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Dated: March 7, 2003.

**Craig Manson,**

Assistant Secretary for Fish and Wildlife and Parks.

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**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****RIN 1018-AG93****Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for *Sidalcea keckii* (Keck's checkermallow)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for *Sidalcea keckii* (Keck's checkermallow). Approximately 438 hectares (ha) (1,085 acres (ac)) are designated in California, consisting of three separate units: one unit in Fresno County, 206 ha (510 ac), and two units in Tulare County, one of 86 ha (213 ac) and one of 146 ha (362 ac). This critical habitat designation provides additional protection under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Section 4 of the Act requires us to consider economic and other relevant impacts when specifying any particular area as critical habitat. We solicited data and comments from the public on all aspects of our proposal, including data on economic and other impacts of the designation.

**DATES:** This rule becomes effective on April 17, 2003.**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during the normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W-2605, Sacramento, CA 95825.**FOR FURTHER INFORMATION CONTACT:** Kirsten Tarp or Susan Moore, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service (telephone 916/414-6600; facsimile 916/414-6710; [kirstent\\_tarp@fws.gov](mailto:kirstent_tarp@fws.gov) or [susan\\_moore@fws.gov](mailto:susan_moore@fws.gov)).**SUPPLEMENTARY INFORMATION:****Background**

*Sidalcea keckii* (Keck's checkermallow) is an annual herb of the mallow family (Malvaceae). The species grows 15 to 33 centimeters (cm) (6 to 13 inches (in)) tall, with slender, erect stems that are hairy along their entire length. Leaves towards the base of the plant have a roughly circular outline, and seven to nine shallow lobes arranged somewhat like the fingers of a hand (palmate). Leaves farther up the plant have fewer lobes which are more deeply divided. Both types of leaves also have irregular serrations at their margins forming "teeth." The plant flowers in April and early May, producing five petalled flowers that are either solid pink or pink with a maroon center. Petals are 1 to 2 cm (0.4 to 0.8 in) long, and are often shallowly notched at their outermost margins. Below the petals is a smaller calyx (cuplike structure) formed by five narrow green sepals (modified leaves). Each sepal is 8 to 11 millimeters (mm) (0.3 to 0.4 in) long, and may have a maroon line running down its center. Below the calyx are bracts (modified leaflike structures), which are much shorter than the sepals and are either undivided or divided into two threadlike lobes. *Sidalcea keckii* is distinguished from other members of its genus by the maroon lines on its sepals, its much shorter bracts, and by stems which are hairy along their entire length (Kirkpatrick 1992; Shevock 1992; Hill 1993).

*Sidalcea keckii* fruit consist of four to five wedge-shaped sections arranged in a disk. The sections measure 3 to 4 mm (0.1 to 0.2 in) across, and each contains a single seed (Abrams 1951; Hill 1993; Cypher 1998). Sections mature and separate in May, but their methods of dispersal, other than gravity, are currently unknown (Cypher 1998). Also unknown are the seeds' requirements for germination (sprouting) in the wild, their typical germination dates, and how long the seeds remain viable in the soil. Based on other Malvaceae species, and on recent observations of extreme yearly fluctuations in numbers of above-ground plants, it is likely that *S. keckii* seeds remain viable for several years and form a persistent soil seed bank (W. Moise as in E. Cypher, Endangered Species Recovery Program, California State University, *in litt.*, 1999; S. Hill, Illinois Natural History Survey, pers. comm., 2002). Persistent seed banks consist of all the viable seeds left ungerminated in the soil longer than a single growing season, and typically extend over a much greater area than the

observable above-ground plants (Given 1994). The number and location of standing plants in a population with a persistent seed bank may vary annually due to a number of factors, including the amount and timing of rainfall, temperature, soil conditions, and the extent and nature of the seed bank. As the depository from which each new generation of plants must grow, such seed banks are extremely important for an annual species' long-term survival in an area, and may maintain a population through years in which few or no above-ground plants can grow or survive (Baskin and Baskin 1978).

The primary pollinators of *Sidalcea keckii* are unknown, but two related California species of *Sidalcea* (*S. oregana* ssp. *spicata* and *S. malviflora* ssp. *malviflora*) are pollinated primarily by various species and families of solitary bees, bumble bees, and bee flies (Ashman and Stanton 1991; Graff 1999). Many bees of the solitary bee genus *Diadasia* specialize in collecting pollen solely from members of the Malvaceae family (Service 1998).

*Sidalcea keckii* is endemic to California and grows in relatively open areas on grassy slopes of the Sierra foothills in Fresno and Tulare counties. It is associated with serpentine soils (Kirkpatrick 1992; Cypher 1998), which are unusually low in nutrients and high in heavy metals. These soil properties tend to restrict the growth of many competing plants (Brooks 1987). As with many serpentine species, *S. keckii* appears to compete poorly with densely growing non-native annual grasses (Stebbins 1992; Weiss 1999).

The primary reason so much remains unknown about *Sidalcea keckii* is that after botanists first collected samples from a site near White River, Tulare County in 1935, 1938, and 1939 (Wiggins 1940; California Natural Diversity Database (CNDDB) 2001), it was not collected or observed by botanists again for over 50 years. A possible reason for this includes the somewhat vague description of the White River site (Wiggins 1940). Searches at the site may also simply have been conducted during poor years when few above-ground plants had germinated from the seed bank (S. Hill, *in litt.*, 1997). Now that botanists have a better understanding of what constitutes appropriate habitat for the species, based on the discovery of additional sites (see below), it is possible that future surveys may relocate *S. keckii* at the White River site. Initial visits to the site have already identified areas of likely habitat (J. Stebbins, Herbarium Curator, California State University, pers. comm., 2002).

*Sidalcea keckii* was presumed extinct until it was rediscovered in 1992 at a site near Mine Hill in Tulare County (Stebbins 1992). The Mine Hill population contained about 60 plants growing on private land around a serpentine rock outcrop on 20 to 40 percent slopes at about 229 meters (m) (750 feet (ft)) in elevation. Associated plants included *Achyrachaena mollis* (blow-wives), *Bromus madritensis* ssp. *rubens* (red brome), *Lepidium nitidum* (shining peppergrass), *Senecio vulgaris* (common groundsel), *Plantago erecta* (California plantain), and *Silene gallica* (windmill pink) (Kirkpatrick 1992; Cypher 1998). We have received information that the standing population at Mine Hill may have been extirpated by conversion of the habitat to an orange grove (J. Stebbins, *in litt.*, 2002). Much of the area around the original population at Mine Hill remains potentially viable however, and may contain a seed bank or standing plants.

Using habitat information from the Mine Hill site, botanists resurveyed a location in the Piedras area of Fresno County where *Sidalcea keckii* had been documented in 1939, and rediscovered the population in 1998 (Service 1997; CNDDDB 2001). This population spans a mix of private and Federal land, much of which has since been purchased by Sierra Foothill Conservancy (SFC) to provide a reserve for the plant (SFC 2001). Although initially only 217 plants were found at the site (Service 2000), subsequent surveys have found 500 to 1,000 plants in 8 separate patches ranging in elevation from 183 to 305 m (600 to 1,000 ft) (Cypher 1998; C. Peck, *in litt.*, 2002). Associated plants at this site include *Bromus heartaches* (soft chess), *Dichelostemma capitatum* (blue dicks), *Gilia tricolor* (bird's eye gilia), *Trileleia ixioides* (pretty face), *Trileleia laxa* (Ithuriel's spear), *Asclepias* sp. (milkweed), and *Madia* sp. (tarweed) (Cypher 1998). Another population was discovered near Piedra in 2002, but we do not yet have details regarding its exact location (J. Stebbins, *in litt.*, 2002).

*Sidalcea keckii* is threatened by urban development, competition from non-native grasses, agricultural land conversion, and random events (S. Hill, pers. comm., 2000; C. Peck, *in litt.*, 2002; Service 2000). Cattle grazing at the current level does not appear to be detrimental, and may reduce encroachment by non-native grasses (C. Peck, *in litt.*, 2002; Weiss 1999). Cattle have been observed to cause some damage to *S. keckii* by eating or trampling it, although the damage was barely noticeable a week later (Cypher 1998). However, unmanaged increases

in grazing during months of flowering, seed-set, or seed maturation, could potentially reduce local population viability and thereby affect long term conservation. The plant's low population numbers, particularly at Mine Hill, leave it vulnerable to random environmental events such as extreme weather, disease, or insect infestations (Shaffer 1981, 1987; Menges 1991). The isolation of *S. keckii* populations exacerbates these vulnerabilities by reducing the likelihood of recolonization of extirpated populations. Inbreeding depression and loss of genetic variability may also be causes for concern in such small isolated populations (Ellstrand and Elam 1993).

#### Previous Federal Action

Federal action on *Sidalcea keckii* began when the Secretary of the Smithsonian Institution, as directed by section 12 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), prepared a report on those native plants considered to be endangered, threatened, or extinct in the United States. This report (House Doc. No. 94-51) was presented to Congress on January 9, 1975, and included *S. keckii* as threatened. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) accepting the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act, and of our intention to review the status of the plant taxa named in the report. On June 16, 1976, we published a proposed rule in the **Federal Register** (41 FR 24523) determining approximately 1,700 vascular plant species to be endangered pursuant to section 4 of the Act. *Sidalcea keckii* was not included on this initial list.

We addressed the remaining plants from the Smithsonian report in a subsequent Notice of Review (NOR) on December 15, 1980 (45 FR 82479). In that NOR, we determined *Sidalcea keckii* to be a category 1 candidate species, which we defined as a species for which we had enough information on biological vulnerability and threats to support preparation of a listing proposal. We published updates of the plant candidate lists in NORs dated September 27, 1985 (50 FR 39526), February 21, 1990 (55 FR 6184), and September 30, 1993 (58 FR 51144), each time maintaining *S. keckii* as a category 1 species. In the NOR published February 28, 1996 (61 FR 7596), we discontinued the use of different categories of candidates, and defined "candidate species" as those meeting the definition of former category 1. We maintained *S. keckii* as a candidate

species in that NOR, as well as in subsequent NORs published September 19, 1997 (62 FR 49398), and October 25, 1999 (64 FR 57533).

On July 28, 1997, we published a proposed rule to list *Sidalcea keckii* as an endangered species under the Act (62 FR 40325). On June 17, 1999, our failure to issue a final rule and to make a critical habitat determination for *S. keckii* was challenged in *Southwest Center for Biological Diversity, et al., v. U.S. Fish and Wildlife Service, et al.* (N.D. Cal) (Case No. C99-2992 CRB). On February 16, 2000, we published a final rule listing *S. keckii* as an endangered species (65 FR 7757). A May 22, 2000, court order, based on a joint stipulation with the plaintiffs, required us to complete a proposed critical habitat designation by September 30, 2001. The court extended the deadline to propose critical habitat for this species, based on a further settlement agreement reached by the parties. In a consent decree issued October 2, 2001, the court required us to complete a proposed critical habitat designation for *S. keckii* and certain other species by June 10, 2002, and to issue a final critical habitat designation for the species by March 10, 2003 (*Center for Biological Diversity, et al., v. Gale Norton, et al.* (D.D.C.) (Case No. Civ. 01-2063)).

We published a proposed rule for *Sidalcea keckii* in the **Federal Register** June 19, 2002 (67 FR 41669). In the proposal, we determined that it was prudent to designate approximately 438 hectares (ha) (1,085 acres (ac)), consisting of three separate units: one unit in Fresno County, 206 ha (510 ac), and two units in Tulare County, one of 86 ha (213 ac) and one of 146 ha (362 ac). Publication of the proposed rule opened a 60-day public comment period, which closed on August 19, 2002. On October 31, 2002, we published a notice announcing the reopening of the comment period on the proposal to designate critical habitat for *S. keckii*, and a notice of availability of the draft economic analysis on the proposed determination (67 FR 66378). This second public comment period closed on December 2, 2002.

#### Summary of Comments and Recommendations

In the June 19, 2002, proposed critical habitat designation (67 FR 41669), we requested all interested parties to submit comments on the specifics of the proposal including information related to biological justification, economics, proposed critical habitat boundaries, and proposed projects. The initial 60-day comment period closed on August 19, 2002. The comment period was

reopened from October 31, 2002, to December 2, 2002 (67 FR 66378), to allow for additional comments on the proposed designation, and comments on the draft economic analysis of the proposed critical habitat.

We contacted all appropriate Federal, State, and local agencies, elected officials, scientific organizations, and other interested parties and invited them to comment. In addition, we invited public comment through the publication of legal notices in the Tulare Advance Register and the Fresno Bee on June 27, 2002. We provided notification of the draft economic analysis to all interested parties. This was accomplished through letters and news releases faxed and/or mailed to affected elected officials, media outlets, local jurisdictions, and interest groups. We also posted the proposed rule and draft economic analysis and associated material on our Sacramento Fish and Wildlife Office internet site following their release on June 19, 2002, and October 31, 2002, respectively.

We received individually written letters from two parties, including one peer reviewer. Both comments were neutral regarding the designation of critical habitat. We reviewed both comments received for substantive issues and new information regarding critical habitat and *Sidalcea keckii*. The comments were either incorporated directly into the final rule or are addressed in the following summary. We received no comments regarding the draft economic analysis.

#### Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from three knowledgeable individuals with expertise in one or several fields, including familiarity with the species, familiarity with the geographic region that the species occurs in, and familiarity with the principles of conservation biology. One of the three peer reviewers responded, and provided us with comments which were summarized in the following section and incorporated into the final rule.

*Issue 1:* Critical habitat identified at the Mine Hill Unit may be misplaced. John Stebbins and Karen Kirkpatrick, the two individuals who found the population, mapped the population in slightly different locations, one of which was mapped much closer to the Centerville clay soils. In addition, John Stebbins' collection notes stated the soil type was Centerville clay. This commenter recommended that the population be visited in the spring and

mapped with a Geographic Positioning System (GPS) unit to precisely map the occurrence. If the landowner will not allow access to the property, it is recommended that the critical habitat boundary be extended to include the adjacent Centerville clay soils.

*Our Response:* Because we are under a settlement agreement to complete a final rule by March 10, 2003, we do not have the option of postponing the designation of critical habitat in order to determine the location of the *Sidalcea keckii* population more precisely with a GPS unit. We disagree with extending the critical habitat boundary to the adjacent Centerville clay soils because most of the adjacent Centerville clay soils are already in agricultural fields or orchards and would be unlikely to contribute to the conservation of *S. keckii*.

The Mine Hill Unit we proposed incorporates both the area mapped by John Stebbins and the area mapped by Karen Kirkpatrick. Although it is true that the area mapped by Karen Kirkpatrick is closer to the boundary of the Centerville clay, it is still within the area mapped as Coarsegold Series soils.

*Issue 2:* Both commenters mentioned that the population of *Sidalcea keckii* at the Mine Hill Unit may have been extirpated by citrus groves. One of the commenters stated that, considering the very limited range of the species, none of the three sites is expendable, and there is a good possibility that areas of natural land may remain on the appropriate soil types within or adjacent to the boundaries of the proposed critical habitat.

*Our Response:* Our information about the status of the population at the Mine Hill site is inconclusive. The standing population at Mine Hill may have been extirpated by conversion of the habitat to an orange grove. We do not know how much habitat may have been converted. We believe that much of the habitat around the original population at Mine Hill remains potentially viable and may contain a seed bank or standing plants.

*Issue 3:* The location of the population mapped at White River may be misplaced. The CNDDDB gives the elevation as 427 m (1,400 ft); however the original description of the site gives the elevation as 380 m (1,247 ft). Given the uncertainty of the precise location of any remaining seed bank, the boundary of the critical habitat proposed at White River should extend all the way to the edge of the Cibo soils.

*Our Response:* We had originally included the referenced Cibo soil area as critical habitat, but a small portion of the Cibo soil area (less than

approximately 2 ha (5 ac)) was inadvertently eliminated when the final proposed critical habitat boundaries were delimited using the Universal Transverse Mercator (UTM) grid. Under the Act and the Administrative Procedure Act (5 U.S.C. 553), we are required to allow the public an opportunity to comment on the proposed rulemaking. Therefore, because this new area was not included in the proposed rule, we are not including it in the final rule. Although this area was not included in the critical habitat proposal, it may be important to the recovery of *Sidalcea keckii* and could be included in recovery activities in the future.

#### Summary of Changes From the Proposed Rule

Based on a review of the comments received on the proposed determination of critical habitat, we reevaluated our proposed designation and made minor changes to the text in the background section of the rule. No changes were made to the unit boundaries delimiting the areas determined to be essential for the conservation of *Sidalcea keckii*. The unit boundaries as depicted in this final rule encompass 438 ha (1,085 ac).

#### Critical Habitat

Section 3 of the Act defines critical habitat as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species, and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. “Conservation” means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat.

In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes

the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." However, in a March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434), the Court found our definition of destruction or adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation would not afford any additional regulatory protections under the Act.

Critical habitat also provides non-regulatory benefits to the species by informing the public and private sectors of areas that are important for species recovery, and where conservation actions would be most effective. Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features essential for the conservation of that species, and can alert the public as well as land-managing agencies to the importance of those areas. Critical habitat also identifies areas that may require special management considerations or protection, and may help provide protection to areas where significant threats to the species have been identified, by helping people to avoid causing accidental damage to such areas.

In order to be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known and using the best scientific and commercial data available, habitat areas that provide at least one of the physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)). Section 3(5)(C) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the

species. Our regulations (50 CFR 424.12(e)) also state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires that our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing rule for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials.

Section 4 of the Act requires that we designate critical habitat based on what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas that support newly discovered populations in the future, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 prohibitions, as determined on the basis of the best available information at the time of the action. Federally funded or assisted

projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

#### Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12, we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of *Sidalcea keckii*. This included information from our own documents on *S. keckii* and related species; the CNDDDB (2001); peer-reviewed journal articles and book excerpts regarding *S. keckii* and related species, or regarding more generalized issues of conservation biology; unpublished biological documents regarding *S. keckii* or related species; site visits, and discussions with botanical experts.

We compared geological and ecological characteristics of the various locations of the plant by using information from the above sources as well as geographic information system (GIS) coverages of documented *Sidalcea keckii* population locations (CNDDDB 2001); soil survey maps (U.S. Soil Conservation Service (SCS) 1971, 1982; U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS) 2001); aerial photographs (CNES/SPOT Image Corporation (SPOT) 2001); topological features (United States Geological Survey (USGS) 1990); features of underlying rock (California Department of Conservation (CDC) 2000) and vegetation cover (USGS 1990). We also examined geological maps not available on GIS (California Division of Mines and Geology (CDMG) 1991, 1992).

The Piedra and the Mine Hill critical habitat units are occupied by both above-ground plants and seed banks, depending on the time of year (*i.e.*, plants are not observable above-ground all year). Although above-ground plants have not been observed on the White River unit since the 1930s, a complete survey has not been done due to the lack of access to lands in private ownership. "Occupied" is defined here as any area with above-ground *Sidalcea keckii* plants or a *S. keckii* seed bank of indefinite boundary. Current surveys need not have identified above-ground

individuals for the area to be considered occupied because plants may still exist at the site as part of the seed bank (Given 1994). All occupied sites contain some or all of the primary constituent elements and are essential to the conservation of the species, as described below.

Each of the critical habitat units likely includes areas that are unoccupied by *Sidalcea keckii*. "Unoccupied" is defined here as an area that contains no above-ground *S. keckii* plants and that is unlikely to contain a viable seed bank. Determining the specific areas that this taxon occupies is difficult because, depending on the climate and the natural variations in habitat conditions, the extent of the distributions may either shrink and disappear, or if there is a residual seed bank present, enlarge and cover a more extensive area. Because it is logistically difficult to determine how extensive the seed bank is at any particular site, and because above-ground plants may or may not be present in all patches within a site every year, we cannot quantify in any meaningful way what proportion of each critical habitat unit may actually be occupied by *S. keckii*. Therefore, patches of unoccupied habitat are probably interspersed with patches of occupied habitat in each unit. The inclusion of unoccupied habitat in our critical habitat units reflects the dynamic nature of the habitat and the life history characteristics of this taxon. Unoccupied areas provide areas into which populations might expand, provide connectivity or linkage between colonies within a unit, and support populations of pollinators and seed dispersal organisms. Both occupied and unoccupied areas that are proposed as critical habitat are essential to the conservation of the species.

#### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. These 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 germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Much of what is known about the specific physical and biological requirements of *Sidalcea keckii* is described in the Background section of this final rule. The designated critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *S. keckii* throughout its range and allow for the expansion of populations in order to help reach the primary goal of conservation, and to provide those habitat components essential for the conservation of the species. These habitat components provide for: (1) individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; (2) areas that allow gene flow and provide connectivity or linkage within larger populations; (3) areas that provide basic requirements for growth, such as water, light, and minerals; and (4) areas that support populations of pollinators and seed dispersal organisms.

We believe the long-term conservation of *Sidalcea keckii* is dependent upon the protection of existing population sites and the maintenance of ecological functions within these sites, including connectivity between colonies (*i.e.*, groups of plants within sites) within close geographic proximity to facilitate pollinator activity and seed dispersal. The areas we are designating as critical habitat provide some or all of the habitat components essential for the conservation of *S. keckii*. Based on the best available information at this time, the primary constituent elements of critical habitat for *S. keckii* are:

- (1) Minimally shaded annual grasslands in the foothills of the Sierra Nevada Mountains containing open patches in which competing vegetation is relatively sparse; and
- (2) Serpentine soils or other soils that tend to restrict competing vegetation.

#### Criteria Used to Identify Critical Habitat

We identified critical habitat areas essential to the conservation of *Sidalcea keckii* in the three primary locations where it currently occurs or has been known to occur: the Piedra area of Fresno County, the Mine Hill area of Tulare County, and near White River in Tulare County. We are designating sufficient critical habitat at each site to maintain self-sustaining populations of *S. keckii* at each of these locations.

During the development of this rule, we considered the role of unoccupied habitat in the conservation of *Sidalcea keckii*. Due to the historic loss of the habitat that supports this species, we believe that future conservation and

recovery of this taxon depends not only on protecting it in the limited area that it currently occupies, but also on providing the opportunity to expand its distribution by protecting currently unoccupied habitat that contains the necessary primary constituent elements within its historic range.

To help achieve our goal of conservation of *Sidalcea keckii*, we are including the White River site, despite the fact that *S. keckii* has not been documented there in recent years. The White River population is the type location where the plant was originally discovered and described from and still is documented to contain the primary constituent elements that would support the species. It is one of the extremely few locations where *S. keckii* has ever been observed and may be occupied by a seed bank. We have evidence from the Piedra site, where *S. keckii* was undocumented from 1939 until its rediscovery in 1998 (Cypher 1998; CNDDDB 2001), that such rediscoveries are possible for *S. keckii*. The Piedra site supports the largest known *S. keckii* population, with 500 to 1,000 plants when last surveyed (Cypher 1998). Even if the species is not rediscovered at the White River site, we still believe the site is essential to the conservation of the species because it is the most appropriate site for a reestablishment effort. The combination of limited range, few populations, and restricted habitat makes *S. keckii* susceptible to extinction or extirpation due to random events, such as fire, disease, or other occurrences (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). Such events are a concern when the number of populations or geographic distribution of a species are severely limited, as is the case with *S. keckii*. Establishment of a third location for *S. keckii* is likely to prove important in reducing the risk of extinction due to such catastrophic events.

Despite the association of *Sidalcea keckii* with serpentine soils (Kirkpatrick 1992; Cypher 1998), only a portion of *S. keckii* plants at the Piedra site grow on soil identified by SCS maps as being serpentine derived (the soil, Fancher extremely stony loam) (SCS 1971; NRCS 2001). Other patches at Piedra grow on what SCS maps indicate are Cibo clays, while the Mine Hill population of *S. keckii* grows in an area mapped as Coarsegold rock outcrop complex (NRCS 2001). Neither of these latter two soil types normally derive from serpentine rock (SCS 1971, 1982), although the underlying geology may contain it. Geologic maps, for example, show the Cibo soils of the Piedra population straddling an arm of

underlying serpentine rock (CDMG 1991; CDC 2000). The soils may, therefore, in fact be derived from such rock or include pockets of soil derived from such rock, or the amount of serpentine rock may be too small to be mapped (E. Russell, NRCS, pers. comm., 2002). Available geologic maps fail to show any serpentine rock in the vicinity of the type locality White River population (CDMG 1992; Jennings 1977; CDC 2000), but instead show that the area contains Cibo clays. However, Cibo soils have an intrinsic tendency to dry out, harden, and form deep cracks during the summer which can discourage the growth of some plants (E. Russell, pers. comm., 2002). Hence, these soils would limit vegetation competition in favor of *S. keckii*.

Based on available soils and geologic maps, the Coarsegold soils of the Mine Hill population do not overlie serpentine rock, nor are they intrinsically restrictive to plant growth (CDMG 1991; Jennings 1977; SCS 1982; CDC 2000; E. Russell, pers. comm., 2002). The botanists who discovered the population, however, characterized the site as a “serpentine rock outcrop” (Kirkpatrick 1992). Although geologic maps do not list serpentine rock at the site itself, they do show it within a mile to the northeast and southwest (CDMG 1991; Jennings 1977; CDC 2000). The site itself sits over “precenozoic metasedimentary and metavolcanic rocks of great variety” (Jennings 1977). Hence, it appears likely that the site consists of a pocket habitat of serpentine soil which was too small to be mapped (E. Russell, pers. comm., 2002). SCS soil maps tend to list only the dominant soil type in an area. Other such pocket

habitats may exist within the same combination of soil and underlying rock.

*Mapping*

We delineated the critical habitat units by creating data layers in a GIS format. First, we identified the locations of the *Sidalcea keckii* populations using information from the CNDDDB (2001) and published and unpublished documents from those who located the known populations (Kirkpatrick 1992; Stebbins 1992). In the case of the Piedra population, where *S. keckii* grew in more than one patch, we identified the locations and approximate dimensions of the various patches as well, based on information provided by SFC (C. Peck, *in litt.*, 2002). We mapped populations or patch locations from all sites on USGS 7.5<sup>1</sup> quadrangle topological maps (USGS 1990) to obtain information on elevation, slope, and recognizable surface features. We then used soil survey maps (NRCS 2001) to restrict potential critical habitat to the boundaries of the basic soil types on which the populations grow. In areas where the presence of *S. keckii* could not be explained by the properties of the mapped soil type alone (such as the Coarsegold soils at the Mine Hill location), we mapped critical habitat boundaries to the same underlying rock type as at the population site (CDC 2000). We then used recent aerial photos (SPOT 2001), topological maps (USGS 1990), and discussions with experts familiar with the areas (R. Faubion, U.S. Bureau of Reclamation (BOR), pers. comm., 2002; C. Peck, pers. comm., 2002) to eliminate large contiguous areas which were noticeably

more overgrown or which were not grassland and, therefore, not suitable habitat for the species.

In order to provide determinable legal descriptions of the critical habitat boundaries, we then used an overlaid 100-meter grid to establish UTM North American Datum of 1983 (NAD 83) coordinates which, when connected, provided the critical habitat unit boundaries. We include the legal description derived from the UTM coordinates for each unit in the Regulation Promulgation section, below.

In designating critical habitat, we made an effort to avoid developed areas, such as housing developments and agricultural fields, that are unlikely to contribute to the conservation of *Sidalcea keckii*. However, we did not map critical habitat in sufficient detail to exclude all developed areas, or other lands unlikely to contain the primary constituent elements essential for the conservation of *S. keckii*. Areas within the boundaries of the mapped units, such as buildings, roads, and paved areas will not contain one or more of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger a section 7 of the Act consultation, unless they affect the species or primary constituent elements in adjacent critical habitat.

**Critical Habitat Designation**

Lands designated as critical habitat are under private and Federal jurisdiction and include one or more of the primary constituent elements described above. The approximate areas of critical habitat by land ownership are shown in Table 1.

TABLE 1.—APPROXIMATE AREAS IN HECTARES (HA) AND ACRES (AC) OF CRITICAL HABITAT FOR *Sidalcea keckii* BY LAND OWNERSHIP

Unit	Federal	Private	Total
1. Piedra .....	3 ha (7 ac) .....	203 ha (503 ac) .....	206 ha (510 ac)
2. Mine Hill .....	0 .....	86 ha (213 ac) .....	86 ha (213 ac)
3. White River .....	0 .....	146 ha (362 ac) .....	146 ha (362 ac)
Totals .....	3 ha (7 ac) .....	435 ha (1,078 ac) .....	438 ha (1,085 ac)

The three critical habitat units include the only two locations where *Sidalcea keckii* has been observed since the 1930s and the type locality. This later site may still be occupied by a seed bank, and is the most appropriate location to consider for reestablishment efforts. A brief description of each critical habitat unit is given below:

**Unit 1: Piedra**

Unit 1 is on the western slopes of Tivy Mountain in the Piedra area of southern Fresno County. It contains 206 ha (510 ac), of which 203 ha (503 ac) are privately owned and 3 ha (7 ac) are managed by the BOR (R. Faubion, pers. comm., 2002). Of the privately owned land, 77 ha (189 ac) of proposed critical habitat is on the Tivy Mountain Reserve which is owned by SFC and established

for the conservation of *Sidalcea keckii* and other rare plants. SFC uses managed grazing as a tool to reduce competing non-native grasses from *S. keckii* sites, and monitors the plant as well (SFC 2001). Another 6.5 ha (16 ac) of this unit occurs on a conservation easement held by SFC on privately owned land adjacent to the reserve.

Recent surveys of the areas containing documented populations of *Sidalcea keckii* were conducted in 1998, 2000,

and 2001. In 1998, surveys coordinated by the BOR found 500 to 1,000 plants in the area (Cypher 1998). Surveys conducted in 2000 and 2001 by the SFC found eight separate patches of *S. keckii* growing on both Fancher and Cibo soils (C. Peck, *in litt.*, 2002).

This unit is essential to the conservation of the species because it is one of the two sites at which the species has been observed since the 1930s. When the number of populations or geographic distribution of a species are severely limited, as is the case when plants have only been observed recently at two locations, possible extinction or extirpation due to random events become a concern. Examples of random events that are a concern include fire and disease (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). This unit is also essential because it includes the most northerly location known for *S. keckii*, and is the only location where above-ground plants with maroon-centered flowers have been documented (Cypher 1998).

#### Unit 2: Mine Hill

Unit 2 is about 3 km (2 mi) south of Success Dam and 5 km (3 mi) east of Porterville in Tulare County and contains 86 ha (213 ac), all of which are on privately owned land. Unit 2 encompasses a single known patch of *Sidalcea keckii*, which contained approximately 60 plants when last surveyed in 1992. At the request of the landowner, it has not been surveyed since that time. However, based on information from public comment, the standing population at Mine Hill may have been extirpated by conversion of the habitat to an orange grove. We currently do not know how much habitat may have been converted, although we believe that much of the habitat around the original population remains potentially viable and may contain a seed bank or standing plants. The Coarsegold rock outcrop soils of the area are best suited to rangeland (SCS 1982), which is the current use of the area where not converted to orchard. However the site is also zoned for mobile home development (R. Brady, Tulare County Planning Department, pers. comm., 1997).

This unit is essential to the conservation of the species because it is presumably one of the two known locations where *Sidalcea keckii* plants have been observed since the 1930s. As is the case with Unit 1, when the number of populations or geographic distribution of a species are severely limited, possible extinction or extirpation due to random events become a concern. Examples of random

events that are a concern include fire and disease (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994).

#### Unit 3: White River

Unit 3 is located near the town of White River in southern Tulare County. It contains 146 ha (362 ac), all of which is private land. Unit 3 contains the "type" location, specimens from which were used to first describe the species in 1940 (Wiggins 1940). This site is the only one not closely associated with serpentine rock, but contains the primary constituent elements that would support the species. This may be due to the presence of currently unknown and unmapped serpentine areas, or it may be due to an increased ability to compete on non-serpentine Cibo soils.

As noted above, the White River site is one of the extremely few locations where *Sidalcea keckii* has ever been observed and may be occupied by a seed bank. *Sidalcea keckii* plants may still occur here, but none have been documented recently. Even if the species is not rediscovered at the White River site, we believe the site is essential to the conservation of the species. Because *S. keckii* has been observed at the site, it is the most appropriate site at which a reestablishment effort might be attempted. The combination of small range, few populations, and restricted habitat makes *S. keckii* susceptible to extinction or extirpation from a significant portion of its range due to random events, such as fire, disease, or other occurrences (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). Such events are a concern when the number of populations or geographic distribution of a species are severely limited, as is the case with *S. keckii*. Establishment of a third location for *S. keckii* is likely to be an important component in reducing the risk of extinction due to such catastrophic events. This location also represents the southernmost extent of the known historical range of the species.

#### Effects of Critical Habitat Designation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, permit, or carry out do not destroy or adversely modify critical habitat. Destruction or adverse modification of critical habitat occurs when a Federal action directly or indirectly alters critical habitat to the extent it appreciably diminishes the value of critical habitat for the conservation of the species. Individuals, organizations, States, local governments,

and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing, or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the action agency in eliminating conflicts that may be caused by the proposed action. The conservation measures in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content and conclusion(s) of the opinion (50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide "reasonable and prudent alternatives" to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be

implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species, or resulting in the destruction or adverse modification of critical habitat.

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

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement, or control has been retained, or is authorized by law. Consequently, some Federal agencies may request reinstitution of consultation or conference with us on actions for which formal consultations has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect *Sidalcea keckii* or its critical habitat will require consultation under section 7 of the Act. Activities on private lands that require a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*), a section 10(a)(1)(B) of the Act permit from the Service, or any other activity requiring Federal action (*e.g.*, funding or authorization from the Federal Highways Administration or Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation. Not all of the areas within these units are capable of supporting *S. keckii* or its primary constituent elements, and such areas would not be subject to section 7 consultation unless the action would affect the species or primary constituent elements in adjacent designated critical habitat.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for

actions that may affect a listed species. Section 7 of the Act ensures that actions funded, authorized, or carried out by Federal agencies are not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat for the recovery of the listed species.

Section 4(b)(8) of the Act requires us to evaluate briefly and describe, in any proposed or final regulation that designates critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat would be those that alter the primary constituent elements to the extent that the value of critical habitat for the conservation of *Sidalcea keckii* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency may directly or indirectly destroy or adversely modify critical habitat for *Sidalcea keckii* include, but are not limited to:

(1) Ground disturbances which destroy or degrade primary constituent elements of the plant (*e.g.*, clearing, tilling, grading, construction, road building, mining, etc.);

(2) Activities that directly or indirectly affect *Sidalcea keckii* plants or underlying seed bank (*e.g.*, herbicide application and off-road vehicle use that could degrade the habitat on which the species depends, incompatible introductions of non-native herbivores, incompatible grazing management during times when *S. keckii* is producing flowers or seeds, clearing, tilling, grading, construction, road building, mining, etc.);

(3) Encouraging the growth of *Sidalcea keckii* competitors (*e.g.*, widespread fertilizer application); and

(4) Activities which significantly degrade or destroy *Sidalcea keckii* pollinator populations (*e.g.* pesticide applications).

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Sacramento Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT** section). Requests

for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE. 11th Ave., Portland, OR 97232 (telephone 503/231-2063; facsimile 503/231-6243).

#### Exclusions Under Section 4(b)(2)

Subsection 4(b)(2) of the Act allows us to exclude areas from the critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in extinction of the species. Following a review of available information from our files, public comments on the proposal, and the economic analysis of the proposed designation, we have determined that none of the lands proposed as critical habitat warranted exclusion from the final designation based on economic impacts or other relevant impacts pursuant to section 4(b)(2).

#### Relationship to Habitat Conservation Plans and Other Planning Efforts

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. Although take of listed plants is not generally prohibited by the Act on private land, listed plant species may also be covered in an HCP for wildlife species. Currently, no HCPs exist that include *Sidalcea keckii* as a covered species. However, we are currently working with PG&E on the development of an HCP on operations and maintenance activities. This HCP is intending to treat *S. keckii* as a covered species, and the area designated as critical habitat for *S. keckii* may overlap with the planning area for this HCP.

In the event that future HCPs covering *S. keckii* are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of this species. This will be accomplished by either directing development and habitat modification to nonessential areas, or appropriately modifying activities within essential habitat areas so that such activities will not adversely modify the primary constituent elements. The HCP development

process would provide an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by *S. keckii*. The process would also enable us to conduct detailed evaluations of the importance of such lands to the long-term survival and conservation of the species in the context of constructing a system of interlinked habitat blocks configured to promote the conservation of the species through application of the principles of conservation biology.

We will provide technical assistance and work closely with applicants throughout the development of any future HCPs to identify lands essential for the long-term conservation of *S. keckii*, and appropriate management for those lands. Furthermore, we will complete intra-Service consultation on our issuance of section 10(a)(1)(B) permits for these HCPs to ensure permit issuance will not destroy or adversely modify critical habitat.

#### Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned. Following the publication of the proposed critical habitat designation, we conducted a draft economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for review on October 31, 2002 (67 FR 66378). We accepted public comment on the draft analysis until December 2, 2002.

Our economic analysis evaluated the potential future effects associated with the listing of *Sidalcea keckii* as an endangered species under the Act, as well as any potential effect of the critical habitat designation above and beyond those regulatory and economic impacts associated with listing. To quantify the proportion of total potential economic impacts attributable to the critical habitat designation, the analysis evaluated a "without section 7" scenario and compared it to a "with section 7" scenario. The "without section 7" baseline represented the level of protection currently afforded to the species under the Act if section 7 protective measures were absent, and includes protections afforded by other

Federal, State, and local laws such as the California Environmental Quality Act. The "with section 7" scenario identifies land-use activities likely to involve a Federal nexus that may affect the species or its designated critical habitat and which have the potential to be subject to future consultations under section 7 of the Act.

Upon identifying section 7 impacts, the analysis proceeds to consider the subset of impacts that can be attributed exclusively to the critical habitat designation. The upper-bound estimate includes both jeopardy and critical habitat impacts (e.g., total section 7 impacts). The subset of section 7 impacts likely to be affected solely by the designation of critical habitat represents the lower-bound estimate of the analysis. The categories of potential costs considered in the analysis included costs associated with: (1) Conducting section 7 consultations associated with the listing or with the critical habitat, including reinitiated consultations and technical assistance; (2) modifications to projects, activities, or land uses resulting from the section 7 consultations; (3) uncertainty and public perceptions resulting from the designation of critical habitat; (4) potential indirect effects associated with the designation; and (5) potential offsetting beneficial costs associated with critical habitat including educational benefits. There may also be economic effects due to the reaction of the real estate market to critical habitat designation, as real estate values may be lowered due to a perceived increase in the regulatory burden.

The analysis estimated that there will be seven future section 7 consultations related to the proposed critical habitat designation for *Sidalcea keckii*. The seven consultations included a reinitiated programmatic consultation for oil pipeline maintenance, five informal consultations for private land acquisition using BOR funds, and one internal consultation by the Service to insure compliance with an HCP that is currently under development. The administrative cost of these consultations is estimated to range from \$19,500 to \$50,700 over a 10-year period. No project modifications are expected to occur as a result of these consultations. The total consultation cost attributable solely to the critical habitat designation is estimated between \$7,000 and \$12,600 over a 10-year period, with the remainder attributable co-extensively to the listing.

Total costs resulting from technical assistance, formal and informal consultations, development of biological assessments, and project modifications

due to listing and critical habitat designation are presented in the economic analysis, according to land use activities and individual critical habitat units. Costs incurred by third parties result from technical assistance, consultations, and development of a biological assessment. Costs to Federal action agencies include those incurred from consultations. Costs to the Service result from technical assistance and consultations.

We did not receive any comments on the draft economic analysis of the proposed determination. Following the close of the comment period, the economic analysis was finalized. There were no revisions or additions to the draft economic analysis.

A copy of the final economic analysis and supporting documents are included in our supporting record for this rulemaking and may be obtained by contacting the Sacramento Fish and Wildlife Office (see ADDRESSES section). Copies of the final economic analysis also are available on the Internet at <http://pacific.fws.gov/news/>.

#### Required Determinations

##### Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this critical habitat designation is not a significant regulatory action. This rule will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. This designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this final critical habitat designation.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic effect on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. In this final rule, we are certifying that the critical habitat designation for *Sidalcea keckii* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

Small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as 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 consider the types of activities that might trigger regulatory impacts under this rule as well as the 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.

To determine if this rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting, etc.). We apply the "substantial number" test individually to determine if certification is appropriate. In some circumstances, especially with proposed critical habitat designations of very limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial.

In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement. Designation of

critical habitat only has the potential to affect activities conducted, funded, or permitted by Federal agencies. In areas where the species is present, Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect *Sidalcea keckii*. Federal agencies must also consult with us if their activities may affect designated critical habitat. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

As required under section 4(b)(2) of the Act, we conducted an analysis of the potential economic impacts of this critical habitat designation. In the analysis, we found that the future section 7 consultations resulting from the listing of *Sidalcea keckii* and the proposed designation of critical habitat could potentially impose total economic costs for consultation and modifications to projects to range between approximately \$19,500 to \$50,700 over the next 10-year period.

The primary land use activity within the three units is grazing. Additionally, Pacific Gas & Electricity also maintains two powerlines in Unit 1, and Southern California Gas operates and maintains oil pipelines within the boundaries of its Northern Service Territory, which include Unit 3. The analysis identified three categories of activities that will potentially require section 7 consultation with the Service in the next 10 years. These included informal consultations with the BOR on habitat acquisition; a reinitiation of a programmatic consultation with the Bureau of Land Management on oil pipeline operations and maintenance; and an internal section 7 consultation on an HCP currently under development. None of the remaining activities are foreseeable, have a Federal nexus, and are harmful to the plant or its habitat.

In summary, we have considered whether this rule could result in significant economic effects on a substantial number of small entities. Our analysis concluded that the only economic costs likely to occur as a result of the critical habitat designation will be borne solely by Federal agencies, which do not qualify as small business entities. Therefore, we are certifying that the designation of critical habitat for *Sidalcea keckii* will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

#### *Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))*

OMB's Office of Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. In the economic analysis, we determined whether designation of critical habitat would cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination. We anticipate that this final rule will not place significant additional burdens on any entity.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under Executive Order 12866. It is not expected to significantly affect energy supplies, distribution, or use. In our Economic Analysis, we did not identify energy production or distribution as being significantly affected by this designation, and we received no comments indicating that the proposed designation could significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effect is required.

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

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

(a) This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that they must ensure that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely modify or destroy designated critical habitat.

(b) This rule will not produce a Federal mandate on State, local, or Tribal governments of \$100 million or greater in any year. The designation of



3. In § 17.96, amend paragraph (a) by adding an entry for "Family Malvaceae" *Sidalcea keckii* in alphabetical order to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) \* \* \*

Family Malvaceae: *Sidalcea keckii* (Keck's checkermallow).

(1) Critical habitat units are depicted for Fresno and Tulare Counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Sidalcea keckii* are the habitat components that provide:

(i) Minimally shaded annual grasslands in the foothills of the Sierra Nevada Mountains containing open patches in which competing vegetation is relatively sparse; and

(ii) Serpentine soils or other soils that tend to restrict competing vegetation.

(3) Existing features and structures made by people, such as buildings, roads, railroads, airports, other paved areas, lawns, and other urban landscaped areas, do not contain one or more of the primary constituent elements. Federal actions limited to

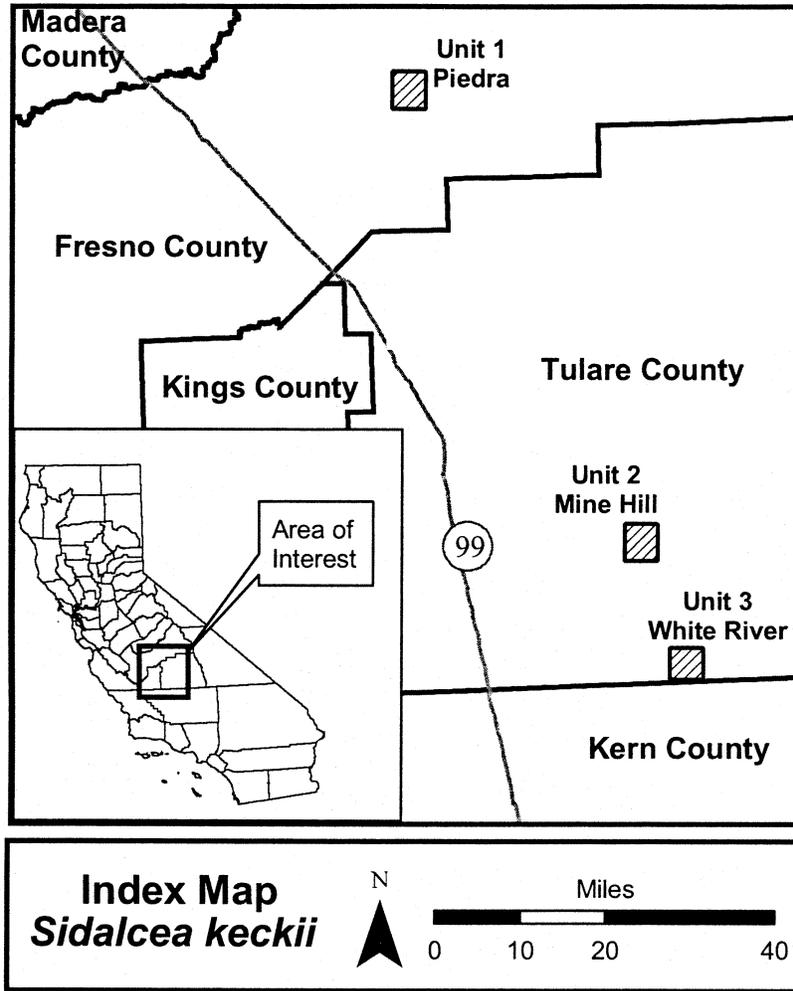
those areas, therefore, would not trigger a consultation under section 7 of the Act unless they may affect the species and/or primary constituent elements in adjacent critical habitat.

(4) *Critical Habitat Map Units*

(i) Data layers defining map units were created on a base of USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(ii) **Note:** Index map follows:

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(5) Unit 1: Piedra Unit, Fresno County, California.

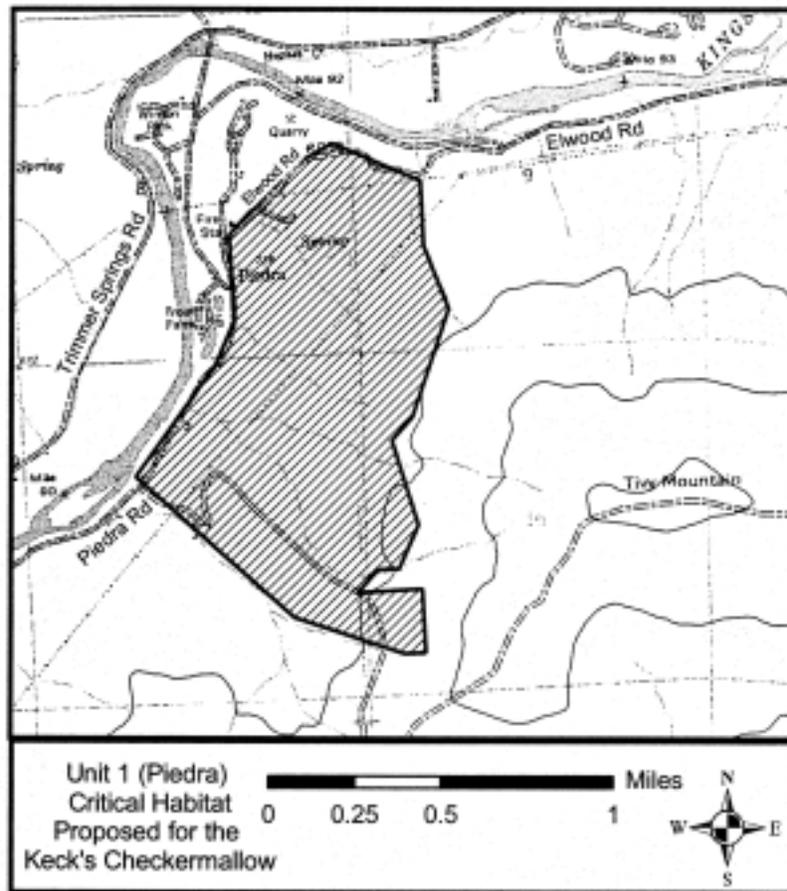
(i) From USGS 1:24,000 quadrangle maps Piedra, and Pine Flat Dam, California; land bounded by the following UTM11 NAD83 coordinates (E,N): 288300, 4074700; 288200,

4074700; 287700, 4074900; 287000, 4075600; 287400, 4076100; 287500, 4076300; 287500, 4076700; 287800, 4077000; 288000, 4077100; 288400, 4076900; 288400, 4076600; 288500, 4076300; 288300, 4075800; 288200, 4075700; 288300, 4075300; 288200,

4075100; 288100, 4075100; 288000, 4075000; 288300, 4075000; 288300, 4074700.

(ii) **Note:** Unit 1 map follows:

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(6) Unit 2: Mine Hill Unit, Tulare County, California.

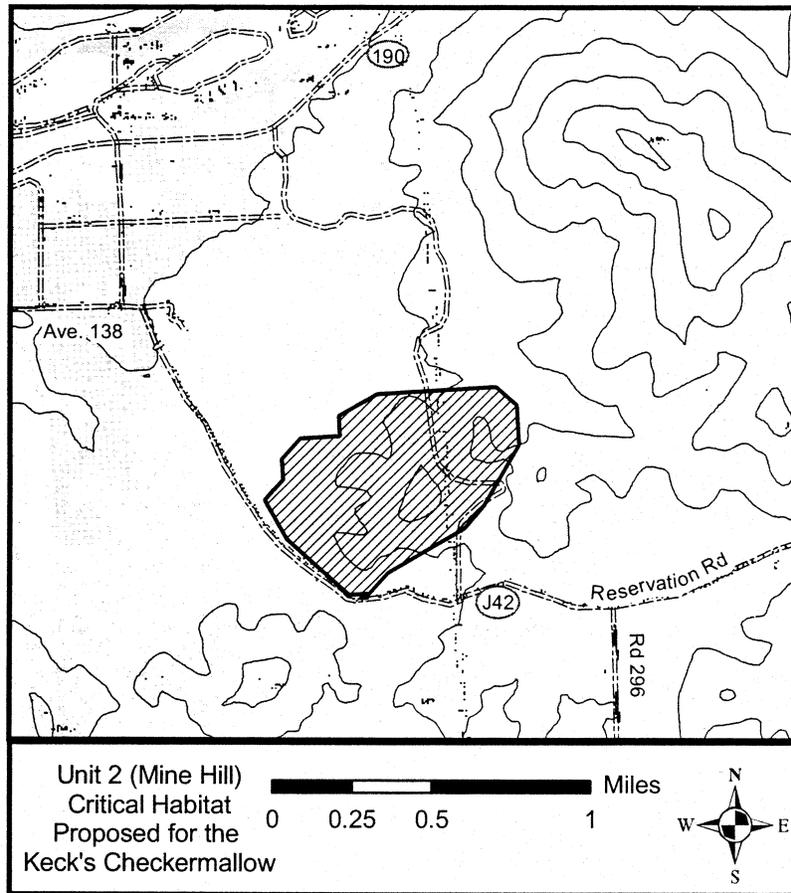
(i) From USGS 1:24,000 quadrangle maps Success Dam, California; land bounded by the following UTM11 NAD83 coordinates (E,N): 326600,

3988600; 326500, 3988600; 326200, 3988900; 326100, 3989100; 326200, 3989200; 326200, 3989300; 326300, 3989400; 326500, 3989400; 326500, 3989500; 326700, 3989600; 327300, 3989600; 327400, 3989500; 327400,

3989300; 327200, 3989000; 327100, 3988900; 326700, 3988700; 326600, 3988600.

(ii) **Note:** Unit 2 map follows:

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BILLING CODE 4310-55-C

(7) Unit 3: White River Unit, Tulare County, California.

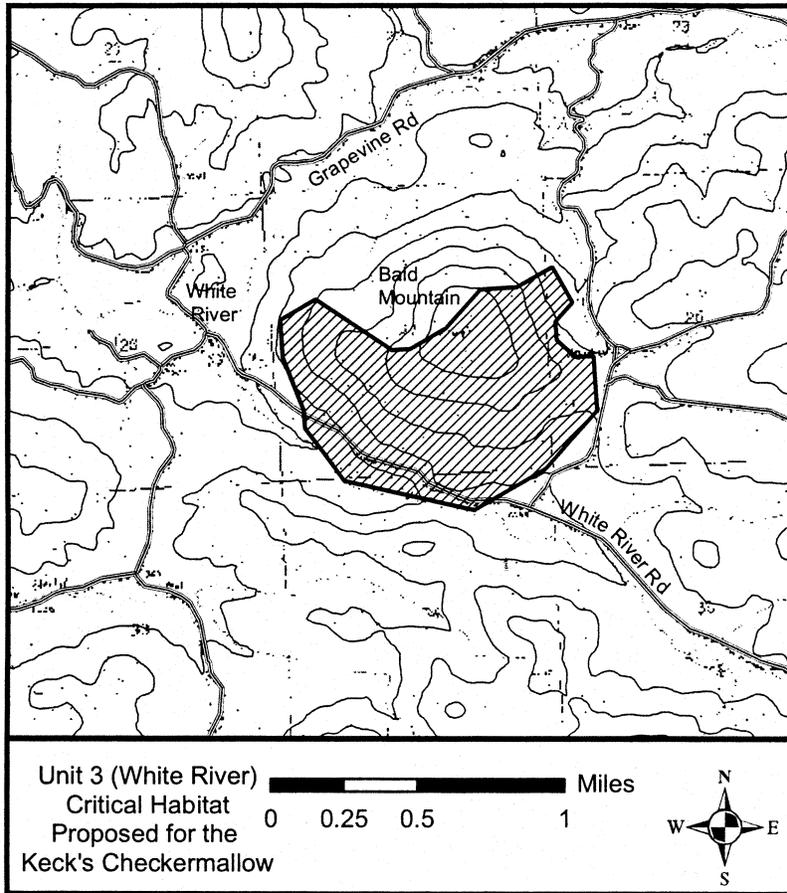
(i) From USGS 1:24,000 quadrangle maps White River, California; land bounded by the following UTM11 NAD83 coordinates (E,N): 334800, 3963600; 334100, 3963800; 333900,

3964100; 333900, 3964200; 333800, 3964500; 333800, 3964700; 334000, 3964800; 334400, 3964500; 334500, 3964500; 334700, 3964600; 334900, 3964800; 335100, 3964800; 335300, 3964900; 335400, 3964700; 335300, 3964600; 335300, 3964500; 335400,

3964400; 335500, 3964400; 335500, 3964100; 335200, 3963800; 334800, 3963600.

(ii) **Note:** Unit 3 map follows:

**BILLING CODE 4310-55-P**



Dated: March 7, 2003.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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