

## PART 391—QUALIFICATION OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTIONS

9. The authority citation for part 391 continues to read as follows:

**Authority:** 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1767; and 49 CFR 1.73.

10. Revise § 391.2 to read as follows:

### § 391.2 General exceptions.

(a) *Farm custom operation.* The rules in this part (except for § 391.15(e)) do not apply to a driver who drives a commercial motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the commercial motor vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(b) *Apriarian industries.* The rules in this part (except for § 391.15(e)) do not apply to a driver who is operating a commercial motor vehicle controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

(c) *Certain farm vehicle drivers.* The rules in this part (except for § 391.15(e)) do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) commercial motor vehicle, as defined in § 390.5. (For limited exemptions for farm vehicle drivers of articulated commercial motor vehicles, see § 391.67.)

11. Amend § 391.15 by adding a new paragraph (e) to read as follows:

### § 391.15 Disqualification of drivers.

\* \* \* \* \*

(e) Disqualification for violation of prohibition of texting while driving a commercial motor vehicle—

(1) *General rule.* A driver who is convicted of violating the prohibition of texting in § 392.80(a) of this chapter is disqualified for the period of time specified in paragraph (e)(2) of this section.

(2) *Duration.* Disqualification for violation of prohibition of texting while driving a commercial motor vehicle—

(i) *Second violation.* A driver is disqualified for not less than 60 days if the driver is convicted of two violations of § 392.80(a) of this chapter in separate incidents during any 3-year period.

(ii) *Third or subsequent violation.* A driver is disqualified for not less than

120 days if the driver is convicted of three or more violations of § 392.80(a) of this chapter in separate incidents during any 3-year period.

## PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

12. The authority citation for part 392 continues to read as follows:

**Authority:** 49 U.S.C. 13902, 31136, 31151, 31502; and 49 CFR 1.73.

13. Amend part 392 by adding a new subpart H to read as follows:

### Subpart H—Limiting the Use of Electronic Devices

#### § 392.80 Prohibition against texting.

(a) *Prohibition.* No driver shall engage in texting while driving.

(b) *Motor Carriers.* No motor carrier shall allow or require its drivers to engage in texting while driving.

(c) *Definition.* For the purpose of this section only, *driving* means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

(d) *Exceptions.* (1) The provisions of § 390.3(f)(1) of this chapter (school bus operations) are not applicable to this section.

(2) Texting is permissible by drivers of a commercial motor vehicle when necessary to communicate with law enforcement officials or other emergency services.

Issued on: March 29, 2010.

**Anne S. Ferro,**

*Administrator.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[Docket No. FWS-R8-ES-2009-0078]  
[MO 99210-0-0009-B4]

### 50 CFR Part 17

### RIN 1018-AW53

### Endangered and Threatened Wildlife and Plants; Proposed Revised Designation of Critical Habitat for *Astragalus jaegerianus* (Lane Mountain milk-vetch).

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to revise designated critical habitat for the Lane Mountain milk-vetch (*Astragalus jaegerianus*) under the Endangered Species Act of 1973, as amended (Act). The previous final rule designated 0 acres (ac) (0 hectares (ha)) of critical habitat and was published in the **Federal Register** on April 8, 2005. We now propose to designate approximately 16,156 ac (6,538 ha) of land located in the Mojave Desert in San Bernardino County, California, which, if finalized as proposed, would result in an increase of approximately 16,156 ac (6,538 ha).

**DATES:** We will accept comments until June 1, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by May 17, 2010.

**ADDRESSES:** You may submit comments by one of the following methods:

• Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. [FWS-R8-ES-2009-0078].

• U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS-R8-ES-2009-0078]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

### FOR FURTHER INFORMATION CONTACT:

Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone (805) 644-1766; facsimile (805) 644-3958. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:****Public Comments**

We intend any final action resulting from this proposal to be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from the public, other governmental agencies, Tribes, the scientific community, industry, or other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not revise the designation of habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

## (2) Specific information on:

- The amount and distribution of *Astragalus jaegerianus* habitat included in this proposed revised rule;
- What areas within the geographic area occupied by the species at the time of listing contain features essential to the conservation of the species and why, and
- What areas outside the geographical area occupied by the species at the time of listing are essential for 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 relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts;

(5) Comments or information that may assist us in identifying or clarifying the primary constituent elements;

(6) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the landscapes identified as essential;

(7) Information on the currently predicted effects of climate change on *Astragalus jaegerianus* and its habitat;

(8) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed revised designation and, in particular, any impacts on electricity production, and the benefits

of including or excluding any particular areas that exhibit these impacts; and

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Our final determination concerning critical habitat for *Astragalus jaegerianus* will take into consideration all written comments we receive during the comment period, including comments from peer reviewers, comments we receive during a public hearing, should one be requested, and any additional information we receive during the 60-day comment period. All comments will be included in the public record for this rulemaking. On the basis of peer reviewer and public comments, we may, during the development of our final determination, find that areas within the proposed designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If your written comments provide personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>. Please include sufficient information with your comment to allow us to verify any scientific or commercial data you submit.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed revised rule by mail from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**) or by visiting the *Federal eRulemaking Portal* at <http://www.regulations.gov>.

**Background**

It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat in this proposed rule. Additional information on the Lane Mountain milk-vetch may also be found in the final listing rule published in the **Federal Register** on October 6, 1998 (63 FR 53596) and the previous proposed critical habitat of April 6, 2004 (69 FR 18018). These documents are available on the Ventura Fish and Wildlife Office website at <http://www.fws.gov/ventura>.

**Species Description**

*Astragalus jaegerianus* is a member of the pea family (Fabaceae), and has a range restricted to a portion of the west Mojave Desert that is north of Barstow, in San Bernardino County, California. The plant is an herbaceous perennial that typically dies back at the end of each growing season, and persists through the dry season as a taproot. The stems often grow in a zigzag pattern, usually up through low bushes, referred to in this proposed rule as host shrubs.

This species can be considered a hemicryptophyte (partially hidden), because it is usually found growing within the canopy of a host shrub. Like other species of *Astragalus*, the roots of *Astragalus jaegerianus* contain nodules that fix nitrogen. Gibson *et al.* (1998, p. 81) postulate that *A. jaegerianus* may have a mutually beneficial relationship with the host shrub, wherein the host shrub provides trellis-like support for *A. jaegerianus*, and benefits from higher levels of soil nitrogen derived from the litter and roots of *A. jaegerianus*.

**Life History**

As with other perennial species in the Mojave Desert, the plant begins regrowth in the late fall or winter, once sufficient soil moisture is available. Individuals go dormant in the late spring or summer when soil moisture has been depleted (Bagley 1999, p. 2). Blooming typically occurs in April and May. However, if climatic conditions are unfavorable, the plants may desiccate (dry out) prior to flowering or setting seed. Therefore, substantial contributions to the seed bank may occur primarily in climatically favorable years.

Production of pods and the number of seeds per pod can be highly variable, both in the field and in greenhouse conditions. Seed pods can contain as many as 18 seeds, but more typically 4 to 14 seeds (Sharifi *et al.* 2003, p. 5). In the field, seeds that do not germinate during the subsequent year become part of the seed bank. Seed germination rates

in the field may resemble the low germination rate of 5 percent that is observed in germination trials of unscarified (outer cover is not broken) seed (Sharifi in litt. 2004, p. 1).

Seeds collected from *Astragalus jaegerianus* range in size from .000053 ounces (1.5 milligrams) to .000764 ounces (5.0 milligrams) in weight (Sharifi in litt. 2003, p. 5). The relatively large size of these seeds, compared to those of many desert annual species, makes them an attractive food source to ants and other large insects, small mammals, and birds (Brown *et al.* 1979, p. 203). These animal species would also be the most likely vectors to disperse *A. jaegerianus* seeds within and between populations. Sharifi (pers. comm. 2004) confirmed the presence of *A. jaegerianus* seeds within native ant coppices (mounds).

Limited observations on *Astragalus jaegerianus* pollinators were carried out in 2003 (Kearns 2003, pp. 9-16), 2004, and 2005 (Hopkins 2005, p. 1). Kearns made observations at two plants in one population for 7 days. Although 30 different insect species were observed visiting flowers in the area, only 4 visited *A. jaegerianus* flowers. The most frequent pollinator was *Anthidium dammersi*, a solitary bee in the megachilid family (Megachilidae). *Anthidium dammersi* occurs in the Mojave and Colorado deserts of California, Nevada, and Arizona (Kearns 2003, p. 12), and will fly up to 0.6 mile (1 kilometer (km)) away from their nest; although if floral resources are abundant, they will decrease their flight distances accordingly (Yanega, pers. comm. 2003). Kearns (2003) found that the *Anthidium* individuals he inspected carried pollen primarily from phacelia (*Phacelia distans*) (82 percent of individuals) and *A. jaegerianus* (64 percent of individuals). The three occasional visitors to *A. jaegerianus* were a hover fly (*Eupeodes volucris*), a large anthophrid bee (*Anthophora* sp.), and the white-lined sphinx moth (*Hyles lineata*). The extent to which *Astragalus jaegerianus* relies on these and other pollinators to achieve seed set is not yet known. However, in a greenhouse experiment, 25 percent of pollinated *Astragalus jaegerianus* flowers set seed, while only 5 percent of nonpollinated flowers set seed (Sharifi pers. comm. 2004).

In a study conducted in 2004 and 2005, Hopkins collected three bee species observed on the flowers of *Astragalus jaegerianus*. Yanega identified the three bee species as *Osmia laisulcata*, *Anthidium emarginatum*, and *Anthidium dammersi*, all of which belong to the

megachilid family. Hopkins also observed two species of flies associated with *Astragalus jaegerianus* flowers. However, Hopkins concluded that the common hoverfly (*Eupeodes volucris*) and bee fly (*Lordotus albidus*) were not effective pollinators of *A. jaegerianus* flowers (Hopkins 2005, p. 1).

Although the aboveground portion of the plant dies back each year, individuals of *Astragalus jaegerianus* persist as a perennial rootstock through the dry season. The perennial rootstock may also allow *A. jaegerianus* to survive occasional dry years, while longer periods of drought might be endured by remaining dormant (Beatley in Bagley 1999, p. 2). In another federally listed species, Osterhout milk-vetch (*Astragalus osterhoutii*), which occurs in sagebrush steppe habitat in Colorado, individuals have remained dormant for up to 4 years (Dawson in litt. 1999, p. 1).

Although a substantial *Astragalus jaegerianus* seedbank most likely exists, establishment of new individuals may not occur with great frequency, and may pose a large bottleneck for the continued persistence of the species. In addition to the possible low seed germination rates discussed earlier, several other observations contribute to this assertion. First, we have some indication that individuals may have a long life span; in one long-term plot, individuals have been tracked for a period of 13 years. Out of a total of 9 individuals, 1 has persisted over a period of 13 years, 1 has persisted 12 years, 1 has persisted 10 years, 1 has persisted 6 years, 1 has persisted 5 years, and 2 have persisted 3 years (Rutherford in litt. 2004). Secondly, despite careful observation, very few seedlings have been observed. During the extensive surveys of 2001, approximately 2 percent of the 4,964 individuals observed were thought to be seedlings (Charis 2002, p. 36). However, the actual number of seedlings may have been even lower, because resprouts from established individuals were most likely mistaken for seedlings (Sharifi pers. comm. 2004).

#### Geographical Area Occupied at the Time of Listing

At the time of listing, *Astragalus jaegerianus* was known to occur in four geographically distinct areas, referred to as Brinkman Wash, Montana Mine, Paradise Wash, and Coolgardie. The species was found from a fifth area, referred to as Goldstone in 2001. Based on what we understand about the lifespan of the species, we infer that the Goldstone area was also occupied at the time of listing (see below).

#### Current Distribution

After the early collections in 1939 and 1941, the plant was not collected again until 1985 at the sites referred to as Brinkman Wash, Montana Mine, and Paradise Wash. Throughout the 1990s, hundreds more plants were located in these areas (Lee and Ro Consulting Engineers 1986, pp. 10-13; Brandt *et al.* 1993, p. 4; Prigge 2000a, p. 6) in surveys sponsored by the Department of the Army (Army). Surveys in 1999 established that the Brinkman Wash and Montana Mine sites together support one large spatially contiguous population (Prigge *et al.* 2000a, p. 7), and thus these areas are now considered one population. In 1992, the southernmost and now considered the third population was found 9 miles (mi) (14 kilometers (km)) to the south, on Coolgardie Mesa, a few miles west of Lane Mountain. This site closely approximates the location of the type locality (the location where a type specimen originated) as described by Edmund C. Jaeger (1940, p. 119).

Extensive surveys funded by the Army were conducted in 2001 (Charis 2002, pp. 1-85). The 2001 surveys contributed greatly to our knowledge of the overall distribution and abundance of *Astragalus jaegerianus* in the three populations (Brinkman Wash–Montana Mine, Paradise Wash, and Coolgardie). In addition, a fourth population was located during these surveys on Army lands within the bounds of the National Training Center at Fort Irwin (NTC) in an area referred to as Goldstone. Approximately 20 percent of this population is on lands leased by the Army to the National Aeronautics and Space Administration (NASA) for tracking facilities. Much of the information on population distribution included in this proposed rule is taken from the Army survey report (Charis 2002, pp. 1-85).

Individuals of *Astragalus jaegerianus* are concentrated in four geographically distinct areas. In this rule, a population refers to a concentration of *A. jaegerianus* individuals, a site refers to the land that supports the population, and a unit refers to specific sites that are being considered for critical habitat designation. The four populations of *A. jaegerianus* are arrayed more or less linearly along a 20-mile-long (32-kilometer) axis that trends in a northeasterly-to-southwesterly direction. The names of the four populations, from northeast to southwest, and land ownership are as follows: the Goldstone population occurs on Army lands including a portion leased to NASA; the Brinkman

Wash–Montana Mine population occurs entirely on Army lands; the Paradise Wash population occurs primarily on Army lands, with a small portion of the remaining population occurring on Bureau of Land Management (Bureau) lands intermixed with private lands along the southwestern fringe of the population; the Coolgardie population occurs primarily on Bureau-managed lands and to a lesser extent lands owned by the Army, with a number of small privately owned parcels scattered within.

Based on the information available, including historic records and current location information, there is nothing to suggest that *Astragalus jaegerianus* was more widespread prior to listing than the currently-known distribution. The Army surveys in 2001 (Charis 2002, p. 17) included reconnaissance surveys on habitat that appeared suitable but outside the known range of *A. jaegerianus*, including the Mount General area near Barstow and in the Alvord Mountains 20 mi (32 km) to the east. In addition, since 1996, rare plant surveys have been conducted on the Naval Air Weapons Station at China Lake 6 miles (4.8 km) northwest of the known distribution (Silverman in litt. 2003). None of these surveys have resulted in the location of any other populations.

#### Habitat

*Astragalus jaegerianus* is most frequently found on shallow soils derived from Jurassic or Cretaceous granitic bedrock. A small portion of the individuals located to date occur on soils derived from diorite or gabbroid bedrock (Charis 2002, p. 35). In one location on the west side of the Coolgardie site, plants were found on granitic soils overlain by scattered rhyolitic cobble, gravel, and sand. Soils tend to be shallower immediately adjacent to milk-vetch plants (within 30 feet (ft) (10 meters (m))) than in the surrounding landscape (Brandt *et al.* 1997, p. 8). At the Montana Mine site, highly weathered granite bedrock was reached within 2 inches (6 centimeters (cm)) of the soil surface near *A. jaegerianus* plants (Fahnestock 1999, p. 3). The topography where *A. jaegerianus* most frequently occurs is on low ridges and rocky low hills where bedrock is exposed or near the surface and the soils are coarse or sandy (Prigge 2000b, p. 5; Charis 2002, p. 35). Most of the individuals found to date occur between 3,100 and 4,200 ft (945 and 1,280 m) in elevation (Charis 2002, p. 40). At lower elevations, the alluvial soils appear to be too fine to support *A. jaegerianus*, and at higher elevations the soils may

not be developed enough to support *A. jaegerianus* (Prigge 2000b, p. 6; Charis 2002, p. 40). Prigge (pers. comm. 2003) examined and found no relationship between the abundance and distribution of *A. jaegerianus* and levels of micronutrients or heavy metals, such as selenium, in the soil.

At the broad landscape level, the plant community within which *Astragalus jaegerianus* occurs can be described as Mojave mixed woody scrub (Holland 1986 p. 13), Mojave creosote bush scrub (Cheatham and Haller 1975, p. 2; Thorne 1976, p. 23; Holland 1986, p. 13), or creosote bush series (Sawyer and Keeler-Wolf 1995, p. 144). These broad descriptions, however, are not sufficiently detailed to be useful in describing the communities where *A. jaegerianus* is found. While creosote bush (*Larrea tridentata*) is present in the landscape, its presence and abundance is not as extensive in the specific areas where *A. jaegerianus* occurs, presumably because these soils are shallower than optimal depth for creosote bush.

Data gathered from the four sites that support *Astragalus jaegerianus* populations have been detailed, and thus very useful in describing the particular plant community within which *A. jaegerianus* grows. Common to all four sites is the remarkably high diversity of desert shrub species, although the relative frequency of these species varies slightly from site to site. The shrub species that occur in the highest densities at *A. jaegerianus* sites include turpentine bush (*Thamnosma montana*), white bursage (*Ambrosia dumosa*), Mormon tea (*Ephedra nevadensis*), Cooper goldenbush (*Ericameria cooperi* var. *cooperi*), California buckwheat (*Eriogonum fasciculatum* var. *polifolium*), brittlebush (*Encelia farinosa* or *E. actoni*), desert aster (*Xylorrhiza tortifolia*), goldenheads (*Acamptopappus sphaerocephalus*), spiny hop-sage (*Grayia spinosa*), cheesebush (*Hymenoclea salsola*), winter fat (*Kraschenninikovia lanata*), and paper bag bush (*Salazaria mexicana*).

*Astragalus jaegerianus* utilizes a variety of species as host shrubs. Individuals of *A. jaegerianus* are sometimes found growing within dead shrubs, and are rarely observed on bare ground. Host shrubs may be important in providing appropriate microhabitat conditions for *A. jaegerianus* seed germination and seedling establishment (Charis 2003, p. 25).

At the Brinkman–Montana Mine site, Prigge *et al.* (2000b, p. 6) showed that the difference between the relative

frequency of use of host shrub species by *Astragalus jaegerianus* and the relative frequency with which these shrubs occurred in the plant community was statistically significant, indicating that some shrubs are more suitable as hosts than others. During Army surveys in 2001, host shrubs were noted for 4,899 individuals of *A. jaegerianus*. Six shrub species (*Thamnosma montana*, *Ambrosia dumosa*, *Eriogonum fasciculatum* ssp. *polifolium*, *Ericameria cooperi* var. *cooperi*, *Ephedra nevadensis*, *Salazaria mexicana*) accounted for 75 percent of the host shrub records. Some relatively frequent shrubs had an extremely low frequency of occurrence as a host. These included *Larrea tridentata*, *Krameria erecta*, *Psorothamnus arborescens* var. *minutifolius*, *Lepidium fremontii*, and *Lycium cooperi* (Charis 2001, p. 41).

#### Population Characteristics

The cumulative total number of *Astragalus jaegerianus* individuals found from all surveys to date is approximately 5,800 (Charis 2002, p. 34). Charis (2002) attempted to extrapolate the total number of individuals by factoring in the amount of intervening suitable habitat between transects in confirmed occupied habitat, along with an “observability” factor ranging from 30 percent to 70 percent; this results in estimations of the total number of individuals ranging from 20,524 to 47,890. The actual numbers of individuals observed during the surveys at the four population sites during the climatically favorable year of 2001 are as follows: Goldstone, 555; Brinkman Wash–Montana Mine, 1,487; Paradise Wash, 1,667; Coolgardie, 2,014 (Charis 2002, p. 36). Low numbers of individuals observed in prior and subsequent years (2000, 2002, and 2003) suggest that this species may well follow the pattern of other perennial desert species that rely on climatic conditions (particularly a heavy rainfall during October or November) that are infrequent and unpredictable (Beatley 1974, p. 860; Kearns 2003, p. 5; Prigge, pers. comm. 2003).

#### Reasons for Decline and Threats

At the time *Astragalus jaegerianus* was listed as endangered in 1998, threats to the species included: Dry wash mining, recreational off-highway vehicle use, military maneuvers on Army lands at the NTC and its future training expansion lands (see New Information Since the Time of Listing section below), and the lack of regulatory mechanisms that would offer formal protection for the species or its habitat. Stochastic extinction (extinction

from random natural events) resulting from flooding (that could wash substantial amounts of the seedbank into unsuitable habitat), prolonged drought (that could reduce the abundance of viable seed in the seedbank), or unforeseen events including wildfire, wildfire suppression activities, or pipeline breaks or repairs were also of concern.

#### New Information Since the Time of Listing

##### Survey information

Surveys conducted in 2001 (Charis 2002, pp. 1-85) increased our understanding of the distribution of the species. The areal extent of the three populations that were previously known was found to be much greater, and the fourth population (Goldstone) was discovered during these surveys. Also, the size of the populations (as represented by the number of individuals that can be observed in a favorable climatic year) is now known to be larger than was thought at the time of listing.

##### Army land transfers and management

A substantial change in land management occurred since the time of listing. On January 11, 2002, the Fort Irwin Military Lands Withdrawal Act of 2001 (Public Law 107-107) was signed into law. This legislation withdrew approximately 110,000 acres (ac) (44,516 hectares (ha)) of land, formerly managed by the Bureau, for military use and management by the Army at the NTC. Subsequent surveys and Geographic Information System (GIS) analysis indicated that the expansion area was actually 118,674 ac (48,026 ha).

As part of their Integrated Natural Resources Management Plan (INRMP) responsibilities, the Army established 40 study plots in 2005 to study the demographics of *Astragalus jaegerianus* and reports annually to the Service. Ten study plots were established in each of the four populations. Information summarized from the 2008 annual monitoring report indicates that the total number of *A. jaegerianus* plants observed above-ground within the plots has decreased since 2005 (Hessing 2008, pp. 2-6). Study plot surveys in 2005 documented 224 individuals. In 2006 the total number of individual plants increased to 230. In 2007, the total number of plants observed in the study plots was 4 plants; drought conditions are suspected to be the cause of decreased numbers observed above-ground. In 2008 the observed population total rose to 123 plants.

Fourteen of the 123 plants (11.4 percent) were new recruits (new individuals from seeds) in 2008; this was correlated with increased rainfall that resulted in the germination of new individuals as well as the reappearance of older, established individuals that had gone dormant during the previous years of drought. In 2009, the total number of living plants observed in the study plots was 124 plants. Eleven of these plants were new plants that had not been observed or tagged previously (Hessing 2009, p. 3). Long-term recruitment into the population is expected to be less, because of seedling and juvenile mortality. For example, only 35 percent of the new recruits in 2006 plants survived until 2008 (Hessing 2008, pp. 2-6).

Population demography studies conducted at permanent survey plots showed that *Astragalus jaegerianus* populations at the Montana Mine and Goldstone sites are failing to recruit new plants into those populations as a result of low seedling survival and perhaps a depleted seed bank (Sharifi *et al.* 2009, p. 10). Additionally, recruitment is probably episodic and requires two or more uncommon conditions such as: A large seed bank, precipitation greater than 200 mm and frequently spaced (approximately four times a month), and a subsequent wet year or summer precipitation (Sharifi *et al.* 2009, p. 10). Recent genetic analysis of *A. jaegerianus* showed that the species exhibits low levels of genetic variation likely due to its small population size and restricted geographical range (over a 20-mi long (32-km) area) (Walker and Metcalf 2009, p. 18).

Three of the four populations of *Astragalus jaegerianus* (Goldstone, Brinkman Wash-Montana Mine, and Paradise Wash populations) occur almost entirely on Army lands at the NTC. The Army established two conservation areas for *A. jaegerianus* in 2005. The first conservation area, referred to as the Goldstone Conservation Area, comprises 2,470 ac (1,000 ha) at the Goldstone site where the Goldstone population occurs and encompasses almost the entire population. The second conservation area, referred to as Paradise Valley Conservation Area, comprises 4,302 ac (1,741 ha) along the southwestern boundary of the NTC where the Paradise Wash population occurs. A portion of the Brinkman Wash-Montana Mine population occurs on a site designated as a "no-dig zone" by the Army; while not as protective as a conservation area, the no-dig zone limits the extent of ground disturbance, and hence disturbance to the habitat of *Astragalus*

*jaegerianus*. Therefore, of the three populations on the NTC lands, all of one and a portion of a second are on sites that have been designated as conservation areas, and a portion of a third population is on a site designated as a no-dig zone.

##### Bureau land transfers and management

As discussed above under "Army land transfers and management," approximately 118,674 ac (48,026 ha) of lands, primarily Bureau lands, were transferred to the Army in 2002. This transfer included lands that support a large portion of the population of *Astragalus jaegerianus* at Brinkman Wash-Montana Mine and almost all the *Astragalus jaegerianus* population at Paradise Wash. The Bureau continues to have jurisdiction on lands that support the *Astragalus jaegerianus* population at Coolgardie.

In 2005, the Bureau amended the California Desert Conservation Area plan with respect to the management of approximately 3,300,000 ac (1,335,477 ha) of Bureau lands in the western Mojave Desert. As part of the plan amendment of the CDCA, the Bureau established two Areas of Critical Environmental Concern (ACEC) for *Astragalus jaegerianus*. The first ACEC, referred to as the West Paradise Conservation Area, comprises 1,243 ac (503 ha), and is contiguous with the Army's Paradise Valley Conservation Area along the southwestern boundary of the NTC. This area was previously designated as land-use class L by the Bureau, which denotes limited use. The second ACEC is the Coolgardie Mesa Conservation Area (CMCA); it comprises approximately 13,354 ac (5,404 ha) at the Coolgardie site. This area was previously designated as land-use class M by the Bureau, which denotes moderate use. Under the plan amendments to the CDCA, both conservation areas are now managed to maintain habitat for *A. jaegerianus* with the following management prescriptions: Implement a minerals withdrawal and notify claimholders of the presence of *A. jaegerianus*, prohibit grazing, issue no permits that allow take of this species, require a 5-to-1 mitigation ratio for land-disturbing projects, acquire private lands to the extent feasible, and limit total ground disturbance to 1 percent of the conservation areas.

Since 2005, Congress and the Department of Interior supported the use of public lands for alternative energy development, including passage of the Energy Policy Act of 2005. The purpose of the act is to encourage energy efficiency and conservation,

promote alternative and renewable energy sources, reduce our dependence on foreign sources of energy, and increase domestic production in an environmentally responsible way. Stepdown orders address more specifically how to implement the Energy Policy Act of 2005 (for example, Order No. 3283 (DOI 2009a pp. 1-2) and Order No. 3285 (DOI 2009b pp. 1-3)). In addition, the Bureau has issued its own guidelines for implementing these policies and orders on Bureau lands. In 2008, the Bureau issued IM 2009-043, the Wind Energy Development Policy, which includes guidelines for the development of wind energy projects within designated ACEC areas (Bureau 2008, p. 2). In accordance with these guidelines, the Bureau will not issue right-of-way authorizations for wind energy development in ACECs when wind energy development is incompatible with specific resource values. Since 2005, the Bureau has received two applications to install meteorological monitoring towers adjacent to *Astragalus jaegerianus* habitat on Coolgardie Mesa. These applications were denied due to concerns over habitat alteration and potential impacts to *A. jaegerianus*. The Bureau worked with the applicants to relocate these two wind energy projects outside of the ACECs designated for *A. jaegerianus* (Trost 2009), thereby avoiding impacts to *A. jaegerianus* while pursuing alternative energy development.

#### Previous Federal Action

The final rule listing *Astragalus jaegerianus* as an endangered species was published on October 6, 1998 (63 FR 53596).

On November 15, 2001, our decision not to designate critical habitat for *Astragalus jaegerianus* and seven other plant and wildlife species at the time of listing was challenged in *Southwest Center for Biological Diversity and California Native Plant Society v. Norton* (Case No. 01-CV-2101-IEG (S.D.Cal.). On July 1, 2002, the court ordered the Service to reconsider its not prudent determination, and propose critical habitat, if prudent, for the species by September 15, 2003, and a final critical habitat designation, if prudent, no later than September 15, 2004. In light of *Natural Resources Defense Council v. U.S. Department of the Interior*, 113 F.3d 1121 (9th Cir. 1997), and the diminished threat of overcollection, the Service reconsidered its decision and determined that it was prudent to propose critical habitat for the species. However, the Service exhausted the funding appropriated by

Congress to work on critical habitat designations in 2003 prior to completing the proposed rule. On September 8, 2003, the court issued an order extending the date for issuance of the proposed critical habitat designation for *A. jaegerianus* to April 1, 2004, and the final designation to April 1, 2005.

On April 6, 2004 (69 FR 18018), we published a proposed critical habitat designation that included 29,522 ac (11,947 ha) in 4 units in San Bernardino County, California. On April 8, 2005 (70 FR 18220), we published our final designation of critical habitat for *Astragalus jaegerianus*. Because we excluded all proposed acreage from the designation, the final designation included zero (0) acres (0 hectares).

On December 19, 2007, the 2005 critical habitat determination was challenged by the Center for Biological Diversity (*Center for Biological Diversity v. United States Fish and Wildlife Service et al.*, Case No. CV-07-08221-JFW-JCRx). In a settlement agreement accepted by the court on June 27, 2008, we agreed to reconsider the critical habitat designation for *A. jaegerianus*. The settlement stipulated that we submit a proposed revised critical habitat rule for *A. jaegerianus* to the **Federal Register** for publication on or before April 1, 2010, and submit a final revised determination on the proposed critical habitat rule to the **Federal Register** for publication on or before April 1, 2011. This revised proposed rule complies with the June 27, 2008, court order.

#### Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) 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

(a) essential to the conservation of the species, and

(b) that may require special management considerations or protection; and

(2) 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 the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under 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 otherwise be 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 discretionary actions carried out, funded, or authorized by a Federal agency. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect 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 the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner seeks or requests Federal agency funding or authorization of an activity that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features that are essential to the conservation of the species. Areas containing the essential physical and biological features are identified, to the extent known using the best scientific data available, as the habitat areas that provide essential life cycle needs of the species; that is, areas on which are found the primary constituent elements laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species. Habitat within the geographical area occupied by the species at the time of listing that contains features essential to the conservation of the species meets the definition of critical habitat only if these features may require special management considerations or protection. Under the Act and the regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed

only when we determine that the best available scientific data demonstrate that the designation of those areas is essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our "Policy on Information Standards Under the Endangered Species Act" (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our 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 we determine which areas to propose as revised critical habitat, our primary source of information is generally the information developed during the listing process for the species and any previous designation of critical habitat. Additional information sources may include the recovery plan and 5-year reviews 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.

Habitat is dynamic, and species may move from one area to another over time. In particular, we recognize that climate change may cause changes in the arrangement of occupied habitat patches. Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change 2007, p. 11; Cayan *et al.* 2009, p. xi). However, predictions of climatic conditions for smaller subregions such as California remain uncertain. It is unknown at this time if climate change in California will result in a warmer trend with localized drying, higher precipitation events, or other effects. Thus, the information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise

estimates of the location and magnitude of the effects. Nor are we currently aware of any climate change information specific to the habitat of *Astragalus jaegerianus* that would indicate what areas may become important to the species in the future. Therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the proposed revised critical habitat for this species to respond to potential effects of climate change; however, we specifically request information from the public on the currently predicted effects of climate change on *A. jaegerianus* and its habitat. Additionally, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated critical habitat area is unimportant or may not be required for recovery of the species.

Areas that support populations of *Astragalus jaegerianus*, but are outside the critical habitat designation, may continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy prohibition, as determined on the basis of the best available information at the time of the agency 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 (HCPs), section 7 consultations, 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) of the Act and 50 CFR 424.12, we used the best scientific information available in determining which areas within the geographic area occupied by the species at the time of listing contain the features essential to the conservation of *Astragalus jaegerianus*, and which areas outside the geographic area occupied at the time of listing are essential for the conservation of the species. We reviewed information used to prepare the 2004 proposed critical habitat rule (69 FR 18018); the 5-year review (Service 2008, pp. 1–21); published

peer-reviewed articles; data from our files that we used for listing the species; geologic maps (California Geologic Survey 1953); recent biological surveys and reports, particularly from the Army surveys of 2001 (Charis 2002, pp. 1–85); additional information provided by the Army, the Bureau, and other interested parties; and discussions with botanical experts. We also conducted site visits to all three units that are being proposed for designation.

The long-term probability of the survival and recovery of *Astragalus jaegerianus* is dependent upon: The protection of existing population sites; the maintenance of ecologic functions within these sites, including connectivity within and between populations in close geographic proximity to one another (to facilitate pollinator activity and seed dispersal mechanisms); and keeping these areas free of major ground-disturbing activities. The areas we are proposing to designate as critical habitat provide all of the features essential for the conservation of *A. jaegerianus*.

In our delineation of the proposed critical habitat units, we initially selected areas to provide for the conservation of *Astragalus jaegerianus* at the four population sites where it is known to occur. As discussed under the section on Distribution, at the time of listing, *A. jaegerianus* was known to occur from Brinkman Wash and Montana Mine (these two sites subsequently determined to be contiguous and thus considered one population), Paradise Wash, and Coolgardie; due to our understanding of the lifespan of the species, we also conclude that the Goldstone site was occupied at the time of listing even though this was not confirmed until three years subsequent to listing. All four sites are important because *A. jaegerianus* exhibits life history attributes, including variable seed production, low germination rates, and habitat specificity in the form of a dependence on a co-occurring organism (host shrubs), that make it vulnerable to extinction (see previous rules (69 FR 18018 and 70 FR 18220) and Keith 1998, p. 1080; Gilpin and Soule 1986, p. 33). We believe the proposed designation is of sufficient size to maintain landscape-scale processes and to minimize the secondary impacts resulting from human occupancy and human activities occurring in adjacent areas. We mapped the units with a degree of precision commensurate with the best available information and the size of the unit.

Of principle importance in the process of delineating the proposed critical habitat units are data in a

geographic information system (GIS) format provided by the Army, depicting the results of Army field surveys for *Astragalus jaegerianus* conducted in 2001 (Charis 2002, pp. 1-85). These data consisted of three files depicting the locations of transects that were surveyed for *A. jaegerianus*, the locations of *A. jaegerianus* individuals found during the surveys, and minimum convex polygons (MCP) calculated to represent the outer bounds of *A. jaegerianus* populations (Charis 2002, pp. 1-85).

For mapping proposed critical habitat units, we proceeded through a multi-step process. First, we started with the MCPs that had been calculated by the Army (Charis 2002, pp. 1-85) based on the presence of documented individuals. We then expanded these boundaries outward from the edge of each of the 4 populations by a distance of 0.25 mi (0.4 km). We did this to include *Astragalus jaegerianus* individuals that are part of these populations, but were not noted during surveys. The basis for determining that these additional land areas are occupied is as follows: (1) This habitat has the appropriate elevational range, and includes the granitic soils and plant communities that support host plants required by *A. jaegerianus*; (2) botanists involved in the Army surveys stated that “the estimate of [*A. jaegerianus*] distribution is a minimum” (SAIC 2003, pp. 1-2), and that additional individuals of *A. jaegerianus* most likely occurred on the fringes of the MCPs (SAIC 2003, pp. 1-2); (3) this 0.25-mi (0.4-km) distance is commensurate in scale with the distance between transects where individuals were found and the distance between individuals along one transect, and it is well within the distance that can be traversed by pollinators and seed dispersers; (4) mapping errors during the 2001 surveys indicated that the location of individuals did not match up precisely with the location of the transect boundaries (Charis 2002); and (5) limited surveys were conducted in 2003, and despite the unfavorable climatic conditions for *A. jaegerianus*, 13 additional individuals were located outside the MCPs (SAIC 2003). Three of the four areas where new plants were found were within the 0.25-mi (0.4-km) distance around the MCPs.

We next removed areas on the margins of the resultant polygons where we determined, by referring to digital raster graphic maps, the topography is either too steep or the elevation too high to support additional *Astragalus jaegerianus* individuals. This boundary modification involved editing the eastern and southeastern edge of the Coolgardie MCP and a cirque-shaped

sliver from the central portion of the southern boundary of the Brinkman-Montana MCP.

For the Goldstone and Brinkman-Montana populations, expansion of the MCP boundaries by 0.25 mi (0.4 km) left a narrow corridor (about 0.125 mi (0.2 km)) between the revised polygons. We chose to bridge the gap between the two polygons by incorporating the intervening habitat that is within the geographic area occupied by the species between the Goldstone and Brinkman-Montana polygons into a single critical habitat unit, called the Goldstone-Brinkman unit. We did this for several reasons: The intervening habitat between the two MCPs contains the PCEs with the appropriate elevational range, granitic soils, and plant communities (based on topographic maps, geologic maps, and aerial photos) that *Astragalus jaegerianus* requires; there were no obvious physical barriers between the two MCPs; the distance between the two closest *A. jaegerianus* individuals across the gap of the two MCPs was smaller than the distance between individuals within the MCPs; and the distance between the two MCPs was small enough that it could be easily traversed by a pollinator with a potential flight distance of 0.6 mi (1 km), or a seed disperser such as certain small mammals and birds. Granitic soil and the plant community in the intervening area between the two polygons also provide habitat for the pollinators that visit *A. jaegerianus* flowers, habitat for seed dispersers (birds, small mammals, and large insects) that carry seed between the coppices of suitable host shrubs, and the area functions as long-term storage for the soil seedbank of *A. jaegerianus*.

For the Paradise population, we removed a small portion of habitat (47 ac (19 ha)) from the eastern edge of the 5,497-ac (2,225-ha) MCP, thereby eliminating a small cluster of three individuals and the surrounding suitable habitat from the proposed critical habitat unit. We did this for two reasons: The distance between this small cluster of three individuals and the other 1,487 individuals mapped within the MCP was greater than the distance between other clusters of individuals within the MCP, and this cluster of individuals was not adjacent or providing connectivity to any other known population of *Astragalus jaegerianus*.

Finally, the boundaries of the critical habitat units were modified slightly in the process of creating the legal descriptions of the critical habitat units. This process consisted of overlaying the critical habitat units with grid lines

spaced at 100-m intervals; the grid lines following the Universal Transverse Mercator (UTM) coordinate system ties to the North American Datum of 1927. Vertices defining the critical habitat boundary polygon were then moved to the closest vertex on the 100-m UTM grid lying inside of the critical habitat boundary. Vertices not necessary to define the shape of the boundary polygon were deleted. Changing the boundaries in this fashion serves two purposes: (1) It creates a list of coordinates that is easier for the public to use when looking at USGS 7.5-minute topographic maps, and (2) it minimizes the number of coordinates necessary to define the shapes of the critical habitat units.

In selecting areas of proposed critical habitat, we typically make an effort to avoid developed areas that are unlikely to contribute to the conservation of the species at issue. However, we did not map critical habitat in sufficient detail to exclude patches of habitat within the larger areas being mapped that are unlikely to contain the primary constituent elements essential for the conservation of *Astragalus jaegerianus*. Land within the boundaries of the mapped units upon which are located facilities, such as buildings, roads, parking lots, communication tower pads, and other paved areas, does not and will not contain any of the primary constituent elements. In addition, old mining sites, where the soil profile and topography have been altered such that no native vegetation can grow, also do not and will not contain any of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger a section 7 consultation under the Act, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas occupied at the time of listing to propose as critical habitat, we consider the physical and biological features 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:

1. Space for individual and population growth and for normal behavior;
2. Food, water, air, light, minerals, or other nutritional or physiological requirements;
3. Cover or shelter;

4. Sites for breeding, reproduction, or rearing (or development) of offspring; and

5. Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

The appropriate quantity and spatial arrangement of the principal biological or physical features within the defined area essential to the conservation of the species compromise the “primary constituent elements” (PCEs) of critical habitat. As defined by our implementing regulations at 50 CFR 424.12(b), these primary constituent elements may include, but are not limited to, features such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetlands or drylands, water quality and quantity, host species or plant pollinators, geological formations, vegetation types, tides, and specific soil types.

Much of what is known about the specific physical and biological requirements of *Astragalus jaegerianus* is described in the Background section of this proposal and in the final listing rule. The proposed revised critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *A. jaegerianus* throughout its range and to provide those habitat components essential for the conservation of the species. The proposed revised critical habitat: (1) provides for individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed banks; (2) provides sites for the host plants that provide structural support for *A. jaegerianus*; (3) includes intervening areas that allow gene flow and provide connectivity or linkage within segments of the larger population; and (4) includes areas that provide basic requirements for growth, such as water, light, and minerals.

Annual distribution of *Astragalus jaegerianus* varies due to a variety of factors. Some of the factors associated with the observed and actual distribution of this species include the following: The degree to which germination requirements of scarification and moisture are met within a germination time frame for the species; the distribution of the seed bank in the soils; and the existence of favorable climatic conditions in a particular year. Therefore, including habitat surrounding the known populations outward for a distance of 0.25 mi (0.4 km) would ensure inclusion of most of the population.

Based on our current knowledge, the primary constituent elements of critical

habitat for *Astragalus jaegerianus* consist of:

(1) Shallow soils at elevations between 3,100 and 4,200 ft (945 to 1,280 m) derived primarily from Jurassic or Cretaceous granitic bedrock, and less frequently on soils derived from diorite or gabbroic bedrock, or on granitic soils overlain by scattered rhyolitic cobble, gravel, and sand.

(2) Host shrubs at elevations between 3,100 and 4,200 ft (945 to 1,280 m). The primary host shrubs are *Thamnosma montana*, *Ambrosia dumosa*, *Eriogonum fasciculatum* ssp. *polifolium*, *Ericameria cooperi* var. *cooperi*, *Ephedra nevadensis*, and *Salazaria mexicana* that are usually found in mixed desert shrub communities.

#### Special Management Considerations or Protection

The term critical habitat is defined in section 3(5)(A) of the Act as geographic areas on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection.

Accordingly, when designating critical habitat, we assess whether the primary constituent elements within the areas occupied at the time of listing may require special management considerations or protection. Although the determination that special management may be required is not a prerequisite to designating critical habitat in areas essential to the conservation of the species that were unoccupied at the time of listing, all areas being proposed as critical habitat require some level of management to address current and future threats to *Astragalus jaegerianus*, to maintain or enhance the physical and biological features essential to its conservation, and to ensure the recovery and survival of the species.

A detailed discussion of threats affecting the physical and biological features essential to the conservation of *Astragalus jaegerianus*, and that may require special management considerations or protection, can be found in the previous proposed critical habitat of April 6, 2004 (69 FR 18018), and the 5-year review (Service 2008, pp. 1-21). In summary, these threats include surface mining, off-highway vehicle recreation, military training activities competition with nonnative species, and habitat fragmentation. In addition, the Bureau has received interest from wind energy companies that are seeking sites for wind energy development.

The areas proposed for designation as revised critical habitat will require some

level of management to address the current and future threats to *Astragalus jaegerianus* and to maintain the physical and biological features essential to the conservation of the species. In units that were occupied at the time of listing and are currently occupied, special management will be needed to ensure that designated habitat is able to provide areas for germination, pollination, reproduction, and sites for the host plants that provide structural support for *A. jaegerianus*; intervening areas that allow gene flow and provide connectivity or linkage within segments of the larger population; and areas that provide basic requirements for growth, such as water, light, and minerals.

There will be impacts from military activities on *Astragalus jaegerianus* and its habitat at NTC. We will not discuss the impacts any further, because areas where *A. jaegerianus* occurs on NTC are being exempted. Army-owned lands in the Paradise and Coolgardie units are not part of the NTC. The lands were purchased for *A. jaegerianus* conservation and will not be impacted by military activities.

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of *Astragalus jaegerianus*. Activities with a Federal nexus that may affect those areas outside of critical habitat, such as development, surface mining, agricultural, military, and road construction activities, are still subject to review under section 7 of the Act if they may affect *A. jaegerianus*. The prohibitions of section 9 of the Act applicable to plants also continue to apply both inside and outside of designated critical habitat. With respect to plants, section 9 of the Act includes among its prohibitions the import or export of listed species, the removal to possession or malicious damage or destruction of species on areas under Federal jurisdiction, or the removal, damage or destruction of species in violation of State law (16 U.S.C. §1538(a)(2)).

#### Criteria Used to Identify Critical Habitat

Using the best scientific and commercial data available as required by section 4(b)(1)(A) of the Act, we identified those areas to propose for revised designation as critical habitat that, within the geographical area occupied by the species at the time of listing (see “Geographical Range Occupied at the Time of Listing” section), possess those physical and biological features essential to the conservation of *Astragalus jaegerianus* and which may require special

management considerations or protection. We also considered the area outside the geographical area occupied by the species at the time of listing for any areas that are essential for the conservation of *A. jaegerianus*. The material we used included the 1998 final listing rule (63 FR 53596), the 2004 proposed critical habitat rule (69 FR 18018), data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits, research published in peer-reviewed articles and presented in academic theses and agency reports, the 5-year review (Service 2008, pp. 1-21), Army surveys of 2001 (Charis 2002, pp. 1-85), and regional GIS coverages. We analyzed this information to develop criteria for identifying areas that contain the PCEs in the appropriate quantity and spatial arrangement essential to the conservation of the *Astragalus jaegerianus* that may require special management considerations or protection, or that are essential for the conservation of *A. jaegerianus*. Extensive surveys funded by the Army were conducted in 2001 (Charis 2002). The 2001 surveys were conducted under optimal growing conditions for the species and contributed greatly to our knowledge of the overall distribution

and abundance of *A. jaegerianus*. We believe the survey results capture the fullest expression of *A. jaegerianus* and provide an accurate representation of habitat occupied by the species.

We are proposing to designate all habitat occupied by *Astragalus jaegerianus* during the extensive Army surveys conducted in 2001. Because the species is long lived and the surveys were conducted under optimal conditions, we believe the species was growing in all potential habitat for the species.

#### Summary of Changes from Previously Proposed Critical Habitat

In our proposed revised critical habitat rules, we typically provide a Summary of Changes that compares the proposed revised critical habitat designation with the previously designated critical habitat. However, we designated zero (0) acres (0 hectares) in our previous designation. Therefore, we are also providing comparison between the previously proposed critical habitat designation from April 6, 2004 (69 FR 18018), and the current proposed revised critical habitat designation. The current proposed revision compares with the previous proposed designation as follows:

(1) In 2004 we proposed 9,627 ac (3,896 ha) of Bureau lands and 4,427 ac (1,792 ha) of private lands. Currently we are proposing 9,888 ac (4,002 ha) of Bureau lands and 2,899 ac (1,169 ha) of private lands.

(2) In 2004 we proposed 211 ac (85 ha) of lands inaccurately identified as State Lands. Currently we are not including, through exemption, 211 ac (85 ha) of the NTC lands covered under the Army's INRMP. The land was inaccurately identified as State Lands in our 2004 proposed critical habitat rule.

(3) Currently we are proposing 1,282 ac (519 ha) of lands that were formerly in private ownership but have been acquired by the Department of the Defense for the purposes of conservation of *Astragalus jaegerianus*. These lands are not contiguous with the NTC and are not covered under the Army's INRMP.

(4) Currently we are not including through exemption 16,462 ac (6,662 ha) of the NTC lands covered under the Army's INRMP.

Below is a table that compares the acreage by land ownership included in the previous proposed critical habitat designation and the previous final critical habitat designation with what we are proposing in this proposed revised critical habitat designation.

TABLE 1: COMPARISON OF ACREAGES INCLUDED IN 2004 PROPOSED CRITICAL HABITAT RULE, 2005 FINAL CRITICAL HABITAT RULE, AND 2010 PROPOSED REVISED CRITICAL HABITAT RULE.

Name of critical habitat unit	2004 proposed designation of critical habitat (69 FR 18018)	2005 final revision to the critical habitat designation (69 FR 53596)	2010 revised proposed designation of critical habitat
Goldstone-Brinkman	9,906 ac (4,008 ha)	Excluded 0 ac (0 ha)	10,394 ac (4,206 ha) exempted due to INRMP on NTC lands
Paradise	6,828 ac (2,763 ha)	Excluded 0 ac (0 ha)	A portion exempted due to INRMP on NTC lands, 6,068 ac (2,456 ha); a portion included 964 ac (390 ha)
Coolgardie	12,788 ac (5,175 ha)	Excluded 0 ac (0 ha)	13,105 ac (5,303 ha) included
Totals	29,522 ac (11,947 ha)	0 ac (0 ha)	14,069 ac (5,693 ha)

#### Proposed Revised Critical Habitat Designation

The proposed revised critical habitat areas described below constitute our best assessment at this time of the areas needed for the species' conservation. The two units being proposed as critical habitat are all within an area that is north of the town of Barstow in the Mojave Desert in San Bernardino County, California, were occupied at the time of listing, are currently occupied, and contain the primary constituent elements that sustain *Astragalus jaegerianus*. We are exempting the previously proposed Goldstone-

Brinkman unit and a large portion of the previously proposed Paradise unit (from the 2004 proposed critical habitat rule) because NTC now has an approved INRMP. Please see discussion in *Exemptions* section below for a description of the importance of these exempted areas to *A. jaegerianus*.

#### Paradise Unit:

The Paradise unit consists of approximately 7,032 ac (2,846 ha). We are proposing critical habitat for *Astragalus jaegerianus* on 964 ac (390 ha). Of this, 318 ac (129 ha) is Army-owned land adjacent to the NTC (off Fort Irwin), 237 ac (96 ha) is privately

owned land located adjacent to the NTC, and approximately 409 ac (166 ha) is on adjacent Federal lands managed by the Bureau. The remaining 6,068 acres (2456 ha) within this unit are on Army lands at NTC subject to the INRMP and have been exempted as discussed below, in the *Exemptions* section.

As part of the plan amendments to the CDCA, the Bureau in 2005 designated an area of approximately 1,000 ac (405 ha) as part of the West Paradise Valley Conservation Area (See section on *Bureau land transfers and management* above for a description of current management of this ACEC). It generally overlaps with the 964 ac (390 ha) being

proposed here for critical habitat. The boundary of the West Paradise Valley Conservation Area encompasses some Army lands not on NTC and some private inholdings. This unit is important because it supports a portion of the Paradise population, only one of four populations of *Astragalus jaegerianus*; in 2001 surveys, 1,667 individuals were observed in this population. The land within this unit supports the granitic soils (PCE 1) and host shrubs (PCE 2) that are necessary for the growth, reproduction, and establishment of *A. jaegerianus* individuals. These granitic soils and host shrubs also provide habitat for the pollinators that visit *A. jaegerianus* flowers that results in the production of seed, habitat for seed dispersers (birds, small mammals, and large insects) that carry seed between the coppices of suitable host shrubs, and the soils provide sites for long-term storage for seedbank of *A. jaegerianus*.

The Paradise unit may require special management considerations or protection due to the threats to the species and its habitat posed by: Invasions of non-native plants such as Sahara mustard (*Brassica tournefortii*) and other plant species that may take over habitat for the species; habitat fragmentation that detrimentally affects plant-host plant and plant-pollinator interactions (i.e., composition and structure of the desert scrub community), leading to a decline in species reproduction and increasing susceptibility to nonnative plant invasion; and vehicles that cause direct and indirect impacts, such as excessive dust, to the plant. Habitat for *Astragalus jaegerianus* in the Paradise unit has been fragmented to a minor extent. We anticipate that in the future, habitat fragmentation may increase, composition and structure of the plant

community may be altered by the spread of nonnative plants, and direct and indirect effects of dust may increase. All of these threats would render the habitat less suitable for *A. jaegerianus*, and special management may be needed to address them.

#### Coolgardie Unit:

The Coolgardie unit consists of approximately 13,105 ac (5,303 ha), primarily on Federal lands managed by the Bureau. The proposed Coolgardie critical habitat unit overlaps to a great extent with the Bureau's Coolgardie Mesa Conservation Area (CMCA) (See section on *Bureau land transfers and management* above for a description of current management of the CMCA). Of this acreage, approximately 9,479 ac (3,836 ha) are managed by the Bureau, and approximately 964 ac (390 ha) were formerly in private ownership, but have been acquired by the Army for the purposes of conservation of *Astragalus jaegerianus* since 2005. These lands are not contiguous with the NTC and are not covered under the Army's INRMP. Parcels of private land are scattered throughout this unit and total approximately 2,662 ac (1,077 ha). Some of these parcels may be acquired by the Bureau and added to the CMCA. This unit supports one of only four populations of *A. jaegerianus*. In 2001, surveyors observed 2,014 plants in this population.

The land within this unit supports the granitic soils (PCE 1) and host shrubs (PCE 2) that are necessary for the growth, reproduction, and establishment of *Astragalus jaegerianus* individuals. It should be noted that the proposed critical habitat does not include the "donut hole" in the center of the unit, where granitic soils are absent. Within the proposed unit, the granitic soils and host shrubs (1) provide habitat

for the pollinators that visit *A. jaegerianus* flowers and result in the production of seed; (2) provide habitat for seed dispersers (birds, small mammals, and large insects) that carry seed between the coppices of suitable host shrubs; and (3) provide for long-term seedbank storage for *A. jaegerianus*.

The Coolgardie unit may require special management considerations or protection due to the threats to the species and its habitat posed by: Invasions of non-native plants such as Sahara mustard (*Brassica tournefortii*) and other plant species that may take over habitat for the species; habitat fragmentation that detrimentally affects plant-host plant and plant-pollinator interactions (composition and structure of the desert scrub community), leading to a decline in species reproduction and increasing susceptibility to nonnative plant invasion; vehicles that cause direct and indirect impacts, such as excessive dust, to the plant; and limited mining activities that can lead to changes in habitat conditions (e.g., decreases in plant cover, and increases in nonnative species). Habitat for *Astragalus jaegerianus* in the Coolgardie unit has been fragmented to a moderate extent from current and historical mining and from off-road vehicle use, and nonnative species have been introduced into the area. We anticipate that in the future, habitat fragmentation may increase, and composition and structure of the plant community may be altered by the continued spread of nonnative plants. Due to increased recreational pressure, off-road vehicle use has increased in the past 4 years. All of these threats would render the habitat less suitable for *A. jaegerianus*, and special management may be needed to address them.

TABLE 2. APPROXIMATE AREAS, GIVEN IN ACRES (AC)<sup>1</sup> AND HECTARES (HA), OF PROPOSED CRITICAL HABITAT FOR *Astragalus jaegerianus* BY LAND OWNERSHIP.

Unit Name	Army lands (Federal)	Bureau of Land Management (Federal)	State Lands Commission	Private lands	Totals
Paradise	318 ac(129 ha)	409 ac(166 ha)	0 ac(0 ha)	237 ac(96 ha)	964 ac (390 ha)
Coolgardie	964 ac(390 ha)	9,479 ac (3,836 ha)	0 ac(0 ha)	2,662 ac (1,077 ha)	13,105 ac (5,303 ha)
Totals	1,282 ac(519 ha)	9,888 ac (4,002 ha)	0 ac(0 ha)	2,899 ac (1,173 ha)	14,069 ac(5,693ha)

<sup>1</sup> Approximate acres have been converted to hectares (1 ac = 0.4047 ha). Fractions of acres and hectares have been rounded to the nearest whole number. Totals are sums of units.

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

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

to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuit

Courts of Appeal have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish*

and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is 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 species proposed for listing or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only, as any conservation recommendations in a conference report or opinion are strictly advisory. However, once proposed species become listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) of the Act apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Conference reports provide conservation recommendations to assist the action agency in eliminating conflicts with the proposed species or proposed critical habitat 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)). The conservation recommendations 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 must enter into consultation with us.

As a result of this consultation, we document compliance with the requirements of section 7(a)(2) of the Act through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

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

Federal activities that may affect *Astragalus jaegerianus* or its designated critical habitat will require section 7(a)(2) consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit under section 10 of the Act from the Service or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

Designation of critical habitat could affect the following agencies and/or actions:

(1) Military-related and construction activities of the Army on its lands or lands under its jurisdiction not covered by an INRMP;

(2) Activities of the Bureau of Land Management on its lands or lands under its jurisdiction;

(3) Activities of the Federal Energy Regulatory Commission (FERC);

(4) The release or authorization of release of biological control agents by Federal agencies, including the Bureau of Land Management, the Army, and the U.S. Department of Agriculture; and

(5) Habitat restoration projects on private lands receiving funding from Federal agencies, such as from the Natural Resources Conservation Service.

As discussed previously in this rule, we completed consultation with both the Army and the Bureau on activities that are being proposed on their lands. We consulted with the Army on its proposed addition of training lands on the NTC (Charis 2003; Service 2005). We also consulted with the Bureau as the lead Federal agency on the plan amendments to the CDCA plan (Bureau 2005; Service 2005).

Where federally listed wildlife species occur on private lands proposed for development, any habitat conservation plans submitted by the applicant to secure an incidental take permit, under section 10(a)(1)(B) of the Act, would be subject to the section 7 consultation process. The Superior-Cronese Critical Habitat Unit for the desert tortoise (*Gopherus agassizii*), a species that is listed as threatened under the Act, overlaps in range with *Astragalus jaegerianus* in a portion of the Paradise

and population of the species. We anticipate that most of the activities occurring on private lands within the range of *A. jaegerianus* will eventually be included under the umbrella of the HCP to be prepared by the County of San Bernardino. However, there may be activities proposed for private lands that either need to be completed prior to the approval of the HCP, or there may be a proposed activity that is not covered by the HCP, and therefore may require a separate habitat conservation plan.

If you have questions regarding whether specific activities will likely constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Pacific Southwest Region, 2800 Cottage Way, Suite W-2606, Sacramento, CA 95825-1846 (telephone (916) 414-6464; facsimile (916) 414-6486).

#### Application of the Jeopardy and Adverse Modification Standard

##### Jeopardy Standard

Currently, the Service applies an analytical framework for *Astragalus jaegerianus* jeopardy analyses that relies heavily on the importance of known populations to the species' survival and recovery. The section 7(a)(2) of the Act analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Astragalus jaegerianus* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, the jeopardy analysis focuses on the range-wide statuses of *A. jaegerianus*, the factors responsible for that condition, and what is necessary for the species to survive and recover. An emphasis is also placed on characterizing the conditions of *A. jaegerianus* in the area affected by the proposed Federal action and the role of affected populations in the survival and recovery of *A. jaegerianus*. That context is then used to determine the significance of adverse and beneficial effects of the proposed Federal action and any cumulative effects for purposes of making the jeopardy determination.

##### Adverse Modification Standard

The key factor related to the adverse modification determination is whether,

with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the PCEs to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features, or other conservation role and function of the affected designated area, to an extent that appreciably reduces the conservation value of critical habitat for *Astragalus jaegerianus*. Generally, the conservation role of *A. jaegerianus* critical habitat units is to support viable core populations and areas that maintain connectivity between core area populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or 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 species.

Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly affect critical habitat and, therefore, should result in consultation for *Astragalus jaegerianus* include, but are not limited to:

(1) Activities that would disturb the upper layers of soil, including disturbance of the soil crust, soil compaction, soil displacement, and soil destabilization. These activities include, but are not limited to, livestock grazing, fire management, and recreational use that would include mechanical disturbance such as would occur with tracked vehicles, heavy-wheeled vehicles, off-highway vehicles (including motorcycles), and mining activities, such as "club mining" with drywashers and sluices.

(2) Activities that appreciably degrade or destroy the native desert scrub communities that support host shrubs, including but not limited to livestock grazing, clearing, discing, fire management, and recreational use that would include mechanical disturbance such as would occur with tracked vehicles, heavy-wheeled vehicles, off-highway vehicles (including motorcycles), and mining activities such as "club mining" with drywashers and sluices.

(3) The application or runoff of chemical or biological agents into the air, onto the soil, or onto native vegetation, including substances such as

pesticides, herbicides, fertilizers, tackifiers, obscurants, and chemical fire retardants.

#### Exemptions

##### Application of Section 4(a)(3) of the Act

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Endangered Species Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

The Sikes Act required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an INRMP. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- (1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- (2) A statement of goals and priorities;
- (3) A detailed description of management actions to be implemented to provide for these ecological needs; and
- (4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management, fish and wildlife habitat enhancement or modification, wetland protection, enhancement, and restoration where necessary to support fish and wildlife, and enforcement of applicable natural resource laws.

Army lands within the boundaries of the NTC at Fort Irwin are subject to an INRMP for 2006-2011 (NTC 2005), which includes management guidelines for *Astragalus jaegerianus*. The Service will monitor the status of the INRMP to assure that it adequately addresses management guidelines for *Astragalus jaegerianus* prior to the completion of the final critical habitat rule. As part of the Army's consultation on the proposed expansion of training lands at

NTC (Service 2005), the Army established a 4,300-ac (1,740-ha) East Paradise Conservation Area on NTC. This area contains approximately 80 percent of the East Paradise population of *A. jaegerianus*. The Army established a 3,700-ac (1497-ha) Brinkman Wash Restricted Access Area (no-dig zone) on NTC. This area contains 1,872 ac (758 ha) of *A. jaegerianus* habitat and approximately 51 percent of the Montana Mine population of *A. jaegerianus*. The Army also maintains the 2,471-ac (1,000-ha) Goldstone Conservation Area. The Army's INRMP management guidelines provide a benefit to *A. jaegerianus* by prohibiting off-road activity. The Army will reduce threats to *A. jaegerianus* caused by dust through the application of soil binders. They will also collect and store site-specific seed from host plants to restore closed routes and other disturbed areas with *A. jaegerianus* habitat. Contingent on funds, the Army will perform intensive nonnative species control and eradication efforts at conservation areas if such species are found there.

In the previous 2004 proposed designation (69 FR 18018), the Army had not yet completed its INRMP and, therefore, was not exempted under section 4(a)(3)(B) of the Act. However, the Army was excluded under section 4(b)(2) of the Act for reasons of national security, and because existing management plans provided a benefit to *Astragalus jaegerianus*. The Army's INRMP was approved in 2006, and includes management actions that the Secretary has determined benefit *A. jaegerianus*. With our current exemption of all areas within the Army's NTC (see "Relationships to Sections 4(a)(3) of the Act" section), the entire Goldstone-Brinkman unit has been exempted from proposed designation as revised critical habitat. Similarly, almost all (6,068 acres (2456 ha) of 7,032 ac (2,846 ha)) of the Paradise Unit on NTC has been exempted from proposed designation as revised critical habitat. Army lands outside the NTC are not subject to the INRMP and therefore not exempted.

#### Exclusions

##### Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat 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. The Secretary may exclude an 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. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we consider all relevant impacts, including economic impacts. In compliance with section 4(b)(2) of the Act, we are preparing a new analysis of the economic impacts of this proposed revision to critical habitat for *Astragalus jaegerianus* to evaluate the potential economic impact of the proposed revised designation. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.regulations.gov>, or from the Ventura Fish and Wildlife office directly (see **FOR FURTHER INFORMATION CONTACT**). During the development of the final revised designation, we will consider economic impacts, public comments, and other new information. Certain areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

At this time, we are not proposing any specific exclusions of areas from critical habitat under section 4(b)(2) of the Act for *Astragalus jaegerianus*. We will consider any available information about areas covered by conservation or management plans that we should consider for exclusion from the designation under section 4(b)(2) of the Act, including whether the benefit of exclusion of those lands would outweigh the benefits of their inclusion. For example, we consider whether there are conservation partnerships that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. In addition, we look at the presence of Tribal lands or Tribal Trust resources that might be affected, and consider the government-to-government relationship of the United States with the Tribal entities. We also consider any social impacts that might occur because of the designation.

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will

solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received within the 60-day comment period on this proposed rule as we prepare our final rulemaking. Accordingly, the final determination may differ from this proposal.

#### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (see **FOR FURTHER INFORMATION CONTACT** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

#### Required Determinations

##### Regulatory Planning and Review – Executive Order 12866

The Office of Management and Budget (OMB) determines whether this rule is significant under Executive Order (E.O.) 12866. OMB bases its determination upon the following four criteria:

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

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

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

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

At this time, we do not believe that the rule would have an annual effect on the economy of \$100 million or more or affect the economy in a material way. We base this on information provided in the economic analysis that was prepared

for the previous proposed critical habitat designation in 2004 (Industrial Economics 2005). In that economic analysis, the predesignation costs (from the time of listing, 1998 to 2004) ranged from \$2.23 to \$2.75 million, and the annualized (over 20 years) postdesignation costs ranged from \$351,000 to \$787,000 at a 3-percent discount rate. However, we will be conducting a new economic analysis in conjunction with this revised proposed designation.

*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. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR 121-201 (also found at <http://www.sba.gov/size/>), which the Regulatory Flexibility Act requires all federal agencies to follow. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result.

An analysis of the economic impacts of the 2004 proposed critical habitat designation was made available to the public on December 8, 2004 (69 FR 70971). In that analysis, we summarized that the estimated predesignation costs ranged from \$1.58 million to \$2.1 million. These costs were associated primarily with two major conservation efforts: those taken by the Army to plan for and implement conservation actions at Fort Irwin, and those taken by the BLM to plan for, and implement, conservation actions within the framework of the West Mojave Plan. The total post-designation costs were estimated to range from \$5.84 million to \$13.01 million. These estimated costs were associated primarily with land management activities and project-related surveys and monitoring associated with the conservation of *Astragalus jaegerianus* over a 20-year time period. Note that although zero (0) acres of critical habitat were designated in the previous final rule in 2005, some of these estimated costs have been borne by the Army and BLM since then for activities related to the conservation of *A. jaegerianus*.

We do not anticipate significant impacts to small entities as a result of this rulemaking. Of the approximately 14,069 acres proposed for critical habitat for *Astragalus jaegerianus*, approximately 1,282 acres are on Army lands but outside the boundaries of the NTC, about 9,888 acres are lands managed by the Bureau, and 2,899 acres are privately owned. The prospective costs associated with conservation measures for *A. jaegerianus* are a result of multiple causative factors, including implementation of conservation measures proposed as parts of the Army's NTC expansion plan and the Bureau's CDCA plan amendments. Conservation measures associated with *A. jaegerianus* are not expected to result in appreciable reduction of either mining or dual-sport activities in the area.

*Energy Supply, Distribution, or Use – Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) 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 proposed rule to designate critical habitat for the *Astragalus jaegerianus*, as described above, is not expected to significantly affect energy supplies,

distribution, or use. There are no transmission power lines identified on the proposed designated habitat, or energy extraction activities (Bureau of Land Management 1980). Therefore, this action is not a significant energy action and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

*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:

(1) This proposed 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, or 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 [T]ribal 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 [T]ribal 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 that receive Federal funding, assistance, or permits, or that 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.

(2) This proposed rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. State lands will not be proposed. Given the distribution of this species, small governments will not be uniquely affected by this proposed rule. Small governments will not be affected at all unless they propose an action requiring Federal funds, permits, or other authorization. Any such activity will require that the involved Federal agency ensure that the action is not likely to adversely modify or destroy designated critical habitat. However, as discussed above, Federal agencies are currently required to ensure that any such activity is not likely to jeopardize the species, and no further regulatory impacts from this proposed designation of critical habitat are anticipated. We will examine any potential impacts to small governments in our economic analysis, and revise our determination if necessary.

#### Takings – Executive Order 12630

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 jaegerianus*. This preliminary assessment concludes that this proposed rule does not pose significant takings implications. However, we have not yet completed the economic analysis for this proposed revised rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

#### Federalism – Executive Order 13132

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. As discussed above, the designation of critical habitat in areas currently occupied by *Astragalus jaegerianus* would have little incremental impact on State and local governments and their activities. This is because the proposed revised critical habitat occurs to a great extent on Federal lands managed by the Department of Defense and the Bureau of Land Management, and less than 2 percent occurs on private lands that would involve State and local agencies.

The proposed designation of critical habitat may have some benefit to State and local governments, in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While this information 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 consultation to occur.

#### Civil Justice Reform – Executive Order 12988

In accordance with Executive Order 12988, the Department of the Interior’s Office of the Solicitor has determined that this proposed revised rule does not unduly burden the judicial system and that it does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. This proposed revision 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 jaegerianus*.

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

This proposed rule does not contain new or revised information collection that requires approval by OMB under the Paperwork Reduction Act of 1995. 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 jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

#### Clarity of the Rule

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

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

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

#### 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), E.O. 13175, and the Department of the 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 there are no Tribal lands essential for the conservation of *Astragalus jaegerianus*. Therefore, designation of critical habitat for *A. jaegerianus* has not been proposed on Tribal lands.

#### References Cited

A complete list of all references cited herein is available at <http://www.regulations.gov> and upon request

from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

#### Author

The primary authors of this proposed rule are the staff of the Ventura Fish and Wildlife Office.

#### List of Subjects in 50 CFR part 17

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

#### Proposed Regulation Promulgation

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

#### PART 17—[AMENDED]

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

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

2. In § 17.96(a), revise critical habitat for *Astragalus jaegerianus* under Family Fabaceae to read as follows:

##### §17.96 Critical habitat—plants.

###### (a) Flowering plants.

\* \* \* \* \*

##### Family Fabaceae: *Astragalus jaegerianus* (Lane Mountain milk-vetch)

(1) Critical habitat units are depicted for San Bernardino County, California, on the map below.

(2) Critical habitat consists of the mixed desert scrub community within the range of *Astragalus jaegerianus* that is characterized by the following primary constituent elements:

(i) Shallow soils derived primarily from Jurassic or Cretaceous granitic bedrock, and less frequently soils derived from diorite or gabbroic bedrock and at one location granitic soils overlain by scattered rhyolitic cobble, gravel, and sand.

(ii) The highly diverse mixed desert scrub community that includes the host

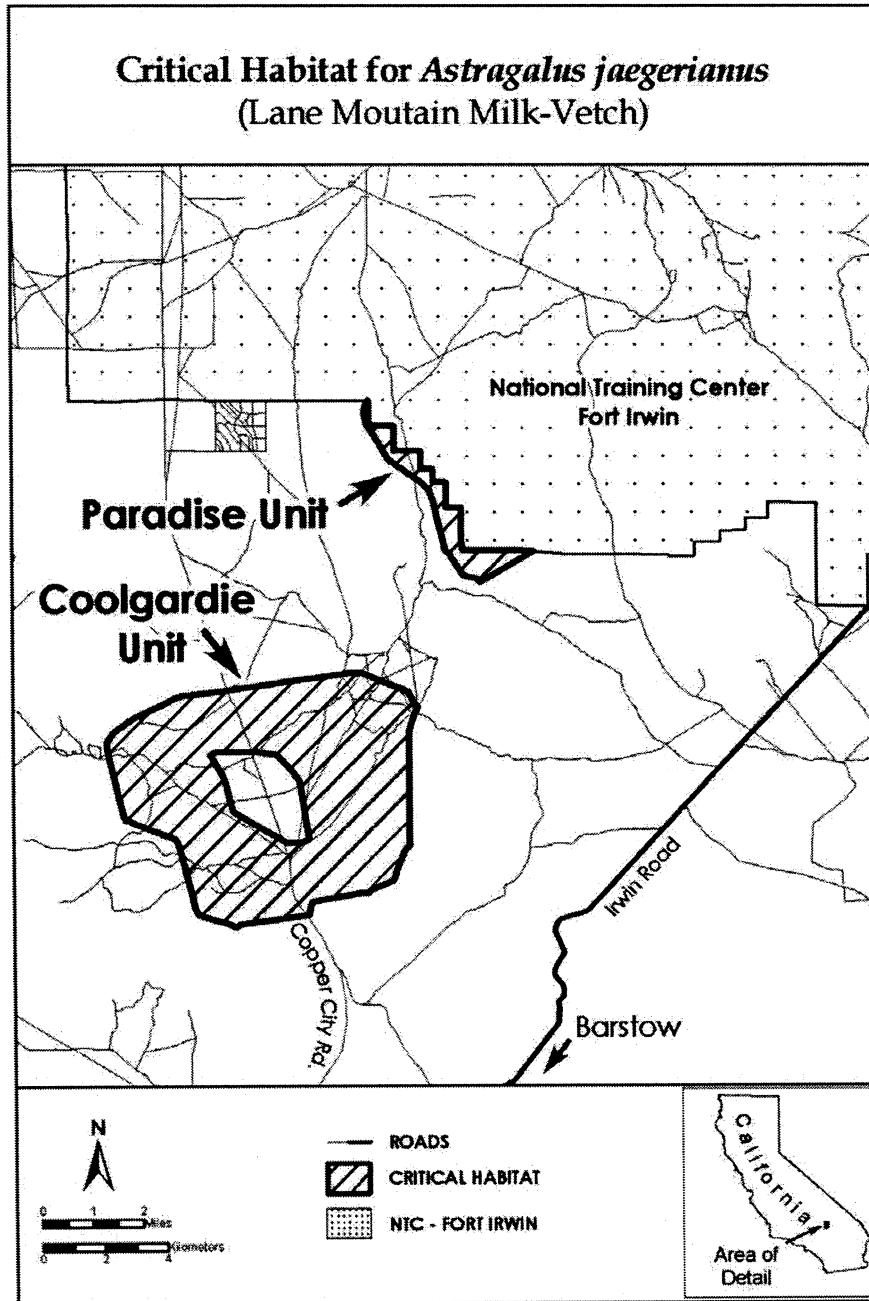
shrubs within which *Astragalus jaegerianus* grows, most notably: *Thamnosma montana*, *Ambrosia dumosa*, *Eriogonum fasciculatum* ssp. *polifolium*, *Ericameria cooperi* var. *cooperi*, *Ephedra nevadensis*, and *Salazaria mexicana*.

(3) Critical habitat does not include manmade structures (including, but not limited to, buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical habitat map units. These critical habitat units were mapped using Universal Transverse Mercator, Zone 10, North American Datum 1983 (UTM NAD 83) coordinates. These coordinates establish the vertices and endpoints of the boundaries of the units.

(5) Note: Map of Paradise and Coolgardie Critical Habitat Units for *Astragalus jaegerianus* follows:

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(6) Paradise Unit, San Bernardino County, CA [Description of unit location to be inserted here.]

(7) Coolgardie Unit, San Bernardino County, CA [Description of unit location to be inserted here.]

\* \* \* \* \*

Dated: March 18, 2010

**Thomas L. Strickland,**  
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010-7117 Filed 3-31-10; 8:45 am]

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