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Billy Pitts, President of Government Affairs,  
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Major Michael Sauter, Commander, Office of  
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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU50

#### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Laguna Mountains Skipper (*Pyrgus ruralis lagunae*)

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

**ACTION:** Proposed rule; reopening of public comment period and notice of availability of draft economic analysis.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the proposed designation of critical habitat for the Laguna Mountains skipper (*Pyrgus ruralis lagunae*) and the availability of a draft economic analysis of the proposed designation of critical habitat. The draft economic analysis estimates the potential total future impacts to range from \$6.5 million to \$8.9 million (undiscounted) over 20 years. Discounted future costs are estimated to be \$3.7 million to \$5.1 million over this same time period (\$351,000 to \$480,000 annually) using a real rate of 7 percent, or \$5.0 million to \$6.9 million (\$337,000 to \$461,000 annually) using a real rate of 3 percent. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule and the associated draft economic analysis. Comments previously submitted on the proposed rule need not be resubmitted as they have already been incorporated into the public record and will be fully considered in our final determination.

**DATES:** We will accept public comments and information until August 7, 2006.

**ADDRESSES:** Written comments and materials may be submitted to us by any one of the following methods:

1. You may submit written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011;

2. You may hand-deliver written comments and information to our Carlsbad Fish and Wildlife Office at the above address;

3. You may fax your comments to 760/431-9624.

4. You may send your comments by electronic mail (e-mail) to [FW8pchskipper@fws.gov](mailto:FW8pchskipper@fws.gov). For directions on how to submit e-mail comments, see

the “Public Comments Solicited” section.

5. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address listed in **ADDRESSES** (telephone, 760/431-9440; facsimile, 760/431-9624.)

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We will accept written comments and information during this reopened comment period. We solicit comments on the original proposed critical habitat designation, published in the **Federal Register** on December 13, 2005 (70 FR 73699), and on our draft economic analysis of the proposed designation. We will consider information and recommendations from all interested parties. We particularly seek comments concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat, as provided by section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether it is prudent to designate critical habitat and whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on: the amount and distribution of Laguna Mountains skipper habitat; which areas should be included in the designation that were occupied at the time of listing and contain the physical and biological features that are essential to the conservation of the species and why; and which areas not occupied at the time of listing are essential to the conservation of the species and why;

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

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(5) Whether the draft economic analysis identifies all State and local costs, and, if not, what other costs should be included;

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

(7) Whether the economic analysis correctly assesses the effect on regional costs associated with land- and water

use controls that derive from the designation;

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

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

(10) Whether there is information about areas that could be used as substitutes for the economic activities planned in critical habitat areas that would offset the costs and allow for the conservation of critical habitat areas; and

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

All previous comments and information submitted during the initial comment period on the proposed rule need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning the draft economic analysis and the proposed rule by any one of several methods (see **ADDRESSES** section). Our final determination concerning designation of critical habitat for the Laguna Mountains skipper will take into consideration all comments and any additional information received during both comment periods. On the basis of public comment on the critical habitat proposal, the draft economic analysis, and the final economic analysis, we may during the development of our final determination find that areas proposed are not essential or are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

If you wish to submit comments electronically, please submit them in an ASCII file and avoid the use of any special characters or any form of encryption. Also, please include "Attn: Laguna Mountains skipper" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** or submit your comments in writing using one of the alternate methods listed in the **ADDRESSES** section. Please note that the Internet address [FW8pchskipper@fws.gov](mailto:FW8pchskipper@fws.gov) will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments and we will make all comments available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office at the address listed under **ADDRESSES**. Copies of the proposed critical habitat rule for the Laguna Mountains skipper and the draft economic analysis are also available on the Internet at <http://www.fws.gov/carlsbad>. In the event that our Internet connection is not functional, please obtain copies of documents directly from the Carlsbad Fish and Wildlife Office.

### Background

On December 13, 2005, we published a proposed rule in the **Federal Register** (70 FR 73699) to designate critical habitat for the Laguna Mountains skipper. We proposed to designate approximately 6,662 acres (ac) (2,696 hectares (ha)) of critical habitat in two units on Laguna and Palomar Mountains in San Diego County, California. For more information on the Laguna Mountains skipper, refer to the final rule listing the species as endangered, published in the **Federal Register** on January 16, 1997 (62 FR 2313).

Critical habitat is defined in section 3 of the Act as the specific areas within the geographic 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 essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographic 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. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4(b)(2) of the Act requires that we designate or revise critical habitat on the basis of the best scientific data

available, after taking into consideration the economic impact, impact to national security, and any other relevant impacts of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the December 13, 2005 (70 FR 73699), proposed designation of critical habitat for the Laguna Mountains skipper.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of the Laguna Mountains skipper, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to designating critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the Laguna Mountains skipper in areas containing features essential to the conservation of this species. The analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use).

This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this analysis looks retrospectively at costs that have been incurred since the date the species was listed as an endangered species and considers those costs that may occur in the 20 years following the designation of critical habitat.

Laguna Mountains skipper conservation activities are likely to primarily impact recreational camping and utility maintenance activities. The draft economic analysis estimates the potential total future impacts to range from \$6.5 million to \$8.9 million (undiscounted) over 20 years. Discounted future costs are estimated to be \$3.7 million to \$5.1 million over this same time period (\$351,000 to \$480,000 annually) using a real rate of 7 percent, or \$5.0 million to \$6.9 million (\$337,000 to \$461,000 annually) using a real rate of 3 percent. Differences in the low and high impact estimates result primarily from uncertainty regarding the potential impacts to utility companies conducting

maintenance activities and making repairs in proposed critical habitat. The low-end estimate of costs assumes grazing on private lands is not affected and biologists' time on site during utility repairs and maintenance is limited to one day per project. Costs under this estimate are dominated (88 percent) by welfare losses to campers in Subunits 1A and 1C. The high-end estimate of costs assumes grazing activities on private lands in proposed critical habitat will be restricted and that utility projects will last longer than a single day. Costs under this estimate are dominated by lost camping opportunities (64 percent) and to a lesser extent costs to utilities (22 percent). In the low-end estimate, 95 percent of the costs are associated with Subunits 1A and 1C. In the high-end estimate, Subunits 1A and 1C again dominate total costs, accounting for 83 percent of total estimated impacts.

#### **Required Determinations—Amended**

##### *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. However, because the draft economic analysis indicates the potential economic impact associated with a designation of all habitat with features essential to the conservation of this species would total no more than \$480,000 annually, applying a 7 percent discount rate, we do not anticipate that this final rule will have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the time line for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review the proposed rule.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any

particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

##### *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 (e.g., 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 the proposed designation of critical habitat for the Laguna Mountains skipper would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., hiking, residential 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.

If this proposed critical habitat designation is 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 draft economic analysis determined that costs involving conservation measures for the Laguna Mountains skipper would be incurred for activities involving (1) Grazing activities, (2) recreational camping activities, (3) recreational hiking activities, (4) utility activities, (5) rural development, (6) other activities on Federal lands, and (7) Laguna Mountains skipper management activities on State lands. Of these seven categories, impacts of skipper conservation are not anticipated to affect small entities in five of these categories: hiking, utilities, rural development, other activities on Federal lands, and management activities on State lands. Residential development is unlikely to be impacted by skipper conservation activities (see Chapter 6 of draft economic analysis). Since neither Federal nor State governments are defined as small entities by the Small Business Administration (SBA), the economic impacts borne by the United States Forest Service (USFS) and the California Department of Fish and Game (CDFG) resulting from implementation of skipper conservation activities or modifications to activities on Federal lands are not relevant to this analysis (for further discussion see Chapters 5, 6, 7, and 8 of draft economic analysis). Likewise, neither of the major utility companies involved (SDG&E and AT&T)

would fit the SBA definition of small entities. Accordingly, the small business analysis focuses on economic impacts to grazing and recreational camping activities.

The proposed designation includes areas of USFS and private lands that are used for livestock grazing. On some Federal allotments that contain Laguna Mountains skipper habitat, meadow areas have been excluded from grazing, thus reducing the carrying capacity, or permitted Animal Unit Months (AUMs), on those allotments. Historically, returns to cattle operations have been low throughout the West. In recent years, these returns have been lower due to the recent wildfires and droughts in California. As a result, any reductions in grazing effort for the Laguna Mountains skipper may affect the sustainability of ranching operations in these areas. The analysis assumes that in the future, grazing efforts on proposed critical habitat areas will be reduced, or in the high-end estimate, eliminated on private land due to skipper concerns. Private ranchers could be affected either by reductions in federally-permitted AUMs that they hold permits to, or by reductions on grazing efforts on private property to avoid adverse impacts on Laguna Mountains skipper habitat. The expected reduction in AUMs is based on an examination of historic grazing levels, section 7 consultations, and discussions with range managers, wildlife biologists, and permittees. Based on this analysis, the high-end impact on grazing activities is estimated at an annual reduction of 1,980 AUMs, of which 1,363 are Federally permitted and 617 are private. The majority of these AUM reductions fall on two ranchers: one operating in Subunit 1A and another operating in Subunit 2A. Therefore, cumulatively over 20 years, two ranchers could be affected by total reductions in AUMs due to Laguna Mountains skipper conservation activities. These impacts do not represent a substantial number of small entities and the potential impact is not considered significant.

This analysis considers lower and upper bounds of potential economic impact on recreational camping activities. The lower bound equals no economic impact. In the upper bound, economic impacts are estimated for recreational campers whose activities may be interrupted by Laguna Mountains skipper conservation activities resulting in a decrease in the number of camping trips. This scenario concludes that camping trips may decrease by as many as 5,352 trips per year. If fewer camping trips were to occur within proposed critical habitat

areas, local establishments providing services to campers may be indirectly affected by Laguna Mountains skipper conservation activities. Decreased visitation may reduce the amount of money spent in the region across a variety of industries, including food and beverage stores, food service and drinking places, accommodations, transportation and rental services.

The draft economic analysis uses regional economic modeling—in particular a software package called IMPLAN—to estimate the total economic effects of the reduction in economic activity in camping-related industries in the one county (San Diego County) associated with Laguna Mountains skipper conservation activities. Commonly used by State and Federal agencies for policy planning and evaluation purposes, IMPLAN translates estimates of initial trip expenditures (e.g., food, lodging, and gas) into changes in demand for inputs to affected industries. Changes in output and employment are calculated for all industries and then aggregated to determine the regional economic impact of reduced recreational camping-related expenditures potentially associated with Laguna Mountains skipper conservation activities.

This analysis uses the average expenditures reported by the 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation for California for fishing, hunting and wildlife-associated recreation, or approximately \$26.23 per trip. This per-trip estimate of expenditures is then combined with the number of camping trips potentially lost due to Laguna Mountains skipper conservation activities (a 1-year loss of 5,352 trips per year) to estimate the regional economic impacts. When compared to the \$192 billion dollar regional economy of San Diego County, the potential loss generated by a decrease in camping trips is a relatively small impact (i.e., less than 0.01 percent). Therefore based on these results, this analysis determines no significant effect on camping-related industries due to Laguna Mountains skipper conservation activities in San Diego County.

We may also exclude areas from the final designation if it is determined that designation of critical habitat in localized areas would have an impact to a substantial number of businesses and a significant proportion of their annual revenues. Based on the above data, we have determined that this proposed designation would not result in a significant economic impact on a substantial number of small entities. As such, we are certifying that this

proposed designation of critical habitat would not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our draft economic analysis of the proposed designation for a more detailed discussion of potential economic impacts to small business entities.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is considered a significant regulatory action under E.O. 12866 because it raises novel legal and policy issues. On the basis of our draft economic analysis, the proposed critical habitat designation is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant action, and no Statement of Energy Effects is required. Please refer to Appendix A of our draft economic analysis of the proposed designation for a more detailed discussion of potential effects on energy supply.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes 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. Non-Federal entities that 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. However, 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 on to State governments.

(b) The draft economic analysis did not identify or examine small governments that fall within proposed critical habitat areas because there were no estimates of impacts to small governments. Consequently, we do not believe that this rule will significantly or uniquely affect small governments. 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 proposing critical habitat for the Laguna Mountains skipper. 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. In conclusion, the designation of critical habitat for the Laguna Mountains skipper does not pose significant takings implications.

#### **Author**

The primary authors of this notice are the staff of the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

#### **Authority**

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

Dated: June 27, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E6-10577 Filed 7-6-06; 8:45 am]

**BILLING CODE 4310-55-P**