

organizations or businesses, available for public inspection in their entirety.

Section 4(b)(3)(B) of the Act requires that we make a finding within 12 months of receipt of the petition as to whether removal of the Morelet's crocodile from the List of Endangered and Threatened Wildlife is warranted, not warranted, or warranted but precluded by pending proposals.

#### References Cited

- Alvarez, J. 1998. Conservation and management of *Crocodylus moreletii* in Mexico. Trip Report—July 1998. Unpublished document.
- CONABIO (Comisión Nacional para el Conocimiento y Uso de la Biodiversidad). 2005. Proposal for the reclassification of Morelet's crocodile (*Crocodylus moreletii*) in the Endangered Species Act (ESA) of the United States of America.
- Ross, J.P. 1998. Crocodiles: Status Survey and Conservation Action Plan. Second Edition. IUCN/SSC Crocodile Specialist Group. IUCN, Gland, Switzerland and Cambridge, United Kingdom.

#### Author

The primary author of this proposed rule is Dr. Javier Alvarez, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 750, Arlington, Virginia 22203.

Dated: June 21, 2006.

**Kenneth Stansell,**

*Acting Director, Fish and Wildlife Service.*

[FR Doc. E6-10149 Filed 6-27-06; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AU58

#### Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To List the Flat-Tailed Horned Lizard as Threatened

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

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** We, the Fish and Wildlife Service (Service), have determined that the proposed listing of the flat-tailed horned lizard (*Phrynosoma mcallii*) as a threatened species under the Endangered Species Act (Act) of 1973, as amended, is not warranted and, thus, we withdraw our November 29, 1993, proposed rule (58 FR 62625). As stated in our January 3, 2003, withdrawal of the proposed rule to list the species as

threatened (68 FR 331), we have made this determination because threats to the species as identified in the November 29, 1993, proposed rule are not significant, and available data do not indicate that the threats to the species and its habitat, as analyzed under the five listing factors described in section 4(a)(1) of the Act, are likely to endanger the species in the foreseeable future throughout all or a significant portion of its range. The analyses and conclusions contained in the January 3, 2003, withdrawal (68 FR 331) are incorporated herein by reference subject to the revisions contained in this notice. In this revised withdrawal, we have re-examined the lost historical habitat of the flat-tailed horned lizard in relation to our January 3, 2003, withdrawal of the proposed listing rule and have determined that the lost historical habitat is not a significant portion of the flat-tailed horned lizard's range and does not result in the species likely becoming endangered in the foreseeable future throughout all or a significant portion of its range.

**ADDRESSES:** Supporting documentation for this rulemaking is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, at the above address (telephone, 760-431-9440, or fax, 760-431-9624).

#### SUPPLEMENTARY INFORMATION:

##### Background

Information on the biology and ecology of this species, factors affecting the species, and current conservation measures applicable to this species can be found in the January 3, 2003, withdrawal of the proposed listing rule (68 FR 331). This document primarily contains information relevant to the current and historical range of this species and the issue of the significance of the lost habitat. We also address the status of several projects and ongoing actions as they relate to the flat-tailed horned lizard and provide an update on several of the actions outlined in the 1997 Flat-Tailed Horned Lizard Conservation Agreement (see "Summary of Comments and Recommendations" section).

The flat-tailed horned lizard is most commonly found in sandy flats and valleys within creosote (*Larrea tridentata*) and white bursage (*Ambrosia dumosa*) plant associations or series (Turner *et al.* 1980; Muth and Fisher 1992; Foreman 1997). This series is

generally found on alluvial fans and upland slopes with well-drained soils that often have a pavement surface (Sawyer and Keeler-Wolf 1995), but flat-tailed horned lizards are usually found in areas with windblown sand deposits. The flat-tailed horned lizard is endemic to the northern Sonoran Desert in southern California, southwestern Arizona, and adjoining portions of northwestern Sonora and Baja California Norte, Mexico (Turner and Medina 1982). Within California, the flat-tailed horned lizard currently ranges in the Colorado Desert portion of the Sonoran Desert, from the Coachella Valley (the northernmost extent of its range), south along both sides of the Imperial Valley. On the west side of the Imperial Valley, the species ranges into the Borrego Valley, Ocotillo Wells area, West Mesa, and Yuha Basin. On the east side of Imperial Valley, the species occurs in the Bureau of Land Management (BLM) Dos Palmas Area of Critical Environmental Concern (ACEC), but predominantly occurs in East Mesa and in areas adjoining the Algodones Dunes (*i.e.*, Imperial Sand Dunes, Glamis Sand Dunes). In Arizona, the flat-tailed horned lizard is found in the Yuma Desert portion of the Sonoran Desert, south of the Gila River and west of the Gila and Butler Mountains (Rorabaugh *et al.* 1987). The flat-tailed horned lizard is patchily distributed at varying densities throughout its range, and although the species was once recorded at 1,706 feet (ft) (520 meters (m)) above sea level, it is more commonly found below 820 ft (250 m) in flat areas or areas with gentle slopes (Turner *et al.* 1980).

The range of the flat-tailed horned lizard extends into Mexico from the international border in the Yuha Basin in California, south along the west side of Laguna Salada in Baja California; and from the international border in the Yuma Desert in Arizona, south and east through the Pinacate Region to the sandy plains around Puerto Penasco and Bahia de San Jorge, Sonora (Johnson and Spicer 1985, Gonzales-Romero and Alvarez-Cardenas 1989).

Most of the range of the flat-tailed horned lizard in California and Baja California Norte is in the Salton Trough, a low-lying depression that is an extension of the Gulf of California. The lowest areas of the Salton Trough are below sea level and are protected from inundation from the ocean by the Colorado River delta. The geological record indicates that, as the Colorado River meandered across its river delta, it would periodically flow into the Salton Trough and form Lake Cahuilla in the bottom of the Trough. Over time,

the river would again flow into the Gulf of California, and Lake Cahuilla would evaporate (Waters 1983). As a result of dams, channelization, and water usage, such flooding no longer occurs.

As discussed in the January 3, 2003, withdrawal of the proposed listing rule (68 FR 331), the range of this species in the United States has been analyzed by Hodges (1997) and the range of the species in the United States and Mexico has been analyzed by Johnson and Spicer (1985). The 2003 revision of the 1997 Flat-tailed Horned Lizard Rangewide Management Strategy (herein referred to as the 2003 Rangewide Management Strategy) is the most recent analysis of the species' range in the United States and Mexico (FTHL-ICC 2003).

Hodges (1997) estimated that the flat-tailed horned lizard historically (prior to agricultural or urban development of either the Coachella or Imperial Valleys) occupied up to 2,419,200 acres (ac) (979,037 hectares (ha)) in Arizona and California. Approximately 51 percent (1,243,339 ac (503,161 ha)) of the historical habitat identified by Hodges remains in the United States, with about 140,300 ac (56,770 ha) in Arizona and 1,103,040 ac (446,390 ha) in California (Hodges 1997). Hodges (1997) included the Salton Sea as historical habitat. However, we noted in the January 3, 2003, withdrawal that the Salton Sea area could arguably be considered ephemeral historical habitat, present or absent at times, as the area changed through time as a result of intermittent flooding and drying. At that time we did not consider the effect of the larger Lake Cahuilla. We estimated that if the area now occupied by the Salton Sea was not considered historical habitat, then, using Hodges' (1997) numbers, approximately 57 percent of historical habitat remains in the United States. Hodges' (1997) analysis did not include current or historical habitat for this species in Mexico.

Johnson and Spicer (1985) analyzed the current range and threats to the species in the United States and Mexico at that time. They estimated that in 1981 approximately 59 percent of the species' range occurred in Mexico (569,578 ac (230,500 ha)), with the majority of the range in Mexico occurring in the state of Sonora (492,975 ac (199,500 ha)). Johnson and Spicer (1985) also estimated that 50 percent of the species' habitat in California, Arizona, and Baja California Norte and 14 percent of the species' habitat in Sonora was in danger of conversion to agriculture or urban development and/or degradation due to factors such as off-highway vehicle recreation. Overall, 21 percent of the

species' habitat throughout its range was considered in danger of being lost or degraded (Johnson and Spicer 1985).

The 2003 Rangewide Management Strategy contained updated information on the current and historical range of the species in the United States and Mexico and made available data on historical and current range in geographic information system (GIS) format (FTHL-ICC 2003). We analyzed the GIS data used in the 2003 Rangewide Management Strategy and estimated the size of the historical and current ranges. We estimated the extent of historic Lake Cahuilla by using a GIS digital elevation model and the estimated elevation the lake reached. We estimated the historical range of the flat-tailed horned lizard in the United States and Mexico to be 4,875,624 ac (1,973,095 ha).

#### Previous Federal Actions

On November 29, 1993, we published in the **Federal Register** a proposed rule to list the flat-tailed horned lizard as a threatened species pursuant to the Act (58 FR 62624). On May 16, 1997, in response to a lawsuit filed by the Defenders of Wildlife to compel us to make a final listing determination on the flat-tailed horned lizard, the District Court in Arizona ordered the Service to issue a final listing decision within 60 days. A month after the District Court's order, seven State and Federal agencies signed the Flat-Tailed Horned Lizard Conservation Agreement (referred to herein as the 1997 Conservation Agreement) to implement a Flat-tailed Horned Lizard Rangewide Management Strategy to protect the flat-tailed horned lizard on Federal lands. Pursuant to the 1997 Conservation Agreement, cooperating parties agreed to take voluntary steps aimed at "reducing threats to the species, stabilizing the species' populations, and maintaining its ecosystem."

On July 15, 1997, we published in the **Federal Register** a final decision to withdraw the proposed rule to list the flat-tailed horned lizard as a threatened species (62 FR 37852). We based the withdrawal on three factors: (1) Population trend data did not conclusively demonstrate significant population declines; (2) some of the threats to the flat-tailed horned lizard habitat were misunderstood previously; and (3) we believed that the recently approved "conservation agreement w[ould] ensure further reductions in threats."

Six months following our withdrawal of the proposed listing rule, the Defenders of Wildlife filed a lawsuit challenging our decision. On June 16,

1999, the District Court for the Southern District of California granted summary judgment in our favor upholding our decision not to list the flat-tailed horned lizard. However, on July 31, 2001, the Ninth Circuit Court of Appeals reversed the lower court's ruling and directed the District Court to remand the matter back to us for further consideration in accordance with the legal standards outlined in its opinion. The case was remanded back to the Service because (1) the withdrawal did not expressly consider whether the flat-tailed horned lizard is likely to become an endangered species within the foreseeable future in a significant portion of its range; and (2) the withdrawal did not "address the lizard's viability in a site-specific manner with regard to the putative benefits of the Conservation Agreement."

On October 24, 2001, the District Court ordered the Service to reinstate the previously effective proposed listing rule within 60 calendar days and, thereafter, commence a 12-month statutory time schedule for a final listing decision, and render our final listing determination in compliance with the mandate of the Ninth Circuit Court's order. Accordingly, we published a notice in the **Federal Register** on December 26, 2001, announcing the reinstatement of the November 29, 1993, proposed rule to list the flat-tailed horned lizard as threatened and the opening of a 120-day public comment period on the reinstated proposed rule (66 FR 66384).

On January 3, 2003, we again published in the **Federal Register** a decision to withdraw the November 29, 1993, proposed rule to list the flat-tailed horned lizard as a threatened species (68 FR 331). The Service found the lizard to be in danger of extirpation in the Coachella Valley; however, we determined that the Coachella Valley is not a significant portion of the species' range. We concluded in the January 3, 2003, withdrawal that the flat-tailed horned lizard populations on either side of the Imperial Valley/Salton Sea and in Arizona were not likely to become endangered in the foreseeable future and that listing the species was not warranted.

The Tucson Herpetological Society and other environmental organizations and individuals filed a lawsuit challenging our January 3, 2003, withdrawal. On August 30, 2005, the U.S. District Court for the District of Arizona set aside our withdrawal of the proposed rule to list the flat-tailed horned lizard as a threatened species on the grounds that our withdrawal violated the Act because it failed to

determine whether the lost historical habitat for the flat-tailed horned lizard was a significant portion of the range for this species. With this exception, all other aspects of the January 3, 2003, withdrawal were upheld by the District Court.

On November 17, 2005, the District Court ordered the Service to submit for publication in the **Federal Register** by November 23, 2005, or as soon thereafter as was practicable, a notice advising the public that the January 3, 2003, withdrawal was vacated and that the November 29, 1993, proposed listing rule was reinstated. On December 7, 2005, we published a notice in the **Federal Register** vacating the January 3, 2003, withdrawal and restoring proposed status to the flat-tailed horned lizard (70 FR 72776).

The November 17, 2005, order limited the scope of the remand to specifically address whether the lost historical habitat is a significant portion of the range for the flat-tailed horned lizard. The Court further required the Service to publish a determination in the **Federal Register** by April 30, 2006, as to whether the lost historical habitat of the flat-tailed horned lizard constitutes a significant portion of the species' range based on the best scientific and commercial data available. On March 2, 2006, we published a notice announcing the reopening of a 14-day public comment period on the November 29, 1993, proposed rule to list the flat-tailed horned lizard under the Act (71 FR 10631). To ensure the public was provided with an adequate opportunity to comment on the matters identified by the Court, the parties filed a Joint

Stipulation with the Court on March 28, 2006, to allow for an additional public comment period. On March 29, 2006, the Court granted our request for an extension of the April 30, 2006, deadline, and ordered us to submit the new final listing determination for the flat-tailed horned lizard to the **Federal Register** on or before the date 6 weeks after the close of the second comment period. The second comment period was opened from April 21, 2006 to May 8, 2006 (71 FR 20637). This withdrawal of the November 29, 1993, proposed listing rule complies with the Court's August 30, 2005, and November 17, 2005, orders.

For your convenience, here is a list of the primary **Federal Register** documents pertaining to the proposed listing of the flat-tailed horned lizard as threatened:

Action	Date	FR citation
Proposed rule to list the flat-tailed horned lizard as threatened .....	November 29, 1993 .....	58 FR 62624
Withdrawal of proposed rule .....	July 15, 1997 .....	62 FR 37852
Reinstatement of proposed rule; reopening of comment period .....	December 26, 2001 .....	66 FR 66384
Withdrawal of proposed rule .....	January 3, 2003 .....	68 FR 331
Reinstatement of proposed rule .....	December 7, 2005 .....	70 FR 72776
Reopening of comment period .....	March 2, 2006 .....	71 FR 10631
Reopening of comment period .....	April 21, 2006 .....	71 FR 20637

### Summary of Comments and Recommendations

During both public comment periods on the December 7, 2005 reinstatement of the proposed rule to list, we requested all interested parties to submit information pertaining to the flat-tailed horned lizard's lost historical habitat. We requested this information to make a reexamination based on the best scientific and commercial data currently available. We also reopened the comment period to admit into the record the 2003 revision of the Flat-tailed Horned Lizard Rangewide Management Strategy. During the public comment periods, we received written comments from a total of 29 entities. Nineteen entities advocated listing of the species, 5 entities advocated not listing the species, and 5 entities did not advocate either decision.

As stated previously, in its November 17, 2005 Order, the Court ordered that "on remand the agency need only address the matters on which the court's August 30, 2005 Order \* \* \* found the January 3, 2003 Withdrawal unlawful, which may summarily be identified as whether the lizard's lost historical habitat renders the species in danger of extinction in a significant portion of its range." We received two comments directly related to the issue of the flat-tailed horned lizard's lost historical

habitat. However, for informational purposes, we have also provided responses to comments on other substantive issues as well. Similar comments are grouped together.

*Comment 1:* One commenter stated that there does not appear to be strong scientific evidence to establish the extent of the historical range of the lizard. The commenter stated that claims that east Imperial County and west Yuma County were historically occupied by flat-tailed horned lizards are unsupported. The commenter indicates that the present range seems adequate to prevent the extinction of this species.

*Our Response:* Delineation of historical habitat is retrospective and not testable in the way that other scientific models are. However, based on knowledge of habitat preference for the species, early descriptions of habitat before development, and early museum records, a reasonable and defensible theoretical estimation of the broad-scale historical range of the species is possible. While there are a number of records of flat-tailed horned lizards from the Imperial Valley and the Yuma Valley in areas that are now developed, locality records do not fully delineate the theoretical range of the flat-tailed horned lizard. Historical museum records are summarized in Funk (1981).

*Comment 2:* One commenter stated that the habitat destroyed by human mediated processes and no longer available for the flat-tailed horned lizard in the Imperial, Coachella, and Yuma valleys was significant to the species from a metapopulation dynamics perspective because the availability of large, continuous patches of potentially available habitat provides areas for species to persist as resources (*i.e.* food, water, and habitat) shift geographically over time.

*Our Response:* We interpreted the commenter's statements to pertain to the importance of maintaining large-scale metapopulation dynamics between populations in the Imperial, Coachella, and Yuma valleys. Metapopulation dynamics refers to the process exhibited when local populations become extirpated in response to local conditions but are later recolonized by adjacent patches.

We acknowledge that large-scale metapopulation dynamics and gene flow have been disrupted by the loss of connectivity between populations in these areas; however, this loss of connectivity endangers primarily Coachella Valley populations because the other populations are large enough to be self-sustaining. We recognized the precarious status and possibility of extinction of the flat-tailed horned

lizard in the Coachella Valley in the January 3, 2003, withdrawal, further acknowledging that if the Coachella Valley populations go extinct, there is no connectivity for repopulation from other areas (e.g., Imperial Valley). However, we determined that the Coachella Valley populations are not a distinct vertebrate population segment and that the Coachella Valley is not a significant portion of the species' range.

Relevant to the importance of maintaining large-scale metapopulation dynamics between Imperial and Yuma Valley populations, most of the intermittent and permanent habitat that has been lost due to human mediated processes (e.g., urbanization and agriculture) was lost early in the 20th century. This lost habitat is not considered significant because of its small size relative to the entire range and because this area has been lost for nearly a century and the flat-tailed horned lizard has persisted in these areas.

As discussed in detail in the January 3, 2003, withdrawal of the proposed listing rule (68 FR 331), the available data concerning population abundance, trends, and threats do not suggest, outside the Coachella Valley, that flat-tailed horned lizard populations are declining in any of the geographic areas, or that because of this habitat loss and degradation the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. As discussed below, recent estimates of population sizes in several management areas in the Imperial Valley (Ocotillo Wells Research Area, West Mesa, Yuha Basin, and East Mesa) and Yuma Valley (Yuma Desert Management Areas) since the January 3, 2003, withdrawal of the proposed listing rule indicate that, overall, no large decline in population size has occurred between 2003 and 2005 in areas for which we have more than one year of data.

Therefore, we do not believe the lost habitat is significant to the species from a large-scale metapopulation perspective, because populations in the Imperial and Yuma valleys appear to be large enough to be self-sustaining despite the loss of habitat between these valleys that occurred early in the 20th century.

*Comment 3:* Several commenters stated that this species needs the protection of the Endangered Species Act.

*Our Response:* As stated in our January 3, 2003, withdrawal of the proposed rule to list the species as threatened (68 FR 331), we have made this determination because threats to the

species as identified in the November 29, 1993, proposed rule are not significant, and available data do not indicate that the threats to the species and its habitat, as analyzed under the five listing factors described in section 4(a)(1) of the Act, are likely to endanger the species in the foreseeable future throughout all or a significant portion of its range.

Also, we have determined, as discussed in this notice, that the lost historical habitat does not render the species in danger of extinction throughout all or a significant portion of its range. Commenters did not provide new information or data during either comment period on additional threats not already considered in the January 3, 2003, withdrawal.

*Comment 4:* Several commenters noted the impacts to the flat-tailed horned lizard that would be associated with the construction of the proposed Yuma Area Service Highway.

*Our Response:* The Yuma Area Service Highway has been discussed at many Arizona Interagency Coordinating Committee (ICC) meetings. Arizona ICC members met repeatedly with Arizona Department of Transportation (DOT) engineers to ensure compliance with the 2003 Rangewide Management Strategy. The Arizona DOT already had long-term plans to construct this highway when the 1997 Conservation Agreement was signed. Therefore, the western border of the Yuma Desert Management Area was defined as the edge of the right-of-way of the future Yuma Area Service Highway. Until the highway is built, the lands under jurisdiction of the signatories of the Conservation Agreement will be managed as part of the Yuma Desert Management Area. The highway, as proposed, would destroy 623 ac (252 ha) of flat-tailed horned lizard habitat and isolate 3,734 ac (1,511 ha) from the Yuma Desert Management Area. Thus, the Yuma Area Service Highway shrinks the 131,000-ac (53,000-ha) Yuma Desert Management Area by a relatively small amount. It is our understanding from the Arizona members of the ICC that Arizona DOT intends to pay compensation for 4,277 ac (1,731 ha) of flat-tailed horned lizard habitat impacted or isolated by the project and that fencing will be installed to deter lizards from crossing the pavement where they may be subject to mortality because of traffic.

*Comment 5:* Several commenters noted that the Bureau of Reclamation plans to construct a new reservoir, the All American Canal Drop 2 reservoir, on East Mesa in flat-tailed horned lizard habitat.

*Our Response:* The All American Canal Drop 2 reservoir, proposed for construction in Imperial County, California, was discussed extensively at the flat-tailed horned lizard ICC meetings. The 621-acre (251-ha) reservoir, as proposed, will be built on the site formerly used for the Brock Ranch Experimental Research Station and will be adjacent to, but outside the boundaries of the 115,300-acre (46,660-ha) East Mesa Management Area. A map released by the Bureau of Reclamation (BOR) showed that half of the reservoir would be within the boundaries of the East Mesa Management Area. However, according to the BLM, that map was in error. The input canal from the Coachella Canal to the Drop 2 reservoir will cross BLM land in the East Mesa Management Area, along the southern boundary, and will directly impact 295 ac (119 ha) in the Management Area. The input canal will also isolate two small areas of the Management Area; however, these areas are of limited value to flat-tailed horned lizards. The first area is 120 ac (49 ha) in the southeast corner of the Management Area that is already highly impacted by off-highway vehicle (OHV) activity. The second area is 320 ac (129 ha) on private land that is currently an abandoned jojoba farm and not suitable habitat for flat-tailed horned lizards. It is our understanding from BLM staff that all areas impacted, including the areas to be isolated, will be compensated for by BOR at the ratio dictated by the 2003 Rangewide Management Strategy. Since this Management Area is not fenced, the location of the input canal will benefit the Management Area by creating a barrier that will discourage illegal OHV activity. The amount of habitat impacted will fall below the 1 percent of Federal lands allowed by the 2003 Rangewide Management Strategy.

*Comment 6:* Several commenters pointed out plans for geothermal plants in flat-tailed horned lizard habitat.

*Our Response:* It is our understanding from BLM staff that several applications for geothermal leases in the West Mesa Management Area and the Ocotillo Wells State Vehicle Recreation Area have been submitted. At this point in time, the construction of geothermal plants is speculative. A lease allows a project applicant to evaluate the site for geothermal energy. If it is then suitable, the applicant and the BLM must go through the National Environmental Policy Act (NEPA) process prior to constructing the geothermal facilities. The NEPA requires the Federal agencies to consider the environmental impacts, including impacts to listed and sensitive

species, of their proposed actions and reasonable alternatives to those actions.

**Comment 7:** Several commenters noted the proposal for a large solar energy plant in flat-tailed horned lizard habitat in Imperial Valley.

**Our Response:** The solar plant was originally proposed to be built in the West Mesa Management Area, but because of the 2003 Rangewide Management Strategy the BLM asked that it be moved out of the West Mesa Management Area and the project proponents agreed. According to the BLM, the current proposed site is on BLM land, is not within any Management Area occupied by the flat-tailed horned lizard, and compensation for any flat-tailed horned lizard lost habitat will be applied, if applicable.

**Comment 8:** Several commenters noted the extensive Border Patrol activity in flat-tailed horned lizard habitat.

**Our Response:** The Border Patrol is not a signatory of the 1997 Conservation Agreement; however, the ICC works with them on conservation issues. In California, new Border Patrol agents are educated on the impacts to biological and archaeological resources by driving off-road. Recently, an educational video paid for by flat-tailed horned lizard compensation funds was distributed to Border Patrol offices and they agreed to show the video to all existing agents as well as incorporate it into the training for new agents. It is our understanding that the ICC intends to continue working with the Border Patrol to minimize impacts to flat-tailed horned lizard and its habitat associated with the performance of their duties along the border.

**Comment 9:** Several commenters stated that the 1997 Conservation Agreement and Rangewide Management Strategy are not working.

**Our Response:** Progress toward the goals of the 1997 Rangewide Management Strategy was evaluated during the 2003 revision of the Rangewide Management Strategy and yearly in annual reports. Some of the progress made includes the following: Between 1997 and 2003, surface disturbance was kept well below the 1 percent cap in each of the five Management Areas. Designation of the Management Areas has occurred and the 2003 Rangewide Management Strategy has become an official part of the BLM California Desert Conservation Area plan. The Management Areas comprise 485,000 ac (196,273 ha) or 758 square miles (1,963 square kilometers) of presumably the best flat-tailed horned lizard habitat on Federal lands. Compensation funds have been

collected for projects in flat-tailed horned lizard habitat and will continue to be collected. These funds have been used to purchase private lands within Management Areas.

As outlined in the 1997 Conservation Agreement, research and monitoring for this species have been funded. Research on basic biology such as significant predators, home range size, diet, and reproduction has been conducted since the 1997 Conservation Agreement was signed. Research on impacts such as edge effects and OHV effects has also been conducted. Studies have also been conducted, or are planned, on the efficacy of mitigation measures such as relocation of lizards from project sites and use of under-highway culverts by this species. Methods to monitor this species, such as scat counts, mark-recapture, presence/absence, trapping webs, distance sampling, and occupancy estimation have been tested for this species, and population estimates have been obtained for four Management Areas and the Research Area. Based on these actions as well as others not explicitly mentioned above, we believe that the 1997 Conservation Agreement is helping to conserve the flat-tailed horned lizard and its habitat.

#### Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1531 (*et seq.*) and the regulations (50 CFR part 424) that implement the listing provisions of the Act set forth the procedures for adding species to the Federal list of endangered and threatened species. They provide that a species may be determined to be endangered or threatened if one or more of the following five factors are met:

- 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.
- E. Other natural or manmade factors affecting its continued existence.

As stated above, the November 17, 2005, Court Order limited the scope of the remand to specifically address whether the lost historical habitat is a significant portion of the range for the flat-tailed horned lizard. (See the January 3, 2003, withdrawal of the proposed listing rule [68 FR 331] for the full discussion of the five factors and their application to the flat-tailed horned lizard.) Therefore, the sole purpose of this withdrawal is to reexamine and expand upon our

previous discussions of the five factors in order to address whether the lost historical habitat is a significant portion of the range for the flat-tailed horned lizard. The analysis in this document will primarily reflect lost historical habitat as a component of factor A because factor A requires an analysis of whether the *curtailment* of a species' habitat or range is a threat to its continued existence.

#### Historical and Current Range, and Temporal Baseline

We consider the 2003 Rangewide Management Strategy to be the best scientific and commercial information available on the historical and current range of the species. The 2003 Rangewide Management Strategy builds on previous information on the range of the species (*i.e.*, Johnson and Spicer 1985; Hodges 1997) and bases the delineation of historical and current range on the presence of suitable habitat, known localities, and elevation (flat-tailed horned lizards have rarely been found above 750 ft in elevation). As stated above, we analyzed the GIS data used in the 2003 Rangewide Management Strategy, which depicted the approximate current and historical distribution of the flat-tailed horned lizard. We also used GIS to estimate the extent of historic Lake Cahuilla, which was subtracted from the current and historical range of the species. We used our analysis to estimate the historical range of the flat-tailed horned lizard in the United States and Mexico to be 4,875,624 ac (1,973,095 ha).

#### Temporal Baseline

In the memorandum of support for the District Court order of August 30, 2005, the Court "found that the Service had failed to satisfy the Ninth Circuit's mandate in a prior phase of this case, by failing to examine whether lost historical habitat constituted a 'significant portion' of the species' range." In citing the Ninth Circuit, the District Court noted that the Service "has discretion to choose the point in time at which to examine the range because neither the Ninth Circuit nor the [Endangered Species Act] provide 'a temporal baseline for assessing a species' total range' \* \* \*. The point in time must be sometime in the past, however, and cannot be the current range." In identifying the lost historical habitat for the flat-tailed horned lizard, we determined it was appropriate to consider the available recorded historical information.

## Lake Cahuilla

Lake Cahuilla is an important consideration in determining the historical range of the flat-tailed horned lizard. From prehistoric times to the formation of the current-day Salton Sea, Lake Cahuilla intermittently filled a portion of the Salton Trough. Thus, the lakebed was intermittent habitat for the flat-tailed horned lizard. Lake Cahuilla completely filled and evaporated 4 times between 700 to 1580 AD (Waters 1983). At other times, spring floods on the Colorado River would partially fill the trough. During the 1800s, reported episodes of inundation occurred in 1828, 1840, 1849, 1852, 1859, 1862, 1867, and 1897 (Littlefield 1966). A flood in 1891 created a water body of approximately the same surface area as the current Salton Sea (Sykes 1914). The 2003 Rangewide Management Strategy, in discussing the historical range of the flat-tailed horned lizard, states: "The Salton Basin [Salton Trough] had been subjected to frequent inundation from the Colorado River even prior to the accidental flooding from 1905 through 1907, and it is questionable whether this area can be considered historic habitat." Flat-tailed horned lizards were likely killed during floods as the water rushed into the basin and recolonization occurred as the water evaporated.

Even when the lake was dry, a large portion of the dry lakebed was likely unsuitable habitat for flat-tailed horned lizards. The lowest point of the trough was covered in a thick deposit of salt left behind when the water evaporated (Free 1914), which was likely devoid of plant and animal life. This area is now covered by the Salton Sea. Desert sinks and playas like the Salton Trough are typically inhabited by a salt-tolerant community dominated by *Atriplex* (saltbush) species (Baldwin et al. 2002). In the saltiest and wettest parts of a desert sink, *Atriplex* is replaced by more salt-tolerant plants such as pickleweed (*Salicornia*), iodine bush (*Allenrolfea*), and seepweed (*Suaeda*). Parish (1914) defined the "Salton Sink" as the area between the shoreline of Lake Cahuilla and the then-shrinking Salton Sea. He characterized the vegetation within the Salton Sink as the *Atriplex* zone, because of the domination by *Atriplex* in the sink. "Of this general flora of the Colorado Desert the xerophytic vegetation of the Sink is a part, differentiated mainly by the great preponderance of *Atriplex* spp. in its composition, so that it may be fittingly denominated the *Atriplex* zone" (Parish 1914, p. 89). Creosote, a typical habitat associate for flat-tailed horned lizards, was characterized as "frequent in arid

soil throughout the Sink, but scattered and seldom dominant" (Parish 1914, p. 109). Parish described white bursage, another typical habitat associate for flat-tailed horned lizards, as "frequent in detrital soil and occasional in light alluvium. [Locations:] Mecca, Caleb, Durmid, Westmorland." He described detrital soils as primarily occurring on the northeast margin of the Sink. Thus, the lakebed of Lake Cahuilla was not the typical creosote-bursage habitat association as has been described for this species (Turner and Medica 1982, Turner et al. 1980, FTHL-ICC 2003).

The *Atriplex* community in the lakebed was, at best, likely marginal habitat for flat-tailed horned lizards. Flat-tailed horned lizards have been found in association with *Atriplex* in the Dos Palmas area and San Sebastian Marsh area, but a mark-recapture plot in desert sink scrub with no sand in the Dos Palmas ACEC found no flat-tailed horned lizards (Mark Massar, Wildlife Biologist, BLM, Palm Springs, pers. comm. 2005). The area surrounding San Sebastian Marsh is in the lakebed of Lake Cahuilla and mirrors the vegetation associations described by Parish (1914) with areas of *Atriplex*, iodine bush, and mesquite, but the San Sebastian Marsh area has yielded very few flat-tailed horned lizards (FTHL-ICC 2003). Turner et al. (1980) recognized that the lakebed appeared to be lesser quality habitat: "In Imperial County, habitats above the old shoreline of Lake Cahuilla are better than those below the shoreline, possibly because soils above the old shoreline tend to be sandier."

The first known historical record of a flat-tailed horned lizard from the lakebed of Lake Cahuilla was collected near the present-day city of Calexico (Klauber 1932). Other flat-tailed horned lizards were collected early in the 20th century near the present-day cities of Westmorland and Holtville and from the edges of the Salton Sea (Klauber 1932; Funk 1981; Turner et al. 1980). These areas are now urban or agricultural areas. Turner and others (1980), noting the few flat-tailed horned lizards found in association with *Atriplex*, suggested they may represent dispersing individuals. In most cases, flat-tailed horned lizard populations in *Atriplex* habitat appear to be sparse. The exception to this rule may be the high densities of flat-tailed horned lizards found associated with *Atriplex* in the Coachella Valley (FTHL-ICC 2003). However, the windblown sand preferred by flat-tailed horned lizards is found in adequate amounts in the Coachella Valley Preserve (Barrows 1996). The San Sebastian Marsh and Dos Palmas areas

described above have little windblown sand. Parish (1914) describes the soils of the southern part of the sink (south of the current-day Salton Sea) as "loams of very fine compact grain \* \* \* with very small percentages of sand. They are permeable by water only to a slight degree." No information has been found on the amount of wind-deposited sand that was present in the lakebed. Free (1914) alludes to accretion dunes in the lakebed that may have been good flat-tailed horned lizard habitat. But Parish (1914), describing the vegetation of the Imperial Valley, reported "wide expanses absolutely devoid of a single plant save in the infrequent furrows and channels which constitute the drainage system."

The precise proportion of the lakebed that historically was habitat, and the quality of that habitat, is difficult to accurately determine. We do not know the precise proportions of specific plant communities that were present in the Salton Sink. We do not know the patterns of windblown sand deposition. Despite the difficulty in accurately determining historic conditions in the dry lakebed, we believe that it contained only a limited amount of suitable habitat, most of which is likely to have been marginal at best. Thus, even if the lakebed were considered historical habitat, it would not be significant to the species.

Additionally, recent work on the genetics of the flat-tailed horned lizard suggests that gene flow across the lakebed between the east and west sides of the Salton trough was low even before the current fragmentation due to development and agriculture (Mulcahy et al. 2006). The authors state: "\* \* \* suggesting that there has not been substantial gene flow across the Imperial Valley since the drying of Lake Cahuilla. Although historic localities exist in the Imperial Valley, genetic differences suggested limited gene flow across this region prior to human development."

## Lost Habitat

As discussed above, the area of the historical range periodically inundated by Lake Cahuilla was not important to the long-term viability of the flat-tailed horned lizard because this area was frequently unavailable and likely contained little quality habitat. Much of the area within the former Lake Cahuilla lakebed likely was not only intermittent, but low-quality habitat for the flat-tailed horned lizard, particularly the central salt deposit and saltier, less sandy portions of the *Atriplex* community. Thus, we determined this area should not be considered part of the species'

historical habitat. The remainder of this analysis considers the historical habitat outside the area of the former Lake Cahuilla to be the appropriate baseline for assessing the species' total range. Using our estimate that the former Lake Cahuilla was 1,309,409 ac (529,899 ha) based on a 39 ft (12 m) shoreline (Waters 1983) calculated with a GIS digital elevation model, the baseline for assessing the species' range (which excludes the former Lake Cahuilla) was approximately 4,875,624 ac (1,973,095 ha). Below we describe the significance of lost habitat within this delineated historical habitat (outside the area of the former Lake Cahuilla).

Approximately 1,103,201 ac (446,450 ha) have been lost, nearly entirely within two areas: the Coachella Valley, and Mexicali and Yuma areas. In the January 3, 2003, withdrawal, we determined that the Coachella Valley, including its lost associated habitat, is not a significant portion of the range. Near Mexicali, agriculture extends from Mexicali south to near the Gulf of California and east to the Colorado River. This block of lost habitat is contiguous (across the Colorado River) with the block of lost habitat in the Yuma area. The block of habitat that encompasses northeastern Baja California Norte and southwestern Arizona is the largest block of lost habitat.

These habitat areas were likely converted to agriculture early in the 20th century, similar to that described for the Imperial Valley (Imperial Irrigation District 2002). The lost habitat is not significant because of its small size relative to the entire range and because this area has been lost to agriculture for nearly a century and the flat-tailed horned lizard has persisted. Since the early 20th century, the species has persisted on East Mesa and West Mesa, and in the Yuha Basin over many generations. Flat-tailed horned lizards rarely live more than 4 years in the wild and can reproduce in their first or second year (FTHL-ICC 2003). If the median generation time is 2 years, then more than 25 generations of flat-tailed horned lizards have come and gone since most of the habitat conversion to agriculture production took place. This continued persistence over a span of nearly 100 years is a strong indication that the species will continue to persist into the foreseeable future despite the loss of historical habitat.

We do not expect additional conversion of flat-tailed horned lizard habitat to agriculture in the future in the Imperial Valley and elsewhere along the Colorado River given the existing limitations on the availability of water for irrigation (Imperial Irrigation District 2002). In fact, a recent water transfer agreement with San Diego required some fields to remain fallow (unirrigated); therefore, agricultural use may even decrease in this area (Imperial Irrigation District 2006).

Though the lost habitat is situated between the Arizona-Sonora and California-Baja California Norte populations, the Colorado River already isolated these populations to some degree. The lost habitat of the flat-tailed horned lizard in the United States and Mexico is not viable for flat-tailed horned lizards in the foreseeable future. Much of this habitat has been permanently lost due to urbanization and/or flooding of the Salton Sea. Habitat lost due to agricultural uses may be restored in certain cases in the future, though most agricultural fields are isolated from existing flat-tailed horned lizard populations by irrigation canals like the Coachella Canal, Highline Canal, and All-American Canal. We do not anticipate any significant amount of previously lost habitat could become viable habitat in the future.

In sum, we believe the lost habitat does not represent a significant portion of the range of the flat-tailed horned lizard because the lost habitat was lost decades ago and the species has persisted. Most of the lost habitat was lost early in the century and that lost habitat was not significant enough to lead to the species' extirpation within intact habitat through edge effects or fragmentation. There were no attributes or specific uses of the lost habitat by flat-tailed horned lizards that made it any more significant than any other habitat. For example, a significant part of a range for a species might be a breeding ground or lek site, but there is nothing of the sort for flat-tailed horned lizards. Additionally, as discussed in detail in the January 3, 2003, withdrawal of the proposed listing rule (68 FR 331), the available data concerning population abundance, trends, and threats do not suggest, outside the Coachella Valley, that flat-tailed horned lizard populations are declining in any of the geographic areas, or that because of this habitat loss and degradation the species is likely to

become endangered within the foreseeable future throughout all or a significant portion of its range. Recent estimates of population sizes have been conducted in the West Mesa, Yuha Basin, East Mesa, and the Yuma Desert Management Areas and Ocotillo Wells Research Area since the January 3, 2003, withdrawal of the proposed listing rule (Young et al. 2004; Hollenbeck, Environmental Scientist, California Department of Parks and Recreation, pers. comm. 2005; Grant 2005). Overall, no large decline in population size occurred between 2003 and 2005 in areas for which we have more than one year of data (Grant 2005, Hollenbeck, Environmental Scientist, California Department of Parks and Recreation, pers. comm. 2005).

### Finding

On January 3, 2003 (68 FR 331), the Service issued a decision to withdraw the proposal to list the flat-tailed horned lizard. The Tucson Herpetological Society and other environmental organizations and individuals filed a lawsuit to challenge our decision. The U.S. District Court for the District of Arizona upheld our decision with the exception that we had failed to consider whether the lost historical range of the flat-tailed horned lizard constituted a significant portion of the range. This notice addresses this issue.

We reviewed the best scientific and commercial data available and determined that the lost habitat is not a significant portion of the species range, and does not render the species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. We conclude that the lost habitat is not significant because the species has persisted despite a large amount of habitat loss in the early 20th century, the species remains viable throughout most of its current extant range, and there were no particular attributes of the lost habitat that made it any more significant than any other part of the range. Therefore, based on the above reasoning and the reasoning presented in the January 3, 2003 withdrawal of the proposed rule to list the flat-tailed horned lizard (68 FR 331), we have determined that the flat-tailed horned lizard is not likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of its range.

<b>References Cited</b>	<b>Author</b>	Act of 1973, as amended (16 U.S.C. 1531 <i>et seq.</i> ).
A complete list of all references cited is available at the Carlsbad Fish and Wildlife Office (see <b>ADDRESSES</b> above).	The primary author of this document is the Carlsbad Fish and Wildlife Office (see <b>ADDRESSES</b> above).	Dated: June 20, 2006.
	<b>Authority</b>	<b>Marshall Jones, Jr.,</b> <i>Acting Director, U.S. Fish and Wildlife Service.</i>
	The authority for this action is section 4(b)(6)(B)(ii) of the Endangered Species	[FR Doc. E6–10138 Filed 6–27–06; 8:45 am]
		<b>BILLING CODE 4310–55–P</b>