

released March 5, 2004. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals, IL, 445 12th Street, SW, Room CY-B402, Washington, DC 20054, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts. For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 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 Illinois, is amended by removing Channel 228A at Joliet and adding Lemont, Channel 228A.

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-AI20**

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Topeka Shiner

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; revisions to proposed critical habitat, reopening of comment period, notice of availability of draft economic analysis and draft environmental assessment, and announcement of public meeting.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the reopening of a 30-day public comment period for the proposed rule to designate critical habitat for the Topeka shiner (*Notropis topeka*) pursuant to the Endangered Species Act of 1973, as amended (Act). The proposed rule to designate critical habitat in the States of Iowa, Kansas, Minnesota, Nebraska, and South Dakota was published on August 21, 2002 (67 FR 54261). We herein propose critical habitat segments for Missouri and one additional segment for South Dakota, and discuss potential exclusions from critical habitat designation under the authority of section 4(b)(2). We also exclude habitat on the Fort Riley Military Installation in Kansas under authority of section 4(a)(3) of the Act. In addition, we announce the availability of the draft economic analysis and draft environmental assessment for the proposed designation, and announce a public meeting.

**DATES:** The public meeting will be held from 7 to 9 p.m. central standard time on April 13, 2004, in Boonville, Missouri.

The comment period is hereby reopened until April 16, 2004. We will consider comments from all interested parties on the proposed rule of August 21, 2002 (67 FR 54261), the additional information provided herein, the draft economic analysis, and the draft environmental assessment. We must receive all comments by the closing date. Any comments that we receive after the closing date will not be considered in the final decision on this proposal.

**ADDRESSES:** The public meeting will be held at the Boonville High School, 1690 Ashley Rd., Boonville, Missouri.

Written comments and materials concerning the proposed rule and

amendments, proposed exclusions, draft economic analysis, and draft environmental assessment may be submitted to us at the hearing, or directly by any one of several methods:

(1) You may submit written comments and information to the Kansas Ecological Services Field Office, U.S. Fish and Wildlife Service, 315 Houston Street, Suite E, Manhattan, Kansas 66502.

(2) You may hand-deliver comments and information to the Kansas Ecological Services Field Office, at the above address, or send comments via facsimile to (785) 539-8567.

(3) You may send comments via electronic mail (e-mail) to [fw6\\_tshiner@fws.gov](mailto:fw6_tshiner@fws.gov). For directions on how to submit comments electronically, see the "Public Comments Solicited" section.

The complete file for this notice and the proposed rule are available for public inspection, by appointment, during normal business hours at the above address. Copies of the proposed rule, draft economic analysis, and draft environmental assessment are available by writing to the above address or by connecting to the Service Internet Web site at <http://mountain-prairie.fws.gov/topekashiner/ch>.

#### FOR FURTHER INFORMATION CONTACT:

Vernon Tabor, Kansas Ecological Services Field Office, at the above address (telephone: (785) 539-3474, extension 110; facsimile: (785) 539-8567; e-mail: [fw6\\_tshiner@fws.gov](mailto:fw6_tshiner@fws.gov)).

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend for any final action resulting from this reopened proposal to be as accurate and effective as possible. Therefore, we are soliciting comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, landowners, or any other interested party regarding the revisions to the proposed rule, the draft economic analysis, and the draft environmental assessment. In addition, we are requesting any further comments regarding our August 21, 2002, proposed rule (67 FR 54261), pertaining to the designation of critical habitat in the remainder of the Topeka shiner's range, which includes portions of Iowa, Kansas (not including Fort Riley), Minnesota, Nebraska, and South Dakota. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the

benefits of designation will outweigh any threats to the species resulting from designation;

(2) Specific information on the amount and distribution of Topeka shiner and its habitat, and which habitat is essential to the conservation of this species and why;

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

(4) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

(5) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments;

(6) Whether the economic analysis identifies all State and local costs. If not, what other costs are overlooked;

(7) Whether the economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(8) Whether the economic analysis appropriately identifies land and water use regulatory controls that will likely result from the designation;

(9) Whether the economic analysis appropriately identifies all costs that could result from the designation;

(10) Whether the economic analysis correctly assesses the effect on regional costs associated with land use controls that derive from the designation;

(11) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation;

(12) The economic analysis should identify all costs related to the designation of critical habitat for the Topeka shiner which was intended to take place at the time the species was listed. As a result, the assumption is the economic analysis should be consistent with the Service's listing regulations. Does this analysis achieve that consistency?

(13) Whether our characterization of existing regulatory protections in the listing document is consistent with the costs of the regulation imposed as a result of this critical habitat determination.

All previous comments and information submitted during the initial comment period need not be resubmitted. Refer to the **ADDRESSES** section for information on how to

submit written comments and information. Please submit electronic comments in an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: RIN 1018-AI20" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please contact us directly at our Kansas Ecological Services Field Office (see **ADDRESSES** section and **FOR FURTHER INFORMATION CONTACT**).

Our practice is to make comments that we receive on this rulemaking, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, including the individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### **Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available 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 Act 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 U.S. under the 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 (NOIs) 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 adequate 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 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 NEPA all are part of the cost of critical habitat designation. 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

The Topeka shiner is a small, stout minnow. It has a dorsal (back) side that is olive-green, a distinct dark stripe preceding the dorsal fin, and a dusky stripe running along the entire longitudinal length of the lateral line. The Topeka shiner is found in small-to mid-size prairie streams of the central prairie regions of the United States with relatively high water quality and cool to moderate temperatures. Many of these streams exhibit perennial flow, although some become intermittent during summer or periods of prolonged drought. The Topeka shiner's historic range includes portions of Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. The species continues to exist in these States, but in most areas, its range is greatly reduced.

We published a final rule in the **Federal Register** on December 15, 1998, designating the Topeka shiner as an endangered species; we also determined that designation of critical habitat for the species was not prudent (63 FR 69008). In an April 4, 2001, court settlement of the case, *Biodiversity Legal Foundation et al. v. Ralph Morgenweck et al.* (C00-D-1180), we agreed to reconsider our prudency determination and, if prudent, to propose critical habitat for the shiner by August 13, 2002, and to finalize our designation of critical habitat by August 13, 2003. On August 21, 2002, we published a proposed rule in the **Federal Register** (67 FR 54261) for the designation of Topeka shiner critical habitat. The proposed designation included 3,766 kilometers (km) (2,340 miles (mi)) of stream in the States of Iowa, Kansas, Minnesota, Nebraska, and South Dakota as critical habitat. We also proposed not

to include Topeka shiner habitat in the State of Missouri and on the Fort Riley Military Installation, Kansas, under the authority of section 3(5)(A) of the Act. Following publication of the proposed rule, we opened a 60-day public comment period. We also held one public meeting in each of the six affected States during September 2002. Due to budgetary constraints, we did not finalize the designation of critical habitat by August 13, 2003. We petitioned the court to extend this deadline until July 17, 2004, and, in an order dated February 10, 2004, the court granted us this extension.

In the August 2002 proposed rule for designation of critical habitat for the Topeka shiner, we indicated our intention not to include critical habitat in Missouri and on Ft. Riley, Kansas, in the critical habitat designation. This was based upon our interpretation of the definition of critical habitat found in section 3(5)(A) of the Act. Section 3(5)(A)(i) of the Act, as amended (16 U.S.C. 1531 *et seq.*), defines critical habitat as areas 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. In order to give meaning to the last clause of the definition, we have considered that if an area was already adequately managed, there would be no requirement for special management considerations or protection. A management plan is considered adequate when it meets the following three criteria: (1) The plan 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 it will be implemented (*i.e.*, those responsible for implementing the management plan are capable of accomplishing the objectives, have an implementation schedule, and/or adequate funding for the management plan); and (3) the plan provides assurances the management plan 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).

Subsequent to publication of the proposed rule, two issues arose. The first issue is a January 2003 court ruling on a separate case not pertaining to the Topeka shiner (*Center for Biological Diversity v. Norton*, Civ. No. 01-409 TUC DCB, D. Ariz., Jan. 13, 2003). In that ruling, a Federal District Court in Arizona disagreed with our application

of the definition of critical habitat as it pertains to section 3(5)(A) of the Act. The court stated that "whether habitat does or does not require special management is not determinative on whether the habitat is 'critical' to a threatened or endangered species." The court affirmed the Secretary's authority to exclude areas from critical habitat designation pursuant to section 4(b)(2) of the Act.

The second issue is that section 318 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, adopted November 24, 2003) amended the Endangered Species Act by adding new language to section 4(a)(3), which prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. The Sikes Act Improvement Act of 1997 requires each military installation that includes land and water suitable for the conservation and management of natural resources to complete an INRMP. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the installation, including needs to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. The Service consults with the military on the development and implementation of INRMPs for installations with listed species.

Because of the court's decision and the amendment to the Act, we decided to clarify the basis for proposed exclusions to critical habitat for the Topeka shiner. In the following paragraphs we address our consideration of Fort Riley, Kansas under section 4(a)(3), followed by our clarification of the basis for our proposed exclusion of the State of Missouri. In addition, we are proposing to designate one additional stream segment in South Dakota as critical habitat, based on information received since the proposed rule was published in 2002.

### Fort Riley, Kansas

We previously proposed not to include stream segments on the Fort Riley Military Installation, Kansas, in critical habitat, on the basis of our interpretation of section 3(5)(A) of the Act. Because of the court's decision and the amendment to the Act, we know clarify the basis for not proposing stream segments on Fort Riley. Section 4(a)(3) of the Act now allows the Secretary of the Department of the Interior to exempt defense sites from critical habitat designations if an adequate INRMP is in place. The law says the Secretary "shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense \* \* \* that are subject to an integrated natural resources management plan \* \* \* if the secretary determines in writing that such a plan provides a benefit to the species for which critical habitat is proposed for designation."

We consider an INRMP adequate under section 4(a)(3) for military installations when it meets the same three criteria we consider under section 3(5)(A) of the Act: (1) The plan 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 it will be implemented (*i.e.*, those responsible for implementing the management plan are capable of accomplishing the objectives, have an implementation schedule, and/or adequate funding for the management plan); and (3) the plan provides assurances the management plan 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).

The Topeka shiner has been a focal species for planning and conservation efforts on Fort Riley since the early 1990s, with numerous stream surveys occurring from this time to the present. Fort Riley initiated development of management guidelines for the species in 1994. The first Endangered Species Management Plan for Topeka Shiner on Fort Riley was formalized in 1997. This management plan was revised and incorporated into Fort Riley's INRMP 2001–2005, which was formalized July 30, 2001 (Keating, Ft. Riley Natural Resources Division, pers. comm. 2002). This management plan outlines and describes conservation goals; management prescriptions and actions; a monitoring plan; estimates of time,

cost, and personnel needed; a checklist of tasks; and an annual report (Department of the Army 2001).

We evaluated the Fort Riley Endangered Species Management Plan for Topeka Shiner and the Fort's associated Topeka shiner conservation actions that have been completed, ongoing, or planned, against our three criteria used to determine whether the requirements of section 4(a)(3) are being satisfied. This management plan provides conservation benefits to the species; the plan provides assurances that conservation efforts will be implemented; and the plan and efforts of the Army will be effective since they include biological goals, restoration objectives, and monitoring consistent with the draft Recovery Plan.

The primary benefit of proposing critical habitat is to identify lands essential to the conservation of the species, which, if designated as critical habitat, would require consultation with the Service to ensure that activities would not adversely modify critical habitat. As previously discussed, Fort Riley has a completed final INRMP that provides for sufficient conservation management and protection for the Topeka shiner. Moreover, this INRMP has already undergone section 7 consultation with the Service prior to its final approval. Further, activities authorized, funded, or carried out by the military or Federal agencies in these areas that may affect the Topeka shiner will still require consultation under section 7 of the Act, based on the requirement that Federal agencies ensure that such activities not jeopardize the continued existence of listed species. This requirement applies even without critical habitat designation on these lands.

Based on the foregoing discussion, we believe that the requirements of section 4(a)(3) of the Act are satisfied in relation to Topeka shiner habitat on Fort Riley. We, therefore, do not include these stream segments in the proposed critical habitat for Topeka shiner.

### Missouri

We previously proposed not to include stream segments in the State of Missouri in proposed critical habitat, based on our interpretation of section 3(5)(A) of the Act. We determined that adequate special management or protection would be provided by a legally operative plan that addresses the maintenance and improvement of essential habitat elements and that provides for the long-term conservation of the species. We further determined that a plan is adequate when it meets

the three criteria listed in a previous paragraph of this preamble.

In the proposed rule for designation of critical habitat for the Topeka shiner, we evaluated Missouri's State Action Plan for the Topeka Shiner (Action Plan) and associated Topeka shiner conservation actions that have been completed, ongoing, or planned in Missouri against the three criteria to determine whether lands require "special management considerations or protections." The Action Plan clearly provides conservation benefits to the species; the Action Plan provides assurances that conservation efforts will be implemented because MDC has authority to implement the plan, has put in place the funding and staffing necessary to implement the Plan, and has completed or begun work on many significant elements of the Plan; and the Action Plan and efforts of MDC will be effective because they include biological goals, restoration objectives, and monitoring consistent with a Service preliminary draft Recovery Plan. We continue to believe that the Missouri Action Plan provides for special management of the Topeka shiner under the definition of critical habitat in section 3(5)(A) of the Act. However, as a consequence of the court's decision in *Center for Biological Diversity v. Norton*, we now propose the previously-excluded segments in Missouri, and also clarify the basis for proposing to exclude these areas from the critical habitat designation for Topeka shiner.

The 12 stream segments, representing 148 km (92 mi) of stream, described below, constitute our best assessment of areas in Missouri needed for the conservation of the Topeka shiner, based on the best scientific and commercial information available. These areas are: (1) Currently considered occupied by the Topeka shiner or provide critical links or corridors between occupied habitats and/or potentially occupied habitats; (2) provide all or some of the primary constituent elements essential to the conservation of the species as described in our proposed rule; and (3) may require special management considerations or protection. A more detailed description of the stream segments follows (see "Proposed Regulation Promulgation" section of this document for legal descriptions and maps of these stream segments).

1. *Sugar Creek Complex (three stream segments), Daviess and Harrison Counties, Missouri.* The stream segments proposed in this complex provide the primary constituent elements necessary for designation as critical habitat, including natural stream

morphology and in-stream habitat. Stream habitat within this complex can be characterized as moderate in quality, with the watershed draining a mosaic of cropland and pastureland. This complex includes portions of the mainstem of Sugar Creek, Tombstone Creek, and an unnamed tributary to Sugar Creek. A downstream portion of Sugar Creek has been severely altered by channelization, and does not provide the primary constituent elements.

2. *Moniteau Creek Complex (four stream segments), Cooper and Moniteau Counties, Missouri.* Stream habitat within this complex can be characterized as moderate to good in quality, with the watershed draining a mosaic of cropland, woodlands, and pastureland. Riparian areas are mostly wooded and appear stable. This complex includes portions of Moniteau Creek, an unnamed tributary to Moniteau Creek, Smiley Creek, and Pisgah Creek.

3. *Bonne Femme Creek Complex (five stream segments), Boone County, Missouri.* The Bonne Femme Creek complex is comprised of four tributary streams, including Turkey Creek, Bass Creek, and two unnamed tributary streams to Bass Creek, as well as a portion of mainstem Bonne Femme Creek. Extensive watershed modification is occurring throughout this basin as the growth of Columbia, Missouri, rapidly spreads through this watershed from the north. There have been no documented collections of Topeka shiners from the streams of the Bonne Femme Creek watershed since 1997. However, it has yet to be determined if the species has been completely eliminated from the watershed or is still present in very reduced numbers. The stream segments in this complex provide the primary constituent elements, including natural stream morphology and in-stream habitat.

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation if we determine that the benefits of such exclusion outweigh the benefits of including the areas within critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such areas as critical habitat will result in the extinction of the species. For the areas of Missouri that were not included in the proposed designation pursuant to the definition of critical habitat, we believe that the benefits of excluding

those areas from the final designation outweigh the benefits of including them. If we determine that the benefits of exclusion are greater than those of designation, critical habitat will be excluded from the final designation pursuant to section 4(b)(2).

For our evaluation of potential critical habitat sites in Missouri, we have conducted an analysis of the economic impacts and other relevant impacts of designating critical habitat. Economic factors include: (1) Costs to us and Federal action agencies from increased workload to conduct consultations under section 7 of the Act and technical assistance associated with critical habitat; (2) costs of modifying projects, activities, or land uses resulting from consultations involving critical habitat; (3) costs of delays from increased consultations involving critical habitat; (4) costs of reduced property values or income resulting from increased regulation of critical habitat designation; (5) potential offsetting economic benefits associated with critical habitat, including educational benefits.

Other relevant impacts include: (1) The willingness of landowners and land managers to work with natural resource agencies and participate in voluntary conservation activities that directly benefit the Topeka shiner and other threatened or endangered species, including such cooperative partnerships as Safe Harbor Agreements; (2) the implementation of various cooperative conservation measures agreed to through various State and local partnerships, such as those outlined in Missouri's State Action Plan or through similar collaborative efforts; (3) management or regulatory flexibility, such as the establishment of nonessential experimental populations under section 10(j) of the Act, to recover Topeka shiners through reintroductions; and (4) opportunities and interest of landowners to participate in various incentive and assistance programs offered by the Service and other Federal, State, and local agencies that restore habitats and improve water quality in watersheds containing Topeka shiners.

Benefits of designating critical habitat include: (1) Focusing conservation activities for listed species by identifying areas essential to conserve the species; (2) increasing awareness by the public and land management agencies of the importance of these areas for conservation of the species; and (3) assisting Federal, State, and local agencies in prioritizing landowner incentive programs, developing agreements with private landowners, and implementing other conservation and land management programs.

We are herein providing notice of availability of an analysis of the economic impacts of designating these areas as critical habitat, along with an opportunity for the public to formally comment on this analysis. This economic analysis along with the analysis of other relevant beneficial and detrimental impacts will serve as the basis of our analysis under section 4(b)(2), and our determination of any exclusions from critical habitat finalized in our future final rule. The final rule will contain our analysis of economic factors and other relevant impacts of designating critical habitat in Missouri, and our consideration of comments received during the public comment period. As a result, we may identify certain areas that will be excluded from the final critical habitat designation, and if so, the final critical habitat determination may exclude or reduce in extent the areas described in this proposal.

In Missouri, the Topeka shiner historically occurred in small, headwater streams in northern portions of the State, within the Missouri/Grand River Watershed. The Topeka shiner has been a focal species for planning and conservation efforts in the State since the mid-1990s. In 1995, the Missouri Department of Conservation (MDC) established a 5-member Topeka Shiner Working Group, and a 16-member Advisory Group to direct, implement, and facilitate Topeka shiner recovery actions in Missouri. In 1996, the MDC, with approval of the Conservation Commission of Missouri (Conservation Commission), listed the Topeka shiner as an endangered species under the State's Wildlife Code (Conservation Commission 2001).

In 1999, the Conservation Commission established the Private Lands Services Division within the MDC. Eighty-three MDC staff were redirected to private land conservation throughout the State, including a minimum of 16 Private Lands Services personnel with responsibility for the counties with Topeka shiner habitat. Duties of personnel within this division include the facilitation of conservation efforts on private property throughout Missouri for all federally listed species, including the Topeka shiner. Additionally, there are at least 86 fisheries, forestry, natural history, protection, and wildlife staff delivering services to private landowners as a routine aspect of their job within the Missouri/Grand River Watershed.

In January 1999, MDC adopted and approved an Action Plan for the Topeka shiner in Missouri (MDC 1999). The Action Plan identifies comprehensive

conservation measures and programs necessary to achieve recovery of the Topeka shiner in Missouri.

Implementation of recovery efforts for the Topeka shiner in Missouri, as outlined in this plan, is ongoing. The

current status of tasks in the Action Plan is described in Table 1 below:

TABLE 1.—STATUS OF TASKS IN THE MISSOURI STATE ACTION PLAN FOR THE TOPEKA SHINER

Item	Status
Establishment of the Missouri Topeka Shiner Working Group .....	Complete & Ongoing.
Development & ongoing implementation of the Action Plan .....	Complete (1999) & Ongoing.
Establishment of permanent sampling sites & standardized monitoring of Missouri's Topeka shiner populations & completion of recent Statewide survey for the species.	Annual Monitoring—Ongoing/Initiated (began in 2000) Statewide Surveying—Complete & Ongoing.
Initiation of artificial propagation of Topeka shiners, including the development & refinement of captive rearing techniques.	Complete & Ongoing.
Completion of genetic analysis of different populations of Topeka shiners in Missouri .....	Complete.
Incorporation of Topeka shiner recovery & conservation efforts in State strategic planning documents on several different levels.	Complete & Ongoing.
Development & dissemination of public outreach & education materials throughout Missouri & elsewhere.	Complete & Ongoing.
Completion & dissemination of several ecological & life history studies involving Topeka shiner	Ongoing/Initiated.
Securing matching funds from the Service to conduct surveys & ecological studies, & for various habitat restoration & enhancement activities.	Complete & Ongoing.
Revision of the Action Plan that will include actions not yet completed since 1999 & those uncompleted actions identified in the Service's preliminary draft Recovery Plan.	Planned.
Implementation of a landowner incentive program & completion of a study on the potential impacts of Confined Animal Feeding Operations (CAFO) within the Moniteau Creek Watershed.	Completed (CAFO study). Ongoing/Initiated (landowner incentive program).
Development of 10-year fish monitoring plans for Moniteau, Bonne Femme, & Sugar Creek Watersheds.	Complete—Plan developed with initial sampling conducted in 2000 & annual sampling since.
Development & implementation of Sugar Creek subbasin management plan. ....	Complete & Ongoing.
Development & implementation of a Three Creeks Conservation Area management plan .....	Complete & Ongoing.
Protection & management of Bonne Femme Creek by establishing these watersheds as Missouri Department of Natural Resources' Non-point Source Pollution Special Area Land Treatment watersheds.	Complete & Ongoing.
Reestablishment or restoration of riparian corridors through tree plantings, natural regeneration, fencing to restrict livestock use of stream banks, creation of alternative livestock watering sources, establishment of warm season grass buffer strips, stream bank stabilization activities, & actions outlined in grazing plan developed for private landowners within the Bonne Femme, Moniteau, & Sugar Creek Watersheds.	Initiated/Ongoing.

Assurances that the Action Plan will be implemented and conservation of the Topeka shiner will be achieved in Missouri is demonstrated by the following actions. Between January 1999 and December 31, 2003, at least \$351,100 was spent on recovery actions for the Topeka shiner in Missouri, and that total is likely to increase to at least \$600,000 within the next 10 years. Eighty percent (*i.e.*, 12 of 15) of the priority 1 tasks (*i.e.*, those actions deemed necessary to prevent extinction of the species) identified and outlined in the implementation schedule of a Service preliminary draft Recovery Plan have either been completed or are currently being implemented (this includes 20 percent of tasks that are 100 percent completed, 47 percent of tasks that are 50 percent or greater completed, and 33 percent of tasks that are 25 percent or less completed) by the MDC in cooperation with us, the Topeka Shiner Recovery Team, and other Federal, State, and private entities. The Private Land Services Division within MDC greatly facilitates the implementation of recovery actions on private property where the species

currently exists or where the species may be reintroduced. The planned expansion of our Partners for Fish and Wildlife Program within Topeka shiner-occupied habitat will benefit an additional 10–15 landowners at an estimated cost of \$100,000 within the next 5 years (Kelly Srigley Werner, Missouri Private Lands Coordinator, pers. comm.). MDC Fisheries and Natural History Division staffs have committed to help coordinate and implement Topeka shiner recovery efforts between the MDC and Federal, State, and private entities, and MDC's Topeka Shiner Recovery Coordinator. The MDC is actively participating in the Topeka Shiner Recovery Team. MDC's revisions to the Action Plan, scheduled for completion in 2004, will focus on incorporating any of the recovery actions outlined in a Service preliminary draft Recovery Plan that are currently not addressed. The scientific soundness of the MDC's Action Plan was further validated by us and the Recovery Team when the Action Plan's monitoring protocol and recommendations for reducing and eliminating threats to the Topeka shiner

were incorporated, in part, into a Service preliminary draft Recovery Plan. In addition, the MDC, in implementing the Action Plan, has established cooperative working relationships with private landowners. These relationships have allowed for the implementation of conservation programs for the benefit of the Topeka shiner.

We provide the following preliminary 4(b)(2) analysis of the benefits of inclusion and the benefits of exclusion in assessing the potential exclusion of critical habitat in Missouri.

#### (1) Benefits of Inclusion

Federal actions that adversely affect critical habitat must undergo consultation under section 7 of the Act. Consultations on Federal actions involving critical habitat ensure that habitat needed for the survival and recovery of a species is not destroyed or adversely modified. However, if adequate protections are provided in another manner (*e.g.*, implementation of MDC's State Action Plan), there is no benefit due to designation of critical habitat.

Other possible benefits of critical habitat include educating the public

regarding the conservation value of an area, focusing conservation activities on these essential areas, and assisting other parties in conservation and land management programs. In Missouri, the educational benefits that may be afforded by a critical habitat designation are already provided through implementation of the Action Plan.

## (2) Benefits of Exclusion

The benefits of excluding Missouri from designated critical habitat would include: Maintenance of effective working partnerships to promote the conservation of the Topeka shiner and its habitat; establishment of new partnerships; providing benefits from the Action Plan to the Topeka shiner and its habitat which exceed those that would be provided by the designation of critical habitat; avoiding added administrative costs to the Service, Federal agencies, and applicants; and future regulatory flexibility for the Service and landowners by maintaining the ability to reintroduce the shiner to formerly occupied streams in Missouri by experimental populations under section 10(j) of the Act.

Recovery of listed species is often achieved through partnerships and voluntary actions. Through the Action Plan, the MDC has gained the cooperation of landowners and has been successful in developing voluntary conservation partnerships with these landowners. Cooperators, with the assistance of MDC, are implementing conservation measures for the Topeka shiner and its habitat in accordance with management objectives outlined in the Action Plan. These actions range from allowing access to private lands for surveys and site visits to rehabilitation of habitat and implementation of measures to control erosion and sedimentation. The partners have committed to conservation measures benefiting the Topeka shiner that are greater than the benefits of designating critical habitat. It is likely that many current and potential partners will not assume the cost and work associated with implementing voluntary management and protection if critical habitat is designated regardless of their desire to contribute to the conservation of the species. The MDC has advised us that the support of voluntary conservation actions of private landowners that benefit Topeka shiner recovery in the State could be withdrawn if critical habitat is designated.

In the draft Economic Analysis of Critical Habitat Designation for the Topeka Shiner, Industrial Economics, Inc. (2003) determined that two of the

three proposed areas in Missouri (Bon Femme and Moniteau Creeks) would have significantly higher costs for consultation under section 7 of the Act than most areas proposed as Topeka shiner critical habitat. This is despite the fact that minimal project modifications requiring consultation under section 7 of the Act are projected for activities conducted within these two watersheds. Consequently, Industrial Economics, Inc. estimates that consultations conducted within these two watersheds would be administratively and economically burdensome to local communities (Jessica Sargent-Michaud, Industrial Economics, Inc., pers. comm.).

In summary, we view the continued implementation of the Action Plan and the cooperative conservation partnerships with landowners to be essential for the conservation of the Topeka shiner in Missouri. We believe that the benefits of including critical habitat in Missouri are small due to the successful implementation of conservation actions, as identified in the Action Plan, through multiple partnerships. We believe the benefits of excluding Missouri areas from critical habitat greatly exceed the limited benefits of including them. Furthermore, we believe that exclusion from critical habitat in this State will not result in the extinction of the Topeka shiner. In accordance with 4(b)(2) of the Act, we believe that the benefits of excluding critical habitat in Missouri outweigh the benefits of designating critical habitat, and are proposing to exclude areas in Missouri containing primary constituent elements from the critical habitat designation.

In making our final decision with regard to areas in Missouri containing primary constituent elements, we will consider several factors, including the benefits provided to the Topeka shiner from the Missouri Action Plan for the Topeka Shiner, as described in the August 2002 proposal. You may request a copy of the Action Plan by contacting the Field Supervisor, U.S. Fish and Wildlife Service, 101 Park DeVillie Dr., Suite A, Columbia, MO 65203.

## South Dakota

In our proposal to designate critical habitat for Topeka shiner published on August 21, 2002 (67 FR 54262), we proposed to designate 40 stream segments in South Dakota totaling 1,475 km (917 mi) of stream channel. In the Big Sioux River basin of South Dakota and Minnesota, we also proposed off-channel/side-channel pool habitat for designation. After the publication of the August 2002 proposal, we received

information on additional Topeka shiner habitat in South Dakota. In examining this information, we concluded that habitat within Stray Horse Creek, Hamlin County, South Dakota, contains the necessary elements for proposal as critical habitat. We are proposing one additional 24-km (15-mi) long stream segment in South Dakota, based on information received since the proposed rule was published in 2002 (see "Proposed Regulation Promulgation" section of this document for legal description and map of this stream segment). Off-channel and side-channel habitat, as well as main-channel habitat, also is proposed for this additional stream.

1. *Stray Horse Creek (one stream segment), Big Sioux River Watershed, Hamlin County, South Dakota.* The stream reach proposed for designation runs upstream from the confluence with the Big Sioux River, including adjacent off-channel pool habitat.

We are giving consideration to exempting South Dakota from critical habitat designation under section 4(b)(2) of the Act. Since the listing of the Topeka shiner in 1998, additional surveys conducted for this species in South Dakota have located extensive occupied habitat that was unknown at the time of listing. These demonstrate that the entire historical range of the Topeka shiner continues to be occupied in South Dakota. Furthermore, these surveys have considerably increased the known number of occupied streams in South Dakota. South Dakota has also completed a State Management Plan for the Topeka shiner. We will continue to evaluate whether listing of areas in South Dakota as critical habitat will appreciably benefit the Topeka shiner beyond the protection already afforded the species under the Act and that afforded by the State Management Plan.

## Kansas

We are giving consideration to exempting Kansas from critical habitat designation under section 4(b)(2) of the Act. The Topeka shiner is a State-listed threatened species in Kansas under the Kansas Nongame and Endangered Species Conservation Act. The State has also designated its own critical habitat for the Topeka shiner. We will continue to evaluate whether listing of areas in Kansas as critical habitat will appreciably benefit the Topeka shiner beyond the protection already afforded the species under the Act and State laws and regulations.

## Land Ownership

The majority of stream segments containing primary constituent elements



in Missouri and South Dakota are in private ownership and are primarily used for grazing and crop production. Additionally, a portion of the Charles Green State Wildlife Management Area, owned by the State of Missouri and managed by the MDC, is within the Bonne Femme Creek Complex of Missouri.

### Economic Analysis

The draft economic analysis estimates the foreseeable economic impacts of the critical habitat designation on government agencies and private businesses and individuals. The Service will make its final decisions about exclusions based on economic impact, when it has obtained public comments on the economic analysis and produced an addendum to the economic analysis containing its final conclusions. The Service is interested in comments from the public on the draft economic analysis, on whether any of the areas identified in the economic analysis as having economic effects should be excluded for economic reasons, and whether those or any other areas should be excluded for other reasons.

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 these areas as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of designating these areas as critical habitat. We cannot exclude areas from critical habitat when the exclusion will result in the extinction of the species. The draft economic analysis serves as the basis of our economic analysis under section 4(b)(2), and of any recommended exclusions made in this document for Missouri. Since the economic analysis supplement will not be completed until after we receive comments from the public on the draft economic analysis, we cannot identify final exclusions from critical habitat designation under

section 4(b)(2) in this document. However, we have identified and recommended areas in Missouri that we believe, at this time, qualify for exclusion under section 4(b)(2). Upon completion of the economic analysis supplement, we will analyze the supplement, public comments on the draft economic analysis, and this proposal, and the benefits of designating areas as critical habitat in Missouri. At that time, we will make a final determination whether certain areas containing primary constituent elements should be excluded from the final critical habitat designation, provided these exclusions will not result in the extinction of the species. As a result, the final critical habitat determination may differ from the proposal.

### Public Meeting

The Act provides for one or more public hearings or meetings on critical habitat proposals, if requested. Previously, following the publication of the initial proposed rule on August 21, 2002 (67 FR 54261), we held six public meetings across the species' range concerning the designation of critical habitat for the Topeka shiner. Due to the reopening of the comment period, and the changes herein to the proposed designation of critical, we have scheduled an additional public meeting.

The public meeting will be held at Boonville High School, 1690 Ashley Rd., Boonville, Missouri, on April 13, 2004, from 7 p.m. to 9 p.m.

### Author

The primary author of this proposed rule is Vernon Tabor, Kansas Ecological Services Field Office (see **ADDRESSES**).

### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

### Proposed Regulation Promulgation

For the reasons stated in the preamble, we propose to amend the proposed amendments to part 17,

subchapter B of chapter I, title 50 of the Code of Federal Regulations, as published in the **Federal Register** of August 21, 2002, starting on page 54262, as follows:

### 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 §17.95, as proposed to be amended by 67 FR 54262:

- a. Revise paragraph (e)(1);
- b. Redesignating paragraphs (e)(15) through (e)(18) as paragraphs (e)(16) through (e)(19) and adding a new paragraph (e)(15);
- c. Adding Map 10a and related text after the new paragraph (e)(15); and
- d. Adding new paragraphs (e)(20) through (e)(22), including maps and legal descriptions:

#### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(e) *Fishes.* \* \* \*

\* \* \* \* \*

#### Topeka Shiner (*Notropis topeka*)

(1) Critical habitat is depicted for Calhoun, Carroll, Dallas, Greene, Hamilton, Lyon, Osceola, Sac, Webster, and Wright Counties, Iowa; Butler, Chase, Dickinson, Geary, Greenwood, Marion, Marshall, Morris, Pottawatomie, Riley, Shawnee, Wabaunsee, and Wallace Counties, Kansas; Lincoln, Murray, Nobles, Pipestone, and Rock Counties, Minnesota; Boone, Cooper, Daviess, Harrison, and Moniteau Counties, Missouri; Madison County, Nebraska; Aurora, Beadle, Brookings, Clay, Davison, Deuel, Hamlin, Hanson, Hutchinson, Lincoln, McCook, Miner, Minnehaha, Moody, and Turner Counties, South Dakota, on the maps and as described below.

\* \* \* \* \*

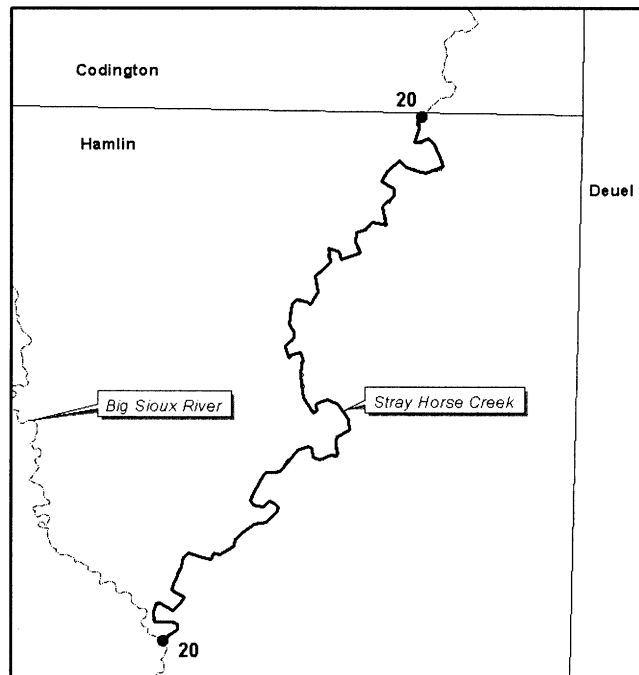
(15) Map 10a follows:

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# Map 10a: General Locations of Proposed Critical Habitat for the Topeka Shiner (*Notropis topeka*)

*South Dakota - Upper Big Sioux Watershed  
Stray Horse Creek*

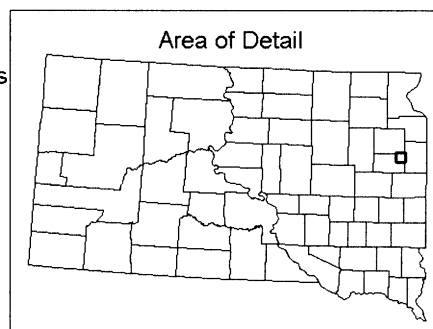


2 0 2 4 Kilometers

2 0 2 4 Miles

- Proposed Critical Habitat
- Not Proposed as Critical Habitat
- County Lines

Reaches  
20. Stray Horse Creek



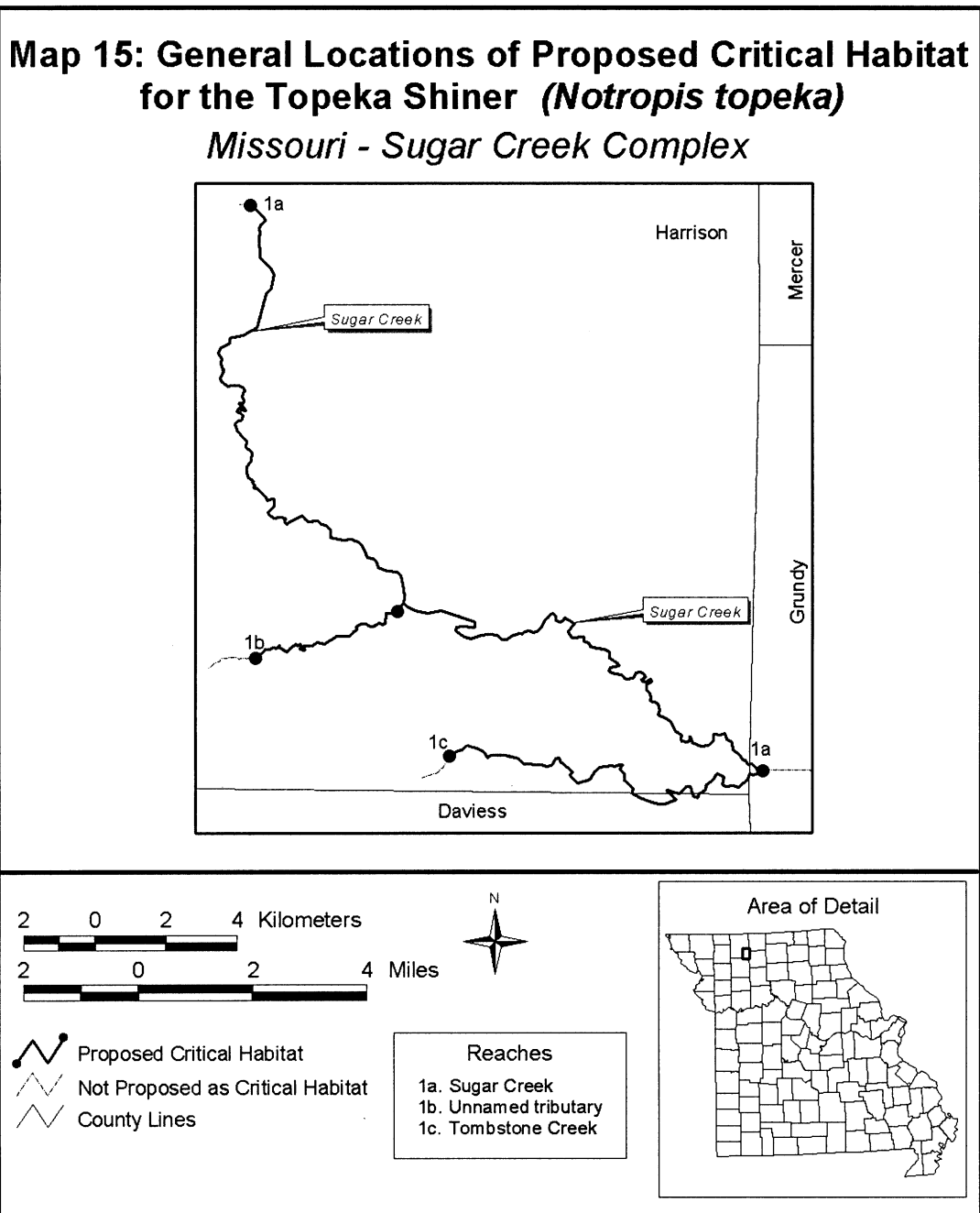
Stray Horse Creek—Hamlin County,  
South Dakota

(T114N, R51W, Sec. 7), upstream  
through T115N, R51W, Sec. 3.

\* \* \* \* \*

20. Stray Horse Creek from its  
confluence with the Big Sioux River

(20) Map 15 follows:



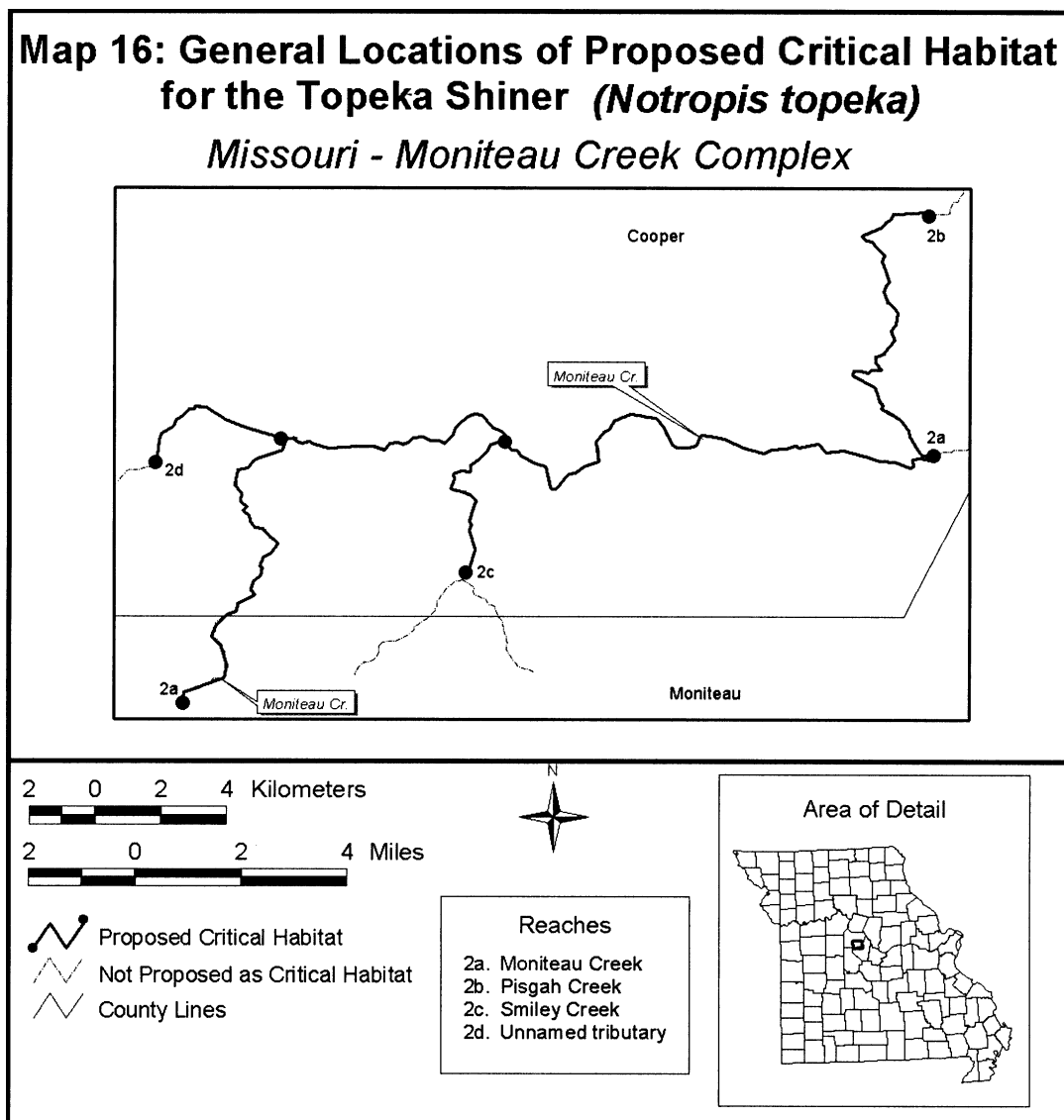
*Sugar Creek Complex*

1a. Sugar Creek from its confluence with Tombstone Creek (T62N, R26W, Sec. 25), upstream through T64N, R27W, Sec. 35.

1b. Unnamed tributary to Sugar Creek from its confluence with Sugar Creek (T62N, R26W, Sec. 8), upstream through T62N, R27W, Sec. 14.

1c. Tombstone Creek from its confluence with Sugar Creek (T62N, R26W, Sec. 25), upstream through T62N, R26W, Sec. 29.

(21) Map 16 follows:



*Moniteau Creek Complex*

2a. Moniteau Creek from its confluence with Pisgah Creek (T46N, R15W, Sec. 19), upstream through T45N, R17W, Sec. 17.

2b. Pisgah Creek from its confluence with Moniteau Creek (T46N, R15W, Sec. 19), upstream through T47N, R16W, Sec. 36.

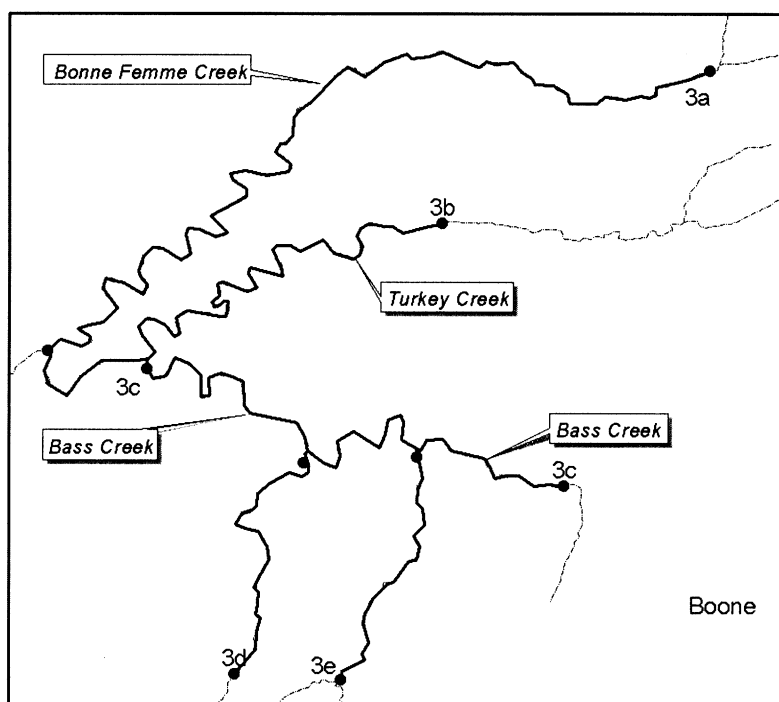
2c. Smiley Creek from its confluence with Moniteau Creek (T46N, R17W, Sec.

24), upstream through T46N, R17W, Sec. 36.

2d. Unnamed tributary to Moniteau Creek from its confluence with Moniteau Creek (T46N, R17W, Sec. 21), upstream through T46N, R17W, Sec. 19. (22) Map 17 follows:

### Map 17: General Locations of Proposed Critical Habitat for the Topeka Shiner (*Notropis topeka*)

#### Missouri - Bonne Femme Creek Complex



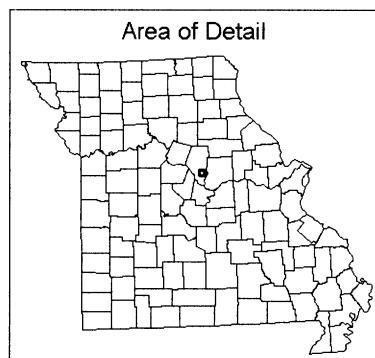
2 0 2 4 Kilometers

1 0 1 2 Miles

- Proposed Critical Habitat
- Not Proposed as Critical Habitat
- County Lines

#### Reaches

- 3a. Bonne Femme Creek
- 3b. Turkey Creek
- 3c. Bass Creek
- 3d. Unnamed Creek
- 3e. Unnamed Creek

*Bonne Femme Creek Complex*

3a. Bonne Femme Creek from its confluence with Turkey Creek (T47N, R12W, Sec. 20), upstream through T47N, R12W, Sec. 12.

3b. Turkey Creek from its confluence with Bonne Femme Creek (T47N, R12W, Sec. 20), upstream to U.S. Highway 63 (T47N, R12W, Sec. 15).

3c. Bass Creek from its confluence with Turkey Creek (T47N, R12W, Sec. 20), upstream through T47N, R12W, Sec. 35.

3d. Unnamed tributary to Bass Creek from its confluence with Bass Creek (T47N, R12W, Sec. 27), upstream through T46N, R12W, Sec. 4.

3e. Unnamed tributary to Bass Creek from its confluence with Bass Creek (T47N, R12W, Sec. 27), upstream through T46N, R12W, Sec. 3.

Dated: March 5, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 04-5926 Filed 3-16-04; 8:45 am]

**BILLING CODE 4310-55-P**