

rule to establish a nonessential experimental population (NEP) of Sonoran pronghorn (*Antilocapra americana sonoriensis*) in southwestern Arizona in the **Federal Register** on February 4, 2010 (75 FR 5732). We are continuing to ask for public comment during this reopened public comment period on the proposed rule and draft environmental assessment (EA). We want the final rule to be as effective as possible and the final EA on the proposed action to evaluate all potential issues associated with this action. We request information from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties relevant to the proposed rule and draft EA. Comments should be as specific as possible. If you submitted information previously on the proposed rule and draft EA, please do not resubmit it. This information has been incorporated into the public record and will be fully considered in the preparation of the final rule. We will consider information received from all interested parties.

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

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

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If your written comment includes your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we

used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the Cabeza Prieta National Wildlife Refuge (see **FOR FURTHER INFORMATION CONTACT**).

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our proposed NEP designation is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed NEP designation.

#### Authority

The authority for this action is section 10(j) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 26, 2010.

**Thomas L. Strickland,**

Assistant Secretary for Fish and Wildlife and Parks.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0035]  
[MO-92210-0-0008-B2]

### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List van Rossem's Gull-billed Tern as Endangered or Threatened.

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

**ACTION:** Notice of petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list van Rossem's gull-billed tern (*Gelochelidon nilotica vanrossemi*) as an endangered or threatened species under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat. Based on our review, we find the petition provides substantial scientific or commercial information indicating that listing this subspecies

may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the subspecies to determine if listing is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this subspecies. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

**DATES:** To allow us adequate time to conduct this review, we request that we receive information on or before August 9, 2010. Please note that if you are using the *Federal eRulemaking Portal* (see **ADDRESSES** section, below) the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Savings Time on this date.

After August 9, 2010, you must submit information directly to the Field Office (see the **FOR FURTHER INFORMATION CONTACT** section below). Please note that we may not be able to address or incorporate information that we receive after the above requested date.

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is FWS-R8-ES-2010-0035. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R8-ES-2010-0035; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, California 92011; by telephone at 760-431-9440; or by facsimile to 760-431-9624. If you use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on van Rossem's gull-billed tern from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

- (1) The subspecies' biology, range, and population trends, including:
  - (a) Habitat requirements for feeding, breeding, and sheltering;
  - (b) Genetics and taxonomy;
  - (c) Historical and current range including distribution patterns;
  - (d) Historical and current population levels, and current and projected trends; and
  - (e) Past and ongoing conservation measures for the subspecies or its habitat or both.
- (2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:
  - (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
  - (b) Overutilization for commercial, recreational, scientific, or educational purposes;
  - (c) Disease or predation;
  - (d) The inadequacy of existing regulatory mechanisms; or
  - (e) Other natural or manmade factors affecting its continued existence.
- (3) Information relevant to the taxonomic status of this or related subspecies of gull-billed terns (particularly of the gull-billed terns nesting in western North America), or whether any population segments of gull-billed terns are discrete or significant under our policy (Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act, 61 FR 4722; February 7, 1996).
- (4) Information regarding the geographic structure of van Rossem's gull-billed tern populations and whether any portion or portions of the range may be considered significant, and why.
- (5) The potential effects of climate change on this species and its habitat.

If, after the status review, we determine that listing the van Rossem's

gull-billed tern is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by van Rossem's gull-billed tern, we request data and information on:

- (1) What may constitute "physical or biological features essential to the conservation of the species,"
- (2) Where these features are currently found, and
- (3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential for the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or threatened species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation that we received and used in preparing this finding, will be available for you to review at <http://www.regulations.gov>, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife

Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly commence a review the status of the species, which is subsequently summarized in our 12-month finding.

## Petition History

On June 8, 2009, we received a petition from the Center for Biological Diversity requesting that we list the "western" or "van Rossem's" subspecies of gull-billed tern throughout its range as endangered or threatened under the Act, and that we designate critical habitat concurrent with listing (CBD 2009, pp. 1–40). The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In an August 18, 2009, letter to the petitioner, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation listing the subspecies under section 4(b)(7) of the Act was not warranted. This finding addresses the petition.

## Previous Federal Actions

We included van Rossem's gull-billed tern as a Category 2 candidate in our November 15, 1994, notice of candidate review (59 FR 58982). Category 2 taxa were defined as those taxa for which information in the possession of the Service, at that time, indicated that proposing to list as endangered or threatened was possibly appropriate but for which persuasive data on biological

vulnerability and threats were not available to support proposed rules. In the February 28, 1996, notice of candidate review (61 FR 7596), we announced our decision to discontinue recognition of Category 2 candidates, including van Rossem's gull-billed tern. This decision was made final on December 5, 1996 (61 FR 64481). Since that time, van Rossem's gull-billed tern has not been treated as a candidate for Federal listing under the Act.

In 2002 and 2008, pursuant to the Fish and Wildlife Conservation Act of 1980, as amended (16 U.S.C. 2901 *et seq.*), our Division of Migratory Bird Management included the gull-billed tern (the species as a whole) in the list of Birds of Conservation Concern (USFWS 2002, pp. 1–99; USFWS 2008, pp. 1–87). The species was included as a Bird of Conservation Concern both nationally and in certain specific Bird Conservation Regions, including the U.S. portions of Bird Conservation Regions 32 (Coastal California) and 33 (Sonoran and Mojave Deserts) (USFWS 2008, pp. 48 and 49). The gull-billed tern that occurs in Bird Conservation Regions 32 and 33 is *Gelochelidon nilotica vanrossemi*.

#### Species Information

The van Rossem's gull-billed tern is a medium-sized seabird. It is one of two subspecies of gull-billed tern in North America (Molina 2008, p. 188) and six worldwide (Parnell *et al.* 1995, p. 3). Scientists with the U.S. Geological Survey are finalizing a study that may help identify additional information regarding the eastern and western North American subspecies; we anticipate looking into this further in the status review. Bancroft (1929, pp. 283–286) described *Gelochelidon nilotica vanrossemi* from specimens collected at the Salton Sea, Imperial County, California. Van Rossem's gull-billed tern differs from the nominate subspecies of the Old World (*G. n. nilotica*) by its shorter tail and bill shape (less angular gonys), and from the subspecies of eastern North America (*G. n. aranea*) by its "decidedly larger size" (Bancroft 1929, p. 284).

Van Rossem's gull-billed tern is migratory. During the spring and summer, it nests locally along the Pacific coast of Mexico including the Gulf of California. An additional coastal nest colony is located in San Diego Bay, San Diego County, California. Nest colonies are also located at inland localities in northeastern Baja California, Mexico, and at the Salton Sea, Imperial County, California. The Salton Sea and San Diego Bay are the only nesting areas for the subspecies in

the United States (Molina and Erwin 2006, p. 273). The extent of the winter range for the subspecies is not known but likely includes the Pacific coast of Mexico, Central America, and possibly northwestern South America (Molina and Erwin 2006, p. 272).

Gull-billed terns, including van Rossem's gull-billed terns, nest in colonies of 20 to 50 pairs, although numbers may vary (Parnell *et al.* 1995, p. 9). Nests consist of shallow scrapes with simple adornments (such as rocks, shells, fish bones) (Parnell *et al.* 1995, p. 10). Nesting habitat for van Rossem's gull-billed terns consists of low, open areas on natural and artificial beaches, islands, and levees with no or sparse vegetation (Parnell *et al.* 1995, pp. 5 and 10; Palacios and Mellink 2007, p. 215). At San Diego Bay and the Salton Sea, van Rossem's gull-billed terns typically lay 2 to 3 eggs per clutch (Parnell *et al.* 1995, p. 12). The egg incubation period is 22 to 23 days, and the young fledge after 28 to 35 days (Parnell *et al.* 1995, p. 11). Fledglings remain dependent upon their parents for at least 4 weeks after fledging, and probably longer (Parnell *et al.* 1995, p. 12).

Like other terns, gull-billed terns (including van Rossem's gull-billed tern) are predators, but they differ from most other tern species in how they forage and in the types of prey they consume. Unlike many other tern species that eat only fish caught by shallow dives into water, gull-billed terns forage on a variety of prey items found in different habitat types: (1) Gull-billed terns in flight capture flying insects in the air (Parnell *et al.* 1995, p. 5); (2) they swoop down and snatch up terrestrial prey (such as crabs, lizards, insects, or chicks of other birds) and aquatic prey (such as small fish) near the water's surface (Parnell *et al.* 1995, p. 5; Molina and Marschalek 2003, p. i); and (3) they land to pick up prey items (Parnell *et al.* 1995, p. 5). Van Rossem's gull-billed tern is predominantly a coastal bird, but it does occur at certain inland sites with aquatic resources (Parnell *et al.* 1995, p. 5; Molina and Erwin 2006, p. 284). The foraging habitat of van Rossem's gull-billed terns consists of "open mudflats in tidal estuaries, river margins, beaches, salt marshes, freshwater marshes, aquacultural impoundments (such as shrimp ponds), and a variety of upland habitats including open scrub, pasturelands and irrigated agricultural fields and associated drains," and the airspace over such areas (Molina and Erwin 2006, p. 284; Parnell *et al.* 1995, pp. 4–5).

#### Evaluation of Information for This Finding

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we first evaluated information presented in the petition and other information available in our files on the taxonomic status of the subspecies petitioned. We then evaluated whether information regarding threats to the van Rossem's gull-billed tern, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

The petitioner requests that the Service list *Gelochelidon nilotica vanrossemi* (van Rossem's gull-billed tern) as endangered or threatened (CBD 2009, p. 1). The petitioner does not specifically address a taxonomic or geographical scope at a level lower than subspecies or the subspecies' entire range; that is, the petitioner does not address any potential distinct population segments, nor does the petitioner identify any portions of the subspecies' range as significant. Therefore, we evaluated the petition as a petition to list the subspecies as endangered or threatened throughout its range.

The petition states that the validity of the subspecies has not been questioned (CBD 2009, p. 4). However, information in the scientific literature shows that some authors have questioned the validity (distinctiveness) of van Rossem's gull-billed tern. These include: (1) Grinnell and Miller (1944, p. 172), who, based on conflicting information available at the time, stated that they "do not recognize a western race" (i.e., subspecies); (2) Unit (2004, p. 249), who questioned the taxon's distinctiveness based on measurements

presented in Parnell *et al.* (1995, p. 3); and (3) Pyle (2008, p. 706), who considered the morphological differences of the western North American birds to be “too slight for subspecific recognition.” In contrast, other authors did not question the distinctiveness of the *vanrossemi* subspecies. For example, the American Ornithologists’ Union (AOU) Committee on Classification and Nomenclature (AOU Committee), the long-standing scientific body responsible for standardizing North American avian taxonomy, recognized the *vanrossemi* subspecies in its 1957 (fifth) edition of its check-list of North American birds, which was the last time the AOU Committee explicitly addressed subspecies (AOU 1957, p. 233). More recently, Patten *et al.* (2003, p. 188), who critically reviewed the taxonomy of subspecies presented in their book on the birds of the Salton Sea region (Patten *et al.* 2003, p. 71), also recognized the subspecies. Thus, the scientific literature readily available in our files is not consistent regarding the distinctiveness of van Rossem’s gull-billed tern. We will address van Rossem’s gull-billed tern for the purposes of evaluating the petitioned action; however, to ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the distinctiveness and taxonomic status of van Rossem’s gull-billed tern especially compared to those gull-billed terns that nest and winter along the west coast of North America.

#### *A. The Present or Threatened Destruction, Modification, or Curtailment of the Species’ Habitat or Range*

##### *Information Provided in the Petition*

The petitioner asserts that van Rossem’s gull-billed tern is threatened by loss of nesting and foraging habitat (CBD 2009, p. 8). In the San Diego Bay area, the petitioner notes that nesting habitat used by van Rossem’s gull-billed tern lies predominantly within the boundaries of the San Diego Bay National Wildlife Refuge (Refuge), and thereby is protected from development. However, its foraging habitat is found outside the Refuge boundaries and is subject to impacts from recreation and military training activities (CBD 2009, p. 8). The petitioner claims that tern nesting and foraging habitat at the Salton Sea is threatened by declining water levels because of reduction of inflows. The petitioner notes inflows to the Salton Sea have declined due to the reduced availability of irrigation water;

less irrigation water is available from the Colorado River, and a portion of what water is available is being transferred from the Imperial Valley agricultural areas to the San Diego region for municipal use. The petitioner claims the amount of nesting habitat is reduced because the reduced inflow into the Salton Sea is causing former nesting islands to become part of the mainland; this allows access by land predators and increased wind-blown dust (CBD 2009, p. 9). Also, foraging habitat for the tern, the petitioner asserts, is threatened at the Salton Sea by degradation of water quality and a reduction in the amount of irrigated agricultural areas (CBD 2009, p. 9). The petitioner also asserts the effects of global climate change, including sea-level rise, shoreline erosion, and changes in vegetation, threatens the van Rossem’s gull-billed tern’s nesting habitat, foraging habitat, or both (CBD 2009, p. 10). Finally, the petitioner asserts nesting and foraging habitat in Mexico for this subspecies is threatened by commercial aquaculture development, tourism-related development, development of evaporation ponds for commercial salt production (saltworks), flooding from beach erosion, and fluctuating water levels in water impoundments (CBD 2009, pp. 9 and 10).

##### *Evaluation of Information Provided in the Petition and Available in Service Files*

The petitioner cited several publications to support assertions made in the petition; however, the petitioner did not include reference information for some citations (such as Schwabe *et al.* 2008). We reviewed cited and referenced publications that were readily available in our files, including Terp and Pavelka (1999, pp. 1–23), Molina and Erwin (2006, pp. 271–295), USFWS (2006, pp. 1–1 through 8–2), and Palacios and Mellink (2007, pp. 214–222). In general, we find substantive information suggesting that the assertions made by the petitioner are accurate. In particular, Molina and Erwin (2006, pp. 284–287) and Palacios and Mellink (2007, pp. 215–221) identified destruction of nesting and foraging habitat from coastal development as a threat to the subspecies.

Destruction and modification of nesting and foraging habitat may affect the subspecies by reducing the amount of available nesting and foraging habitats. Such reductions in nesting habitat may force van Rossem’s gull-billed terns to nest in sub-optimal habitat subject to disturbance or other

threats, which may subsequently affect the subspecies’ reproductive success (Molina and Erwin 2006, p. 285). Also, van Rossem’s gull-billed terns need foraging habitat close to nesting habitat so that adults can efficiently feed their young (Molina and Erwin 2006, p. 284). Destruction and modification of foraging habitat in the nesting range may further reduce the van Rossem’s gull-billed terns’ reproductive success. If reproductive rates are reduced enough, the overall population of the subspecies may be reduced. Additionally, the range of the subspecies may be curtailed by habitat destruction.

The petitioner provided information, which is corroborated by information readily available in our files, that destruction and modification of van Rossem’s gull-billed tern habitat has occurred and is likely to continue in the future. Therefore, we find the petition and readily available information in our files presents substantial information indicating that the present or threatened destruction, modification, or curtailment of nesting or foraging habitat may be a significant threat to the van Rossem’s gull-billed tern.

#### *B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*

##### *Information Provided in the Petition*

The petitioner, citing information in the scientific literature (Gonzalez-Bernal *et al.* 2003, and Palacios and Mellink 2007), asserts that van Rossem’s gull-billed terns are threatened by people collecting eggs, chicks, or both at certain nest sites in Mexico (CBD 2009, p. 12).

##### *Evaluation of Information Provided in the Petition and Available in Service Files*

We reviewed Gonzalez-Bernal *et al.* (2003, pp. 175–177) and Palacios and Mellink (2007, pp. 214–222). Both indicate the eggs and young of colonial waterbirds, potentially including van Rossem’s gull-billed terns, have been utilized for commercial or subsistence purposes (Gonzalez-Bernal *et al.* 2003, p. 177; Palacios and Mellink 2007, pp. 216). This use of eggs and young results in the death of embryos and nestlings, which, depending on the amount of this use, could significantly reduce the reproductive success of nesting colonial waterbirds. If such use affects van Rossem’s gull-billed terns and if utilization rates are high enough, the status of the subspecies may be affected. While it is unclear whether or to what extent this threat affects the van Rossem’s gull-billed tern, we find the petition and readily available

information in our files presents substantial information indicating that overutilization of van Rossem's gull-billed tern eggs and nestlings may be a significant threat to the subspecies.

#### C. Disease or Predation

##### Information Provided in the Petition

**Disease**—The petitioner notes that there is “little to no existing literature on the prevalence of disease in [van Rossem's] gull-billed terns” (CBD 2009, p. 12). However, the petitioner suggests that West Nile virus is a possible threat to van Rossem's gull-billed tern (CBD 2009, p. 12). Additionally, the petitioner implies that van Rossem's gull-billed tern may be susceptible to disease by noting that a number of other bird species that may be found near van Rossem's gull-billed tern's nesting and foraging areas in southern California suffered illness and mortality during a 2004 outbreak of an unknown illness (although the petitioner notes that it may have been a result of contamination) (CBD 2009, p. 21).

**Predation**—The petitioner asserts that predation is a threat to van Rossem's gull-billed tern throughout its range, noting a number of potential and documented predator species (CBD 2009, pp. 10–12). The petitioner cites several sources from the scientific literature documenting predation on the subspecies.

##### Evaluation of Information Provided in the Petition and Available in Service Files

**Disease**—Diseases occur naturally in wildlife populations, but the occurrence of a disease within the range of a species does not necessarily mean that it is deleterious to that species. However, if one or more diseases are virulent enough, the status of the subspecies will be affected. We reviewed the petition and information in our files and did not find substantial information to indicate that disease may be a threat to the subspecies; however, we will investigate the potential impact of disease, including West Nile virus, during the status review for the subspecies.

**Predation**—The petitioner cites several published and unpublished documents to support the assertions of predation as a potential threat; however, the petitioner did not include reference information for some citations (such as Blus and Stafford 1980, Elyer *et al.* 1999, and O'Connell and Beck 2003). We reviewed the publications that were readily available in our files, including Parnell *et al.* (1995, pp. 8 and 13), Molina and Erwin (2006, pp. 285–286), and Palacios and Mellink (2007, pp.

216–219). Based on the review of these sources, we found information suggesting that the assertions made by the petitioner regarding the occurrences of predation are generally accurate. Although not articulated by the petitioner, we note that these sources indicate that predation is primarily of eggs or young at nest sites (or “nest predation”), although the petitioner also alluded to predation of adult terns (CBD 2009, pp. 11–12).

Predators kill prey for food. Nearly all species are subject to predation under natural conditions. A high level of nest predation at a van Rossem's gull-billed tern nest colony could significantly reduce the reproductive success of the subspecies at that site. Also, high levels of predation on adult gull-billed terns could significantly affect the population of the subspecies as a whole. If predation rates are high enough, the status of the subspecies may be affected. We reviewed the petition and information in our files and did not find substantial information to indicate that predation may be a threat to the subspecies; however, we will further evaluate the potential effects of predation on the status of the van Rossem's gull-billed tern as we conduct our status review.

#### D. The Inadequacy of Existing Regulatory Mechanisms

##### Information Provided in the Petition

The petitioner identifies three existing Federal regulatory mechanisms in the United States that may provide some conservation benefit for van Rossem's gull-billed tern. These are: (1) The Migratory Bird Treaty Act (16 U.S.C. 703–712), (2) the Fish and Wildlife Conservation Act (16 U.S.C. 2901 *et seq.*), and (3) Executive Order 13186. The petitioner also identifies one existing State regulatory mechanism (the State of California's list of Bird Species of Special Concern) and one existing regulatory mechanism in Mexico (the 1936 international treaty between the United States and Mexico for the protection of Migratory Birds and Game Mammals). The petitioner asserts that none of these existing regulatory mechanisms are adequate to conserve van Rossem's gull-billed tern (CBD 2009, pp. 22–24). To illustrate the asserted inadequacy, the petitioner includes several examples of past management actions under Service-issued permits that resulted in the death of van Rossem's gull-billed terns. These management actions were for protection of endangered and threatened species and to reduce the risk of bird airstrike hazards at an airport runway (CBD 2009,

p. 22). The petitioner also notes there have been proposals for additional actions to manage gull-billed terns.

##### Evaluation of Information Provided in the Petition and Available in Service Files

The petitioner cites several published and unpublished sources, but most of the references readily available in our files are of the regulatory mechanisms themselves, and few readily available references evaluate whether regulatory mechanisms to protect van Rossem's gull-billed tern are adequate. However, we note that Molina 2008 (p. 190) corroborates the petitioner's assertion that lethal control has been used on van Rossem's gull-billed terns in response to a potential airstrike hazard. Additionally, the Service has proposed to manage van Rossem's gull-billed tern populations that prey on other federally listed species on San Diego Bay National Wildlife Refuge, which is evidence that supports the petitioner's assertion that such examples of management may continue into the future.

In general, application of Factor D, assumes two pre-existing conditions: (1) One or more threats exist that are severe enough to affect the status of the species, such existing threats would fall under at least one of the other listing factors (Factors A, B, C, or E); and (2) one or more regulatory mechanisms exist that address in some way the aforementioned threat or threats.

Existing regulatory mechanisms can be inadequate, and thus considered to be a “threat” to the species under Factor D in two ways: (1) The regulatory mechanism is inherently inadequate to reduce the severity of the existing threat or threats to a point that such threats do not affect the status of the species; or (2) the regulatory mechanism is not inherently inadequate to address the threat or threats, but enforcement of that regulatory mechanism is lacking or wanting, thus making the existing regulatory mechanism inadequate to reduce the severity of the existing threat or threats to a point that those threats affect the status of the species.

The petitioner asserts that threats under Factors A, B, C, and E are affecting the status of the species; we have found substantial evidence to support the assertions for Factors A, B and E (see our discussion under those factors). The petitioner has identified that regulatory mechanisms exist and asserts that such mechanisms are inadequate, either because of inherent flaw in the mechanism with respect to the threat or because of inadequate enforcement. As we noted above,

instead of providing an analysis of how the regulatory mechanisms are inadequate, the petitioner supports the assertions by providing examples, which we find are accurate, at least to some extent. We believe the provided examples are enough to lead a reasonable person to conclude that existing regulatory mechanisms may be inadequate. Therefore, we find the petition and readily available information in our files presents substantial information indicating that the inadequacy of existing regulatory mechanisms to protect the van Rossem's gull-billed tern may be a significant threat to the subspecies.

#### *E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

##### Information Provided in the Petition

The petitioner, citing a variety of published and unpublished sources and supplying several examples, asserts a number of natural and manmade factors affect the continued existence of van Rossem's gull-billed tern. Below, we summarize and group the petitioner's claims into the following categories:

- The effects of other colonial-nesting bird species on van Rossem's gull-billed terns at nest sites, including competition for nesting space, disturbance of adults or young, or harm of eggs or chicks (CBD 2009, pp. 11 and 19) of the van Rossem's gull-billed tern.
- Disturbance of van Rossem's gull-billed terns at nest sites caused by the actions of humans, livestock, or dogs (CBD 2009, p. 13).
- Intentional killing or other take (as defined under section 3 of the Act) of individual van Rossem's gull-billed tern adults, young, or eggs through legal and illegal actions, or through specific management actions in the United States and Mexico (CBD 2009, pp. 15–19).
- Deleterious effects resulting from exposure to pesticides, heavy metals, or other natural or anthropogenic contaminants (CBD 2009, pp. 20–21).
- Fluctuations in food availability resulting from natural or anthropogenic changes in the environment (CBD 2009, p. 20).
- Increased vulnerability to extinction and other effects associated with small population size (CBD 2009, p. 13).
- Effects associated with natural and anthropogenic variations in weather and climate, including anticipated effects associated with global climate change and subsequent changes in sea level and other sources of coastal flooding (CBD 2009, pp. 12 and 21).

#### Evaluation of Information Provided in the Petition and Available in Service Files

We reviewed the information cited and referenced in the petition and other information that was readily available in our files. The effects of other colonial-nesting bird species as a potential threat is supported by information in Molina (2004, p. 98), while disturbance by humans and other animals as a potential threat is supported by Parnell *et al.* (1995, p. 13), Molina and Erwin (2006, p. 285), and Palacios and Mellink (2007, p. 219). Intentional killing as a potential threat is supported by Molina and Erwin (2006, p. 287) and Molina (2008, p. 190). Contaminants as a potential threat is supported by Parnell *et al.* (1995, p. 13) and Molina and Erwin (2006, p. 287), while potential threats acting on the small population size is supported by Palacios and Mellink (2007, p. 221). Additionally, Parnell *et al.* (1995, p. 13) and Palacios and Mellink (2007, p. 216) include information on changes in climate, weather, and flooding as potential threats. Neither the petition nor readily available information in our files yielded substantial information indicating that the effects of fluctuations in food availability may be a significant threat to the van Rossem's gull-billed tern.

The individual threats under this factor are wide-ranging and may affect the subspecies in a number of ways. For example, such threats may significantly reduce the reproductive success of the van Rossem's gull-billed tern (such as trampling of van Rossem's gull-billed tern chicks by other waterbird species), result in the death of individual adults (such as lethal control of van Rossem's gull-billed terns in an effort to protect other listed species), or affect populations (such as contaminant build-up in the food chain). Additionally, as cited in the petition, the San Diego National Wildlife Refuge proposes to addle up to 43 percent of the van Rossem's gull-billed tern egg clutches at the San Diego Bay to protect listed species (Service 2009, p. 1). Although this activity has not been implemented by the Refuge, if such action occurs in the future, it would likely impact the population of this subspecies. If these threats, either individually or collectively, are severe enough, the status of the subspecies may be significantly affected. We have evaluated the petition and readily available information in our files and find substantial information indicating that the effects of one or more of the following—other colonial-nesting bird species, disturbance by humans and

other animals, intentional killing, contaminants, threats linked to small population size, or potential changes in climate, weather, and flooding regimes—may significantly affect the status of van Rossem's gull-billed tern.

#### Finding

On the basis of our evaluation of the information presented under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing the van Rossem's gull-billed tern may be warranted. This finding is based on information provided under Factor A (present or threatened destruction, modification, or curtailment of the subspecies' habitat or range), Factor B (overutilization for commercial, recreational, scientific, or educational purposes), Factor D (the inadequacy of existing regulatory mechanisms), and Factor E (other natural or manmade factors affecting the subspecies' continued existence). Because we have found that the petition presents substantial information indicating that the van Rossem's gull-billed tern may be at risk of extinction now or in the foreseeable future and therefore listing under the Act may be warranted, we are initiating a status review to determine whether listing the van Rossem's gull-billed tern under the Act is warranted.

The "substantial information" standard for a 90-day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

#### References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Author

The primary authors of this notice are staff members of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

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

Dated: May 26, 2010

**Daniel M. Ashe,**  
*Acting Director, U.S. Fish and Wildlife Service.*  
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