

Agreement or if specifically objected to by Industry Canada.

DATES: Effective April 12, 2004.

FOR FURTHER INFORMATION CONTACT:

Victoria M. McCauley, Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 03-7, adopted February 25, 2004, and released February 27, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 445 12th Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, and 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by adding Caledonia, Channel 240A and by removing Upper Sandusky, Channel 240A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-A169

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Yermo xanthocephalus* (Desert Yellowhead)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; notice of availability.

SUMMARY: We, the Fish and Wildlife Service (Service), designate critical habitat for *Yermo xanthocephalus* (desert yellowhead) pursuant to the Endangered Species Act (Act) of 1973. Approximately 146 hectares (360 acres) in Fremont County, Wyoming, are designated as critical habitat for *Y. xanthocephalus*, which was federally listed as threatened throughout its range in central Wyoming in 2002.

Section 4 of the Act requires us to consider economic and other relevant impacts of specifying any particular area as critical habitat. Section 7 of the Act prohibits destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency.

This publication also provides notice of the availability of the Final Economic Analysis of Critical Habitat Designation for the Desert Yellowhead (Final Economic Analysis) and the Final Environmental Assessment for Designation of Critical Habitat for the Desert Yellowhead (Final EA) for this final rule.

DATES: This final rule is effective April 15, 2004.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Wyoming Field Office, U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, Wyoming, 82001. You may obtain copies of this final rule and the Final EA and Final Economic Analysis from the field office address above or by calling 307-772-2374.

FOR FURTHER INFORMATION CONTACT:

Brian T. Kelly, Field Supervisor, Wyoming Field Office, U.S. Fish and Wildlife Service, at the above address (telephone: 307-772-2374; facsimile: 307-772-2358; e-mail: Brian_T_Kelly@fws.gov).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than

biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 306 species, or 25 percent of the 1,211 listed species in the United States under jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,211 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent to sue relative to critical habitat, and to comply with the growing number of

adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for additional public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the critical habitat designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

Background

Wyoming botanist Robert Dorn discovered *Yermo xanthocephalus* (desert yellowhead) while conducting field work in the Beaver Rim area of central Wyoming in 1990. Dorn discovered a small population of an unusual species of Composite (Asteraceae). Dorn's closer examination revealed that the species was unknown to science and represented a new genus. Dorn (1991) named his discovery *Y. xanthocephalus*, or literally "desert yellowhead."

Yermo xanthocephalus is a tap-rooted, glabrous (hairless) perennial herb with leafy stems to 30 centimeters (cm) (12 inches (in)) high. The leathery leaves are alternate, lance-shaped to oval, 4 to 25 cm (1.5 to 10 in) long and often folded along the midvein. Leaf edges are smooth or toothed. Flower heads are many (25 to 180) and crowded at the top of the stem. Each head contains four to six yellow disk flowers (ray flowers are absent) surrounded by five yellow, keeled involucre (whorled) bracts (small leaves beneath the flower).

The pappus (attached to the top of each seed) consists of many white bristles.

Yermo xanthocephalus flowers from mid-June to August and may flower a second time in September. The start and end of flowering, as well as the duration of flowering, vary between years and seem dependent upon temperature and other climatic variables. Fruits have been observed from mid-July to early September, but do not persist after the flower has dried and bracts ruptured (Heidel 2002).

Yermo xanthocephalus appears to be an obligate outcrosser (cannot self-pollinate) (Heidel 2002), and is likely pollinated by visually-oriented insects attracted to the yellow flowers (Dorn 1991). Several Hymenoptera (order including sawflies, ants, bees, and wasps) have been collected from *Y. xanthocephalus* heads, and small skipper butterflies noted on them, although the identity of these potential pollinators is not currently known (Heidel 2002). No work has been done to document the status of these potential pollinators in this vicinity. However, of the skippers known from Fremont County that most likely use *Y. xanthocephalus* habitat, all have Nature Conservancy Global Ranks of G-4 (apparently secure globally) and G-5 (demonstrably secure globally) with no special conservation or management needs identified by Opler *et al.* (1995).

The fruits of *Yermo xanthocephalus* are single-seeded achenes (dry fruit) with a parachute-like pappus of slender bristles. At maturity, the fruits are exposed to the wind, which may disperse the seed over long distances. However, the clustered distribution pattern of *Y. xanthocephalus*, often along colluvial (rock debris) washes, suggests that dispersal distances are short and perhaps fostered by water erosion (Heidel 2002).

Yermo xanthocephalus is restricted to shallow deflation hollows in outcrops of Miocene sandstones of the Split Rock Formation (Love 1961, Van Houten 1964). These hollows have been shaped by the microscale dynamics of local winds, as well as erosional processes, in an unstable portion of the landscape on sites lacking desert pavement and with low vegetation exposed to strong wind (Bynum 1993). Within the hollows, *Y. xanthocephalus* occurs on low slopes, rim margins, colluvial fans, and bottoms at elevations generally ranging from 2,050 to 2,060 meters (m) (6,720 to 6,760 feet (ft)) (Heidel 2002).

Yermo xanthocephalus grows in recent soils derived from sandstones and limestones of the Split Rock Formation at its junction with the White River Formation (Heidel 2002). Bynum

(1993) found these soils are shallow, loamy soils of the Entisol order that can be classified as a coarse-loamy over sandy-skeletal mixed Lithic Torriorthent. In contrast, the surrounding sagebrush community occupies deep sandy loam of the Aridisol order. The surface stratum is mildly alkaline with little organic matter, while subsurface layers have no accumulation of humus, clay, gypsum, salts, or carbonates (Bynum 1993).

The shape and orientation of the wind-excavated hollows may allow for accumulation of moisture from sheet wash coming off adjacent areas, so the hollows may be more mesic (moist) than surrounding areas (R. Scott, Central Wyoming College, pers. comm. 2002). The vegetation of these sites is typically sparse, with vegetative cover often as low as 10 percent, and consists primarily of low-cushion plants and scattered clumps of *Stipa hymenoides* (Indian ricegrass). Species common to these communities include *Arenaria hookeri* (Hooker's sandwort), *Astragalus kentrophyta* (thistle milkvetch), *Hymenoxys acaulis* (stemless hymenoxys), and *Phlox muscoides* (squarestem phlox) (Fertig 1995). A more complete list of frequently associated species can be found in Heidel (2002).

Yermo xanthocephalus is currently known from a single population with plants widely scattered over an area of 20 hectares (ha) (50 acres (ac)). This population consists of one large subpopulation at the base of Cedar Rim and two smaller subpopulations within 0.4 kilometer (km) (0.25 mile (mi)). Originally, Dorn observed approximately 500 plants within 1 ha (2.5 ac) in 1990 on Federal land managed by the Bureau of Land Management (BLM) (Dorn 1991). However, this was a visual estimate, likely weighted toward flowering plants, and is not considered an actual estimate of the population size and should not be considered when assessing population trends over time.

A permanent survey grid is now in place, and has facilitated an annual census of all known individuals. The total population size has varied from 9,293 to 13,244 individuals during the time the census has been conducted (1995-2003) (R. Scott, Central Wyoming College Herbarium, *in litt.* 2004). Scott has hypothesized that some of the changes in population numbers censused could be in response to higher than normal precipitation over the study period (R. Scott, Central Wyoming College, pers. comm., 2001).

Surveys conducted between 1990 and 1994 failed to locate additional

populations of *Yermo xanthocephalus* on outcrops of the Split Rock, White River, Wagon Bed, and Wind River formations in the Cedar Rim and Beaver Rim areas of southern Fremont County (Fertig 1995). No additional populations were located during follow-up surveys conducted during 1997 along Beaver Rim in Fremont and Natrona Counties, as well as in the Shirley Basin in Carbon County (Heidel 2002). Additional surveys were conducted during 2001 in segments of Cedar Rim and Beaver Rim and surrounding areas not previously surveyed; however, no new populations were located (Heidel 2002).

Yermo xanthocephalus is vulnerable to extinction from randomly occurring, catastrophic events, as well as from even small-scale habitat degradation, due to its small population size and limited geographic range. As described by Fertig (1995), the species is characterized by a long-lived perennial growth form, adaptation to severe habitats, and low annual reproductive output. This low reproductive output would make the species increasingly vulnerable to extinction due to a chance event if the population size declined, because it is unlikely that the species would exhibit a high rate of population growth even if environmental conditions improved after such an event.

While not known to have impacted *Yermo xanthocephalus* to date, oil and gas development could impact the population of *Y. xanthocephalus*. The known population is encompassed by, and adjacent to, oil and gas leases with no specific lease stipulations included to protect the plant. Construction of well pads, access roads, and pipelines through occupied habitat, as well as seismic exploration of oil and gas producing formations, could result in direct destruction or crushing of plants and soil compaction and erosion. Additionally, a network of roads and well pads in the area would result in more human intrusion into what is now a relatively remote area.

The presence of locatable minerals in the area and their potential extraction also could impact the known *Yermo xanthocephalus* population. Uranium and zeolites are found in the Beaver Rim area (BLM 1986). The latter is a locatable mineral with properties useful in water softening, manufacturing of catalysts, pollution control, and removal of radioactive products from radioactive waste. Private parties can stake a mining claim, explore for, and extract locatable minerals in accordance with the 1872 General Mining Law. Such activity should it occur in the vicinity of the known *Y. xanthocephalus* population

could result in direct destruction of individual plants and habitat.

Recreational off-road vehicle use threatens to crush *Yermo xanthocephalus* plants and compact or erode soil. A two-track, four-wheel drive vehicle trail leading to an abandoned oil well bisects the population and is open to hunters or other recreationists driving four-wheel drive trucks and other smaller all-terrain vehicles.

The *Yermo xanthocephalus* population is in a grazing allotment pasture where trampling may occur as cattle casually move along "cow trails" or other tracks while grazing or moving to water. Focused or prolonged use of the area by cattle could result in damage to the habitat and individual plants. Scott (2000) noted signs of moderate wild horse traffic adjacent to the habitat. However, at this time, grazing has not been documented as impacting the *Y. xanthocephalus* population.

Additionally, the invasion of non-native species, particularly noxious weeds, could accompany many of the activities discussed above. The resulting changes to the vegetative community could have significant adverse impacts on the population of *Yermo xanthocephalus*.

The current BLM Lander Resource Management Plan (RMP), which covers the area designated as critical habitat for *Yermo xanthocephalus*, was approved in 1987, 3 years prior to the species' discovery. Therefore, the Lander RMP does not specifically mention *Y. xanthocephalus*. In response to the proposal listing of the species, the BLM developed a draft conservation agreement, assessment, and strategy for *Y. xanthocephalus* (BLM 1998) in order to promote its conservation and recovery on BLM lands. However, the document was never finalized or signed.

Since complete population counts were started in 1995, the *Yermo xanthocephalus* population has appeared stable (Heidel 2002; R. Scott, Central Wyoming College Herbarium, *in litt.* 2004). Current conditions appear favorable to the species and its habitat. Even small changes to the habitat, such as protective fencing around the plant's location, or changes in livestock and wildlife use or numbers, may have negative impacts by altering water flow patterns and trails that currently carry water and soil flows. These kinds of changes also may allow native and non-native plant species to outcompete *Y. xanthocephalus* for water and habitat.

Previous Federal Action

On March 14, 2003, we published the proposed rule to designate critical habitat for *Yermo xanthocephalus* (68

FR 12326). In that proposed rule (beginning on page 12328), we included a detailed summary of the previous Federal actions completed prior to publication of the proposal. On January 27, 2004, the Service announced the availability of the Draft Economic Analysis of Critical Habitat Designation for the Desert Yellowhead (Draft Economic Analysis) and the Draft Environmental Assessment for Designation of Critical Habitat for the Desert Yellowhead (Draft EA) (69 FR 3871), and opened the comment period on all three documents through February 26, 2004.

Summary of Comments and Recommendations

In the March 14, 2003, proposed rule, we requested that all interested parties submit comments or information concerning the designation of critical habitat for *Yermo xanthocephalus*. A 60-day comment period closed on May 13, 2003. We contacted interested parties (including elected officials, media outlets, local jurisdictions, and interest groups) through a press release and related faxes, mailed announcements, telephone calls, and e-mails. On January 27, 2004, the Service opened a 30-day comment period on the Draft Economic Analysis, Draft EA, and Proposed Rule (69 FR 3871). We received three comments from the State of Wyoming and eight comments from the public. Of the public comments, five comments opposed designation or favored reduced designation, one comment supported designation or favored expanded designation, and two were deemed neutral regarding critical habitat. Relatively minor editing changes suggested by commenters have been incorporated into this final rule as appropriate.

In accordance with our policy published on July 1, 1994 (59 FR 34270), we seek the expert opinions of at least three appropriate independent specialists regarding proposed rules. The purpose of such review is to ensure that decisions are based on scientifically sound data, assumptions, and analyses. We solicited opinions of four independent experts to peer-review the proposed critical habitat designation. All four peer reviewers provided comments.

Peer Review Comments

Comment 1: One reviewer recommended decreasing the size of the critical habitat and identified specific areas he believed could be considered for removal. However, the reviewer specifically deferred to the opinion of another reviewer.

Our Response: We reviewed the suggested removals from the critical habitat designation. We remain convinced that these areas are essential to the conservation of the species and may require special management. We believe the areas contain one or more of the Primary Constituent Elements (PCEs) identified in this rule. In fact, one area suggested for removal actually contains individual *Yermo xanthocephalus* plants. Additionally, we believe these areas are important because they contain the topographic features/relief and physical processes that maintain the habitat and hydrology upon which *Y. xanthocephalus* depends. Furthermore, the reviewer to whom this reviewer deferred was one of two reviewers to suggest that the designated critical habitat be made larger.

Comment 2: Two reviewers recommended enlarging the designated critical habitat. One reviewer provided specific suggestions for areas that should be included in the critical habitat designation and thought the enlarged area would provide a slightly greater buffer. The other peer reviewer suggested that the rarity of *Yermo xanthocephalus* warrants extra caution that would be provided by enlargement of the designated critical habitat.

Our Response: By definition under section 3(5)(A) of the Act, critical habitat includes areas known to be essential to conserve the species. While the areas suggested for addition to critical habitat appear to have one or more of the PCEs identified in this rule, we do not believe they are essential to the conservation of the species. These areas are outside of the area containing the topographic features necessary to maintain the habitat and hydrology for the known population of *Yermo xanthocephalus*. While some of the areas appear to contain the appropriate soils and plant communities to support *Y. xanthocephalus*, these areas appear to be outside of the areas in which the plant typically is found. We understand that, in recent years, the plant's distribution has been static, even on a relatively fine scale. We further understand that individual plants that might appear to be colonizing new habitat and becoming established further from the general population location tend to be short-lived and never truly establish an extension of the population. Even so, we believe the critical habitat designation encompasses these areas *Y. xanthocephalus* temporarily colonized in the past to provide for the future possibility of a slight expansion of the population.

We share the reviewers' concerns regarding the vulnerability of *Yermo xanthocephalus* due to its rare nature and small distribution. It is vulnerable to impacts from activities within and outside of designated critical habitat. Yet, the definition of critical habitat does not include areas that are not deemed essential to the conservation of the species. However, section 7(a)(2) of the Act requires each Federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. In considering the effects of a proposed action, the Federal agency looks at the direct and indirect effects of an action on the species or critical habitat. Indirect effects are caused by the proposed action, are later in time, and are reasonably certain to occur. They may occur outside of the area directly affected by the action. Therefore, actions occurring outside of the critical habitat boundaries, but possibly affecting *Y. xanthocephalus* or its critical habitat, will still be reviewed for their effect and modified if necessary. Because the designated critical habitat is completely surrounded by Federal land, this requirement of the Act effectively provides the same level of protection for *Y. xanthocephalus*.

Comment 3: One reviewer was critical of the manner in which the Service used Dorn's initial visual estimate of the *Yermo xanthocephalus* population size (Dorn 1991), indicating that the estimate should not be used in conjunction with the quantitative data, particularly to speculate regarding population changes over time. The reviewer also provided more current census information for the population.

Our Response: We have revised the background section of this rule to better reflect the nature of Dorn's estimate, and have incorporated the current census data.

Comment 4: Several peer reviewers commented on various threats to the critical habitat area (such as invasive weeds), as well as needed management within critical habitat. Two reviewers specifically expressed concern regarding the existing system of two track roads in the area, with one reviewer citing recent resource and plant damage. That reviewer suggested that closure, obliteration, and restoration of some roads is appropriate.

Our Response: In the proposed rule, the Service acknowledged the potential for several activities to destroy or adversely modify critical habitat. Management of the critical habitat area

will be addressed through consultation between the Service and the BLM. The Service and BLM were unaware of recent plant damage associated with the road system and have begun coordination to evaluate and address the problem.

Comment 5: Two reviewers stressed the importance of continued monitoring of *Yermo xanthocephalus*. One reviewer emphasized that the importance of monitoring has increased, because publication of maps and information has increased the vulnerability of this rare plant.

Our Response: We agree. The Service will support monitoring efforts as resources allow. Monitoring needs also will be addressed during recovery planning.

Comment 6: One reviewer commented that more detailed maps and other information would have been valuable in evaluating the adequacy of the critical habitat proposal.

Our Response: We agree. However, even the more detailed maps in our office do not provide the location of all the two-track roads, livestock trails, livestock water tanks, and other details of interest to this reviewer.

State Agencies

We received comments from the Office of the Governor (Governor), Wyoming Game and Fish Department (WGFD), and the Wyoming Department of Agriculture (WDA). Issues raised by the State agencies are addressed below.

State Comment 1: The Governor indicated that the State is opposed to designation of critical habitat for *Yermo xanthocephalus* based on the potential modification of existing land uses in this area.

Our Response: 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 designate critical habitat at the time the species is determined to be endangered or threatened. Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We anticipate only minor changes to existing land uses in the area, although we acknowledge that some costs are associated with section 7 consultation due to the listing of *Yermo xanthocephalus* or designation of critical habitat. Those costs are identified in the Final Economic Analysis.

State Comment 2: The Governor commented that existing land uses including livestock grazing appear favorable to the plant and expressed the State's concern that any changes to the existing habitat could be detrimental to this plant and its nurturing habitat. The WDA also commented on the importance of maintaining the current grazing use and avoiding the use of protective fencing.

Our Response: As indicated in our proposed rule, we agree with the Governor. *Yermo xanthocephalus* appears to be stable and we do not propose any changes to land use that would result in changes to the habitat. There has been general agreement among the Service, BLM, and species experts that grazing at the current levels does not appear to be adversely affecting the species, and that fencing the site may cause significant adverse changes to the area.

State Comment 3: The Governor expressed the State's belief that the proposed critical habitat is too expansive and will have an adverse impact on locatable minerals mining or liquid mineral surface occupancy.

Our Response: We believe the entire area designated as critical habitat is essential to the conservation of the species (see our response to Peer Review Comment 1). We understand the Governor's concern that critical habitat designation could potentially have an adverse impact on locatable minerals mining or liquid mineral surface occupancy. However, we believe that these impacts will be minor.

Although the BLM is pursuing withdrawal of the critical habitat designation from locatable mineral development, it appears the uranium and zeolite resources at the site have only marginal commercial value. This is supported by the fact that there are no active load or placer claims on the critical habitat designation and the extraction of potential uranium and zeolite resources is not economical in the current price environment.

The critical habitat designation is located within the BLM's Beaver Creek Management Unit, which is rated as having a low potential for oil and gas. There are two leases encompassing the critical habitat unit. From 1952 to the present, four wells have been drilled in the general vicinity of the designated critical habitat, and all have resulted in dry holes, further supporting the low potential for oil and gas. Currently, the BLM's Lander RMP prohibits surface occupancy when necessary within a 200-meter (656-foot) buffer of the plants. The BLM plans to continue implementing the buffer area until the

existing leases expire. At that time, BLM plans to exclude the designated critical habitat area from drilling activities, necessitating the use of directional drilling by new lease holders. We acknowledge that these project modifications result in an impact to the operators. The estimated costs to the oil and gas industry of critical habitat designation are around \$460,000 over 10 years and are more fully described in the Final Economic Analysis.

Public Comments

We reviewed all comments received for substantive issues and new data regarding critical habitat and *Yermo xanthocephalus*, the Draft Economic Analysis, and the Draft EA. In the following summary of issues we address comments received on all documents during the public comment periods. No comments were received regarding the Draft EA. Comments of a similar nature are grouped into issues.

Comment 1: Several commenters, including county government, indicated the designation was either unnecessary or excessive, and recommended removing areas generally at the north end of the designation.

Our Response: We believe the entire area designated as critical habitat is essential to the conservation of the species (see our response to Peer Review Comment #1). We remain convinced that the northern portion of the critical habitat is essential to maintain the habitat and hydrology that support *Yermo xanthocephalus*.

Comment 2: One commenter stated that the critical habitat should be expanded in all directions. The commenter was concerned that hydrological and other physical processes, occurring on the land to the east of the critical habitat would not be protected. The commenter was also concerned that the plant would be impacted by various activities, such as motorized vehicle use and oil and gas activities, occurring outside critical habitat to the north, south, and west.

Our Response: We do not agree that expansion of the critical habitat is necessary. See our response to Peer Review Comment 2.

Comment 3: Several commenters expressed concerns regarding the potential for critical habitat designation to impact various activities occurring in the area, such as grazing, public access, mining, and oil and gas development. Several commenters expressed concerns that fencing the area to restrict grazing would actually cause harm to *Yermo xanthocephalus*.

Our Response: See our response to State Comments 2 and 3.

Comment 4: More surveys for other populations of *Yermo xanthocephalus* are needed before designating critical habitat.

Our Response: As required by section 4(b)(2) of the Act, we have designated critical habitat on the basis of the best scientific and commercial information available. Extensive surveys of nearby suitable habitat have found it to be unoccupied by *Yermo xanthocephalus*. It is unlikely other populations of this plant exist. However, in the unlikely event additional populations are discovered in the future, we will evaluate their importance to the conservation of this species and take appropriate action.

Comment 5: The observations of Dr. Dick Scott should form the basis for the designation, as he is the species expert.

Our Response: Dr. Scott reviewed our proposed rule and provided comments.

Comment 6: A recovery plan crafted in close consultation with Federal agencies and State and local governments should be finalized.

Our Response: We agree and intend to begin the recovery planning process as soon as resources allow.

Comment 7: One commenter criticized the lack of detail provided on the map accompanying the critical habitat proposal. The map should have included all two-track roads, topographic features, and other information.

Our Response: See our response to Peer Review Comment 6. Regulation 50 CFR 424.12(c) requires us to define critical habitat according to "specific limits using reference points and lines as found on standard topographic maps of the area." We have done this by basing the critical habitat legal description on section lines associated with the Public Land Survey System. In addition to the legal descriptions, we also published maps providing an overview of the critical habitat boundaries in the proposed rule. The **Federal Register** maps are only intended for illustrative purposes. The proposed rule references the U.S. Geological Survey (USGS) 7.5" quadrangle maps Dishpan Butte and Sweetwater Station, Wyoming. These maps would provide the topographic detail and possibly more information regarding locations of two-track roads, although many two-tracks do not show on the 7.5" quadrangle maps.

Prior to publication of the proposed rule, several interested parties expressed concern regarding increased knowledge of the precise location of *Yermo xanthocephalus* population and the potential for vandalism of the population. The Service tried to balance

their concerns with the need to publish a map along with the proposed rule.

Comment 8: Nearby unoccupied areas of suitable habitat should be included in the designation of critical habitat.

Our Response: Based upon data collected during nine years of annual census, the population of *Yermo xanthocephalus* appears stable. Extensive surveys of nearby suitable habitat have found it to be unoccupied by *Y. xanthocephalus*. There is no evidence that the plant has ever occurred outside of the area currently occupied. While we agree that there could be additional security against extinction for the species if there were multiple populations, there appears to be no foundation upon which to make a determination that the conservation needs of *Y. xanthocephalus* require designation of critical habitat outside of the geographic area occupied by the species.

Comment 9: One commenter asked that we consider ecosystem services, species recovery, and passive values when developing the economic analysis of this critical habitat designation.

Our Response: Our Draft and Final Economic Analyses address those issues.

Comment 10: One commenter expressed concerns having to do with the status of section 7 consultation between BLM and the Service regarding *Yermo xanthocephalus*.

Our Response: We encourage the commenter to contact the Service's Wyoming Field Office (see ADDRESSES section) to discuss the status of the consultation.

Critical Habitat

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

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions authorized, funded, or carried out by a Federal

agency. Section 7 of the Act also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation would not afford any additional regulatory protections under the Act against such activities.

To be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat must also require special management or protection to be included in critical habitat. Critical habitat identifies those areas that need alternation or protection to provide for the recovery of the species. We do not include areas where existing management is sufficient to conserve the species.

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

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

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent

the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

Critical habitat designations do not signal that habitat outside the designation is unimportant to *Yermo xanthocephalus*. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts.

Methods

In determining areas that are essential to conserve *Yermo xanthocephalus*, we used the best scientific information available, as required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12). We reviewed available information that pertains to the habitat requirements of this species, including information from the final rule listing the species as threatened (67 FR 11442; March 14, 2002), data from research and survey observations at the known population site, status reports compiled by the Wyoming Natural Diversity Database, the BLM's RMP/ Environmental Impact Statement for the Lander Resource Area (1986), Geological Survey Bulletins regarding the geology of central Wyoming and the Beaver Rim area, data regarding soils at the known population site, and discussions with botanical experts and BLM employees.

We mapped critical habitat based on USGS 7.5" quadrangle maps (Dishpan Butte and Sweetwater Station, Wyoming). We included the areas occupied by the subpopulations of *Yermo xanthocephalus* based upon existing maps of the subpopulations, as well as site visits by Service and BLM employees. We included adjacent areas of suitable soils and vegetative

communities to allow for maintenance of the seed bank and dispersal. Additionally, we identified areas with topographic features (outcroppings, cliffs, and hills) influencing the microscale dynamics of local winds, erosional processes, and hydrologic processes needed to maintain the integrity of the shallow deflation hollows providing *Y. xanthocephalus* habitat, as well as the sheet wash that provides increased moisture to the habitat. We believe these areas are necessary because of the unstable nature of the landscape (Bynum 1993) and the more mesic nature of the hollows than the surrounding arid landscape (R. Scott, Central Wyoming College, pers. comm. 2002). We delineated the boundary of this area using section lines and quarter-section lines where feasible, in order to facilitate BLM management and enforcement.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we must consider those physical and biological features (Primary Constituent Elements, PCEs) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. The area designated as critical habitat for *Yermo xanthocephalus* is within the geographical area presently occupied by the species and contains these physical or biological features (PCEs) essential for the conservation of the species.

Based on our knowledge to date, the Primary Constituent Elements for *Yermo xanthocephalus* consist of, but are not limited to:

(1) Recent soils derived from sandstones and limestones of the Split Rock Formation at its junction with the White River Formation. These are shallow, loamy soils of the Entisol order that can be classified as course-loamy over sandy-skeletal, mixed, Lithic Torriorthent. The surface stratum has little organic matter and subsurface layers show no accumulation of humus, clay, gypsum, salts, or carbonates.

(2) Plant communities associated with *Yermo xanthocephalus* that include, but

may not be limited to, sparsely-vegetated cushion plant communities with scattered clumps of *Oryzopsis hymenoides* (Indian ricegrass) between 2,043 and 2,073 m (6,700 and 6,800 ft) in Fremont County, Wyoming. Species common to these communities include *Arenaria hookeri* (Hooker's sandwort), *Astragalus kentrophyta* (thistle milkvetch), *Hymenoxys acaulis* (stemless hymenoxys), and *Phlox muscoides* (squarestem phlox). These cushion-plant communities also contain natural openings.

(3) Topographic features/relief (outcroppings, cliffs, and hills) and physical processes, particularly hydrologic processes, that maintain the shape and orientation of the hollows characteristic of *Yermo xanthocephalus* habitat (through microscale dynamics of local winds and erosion) and maintain moisture below the surface of the ground (through sheet wash from the adjacent outcroppings, cliffs, and hills).

Criteria Used To Identify Critical Habitat

We identified critical habitat essential for the conservation of *Yermo xanthocephalus* in the only area where it is known to occur. There are no known historic locations for this species. While we acknowledge the high degree of threat that arises from chance catastrophic events given the limited geographic distribution of this species, we find no compelling evidence that the plant ever existed at other locations. We believe conservation of the species can be achieved through management of threats to the population within this designation of critical habitat.

Given the clustered distribution pattern of *Yermo xanthocephalus* and our assumption that dispersal distances are short and possibly fostered by water erosion, a limited amount of critical habitat is essential for maintenance of the seed bank and dispersal. Additionally, the persistence of the species requires some surrounding habitat to maintain the ecological processes that allow the population and the PCEs to persist.

Even though we did not propose sites other than where the population is currently known to occur, we do not imply that habitat outside the designation is unimportant or may not be required for recovery of the species. Areas that support newly discovered populations in the future, but are outside the critical habitat designation, will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy

standard and the prohibitions of section 9 of the Act, as determined on the basis of best available information at the time an action is proposed.

Critical Habitat Designation

The critical habitat areas described below include one or more of the primary constituent elements described above and constitute our best assessment at this time of the areas needed for the conservation of *Yermo xanthocephalus*. The site includes the only known location where the species currently occurs and, as such, is essential.

The designated critical habitat is approximately 146 ha (360 ac) of Federal lands managed by BLM in the Beaver Rim area approximately 10 km (6 mi) north of Sweetwater Station in southern Fremont County, Wyoming. Within this area, *Yermo xanthocephalus* occurs in sparsely-vegetated cushion plant communities associated with shallow soils on low slopes, rim margins, colluvial fans, and bottoms within deflation hollows. Additionally, as discussed previously, we included areas supporting topographic features (outcroppings, cliffs, and hills) influencing the microscale dynamics of local winds, erosional processes, and hydrologic processes needed to maintain the integrity of the shallow deflation hollows providing *Y. xanthocephalus* habitat, as well as the sheet wash that provides increased moisture to the habitat. Within the critical habitat, *Y. xanthocephalus* occurs in 3 subpopulations with a total population size of 11,967 plants in 2001 (R. Scott, Central Wyoming College, pers. comm. 2001). Dispersal from these subpopulations is limited and frequently occurs along colluvial washes.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies, including the Service,

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

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

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

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the destruction or adverse modification of 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 critical habitat is subsequently designated, and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect *Yermo xanthocephalus* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or any other Federal action (e.g., funding or authorization from the Federal Highway Administration), also will be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that, when carried out, funded or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat or may be affected by the designation include, but are not limited to:

(1) Activities that have the potential to appreciably degrade or destroy *Yermo xanthocephalus* habitat (and its PCEs), including mining, oil and gas exploration and development, herbicide use, intensive livestock grazing, clearing, discing, farming, residential or commercial development, off-road vehicle use, and heavy recreational use;

(2) Alteration of existing hydrology by lowering the groundwater table or redirection of sheet flow from areas adjacent to deflation hollows;

(3) Compaction of soil through the establishment of new trails or roads;

(4) Activities that foster the introduction of non-native vegetation, particularly noxious weeds, or create conditions that encourage the growth of non-natives. These activities could include, but are not limited to: irrigation, supplemental feeding of livestock, and ground disturbance associated with pipelines, roads, and other soil-disturbing activities; and

(5) Indirect effects that appreciably decrease habitat value or quality (e.g., construction of fencing along the perimeter of the critical habitat leading to cattle congregation at the fence and resultant focused disturbance, erosion, and changes to drainage patterns, soil stability, and vegetative community composition).

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Wyoming Field Office, U.S. Fish and Wildlife Service (see ADDRESSES section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, P.O. Box 25486, DFC, Denver, Colorado 80225-0486 (telephone: 303-236-7400; facsimile: 303-236-0027).

Relationship to Section 3(5)(A) and 4(b)(2) of the Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection. As such, for an area to be designated as critical habitat for a species, it must meet both provisions of the definition. In those cases where a specific area does not provide those physical and biological features essential to the conservation of the species, it has been our policy to not include the area in designated critical habitat. Likewise, if an area determined to be biologically essential has an adequate management plan that covers the species, then special management and protection are already being provided. These areas would not meet the second provision of the definition and would not be proposed as critical habitat.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (i.e., the plan must maintain or provide for an increase in the species' population, or the

enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such an area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impact such as preservation of conservation partnerships or military readiness considerations, if we determine that the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the exclusion will not result in the extinction of the species.

In summary, we use both the definitions in section 3(5)(A) and the provisions of section 4(b)(2) of the Act to evaluate those specific areas that are proposed for designation as critical habitat as well as for those areas that are subsequently finalized (*i.e.*, designated as critical habitat). On that basis, it has been our policy to not include in proposed critical habitat, or exclude from designated critical habitat, those areas: (1) Not biologically essential to the conservation of a species, (2) covered by an individual (project-specific) or regional Habitat Conservation Plan (HCP) that covers the subject species, (3) covered by a complete and approved Integrated Natural Resource Management Plan (INRMP) for specific Department of Defense (DOD) installations, or (4) covered by an adequate management plan or agreement that protects the

primary constituent elements of the habitat.

We have not excluded any lands from this designation pursuant to section 3(5)(A) and 4(b)(2) of the Act. No HCPs that include *Yermo xanthocephalus* are in development or completed, the designation does not include any DOD installations, and no management plans that protect *Y. xanthocephalus* have been finalized.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We based this final rule on the best scientific and commercial data available. In order to make a final critical habitat designation, we further utilized the draft and final Economic Analyses and our analysis of other relevant impacts and considered all comments and information submitted during the public comment periods. No areas proposed as critical habitat were excluded or modified because of economic impacts.

Our economic analysis estimates the economic impact of compliance with the protections derived from the designation of critical habitat for *Yermo xanthocephalus*, including habitat protections that may be coextensive with the listing of the species. The measurement of direct compliance costs focuses on the implementation of section 7 of the Act. Federal agencies are required to consult with the Service under section 7 of the Act to ensure that any action they authorize, fund, or carry out will not likely jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a listed species' habitat. Categories of potential cost and benefits considered in the analysis include costs associated with: (1) Conducting section 7 consultations associated with the listing or with critical habitat; (2) modifications to projects, activities, or land uses resulting from section 7 consultations; (3) costs related to the uncertainty associated with the outcome of section 7 consultations; and (4) potential benefits of designating critical habitat.

Activities potentially affected by this designation of critical habitat include oil and gas extraction, geophysical oil and gas exploration, cattle grazing, utility right-of-way (ROW), and BLM activities. Impacts are defined in terms of both the anticipated number and effort level of future consultations as well as any associated project

modifications taking place under section 7 of the Act.

In our final economic analysis, we found that total costs that may be attributable to future section 7 consultations resulting from the listing of *Yermo xanthocephalus* and the critical habitat designation could range from \$530,000 to \$630,000 over the next ten years. Consultations associated with oil and gas extraction activities are expected to comprise about 73 percent (approximately \$460,000) of the total economic impact, and more than 90 percent of these costs (approximately \$430,000) are expected to stem from the implementation of project modifications (*i.e.*, directional well drilling). While the BLM estimates two consultations for oil and gas extraction activities during the next 10 years, the existing lessee has no plans to drill within the lease areas during the remaining terms of each lease. Therefore, any future consultations for oil and gas development will occur after the current leases expire in 2006 and 2007. In addition to oil and gas extraction projects, activities potentially affected by the designation of critical habitat for *Y. xanthocephalus* are: Review and revision of BLM's Lander Resource Management Plan (20 percent of total expected costs); cattle grazing (two percent); utility ROWs (two percent); and geophysical oil and gas exploration (two percent). Of the total anticipated costs, four percent will be administrative costs borne by the Service (approximately \$27,000), and 21 percent will be administrative and operational costs borne by the BLM (approximately \$133,000). The remainder of the cost is expected to be borne by third parties (approximately \$469,000).

A copy of the final economic analysis and supporting documents are included in our supporting record for this rulemaking, and may be obtained by contacting the Wyoming Field Office (see ADDRESSES section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this critical habitat designation is not a significant regulatory action. This rule will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government.

This designation will not create inconsistencies with other agencies'

actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this final critical habitat designation.

Regulatory Flexibility Act

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), whenever a Federal 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 effect 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 an 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 statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

On the basis of information in our final economic analysis, we have determined that a substantial number of small entities are not affected by the critical habitat designation for *Yermo xanthocephalus*. Therefore, we are certifying that the designation will not have a significant effect on a substantial number of small entities. The factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities is as follows.

Small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The RFA/SBREFA requires that agencies use the Small Business Administration's definition of "small business" that has been codified at 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. The RFA/SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In addition, Federal courts and Congress have indicated that an RFA/SBREFA is properly limited to impacts to entities directly subject to the requirements of the regulation (Service 2002). Therefore, entities not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis. The RFA/SBREFA defines "small governmental jurisdiction" as the government of a city, county, town, school district, or special district with a population of less than 50,000. Although certain State agencies may be affected by this critical habitat designation, State governments are not considered small governments, for the purposes of the RFA. SBREFA further defines "small organization" as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

The economic analysis identified small businesses in the oil and gas extraction, cattle ranching, and geophysical oil and gas exploration industries as potentially being affected by section 7 protection for *Yermo xanthocephalus*. Because oil and gas extraction and geophysical oil and gas exploration companies that operate in Fremont County, Wyoming, are typically headquartered outside the State, the relevant area of analysis for these two industries is the United States. The estimated number of small businesses in these industries that will be affected is less than 1 percent for each industry per year. The economic analysis estimates that seven ranchers will be involved in a single section 7 consultation related to livestock grazing during the 10-year period. In relative terms, the analysis estimates that 13 percent of small businesses in the cattle industry are affected by section 7 consultation for *Y. xanthocephalus* annually. However, the seven ranchers involved in the single consultation will share the work and cost of the consultation, and the cost per rancher is only about \$1,000.

Even where the requirements of section 7 might apply due to critical habitat, based on our experience with section 7 consultations for all listed species, virtually all projects, including

those that, in their initial proposed form, would result in jeopardy or adverse modification determinations under section 7, can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures by definition must be economically feasible and within the scope of authority of the Federal agency involved in the consultation.

For these reasons, we are certifying that the designation of critical habitat for *Yermo xanthocephalus* will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et. seq.)

Under the SBREFA (5 U.S.C. 801 *et seq.*), this rule is not a major rule. Based on the effects identified in the economic analysis, we believe that this critical habitat designation will not have an effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Our detailed assessment of the economic effects of this designation is described in the economic analysis.

Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order (E.O.) 13211, on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy production, supply, and distribution facilities because no such facilities are included within designated critical habitat. As described in the economic analysis, Fremont County, Wyoming, produces less than ten barrels of crude oil per well on a daily basis (based on historic well production records). In the worst-case scenario that section 7 consultation causes lessees to forego drilling and operating two future production wells in the area that will be affected by critical habitat designation, it is extremely unlikely that crude oil supply will drop by more than the threshold specified in E.O. 13211 (10,000 barrels per day). Thus we do not believe that designation of critical habitat for *Yermo xanthocephalus* will significantly affect future energy production. Therefore, this action is not

a significant energy action and no Statement of Energy Effects is required.

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

The Unfunded Mandates Reform Act, UMRA (2 U.S.C. 1501 *et seq.*) requires each agency, unless otherwise prohibited by law, to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. Under section 202 of UMRA, we must prepare a written statement, including a cost-benefit analysis, for significant regulatory actions that include a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Even though the economic analysis that was prepared in support of this rulemaking fully assesses the effects of this designation on Federal, State, local, and tribal governments, and to the private sector, the designation of critical habitat will not result in a Federal mandate imposing an enforceable duty upon those entities; therefore a written statement is not required.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights," March 18, 1988; 53 FR 8859), we have analyzed the potential takings implications of the designation of critical habitat for *Yermo xanthocephalus*. The takings implications assessment concludes that this final rule does not pose significant takings implications. A copy of this assessment can be obtained by contacting the Wyoming Field Office (*see ADDRESSES*).

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Wyoming. The designation of critical habitat within the geographic range occupied by *Yermo xanthocephalus* imposes no additional restrictions to those currently in place and, therefore, has little additional impact on State and local governments and their activities.

The designation may have some benefit to these governments in that the area essential to the conservation of the species is more clearly defined, and the PCEs of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the PCEs within the designated area to assist the public in understanding the habitat needs of *Yermo xanthocephalus*.

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

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act is required. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB Control Number.

National Environmental Policy Act

Our position is that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the National Environmental Policy Act in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (Ninth Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)). However, when the range of the species includes States within the Tenth Circuit, pursuant to the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (Tenth Cir. 1996), we will complete a NEPA analysis. The range of *Yermo xanthocephalus* includes States within the Tenth Circuit; therefore, we completed a draft

EA and made it available for public review and comment. A final EA and Finding of No Significant Impact have been prepared for this designation and are available from the Wyoming Field Office (*see ADDRESSES*).

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, and 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We are required to assess the effects of critical habitat designation on Tribal lands and Tribal trust resources. We believe that no Tribal lands or Tribal trust resources are essential for the conservation of *Yermo xanthocephalus*.

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Wyoming Field Office (*see ADDRESSES* section).

Author

The primary author of this rule is Mary E. Jennings (*see ADDRESSES* section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

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

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h), revise the entry for *Yermo xanthocephalus* under "FLOWERING PLANTS" to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Yermo xanthocephalus</i> .	* Desert yellowhead ..	* U.S.A. (WY)	* Asteraceae—Sun-flower.	* T	* 723	* 17.96(a)	* NA
*	*	*	*	*	*	*	*

■ 3. In § 17.96, amend paragraph (a) by adding an entry for *Yermo xanthocephalus* in alphabetical order under Asteraceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) * * *

Family Asteraceae: *Yermo xanthocephalus* (Desert yellowhead)

(1) Critical habitat unit is depicted for Fremont County, Wyoming, on the map below.

(2) The primary constituent elements of critical habitat for *Yermo xanthocephalus* are those habitat components that are essential for the primary needs of the species. Based upon our current knowledge of this species, the primary constituent elements include, but are not limited to:

(i) Recent soils derived from sandstones and limestones of the Split Rock Formation at its junction with the White River Formation. These are shallow, loamy soils of the Entisol order that can be classified as course-loamy over sandy-skeletal, mixed, Lithic Torriorthent. The surface stratum has little organic matter, and subsurface layers show no accumulation of humus, clay, gypsum, salts, or carbonates.

(ii) Plant communities associated with *Yermo xanthocephalus* that include, but may not be limited to, sparsely vegetated cushion plant communities with scattered clumps of *Oryzopsis hymenoides* (Indian ricegrass) between 2,043 and 2,073 m (6,700 and 6,800 ft) in Fremont County, Wyoming. Species common to these communities include *Arenaria hookeri* (Hooker's sandwort), *Astragalus kentrophyta* (thistle

milkvetch), *Hymenoxys acaulis* (stemless hymenoxys), and *Phlox muscoides* (squarestem phlox). These cushion-plant communities also contain natural openings.

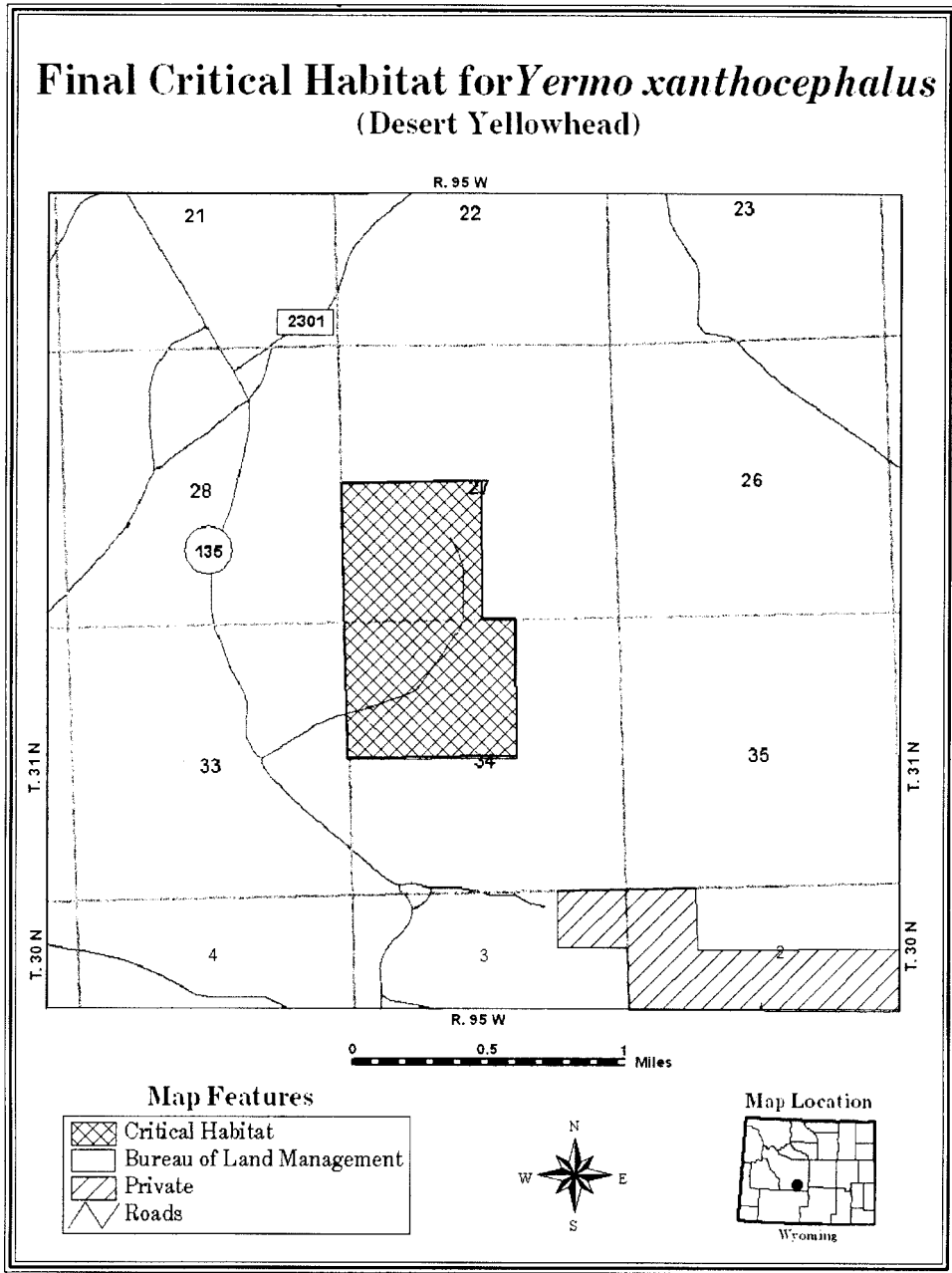
(iii) Topographic features/relief and physical processes, particularly hydrologic processes, that maintain the shape and orientation of the hollows characteristic of *Yermo xanthocephalus* and maintain moisture below the surface of the ground.

(3) Critical habitat: Fremont County, Wyoming.

(i) From U.S. Geological Survey 7.5" quadrangle maps Dishpan Butte and Sweetwater Station, Wyoming. T. 31 N., R. 95 W., SW¹/₄ sec. 27, NW¹/₄ sec. 34, and W¹/₂ W¹/₂ NE¹/₄ sec. 34.

(ii) Map follows:

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Dated: March 8, 2004.
Craig Manson,
*Assistant Secretary for Fish and Wildlife and
Parks.*
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