

of the Communications Act of 1934, as amended.

(ii) A public telecommunications entity as defined in § 397(12) of the Communications Act of 1934, as amended.

(iii) An accredited nonprofit educational institution or a governmental organization engaged in the formal education of enrolled students (A publicly supported educational institution must be accredited by the appropriate state department of education; a privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations.), or

(iv) A nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.

(v) Other noncommercial entities with an educational mission.

(3) *Editorial control.*

(i) A DBS operator will be required to make capacity available only to qualified programmers and may select among such programmers when demand exceeds the capacity of their reserved channels.

(ii) A DBS operator may not require the programmers it selects to include particular programming on its channels.

(iii) A DBS operator may not alter or censor the content of the programming provided by the qualified programmer using the channels reserved pursuant to this section.

(4) *Non-commercial channel limitation.* A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

(5) *Rates, terms and conditions.* (i) In making the required reserved capacity available, DBS providers cannot charge rates that exceed costs that are directly related to making the capacity available to qualified programmers. Direct costs include only the cost of transmitting the signal to the uplink facility and uplinking the signal to the satellite.

(ii) Rates for capacity reserved under paragraph (c)(1) of this section shall not exceed 50 percent of the direct costs as defined in this section.

(iii) Nothing in this section shall be construed to prohibit DBS providers

from negotiating rates with qualified programmers that are less than 50 percent of direct costs or from paying qualified programmers for the use of their programming.

(iv) DBS providers shall reserve discrete channels and offer these to qualifying programmers at consistent times to fulfill the reservation requirement described in these rules.

(6) *Public file.* (i) Each DBS provider shall keep and permit public inspection of a complete and orderly record of:

(A) Quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes;

(B) A record of entities to whom noncommercial capacity is being provided, the amount of capacity being provided to each entity, the conditions under which it is being provided and the rates, if any, being paid by the entity;

(C) A record of entities that have requested capacity, disposition of those requests and reasons for the disposition; and

(D) A record of all requests for political advertising time and the disposition of those requests.

(ii) All records required by this paragraph shall be placed in a file available to the public as soon as possible and shall be retained for a period of two years.

(7) *Effective date.* DBS providers are required to make channel capacity available pursuant to paragraph (c) of this section upon the effective date. Programming provided pursuant to this rule must be available to the public no later than six months after the effective date.

* * * * *

[FR Doc. 99-1346 Filed 2-5-99; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AC88

Endangered and Threatened Wildlife and Plants; Determination of Whether Designation of Critical Habitat for the Coastal California Gnatcatcher is Prudent

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of determination.

SUMMARY: We, the U.S. Fish and Wildlife Service, have reconsidered our

prudence finding for designating critical habitat for the coastal California gnatcatcher (*Polioptila californica californica*). We listed the coastal California gnatcatcher as a threatened species under the Endangered Species Act of 1973, as amended (Act) on March 30, 1993. At that time, we determined that designation of critical habitat was not prudent because designation would not benefit the coastal California gnatcatcher and would increase the degree of threat to the species. On May 21, 1997, the United States Court of Appeals for the Ninth Circuit issued an opinion that required us to issue a new decision regarding the prudence of designating critical habitat for the coastal California gnatcatcher. This notice of determination responds to that court order.

DATES: We made the finding announced in this document on January 21, 1999.

ADDRESSES: The complete file for this prudence reconsideration is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2730 Loker Avenue West, Carlsbad, California 92008.

FOR FURTHER INFORMATION CONTACT: Ken S. Berg, Field Supervisor, at the above address (telephone: 760/431-9440; facsimile 760/431-9624).

SUPPLEMENTARY INFORMATION:

Background

We listed the coastal California gnatcatcher (*Polioptila californica californica*) (gnatcatcher) as a threatened species under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) on March 30, 1993 (58 FR 16742). This small, insectivorous songbird typically occurs in several distinctive subassociations of the coastal sage scrub plant community. Coastal sage scrub vegetation is composed of relatively low-growing, dry-season deciduous, and succulent plants. Characteristic plants of this community include coastal sagebrush (*Artemisia californica*), various species of sage (*Salvia* spp.), California buckwheat (*Eriogonum fasciculatum*), lemonadeberry (*Rhus integrifolia*), California encelia (*Encelia californica*), prickly pear and cholla cactus (*Opuntia* spp.), and various species of *Haplopappus*. The gnatcatcher exhibits a strong affinity to coastal sage scrub vegetation dominated by coastal sagebrush, although in some portions of its range (e.g., western Riverside County) other plant species may be more abundant. The species occurs below about 912 meters (m) (3,000 feet (ft)) in elevation. The species remains

threatened by habitat loss and fragmentation resulting from urban and agricultural development, and the synergistic effects of cowbird parasitism and predation (58 FR 16742).

The precarious status of the gnatcatcher and the importance of habitat protection are well known to the general public and to land planning agencies. We are working with Federal, State, and local agencies and private landowners throughout the historic range of the gnatcatcher to implement or develop conservation plans for this species and the large array of other listed or sensitive species also found in its coastal sage scrub habitats.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and, (ii) specific areas outside the geographical area occupied by a species at the time it was listed, upon a determination that such areas are essential for the conservation of the species. “Conservation” means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act, as amended, and its implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. According to our regulations (50 CFR 424.12(a)(1)), designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

In general, critical habitat designation contributes to species conservation primarily by highlighting habitat areas in need of special management considerations or protection, and by describing the features within those areas that are essential to the conservation of the species. Critical habitat designation may provide additional protection under section 7 of the Act with regard to activities that are funded, authorized, or carried out by a Federal agency on either Federal or non-

Federal land. Section 7(a)(2) of the Act requires Federal agencies, in consultation with us, to ensure that any action they carry out, fund, or authorize does not jeopardize the continued existence of a federally listed species or result in the destruction or adverse modification of designated critical habitat. This requirement of Federal agencies is the only mandatory legal consequence of a critical habitat designation. We refer to areas where a Federal agency may be involved as having a “Federal nexus.”

Regulations in 50 CFR part 402 define “jeopardize the continued existence of” and “destruction or adverse modification of” in similar terms. To jeopardize the continued existence of a species means to engage in an action “that reasonably would be expected to reduce appreciably the likelihood of both the survival and recovery of a listed species.” Destruction or adverse modification of habitat means an “alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” Common to both definitions is an appreciable detrimental effect on both the survival and recovery of a listed species. Thus, actions that would adversely modify critical habitat generally also jeopardize the continued existence of the species.

At the time of the listing, we concluded that designation of critical habitat for the gnatcatcher was not prudent because such designation would not benefit the species and would make the species more vulnerable to activities prohibited under section 9 of the Act. We were aware of several instances of apparently intentional habitat destruction that had occurred during the listing process. In addition, most land occupied by the gnatcatcher was in private ownership and a designation of critical habitat was not believed to be of benefit because of a lack of a Federal nexus.

On May 21, 1997, the United States Court of Appeals for the Ninth Circuit (Court), issued an opinion (No. 95–56075; D.C. No. CV–93–999–LHM) that required us to issue a new decision regarding the prudence of determining critical habitat for the gnatcatcher. In this opinion, the Court held that the “increased threat” criterion in the regulations may justify a not prudent finding only when we have weighed the benefits of designation against the risks of designation. Secondly, with respect to the “not beneficial” criterion explicit in the regulations, the Court ruled that our conclusion that designation of critical habitat was not prudent because it would fail to control the majority of

land-use activities within critical habitat was inconsistent with Congressional intent that the imprudence exception to designation should apply “only in rare circumstances.” The Court noted that a substantial portion of gnatcatcher habitat would be subject to a future nexus sufficient to trigger section 7 consultation requirements regarding critical habitat. Third, the Court determined that our conclusion that designation of critical habitat would be less beneficial to the species than another type of protection (i.e., State of California Natural Community Conservation Planning efforts) did not absolve us from the requirement to designate critical habitat. The Court was also critical of our lack of specificity in our analysis.

Prudence Redetermination Process

We have reevaluated our previous not prudent finding regarding critical habitat designation for the gnatcatcher as instructed by the Court. Initially, we inventoried all lands within the known range of the gnatcatcher containing coastal sage scrub habitats. These lands included coastal and inland areas—(1) that may support sage scrub or similar habitat within San Diego, Orange, Los Angeles, Riverside, San Bernardino, and Ventura counties, California, and (2) that are below 912 m (3,000 ft) in elevation (the approximate maximum elevation occupied by gnatcatchers). Once we defined the study area, we categorized lands by ownership within each County using Geographic Information System (GIS) theme coverages, and estimated approximate acreages for each category. We used Federal and non-Federal (i.e., Tribal, local/State jurisdiction, and private) land ownership categories for the purposes of this prudence determination. We also considered the likelihood of a Federal nexus through land ownership, project funding or activity jurisdiction (Table 1).

We considered all Federal and Tribal trust lands to have a Federal nexus. Because of its Tribal trust responsibilities, the Bureau of Indian Affairs (BIA) represents the Federal nexus on Tribal trust lands; the BIA does not represent a Federal nexus on Tribal fee-owned land. We evaluated State, local government, and private lands that contain gnatcatcher habitat for a potential Federal nexus. We expect some projects on State, local government, or private lands in Orange, San Diego and Ventura counties to have a Federal nexus.

Table 1.—Geographic Distribution, Ownership, and Size of Areas Evaluated in the Critical Habitat Prudency Redetermination for the Coastal California Gnatcatcher

Land ownership and county	Total area within gnatcatcher study area hectares (acres)	Gnatcatcher habitat hectares (acres) ^(a)	Gnatcatcher habitat with federal nexus hectares (acres) ^(b)	Gnatcatcher habitat with a Federal nexus where critical habitat is determined to be prudent hectares (acres)
Federal:				
Los Angeles	186,004(459,625)	11,470(28,343)	11,470(28,343)	11,470(28,343)
Orange	26,948(66,590)	991(2,448)	991(2,448)	991(2,448)
Riverside	88,072(217,631)	5,616(13,877)	5,616(13,877)	5,616(13,877)
San Bernardino	22,890(56,562)	1,256(3,104)	1,256(3,104)	1,256(3,104)
San Diego	178,285(440,550)	24,650(60,911)	24,650(60,911)	24,650(60,911)
Ventura	77,287(190,980)	4,381(10,825)	4,381(10,825)	4,381(10,825)
Total Federal	579,486(1,431,938)	48,364(119,508)	48,364(119,508)	48,364(119,508)
Non-Federal:				
Los Angeles	466,149(1,151,873)	53,058(131,108)	54(133)	0
Orange	178,040(439,944)	23,572(58,247)	^(d) 8,428(20,826)	473(1,169)
Riverside	380,789(940,946)	62,248(153,817)	^(d) 750(1,854)	83(205)
San Bernardino	128,953(318,649)	15,697(38,789)	^(c) 0	0
San Diego	510,191(1,260,706)	673,684(167,250)	^(d) 32,627(80,622)	1,095(2,706)
Ventura	221,167(546,514)	79,070(195,385)	^(d) 243(600)	243(600)
Total Non-Federal	1,885,289(4,658,632)	301,328(744,596)	42,102(104,035)	1,894(4,680)
Grand Totals	2,464,775(6,090,570)	349,691(864,104)	90,465(223,543)	50,257(124,188)

^(a)Total amount of coastal sage scrub habitats within designated category.

^(b)Extent of habitat where a Federal nexus exists.

^(c)There are no known proposed projects or likely future activities with an established Federal nexus on lands within category.

^(d)See text for individual Federal project action areas contributing to totals; action areas in these categories may include small amounts of State and local lands.

Of the approximately 2,464,775 hectares (ha) (6,090,570 acres (ac)) of land within the study area, 77 percent is non-Federal land and 23 percent is Federal (Table 1). The GIS-based analysis of the study area landscape further revealed that only about 349,691 ha (864,104 ac) or 14 percent of these lands support sage scrub habitat, with the majority of the habitat occurring on privately or federally owned lands (Table 1). This estimate of habitat availability is more precise than our previous efforts and may differ with some published estimates.

We followed existing statutes and regulations, the Court order, and our policy, to identify those lands for which a designation of critical habitat might be prudent. In general, we carried out the analytical steps for determining prudency sequentially—(1) we determined whether Federal lands were involved, (2) if lands were non-Federal, we determined whether a Federal nexus existed, (3) we determined whether any threats associated with designation as critical habitat of Federal lands and those non-Federal lands having a Federal nexus outweigh the benefits of such designation, and (4) we determined whether any threats associated with designation of non-Federal lands that lack a Federal nexus

outweigh the benefits of such designation.

The potential threats associated with designation include an increased likelihood of intentional acts of vandalism due to widespread public misunderstanding of critical habitat. The benefits of designating critical habitat include the section 7 consultation benefit and the benefit of highlighting areas needing special management considerations or protections. We describe several instances of vandalism and intentional destruction of endangered species habitat in the “Prudency Finding” section of this notice.

In addition to determining whether designation of an area as critical habitat is prudent, we must also evaluate, in accordance with section 3(5)(A) of the Act, whether the area is essential to the conservation of the species and whether the area may require special management considerations or protection before designating the area as critical habitat. Section 4(b)(2) of the Act requires us to evaluate economic and other impacts, and exclude any area from the designation if the benefits of excluding the area outweigh the benefits of including the area. However, we can not exclude an area if the exclusion would result in the extinction of the species. These additional evaluations

required to designate critical habitat are not a part of the prudency determination ordered by the Court, and, for the most part, have been deferred consistent with the current listing priority guidance published on May 8, 1998 (63 FR 10931).

Prudency Finding

The only regulatory impact of a critical habitat designation is through the consultation provisions of section 7. Section 7 applies only to activities having a Federal nexus, not to activities that are exclusively State or private. Thus, the existence or lack of a Federal nexus is a key consideration in determining whether designating critical habitat is prudent. A Federal nexus exists when a Federal agency carries out, funds, or authorizes an activity or project on Federal or non-Federal lands. As we previously stated, the designation of non-Federal lands that lack a Federal nexus may not be prudent because the limited benefit may be outweighed by the threat of destruction of these areas. On the other hand, the designation of non-Federal lands where a Federal nexus exists or may exist in the future could prove to be beneficial to the species. However, even for non-Federal lands where there may be a future Federal nexus, we must weigh the benefits of designation as

critical habitat against any threat associated with designation. We discuss our prudency findings, arranged by land ownership, below.

Tribal Lands. Tribal lands include Tribal fee-owned and Tribal trust lands. Tribal fee-owned lands are treated as private lands and thus have no inherent Federal nexus. However, activities on such lands are subject to section 7 consultation if a Federal action is involved. Tribal trust lands have a Federal nexus in light of the trust responsibility of the BIA. However, given the extremely small proportion of coastal sage scrub habitat on Tribal lands (2 percent of the 349,691 ha (864,104 ac) of total existing habitat) (Table 1), and because no significant gnatcatcher populations are known to occur on Tribal lands, we conclude that such lands are not essential to the conservation of the species and do not meet the definition of critical habitat.

Federal Lands. Federal lands are generally those administered by the Department of Defense (DOD) (including the Army Corps of Engineers (COE), Department of Navy, Marine Corps, and Air Force), Bureau of Land Management (BLM), Federal Aviation Administration (FAA), Forest Service, National Park Service, Fish and Wildlife Service, and Bureau of Reclamation. For convenience, we included Tribal trust lands in the Federal lands category in Table 1 due to the inherent BIA nexus; however, for the reasons stated above in the discussion under "Tribal Lands," we conclude that Tribal trust lands are not essential to the conservation of the species and do not meet the definition of critical habitat. Approximately 579,486 ha (1,431,938 ac) of land within the study area are in this Federal land category. Of this total, an estimated 48,363 ha (119,508 ac), or 8 percent, support sage scrub habitat (Table 1). We have determined that it is prudent to designate critical habitat for the gnatcatcher on all Federal lands (not including Tribal trust lands) containing coastal sage scrub within the defined study area. We will further evaluate these lands during our development of a proposed critical habitat rule. That evaluation may indicate that not all of such habitat is essential for the conservation of the species or requires special management. We may also exclude some of these areas from designation as critical habitat because of economic impacts of such designation.

Non-Federal Lands. Non-Federal lands include lands owned by local and State jurisdictions and private entities. This category includes Tribal fee-owned lands. A Federal nexus exists on non-Federal lands when there is Federal

authorization or funding of, or participation in, a project or activity. In such cases, a Federal action agency is required to consult with us under section 7(a)(2) of the Act if the proposed activity or project may affect a listed species or any designated critical habitat.

Several types of activities on non-Federal lands supporting sage scrub habitat could potentially involve a Federal nexus. We have evaluated all habitat within the range of the gnatcatcher and all types of projects for a potential Federal nexus. For each Federal agency, we describe below the agency's potential involvement in activities on non-Federal lands and identify those areas for which designation of critical habitat is prudent.

- The BIA may provide funding, logistical support, and technical assistance to Indian Tribes for activities that may involve Tribal fee-owned lands. In some cases these actions require the BIA to consult with us pursuant to section 7 of the Act. However, for the reasons stated above in the discussion under "Tribal Lands," we conclude that Tribal fee-owned lands, as well as Tribal trust lands, are not essential to the conservation of the species and do not meet the definition of critical habitat.

- The Federal Highway Administration (FHWA) provides funding for transportation projects and approves linkages with the Federal highway system. These activities require section 7 consultation. Two regional transportation plans identify potential transportation alignments and alternatives with potential FHWA involvement in southern California. The 1998 Regional Transportation Plan authored by the Southern California Association of Governments addresses Los Angeles, Orange, Riverside, San Bernardino, and Ventura counties, while the Regional Transportation Plan 1996–2020 authored by the San Diego Association of Governments covers San Diego County. We have identified several projects having a Federal nexus through FHWA involvement that may affect gnatcatcher habitat. In Orange County, the action area of the Foothill Transportation Corridor, which is under the jurisdiction of FHWA, contains 461 ha (1,140 ac) of coastal sage scrub, and the action area of the State Route 133/Laguna Canyon Road Realignment project, which is also under the jurisdiction of FHWA, contains approximately 12 ha (29 ac) of habitat. In San Diego County, State Route 125 Project contains about 42 ha (105 ac) of habitat; State Route 905 Project contains

about 8 ha (20 ac); State Route 78 Project contains about 0.25 ha (0.65 ac) of habitat; and State Route 76 Project contains about 7 ha (17 ac). The Moorpark Specific Plan I2/Highway 118 Extension Project, which is a Ventura County project under the jurisdiction of the FHWA, contains 243 ha (600 ac) of coastal sage scrub habitat. We conclude that designation of critical habitat in these areas is prudent.

- The Fish and Wildlife Service conducts internal section 7 consultations when our actions may affect a listed species. Our activities on non-Federal lands include issuance of permits for incidental take of listed species under section 10 of the Act. Because the decision to apply for an incidental take permit, thereby creating a Federal nexus for consultation, rests solely with the potential non-Federal permit applicant, we do not consider the section 10 permit process as providing a reliable future Federal nexus for activities on non-Federal lands.

- The COE and the Environmental Protection Agency (EPA) administer the Clean Water Act Section 404 permit program. Under Section 404 of the Clean Water Act, a Department of the Army permit is required for projects on non-Federal and Federal lands involving a discharge of dredged or fill material into waters of the United States, including wetlands. The COE and EPA do not generally have jurisdiction over upland areas where gnatcatchers are found unless upland development is dependent upon an activity requiring a Section 404 permit. For this reason, Section 404 of the Clean Water Act would not ordinarily provide a Federal nexus for activities on non-Federal lands where gnatcatchers occur. However, the COE has exercised jurisdiction on the SilverHawk project in Riverside County which contains 83 ha (205 ac) of coastal sage scrub. We conclude that it is prudent to designate these 83 ha (205 ac) of coastal sage scrub as critical habitat. We do not know of any other projects in gnatcatcher habitat under the jurisdiction of the COE.

By delegation of authority from the Department of Defense through the Department of the Army, the COE also has responsibility to address all ordnance and explosive wastes concerns and environmental restoration activities at former defense sites. As a result, the COE has jurisdiction over the East Elliot Ordnance Removal, a project that would affect 243 ha (600 ac) of habitat in San Diego County. We conclude that it is prudent to designate these 243 ha (600 ac) of coastal sage scrub as critical habitat.

- The BLM and Forest Service occasionally exchange their lands for non-Federal lands. These land exchanges generally result in more manageable landownership configurations for these agencies. These agencies mostly try to acquire private inholdings within larger Federal holdings in exchange for isolated Federal parcels that are surrounded by non-Federal land. The BLM and Forest Service have already completed most such land exchanges in southern California, and we do not anticipate any future land exchange efforts that would affect the gnatcatcher. Occasionally, projects such as roads or utility rights-of-way will cross both private and Forest Service or BLM property. In these instances, both Federal and non-Federal lands will be considered during the section 7 consultation process. Because private lands in the vicinity of Forest Service or BLM land generally do not contain gnatcatcher habitat, the potential of utility projects on Federal land also affecting gnatcatcher habitat on private land is speculative and likely remote.

- The Immigration and Naturalization Service (INS) conducts activities along the United States/Mexico border and at immigration check stations on major highways north of the border. Current anticipated projects along the border include fences and roads to increase interdiction of illegal immigrants. These projects are generally located within 400 m (0.25 mile) of the international border. Within this area, there are approximately 786 ha (1941 ac) of non-Federal lands containing gnatcatcher habitat that may be affected by these projects. We conclude that the designation of critical habitat in these areas is prudent.

- The Department of Housing and Urban Development (HUD) conducts programs to assist private landowners in the purchase, sale, and development of their properties. However, these programs generally involve rehabilitation or redevelopment of previously disturbed areas that do not contain gnatcatcher habitat.

- The Federal Emergency Management Agency (FEMA) is involved with non-Federal lands following natural disasters and other emergencies such as floods, earthquakes, and other natural events. FEMA's involvement in the projects typically does not occur during an "emergency" situation, but rather after the disaster has occurred, so that any impact to gnatcatcher habitat from such natural disasters would also likely have already occurred prior to FEMA involvement. For example, actions taken

on private lands during a flood event, placing riprap for example, do not involve FEMA funds since private landowners are taking actions immediately. FEMA may provide financial assistance for the repair of culverts, roads, etc. after a disaster. In these cases, FEMA consults with us to avoid or minimize impacts to gnatcatchers. Additionally under the Hazard Mitigation Grant Program, FEMA funds programs, including vegetation management activities to reduce the likelihood of wildfires. FEMA is currently consulting with us on these actions. The existence of a Federal nexus from future FEMA disaster relief or other actions cannot be predicted and is at best speculative.

- The Federal Aviation Administration (FAA) oversees activities at existing airports and evaluates proposed airport expansion and new airport construction. Construction of new airports and expansion of existing airports have already been planned in southern California, and we considered these projects in the development of this determination. The Ramona Airport expansion project contains 9 ha (22 ac) of habitat. The designation of critical habitat on this parcel is prudent. We do not know of any other FAA projects proposed in gnatcatcher habitat.

As discussed above, FHWA, FAA, INS, and COE may carry out, fund, or authorize projects in gnatcatcher habitat on non-Federal lands in San Diego, Orange, and Ventura counties. We evaluated these lands to determine whether a designation of critical habitat would be prudent. We found that a Federal nexus exists for projects covering a total of 1,894 ha (4,680 ac), and determined that a designation of critical habitat would be prudent for these lands.

Approved NCCP Efforts

Several multi-species planning efforts and habitat conservation planning efforts have been undertaken within the southern California range of the gnatcatcher to conserve the species and its coastal sage scrub habitat. Principal among these are State of California Natural Community Conservation Planning (NCCP) efforts in Orange and San Diego counties. NCCP plans completed and permitted to date have resulted in the conservation of 40,208 ha (99,310 ac) of gnatcatcher habitat.

In southern San Diego County, the development of the NCCP Multiple Species Conservation Program (MSCP) has resulted in our approval of three southern County subarea plans under section 10(a)(1)(B) of the Act. These

three southern subarea plans account for approximately 95 percent of the gnatcatcher habitat in southern San Diego County. Approval is pending for four other subarea plans within southern San Diego County's MSCP. This planning effort has resulted in the establishment of conservation areas that collectively contain 28,844 ha (71,274 ac) of coastal scrub habitat within a 69,573-ha (171,917-ac) preserve area.

In addition, we have approved the Orange County NCCP Central/Coastal Plan and issued an incidental take permit under section 10(a)(1)(B) of the Act. This planning effort has resulted in the conservation of 15,677 ha (38,738 ac) of reserve lands, which contain 7,621 ha (18,831 ac) of coastal sage scrub habitat.

We have also approved several smaller multiple species habitat conservation plans (HCPs) in San Diego, Riverside, Los Angeles, and Orange counties. These include, Bennett Property, Meadowlark Estates, Fieldstone, and Poway Subarea Plan in San Diego County; Coyote Hills East and Shell Oil in Orange County; Ocean Trails in Los Angeles County; and Lake Mathews in Riverside County. These efforts have resulted in the protection of 3,743 (9,250 ac) of gnatcatcher habitat.

The gnatcatcher habitat in the approved NCCPs in San Diego and Orange counties was selected for permanent preservation and configuration into a biologically viable interlocking system of reserves by the local jurisdictions with our technical assistance and that of the California Department of Fish and Game. The reserve system established under the approved NCCP plans includes the coastal sage scrub habitat subject to the jurisdiction of those plans that we consider essential to the long-term survival and recovery of the gnatcatcher. In addition, the plans provide for management of the reserve lands to protect, restore, and enhance their value as gnatcatcher habitat. Because the essential gnatcatcher habitat that is subject to the jurisdiction of the approved plans is permanently protected in the habitat reserves, no additional private lands covered by the plans warrant designation as critical habitat. In addition, because the gnatcatcher habitat preserved in the plan is managed for the benefit of the gnatcatcher as required under the plans, there are no "additional management considerations or protections" within the meaning of "critical habitat" under section 3(5)(A)(ii) of the Act required for those lands. Therefore, we have determined that private lands subject to the approved NCCPs do not meet the

definition of critical habitat in the Act and that designation of such lands would not benefit the gnatcatcher.

Private Lands Without a Federal Nexus

We conclude that the designation of critical habitat on the 259,226 ha (640,560 ac) of coastal sage scrub on non-Federal lands that either lack a Federal nexus or are covered by approved HCPs under the NCCP program is not prudent. Threats and acts of vandalism toward coastal sage scrub habitats were most acute at the time of the publication of the final listing for the gnatcatcher in 1993 (58 FR 16742). The destruction of coastal scrub habitat in apparent attempts to circumvent potential land use restrictions resulting from Endangered Species Act prohibitions continues. Our Law Enforcement Division has received information on six incidents of land clearing that cumulatively resulted in the destruction of about 243 ha (600 ac) of coastal sage habitat and the possible take of up to eight pairs of gnatcatchers. These actions involved clearing of coastal sage scrub, in some instances without County grading permits, in San Diego, Riverside and San Bernardino counties. We also have recently initiated investigation into activities that apparently affected two endangered species, the Quino checkerspot butterfly and the Delhi Sands flower-loving fly.

As has been documented by a series of recent newspaper articles, some members of the public believe that—(1) critical habitat can be “* * * put off limits for development* * *” (San Diego Union Tribune, May 22, 1997), and (2) the presence of listed species on a land parcel can create “* * * a lot of uncertainty among developers* * *” and complicate land sales (Riverside Press-Enterprise, January 7, 1998).

The vast majority of private lands lack a Federal nexus that would invoke the section 7 prohibition against adverse modification of critical habitat. Also, considering the common misunderstandings about the effects of designation, we believe that designating such lands as critical habitat would increase the instances of habitat destruction and exacerbate threats to the gnatcatcher. Therefore, we conclude that the threats that would result from designating these lands as critical habitat outweigh the benefit that would be provided.

We will continue to investigate all instances of coastal sage scrub clearing that may result in an unauthorized “take” of gnatcatchers in violation of section 9 of the Act. Also, we are continuing extensive outreach efforts to address public misunderstandings about

the gnatcatcher and its habitat. We are continuing to encourage local jurisdictions to pursue comprehensive multi-species conservation plans (e.g., NCCP plans) to conserve the gnatcatcher and other sensitive species. Our cooperative approach is intended to ameliorate the circumstances that may have led private landowners to destroy coastal sage scrub habitat and to correct the misinformation presented by some media accounts.

We acknowledge that in some cases a designation of critical habitat on private lands may provide some benefit to a species by highlighting areas where the species may occur or areas that are important to the species' recovery. However, as discussed above, the status of the gnatcatcher, its coastal sage scrub habitat requirements, and the location of that habitat are already well known, and this information is readily available. County planning agencies inform members of the public about sensitive resources, including the gnatcatcher and its habitat, that may potentially occur on their lands. For example, the County of San Diego informs applicants for grading permits of the status of gnatcatchers and may require them to survey for the birds prior to receiving a permit. Numerous newspaper articles have also appeared describing the gnatcatcher and its habitat. The plight of this species and coastal sage scrub habitat is well known to the public, and a designation of critical habitat on private lands will not appreciably increase landowners' knowledge of areas important for gnatcatcher conservation.

We, therefore, conclude that no benefit would arise from designating critical habitat on private lands that do not have a Federal nexus. To the contrary, we believe it is likely that a designation of critical habitat on private lands may incite some members of the public and increase incidences of habitat destruction through acts of vandalism above current levels. Because, in this case, no benefit can be identified, and because of increased threats to the gnatcatcher and its habitat likely to result from designation, we conclude that designation of critical habitat on private lands that lack a Federal nexus is not prudent.

Summary and Conclusion

We conclude that designation of critical habitat totaling 50,257 ha (124,188 ac) on lands within the United States portion of the range of the gnatcatcher is prudent (Table 1). This total includes all Federal lands within the range of the gnatcatcher (48,364 ha (119,508 ac)) and 1,894 ha (4,680 ac) of

non-Federal lands where a Federal nexus exists.

In addition to determining whether designation of an area as critical habitat is prudent, we must also evaluate, in accordance with section 3(5)(A) of the Act, whether the area is essential to the conservation of the species and whether the area may require special management considerations or protection before designating the area as critical habitat. Also, section 4(b)(2) of the Act requires us to evaluate economic and other impacts, and exclude any area from the designation if the benefits of excluding the area outweigh the benefits of including the area, unless the exclusion would result in the extinction of the species. These additional determinations required to designate critical habitat are not a part of the prudence determination ordered by the Court. We are deferring these additional determinations consistent with the current listing priority guidance published (63 FR 10931) described below.

Listing Priority Guidance

We published Listing Priority Guidance for Fiscal Years 1998 and 1999 on May 8, 1998 (63 FR 25502). The guidance clarifies the order in which we will process rulemakings, giving highest priority (Tier 1) to processing emergency rules to add species to the Lists of Endangered and Threatened Wildlife and Plants; second priority (Tier 2) to processing final determinations on proposals to add species to the lists, processing new listing proposals, processing administrative findings on petitions (to add species to the lists, delist species, or reclassify listed species), and processing a limited number of proposed and final rules to delist or reclassify species; and third priority (Tier 3) to processing proposed and final rules designating critical habitat. Upon completion of higher priority listing actions in accordance with the listing priority guidance, we intend to go forward with the critical habitat designation process for the gnatcatcher.

References Cited

- Riverside Press-Enterprise. January 7, 1998. Rats! Irked developers frustrated by butterfly. Page 22.
- San Diego Union Tribune. May 22, 1997. Court says gnatcatcher must have safe habitat. Page A-3.

Authors

The primary authors of this document are Loren R. Hays, Doug Krofta, Art Davenport, Clark Roberts, and Jim

Bartel, Carlsbad Fish and Wildlife Office (see ADDRESSES section).

Authority

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

Dated: January 21, 1999.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 99-2866 Filed 2-5-99; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AC26

Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Sacramento Splittail

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened status for the Sacramento splittail (*Pogonichthys macrolepidotus*) pursuant to the Endangered Species Act of 1973, as amended (Act). Sacramento splittail occur in Suisun Bay and the San Francisco Bay-Sacramento-San Joaquin River Estuary (Estuary) in California. The Sacramento splittail has declined by 62 percent over the last 15 years. This species is primarily threatened by changes in water flows and water quality resulting from the export of water from the Sacramento and San Joaquin rivers, periodic prolonged drought, loss of shallow-water habitat, introduced aquatic species, and agricultural and industrial pollutants. Designation of critical habitat is not prudent at this time. This rule implements the protection and recovery provisions afforded by the Act for Sacramento splittail.

EFFECTIVE DATE: March 10, 1999.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 3310 El Camino Avenue, Suite 130, Sacramento, CA 95821-6340.

FOR FURTHER INFORMATION CONTACT: Michael Thabault, Deputy Assistant Field Supervisor, U.S. Fish and Wildlife Service (see ADDRESSES section) (telephone 916-979-2710).

SUPPLEMENTARY INFORMATION:

Background

As used in this rule, the term "Delta" refers to all tidal waters contained within the legal definition of the San Francisco Bay-Sacramento-San Joaquin River Delta, as delineated by section 12220 of the State of California's Water Code. Generally, the Delta is contained within a triangular area that extends south from the City of Sacramento to the confluence of the Stanislaus and San Joaquin rivers at the southeast corner and Chipps Island in Suisun Bay. The term "Estuary," as used in this rule, refers to tidal waters contained in the Sacramento and San Joaquin rivers, the Delta, and San Pablo and San Francisco bays. "Export facilities," as used in this rule, refer to the Central Valley Project and State Water Project water export facilities in the South Delta.

Sacramento splittail were first described in 1854 by W.O. Ayres as *Leuciscus macrolepidotus* and by S.F. Baird and C. Girard as *Pogonichthys inaeqilobus*. Although Ayres' species description is accepted, the species was assigned to the genus *Pogonichthys* in recognition of the distinctive characteristics exhibited by the two California splittail species *P. ciscooides* and *P. macrolepidotus* (Hopkirk 1973). *Pogonichthys ciscooides*, endemic to Clear Lake, Lake County, California, has been extinct since the early 1970s. The Sacramento splittail (hereafter splittail) represents the only existing species in its genus in California.

The name splittail refers to the distinctive tail of the fish. Pogon-ichthys means bearded fish, referring to the small barbels (whisker-like sensory organs) on the mouth of the fish, unusual in North American cyprinids. Macro-lepidotus means large-scaled. The splittail is a large cyprinid fish that can exceed 40 centimeters (cm) (16 inches (in)) in length (Moyle 1976). Adults are characterized by an elongated body, distinct nuchal hump (on the back of the neck), and small, blunt head, usually with barbels at the corners of the slightly subterminal mouth. The enlarged dorsal lobe of the caudal fin distinguishes the splittail from other minnows in the Central Valley of California. Splittail are dull, silvery-gold on the sides and olive-gray dorsally. During spawning season, pectoral, pelvic, and caudal (tail) fins are tinged with an orange-red color. Males develop small white nuptial tubercles on the head. Breeding tubercles (nodules) also appear on the base of the fins (Moyle in prep).

Splittail are native to California's Central Valley, where they were once widely distributed (Moyle 1976).

Historically, splittail were found as far north as Redding on the Sacramento River (at the Battle Creek Fish Hatchery in Shasta County), as far south as the present-day site of Friant Dam on the San Joaquin River, and up the tributaries of the Sacramento River as far as the current Oroville Dam site on the Feather River and Folsom Dam site on the American River (Rutter 1908). Recreational anglers in Sacramento reported catches of 50 or more splittail per day prior to the damming of these rivers (Caywood 1974). Splittail were captured in the past in southern San Francisco Bay and at the mouth of Coyote Creek in Santa Clara County, but they are no longer present there (Moyle in prep). The species was part of the Central Valley Native American diet (Caywood 1974).

In recent times, dams and diversions have increasingly prevented splittail from upstream access to the large rivers, and the species is now restricted to a small portion of its former range (Moyle and Yoshiyama 1992). However, during wet years, they migrate up the Sacramento River as far as the Red Bluff diversion dam in Tehama County, and into the lowermost reaches of the Feather and American rivers (Moyle in prep, Jones and Stokes 1993, Charles Hanson, State Water Contractors, *in litt.* 1993). Small numbers of splittail have recently been found in the upper Sacramento and San Joaquin rivers and their tributaries (Baxter 1995). Recent surveys of San Joaquin Valley streams found splittail in the San Joaquin River below its confluence with the Merced River, mainly following wet winters (Moyle in prep). Splittail have also been recorded using the Sutter and Yolo bypasses for spawning areas during wet winters (Sommer *et al.* 1997). Successful spawning has been recorded in the lower Tuolumne River during wet years in the 1980s, as well as in 1995. Both adults and juveniles were observed at Modesto, 11 kilometers (km) (6.6 miles (mi)) upriver from the mouth of the river (Moyle in prep). However, all of the sightings reported above were during wet years when splittail were able to exploit more spawning habitat. Except for very wet years, the species is for the most part now confined to the Delta, Suisun Bay, Suisun Marsh, and Napa Marsh. In the Delta, they are most abundant in the north and west portions when populations are low, but are more evenly distributed throughout the Delta following years of successful reproduction (Sommer *et al.* 1997).

Splittail are relatively long-lived, frequently reaching 5 to 7 years of age. An analysis of hard parts of the splittail indicate that larger fish may be 8 to 10