subparagraphs (i) through (iv) as (1) through (4).

§ 139.317 [Corrected]

■ 8. On page 6431, in column 3, on line six of § 139.317(k), add the date, ''June 9, 2004'', at the end of the sentence after the word ''after''.

§ 139.319 [Corrected]

■ 9. On page 6432, in column 1, on line three of § 139.319(g)(3), correct the reference ''(h)(1)'' to read ''(g)(1)''.

Issued in Washington, DC, on, May 27, 2004.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

[FR Doc. 04–12615 Filed 6–1–04; 12:58 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AJ85

Board of Veterans' Appeals: Rules of Practice—Motions for Revision of Decisions on Grounds of Clear and Unmistakable Error: Advancement on the Docket

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document affirms the interim final rule amending the Rules of Practice of the Board of Veterans' Appeals (Board) relating to challenges to Board decisions on the grounds of ''clear and unmistakable error'' (CUE). The amendment provides for advancing CUE motions on the docket.

DATES: *Effective Date:* This final rule is effective June 4, 2004.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 ((202) 565–5978).

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on September 12, 2003 (68 FR 53681), we published an interim final rule with request for comments, which amended the Board's Rule of Practice 1405(a) (38 CFR 20.1405(a)). Rule 1405(a) requires that motions challenging decisions of the Board on the grounds of CUE be decided in accordance with their place on the Board's docket. While appeals are subject to the same requirement, 38 U.S.C. 7107(a)(1), we noted that both section 7107(a)(2) and its implementing regulation provide for earlier consideration of appeals if good cause is shown. 38 CFR 20.900(c) (Rule 900(c)). Rule 900(c) sets forth the good cause reasons for advancing an appeal on the Board's docket and the requirements for filing a motion to advance an appeal on the docket. However, because CUE motions are not appeals, and thus not subject to the various rules relating to appeals, we realized there was no regulatory provision for advancing CUE motions.

We therefore amended Rule 1405(a) to provide that a CUE motion may be advanced on the docket subject to the substantive and procedural requirements of Rule 900(c). We asked interested parties to submit comments on or before October 14, 2003. We received no comments. Based on the rationale noted above and as set forth in the interim final rule, we are adopting the interim final rule as a final rule without change.

Administrative Procedure Act

This document affirms without any changes an interim final rule that is already in effect. Accordingly, we have concluded under 5 U.S.C. 553 that there is good cause for dispensing with a delayed effective date based on the conclusion that such procedure is impracticable and unnecessary.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This final rule would have no such effect on State, local, or tribal governments, or the private sector.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule affects only the processing of claims by VA and does not affect small businesses, to include law firms. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Approved: April 22, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

Accordingly, the interim final rule amending 38 CFR part 20 which was published at 68 FR 53681 on September 12, 2003 is adopted as a final rule without change.

[FR Doc. 04–12625 Filed 6–3–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to Delist Astragalus magdalenae var. peirsonii (Peirson's Milk-vetch)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) announce a 12-month finding for a petition to delist *Astragalus magdalenae* var. *peirsonii* (Peirson's milk-vetch) under the Endangered Species Act (Act) of 1973, as amended, (16 U.S.C. 1531 *et seq.*). After reviewing the best scientific and commercial information available, we find that the petitioned action is not warranted. We ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the species. This information will help us monitor and encourage the conservation of this species.

DATES: The finding announced in this document was made on May 28, 2004. Although no further action will result from this finding, we request that you submit new information concerning the status of, or threats to, this species, whenever it becomes available.

ADDRESSES: The complete file for this finding is available for inspection, by appointment, during normal business hours, at Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92009. Submit new information, materials, comments, or questions concerning this plant to us at the above address.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish

and Wildlife Office; telephone (760–431–9440).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Act requires that within 12 months after receiving a petition to revise the List of Threatened and Endangered Species that contains substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings: (a) The petitioned action is not warranted, (b) the petitioned action is warranted, or (c) the petitioned action is warranted but precluded by pending proposals. Such 12-month findings are to be published promptly in the **Federal Register**.

The Peirson's milk-vetch was listed as threatened on October 6, 1998 (63 FR 53596). At the time of listing, the primary threat to the milk-vetch was the destruction of individuals and dune habitat from off-highway vehicle (OHV) use and the recreational development associated with it. On October 25, 2001, we received a petition to delist *Astragalus magdalenae* var. *peirsonii* dated October 24, 2001, from David P. Hubbard, Ted J. Griswold, and Philip J. Giacinti, Jr. of Procopio, Cory, Hargreaves & Savitch, LLP, that was prepared for the American Sand Association (ASA), the San Diego Off-Road Coalition, and the Off-Road Business Association (ASA *et al.* 2001). On September 5, 2003, we announced an initial petition finding in the **Federal Register** that the petition presented substantial information to indicate the petitioned action may be warranted (68 FR 52782). In accordance with section 4(b)(3)(A) of the Act, we have now completed a status review of the best available scientific and commercial information on the species, and have reached a determination regarding the petitioned action. This determination meets deadline requirements established by a court-approved settlement agreement (*ASA et. al.* v. *USFWS and Gale Norton*, Stipulated Settlement Agreement, Civ. No. 03–315L LAB).

Species Description

Astragalus magdalenae var. *peirsonii* is an erect to spreading, herbaceous, short-lived perennial in the Fabaceae (Pea family) (Barneby 1959, 1964). Plants may reach 8 to 27 inches (20 to 70 centimeters) in height and develop taproots (Barneby 1964) that penetrate to the deeper, moister sand. According to Phillips and Kennedy (2003), plants largely die back to a root crown in the summer. The stems and leaves are covered with fine, silky appressed hairs. Young seedlings often retain their cotyledons (Phillips and Kennedy 2003). The leaflets, which may fall off in response to drought, are small and widely spaced, giving the plants a brushy appearance. This taxon is unusual in that the terminal leaflet is continuous with the rachis rather than articulated with it. The purple flowers are arranged in 10- to 17-flowered axillary racemes. Romspert and Burk (1979) found inflorescences present from December through at least April. *Astragalus lentiginosus* var. *borreganus,* easily distinguished by its conspicuously broad leaflets, and *Astragalus insularis* var. *harwoodii,* easily distinguished by its smaller stature and shorter banner petals, are the only other *Astragalus* taxa found nearby.

Life History

Astragalus magdalenae var. *peirsonii* has variously been considered an annual or perennial (Munz 1932, 1974; Barneby 1959, 1964; Spellenberg 1993; Willoughby 2001). Willoughby (2001) states that *A. m.* var. *peirsonii* apparently is a short-lived perennial, and as such its response to rainfall was predictable. Documented persistence of individuals also attests to the perennial nature of *A. m.* var. *peirsonii* (Phillips and Kennedy 2002, 2003). The onset of germination may occur anytime between the beginning of January and the end of February (Porter *in litt.* 2003b). Plants are reportedly in flower from as early as mid-November through May (Barneby 1965; Porter *in litt.* 2003b; Phillips and Kennedy 2002).

As part of his studies of the natural history and pollination biology of *Astragalus magdalenae* var. *peirsonii,* Porter (*in litt.* 2002a) has identified a white-faced, medium-sized, solitary bee as the only effective pollinator. His preliminary experiments in the field and under greenhouse conditions indicate that *A. m.* var. *peirsonii* plants are not capable of self-pollination in the absence of pollinators. This is a significant consideration for population structure and function. Large populations of standing individuals are likely necessary to provide adequate numbers of individuals for cross pollination and to ensure adequate seed set.

Based on current understanding of the species' life history, sufficient rain in conjunction with wetter-than-average fall weather appears to trigger germination events. Seedlings may be generally present in suitable habitat throughout the dunes, especially during above-normal precipitation years. In intervening drier years, plant numbers decrease as individuals die and are not replaced by new seedlings. The species likely depends on the production of seeds in the wetter years, and the persistence of the seed banks from all years, to persist until appropriate conditions for production and germination occur. Further research and modeling are necessary to better understand the dynamics of this system and how the species may be responding to natural and man-made disturbances within its range. As one of the peer reviewers noted, this species has a complex life history, and while it can act as a perennial, it is more apt to behave as an annual (McCue, 2003).

The relative contribution of first-year plants of Peirson's milk-vetch to the seed bank and survival of the taxon is not fully understood. The available data suggest that older age classes may produce substantially more seeds than first-year plants and that, therefore, the older persisting plants may be more important for reproductive success (Phillips and Kennedy 2002, Romspert and Burk 1979). Phillips and Kennedy (2002) reported that the older plants produced a mean of 171 fruits per plant, compared to an estimated 5 fruits per each younger plant in the earlier spring survey. Romspert and Burk (1979) state that Peirson's milk-vetch plants that become reproductive the first season do not contribute a great deal to the seed bank, but that mature plants produced copious amounts of seeds.

In desert plants, the majority of seedlings may die off at the onset of the dryer season as noted by previous reports. Pavlik and Barbour (1988) studied the establishment and survivorship pattern of *Astragalus lentiginosus* var. *micans,* another dune endemic plant, and recorded a complete crash of the 1984–1985 seedling cohort. These authors also reported that 54 percent of the 1985–1986 cohort of seedlings survived. However, none of these plants reached reproductive maturity within the year. Thus, a large or very large number of seedlings of Peirson's milk-vetch may succumb prior to producing and dispersing seeds. Peirson's milk-vetch populations must then rely on the cumulative seed bank, not the seed production of a single year even if germination was high. This demonstrates the need for long-term analysis of the population dynamics of this plant to adequately assess adaptive management concerns and recovery actions.

Seed Biology

The fruits of Peirson's milk-vetch are 0.8 to 1.4 in (2 to 3.5 cm) long, one chambered, hollow, and inflated.

Peirson's milk-vetch fruits contain 11 to 16 large, flattened black seeds. The seeds, among the largest seeds of any *Astragalus* in North America (Barneby 1964), average less than 0.1 ounces (oz) (15 milligrams (mg)) each in weight and are up to 0.2 in (4.7 millimeters (mm)) in length (Bowers 1996). Seeds are either dispersed locally by falling out of partly opened fruits on the parent plant, salt-shaker style, or by their release from fruits blown across the sand after falling from the parent plant. Seeds require no pre-germination treatment to induce germination, but show increased germination success when scarified (outer cover is broken). Porter (*in litt.* 2002a) reported about 98 percent of scarified seeds germinated while only 21 percent of unscarified seeds germinated. In germination trials conducted by Romspert and Burk (1979), 92 percent or more seeds germinated within 29 days at temperatures of 77 °F (25 °C) or less, and no seeds germinated at temperatures of 86 °F (30 °C) or higher. This indicates that seeds on the dunes may likely germinate in the cooler months of the year. Porter (*in litt.* 2002a) reported that, under greenhouse conditions, seed germinated within 5 days of sowing. In the same report, Porter identified the primary dormancy mechanism in Peirson's milk-vetch is the impermeability of the seed coat to water. He demonstrated little loss of viability in seeds stored for three years, consistent with species having a seed bank (Given 1994). Dispersed seeds that do not germinate during the subsequent growing season become part of the seed bank (Given 1994). Romspert and Burk (1979) noted that older plants were the primary seed producers, and plants that become reproductive in the first season do not make significant contributions to the seedbank. Considering statements by Phillips and Kennedy (2002) that plants in early 2001 were estimated to produce 5 fruits per plant compared to 171 counted in a small sample of older plants that year, it is likely that older plants are important contributors to the seed bank and survival of Peirson's milk-vetch.

In a given year, an annual or short-lived species can fluctuate between large numbers of plants to few or even no plants. Many species, and Peirson's milk-vetch may be one of them, have periodic ''rescue'' episodes from the seed bank where large flushes appear when germination conditions are suitable (Elzinga *et al.* 1998). To the extent that plants are precluded from adding seeds to the seed bank by being eliminated by summer drought, herbivory, and OHV impacts, these individuals cannot be expected to contribute to the reproductive success of Peirson's milk-vetch. Development of a seed bank and associated dormancy allows plant species to grow, flower, and set seed in years with most favorable conditions (Given 1994). When measuring seed bank dynamics, to determine the viability and productivity of a seed bank, it is considered necessary to estimate the rate of seed mortality and aging, the amount of seed removed by predators, and the variability in germination events are among the factors considered necessary (Elzinga *et al.* 1998).

Distribution and Habitat

Astragalus magdalenae var. *peirsonii* is reported from northeastern Baja California, Mexico (Barneby 1959, 1964; WESTEC 1977; Spellenberg 1993), and has been verified in the Gran Desierto of Sonora, Mexico (Felger 2000). In the United States, this plant is restricted to about 53,000 acres (21,500 hectares) in a narrow band of the central portion of the Algodones Dunes of eastern Imperial County, California, which are one of the largest dune fields in North America. The Algodones Dunes are often referred to as the Imperial Sand Dunes, a designation derived from their inclusion in the Imperial Sand Dunes Recreation Area (ISDRA) established by the Bureau of Land Management (BLM). Nearly all lands in the Algodones Dunes are managed by the BLM. However, the State of California and private parties own small inholdings in the dune area. Approximately 52,780 ac (21,359 ha) of the 185,000 acre ISDRA have been proposed as critical habitat for *A. m.* var. *peirsonii* (68 FR 46143).

The western boundary of the dunes is marked by a series of parallel, longitudinal southeast trending ridges. The northern third of the dunes is narrow, about 2 mi (3 km) wide, and increases in elevation from 200 to 300 feet (ft) (60–91 meters (m)) in the northern portion to 300 to 400 ft (91 to 121 m) in the southern portion north of Highway 78. Areas in the central portion of the dunes reach an elevation 500 ft (152 m) south of State Highway 78, but reach elevations of only 200 ft (60 m) for most areas just north of Interstate 8. The central portion of the dunes is wider, about 5 mi (8 km), and is characterized by deep bowls (hollows among the dunes) and slip faces (areas so steep that the loose sand naturally cascades downward) that run transverse to the primary ridge line (Norris and Norris 1961). The area south of Interstate 8 is generally characterized by a lower elevation, dunes less than 300 ft (91 m).

The Algodones Dunes are one of the driest and hottest regions in the United States. Romspert and Burk (1979) reported average precipitation between 1941 and 1970 was 2.6 in (67.8 mm) per year. Rainfall amounts differ from place to place and from year to year with areas to the northwest being generally dryer than those to the southeast (Willoughby 2001). Habitat for this plant is found in a band that runs parallel to the active, linear dunes on the western edge of the dune field in a northwest to southeast direction. The band is between these active linear dunes on the west and transverse ridge dunes to the east. This includes the area within the central dunes between State Highway 78 and Interstate 8. The dunes in this band are composed of a series of transitional crescentic ridges (Muhs *et al.* 1995). *A. m.* var. *peirsonii* occurs on the open, higher, more active dune areas with generally less than 20 degrees slope, in a vegetation community referred to as psammophytic (dune loving) scrub (Thorne 1982; Willoughby 2000).

Psammophytic scrub in the dunes proper occurs on the relatively stable substrates on the leeward side of the dune ridge tops in areas gradually sloping up from the bowls at the bases of the steep leeward slip faces (Phillips and Kennedy 2002). Because of the tiered nature of the dune system, a system of alternating slopes and swales, areas suitable for development of psammophytic scrub and thus Peirson's milk-vetch occur as scattered occurrences distributed among the dunes. These areas are protected from extreme deposition or removal of sand (Phillips and Kennedy 2002) and may shift in position over time. Therefore, the distribution and relative abundance of the plant varies from place to place and over time (WESTEC 1977, Willoughby 2000, 2001; Phillips and Kennedy 2003).

Abundance

Peirson's milk-vetch exhibits temporal variability in plant numbers apparently associated with annual precipitation patterns. Based on current understanding of the plant's life history, sufficient rain in conjunction with cooler fall weather appears to trigger germination events. Seedlings may be generally present in suitable habitat throughout the dunes, especially during above-normal precipitation years. In intervening drier years, plant numbers decrease as individuals die and are not replaced by new seedlings. The species likely depends on the production of

seeds in the wetter years and the persistence of the seed bank.

WESTEC (1977) was a study done under contract to BLM to determine, among other things, the distribution and abundance of seven sensitive plant taxa including the Peirson's milk-vetch. BLM surveyed 34 selected west-east transects in 1998 that were a subset of those used by WESTEC (Willoughby 2000). The document compares its findings to those of the earlier WESTEC study and concludes that all six of the plants taxa monitored in 1998 are at least as abundant and widespread in the entire dune system as they were in the 1977 WESTEC study. However, the BLM document cautions that the data are not directly comparable because the rainfall amounts were different for the two years and different methodologies were used in the two studies.

The number and location of standing plants may vary considerably from year to year due to a number of factors including the amount, timing, and location of rainfall; temperature; soil conditions; and the extent and nature of the seed bank. BLM continued to monitor the Peirson's milk-vetch population along the 34 transects and reported that 942 plants were found in 1999 and only 86 plants in 2000, both low rainfall years compared to the wetter year 1998, when 5,064 plants were found (Willoughby 2001).

In spring 2001, Thomas Olsen and Associates (TOA) conducted a survey of a portion of the Peirson's milk-vetch populations on approximately 35,000 acres of the dunes that were open to vehicle access. In the 13 days of ground surveys, approximately, 71,926 plants were reported (TOA 2001), but this single census does not provide any information on population trend. In addition, TOA (2001) states that ''extrapolation of the census data to the entire dunes or to other specific areas was not warranted.'' Plant mortality over the short term may also be considerable (Phillips and Kennedy 2002).

The count was reportedly the result of an explosive germination event in response to wet conditions during the winter of 2000 through 2001 (TOA 2001). The record of steep decline of the cohort counted by TOA in 2001 was tracked by Phillips and Kennedy (2002) who reported that 26 percent of the plants seen in Spring of 2001 were present in late 2001 and Phillips and Kennedy (2003) who reported that only 0.26 percent of the plants counted in Spring 2001 survived to Spring 2003. In 2003, Phillips and Kennedy (2003) reported that many of the germinants were already dead and that large numbers of those remaining would likely die. This severe decline in the population in 2003 was further documented by Porter (*in litt.* 2003a), reporting a similar mean seedling survival of 0.19 percent in monitored plots for the 2003 cohort of Peirson's milk-vetch.

Only 5 of these 71,926 plants encountered were considered to be more than one season old (TOA 2001). The observation that only 5 plants of the 71,926 individuals were censussed more than 1 season old suggests that the seedlings for this species suffered a high degree of mortality, or that the age classes were misidentified during the survey. In contrast, a study prepared for the ASA (Phillips and Kennedy 2002) estimated that 26 percent of the plants counted in the spring 2001 survey survived to the winter of 2001 through 2002. Phillips and Kennedy (2002) also found that these persisting plants produced a mean of 171 fruits per plant, compared to an estimated 5 fruits per each younger plant in the earlier spring survey. Phillips and Kennedy (2002) data suggested that older age classes may produce substantially more seeds, and that longevity may be an important factor for reproductive success.

Public and Peer Review Comments

On September 5, 2003, we published a Notice in the **Federal Register** (68 FR 52782) that the petition received on October 25, 2001 to delist the Peirson's milk-vetch presented substantial information to indicate the petitioned action may be warranted. As part of this Notice, we requested information on the status of *Astragalus magdalenae* var. *peirsonii*. In response, we received comments and information from several organizations. In addition, to ensure that our status review and 12-month finding are based on the best available scientific and commercial information available, we solicited peer review of the key documents supporting the petition from three scientists with demonstrated and significant expertise and backgrounds in studies of genetic diversity, seed banks, plant systematics, population genetics, *Astragalus* field studies, and/or dune plant research. Documents referenced by the petitioner, sent to the peer reviewers, included Willoughby (cited as BLM) (2000, 2001); Thomas Olsen Associates, Inc. (TOA) (2001); and Phillips and Kennedy (2002, 2003). These documents represent considerable effort to address complex ecological issues. They provide some useful data relative to the life history and ecology of *A. m.* var. *peirsonii.* However, survey methodology and measures used in these studies often differed.

All of the peer reviewers provided comments on some or all of the documents provided to them. These included two documents considered supportive to the delisting petition although not provided with the petition (Phillips and Kennedy 2002, 2003). The peer reviewers identified weaknesses in the supporting documents or limitations of the data that was used to support the delisting petition. In particular, the peer reviewers discussed the limitations of each survey methodology used in the various documents and cautioned the use of data extrapolation. For example, a few of the peer reviewers cautioned against comparing the WESTEC (1977) and Willoughby (2000) studies due to the widely different survey methodologies. Several reviewers noted that a few statements in TOA (2001) and Phillips and Kennedy (2002, 2003) were not completely supported by the data presented. The Service has incorporated the data from these studies in this finding, however, we have taken into account the specific data limitations discussed by the peer reviewers. All of the comments and information provided by the public and the peer reviewers were considered in the development of the 12-month finding and are cited in the finding, where appropriate.

Discussion of Listing Factors

When considering an action for listing, delisting, or reclassifying a species, we are required to determine whether a species is endangered or threatened based on one or more of the five listing factors identified in section 4(a)(1) of the Act. These factors are: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) over-utilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting the continued existence of the species. Delisting a species must be supported by the best scientific and commercial data available and only if such data substantiates that the species is neither endangered nor threatened for one or more of the following reasons: (1) The species is considered extinct; (2) the species is considered to be recovered; and/or (3) the original data available when the species was listed, or the interpretation of such data, were in error (50 CFR 424.11).

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The final listing rule (63 FR 53596, October 6, 1998) identifies OHVs as a serious threat to *Astragalus magdalenae* var. *peirsonii*, citing the fragile nature of the plants. Numbers and distribution of OHVs have increased since the species was listed (BLM 2003 and references cited therein).

Impacts of OHV use on *Astragalus magdalenae* var. *peirsonii* plants and habitat have been noted by most dune plant studies. For example, ''The occurrence of dune plants and heavy use areas for vehicles is, to a large extent, mutually exclusive'' (TOA 2001). This supports similar findings by Willoughby (2000, 2001), WESTEC (1977), Luckenbach and Bury (1983), and ECOS, Inc. (1990). Because of the generally transient nature of surface structure of the dunes, most quantitative measures of OHV impacts are given in terms of numbers of plants impacted. The TOA (2001) survey reported finding 667 OHV-impacted plants during 13 survey days. Phillips and Kennedy (2003) reported finding 430 impacted plants during 6 survey days. But in neither study were plants marked to determine survival or reproductive success at a later date. Impacts to *A. m.* var. *peirsonii* from OHVs continue to be noted (Phillips and Kennedy 2003; Willoughby 2004) although no follow-up to measure long-term impact or relative severity of impact has been done.

The impacts of OHV use on other types of desert vegetation have been documented. Bury *et al.* (1977) compared eight paired sites in the Mojave Desert in 1974 and 1975, examining the impact of OHV use on creosote bush scrub and associated wildlife. There were fewer creosote shrubs per hectare in plots with higher OHV use, and the proportion of shrubs per plot damaged by OHVs increased with increased OHV use.

The North Algodones Dunes Wilderness (Wilderness) will continue to be closed to OHV use. However, the Wilderness alone is not sufficient to ensure the long-term survival of *Astragalus magdalenae* var. *peirsonii* because this area provides only a small percentage of the entire habitat for this species within the Algodones Dunes and the area provides less available habitat for this plant relative to the areas south of State Highway 78 that are open to OHV use.

The Bureau of Land Management estimates that only approximately 14–16 percent of the habitat for *Astragalus magdalenae* var. *peirsonii* occurs within the Wilderness. Between 75–80 percent of all known colonies of *Astragalus magdalenae* var. *peirsonii* in 1977 were found in the areas open to OHV activity; only approximately 20% of the larger occurrences were found in the Wilderness (WESTEC 1977). Further, the habitat within the Wilderness is not all suitable for this species. Creosote bush scrub habitat, which does not support *Astragalus magdalenae* var. *peirsonii* is more abundant in the Wilderness than in the areas south of State Highway 78. The distribution of *Astragalus magdalenae* var. *peirsonii* from 1998–2000 indicates a higher relative abundance of plants in the central dunes south of State Highway 78 (BLM 2003). Thus, the Wilderness is not sufficient to sustain this species because it does not provide sufficient habitat and habitat quality to ensure the long-term survival of this species.

The recently released Recreation Area Management Plan (RAMP) (BLM 2003) proposes to reopen, to OHV use, all temporarily closed areas of the dunes. Re-opening these areas will likely affect the Peirson's milk-vetch found in these locations. While many of these areas were likely inaccessible prior to the closure, the technological advances, such as affordable global positioning system (GPS) units, cell phones, and OHVs with greater range have enabled OHV use to penetrate further into the dunes. This will likely affect more of the population than was previously impacted.

Visitorship continues to increase in the ISDRA (BLM 2003) and has outpaced previous estimations (BLM 1987). Since this plant was listed, visitorship to the recreation area has continued to increase. Based on the BLM (*in litt.* 2002), visitorship increased an additional 79 percent between 1996 and 1999, and 111 percent over the base year of 1994. The visitorship levels recorded in 1999–2000 (BLM *in litt.* 2002) were 149 percent higher than those projected for the year 2000 by BLM (1987). The BLM (2002) estimated visitorship for 2002 to be 1,005,000. In fact, according to BLM figures (Integrated Marketing Systems 2003), there were over 1.4 million visitors. This is 400,000 visitors higher than were projected. The BLM (2002) estimated range of visitorship projected for 2012 is 1,418,000 to 2,071,000. User groups are advocating for building as many camping pads as possible until ''Over a span of time, 100 percent of both sides of the road would be camping pads'' (ASA 2002). Shifts in visitation have also been reported by the BLM (Schoeck, BLM *in litt.* 2001) indicating that, by the late 1990s and early 2000s, day use of the central dunes between State Highway 78 and Interstate 8 had become heavy and continues to increase. In the late 1970s visitation was concentrated primarily to major winter holiday weekends, with Thanksgiving week receiving the highest numbers of visitors. However, day use has been reported to be increasing on non-holiday weekends as well (Schoeck, BLM *in litt.* 2001).

Significant impacts from OHV use on *Astragalus magdalenae* var. *peirsonii* habitat have been observed at or near the OHV staging areas (Willoughby 2000). The TOA (2001) report supports the BLM findings (Willoughby 2000, 2001) regarding limited occurrence of dune plants associated with heavy OHV activity: ''The occurrence of dune plants and heavy use areas for vehicles is to a large extent mutually exclusive.'' This corroborates earlier findings by WESTEC (1977), Luckenbach and Bury (1983), and ECOS, Inc. (1990), and was reported in the final listing rule (63 FR 53596). The coincidence of timing of seedling establishment and the cooler months (OHV season) are among the reasons for the plants' susceptibility to impacts from OHVs (Romspert and Burk 1979). Luckenbach and Bury (1983), in non-replicated studies of paired plots along Highway 78 in the Algodones Dunes, report reduced numbers of herbaceous and perennial plants, arthropods, lizards, and mammals between areas closed to entry (control plots) and those exposed to heavy OHV use. Control plots had 2.4 times the number of species, 10 times the numbers of individuals within these species, 9.4 times the vegetative cover, and 40 times the volume of shrubby perennials as compared to the OHV-impacted areas (Luckenbach and Bury 1983). These data are from localized plots and were not intended to be extrapolated to the dune system as a whole but rather are presented here to illustrate the effects of OHV use on biota. Willoughby (2001) presented data, albeit limited, indicating a higher percentage of *A. m.* var. *peirsonii* seedlings in the areas closed to OHV use compared to areas open to OHV use.

A map of vehicle tracks (Willoughby 2000) along selected transects of the Algodones Dunes on a single day in 1998 showed that considerable areas of potential habitat have been impacted. We have no evidence that the extent of vehicle tracks, as depicted on this map, will diminish in the future. Nor do we know how the distribution and intensity of these tracks changes over a growing season or recreation season. *Astragalus magdalenae* var. *peirsonii* plants, if

present in those areas, may have been impacted; however, on-the-ground counts coincident with the vehicle track mapped areas were not performed. Because of the transient nature of sand dunes, impacts from OHVs are usually reported in terms of plant numbers impacted or the condition of the impacted plants. In their report, TOA (2001) found 667 plants impacted by OHVs over the course of 13 survey days. A seedling's roots are especially sensitive to drying out if the plants or sand surface are disturbed. There are potential direct impacts if OHVs run over the delicate seedlings and indirect impacts, such as higher soil and root desiccation, if sand disturbance occurs in close proximity to the seedlings. Seedling death may result from both types of impacts. Seedlings that sustain broken branches and live will produce fewer flowers, fruits, and seeds that they otherwise would have produced. Most recently, during their short survey period, Phillips and Kennedy (2003) report that they found several hundred *A. m.* var. *peirsonii* plants that had been impacted by OHVs. Neither TOA (2001) nor Phillips and Kennedy (2003) described the degree, pattern, or frequency of impacts to the habitat occupied by the plants, or to adjacent suitable habitat used as access avenues to the impacted site. Follow-up surveys to determine the effects of the impacts on the plant's survival and reproductive output were also lacking. Willoughby (2004) did not record the area associated with the OHV-impacted plants he recorded. The early, and most sensitive, life history phases of Peirson's milk-vetch plants occur between late October and late February. This period directly overlaps five of the peaks of visitorship to the Algodones Dunes that occur in the same time frame. These peaks in visitor use include Thanksgiving (250,000), New Years (150,000), and Presidents Day (100,000) as well as Halloween and Martin Luther King Day. Only two other visitor peaks over 50,000 visitors occur during a typical recreation year. The early elimination of a portion of a seedling cohort means that there will be fewer plants to potentially survive to become older plants. Older plants have been shown to produce many more seed pods per plant than younger first year plants.

In a very limited study, Pavlik (1979) quantified the immediate physical effects of direct contact with an OHV to four specimens of each of three psammophytic plant taxa found on the Eureka Dunes in Inyo County, California. One was *Astragalus lentiginosus* var. *micans* (shining milk-vetch), a short-lived perennial to annual desert plant similar to *Astragalus magdalenae* var. *peirsonii*. Damage to each of the plants impacted was assessed in terms of percentage of shoots severed, apices removed, flowers removed, foliage loss or damage, and damage to underground parts of the plants. In this study, *A. l.* var. *micans* lost 50 to 90 percent of the shoots and stem apices with light to moderate OHV activity.

Willoughby (2000) notes a similar abundance trend in both the closed and open areas for OHV activity for five of the six monitored plant taxa, including Peirson's milk-vetch. Willoughby (2000) states that this is likely due to the fact that intensive OHV use did not encroach on much of the plant's habitat over relatively large portions of the open area (all of the dunes except the wilderness area at that time). Willoughby (2000) further notes that this trend may be expected to continue unless OHV use patterns change. Patterns of visitorship have reportedly changed according to BLM with the advent of GPS units and cell phones, which apparently embolden riders to use more remote areas (Schoeck *in litt.* 2001). Also, the projected 82 percent increase in visitorship by 2012–2013 over 1999–2000 levels (BLM 2002) will likely result in intensification and dispersal of OHV impacts. Willoughby (2000) also states that the BLM surveys are monitoring programs and not research, and there are limitations to using the information to assess the impacts of OHV use on the plants monitored. This indicates the observational nature of the monitoring rather than research that tests hypotheses related to measures of OHV impacts on plants.

The early, and most sensitive, life history phases of Peirson's milk-vetch plants occur between late October and late February. This period directly overlaps five of the peaks of visitorship to the Algodones Dunes that occur in the same time frame. These peaks in visitor use include Thanksgiving (250,000), New Years (150,000), and Presidents Day (100,000) as well as Halloween and Martin Luther King Day. Only two other visitor peaks over 50,000 visitors occur during a typical recreation year.

The period of plant sensitivity, approximately late October to late February, includes seed germination as well as seedling emergence. A seedling's roots are especially sensitive to drying out if the plants or sand surface are disturbed. There are potential direct impacts if OHVs run over the delicate seedlings and indirect impacts, such as higher soil and root desiccation, if sand disturbance occurs in close proximity to the seedlings. Seedling death may result from both types of impacts. Broken seedlings will produce fewer branches which results in fewer flowers and seeds than undamaged seedlings leading to a gradual diminishment of the seed bank.

The early elimination of a portion of a seedling cohort means that there will be fewer plants to potentially survive to become older plants. Older plants have been shown to produce many more seed pods per plant than younger first year plants. Surveys that found hundreds of plants impacted in 2001 (TOA 2001) and 2003 (Phillips and Kennedy 2003) were conducted between early March and mid May. The magnitude of impact described in these reports is likely conservative, in that the surveys occurred after the highest vehicular use.

One of the mechanisms of survival for this species is a seed-setting strategy for producing large numbers of seeds per plant, particularly by older plants. Additionally, as is the nature of seed banks, not all of the seeds in the soil germinate the following year, as a safety measure against population failure. Natural ecological processes diminish the Peirson's milk-vetch seed bank. Natural factors affecting the seed bank include seed viability, seed parasitism, seed deposition in suitable habitat and at appropriate depth, age of the seeds, and failure of an entire seedling generation due to range-wide environmental conditions. Each of these factors can limit the number of seeds available for germination. The timing of the germination of seedlings, the most sensitive life-stage of PMV, also overlaps with the onset and peak levels of OHV activity within the Algodones Dunes. Several studies document plants that were run over by OHVs at the Algodones Dunes and this activity likely results in the direct loss and damage to seedlings. The likely mortality of seedlings and older plants by OHV activity precludes their future contribution to the seed bank further threatening the long-term recovery potential and viability of this plant.

The available documentation attests to historical and ongoing, heavy OHV impacts to *Astragalus magdalenae* var. *peirsonii* (WESTEC 1977; ECOS, Inc. 1990; Willoughby 2000, 2001, 2004; TOA 2001, Phillips and Kennedy 2003). Based on information noted above, visitorship is expected to continue to increase (BLM 1987, 2002, 2003). and OHV use will continue to pose a threat to the survival of *A. m.* var. *peirsonii.* In summary, OHV use generally reduces the number of species and density of

those species in a given area. The Pierson's milk-vetch seedling establishment timing coincides with the heaviest use of OHV use, which impacts seedlings reducing the number of older plants. The older plants produce more seed, ultimately contributing the most seed to the seed bank. Without establishment of the older plants the seed bank will likely decrease. Given that this plant survives in a dry dune habitat that is highly disturbed by its nature and experiences periods of long periods of drought, increasing the size of the seed bank is key to the long term survival and eventual recovery of the species.

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

Current data do not indicate that these factors constitute a threat to *Astragalus magdalenae* var. *peirsonii* at this time.

C. Disease or Predation

Herbivory was reported for some of the taxa of *Astragalus* in the final listing rule (63 FR 53596). As part of a series of reports on the natural history of *Astragalus magdalenae* var. *peirsonii,* Porter (*in litt,* 2003a) noted the general poor health of adult plants and attributed it to evidenced rodent and insect herbivory. Porter (*in litt.* 2002a) reported ''nearly ubiquitous'' harvesting of leaflets and young inflorescences by rodents in *A .m.* var. *peirsonii* populations. Most of the plants had leaves, leaflets, and/or terminal portions of the stems removed, likely by unidentified rodents that had left abundant tracks around the milk-vetch plants. Porter (*in litt.* 2003a) also found similar results in 2003. To the extent that rodents remove photosynthetic tissue and young inflorescences, plants are likely to exhibit a loss of vigor and reduction in reproductive output (*i.e.*, seeds). Indeed, Phillips and Kennedy (2002) noted that seed bank counts were lower in areas where they noted kangaroo rat (*Dipodomys* spp.) tracks and dens and suggested that this should be investigated. Pavlik (*in litt.* 2003) noted that rodents may be a constant, long-term source of high seed mortality that could dramatically reduce the seed bank. As yet unidentified weevils were observed to strip the epidermis from the stems, which would affect the movement of food and water in the plants (Porter *in litt.* 2003a).

Beetles, in the family Bruchidae, were reported to contribute to the high mortality of seeds and reduced seed crop for *Astragalus magdalenae* var. *peirsonii* by Romspert and Burk (1979). Larvae of these beetles eat the contents of the seeds before emerging as adults. Fruits collected in April continued to release beetles, into October (Romspert and Burk 1979). Porter (*in litt.* 2003a) found between 45 and 86 percent of the fruits on the few *Astragalus magdalenae* var. *peirsonii* plants, where he could find fruits, were infested with bruchid beetles. The range was 0 to 29 percent for dispersed fruits on the ground. Similarly, for the obligate dune plant *Astragalus lentiginosus* var. *micans,* Pavlik and Barbour (1985) found that dispersed fruits had about 66 percent of the seeds eaten or damaged by insect larvae compared to 86 percent of the seeds in fruits still on the plant. Also the number of undamaged seeds decreased by more than 60 percent between April and May, indicating that predation is highest at dispersal time. The reduction of productivity of any given cohort of *A. m.* var. *peirsonii* from seed predation is unknown but may locally be considerable in a given year. Seed predation has been reported to cause significant loss of ovules or seeds in *Astragalus canadensis* (Boe *et al.* 1989), and in two other species of *Astragalus* (Green and Palmbald 1974).

Available information shows that rodent herbivory and seed predation, as noted above, are not detrimental to the species by themselves but, may be additive threats to Peirson's milk-vetch in the presence of the other stressors that the population is currently undergoing.

D. The Inadequacy of Existing Regulatory Mechanisms

The lack of regulatory protections for *Astragalus magdalenae* var. *peirsonii* by the State of California cited in the final listing rule (63 FR 53596) still hold true. Pursuant to the Native Plant Protection Act (California Department of Fish and Game (CDFG) Code) and the California Endangered Species Act (CESA), *A. m.* var. *peirsonii* was listed as endangered in 1979. This plant is known to occur primarily on BLM managed lands. BLM is not subject to the provisions of the CESA. The BLM and the CDFG developed a habitat management plan in 1987 that included provisions for monitoring transects every other year until trends were established. However, little monitoring specific to sensitive species was carried out by the BLM prior to the listing of *A. m.* var. *peirsonii.* Since the listing, the BLM and the CDFG have been conducting periodic monitoring for the rare plants on the Algodones Dunes.

The BLM temporarily closed areas of the Algodones Dunes to OHV and other traffic on November 3, 2000. However, the recent RAMP for the ISDRA (BLM 2003) proposes to reopen those areas temporarily closed to OHV activity. The opening of the temporarily closed areas will increase the threat to *Astragalus magdalenae* var. *peirsonii* to some degree from current levels. This would open all areas of the dunes to OHV use, except for the Wilderness Area, which was the case when this species was listed in 1998 (63 FR 53596). To help protect the plant, BLM has an adaptive management and monitoring strategy in place. This will provide corrective measures should existing management be found to cause excessive, unacceptable impact to the plant. The majority of OHV users are responsible recreationists on the dunes and avoid vegetated sites (TOA 2001). However, there may be significant damage to populations of *A. m.* var. *peirsonii* and its habitat, especially closer to the staging areas. This would be the result of the focus of increased OHV activity in a smaller area.

The designation of the North Algodones Dunes Wilderness was fully considered and was one of the reasons for changing the listing status from endangered, published in the proposed rule (57 FR 19844), to threatened in the final rule (63 FR 53596). As stated in the final listing rule (USFWS 1998), ''While this taxon remains vulnerable to the OHV use occurring over most of its dune habitat, the Service believes that the dispersed nature of its colonies and the wilderness designation reduce the potential for immediate extinction.''

Available information does not indicate that adequate regulatory mechanisms are in place to protect Peirson's milk vetch.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

The vast majority of OHV users likely avoid *Astragalus magdalenae* var. *peirsonii* and other biota on the dunes for safety and aesthetic reasons. The impacts from OHVs can be incidental or purposeful. Although the range-wide impact is difficult to assess, there has been an increase in reports of vandalism to the habitat and individuals of *A. m.* var. *peirsonii.* This was a specific concern expressed in the critical habitat discussion of the final listing rule (63 FR 53596). There has been no monitoring specifically for the distribution, extent, and impact of vandalism to the plant across its range. Porter (*in litt.* 2002) describes both tracks and incursions of OHVs into areas outside of the Wilderness Area that were closed to OHV traffic. Three of the 20 plants in one of Porter's monitored plots (Porter *in litt.* 2002) were destroyed by vandals. There have

been other reported incidents of vandalism, some by our staff, and others, but because of the time, lack of knowledge of intent, precision of the description of the location, frequency of occurrence, and percentage of the plant's range involved, it is difficult to assess the cumulative impact to the species.

This species is also threatened by low numbers of reproducing individuals, a circumstance that occurs from time to time. Movements and fluctuations of populations have not been recorded long enough to assess the full impact of significance to the survival of the taxon. The BLM (Willoughby 2001) reported a total of only 86 plants throughout its transect areas in the 2000 survey. TOA (2001) found only five plants more than a year old in their survey of all of the areas open to OHV use. This would be an extremely important fact requiring explanation and assessment if only five plants of an herbaceous perennial taxon had persisted from the previous season, especially in light of seed production as mentioned before. The older, larger plants contribute more to the seed bank than younger flowering juveniles (Romspert and Burk 1979; Phillips and Kennedy 2002). Random events may have a significant detrimental effect on the species when so few individuals are present or when the habitat requirements are so narrow that random environmental conditions can result in the demise of an entire cohort. This was apparently the case with the loss of the entire 2003 cohort of seedlings (Phillips and Kennedy 2003; Porter *in litt* 2003). The ecological impact of any cyclic depletion and restoration of the seed bank is unknown.

Astragalus magdalenae var. *peirsonii,* like some other narrow endemic dune taxa, is subject to debilitating or lethal environmental conditions, such as drought or excessive unseasonal winds, across its entire range that can affect an entire cohort of plants. Pavlik and Barbour (1988), noting the establishment/survivorship pattern of *Astragalus lentiginosus* var. *micans,* another dune endemic plant, reported a complete crash of the 1984 through 1985 seedling cohort. Even though 54 percent of the 1985 through 1986 cohort of seedlings survived, none of these plants reached reproductive maturity within the year. This was apparently the case for the 2003 cohort of *A. m.* var. *peirsonii.* Phillips and Kennedy (2003) noted that many of the germinants were already dead and that large numbers of those remaining would likely die. Porter (*in litt.* 2003a) reports a similar mean seedling survival of 0.19 percent in monitored plots for the 2003 cohort of *A. m.* var. *peirsonii.* Environmental conditions unsuitable for this plant can occur at irregular intervals or can persist for several years. Low numbers combined with periodic, range-wide, debilitating environmental conditions pose an ongoing potential threat to this plant.

Finding

We have carefully assessed the best scientific and commercial information regarding the biology of this species and its threats. We reviewed the petition and associated documents, information available in our files, other published and unpublished information submitted to us during the public comment period following our 90-day petition finding. We reviewed new data and information on the life history and ecology of Peirson's milk-vetch; however, we did not find convincing information that Peirson's milk-vetch was listed in error.

The North Algodones Dunes Wilderness (Wilderness) will continue to be closed to OHV use. However, the Wilderness alone is not sufficient to ensure the long-term survival of *Astragalus magdalenae* var. *peirsonii* because this area provides only a small percentage of the entire habitat for this species within the Algodones Dunes and the area provides less available habitat for this plant relative to the areas south of State Highway 78 that are open to OHV use.

The Bureau of Land Management estimates that only approximately 14–16 percent of the habitat for *Astragalus magdalenae* var. *peirsonii* occurs within the Wilderness. Between 75–80 percent of all known colonies of *Astragalus magdalenae* var. *peirsonii* in 1977 were found in the areas open to OHV activity; only approximately 20% of the larger occurrences were found in the Wilderness (WESTEC 1977). Further, the habitat within the Wilderness is not all suitable for this species. Creosote bush scrub habitat, which does not support *Astragalus magdalenae* var. *peirsonii* is more abundant in the Wilderness than in the areas south of State Highway 78. The distribution of *Astragalus magdalenae* var. *peirsonii* from 1998–2000 indicates a higher relative abundance of plants in the central dunes south of State Highway 78 (BLM 2003). Thus, the Wilderness is not sufficient to sustain this species because it does not provide sufficient habitat and habitat quality to ensure the long-term survival of this species.

This species likely depends on the production of seeds in the wetter years and the persistence of the seed bank from previous years to survive until appropriate conditions for germination occur again. However, assertions that the reproductive success of Peirson's milk-vetch is not dependent on the longevity of individual plants but on each plant's ability to produce and drop seeds in their first year is not supported by the available documentation. First year plants produce substantially less seeds than older plants (5 fruits per plant as opposed to 171 fruits per plant) (Phillips and Kennedy 2002). TOA (2001) reported plants produce seeds their first year, however those age classes may have been misidentified. In addition, an entire cohort of seedlings may die off in a given year without producing seeds (Phillips and Kennedy 2003, Porter *in litt.* 2003). Therefore, the key to survival and recovery is having a large seed bank. The available information on the rate of seed deposition to the seed bank and the longevity of seeds in the seed bank does not support claims of a healthy seed bank. Given, the low numbers of Pierson's milk-vetch, other natural predators (seed predatory beetles and kangaroo rats) further threaten the species by depleting an already low seed bank reserve. Peirson's milk-vetch also exhibits a wide variation in numbers of standing individuals found in any given year. Plant count data between years is often not directly comparable due to differences in rainfall amounts and methodologies. Long-term studies need to be undertaken to show the population trends for the species.

Documentation available attests to historical and ongoing OHV impacts to Peirson's milk-vetch (WESTEC 1977, ECOS 1990, Willoughby 2000, 2001, 2004, TOA 2001, Phillips and Kennedy 2003). Areas within the dunes subject to intensive OHV use have a lower abundance of Peirson's milk-vetch (*e.g.*, staging areas). Plants within the interior portions of the dunes have remained less affected by OHV use, however, the advent of GPS and increased vehicle fuel efficiency now enable OHV users to travel further into the interior of the dunes without getting disoriented and lost. Available information suggests OHV use will continue to pose a threat to the survival of Peirson's milk-vetch. Given the low numbers, other threats such as rodent and insect herbivory, seed predation, and vandalism are contributing to the cumulative threats to the Peirson's milk-vetch.

After a thorough review and consideration of all information available, we find that delisting Peirson's milk-vetch is not warranted at this time and that this species should remain classified as a threatened species. In making this determination we have followed the procedures set

forth in section 4(a)(1) of the Act and regulations implementing the listing provisions of the Act (50 CFR part 424).

We will continue to monitor the status of the species, and to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of all references cited in this finding is available on request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** above).

Author

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

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

Dated: May 28, 2004.

Marshall Jones,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 04–12659 Filed 6–3–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 300 and 600

[Docket No. 040423129–4165–02; I.D. 041404D]

RIN 0648–AQ22

International Fisheries Regulations; Pacific Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement the 1981 Treaty Between the Government of the United States of America and the Government of Canada on Pacific Coast Albacore Tuna Vessels and Port Privileges (Treaty) as authorized by recently passed legislation. This final rule establishes vessel marking, record keeping, and reporting requirements for U.S. albacore tuna fishing vessel operators and vessel marking and reporting requirements for Canadian albacore tuna fishing vessel operators fishing under the Treaty. The intended effect of this final rule is to allow the United States to carry out its obligations under the Treaty by limiting fishing by both U.S. and Canadian vessels as provided for in the Treaty.

DATES: Effective June 1, 2004.

ADDRESSES: Copies of the environmental assessment/regulatory impact review/final regulatory flexibility analysis (EA/RIR/FRFA) are available from Svein Fougner at the NMFS address. Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted in writing to Svein Fougner, Assistant Administrator for Sustainable Fisheries, NMFS, Southwest Region and to David Rostker, OMB, by e-mail at *David__Rostker@omb.eop.gov*, or by facsimile (Fax) to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Svein Fougner, Sustainable Fisheries Division, Southwest Region, NMFS, 562–980–4030; fax: 562–980–4047; and email: *svein.fougner@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Treaty, as amended in 2002, establishes a number of obligations of the Parties (the United States and Canada) to control reciprocal fishing in the waters of one Party by vessels of the other Party as well as reciprocal port privileges. The proposed rule (69 FR 23715, April 30, 2004) provided substantial information on the history of the Treaty and that information will not be repeated here. The Treaty permits fishing vessels of one Party to fish for albacore tuna in waters under the fisheries jurisdiction of the other Party seaward of 12 nautical miles from the baseline from which the territorial sea is measured (hereafter generally referred to as ''waters''). The Treaty originally allowed for unlimited fishing for albacore tuna by vessels of each Party in waters of the other Party. In response to U.S. industry concerns about the increase in fishing effort by Canadian vessels in U.S. waters beginning in 1998, the Departments of State (DOS), supported by the National Marine Fisheries Service, initiated technical discussions which led to negotiations with Canada and ultimately agreement to amend the Treaty to establish controls over reciprocal fishing. Agreement to amend the Treaty was reached on April 24, 2002. The U.S. Senate has given its advice and consent to the Treaty amendments, and Congress enacted H.R. 2584 (Public Law 108–219) on March 29, 2004, to authorize the Secretary of Commerce to issue regulations to implement the amended Treaty. The President signed H.R. 2584 into law on April 13, 2004.

The amendment to Article 1 (b) of the Treaty allows for the United States and Canada to establish a mutually agreed upon fisheries limitation regime applicable to each Party's vessels fishing for albacore in the other Party's waters. Pursuant to that provision, the United States and Canada agreed to an initial 3–year regime that reduces reciprocal fishing effort each year until a level is reached in year three that is slightly above the pre–1998 average. Annex C of the Treaty also provides for a further reduced level of fishing after the 3–year period if the Parties are not able to reach agreement on a subsequent regime.

The specific actions that are called for under the Treaty and being implemented through this final rule are:

Vessel Lists

As under the original Treaty, the United States and Canada will annually exchange lists of fishing vessels which may fish for albacore tuna in each other's waters under the Treaty.

Vessel Marking

U.S. and Canadian vessels must have their name and vessel identification marking prominently displayed where they will be clearly visible both from the air and from a surface vessel.

Hail-in and Hail-out

The operators of U.S. and Canadian albacore fishing vessels must report to designated reporting offices at least 24 hours prior to entering the waters of the other nation to fish under the Treaty.

Recordkeeping

Operators of U.S. and Canadian vessels must keep accurate logbook records of catch and effort while fishing under the Treaty and must submit those logbooks to their respective fishery agencies.

Information Exchange

The United States and Canada will annually monitor the amount of fishing and the weight of albacore tuna caught by their respective vessels in waters under the fisheries jurisdiction of the other Party, and will annually exchange this information.

Annual Treaty Consultations

The United States and Canada will consult annually to review the information exchanged on the albacore tuna fisheries; on their respective conservation and management measures for albacore tuna; and on implementation of internationally agreed conservation and management measures applicable to the Parties related to fisheries covered under the Treaty.