ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a channel substitution proposed by Pappas Telecasting of Central Nebraska, L.P. (''Pappas''), the permittee of KWNB–DT, DTV channel 18, Hayes Center, Nebraska. Pappas requests the substitution of DTV channel 6 for channel 18 at Hayes Center.

DATES: Comments must be filed on or before December 8, 2008, and reply comments on or before December 22, 2008.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Kathleen Victory, Esq., Fletcher, Heald & Hildreth, PLC, 1300 North 17th Street, 11th Floor, Arlington, VA 22209.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, *joyce.bernstein@fcc.gov*, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 08–193, adopted September 12, 2008, and released September 19, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com*. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

2. Section 73.622(i), the DTV Table of Allotments under Nebraska, is amended by adding channel 6 and removing channel 18 at Hayes Center.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E8–26507 Filed 11–5–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS R2 ES 2008 0114; 92220–1113–0000; C5]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Delist Cirsium vinaceum (Sacramento Mountains Thistle)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of a status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the threatened *Cirsium vinaceum* (Sacramento Mountains thistle) from the Federal List of Threatened and Endangered Plants, under the Endangered Species Act of 1973, as amended (Act). We find that the petition presents substantial information indicating that delisting of *C. vinaceum* may be warranted. Therefore, with the publication of this notice, we are initiating a 12-month status review in response to this petition under section 4(b)(3)(B) of the Act to determine if delisting the species is warranted. To ensure that the review is comprehensive, we are soliciting data and other information regarding *C. vinaceum.*

DATES: To allow us adequate time to conduct a status review, we request that information be submitted on or before December 22, 2008.

ADDRESSES: You may submit information 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: [FWS–R2–ES–2008–0114; 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 information received on: *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Wally ''J'' Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Office, 2105 Osuna Road, NE, Albuquerque, New Mexico 87113; telephone 505–346–2525; facsimile 505–346–2542. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that substantial information exists to indicate that listing or delisting a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting any additional information on the status of *Cirsium vinaceum* from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry or environmental entities, or any other interested parties.

We are seeking information on historical and current distribution, biology and ecology, ongoing conservation measures for the species or its habitat, and threats to the species or its habitat. We also request information regarding the adequacy of existing regulatory mechanisms.

Please note that comments merely stating support or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species shall be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will issue the 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*).

You may submit your information concerning this finding by one of the methods listed in the **ADDRESSES** section. We will not consider submissions sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit information via *http://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy 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 hardcopy submissions on *http://www.regulations.gov.*

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

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. Such findings are based on information contained in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the finding. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our 90-day finding under section 4(b)(3)(A) of the Act and § 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial information'' threshold. ''Substantial information'' is defined in 50 CFR 424.14(b) as ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'' If we find that substantial information was presented, we are required to promptly commence a status review of the species.

We evaluated the information provided by the petitioner in accordance with 50 CFR 424.14(b). Our process for making this 90-day finding under section 4(b)(3)(A) of the Act and 50 CFR 424.14(b) of our regulations is limited to a determination of whether the information in the petition meets the ''substantial scientific and commercial information'' threshold (as mentioned above).

Species Information

Cirsium vinaceum is a stout plant, 3.3 to 5.9 feet (ft) (1 to 1.8 meters (m)) tall. *Cirsium vinaceum* stems are brown-purple and highly branched. The basal leaves are green, 12 to 20 inches (in) (30 to 50 centimeters (cm)) long, and up to 8 in (20 cm) wide, with ragged edges. *Cirsium vinaceum* is a short-lived perennial. It lives as a rosette (a circular arrangement of leaves close to the ground) for one or more years, and eventually a stem bolts upward producing flower and seed. Flowering, the vehicle for sexual reproduction, occurs only once, from July through September, when pink-purple flower heads form at the tips of stems. At any given time, flowering adults comprise approximately 10 percent of the total number of plants (USFS 2003). Seed production usually occurs from cross-pollination by native bees, flies, butterflies, and hummingbirds, although pollination from another plant is not always required for reproduction. Adult *C. vinaceum* plants die after flowering. *Cirsium vinaceum* is an obligate wetland species that requires saturated soils with surface or sub-surface water flow. Waters at these sites are rich in calcium carbonate from limestone sources that often precipitates out to create large areas of travertine (calcium carbonate) deposits, which occasionally become large bluffs or hills. Travertine deposits are the most common habitat of the species.

Cirsium vinaceum presently occurs on both the eastern and western slopes of the Sacramento Mountains in south-central New Mexico. The species is found primarily on National Forest Service lands of the Lincoln National Forest in Otero County, New Mexico (Service 1993, p. 3). A few occupied sites lie on the extreme southern end of the Mescalero Apache Indian Reservation and a few private land inholdings within the Lincoln National Forest (Service 1993, p. 3). Within this known range, *C. vinaceum* grows in the mixed-conifer zone, between 7,500 and 9,500 ft (2,300 and 2,900 m), in limestone substrate.

Cirsium vinaceum was listed as a threatened species on June 16, 1987, based on threats from water development, trampling and ground disturbance by livestock, recreation, logging, and the invasion of exotic plants (52 FR 22933). At the time of listing, it was known from 20 localities consisting of a total of 10,000 to 15,000 sexually reproducing plants (52 FR 22933). This number of plants was greater than the 2,000 to 3,000 sexually reproducing plants known at the time the species was proposed for listing in 1984 (49 FR 20735). A recovery plan for *C. vinaceum* was finalized on September 27, 1993 (Service 1993, pp. 1–23). Critical habitat has not been designated for this species.

Review of the Petition

On August 13, 2007, we received a petition from the Board of County Commissioners of Otero County, New Mexico, to delist *Cirsium vinaceum.* The petitioner cites the following documents pertaining to *C. vinaceum:* A 1984 proposal to determine *C. vinaceum* to be a threatened species and to determine critical habitat (49 FR 20735, May 16, 1984); the June 16, 1987 final rule to determine *C. vinaceum* to be a threatened species (52 FR 22933); the 1993 Sacramento Mountains Thistle (*Cirsium vinaceum*) Recovery Plan; the 2004 original petition to delist the Sacramento Mountains thistle submitted by Otero County Commissioner Doug Moore; the 2004 Final Environmental Impact Statement—Sacramento, Dry Canyon, and Davis Grazing Allotments (Forest Service 2004); the 2005 Programmatic Biological and Conference Opinion: the Continued Implementation of the Land and Resource Management Plans (LRMP) for the Eleven National Forests and National Grasslands of the Southwestern Region (LRMP Biological Opinion) (USFWS 2005); the 2006 90-

day finding on a petition to delist the Sacramento Mountains thistle (*Cirsium vinaceum*) and initiation of a 5-year status review (71 FR 70479, December 5, 2006); the USDA Natural Resources Conservation Service web report, ''New Mexico County Level Distribution for *Cirsium vinaceum*'' (web-checked by petitioner February, 2007); and a U.S. Forest Service (Forest Service) Draft Map of Known Locations of Sacramento Mountains Thistle (*Cirsium vinaceum*), Sacramento Ranger District, Lincoln National Forest (undated). The petitioner clearly identifies the petition as a petition and includes the requisite information for the petitioner, as required in 50 CFR 424.14(a).

The petitioner summarizes the natural history of *Cirsium vinaceum*, describes the range and population status from 1984 to 2003, and outlines the regulatory history.The petitioner emphasizes that *C. vinaceum* numbers have increased dramatically since the original listing and believes that the recovery objectives have been satisfied. Comparisons of occupied localities and population numbers are drawn from the 1984 petition to list *C. vinaceum* (49 FR 20735, May 16, 1984), the June 16, 1987 final rule to list *C. vinaceum* as threatened (52 FR 22933), the 1993 recovery plan for *C. vinaceum*, and the 2006 90-day finding on a petition to delist *C. vinaceum* (71 FR 70479, December 5, 2006). These documents give the locality and population numbers as: 14 localities with 2,000 to 3,000 total individuals in 1984; 20 localities with a total of 10,000 to 15,000 reproductive individuals in 1987; 62 localities with 49,000 total plants in 1993; and 86 localities with an estimated 350,000 to 400,000 total *C. vinaceum* plants in 2003. Population data after 2003 are not included in the petition. The petitioner also discusses possibilities of the range of *C. vinaceum* extending northward into Lincoln County as suggested by a National Resources Conservation Service web site general map that highlights Lincoln County as well as Otero County for the distribution of *C. vinaceum* (*http://plants.usda.gov/java/county?state_name=New%20Mexico&statefips=35&symbol=CIVI4*, from 2007), and southward, based on a large known population located toward the southern tip of the Sacramento Ranger District of the Lincoln National Forest.

The petitioner claims that threats to *Cirsium vinaceum* have been ''either completely eliminated or sufficiently reduced so that the long-term survival of *C. vinaceum* is ensured.'' Each of the five listing factors is addressed by the petitioner, who analyzes threats given in the original listing of 1987 and believes that they have been minimized. The petitioner states that delisting is warranted based on the sufficient recovery of the species and the assertion that the initial listing was done in error.

In making this 90-day finding, we evaluated whether information on the changes in the status and threats to *Cirsium vinaceum*, as presented in the petition, and clarified by information readily available in our files at the time of the petition review, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

Threats Analysis

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. We evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. We must consider these same five factors in delisting a species. We may delist a species only if the best scientific and commercial data available indicate that the species no longer meets the definition of threatened or endangered under the Act. Delisting may be warranted as a result of: (1) Extinction, (2) recovery, and/or (3) a determination that the original data used for classification of the species as endangered or threatened were in error.

Under section 4 of the Act, we may list a species, subspecies, or Distinct Population Segment of vertebrate taxa on the basis of any of the following five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We also apply these same factors in determining whether the threats have been sufficiently reduced or eliminated to justify delisting. This 90-day finding is not a status assessment and does not constitute a status review under the Act.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

The June 16, 1987, listing rule (52 FR 22933) and subsequent recovery plan (Service 1993, pp. 4–6) list habitat destruction or alteration by domestic livestock, water development (e.g., withdrawal from springs, reservoir construction), trampling by recreationists, road construction, logging, and competition with exotic plants as threats to the species' habitat and range. *Cirsium vinaceum* also has been impacted by off-road vehicles, motorcycles, road maintenance, and other activities (Service 1993, pp. 4–6; Forest Service 2004, pp. 625–629).

Range and Population

The petitioner states that the number of localities and abundance of *Cirsium vinaceum* have increased since it was listed. As discussed above, the petitioner notes that the known distribution of *C. vinaceum* has grown from 20 localities at the time of listing in 1987 to 86 discovered localities by 2003. As noted in the Species Information section above, we now know that flowering adults comprise approximately 10 percent of the total number of plants (USFS 2003). This means that the 350,000 to 400,000 individuals reported in 2003 by the petitioner equate to approximately 35,000 to 40,000 flowering plants. Therefore, the estimated number of flowering plants increased from 10,000 to 15,000 in 1987 to 35,000 to 40,000 by 2003.

Our records indicate that the numbers of *Cirsium vinaceum* localities and individuals presented in the petition through 2003 are accurate. Much of the increase in individual plants is attributable to more intensive survey efforts since 1984 which also resulted in the discovery of several new areas of occupied habitat. There is no doubt that the numbers of documented *C. vinaceum* have grown between the years of 1984 and 2003, the most recent data presented in the petition.

A method to estimate the total number of plants (flowering individuals plus rosette individuals that have not flowered yet) was devised, based on a 1989 count of all rosettes in 4 *Circium vinaceum* localities, which found that the number of rosettes (non-reproductive for that year, but potentially reproductive the following year) was approximately 10 times the number of reproductive plants in the field (Thompson 1991). Using this method, the total number of individual plants has been calculated by multiplying the number of flowering plants by 10 to obtain the number of both non-reproductive rosettes and reproductive individuals. This would amount to an increase from 100,000 to 150,000 total individuals in 1987 to 350,000 to 400,000 total individuals in 2003 (Service 2005, p. 712). In terms of range size, one (Fresnal Canyon) of the

new thistle locations occurs outside the 155-square-mile area that was proposed but never finally designated as critical habitat in the 1984 listing proposal (May 16, 1984, 49 FR 20735). Thus, the overall distribution of the species has increased (Service 2005, p. 698; Sivinski 2007, p. 1). We agree with the petitioner that the numbers of localities and individuals, and the range of the species appears to have increased.

Livestock Grazing

The petitioner claims that the threat of livestock grazing activities has been adequately reduced as a result of herding practices, exclosures (fences to exclude livestock), and livestock inaccessibility due to rough terrain. In addition, the petitioner asserts that the use of exclosures, herding efforts, and natural inaccessibility collectively have satisfied one of the major actions of the recovery plan, which was to ''develop habitat management plans to alleviate threats to the species and ensure permanent protection of at least 75 percent of the known occupied habitats according to steps outlined in the plans.''

To support this conclusion, the petitioner cites the 1993 recovery plan, which mentions that grazing permittees have exerted more effort toward herding, and that many seep and spring habitats are excluded from frequent livestock use by the steepness of travertine ledges (Service 1993). The petitioner further cites the recovery plan and concludes that grazing impacts to the remaining habitats have been sufficiently mitigated as a result of exclosure fences constructed around almost half of all occupied *Cirsium vinaceum* sites recorded for 2003. According to the petition, which cites the Forest Service's 2003 Biological Assessment for the Sacramento Grazing Allotment Management Plan (Forest Service 2003), exclosures have increased *C. vinaceum* numbers for those fenced populations. The petitioner states that the recovered status of the species will be maintained by the installation of additional exclosure fences in the future, as noted in a final environmental impact statement covering the Sacramento grazing allotment (Forest Service 2004a).

At the time of listing, the presence of livestock was recognized as being detrimental to *Cirsium vinaceum* due to trampling and ground disturbance (52 FR 22933, June 16, 1987). Evidence of damage by livestock was based on the notable decrease in numbers of individuals in Lucas Canyon when exposed to excessive grazing prior to listing, and on the substantial increase in *C. vinaceum* at Bluff Springs once the area was fenced (52 FR 22933). Our current understanding of livestock impacts involves the susceptibility of the species to trampling of vulnerable seedlings, rosettes, and flowering stalks, as well as damaging of travertine and soft substrates in occupied and potential habitat (Thomson 1991, pp. 44–52; Service 2004, pp. 62–63). *Cirsium vinaceum* can recover within a few weeks after heavy grazing is reduced or eliminated, and can continue to persist with light grazing if only the foliage and not the central stem is grazed (Forest Service 2003, pp. 53, 59; Service 2005, p. 697). But livestock consumption of flowering stalks and the leaves of rosettes can cause the loss of the entire reproductive output of the plant (Forest Service 2003, pp. 53, 59; Service 2005, p. 697). Thus, in areas that are grazed, *C. vinaceum* experiences direct impacts from livestock trampling and consumption, as well as indirect impacts from ground disturbance, substrate destruction, and rechannelling of water flow (Forest Service 2003, pp. 43–56; Service 2005, p. 697).

Information in our files indicates that fencing around *C. vinaceum* individuals to prevent livestock access has produced an increase in plants in those localities. Currently, exclosures cover approximately 290 acres (ac) (120 hectares (ha)), protecting about half of the occupied habitat from the negative impacts associated with livestock use (Service 2005, p. 698). We agree with the petitioners that exclosures have protected individual plants and habitat from livestock access and destruction.

Habitat Protection

The petitioner states that the objective of the recovery plan to protect 75 percent of known occupied habitat has been met through the success of protecting *Cirsium vinaceum* from grazing through building exclosure fences. A portion of this protection also is afforded by topography, making terrain inaccessible to cattle, notes the petitioner. According to the petitioner, the recovery criterion has been exceeded based on a comparison of known population areas and *C. vinaceum* numbers between 1987 and 2003. Numbers of an estimated 10,000 to 15,000 plants from 20 known localities in 1987 are contrasted with data from 2003 for 350,000 to 400,000 plants. The petitioner links this increase to the fencing of approximately 290 ac (120 ha) of *C. vinaceum* habitat and concludes that the area fenced must have protected at least 75 percent of the known occupied habitats.

Information in our files indicates that the petitioner's claim that the number of populations and range of *Cirsium vinaceum* are greater as of the date when the petition was written than what was known in 1987 is reliable and accurate. A delisting criterion in the recovery plan involves the permanent protection of at least 75 percent of the known occupied habitat (Service 1993, p. 9). Using the most current data presented by the petitioner, the achievement of 75 percent permanent protection for the known *C. vinaceum* occupied habitat area, number of localities, or number of plants would mean that 58 of an estimated 77 acres of occupied habitat, 64 of 86 occupied localities, or 262,500 to 300,000 of 350,000 to 400,000 plants would have to be permanently protected. Although the information presented by the petitioner does not indicate that protection of 75 percent of known occupied habitat has been achieved, it does indicate that the amount of habitat in protected status has increased and that the extent of the threat of disruption or modification of habitat may be reduced.

Water Accessibility

The petitioner maintains that threats of habitat destruction from water development have been reduced adequately by the Forest Service's special-use water permit process, new State legislation, and the implementation of conservation actions in the form of habitat improvement projects recommended in the recovery plan.

The petitioner reports that New Mexico adopted in-stream flow legislation in 2005. From our records, the State of New Mexico enacted in-stream flow legislation in 2005 and then amended it in 2007. This legislation establishes a water reserve based on water donation, purchase, or lease from willing sellers to benefit species that are rare, sensitive, or have small populations (N.M. Stat. Ann. § 72–14–3.3). Use of the water is limited to aquatic or obligate riparian species within a river reach or ground water basin (N.M. Stat. Ann. § 72–14–3.3). The new State statute does provide a mechanism to protect lower drainage habitats of *Cirsium vinaceum* from drying if a strategic water reserve is created, although the legislation does not prevent the diversion of water from isolated montane wetlands or headwater springs, where *C. vinaceum* also occurs, and does not directly establish a ''strategic water reserve'' for the thistle, (N.M. Stat. Ann § 72–14–3.3). Nevertheless, the statute's goals of providing water to obligate riparian

listed species, by creating a ''strategic water reserve'', and avoiding the listing of additional species might be applied to benefit *C. vinaceum* (N.M. Stat. Ann § 72–14–3.3).

The petitioner states that through the issuance of special-use permits, the Forest Service can control the location of a water diversion point in relation to *Cirsium vinaceum* locations near springs. According to the petitioner, the recovery plan recommends water diversion for spring development only at locations downstream of suitable habitat in order to provide necessary water to the species and prevent habitat disturbance (Service 1993). Citing the LRMP Biological Opinion (Service 2005), the petitioner claims that the Forest Service can specify the location of water intake points in special use permits to protect *C. vinaceum* from habitat degradation.

The petitioner believes that water conservation to benefit *Cirsium vinaceum* has been implemented by the Forest Service. Citing the LRMP Biological Opinion (Service 2005), the petitioner describes a riparian improvement project in 2001–02 that supplied former occupied habitat with additional water by allowing drainage under roads in Water Canyon and the Rio Penasco. The petitioner maintains that this project increased water availability to plants, promoted establishment and abundance of the species, and helped to conserve *C. vinaceum*.

At the time of listing, the Service was concerned about the impacts of water development or associated habitat deterioration to *Cirsium vinaceum* individuals. The listing notice mentioned that an unauthorized 1,900 ft (579 m) long pipeline and cement spring box had been constructed at a *C. vinaceum* site, which negatively impacted nearby plants (52 FR 22933, June 16, 1987). These structures impeded water flow to the plant and provided evidence of the sensitivity of *C. vinaceum* to diminishment of its water supply. Just prior to the time of listing, the Bureau of Reclamation had conducted studies of three potential dam and reservoir sites to be used for industrial and domestic water supply in the region (52 FR 22933). Developing any of these water sites was believed to pose a significant threat to *C. vinaceum*. To emphasize the species' requirement of wetland habitat, the Service identified the adoption of in-stream flow legislation and acquisition of water rights as the first delisting criterion for *C. vinaceum* in the recovery plan (Service 1993, p. 9).

As an obligate wetland plant, *Cirsium vinaceum* continues to depend on water availability for its survival. Although the dam and reservoir projects mentioned in the listing notice were not implemented, information from our files indicates that *C. vinaceum* currently is subjected to water loss from natural drought conditions; other factors that can cause a spring to go dry (*e.g.*, rerouting of underground channels); or human impacts, such as spring development or loss of water flow to an occupied site through diversion by roads or trails (Service 1993, pp. 4–5; Service 2004, p. 35). Currently, the region has been under drought conditions since 1999. The length and severity of the drought, and therefore its ultimate impact on *C. vinaceum*, are not known (Piechota et. al. 2004, pp. 303–305). It is likely that the seasonal distribution of yearly precipitation also plays a role in water availability for *C. vinaceum*. Spring desiccation at occupied sites has led to a reduction in the number of individual plants, and in some cases, caused a loss of all plants at previously occupied sites (Forest Service 2003, pp. 35–36). It is unclear how the springs in the Sacramento Mountains would respond to a combination of extended drought and an increase in the level of water withdrawals (*e.g.*, diversions, groundwater pumping).

In summary, the new State legislation provides a mechanism to protect lower drainage habitats of *Cirsium vinaceum* from drying if a strategic water reserve is created (N.M. Stat. Ann § 72–14–3.3). Moreover, the statute's goals of providing water to obligate riparian species by creating a ''strategic water reserve'' might be applied to benefit *C. vinaceum* (N.M. Stat. Ann § 72–14–3.3). Our records indicate that in the State of New Mexico, the land owner reserves the right to determine the point of water diversion (United States v. New Mexico, 438 U.S. 696 (1978)). For populations located on the Lincoln National Forest, the Forest Service has the ability to designate the intake point for water diversion during the special use permitting process in a manner that protects *C. vinaceum* from desiccation. Information from our files supports the petitioner's claim that the Water Canyon and the Rio Penasco road improvement project conserved water and *C. vinaceum* by retaining water and diverting it toward suitable habitat (Service 2005). This retention and influx of water into suitable habitat enabled *C. vinaceum* reoccupation of these sites (Service 2005).

Road Construction, Logging, and Recreation

The petitioner cites information in the recovery plan (Service 1993) to assert that road construction, logging operations, and recreational activities do not threaten the *Cirsium vinaceum* or its habitat at this time. Specifically, the petitioner claims that the Forest Service's policy of maintaining a 200-ft (61-m) buffer region around populations protects *C. vinaceum* during road construction, logging operations, and trail planning (Service 1993). The petition also references a ''no entry area condition on a recent timber sale'' (52 FR 22933, June 16, 1987), in response to minimizing logging threats to *C. vinaceum*. The petitioner provides a quote from the previous 90-day finding highlighting the Service's acknowledgement that logging ''does not currently threaten the thistle'' (71 FR 70479, December 5, 2006). In addressing recreation, the petitioner refers to the recovery plan's mention of a fence that was constructed by the Forest Service prior to 1993 around Bluff Springs and its fragile travertine substrate to re-route foot trails (Service 1993). The Biological Assessment for the Sacramento Grazing Allotment (Forest Service 2003) also is referenced by the petitioner to support the effectiveness of the Bluff Springs exclosure by noting that *C. vinaceum* numbers have increased since the fence was constructed.

At the time of listing, there was concern that ground disturbance from road construction and logging could impact *Cirsium vinaceum* habitats if planning for logging operations did not consider the species (52 FR 22933). In addition, Bluff Springs, an area containing *C. vinaceum*, was also vulnerable to overuse by recreationists (52 FR 22933, June 16, 1987). The listing rule affirms that ''overuse for recreation or any human-caused deterioration of the area around the springs could harm the species'' (52 FR 22933). At present, our information indicates that the Forest Service applies a minimum 200-ft (61-m) protective buffer around *C. vinaceum* occurrences during forest management activities (Service 2002, p. 3; Service 2004, pp. 4–13). The exclosure constructed around Bluff Springs has served to dissuade human use and divert foot traffic from sensitive substrates at Bluff Springs, with a slowly responding increase in *C. vinaceum* numbers at that site as of 2007 (Forest Service 2003, p. 59; 2007 database). Maintenance of the buffers and exclosures appears to be assisting in the recovery of *C. vinaceum*.

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

The petitioner provides minimal information addressing this factor, reiterating that this factor has not been an issue for *Cirsium vinaceum*. The original listing did not cite this factor as significant and a review of information in our files does not suggest that overutilization for commercial, recreational, scientific or educational purposes currently threatens *C. vinaceum*. We agree that this issue may not be applicable to the species at this time.

C. Disease or Predation

Disease is mentioned as being an insignificant threat to *Cirsium vinaceum* in the conclusion of the petition. No information is provided by the petitioner regarding the effects of disease on the species. At the time of listing, there were no known diseases to *C. vinaceum*, and disease was not mentioned in the listing petition. Currently, we have no information in our files suggesting that disease may be a significant threat to the species.

The petitioner states that wildlife and livestock predation or consumption of *Cirsium vinaceum* is not a known threat. The 2004 Biological Assessment for the Southwestern Region is referenced as support for the assertion that wildlife predation is negligible and cattle are the primary grazers of *C. vinaceum* (Forest Service 2004). The petition cites the recovery plan to support its conclusion that threats from grazing have been alleviated by exclosures, inaccessible topography, and herding practices (Service 1993). Based on a Forest Service herbivory (plant consumption) monitoring report, the petitioner claims that livestock consumption of the plants is no longer a substantial threat because livestock herbivory during 1992 led to increases in *C. vinaceum* vigor and population growth in 1993 (Forest Service 1994). The petitioner further reports that there was no evidence of negative effects to *C. vinaceum* from livestock grazing during the years of 1995, 1998, and 2001 (Forest Service 2004). The petitioner suggests that ''a certain amount of herbivory may promote *C. vinaceum* reproduction by causing seeds to shed and by dispersing the seeds'' (p. 27 of the petition) and concludes that herbivory by livestock is not a significant threat to *C. vinaceum*.

At the time of listing, herbivory by livestock was not mentioned as a threat, but trampling of *Cirsium vinaceum* and ground disturbance by livestock were understood to be threats (52 FR 22933, June 16, 1987) (see additional discussion in Factor A above). However, by the time of the recovery plan's publication date, research verified that livestock consumption of *C. vinaceum* caused a reduction in plant rosette size and reproductive output (Service 1993, p. 5). Some thistle localities are protected from livestock access by use of exclosure fencing.

Information in our files indicates that a complex relationship exists among *Cirsium vinaceum*, precipitation, and livestock herbivory; however, overall, plants in grazed areas do more poorly than *C. vinaceum* plants protected from livestock access (Forest Service 2003, pp. 44–51). Still, our data affirm an increase in *C. vinaceum* abundance, detected during the early and mid 1990s for the Forest Service's herbivory report.

D. Existing Regulatory Mechanisms

The petitioner provides documentation of protective regulations in the form of Forest Service regulations, the Lacey Act, New Mexico State law, and a potential post-delisting monitoring process to claim that existing regulations are sufficient to conserve *Cirsium vinaceum* if it becomes delisted. Several regulations under Forest Service jurisdiction are discussed by the petitioner. A Federal regulation protects threatened and endangered species against take in National Forests, which prohibits the damage or removal of plants, including *C. vinaceum* (36 CFR 261.9). The Forest Service's issuance of special-use permits to designate points of water diversion in the Lincoln National Forest is addressed as a means to protect *C. vinaceum* from spring development. Based on the recovery plan, the petitioner mentions that a permit is required to collect plants in *C. vinaceum* localities (Service 1993). The petitioner presents two other species that have received protection from the Sensitive Species program (McKittrick pennyroyal (*Hedeoma apiculatum*) and Tumamoc globeberry (*Tumamoca macdougalii*)), and claims that this program provides an additional regulatory mechanism for *C. vinaceum* protection (58 FR 49244; 58 FR 33562). The petitioner believes that the 200-ft (61-m) buffer around roads, trails, and timber operations described in the recovery plan (Service 1993), along with the standards and guidelines given in the LRMP Biological Opinion (Service 2005), offer direction for actions in the Lincoln National Forest, which further protect *C. vinaceum*.

The petitioner also claims that the Lacey Act provides adequate protection to *Cirsium vinaceum*. According to the petition, the Lacey Act makes importing, exporting, transporting, selling, receiving, acquiring, or purchasing *C. vinaceum* unlawful within or outside of State, National, and international boundaries (16 U.S.C. 3372; Service 1993, p. 6). At the State level, the petitioner asserts that *C. vinaceum* receives protection from the New Mexico State Endangered Plant Species Act. The New Mexico State Endangered Plant Species Act prohibits the take, damage, or sale of listed plants, and requires permits for scientific study (N.M. Stat. Ann. § 19.21.2). The recent in-stream flow legislation is mentioned by the petitioner as another protective regulation for the species in terms of water provisioning (N.M. Stat. Ann § 72–14–3.3). Finally, the petitioner believes that the post-delisting monitoring plan will protect the species because any indication of becoming extinct would trigger the emergency listing process of the Act that would re-list *C. vinaceum* (16 U.S.C. 1533(g)).

At the time of listing, only the Federal regulations at 36 CFR 261.9 prohibiting take of plants from National Forests were in existence (52 FR 22933, June 16, 1987). The other regulations had not been enacted. Currently, under the Act, damage, destruction, removal, possession, transport, or sale of *Cirsium vinaceum* is prohibited on Federal lands (16 U.S.C. 1531 *et seq.*). On State lands, the Act serves to prohibit moving, digging up, cutting, damaging, destroying, transporting, or selling *C. vinaceum*, including instances where trespassing is involved (16 U.S.C. 1531 *et seq.*). Permits may be authorized under specific instances to engage in otherwise lawful activities with *C. vinaceum*.

Information in our files, along with information from the petition, supports the existence of the mentioned regulatory mechanisms for *Cirsium vinaceum* as a listed species. As a delisted species, *C. vinaceum* individuals would continue to be protected by the Lacey Act, if involved in collection, transport, or commerce, as well as the New Mexico State Endangered Plant Species Act, if the plant retains its state status as endangered; however, these laws do not protect *C. vinaceum* habitat. If delisted, *C. vinaceum* could benefit from regulatory protection as a Forest Service sensitive species. We affirm that *C. vinaceum* would be carefully monitored for at least 5 years after delisting to ensure that the species would not be at risk of extinction during that time. If delisted, the post-delisting monitoring plan would likely include thresholds indicating when a status review was warranted.

E. Other Factors Affecting the Species

Citing information from the recovery plan and the LRMP Biological Opinion (Service 2005), the petitioner discusses a lack of evidence indicating that exotic teasel (*Dipsacus sylvestris*) and musk thistle (*Carduus nutans*) are posing threats to *C. vinaceum* via competition. The petitioner acknowledges the ''potential for *C. vinaceum* to become excluded from some of its drier habitats by the invasive teasel,'' which the petitioner quotes from the recovery plan (Service 1993). However, the petitioner also claims that evidence concerning competitive impacts to *C. vinaceum* from interactions with bull thistle (*Cirsium vulgare*), Canada thistle (*Cirsium arvense*), and poison hemlock (*Conium maculatum*) has not been presented. Thus, the petitioner concludes that competition from invasive plants is not an immediate threat to *C. vinaceum*.

At the time of listing, competition with introduced teasel and musk thistle had reduced or eliminated populations of *Cirsium vinaceum* at sites where it had formerly grown or where habitat was still suitable but where invasive plant species were present (52 FR 22933, June 16, 1987). Information in our files indicates that exotic teasel and musk thistle occurrences are being monitored and are found at approximately one-third of the *C. vinaceum* localities (2007 database). At this time we have no information suggesting that competition among *C. vinaceum* and exotic plants is a significant threat. Similarly, we have no information establishing bull thistle, Canada thistle, and poison hemlock as immediate threats to *C. vinaceum*. Information in our files suggests the musk thistle may be serving as a vector for *Rhinocyllus conicus*, the exotic seed head weevil (Sivinski 2007, pp. 6, 13; Gardner and Thompson 2008, p. 1), although future interactions among the musk thistle, weevil, and *C. vinaceum* remain unclear.

Finding

We have reviewed the delisting petition and the supporting documents, as well as other information in our files. We find that the delisting petition and other information in our files present substantial information that threats to *Cirsium vinaceum* may have been reduced and that delisting *C. vinaceum* may be warranted, and we are initiating a status review. Our process for making this 90-day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition presents ''substantial scientific and commercial information,'' which is interpreted in our regulations as ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)).

The petitioner provides a detailed petition that reviews much of the knowledge of *Cirsium vinaceum*, including the natural history, range, and threats. The documents referenced provide substantial information indicating that *C. vinaceum* is more widely distributed throughout several canyon drainages in the Sacramento Mountains area than recorded at the time of listing. The 2003 population data of *C. vinaceum*, the most recent survey data analyzed by the petitioner, indicates that the number of individuals has increased since the time of listing in 1987. Additionally, substantial documentation of the reduction of threats from potential water development, road construction, logging operations, and recreational activities is presented. The petitioner also provides substantial information indicating that additional regulatory mechanisms may now exist that could limit damage to individuals and the development of water in riparian areas.

It is important to note that the ''substantial information'' standard for a 90-day finding is in contrast to the Act's ''best scientific and commercial data'' standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not necessarily mean that the 12-month finding will be warranted.

References Cited

A complete list of all references cited in this notice is available upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this rule are the New Mexico Ecological Services Field Office staff (see **FOR FURTHER INFORMATION CONTACT**).

Authority

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

Dated: October 28, 2008.

Kenneth Stansell,

Acting Director, Fish and Wildlife Service.

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