultural Imagery Program.

It is possible the Peñasco least chipmunk is present in the unoccupied unit; however, with no confirmed records, the unit is being treated as unoccupied for purposes of this designation.

General Information on the Maps of the Critical Habitat Designation

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Peñasco least chipmunk. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action will affect the physical or biological features in the adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Regulation Promulgation. We include more-detailed information on the boundaries of the critical habitat designation in the preamble of this document. The coordinates or plot points or both on which each map is based are available to the public on <https://www.regulations.gov> at Docket No. FWS-R2-ES-2020-0042.

Final Critical Habitat Designation

We are designating three units as critical habitat for the Peñasco least chipmunk. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the Peñasco least chipmunk. The three areas we designate as critical habitat are: (1) Noyal Peak, (2) Crest Trail, and (3) Sierra Blanca. Table 3 shows the critical habitat units and the approximate area of each unit.

TABLE 3—CRITICAL HABITAT UNITS FOR THE PEÑASCO LEAST CHIPMUNK

Critical habitat unit	Occupied at the time of listing	Land ownership	Area of unit in hectares (acres)	Area of overlap with Mexican spotted owl designated critical habitat	Overlap with Lincoln National Forest Wilderness area
Unit 1. Nogal Peak	Yes	Federal	393 (972)	100% 393 hectares (972 acres)	100% 393 hectares (972 acres)
Unit 2. Crest Trail	No	Federal	910 (2,249)	89.5% 814 hectares (2,012 acres)	100% 910 hectares (2,249 acres)
Unit 3. Sierra Blanca	Yes	Federal	471 (1,165)	100% 471 hectares (1,165 acres)	49.3% 232 hectares (574 acres)
Total	1,774 (4,386).		

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the Peñasco least chipmunk, below.

Unit 1: Nogal Peak, New Mexico

Unit 1 consists of approximately 393 hectares (972 acres) of subalpine habitat within the Lincoln National Forest Wilderness Area and is occupied. This unit is within the critical habitat designation in Lincoln County, New Mexico, for the Mexican spotted owl, which is listed as a threatened species under the Act. Elevation ranges approximately 2,570–3,031 meters (8,432–9,944 feet) above mean sea level. Mean elevation in Unit 1 is 2,772 meters (9,094 feet) with a standard deviation of 70 meters (230 feet). Approximately 79 percent of Unit 1 is classified as grass-forb mix or Gambel oak. Unit 1 contains all the physical or biological features that are essential to the conservation of the Peñasco least chipmunk. This unit is federally owned by the U.S. Forest Service; it is 100 percent within the Lincoln National Forest Wilderness Area. Threats to the physical or biological features within the unit include forest encroachment into the open meadows, grazing, and destruction of habitat by nonnative species (feral hogs). Special management considerations that may reduce these threats include prescribed fire and forest management to maintain the open subalpine meadows with native vegetation, continued closure of the encompassing U.S. Forest Service allotment to grazing, and feral hog management.

Unit 2: Crest Trail, New Mexico

Unit 2 consists of approximately 910 hectares (2,249 acres) of subalpine habitat. Although it is considered unoccupied, we have determined that it is essential for the conservation of the species because it provides important connectivity between Unit 1 and Unit 3, both of which are known to be occupied by the species. The unit has all of the

physical or biological features essential for the conservation of the Peñasco least chipmunk: It is in the White Mountains, at elevations of 2,500–3,597 meters (8,200–11,800 feet), with rock outcrop, and appropriate vegetation characteristics. Therefore, we conclude that this area is habitat for the subspecies.

Due to the location between Units 1 and 3 and the overall suitability of the habitat, it is possible the Peñasco least chipmunk is present in the unoccupied unit; however, with no confirmed records, the unit is being treated as unoccupied for purposes of this designation. Surveys of the southern portion of this unit in 2018 did not detect Peñasco least chipmunks, but an additional 8 kilometers (5 miles) of habitat remain unsurveyed. Approximately 90 percent of this unit is within the critical habitat designation for the Mexican spotted owl in Lincoln County, New Mexico. This unit is federally owned by the U.S. Forest Service and is 100 percent within the Lincoln National Forest Wilderness Area. Elevation ranges approximately 2,621–3,292 meters (8,599–10,800 feet) above mean sea level. Mean elevation in Unit 2 is 2,876 meters (9,436 feet) with a standard deviation of 139 meters (456 feet). Approximately 44 percent of Unit 2 is classified as grass-forb mix or Gambel oak.

Unit 3: Sierra Blanca, New Mexico

Unit 3 includes approximately 471 hectares (1,165 acres) of subalpine habitat, contains the physical or biological features that are essential to the conservation of the species, and is known to be occupied. This unit is federally owned by the U.S. Forest Service; approximately 30 percent overlaps with the Lincoln National Forest Wilderness Area. One hundred percent of the unit is also Mexican spotted owl critical habitat in Lincoln County, New Mexico. Elevation ranges approximately 2,763–3,518 meters (9,065–11,542 feet) above mean sea

level. Mean elevation in Unit 3 is 3,167 meters (10,390 feet) with a standard deviation of 131 meters (428 feet). Approximately 34 percent of Unit 3 is classified as grass-forb mix or Gambel oak. Unit 3 contains all the physical or biological features that are essential to the conservation of the species. Threats to the unit include forest encroachment into the open meadows, recreation, development, land use, and land management, grazing, and destruction of habitat by nonnative species (feral hogs). Special management considerations that may address these threats include prescribed fire and forest management to maintain the open subalpine meadows with native vegetation, continued closure of the encompassing U.S. Forest Service allotment to grazing, and feral hog management.

In the proposed rule, Unit 3 comprised 1,357 hectares (3,353 acres), an area which included land owned by the U.S. Forest Service and the Mescalero Apache Tribe. We have excluded from the final designation the portion owned by the Mescalero Apache Tribe and an adjacent parcel of U.S. Forest Service land operated by the Tribe, approximately 886 hectares (2,189 acres) (see Consideration of Impacts Under Section 4(b)(2) of the Act, below).

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 authorize, fund, 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.

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 (50 CFR 402.02).

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

- (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 formal 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 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 consultation. Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) If the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action. As provided in 50 CFR 402.16, the requirement to reinstate consultations for new species listings or critical

habitat designation does not apply to certain agency actions (*e.g.*, land management plans issued by the Bureau of Land Management in certain circumstances).

Destruction or Adverse Modification of Critical Habitat

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 that our **Federal Register** documents “shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify [critical] habitat, or may be affected by such designation.” Activities that may be affected by designation of critical habitat for the Peñasco least chipmunk include those that may affect the physical or biological features of the Peñasco least chipmunk’s critical habitat (see Physical or Biological Features Essential to the Conservation of the Species).

Exemptions

Application of Section 4(a)(3) 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 Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. There are no DoD lands with a completed INRMP within the final 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 critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the “2016 Policy”; 81 FR 7226, February 11, 2016)—both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor’s opinion entitled “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (M–37016). We explain each decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable.

The Secretary may exclude any particular area if she determines that the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. 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 deciding whether to exclude any areas—taking into consideration each category of impacts and our analysis of the relevant impacts.

Exclusions Based on 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. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, we consider our economic analysis of the critical habitat designation and related factors (Service 2019, entire). The analysis, dated May 5, 2019, was made available for public review from September 28, 2021, through November 29, 2021 (86 FR 53583). The economic analysis addressed probable economic impacts of critical habitat designation for the

Peñasco least chipmunk. Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the Peñasco least chipmunk is summarized below and available in the screening analysis for the Peñasco least chipmunk (IEc 2019, entire), available at <https://www.regulations.gov>.

The full description of the findings from the economic analysis is outlined in the proposed rule (86 FR 53583; September 28, 2021). The estimated incremental costs of the total proposed critical habitat designation for Peñasco least chipmunk was found to be less than \$5,000 per year. Therefore, the annual administrative burden is very unlikely to reach \$200 million, which is the threshold for a significant regulatory action under Executive Order (E.O.) 14094. As discussed above, we considered the economic impacts of the critical habitat designation, and the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the Peñasco least chipmunk based on economic impacts.

Exclusions Based on Impacts on National Security and Homeland Security

In preparing this rule, we determined that there are no lands within the designated critical habitat for the Peñasco least chipmunk that are owned or managed by the DoD or Department of Homeland Security, and, therefore, we anticipate no impact on national security or homeland security. We did not receive any additional information during the public comment period for the proposed designation regarding impacts of the designation on national security or homeland security that would support excluding any specific areas from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19, as well as the 2016 Policy.

Exclusions Based on 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 as discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a

number of factors, including whether there are approved and permitted conservation plans covering the species in the area such as safe harbor agreements (SHAs), candidate conservation agreements with assurances (CCAAs), “conservation benefit agreements” or “conservation agreements” (CBAs) (CBAs are a new type of agreement replacing SHAs and CCAAs in use after April 2024 (89 FR 26070; April 12, 2024)) or HCPs, or whether there are non-permitted conservation agreements and partnerships that would be encouraged 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, social, or other impacts that might occur because of the designation.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. In the case of Peñasco least chipmunk, the benefits of critical habitat include public awareness of the presence of Peñasco least chipmunk and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Peñasco least chipmunk due to protection from destruction or adverse modification of critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation, strengthening, or encouragement of partnerships. Additionally, continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation

management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as additional public comments we received, and the best scientific data available, we evaluated whether certain lands in the critical habitat (Unit 1–Nogal Peak, Unit 2–Crest Trail, and Unit 3–Sierra Blanca) are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If our analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise her discretion to exclude the lands from the final designation. In the paragraphs below, we provide our analysis of the areas being excluded under section 4(b)(2) of the Act.

Federal Lands

Federal land managers have unique obligations under the Act. First, Congress declared its policy that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act (section 2(c)(1)). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Therefore, in general we will focus our exclusions on non-Federal lands. However, our regulations at 50 CFR 424.19 and the 2016 Policy provide for the consideration of the exclusion of Federal lands in particular instances.

In this particular situation, we have determined that the benefits of exclusion for portions of the Sierra Blanca Unit outweigh the benefits of inclusion. In our proposed rule (86 FR 53583), the Sierra Blanca Unit is described as being located in Lincoln and Otero Counties in the White Mountains of southern New Mexico. The area proposed for designation as critical habitat includes subalpine habitat located within the Lincoln National Forest, the Lincoln National Forest Wilderness Area, and Mescalero Apache Tribal Reservation land. A portion of the Sierra Blanca Unit known as the Ski Apache Resort is managed by the U.S. Forest Service as part of the Lincoln National Forest and operated under a special use permit by the Mescalero Apache Tribe. The Tribe manages the Ski Apache Resort and ski lifts, and the U.S. Forest Service maintains ownership and is responsible for managing the land for forest health, in collaboration with the Mescalero Apache Tribe. The Mescalero Apache Tribe has agreed to protect the habitat of any federally listed species and call for the immediate abatement of any otherwise authorized activity on, or use of, the land operated under a special use permit that causes or threatens to cause harm to any natural resource, including species and their habitat (U.S. Forest Service 2014, pp. 10–13).

Proposed Unit 3 (Sierra Blanca)—Ski Apache Resort

Benefits of Inclusion

The benefits of including lands in critical habitat can be regulatory, educational, or to aid in recovery of species as generally discussed in Consideration of Impacts Under Section 4(b)(2) of the Act above. The following is our assessment of the benefits for inclusion of the portion of the Sierra Blanca Unit in Lincoln County known as the Ski Apache Resort, which is managed by the U.S. Forest Service as part of the Lincoln National Forest and operated under a special use permit by the Mescalero Apache Tribe. This permit has contributed to development of an informal partnership between the Tribe and the U.S. Forest Service to conserve and manage habitat on the Ski Apache Resort (Williams, 2024 pers. comm.).

The designation of critical habitat can help to educate the public regarding the potential conservation value of an area and can focus efforts by clearly delineating areas of high conservation value for the Peñasco least chipmunk. Specifically, designation of critical habitat on the Ski Apache Resort could

serve to further educate the public regarding the specific needs that the chipmunk requires on the same lands that the public enjoys and uses. However, the chipmunk habitat in the White Mountains exists entirely on U.S. Forest Service and Tribal land, and both entities are aware of the high conservation value of the habitat to the species. The U.S. Forest Service has included the chipmunk on their list of sensitive species for more than a decade and incorporates management of their lands in consideration of this and other sensitive species. Little additional educational benefit would be gained from designation of critical habitat on the Ski Apache Resort as a result of informing the public of the presence of the chipmunk and the high conservation value of this area. Therefore, we find that the benefits of inclusion of the Ski Apache Resort as part of the Sierra Blanca Unit are reduced as a result of these past and ongoing actions.

The designation of critical habitat can aid in recovery of the species by raising awareness to landowners and managers by calling attention to recovery actions that could be implemented. In the case of the Peñasco least chipmunk, catastrophic wildfire is one of the biggest threats to the subspecies because the chipmunk's range has been reduced to a single population and wildfire has the potential to cause extinction of the subspecies. This threat was demonstrated in the recent South Fork Fire, which burned 2.3 hectares (5.7 acres) of the Sierra Blanca Unit managed by the U.S. Forest Service before it was contained. The U.S. Forest Service has an agreement with the Mescalero Apache Tribe to address habitat and conservation needs for the Peñasco least chipmunk, with particular emphasis on reducing the threat of wildfire.

In 2018, the U.S. Forest Service published a decision to reduce wildland fuels and promote forest health on the Ski Apache Resort and a portion of the Mescalero Apache Reservation by removing, piling, and burning hazard trees; restoring and protecting new trees; and reseeded disturbed areas with beneficial plants (USDA 2018, entire). The plan is formally named the Ski Apache Vegetation Restoration Project. In addition to reducing the threat of catastrophic wildfire, the plan calls for surveys to be conducted to locate Peñasco least chipmunks and to identify and retain habitat characteristics that favor them (e.g., large logs for cover) in the project area. The plan also calls for restoration of habitat features that match the physical or biological features essential to the conservation of the species, including reseeded of open

slopes with subalpine meadow/grassland species such as Thurber's fescue, sedges, and flowering forbs. Work on the restoration project began in 2019 but was then delayed by COVID-19 impacts to agency operations, staff turnover, and lack of funding. It will be reinitiated in fiscal year 2024 using funds from the Infrastructure Investment and Jobs Act (also known as the Bipartisan Infrastructure Law, Pub. L. 117–58; November 15, 2021) (Brennan, 2024 pers. comm.). The decision demonstrates the commitment of the U.S. Forest Service and Mescalero Apache Tribe to decreasing the threat of wildfire potential on the Ski Apache Resort for the benefit of the Peñasco least chipmunk. The partnership between the Tribe and the U.S. Forest Service and their commitment to this plan and the provisions thereof reduces the benefits of inclusion of the Ski Apache Resort as part of the Sierra Blanca Unit in a designation of critical habitat.

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that protection is provided to avoid destruction or adverse modification of critical habitat. However, we conclude that few regulatory benefits to the Peñasco least chipmunk would be gained from a designation of critical habitat on the Ski Apache Resort. Through the consultation process for specific projects, we would determine if there are any anticipated effects to listed species or potential destruction or adverse modification to critical habitat.

We find it is unlikely that many, if any, consultations would occur to assess the potential for projects to destroy or adversely modify Peñasco least chipmunk critical habitat on the Ski Apache Resort because, despite listed species occurring there (e.g., Mexican spotted owl), the U.S. Forest Service has yet to have cause to consult with the U.S. Fish and Wildlife Service on any project in the area for the past 30 years. Because the Sierra Blanca Unit is occupied by the Peñasco least chipmunk, should a project arise requiring consultation in the future (such as wildfire reduction as part of the Ski Apache Vegetation Restoration Project discussed above), absent critical habitat, an assessment of the anticipated effects to the Peñasco least chipmunk would still be conducted under the jeopardy standard.

In our evaluation of the probable economic impact of a critical habitat designation, we identified the effects

expected to occur solely due to the designation of critical habitat and not from the protections that are in place due to the species being listed under the Act. Our assessment concluded that there are no project modifications that would be recommended to avoid adverse alteration of the physical and biological features of the critical habitat that would not also be recommended to avoid adverse effects to the subspecies. In the event of an adverse modification determination, we expect that reasonable and prudent alternatives to avoid jeopardy to the subspecies would also avoid adverse modification of the critical habitat. Therefore, the only substantive difference between an analysis of jeopardy and destruction or adverse modification is the minor additional cost of the consultation for destruction or adverse modification. Accordingly, we find the benefits of inclusion for this unit based on the consultation requirement for a designation of critical habitat are minimal for the Peñasco least chipmunk on the Ski Apache Resort.

We expect few to no additional benefits to the recovery of the Peñasco least chipmunk as a result of the designation of this portion of the Sierra Blanca Unit. The habitat areas are outlined and the biological features are readily defined in the species' recovery plan. Overall, with minimal regulatory, educational, and recovery benefits likely, we foresee limited benefits to further recovery of the species as a result of the designation of critical habitat on the Ski Apache Resort.

Benefits of Exclusion

The benefits of excluding the Ski Apache Resort from designated critical habitat are more significant. They include the following: (1) the maintenance of effective working relationships to promote the conservation of the Peñasco least chipmunk and its habitat; (2) the allowance for continued meaningful collaboration and cooperation in working groups; and (3) the provision of conservation benefits to listed species and their habitats that might not occur if the Ski Apache Resort were designated as critical habitat.

The Mescalero Apache Tribe, as special use permit holder of the land, has requested that we exclude the Ski Apache Resort from the critical habitat designation and allow them to manage and protect the natural resources in the area without requiring additional permits or consultation with the U.S. Fish and Wildlife Service (Mescalero Apache Tribe 2023, entire). As discussed above, the partnership

between the Tribe and the U.S. Forest Service to conserve and manage habitat on the Ski Apache Resort has led to the development of a plan that considers the impact of actions on the Peñasco least chipmunk and reduces the threat of wildfire on the landscape (USDA 2018, p. 15). This agreement demonstrates an effective partnership to promote the conservation of the Peñasco least chipmunk and its habitat.

The designation of Peñasco least chipmunk critical habitat on the Ski Apache Resort would be expected to adversely impact the Service's working relationship with the Mescalero Apache Tribe. The Tribe has indicated that the designation of critical habitat for the Peñasco least chipmunk on the Ski Apache Resort, an area over which the Tribe has requested ownership (Maue 2017, entire), would be viewed as an unwarranted and unwanted intrusion into Tribal natural resource programs. In discussions regarding other listed species, we were informed that critical habitat would be viewed as an infringement on the Tribe's sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. We have found that the Tribe would prefer to work with us on a government-to-government basis. The perceived future restrictions (whether realized or not) of a critical habitat designation could have a damaging effect to coordination efforts, possibly preventing actions that might maintain, improve, or restore habitat for the chipmunk and other species. For these reasons, we believe that our working relationship with the Mescalero Apache Tribe would be better maintained if the Ski Apache Resort is excluded from the designation of critical habitat for the Peñasco least chipmunk. We view this as a substantial benefit of exclusion.

A cooperative working relationship between the Service and Mescalero Apache Tribe has benefited the conservation and recovery of other listed species and other natural resources. For example, the Service's relationship with Mescalero Apache resulted in the successful prosecution of a Mexican spotted owl take case under section 9 of the Act, related to an arsonist in 2002 (Service 2002). Additionally, the development of the Mexican Spotted Owl Management Plan for the Mescalero Apache Reservation was a noteworthy accomplishment that has benefited the conservation of the owl. Recovery of the Peñasco least chipmunk will be greatly enhanced by a mutually respectful partnership. We have plans with the U.S. Forest Service and Mescalero Apache Tribe members

to research use of the Ski Apache Resort by Peñasco least chipmunks. In the future, we plan to continue to provide training or guidance as needed to support recovery of the subspecies in this area. We conclude that our working relationship with the Tribe on a government-to-government basis has been extremely beneficial in implementing natural resource conservation for other species, and that maintaining a productive relationship would be best fostered by exclusion of critical habitat for the Peñasco least chipmunk on the Ski Apache Resort.

Lastly, we anticipate future management/conservation plans to include conservation efforts for other listed species and their habitat. We believe that other Tribes would be willing to work cooperatively with us to benefit other listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species will likely be premised upon whether the U.S. Forest Service land, on which the Mescalero Apache Tribe operates the Ski Apache Resort under a special use permit, is excluded from critical habitat for the Peñasco least chipmunk. Thus, a benefit of excluding the Ski Apache Resort would be the encouragement of future conservation efforts that would benefit other listed species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We found there to be few benefits of including the Ski Apache Resort (the portion of the proposed Sierra Blanca Unit managed by the U.S. Forest Service and operated by the Mescalero Apache Tribe under a special use permit) as part of the critical habitat designation for the Peñasco least chipmunk, including the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid destruction or adverse modification of critical habitat, minimal additional educational opportunities, and minimal gains for species recovery through the reduction of the wildfire threat. The benefits of inclusion are outweighed by the more substantial benefits of excluding the portion of the Sierra Blanca Unit regarding (1) the advancement and support of our Federal Indian Trust obligations and the maintenance of effective collaboration and cooperation to promote the conservation of Peñasco least chipmunk; (2) the maintenance of effective working relationships and an existing partnership between the Tribe and U.S. Forest Service to promote the

conservation of the Peñasco least chipmunk and its habitat; (3) allowance for continued meaningful collaboration and cooperation with the Tribe to implement natural resource conservation; and (4) provision of future conservation efforts that would benefit other listed species and their habitats. In conclusion, we have found the benefits of including the Ski Apache Resort as part of the critical habitat designation of the Sierra Blanca Unit are outweighed by the benefits of excluding this particular area.

Exclusion Will Not Result in Extinction of the Species

We have determined that the exclusion of the Ski Apache Resort portion of the Sierra Blanca Unit that includes 305 hectares (754 acres) from the final designation of critical habitat will not result in the extinction of the Peñasco least chipmunk. The species occupies two other areas, Nogal Peak Unit and the northern portion of the Sierra Blanca Unit, both of which are managed by the U.S. Forest Service. The Crest Trail Unit connects the northern portion of the Sierra Blanca Unit and the Nogal Peak Unit. Occupancy of the Crest Trail Unit is not known but the area is considered essential to allow movement between the Nogal Peak and Sierra Blanca Units. As described above, all of the area we are excluding from critical habitat is considered to be occupied by the species, and consultations will still occur under section 7 of the Act if there is a Federal nexus, even in the absence of the area's designation as critical habitat. Application of the jeopardy standard of section 7 of the Act also provides assurances that the species will not go extinct in the absence of the designation of this particular area.

In summary, the benefits of including the Ski Apache Resort portion of the Sierra Blanca Unit in the critical habitat designation for the Peñasco least chipmunk are few. The benefits of excluding this area from designated critical habitat are greater and include maintaining an important partnership. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area and that exclusion will not result in the extinction of the species.

Tribal Lands

Several Executive Orders, Secretary's Orders, and policies concern working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to

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

A joint Secretary's Order that applies to both the Service and the National Marine Fisheries Service (NMFS)—Secretary's Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206)—is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, the appendix to S.O. 3206 explicitly recognizes the right of Tribes to participate fully in any listing process that may affect Tribal rights or Tribal trust resources; this includes the designation of critical habitat. Section 3(B)(4) of the appendix requires us to consult with affected Tribes “when considering the designation of critical habitat in an area that may impact Tribal trust resources, Tribally-owned fee lands, or the exercise of Tribal rights.” That provision also instructs the Services to avoid including Tribal lands within a critical habitat designation unless the area is essential to conserve a listed species, and it requires the Services to “evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.”

Our implementing regulations at 50 CFR 424.19 and the 2016 Policy are consistent with S.O. 3206. When we undertake a discretionary exclusion analysis, in accordance with S.O. 3206, we consult with any Tribe whose Tribal trust resources, tribally owned fee lands, or Tribal rights may be affected by including any particular areas in the designation, and we evaluate the extent to which the conservation needs of the species can be achieved by limiting the designation to other areas. When we undertake a discretionary section 4(b)(2) exclusion analysis, we always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not override the Act's statutory requirement of designation of critical habitat. As stated above, we must consult with any Tribe when a designation of critical habitat may affect Tribal lands or resources. The Act requires us to identify areas that meet the definition of “critical habitat” (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may

require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to land ownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority under the Act or other statutes.

Proposed Unit 3 (Sierra Blanca)—Mescalero Apache Reservation

Benefits of Inclusion

The benefits of including lands in critical habitat can be regulatory, educational, or to aid in recovery of species as generally discussed in Consideration of Impacts Under Section 4(b)(2) of the Act above. The following is our assessment of the benefits for inclusion of the portion of the Sierra Blanca Unit in Otero County owned by the Mescalero Apache Tribe.

The principal benefit of any designated critical habitat is that activities in and affecting such habitat require consultation under section 7 of the Act. Such consultation would ensure that protection is provided to avoid destruction or adverse modification of critical habitat. However, we conclude that few regulatory benefits to the Peñasco least chipmunk would be gained from a designation of critical habitat on the Mescalero Apache Reservation. The Tribe is not required to consult with the Service except in cases where there is a Federal nexus due to involvement of a Federal agency (*e.g.*, Bureau of Indian Affairs funding a project on Mescalero Apache land). Through the consultation process, we would determine if there are any anticipated effects to listed species or potential destruction or adverse modification of designated critical habitat.

We find it is unlikely that many, if any, consultations would occur to assess the potential for adverse modification to the Peñasco least chipmunk critical habitat on the Mescalero Apache Reservation because, despite several listed species historically occurring there (*e.g.*, Mexican spotted owl, New Mexico meadow jumping mouse), the Tribe has yet to have cause to consult with the Service on any project in the area for the past 30 years. Because this area is occupied by the species, should a project arise requiring consultation in the future, an assessment of the anticipated effects to the Peñasco least chipmunk would still be conducted under the jeopardy standard.

In our evaluation of the probable economic impact of a critical habitat designation, we identified the effects

expected to occur solely due to the designation of critical habitat and not from the protections that are in place due to the species being listed under the Act. Our assessment concluded that there are no project modifications that would be recommended to avoid adverse alteration of the physical and biological features of the critical habitat that would not also be recommended to avoid adverse effects to the subspecies. In the event of an adverse modification determination, we expect that reasonable and prudent alternatives to avoid jeopardy to the subspecies would also avoid adverse modification of the critical habitat. Therefore, the only substantive difference between an analysis of jeopardy and destruction or adverse modification is the minor additional cost of the consultation for destruction or adverse modification. Accordingly, we find the benefits of inclusion for this unit based on the consultation requirement for a designation of critical habitat are minimal for the Peñasco least chipmunk on the Mescalero Apache Reservation.

The designation of critical habitat can help to educate the public regarding potential conservation value of an area and can focus efforts by clearly delineating areas of high conservation value for the Peñasco least chipmunk. However, the chipmunk habitat in the White Mountains exists entirely on U.S. Forest Service and Tribal land. There is little additional educational benefit to be gained from designation of critical habitat on the Mescalero Apache Reservation as a result of informing the public of the high conservation value of this area. The Mescalero Apache Tribe is currently working with the Service to address habitat and conservation needs for listed species. We anticipate that the Tribe will continue to actively participate in working groups, providing for the timely exchange of management information. The educational benefits important for the long-term survival and conservation for the other listed species (*i.e.*, Mexican spotted owl) are being realized. Therefore, the educational benefits of including the Mescalero Apache Reservation in critical habitat are minimal.

We expect few to no additional benefits to the recovery of the Peñasco least chipmunk as a result of the designation of this portion of the Sierra Blanca Unit. The habitat areas are outlined, and the biological features are readily defined in the species' recovery plan. With limited regulatory and educational benefits likely, we foresee limited benefit to further recovery of the species as a result of a designation of

critical habitat on the Mescalero Apache Tribe Reservation.

Benefits of Exclusion

The benefits of excluding Mescalero Apache Tribe land from designated critical habitat are more significant. They include the following: (1) the advancement and support of our Federal Indian Trust obligations and the maintenance of effective collaboration and cooperation to promote the conservation of the Peñasco least chipmunk; (2) the maintenance of effective working relationships and an existing partnership between the Tribe and U.S. Forest Service to promote the conservation of the Peñasco least chipmunk and its habitat; (3) allowance for continued meaningful collaboration and cooperation with the Tribe to implement natural resource conservation; and (4) provision of future conservation efforts that would benefit other listed species and their habitats.

Through the years, we have met with the Mescalero Apache Tribe to discuss management and conservation of federally listed species. Our goal has been to establish an effective working relationship. As part of our relationship, we have provided assistance to develop measures to conserve listed species and their habitats on Mescalero Apache lands. These measures are contained within the Tribal management/conservation plans we have developed together, such as the Mexican Spotted Owl Management Plan for the Mescalero Apache Reservation (Mescalero Apache 2000). These proactive actions were conducted in accordance with Secretary's Order 3206 (described above). We believe that the Mescalero Apache Tribe should be the governmental entity to manage and promote the conservation of the Peñasco least chipmunk on their lands, and they have taken the initial steps to do so, requesting our assistance to conduct trainings on how to survey for the Peñasco least chipmunk and discuss habitat enhancements needed on the Reservation. We recognize and endorse their fundamental right to provide for Tribal resource management activities, including those relating to the species' habitat.

The designation of Peñasco least chipmunk critical habitat on the Reservation would adversely impact our working relationship with the Mescalero Apache Tribe. In discussions regarding other listed species, we were informed that critical habitat would be viewed as an infringement on the Tribe's sovereign abilities to manage natural resources in accordance with their own policies, customs, and laws. The Tribe has

indicated that the designation of critical habitat for the Peñasco least chipmunk on the Mescalero Apache Reservation would amount to additional Federal regulation of a sovereign Nation's land and would be viewed as an unwarranted and unwanted intrusion into Tribal natural resource programs. We have found that the Tribe would prefer to work with us on a government-to-government basis. For these reasons, we find that our working relationship with the Mescalero Apache Tribe would be better maintained if the Reservation is excluded from the designation of critical habitat for the Peñasco least chipmunk. We view this as a substantial benefit of exclusion.

A cooperative working relationship between the Service and Mescalero Apache Tribe has benefited in the conservation and recovery of listed species and other natural resources. For example, the Service's relationship with Mescalero Apache resulted in the successful prosecution of a Mexican spotted owl take case under section 9 of the Act, related to an arsonist in 2002 (Service 2002). Additionally, the development of the Mexican Spotted Owl Management Plan for the Mescalero Apache Reservation was a noteworthy accomplishment that has benefited the conservation of the owl. Recovery of the Peñasco least chipmunk will be greatly enhanced with a mutually respectful partnership. As mentioned above, the Mescalero Apache have requested our assistance to conduct trainings on how to survey for the Peñasco least chipmunk and discuss habitat enhancements needed on the Reservation. In the future, we plan to continue to provide training or guidance as needed to support recovery of the subspecies in this area. We conclude that our working relationships with the Tribe on a government-to-government basis has been beneficial in implementing natural resource conservation for other species, and that maintaining a productive relationship would be best fostered by exclusion of critical habitat for the Peñasco least chipmunk on the Mescalero Apache Reservation.

Lastly, we anticipate future management/conservation plans to include conservation efforts for other listed species and their habitat. We believe that many Tribes would be willing to work cooperatively with us to benefit other listed species, but only if they view the relationship as mutually beneficial. Consequently, the development of future voluntary management actions for other listed species will likely be premised upon whether these Tribal lands are excluded

from critical habitat for the Peñasco least chipmunk. Thus, a benefit of excluding these lands would be encouraging future conservation efforts that would benefit other listed species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

In weighing the benefits of inclusion and the benefits of exclusion of the portion of the Sierra Blanca Unit owned and managed by the Mescalero Apache Tribe, we find that the benefits of exclusion of this land outweigh the benefits of inclusion of this land in the critical habitat designation. This is based on the fact that there are very limited benefits to inclusion and substantial benefits from supporting our partnerships by excluding this portion of the unit. We found there to be few benefits of including the area owned by the Mescalero Apache Tribe as part of the critical habitat designation for the Peñasco least chipmunk, including the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid destruction or adverse modification of critical habitat, minimal additional educational opportunities, and minimal gains for species recovery through the reduction of the wildfire threat. In addition to supporting Secretary’s Order 3206 and Mescalero Apache Tribe sovereignty, we have determined that excluding a portion of the Sierra Blanca Unit that overlaps with Reservation land will provide for maintenance of a positive relationship with the Tribe in Otero County. This relationship is fundamental for

implementing recovery actions for the Peñasco least chipmunk and outweighs the limited benefits that may occur from the designation of critical habitat there. Recovery of the Peñasco least chipmunk is best served by the exclusion of the portion of the Sierra Blanca Unit owned by the Mescalero Apache Tribe. In conclusion, we have found the benefits of including the portion of the Sierra Blanca Unit owned and managed by the Mescalero Apache Tribe are outweighed by the benefits of exclusion of this particular area.

Exclusion Will Not Result in Extinction of the Species

We have determined that the exclusion of the portion of the Sierra Blanca Unit that includes 581 hectares (1,435 acres) from the final designation of critical habitat will not result in the extinction of Peñasco least chipmunk. The species occupies two other areas, Nogal Peak Unit and the northern portion of the Sierra Blanca Unit, both of which are managed by the U.S. Forest Service. The Crest Trail Unit connects the northern portion of the Sierra Blanca Unit and the Nogal Peak Unit. Occupancy of the Crest Trail Unit is not known but the area is considered essential to allow movement between the known populations in the Nogal Peak and Sierra Blanca units. As described above, all of the area we are excluding from critical habitat is considered to be occupied by the species, and consultations will still occur under section 7 of the Act if there is a Federal nexus, even in the absence of the designation of this area as critical

habitat. Application of the jeopardy standard of section 7 of the Act also provides assurances that the species will not go extinct in the absence of this designation.

In summary, the benefits of including the portion of the Sierra Blanca Unit in the critical habitat designation for the Peñasco least chipmunk are few. The benefits of excluding this area from designated critical habitat are greater and include maintaining an important partnership. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area and that exclusion will not result in the extinction of the species.

Summary of Exclusions

As discussed above, based on the information provided by entities seeking exclusion, as well as any additional public comments received, we evaluated whether certain lands in the proposed critical habitat were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act. We are excluding the following areas from the critical habitat designation for the Peñasco least chipmunk: Proposed Unit 3—Sierra Blanca, Mescalero Apache Tribe Reservation and Ski Apache Resort. Table 4 shows the sizes of the areas excluded from the critical habitat designation. While the area proposed for critical habitat was in Lincoln and Otero Counties, the area in Otero County is now being excluded. The critical habitat in this final designation is entirely within Lincoln County.

TABLE 4—AREAS EXCLUDED FROM CRITICAL HABITAT DESIGNATION BY CRITICAL HABITAT UNIT

Unit	Specific area	Areas meeting the definition of critical habitat, in hectares (acres)	Areas excluded from critical habitat, in hectares (acres)
3. Sierra Blanca	Mescalero Apache Reservation	581 (1,435)	581 (1,435)
	Ski Apache Resort	305 (754)	305 (754)
Total area excluded	886 (2,189)

Required Determinations

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 14094 amends and reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866 and E.O. 13563, and the

Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed

this final rule in a manner consistent with these requirements.

Executive Order 12866, as reaffirmed by E.O. 13563 and amended by E.O. 14094, 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.

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

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

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

Under the RFA, as amended, 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 will be directly regulated by this designation. The RFA does not require evaluations of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities will be directly regulated by this rulemaking, we certify that this critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule, we reviewed and evaluated all information submitted during the comment period on the September 28, 2021, proposed rule (86 FR 53583) that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a 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 “to the extent permitted by law” when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a “significant energy action” as an action that (i) is a significant regulatory action under E.O. 12866 or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule is not a significant regulatory action under E.O. 12866 or E.O. 14094 (88 FR 21879; April 11, 2023). Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

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

The 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 are not likely to 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 will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any 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. 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 E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Peñasco least chipmunk in a takings implications assessment. The Act does not authorize the Services 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 and concludes that this designation of critical habitat for the Peñasco least chipmunk does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this 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 critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, this final rule does not have substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The 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 will 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 will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat

needs of the species, this final rule identifies the physical or biological features essential to the conservation of the species. The areas of designated critical habitat are presented on maps, and the 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.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

However, when we designate as “critical habitat” any areas that fall within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, including this designation for the Peñasco least chipmunk, we undertake a NEPA analysis for that critical habitat designation consistent with the Tenth Circuit’s ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996).

We performed the NEPA analysis, and the draft environmental assessment was made available for public comment on June 13, 2022, on the New Mexico Ecological Services Field Office website (below). We emailed notices to 64 individuals, agencies, organizations, and Tribes that were likely to be interested in and/or potentially affected by the proposed action. We accepted public comments through September 9, 2022, and received comments from Holloman Air Force Base and the Lincoln County Government and Board of Commissioners. The final environmental assessment and finding of no significant impact have been

completed and are available for review with the publication of this final rule. You may obtain a copy of the documents online at <https://www.regulations.gov>, by mail from the New Mexico Ecological Services Field Office (see ADDRESSES), or by visiting our website at <https://www.fws.gov/office/new-mexico-ecological-services/>.

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, May 4, 1994), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), the President's memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation; 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes and Alaska Native Corporations (ANCs) on a government-to-government basis. In accordance with Secretary's 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.

In a letter dated November 27, 2017, we informed the Mescalero Apache Tribe of our intent to conduct a status assessment for the Peñasco least chipmunk. On July 5, 2018, we shared the draft of the SSA report (Service 2018) with the Mescalero Apache Tribe for their partner review. We sent a notification letter to the President of the Mescalero Apache Tribe, on September 24, 2021, notifying the Tribe that the proposed rule had published in the **Federal Register** to allow for the maximum time to submit comments. We received a letter from the Tribe March 8, 2023, which explained their opposition to designation of critical habitat on Tribal land and the Ski Apache Resort (Mescalero Apache Tribe 2023, entire). We plan to continue working with the Tribe for conservation of the Peñasco least chipmunk and other species of concern.

We considered Tribal areas for exclusion from final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act and subsequently excluded two portions of the Sierra Blanca Unit (Unit 3) from this final designation.

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 New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the U.S. Fish and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, we 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. In § 17.11, amend paragraph (h) in the List of Endangered and Threatened Wildlife by adding an entry for “Chipmunk, Peñasco least” in alphabetical order under MAMMALS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
MAMMALS				
*	*	*	*	*
Chipmunk, Peñasco least	<i>Neotamias minimus atristriatus</i> .	Wherever found	E	89 FR [INSERT FEDERAL REGISTER PAGE WHERE THE DOCUMENT BEGINS], 12/10/2024; 50 CFR 17.95(a). ^{CH}
*	*	*	*	*

■ 3. In § 17.95, amend paragraph (a) by adding an entry for “Peñasco Least Chipmunk (*Neotamias minimus atristriatus*)” after the entry for “Woodland Caribou (*Rangifer tarandus caribou*), Southern Mountain Distinct Population Segment (DPS)” to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) *Mammals.*

* * * * *

Peñasco Least Chipmunk (*Neotamias minimus atristriatus*)

(1) Critical habitat units are depicted for Lincoln County, New Mexico, on the maps in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the Peñasco least chipmunk consist of the following components:

(i) Areas within the White Mountains that:

(A) Are between elevations of 2,500–3,597 meters (8,200–11,800 feet);

(B) Contain rock outcrops or talus;

(C) Are subalpine Thurber's fescue meadow/grassland communities found within openings of spruce-fir forest,

above tree line in the glacial cirque, containing tall bunchgrasses, including Thurber's fescue, sedges, flowering forbs, and shrubs; and

(D) Contain widely spaced large-diameter conifers, such as Engelmann spruce or ponderosa pine, intermixed in low densities with the meadow/grassland vegetation.

(ii) Forage, including species of Asteraceae, flowers and fruits of gooseberry (*Ribes* spp.), wild strawberry (*Fragaria* spp.), pinyon (*Pinus edulis*) nuts, Gambel oak (*Quercus gambelii*) acorns, and insects.

(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 January 9, 2025.

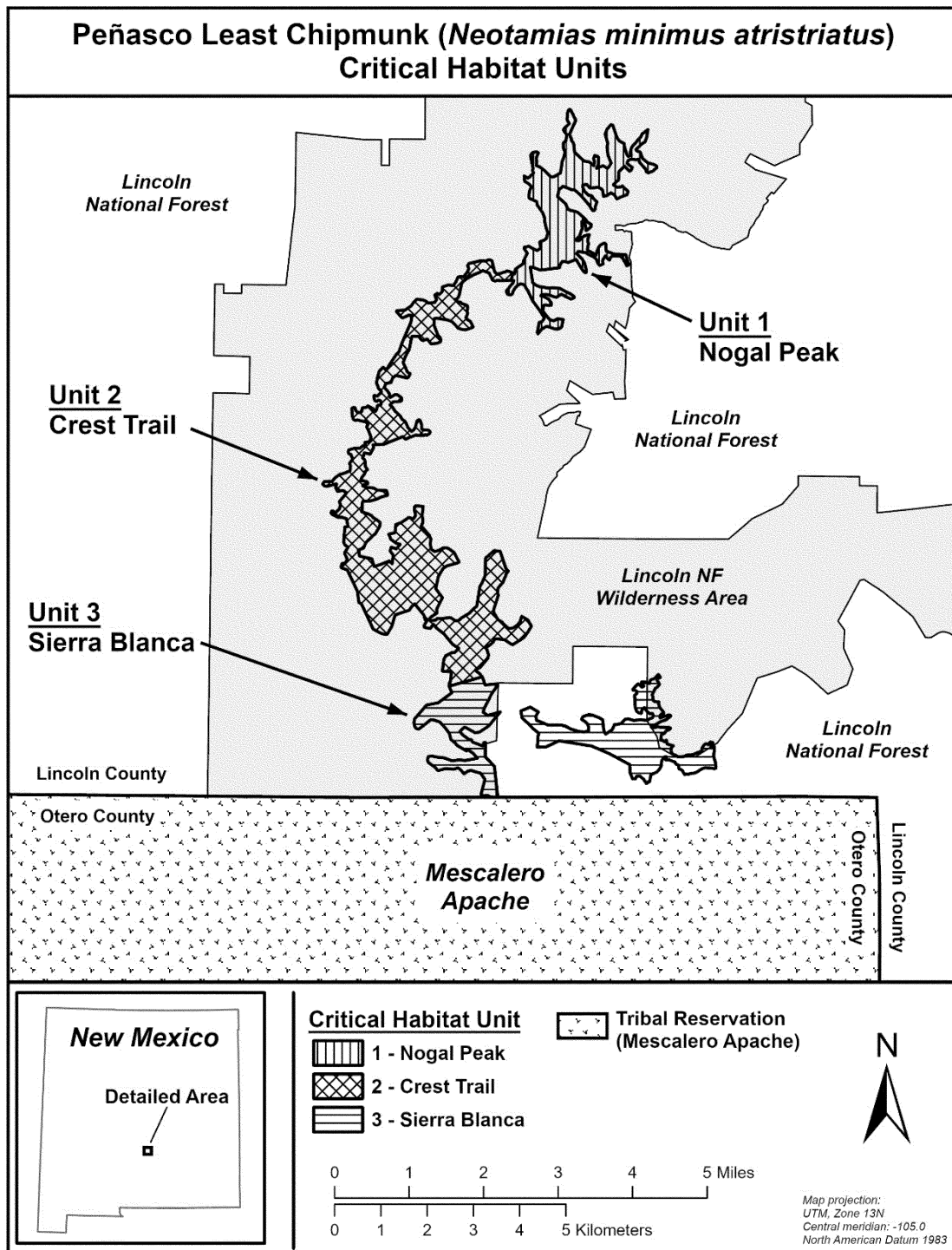
(4) Data layers defining map units were created using publicly available geospatial vegetation data for the Lincoln National Forest, 30-meter digital elevation models from the

National Elevation Dataset, and 3-band county mosaics obtained from the National Agricultural Imagery Program. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at <https://www.regulations.gov> at Docket No. FWS-R2-ES-2020-0042 and at the

field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map follows:

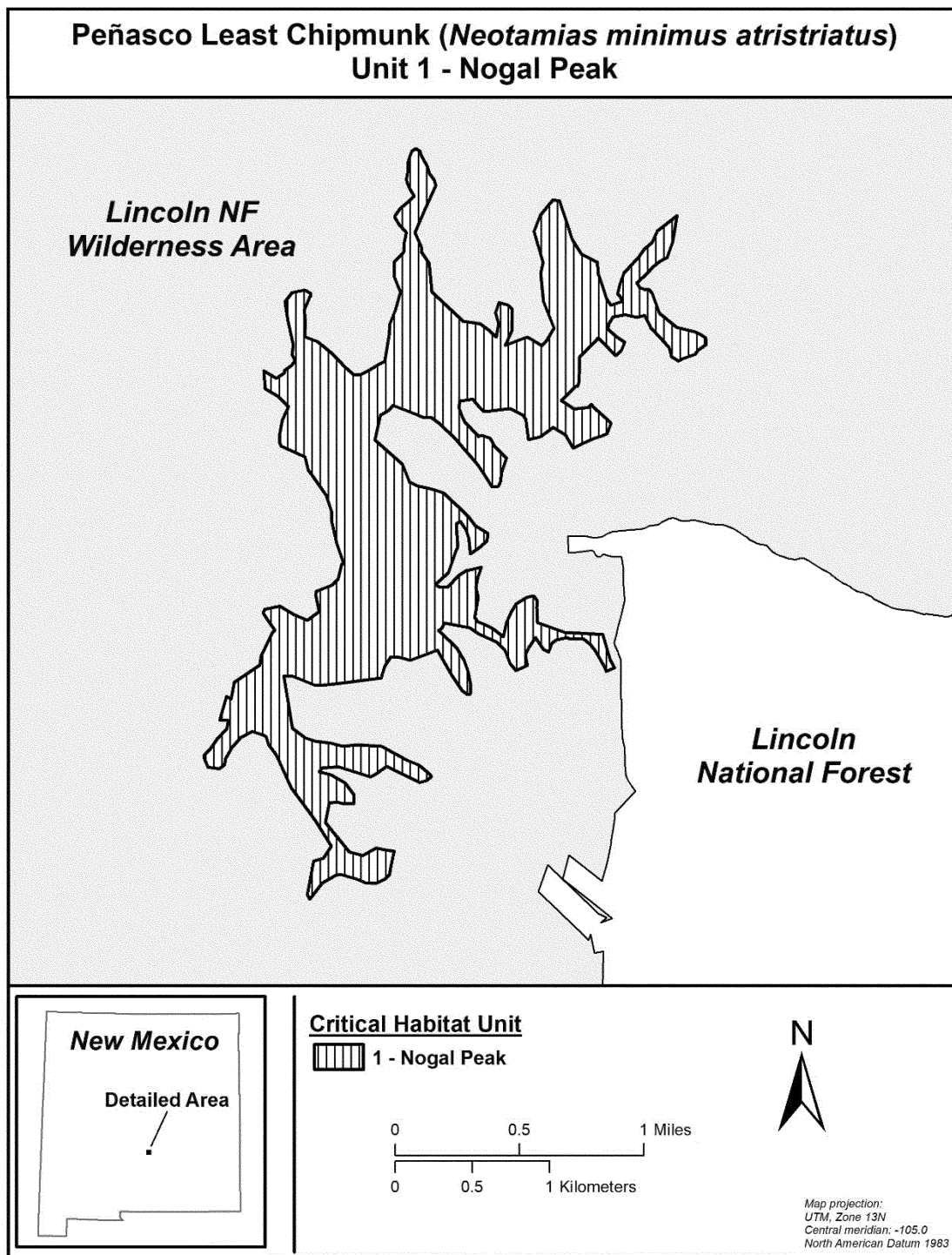
Figure 1 to Peñasco least chipmunk (*Neotamias minimus atristriatus*) paragraph (5)



(6) Unit 1: Nogal Peak, Lincoln County, New Mexico.
 (i) Unit 1 consists of approximately 393 hectares (972 acres) of subalpine habitat within the Lincoln National

Forest Wilderness Area. Elevation ranges approximately 2,570–3,031 meters (8,432–9,944 feet) above mean sea level.
 (ii) Map of Unit 1 follows:

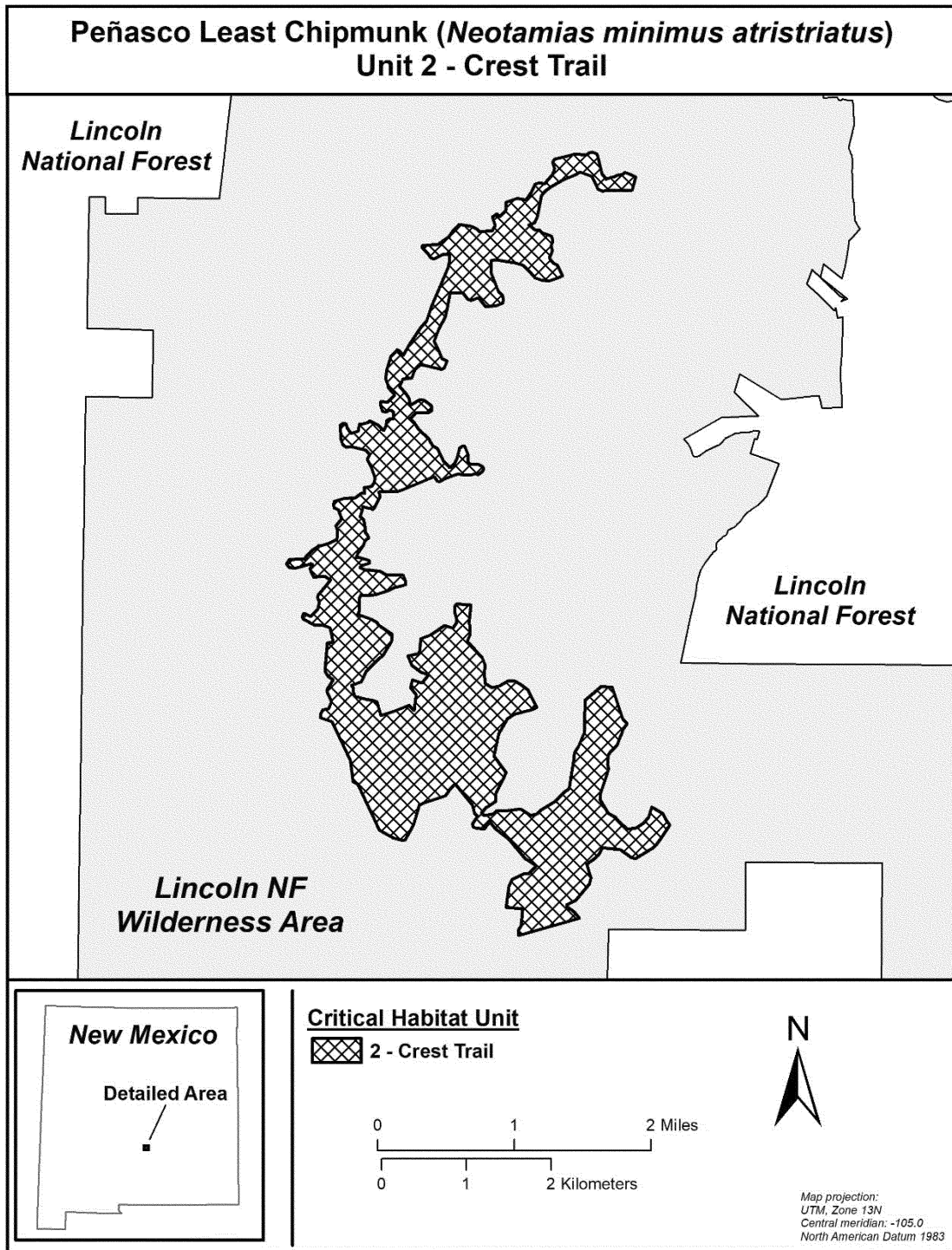
Figure 2 to Peñasco least chipmunk (*Neotamias minimus atristriatus*) paragraph (6)(ii)



(7) Unit 2: Crest Trail, Lincoln County, New Mexico.
 (i) Unit 2 consists of approximately 910 hectares (2,249 acres) of subalpine habitat located within the Lincoln

National Forest Wilderness Area. Elevation ranges approximately 2,621–3,292 meters (8,599–10,800 feet) above mean sea level.
 (ii) Map of Unit 2 follows:

Figure 3 to Peñasco least chipmunk (*Neotamias minimus atristriatus*) paragraph (7)(ii)

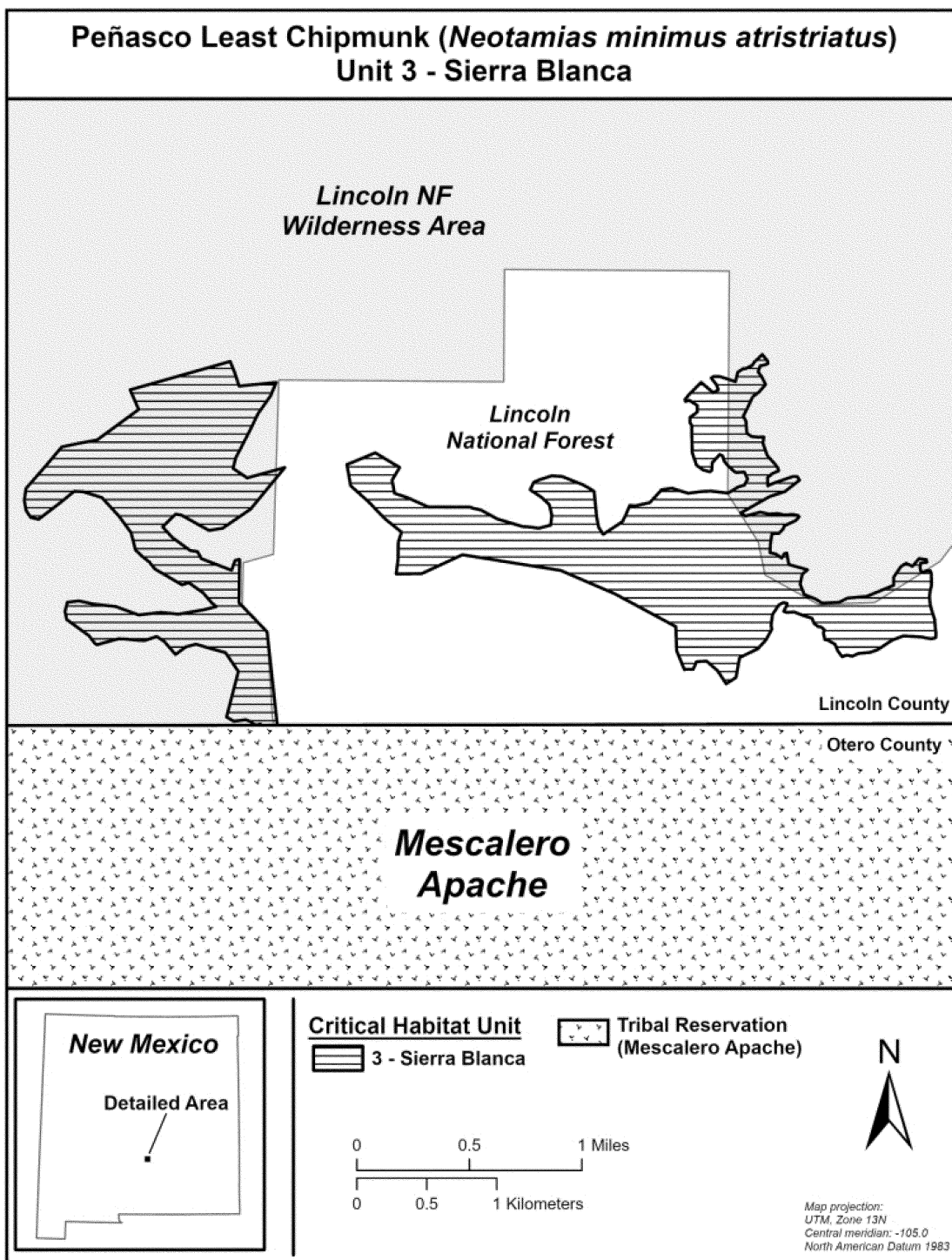


(8) Unit 3: Sierra Blanca, Lincoln County, New Mexico.

(i) Unit 3 includes approximately 471 hectares (1,165 acres) of subalpine habitat located within the Lincoln

National Forest and Lincoln National Forest Wilderness Area. Elevation ranges approximately 2,763–3,518 meters (9,065–11,542 feet) above mean sea level.

(ii) Map of Unit 3 follows: Figure 4 to Peñasco least chipmunk (*Neotamias minimus atristriatus*) paragraph (8)(i)



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

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