

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Parts 229, 234, 235, and 236**

[Docket No. FRA-2008-0132, Notice No. 2]

RIN 2130-AC03

**Positive Train Control Systems**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of public hearing.

**SUMMARY:** By notice of proposed rulemaking (NPRM) published on July 21, 2009 ([CITE]), FRA proposed regulations implementing a requirement of the Rail Safety Improvement Act of 2008 that certain passenger and freight railroads install positive train control systems. The proposal includes required functionalities of the technology and the means by which it would be certified. The proposal also describes the contents of the positive train control implementation plans required by the statute and contains the proposed process for submission of those plans for review and approval by FRA. These proposed regulations could also be voluntarily complied with by entities not mandated to install positive train control systems. This document announces a public hearing being conducted in connection with this proceeding.

**DATES:** A public hearing will be held on August 13, 2009, from 9 a.m. to 6 p.m. at the location listed below to provide interested parties the opportunity to comment on the proposals contained in the NPRM.

**ADDRESSES:** (1) *Public Hearing.* A public hearing to provide interested parties the opportunity to comment on the proposals contained in the NPRM will be held at the Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

(2) *Docket Clerk.* Written notification of a party's intent to provide oral testimony at the public hearing should identify the docket number and should be submitted to the FRA Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Ave., SE., RCC-10, Stop 10, Washington, DC 20590 or fax to (202) 493-6068.

**FOR FURTHER INFORMATION CONTACT:** Thomas McFarlin, Office of Safety Assurance and Compliance, Staff Director, Signal & Train Control Division, Federal Railroad Administration, Mail Stop 25, West

Building 3rd Floor West, Room W35-332, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6203); or Jason Schlosberg, Trial Attorney, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W31-217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6032).

**SUPPLEMENTARY INFORMATION:** Interested parties are invited to present oral statements and proffer information and views at the hearing. The hearing will be informal and will be conducted by a representative designated by FRA in accordance with FRA's Rules of Practice (49 CFR 211.25). The hearing will be non-adversarial proceedings; therefore, there will be no cross examination of persons presenting statements or proffering evidence. An FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make a brief rebuttal will be given the opportunity to do so in the same order in which the initial statements were made. Additional procedures, as necessary for the conduct of the hearing, will be announced at the hearing. The purpose of the hearing is to receive oral comments regarding the specific provisions contained in the proposed rule. A transcript of the discussions will be made part of the public docket in this proceeding.

*Public Participation Procedures.* Any person wishing to participate in the public hearing should notify the Docket Clerk by mail or at the address or fax number provided in the **ADDRESSES** section at least five working days prior to the date of the hearing and submit three copies of the oral statement that he or she intends to make at the proceeding. The notification should identify the party the person represents, the particular subject(s) the person plans to address, and the time requested. The notification should also provide the Docket Clerk with the participant's mailing address and other contact information. FRA reserves the right to limit participation in the hearings of persons who fail to provide such notification. FRA reserves the right to limit the duration of presentations if necessary to afford all persons with the opportunity to speak.

Issued in Washington, DC, on July 17, 2009.

**Jo Strang,**

*Associate Administrator for Railroad Safety/Chief Safety Officer.*

[FR Doc. E9-17391 Filed 7-21-09; 8:45 am]

**BILLING CODE 4910-06-P**

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

[Docket No. FWS-R2-ES-2009-0039; MO 922105 0082-B2]

**Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the White-Sided Jackrabbit (*Lepus callotis*) as Threatened or Endangered**

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

**ACTION:** Notice of 90-day petition finding and initiation of status and critical habitat review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the white-sided jackrabbit (*Lepus callotis*) as an endangered species and designate critical habitat under the Endangered Species Act of 1973, as amended. Following a review of the petition, we find the petition provides substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a status review to determine if listing this species is warranted. To ensure that the status review is comprehensive, we are requesting the public to submit scientific and commercial data and other information regarding the white-sided jackrabbit. We will make a determination on critical habitat if and when we initiate a listing action for this species.

**DATES:** We made the finding announced in this document on July 22, 2009. To allow us adequate time to conduct this review, we request that we receive information on or before September 21, 2009.

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

- Federal eRulemaking Portal: <http://www.regulations.gov>. Search for docket FWS-R2-ES-2009-0039 and then follow the instructions for submitting comments.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R2-ES-2009-0039; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

**FOR FURTHER INFORMATION CONTACT:**

Wally "J" Murphy, Field Supervisor, New Mexico Ecological Services Office, 2105 Osuna NE, Albuquerque, NM 87113; by telephone (505-346-2525) or by facsimile (505-346-2542). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Information Requested**

When we make a finding that a petition presents substantial information indicating that listing 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 information on the status of the white-sided jackrabbit. We request information from the public, other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning the status of the white-sided jackrabbit. We are seeking information regarding:

(1) The historical and current status and distribution of the white-sided jackrabbit, its biology and ecology, and ongoing conservation measures for the species and its habitat in the United States and Mexico; and

(2) Information relevant to the factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

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

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting the species' continued existence and threats to it or its habitat.

If we determine that listing the white-sided jackrabbit is warranted, we intend to propose critical habitat to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, with regard to areas within the geographical range currently occupied by the white-sided jackrabbit, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, and

whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the white-sided jackrabbit that are essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat should be proposed for designation if the species is proposed for listing, and why that proposed habitat meets the requirements of the Act.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available." Based on the status review, we will issue a 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your information concerning this status review by one of the methods listed in the **ADDRESSES** section.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If 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>. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

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 requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted.

We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of this finding promptly in the **Federal Register**.

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

On October 15, 2008, we received a petition dated October 9, 2008, from the WildEarth Guardians requesting that the white-sided jackrabbit (*Lepus callotis*) (jackrabbit) be listed as threatened or endangered under the Act. The petitioner requested that we evaluate three potentially listable entities of the jackrabbit: (1) the northern population of the subspecies *L. callotis gaillardia* as a distinct population segment (DPS); (2) the full species *L. callotis* throughout its range; and (3) each of the subspecies of the jackrabbit, which they identified as *L. callotis gaillardia* and *L. callotis callotis*. Additionally, the petition requested that critical habitat be designated concurrent with listing of *L. callotis*, its subspecies, and the northern DPS. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). In a November 26, 2008, letter to the petitioner, we responded that we had reviewed the petition and determined that an emergency listing was not necessary. In that letter, we advised the petitioner that, to the maximum extent practicable, we would address the petition within 90 days. During our review of the petition, we found that the majority of information cited in the petition was not readily available to us. Therefore, on January 13, 2009, we requested that the petitioner provide references. On February 13, 2009, the petitioner provided references. We received a 60-day notice of intent to sue from the petitioner dated January 28, 2009, and on April 15, 2009, the petitioner brought a lawsuit against us for failure to make a decision on the Petition within 90 days of its receipt.

### Previous Federal Actions

The white-sided jackrabbit was first listed as a candidate (Category 2) for Federal listing as either a threatened or endangered species under the Act, in the 1982 Candidate Notice of Review (47 FR 58454, December 30, 1982). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. In the Candidate Notice of Review published on February 28, 1996, we announced a revised list of animal and plant taxa that were regarded as candidates for possible addition to the Lists of Endangered and Threatened Wildlife and Plants (61 FR 7595). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list to reduce confusion about the conservation status of these species, and to clarify that the Service no longer regarded these species as candidates for listing. Because the white-sided jackrabbit was a Category 2 species, it was no longer recognized as a candidate species.

### Species Information

The white-sided jackrabbit is one of four species of hares (Family Leporidae) occurring in New Mexico, including the black-tailed jackrabbit (*Lepus californicus*), which co-occurs with the white-sided jackrabbit (Findley *et al.* 1975). The white-sided jackrabbit can be distinguished from the black-tailed jackrabbit by its extensive white sides and inconspicuous or absent black ear tips (Findley *et al.* 1975, pp. 92, 96; Best and Henry 1993, p. 1).

One of the primary issues presented by the petitioner is related to the taxonomy of the jackrabbit. The petitioner presents information that morphological and genetic data have caused some to question the uniqueness of the subspecies *Lepus callotis callotis* and the subspecies *L. callotis gaillardii* (e.g., InfoNatura 2008). They request that we consider each recognized subspecies for listing, if we find them to be taxonomically valid. Under section 3(16) of the Act, we may consider for listing any species or subspecies of fish, wildlife, or plants, or any distinct population segment of vertebrate fish or wildlife which interbreeds when mature. Thus, in our 12-month finding, should we determine that the species as a whole does not warrant listing, we will evaluate whether any valid subspecies warrants listing. If we

conclude that the subspecies *L. callotis gaillardii* is valid, but does not warrant listing, we will consider whether the northern populations of the subspecies is a valid DPS under our policy (61 FR 4722, February 7, 1996) and, if so, whether it warrants listing. If we conclude that the subspecies *L. callotis gaillardii* is not valid, we will consider whether the northern populations of the full species is a valid DPS and, if so, whether it warrants listing.

The core distribution of the white-sided jackrabbit lies within Mexico (New Mexico Department of Game and Fish (NMDGF) 2006, p. 114). The species historically occurred from southern New Mexico to northern Oaxaca, Mexico, within two distinct geographic areas (Best and Henry 1993, p. 2). One area was located in the southern Animas and Playas valleys of Hidalgo County, south to west-central Chihuahua and north-central Durango, Mexico (Bednarz and Cook 1984, p. 358; Reynolds 1988, p. 1). The other area was from central Durango south across the open plains of the Mexican Plateau to the State of Oaxaca, Mexico (Hall 1981, p. 330). The geographic separation of the two areas occurs on either side of the Rio Nazas, Durango, Mexico; that river marks the dividing line for many subspecies of mammals (Peterson 1976, pp. 496-498). The jackrabbit's range in New Mexico was restricted to about 121 square kilometers (47 square miles) (Bednarz 1977, p. 6; Bednarz and Cook 1984, p. 359). We are unaware of any similar estimate for Mexico. There is no recent information on the amount of habitat occupied by the jackrabbit in either country. Moreover, the white-sided jackrabbit has not been confirmed as extant in Arizona (Cahalane 1939, p. 436), although in 1954, Hoffmeister and Goodpaster reportedly observed what they believed to be white-sided jackrabbits along the west base of the Huachuca Mountains, Cochise County, Arizona (Hoffmeister 1986). Therefore, New Mexico is the only confirmed place in the United States where the species has been documented to occur.

This species is highly elusive. It inhabits predominately well-developed open grasslands that have low shrub density and level terrain, avoiding hills or mountains (Bednarz and Cook 1984, p. 359; Cook 1986, p. 15; Desmond 2004, p. 416). It was reported only a few times after the species was discovered in 1892 along the International Border between the United States and Mexico (Mearns 1895). For example, two animals were collected in the Playas Valley in 1931 and one animal was collected in the Animas Valley in 1974

(Anderson and Gaunt 1962; Bogan and Jones 1975, p. 47; Bednarz 1977, p. 1).

The petitioner provides information indicating that white-sided jackrabbit populations are declining (Bednarz and Cook 1984, p. 360; Mehlhop 1995, pp. 3-10; Traphagen 2002, pp. 4-5). The information in our files is consistent with the population numbers reported in the petition. We judge the information regarding a possible decline in jackrabbit numbers to be substantial and reliable. In 1976, the white-sided jackrabbit was found in New Mexico only in the Animas Valley on the Diamond A Ranch (the Diamond A Ranch includes the lands formerly called Gray Ranch in southwestern New Mexico) and in limited parts of the southern Playas Valley east of the Diamond A Ranch in southern Hidalgo County (Bednarz 1977, pp. 4-5). During investigations conducted between May and August 1976, Bednarz (1977) speculated that the number of white-sided jackrabbits in the Animas Valley was between 250 to 300 individuals. Five years later, surveys in New Mexico revealed that white-sided jackrabbit sightings had decreased to approximately half of the mean reported by Bednarz (Bednarz and Cook 1984, pp. 359-360). The jackrabbit may now be extirpated from the Playas Valley; no observations of the species have been made in this area during recent surveys (Traphagen 2002, p. 5; Frey 2004, p. 22; NMDGF 2006, p. 115). Surveys in Chihuahua, Mexico, also reported low densities of white-sided jackrabbits (Desmond 2004, p. 417). We are unaware of any additional information on population abundance, or any year-round or long-term monitoring data on the white-sided jackrabbit in either the United States or Mexico (see also NMDGF 1997, p. 3). As such, the status of this species remains unclear in both countries.

In the white-sided jackrabbit, females are generally larger than males (Bednarz 1977, pp. 13, 15). In New Mexico, white-sided jackrabbits are observed almost unvaryingly in pairs (Bednarz 1977, p. 9), suggesting that mated animals remain together on a long-term basis. Pair bonds may serve to ensure adequate reproduction, in the context of generally low population density (Bednarz 1977, p. 12). The members of the pair are usually near each other and run together when approached by intruders (Bednarz 1977). Several litters are probably produced each year, with litter size appearing to average 2.2 young (Bednarz 1977). The young tend to have a soft, woolly coat in early life and attain sexual maturity at a rapid rate.

In the United States portion of its range, the white-sided jackrabbit appears to be found only in association with grasslands (Bednarz 1977, p. 6). Plants commonly found in areas inhabited by this species in the Animas and Playa valleys of New Mexico include *Bouteloua gracilis* (blue grama), *B. eriopoda* (black grama), *Hilaria mutica* (tobosa), *Buchloe dactyloides* (buffalo grass), *Lycurus phleoides* (wolftail), *Muhlenbergia torreyi* (ring muhly), *Cyperus* spp. (flatsedges), *Gutierrezia sarothrae* (snakeweed), *Yucca elata* (soap tree yucca), and *Prosopis glandulosa* (honey mesquite) (Bednarz and Cook 1984, pp. 358-359; Mehlhop 1995, p. 15; Moore-Craig 1992, p. 4). More than 97 percent of all observations of this species have been in pure grasslands and less than 3 percent in grasslands with varying amounts of forbs (flowering herbs) and shrubs (Bednarz and Cook, 1984). In New Mexico, white-sided jackrabbits feed primarily on *B. gracilis*, *B. dactyloides*, *B. eriopoda*, *L. phleoides*, and *M. torreyi* (Bednarz 1977, pp. 14, 16).

Although the white-sided jackrabbit shares its range with the black-tailed jackrabbit, the two generally occupy different habitats, with white-sided jackrabbit found in areas of pure grassland and the black-tailed generally found in areas dominated by shrubs (Bednarz 1977, p. 17; Bednarz and Cook 1984, p. 359-360; Desmond 2004, p. 417).

The white-sided jackrabbit constructs and uses forms (scrapes or depressions in the ground). Forms provide jackrabbits with concealment and protection. The form is usually located in clumps of grass and surrounded by dense stands of *Hilaria mutica* (Bednarz 1977, p. 16). Daytime observations of white-sided jackrabbits are uncommon, as the species is primarily nocturnal (Bednarz 1977, pp. 6-11; Best and Henry 1993, p. 5). Although many species of jackrabbit and hare are considered pests because they may damage crops, fields, and orchards, the white-sided jackrabbit is not known to depredate crops.

#### Five-Factor Evaluation

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

overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In making this 90-day finding, we evaluated whether information on threats to the white-sided jackrabbit, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

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

The petition asserts that current and historic grazing practices and suppression of wildfire threaten the jackrabbit because they have led to shrub encroachment into grasslands. The petitioner correctly asserts that the jackrabbit is found only in association with well-developed, high-elevation (greater than 1,460 meters (4,800 feet)) Chihuahuan desert grasslands, characterized by flat topography and few shrubs and forbs (Bednarz 1977). Moreover, the petitioner claims that declines in grassland health, indicated by increases in shrub and forb cover, cause populations of white-sided jackrabbit to decrease while populations of black-tailed jackrabbit increase. The petitioner states that this change in grassland vegetation is especially apparent in the Playas Valley, Hidalgo County, where the white-sided jackrabbit may have been recently extirpated (Traphagen 2002, pp. 5, 11; NMDGF 2006, p. 4). The petitioner indicates that little is known about the specific habitat associations of the white-sided jackrabbit in Mexico, but it appears to also inhabit high-elevation grassland similar to that used by the species in New Mexico.

The NMDGF's 2006 biennial review of State threatened and endangered species identifies the loss and degradation of grassland habitat through drought, shrub encroachment, and changes in grass composition as the primary threat to the white-sided jackrabbit in New Mexico (NMDGF 2006, p. 115). Numerous sources substantiate that past range-management practices have contributed to the degradation of desert grasslands or their conversion to shrublands (National Museum of Natural History 2008, p. 1; Bednarz and Cook 1984, p. 360; Desmond 2004, p. 417; NatureServe 2008, p. 2; USDA Forest Service 2007, p. 15; Service 2008,

p. 53). Bednarz and Cook (1984, p. 360) postulated that numbers of white-sided jackrabbit had decreased in New Mexico as the density and vigor of grasses declined, while black-tailed jackrabbits and desert cottontail (*Sylvilagus audubonii*) numbers increased in response to an increase in woody shrubs. Desmond (2004, p. 417) reported a similar pattern from Chihuahua, Mexico, where she found that increased shrub encroachment into grasslands negatively affected populations of white-sided jackrabbits (Desmond 2004, p. 417). It is likely that the increase in shrub cover has occurred through a combination of fire suppression policies, drought, and intense livestock grazing during the late 1800s and early 1900s, which were the key causes of the replacement of grasslands by shrublands (Malpai Borderlands Habitat Conservation Plan Technical Working Group 2008, p. 18; Traphagen 2002, p. 12).

Citing Brown (1994), the petition asserts that the primary cause of loss and degradation of grasslands in the Chihuahuan Desert is overgrazing by cattle. Overgrazed grassland is susceptible to invasion by shrubs and forbs, a cover type which greatly favors the black-tailed jackrabbit (Baker 1977, pp. 222-223; Bednarz and Cook 1984, pp. 359-360; Desmond 2004, p. 417; Moore-Craig 1992, p. 13; NMDGF 2006, p. 115). Areas where white-sided jackrabbits historically or currently occur have been continuously grazed for over a century (Traphagen 2002). We will explore overgrazing more thoroughly in our 12-month finding for the jackrabbit.

The petitioner claims that wildfire suppression is a cause of grassland degradation. We have information in our files to substantiate that fire exclusion has led to encroachment of shrubs into the grassland habitat of the white-sided jackrabbit. For example, Humphrey (1958, p. 245) believed fires were the controlling factor that kept shrubs from invading the desert grasslands in southeastern Arizona and southwestern New Mexico. The Bureau of Land Management (BLM) came to a similar conclusion for the region of southwestern New Mexico where the white-sided jackrabbit historically occurred (BLM 2009, pp. 1-3). Alternatively, Valone *et al.* (2002, p. 563) reported that two fires in 5 years did not result in high levels of mortality to woody shrubs such as *Prosopis glandulosa* (mesquite) on the Diamond A Ranch, Hidalgo County, which is within the range of the jackrabbit. Based on this information, we find that the petition and other readily available

information in our files support the claim that fire exclusion may have led to the degradation of grasslands inhabited by the jackrabbit.

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

We have evaluated the petition and readily available information in our files and find substantial information indicating that listing the species throughout its range may be warranted due to the present or threatened destruction, modification, or curtailment of the habitat or range of the white-sided jackrabbit. We find that substantial information was presented that shrub encroachment into grassland fostered by current and historic grazing practices, drought, and fire exclusion may threaten the species.

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

The petitioner identifies hunting of the white-sided jackrabbit for sport and food as an ongoing threat to the species. The petition reports that the species has been commercially hunted in Mexico and is considered a non-game species that is hunted in New Mexico, and thus is not protected by State game laws. Matson and Baker (1986, p. 41) indicated that the species was heavily hunted and considered highly edible. Reynolds (1988) also reported that white-sided jackrabbits were commonly hunted in some of the grasslands of Mexico. The species was historically hunted for commercial markets in Mexico (Leopold 1959, p. 349). Thus, hunting may have played a role in the decline of the white-sided jackrabbit in Mexico (Moore-Craig, 1992, p. 13). While all of the citations in the petition that document that the species was hunted in Mexico are over 20 years old, we do not have information indicating that hunting of the jackrabbit in Mexico has ceased. However, information in our files indicates that the species is not currently hunted in New Mexico. The white-sided jackrabbit is currently protected under the New Mexico Wildlife Conservation Act and may not be hunted (NMDGF 2008, p. 10). The petitioner does not detail ongoing or future impacts to the species from hunting in the United States.

The petition claims that the white-sided jackrabbit is currently subject to animal damage control programs, and cites the NMDGF in saying that some white-sided jackrabbits are known to have been killed by gunners and trappers. The NMDGF (1985, p. 2) stated that some white-sided jackrabbits have

been lost to “gunners and trappers,” but provided no further information. This may be referring to Federal or State animal damage control agents. We have information in our files that the U.S. Department of Agriculture (USDA) reported that jackrabbits (*Lepus* spp.) have been taken in New Mexico as part of their animal damage control program (USDA APHIS 1994, Appendix H, pp. 18-19). The petitioner does not describe current or future plans for lethal control of any white-sided jackrabbits or quantify the amount that may have taken place historically through either the USDA or the general public. Therefore, neither information in our files nor the literature cited by the petition supports the petitioner’s claim that the white-sided jackrabbit is currently subject to animal damage control programs by methods such as trapping or shooting, or is likely to be in the future.

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

The petition provides substantial information that hunting of the white-sided jackrabbit has been, and may continue to be, a threat to its populations in Mexico. Therefore, we find that the petition presents substantial information indicating that the petitioned action may be warranted due to overutilization.

#### C. Disease or Predation

The petitioner cites Bednarz (1977) in indicating that a lung infection has been observed in white-sided jackrabbits, but no serious diseases were noticed. Moore-Craig (1992, p. 11) noted that the infections found by Bednarz (1977) were all of a minor nature, and the overall health of the jackrabbit population appeared to be fair to good. Tularemia, a common disease among black-tailed jackrabbits, has not been found in the white-sided jackrabbit (Moore-Craig 1992, p. 11). The petition also notes that a wide variety of predators exists in the southern Animas Valley, New Mexico. It is likely that predation occurs on white-sided jackrabbits, since native predators occur within the range of both subspecies. However, the petitioner provided no data to support predation as an impact to populations of the jackrabbit.

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

We have no information in our files indicating that the petitioned action may be warranted due to disease or predation. Therefore, we find that the

petition does not provide substantial information that listing the white-sided jackrabbit due to disease or predation may be warranted.

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

The petitioner asserts that existing regulatory mechanisms do not provide any protections for the species and have been ineffective in mitigating many of the threats. The petitioner states that the species’ ranking in NatureServe is G3 (vulnerable) and its National and State Status rankings are N1S1 (critically imperiled). Its status under the International Union for Conservation of Nature and Natural Resources is near threatened. We reviewed these designations and find the petitioner’s claims to be accurate. However, these lists are not regulatory mechanisms; they serve only to notify the public of the species’ status; no conservation or management actions are required; no regulatory authority for species conservation is established through these listings.

The petitioner states that the Malpai Borderlands Habitat Conservation Plan (MBHCP) does not reliably assure protection to the jackrabbit on private lands in New Mexico. The apparent basis of this position is that the Service willingly issued an incidental take permit on private lands to the Malpai Borderlands Group for the MBHCP. The petitioner also contends, based upon observed degradation of grassland habitat and declines in the jackrabbit population, that the Malpai Borderlands Group is not fulfilling its stated mission to restore and maintain natural processes that support diverse and flourishing animal life in the borderlands region, which includes the Diamond A Ranch in southern Hidalgo County, and is within the range of the white-sided jackrabbit in the United States. The petition does not provide information that documents the extent, magnitude, or immediacy of the perceived inadequacies of the MBHCP or how they threaten the white-sided jackrabbit in New Mexico.

The white-sided jackrabbit was listed as threatened by the State of New Mexico on January 24, 1975. This designation provides the protection of the New Mexico Wildlife Conservation Act, which prohibits direct take of the species except under issuance of a scientific collecting permit. However, this only conveys protection from collection or intentional harm.

Although the State of New Mexico statutes require the NMDGF to develop a recovery plan that will restore and maintain habitat for the species, the

species does not have a finalized recovery plan, conservation plan, or conservation agreement (NMDGF 2006a, p. 430). As such, existing State of New Mexico regulatory mechanisms are currently inadequate to protect the jackrabbit. As discussed above under Factor A, we find that the petition presents substantial evidence of threats to the species from grassland degradation, and we thus find that the petition presents substantial evidence that the inadequacy of existing regulatory mechanisms to prevent further grassland degradation or to recover grasslands may threaten the white-sided jackrabbit as well.

The white-sided jackrabbit is on the Regional Forester's Sensitive Species List for the Coronado National Forest (USDA Forest Service 2007, p. 15). However, we found no information in our files to substantiate that the jackrabbit is present on any public lands in New Mexico. Moreover, the petition asserts that the jackrabbit is only found on private lands in New Mexico. If the species is found on National Forest System lands, the US Forest Service (USFS) is required to analyze the impacts any proposed actions may have on the jackrabbit in all applicable National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) documents. On April 21, 2008, a new USFS planning rule (73 FR 21468) was made final. The USFS's new planning rule indicated that once a USFS land and resource management plan has been revised, the sensitive species designation will no longer be needed because species of concern (listed, proposed, or candidate species under the Act) or species of interest will replace them. Since the occurrence of the jackrabbit on the Coronado National Forest is uncertain, the petition and information in our files do not contain substantial information that the jackrabbit is faced with current and future threats on Forest Service lands.

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

Neither the petition nor our files provide information about existing regulatory mechanisms for the species in Mexico, which contains the majority of the current range of the white-sided jackrabbit. As such, we have no information that the lack of regulatory mechanisms in Mexico is affecting the continued existence of the white-sided jackrabbit. We intend to assess this factor more thoroughly during our status review of the species.

As noted above, the jackrabbit receives no protection from the

NatureServe or International Union for Conservation of Nature and Natural Resources designations, as these lists serve only to notify the public of the species' status rather than requiring any conservation or management actions; these listings do not impact either adequacy or inadequacy of regulatory mechanisms, since they are not regulatory in nature.

The petitioner does provide substantial information that the white-sided jackrabbit's status as a State-listed threatened species in New Mexico confers little regulatory protection (except against direct take). Therefore, we find that the petition presents substantial information that the petitioned action may be warranted due to the inadequacy of existing mechanisms in the United States.

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

The petition cites non-point source habitat change as a threat to the jackrabbit, suggesting that no single factor (e.g., grazing, fire suppression, shifting rainfall patterns, or increased atmospheric carbon dioxide levels) has led to the encroachment of shrubs into the grasslands. We find the information cited to be generic in nature and not specific to the white-sided jackrabbit or its habitat beyond the discussion under Factor A above.

The petitioner states that climate change and drought threaten the white-sided jackrabbit under Factor E. The petitioner cites a variety of sources in the body of the petition to support the claim regarding climate change and drought and their relation to the persistence of the jackrabbit, but did not provide any of these to us. Much of this information is not readily available to us. There is uncertainty over how climate change will affect the jackrabbit and its habitat. The petition claims that climate change will likely cause a deterioration of grassland habitat in New Mexico and the Chihuahuan Desert region. Further, the petitioner asserts that information indicates that the impact of drought and climate change have been implicated as influencing shrub encroachment into grasslands. Information readily available to us supports the petitioner's assertion that climate change might contribute to more frequent and intense drought within the U.S. and northern Mexico portion of the range of the jackrabbit (Seager *et al.* 2007, pp. 1181-1182). We will review the possible effects of climate change on the white-sided jackrabbit more thoroughly in our status review.

The petitioner reports a case of a New Mexico rancher finding several dead white-sided jackrabbits while eradicating mustard plants. Bednarz (1977) suggests that this mortality may have been caused by the jackrabbits' consumption of mustard plants and ensuing nitrate poisoning. Consumption of mustard plants is known to cause nitrate poisoning in cattle, and Bednarz (1977, p. 18) cites it as likely having the same effect on jackrabbits. No other information or support was provided by the petition, nor is there any information readily available to us that provides substantial information that food poisoning threatens the jackrabbit now or in the foreseeable future. The potential for jackrabbit mortality due to food poisoning merits further investigation during our status review of the species.

The petition asserts that road-killed white-sided jackrabbits have been found in the past. Nevertheless, the petition does not claim this is a threat to the species. Moore-Craig (1992, p. 16) found that occasionally white-sided jackrabbits are killed by vehicles. Traphagen (2009, p. 1) also noted that white-sided jackrabbits have been reported road-killed recently, likely from an increased presence of Border Patrol vehicles in New Mexico. Bednarz (1977, p. 18) reported that, even though fieldworkers were constantly looking for road-killed white-sided jackrabbits during a study, the species was rarely observed on the roads and tended to avoid approaching vehicles. The NMDGF (1997, p. 4) found that impacts from this type of mortality are unknown, but probably do not represent a significant threat to the species. Based on this review, the petition and information readily available to us do not provide any substantial information to support that vehicle collisions represent a threat to the white-sided jackrabbit currently or in the foreseeable future.

The petition notes that Smith (1999, p. 1) observed a white-sided jackrabbit's behavior in response to an approaching wildfire, but does not claim this is a threat to the species. The petitioner does not present specific information that the wildfire Smith (1999) observed resulted in losses of the white-sided jackrabbit. We acknowledge that the active fire management program in the Malpai Borderlands area may affect the white-sided jackrabbit. Effects during fire management may include mortality or injury of individuals as a result of direct exposure to fire, smoke inhalation, and crushing by the tires or tracks of vehicles used in fire management activities (Service 2008, pp. 64-65). We

believe that the jackrabbit is capable of surviving such fire effects by running away (Service 2008, p. 64). We find prescribed burns may also expose white-sided jackrabbits to higher rates of predation, but also allow for easier detection of terrestrial predators (Service 2008, p. 65). The effects of a prescribed burn would likely be short-term, because the fire-adapted grassland community usually responds quickly, with plant species showing regrowth within several days post-fire.

Nevertheless, a reduction of shrubs would benefit the white-sided jackrabbit by improving grassland habitat. Although the MBHCP will likely result in short-term adverse effects to the jackrabbit, the long-term effects will improve the grassland community used by white-sided jackrabbits by reducing the shrub component, providing additional suitable habitat, and improving the area around occupied habitat for potential expansion; thus, implementation of the MBHCP, including the fire management program, should promote the conservation of the white-sided jackrabbit. For these reasons, we found no data or substantial information to indicate that wildfires or prescribed burns threaten white-sided jackrabbits or their habitat.

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

We reviewed the petition, supporting information, and the information readily available to the Service and find the petition does not present any additional substantial information that any natural or manmade factors other than those discussed above for Factors A, B, and D may affect the white-sided jackrabbit's continued existence.

#### Finding

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (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. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**.

Our 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)). We have reviewed the petition and the available literature cited in the petition, and evaluated the information to determine whether the sources cited support the claims made in the petition. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. As described in our Five-Factor Evaluation, above, the petition presents substantial information indicating that listing the white-sided jackrabbit throughout its entire range may be warranted based on Factor A (present or threatened destruction, modification, or curtailment of the species' habitat or range), Factor B (overutilization for commercial, recreational, scientific or educational purposes), and Factor D (inadequacy of existing regulatory mechanisms). Based on our Five-Factor Evaluation (above), the petition does not present substantial information indicating that Factor C (disease or predation) or Factor E (other natural or manmade factors affecting the species' continued existence) is currently, or in the future will be, a threat to the white-sided jackrabbit.

Based on this review and evaluation, we find that the petition has presented substantial scientific or commercial information that listing the jackrabbit throughout all of its range may be warranted due to current and future threats under Factors A, B, and D. We also find that the petition presented substantial information that the northern populations of the species may be a valid DPS and may warrant listing. Therefore, we are initiating a status review to determine whether listing the jackrabbit under the Act is warranted. As part of our status review, we will examine whether the full species, subspecies, or the petitioned northern DPS of the jackrabbit warrants listing under the Act. We will issue a 12-month finding as to whether any of the petitioned actions is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information regarding the jackrabbit.

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 positive 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a positive 90-day finding does not mean that the 12-month finding also will be positive.

The petitioner requested that critical habitat be designated for this species. If we determine in our 12-month finding that listing the jackrabbit is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking.

#### References Cited

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

#### Author

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

#### Authority

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

Dated: July 14, 2009.

**James J. Slack,**

*Acting Deputy Director, Fish and Wildlife Service.*

[FR Doc. E9-17449 Filed 7-21-09; 8:45 am]

**BILLING CODE 4310-55-S**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Parts 21 and 22

[FWS-R9-MB-2009-0002; 91200-1231-9BPP]

RIN 1018-AW44

#### Migratory Bird Permits; Changes in the Regulations Governing Falconry

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, published a final rule in the **Federal Register** on October 8, 2008, to revise our regulations governing falconry in the United States.