

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

[FWS–R8–ES–2007–0010]; [92210–1117–0000–B4]

RIN 1018–AV04

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Poa atropurpurea* (San Bernardino bluegrass) and *Taraxacum californicum* (California taraxacum)**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for *Poa atropurpurea* (San Bernardino bluegrass) and *Taraxacum californicum* (California taraxacum) under the Endangered Species Act of 1973, as amended (Act). We are also notifying the public that we have received new information concerning portions of three proposed critical habitat units (see “New Information Received” section) that may result in the final designation of critical habitat differing from the proposed rule published on August 7, 2007 (72 FR 44232). We also announce the availability of the draft economic analysis (DEA) of the proposed critical habitat designation and announce an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, the new information we have received, and the amended required determinations section. Comments previously submitted on this rulemaking do not need to be resubmitted. These comments have already been incorporated into the public record and will be fully considered in preparation of the final rule.

DATES: We will accept public comments received or postmarked on or before May 16, 2008.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AV04; Division of Policy and Directives

Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the “Public Comments” section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:**Public Comments**

We will accept written comments and information during this reopened comment period on the proposed critical habitat designation for *Poa atropurpurea* and *Taraxacum californicum* published in the **Federal Register** on August 7, 2007 (72 FR 44232), the DEA of the proposed designation, the new information regarding Units 1, 14, and 15, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why habitat should or should not be designated as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by designation such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of *Poa atropurpurea* and *Taraxacum californicum* habitat (especially in Unit 1),
- What areas occupied at the time of listing and that contain features essential for the conservation of the species should be included in the designation and why, and
- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Specifically, with reference to those U.S. Forest Service (USFS) lands that are proposed for designation, information on any areas covered by conservation or management plans that we should consider for exclusion from the designation under section 4(b)(2) of the Act; particularly the appropriateness

of including or excluding lands covered by the Cleveland National Forest’s (CNF) Habitat Management Guide for Four Sensitive Plant Species in Riparian Montane Meadows (CNF 1991), and the San Bernardino National Forest’s (SBNF) Meadows Habitat Management Guide (SBNF 2002).

(4) Any additional proposed critical habitat areas covered by conservation or management plans that we should consider for exclusion from the designation under section 4(b)(2) of the Act. We specifically request information on any operative or draft habitat conservation plans that include *Poa atropurpurea* or *Taraxacum californicum* as covered species that have been prepared under section 10(a)(1)(B) of the Act, or any other management plan, conservation plan, or agreement that benefits either plant or its primary constituent elements.

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

(6) Additional scientific information that will help us to better delineate areas that contain the primary constituent elements, especially in proposed critical habitat Unit 1 (Pan Hot Springs), Unit 14 (Laguna Meadow), or Unit 15 (Bear Valley) (see “New Information Received” section below).

(7) Information on the number of individual plants observed in any unit of critical habitat for either *Poa atropurpurea* or *Taraxacum californicum*; in particular, we are seeking information on the number of individual *T. californicum* plants observed in Unit 1 since this species was listed in 1998.

(8) Information as to whether State or local environmental conservation measures referenced in the DEA were in place at the time of listing, were adopted as a result of the listing of *Poa atropurpurea* or *Taraxacum californicum* under the Act, or were enacted for other reasons.

(9) Information regarding potential impacts on Tribal resources from the designation of critical habitat within the proposed designations, especially in proposed critical habitat Unit 1 (Pan Hot Springs), in light of a comment we received that describes a sacred Tribal site of the San Miguel Band of Mission Indians.

(10) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed critical habitat designation, and information on any costs or benefits we have inadvertently overlooked.

(11) Information on any economic costs and benefits associated with the

potential addition of Unit 1 (Pan Hot Springs Meadow) to the critical habitat designation for *Taraxacum californicum* announced in this document.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes likely imposed as a result of the designation of critical habitat.

(13) Information on whether the DEA correctly assesses the effect (or lack thereof) on regional costs associated with any land use controls that may result from the designation of critical habitat.

(14) Information on areas that could be disproportionately impacted by the designation of critical habitat for *Poa atropurpurea* or *Taraxacum californicum*.

(15) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation, and in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(16) Information on whether the DEA appropriately identifies all costs that could result from the critical habitat designation.

(17) Information on any quantifiable economic benefits of the designation of critical habitat.

(18) Whether the benefits of excluding any particular area from the critical habitat designation under section 4(b)(2) of the Act outweigh the benefits of including that area in the designation.

(19) Economic data on the incremental costs of designating any particular area as critical habitat.

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

Comments and information submitted on the proposed rule (72 FR 44232) during the initial comment period from August 7, 2007, to October 9, 2007, or the second comment period (72 FR 70284) from December 11, 2007, to January 25, 2008, do not need to be resubmitted as they have already been incorporated into the public record. Our final determination concerning the designation of critical habitat will take into consideration all written comments and any additional information we receive during all comment periods, as well as verbal comments received during the January 10, 2008, public hearing. On the basis of information provided during the public comment periods on the critical habitat proposal

and the DEA, we may, during the development of our final determination, find that areas proposed are not essential, or are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, the associated DEA, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hard copy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hard copy comments on <http://www.regulations.gov>.

Comments and materials we receive (and have received), as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov> [FDMS Docket Number FWS-R8-ES-2007-0010], or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule and DEA by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, or on our Web site at <http://www.fws.gov/carlsbad>.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this notice. For more information on the taxonomy and biology of *Poa atropurpurea* and *Taraxacum californicum*, refer to the final listing rule published in the **Federal Register** on September 14, 1998 (63 FR 49006) and the proposed critical habitat rule published on August 7, 2007 (73 FR 44232).

On September 13, 2004, the Center for Biological Diversity (CBD) and California Native Plant Society (CNPS) challenged our failure to designate critical habitat for *Poa atropurpurea* and *Taraxacum californicum* (*CBD and CNPS v. Norton*, 04–1150 RT SGLx; C.D. Cal.). In settlement of the lawsuit, the

Service agreed to submit to the **Federal Register** a proposed rule to designate critical habitat, if prudent, on or before July 27, 2007, and a final designation by July 25, 2008. On August 7, 2007, we published a proposed rule to designate critical habitat, identifying approximately 3,014 acres (ac) (1,221 hectares (ha)) of land in San Bernardino and San Diego Counties, California, as critical habitat for *P. atropurpurea*, and approximately 1,930 ac (782 ha) of land in San Bernardino County, California, as critical habitat for *T. californicum* (72 FR 44232). During the first open comment period, we received a request for a public hearing. To respond to this request, we reopened the comment period from December 11, 2007, to January 25, 2008 (72 FR 70284), and conducted the public hearing in San Bernardino, California on January 10, 2008.

Section 3 of the Act defines critical habitat as 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 essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, in accordance with section 7(a)(2) of the Act.

New Information Received

During the first two comment periods, we received new information indicating that some portions of the proposed critical habitat in Unit 1 (Pan Hot Springs), Unit 14 (Laguna Meadow), and Unit 15 (Bear Valley) may not contain the physical and biological features essential to the conservation of *Poa atropurpurea*. By this document, we are notifying the public that the final designation of critical habitat may differ from the proposed rule published on August 7, 2007 (72 FR 44232). We intend to use the best available science to delineate the specific geographic areas that contain the primary constituent elements for *P. atropurpurea* laid out in the appropriate quantity and spatial arrangement for the conservation

of the species. Therefore, we are requesting any additional information that may be useful in reassessing the proposed boundaries of Unit 1, Unit 14, or Unit 15 for *P. atropurpurea*. In particular, information indicating the distribution of any primary constituent element in these units would be helpful to improving the final critical habitat designation.

Additionally, we received several other comments related to proposed Unit 1 (Pan Hot Springs Meadow). We received information indicating that lands within or adjacent to Pan Hot Springs are considered sacred by the San Miguel Band of Mission Indians, and are seeking input from the San Miguel Band of Mission Indians and the public at large to better understand if the designation of critical habitat would have any impacts on the use of this sacred site. Secondly, we received information from members of the Board of Directors for the Big Bear City Community Services District (BBCCSD) indicating that they are interested in developing a conservation strategy or habitat management plan to conserve areas within proposed Unit 1. Should such a plan be submitted prior to the close of this public comment period, we will evaluate the appropriateness of excluding this area under section 4(b)(2) of the Act. Finally, we received new information from one of our peer reviewers indicating that Unit 1, which was only proposed as critical habitat for *Poa atropurpurea*, should also be considered as critical habitat for

Taraxacum californicum because it meets our criteria for critical habitat. This information is explained in greater detail below in the "Unit 1: Pan Hot Springs Meadow" section. At this time, we are considering the possibility of including this unit as critical habitat for *T. californicum*.

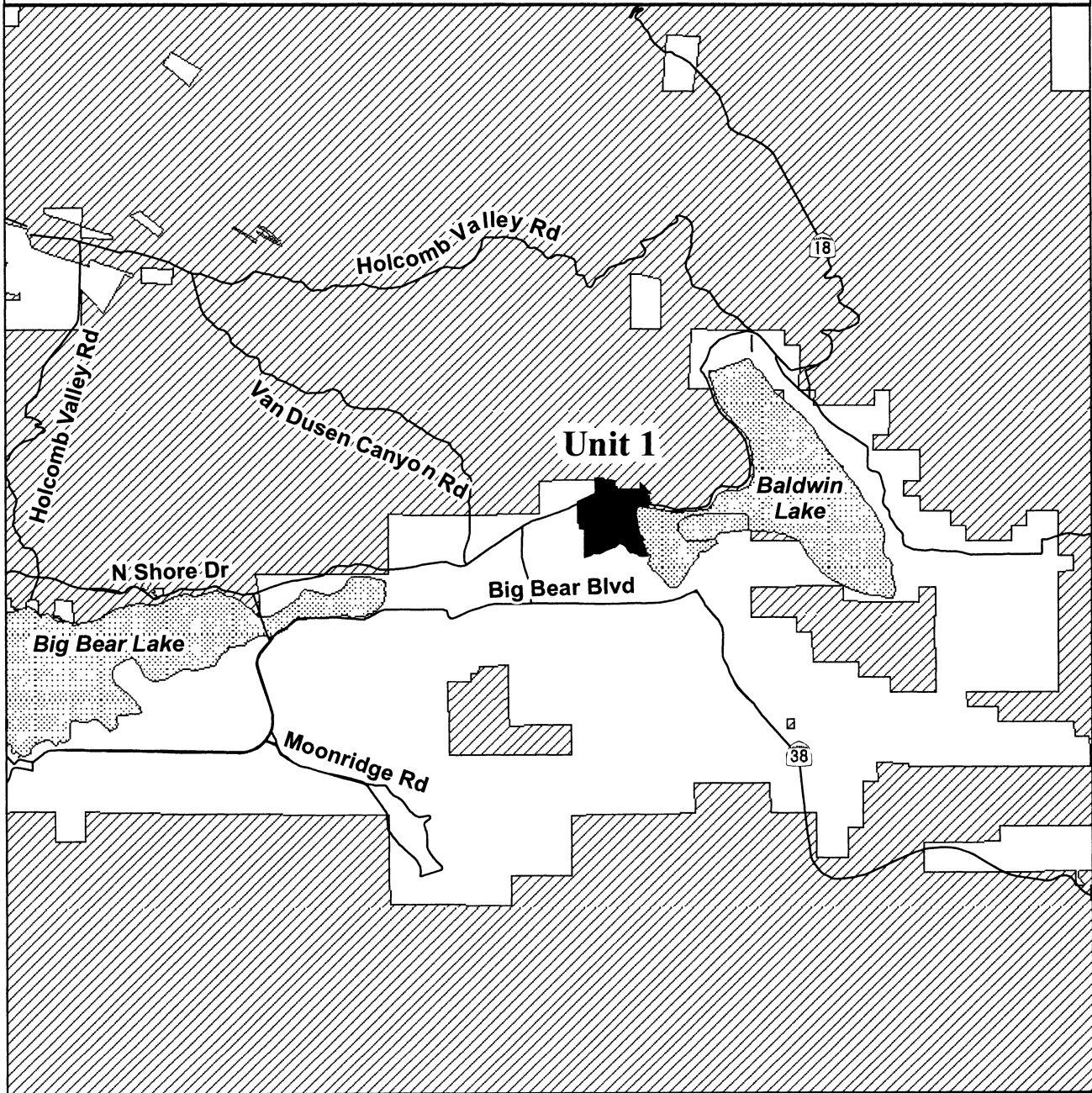
Unit 1: Pan Hot Springs Meadow

We are considering the possibility of including Unit 1 as critical habitat for *Taraxacum californicum* (see Figure 1). This unit is currently only proposed as critical habitat for *Poa atropurpurea*. Unit 1 consists of an approximately 142-ac (57-ha) meadow habitat. New information that we received from a peer reviewer indicates that Pan Hot Springs Meadow was occupied by *T. californicum* at the time of listing and that this species continues to occur within this unit. In the proposed rule, we incorrectly stated that "in the last known survey conducted for *Taraxacum californicum* in 1985, fewer than 10 individuals were also reported from Unit 1." Dr. Timothy Krantz, a recognized species expert on both *P. atropurpurea* and *T. californicum*, indicated in his peer review of our proposed critical habitat designation that in Unit 1 "several dozen individuals of *T. californicum* have been observed on numerous occasions since 1985." On March 4, 2008, Dr. Krantz stated that although he did not have field notes, he believes there are approximately 15–20 individual *T. californicum* plants near the well head of Pan Hot Springs and additional *T.*

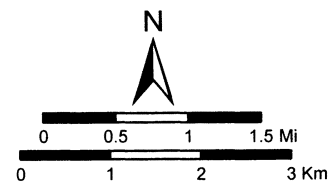
californicum plants scattered in other portions of the meadow (Krantz 2008, p. 1). In both his peer review and follow-up comment, he reiterated the importance of this site to the overall distribution of the species and stated that the site has biogeographical significance because it represents one of the largest of three remaining sites of *T. californicum* at the northeast end of Big Bear Valley. At the time of the proposed rule, we believed that our proposal adequately represented the habitat needed for the conservation of *T. californicum* throughout its range. In light of the information provided by the peer reviewer, this area may meet our criteria for critical habitat. This unit appears to contain all of the features essential to the conservation of *T. californicum*, and appears to meet our criteria for critical habitat because the meadow is currently occupied by *T. californicum* and supports a population of greater than 10 individuals (Krantz 2007, p. 1; 2008, p. 1). We are seeking additional information regarding the amount and distribution of *T. californicum* in Unit 1 (Pan Hot Springs Meadow). If it is confirmed that the population of *T. californicum* is greater than 10 individuals we may designate this area as critical habitat for *T. californicum* as well as *Poa atropurpurea*. This unit is located partially within the SBNF boundary, east of Big Bear Lake, and just west of Baldwin Lake. The majority of Unit 1 is privately owned by the BBCCSD.

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Figure 1
 New area being considered as Critical Habitat for *Taraxacum californicum* (California taraxacum).
 Pan Hot Springs Meadow, San Bernardino County, California



- Pan Hot Springs Meadow
- San Bernardino National Forest
- Lakes
- Roads



Taraxacum californicum and features essential to its conservation are threatened in this unit by invasion of nonnative herbaceous annuals, including potential hybridization of *T. californicum* with *T. officinale* (Krantz 2007, p. 1; 2008, p. 1). Additionally, horse grazing and roadside dumping have been reported at this location (CNDDDB 2006a, p. 12; 2006b, p. 21). Although 10 ac (4 ha) of the BBCCSD property are under a deed-restriction to protect known occurrences of *Thelypodium stenopetalum* and *Sidalcea pedata* (two federally listed pebble plains plants; 49 FR 34497; August 31, 1984), the drainage feeding the habitat was not included in the deed restriction. Without control of water availability, *T. californicum* and its essential features continue to be threatened (SBNF 2002a, p. 25). Therefore, special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit 1 due to the threats from human disturbance, water source alteration, and invasive nonnative plant species.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. Based on the August 7, 2007, proposed rule to designate critical habitat for *Poa atropurpurea* and *Taraxacum californicum* (72 FR 44232), we have prepared a draft economic analysis (DEA) of the proposed critical habitat designation.

The intent of the DEA is to quantify the economic impacts of all potential conservation efforts for *Poa atropurpurea* and *Taraxacum californicum*; some of these costs will likely be incurred regardless of whether we designate critical habitat. The DEA employs “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. The analysis looks retrospectively at baseline impacts incurred since the

species were listed (63 FR 49006, September 14, 1998), and forecasts both baseline and incremental impacts likely to occur after the designation of critical habitat. The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for *P. atropurpurea* and *T. californicum* over the next 20 years. The DEA does not specifically include estimated costs that may be associated with the potential addition of Unit 1 to critical habitat for *T. californicum* announced in this document; however, because the costs were already estimated for this unit for *P. atropurpurea* and the unit boundary is identical for *T. californicum*, we can likely use the same estimate for the potential economic impact of this unit for *T. californicum*. If we determine that Unit 1 should be critical habitat for *T. californicum*, we will make all necessary changes in the final economic analysis to address this issue.

Potential incremental impacts are separated according to activity into three impact categories: Impacts to recreation; impacts to transportation; and administrative costs related to the section 7 consultation process under the Act. The proposed rule also identified grazing; mining; invasive, nonnative species management; and land development activities that could alter the hydrological regime as potential threats to the species (72 FR 44232, August 7, 2007). However, except for some baseline impacts related to grazing activities, the DEA concluded that impacts associated with the proposed designation of critical habitat on these specific activities are not expected.

The pre-designation (1998 to 2007) impacts associated with species conservation activities for *Poa atropurpurea* and *Taraxacum californicum* in the areas proposed for designation range from \$153,000 and \$186,000, and were related to recreation, grazing, and section 7 consultations under the Act. The DEA forecasts incremental impacts associated with the proposed rulemaking to range from approximately \$124,000 to \$4.3 million (\$11,000 to \$403,000 annualized) over the next 20 years in present value terms applying a 7 percent discount rate. The present value of these impacts, applying a 3 percent discount rate, is \$130,000 to \$5.0 million (\$8,000 to \$336,000 annualized).

The DEA considers the potential economic effects of actions relating to the conservation of *Poa atropurpurea* and *Taraxacum californicum*, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of critical

habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for *P. atropurpurea* and *T. californicum* in areas containing features essential to the conservation of the species. The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector (see the “Required Determinations” section below).

Potential impacts related to recreation management account for about 86 percent of the upper-bound incremental impacts applying a 7 percent discount rate and over 79 percent of these impacts when a 3 percent discount rate is used. The remaining incremental impacts stem from transportation (14 and 21 percent using 7 and 3 percent discount rates, respectively) and administrative costs (less than 1 percent at both discount rates). The baseline impacts (impacts expected to occur whether critical habitat is designated or not) are primarily associated with transportation (68 and 75 percent using 7 and 3 percent discount rates, respectively), followed by grazing (18 and 16 percent using 7 and 3 percent discount rates, respectively), recreation management (13 and 8 percent using 7 and 3 percent discount rates, respectively), and administrative costs (2 percent at both discount rates). The majority of the incremental impacts associated with the proposed designation of critical habitat are expected to occur in Unit 1 (Pan Hot Springs Meadow), which is primarily owned by the BBCCSD. The BBCCSD is expected to bear over 86 percent of the total anticipated upper-bound incremental impacts at a 7 percent discount rate and about 79 percent at a 3 percent discount rate, while the California Department of Transportation (Caltrans) is forecast to bear approximately 14 percent and 21 percent of these impacts at 7 and 3

percent discount rates, respectively. The remaining incremental impacts (less than one percent of the total incremental impacts) are shared between the USFS, the Service, and the Federal Highway Administration (FHWA).

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed rule, the new information we have received, and our amended required determinations. The final designation may differ from the proposed rule based on new information we receive during the public comment periods. Our supporting record will reflect any new information used in making the final designation. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided the exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our August 7, 2007, proposed rule (72 FR 44232), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data in making these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 (Regulatory Planning and Review) and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an

economic sector, productivity, jobs, the environment, or other units of the government.

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

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

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

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

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

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

impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *Poa atropurpurea* and *Taraxacum californicum* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (such as residential development and dispersed recreation activities). In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. The designation of critical habitat will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize the proposed critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

The DEA analyzes whether a particular group or economic sector is expected to bear an undue proportion of the impacts. Appendix B of the DEA describes potential impacts of proposed designation on small entities. Appendix B considers the extent to which the incremental impacts results presented in the previous sections reflect potential future impacts on small entities and the energy industry. The screening analysis is based on the estimated impacts associated with the proposed rulemaking as described in chapters 2 through 8 of the DEA. The analysis evaluates the potential for economic impacts related to several categories, including: (1) Recreation; (2) transportation; (3) mining; (4) grazing; (5) invasive, nonnative species management; and (6) development and hydrological regime. As summarized below and presented in more detail in section B.1.2 of the DEA, the BBCCSD is the only small entity expected to be affected by the proposed rulemaking.

Post-designation incremental impacts associated with proposed critical habitat designation-related conservation activities are not expected for mining (Chapter 4 of the DEA); grazing (Chapter 5 of the DEA); invasive, nonnative

species management (Chapter 6 of the DEA); or development and water source alteration activities (Chapter 7 of the DEA). The incremental administrative costs of post-designation section 7 consultations and technical assistance requests (Appendix A of the DEA) associated with the proposed critical habitat designation, as well as incremental impacts associated with transportation projects (Chapter 3 of the DEA), will be borne by State and Federal government agencies. These agencies are Caltrans, the USFS, and the Service. The State and Federal governments are not considered small entities by the SBA. As described in Chapter 2 of the DEA, post-designation incremental impacts of critical habitat associated with recreation are related to Phase II of the proposed community park in Unit 1 by BBCCSD. BBCCSD provides fire, water, sanitation, and refuse services to approximately 10,000 residents in unincorporated areas of Big Bear Valley and is considered a small entity by the SBA.

As described in section B.1 of the DEA, the screening analysis focuses on economic impacts resulting from potential modifications to recreation facility development activities proposed by BBCCSD within the area proposed for designation. The incremental impact consists of a percentage of costs of conducting the Environmental Review (ER) for Phase II of a proposed park under the California Environmental Quality Act (CEQA) that is attributable to the critical habitat designation and implementation of the anticipated mitigation or conservation measures stemming from the ER. The total cost of the CEQA process is expected to range from \$150,000 to \$300,000, of which approximately \$100,000 to \$200,000 is considered that incremental impact as this is the additional cost of the ER anticipated to stem from the designation of critical habitat.

The mitigation or conservation measures under CEQA to protect the habitat following the final designation of critical habitat are anticipated to vary from a minimal modification of the park design such that the occurrences of *Poa atropurpurea* (or areas close to the occurrences) are well-protected and are located in the more passive portions of the park to a possible relocation of the park to a more suitable location outside of Unit 1 (or to provide land elsewhere for the protection of the species in lieu of this habitat). The design modification of the proposed park is expected to cost approximately \$20,000. In the extreme case that the 25-ac (10-ha) park must be relocated, BBCCSD could potentially need to find and purchase a 25-ac (10-

ha) tract of land outside the proposed critical habitat designation. Because regional land values are high, a 25-ac (10-ha) lot with development potential is expected to cost between \$3.0 and \$4.0 million. In total, BBCCSD is expected to experience an annualized impact that ranges from a low of \$10,000 to a high of \$347,000. The annualized impacts are equivalent to 0.1 to 2.9 percent of BBCCSD's annual operating budget (approximately \$12.1 million).

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. We have identified only one small entity that may be impacted by the proposed critical habitat designation. Although this action has a potential to impact the BBCCSD, we believe that the Phase II of their proposed park project can incorporate measures to ensure the long-term conservation of *Poa atropurpurea* in proposed critical habitat Unit 1 and BBCCSD may not need to relocate the project. Therefore, it is likely that the BBCCSD will not bear the majority of the estimated impacts, which are associated with the costs of relocating this project. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The DEA finds none of these criteria relevant to this analysis (Appendix B of the DEA). Thus, based on the information in the DEA, we do not expect *Poa atropurpurea* and *Taraxacum californicum* conservation activities within proposed critical habitat to lead to energy-related impacts. As such, we do not expect the proposed designation of critical habitat to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

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

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except as (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

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

entitlement programs listed above on to State governments.

(b) Although this action has a potential to impact the BBCCSD, we believe that the Phase II of their proposed park project can incorporate measures to ensure the long-term conservation of *Poa atropurpurea* in Unit 1 and BBCCSD may not need to relocate the project. Therefore, it is likely that the BBCCSD will not bear the majority of the estimated impacts, which are associated with the costs of relocating this project. Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government

entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of proposing critical habitat for *Poa atropurpurea* and *Taraxacum californicum* in a takings implications assessment. Our takings implications assessment concludes that the proposed designation of critical habitat for *P. atropurpurea* and *T. californicum* does not pose significant takings implications.

Author

The primary author of this notice is staff of the Carlsbad Fish and Wildlife Office.

Authority

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

Dated: April 4, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

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