

36. In § 40.329, the section heading and paragraph (b) are revised, to read as follows:

§ 40.329 What information must laboratories, MROs, and other service agents release to employees?

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(b) As a laboratory or IITF, you must provide, within 10 business days of receiving a written request from an employee, and made through the MRO, the records relating to the results of the employee's drug test (*i.e.*, laboratory or IITF) report and data package). You may charge no more than the cost of preparation and reproduction for copies of these records.

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37. In § 40.355, the introductory text, paragraphs (a) through (c), and paragraph (l) are revised, to read as follows:

§ 40.355 What limitations apply to the activities of service agents?

As a service agent, you are subject to the following limitations concerning your activities in the DOT drug and alcohol testing program.

(a) You must not require an employee to sign a consent, release, waiver of liability, or indemnification agreement with respect to any part of the drug or alcohol testing process covered by this part (including, but not limited to, collections, laboratory or IITF testing, MRO, and SAP services). No one may do so on behalf of a service agent.

(b) You must not act as an intermediary in the transmission of drug test results from the laboratory or IITF to the MRO. That is, the laboratory or IITF must not send results to you, with you in turn sending them to the MRO for verification. For example, a practice in which the laboratory or IITF transmits results to your computer system, and you then assign the results to a particular MRO is not permitted.

(c) You must not transmit drug test results directly from the laboratory or IITF to the employer (by electronic or other means) or to a service agent who forwards them to the employer. All confirmed laboratory or IITF results must be processed by the MRO before they are released to any other party.

* * * * *

(l) In transmitting documents to laboratories or IITFs, you must ensure that you send to the laboratory or IITF that conducts testing only the laboratory copy of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory or IITF.

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38. Appendix B is revised, to read as follows:

Appendix B to Part 40—DOT Drug Testing Semi-Annual Laboratory or IITF Report to Employers

Laboratory Report to Employer

The following items are required on each laboratory report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)
Employer Identification: (name; may include Billing Code or ID code)

C/TPA Identification: (where applicable; name and address)

1. Specimen Results Reported (total number)
By Test Reason:

- (a) Pre-employment (number)
- (b) Post-Accident (number)
- (c) Random (number)
- (d) Reasonable Suspicion/Cause (number)
- (e) Return-to-Duty (number)
- (f) Follow-up (number)
- (g) Type of Test Not Noted on CCF (number)

2. Specimens Reported

- (a) Negative (number)
- (b) Negative and Dilute (number)

3. Specimens Reported as Rejected for Testing (total number)

By Reason

- (a) Fatal flaw (number)
- (b) Uncorrected Flaw (number)

4. Specimens Reported as Positive (total number) By Drug

- (a) Marijuana Metabolite (number)
- (b) Cocaine Metabolite (number)
- (c) Opiates (number)
 - (1) Codeine (number)
 - (2) Morphine (number)
 - (3) 6-AM (number)
 - (d) Phencyclidine (number)
 - (e) Amphetamines (number)
 - (1) Amphetamine (number)
 - (2) Methamphetamine (number)
 - (3) MDMA (number)
 - (4) MDA (number)
 - (5) MDEA (number)

5. Adulterated (number)

6. Substituted (number)

7. Invalid Result (number)

IITF Report to Employer

The following items are required on each IITF report:

Reporting Period: (inclusive dates)
IITF Identification: (name and address)
Employer Identification: (name; may include Billing Code or ID code)

C/TPA Identification: (where applicable; name and address)

1. Specimen Results Reported (total number)
By Test Reason:

- (a) Pre-employment (number)
- (b) Post-Accident (number)
- (c) Random (number)
- (d) Reasonable Suspicion/Cause (number)
- (e) Return-to-Duty (number)
- (f) Follow-up (number)
- (g) Type of Test Not Noted on CCF (number)

2. Specimens Reported

- (a) Negative (number)
- (b) Negative and Dilute (number)

3. Specimens Reported as Rejected for Testing (total number)

By Reason

- (a) Fatal flaw (number)

(b) Uncorrected Flaw (number)
4. Number of specimens forwarded to an HHS-certified laboratory for additional drug testing and/or specimen validity testing.

39. Appendix C is revised, to read as follows:

Appendix C to Part 40—DOT Drug Testing Semi-Annual Laboratory or IITF Report to DOT

Mail, fax, or e-mail to: U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, W62-300, 1200 New Jersey Avenue, SE., Washington, DC 20590, Fax: (202) 366-3897, E-mail: ODAPCWebMail@dot.gov.

The following items are required on each laboratory report:

Reporting Period: (inclusive dates)
Laboratory Identification: (name and address)

1. DOT Specimen Results Reported (number)

2. Negative Results Reported (number)

Negative (number)

Negative-Dilute (number)

3. Rejected for Testing Reported (number)

By Reason (number)

4. Positive Results Reported (number)

By Drug (number)

5. Adulterated Results Reported (number)

By Reason (number)

6. Substituted Results Reported (number)

7. Invalid Results Reported (number)

By Reason (number)

The following items are required on each IITF report:

Reporting Period: (inclusive dates)

IITF Identification: (name and address)

1. DOT Specimen Results Reported (number)

2. Negative Results Reported (number)

Negative (number)

Negative-Dilute (number)

3. Rejected for Testing Reported (number)

By Reason (number)

4. Specimens forwarded to an HHS-certified laboratory for additional testing (number)

For Drugs (number)

For SVT (number)

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R2-ES-2009-0077; 92220-1113-0000; ABC Code: C3]

RIN 1018-AW63

Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Sonoran Pronghorn in Southwestern Arizona

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; public hearing, and availability of draft environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reestablish the Sonoran pronghorn, a federally listed endangered mammal, into its historical habitat in King Valley, Kofa National Wildlife Refuge (Kofa NWR), in Yuma County, and to the Barry M. Goldwater Range—East (BMGR—E), in Maricopa County, in southwestern Arizona. We propose to reestablish the Sonoran pronghorn under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and to classify that reestablished population as a nonessential experimental population (NEP). This proposed rule provides a plan for establishing the NEP and provides for allowable legal incidental taking of Sonoran pronghorn within the defined NEP area. We have prepared a draft environmental assessment (EA) on this proposed action.

DATES: We request that you send us comments on this proposal by the close of business on April 5, 2010, or at the public hearing. We will hold a public information session from 4:30 p.m. to 5:30 p.m., followed by a public hearing from 7 p.m. to 8:30 p.m., on February 23, 2010.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for docket FWS—R2—ES—2009—0077 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS—R2—ES—2009—0077; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **INFORMATION REQUESTED** section below for more details).

Copies of Documents: The proposed rule and draft EA are on <http://www.regulations.gov> and available from our Web site at <http://www.fws.gov/southwest/es/Library/>. In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Arizona Ecological Services Office, 201 North Bonita Avenue, Suite 141, Tucson, AZ 85745, telephone 520-670-6144. Persons who use a telecommunications device for the deaf (TDD) may call the Federal

Information Relay Services (FIRS) at 800-877-8339.

Public Hearing: We will hold our public hearing at Logan Auditorium, Gila Bend High School, 308 North Martin Avenue, Gila Bend, AZ 85337. For information requesting reasonable accommodations to attend the information session or hearing, see the **PUBLIC COMMENTS** section.

FOR FURTHER INFORMATION CONTACT:

Curtis McCasland, Refuge Manager, Cabeza Prieta National Wildlife Refuge, 1611 North Second Avenue, Ajo, AZ 85321; by telephone (520-387-6483) or by facsimile (520-387-5359).

SUPPLEMENTARY INFORMATION:

Public Comments

We want the final rule to be as effective as possible and the final EA on the proposed action to evaluate all potential issues associated with this action. Therefore, we invite tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule and the draft EA. Comments should be as specific as possible.

To issue a final rule to implement this proposed action and to determine whether to prepare a finding of no significant impact or an environmental impact statement, we will take into consideration all comments and any additional information we receive. Such communications may lead to a final rule that differs from this proposal. All comments, including commenters' names and addresses, if provided to us, will become part of the supporting record.

You may submit your comments and materials concerning the proposed rule and draft EA by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Finally, we will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section. Comments must be submitted to <http://www.regulations.gov> before midnight (Eastern Time) on the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If your written comment includes your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot

guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the Cabeza Prieta NWR or the Arizona Ecological Services Office (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Persons needing reasonable accommodations in order to attend and participate in a public hearing should contact the Refuge Manager, Cabeza Prieta NWR, at the address or phone number listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing. Information regarding this proposal is available in alternative formats upon request.

Background

Regulatory

We listed the Sonoran pronghorn subspecies (*Antilocapra americana sonoriensis*) as endangered throughout its range on March 11, 1967 (32 FR 4001), under the Endangered Species Preservation Act of October 15, 1966, without critical habitat. This subspecies was included as an endangered species when the Act was signed into law in 1973. The Act provides that species listed as endangered are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act, among other things, prohibits the take of endangered wildlife. "Take" is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates that all Federal agencies use their existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry 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. Section 7 of the Act does not

affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reestablished populations outside the species' current range as "experimental." With the experimental population designation, the relevant population is treated as threatened for purposes of section 9 of the Act, regardless of the species' designation elsewhere in its range. Threatened designation allows us discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary and advisable to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species.

Based on the best scientific and commercial data available, we must determine whether the experimental population is *essential* or *nonessential* to the continued existence of the species. The regulations (50 CFR 17.80(b)) state that an experimental population is considered essential if its loss would be likely to appreciably reduce the likelihood of survival of that species in the wild. All other populations are considered nonessential. We have determined that this experimental population would not be essential to the continued existence of the species in the wild (*see Status of Proposed Population* section below). Therefore, the Service is proposing to designate a nonessential experimental population (NEP) for the species in this area.

For the purposes of section 7 of the Act, we treat an NEP as a threatened species when the NEP is located within a National Wildlife Refuge or unit of the National Park Service, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to carry out programs for the conservation of listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park Service unit, then for the purposes of section 7, we treat the population as

proposed for listing and only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are in the form of conservation recommendations that are optional as the agencies carry out, fund, or authorize activities. Because the NEP is, by definition, not essential to the continued existence of the species, then the effects of proposed actions affecting the NEP will generally not rise to the level of jeopardizing the continued existence of the species. Section 10(j)(2)(c)(ii) precludes the designation of critical habitat for non-essential populations. As a result, a formal conference will likely never be required for Sonoran pronghorn established within the NEP area. Nonetheless, some agencies (e.g., Bureau of Land Management (BLM)) voluntarily confer with the Service on actions that may affect a proposed species. Activities that are not carried out, funded, or authorized by Federal agencies are not subject to provisions or requirements in section 7.

Sonoran pronghorn used to establish an experimental population would come from a captive-rearing pen on Cabeza Prieta NWR, provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. The donor population is a captive-bred population derived primarily from wild stock at Cabeza Prieta NWR and from a wild Sonoran pronghorn population in northwestern Sonora, Mexico. The purpose of the captive population is to provide stock for augmenting existing U.S. and Mexican populations of Sonoran pronghorn, as well as supplying founder animals for establishment of an additional U.S. herd(s), in accordance with recovery actions 2.1–2.4 of the Sonoran Pronghorn Recovery Plan (USFWS 2002). The proposed population establishment would involve two phases: (1) Construction and operation of a captive-breeding pen at Kofa NWR, with subsequent releases to establish a second herd; and (2) relocation of excess Sonoran pronghorn from the existing breeding pen at Cabeza Prieta NWR to the eastern portion of the BMGR–E, east of Highway 85 and south of Interstate 8,

with the intent of establishing a separate herd in that area, as well.

We have not designated critical habitat for the Sonoran pronghorn. Section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated for any experimental population that is determined to be nonessential. Accordingly, we cannot designate critical habitat in areas where we establish an NEP.

Biological

The Sonoran subspecies of pronghorn (*Antilocapra americana sonoriensis*) was first described by Goldman (1945) and is small in terms of cranial measurements compared to other subspecies of pronghorn (Nowak and Paradiso 1983, p. 857). Historically, the Sonoran pronghorn ranged in the United States from approximately the Santa Cruz River, Arizona, in the east, to the Gila Bend and Kofa Mountains, Arizona, to the north, and to Imperial Valley, California, to the west. In northwestern Sonora, Mexico, the subspecies is thought to have occurred historically as far south as Bahia Kino and east to Santa Ana and Nogales. In Baja California, Mexico, the subspecies occurred in the northeast from the U.S. Border south to the vicinity of Punta Estrella (Phelps and Webb 1981, pp. 20–21; Service 2002, Fig. 2). Currently, three populations of the Sonoran pronghorn are extant: (1) A U.S. population in southwestern Arizona, south of Interstate 8, west of Highway 85, and east of the Copper and Cabeza Prieta mountains (76 wild pronghorn), (2) a population in the El Pinacate Region of northwestern Sonora (50 pronghorn), and (3) a population south and east of Mexico Highway 8 and west and north of Caborca, Sonora (354 pronghorn). The three populations are geographically isolated due to barriers such as roads and fences (Service 2002, pp. 4–10, Fig. 1). The 'current range' as used at 10(j)(2)(A)—"The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species * * *" is defined by the boundaries described in part (1). Consistent with years of survey data, we are confident that no Sonoran pronghorn population occurs outside of the current range as defined in part (1) (Phelps 1981, pp. 23–24; Service 2002, pp. 16 and 47).

Threats to the Sonoran pronghorn include (1) highways, fences, railroads, developed areas, and irrigation canals that block access to essential forage or water resources; (2) a variety of human

activities that disturb pronghorn or degrade habitat, including livestock grazing in the United States and Mexico; military activities; recreation; poaching and hunting; clearing of desert scrub and planting of buffelgrass (*Pennisetum ciliare*) in Sonora; gold mining southeast of Sonoita, Sonora; dewatering and development along the Gila River and Río Sonoita; and high levels of undocumented immigration and drug trafficking across the international border and associated law enforcement response; (3) wildfire fueled by nonnative perennial and ephemeral plants that have increased fine fuels and allowed fire to become a much more frequent event in the Sonoran Desert; (4) drought and associated limited food and water; and (5) small population size and random changes in demographics. Populations at low levels may experience random variations in sex ratios, age distributions, and birth and death rates among individuals, which can cause fluctuations in population size and possibly extinction (Service 2002, pp. 14–35; Roughgarden 1998, pp. 84–86). In very sparse populations, males may have trouble finding females, reducing productivity (Brewer 1988, p. 138). In 2002, a severe drought was the primary cause in a major die off of Sonoran pronghorn. The U.S. population declined in 2002 by 83 percent to 21 animals (Bright and Hervert 2005, p. 46). The Mexican populations declined at the same time, but not to the same degree. The population southeast of Highway 8 declined by 18 percent, while the El Pinacate population declined by 26 percent. The differences between the rates of decline north and south of the border may be due to high levels of human disturbance on the U.S. side due primarily to heightened levels of illegal immigration, smuggling, and law enforcement response (Service 2008, p. 55).

Recovery Efforts

Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our endangered species program. Thus, in 1982 we published the Sonoran Pronghorn Recovery Plan (Plan) (Service 1982), which was produced by a Recovery Team comprised of representatives from the Arizona Game and Fish Department (AGFD), Cabeza Prieta NWR, BLM, Organ Pipe Cactus National Monument (OPCNM), Commission of Ecology and Sustainable Development for the State of Sonora (CEDES), and National Commission for Protected Natural Areas (CONANP). The Plan was subsequently revised in 1994,

1998, and 2002. Major recovery actions include: (1) Enhance present populations of Sonoran pronghorn by providing supplemental forage and/or water, (2) determine habitat needs and protect present range; (3) investigate and address potential barriers to expansion of presently used range, and investigate, evaluate, and prioritize present and potential future reintroduction sites within the historical range; (4) establish and monitor a new, separate herd(s) to guard against catastrophes decimating the core population; (5) continue monitoring populations and maintain a protocol for a repeatable and comparable survey technique; and (6) examine additional specimen evidence to assist in verification of taxonomic status (Service 1998, pp. iii–iv). The 2002 Supplement did not include delisting criteria; however, eight short-term recovery actions were identified as necessary to downlist the species to threatened. The supplement goes on to say that accomplishing these actions would provide the information necessary to determine delisting criteria. One of the short-term recovery actions was “evaluating potential transplant locations, establishing methodology and protocols, developing interagency agreements (including with Mexico as required), acquiring funding, and initiating reestablishment projects” (Service 2002, p. 38).

After the catastrophic die off of Sonoran pronghorn in 2002, the Service and its partners embarked on a number of aggressive recovery actions to ensure the species’ continued existence and to begin to rebuild populations. The cornerstone of these actions was a semi-captive breeding facility, constructed in Childs Valley, Cabeza Prieta NWR, in 2003, and stocked with wild Sonoran pronghorn in 2004. As of March 2009, 63 Sonoran pronghorn reside in the pen. Limited releases from the pen to the U.S. herd occurred in 2007 and 2008; however, the objective is to produce 10 to 25 fawns each year for release to the current U.S. population, to newly established population(s) in the United States, and to augment Mexican populations. This target number of fawn production will likely be met in 2009. A number of other projects are underway to increase availability of green forage and water during dry periods and seasons, offsetting to some extent the effects of drought and barriers that prevent Sonoran pronghorn from accessing greenbelts and water, such as the Gila River and Río Sonoita. Nine emergency water sources (six on Cabeza Prieta NWR, one on OPCNM, and two on BMGR-West) have been constructed

in recent years throughout the range of the U.S. population. Four forage enhancement plots, each consisting of a well, pump, pipelines, and irrigation lines, have been developed to irrigate the desert and produce forage for pronghorn. Another plot is nearing completion, and two additional plots will be installed over the next 5 years. These crucial projects, intended to pull the U.S. population back from the brink of extinction, have been cooperative efforts among the Service, AGFD, Marine Corps Air Station—Yuma, Luke Air Force Base, BLM, and OPCNM, with volunteer efforts from the Arizona Desert Bighorn Sheep Society, Arizona Antelope Foundation, and the Yuma Rod and Gun Club.

The U.S. wild population of Sonoran pronghorn has rebounded from 21 in 2002 to 76 in 2008; this increase has been facilitated by the collaborative recovery efforts for this species. However, at 76 animals currently, the U.S. population is far from being secure. We have begun to work with our Mexican partners on recovery of the Sonoran pronghorn in Sonora; although the number of pronghorn in Sonora (404 animals) is significantly greater than in the United States, the safety net of waters and forage plots are not in place there, and a severe drought could decimate those populations.

Reestablishment Areas

O’Brien *et al.* (2005) used landscape-level classification and regression tree and logistic regression models to assess potential Sonoran pronghorn habitat in southwestern Arizona, including current and historical range, as a means of beginning the process of identifying potential locations for establishing a second U.S. Sonoran pronghorn herd. Both models identified greater than 4,632 square miles (sq mi) (greater than 12,000 square kilometers (sq km)) of potential habitat (O’Brien *et al.* 2005, pp. 28–30). The largest blocks of potential habitat outside of the current range, which were identified by both models, were the Ranegras and Harquahala plains, King Valley at Kofa NWR north of Interstate 8; Sentinel Plain and other areas to the west between Interstate 8 and the Gila River; and areas not currently occupied south of Interstate 8 and immediately west of Highway 85. The models also identified a large habitat block east of Highway 85 and south of Interstate 8 as potential habitat. The authors did not evaluate potential habitats in the far eastern portions of the historical range of the pronghorn in Arizona (O’Brien *et al.* 2005, Figs. 3 and 4). O’Brien *et al.* (2005, p. 32) further explained that their

models were an initial step towards identifying and evaluating potential translocation sites. They recommended soliciting public input, reviewing predator presence and density, fencing, and the presence of preferred forage and water as additional steps in the evaluation process (O'Brien *et al.* 2005, p. 32).

An Interdisciplinary Team (IDT), comprised of members of the Sonoran Pronghorn Recovery Team, as well as representatives from land management agencies located in southwestern Arizona, was convened in 2008 to address these and other issues and considerations, and to recommend specific areas for establishing an additional U.S. herd or herds. Development of alternatives for population establishment entailed consideration of three key variables: (1) Geographical areas for establishing populations outside of the current range; (2) potential establishment techniques; and (3) legal status of established populations under the Act. Each of these three key variables had a range of options. The IDT evaluated the three key variables to arrive at the most effective combinations of geographical areas, establishment techniques, and legal status options. The IDT conducted a mapping exercise, to identify areas within the historical range of Sonoran pronghorn in the United States that were under Federal or State ownership and that contained suitable habitat for the species. The result of this exercise was identification of seven potential reestablishment areas, designated Areas A through G. The seven areas were then ranked by the IDT, using seven selection criteria, to determine the best areas for translocation. Area A (King Valley at Kofa NWR, and adjacent portions of primarily Yuma Proving Grounds and BLM lands) and Area D (primarily portions of the BMGR-E, BLM lands, and a portion of the Tohono O'odham Nation, all east of Highway 85) were ranked 1 and 2, respectively. Public scoping for the Sonoran pronghorn population establishment project included three open houses held on successive evenings at Yuma, Tucson, and Phoenix, AZ, and was conducted in November 2008. After consideration of public input, two alternatives were carried forward in the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) process, including establishment of Sonoran pronghorn in Areas A and D, which is what we are proposing in this document. Specific population establishment techniques are described for both areas (*see Release Procedures*, below), and we propose to

establish Sonoran pronghorn as a nonessential experimental population in these areas under section 10(j) of the Act.

The NEP encompasses Areas A and D, as well as all areas into which Sonoran pronghorn are likely to disperse. The NEP is defined as follows: In Arizona, an area north of Interstate 8 and south of Interstate 10, bounded by the Colorado River on the west and Interstate 10 on the east; and an area south of Interstate 8, bounded by Highway 85 on the west, Interstates 10 and 19 on the east, and the United States-Mexico border on the south.

Section 10(j) of the Act requires that an experimental population be wholly separate geographically from other wild populations of the same species. The Colorado River; Interstates 8, 10, and 19; and Highway 85, which form the boundaries of the NEP, are barriers to movement. Interstate 8 separates Area A from the current U.S. population, and Highway 85 forms a boundary between Area D and the current U.S. population. We do not expect Sonoran pronghorn to cross these barriers. Brown and Ockenfels (2007, pg. 29) found that high-speed highways with right-of-way fences, such as these, were virtually Sonoran pronghorn-proof due to stringent fencing and high volume traffic and that interstate highways are nothing short of impassable for the species. Only once has a pronghorn been known to cross Interstate 8 (1973, Phelps 1981, p. 27) and only once has a pronghorn been known to cross Highway 85 and its associated right-of-way fences into BMGR-E (2008; Howard 2008, p. 1).

Nonetheless, in the unlikely event that a pronghorn moves outside the NEP, the individual, lone pronghorn does not constitute a population. The Department defines "population" as a potentially self-sustaining group "in common spatial arrangement," (50 *CFR* 17.3) and thus determined a "geographic separation" is any area outside the area in which a particular population sustains itself. *See Wyoming Farm Bureau Fed'n*, 987 *F. Supp.* at 1373; 59 *FR* at 60256. These definitions preclude the possibility of population overlap as a result of the presence of individual dispersing pronghorn—by definition lone dispersers do not constitute a population or even part of a population, since they are not in "common spatial arrangement" sufficient to interbreed with other members of a population. The evidence suggests that the likelihood of a lone pronghorn crossing the NEP boundary is very low, so it follows that the probability of that lone disperser encountering another

pronghorn of the opposite sex and reproducing is even more remote.

The status, as endangered or a member of the NEP, of any dispersing pronghorn that manages to cross Highway 85 or other barriers between the NEP and the current range would be defined geographically. Any Sonoran pronghorn within the NEP area would be considered a member of the nonessential experimental population (including any dispersing animals from within the current range that cross into the NEP area), whereas any Sonoran pronghorn outside of the NEP would be fully protected under the Act as an endangered species.

The geographical extent that we are proposing for NEP designation is larger than needed, as only portions of this proposed NEP area contain suitable habitat. Within the NEP, Sonoran pronghorn habitat is limited to valleys. Mountainous areas, such as the Kofa, Castle Dome, Palomas, and Gila Bend mountains, do not provide habitat for this species; nor do developed areas within the valleys, such as agricultural areas and towns and cities. However, the NEP area represents what we believe to be the maximum geographical extent to which Sonoran pronghorn could move if released in Areas A and D. Once released into these areas, we expect the Sonoran pronghorn population(s) to grow and expand into adjacent suitable habitats, potentially moving to the boundaries of the NEP. However, mountainous areas and developed agriculture and urban areas in the NEP would not be occupied because these areas are not considered habitat for Sonoran pronghorn. In the unlikely event that any of the released Sonoran pronghorn, or their offspring, move across interstate highways or other barriers (*e.g.*, river or mountainous areas, developed agriculture areas, or urban areas) to outside the designated NEP area (but not into the area occupied by the wild population), then the Service would evaluate the need, in the context of the 10(j) requirements, to amend the 10(j) rule to enlarge the boundaries of the NEP area to include the area of the expanded population. As discussed above, the likelihood of pronghorn moving from the NEP area into the current range is very low.

Release Procedures

The IDT developed the methods of release of Sonoran pronghorn into Areas A and D with the objective of maximizing the likelihood of success in establishing herds, while minimizing the impact to the source population (the animals in the captive breeding pen at Cabeza Prieta NWR) and limiting

mortality or injury to translocated Sonoran pronghorn to the maximum extent possible. In King Valley, Kofa NWR (Area A), a rectangular-shaped, 0.5 sq mi (1.29 sq km) captive-breeding pen would be constructed, beginning in spring 2010. The pen would include water sources and irrigated areas to enhance forage production, as well as two observation towers from which the animals would be monitored. In December 2010 and January 2011, 11 pronghorn (10 females and 1 male) would be moved to the pen from the captive-rearing pen at Cabeza Prieta NWR. These animals would be individually tranquilized using a dart gun and moved one or two at a time by helicopter. Biennial rotation of the breeding male and death of any Sonoran pronghorn in the breeding pen at Kofa NWR would require additional flights to bring new animals from Cabeza Prieta NWR. Methods perfected at Cabeza Prieta NWR will be employed in these activities, which have been used successfully with minimal mortality of pronghorn. Assuming successful captive-breeding at the Kofa NWR pen, up to 20 Sonoran pronghorn would be released annually into suitable habitats outside of but adjacent to the pen site at Kofa NWR, beginning as early as the winter of 2012 or 2013 and recurring each winter until 2020. Sonoran pronghorn in the pen, as well as animals released, would be closely monitored to determine success or need for adaptive management. Success criteria will be developed by the recovery team prior to the release of any animals. Concurrently, if excess animals are available from the captive breeding pen at Cabeza Prieta NWR (not needed to augment existing herds or for the pen at Kofa NWR), these animals would be captured from the pen, transported to a holding pen in Area D, held temporarily, and then released as a group. The holding pen in Area D is located in the Hat Mountain area (locally known as BMGR-East "Area B") in Maricopa County, Arizona. Ideally, the Sonoran pronghorn would be captured together and moved quickly to a holding pen, allowed to recover for a brief period, and released together. Released animals in Area D would be monitored via aircraft and on-the-ground personnel to determine survival, reproduction, and other measures of success. Release techniques will be revised as needed to ensure success. You can find additional description of the release procedures and monitoring protocols in the draft EA (find under docket FWS-R2-2009-0077 at <http://www.regulations.gov> or contact

CPNWR—see contact information above—for copies of this document).

Status of Proposed Population

We have determined that these proposed populations are nonessential. This determination has been made for the following reasons:

(a) Wild populations of the Sonoran pronghorn, totaling about 470 animals, currently exist at: (1) Cabeza Prieta NWR, OPCNM, BMGR, and adjacent BLM lands, (2) in the El Pinacate region of Sonora, and (3) south and east of Highway 8 in Sonora.

(b) A captive-breeding pen at Cabeza Prieta NWR maintains a captive population and provides stock to augment the wild populations in Arizona and Sonora. The pen has been highly successful. First stocked with pronghorn in 2004, the original group of 11 animals has grown to 71 as of this writing (October 2009), and another 21 pronghorn have been released from the pen into the wild.

(c) The first priority for use of animals in the captive-breeding pen at Cabeza Prieta NWR is to augment herds within the boundaries of the current range of the species; hence, relocation of Sonoran pronghorn from the captive breeding pen to Kofa NWR would not inhibit the augmentation efforts for the herds within the boundaries of the current range of the species. Sonoran pronghorn produced at the Cabeza Prieta pen that are not needed to augment herds within the current range or to populate the Kofa NWR pen would be used to establish a population in Area D.

(d) The possible failure of this proposed action would not appreciably reduce the likelihood of survival of the species in the wild because (1) the first priority for use of pronghorn from the captive-breeding pen at Cabeza Prieta NWR is to augment the wild herd, and (2) recovery actions have been implemented in the United States to ameliorate the effects of drought on the species (U.S. Fish and Wildlife Service 2009, p. 9, 18–19).

(e) Through programs of work endorsed by the Canada/Mexico/U.S. Trilateral Committee for Wildlife and Ecosystem Conservation and Management, the U.S. Fish and Wildlife Service and AGFD coordinate with Mexican partners on recovery of the Sonoran pronghorn in Mexico.

If this proposal is adopted, we would ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of Sonoran pronghorn from the donor population at Cabeza Prieta NWR for releases in Areas A or D is not likely to

jeopardize the continued existence of the species in the wild. Establishment of additional Sonoran pronghorn populations within the species' historical range is a necessary step in recovery (Service 2002, p. 38).

The special rule that accompanies this 10(j) rule is designed to broadly exempt from the section 9 take prohibitions any take of Sonoran pronghorn that is incidental to otherwise lawful activities. We provide this exemption because we believe that such incidental take of members of the NEP associated with otherwise lawful activities is necessary and advisable for the conservation of the species, as activities that currently occur or are anticipated in the NEP area are generally compatible with Sonoran pronghorn recovery. For example, in Area A, there are vast expanses of open valleys without major barriers to pronghorn movement that provide suitable habitat. These valleys include King Valley at Kofa NWR, Palomas Plain, the southern end of the Ranegras Plain, and portions of the Yuma Proving Grounds. The La Posa Plain and Castle Dome Plain also provide habitat. Highway 95 runs north-south through those plains, and although it may somewhat inhibit movement to the west side of those plains, it is not a substantial barrier because it lacks right-of-way fences. In Area D, there is considerable habitat in the valleys among the Saucedo, Sand Tank, Batamote, and other mountains in that region. There are existing military activities at Yuma Proving Grounds in Area A and BMGR-E in Area D, but pronghorn have coexisted with military activities for many years at the BMGR (deVos 1989, pp. 15–16; Krausman *et al.* 2001, pp. 2, 80–90; Krausman *et al.* 2005, pp. 20–22); as a result, we believe they would persist with the similar activities conducted at Yuma Proving Grounds and in Area D. Although some forms of military activities could potentially result in incidental death or injury of individual pronghorn, no incidental take has ever been documented due to military activities. There would be some likelihood of Sonoran pronghorn drownings in canals in Area A. Canals are present in agricultural areas on the southern, eastern, and northeastern portions of Area A; Sonoran pronghorn are known to drown in such canals (Rautenstrauch and Krauseman 1986, p. 9). However, the major canal on the southern border of Area A, the Wellton-Mohawk Canal, is equipped with ramps and steps designed to prevent ungulate drownings, and a series of wildlife waters exist to the north of the canal as

alternative water sources. Most of the canals elsewhere in Area A are too small to result in Sonoran pronghorn entrapment. Other activities, such as recreational hunting and camping, vehicle use, livestock grazing, and small-scale rural or agricultural development, are anticipated to either have minimal effects on Sonoran pronghorn or would be limited in extent (e.g., rural and agricultural development).

Under section 7(a)(1) of the Act, all Federal agencies are mandated to use their authorities to conserve listed species. In addition, the BLM has a written policy of conferring with the Service, under section 7(a)(4), on their actions that may affect proposed species. Some activities would have greater potential to compromise the success of the Sonoran pronghorn reestablishment than those described above. For instance, construction of new highways or new canals in the NEP could create barriers to movement and bisect important pronghorn habitats. There is also the potential for BLM to permit large-scale solar power plants, which would be constructed in the valleys and could eliminate up to tens of thousands of acres of habitat. Other BLM-authorized projects, such as agricultural leases, could also potentially remove large blocks of habitat and perhaps compromise the success of this project. The potential for these projects to impact the reestablishment is probably greatest on BLM lands in the valleys to the east of Kofa NWR. The Service may have the opportunity through the section 7(a)(4) conferring process to work with the BLM to minimize the potential adverse effects of solar plants, agricultural leases, highways, or other projects that may compromise Sonoran pronghorn recovery.

Management

The lands within the NEP area are managed and listed in descending order of acreage within areas A and D as follows: Area A—the Service (Kofa NWR), Department of the Army (Yuma Proving Grounds), BLM, Arizona State Lands Department, private landowners, and Colorado River Indian Tribes; Area D: Tohono O'odham Nation, BLM, Department of the Air Force (BMGR-E), private owners, and Arizona State Land Department. Outside of Areas A and D, but within the NEP, land ownership is similar, but also includes lands within the Gila River Indian Reservation, Ak-Chin Indian Reservation, Pascua Yaqui Indian Reservation, San Xavier Reservation, Buenos Aires NWR, Saguaro National Park, OPCNM, Tucson

Mountain Park, and Coronado National Forest. Due to the management flexibility provided by the NEP designation and the special rule, we do not anticipate that establishment of Sonoran pronghorn in Areas A or D and subsequent dispersal of Sonoran pronghorn from the release sites will affect management on Tribal, BLM, National Forest, Department of Defense, State, or private lands. Through section 7 consultations on NWR lands and National Park Service lands, some changes in management may occur to reduce adverse effects to pronghorn, including minimizing the likelihood of incidental take. However, we believe few changes would be needed, because management of these lands already is broadly compatible with Sonoran pronghorn recovery. Other Federal agencies that propose actions on Kofa NWR or National Park Service lands would also be required to consult with us under section 7, if such activities may affect Sonoran pronghorn. For instance, some activities conducted by Yuma Proving Grounds (e.g., overflights of Kofa NWR) would be subject to the consultation requirements. Some Federal agencies, such as BLM, that propose actions outside of Kofa NWR or National Park Service lands may elect to work with the Service voluntarily through the section 7(a)(4) conferring process to ensure that adverse effects of their actions on Sonoran pronghorn in the NEP area are minimized.

The Service (Cabeza Prieta NWR, Kofa NWR, and Ecological Services), AGFD, OPCNM, Luke Air Force Base, BLM, and other partners, in close coordination with the Sonoran Pronghorn Recovery Team, would plan and manage the establishment of new populations of Sonoran pronghorn. This group would closely coordinate on releases, monitoring, and coordination with landowners and land managers, among other tasks necessary to ensure successful population establishment. Management issues related to the Sonoran pronghorn NEP that have been considered include:

(a) *Mortality*: The regulations implementing the Act define “incidental take” as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (50 CFR 17.3), such as agricultural activities and other rural development, ranching, military training and testing, camping, hiking, hunting, vehicle use of roads and highways, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. If this 10(j) rule is finalized, incidental take of Sonoran pronghorn within the NEP area would not be prohibited,

provided that the take is unintentional, not due to negligent conduct, and is in accordance with the special rule that is a part of this 10(j) rule. However, if there is evidence of intentional take of a Sonoran pronghorn within the NEP that is not authorized by the special rule, we would refer the matter to the appropriate law enforcement entities for investigation. We expect levels of incidental take to be low because, as discussed in part (d) of *Status of Newly Established Population* above, the establishment of new populations is compatible with most existing human use activities and practices for the area. In the current range of the pronghorn in the U.S., no incidental take has been documented from military activities, recreation, use of highways, and most other activities that occur both in the current range and in the NEP; the exception being canals, in which Sonoran pronghorn have drowned on several occasions. More specific information regarding take can be found in the **Proposed Regulation Promulgation** section of this proposed rule.

(b) *Special handling*: In accordance with 50 CFR 17.21(c)(3), any employee or agent of the Service, any other Federal land management agency, or State personnel, designated for such purposes, may in the course of their official duties, handle Sonoran pronghorn to aid sick or injured Sonoran pronghorn, or to salvage dead Sonoran pronghorn. However, non-Service personnel and their agents would need to acquire permits from the Service for these activities.

(c) *Coordination with landowners and land managers*: The Service and cooperators have identified issues and concerns associated with the proposed Sonoran pronghorn population establishment through the NEPA scoping comment period. The proposed population establishment also has been discussed with potentially affected State agencies, Tribes, and private landowners. Affected State agencies, Tribes, landowners, and land managers have either indicated support for, or no opposition to, the proposed population establishment, provided a NEP is designated and a special rule is promulgated to exempt incidental take and some forms of intentional take for management purposes from the section 9 take prohibitions. More specific information regarding take can be found in the **Proposed Regulation Promulgation** section of this proposed rule.

(d) *Monitoring*: A monitoring and adaptive management plan for the population establishment program

would be implemented by the Service, AGFD, and other partners to determine if the program is successful. The monitoring will assess all aspects of the population establishment program, from capture and movement of the animals to the captive breeding pen (Area A) or holding area (Area D), monitoring of the animals in these captive facilities, and monitoring and tracking released Sonoran pronghorn in the release areas, including Sonoran pronghorn waters and any forage enhancement vegetation plots developed to support the established herds. Monitoring of released Sonoran pronghorn will be conducted to determine the following: (1) Mortality and recruitment rates, (2) causes of mortality among adult and juvenile pronghorn, (3) reliance on free-standing water sources, (4) movement corridors and barriers to movements, and (5) habitat preferences. Each released animal will be fitted with an ear tag and radio collar. A limited number of Sonoran pronghorn will be fitted with Geographic Positioning System (GPS) platform telemetry collars. It is expected the transmitters will function for 3 to 5 years. Telemetry flights with a fixed-wing aircraft will be conducted twice a month. Each Sonoran pronghorn will be observed from an altitude of 1,000 feet (ft) above ground level with the aid of binoculars. Group size and composition (sex and age), habitat type, and terrain will be recorded. Additional monitoring of individual pronghorn and herd movements will be done from the ground, particularly from high points where valley habitats of the pronghorn can be viewed. All monitoring flights and on-the-ground surveillance will be closely coordinated with and approved by the Tribal, military, and other land managers and owners where such monitoring will occur. As Sonoran pronghorn become established and breed in the establishment areas, the percentage of animals tagged or radio-collared will decline over time, and additional animals may need to be captured and radio collared to adequately monitor the herds. Ideally, at least 10 percent of a population will be equipped with radio collars. Monitoring data will be assessed regularly by the Recovery Team, and methods will be revised as needed to increase the likelihood of successful population establishment and to increase efficiency. A comprehensive review, assessment, and report of the reestablishment program by the Recovery Team will occur at a frequency of no less than once every 5 years.

(e) *Public awareness and cooperation:* Public scoping for the Sonoran pronghorn population establishment project was conducted in the fall of 2008. Actions included an October 30, 2008, scoping letter sent to approximately 6,000 names, a news release to local media sources, and a series of three open houses held in the Arizona cities of Yuma, Tucson, and Phoenix, during November 18–20, 2008. We accepted written public scoping comments until December 12, 2008. We received 44 written responses about the project. We discuss issues identified in the responses in the EA. The IDT used these issues to refine the proposed action and alternatives in the EA, and to identify mitigation measures to avoid or reduce potential project effects. The IDT also used the public concerns to determine which resources would be the greatest focus of the EA analysis.

Peer Review

In accordance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we will provide copies of this proposed rule to three or more appropriate and independent specialists in order to solicit comments on the scientific data and assumptions relating to the supportive biological and ecological information for this proposed NEP designation. The purpose of such review is to ensure that the proposed NEP designation is based on the best scientific information available. We will invite these peer reviewers to comment during the public comment period and will consider their comments and information on this proposed rule during preparation of a final determination.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the proposed rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the proposed rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the proposed rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the proposed rule raises novel legal or policy issues.

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

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*, 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 that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act 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. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area that would be affected if this proposed rule is adopted includes the release areas at Kofa NWR and BMGR–E and adjacent areas into which pronghorn may disperse, which over time could include significant portions of the NEP, where valley habitats for the pronghorn occur. Mountainous areas and developed agriculture and urban areas in the NEP would not be occupied because these areas are not considered habitat for Sonoran pronghorn. Because of the regulatory flexibility for Federal agency actions provided by the NEP designation and the exemption for incidental take in the special rule, we do not expect this rule to have significant effects on any activities within Tribal, Department of Defense, BLM, National Wildlife Refuge, National Park Service, State, or private lands within the NEP. On National Wildlife Refuges and units of the National Park System within the NEP, Federal action agencies would be required to consult with us, under section 7(a)(2) of the Act, on any of their activities that may affect the Sonoran pronghorn. However, because current management of these areas is consistent with the needs of the pronghorn (see part (d) of *Status of Proposed Population* above), we do not anticipate that consultation would significantly change proposed Federal actions on those lands. In portions of

the NEP outside of National Wildlife Refuge and National Park Service lands, in regard to section 7(a)(2), the population is treated as proposed for listing and Federal action agencies are not required to consult on their activities. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. But because the NEP is, by definition, not essential to the survival of the species, conferring will likely never be required for the Sonoran pronghorn populations within the NEP area. Furthermore, the results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities. Nonetheless, some agencies, such as BLM, voluntarily confer with us on actions that may affect proposed species. In addition, section 7(a)(1) requires Federal agencies to use their authorities to carry out programs to further the conservation of listed species, which would apply on any lands within the NEP area. As a result, and in accordance with these regulations, some modifications to proposed Federal actions within the NEP area may occur to benefit the Sonoran pronghorn, but we do not expect projects to be halted or substantially modified as a result of these regulations.

If adopted, this proposal would broadly authorize incidental take of Sonoran pronghorn within the NEP area. The regulations implementing the Act define "incidental take" as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as, agricultural activities and other rural development, ranching, military training and testing, camping, hiking, hunting, vehicle use of roads and highways, and other activities in the NEP area that are in accordance with Federal, Tribal, State, and local laws and regulations. Intentional take for purposes other than authorized data collection or recovery purposes would not be permitted. Intentional take for research or recovery purposes would require a section 10(a)(1)(A) recovery permit under the Act.

The principal activities on private property near the NEP area are agriculture, ranching, rural development, and recreation. We believe the presence of the Sonoran pronghorn would not affect the use of lands for these purposes because there would be no new or additional economic or regulatory restrictions imposed upon States, non-federal entities, or members of the public due to the presence of the Sonoran

pronghorn, and Federal agencies would only have to comply with sections 7(a)(2) and 7(a)(4) of the Act in these areas. Therefore, this rulemaking is not expected to have any significant adverse impacts to activities on private lands within the NEP area.

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

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

(a) If adopted, this proposal will not "significantly or uniquely" affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed NEP designation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year (i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act). This proposed NEP designation for the Sonoran pronghorn would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. When populations of federally listed species are designated as NEPs, the Act's regulatory requirements regarding those populations are significantly reduced. Section 10(j) of the Act can provide regulatory relief with regard to the taking of reestablished species within an NEP area. For example, this proposed rule would not prohibit the taking of Sonoran pronghorn in the NEP area outside of National Wildlife Refuge and National Park Service lands when such take is incidental to an otherwise legal activity, such as agricultural activities and other rural development, ranching, military training and testing, camping, hiking, hunting, vehicle use of roads and highways, and other activities that are in accordance with Federal, State, Tribal and local laws and regulations.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically

beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of a listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this proposed rule with the affected resource agencies in Arizona. Achieving the recovery goals for this species would contribute to its eventual delisting and its return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments would not change; and fiscal capacity would not be substantially directly affected. The special rule operates to maintain the existing relationship between the State and the Federal government and is being undertaken in coordination with the State of Arizona. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. This proposed rule does not contain any new information collections that require approval. OMB has approved our collection of information associated with reporting the taking of experimental populations (50 CFR

17.84(p)(6) and assigned control number 1018-0095. We may not collect or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have prepared a draft EA as defined under the authority of the National Environmental Policy Act of 1969. It is available from the Cabeza Prieta NWR (see **FOR FURTHER INFORMATION CONTACT** section), <http://www.regulations.gov>, and from our Web site at <http://www.fws.gov/southwest/es/Library/>.

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 the Department of the Interior Manual Chapter 512 DM 2, we have consulted with 21 Tribal Nations whose lands or interests might be affected by this rule. The Tohono O'odham Nation participated in scoping meetings and provided comments on draft documents and proposals. The Ak-Chin Indian Community also provided written comments. The only substantial comments from Tribes were related to cultural resource surveys at the specific sites where pens will be constructed, which we will do.

Energy Supply, Distribution or Use (E.O. 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Because this action is not a significant energy action, no Statement of Energy Effects is required.

Clarity of This Regulation (E.O. 12866)

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

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

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Cabeza Prieta NWR (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are staff members of Cabeza Prieta NWR and the Service's Arizona Ecological Services Office (**ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. Amend § 17.11(h) by revising the entry for "Pronghorn, Sonoran" under "MAMMALS" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Pronghorn, Sonoran	<i>Antilocapra americana sonoriensis</i>	U.S.A. (AZ), Mexico.	Entire, except where listed as an experimental population.	E	543	N/A	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Pronghorn, Sonoran	<i>Antilocapra americana sonoriensis</i> .	U.S.A. (AZ), Mexico.	In Arizona, an area north of Interstate 8 and south of Interstate 10, bounded by the Colorado River on the west and Interstate 10 on the east; and an area south of Interstate 8, bounded by Highway 85 on the west, Interstates 10 and 19 on the east, and the U.S.-Mexico border on the south.	XN	NA	17.84(v)
*	*	*	*	*	*	*	*

3. Amend § 17.84 by adding paragraph (v) to read as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(v) Sonoran pronghorn (*Antilocapra americana sonoriensis*).

(1) The Sonoran pronghorn (*Antilocapra americana sonoriensis*) (pronghorn) population identified in paragraph (v)(12) of this section is a nonessential experimental population (NEP).

(2) No person may take this species, except as provided in paragraphs (v)(3) through (6) of this section.

(3) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under § 17.32 may take pronghorn within the NEP area for scientific purposes, the enhancement of propagation or survival of the species, and other conservation purposes consistent with the Endangered Species Act (Act).

(4) A pronghorn may be taken within the boundaries of Yuma Proving Grounds; Barry M. Goldwater Range; lands of the Arizona State Land Department; Bureau of Land Management lands; privately owned lands; and lands of the Tohono O’odham Nation, Colorado River Indian Tribes, Gila River Indian Reservation, Ak-Chin Indian Reservation, Pascua Yaqui Indian Reservation, and San Xavier Reservation within the NEP area, provided that such take is incidental to, and not the purpose of, the carrying out of any otherwise lawful activity; and provided that such taking is reported as soon as possible in accordance with paragraph (v)(6) of this section. Otherwise lawful activities are any activities in compliance with land

management regulations, hunting regulations, Tribal law, and all other applicable law and regulations, and include, but are not limited to, military training and testing, agriculture, rural and urban development, livestock grazing, camping, hiking, hunting, recreational vehicle use, sightseeing, nature or scientific study, rockhounding, and geocaching, where such activities are permitted.

(5) Pursuant to a Memorandum of Understanding (MOU) among the Service, Arizona Game and Fish Department, and the Tribes listed in paragraph (v)(4) of this section, any employee or agent of the parties to the MOU who is designated for such purpose may, when acting in the course of official duties, take a Sonoran pronghorn if such action is necessary to:

(i) Aid a sick, injured, or orphaned Sonoran pronghorn, including rescuing such animals from canals;

(ii) Dispose of a dead Sonoran pronghorn specimen, or salvage a dead specimen that may be useful for scientific study;

(iii) Move a Sonoran pronghorn for genetic purposes or to improve the health of the population; or

(iv) Capture and release a Sonoran pronghorn for relocation, to collect biological data, or to attach, service, or detach radio-telemetry equipment.

(6) Any taking pursuant to paragraphs (v)(3) through (5) of this section must be reported as soon as possible by calling the U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 201 N Bonita Avenue, Suite 141, Tucson, AZ 85745 (520/670-6150), or the Cabeza Prieta National Wildlife Refuge, 1611 North Second Avenue, Ajo, AZ 85321 (520/387-6483). Upon contact, a

determination will be made as to the disposition of any live or dead specimens.

(7) No person may possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any Sonoran pronghorn or Sonoran pronghorn parts taken in violation of these regulations.

(8) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in paragraphs (v)(2) and (7) of this section.

(9)(i) The boundaries of the designated NEP area are based on the maximum estimated range of pronghorn that are released in and become established within the NEP area. These boundaries are physical barriers to movements, including major freeways and highways, and the Colorado River. All release sites will be within the NEP area.

(ii) All pronghorn found in the wild within the boundaries of the NEP area after the first releases will be considered members of the NEP. Any pronghorn occurring outside of the NEP area are considered endangered under the Act.

(iii) The Service has designated the NEP area to accommodate the potential future movements of a wild pronghorn. All released pronghorn and their progeny are expected to remain in the NEP area due to the geographical extent of the designation and substantial barriers to movement that form the boundaries of the NEP.

(10) The NEP will be monitored closely for the duration of the program. Any pronghorn that is determined to be sick, injured, or otherwise in need of special care will be recaptured to the extent possible by Service and/or State

or Tribal wildlife personnel or their designated agent and given appropriate care. Such pronghorn will be released back to the wild as soon as possible, unless physical or behavioral problems make it necessary to return them to a captive-breeding facility.

(11) The Service plans to evaluate the status of the NEP every 5 years to determine future management status and needs, with the first evaluation occurring not more than 5 years after the

first release of pronghorn into the NEP area. All reviews will take into account the reproductive success and movement patterns of individuals released, food habits, and overall health of the population. This evaluation will include a progress report.

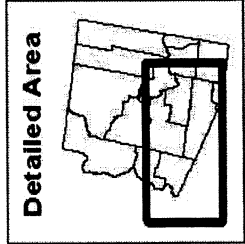
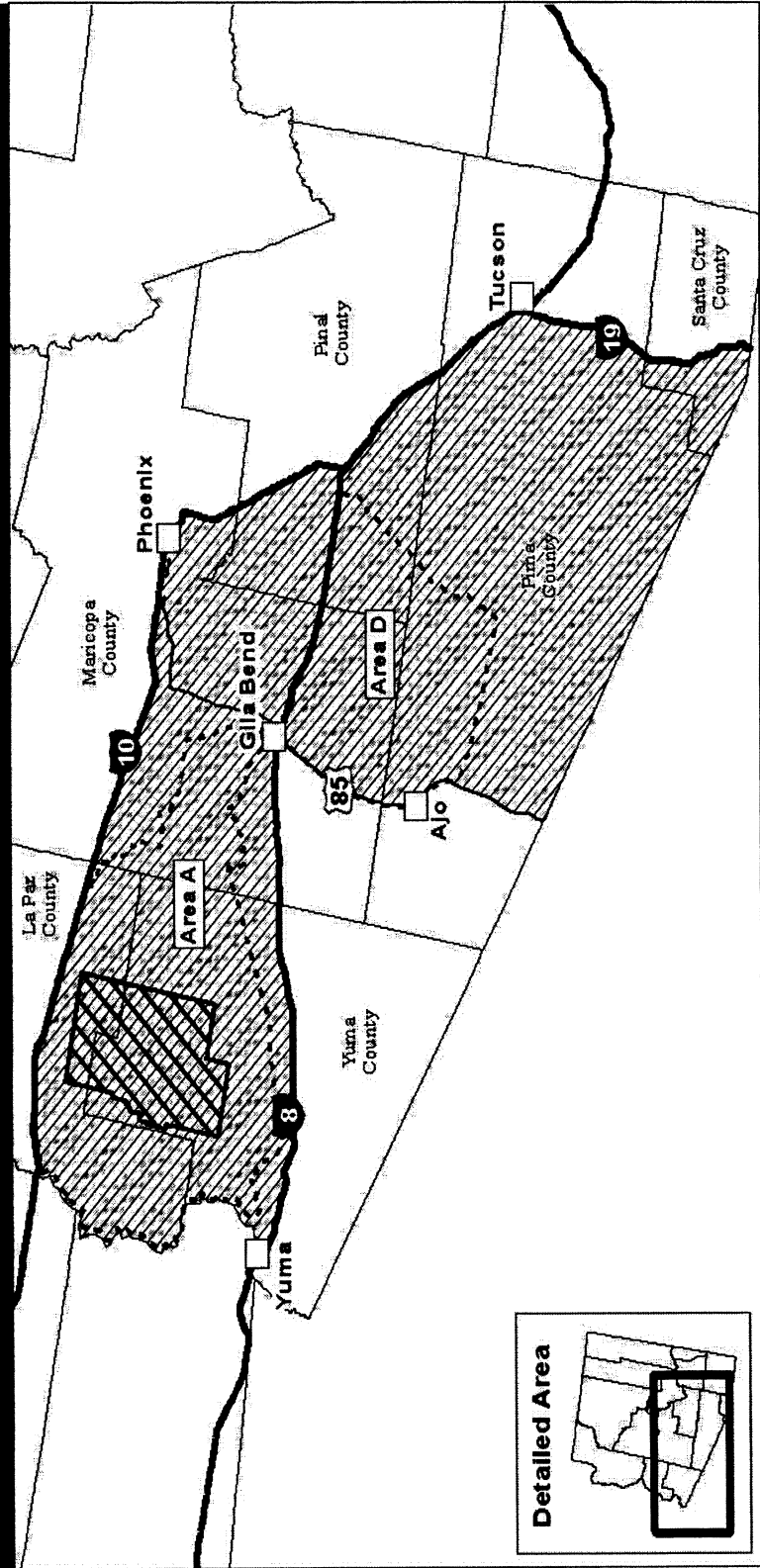
(12) The areas covered by this proposed nonessential experimental population designation are in Arizona. They include the area north of Interstate 8 and south of Interstate 10, bounded by

the Colorado River on the west and Interstate 10 on the east, and an area south of Interstate 8, bounded by Highway 85 on the west, Interstates 10 and 19 on the east, and the U.S.-Mexico border on the south.

(13) **Note:** Map of the proposed NEP area for the Sonoran pronghorn in southwestern Arizona follows.

BILLING CODE 4310-55-P

Proposed 10(j) Experimental Population Area for Sonoran Pronghorn



- Proposed 10(j) Experimental Population Area
- Re-establishment Areas
- Kofa National Wildlife Refuge
- County Boundaries
- Interstates
- State Roads
- Cities

* * * * *

Dated: January 20, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010-2230 Filed 2-3-10; 8:45 am]

BILLING CODE 4310-55-C

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 300**

[Docket No. 100119028-0029-01]

RIN 0648-AY31

Pacific Halibut Fisheries; Catch Sharing Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS proposes to approve and implement changes to the Pacific Halibut Catch Sharing Plan (Plan) for the International Pacific Halibut Commission's (IPHC or Commission) regulatory Area 2A off Washington, Oregon, and California (Area 2A). NMFS proposes to implement the portions of the Plan and management measures that are not implemented through the IPHC. This includes tribal regulations and the sport fishery allocations and management measures for Area 2A. These actions are intended to enhance the conservation of Pacific halibut, to provide greater angler opportunity where available, and to protect overfished groundfish species from being incidentally caught in the halibut fisheries.

DATES: Comments on the proposed changes to the Plan and on the proposed domestic Area 2A halibut management measures must be received no later than 5 p.m., local time on February 19, 2010.

ADDRESSES: Copies of the Plan and Regulatory Impact Review (RIR)/Initial Regulatory Flexibility Analysis (IRFA) are available from Barry Thom, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070. Electronic copies of the Plan, including proposed changes for 2010, and of the draft RIR/IRFA are also available at the NMFS Northwest Region website: <http://www.nwr.noaa.gov>, click on "Groundfish & Halibut" and then click on "Pacific Halibut".

You may submit comments, identified by RIN 0648-AY31, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>
- Fax: 206-526-6736, Attn: Sarah Williams.
- Mail: Barry Thom, Acting Administrator, Northwest Region, NMFS, Attn: Sarah Williams, 7600 Sand Point Way NE, Seattle, WA 98115-0070.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/a in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Sarah Williams, 7600 Sand Point Way NE, Seattle, WA, 98115. By phone at 206-526-4646 or fax at 206-526-6736.

SUPPLEMENTARY INFORMATION: The Northern Pacific Halibut Act (Halibut Act) of 1982, at 16 U.S.C. 773c, gives the Secretary of Commerce (Secretary) general responsibility for implementing the provisions of the Halibut Convention between the United States and Canada (Halibut Convention). It requires the Secretary to adopt regulations as may be necessary to carry out the purposes and objectives of the Halibut Convention and the Halibut Act. Section 773c of the Halibut Act authorizes the regional fishery management councils to develop regulations governing the Pacific halibut catch in their corresponding U.S. Convention waters that are in addition to, but not in conflict with, regulations of the IPHC. Each year between 1988 and 1995, the Pacific Fishery Management Council (Pacific Council) developed a catch sharing plan in accordance with the Halibut Act to allocate the total allowable catch (TAC) of Pacific halibut between treaty Indian and non-treaty harvesters and among non-treaty commercial and sport fisheries in Area 2A.

In 1995, NMFS implemented the Pacific Council-recommended long-term

Plan (60 FR 14651, March 20, 1995). In each of the intervening years between 1995 and the present, minor revisions to the Plan have been made to adjust for the changing needs of the fisheries. The Plan allocates 35 percent of the Area 2A TAC to Washington treaty Indian tribes in Subarea 2A-1 and 65 percent to non-tribal fisheries in Area 2A.

The allocation to non-tribal fisheries is divided into three shares, with the Washington sport fishery (north of the Columbia River) receiving 36.6 percent, the Oregon/California sport fishery receiving 31.7 percent, and the commercial fishery receiving 31.7 percent. The commercial fishery is further divided into a directed commercial fishery that is allocated 85 percent of the commercial allocation and an incidental catch in the salmon troll fishery that is allocated 15 percent of the commercial allocation. The directed commercial fishery in Area 2A is confined to southern Washington (south of 46° 53.30' N. lat.), Oregon, and California. North of 46° 53.30' N. lat. (Pt. Chehalis), the Plan allows for incidental halibut retention in the primary limited entry longline sablefish fishery when the overall Area 2A TAC is above 900,000 lb (408.2 mt). The Plan also divides the sport fisheries into six geographic subareas, each with separate allocations, seasons, and bag limits.

The Area 2A TAC will be set by the IPHC at its annual meeting on January 26-29, 2010, in Seattle, WA. Following the annual meeting the IPHC publishes the final TAC on their website and produces a news release. Through this proposed rule NMFS requests public comments on the Pacific Council's recommended modifications to the Plan and the proposed domestic fishing regulations by [insert date of end of comment period]. This allows the public the opportunity to consider the final Area 2A TAC before submitting comments on the proposed rule. The States of Washington and Oregon will conduct public workshops shortly after the IPHC meeting to obtain input on the sport season dates. After the final Area 2A TAC is known and after NMFS reviews public comments and comments from the states, NMFS will issue a final rule for Areas 2A, 2C, 3A, 3B, 4A, 4B, 4C, 4D, and 4E, Pacific halibut fisheries concurrent with its publication of the IPHC regulations for the 2010 Pacific halibut fisheries. A 15 day public comment period is necessary with this proposed rule to balance two purposes, first to provide the public with enough time to comment on the proposed rule after the final TAC is decided by the IPHC, and second to incorporate the final U.S. domestic