

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AT74

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), herein address the designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch) under the Endangered Species Act of 1973, as amended (Act). In total, we are designating zero acres of critical habitat for *Astragalus lentiginosus* var. *coachellae*. We identified 17,746 ac (7,182 ha) of local, County, State, Federal, and private lands containing features essential to the conservation of *A.l.* var. *coachellae* in Riverside County. However, all habitat with essential features is located within areas to be conserved and managed by the draft Coachella Valley MSHCP/NNCP or within areas conserved within the Coachella Valley Preserve System under the Coachella Valley fringe-toed HCP, and therefore is excluded or exempted from critical habitat under section 4(b)(2) or 3(5)(A) of the Act.

**DATES:** This rule becomes effective on January 13, 2006.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92011. You may obtain copies of the final rule and economic analysis from this address or by calling (760) 431-9440, or from our Internet site at <http://carlsbad.fws.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

**SUPPLEMENTARY INFORMATION:****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 470 species, or 37.5 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat.

We address the habitat needs of all 1,253 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.

We note, however, that the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, found our definition of adverse modification was invalid. In response to the decision, the Director has provided guidance to the Service based on the statutory language. In this rule, our analysis of the consequences and relative costs and benefits of the critical habitat designation is based on application of the statute consistent with the 9th Circuit's ruling and the Director's guidance.

*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 coupled with the need to avoid the risks associated with noncompliance with judicially imposed deadlines, have left the Service with limited ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals. 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 the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

**Background**

*Astragalus lentiginosus* var. *coachellae* is found on loose wind-blown sands in dunes and flats, and in

sandy alluvial washes in the northern Coachella Valley area spanning roughly from the sandy alluvial washes just east of Cabezon to the dunes off Washington Avenue, north and west of Indio in Riverside County, California. At the time *A. l. var. coachellae* was listed under the Act in 1998, we were aware that 90 percent of this taxon's occurrences were located within 3 mi (5 km) of Interstate 10 from north of Indio to Cabezon (Barrows 1987; CNDDB 1996). A majority of these occurrences were discovered in and around Snow Creek, Whitewater River downstream from the percolation ponds, Mission and Morongo Creeks, the Willow Hole Reserve, the Big Dune south of Interstate Highway 10 (I-10), and the Coachella Valley Preserve (Coachella Valley Association of Governments unpublished data 2004). The largest populations of up to several thousand plants were found prior to listing in the Big Dune area south of I-10, including several thousand plants that were discovered again in 2005 (USFWS unpublished data 2005). Other areas containing large populations that were known prior to listing that contain from several hundred to a thousand plants include the Willow Hole reserve area, Snow Creek area, and Coachella Valley Preserve (Coachella Valley Association of Governments unpublished data 2004).

There also exists a disjunct *Astragalus lentiginosus* var. *coachellae* population that was known at the time of listing. This population is located approximately 50 miles (80 km) east of the Coachella Valley in the Chuckwalla Valley near the City of Desert Center. This population has only been found in a limited extent on and near a sandy roadside berm along a 5-mile (8-km) stretch of Highway 177, northeast of the City of Desert Center. The Palen Dunes, located approximately 3 miles (5 km) south of Highway 177, contain sandy soils that appear suitable for *A. l. var. coachellae*. However, it is uncertain whether the plant occurs in this area since surveys are limited to only one unsuccessful survey attempt in 1998 (Bureau of Land Management, unpublished data 2001a).

Please refer to the final listing rule published in the **Federal Register** on October 6, 1998 (63 FR 53596), for a detailed discussion on the taxonomic history and description of this taxon. It is our intent in this document to reiterate and discuss only those topics directly relevant to the development and designation of critical habitat or relevant information obtained since the final listing.

The primary threat to *Astragalus lentiginosus* var. *coachellae* and its habitat is the extensive and growing urban development in the Coachella Valley (63 FR 53596), including residential, commercial, and agricultural development. Urbanization has both direct and indirect adverse effects on *A. l. var. coachellae*. Urbanization directly destroys suitable and occupied habitat onsite, and indirectly degrades suitable and occupied habitat by blocking the fluvial (water) and eolian (wind) transport of sand from sand source areas to downwind areas of suitable habitat. Other threats to *Astragalus lentiginosus* var. *coachellae* and its habitat include the obstruction of sand transport and competition by dense populations of invasive exotic plants, such as Saharan mustard (*Brassica tournefortii*) and Mediterranean grass (*Schismus barbatus*), and direct mortality by off-highway vehicle (OHV) use (63 FR 53596).

#### Previous Federal Actions

The following section summarizes the Federal actions that occurred since the rule listing this species as endangered was published in the **Federal Register** on October 6, 1998. Please refer to the final listing rule (63 FR 53596) for a discussion of Federal actions that occurred prior to the species Federal listing.

At the time of listing we determined that designation of critical habitat was "not prudent" (63 FR 53596). On November 15, 2001, the Center for Biological Diversity and the California Native Plant Society filed a lawsuit against Secretary of the Interior and the Service challenging our "not prudent" determinations for eight plant species listed as endangered or threatened, including *Astragalus lentiginosus* var. *coachellae* (*Center for Biological Diversity, et al. v. Norton*, No. 01 CV 2101, S.D. Cal.). A second lawsuit asserting the same challenge was filed on November 21, 2001, by the Building Industry Legal Defense Foundation (*Building Industry Legal Defense Foundation v. Norton*, No. 01 CV 2145, S.D. Cal.). The parties in both cases agreed to remand the critical habitat determinations for the eight plant species at issue to the Service for reconsideration. On July 1, 2002, the Court directed us to reconsider our not prudent determination and submit to the Federal Register for publication a proposed critical habitat designation, if prudent, for *Astragalus lentiginosus* var. *coachellae* on or before November 30, 2004, and to submit to the Federal Register for publication of a final critical

habitat designation on or before November 30, 2005. The proposed rule to designate critical habitat for *Astragalus lentiginosus* var. *coachellae* was signed on November 30, 2004, and published in the **Federal Register** on December 14, 2004 (69 FR 74468).

#### Summary of Comments and Recommendations

During the initial 60-day public comment period for the proposed designation of critical habitat (69 FR 74468), we contacted all appropriate State, local and Federal agencies, elected officials, scientific organizations, and other interested parties, via mail and/or fax, and invited them to submit comments and/or information concerning the proposed rule. We also published newspaper notices on December 17, 2004, in the *Desert Sun*, Palm Springs, CA; *Press-Enterprise*, Riverside, CA; *San Diego Union-Tribune*, San Diego, CA; *Orange County Register*, Santa Ana, CA; and in the *Los Angeles Times*, Los Angeles, CA, inviting public comment. The initial comment period ended February 14, 2005. We did not receive any requests for a public hearing prior to the published deadline.

A second comment period was open from September 27, 2005, to October 27, 2005 (70 FR 56434), announcing the availability of the September 2005 draft economic analysis (DEA) of critical habitat designation for *Astragalus lentiginosus* var. *coachellae* as prepared by Northwest Economic Associates and reopening the comment period for the proposed rule. All comments and new information have been incorporated into this final rule as appropriate.

During the first comment period, we received four comments, including a joint letter from two non-profit organizations, a letter from a county agency, a water agency, and a local mining business. All four comment letters disagreed with the size and area proposed critical habitat: three of the letters requested the reduction of critical habitat and one letter requested the expansion of critical habitat to more areas.

During the second comment period, we received one comment letter on the draft economic analysis from an environmental organization. The commenter, who also commented during the first comment period, disagreed with excluding areas from critical habitat and requested that we include sand source areas in critical habitat. The commenter also claimed that the economic analysis grossly overestimated the costs associated with

conserving *Astragalus lentiginosus* var. *coachellae*.

#### Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from four knowledgeable individuals who have expertise with the species, with the geographic region where the species occurs, and/or with the principles of conservation biology. The purpose of such review is to ensure that the designation is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

Of the four individuals contacted, two responded. The two peer reviewers that responded generally supported the proposal and provided us with additional information, clarifications, and suggestions to improve the final critical habitat designation. One reviewer recommended expanding the critical habitat designation to include lands within the draft Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) that were proposed for exclusion. This recommendation was based on the fact that the draft Coachella Valley MSHCP/NCCP has yet to be approved and that effective conservation efforts for *Astragalus lentiginosus* var. *coachellae* are, therefore, still unproven. The other peer reviewer did not comment on whether critical habitat should be expanded or reduced, but recommended the Service provide more explanation for our determinations for including or excluding certain areas from designated critical habitat. Both peer reviewers discussed the importance of including important sand source areas as critical habitat because they are important for providing and transporting sediment containing new sands to downstream and downwind sandy areas containing PCEs, even though these areas do not contain PCEs that support populations of this taxon. Both reviewers suggested ways to improve the clarity of both the rule and our decision-making process.

We reviewed all comments, including comments received from the public and peer reviewers during the comment periods, for substantive, relevant issues and new data regarding critical habitat and *Astragalus lentiginosus* var. *coachellae*. Peer reviewer comments are summarized and addressed separately in the following section. Public comments are grouped into three general issue categories relating to critical habitat and the draft economic analysis and addressed in the Public Comments section below.

#### Peer Review Comments

(1) *Comment:* A peer reviewer requested we clarify how critical habitat may provide legal protection to a federally listed plant on non-Federal lands. Specifically, they sought more information on several matters, including: (1) Whether non-Federal landowners were contacted about the proposed critical habitat designation and inquired about their perspective of the proposal; (2) whether non-Federal landowners are currently under any agreement with State, Federal, or local governments for the conservation of this taxon; (3) an assessment of how the proposed designation may open the Service to litigation for designating critical habitat on non-Federal lands and increase vandalism to plants on non-Federal lands.

*Our Response:* First, although some habitat containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* were determined to occur on non-Federal lands, these lands were excluded from critical habitat designation because of their inclusion in the preferred alternative reserve design in the draft Coachella Valley MSHCP/NCCP (CVMC 2004).

Second, we did not contact all non-Federal landowners whose property contained habitat with features essential to the conservation of this taxon. However, we did inform the public about the proposed critical habitat designation through several local newspapers and with a letter to elected officials and several local, State, Tribal, and Federal agencies working in the Coachella Valley. We also are currently working with non-Federal landowners whose property contains habitats with features essential to the conservation of this taxon on the draft Coachella Valley MSHCP/NCCP to conserve habitat for this taxon.

Third, it is not within the scope of a critical habitat designation to determine whether a designation of critical habitat on non-Federal lands will make the Service more vulnerable to litigation. As required under section 4(b)(1)(A) of the Act, we use the best scientific data available to determine areas that contain habitat with features essential to the conservation of the species. Ownership of lands being proposed as critical habitat is relevant to the Secretary's consideration under 4(b)(2) of the Act of relevant factors such as the economic impacts to landowners of designating such lands as critical habitat. We also share concerns that designating critical habitat may lead to an increase in vandalism of *Astragalus lentiginosus*

var. *coachellae*, as stated in our rule to list the species on October 6, 1998 (63 FR 53596). However, we anticipate that vandalism to this taxon may not increase since we are working with non-Federal landowners on the draft Coachella Valley MSHCP/NCCP and excluding lands that contain habitat with features essential to the conservation of the species from critical habitat. Furthermore, the draft Coachella Valley MSHCP/NCCP is also proposing to protect reserve areas containing *A. l.* var. *coachellae* with fencing and other forms of enforcement. These types of actions under a comprehensive management plan offer more protections for federally listed plants, such as *A. l.* var. *coachellae*, on non-Federal lands than a critical habitat designation.

(2) *Comment:* A peer reviewer emphasized the importance of protecting various types of habitat, including: (1) Currently unoccupied habitat; (2) currently unoccupied habitat that was historically occupied; (3) potential habitat downwind and downstream of current populations; and (4) source sand areas that provide future habitat in downwind and down-drainage areas. Another reviewer stated that it was unclear in the proposed rule whether these areas were included as critical habitat.

*Our Response:* First, the Act defines critical habitat as "specific areas within the geographical area occupied by the species, at the time it is listed \* \* \* on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." We have identified all areas within the geographic range of the species that are known to be occupied, contain features essential to the conservation of *Astragalus lentiginosus* var. *coachellae*, and that may require special management considerations or protection. It is not our current policy to include all areas that could potentially provide suitable habitat or are not known to be occupied, even if they were historically occupied. Second, we agree with the reviewer that sand source areas are important for the conservation of *A. l.* var. *coachellae*. However, we have determined that the presence of active sand dunes (primary constituent element (PCE) 1) is an essential feature, and we have designated them as a PCE (see Primary Constituent Elements for a detailed discussion). Therefore, Federal actions that affect the sand transport system will indirectly affect critical habitat. Because there is already a regulatory

mechanism within this designation, it is not necessary to designate the sand source areas themselves. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases.

(3) *Comment:* A peer reviewer stated that one of the benefits of designating critical habitat is that it helps in identifying extant populations of *Astragalus lentiginosus* var. *coachellae* when initiating Section 7 consultations.

*Our Response:* We agree with the reviewer that there is an educational benefit of designating critical habitat because it identifies areas that contain features essential to the conservation of the species that may require special management protection or considerations, and this may provide information to Federal agencies required to consult with us on their actions.

(4) *Comment:* The same peer reviewer stated that another benefit of designating critical habitat is identifying unoccupied areas that may be important areas for supporting *Astragalus lentiginosus* var. *coachellae* populations in the future.

*Our Response:* We agree with the reviewer that unoccupied areas may be important for the recovery of the taxon by supporting future *Astragalus lentiginosus* var. *coachellae* populations. However, it is not the intent of the Act to designate critical habitat throughout a taxon's entire range, including areas that potentially could be occupied. We have identified areas known to be occupied at the time of listing and known to be currently occupied that contain habitat with features essential to the conservation of this taxon.

(5) *Comment:* A peer reviewer stated that it is beneficial to exclude areas from critical habitat if the area is already protected through the Federal or local government ownership as well as through private reserves.

*Our Response:* We agree with the reviewer. A critical habitat designation will not afford as much protection for an area containing habitat with features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* as would be afforded under Federal, State, Tribal, or local ownership provided the property is managed for the conservation of this taxon. Also, under the definition of critical habitat, we can only include lands in critical habitat if the essential features may require special management considerations or protection. Thus, we have excluded all areas containing features essential to the conservation of this taxon due to their inclusion within

conservation areas that are or will be conserved and managed by Federal and local governments (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act for a more detailed discussion*).

(6) *Comment:* A peer reviewer stated that designating only small tracts of land as critical habitat may not be beneficial because of the movement of suitable habitat through time due to wind and flooding, thus resulting in these areas becoming unsuitable.

*Our Response:* First, as discussed above in Comment #5, we have excluded in this final rule all areas that were proposed as critical habitat. Second, the reason only small tracts of lands were originally proposed as critical habitat was because larger adjacent areas with habitat containing features essential to conservation of this taxon were either excluded from the designation because they are proposed for protection under the draft Coachella Valley MSHCP/NCCP. We believe that these conservation practices will garner more conservation benefits than a critical habitat designation (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act for a more detailed discussion*).

(7) *Comment:* A peer reviewer stated that there is value in the process for determining critical habitat because it has allowed for an assessment of areas with habitat that contain features essential to the conservation of the taxon, even though not all these areas are being proposed because they are being addressed in other management plans.

*Our Response:* We agree with the reviewer and have discussed this later in the rule (see Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a detailed discussion).

(8) *Comment:* A peer reviewer stated that there are many occurrences of *Astragalus lentiginosus* var. *coachellae* on sites that are "cut off" from sand sources by intervening land uses. The peer reviewer suggests that the rule would be more clear if it described how long these sites might be expected to support viable populations and whether these occurrences can be meaningful to long-term conservation for the plant, and whether management efforts could help protect these populations.

*Our Response:* We agree with the reviewer that there are occurrences of *Astragalus lentiginosus* var. *coachellae* that are now isolated from the sand

transport system and "cut off" from the sand sources that maintain suitable habitat for this plant. The long-term viability of these occurrences is reduced because there is little to no potential that the natural ecological processes that maintain the habitat for *A. l.* var. *coachellae* will return. The length of time that these isolated occurrences will remain into the future depends upon a variety of site-specific factors such as the degree of isolation from the sand transport system, size and scale of the development that is blocking the downstream movement of sediment, and the rate of sand loss around the plant population. Management efforts may substitute for the natural ecological processes by mechanically transferring sand to areas "cut off" from sand sources. These management practices are discussed below (see section titled Special Management Considerations or Protection).

(9) *Comment:* A peer reviewer questioned why there were no Agua Caliente Reservation lands included within critical habitat if there are significant populations on these lands.

*Our Response:* We recognize that important populations exist on Agua Caliente Reservation lands in the Big Dune area. However, we determined that these areas did not contain features essential to the conservation of this taxon because the ecological processes that maintain suitable habitat in this area from the Whitewater River sand transport system have been compromised by development in Cathedral City. New eolian sands are prevented by development from replenishing the Big Dune area. We have determined that without these ecological processes the long-term prospect of *Astragalus lentiginosus* var. *coachellae* populations in this area is reduced.

(10) *Comment:* A peer reviewer stated that we should include a discussion on the best and worst case scenarios for *Astragalus lentiginosus* var. *coachellae* protections once the draft Coachella Valley MSHCP/NCCP is finalized.

*Our Response:* The impacts and conservation measures provided for *Astragalus lentiginosus* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP will be analyzed as part of a section 7 consultation for the issuance of a section 10(a)(1)(B) permit to the Coachella Valley Association of Governments (CVAG) and local jurisdictions. The Service has not completed the section 7 consultation for this section 10 permit at this time. However, we are confident that CVAG will reach a successful conclusion to its MSHCP/NCCP development process

and successfully conserve habitat for *Astragalus lentiginosus* var. *coachellae* to meet the requirements outlined in section 10(a)(1)(B) of the Act. The draft MSHCP/NCCP proposes to conserve 19,321 ac (7,819 ha) of modeled *A. l.* var. *coachellae* habitat in their Conservation Areas that includes large core habitat areas and other important conservation areas, such as sand sources and sand transport corridors. Other goals include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting necessary ecological processes, including the sand transport systems, that will be beneficial in maintaining the PCEs in the areas containing features essential for the conservation of *A. l.* var. *coachellae*; (3) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions. Therefore, we have excluded under section 4(b)(2) of the Act all lands containing features essential for the conservation of *A. l.* var. *coachellae* within the Coachella Valley MSHCP/NCCP plan area (see section titled Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan MSHCP/NCCP for a more detailed discussion).

(11) *Comment:* A peer reviewer stated that we should include a discussion on what options the Service has for conservation of *Astragalus lentiginosus* var. *coachellae* if the draft Coachella Valley MSHCP/NCCP is never finalized.

*Our Response:* In the absence of an approved Coachella Valley MSHCP/NCCP, *Astragalus lentiginosus* var. *coachellae* would continue to receive means for protection and be provided a program for its conservation under the Act. Under section 4 of the Act, the Service would develop and implement a recovery plan for *A. l.* var. *coachellae*, although there are currently no plans by the Service to fund or finish preparing a recovery plan. However, implementation of a recovery plan by landowners, Federal agencies, and other parties is voluntary. Section 7(a)(1) of the Act calls for Federal agencies (including the Department of the Interior), in consultation with and assistance from the Secretary of the Interior, to utilize their authorities in furtherance of the purposes of the Act. Section 7(a)(2) of the Act requires Federal agencies to ensure that any Federal action would not likely jeopardize the continued existence of

the species or result in the destruction or adverse modification of critical habitat. Section 9 of the Act includes prohibitions on the removal and reduction to possession; maliciously damaging or destroying, or removing, cutting, digging up, or damaging or destroying in knowing violation of any state law; or in violation of a state criminal trespass law of *A. l.* var. *coachellae* on Federal lands.

The Bureau of Land Management (BLM) continues to manage *Astragalus lentiginosus* var. *coachellae* under the California Desert Conservation Act and other authorities, including section 7 of the Act. We have made significant progress in completing the Coachella Valley MSHCP/NCCP and we believe that the plan would provide a greater level of conservation to *A. l.* var. *coachellae* than would sections 4, 7, and 9 of the Act by themselves. The plan provides for the conservation of core habitat areas and other conserved habitats that would benefit the species, protects necessary ecological processes and biological corridors and linkages, implements monitoring and management programs, and restricts activities that result in adverse impacts to this plant.

(12) *Comment:* A peer reviewer stated that we should include a discussion on the Service's authority (if any) to monitor compliance of the Coachella Valley MSHCP/NCCP and ensure that conservation measures for *Astragalus lentiginosus* var. *coachellae* are implemented as proposed in the draft plan.

*Our Response:* Section 10(a)(2)(B) of the Act specifies that an incidental take permit "shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with." The draft Coachella Valley MSHCP/NCCP includes monitoring and reporting requirements that will be incorporated into any permit issued under the plan.

(13) *Comment:* The same peer reviewer also stated that the Service should describe any proposed monitoring or adaptive management in the draft plan that might ensure adequate remedial work that will be done if needed.

*Our Response:* The draft Coachella Valley MSHCP/NCCP follows an adaptive management approach that involves development of objectives, conceptual models of system dynamics, a monitoring program, and changes to

management based on monitoring results. The facets are interrelated and their integration will test assumptions systematically in order to adapt and learn.

(14) *Comment:* A peer reviewer stated that the Service's analysis of the benefits of excluding lands covered under the draft Coachella Valley MSHCP/NCCP did not present a cogent argument for why the benefits of excluding critical habitat within the draft Coachella Valley MSHCP/NCCP outweigh the benefits of inclusion.

*Our Response:* We believe that our argument for excluding non-Federal lands within the draft Coachella Valley MSHCP/NCCP emphasizes the point that benefits of a comprehensive management plan that covers a federally listed plant on non-Federal lands will garner more conservation benefits than designating critical habitat (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

#### *Comments From the State*

Section 4(i) of the Act states, "the Secretary shall submit to the State agency a written justification for her failure to adopt regulation consistent with the agency's comments or petition." No comments were received from the State regarding the proposal to designate critical habitat for the *Astragalus lentiginosus* var. *coachellae*.

#### **Comments Related to the Process of Designating Critical Habitat**

(15) *Comment:* One commenter stated that the Service failed to cite any scientific evidence supporting our decision to exclude certain areas with habitat containing features essential to the conservation of the taxon from the critical habitat designation.

*Our Response:* Section 4(b)(2) of the Act allows us to consider the economic, national security, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. As outlined in the proposed rule, we determined the benefits of exclusion outweigh the benefits of including lands covered by the draft Coachella Valley MSHCP/NCCP. We have also clarified our determination that exclusion of

these areas will not result in extinction of the species (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

(16) *Comment:* A commenter contended that Habitat Conservation Plans (HCPs: In this case the draft Coachella Valley MSHCP/NCCP) have very different goals for species conservation than critical habitat designations. HCPs allow for take of covered species, reducing species numbers that are already in crisis of extinction even further and further reducing listed species opportunity for recovery. Whereas, a critical habitat designation and protection are meant to promote recovery of the species (section 3(3) and 3(5) of the Act; F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United State Fish and Wildlife Service*). Furthermore, under the Act, "essential habitat" and "unoccupied areas" that are critical to the species survival and recovery have no legal definition and therefore no legal standing under the law. As a result, the commenter contended that by not designating critical habitat as required, the Service is an abdication of responsibility to follow the law.

*Our Response:* The Service has operated under the Secretary's discretion to exclude areas from critical habitat if the benefits of such exclusion outweigh the benefits of its inclusion. Section 4(b)(2) of The Act states "the Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned."

The Service's exclusion of areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* from critical habitat is based on the inclusion of these areas within conservation areas of a nearly approved HCP. The benefits to *A. l.* var. *coachellae* that are garnered from a HCP

outweigh the benefits of including these areas as designated critical habitat and applying another regulatory hardship on HCP participants for lands that are already or will conservation benefits for *A. l.* var. *coachellae*.

(17) *Comment:* A commenter stated that there is a benefit of having designated critical habitat in excluded areas should the draft Coachella Valley MSHCP/NCCP and Coachella Valley Fringe-Toed Lizard HCP falter in their conservation mandate.

*Our Response:* If these HCPs were to fail in their conservation mandate, it would be possible for the Service to re-propose these areas for critical habitat designation. However, the Service has determined that the benefits of designating critical habitat in these areas do not outweigh the benefits of excluding these areas from designation while these lands are covered under either the Coachella Valley MSHCP or the Coachella Valley Fringe-Toed Lizard HCP, and therefore have excluded these areas from designation.

(18) *Comment:* One commenter expressed their concern that any designation of critical habitat within the draft Coachella Valley MSHCP/NCCP Plan Area may jeopardize the participation by various cities in the Plan.

*Our Response:* It is our determination that maintaining partnerships in the planning process for the Coachella Valley MSHCP/NCCP will provide a greater conservation benefit to *Astragalus lentiginosus* var. *coachellae* than designating critical habitat on lands under these partners' auspices and potentially losing their participation in the Plan.

(19) *Comment:* A commenter stated that the proposed critical habitat included only one of twenty-six *Astragalus lentiginosus* var. *coachellae* locations recorded in the California Natural Diversity Database (CNDDDB). They also stated that it is unclear if the remaining locations are within lands excluded from the designation, and commented that all lands with habitat essential to the conservation of the taxon should be included as critical habitat. They also stated excluding critical habitat would hurt the recovery potential of the taxon.

*Our Response:* Ten of twenty-eight CNDDDB records (there are 28 records rather than 26 as stated in the comment) were captured within areas that we have determined contain features essential to the conservation of this taxon. In determining these areas, it is important not only to look at quantity of locations that were captured, but also the quality of the locations that were captured.

Several of the CNDDDB records are in habitats that are severely degraded due to significant disturbance from nearby development. Additionally, in determining areas containing essential features, we compiled a larger dataset of *Astragalus lentiginosus* var. *coachellae* locations than just the CNDDDB records. It is evident from our data that we have captured a majority of the high quality locations within areas possessing features essential to the conservation of this taxon. High-quality locations include those sites with PCEs and are within areas still functioning as part of one of the three major sand transport systems in the Coachella Valley. We believe we captured locations that have the best prognosis for long-term survival and are the areas essential to the conservation of the taxon. Our proposed rule for critical habitat designation of *A. l.* var. *coachellae* clearly mapped areas that were being proposed as critical habitat as well as areas that were proposed for exclusion. We do not believe that it should have been confusing to determine as to whether the CNDDDB records were located either within proposed areas, excluded areas, or areas not containing features essential to the conservation of *A. l.* var. *coachellae*.

We also do not believe that all areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* should be designated critical habitat if they are within areas that are already receiving or will very likely receive management benefits to this taxon (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act* for a more detailed discussion). On the same note, we do not believe that excluding critical habitat based on existing or pending habitat conservation plans would set back the recovery potential of *A. l.* var. *coachellae* since these plans provide more conservation benefits than would be provided by designating these areas as critical habitat. As a result, we believe that the long-term partnerships that are formed by agreeing to habitat conservation plans or other conservation plans that provide conservation benefits to *A. l.* var. *coachellae* work more effectively toward promoting the recovery of this taxon than would a critical habitat designation.

(20) *Comment:* One commenter stated that the critical habitat designation suffers from a lack of habitat connectivity.

*Our Response:* We recognize that habitat connectivity is an important aspect of a critical habitat designation because this allows for gene flow

between populations and recolonization of areas with endangered or extirpated populations. We used the best available scientific data to develop the criteria used to delineate critical habitat boundaries associated with both recent occurrences and occurrences known at the time of listing (see *Criteria Used To Identify Critical Habitat*). We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

*Comments Related to Site-Specific Areas and Unoccupied Areas Identified for Possible Inclusion*

(21) *Comment:* One commenter requested that unoccupied areas identified in the proposed rule as being important to maintain fluvial and eolian processes be included as part of the final critical habitat designation.

*Our Response:* See response to Comment #2 above.

(22) *Comment:* A commenter stated that not all Coachella Valley Water District (CVWD) lands were excluded from the critical habitat designation, possibly due to the Service's use of outdated parcel data. Similarly, another commenter stated that we should remove all Granite Construction Company property from critical habitat designation and suggested that its inclusion may be due to errors in parcel data.

*Our Response:* We excluded all CVWD lands from critical habitat because of their participation and anticipated signatory status in the draft Coachella Valley MSHCP/NCCP planning process (see Discussion in Relation of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan/ Natural Communities Conservation Plan (MSHCP/NCCP)). The inclusion of CVWD property within the critical habitat designation was an artifact of our mapping process during the proposed rule for describing legal boundaries for areas with habitat containing features essential for the conservation of this taxon. The mapping process for the proposed rule overlaid a 100m by 100m grid on areas containing essential features to create an outer boundary that was used to describe the legal Universal Transverse Mercator (UTM) coordinates. In some areas, this process captured excluded Water District lands containing essential features for the conservation of this

taxon. We changed our mapping procedure for the final designation and abandoned use of the grid system. Instead, the legal UTM coordinates for the boundary of the critical habitat followed precisely with the boundary of the areas containing essential features. As a result, all CVWD lands containing features essential for the conservation of this taxon were excluded from critical habitat designation pursuant to section 4(b)(2) of the Act.

Granite Construction Company lands were also included within the legal maps for the same reasons. After the change in our mapping process for the final designation, Granite Construction Company lands are no longer in critical habitat because they do not contain habitat with features essential to the conservation of this taxon.

(23) *Comment:* Two commenters requested that BLM lands north of the percolation ponds be removed from critical habitat because it is not suitable habitat. One of these commenters also requested that all remaining BLM lands within the draft Coachella Valley MSHCP/NCCP Plan be excluded from critical habitat because the BLM's California Desert Conservation Area Plan Amendment (CDCAPA) for the Coachella Valley already requires BLM to manage their lands consistent with the Coachella Valley MSHCP/NCCP.

*Our Response:* We agree with the commenter and all BLM lands that were proposed as critical habitat are excluded from designation in this final rule based on BLM's commitment under their CDCAPA to manage their lands consistent with the draft Coachella Valley MSHCP once it is completed (see section titled Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP) for a more detailed discussion).

(24) *Comment:* One commenter stated that the *Astragalus lentiginosus* var. *coachellae* population located north of Desert Center also be included as critical habitat since it represents an important peripheral population. The commenter also discusses other peripheral populations that were not included.

*Our Response:* Although the *Astragalus lentiginosus* var. *coachellae* population in Desert Center appears unusual because it is so disjunct from the main center of the taxon's range, we do not have any information indicating that this population has special demographic, ecological, or genetic significance. It is not the intent of the

Act to include every population throughout a species' range within critical habitat. The commenters did not provide information indicating the significance of the Desert Center population or what other peripheral populations should have been included within critical habitat.

(25) *Comment:* A commenter requested clarification on the area of proposed critical habitat in Unit 1 outside the bounds of the Whitewater Floodplain Conservation Area (southeast of the Conservation Area).

*Our Response:* This area has been determined to not contain features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* and has been removed from critical habitat.

**Comments Related to the Draft Economic Analysis**

(26) *Comment:* A commenter stated that the draft economic analysis (DEA) should have included an analysis of benefits, such as maintaining natural flood control processes along waterways, amenity values, open space, flood/drought mitigation, and detoxification and decomposition of wastes.

*Our Response:* In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is to designate areas in need of special management that contain the features that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from "just knowing" that a particular listed species' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition,

are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (e.g., impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, however, the economic analysis did not identify any credible estimates or measures of positive economic impacts that could offset some of the negative economic impacts analyzed earlier in this analysis.

Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. OMB's Circular A-4 distinguishes two types of economic benefits: direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose of the rulemaking. In the context of critical habitat, the primary purpose of the rulemaking (i.e., the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation and recovery of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

We have accordingly considered, in evaluating the benefits of excluding versus including specific area, the biological benefits that may occur to a species from designation (see below, Exclusions Under section 4(b)(2) of the Act), but these biological benefits are not addressed in the economic analysis.

(27) *Comment:* The same commenter objected to the attribution of conservation costs that benefit multiple sympatric species solely to *Astragalus lentiginos* var. *coachellae* in the DEA.

*Our Response:* The DEA discusses other relevant regulations and protection efforts for other listed species that include *Astragalus lentiginos* var. *coachellae* and its habitat. In general, the analysis errs conservatively in order to make certain the economic effects have not been missed. It treats as "coextensive" other Federal and State requirements that may result in overlapping protection measures (e.g., California Environmental Quality Act) for the plant. The economic analysis distributes the cost of conserving *A. l.* var. *coachellae* habitat equally among the number of other listed species likely to co-exist with *A. l.* var. *coachellae* as indicated by the historical consultations. None of the past *A. l.* var. *coachellae* consultations focused solely on *A. l.* var. *coachellae* but rather on other listed and sensitive species co-occurring in the area. Within a biological opinion or HCP that covers several species, we are unable to accurately segregate out the cost for an individual species from the rest of the species covered in the biological opinion or HCP.

(28) *Comment:* The same commenter stated that the DEA does not make a distinction between the costs of listing the species under the Act versus designating critical habitat.

*Our Response:* The economic analysis is intended to assist the Secretary in determining whether the benefits of excluding particular areas from the designation outweigh the biological benefits of including those areas in the designation. Also, this information allows us to comply with direction from the U.S. 10th Circuit Court of Appeals that "co-extensive" effects should be included in the economic analysis to inform decision-makers regarding which areas to designate as critical habitat (*New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service* (248 F.3d 1277)).

This analysis identifies those potential activities believed to be most likely to threaten *Astragalus lentiginos* var. *coachellae* and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. Where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under section 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all

future conservation-related impacts to be co-extensive with the designation.

(29) *Comment:* A commenter contended that pre-designation impacts are attributed to the listing of the species and not critical habitat, and therefore should not be included in the DEA.

*Our Response:* The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Astragalus lentiginos* var. *coachellae*. The Act defines critical habitat to mean those specific areas that are essential to the conservation of the species. The Act also defines conservation to mean the use of all methods and procedures necessary to bring any endangered species or threatened species to the point at which the measures of the Act are no longer necessary. Thus we interpret the Act to mean that the economic analysis should include all of the economic impacts associated with the conservation of the species, which may include some of the effects associated with listing because the species was listed prior to the proposed designation of critical habitat. We note that the Act generally requires critical habitat to be designated at the time of listing, and, that had we conducted an economic analysis at that time, the impacts associated with listing would not be readily distinguishable from those associated with critical habitat designation.

(30) *Comment:* A commenter questioned the framework for quantifying conservation-related costs in the DEA of critical habitat for *Astragalus lentiginos* var. *coachellae* for flood control projects, local transportation projects, California Department of Transportation (Caltrans) mitigation, and all other projects within the boundaries of the draft Coachella Valley MSHCP/NCCP as these projects and the costs associated with them are covered under the draft Coachella Valley MSHCP/NCCP.

*Our Response:* As described in Section 8.6.2 of the DEA, the post-designation Coachella Valley MSHCP/NCCP costs captured by the DEA include management, monitoring, and administration of the Coachella Valley MSHCP/NCCP reserve system. These costs are calculated and allocated based on the rate of projected development within the units. Other non-development related activities also contribute funds toward the management, monitoring and management of the Coachella Valley MSHCP/NCCP. As described in Section 6.1.2.2 of the DEA, CVAG, the joint

powers authority functioning as lead agency for the preparation of the draft Coachella Valley MSHCP/NCCP, is expected to contribute approximately \$1 million toward management, monitoring, and administration of the Coachella Valley MSHCP/NCCP for transportation projects. The costs related to these transportation projects are not captured in the estimated Coachella Valley MSHCP/NCCP costs. Furthermore, as described in Sections 6.1.2.3 and 8.1.1.2 of the DEA, the costs captured in the DEA for Caltrans mitigation and flood control are related to land acquisitions, and land acquisition costs were not captured in the estimated Coachella Valley MSHCP/NCCP costs. The Coachella Valley MSHCP/NCCP costs estimated in the DEA include management, monitoring, and administration of the Coachella Valley MSHCP/NCCP reserve system.

(31) *Comment:* The same commenter questioned the use of cost information from the draft Coachella Valley MSHCP/NCCP in the DEA since the Coachella Valley MSHCP/NCCP is not yet finalized and will not be prior to final designation of critical habitat for *Astragalus lentiginosus* var. *coachellae*.

*Our Response:* As described in Section 1.3 of the DEA, estimates of post-designation effects are based on activities that are “reasonably foreseeable,” including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. The draft Coachella Valley MSHCP/NCCP falls under this latter category. While in draft form, planning and development of the Coachella Valley MSHCP/NCCP began 12 years ago in 1994, and it is anticipated that the Coachella Valley MSHCP/NCCP will become permitted by year-end 2005. Furthermore, as described in response to Issue 1, considering the Coachella Valley MSHCP/NCCP costs captured by the DEA are separate from the estimated non-development-related costs, there are no double counting issues.

(32) *Comment:* A commenter questioned the consistency in the allocation of habitat conservation plan-related costs to *Astragalus lentiginosus* var. *coachellae* in the DEA. In particular, the commenter questioned why conservation costs to develop the Agua Caliente Band of Cahuilla Indians HCP were not allocated to costs of critical habitat for *Astragalus lentiginosus* var. *coachellae*.

*Our Response:* As described in Section 3.4 of the DEA, a draft HCP proposing coverage for 24 species, including *Astragalus lentiginosus* var.

*coachellae*, has been developed for the Agua Caliente Indian Reservation. In the proposed rule, we did not identify habitat on Agua Caliente Tribal lands as containing features essential for the conservation of the *Astragalus lentiginosus* var. *coachellae*, thus, no pre or post-designation costs are estimated on Tribal lands as associated with the critical habitat designation.

(33) *Comment:* A commenter questioned the relevancy of some of the development-related *Astragalus lentiginosus* var. *coachellae* conservation costs described in Table 13. Specifically, the commenter questioned the inclusion of costs that do not directly or indirectly benefit *A. l. var. coachellae*.

*Our Response:* As described in Section 5.1 of the DEA, the section 7 consultation history involving *Astragalus lentiginosus* var. *coachellae* and development projects was reviewed. The consultation history for *A. l. var. coachellae* provides the types of conservation activities incurred by developers for conserving *A. l. var. coachellae* and its habitat. The costs associated with these consultations are not included in the DEA as these projects occurred in areas not identified in the proposed CHD. However, the information on the conservation activities is provided for background information on conservation efforts for the species and its habitat. Furthermore, while the commenters do not cite specific examples of costs included in the analysis that do not directly or indirectly benefit *A. l. var. coachellae*, this analysis does not include conservation costs for activities that do not benefit *A. l. var. coachellae*.

(34) *Comment:* A commenter questioned the DEA’s derivation of the “not allocated” pre-designation costs of conserving *Astragalus lentiginosus* var. *coachellae* incurred by development in essential habitat in Table 15 of the DEA.

*Our Response:* The commenter is correct; Section 5.1.4 and Table 15 in the DEA are incorrect. Based on the consultation history for *Astragalus lentiginosus* var. *coachellae*, there have been five informal consultations and one formal consultation where the project proponent was required to implement *A. l. var. coachellae* conservation efforts. However, because these projects occurred in areas not identified in the proposed critical habitat designation, costs associated with these consultations are not included in this analysis. While the text and table in Section 5.1.4 of the DEA describe and estimate pre-designation costs for these projects, the remaining tables and text appropriately do not

include these impacts. The final economic analysis will update Section 5.1.4 and Table 15 to exclude these costs; however, the final results of the report are not changed by this comment.

(35) *Comment:* A commenter asserted that the methodology used to quantify development impacts in the DEA is questionable as it assumes that habitat will be destroyed and it does not examine the ability of habitat to be acquired.

*Our Response:* Section 2.2.2.1 of the DEA describes the model applied to estimate impacts to development. The draft Coachella Valley MSHCP/NCCP has proposed implementation of a one-time mitigation fee for future development within the boundaries of the Coachella Valley MSHCP/NCCP. These funds will be used by the County to finance the future acquisition of lands for the Coachella Valley MSHCP/NCCP reserve and are captured by the DEA (Section 5.2.1). The DEA assumes that development is allowed in habitat areas if appropriate mitigation fees paid. That is, this open city modeling approach assumes that land is not lost to development, but instead that development occurs with mitigation, for example, preserving habitat outside the footprint of the development project. It is uncertain which specific areas containing essential features may be developed during the forecast period and when those areas may be developed. By assuming that all future development is allowed in habitat areas with appropriate mitigation fees, the DEA captures the cost to development projects of protecting the plant and its habitat.

(36) *Comment:* A commenter requested clarification on whether the Whitewater River/Thousand Palms Flood Control project is covered under the draft Coachella Valley MSHCP/NCCP, if it is on hold due to lack of funding, or if it is moving forward.

*Our Response:* As described in Section 8.2.1 of the DEA, “Currently, the flood control project has been delayed due to a lack of funding for the project. Therefore, at this time it is not possible to determine what, if any, additional measures may be required due to the proposed project redesign. However, the flood control project is a “Covered Activity” in the draft Coachella Valley MSHCP.”

(37) *Comment:* A commenter questioned the “not allocated” pre-designation costs in Table 27 of the DEA of conserving *Astragalus lentiginosus* var. *coachellae* incurred by the BLM in areas containing features essential to the conservation of *A. l. var. coachellae*.

*Our Response:* The commenter identified a mistake in Table 27 of the DEA. These costs occurred in areas not identified in the proposed critical habitat designation and should not be included in this Table. The remaining tables and text in the DEA appropriately do not include these impacts. The final economic analysis will update Table 27 to exclude these costs; however, the final results of the report are not changed by this comment.

(38) *Comment:* A commenter stated the cost model used in the DEA to estimate the administrative cost of section 7 consultation is highly inflated.

*Our Response:* As described in Section 2.2 of the DEA, the cost model is based on a survey of Federal agencies and Service Field Offices across the country and the costs are believed to be representative of the typical range of costs of the section 7 consultation process. Throughout the development of the DEA, stakeholders were asked whether the range of estimated consultation costs was reasonable. In the case that stakeholders anticipated higher or lower costs, this improved information would be applied in the DEA. No stakeholders indicated, however, that the range of costs applied in the DEA was inappropriate.

(39) *Comment:* A commenter stated that the cost estimates of species conservation as provided in the DEA conflict with the cost estimated in the draft Coachella Valley MSHCP/NCCP. Therefore, either the DEA or the draft Coachella Valley MSHCP/NCCP contains errors in its impact estimates.

*Our Response:* Section E.S.5 of the draft Coachella Valley MSHCP/NCCP summarizes the costs of implementing the plan, including non-acquisition program administration costs, Monitoring Program, Management Program, and Adaptive Management Costs, and land acquisition and land improvement costs. The draft Coachella Valley MSHCP/NCCP estimates these costs will total almost \$1.5 billion during the first 75 years of implementing the Coachella Valley MSHCP/NCCP. This impact estimate, however, is not directly comparable to that in the DEA as the policy actions being analyzed are different. The draft Coachella Valley MSHCP/NCCP estimates the cost of acquiring and managing its reserve area and conservation actions for the multiple species covered under the plan. Further, the geographic scope of the draft Coachella Valley MSHCP/NCCP and the areas designated as critical habitat for *Astragalus lentiginosus* var. *coachellae* are different.

(40) *Comment:* A commenter questioned the use of “low income farmers” as an example of a group that may be adversely affected by species conservation in Section 1.1 of the DEA. The commenter stated that no Federal nexus exists for farming activity and therefore farming is exempt from any regulation by the Endangered Species Act.

*Our Response:* As described in Appendix A of the DEA, approximately 39 ac (16 ha) of private lands in Units 1 and 2 are classified as agriculture land and were included in proposed critical habitat. While the number of agriculture acres was negligible in the proposed rule, and actually not designated as critical habitat in the final rule, the use of farmers as an example of a group of individuals that could be impacted in Section 1.1 of the DEA is simply for illustrative purposes and is considered appropriate. In addition, while a Federal nexus may not exist for farming activities, the DEA quantifies coextensive effects. As defined in Section 1.2, the DEA estimates impacts associated with overlapping protective measures of other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation.

(41) *Comment:* A commenter requested that a more equitable input-output model be used to evaluate the regional economic effects in the DEA.

*Our Response:* As described in Section 1.1.2.2 of the DEA, it was assumed that development is not restricted by critical habitat designation, but that developers will instead mitigate their activities through mitigation fee payments to address *Astragalus lentiginosus* var. *coachellae* conservation concerns. Therefore, regional economic impacts are not expected as a result of *A. l.* var. *coachellae* conservation efforts.

(42) *Comment:* A commenter mentioned that critical habitat for plants has no jurisdiction on private lands that lack a federal nexus and that the DEA does not address this issue.

*Our Response:* As described in Section 2.2.2 of the DEA, the critical habitat designation for *Astragalus lentiginosus* var. *coachellae* or any other threatened or endangered species has the potential to impose costs on private individuals or groups of individuals if there is a connection or nexus between private activities and Federal actions. For example, if a Federal permit is required before developers can begin construction or if there is Federal funding for a private activity, then it is possible that the provisions of the Act, including critical habitat designation, may potentially restrict private actions

if the action results in a section 7 consultation. This analysis appropriately identifies and analyzes economic impacts on activities that may occur on private lands within the proposed critical habitat areas. Furthermore, the DEA is not limited to only those activities with a Federal nexus. As described in Section 1.1, the DEA quantifies costs associated with measures taken to protect the species and its habitat, not just section 7-related costs.

(43) *Comment:* A commenter stated Section 4.3.2 of the DEA must be modified to clarify that benefits are limited to areas where *Astragalus lentiginosus* var. *coachellae* and fringe-toed lizard are sympatric, not through the whole range of *A. l.* var. *coachellae*.

*Our Response:* This comment clarifies statements in the DEA on page 46. This comment does not change the results of the report.

#### Summary of Changes From the Proposed Rule

In developing the final designation of critical habitat for *Astragalus lentiginosus* var. *coachellae*, we reviewed peer and public comments received on the proposed designation of critical habitat published on December 14, 2004 (69 FR 74468) and draft economic analysis published on September 27, 2005 (70 FR 56434); conducted further evaluation of lands proposed as critical habitat; updated our mapping parcel data; and were more precise with our mapping.

We modified our mapping process in the final rule from the proposed rule to remove 675 ac (272 ha) of Service's Refuge lands and private lands that were inadvertently proposed as critical habitat. These lands were either already excluded from critical habitat under section 4(b)(2) of the Act or did not contain features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. In the proposed rule, we used a process that overlaid a grid on areas containing features essential for the conservation of *A. l.* var. *coachellae* in order to produce legal Universal Transverse Mercator (UTM) coordinates that represented the critical habitat boundaries. This gridding process extended the legal boundaries beyond the boundaries of the areas containing essential features and consequently included private lands that did not contain essential features or included private lands and Service Refuge lands that contained essential features, but were intended to be excluded under section 4(b)(2) of the Act. For the final designation, we have abandoned the use of the gridding process and have based

the legal coordinates precisely on the boundaries of the areas containing essential features. Based on this mapping modification, we removed all proposed private and Service Refuge lands (675 ac (272 ha)) from critical habitat.

In addition to the non-Federal lands that were excluded pursuant to section 4(b)(2) of the Act based on their coverage under the draft Coachella Valley MSHCP/NCCP, we have also excluded BLM lands that were proposed as critical habitat. BLM is an official cooperater with the Coachella Valley MSHCP/NCCP and has committed to manage their lands consistent with the MSHCP/NCCP under their California Desert Conservation Area Plan Amendment for the Coachella Valley that was signed in 2002 (see section titled Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community

Conservation Plan (MSHCP/NCCP for a more detailed discussion).

We have also determined that BLM and Service Refuge (Coachella Valley National Wildlife Refuge) lands within the Coachella Valley Preserve System do not meet the definition of critical habitat under section 3(5)(A) of the Act since these lands may not require special management considerations due to their inclusion and management within the Coachella Valley Preserve System under the Coachella Valley Fringe-Toed Lizard HCP. Both the BLM and the Service entered into an MOU with the Coachella Valley Fringe-Toed Lizard HCP in 1986 that defined their roles and responsibilities for managing their lands within the Coachella Valley Preserve System. Conservation measures outlined in the Coachella Valley Fringe-Toed Lizard HCP also benefit *Astragalus lentiginosus* var. *coachellae* since it has similar habitat requirements as the

Coachella Valley fringe-toed lizard for sandy soils. Based on this HCP and MOU, we have not included 3,527 ac (1,427 ha) of Service Refuge lands from Unit 3 and 128 ac (52 ha) of BLM lands from all three units (see section titled Relationship of Critical Habitat to Federal Lands within the Coachella Valley Fringe-Toed Lizard HCP— Application of Section 3(5)(A) of the Act for a more detailed discussion). Table 1 reflects the changes made in this final rule and outlines the total area containing habitat with features essential to the conservation of *A. l.* var. *coachellae*, areas excluded from final critical habitat under the pending Coachella Valley MSHCP/NCCP or not included based on the approved Coachella Valley Fringe-Toed Lizard HCP, and total area designated as final critical habitat.

TABLE 1.—TOTAL AREA CONTAINING HABITAT WITH ESSENTIAL FEATURES, AREAS EXCLUDED FROM FINAL CRITICAL HABITAT UNDER THE PENDING COACHELLA VALLEY MSHCP/NCCP, AND AREAS NOT INCLUDED AS CRITICAL HABITAT WITHIN THE COACHELLA VALLEY PRESERVE SYSTEM UNDER THE COACHELLA VALLEY FRINGE-TOED LIZARD HCP, AND TOTAL AREA DESIGNATED AS FINAL CRITICAL HABITAT FOR ASTRAGALUS LENTIGINOSUS VAR. COACHELLAE (AC/HA)

Critical habitat unit	Total area containing habitat with essential features	Area excluded under pending Coachella Valley MSHCP/NCCP	Area not included under Coachella Valley Fringe-Toed Lizard HCP	Total area designated as final critical habitat
1. Whitewater River System .....	8,210 ac ..... (3,323 ha) ...	8,188 ac ..... (3,314 ha) ...	22 ac ..... (9 ha) .....	0 ac. (0 ha).
2. Mission Creek/Morongu Wash System .....	4,699 ac ..... (1,901 ha) ...	4,607 ac ..... (1,864 ha) ...	92 ac ..... (37 ha) .....	0 ac. (0 ha).
3. Thousand Palms System .....	4,837 ac ..... (1,958 ha) ...	1,296 ac ..... (525 ha) .....	3,541 ac ..... (1,433 ha) ...	0 ac. (0 ha).
Total .....	17,746 ac ..... (7,182 ha) ...	14,091 ac ..... (5,703 ha) ...	3,655 ac ..... (1,480 ha) ...	0 ac. (0 ha).

In the proposed rule we requested comment on the potential inclusion of unoccupied sand source areas downwind and downstream of suitable habitat. We received feedback from three commenters, all of whom supported including these areas in the critical habitat designation as areas containing habitat with features essential to the conservation of the taxon. We acknowledge the importance of sand to this species in the Primary Constituent Elements section and have determined that inclusion of the sand sources areas in the final critical habitat designation is not essential to the conservation of the species as these areas are both unoccupied and unsuitable for *Astragalus lentiginosus* var. *coachellae*. Finally, the draft

Coachella Valley MSHCP/NCCP is proposing to protect sand source areas in a way that will benefit *A. l.* var. *coachellae*.

Our Primary Constituent Elements have been revised to reflect only features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* on lands that are occupied by this taxon and on which we are designating critical habitat. The Primary Constituent Elements in the proposed rule included features that occurred only on lands that are not expected to ever be occupied by *A. l.* var. *coachellae* (sand source areas), and which we do not consider to be essential to the conservation of this species.

We have included a discussion in the Section 7 Consultation section that

explains the relationship between critical habitat and BLM activities that are covered under their California Desert Conservation Area Plan.

We changed the land ownership data in GIS for the final rule. We determined that the ownership data provided by the CVAG is superior to the State ownership data that was used in the proposed rule because it is a region-specific dataset that is currently being used in land management planning for the Coachella Valley region. This changed the land ownership classification for areas in the proposed rule that were thought to be State Lands Commission lands. These lands were reclassified in the final rule as either private or CVWD lands under the CVAG's dataset. Because of our section 4(b)(2) exclusion determinations

for this designation, lands under these ownerships were excluded from critical habitat designation.

### Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the

primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time.

Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

### Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that are essential to the conservation of *Astragalus lentiginosus* var. *coachellae*. This includes information from our own documents, including the final rule listing the taxon as endangered (63 FR 53596), recent biological surveys, reports, aerial photos, and other documentation. We also used the habitat model developed by the Coachella Valley Mountain Conservancy (CVMC) for the proposed Coachella Valley MSHCP/NCCP (CVMC 2004), as a starting point for identification of areas with habitat that contain features essential to the conservation of this taxon and compared it to data from other plant surveys.

We have also reviewed available information that pertains to the habitat requirements of this species. We used published historical surveys for *Astragalus lentiginosus* var. *coachellae* and ecological descriptions of the Sonoran Desert (Abrams 1944, Munz and Keck 1959, Shreve and Wiggins 1964, Turner and Brown 1982, Holland 1986) to describe the range of environmental conditions in which the plant existed prior to current landscape changes that have resulted in the loss of the species' habitats. We used data in

reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits to evaluate the habitat model developed for the plant (Sanders and Thomas Olsen Associates 1996, Service unpublished Geographic Information System (GIS) data). We also used agency and academic reports to describe the sand transport systems (Lancaster et al 1993, Griffiths *et al.* 2002) and used reports about related varieties of *Astragalus lentiginosus* to describe its ecology and phenology (Beatley 1974, Forseth *et al.* 1984, and Pavlik 1985). Finally, we used information and materials submitted during the public comment period for the proposed critical habitat rule.

### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat that were within the geographic area occupied by the species at the time of listing, we are required to base critical habitat determinations on the best scientific data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements essential to the conservation of *Astragalus lentiginosus* var. *coachellae* are derived from the physical and biological features that are essential to the conservation of this taxon as described below.

#### *Space for Individual and Population Growth Within the Eolian (Wind-Blown) Sand Transport System*

*Astragalus lentiginosus* var. *coachellae* has a limited distribution. The majority of populations are found in the Coachella Valley area, mostly in and around Snow Creek, Whitewater River, Mission and Morongo Creeks, Willow Hole, Big Dune, and Coachella Valley Preserve areas (Bureau of Land Management, unpublished data 2001b). There are also several historic and recent records southeast of the

Coachella Valley in the Chuckwalla Valley, along approximately a 5-mile portion of Highway 177 northeast of Desert Center (Bureau of Land Management, unpublished data 2001a).

*Astragalus lentiginosus* var. *coachellae* populations in the Coachella Valley are strongly affiliated with active, stabilized, and shielded sandy substrates (Holland 1986, Sanders and Thomas Olsen Associates 1996). This taxon is primarily found on loose eolian (wind transported) and rarely on alluvial (water transported) sands that are located on dunes or flats, and along disturbed margins of washes (Barneby 1964). The highest densities of *A. l.* var. *coachellae* have been found in locations containing large deposits of eolian sand, including Snow Creek (Sanders and Thomas Olsen Associates 1996), Big Dune, and Willow Hole areas (Bureau of Land Management, unpublished data 2001b).

The sandy substrates that provide suitable habitat for *Astragalus lentiginosus* var. *coachellae* are extremely dynamic in terms of spatial mobility and tendency to change back and forth from active to stabilized (Lancaster 1995). This has significant consequences for *A. l.* var. *coachellae* because their population densities vary with different types of sandy substrates. For instance, the greatest densities of plants have been recorded on dune and hummock habitats, such as Big Dune, Snow Creek and Willow Hole, whereas smaller densities of plants have been recorded on stabilized sand fields (Bureau of Land Management, unpublished GIS data 2001b). Conserving a wide variety of sandy substrate types is important for the conservation of *A. l.* var. *coachellae* because of the dynamics of the eolian sand transport processes.

Active dunes are generally characterized as barren expanses of moving sand where perennial shrub species are sparse. These dunes may intergrade with stabilized or partially stabilized dunes, which have similar sand accumulations and formations, but are stabilized by evergreen or deciduous shrubs, scattered low annuals, and perennial grasses.

Active sand fields are similar to active dunes, but are characterized as smaller sand accumulations that are not of sufficient depth to form dune formations. These may be characterized as hummocks forming behind individual shrubs or clumps of vegetation.

Stabilized sand fields are similar to active sand fields, but contain sand accumulations that are stabilized by vegetation or are armored. Armoring is

the process where the wind picks up and moves small sand grains, and leaves behind larger sand grains forming an "armor" that prevents wind from moving additional smaller particles trapped below (Sharp and Saunders 1978). The stabilized sand fields in the latter case are temporary, becoming active when the armor is disturbed over large areas, or new blow sand is deposited from upwind fluvial depositional areas.

*Astragalus lentiginosus* var. *coachellae* is also found in shielded sand dunes and fields. These areas have similar sand formations as compared to active and stabilized sand dunes and fields, except that sand source and transport systems that would normally replenish these areas have been interrupted or shielded by human development.

*Astragalus lentiginosus* var. *coachellae* also occurs in localized patches of eolian sand or in active washes that are, in some cases, fairly distant from large dunes or sand field areas. Some of these localized patches of eolian sands are characterized as ephemeral sand accumulations lacking dune formation. This type of habitat generally occurs at the western end of the Coachella Valley where wind velocities are highest (Sharp and Saunders 1978).

*Astragalus lentiginosus* var. *coachellae* fruiting bodies are inflated, an apparent adaptation for being dispersed by wind. Protecting wind transport corridors between *A. l.* var. *coachellae* populations from obstruction is important for allowing inflated fruit pods to disperse to other areas and promote gene flow among populations. Protecting these corridors is also important for allowing pollinators to reach different populations and presumably assist in also maintaining gene flow. Finally, some of the fine sands blowing across the corridor are deposited and occasionally accumulate and serve as ephemeral habitat.

#### *Primary Constituent Elements for Astragalus lentiginosus var. coachellae*

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that *Astragalus lentiginosus* var. *coachellae*'s primary constituent elements are:

1. Active sand dunes, characterized as large accumulations of moving sand with sparse perennial shrub cover that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and

Morongo Wash, and Thousand Palms sand transport systems), that provide soil conditions for the growth of *Astragalus lentiginosus* var. *coachellae*.

2. Stabilized or partially stabilized sand dunes containing evergreen or deciduous shrubs, scattered low annuals, or perennial grasses that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual population growth of *Astragalus lentiginosus* var. *coachellae*.

3. Active or stabilized sand fields containing smaller sand accumulations than dunes and are often characterized as hummocks forming on leeward sides of shrubs that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae*. Stabilized fields are similar to active fields but contain sands stabilized by vegetation or that are armored.

4. Shielded sand fields or dunes that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae*. These habitat features are similar to active or stabilized sand fields or dunes, except the sand source is no longer able to replenish these areas with new sand due to anthropogenic factors.

5. Active washes containing fluvial sand deposits that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae*.

6. Ephemeral non-sandy areas within the sand transport system where mass movements of sand by eolian processes can occur and that are contained within one of the three major sand transport systems (Whitewater River, Mission Creek and Morongo Wash, and Thousand Palms sand transport systems) and providing soil conditions for individual growth of *Astragalus lentiginosus* var. *coachellae*.

#### *Unoccupied Areas Identified for Possible Inclusion*

The Act has different standards for designation of critical habitat in

occupied and unoccupied habitat. For areas occupied by the species, these are “(i) the specific areas on which are found those physical and biological features essential to the conservation of the species and that may require special management considerations or protection. For areas not occupied, a determination is required that the entire area is essential for the conservation of the species before it can be included in critical habitat. Congress has also cautioned the Service to be “exceedingly circumspect” in designating unoccupied areas as critical habitat.

Our proposed rule included a section containing Unoccupied Areas Identified for Possible Inclusion, for which we requested comment regarding whether all, only a portion, or none of these areas should be included in the designation. *Astragalus lentiginosus* var. *coachellae*'s PCEs are dependent on sand being continually replenished from sand source areas upwind and upstream of where it occupies. Those areas identified for possible inclusion included sand source areas (mountain drainages) for each Unit that function to provide fluvial sediment containing sands to fluvial depositional areas where wind transports the sands to areas that support the taxon's PCEs. Areas identified for specific review included mountain drainages in the San Bernardino and San Jacinto mountains for Unit 1, mountain drainages in the eastern San Bernardino and Little San Bernardino mountains for Unit 2, and mountain drainages in the Indio Hills west of Thousand Palms Canyon for Unit 3. For a more detailed discussion on the function of these sand source areas see *Areas Containing the Fluvial and Eolian Processes That Generate Suitable Habitat* in the proposed designation of critical habitat for *A. l.* var. *coachellae* (69 FR 74468). We also requested comment on whether the draft Coachella Valley MSHCP/NCCP would provide for sufficient sand transport to maintain *A. l.* var. *coachellae*, and whether there are threats to sand source areas that would be addressed by designating them as critical habitat.

Although peer review and public comment were generally favorable towards including the unoccupied sand source areas in the final critical habitat designation, we are only designating areas actually occupied at the time of listing in 1998. We have determined that the presence of active sand dunes (PCE 1) is an essential feature, and we have designated them as a PCE. We believe that the PCEs adequately describe the essential function of the seed source areas in occupied areas.

Further, we believe the draft Coachella Valley MSHCP/NCCP will adequately address the issue of protecting the function of these sand source areas so that they continue to replenish sands to protected sandy habitat areas in the Coachella Valley.

#### **Criteria Used To Identify Critical Habitat**

We are designating critical habitat on lands that we have determined were occupied at the time of listing, are currently known to be occupied, contain the primary constituent elements essential for the conservation of *Astragalus lentiginosus* var. *coachellae*, and may be in need of special management considerations or protection

We reevaluated the proposed designations based on public comment, peer review of the proposed rule, the economic analysis of the proposed rule, the public comments on that analysis, and other available information, to ensure that the designation accurately reflects habitat with the PCEs that is essential to the conservation of *Astragalus lentiginosus* var. *coachellae*. All areas identified in the model are within the historical and current ranges of *A. l.* var. *coachellae* and contain the PCEs described above. Rather than designate every area containing PCEs, we designated only those areas which available evidence suggests those areas support the numbers and distribution of *A. l.* var. *coachellae* conservation. Areas for which the evidence available at this time was less certain were not included in this designation, although we believe these areas to be important to the species and may include them in future recovery plans. We designated critical habitat for *A. l.* var. *coachellae* in areas that are necessary to advance at least one of the following conservation criteria:

(1) The conservation of areas representative of the geographic distribution of the species since species that are protected across their ranges have lower chances of extinction (Soule and Simberloff 1986; Pavlik 1996; Noss *et al.* 1999);

(2) The conservation of areas representative of the ecological distribution of the species. *Astragalus lentiginosus* var. *coachellae* is associated with various sandy soil types and vegetation communities. Maintaining the full range of varying habitat types and characteristics for a species is necessary because it would include the full extent of the physical and biological conditions necessary for the species (Noss *et al.* 2002).

(3) The conservation of areas necessary to allow movement of pollen and seeds between areas representative of the geographic and ecological distribution of *Astragalus lentiginosus* var. *coachellae*.

(4) The conservation of areas that still function within one of three major sand transport systems within the geographic range of this taxon in the northern Coachella Valley. These three systems named for the purposes of this rule are the Whitewater River, Mission Creek/Morongo Wash, and Thousand Palms sand transport systems. The sand transport systems are very important for sustaining the various types of sandy habitats required by *Astragalus lentiginosus* var. *coachellae* in the Coachella Valley. The eolian sands in the valleys originate in the drainage basins in the surrounding mountains. Major precipitation and flooding episodes erode sediment from the hillslopes and carry it downstream through the fluvial systems. Fine-grained sediments are deposited in either bajadas (alluvial fans) or depositional areas that form the supply of sand for the eolian sand transport system.

In cases where more occupied areas were present than were needed for the conservation of the geographic or ecological distribution of the species, we gave priority to areas which were would be receiving protection under the draft Coachella Valley MSHCP/NCCP.

*Astragalus lentiginosus* var. *coachellae* is one of the species proposed for coverage by the proposed Coachella Valley MSHCP/NCCP. A spatially explicit habitat model for the plant in the Coachella Valley spanning from Cabezon to Thousand Palms was created to assist in the design of preserves and to evaluate the potential benefits of the MSHCP/NCCP on *A. l.* var. *coachellae* (Coachella Valley Mountain Conservancy (CVMC) 2004). We used this habitat model to assist us in identifying specific areas to designate as critical habitat for the *A. l.* var. *coachellae*. The model was developed with occurrence data for *A. l.* var. *coachellae* (Bureau of Land Management, unpublished data 2001b). Environmental variables associated with the occurrence locations were identified and maps containing those variables were combined with GIS land use and habitat information to create the model. Eight types of habitats were used in the model: (1) Margins of active dunes, (2) active shielded desert dunes, (3) stabilized desert dunes, (4) stabilized sand fields, (5) stabilized shielded sand fields, (6) ephemeral sand fields, (7)

active sand fields, and (8) mesquite hummocks.

Because the model has not been refined with any field data since it was developed (CVMC 2004), we reviewed the validity of the environmental variables used to create the model with occurrence data and information about the plant's ecology. We found records for *Astragalus lentiginosus* var. *coachellae* in all of the natural communities used to create the model. The areas we determined contain essential features for the conservation of this taxon include a mosaic of these habitat types, as well as intervening areas of ephemeral habitat to allow for the transport of wind-dispersed seed pods and eolian sands between locations containing large areas of habitat.

Habitat with essential features for the conservation of *Astragalus lentiginosus* var. *coachellae* was mapped using GIS and refined using topographical and aerial map coverages. We excluded areas containing features essential for the conservation of this taxon that were covered under legally operative or nearly completed habitat conservation plans (HCPs) pursuant to section 4(b)(2) of the Act. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal species incidental to otherwise lawful activities. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. We encourage HCP applicants to also incorporate measures to provide for the conservation of listed plant species. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act.

In the final rule, we described the legal Universal Transverse Mercator (UTM) coordinates, North American Datum 27, of the critical habitat boundaries by recording coordinates along actual boundaries of the areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae*. This is in contrast to the proposed critical habitat rule where we overlaid a 100-meter by 100-meter grid on areas containing essential features to determine the critical habitat boundaries that were described as the legal UTM coordinates. The 100-meter gridding process in the proposed rule

was used to provide a more easily describable boundary for habitat boundaries that are often non-linear. However, we abandoned using this process because it created confusion by inadvertently capturing areas outside of areas containing features essential to the conservation of this taxon or areas that were originally excluded pursuant to section 4(b)(2) of the Act as described above.

When determining critical habitat boundaries, we made every effort to avoid including within the boundaries of the map contained within this final rule developed areas such as buildings, paved areas, and other structures that lack primary constituent elements for *Astragalus lentiginosus* var. *coachellae*. The scale of the maps prepared under the parameters for publication within the *Code of Federal Regulations* may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the proposed rule and are not designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

#### Special Management Considerations or Protection

When designating critical habitat, we assess whether the primary constituent elements contained within the identified habitat may require special management considerations or protection. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of this taxon for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Threats to *Astragalus lentiginosus* var. *coachellae*'s PCEs include direct and indirect effects of residential and commercial development and exotic plant species.

Areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* may require special management due to threats posed by urban development that are not designed to avoid direct destruction of *A. l.* var. *coachellae*'s PCEs and that obstruct eolian sand transport to areas that contain the PCEs. On private lands, urban and golf course developments destroy plants and occupied habitat directly. Large housing and golf course

developments may also affect the localized wind and flooding regimes by reducing wind movement by the structures and landscaping and by changing the flooding and drainage patterns. Occupied habitats downstream and downwind of these developments, dependent upon the continuous replenishment of loose unconsolidated sands for their long-term existence, may be degraded by the alteration, blockage, and reduction in their supply of sand. In addition, some areas may require special management due to other types of development that are also not designed to avoid direct impacts to *Astragalus lentiginosus* var. *coachellae*'s PCEs and that obstruct eolian sand transport to areas that contain the PCEs. On public lands, the construction and operation of sand and gravel mining, dams, and percolation ponds in western Coachella Valley can directly impact plants and occupied habitat and decrease the amount of fluvial transported sediments to deposition areas downstream occupied habitats. For example, the percolation ponds constructed on BLM areas resulted in the direct loss of plants and occupied habitat and may have altered the transport of sand to downstream occupied habitats. *Astragalus lentiginosus* var. *coachellae* is threatened by the lack of minimization measures in project designs for operation and maintenance of these facilities that reduce both direct impacts to *A. l.* var. *coachellae* and its habitat and indirect impacts to sand transportation downstream and downwind from these facilities to occupied habitats. Finally, some areas may require special management due to other threats posed by invasive exotic plants to *Astragalus lentiginosus* var. *coachellae*'s PCEs. On both private and public lands in the Coachella Valley region, the major invasive exotic plant species include Saharan mustard (*Brassica tournefortii*), Mediterranean grass (*Schismus barbatus*), and Russian thistle (*Salsola tragus*). The invasion of these exotic species is likely having indirect effects on *Astragalus lentiginosus* var. *coachellae*'s PCEs by reducing wind velocity near ground level and stabilizing loose sediments that are a major component of the PCEs. The reduction in sand movement reduces the quality of the PCEs (loose-sandy habitat) that support *A. l.* var. *coachellae* populations and obstructs eolian sand transport to downwind areas containing PCEs. Further, the reduction in sand movement may reduce the amount of scarification that

is often necessary to germinate *A. l.* var. *coachellae*'s seeds.

### Final Critical Habitat Designation

We determined that approximately 17,746 ac (7,182 ha) of habitat that was known to be occupied at the time of listing and is known to be currently occupied and contains features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* exist in Riverside County, California (Table 1). All 17,746 ac (7,182 ha) are within areas that are conserved or will soon be conserved under HCPs, including 3,655 ac (1,479 ha) that is already conserved within the Coachella Valley Preserve System under the approved Coachella Valley Fringe-Toed Lizard HCP and 14,091 ac (5,703 ha) that will very likely be conserved under the Coachella Valley MSHCP/NCCP. On the basis of our evaluation of the conservation measures afforded to *A. l.* var. *coachellae* under the Coachella Valley Fringe-Toed Lizard HCP, we have concluded that the Federal lands within the Coachella Valley Preserve System that contain features essential to conservation of this taxon do not meet the definition of critical habitat under section 3(5)(A) of the Act because they may not require special management considerations. In addition, on the basis of our evaluation of the conservation measures that will very likely be afforded to *A. l.* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP, we have concluded that the benefit of excluding the lands covered by this MSHCP/NCCP outweighs the benefit of including them as critical habitat (see section titled *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act* for a more detailed discussion), and therefore are excluding these lands from critical habitat designation pursuant to section 4(b)(2) of the Act. As a result, we are not designating any areas containing features essential to the conservation of *A. l.* var. *coachellae* as critical habitat in this final rule.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Such alterations include, but are not limited to: "Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." We are currently reviewing the regulatory definition of adverse

modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports may include reasonable and prudent alternatives or reasonable and prudent measures to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). Until such time as a proposed designation is finalized, any reasonable and prudent alternatives or reasonable and prudent measures included in a conference report are advisory.

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

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the

Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinstatement of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or are likely to adversely modify or destroy proposed critical habitat.

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

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the *Astragalus lentiginosus* var. *coachellae*. Federal activities that, when carried out, may adversely affect critical habitat for the *A. l.* var. *coachellae* include, but are not limited to:

(1) Activities that inhibit downstream sediment transport and the replenishment of sands to areas of occupied habitat, and thus degrading

the PCEs, such as active sand dunes or fields, in areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. An example of such activity includes sand and gravel mining within stream channels;

(2) Activities that block downwind transport of eolian sands to areas of suitable habitat, and thus degrading the PCEs, such as active sand dunes or fields, in areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. Examples of such activities include any type of development or the planting of tamarisk rows that obstruct near surface winds carrying eolian sands;

(3) Activities that foster invasion of exotic weeds in areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* (e.g., roads, landscaping, soil disturbance) that may outcompete *A. l.* var. *coachellae* for valuable resources and may stabilize sands in upwind areas and prevent them from being transported to areas containing features essential for the conservation of *A. l.* var. *coachellae*.

Both designated critical habitat Units are known to be occupied by *Astragalus lentiginosus* var. *coachellae*. Federal agencies already consult with us on activities in areas currently occupied by the taxon or if the taxon may be affected by the action to ensure that their actions do not jeopardize the continued existence of the *A. l.* var. *coachellae*.

On December 24, 2002, we issued a *Biological Opinion* on the BLM's California Desert Conservation Area Plan Amendment (CDCAPA) for the Coachella Valley. At issue was the proposed amendment to the 1980 BLM California Desert Conservation Area Plan (CDCA Plan).

Congress designated the CDCA with Section 601 of the Federal Land Policy and Management Act (FLPMA) of 1976. To provide for management of recreational use, as well as to resolve other resource and public land use conflicts, FLPMA also directed the Secretary of the Interior to "prepare and implement a comprehensive, long-range plan for management, use, development, and protection of the public lands within the CDCA." The CDCA Plan was signed in January 1980, and this document now serves as the primary document that describes the basic management principles that the BLM uses for managing their portion of the CDCA. The CDCA Plan has undergone numerous minor amendments over the past 25 years, including major amendments to divide it into five eco-regions/planning areas. The Coachella

Valley is one of five bioregional planning areas under the CDCA Plan. Amendments to this plan for each bioregion address unique biological resource issues that are applicable to a given area, and prescribe management actions that address local land use needs. To more effectively and consistently manage their portion of the public lands within the CDCA, the BLM developed a land zoning system that provided specific land management prescriptions. Under this zoning strategy, different areas are assigned to one of four multiple-use classes (MUC). The MUC assignment is based on the considered sensitivity of resources and kinds of uses occurring in each geographic area.

Under their CDCAPA for the Coachella Valley, the BLM proposes seven interim measures to protect federally listed species, including *Astragalus lentiginosus* var. *coachellae*. These interim measures were developed to conserve species during development of the Coachella Valley MSHCP/NCCP. These interim measures that are relevant to *A. l.* var. *coachellae* include: (1) The BLM will only consider land exchanges or disposals involving threatened or endangered species habitat if they benefit the species; and (2) the BLM will not allow any new activities that may adversely affect *A. l.* var. *coachellae* on BLM lands within the conservation areas of the draft Coachella Valley MSHCP/NCCP. In addition, the BLM will manage for maintenance of hydrologic regime and sand sources for all known populations and habitat of *A. l.* var. *coachellae* on BLM lands.

Overall, the CDCAPA for the Coachella Valley bioregion provided general guidance that can either benefit or adversely affect the conservation of federally listed species, including *Astragalus lentiginosus* var. *coachellae*, depending on location and project type relative to their Multiple-Use Class activity guidelines. However, future activities and projects will still need to receive site-specific environmental review and section 7 consultation.

#### *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential

for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that do not require special management also are not, by definition, critical habitat. To determine whether an area requires special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other reason, then the area does not require special management.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use both provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas that we proposed for designation as critical habitat. Lands we have found that do not meet the definition of critical habitat under section 3(5)(A), and lands excluded pursuant to section 4(b)(2) include those covered by the following types of plans

if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans. Table 1 contains a summary of areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* that do not meet the definition of critical habitat as well as areas containing essential features that are being excluded from critical habitat in this rule.

#### **Relationship of Critical Habitat to Federal Lands Within the Coachella Valley Fringe-Toed Lizard HCP—Application of Section 3(5)(A) of the Act**

We are not including areas containing features essential to the conservation of *Astragalus lentiginosus* var. *coachellae* in portions of all three units that are contained within Federal lands (BLM and Service Refuge lands) within the boundaries of the Coachella Valley Preserve System in the Coachella Valley fringe-toed lizard HCP under section 3(5)(A) of the Act. On April 21, 1986, the Service approved and issued a Section 10(a)(1)(B) incidental take permit under the Act for the Coachella Valley fringe-toed lizard under the Coachella Valley Fringe-Toed Lizard HCP and IA. The HCP called for the establishment of three separate preserves for the conservation of the Coachella Valley fringe-toed lizard: (1) The Coachella Valley Preserve; (2) the Willow Hole-Edom Hill Preserve; and (3) the Indian Avenue Preserve within the Whitewater River floodplain, which are collectively known as the Coachella Valley Preserve System. Acquisition and maintenance of the Coachella Valley Preserve System was the basis for the issuance of the Service's section 10(a) permit to allow the incidental take of the Coachella Valley fringe-toed lizard on private lands. The Coachella Valley Preserve System is managed cooperatively by the major landowners within each Preserve, including the BLM, the Service, the CDFG, and The Nature Conservancy. These major landowners signed an IA in 1986 that defined their roles and responsibilities in the management of the Coachella Valley Preserve System, which was later amended in 1991 to include the CDPR as a major landowner. Another amendment on August 3, 1999

transferred management responsibilities by the TNC to the Center for Natural Lands Management (CNLM). The Coachella Valley Preserve System was designed to capture habitats closely associated with the Coachella Valley fringe-toed lizard, including primarily loose, unstabilized, windblown sand. These habitats encompass several of the PCEs important for the conservation of *Astragalus lentiginosus* var. *coachellae*, including active sand dunes, stabilized or partially stabilized sand dunes, active or stabilized sand fields, and shielded sand fields that are contained within the Thousand Palms sand transport system.

Even though *Astragalus lentiginosus* var. *coachellae* is not a covered species under the Coachella Valley Fringe-Toed Lizard HCP, it receives conservation benefits from the management of the Coachella Valley Preserve System due to the protections afforded to the habitats associated with the Coachella Valley fringe-toed lizard that are also associated with *Astragalus lentiginosus* var. *coachellae*. In May 1995, the BLM prepared the Coachella Valley Preserve System Management Plan and Decision Record (CVPS Management Plan) that provided guidance for managing the Coachella Valley Preserve System. The proposed CVPS Management Plan was available for public review in October 1994. The CVPS Management Plan discussed management actions that were designed to conserve other sand-dependent sensitive species, including *Astragalus lentiginosus* var. *coachellae* (which was a Federal candidate species at the time). These management actions included, acquisition of suitable habitat for the Coachella Valley fringe-toed lizard, law enforcement, install and maintain boundary fencing and signs, research effective methods for removing exotic invasive weeds, such as Russian thistle (*Salsola tragus*) and mustard (*Brassica tournefortii*), and research techniques for enhancing sand deposition into the preserves.

In order for the Secretary to determine that an area is adequately managed and does not require special management, the Secretary must evaluate existing management and find that it provides (1) a conservation benefit to the species; (2) reasonable assurances for implementation; and (3) reasonable assurances that conservation efforts will be effective. The Secretary has reviewed the management plan and actions for the Coachella Valley Preserve System and has determined that the Preserve System is adequately managed for *Astragalus lentiginosus* var. *coachellae*, and therefore does not need special management. Therefore, all areas within BLM and Service Refuge lands

containing features essential for the conservation of *A. l. var. coachellae* within the boundaries of the Coachella Valley Preserve System are not included in this final critical habitat designation pursuant to section 3(5)(A) of the Act. Finally, rather than not including the other non-Federal landowners within the Coachella Valley Preserve System in critical habitat, these lands are excluded from critical habitat pursuant to section 4(b)(2) of the Act because of their intent to be signatories to the draft Coachella Valley MSHCP/NCCP.

*Relationship of Critical Habitat to Pending Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the Permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. Although take of plant species is not prohibited under the Act, and therefore cannot be authorized under an incidental take permit, plant species are included on the permit in recognition of the conservation benefits provided to them under the HCP and for the purposes of the No Surprises assurances.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP.

However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place.

In developing critical habitat designations, the Service has analyzed habitat conservation planning efforts to determine if the benefits of excluding them from critical habitat outweigh the benefits of including them in designated critical habitat. In reviewing HCPs, the Service has assessed the potential impacts of critical habitat designation on lands covered by HCPs on future partnerships, the status of HCP efforts and progress made in developing and implementing such plans, and their relationship to the conservation of species. In certain circumstances, the Service has determined that an HCP not yet completed may be considered for exclusion from critical habitat designation pursuant to section 4(b)(2) of the Act.

**Pending Coachella Valley Multiple Species Habitat Conservation Plan and Natural Community Conservation Plan (MSHCP/NCCP)**

We re-affirmed our December 14, 2004, proposed rule exclusion of non-Federal lands containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP's plan area under section 4(b)(2) of the Act (69 FR 74468). In addition, we have determined that BLM lands within the draft Coachella Valley MSHCP/NCCP that are outside of the Coachella Valley Preserve System warrant exclusion from the critical habitat designation due to their official participation in the draft Coachella Valley MSHCP/NCCP planning process and commitment under their CDCAPA to manage their lands consistent with the Coachella Valley MSHCP/NNCP once it is completed.

The draft Coachella Valley MSHCP/NCCP has been in development from the mid-1990s to present. Since 1997, the planning process has proceeded under the auspices of a Memorandum of Understanding governing the preparation of the MSHCP/NCCP entered into by the following entities: CVAG; the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; the Service; California Department of Fish and Game (CDFG); BLM; U.S. Forest Service; and the National Park Service. Later, the Caltrans, CVWD, Imperial Irrigation District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and

Open Space District, Riverside County Waste Management District, California Department of Parks and Recreation (CDPR), and Coachella Valley Mountains Conservancy also joined in preparation of the Plan. The parties later amended the Planning Agreement to also address the requirements of the NCCP Act and prepare a NCCP pursuant to California Fish and Game Code Section 2810. As stated in their CDCAPA for the Coachella Valley, BLM has committed 95% of their public land base within the conservation areas of the MSHCP/NCCP to be managed consistent with the MSHCP/NCCP. The MSHCP/NCCP area proposes to encompass approximately 1,131,000 ac (457,700 ha) in Riverside County. The MSHCP/NCCP is proposing to provide 747,000 ac (302,300 ha) of conservation areas that will provide conservation benefits for 52 federally listed and sensitive species, including *A. l. var. coachellae*, over the life of the permit (75 years). The Permittees' funding program proposes funding from a variety of potential sources, including, but not limited to: (1) Local development mitigation fees; (2) fees on the importation of waste into landfills and transfer stations in Riverside County; (3) transportation project mitigation; (4) regional infrastructure project mitigation; and (5) Eagle Mountain Landfill Environmental Mitigation Trust Fund. CVAG has demonstrated a sustained commitment to develop the MSHCP/NCCP to comply with section 10(a)(1)(B) of the Act, the California Endangered Species Act, and the State's NCCP program. On November 5, 2004, the Service published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the MSHCP/NCCP.

All areas containing features essential for the conservation of *Astragalus lentiginosus* var. *coachellae* are contained within the proposed preferred alternative reserve design of the draft Coachella Valley MSHCP/NCCP. CVAG estimates there are 36,398 ac (14,730 ha) of modeled habitat for *A. l. var. coachellae* habitat within the draft Coachella Valley MSHCP/NCCP plan area. The draft MSHCP/NCCP proposes to conserve 19,321 ac (7,819 ha) of modeled *A. l. var. coachellae* habitat in their Conservation Areas that includes large core habitat areas and other important conservation areas, such as sand sources and sand transport corridors. Core habitat areas include: Snow Creek/Windy Point Conservation Area; Whitewater Floodplain Conservation Area; Willow Hole

Conservation Area; and Thousand Palms Conservation Area. Other goals include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting necessary ecological processes, including the sand transport systems, that will be beneficial in maintaining the PCEs in the areas containing features essential for the conservation of *A. l. var. coachellae*; (3) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions.

CVAG carefully considered all available and occupied habitats for *Astragalus lentiginosus* var. *coachellae* in developing their conservation strategy for this species. CVAG concluded that the habitats within the proposed Conservation Areas would provide long-term protection for self-sustaining populations of this taxon because of the following factors: (1) Conserved habitat areas are large enough to increase the likelihood for maintaining self-sustaining populations of *A. l. var. coachellae* and incorporate key habitat elements for the species; (2) potential adverse effects within Conservation Areas would not eliminate or significantly impact any core populations; (3) potential development would not adversely impact the necessary ecological processes (such as sand source and transport system) needed to maintain currently viable habitat, and (4) lands in the MSHCP/NCCP reserve system would be managed and monitored (CVMC 2004). The Service evaluated the Conservation Areas for *A. l. var. coachellae*, and based on our analysis and the best scientific data available, recognized that the Conservation Areas also contained the physical and biological features essential to the conservation of the species.

In light of the Service's confidence that CVAG will reach a successful conclusion to its MSHCP/NCCP development process and successfully conserve habitat for *Astragalus lentiginosus* var. *coachellae*, we have identified and excluded under section 4(b)(2) of the Act all lands (14,091 ac (5,703 ha)) containing features essential for the conservation of *A. l. var. coachellae* within the Coachella Valley MSHCP/NCCP plan area, including non-Federal lands covered by the MSHCP/NCCP and Federal lands managed consistent with the MSHCP/NCCP. We believe that CVAG has made significant progress in the development of its

MSHCP/NCCP to meet the requirements outlined in section 10(a)(1)(B) of the Act.

#### (1) Benefits of Inclusion

Overall, we believe that there is minimal benefit from designating critical habitat for *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP because, as explained above, these lands are being proposed to be managed for the conservation of this taxon.

A benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for *Astragalus lentiginosus* var. *coachellae* that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit. We are in the final stages of completing a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the Coachella Valley MSHCP/NCCP for which *A. l. var. coachellae* is a covered species. The section 10(a)(1)(B) permit includes plants in recognition of the conservation value of the HCP and to provide "No Surprises" to Permittees, even though the take prohibition does not apply to plants.

If designated, primary constituent elements in this area would be protected from destruction or adverse modification by Federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, since all areas containing features essential for the conservation of the *Astragalus lentiginosus* var. *coachellae* are occupied, consultation for activities which may adversely affect the species would be required, even without the critical habitat designation.

Another potential benefit of designation would be to signal the importance of these lands to the

conservation of *Astragalus lentiginosus* var. *coachellae* to Federal agencies and to the public. In *Sierra Club v. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat containing the features essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The inclusion of an area as critical habitat may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this educational benefit has largely been achieved for *A. l. var. coachellae*. The public outreach and environmental impact reviews required under the National Environmental Policy Act for the draft Coachella Valley MSHCP/NCCP provided significant opportunities for public education regarding the conservation of the areas occupied by *A. l. var. coachellae*. There would be little additional informational benefit gained from including these lands as critical habitat because of the level of information that has been, and continues to be, made available to the public as part of the regional planning effort. Additionally, we believe the value of the Conservation Areas to provide protection and enhancement of habitat for *Astragalus lentiginosus* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP is well established among State and local governments, and Federal agencies even without the designation of critical habitat.

The inclusion of the identified 14,091 ac (5,703 ha) of land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in jeopardizing the continued existence of the species or result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on the 11,877 ac (4,807 ha) of non-Federal lands would likely consider

the conservation value of these lands as identified in the draft Coachella Valley MSHCP/NCCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

As discussed below, however, we believe that designating any lands within the Coachella Valley MSHCP/NCCP as critical habitat would provide little additional educational and Federal regulatory benefits for the species. Because the excluded areas are occupied by the species, there must be consultation with the Service over any action which may result in adverse effects to these populations on Federal lands or on lands with a Federal nexus. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Coachella Valley MSHCP/NCCP.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an "adverse modification" finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: Section 7(a)(2) limits adverse effects to the species and its designated critical habitat through either a jeopardy or destruction or adverse modification analyses. It does not require positive improvements or enhancement of the species status. Thus, any management plan which considers enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation. This is particularly true for management plans that include plants on non-Federal lands because plants do not receive protection stemming from the take prohibitions under the Act on non-Federal lands.

#### (2) Benefits of Exclusion

As mentioned above, the draft Coachella Valley MSHCP/NCCP proposes to provide for the conservation

of the PCEs for *Astragalus lentiginosus* var. *coachellae* by: (1) Protecting important ecological processes that maintain the PCEs for *A. l.* var. *coachellae*; (2) maintaining biological corridors and linkages among all conserved populations to the maximum extent feasible; and (3) ensure conservation of habitat quality through biological monitoring and adaptive management actions, such as controlling exotic invasive weeds that may degrade the PCEs. The draft Coachella Valley MSHCP/NCCP therefore proposes to provide for the protection of PCEs, and address special management needs. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures in the plan.

The benefit of excluding lands within nearly completed HCPs from critical habitat designation includes relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species and federally listed plants that do not receive protections on non-Federal lands not subject to a Federal nexus. Imposing an additional regulatory review after an HCP is nearly completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process because the critical habitat designation may result in additional regulatory requirements than faced by other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of nearly approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. Another benefit from excluding these lands is to maintain the partnerships developed among several partners in the Coachella Valley including CVAG; the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; CVWD, Imperial Irrigation

District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and Open Space District, Riverside County Waste Management District, CDPR; Coachella Valley Mountains Conservancy; CDFG; Caltrans; BLM; U.S. Forest Service; the National Park Service; and us to complete and implement the Coachella Valley MSHCP/NCCP. Instead of using limited funds to comply with administrative consultation and designation requirements which cannot provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within nearly completed HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future. This is especially important for federally listed plants that do not receive take prohibitions under the Act on non-Federal lands. By including measures to conserve plants and habitat in an HCP, non-Federal participants are voluntarily agreeing to conserve plants that would not otherwise receive protections with a critical habitat designation. Further, imposing additional regulatory burdens on HCP participants with regard to a listed plant could discourage them from including plants as covered species and providing conservation benefits for them.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. In addition, Federal actions not covered by the HCP in area that may affect occupied by listed species would still require consultation under section 7 of

the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP "No Surprises" regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management considerations or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the exclusion of 14,091 ac (5,703 ha) of lands within the nearly completed Coachella Valley MSHCP/NCCP plan area from critical habitat designation for *Astragalus lentiginosus* var. *coachellae*; and based on this evaluation, we find that the benefits of exclusion, which include potentially avoiding increased regulatory costs that could result from including those lands in this designation of critical habitat, ensuring the willingness of existing partners to continue active conservation measures, maintaining the ability of attracting new partners, and directing limited funding to conservation actions with partners, of the lands containing features essential to the conservation of *A. l.* var. *coachellae* within the draft Coachella Valley MSHCP/NCCP outweigh the benefits of inclusion, which include limited educational and regulatory benefits that are largely otherwise provided for under the draft MSHCP/NCCP, of these lands as critical habitat. The benefits of inclusion of these 14,091 ac (5,703 ha) of lands as critical habitat are lessened because of the significant level of conservation that is proposed to be provided for *A. l.* var. *coachellae* under the draft Coachella Valley MSHCP/NCCP, including the conservation of PCEs, protection of important ecological processes that maintain PCEs, maintenance of biological corridors and linkages among

all conserved populations to the maximum extent feasible, and conservation of habitat quality through biological monitoring and adaptive management actions that may improve PCEs.

In contrast, the benefits of excluding 11,877 ac (4,807 ha) of non-Federal lands covered by their likely signatory status to the draft Coachella Valley MSHCP/NCCP and 2,214 ac (896 ha) of BLM lands based on their commitment under their CDCAPA for the Coachella Valley to manage their lands consistent with the draft Coachella Valley MSHCP/NCCP and official participation in the draft Coachella Valley MSHCP/NCCP planning process from critical habitat designation are increased because of the high level of cooperation by the participants in the Coachella Valley MSHCP/NCCP to conserve this taxon. This partnership exceeds any conservation value provided by a critical habitat designation, particularly for federally listed plants, which do not receive protection stemming from take prohibitions on non-Federal lands under the Act.

### (4) Exclusion Will Not Result in Extinction of the Species

In the proposed designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* published on December 14, 2004 (69 FR 74468), we excluded all non-Federal lands containing essential features for the conservation of *A. l.* var. *coachellae* from the proposed designation under Section 4(b)(2) of the Act because of their relationship to the draft Coachella Valley MSHCP/NCCP. In this final designation, we continue to believe that the exclusion of non-Federal lands as well as BLM lands (14,091 ac (5,703 ha)) in all three Units will not result in extinction of *A. l.* var. *coachellae* since all areas containing essential features for the conservation of *A. l.* var. *coachellae* are being proposed for conservation and management that will benefit this taxon pursuant to the draft Coachella Valley MSHCP/NCCP. The draft Coachella Valley MSHCP/NCCP includes specific conservation objectives, avoidance and minimization measures, and management for the draft Coachella Valley MSHCP/NCCP that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. The exclusion leaves this protection unchanged from what would exist if the

excluded areas were designated as critical habitat.

Critical habitat is being designated for *Astragalus lentiginosus* var. *coachellae* in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion of these 14,091 ac (5,703 ha) within the draft Coachella Valley MSHCP/NCCP will not result in extinction of *A. l.* var. *coachellae*.

### Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate potential economic effects of the proposed *Astragalus lentiginosus* var. *coachellae* critical habitat designation (Northwest Economics Associates 2005). The draft analysis was made available for public review on September 27, 2005 (70 FR 56434). We accepted comments on the draft analysis until October 27, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the *Astragalus lentiginosus* var. *coachellae*. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

There is no economic impact within the final designation because the Service has not designated any lands as critical habitat for *Astragalus lentiginosus* var. *coachellae*.

A copy of the final economic analysis and supporting documents are included in our administrative file and may be obtained by contacting the Carlsbad office (see **ADDRESSES** section).

### Required Determinations

#### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it will not have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above in the section titled Economic Analysis, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment

a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

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

To determine if this designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* will affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., residential, industrial, and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by

Federal agencies; non-Federal activities are not affected by the designation.

Typically, when proposed critical habitat designations are made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. Our analysis determined that costs involving conservation measures for *Astragalus lentiginosus* var. *coachellae* would be incurred for activities involving residential, commercial, and industrial development (land subdivision companies); transportation (Caltrans, CVAG, or Riverside County Transportation Commission); Federal land (BLM, U.S. Forest Service, and the Service); other public (CDFG and CDPR) or conservation (TNC and CNLM) land management; water supply (Mission Springs Water District and CVWD); flood control (CVWD and Riverside County Flood Control and Water Conservation District agencies); implementation of the draft Coachella Valley MSHCP/NCCP; and wind energy projects (private businesses and individuals). However, since no critical habitat is being designated, no consultations would be necessary.

In our economic analysis of the proposed designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of this species and designation of its critical habitat. Because zero acres of critical habitat are being designated, there would be no additional costs to small businesses, and, thus, this rule would not result in a "significant effect" for small businesses in Riverside County, California. As such, we are certifying that this rule will not result in a significant economic impact on a substantial number of small entities.

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

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

*Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 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 final rule to designate critical habitat for *Astragalus lentiginosus* var. *coachellae* is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

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

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

participation in a voluntary Federal program."

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

(b) We do not believe that this rule will significantly or uniquely affect small governments because we are designating zero acres of critical habitat. Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

*Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for *Astragalus lentiginosus* var. *coachellae*. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. Because we are designating zero acres of critical habitat for *Astragalus lentiginosus* var. *coachellae*, this rule does not pose significant takings implications.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from,

and coordinated development of, this critical habitat designation with appropriate State resource agencies in California. The designation of zero acres of critical habitat in areas currently occupied by *Astragalus lentiginosus* var. *coachellae* would have no impact on State and local governments and their activities. The process of identifying habitat with features essential to the conservation of the species may have some benefit to these governments in that these areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated zero acres of critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Astragalus lentiginosus* var. *coachellae*.

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

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

*National Environmental Policy Act*

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the

Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that no tribal lands occupied at the time of listing contain the features essential for the conservation and no tribal lands that are unoccupied are essential for the

conservation of the *Astragalus lentiginosus* var. *coachellae*.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see ADDRESSES section).

**Author(s)**

The primary authors of this package are the Carlsbad Fish and Wildlife Office staff.

**List of Subjects in 50 CFR Part 17**

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

**Regulation Promulgation**

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

**PART 17—[AMENDED]**

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

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

■ 2. In § 17.12(h), in the List of Endangered and Threatened Plants, revise the entry for "*Astragalus lentiginosus* var. *coachellae*" under "FLOWERING PLANTS" to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Astragalus lentiginosus</i> var. <i>coachellae</i> .	* Coachella Valley milk-vetch.	* U.S.A. (CA) .....	* Fabaceae .....	* E	* 647	* 17.96(a) (No areas designated)	* NA
*	*	*	*	*	*	*	*

■ 3. In § 17.96, amend paragraph (a) by adding an entry for *Astragalus lentiginosus* var. *coachellae* in alphabetical order under Family Fabaceae to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) *Flowering plants.*

\* \* \* \* \*

**Family Fabaceae: *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch)**

Pursuant to section 4(b)(2) of the Act, we have excluded all areas determined to meet the definition of critical habitat under section 3(5)(A) of the Act for *Astragalus lentiginosus* var. *coachellae*. Therefore, no specific areas are

designated as critical habitat for this species.

\* \* \* \* \*

Dated: November 30, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–23694 Filed 12–13–05; 8:45 am]

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