



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2023-0188; FXES1111090FEDR-245-FF09E21000]

RIN 1018-BH12

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Dixie Valley Toad

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Dixie Valley toad (*Anaxyrus williamsi*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 930 acres (376 hectares) in Churchill County, Nevada, fall within the boundaries of the proposed critical habitat designation. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for the Dixie Valley toad.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments submitted electronically using the Federal eRulemaking Portal (see

ADDRESSES, below) must be received by 11:59 p.m. eastern time on the closing date.

We must receive requests for a public hearing, in writing, at the address shown in **FOR**

FURTHER INFORMATION CONTACT by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

- (1) *Electronically:* Go to the Federal eRulemaking Portal:

<https://www.regulations.gov>. In the Search box, enter FWS-R8-ES-2023-0188, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on “Comment.”

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R8-ES-2023-0188, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

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

Availability of supporting materials: Supporting materials, such as the species status assessment (SSA) report and draft economic analysis (DEA), are available at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2023-0188. For the proposed critical habitat designation, the coordinates or plot points or both from which the map is generated are included in the decision file for this critical habitat designation and are available at <https://www.regulations.gov> under Docket No. FWS-R8-ES-2023-0188.

FOR FURTHER INFORMATION CONTACT: Jodie Mamuschia, Field Supervisor, U.S. Fish and Wildlife Service, Reno Fish and Wildlife Office, 1340 Financial Blvd., Suite 234, Reno, NV 89502; telephone 775–861–6300. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. Please see Docket No.

FWS-R8-ES-2023-0188 on <https://www.regulations.gov> for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 et seq.), when we determine that any species warrants listing as an endangered or threatened species, we are required to designate critical habitat, to the maximum extent prudent and determinable. Designations of critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 et seq.).

What this document does. We propose to designate critical habitat for the Dixie Valley toad, which is listed as an endangered species (see 87 FR 73971; December 2, 2022).

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

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific data available and be as accurate and as effective as possible.

Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Specific information on:

(a) The amount and distribution of Dixie Valley toad habitat;

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

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

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

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

(4) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and any additional information regarding probable economic impacts that we should consider.

(5) 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. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

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

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

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific 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 <https://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <https://www.regulations.gov>.

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

Our final determination may differ from this proposal because we will consider all comments we receive during the comment period as well as new information that may become available after this proposal. Based on the new information we receive (and, if relevant, any comments on that new information), our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species, or may exempt areas owned or controlled by the Department of Defense if we find the Air Station's integrated natural resources management plan (INRMP) provides a conservation benefit to the species in accordance with 50 CFR 424.12(h). In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the *Federal Register* and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the *Federal Register*. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On April 7, 2022, we published in the *Federal Register* a proposed rule (87 FR 20374) and emergency listing rule (87 FR 20336) to list the Dixie Valley toad as an endangered species. We determined that designation of critical habitat was prudent but not determinable because we lacked specific information on the impacts of our designation. On December 2, 2022, we published in the *Federal Register* (87 FR 73971) a final rule to list the Dixie Valley toad as an endangered species. In that rule, we stated that assessments of the economic impacts that may occur due to a critical habitat designation were not yet complete. See the April 7, 2022, emergency rule and December 2, 2022, final rule for more information on previous Federal actions concerning the Dixie Valley toad.

Peer Review

In accordance with our joint policy on peer review published in the *Federal Register* on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the Dixie Valley toad SSA report (Service 2022, entire). We sent the SSA report to four independent peer reviewers and received three responses; we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule. Results of this structured peer review process can be found at <https://www.regulations.gov>. For a summary of peer reviewer comments, please refer to the December 2, 2022, final listing rule (87 FR 73971).

Background

It is our intent to discuss in this proposed rule only those topics directly relevant to the designation of critical habitat for the Dixie Valley toad. For more information on the taxonomy, life history, habitat, population descriptions, and factors affecting the

species, please refer to the April 7, 2022, emergency listing rule (87 FR 20336) and proposed listing rule (87 FR 20374), as well as the December 2, 2022, final listing rule (87 FR 73971).

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

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

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

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

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

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

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 each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement “reasonable and prudent alternatives” to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act’s definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or

biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

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

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

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include

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

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define “physical or biological features essential to the conservation of the species” as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A

feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

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

The following is a summary of the key information describing the physical and biological features essential to the conservation of the Dixie Valley toad. More information on species ecology and resource needs is available in chapter 3 of the SSA report (Service 2022, pp. 14–26), which is available on <https://www.regulations.gov> at

Docket No. FWS-R8-ES-2023-0188, and on the Service's Environmental Conservation Online System (ECOS) website at <https://ecos.fws.gov/ServCat/DownloadFile/215829>.
Space For Individual and Population Growth and For Normal Behavior

Dixie Valley toads need enough wetland habitat to maintain population dynamics and life-history functions. Wetland habitat needs to include enough wetted area and have the natural range of variability of water extent to support the vegetation Dixie Valley toads use for brumation (periods of inactivity during cold temperatures) and shelter; open, ephemeral wetted areas for breeding; as well as the prey items the species relies upon.

There is little information on Dixie Valley toad dispersal capacity, besides the fact that they cannot disperse outside of the Dixie Meadows wetlands because they are surrounded by a dry landscape. However, we assume Dixie Valley toads can disperse among the wetlands, via upland corridors, during wet periods or rain. Maintaining the upland dispersal corridors between wetlands is important to maintain genetic diversity within the population and species.

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

Dixie Meadows contains 122 known spring and seep sources (McGinley and Associates 2021, pp. 1–2) that distribute water across the landscape. Dixie Valley toads are completely reliant on the wetlands produced by the Dixie Meadows springs, as the species is highly aquatic and individuals are rarely found more than 14 meters (m) (46 feet (ft)) away from water (Halstead et al. 2021, pp. 28, 30).

Not only is the water itself necessary for the Dixie Valley toad, but the warm water temperatures produced by the springs are necessary for the species. The Dixie Meadows springs are thermal springs, providing relatively stable, warm temperatures to the wetlands. Dixie Valley toads select areas that are warmer than other surrounding available habitat, particularly in spring, fall, and winter months (Halstead et al. 2021, pp.

30, 33–34). In the spring, Dixie Valley toads select areas with warmer water for breeding (oviposition sites), which allows for faster egg hatching and time to metamorphosis. In the fall, Dixie Valley toads select different areas (closer to thermal springs with dense vegetation) to satisfy their thermal preferences as nighttime temperatures decrease. As they enter winter months, toads find areas with consistent warm temperatures during brumation (periods of inactivity during cold temperatures) so that they do not freeze (Halstead et al. 2021, pp. 30, 33–34). Dixie Valley toads are reliant on warm water temperatures, with Dixie Valley toad tadpoles found most often between 20°C–28°C (68°F–82°F), in wetland habitat for all life-history stages (Rose et al. 2023, p. 560).

The exact water quality parameters preferred by the Dixie Valley toad are unknown; however, this species has evolved only in Dixie Meadows and is presumed to thrive in the existing complex mix of water emanating from both the basin-fill aquifer and the deep geothermal reservoir. Temperature, dissolved oxygen, pH, salinity and water conductivity, and excessive nutrient concentrations (among others) have all been shown to have direct and indirect impacts to amphibian species when found to be outside of naturally occurring levels for any particular location (Sparling 2010, pp. 105–117). The natural variation of water quality parameters found in Dixie Meadows is considered a need for the species.

There is no published information on the feeding habits of the Dixie Valley toad. It is assumed that adult Dixie Valley toads are opportunistic feeders, similar to other toad species (e.g., Muths and Nanjappa 2005, p. 395), and their diet most likely consists of the available aquatic and terrestrial invertebrates found in Dixie Meadows. Toad tadpoles are assumed to feed on algae and detritus (e.g., Fellers 2005, p. 407).

Cover or Shelter

Dixie Valley toads need sufficient wetland vegetation to use as shelter. The species uses dense stands of bulrush (*Schoenoplectus* spp.) for shelter from predators and

as brumation sites during cold winter months. Dixie Valley toads use other types of vegetation for shelter as well, so the natural heterogeneity of the wetland vegetation found in Dixie Meadows is a need for the species (e.g., *Juncus balticus* (Baltic rush), *Schoenoplectus* spp. (bulrushes), *Phragmites australis* (common reed), *Eleocharis* spp. (spikerushes), *Carex* spp. (sedges), and *Distichlis spicata* (saltgrass)) (Halstead et al. 2021, p. 34).

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

Dixie Valley toad breeding occurs annually from March through May (Forrest et al. 2013, p. 76). Breeding appears protracted due to the thermal nature of the habitat and can last for months, with toads breeding early in the year in habitats closer to the thermal spring sources and then moving downstream into habitats as they warm throughout the spring and early summer, which is not typical of other toad species that have a much more contracted breeding season of 3 to 4 weeks (e.g., Sherman 1980, pp. 18–19, 72–73). Dixie Valley toads prefer to breed in open, ephemeral wetted areas adjacent to vegetated areas (Rose et al. 2023, p. 560).

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the Dixie Valley toad from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the SSA report (Service 2022, pp. 14–27; available on <https://www.regulations.gov> under Docket No. FWS-R8-ES-2022-0024). We have determined that the following physical or biological features are essential to the conservation of the Dixie Valley toad:

(1) Wetlands within Dixie Valley that are composed of some combination of the following characteristics:

(a) Diverse wetland vegetation that includes, but is not limited to, native phreatophyte (deep-rooted) species found within the Dixie Meadows wetlands (e.g.,

Juncus balticus (Baltic rush), *Schoenoplectus* spp. (bulrushes), *Phragmites australis* (common reed), *Eleocharis* spp. (spikerushes), *Carex* spp. (sedges), and *Distichlis spicata* (saltgrass)).

(b) Dense bulrush stands for brumation and shelter.

(c) Open, ephemerally wetted areas adjacent to vegetated areas for breeding.

(d) The natural range of variability of water temperatures found throughout each wetland.

(e) The natural range of variability of water extent found throughout each wetland.

(f) Water quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(g) A variety of aquatic and terrestrial invertebrates, detritus, and algae for feeding.

(2) Upland habitat between wetlands through which Dixie Valley toads can disperse when conditions permit.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Dixie Valley toad may require special management considerations or protection to reduce the following threats: (1) groundwater pumping activities, such as those associated with geothermal energy development and production; and (2) cattle grazing. Geothermal development is considered the primary threat to the Dixie Valley toad. Specifically, the Dixie Meadows Geothermal Utilization Project could have significant, detrimental impacts to the water flow and temperature emanating from the thermal springs the Dixie

Valley toad relies on (Service 2022, pp. 39–41, 80–84, 113–119; Tetra Tech 2023a, pp. 3–7; Tetra Tech 2023b, pp. 2–3). A decrease in water flow would reduce habitat in the wetlands, and water temperatures in the wetlands could be reduced to a degree that the species cannot survive through cold winter months. Cattle can step on Dixie Valley toads while grazing, causing direct mortality and grazing may have impacts on water quality due to defecation and urination in the water.

Management activities that could ameliorate these threats include, but are not limited to, development and use of best management practices designed to maintain natural spring flows, spring temperatures, and water quality; use of best management practices designed to control or minimize the level of grazing in order to maintain the desired condition of Dixie Valley toad habitat; and restoration of disturbed features to their pre-disturbance, natural state.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because we have not identified any unoccupied areas that meet the Act's definition of critical habitat. There are no unoccupied areas that have the unique characteristics and physical and biological features necessary to support the Dixie Valley toad.

Sources of data for the Dixie Valley toad and its habitat needs include peer-reviewed articles on the species and related species, satellite imagery analysis done by the U.S. Geological Survey (USGS), and communication with species experts.

To determine which areas to propose as critical habitat, we used the Dixie Meadows wetlands as a starting point. All of the wetlands are considered occupied by the Dixie Valley toad (Rose et al. 2023, entire) and are proposed as critical habitat.

We then used USGS's satellite imagery analysis on the extent of land cover vegetation and soil wetness from October 2015 through January 2022 (Bransky et al. 2023, entire), to determine the upland habitat that could be used by Dixie Valley toads to disperse between wetlands. We delineated all areas of habitat classified by USGS with at least a class two landcover class (apparent moist soil and sparse or short vegetation) at some time during the analysis period, using the Green Normalized Difference Vegetation Index (gNDVI; Gitelson et al. 1996, entire), as suitable upland dispersal habitat for inclusion in the proposed critical habitat. Although upland habitat is not occupied year-round, it is assumed to be used during wet periods each year, playing a vital role in maintaining genetic diversity throughout the single population of the species.

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

- (1) We identified the wetlands occupied by the Dixie Valley toad.

- (2) We then delineated the upland habitat between wetlands that included all areas that could be used for dispersal. Upland habitat was considered dispersal habitat if it has been classified by USGS at some time from October 2015 through January 2022 as at least a gNDVI class two land cover class based on satellite imagery analysis.

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 necessary for the Dixie

Valley toad. 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.

The proposed critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under **Proposed Regulation Promulgation**. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on <https://www.regulations.gov> at Docket No. FWS-R8-ES-2023-0188.

Proposed Critical Habitat Designation

We are proposing to designate approximately 930 acres (ac) (376 hectares (ha)) in one unit as critical habitat for the Dixie Valley toad. The critical habitat area we describe below as Dixie Meadows is occupied by the species and constitutes our current best assessment of the area that meets the definition of critical habitat for the Dixie Valley toad. Table 1 shows the land ownership and approximate areas of the proposed critical habitat unit for the Dixie Valley toad.

TABLE 1—PROPOSED CRITICAL HABITAT UNIT FOR THE DIXIE VALLEY TOAD
 [Area estimates reflect all land within critical habitat unit boundaries.]

Critical Habitat Unit	Land Ownership by Type	Size of Unit in Acres (Hectares)	Occupied?
Dixie Meadows	Department of Defense (DoD)	588 (238)	Yes
	BLM	342 (138)	

	<i>Total</i>	<i>930 (376)</i>	
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We present a brief description and map of the proposed unit, and reasons why it meets the definition of critical habitat for the Dixie Valley toad, below.

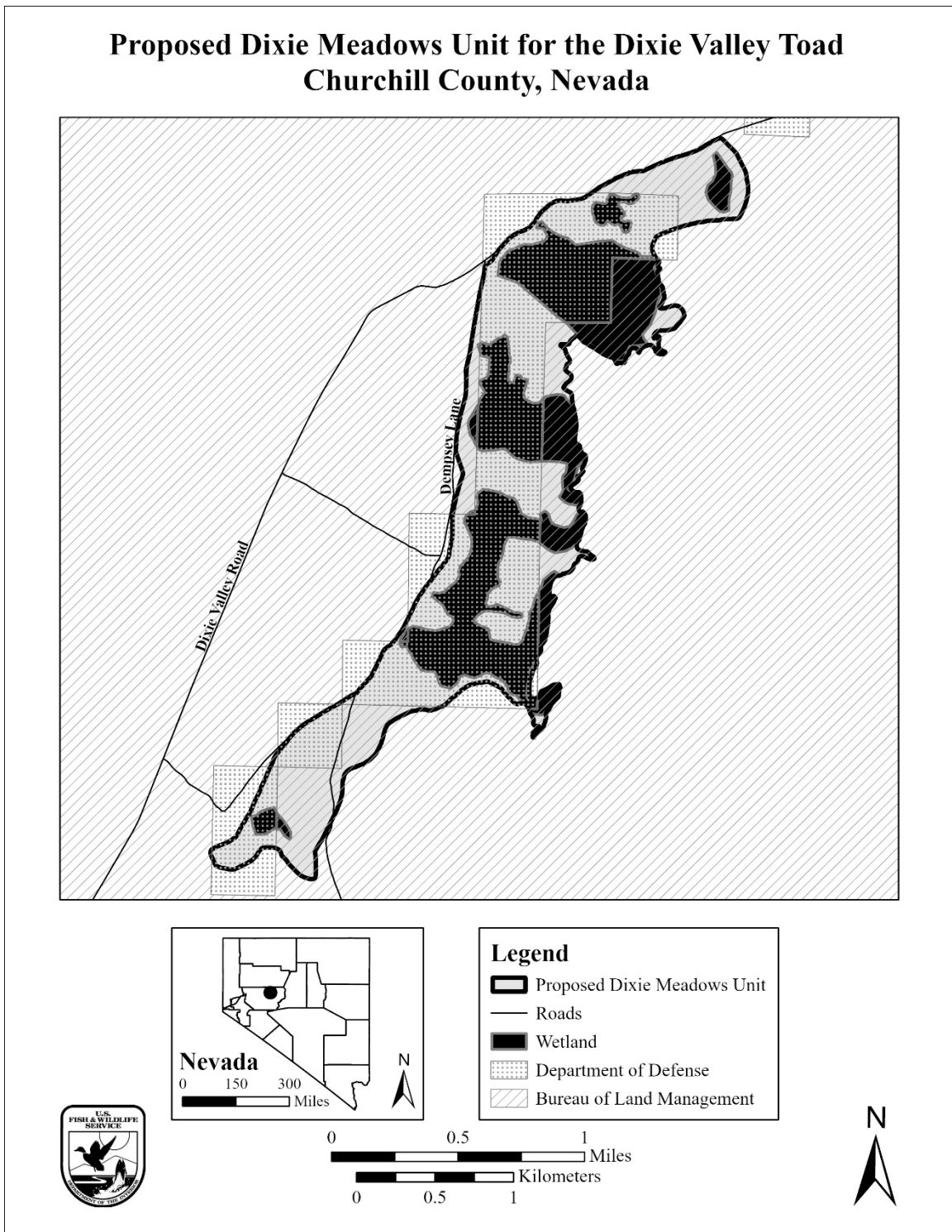
Dixie Meadows Unit

The Dixie Meadows Unit consists of 930 ac (376 ha) of occupied wetland and upland habitat in Dixie Meadows, Churchill County, Nevada. This unit encompasses the entire range of the Dixie Valley toad and contains all of the physical or biological features essential to the conservation of the species. This unit is essential to the recovery of Dixie Valley toad because it includes all the habitat that is occupied by the species across its range. Special management considerations or protection may be required to protect against impacts from threats that are anticipated: to reduce water flow, temperature, and quality emanating from the springs; and to reduce water quality, water temperature, the amount of wetted area, and vegetation on the landscape. Sources of these threats include geothermal development and production, groundwater pumping activities, and grazing (see **Special Management Considerations or Protection**, above). Special management considerations related to geothermal development and production, groundwater pumping, and grazing include, but are not limited to: development and use of best management practices designed to maintain natural spring flows, spring temperatures, and water quality; use of best management practices designed to control or minimize the level of grazing in order to maintain the desired condition of Dixie Valley toad habitat; and restoration of disturbed features back to their pre-disturbance, natural state.

Roughly 63 percent (588 ac (238 ha)) of the Unit is part of the Air Station's lands and 37 percent (342 ac (138 ha)) is Bureau of Land Management (BLM) land. The 588 ac (238 ha) of Air Station lands are being considered for exemption from the critical habitat designation (see **Exemptions**, below).

A map of the proposed unit, showing areas of wetlands, the Air Station's lands, and BLM land appears below. Please note that the BLM lands are those areas within the proposed unit's boundaries that are not labeled as Department of Defense lands:

Figure 1. Proposed Dixie Meadows Unit for the Dixie Valley Toad.



Effects of Critical Habitat Designation

Section 7 Consultation

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

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species (50 CFR 402.02).

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

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

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

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

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

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

(3) Are economically and technologically feasible, and

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

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

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinstate consultation. Reinstatement of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action. As provided in 50 CFR 402.16, the requirement to reinstate consultations for new species listings or critical habitat designation does not apply to certain agency actions (e.g., land management plans issued by the Bureau of Land Management in certain circumstances).

Destruction or Adverse Modification of Critical Habitat

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

Section 4(b)(8) of the Act requires that our Federal Register notices “shall, to the maximum extent practicable also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify [critical] habitat, or may be affected by such designation.”

Activities that may be affected by designation of critical habitat for the Dixie Valley toad include those that may affect the physical or biological features of the Dixie Valley toads’ critical habitat (see **Physical or Biological Features Essential to the Conservation of the Species**).

Exemptions

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

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the DoD, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

An INRMP was completed by the Air Station in 2014, prior to the Dixie Valley toad being described as a species and before the toad was listed as an endangered species.

The Air Station is in the process of amending its INRMP to incorporate the DoD's National Strategic Plan for amphibian and reptile conservation and management (Lovich et al. 2015, entire), which will include specific management for Dixie Meadows and the Dixie Valley toad (Schofield 2023, in litt.). After we receive the INRMP amendment, we will assess its conservation benefit to the toad under 50 CFR 424.12(h) before the final critical habitat designation. If we determine the Air Station lands qualify for exemption from critical habitat designation, then the 588 ac (238 ha) of Air Station land would be exempted from the final designation, which is 63 percent of the proposed critical habitat designation.

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

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the "2016 Policy"; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (M-37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion

outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to make clear the rational basis for our decision. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

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

The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat

incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Executive Order 14094 reaffirms the principles of E.O.s 12866 and 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a “significant regulatory action” and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of \$200 million or more in any given year (section 3(f)(1), as amended by E.O. 14094). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for the Dixie Valley toad is likely to exceed the economically significant

threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Dixie Valley toad (Industrial Economics (IEc) 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species.

Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the

information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the Dixie Valley toad; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Dixie Valley toad, first we identified, in the IEM dated April 10, 2023, probable incremental economic impacts associated with the following categories of activities: (1) geothermal development and production (BLM, DoD); (2) groundwater withdrawal; and (3) grazing (BLM). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In the area where the Dixie Valley toad is present, Federal agencies are required to consult with the Service under section 7 of the Act on activities they authorize, fund, or carry out that may affect the species. If we finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the Dixie Valley toad's critical habitat. It has been our experience that it is difficult to discern which conservation efforts are attributable to the species being listed and those which will result

solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of occupied critical habitat are also likely to adversely affect the species itself. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Dixie Valley toad includes 930 ac (376 ha) of wetland and upland habitat in one occupied unit. The Air Station manages 588 ac (238 ha), and the BLM manages the remaining 342 ac (138 ha). Any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Dixie Valley toad. Therefore, only administrative costs are expected to result from the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

The probable incremental costs of designating critical habitat for the Dixie Valley toad are likely to be limited to additional administrative efforts to consider adverse modification in section 7 consultations. This limitation is because all of the proposed critical habitat designation is occupied by the Dixie Valley toad. The incremental administrative burden resulting from the designation of critical habitat for the Dixie

Valley toad is not anticipated to reach \$200 million in any given year based on the anticipated annual number of consultations and associated consultation costs, which are not expected to exceed \$7,000 per year (2023 dollars). If Air Station lands are determined to be exempt from the critical habitat designation for the Dixie Valley toad, the anticipated annual consultations costs are not expected to exceed \$4,000 per year. The designation is unlikely to trigger additional requirements under State or local regulations. Thus, the annual administrative burden is relatively low.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under the authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of “critical habitat.” However, we must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of

Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

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

Under section 4(b)(2) of the Act, we also consider whether a national security or homeland security impact might exist on lands owned or managed by DoD or DHS. The Air Station may request exclusion on the basis of national-security or homeland-security impacts. The only DoD or DHS lands within the proposed critical habitat designation are the 588 ac (238 ha) of Air Station lands, which is 63 percent of the proposed critical habitat designation, that are being considered for exemption under section 4(a)(3)(B)(i) of the Act (see **Exemptions**, above). The Air Station has not requested exclusion based on national security impacts.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are approved and permitted conservation agreements or plans covering the species in the area—such as safe harbor agreements (SHAs), candidate conservation agreements with assurances (CCAAs) or “conservation benefit agreement” or “conservation agreement” (“CBAs”) (CBAs are a new type of agreement replacing SHAs and CCAAs in use after April 2024 (89 FR 26070; April 12, 2024)) or HCPs—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Summary of Exclusions Considered Under 4(b)(2) of the Act

In preparing this proposal, we have determined that no HCPs or other management plans for Dixie Valley toad currently exist, and the proposed designation

does not include any Tribal lands or trust resources or any lands for which designation would have any economic impacts. We note that this land is a sacred site to the Fallon Paiute-Shoshone Tribe and that they supported the listing of the Dixie Valley toad in their comments on the April 7, 2022, proposed listing rule (87 FR 20374). Therefore, we anticipate no other relevant impacts to Tribal lands, partnerships, or HCPs from this proposed critical habitat designation, and, thus, as described above, we are not considering excluding any particular areas on the basis of the presence of conservation agreements or impacts to trust resources. We will consider exclusion of the Air Station lands if the Air Station requests an exclusion based on national-security impacts.

However, if through the public comment period we receive information that we determine indicates that there are economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action. (Please see **ADDRESSES**, above, for instructions on how to submit comments).

Required Determinations

Clarity of the Rule

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;

- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

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

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

Executive Order (E.O.) 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 et seq.), whenever an agency is required to publish a notice of rulemaking for any

proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

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

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The

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

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects “to the extent permitted by law” when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a “significant energy action” as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order, including, most recently, E.O. 14094 (88 FR 21879);

April 11, 2023)); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule is not a significant regulatory action under E.O. 12866 or 14094. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

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

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

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

except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

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

(2) We do not believe that this rule would significantly or uniquely affect small governments. The lands being proposed for critical habitat designation are owned by the DoD and BLM. Neither of these government entities fit the definition of “small governmental jurisdiction.” Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Dixie Valley toad in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the

designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Dixie Valley toad, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities

may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

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

Civil Justice Reform—Executive Order 12988

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

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

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

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

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

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), the President's memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation; 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretaries' 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 requested information from the Fallon Paiute-Shoshone Tribe during the SSA and proposed listing processes and responded to comments the Tribe made on the proposed listing rule. The Fallon Paiute-Shoshone Tribe commented that they support the listing of the Dixie Valley toad and that the Dixie Meadows hot springs are one of the most sacred sites in their Tribe's culture. The Service met with the Fallon

Paiute-Shoshone Tribe for government-to-government consultation in March 2023 at the Tribe's request. During this consultation, the Service emphasized our commitment to incorporating the Tribe's traditional ecological knowledge, to the extent to which the Tribe is comfortable, into the proposed critical habitat designation process, and we stated that we welcome further conversations to facilitate this. We will continue to work with Tribal entities during the development of a final rule for the designation of critical habitat for the Dixie Valley toad.

References Cited

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

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Reno Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by revising the entry for “Toad, Dixie Valley” under AMPHIBIANS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * *	* * *	AMPHIBIANS		
* * * * *	* * *	AMPHIBIANS		
Toad, Dixie Valley	<i>Anaxyrus williamsi</i>	Wherever found	E	87 FR 73971, 12/2/2022; 50 CFR 17.95(d). ^{CH}
* * * * *	* * *	AMPHIBIANS		

3. In § 17.95, amend paragraph (d) by adding an entry for “Dixie Valley Toad (*Anaxyrus williamsi*)” after the entry for “Arroyo Toad (*Anaxyrus californicus*)”, to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

Dixie Valley Toad (*Anaxyrus williamsi*)

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

(2) Within these areas, the physical or biological features essential to the conservation of the Dixie Valley toad consist of the following components:

(i) Wetlands within Dixie Valley that are composed of some combination of the following characteristics:

(A) Diverse wetland vegetation that includes, but is not limited to, native phreatophyte (deep-rooted) species found within the Dixie Meadows wetlands (e.g., *Juncus balticus* (Baltic rush), *Schoenoplectus* spp. (bulrushes), *Phragmites australis* (common reed), *Eleocharis* spp. (spikerushes), *Carex* spp. (sedges), and *Distichlis spicata* (saltgrass)).

(B) Dense bulrush stands for brumation and shelter.

(C) Open, ephemeral wetted areas adjacent to vegetated areas for breeding.

(D) The natural range of variability of water temperatures found throughout each wetland.

(E) The natural range of variability of water extent found throughout each wetland.

(F) Water quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages.

(G) A variety of aquatic and terrestrial invertebrates, detritus, and algae for feeding.

(ii) Upland habitat between wetlands through which Dixie Valley toads can disperse when conditions permit.

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

(4) Data layers defining the map unit were created by the Service, and the critical habitat unit was then mapped using Universal Transverse Mercator Zone 11N coordinates. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which this map is based are available to the public at the Service's internet site at <https://www.regulations.gov> at Docket No. FWS-R8-ES-2023-0188, and at

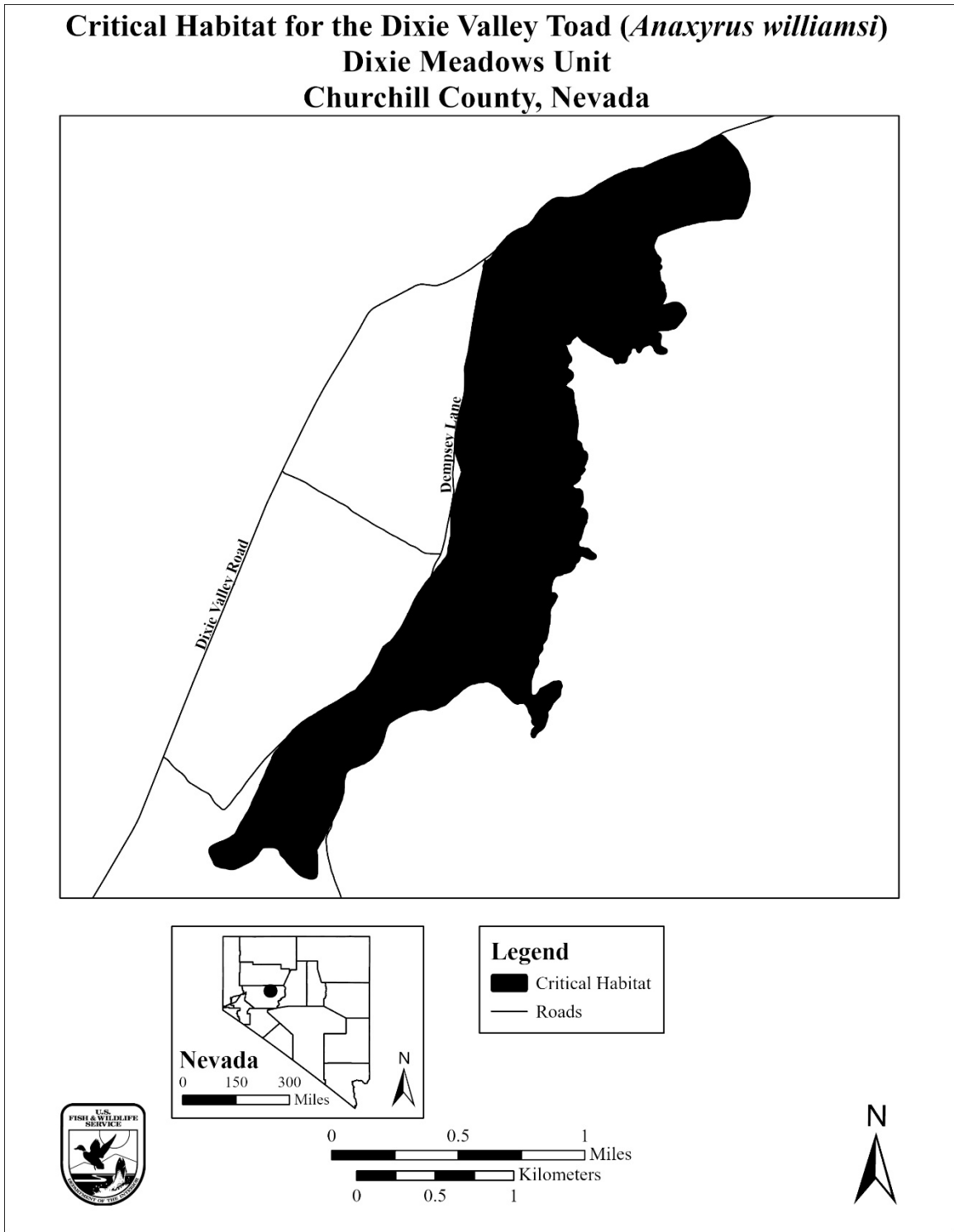
the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Dixie Meadows Unit; Churchill County, Nevada.

(i) The unit consists of 930 acres (ac) (376 hectares (ha)) in Churchill County and is composed of Federal lands owned by the Department of Defense (588 ac (238 ha)) and Bureau of Land Management (342 ac (138 ha)).

(ii) Map follows:

Figure 1 to Dixie Valley Toad (*Anaxyrus williamsi*) paragraph (5)(ii)



* * * * *

Martha Williams,
Director,
U.S. Fish and Wildlife Service.

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