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Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Oregon Spotted Frog; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2013–0088; 4500030114]

RIN 1018–AZ56

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Oregon Spotted Frog

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for the Oregon spotted frog under the Endangered Species Act. We are proposing critical habitat for this species in Washington and Oregon, and this action fulfills our obligations under the Endangered Species Act and a court-approved settlement agreement. The effect of this regulation will be to designate critical habitat for the Oregon spotted frogs' habitat under the Endangered Species Act.

DATES: We will accept comments received or postmarked on or before October 28, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by October 15, 2013.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. In the Search box, enter FWS–R1–ES–2013–0088, which is the docket number for this rulemaking. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2013–0088; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

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

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at *http://www.fws.gov/wafwo* and *http://www.regulations.gov* at Docket No. FWS–R1–ES–2013–0088, and at the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking will also be available at the U.S. Fish and Wildlife Service Web site and Field Office set out above, and may also be included at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ken Berg, Manager, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive SE., Suite 102, Lacey, WA 98503, by telephone 360–753–9440 or by facsimile 360–753–9445. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act), any species that is determined to be an endangered or threatened species requires that critical habitat be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can be completed only by issuing a rule. Elsewhere in today's **Federal Register**, we have proposed to list the Oregon spotted frog (*Rana pretiosa*) as a threatened species under the Act.

The basis for our action. Under the Endangered Species Act, any species that is determined to be a threatened or endangered species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Endangered Species 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 if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

We are preparing an economic analysis of the proposed designation of critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek additional public review and comment.

In this rule we propose to designate critical habitat for this species. We are proposing to designate 68,192 acres (27,597 hectares), and approximately 24 stream miles (38 km) as critical habitat in Washington and Oregon. The proposed critical habitat areas are under ownership or management by Federal and State agencies, Counties, local municipalities, and private individuals. We are considering excluding one area in Washington and three areas in Oregon from critical habitat designation under section 4(b)(2) of the Act, based on the existence of partnerships as evidenced by conservation plans. These areas encompass 10,277 acres (4,158 hectares). All comments received will be fully considered in the Secretary's final determination regarding the potential exclusion of these areas and any other areas for which exclusion may be appropriate.

We will seek peer review. We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

Information Requested

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

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase

in threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of Oregon spotted frog habitat;

(b) What may constitute ''physical or biological features essential to the conservation of the species,'' within the geographical range currently occupied by the Oregon spotted frog;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why;

(g) Whether there are any specific areas where the proposed critical habitat boundaries should be expanded to include adjacent riparian areas, what factors or features should be considered in determining an appropriate boundary revision, and why this would be biologically necessary or unnecessary; and

(h) Additional research studies or information regarding the movement distances or patterns of Oregon spotted frogs.

(3) Land use designations and current or planned activities in the areas proposed to be designated as critical habitat, and possible impacts of these activities on the proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the Oregon spotted frog within the proposed critical habitat areas.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular; any impacts on small entities or families, and the benefits of including or excluding areas from the proposed designation that exhibit these impacts.

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(7) The likelihood of adverse social reactions to the designation of critical habitat and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(8) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(9) Whether the areas being considered for exclusion under section 4(b)(2) of the Act in this proposed rule should be excluded, and whether the benefits of excluding these areas would outweigh the benefits of including them in the designation.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made ''solely on the basis of the best scientific and commercial data available.''

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

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

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

Previous Federal Actions

Please see the proposed listing rule published in today's **Federal Register** for a complete history of previous Federal actions.

In a settlement agreement with plaintiff WildEarth Guardians on May 10, 2011, the Service submitted a workplan to the U.S. District Court for the District of Columbia in *re Endangered Species Act Section 4 Deadline Litigation,* No. 10–377 (EGS), MDL Docket No. 2165 (D. DC May 10, 2011), and obtained the court's approval to systematically, over a period of 6 years, review and address the needs of more than 250 candidate species to determine if they should be added to the Federal Lists of Endangered and Threatened Wildlife and Plants. The Oregon spotted frog is 1 of 251 candidate species identified in the May 2011 workplan. Accordingly, a proposed rule to list the Oregon spotted frog as a threatened species under the Act is published in today's **Federal Register**.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Oregon spotted frog in this section of the proposed rule. For more information on Oregon spotted frog species description, taxonomy, life history, habitat and distribution descriptions, refer to the proposed rule to list the Oregon spotted frog as a threatened species under the Act published in today's **Federal Register**.

Critical Habitat

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

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

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

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

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

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided

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

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

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species, and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

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. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure 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 developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, 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) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. 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 available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

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

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

(2) such designation of critical habitat would not be beneficial to the species.

Currently no imminent threat of take is attributed to collection or vandalism to the Oregon spotted frog, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if critical habitat designation would result in any benefits, then a prudent finding is warranted. Here, the potential

benefits of designation include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Oregon spotted frog.

Critical Habitat Determinability

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

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

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

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

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

Physical or Biological Features

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

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

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

(3) Cover or shelter;

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

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

We derive the specific physical or biological features required for the Oregon spotted frog from studies of this species' habitat, ecology, and life history as described below. We have determined that the following physical or biological features are essential for the Oregon spotted frog:

Space for Individual and Population Growth and for Normal Behavior

The Oregon spotted frog is the most aquatic native frog species in the Pacific Northwest. It is almost always found in or near a perennial body of water, such as a spring, pond, lake, sluggish stream, irrigation canal, or roadside ditch. For completion of their life cycle, Oregon spotted frogs require shallow, stable water areas for egg and tadpole survival and development; perennial, deep, moderately vegetated pools for adult and juvenile survival in the dry season; and perennial water overlying emergent vegetation for protecting all age classes during cold wet weather (Watson *et al.* 2003, p. 298; Pearl and Hayes 2004, p. 18). This scenario essentially equates to ''an expansive meadow/wetland with a continuum of vegetation densities along edges and in pools and an absence of introduced predators'' (Watson *et al.* 2003, p. 298).

Oregon spotted frogs exhibit fidelity to seasonal pools throughout all seasons (breeding, dry, and wet) (Watson *et al.* 2003, p. 295), and these seasonal pools need to be connected by water, at least through the spring and again in the fall, for frogs to access them. Subadult and adult frogs may be able to make short terrestrial movements, but wetted movement corridors are preferred. A wetted movement corridor with a gradual topographic gradient (less than or equal to three percent) is necessary to enable tadpole movement out of shallow egg-laying sites into deeper, more permanent water, as water levels recede during the dry season (Watson *et al.* 2003, p. 298; Pearl and Hayes 2004, p. 20). Impediments to movement may include, but are not limited to, hard barriers such as dams and inhospitable habitat, such as lakes or rivers/creeks without refugia from predators.

Therefore, based on the information above, we identify the following physical or biological features needed by Oregon spotted frogs to provide space for their individual and population growth and for normal behavior: (1) Perennial bodies of water (such as, but not limited to springs, ponds, lakes, and sluggish streams) or other water bodies that retain water year round (such as irrigation canals or roadside ditches) with a continuum of vegetation densities along edges; (2) a gradual topographic gradient that enables movement out of shallow oviposition (egg-laying) sites into deeper, more permanent water; and, (3) barrier-free movement corridors.

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

The ecosystems utilized by Oregon spotted frogs have inherent community dynamics that sustain the food web. Habitats, therefore, must maintain sufficient water quality to sustain all life stages, as well as acceptable ranges for maintaining the underlying ecological community. These key physical parameters include pH, temperature, nutrients, and uncontaminated water.

For tadpoles and frogs living in productive wetland habitats, food is not usually a limiting factor. Post-metamorphic Oregon spotted frogs are opportunistic predators feeding on live animals found in or near water (important prey species information is provided in the life history section of the listing document). Tadpoles are grazers, having rough tooth rows for scraping plant surfaces and ingesting plant tissue and bacteria, algae, detritus, and probably carrion (Licht 1974, p. 624; McAllister and Leonard 1997, p. 13). Competitors for food resources include nonnative fish species, bullfrogs, and green frogs.

Pearl and Hayes (2004, pp. 8–9) posit that Oregon spotted frogs are limited by both latitude and elevation to areas that provide warm-water marsh conditions (summer shallow water exceeding 20 degrees Celsius (C) (68 degrees Fahrenheit (F)) based on the observed temperatures and slow developmental rates in egg stages (compared to other pond-breeding ranid frogs) and increased surface activity in adult frogs as water temperatures exceed 20 degrees C (68 degrees F) and when the differentiation between surface and subsurface is greater than 3 degrees C (37 degrees F) (Watson *et al.* 2003, p. 299). Warmer water is important for embryonic development and plant food

production for larval rearing (Watson *et al.* 2003, p. 299) and to allow subadults and adults to bask.

Therefore, based on the information above, we identify the following physical or biological features needed by Oregon spotted frogs to provide for their nutritional and physiological requirements: (1) Sufficient quality of water to support habitat used by Oregon spotted frogs (including providing for a sufficient prey base); (2) absence of competition from introduced fish and bullfrogs; and (3) shallow (warmer) water.

Cover or Shelter

During the dry season, Oregon spotted frogs move to deeper, permanent pools or creeks and show a preference for areas with greater than 50 percent surface water and/or less than 50 percent vegetation closure (Watson *et al.* 2003, pp. 295, 297), avoiding dense stands of grasses with greater than 75 percent closure. They are often observed near the water surface basking and feeding in beds of floating and shallow subsurface vegetation (Watson *et al.* 2003, pp. 291–298; Pearl *et al.* 2005a, pp. 36–37) that appears to allow them to effectively use ambush behaviors in habitats with high prey availability, and the off-shore vegetation mats offer basking habitat that is less accessible to some terrestrial predators (Pearl et al 2005a, p. 37). Proximity to escape cover such as aggregated organic substrates also may be particularly important for Oregon spotted frogs to successfully evade avian, terrestrial, and amphibian predators (Licht 1986b, p. 241; Hallock and Pearson 2001, pp. 14–15; Pearl & Hayes 2004, p. 26).

Oregon spotted frogs, which are palatable to fish and bullfrogs, did not evolve with introduced species and, in some areas, such as high-elevation lakes, did not evolve with native fish. Therefore, Oregon spotted frogs may not have the mechanisms to avoid the predatory fish that prey on the tadpoles. The warm-water microhabitat requirement of the Oregon spotted frog, unique among native ranids of the Pacific Northwest, exposes it to a number of introduced fish species (Hayes 1994, p. 25), the most common being brook trout (*Salvelinus fontinalis*). During drought years, as dropping water levels reduce wetland refuges, Oregon spotted frog larvae become concentrated and are exposed to brook trout predation (Hayes *et al.* 1997, p. 5; Hayes 1998a, p. 15), resulting in lower Oregon spotted frog recruitment (Pearl 1999, p. 18). Demographic data suggest introduced fish have a negative effect on Oregon spotted frogs because sites with significant numbers of brook trout and/or fathead minnow have a disproportionate ratio of older spotted frogs to juvenile frogs (i.e., poor recruitment) (Hayes 1997, pp. 42–43). Overwintering locations of Oregon spotted frogs, where nonnative fish have limited or no access, improve the winter survival rates of males and females (Chelgren *et al.* 2008, p. 749), and the associated breeding areas have a significantly higher (0.89 times) number of egg masses (Pearl *et al.* 2009a, p. 142). In addition, nonnative fish (in particular wide-gape fish like bluegill sunfish) may be facilitating the distribution and abundance of bullfrogs by preying upon macroinvertebrates that would otherwise consume bullfrog tadpoles (Adams *et al.* 2003, p. 349).

Bullfrogs share similar habitat and temperature requirements with the Oregon spotted frog, but adult bullfrogs achieve larger body size than native western ranids and even juvenile bullfrogs can consume post-metamorphic native frogs (Hayes and Jennings 1986, p. 492; Pearl *et al.* 2004, p. 16). In addition, bullfrog larvae can outcompete or displace native larvae from their habitat or optimal conditions by harassing native larvae at feeding stations or inhibiting native larvae feeding patterns (Kupferberg 1997, pp. 1741–1746, Kiesecker and Blaustein 1998, pp. 783–784, Kiesecker *et al.* 2001b, pp. 1966–1967). Therefore, Oregon spotted frogs require areas that are sheltered from competition with, or predation by, bullfrogs.

Within the current range of the Oregon spotted frog are two different winter regimes. In British Columbia and Washington, the Puget Trough climate is maritime with mild summer and winter temperatures. Subfreezing conditions occur only for short periods in November through March, but ice rarely persists for more than a week. The Cascades winter conditions are cold enough to produce ice-capped water bodies from December to February, and temperatures regularly extend below freezing between mid-October and early April. Known overwintering sites are associated with flowing systems, such as springs and creeks, that provide well-oxygenated water (Hallock and Pearson 2001, p. 15; Hayes *et al.* 2001, pp. 20–23; Tattersall and Ultsch 2008, pp. 123, 129, 136) and sheltering locations protected from predators and freezing (Risenhoover *et al.* 2001b, pp. 13–26; Watson *et al.* 2003, p. 295; Pearl and Hayes 2004, pp. 32–33). Oregon spotted frogs may burrow in mud, silty substrate, or clumps of emergent vegetation during periods of prolonged or severe cold (Watson *et al.* 2003, p. 295; McAllister and Leonard 1997, p. 17) but may remain active throughout most of the winter (Hallock and Pearson 2001, p. 17). Therefore, overwintering habitat needs to retain water during the winter (October through March or early April), and, to facilitate movement, these areas need to be hydrologically connected via surface water to breeding and rearing habitat.

In the areas of the range where water bodies become capped by ice and snow for several weeks during the winter, hypoxic water conditions can occur due to cessation of photosynthesis combined with oxygen consumption by decomposers (Wetzel 1983, pp. 162–170). While lethal oxygen levels for Oregon spotted frogs have not been evaluated, other ranid species have been found to use overwintering microhabitat with well-oxygenated waters (Ultsch *et al.* 2000, p. 315; Lamoureux and Madison 1999, p. 434), and most fish cannot tolerate levels below 2.0 mg/L (Wetzel 1983, p. 170). However, some evidence indicates that Oregon spotted frogs can tolerate levels at or somewhat below 2.0 mg/L and do not purposefully avoid areas with low oxygen levels, at least for short periods (Hayes *et al.* 2001, pp. 20–22; Risenhoover *et al.* 2001b, pp. 17–18).

Therefore, based on the information above, we identify the following physical or biological features needed by Oregon spotted frogs to provide for their cover and shelter requirements: (1) Permanent fresh water bodies, including natural and manmade, that have greater than 50 percent surface water with floating and shallow subsurface vegetation during the summer and that are hydrologically connected via surface water to breeding and rearing habitat; (2) permanent fresh water bodies, including natural and manmade, that hold water from October to March and are hydrologically connected via surface water to breeding and rearing habitat; (3) physical cover from avian and terrestrial predators, and lack of predation by introduced fish and bullfrogs; and (4) refuge from lethal overwintering conditions (freezing and anoxia).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Oregon spotted frog breeding sites are generally temporarily inundated (flooded or underwater) shallows (2–12 in (5–30 cm) deep) that are hydrologically connected to permanent waters (Licht 1971, p. 120, Hayes *et al.* 2000 entire, Pearl and Bury 2000 entire, Risenhoover *et al.* 2001a, pp. 13–15, Watson *et al.* 2003, p. 295) and include pools, gradually receding shorelines,

benches of seasonal lakes and marshes, and wet meadows. Egg-laying microhabitats are gradually sloped and relatively close to shorelines (Hayes *et al.* 2000, p. 5; Pearl and Bury 2000, p. 6; Pearl and Hayes 2004, p. 20) and are usually associated with submergent or the previous year's emergent vegetation. Characteristic vegetation includes grasses, sedges, and rushes. Vegetation coverage beneath egg masses is generally high, and Oregon spotted frog egg masses are rarely found over open soil or rock substrates (Pearl and Bury 2000, p. 6; Lewis *et al.* 2001, pp. 9–10). Full solar exposure seems to be a significant factor in breeding habitat selection and eggs are laid where the vegetation is low or sparse, such that vegetation structure does not shade the eggs (McAllister and Leonard 1997, pp. 8, 17; McAllister and White 2001, pp. 10–11; Pearl and Bury 2000, p. 6; Pearl *et al.* 2009a, pp. 141–142).

To be considered essential breeding habitat, water must be permanent enough to support breeding, tadpole development to metamorphosis (approximately 4 months), and survival of frogs. Egg-laying can begin as early as February in British Columbia and Washington and as late as April/May in the higher elevations. In addition, breeding habitat must be hydrologically connected to permanent waters. The heaviest losses to predation are thought to occur shortly after tadpoles emerge from eggs, when they are relatively exposed and poor swimmers (Licht 1974, p. 624). Significant mortality can also result when tadpoles become isolated in breeding pools away from more permanent waters (Licht 1974, p. 619; Watson *et al.* 2003, p. 298). Watson *et al.* (2000, p. 28) reported nearly total reproductive failure in 1998 when the egg-laying pools dried due to dry weather following breeding. In addition to being vulnerable to desiccation, tadpoles may succumb to low dissolved oxygen levels in isolated pools and ponds during summer (Watson *et al.* 2000, p. 28).

Therefore, based on the information above, we identify the following physical or biological features needed by Oregon spotted frogs to provide for sites for breeding reproduction, or rearing (development) of offspring: (1) Standing bodies of fresh water, including natural and manmade ponds, slow-moving streams or pools within streams, and other ephemeral or permanent water bodies that typically become inundated during winter rains and hold water for a minimum of 4 months (from egg-laying through metamorphosis); (2) shallow (less than or equal to 12 inches (30cm)) water areas (shallow water may also occur over vegetation that is in deeper water); (3) a hydrological connection to a permanent water body; (4) gradual topographic gradient; (5) emergent wetland vegetation (or vegetation that can mimic emergent vegetation via manipulation, for example reed canarygrass that can be mowed); and (6) full solar exposure.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

Dispersal habitat may consist of ephemeral (water present for only a short time), intermittent, or perennial drainages that are generally not suitable for breeding but can provide corridors that afford movement. This habitat also offers areas for the establishment of home ranges by juvenile recruits, maintenance of gene flow through the movement of juveniles and adults between populations, and recruitment into new breeding habitat or recolonization of breeding habitat after local extirpations. Detailed studies of dispersal and population dynamics of Oregon spotted frogs are limited. However, home ranges in a Washington study averaged 5.4 ac (2.2 ha), and daily movement was 16–23 feet (ft) (5–7 meters (m)) throughout the year (Watson *et al.* 2003, p. 295). Oregon spotted frogs at the Sunriver site in Oregon routinely make annual migrations of 0.31–0.81 mi (0.5–1.3 km) between the major egg-laying complex and an overwintering site (Bowerman 2006, pers. comm.). Longer travel distances, while infrequent, have been observed between years and within a single year between seasons. The maximum observed movement distance in Washington was 1.5 mi (2.4 km) between seasons along lower Dempsey Creek to the creek's mouth from the point where the frogs were marked (McAllister and Walker 2003, p. 6). In Oregon, the maximum observed movement was 1.74 mi (2.8 km) downstream (Cushman and Pearl 2007, p. 13). While these movement studies are specific to Oregon spotted frogs, the number of studies and size of the study areas are limited and studies have not been conducted over multiple seasons or years. In addition, the ability to detect frogs is challenging because of the difficult terrain in light of the need for the receiver and transmitter to be in close proximity. Hammerson (2005) recommends that a 3.1-mile (5-km) separation distance for suitable habitat be applied to all ranid frog species because the movement data for ranids are consistent and the preponderance of data indicates that a separation distance of several kilometers may be appropriate and practical for delineation of occupancy, despite occasional movements that are longer or that may allow some genetic interchange between distant populations (for example, the 10-km (6.2-mi) distance noted by Blouin *et al.* 2010, pp. 2186, 2188). Therefore, for the purposes of evaluating the connectedness of Oregon spotted frog breeding areas and individual frogs' ability to move between areas of suitable habitat, we will assume a maximum movement distance of 3.1 mi (5 km). In addition, these aquatic movement corridors should be free of impediments to movement, including but not limited to hard barriers such as dams and biological barriers such as abundant predators.

Maintenance of populations across a diversity of ecological landscapes is necessary to provide sufficient protection against changing environmental circumstances (such as climate change). This diversity of habitat areas provides functional redundancy to safeguard against stochastic events (such as droughts) and may also be necessary as different regions or microclimates respond to changing climate conditions. Establishing or maintaining populations across a broad geographic area spreads out the risk to individual populations across the range of the species, thereby conferring species resilience. Finally, protecting a wide range of habitats across the occupied range of the species simultaneously maintains genetic diversity of the species, which protects the underlying integrity of the major genetic groups (Blouin *et al.* 2010, pp. 2184–2185) whose persistence is important to the ecological fitness of the species as a whole (Blouin *et al.* 2010, p. 2190).

Therefore, based on the information above, we identify the following physical or biological features needed by Oregon spotted frogs to provide habitats protected from disturbance and representative of the historical, geographic, and ecological distribution: (1) Wetted corridors within 3.1 mi (5 km) of breeding habitat that are free of barriers to movement, and (2) a diversity of high-quality habitats across multiple sub-basins throughout the geographic extent of the species' range sufficiently representing the major genetic groups.

Primary Constituent Elements for Oregon Spotted Frog

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Oregon spotted frog in areas occupied at

the time of listing, focusing on the features' primary constituent elements (PCEs). Primary constituent elements are those specific elements of the physical or biological features (PBFs) that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Oregon spotted frog are:

(1) Primary constituent element 1—Nonbreeding (N), Breeding (B), Rearing (R), and Overwintering Habitat (O). Ephemeral or permanent bodies of fresh water, including, but not limited to natural or manmade ponds, springs, lakes, slow-moving streams, or pools within or oxbows adjacent to streams, canals, and ditches, that have one or more of the following characteristics:

- Inundated for a minimum of 4 months per year (B, R) (timing varies by elevation but may begin as early as February and last as long as September);
- Inundated from October through March (O);
- If ephemeral, areas are hydrologically connected by surface water flow to a permanent water body (e.g., pools, springs, ponds, lakes, streams, canals, or ditches) (B, R);
- Shallow water areas (less than or equal to 30 centimeters (12 inches), or water of this depth over vegetation in deeper water (B, R);
- Total surface area with less than 50 percent vegetative cover (N);
- Gradual topographic gradient (less than 3 percent slope) from shallow water toward deeper, permanent water (B, R);
- Herbaceous wetland vegetation (i.e., emergent, submergent, and floating-leaved aquatic plants), or vegetation that can structurally mimic emergent wetland vegetation through manipulation (B, R);
- Shallow water areas with high solar exposure or low (short) canopy cover (B, R);
- An absence or low density of nonnative predators (B, R, N)

(2) Primary constituent element 2—Aquatic movement corridors. Ephemeral or permanent bodies of fresh water that have one or more of the following characteristics:

- Less than or equal to 5 kilometers (3.1 miles) linear distance from breeding areas;
- Impediment free (including, but not limited to, hard barriers such as dams, biological barriers such as abundant predators, or lack of refugia from predators).

(3) Primary constituent element 3—Refugia habitat. Nonbreeding, breeding, rearing, or overwintering habitat or aquatic movement corridors with habitat characteristics (e.g., dense vegetation and/or an abundance of woody debris) that provide refugia from predators (e.g., nonnative fish or bullfrogs).

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 essential to the conservation of the species and which may require special management considerations or protection. Here we describe the type of special management considerations or protections that may be required for the physical or biological features identified as essential for the Oregon spotted frog. The specific critical habitat units and subunits where these management considerations or protections apply for each species are identified in Unit Descriptions.

A detailed discussion of activities influencing the Oregon spotted frog and their habitat can be found in the proposed listing rule. Threats to the physical or biological features that are essential to the conservation of this species and that may warrant special management considerations or protection include, but are not limited to: (1) Habitat modifications brought on by nonnative plant invasions or native vegetation encroachment (trees and shrubs); (2) loss of habitat from conversion to other uses; (3) hydrologic manipulation; (4) removal of beavers; (5) livestock grazing; and (6) predation by invasive fish and bullfrogs. These threats also have the potential to affect the PCEs if conducted within or adjacent to designated units.

The physical or biological features essential to the conservation of the Oregon spotted frog may require special management considerations or protection to ensure the provision of wetland conditions and landscape context of sufficient quantity and quality for long-term conservation and recovery of the species. Management activities that could ameliorate the threats described above include (but are not limited to) treatment or removal of exotic and encroaching vegetation (for example mowing, burning, grazing, herbicide treatment, shrub/tree removal); modifications to fish stocking and beaver removal practices in specific water bodies; nonnative predator control; stabilization of extreme water level fluctuations; restoration of habitat features; and implementation of appropriate livestock grazing practices.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to designate critical habitat. We review available information pertaining to the habitat requirements of the species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—is necessary to ensure the conservation of the species. All areas currently known to be occupied by Oregon spotted frogs constitute the specific areas within the geographical area occupied by the species at the time of its proposed listing on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protections. These areas are identified as occupied in each of the unit or subunit descriptions below. We are also proposing to designate areas that are currently ''not known to be occupied'' that are also essential for the conservation of the species. The distinction between ''occupied'' and ''not known to be occupied'' areas is based primarily on a lack of survey data for the latter areas (i.e., these areas may be either occupied or unoccupied, but have not been surveyed because of access limitations). Our determination of the areas occupied at the time of listing and the rationale for why ''not known to be occupied'' areas are essential for the conservation of the species are provided below.

We used information from reports and databases prepared by Federal and State agencies and private researchers to identify the specific locations used by Oregon spotted frogs for egg-laying, rearing, nonbreeding, and overwintering. Occurrence data used for determining occupancy includes the time period between 2000 and 2012; older occurrence data were not considered to be a reliable predictor for current occupancy. In only three locations throughout the species' range is occurrence data used prior to 2005 (i.e., 2000–2004). Therefore, the majority of occupied occurrence data was collected in 2005 or later.

The presence of primary constituent elements (PCEs) are not a mandatory requirement for areas proposed for

designation as unoccupied critical habitat (i.e., the ''not known to be occupied'' areas in this proposed rule) (50 CFR 424.02(d)). However, the presence of PCEs was evaluated in mapping these areas, since areas having those features would have greater likelihood of providing habitat features essential to Oregon spotted frog conservation. To determine whether the currently occupied areas and the ''not known to be occupied'' areas contain the primary constituent elements, we plotted all occurrence records in ArcGIS, version 9 or 10 (Environmental Systems Research Institute, Inc.), a computer geographic information system program, and overlaid them on National Agriculture Imagery Program (NAIP) digital imagery, National Wetland Inventory (NWI) data, National Hydrologic Data (NHD), and slope data. Where NWI data were available and appeared to well-represent the potential habitat as seen on the NAIP imagery, the NWI data were used to approximate primary constituent elements. These areas are referred to as ''wetlands'' in the unit descriptions. However, in many cases the NWI features were either too expansive or not expansive enough to capture the known occurrences; in these cases, NAIP imagery, slope, and local knowledge were utilized to approximate the primary constituent elements. These areas are referred to as ''seasonally wetted'' in the unit descriptions. In order to capture primary constituent element 2–aquatic movement corridors, we used the NHD to map 3.1 mi (5 km) distance up and downstream from the occurrence data. NAIP imagery and local knowledge were used to refine NHD line features (for example, adjusting alignment with actual water course).

When determining proposed 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 for Oregon spotted frog. 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 proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined are occupied by the Oregon spotted frog at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the species. The physical or biological features relate to Oregon spotted frog nonbreeding, breeding, rearing, and overwintering habitat needs, the specifics of which are discussed in greater detail under ''Primary Constituent Elements for Oregon spotted frog'' above. We determined occupancy in these areas based on occurrence data as described above. These occupied areas provide the physical or biological features essential to the conservation of the species, which may require special management considerations or protection.

In addition, we are proposing to designate critical habitat within areas ''not known to be occupied'' at the time of listing, but that we have determined to be essential for the conservation of the species. We can designate critical habitat in areas outside the geographic area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. For areas not occupied by the species at the time of listing, we must demonstrate that these areas are essential to the conservation of the species in order to include them in our critical habitat designation. For purposes of this proposed rule and our analysis, the ''not known to be occupied areas'' are defined as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. To determine if ''not known to be occupied'' areas met the criteria for critical habitat, we considered: (1) The importance of the area to the overall status of the species to prevent extinction and contribute to future recovery of the species; (2) whether the area presently provides the essential physical or biological features, or could be managed and restored to contain the necessary physical or biological features to support the species; and (3) whether individuals were likely to use or colonize the area. While the Act does not require that such features be present in order to designate areas as unoccupied critical habitat, these presently ''not known to be occupied'' areas generally provide the physical or biological features essential for the conservation of the species and may require special management considerations or protection. In general, these areas are ''not known to be occupied'' because they have not been surveyed. However, each of these areas are within occupied sub-basins, contain habitat features similar to known occupied areas, hydrologically connect (via surface water) occupied areas, and do not contain barriers that would inhibit Oregon spotted frog movement between occupied areas.

Within Critical Habitat Unit 1 (Lower Chilliwack River Washington), approximately 137 ac (55 ha) and 0.38 river mi (0.61 km) are being proposed as unoccupied critical habitat (i.e., ''not known to be occupied''—see discussion below), and within Critical Habitat Unit 8 (Upper Deschutes River Oregon (subunit 8A)), approximately 177 ac (72 ha) fall within this category. In Critical Habitat Unit 9 (Little Deschutes River, Oregon), approximately 45 ac (18 ha), 13 ac (5 ha) within Critical Habitat Unit 12 (Williamson River Oregon), and 83 ac (33 ha) within Critical Habitat Unit 13 (Upper Klamath Lake Oregon) are within unoccupied critical habitat. In total, approximately 455 ac (184 ha), and 0.38 river mile are proposed as unoccupied critical habitat. Each of the areas proposed as unoccupied critical habitat are adjacent to known occupied sites, where a number of threats remain operative.

Although these areas are being treated as if they are unoccupied for purposes of this proposed rule, substantial uncertainty surrounds their occupancy status. There is no conclusive evidence that the Oregon spotted frog is completely absent from these areas, since: (1) Surveys have not been conducted (because of access limitations on private property or resource limitations on public lands); (2) the unoccupied reaches have appropriate habitat based on the best available information; (3) these areas are between or connected to known occupied areas; and (4) there are no barriers that would constrain upstream or downstream movement.

The species has been extirpated from up to 90 percent of its historical range, and limiting the proposed designation to the known currently occupied sites would not be adequate to ensure the conservation of the species. Including the proposed designation of unoccupied habitat is essential to ensure adequate resilience, redundancy, and representation in the wild. Resilience describes characteristics of a species

and its habitat that allow it to recover from periodic disturbance. Redundancy (having multiple populations distributed across the landscape) is needed to provide a margin of safety for the species to withstand catastrophic events. Representation (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. These terms are not independent of each other, and some characteristic of a species or area may contribute to all three.

The inclusion of unoccupied critical habitat in the proposed rule provides for the connectivity of upstream and downstream populations, facilitating gene flow and allowing for recolonization of sites that may become lost due to threats or other factors. Six of the unoccupied areas included in the proposed designation comprise river segments and their adjacent seasonally flooded areas. These areas contain some of the physical and biological features necessary to support Oregon spotted frogs and provide a corridor between known occupied areas. Two additional unoccupied areas included in the proposed designation are areas that also contain some of the physical and biological features necessary to support Oregon spotted frogs, and are adjacent to occupied areas. The designation of unoccupied critical habitat connecting known occupied areas or adjacent to known occupied sites is essential because it provides: (1) Areas for dispersal and the establishment of new breeding populations; (2) sites for future reintroduction efforts should that be part of a recovery strategy; and (3) nearby nonbreeding, breeding, rearing, and overwintering habitat opportunities should threats, natural catastrophic, or stochastic events render existing occupied sites nonfunctional. All of the unoccupied areas are within occupied sub-basins, contain habitat features similar to known occupied areas, are hydrologically connected (via surface water) occupied areas, and do not contain barriers that would inhibit Oregon spotted frog movement between occupied areas.

Areas proposed as critical habitat for the Oregon spotted frog are not representative of the entire known historical geographic distribution of the species. We are not proposing to designate critical habitat in areas where the species has been extirpated, such as in California or the Willamette Valley in Oregon. These historical areas do not meet the criteria for critical habitat since they are not essential to the conservation of the species.

We are proposing 14 units of critical habitat for designation based on sufficient elements of physical or biological features being present to support Oregon spotted frog life-history processes. These units are delineated by the sub-basins where Oregon spotted frogs remain extant. The threats are relatively consistent across each unit, with the exception of one unit where threats are significantly different (Unit 8 Upper Deschutes River). This unit is further subdivided into two subunits. Each unit contains areas occupied by Oregon spotted frogs and all of the identified elements of physical or biological features and supports multiple life-history processes. Some segments within the units contain only some elements of the physical or biological features necessary to support the Oregon spotted frog's particular use of that habitat. In addition, some segments within the units are not known to be presently occupied, but we have determined them to be essential for the conservation of the species. Therefore, we are also proposing these ''not known to be occupied'' areas as critical habitat for the Oregon spotted frog.

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 in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–ES–R1–2013–0088, on our Internet site *http://www.fws.gov/wafwo*, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing 14 units as critical habitat for Oregon spotted frog. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for Oregon spotted frog. The 14 areas we propose as critical habitat are: (1) Lower Chilliwack River; (2) South Fork Nooksack River; (3) Samish River; (4) Black River; (5) White Salmon River; (6) Middle Klickitat River; (7) Lower Deschutes River; (8) Upper Deschutes River; (9) Little Deschutes River; (10) McKenzie River; (11) Middle Fork Willamette River; (12) Williamson River; (13) Upper Klamath Lake; and (14) Upper Klamath. All units contain areas occupied by Oregon spotted frogs. However, as previously discussed, some units also contain areas ''not known to be occupied'' by Oregon spotted frogs; more details about these areas are included within each individual critical habitat unit description below. The approximate area and river mileage of each proposed critical habitat unit and its relevant subunits, as well as landownership within each unit, are shown in Tables 1 and 2. Unlike Washington, no river miles alone were proposed for designation in Oregon as these areas were included within the area of the larger Unit designation. River miles alone were applied only where we were unable to delineate a polygon to encompass the PBF, such as in incised channels or developed areas. Otherwise, all of the river miles are encompassed in the acreage totals.

TABLE 1—APPROXIMATE AREA AND LANDOWNERSHIP IN PROPOSED CRITICAL HABITAT UNITS FOR THE OREGON SPOTTED FROG

Critical habitat unit	Federal Ac (Ha)	State Ac (Ha)	County Ac (Ha)	Private/Local municipalities Ac (Ha)	Total
Washington:					
1. Lower Chilliwack River	0	0	13 (5)	267 (108)	280 (113)
2. South Fork Nooksack River	0	0	0	111 (45)	111 (45)
3. Samish River	0	1 (<1)	1 (<1)	982 (398)	984 (398)
4. Black River	877 (355)	375 (151)	151 (61)	3,478 (1,408)	4,881 (1,975)
5. White Salmon River	108 (44)	1,084 (439)	0	33 (13)	1,225 (496)
6. Middle Klickitat River	4,048 (1,638)	0	2 (1)	2,796 (1132)	6,846 (2,770)
Oregon:					
7. Lower Deschutes River	63 (25)	0	0	6 (2.5)	69 (28)

TABLE 1—APPROXIMATE AREA AND LANDOWNERSHIP IN PROPOSED CRITICAL HABITAT UNITS FOR THE OREGON SPOTTED FROG—Continued

Critical habitat unit	Federal Ac (Ha)	State Ac (Ha)	County Ac (Ha)	Private/Local municipalities Ac (Ha)	Total
8. Upper Deschutes River	23,211 (9,393)	180 (73)	45 (18)	962 (389)	24,398 (9,873)
8A. Upper Deschutes River, Below Wickiup Dam	1,180 (477)	180 (73)	45 (18)	961 (389)	2,366 (958)
8B. Upper Deschutes River, Above Wickiup Dam	22,031 (8,916)	0	0	<1	22,031 (8,916)
9. Little Deschutes River	5,275 (2,135)	216 (87)	81 (33)	5,789 (2,343)	11,361 (4,598)
10. McKenzie River	98 (40)	0	0	0	98 (40)
11. Middle Fork Willamette River	292 (118)	0	0	0	292 (118)
12. Williamson River	10,335 (4,182)	0	0	4,817 (1,949)	15,152 (6,132)
13. Upper Klamath Lake	1,243 (503)	6 (3)	0	1,002 (405)	2,251 (911)
14. Upper Klamath	85 (34)	0	0	160 (65)	245 (99)
Total	45,635 (18, 647)	1,862 (753)	293 (118)	20,402 (8,258)	68,192 (27,597)

Note: Area sizes may not sum due to rounding. Area estimates reflect all land and stream miles within critical habitat unit boundaries, except those stream miles included in Table 2.

TABLE 2—APPROXIMATE RIVER MILEAGE AND OWNERSHIP WITHIN PROPOSED CRITICAL HABITAT UNITS FOR THE OREGON SPOTTED FROG

Ownership *	Federal river mile (km)	Federal/Private river mile (km)	State river mile (km)	State/Private river mile (km)	County river mile (km)	County/Private river mile (km)	Private/Local municipalities river mile (km)	Total
1. Lower Chilliwack River	0	0	0	0	0	0	7.63 (12.28)	7.63 (12.28)
2. South Fork Nooksack River	0	0	0	0	0	0	3.56 (5.73)	3.56 (5.73)
3. Samish River	0	0	0	0	0	0	1.73 (2.78)	1.73 (2.78)
4. Black River	0.06 (0.10)	0.06 (0.09)	0.45 (0.73)	0.05 (0.07)	0.64 (1.02)	0.27 (0.43)	5.90 (9.49)	7.42 (11.94)
5. White Salmon River	0.91 (1.46)	0	0	0	0	0	2.30 (3.70)	3.20 (5.15)
Total	0.97 (1.55)	0.06 (0.09)	0.5 (0.8)	0.05 (0.07)	0.63 (1.02)	0.27 (0.43)	21.12 (33.97)	23.54 (37.88)

* Ownership—multi-ownership (such as Federal/Private) indicate different ownership on each side of the river/stream/creek.

Note: River miles (km) may not sum due to rounding. Mileage estimates reflect stream miles within critical habitat unit boundaries that are not included in area estimates in Table 1.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for Oregon spotted frog, below. In some cases, multiple data sources are used to inform our determinations. These multiple data sources include various unpublished reports, databases, and spreadsheets provided by our partner agencies. These sources are identified in the literature cited list, which is included as supplementary information on *http://www.regulations.gov* for this proposed rule. These sources are available upon request from the Washington Fish and Wildlife Office (see **ADDRESSES**).

Critical Habitat Unit 1: Lower Chilliwack River

The Lower Chilliwack River unit consists of 280 ac (113 ha) and 8 river miles (12 river kilometers) in Whatcom County, Washington. This unit includes the Sumas River and adjacent seasonally wetted areas from approximately the intersection with Hopewell Road downstream to the intersection with Gillies Road. This unit also includes portions of Swift Creek and an unnamed tributary just south of Swift Creek, along with their adjacent seasonally wetted areas. Oregon spotted frogs are known to currently occupy 143 ac (58 ha) and 7 river miles (11 river kilometers) in this unit (Bohannon *et al.* 2012). Currently, a 137–ac (55–ha) area and a river segment of 0.38 river miles (0.61 river kilometers) are ''not known to be occupied'' (see explanation of this definition above). We consider the ''not known to be occupied'' acres and river miles to be essential for the conservation of the species because they provide egg-laying habitat and an aquatic movement corridor for the Oregon spotted frogs in the unnamed tributary. Within this unit, currently, 13 ac (5 ha) are managed by Whatcom County, and 267 ac (108 ha) and 8 river miles (12 river kilometers) are privately owned. All of the essential physical or biological features are found within the unit, but are impacted by invasive plants (reed canarygrass), woody vegetation plantings, and hydrologic modification of river flows. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 2: South Fork Nooksack River

The South Fork Nooksack River unit consists of 111 ac (45 ha) and 4 river miles (6 river kilometers) in Whatcom County, Washington. This unit includes the Black Slough and adjacent seasonally wetted areas from the headwaters to the confluence with South Fork Nooksack River. This unit also includes wetlands and seasonally wetted areas along Tinling Creek and the unnamed tributary to the Black Slough. Oregon spotted frogs are known to currently occupy this unit (Bohannon *et al.* 2012). The entire area within this unit is under private ownership, including one nonprofit conservation organization. All of the essential physical or biological features are found within the unit, but are impacted by

invasive plants (reed canarygrass), woody vegetation plantings and succession, and beaver removal efforts. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 3: Samish River

The Samish River unit consists of 984 ac (398 ha) and 2 river miles (3 river kilometers) in Whatcom and Skagit Counties, Washington. This unit includes the Samish River and adjacent seasonally wetted areas from the headwaters downstream to the confluence with Dry Creek. Oregon spotted frogs are known to currently occupy this unit (Bohannon *et al.* 2012). Within this unit, currently less than 1 ac (less than 1 ha) is managed by Washington Department of Natural Resources (WDNR), 1 ac (less than 1 ha) is managed by Skagit County, and 982 ac (397 ha) and 2 river miles (3 river kilometers) are privately owned, including two nonprofit conservation organizations. All of the essential physical or biological features are found within the unit, but are impacted by invasive plants (reed canarygrass), woody vegetation plantings and succession, and beaver removal efforts. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 4: Black River

The Black River unit consists of 4,881 ac (1,975 ha) and 7 river miles (12 river kilometers) in Thurston County, Washington. This unit includes the Black River and adjacent seasonally wetted areas from Black Lake downstream to approximately 3 mi (5 km) south of the confluence with Mima Creek. This unit also includes six tributaries to the Black River (Dempsey Creek, Salmon Creek, Blooms Ditch, Allen Creek, Beaver Creek, and Mima Creek), one tributary to Black Lake (Fish Pond Creek), and their adjacent seasonally wetted areas. Oregon spotted frogs are known to currently occupy this unit (Hallock 2013). Within this unit, currently 877 ac (355 ha) are Federally managed by the Nisqually NWR (873 ac (353 ha)) and the Department of Energy (4 ac (2 ha)); 375 ac (151 ha) are managed by State agencies, including the Washington Department of Fish and Wildlife and Department of Natural Resources; 151 ac (61 ha) are City or County managed; and 3,478 ac (1,408 ha) are privately owned, including two nonprofit conservation organizations. Within this unit, currently 6 river miles (10 river kilometers) are privately owned; less than 1 river mile (less than 1 river kilometer) is dually managed/owned (i.e., different owners on opposite sides of the river); and less than 1 river mile (less than 1 river kilometer) is managed by each of the following: Nisqually NWR, State agencies, and Thurston County. All of the essential physical or biological features are found within the unit, but are impacted by invasive plants (reed canarygrass), woody vegetation plantings and succession, and beaver removal efforts. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 5: White Salmon River

The White Salmon River unit consists of 1,225 ac (496 ha) and 3 river miles (5 river kilometers) in Skamania and Klickitat Counties, Washington. This unit includes the Trout Lake Creek from the confluence with Little Goose Creek downstream to the confluence with White Salmon River, Trout Lake, and the adjacent seasonally-wetted areas. Oregon spotted frogs are known to currently occupy this unit (Hallock 2011 and Hallock 2012). Within this unit, currently 108 ac (44 ha) and 1 river mile (2 river kilometers) are managed by the U.S. Forest Service (USFS), 1,084 ac (439 ha) are managed by Washington Department of Natural Resources as the Trout Lake NAP, and 33 ac (13 ha) and 2 river miles (4 river kilometers) are privately owned. All of the essential physical or biological features are found within the unit, but are impacted by invasive plants and nonnative predaceous fish. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. The Trout Lake NAP (WDNR) has a draft Management Plan that is used for management on WDNR lands in this unit and we are considering exclusion of these lands under section 4(b)(2) of the Act (see Exclusions, below).

Critical Habitat Unit 6: Middle Klickitat River

The Middle Klickitat River unit consists of 6,846 ac (2,770 ha) in Klickitat County, Washington. This unit encompasses Conboy Lake, Camas Prairie, and all water bodies therein, and extends to the northeast along Outlet Creek to Mill Pond. The southwestern edge is approximately Laurel Road, the southern edge is approximately BZ Glenwood Highway, and the northern edge follows the edge of Camas Prairie to approximately Willard Spring. Oregon spotted frogs are known to currently occupy this unit (Hayes and Hicks 2011). Within this unit, currently 4,048 ac (1,638 ha) are managed by the Conboy Lake National Wildlife Refuge; 2 ac (1 ha) are managed by Klickitat County, and 2,796 ac (1,132 ha) are privately owned. All of the essential physical or biological features are found within the unit, but are impacted by water management, exotic plant invasion, native tree encroachment, and nonnative predaceous fish and bullfrogs. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 7: Lower Deschutes River

The Lower Deschutes River unit consists of 69 acres (28 ha) in Wasco County, Oregon. This Unit includes Camas Prairie and Camas Creek, a tributary to the White River and is located on the Mt. Hood National Forest. Oregon spotted frogs are known to currently occupy this unit (C. Corkran, pers. comm. 2012). Within this unit, 63 ac (25 ha) are managed by the USFS Mt. Hood National Forest, and 6 ac (2.5 ha) are privately owned. All of the essential physical or biological features are found within the unit but are impacted by vegetation succession (conifer encroachment). The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic

movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 8: Upper Deschutes River

The Upper Deschutes River unit includes 24,398 ac (9,873 ha) in Deschutes County, Oregon, in the Upper Deschutes River sub-basin. The Upper Deschutes River unit extends from headwater streams and wetlands draining to Crane Prairie and Wickiup Reservoirs to the Deschutes River downstream to Bend, Oregon. This unit also includes Odell Creek and Davis Lake. Within this unit, currently 23,210 ac (9,393 ha) are managed by the USFS Deschutes National Forest, 180 ac (73 ha) are managed by Oregon Parks and Recreation Department, 45 ac (18 ha) are owned by the county, and 962 ac (389 ha) are privately owned. The Upper Deschutes River unit consists of two subunits: Below Wickiup Dam (Subunit 8A) and Above Wickiup Dam (Subunit 8B). Oregon spotted frogs are known to currently occupy 24,221 ac (9,801 ha) in unit 8 (USGS, Bowerman, and USFS multiple data sources). Within subunit 8A, 177 ac (72 ha) are ''not known to be occupied,'' but are essential to the conservation of the species for the reasons identified in the subunit description below. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. Within this unit, we are considering exclusion of lands that may be managed under a Sunriver Candidate Conservation Agreement with Assurances (CCAA), the Old Mill Pond Oregon spotted frog CCAA, and the Deschutes Basin Habitat Conservation Plan under section 4(b)(2) of the Act (see Exclusions, below).

Subunit 8A: Below Wickiup Dam

This subunit includes 2,366 ac (958 ha). This subunit consists of the Deschutes River and associated wetlands downstream of Wickiup Dam to Bend, Oregon, beginning at the outlet of an unnamed tributary draining Dilman Meadow. Currently, two areas totaling 177 ac (72 ha) are ''not known to be occupied''. We consider the ''not known to be occupied'' acres to be essential for recovery of the species because they provide aquatic movement corridors between the few remaining populations below Wickiup Dam (e.g., Dilman Meadow and frog populations downstream along the Deschutes River). Within this subunit, currently 1,180 ac (477 ha) are managed by the USFS Deschutes National Forest, 180 ac (73 ha) are managed by Oregon Parks and Recreation Department, 45 ac (18 ha) are managed by Deschutes County, and 962 ac (389 ha) are privately owned. All of the essential physical or biological features are found within the subunit but are impacted by hydrologic modification of river flows, reed canarygrass, predaceous fish, and bullfrogs. The essential features within occupied habitat within this subunit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Subunit 8B: Above Wickiup Dam

This subunit includes 22,031 ac (8,916 ha). This subunit includes the following lakes, including associated wetlands, in the upper watersheds that flow into the Crane Prairie/Wickiup Reservoir system: Hosmer Lake, Lava Lake, Little Lava Lake, Winopee Lake, Muskrat Lake, and Little Cultus Lake, Crane Prairie, Wickiup Reservoirs, and Davis Lake. Deep water areas (i.e., greater than 20 ft (6 m) without floating or submerged aquatic vegetation are not included as critical habitat within these waterbodies because they do not contain the primary constituent elements of critical habitat for Oregon spotted frog. The following riverine waterbodies and associated wetlands are critical habitat: Deschutes River from Lava Lake to Wickiup Reservoir, Cultus Creek downstream of Cultus Lake, Deer Creek downstream of Little Cultus Lake, and Odell Creek from an occupied unnamed tributary to the outlet in Davis Lake. The land within this subunit is primarily under USFS ownership. Oregon spotted frogs are known to currently occupy this subunit (USGS 2006 and 2012 datasets; USFS 2012 dataset). Within this subunit, currently 22,031 ac (8,916 ha) are managed by the USFS Deschutes National Forest and less than one acre (0.14 ha) is in private ownership. All of the essential physical or biological features are found within the subunit but are impacted by vegetation succession and nonnative predaceous fish. The essential features within this subunit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 9: Little Deschutes River

The Little Deschutes River unit consists of 11,361 ac (4,598 ha) in Klamath and Deschutes Counties, Oregon. The Little Deschutes River unit includes the extent of the Little Deschutes River and associated wetlands from the headwaters to the confluence with the Deschutes River, 1 mile (1.6 km) south of Sunriver and approximately 20 miles (32.2 km) south of Bend, Oregon. This unit includes the following tributaries, including adjacent wetlands: Big Marsh Creek, Crescent Creek, and Long Prairie Creek. Oregon spotted frogs are known to currently occupy 11,316 ac (4,490 ha) in this unit (USGS, Bowerman, and USFS multiple data sources). Currently, one 45–ac (18–ha) area is ''not known to be occupied.'' We consider the ''not known to be occupied'' acres to be essential for the conservation of the species because they provide an aquatic movement corridor between populations along the Little Deschutes River. Within this unit, currently 5,275 ac (2,135 ha) are managed by the USFS Deschutes National Forest and Prineville BLM, 216 ac (87 ha) are managed by the State of Oregon, 81 ac (33 ha) are managed by Deschutes and Klamath Counties, and 5,789 ac (2,343 ha) are privately owned. Additionally, the essential physical or biological features are found within the unit but are impacted by hydrologic manipulation of water levels for irrigation, nonnative predaceous fish, reed canarygrass, and bullfrogs. The essential features within occupied areas within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features. Within this unit, we are considering exclusion of lands that may be managed under the Deschutes Basin Habitat Conservation Plan under section 4(b)(2) of the Act (see Exclusions, below).

Critical Habitat Unit 10: McKenzie River Sub-Basin

The McKenzie River unit consists of 98 ac (40 ha) in Lane County, Oregon. This critical habitat unit occurs in the Mink Lake Basin, located in the headwaters of the main South Fork of the McKenzie River on the McKenzie River Ranger District of the Willamette

National Forest. The McKenzie River unit includes seven wilderness lakes, marshes, and ponds: Penn Lake, Corner Lake, Boat Lake, Cabin Meadows, two unnamed marshes and a pond northeast of Penn Lake. A small segment of the South Fork McKenzie River between the two unnamed marshes also is included within this critical habitat unit. The entire area within this unit is under USFS ownership. Oregon spotted frogs are known to currently occupy this unit (Adams *et al.* 2011). All of the essential physical or biological features are found within the unit, but are impacted by nonnative predaceous fish, isolation, and vegetation encroachment. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 11: Middle Fork Willamette River

The Middle Fork Willamette River unit consists of 292 ac (118 ha) in Lane County, Oregon. This unit includes Gold Lake and bog, which are located in the 465–acre (188–ha) Gold Lake Bog Research Natural Area on the upstream end of Gold Lake on the Willamette National Forest. The entire area within this unit is under USFS ownership. Oregon spotted frogs are known to currently occupy this unit (USDA Forest Service 2011). All of the essential physical or biological features are found within the unit, but are impacted by nonnative predaceous fish, isolation, and vegetation encroachment. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 12: Williamson River

The Williamson River unit consists of 15,152 ac (6,132 ha) in Klamath County, Oregon. This unit includes the Williamson River and adjacent seasonally wetted areas in Klamath Marsh National Wildlife Refuge (NWR) 4.89 mi (7.87 km) east of Silver Lake Highway, north to 0.998 mi (1.61 km) southeast of Big Springs, north through the Refuge to 0.24 mi (0.36 km) southeast of Three Creek spring, and upstream to 2.14 mi (3.44 km) north of the confluence with Aspen Creek. This unit also includes a portion of one tributary to the Williamson River (Jack Creek) and its adjacent seasonally wetted areas from National Forest Road 94 to 0.132 mi (0.212 km) south of National Forest Road 88. Oregon spotted frogs are known to currently occupy 15,139 ac (6,127 ha) in this unit (USGS, USFS, and USFWS multiple data sources). Currently, one 13-ac (5-ha) area is ''not known to be occupied.'' We consider the ''not known to be occupied'' acres to be essential for the conservation of the species because they provide an aquatic movement corridor between Oregon spotted frogs in the Klamath Marsh NWR to frogs in the Upper Williamson River. Within this unit, 10,335 ac (4,182 ha) are federally managed by the Klamath Marsh National Wildlife Refuge and the USFS Fremont-Winema National Forest, and 4,817 ac (1,949 ha) are privately owned. Additionally, the essential physical or biological features are found within the unit, but are impacted by invasive plants (reed canarygrass), woody vegetation succession, absence of beaver, and nonnative predators. The essential features within occupied areas within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 13: Upper Klamath Lake

The Upper Klamath Lake unit consists of 2,251 ac (911 ha) in Klamath County, Oregon. This unit includes the Wood River and its adjacent seasonally wetted areas from its headwaters downstream to the Bureau of Land Management (BLM) south levee road just north of the confluence with Agency Lake as well as the complete length of the Wood River Canal (west of the Wood River) and its adjacent seasonally-wetted areas starting 1.80 mi (2.90 km) south of Weed Road and continuing south. This unit also includes one tributary to the Wood River (Fort Creek) and its adjacent seasonally wetted areas. In addition, this unit includes three creeks (Sevenmile, Crane, and Fourmile) that flow into Sevenmile Canal and then into Agency Lake and their adjacent seasonally wetted areas.

Sevenmile Creek includes 1.40 mi (2.25 km) beginning north of Nicholson Road, south to the confluence of Crane Creek as well as two tributaries (Blue Spring and Short Creek) and the associated, adjacent seasonally wetted areas. Crane Creek includes adjacent seasonally wetted areas 0.28 mi (0.44 km) from its headwaters south to the confluence with Sevenmile Creek as well as two tributaries (Mares Egg spring and a portion of an unnamed spring to the west of Crane Creek 0.16 mi (0.30 km) south of three unnamed springs near Sevenmile Road). Fourmile Creek includes the adjacent seasonally wetted areas associated with the historical Crane Creek channel, Threemile Creek, Cherry Creek, Jack springs, Fourmile springs, the confluence of Nannie Creek, and the north-south canals that connect Fourmile Creek to Crane Creek.

Oregon spotted frogs are known to currently occupy 2,168 ac (877 ha) in this unit (BLM, USFS, USGS, and USFWS multiple data sources). Currently, two areas totaling 83 ac (33 ha) are ''not known to be occupied.'' We consider the ''not known to be occupied acres'' to be essential for the conservation of the species because they contain some of the physical and biological features necessary to support Oregon spotted frogs and are adjacent to areas known to be occupied by Oregon spotted frogs (Fort Creek to the Wood River). In addition, they provide an aquatic movement corridor between Oregon spotted frogs in Sevenmile Creek to frogs in Crane Creek and its associated tributaries.

Within this unit, 1,243 ac (503 ha) are managed by the BLM and Fremont-Winema National Forest, 6 ac (3 ha) are managed by Oregon State Parks, and 1,002 ac (405 ha) are privately owned. All of the essential physical or biological features are found within the unit, but are impacted by invasive plants (reed canarygrass), woody vegetation plantings and succession, hydrological changes, and nonnative predators. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Critical Habitat Unit 14: Upper Klamath

The Upper Klamath unit consists of 245 ac (99 ha) of lakes and creeks in Klamath and Jackson Counties, Oregon. In Klamath County, Buck Lake critical habitat includes seasonally wetted areas adjacent to the western edge of Buck Lake encompassing Spencer Creek, three unnamed springs, and Tunnel Creek. Parsnip Lakes, in Jackson County, includes seasonally wetted

areas associated with Keene Creek from the Keene Creek dam to 0.55 mi (0.88 km) east from the confluence of Mill Creek as well as four lakes associated with the creek. Oregon spotted frogs are known to currently occupy this unit (BLM, USFS, USGS, and USFWS multiple data sources). Within this unit, 85 ac (34 ha) are managed by the BLM and Fremont-Winema National Forest, and 160 ac (65 ha) are privately owned. All of the essential physical or biological features are found within the unit, but are impacted by woody vegetation succession, nonnative predators, lack of beaver, and hydrological changes. The essential features within this unit may require special management considerations or protection to ensure maintenance or improvement of the existing nonbreeding, breeding, rearing, and overwintering habitat; aquatic movement corridors; or refugia habitat, and to address any changes that could affect these features.

Effects of Critical Habitat Designation

Section 7 Consultation

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

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or 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 or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

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

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

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

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

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

(3) Are economically and technologically feasible, and

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

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

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for Oregon spotted frog. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

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

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Oregon spotted frog, including Federal actions that occur outside of critical habitat that impact physical or biological features within critical habitat. The regulations at 50 CFR 402.02 define the ''action area'' as all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action. These activities include, but are not limited to:

(1) Actions that would significantly alter the structure and function of the wetland, pond, channel, lake, oxbow, spring, or seasonally flooded areas morphology, geometry, or water availability/permanence. Such actions or activities could include, but are not limited to:

(1) Filling or excavation; channelization; impoundment;

(2) road and bridge construction; urban, agricultural, or recreational development;

(3) mining;

(4) groundwater pumping;

(5) dredging;

(6) construction or destruction of dams or impoundments;

(7) water diversion;

(8) water withdrawal;

(9) hydropower generation;

(10) livestock grazing;

(11) beaver removal;

(12) destruction of riparian or wetland vegetation;

(13) pond construction; and

(14) river restoration, including channel reconstruction, placement of large woody debris, vegetation planting, reconnecting riverine floodplain, or gravel placement.

These activities may lead to changes in the hydrologic function of the aquatic habitat and alter the timing, duration, water flows, and water depth. These changes may be designed to be beneficial to the Oregon spotted frog and actually increase habitat in the long term or may degrade or eliminate Oregon spotted frog habitat and could lead to the reduction in available breeding, rearing, nonbreeding, and overwintering habitat necessary for the frog to complete its life cycle. If the permanence of an aquatic system declines so that it regularly dries up, it may lose its ability to support Oregon spotted frogs. If the quantity of water declines, it may reduce the likelihood that the site will support a population of frogs that is robust enough to be viable over time. Similarly, ephemeral, intermittent, or perennial ponds can be important stop-over points for frogs moving among breeding areas or between breeding, rearing, dry season, or wintering areas. Reducing the permanence of these sites may reduce their ability to facilitate frog movements. However, in some cases, increasing permanence can be detrimental as well, if it creates favorable habitat for predatory fish or bullfrogs that otherwise could not exist in the system.

(2) Actions that would significantly alter the vegetation structure in and around habitat. Such actions or activities could include, but are not limited to, removing, cutting, burning, or planting vegetation for restoration actions, creation or maintenance of urban or recreational developments, agricultural activities, and grazing. The alteration of the vegetation structure may change the habitat characteristics by changing the microhabitat (e.g., change in temperature, water depth, basking opportunities, and cover) and thereby negatively affect whether the Oregon spotted frog is able to complete all normal behaviors and necessary life functions or may allow invasion of competitors or predators.

(3) Actions that would significantly degrade water quality (for example, alter water chemistry or temperature). Such actions or activities could include, but are not limited to, release of chemicals or biological pollutants into surface water or into connected ground water at a point source or by dispersed release (nonpoint source); livestock grazing that results in sedimentation, urine, or feces in surface water; runoff from agricultural fields; and application of pesticides (including aerial overspray). These actions could adversely affect the ability of the habitat to support survival and reproduction of Oregon spotted frogs. Variances in water chemistry or temperature could also affect the frog's ability to survive with Bd, oomycete water mold *Saprolegnia,* or *Ribeiroia.*

(4) Actions that would directly or indirectly result in introduction of nonnative predators, increase the abundance of extant predators, or introduce disease. Such actions could include, but are not limited to: Introduction or stocking of fish or bullfrogs; water diversions, canals, or other water conveyance that moves water from one place to another and through which inadvertent transport of predators into Oregon spotted frog habitat may occur; and movement of water, mud, wet equipment, or vehicles from one aquatic site to another, through which inadvertent transport of eggs, tadpoles, or pathogens may occur. These actions could adversely affect the ability of the habitat to support survival and reproduction of Oregon spotted frogs. Additionally, the stocking of introduced fishes could prevent or preclude recolonization of otherwise available breeding or overwintering habitats, which are necessary for the conservation of Oregon spotted frogs.

(5) Actions and structures that would physically block aquatic movement corridors. Such actions and structures include, but are not limited to: Urban, industrial, or agricultural development; water diversions (such as dams, canals, pipes); water bodies stocked with predatory fishes or bullfrogs; roads that do not include culverts; or other structures that physically block movement. These actions and structures could reduce or eliminate immigration and emigration within a sub-basin.

(6) Inclusion of lands in conservation agreements or easements that result in any of the actions discussed above. Such easements could include, but are not limited to NRCS Wetland Reserve Program, USDA Farm Service Agency's Conservation Reserve and Conservation Reserve Enhancement Programs, Habitat Conservation Plans, Safe Harbor Agreements, or Candidate Conservation Agreements with Assurances.

Exemptions

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

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

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

There are no Department of Defense lands within the proposed critical habitat designation.

Exclusions

Application of 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 if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, 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.

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction 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.

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

In the case of the Oregon spotted frog, the benefits of critical habitat include public awareness of the species presence and the importance of habitat protection, and in cases where a Federal nexus exists, increased habitat protection for Oregon spotted frogs due to the protection from adverse modification or destruction of critical habitat.

When we evaluate a conservation plan during our consideration of the benefits of exclusion, we assess 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. 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 any additional public comments received, we will evaluate whether certain lands in the proposed critical habitat are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the 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 his discretion to exclude the lands from the final designation.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. We have identified potential effects to land use sectors that may be associated with the following activities: (1) Species and habitat management; (2) residential, commercial, or industrial development; (3) agriculture, including cattle grazing, dairy farms, and hay production; (4) construction of new, or maintenance of, roads and highways; (5) maintenance (including vegetation removal or alteration) of drainage ditches; (6) construction or maintenance of recreational facilities; and (7) construction or maintenance of dams or water diversion structures.

During the development of a final designation, we will consider economic impacts based on information in our economic analysis, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for Oregon spotted frog are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not intending to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

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

In preparing this proposal, we have determined that the proposed designation does not include any tribal lands. Therefore, we have not proposed designation of critical habitat for the Oregon spotted frog on tribal lands. However, we will coordinate with the tribes in nearby areas should there be any concerns or questions arising from this proposed critical habitat designation. Because we are not proposing designation of critical habitat for the Oregon spotted frog on any tribal lands, we anticipate no impact to tribal lands.

We have identified certain areas that we are considering excluding from the

final critical habitat designation for the Oregon spotted frog based on conservation partnerships. However, we solicit comments on the inclusion or exclusion of such particular areas (see ''Public Comments'' section). During the development of the final designation, we will consider economic and other relevant impacts, public comments, and other new information before deciding if inclusion or exclusion of these areas is warranted. As a result, additional areas, in addition to those identified below for potential exclusion in this proposed rule, may be excluded from the final critical habitat designation under section 4(b)(2) of the Act. Alternatively, we may decide not to exclude these lands based on information received during the public comment period or other information.

TABLE 3—LANDS PROPOSED OR THAT MAY BE CONSIDERED FOR EXCLUSION FROM THE FINAL RULE TO DESIGNATE CRITICAL HABITAT FOR OREGON SPOTTED FROG

Type of conservation plan	Critical habitat unit name	State	Name of agreement/entity	Acres	Hectares
Draft Management Plan	Middle Klickitat River	WA	Trout Lake NAP	1,084	439
Candidate Conservation Agreement.	Upper Deschutes River	OR	Sunriver	219	88
Candidate Conservation Agreement.	Upper Deschutes River	OR	Old Mill Pond	26	10
Habitat Conservation Plan	Upper Deschutes River Little Deschutes River.	OR	Deschutes Basin	8,948	3,621
Total Considered				10,277	4,158

Management Plans or Conservation Partnerships on Non-Federal Lands

In determining how the benefits of exclusion and the benefits of inclusion are affected by the existence of conservation plans and partnerships, we evaluate a variety of factors, which may include (but are not limited to), the plan's implementation history and demonstrated success; whether the plan is finalized; how the plan provides for the conservation of the essential habitat features for the species; whether there is a reasonable expectation of future implementation; and whether the plan contains a monitoring and adaptive management program to ensure that the conservation measures are effective in response to new information, if necessary.

Trout Lake Natural Area Preserve Draft Management Plan

We are considering excluding 1,084 ac (439 ha) of lands managed by the Washington Department of Natural Resources as the Trout Lake NAP. These lands are located in Unit 5 in Klickitat County, Washington. NAPs are established to provide the highest level of protection for excellent examples of unique or typical land features in Washington State and have three objectives: (1) To protect outstanding examples of rare or vanishing terrestrial or aquatic ecosystems, rare plant and animal species, and unique geologic features; (2) to serve as baselines against which the influences of human activities in similar, but differently managed ecosystems can be compared; and (3) to provide areas that are important to preserving natural features of scientific or educational value.

The Trout Lake NAP was proposed in 1995 to protect three natural features, one of which was the Oregon spotted frog. A draft Trout Lake NAP management plan was completed in 2001, but has not been finalized or approved. The guiding principle for managing this NAP is to permit natural ecological and physical processes to predominate, while controlling activities that directly or indirectly modify these processes. Exceptions may occur when a primary feature (e.g., Oregon spotted frog) for which the site was designated would be jeopardized without active intervention. The management goal, as it pertains to Oregon spotted frogs, is to maintain a stable or increasing population where they are found on the NAP through maintenance and restoration of habitat and key natural processes.

Over the last decade, multiple management actions within the NAP have been implemented to benefit Oregon spotted frogs, including water management and reed canarygrass treatments. Based on discussions with managers of the NAP, we expect actions that benefit Oregon spotted frogs will continue to be implemented in the future; however, funding for these actions is uncertain. We intend to work with the NAP managers to revise and finalize the draft NAP Plan for continued use on the Trout Lake NAP. If we determine prior to our final rulemaking that conservation efforts identified in the newly revised and finalized NAP Plan will provide a conservation benefit to the Oregon spotted frog, we may exclude the identified lands from the final designation of critical habitat.

Sunriver Candidate Conservation Agreement

In 2004, the Service prepared a draft Candidate Conservation Agreement with Assurances (CCAA) with the Sunriver Nature Center, Sunriver Owners Association (SROA), Sunriver Resort Limited Partnership (SRLP), Crosswater Owners Association, and Vandevert Acres to promote conservation measures for Oregon spotted frogs on private lands in the vicinity of Sunriver, Oregon. Although the agreement was not finalized due to herbicide and pesticide use on golf courses, the Sunriver Nature Center and other parties covered under the agreement have participated in monitoring for Oregon spotted frog on private golf courses and ranches. Additionally, water management practices conducted by the Sunriver Nature Center that stabilize water levels from breeding through metamorphosis have facilitated conservation and recovery of Oregon spotted frog in the Sunriver area, which hosts the largest population of Oregon spotted frogs in the Upper Deschutes River sub-basin. The Service has been discussing the development of a new CCAA that is specific to management of water levels using weirs on lands owned by SROA and SRLP. If a CCAA is completed prior to the final critical habitat rule for Oregon spotted frog that includes adequate conservation measures and implementation is assured to promote conservation of Oregon spotted frog, we will consider excluding 219 ac (89 ha) under this agreement from critical habitat if the conservation efforts will provide a conservation benefit of excluding that outweighs the benefit of including. These lands are located in Unit 8.

Old Mill Pond—Oregon Spotted Frog CCAA

In July 2012, a new population of Oregon spotted frogs was discovered in a water retention pond at The Old Mill District Shops in downtown Bend, Oregon. In October 2012, frog occupancy was confirmed in a nearby wetland adjacent to the Deschutes River on the Old Mill property. The Service has been discussing the development of a CCAA for the pond and riverine wetland with the owner of the Old Mill District property. This area is located in Unit 8. If a CCAA is completed prior to the final critical habitat rule for Oregon spotted frog that has adequate conservation measures, and its implementation is assured to promote the conservation of Oregon spotted frog, we will consider excluding 26 ac (11 ha) under this agreement from the final critical habitat designation.

Deschutes Basin Habitat Conservation Plan

The Deschutes Basin Board of Control (DBBC) and the City of Prineville are preparing the Upper Deschutes Basin Multi-species Habitat Conservation Plan (HCP). These lands are located in Units 8 and 9. The DBBC consists of seven member irrigation districts including Arnold Irrigation District, Central Oregon Irrigation District, North Unit Irrigation District, Ochoco Irrigation District, Swalley Irrigation District, Three Sisters Irrigation District, and Tumalo Irrigation District. They are preparing a Habitat Conservation Plan for 16 species that occur within the Upper Deschutes and Little Deschutes sub-basins including the Oregon spotted frog. If the conservation measures within an HCP are deemed adequate and implementation is assured to promote the conservation of Oregon spotted frog prior to the final critical habitat rule, we will consider excluding approximately 8,948 ac (3,621 ha) of lands within the Upper Deschutes and Little Deschutes sub-basin covered under the HCP from the final critical habitat designation.

Peer Review

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

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

Public Hearings

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

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

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended 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 such businesses as 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 forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider 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.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the

rulemaking itself, and not the potential impacts to indirectly affected 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, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis, we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will directly regulate only Federal agencies, which are not by definition small business entities. And as such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use because there are no energy supply facilities included in the areas proposed for designation and, where distribution corridors intersect the proposed critical habitat, activities in those corridors are not anticipated to adversely affect the primary constituent elements. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

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

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

(1) This 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 Indian 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 Indian 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 Indian 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 Indian governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

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

(2) We have determined that this rule will not significantly or uniquely affect small governments because 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 critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required. Further, 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.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Oregon spotted frog in a takings implications assessment. Critical habitat designation 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. The takings implications assessment concludes that this designation of critical habitat for Oregon spotted frog does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Washington and Oregon. The designation of critical habitat in areas currently occupied by the Oregon spotted frog imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation of critical habitat in areas currently occupied by the Oregon spotted frog may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to 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 local governments in long-range planning (rather than having them 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) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the Oregon spotted frog within the designated areas to assist the public in understanding the habitat needs of the species.

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

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

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

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).]

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands that were occupied by the Oregon spotted frog at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by the Oregon spotted frog that are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for the Oregon spotted frog on tribal lands.

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

References Cited

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

Authors

The primary authors of this package are the staff members of the Washington Fish and Wildlife Office, Oregon Fish and Wildlife Office—Bend Field Office, and Klamath Falls Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

■ 2. In § 17.95, amend paragraph (d) by adding an entry for ''Oregon Spotted Frog (*Rana pretiosa*),'' to follow the entry for ''Mountain Yellow-legged Frog *(Rana muscosa),* Southern California DPS'', to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(d) *Amphibians.*

* * * * *

Oregon Spotted Frog (*Rana pretiosa*)

(1) Critical habitat units are depicted for Klickitat, Skagit, Skamania, Thurston, and Whatcom Counties in Washington and Deschutes, Jackson, Klamath, Lane, and Wasco Counties in Oregon, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Oregon spotted frog consist of three components:

(i) *Primary constituent element 1.—Nonbreeding (N), Breeding (B), Rearing (R), and Overwintering (O) Habitat.* Ephemeral or permanent bodies of fresh water, including, but not limited to, natural or manmade ponds, springs, lakes, slow-moving streams, or pools within or oxbows adjacent to streams, canals, and ditches, that have one or more of the following characteristics:

(A) Inundated for a minimum of 4 months per year (B, R) (timing varies by elevation but may begin as early as February and last as long as September);

(B) Inundated from October through March (O);

(C) If ephemeral, areas are hydrologically connected by surface water flow to a permanent water body (e.g., pools, springs, ponds, lakes, streams, canals, or ditches) (B, R);

(D) Shallow water areas (less than or equal to 30 centimeters (12 inches), or water of this depth over vegetation in deeper water (B, R);

(E) Total surface area with less than 50 percent vegetative cover (N);

(F) Gradual topographic gradient (less than 3 percent slope) from shallow water toward deeper, permanent water (B, R);

(G) Herbaceous wetland vegetation (i.e. emergent, submergent, and floating-leaved aquatic plants), or vegetation that can structurally mimic emergent wetland vegetation through manipulation (B, R);

(H) Shallow water areas with high solar exposure or low (short) canopy cover (B, R); and

(I) An absence or low density of nonnative predators (B, R, N).

(ii) *Primary constituent element 2.—Aquatic movement corridors.* Ephemeral or permanent bodies of fresh water that have one or more of the following characteristics:

(A) Less than or equal to 5 kilometers (3.1 miles) linear distance from breeding areas; and

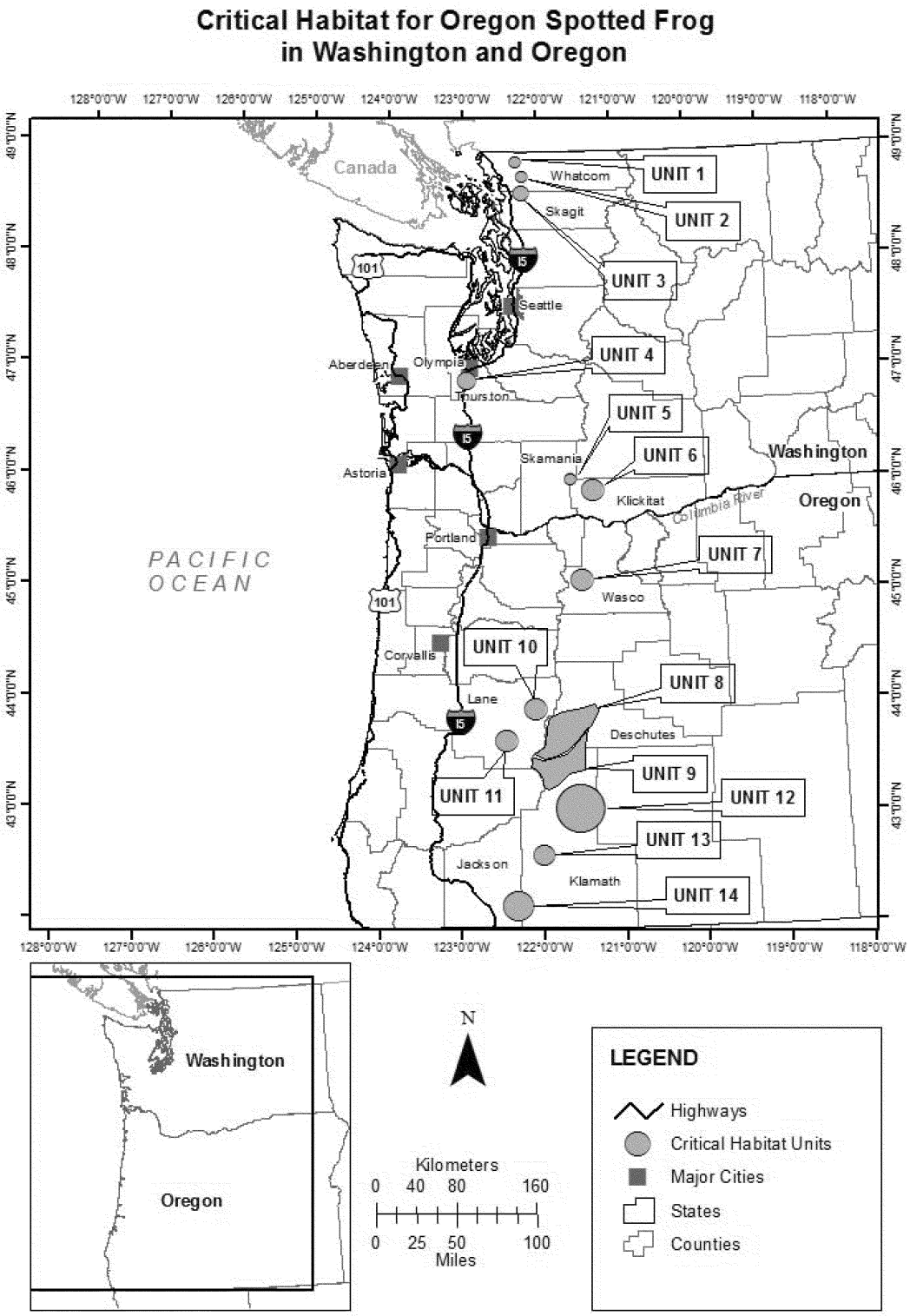
(B) Impediment free (including, but not limited to, hard barriers such as dams, biological barriers such as abundant predators, or lack of refugia from predators).

(iii) *Primary constituent element 3.—Refugia habitat.* Nonbreeding, breeding, rearing, or overwintering habitat or aquatic movement corridors with habitat characteristics (e.g., dense vegetation and/or an abundance of woody debris) that provide refugia from predators (e.g., nonnative fish or bullfrogs).

(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 [*INSERT EFFECTIVE DATE OF THE FINAL RULE*].

(4) *Critical habitat map units.* Data layers defining map units were created from 2010 aerial photography from U.S. Department of Agriculture, National Agriculture Imagery Program base maps using ArcMap (Environmental Systems Research Institute, Inc.), a computer geographic information system (GIS) 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 the Service's internet site (*http://www.fws.gov/wafwo*), *http://www.regulations.gov* at Docket No. FWS–R1–ES–2013–0088, and at the field office(s) 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) *Note:* Index map follows:



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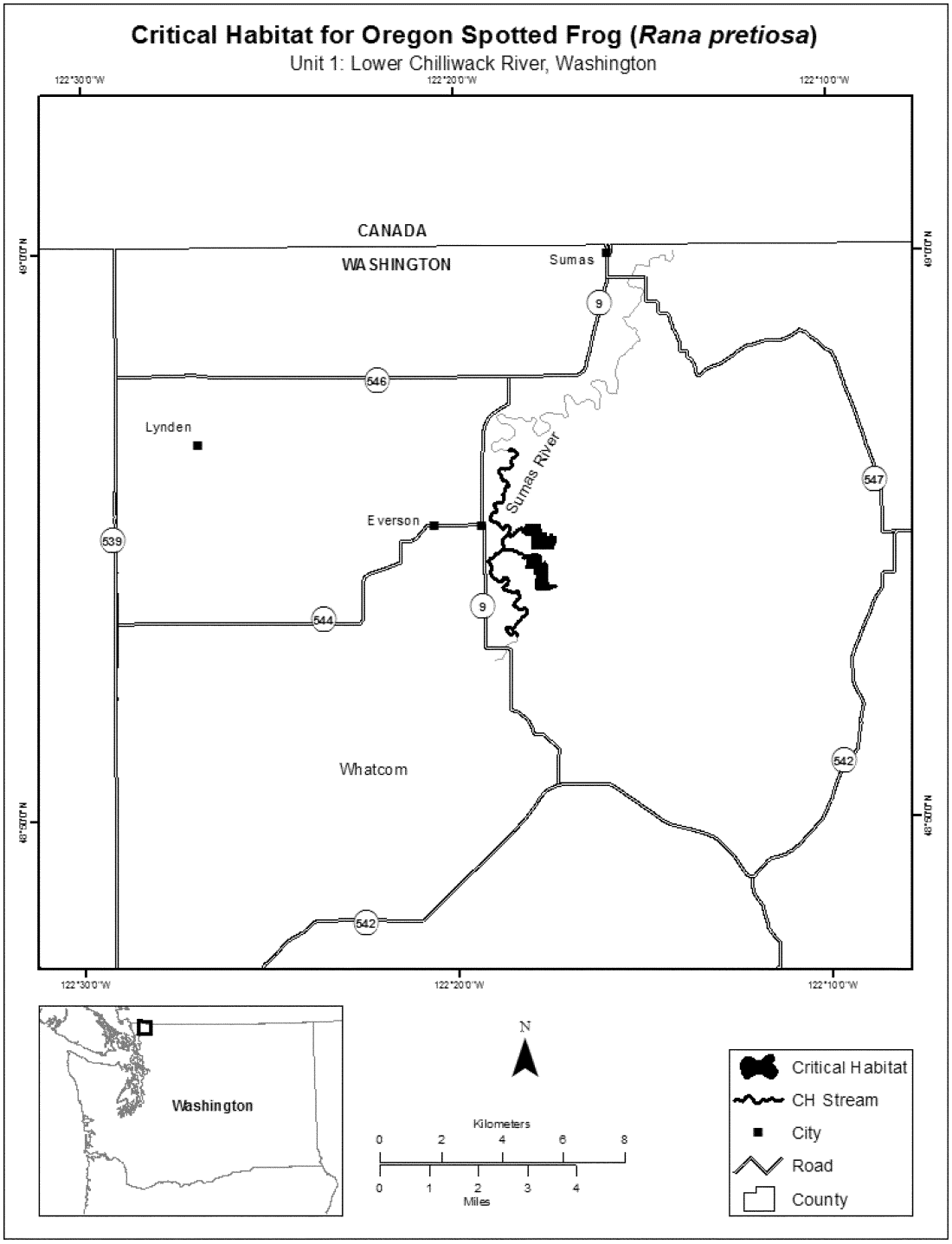
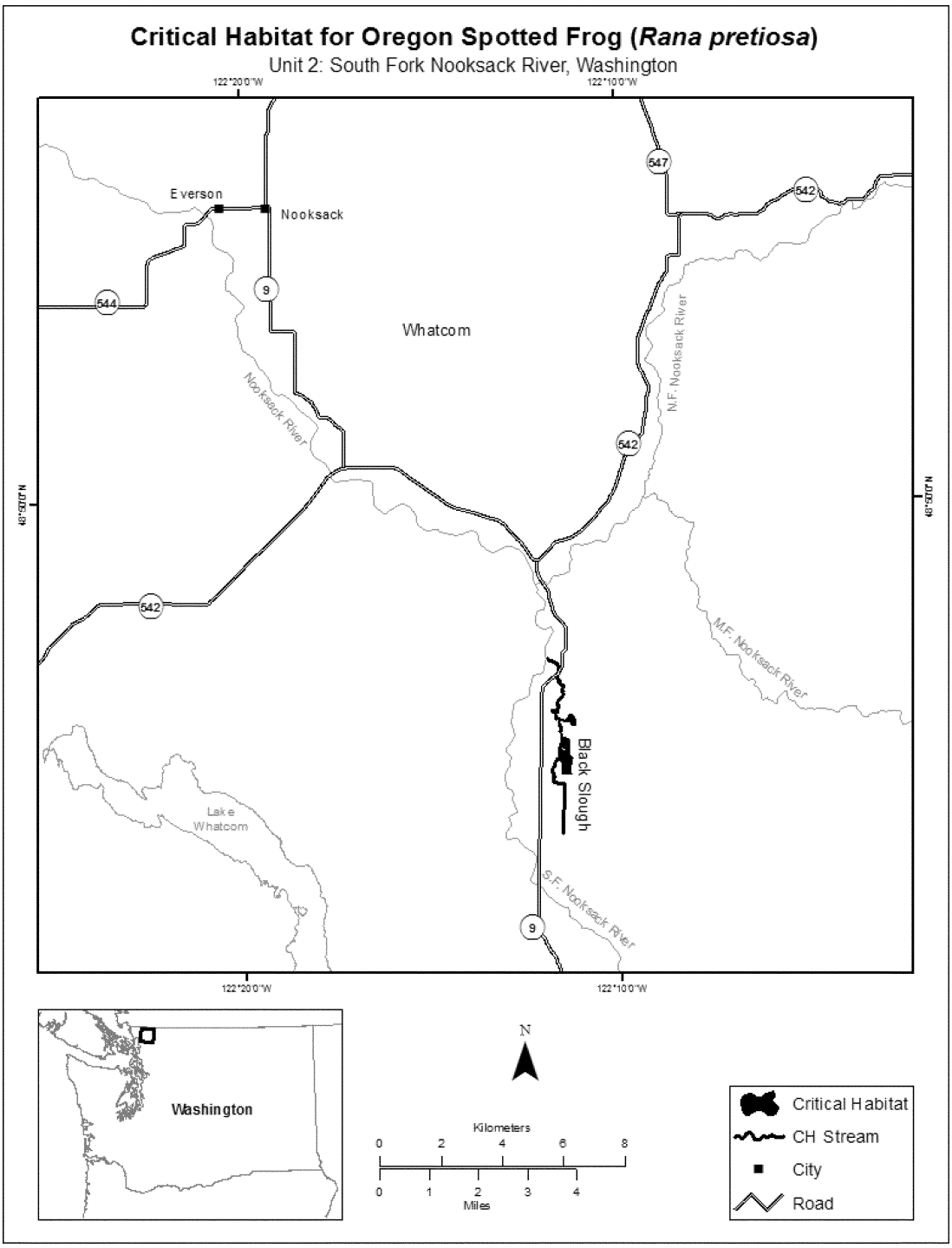
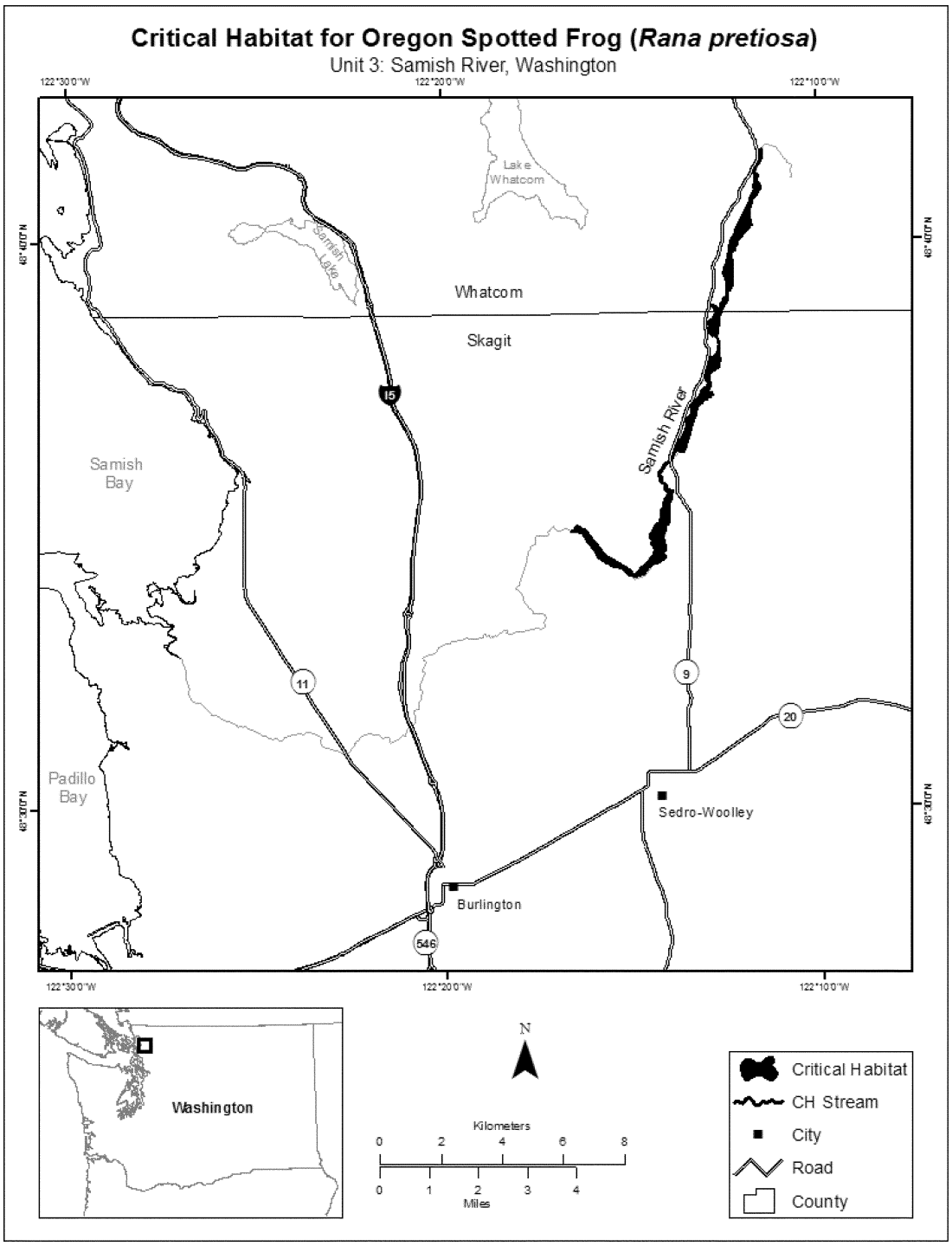
(6) Unit 1: Lower Chilliwack River, Whatcom County, Washington. Map of Unit 1 follows:



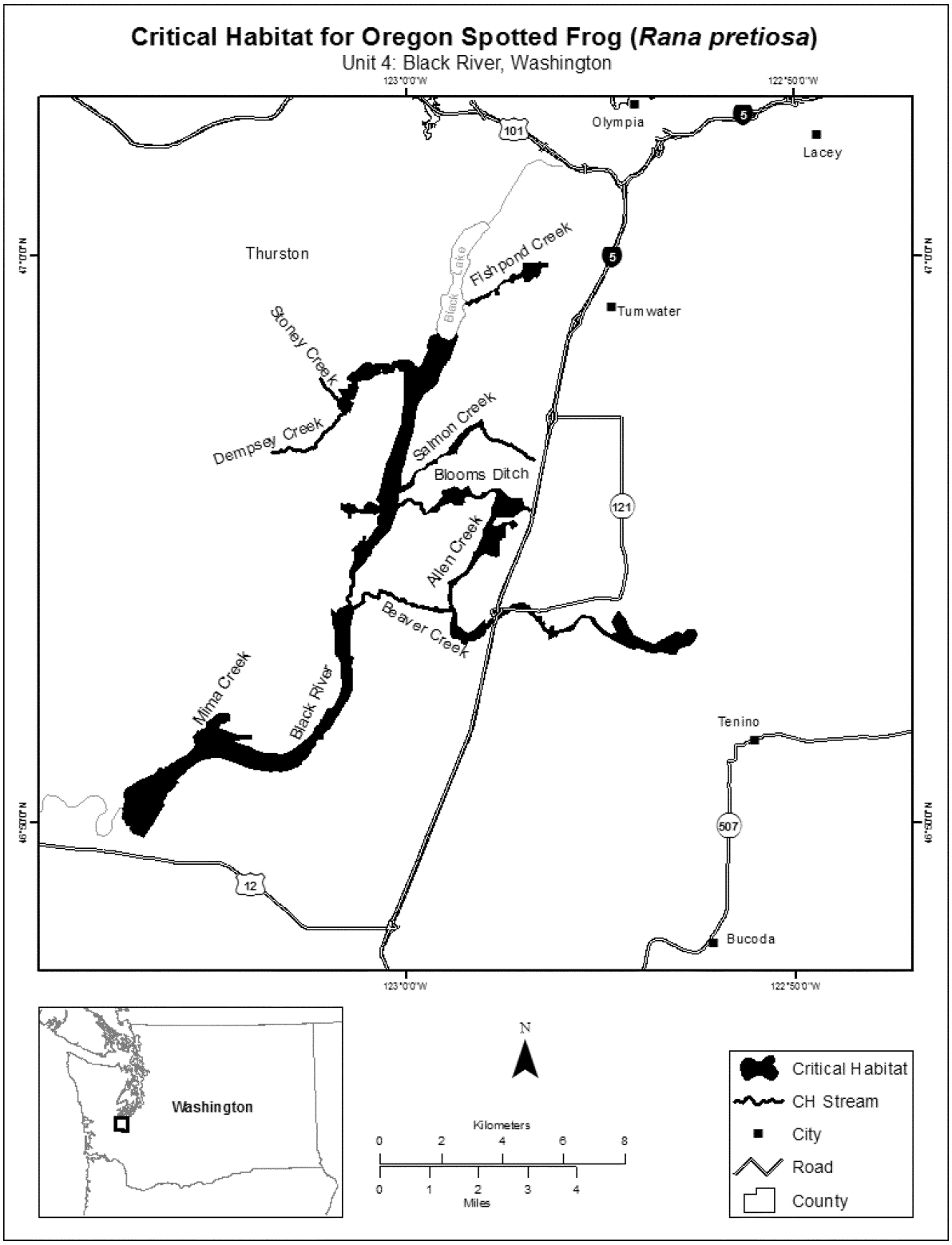
(7) Unit 2: South Fork Nooksack River, Whatcom County, Washington. Map of Unit 2 follows:



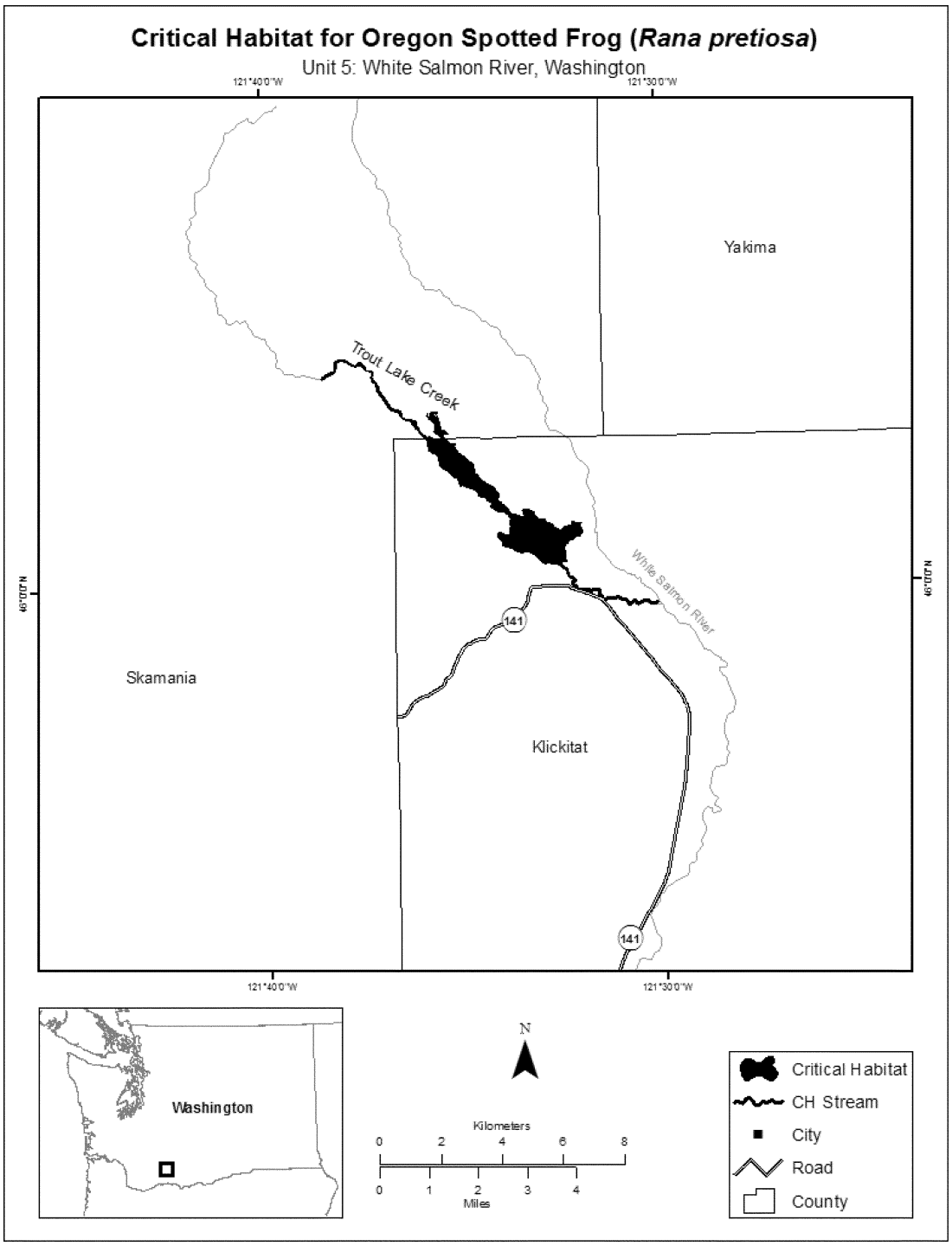
(8) Unit 3: Samish River, Whatcom and Skagit Counties, Washington. Map of Unit 3 follows:



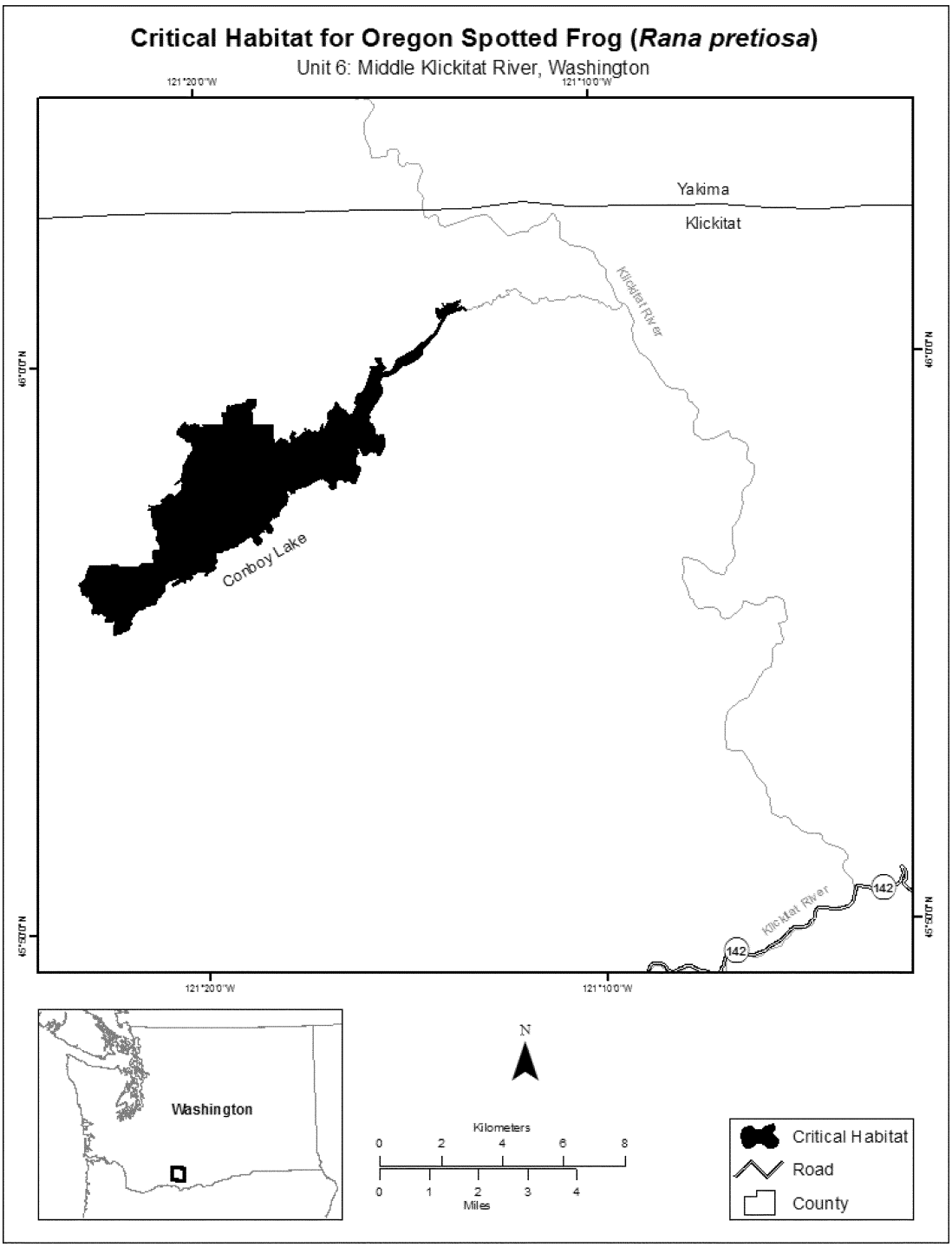
(9) Unit 4: Black River, Thurston County, Washington. Map of Unit 4 follows:



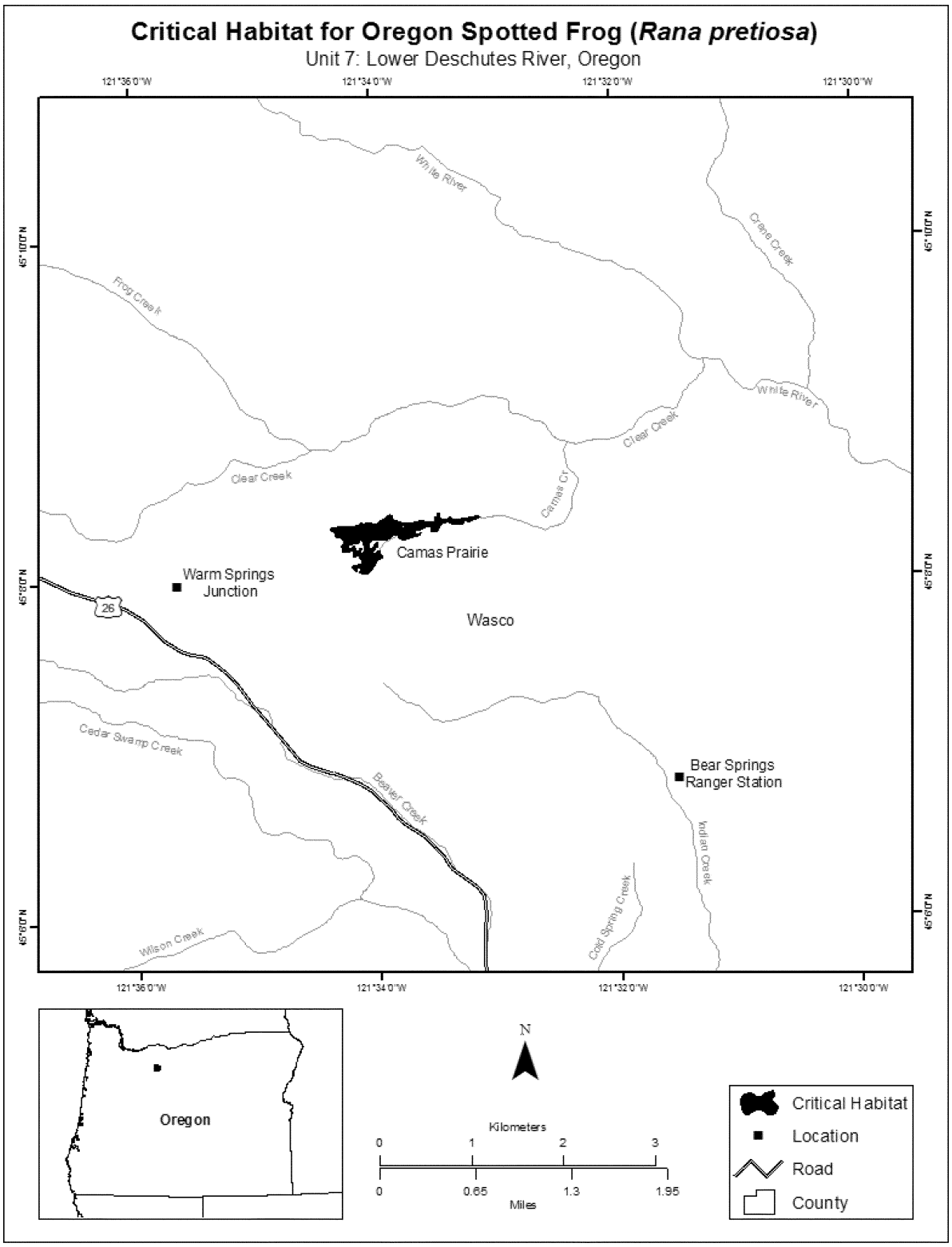
(10) Unit 5: White Salmon River, Skamania and Klickitat Counties, Washington. Map of Unit 5 follows:



(11) Unit 6: Middle Klickitat River, Klickitat County, Washington. Map of Unit 6 follows:

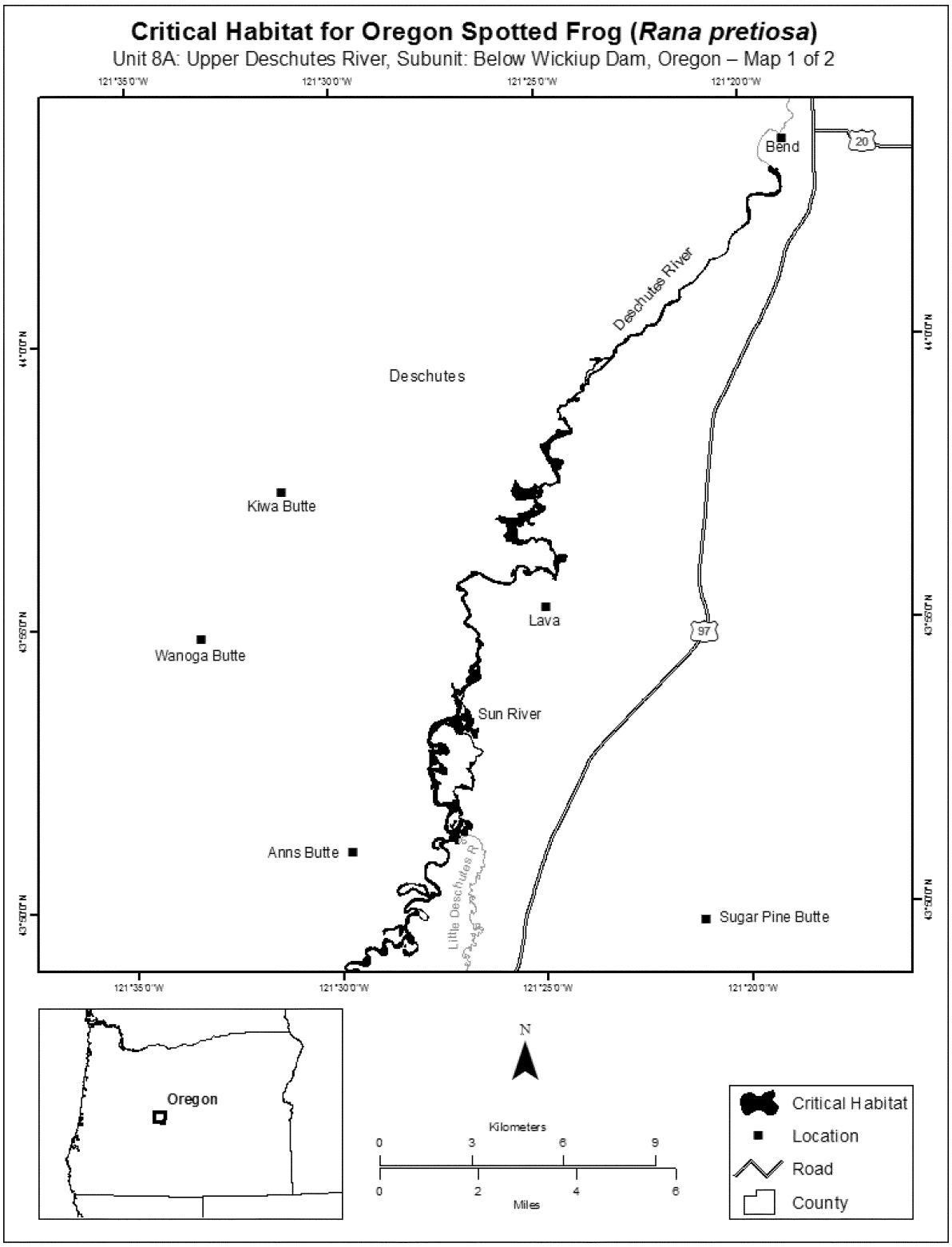


(12) Unit 7: Lower Deschutes River, Wasco County, Oregon. Map of Unit 7 follows:

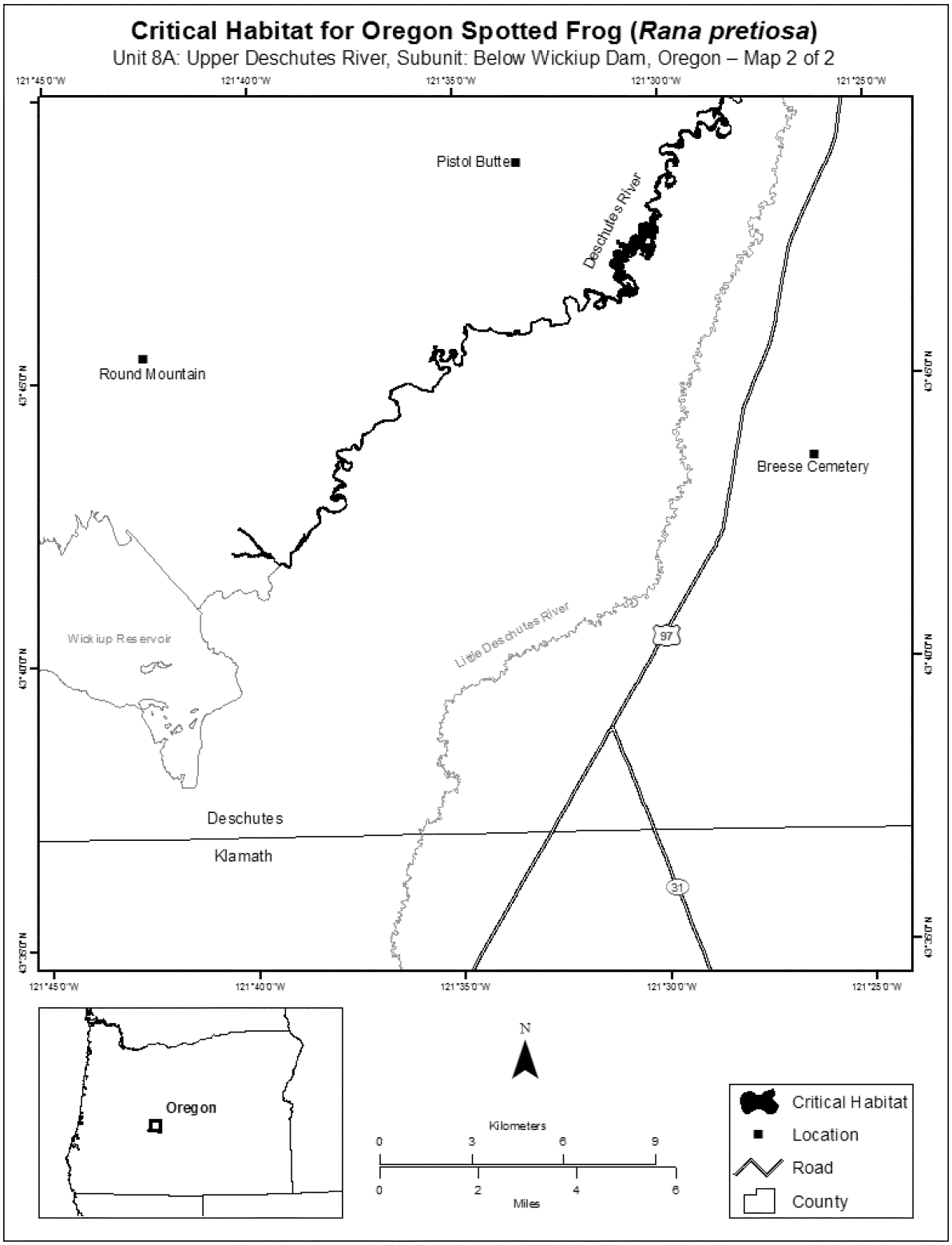


(13) Unit 8A: Upper Deschutes River, Subunit: Below Wickiup Dam, Oregon.

(i) Map 1 of 2, Upper Deschutes River, Below Wickiup Dam, Deschutes County, Oregon. Map 1 of 2 of Unit 8A follows:

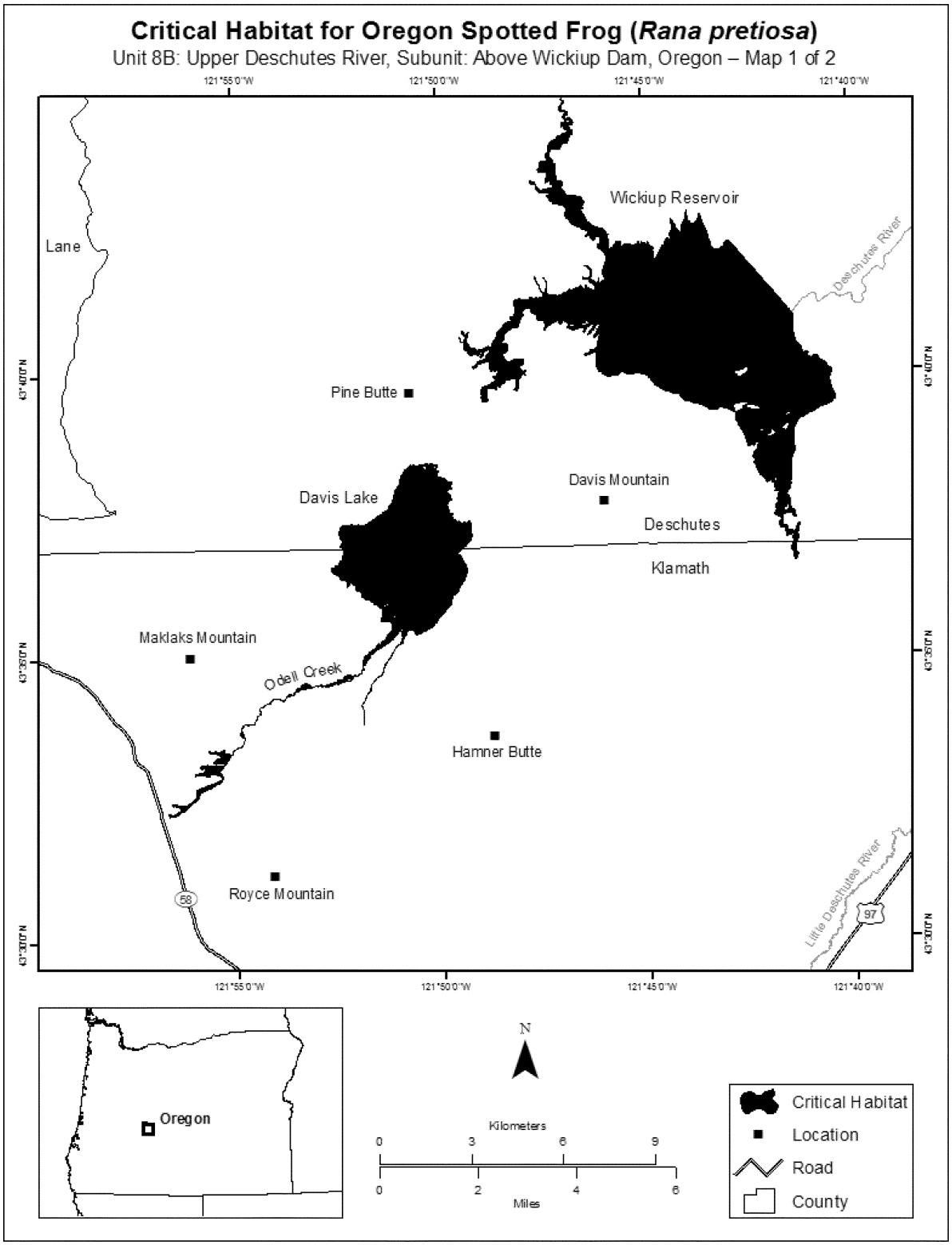


(ii) Map 2 of 2, Upper Deschutes River, Below Wickiup Dam, Deschutes County, Oregon. Map 2 of 2 of Unit 8A follows:

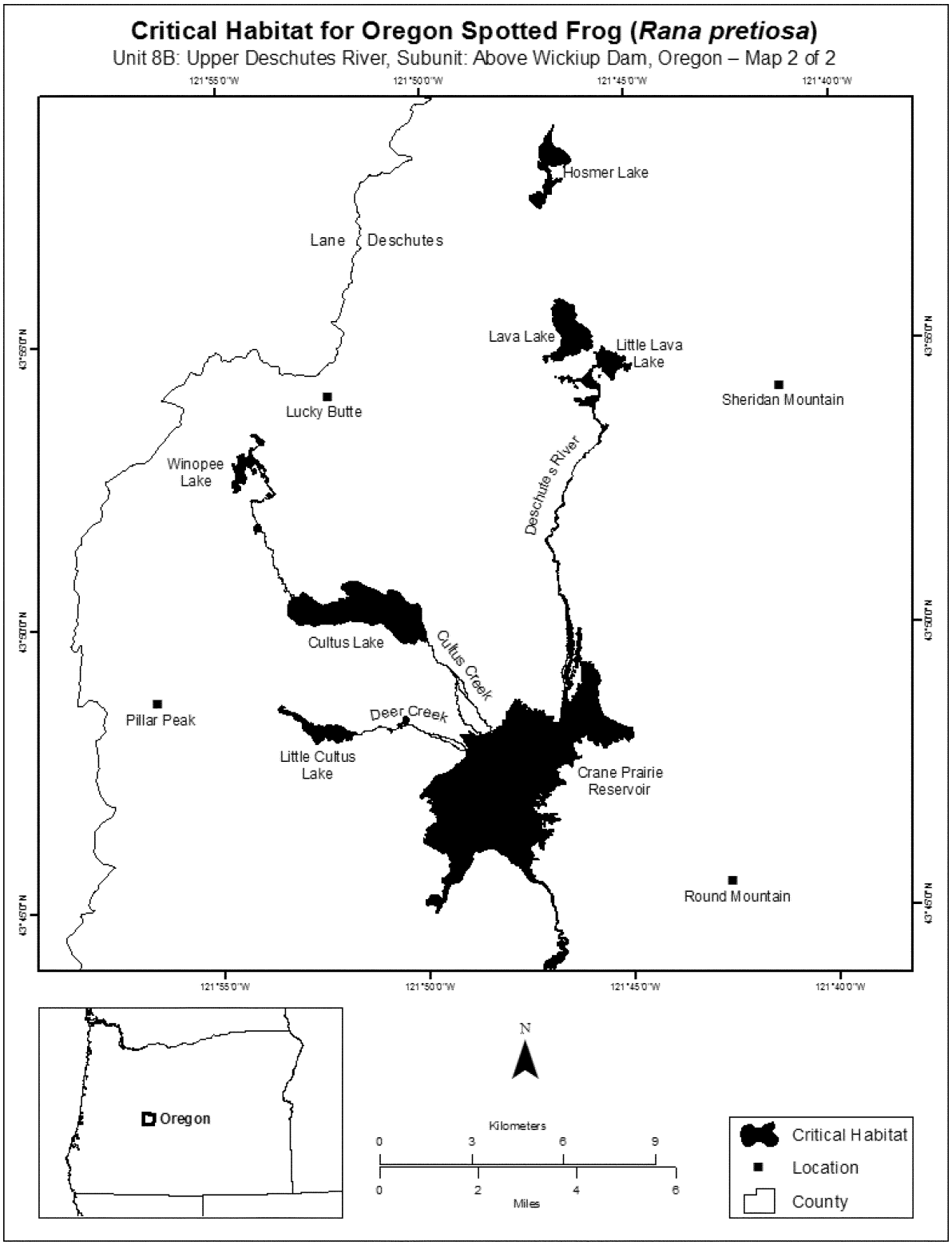


(14) Unit 8B: Upper Deschutes River, Subunit: Above Wickiup Dam, Oregon.

(i) Map 1 of 2, Upper Deschutes River, Above Wickiup Dam, Deschutes and Klamath Counties, Oregon. Map 1 of 2 of Unit 8B follows:

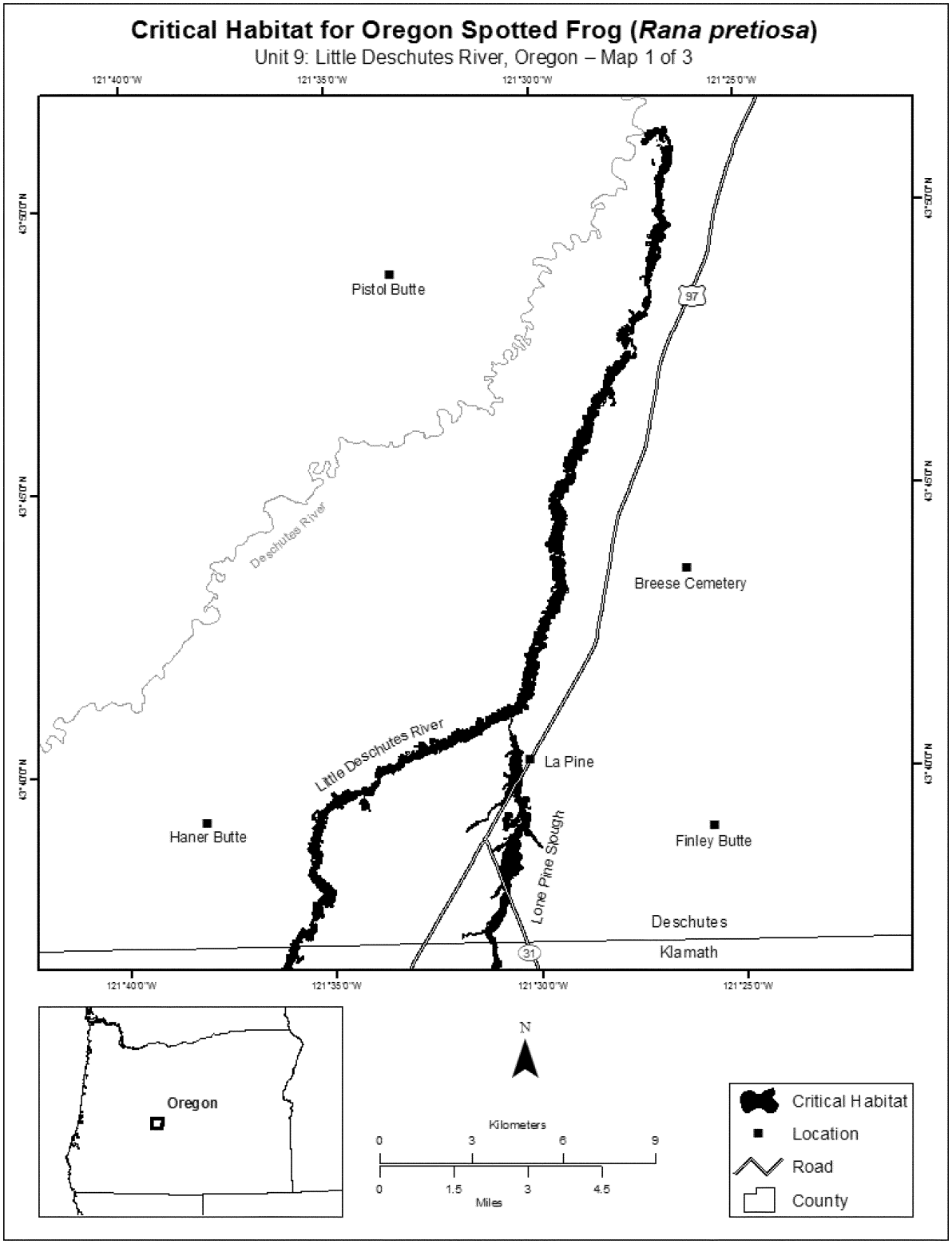


(ii) Map 2 of 2, Upper Deschutes River, Above Wickiup Dam, Deschutes and Klamath Counties, Oregon. Map 2 of 2 of Unit 8B follows:

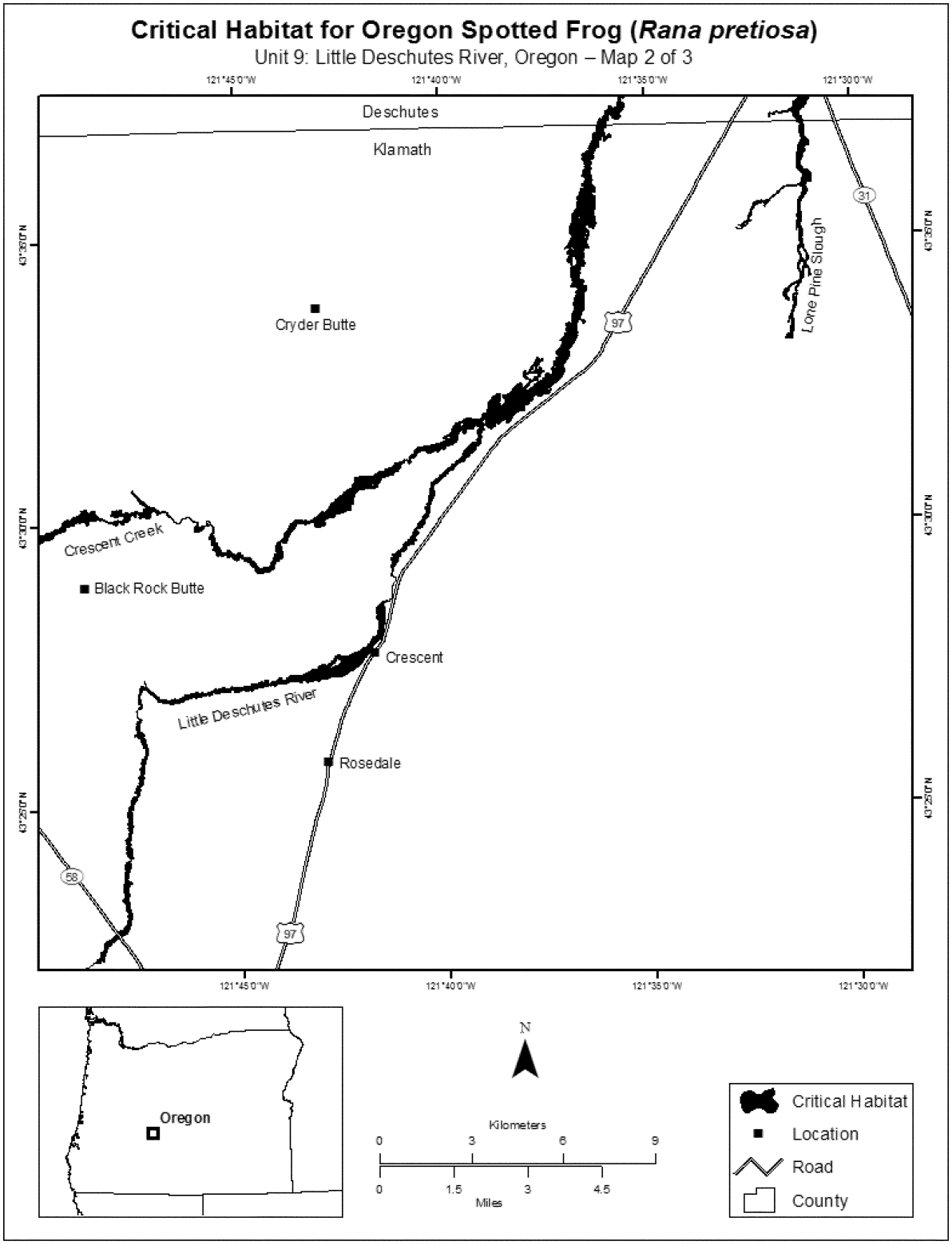


(15) Unit 9: Little Deschutes River, Deschutes and Klamath Counties, Oregon.

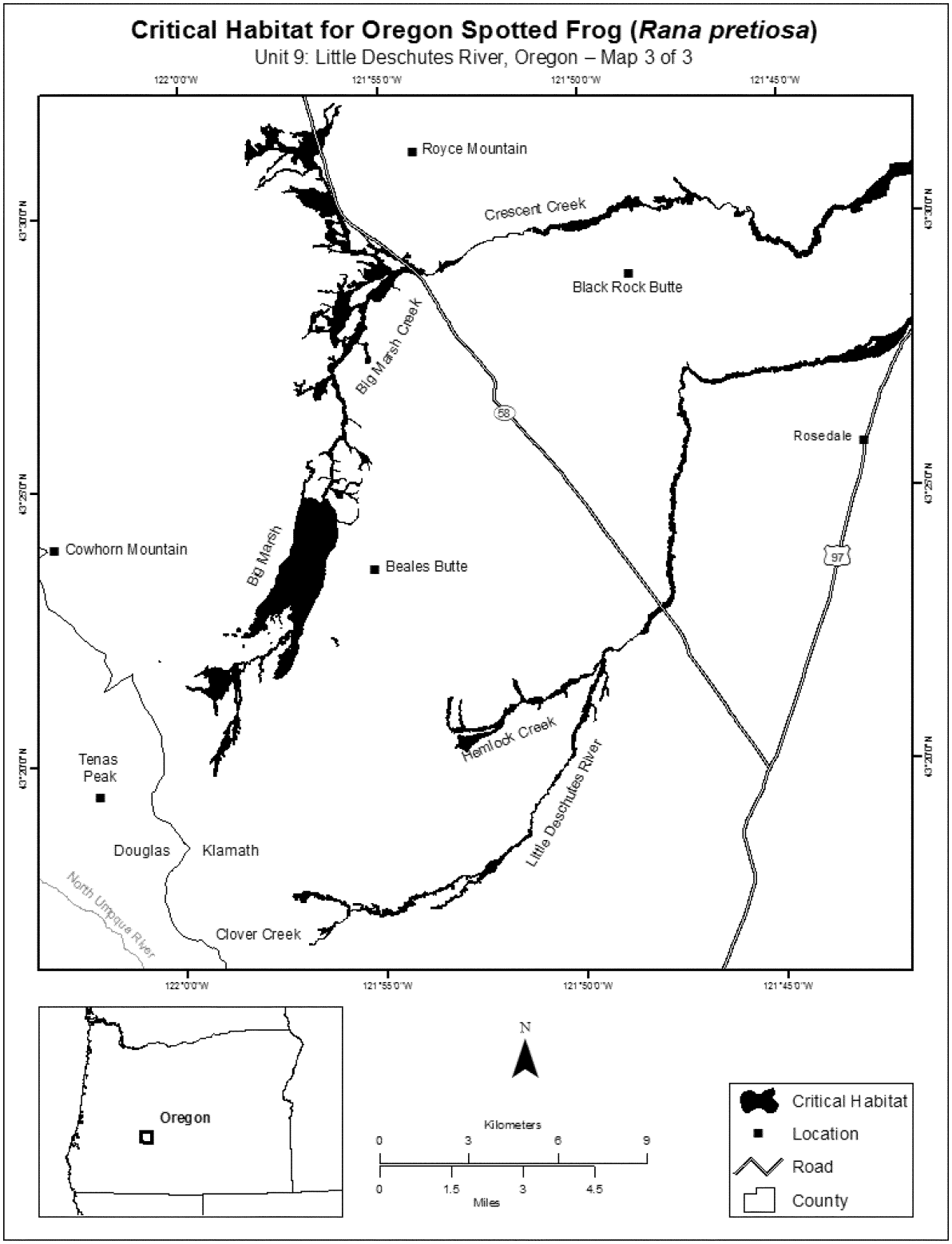
(i) Map 1 of 3, Little Deschutes River, Deschutes and Klamath Counties, Oregon. Map 1 of 3 of Unit 9 follows:



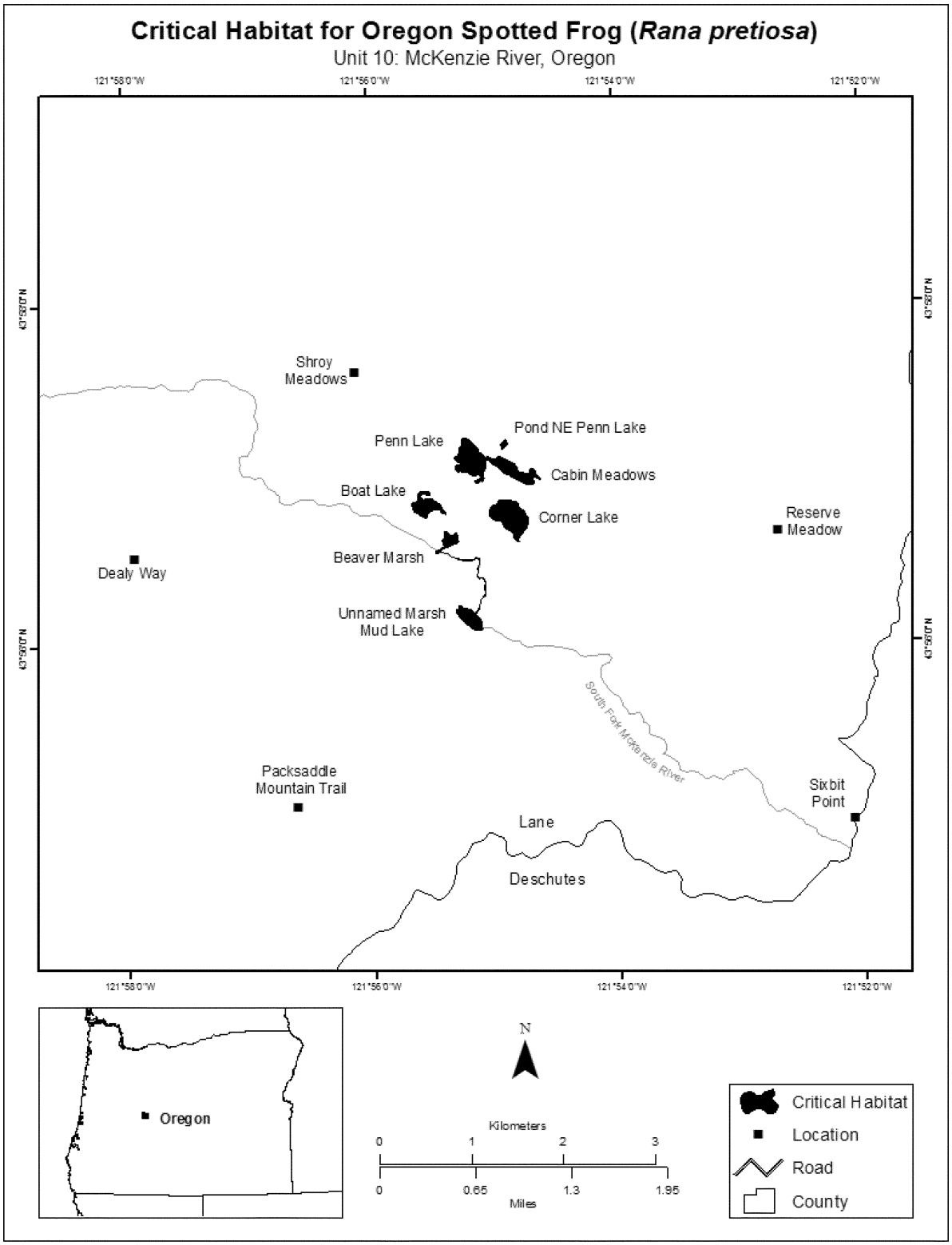
(ii) Map 2 of 3, Little Deschutes River, Deschutes and Klamath Counties, Oregon. Map 2 of 3 of Unit 9 follows:



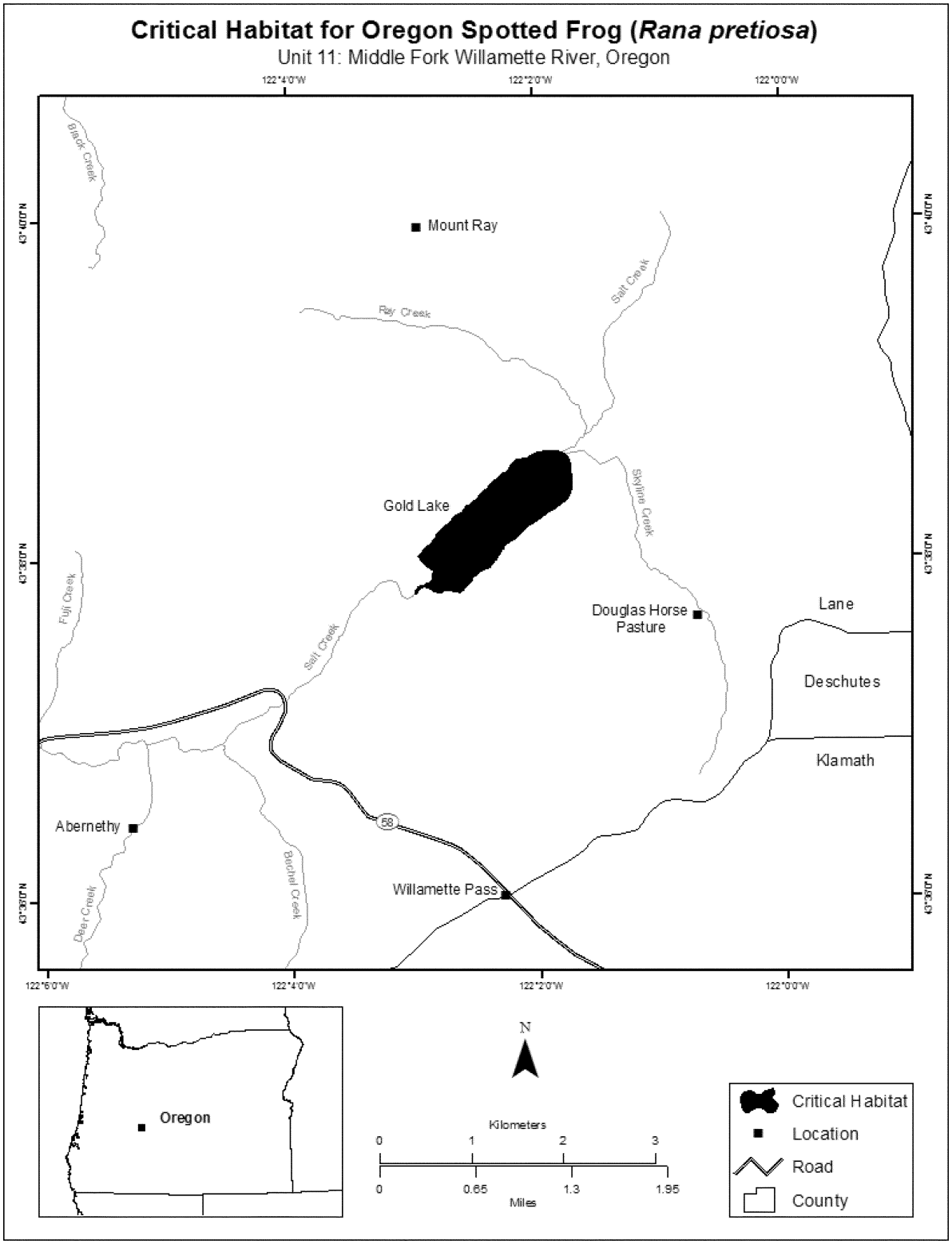
(iii) Map 3 of 3, Little Deschutes River, Deschutes and Klamath Counties, Oregon. Map 3 of 3 of Unit 9 follows:



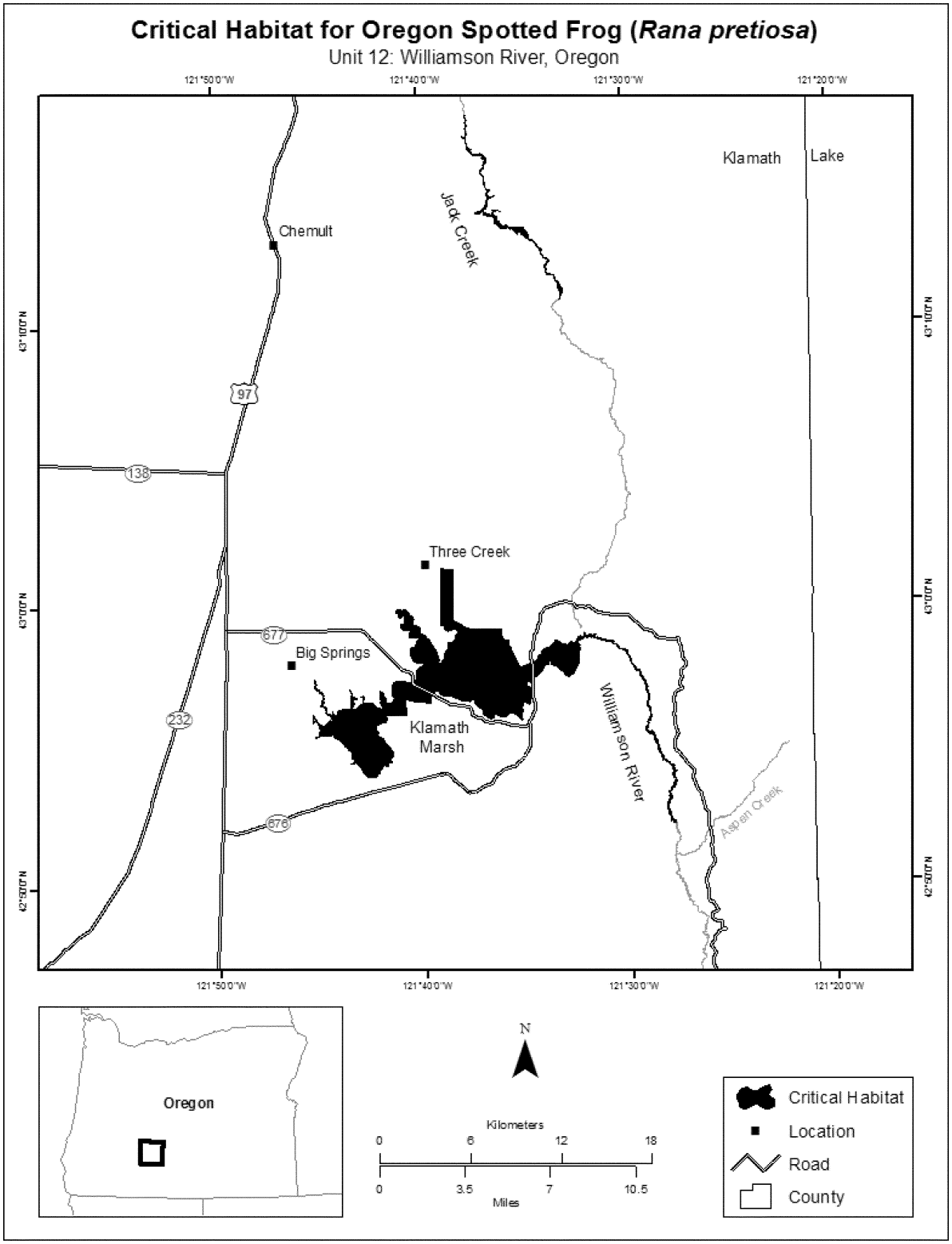
(16) Unit 10: McKenzie River, Lane County, Oregon. Map of Unit 10 follows:



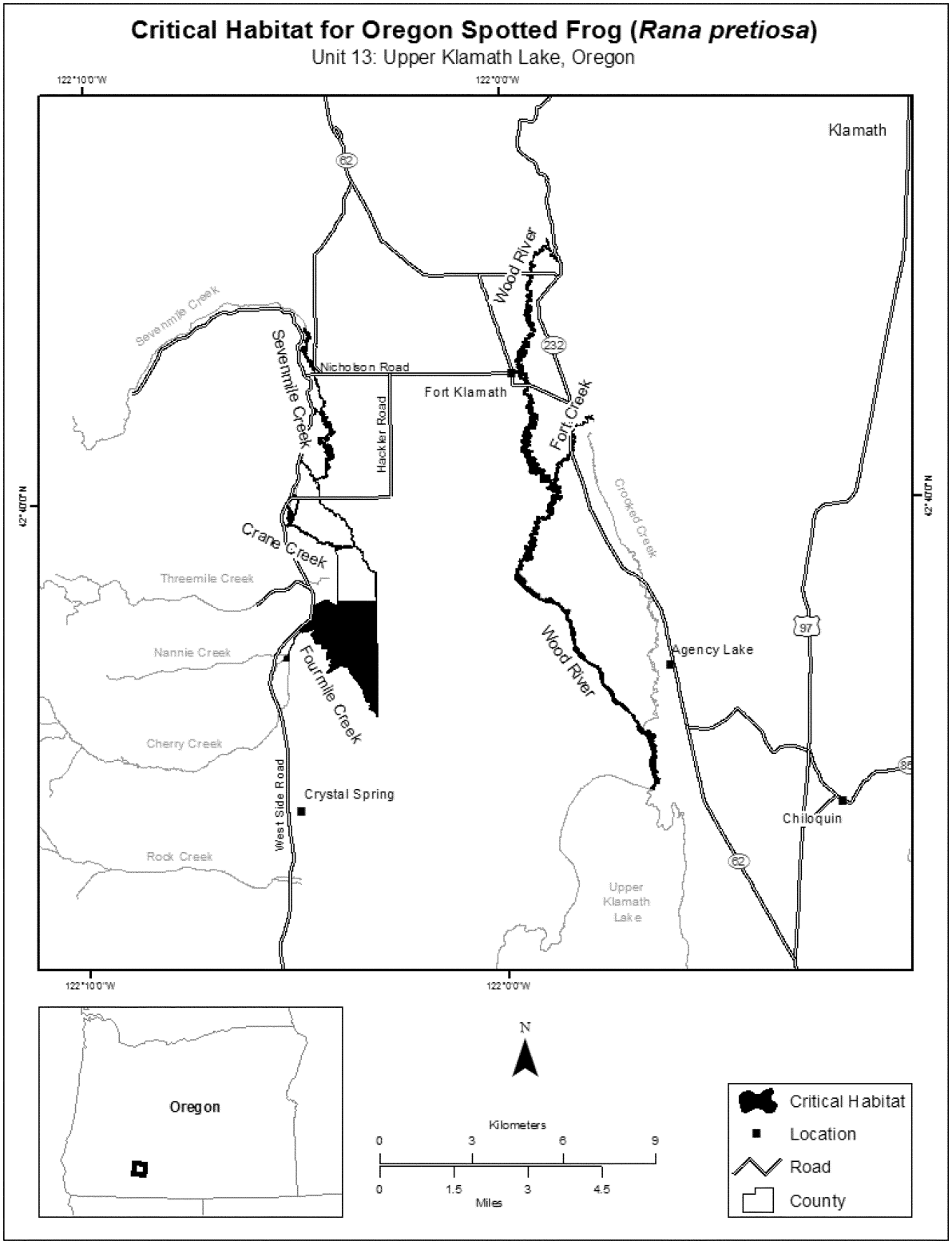
(17) Unit 11: Middle Fork Willamette River, Lane County, Oregon. Map of Unit 11 follows:



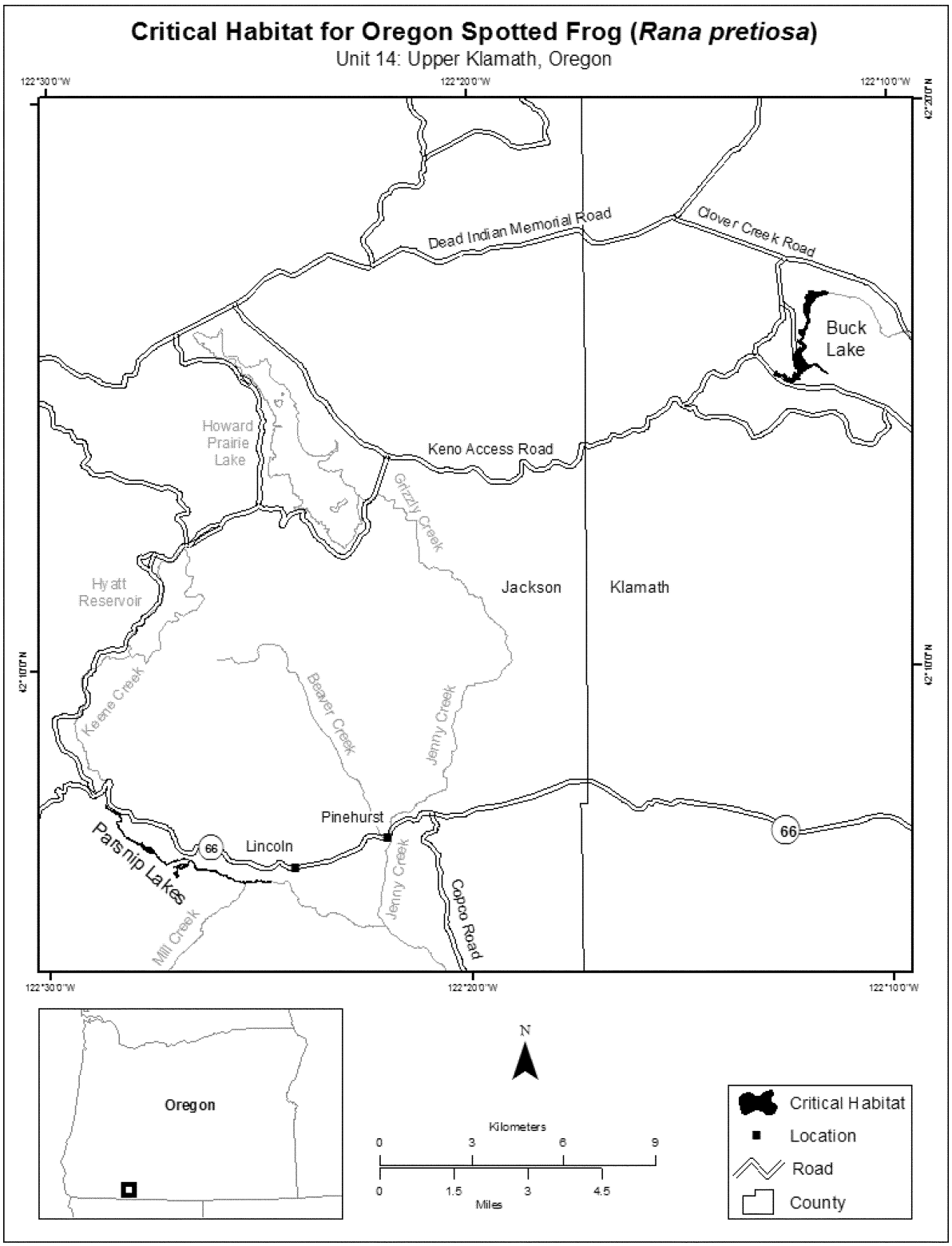
(18) Unit 12: Williamson River, Klamath County, Oregon. Map of Unit 12 follows:



(19) Unit 13: Upper Klamath Lake, Klamath County, Oregon. Map of Unit 13 follows:



(20) Unit 14: Upper Klamath, Jackson and Klamath Counties, Oregon. Map of Unit 14 follows:



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Dated: August 6, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–20985 Filed 8–28–13; 8:45 am]

BILLING CODE 4310–55–C