

part of a submission of a payment request made using Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA) or another electronic form authorized by the Contracting Officer.

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(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests using WAWF-RA, in one of the following electronic formats that WAWF-RA accepts: Electronic Data Interchange, Secure File Transfer Protocol, or World Wide Web input. Information regarding WAWF-RA is available on the Internet at <https://wawf.eb.mil/>.

(c) The Contractor may submit a payment request using other than WAWF-RA only when—

(1) The Contracting Officer authorizes use of another electronic form. With such an authorization, the Contractor and the Contracting Officer shall agree to a plan, which shall include a timeline, specifying when the Contractor will transfer to Wide Area WorkFlow-Receipt and Acceptance;

(2) DoD is unable to receive a payment request in electronic form; or

(3) The Contracting Officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the Contractor. In such cases, the Contractor shall include a copy of the Contracting Officer's determination with each request for payment.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU80

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Arenaria ursina* (Bear Valley Sandwort), *Castilleja cinerea* (Ash-gray Indian Paintbrush), and *Eriogonum kennedyi* var. *austromontanum* (Southern Mountain Wild-buckwheat)

**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 *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var.

*austromontanum* under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis for the proposed critical habitat designation and an amended Required Determinations section of the proposal. The draft economic analysis forecasts future costs associated with conservation efforts for the three listed plants in the areas proposed for designation to be \$1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is \$1.45 million (\$0.10 million annualized); or \$1.03 million, using a discount rate of 7 percent (\$0.10 million annualized). The amended Required Determinations section provides our determination concerning compliance with applicable statutes and Executive Orders that we deferred until the information from the draft economic analysis of this proposal was available. We are reopening the comment period to allow all interested parties to comment simultaneously on the proposed rule, the associated draft economic analysis, and the amended Required Determinations section.

**DATES:** We will accept public comments until September 13, 2007.

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

(1) E-mail: Please submit electronic comments to

[fw8cfwocomments@fws.gov](mailto:fw8cfwocomments@fws.gov). Include "pebble plains plants" in the subject line. Please see the Public Comments Solicited section under **SUPPLEMENTARY INFORMATION**.

(2) Facsimile: You may send your comments to 760-431-5901.

(3) U.S. mail or hand-delivery: You may submit written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

(4) *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address listed in **ADDRESSES** (telephone: 760-431-9440). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

#### Public Comments Solicited

We will accept written comments and information during this reopened comment period. We solicit comments on the proposed critical habitat designation for *Arenaria ursina* (Bear Valley sandwort), *Castillejacinerea* (Ash-gray Indian paintbrush), and *Eriogonum kennedyi* var. *austromontanum* (southern mountain wild-buckwheat) (also collectively referred to herein as three pebble plains plants), published in the **Federal Register** on November 22, 2006 (71 FR 67712), and on our draft economic analysis of the proposed designation. 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 will outweigh threats to these species caused by designation, such that designation of critical habitat is prudent;

(2) Specific information on the amount and distribution of *Arenaria ursina*, *Castillejacinerea*, and *Eriogonum kennedyi* var. *austromontanum* habitat, and what areas that were occupied at the time of listing that contain features essential for the conservation of the species should be included in the designation and why, and what areas that were not occupied at the time of listing are essential to the conservation of the species and why;

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

(4) Information on the extent to which any State and local environmental protection measures referred to in the draft economic analysis may have been adopted largely as a result of the listing of *Arenaria ursina*, *Castillejacinerea*, and *Eriogonum kennedyi* var. *austromontanum*;

(5) Information on whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation, and information on any costs that have been inadvertently overlooked;

(6) Information on whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(7) Information on whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat;

(8) Information on areas that could potentially be disproportionately impacted by designation of critical habitat for *Arenariaursina*, *Castillejacinerea*, or *Eriogonumkennedyi* var. *austromontanum*;

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

(10) Information on whether the draft economic analysis appropriately identifies all costs that could result from the designation;

(11) Information on whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments;

(12) Economic data on the incremental effects that would result from designating any particular area as critical habitat; and

(13) Information on whether there are any quantifiable economic benefits that could result from the designation.

Pursuant to section 4(b)(2) of the Act, an area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

All previous comments and information submitted during the initial comment period from November 22, 2006, to January 22, 2007, for the proposed rule (71 FR 67712) need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning the draft economic analysis and the proposed rule by any one of several methods (see **ADDRESSES**). Our final designation of critical habitat will take into consideration all comments and any additional information we have received during both comment periods. On the basis of public comment on this analysis, the critical habitat proposal, and the final economic analysis, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

If submitting comments electronically, please also include "Attn: pebble plains plants" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

You may obtain copies of the proposed rule and draft economic analysis by mail from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or by visiting our website at <http://www.fws.gov/carlsbad/SBMP.htm>.

### Background

On September 13, 2004, the Center for Biological Diversity and the California Native Plant Society filed a joint lawsuit challenging the Service's failure to designate critical habitat for six California plant species, including *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* (*Center for Biological Diversity, et al. v. Norton, No. ED CV-04-1150 RT (SGLx)*). In an April 14, 2005, settlement agreement, the Service agreed to submit to the **Federal Register** a proposed rule to designate critical habitat, if prudent, on or before November 9, 2006, and a final rule by November 9, 2007.

On November 4, 2006, a proposed rule to designate critical habitat for *A. ursina*, *C. cinerea*, and *E. k. var. austromontanum* was signed; it was published on November 22, 2006 (71 FR 67712). The proposal includes approximately 1,511 acres (ac) (611 hectares (ha)) of land in San Bernardino County, California.

Critical habitat is defined in section 3 of the Act 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, pursuant to section 7(a)(2) of the Act.

### 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. We have prepared a draft economic analysis based on the November 22, 2006, proposed rule to designate critical habitat for *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* (71 FR 67712).

The draft economic analysis is intended to quantify the economic impacts of all potential conservation efforts for the three pebble plains plants; some of these costs will likely be incurred regardless of whether critical habitat is designated. According to the draft economic analysis, activities associated with the conservation of the three listed pebble plains plants are likely to primarily impact unauthorized off-highway vehicle use, control of invasive, nonnative plants, and dispersed recreation. The draft economic analysis forecasts future costs associated with conservation efforts for the three pebble plains plants in the areas proposed for designation to be \$1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is \$1.45 million (\$0.10 million annualized); or \$1.03 million, using a discount rate of 7 percent (\$0.10 million annualized). The analysis quantifies economic impacts associated with the conservation efforts on each affected entity—typically landowners or managers—associated with the following: (1) vehicle use off designated routes; (2) the presence of nonnative plant species; and (3) dispersed recreation activities.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum*, including costs associated with sections 4, 7, and 10 of the Act, and including those 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 *A. ursina*, *C. cinerea*, and *E. k. var. austromontanum* in areas containing features essential to the conservation of the species. The draft analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs that have been incurred since the date *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* were listed as threatened (63 FR 49006; September 14, 1998), and considers those costs that may occur in the 20 years following the designation of critical habitat.

As stated earlier, we solicit data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal or its supporting documents to incorporate or address new information received during the comment period. 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 such exclusion will not result in the extinction of the species.

#### Required Determinations—Amended

In our November 22, 2006, proposed rule (71 FR 67712), 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 was available in the draft economic analysis. Those data are now available for our use in making these determinations. In this notice we are affirming the information contained in the proposed rule concerning Executive Order (E.O.)

13132; E.O. 12988, the Paperwork Reduction Act; and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments (59 FR 22951). Based on the information made available to us in the draft economic analysis, we are amending our Required Determinations, as provided below, concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211, E.O. 12630, and the Unfunded Mandates Reform Act.

#### Regulatory Planning and Review

In accordance with E.O. 12866, this document is a significant rule because it may raise novel legal and policy issues. Based on our draft economic analysis of the proposed designation of critical habitat for *Arenariaursina*, *Castillejacinerea*, or *Eriogonumkennedyi* var. *austromontanum*, costs related to conservation activities for these species pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately \$1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is \$1.45 million (\$0.10 million annualized); or \$1.03 million, using a discount rate of 7 percent (\$0.10 million annualized). Therefore, based on our draft economic analysis, we do not anticipate that the proposed designation of critical habitat for *A. ursina*, *C. cinerea*, and *E. k. var. austromontanum* would result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the necessary timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule or accompanying economic analysis.

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

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

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

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

Under the Regulatory Flexibility Act (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 (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based upon our draft economic analysis 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 received, this determination is subject to revision as part of the 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 *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var. *austromontanum* 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). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and thus will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this proposed critical habitat designation is made final, Federal agencies must consult with us 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.

In our draft economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Arenaria ursina*, *Castilleja cinerea*, or *Eriogonum kennedyi* var. *austromontanum* and proposed designation of its critical habitat. The analysis is based on the estimated impacts associated with the proposed rulemaking as described in Chapters 2 through 4 of the analysis and evaluates the potential for economic impacts related to three categories: unauthorized vehicle activities; invasive, nonnative plant species management; and dispersed recreation activities.

The U.S. Forest Service (USFS), the California Department of Fish and Game, and the Boy Scouts of America are not considered small entities by the Small Business Administration. They do not meet the criteria because the first two entities are governments serving more than 50,000 people, and the Boy Scouts of America is a civic or social organization having annual receipts greater than \$6.5 million. The private landowners are unlikely to be business entities. Accordingly, the small business

analysis contained in Appendix A of the economic analysis focuses on economic impacts of controlling unauthorized off-highway vehicles and nonnative plant species on land owned by The Wildlands Conservancy.

The Wildlands Conservancy (TWC) is a nonprofit, public benefit organization. It was unaware of the presence of the three listed species and their habitat on its land and, to date, has not undertaken actions specific to the conservation of the plants. Potential impacts to TWC of managing unauthorized off-road vehicle use and controlling invasive, nonnative plant species are based on cost-per-acre estimates from the USFS. Annualized impacts to TWC at a 3 percent discount rate are expected to be \$4,504. However, since only one entity meeting the definition of a small business owns land within the area proposed as critical habitat, we do not anticipate that this regulation, if finalized as proposed, will result in a significant impact to a substantial number of small business entities. Please refer to our draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether this proposed rule would result in a significant economic effect on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the rule will not, if promulgated, have a significant economic impact on a substantial number of small 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. This proposed designation of critical habitat for *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var.

*austromontanum* is considered a significant regulatory action under E.O. 12866 due to its potentially raising novel legal and policy issues. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared without the regulatory action under consideration. The draft economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on the information

in the draft economic analysis, energy-related impacts associated with *A. ursina*, *C. cinerea*, and *E. k. var. austromontanum* conservation activities within proposed critical habitat are not expected. As such, the proposed designation of critical habitat is not expected 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), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, 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. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only

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

(b) We do not believe that this rule will significantly or uniquely affect

small governments. As discussed in the draft economic analysis, the majority (92 percent) of the lands proposed as critical habitat are federally owned by the USFS, which does not qualify as a small government. Of the remaining eight percent, seven percent is privately owned land and one percent is State land. 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 *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var.

*austromontanum* in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for the three listed pebble plains plants does not pose significant takings implications.

#### **Author**

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

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

Dated: August 3, 2007.

#### **Todd Willens,**

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

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