

Solid Waste and Refuse Authority Superfund Site without prior notice of intent to delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final deletion. If we receive no adverse comment(s) on this notice of intent to delete or the direct final notice of deletion, we will not take further action on this notice of intent to delete. If we receive adverse comment(s), we will withdraw the direct final notice of deletion and it will not take effect. We will, as appropriate, address all public comments in a subsequent final deletion notice based on this notice of intent to delete. We will not institute a second comment period on this notice of intent to delete. Any parties interested on commenting must do so at this time. For additional information, see the direct final notice of deletion which is located in the Rules section of this **Federal Register**.

**DATES:** Comments concerning this Site must be received by January 13, 2005.

**ADDRESSES:** Written comments should be addressed to Larry Johnson, Community Involvement Coordinator, 3HS43, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, (215) 814-3239.

**FOR FURTHER INFORMATION CONTACT:** Romuald Roman, Remedial Project Manager, 3HS22, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, (215) 814-3212. fax: (215) 814-3002; e-mail: [roman.romuald@epa.gov](mailto:roman.romuald@epa.gov).

**SUPPLEMENTARY INFORMATION:** For additional information, see the Direct Final Notice of Deletion which is located in the Rules and Regulations section of this **Federal Register**.

*Information Repositories:* Repositories have been established to provide detailed information concerning this decision at the following address: U.S. EPA Region III, Regional Center for Environmental Information (RCEI), 1650 Arch Street, Philadelphia, PA 19103, (215) 814-5364 (Monday through Friday 8 a.m. to 4:30 p.m.) and the Mason-Dixon Public Library, Main Street, Stewartstown, Pennsylvania 17363.

#### List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR,

1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: October 26, 2004.

**Richard J. Kampf,**

*Acting Regional Administrator, Region III.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AT74

### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch)

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch) pursuant to the Endangered Species Act of 1973, as amended (Act). We are proposing to designate approximately 3,583 acres (ac) (1,450 hectares (ha)) of critical habitat in three units in Riverside and San Bernardino counties, California. Habitat essential to the conservation of the species in Riverside and San Bernardino counties is being excluded from critical habitat under section 4(b)(2) of the Act.

**DATES:** We will accept comments from all interested parties until February 14, 2005. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by January 28, 2005.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California, 92009.
2. You may hand-deliver written comments to our Office, at the address given above.
3. You may send comments by electronic mail (e-mail) to [fw1cfwocvmv@fws.gov](mailto:fw1cfwocvmv@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.
4. You may fax your comments to (760) 431-9618.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office at the address given above (760) 431-9440).

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, Carlsbad Fish and Wildlife Office (*see ADDRESSES* section).

#### SUPPLEMENTARY INFORMATION:

#### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. In particular, we are seeking comments concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of habitat, and what habitat is essential to the conservation of the species and why;

(3) Whether unoccupied habitat identified as such and which serves as a source of sand for the areas proposed as critical habitat should be included in the designation;

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

(5) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(7) The exclusion of Federal lands (*e.g.*, Bureau of Land Management and the U.S. Forest Service) from critical habitat based on their participation in and contribution to the conservation of *Astragalus lentiginosus* var. *coachellae* under the proposed Coachella Valley Multiple Species Habitat Conservation Plan.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of

several methods (see **ADDRESSES** above). Please submit e-mail comments to [fw1cfwocvmv@fws.gov](mailto:fw1cfwocvmv@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Coachella Valley milk-vetch" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Please note that the e-mail address [fw1cfwocvmv@fws.gov](mailto:fw1cfwocvmv@fws.gov) will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

#### **Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs). The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit

to the species most in need of protection.

#### *Role of Critical Habitat in Actual Practice of Administering and Implementing the Act*

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

#### *Procedural and Resource Difficulties in Designating Critical Habitat*

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent

(NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

#### **Background**

*Astragalus lentiginosus* var. *coachellae* is found on loose wind-blown sands in dunes and flats, and in sandy alluvial washes in the northern Coachella Valley area, and to a limited extent, in northern Chuckwalla Valley. Its distribution in the Coachella Valley area roughly spans from just east of Cabezon to the dunes off Washington Avenue, north and west of Indio. The occurrences in the Chuckwalla Valley are all along a 5-mile stretch of Highway 177 just north of Desert Center.

Please refer to the final listing rule published in the **Federal Register** on October 6, 1998 (63 FR 53596) for a detailed discussion on the taxonomic history and description of this taxon. It is our intent in this document to reiterate and discuss only those topics directly relevant to the development and designation of critical habitat or relevant information obtained since the final listing.

The primary threat to *Astragalus lentiginosus* var. *coachellae* is the

extensive urban development in the Coachella Valley (63 FR 53596). Urbanization has both direct and indirect effects on *A. l. var. coachellae*. Urbanization can destroy plants and suitable and occupied habitat on-site, and indirectly degrade suitable and occupied habitat by blocking sand transport downwind of the development. Other threats include habitat destruction from future wind energy projects, off-highway vehicle (OHV) use, and spread of exotic plants, such as Saharan mustard (*Brassica tournefortii*) and Mediterranean grass (*Schismus barbatus*) (63 FR 53596).

#### Previous Federal Actions

The following section summarizes the Federal actions that occurred since the final listing rule of this species as endangered was published in the **Federal Register** on October 6, 1998. Please refer to the final listing rule (63 FR 53596) for a discussion of Federal actions that occurred prior to the species being federally-listed.

At the time of listing we determined that designation of critical habitat would not provide any additional conservation benefits beyond those provided by listing the species and that the designation could lead to acts of collection or vandalism (63 FR 53596). On November 15, 2001, the Center for Biological Diversity and the California Native Plant Society filed a lawsuit against Secretary Gale Norton and the Service alleging that the Service violated the Act and the Administrative Procedure Act (APA) by determining that designating critical habitat for eight plant species listed as endangered or threatened, including *Astragalus lentiginosus* var. *coachellae*, was not prudent (*Center for Biological Diversity et al. v. Norton*, No. 01 CV 2101). A second lawsuit also asserting the same challenge was filed on November 21, 2001, by the Building Industry Legal Defense Foundation (*Building Industry Legal Defense Foundation v. Norton*, No. 01 CV 2145).

The Court convened an Early Neutral Evaluation Conference on March 19, 2002, in which the Center for Biological Diversity, California Native Plant Society, and the Building Industry Legal Defense Foundation participated. At the conference, the parties agreed that (1) the critical habitat determinations for the eight plant species at issue would be remanded to the Service for reconsideration of its previous "not prudent" determinations and (2) that the two cases should be consolidated into a single case. The parties did not come to agreement on an appropriate timeline for issuance of proposed and

final determinations of critical habitat on the remand during the conference, but did agree to brief the Court regarding the appropriate schedule for reconsideration of the not prudent determination and to be bound by the Court's determination. Following the conference, on April 8, 2002, the court granted a motion to intervene filed by the American Sand Association, the California Off-Road Vehicle Association, the American Motorcycle Association, Inc.—District 37, the San Diego Off-Road Coalition, and the Off-Road Business Association (collectively, "intervenor"). The motion limited the intervenors' participation to resolution of an appropriate timeline for reconsideration of the critical habitat determination.

On July 1, 2002, the Court ordered the Service to reconsider its not prudent determination and publish a proposed critical habitat designation, if prudent, for *Astragalus lentiginosus* var. *coachellae* on or before November 30, 2004, and to publish a final critical habitat designation on or before November 30, 2005.

#### Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species

(i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and our U.S. Fish and Wildlife Service Information Quality Guidelines (2002) provide criteria, establish procedures, and provide guidance to ensure that our decisions represent the best scientific and commercial data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Critical habitat designations do not signal that habitat outside the designation is unimportant to *Astragalus lentiginosus* var. *coachellae*. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation

plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

### Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that are essential to the conservation of *Astragalus lentiginosus* var. *coachellae*. This includes information from our own documents, including the final rule listing the taxon as endangered (63 FR 53596), recent biological surveys, reports, aerial photos, and other documentation. We also used the habitat model developed by the Coachella Valley Mountain Conservancy (CVMC) for the proposed Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP) (CVMC 2004), as a starting point for identification of essential habitat and compared it to data from other plant surveys.

We have also reviewed available information that pertains to the habitat requirements of this species. We used published historical surveys for *Astragalus lentiginosus* var. *coachellae* and ecological descriptions of the Sonoran Desert (Abrams 1944, Munz and Keck 1959, Shreve and Wiggins 1964, Turner and Brown 1982, Holland 1986) to describe the range of environmental conditions in which the plant existed prior to current landscape changes that have resulted in the loss of the species' habitats. We used data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits to evaluate the habitat model developed for the plant (Sanders and Thomas Olsen Associates 1996, Service unpublished Geographic Information System (GIS) data). We also used agency and academic reports to describe the sand transport systems (Lancaster *et al.* 1993, Griffiths *et al.* 2002) and used reports about related varieties of *Astragalus lentiginosus* to describe its ecology and phenology (Beatley 1974, Forseth *et al.* 1984, and Pavlik 1985).

### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that

may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements required for *Astragalus lentiginosus* var. *coachellae* habitat are derived from the physical and biological features that are essential to the conservation of the species as described below.

#### *Space for Individual and Population Growth Within the Eolian (Wind-Blown) Sand Transport System*

*Astragalus lentiginosus* var. *coachellae* has a limited distribution. The majority of populations are found in the Coachella Valley area, mostly in and around Snow Creek, Whitewater River, Mission and Morongo Creeks, Willow Hole, Big Dune, and Coachella Valley Preserve areas (Bureau of Land Management, unpublished data 2001a). There are also several historic and recent records southeast of the Coachella Valley in the Chuckwalla Valley, along approximately a 5-mile portion of Highway 177 northeast of Desert Center (Bureau of Land Management, unpublished data 2001b).

*Astragalus lentiginosus* var. *coachellae* populations in the Coachella Valley are strongly affiliated with active, stabilized, and shielded sandy substrates (Sanders and Thomas Olsen Associates 1996, White 2004). This taxon is primarily found on loose eolian (wind transported) or alluvial (water transported) sands that are located on dunes or flats, and along disturbed margins of sandy washes. The highest densities of *A. l.* var. *coachellae* have been found in locations containing large areas of eolian sand, including Snow Creek (Sanders and Thomas Olsen Associates 1996), Big Dune, and Willow Hole area (Bureau of Land Management, unpublished data 2001a). Within active and stabilized sand fields and dunes, *A. l.* var. *coachellae* tends to occur in coarser sands in the margins of dunes, but not in most active windswept sand areas (White 2004).

Active dunes are generally characterized as barren expanses of moving sand where perennial shrub species are sparse. These dunes may intergrade with stabilized or partially stabilized dunes, which have similar sand accumulations and formations, but

are stabilized by evergreen or deciduous shrubs, scattered low annuals, and perennial grasses.

Active sand fields are similar to active dunes, but are characterized as smaller sand accumulations that are not of sufficient depth to form dune formations. These may be characterized as hummocks forming behind individual shrubs or clumps of vegetation.

Stabilized sand fields are similar to active sand fields, but contain sand accumulations that are stabilized by vegetation or are armored. Armoring is the process where the wind picks up and moves small sand grains, and leaves behind larger sand grains forming an "armor" that prevents wind from moving additional smaller particles trapped below (Sharp and Saunders 1978). The stabilized sand fields in the latter case are temporary, becoming active when the armor is disturbed over large areas, or new blow sand is deposited from upwind fluvial depositional areas.

*A. l.* var. *coachellae* are also found in shielded sand dunes and fields. These areas have similar sand formations as compared to active and stabilized sand dunes and fields, except that sand source and transport systems that would normally replenish these areas have been interrupted or shielded by human development.

*Astragalus lentiginosus* var. *coachellae* also occurs in localized patches of eolian sand or in active washes that are, in some cases, fairly distant from large dunes or sand field areas (White 2004). Some of these localized patches of eolian sands are characterized as ephemeral sand accumulations lacking dune formation. This type of habitat generally occurs at the western end of the Coachella Valley where wind velocities are highest (Sharp and Saunders 1978).

The sandy substrates that provide suitable habitat for *Astragalus lentiginosus* var. *coachellae* are extremely dynamic in terms of spatial mobility and tendency to change back and forth from active to stabilized (Lancaster 1995). This has significant consequences for *A. l.* var. *coachellae* because their population densities vary with different types of sandy substrates. For instance, the greatest densities of plants have been recorded on dune and hummock habitats, such as Big Dune, Snow Creek and Willow Hole, whereas smaller densities of plants have been recorded on stabilized sand fields (Bureau of Land Management, unpublished GIS data 2001a). Conserving a wide variety of sandy substrate types is important for the

conservation of *A. l.* var. *coachellae* because of the dynamics of the eolian sand transport processes.

*Astragalus lentiginosus* var. *coachellae* fruiting bodies are inflated, an apparent adaptation for being dispersed by wind. Protecting wind transport corridors between *A. l.* var. *coachellae* populations from obstruction is also important for facilitating adequate gene flow and maintaining areas that may serve as ephemeral habitat.

#### *Areas Containing the Fluvial and Eolian Processes That Generate Suitable Habitat*

Sandy habitat in the Coachella Valley is highly dynamic and is controlled by two main factors: (1) The supply of sand-size sediment released by the fluvial system (water-transported), and (2) the rate of eolian (wind-blown) transport (Griffiths *et al.* 2002). The latter is affected primarily by wind fetch (the length of unobstructed area exposed to the wind), and less by wind speed and duration, availability and size of sand in channel bottoms, presence of natural and artificial windbreaks, and the density and size of natural vegetation in channels and among sand dunes.

Most of the suitable sandy habitats in the Coachella Valley are generated from several drainage basins in the San Bernardino, Little San Bernardino, and San Jacinto mountains and Indio Hills (Griffiths *et al.* 2002, Lancaster 1997). Sediment is washed from hill slopes and channels in the headwaters and is transported downstream in stream channels during infrequent flood events (Griffiths *et al.* 2002). Fluvial transport is the dominant mechanism that moves sediment into fluvial depositional areas in the Coachella Valley (Griffiths *et al.* 2002). Some sediment is stored on terraces within the channels, whereas during larger flood events, sediment is stored on the bajada (large, coalescing alluvial fans) surface as floodplain deposits or is transported through the bajada in channelized washes and deposited over broad depositional areas. The largest depositional area in the Coachella Valley is in the western end of the Whitewater River, northwest of the City of Palm Springs (Griffiths *et al.* 2002). For sufficient fine-grained sands to reach the eolian system in the valley floor and become suitable *Astragalus lentiginosus* var. *coachellae* habitat, it is necessary to protect major fluvial channels that transport source sand from the surrounding drainage basins as well as bajadas and depositional areas. The Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP)

identifies the protection of the above-mentioned essential ecological processes, including sand source/transport systems as a species conservation goal.

The narrow San Gorgonio Pass is between the two highest peaks in southern California, San Gorgonio Mountain (11,510 ft., 3,508 m) to the north and San Jacinto Mountain (10,837 ft., 3,303 m) to the south. Westerly winds funneling through San Gorgonio Pass are the dominant mechanism by which eolian sands are transported from bajadas and fluvial depositional areas to eolian deposits in the Coachella Valley (Sharp and Saunders 1978, Griffiths *et al.* 2002). *Astragalus lentiginosus* var. *coachellae* is associated with various types of sandy habitats that are formed by these eolian deposits (Sanders and Thomas Olsen Associates 1996, White 2004). In order to maintain adequate replenishment of eolian sands into eolian depositional areas, it is important that sand-transport corridors between fluvial and eolian depositional areas remain unobstructed for wind passage. The strong wind energy in this region can also erode sands from wash margins and suitable *A. l.* var. *coachellae* habitat, thereby shifting *A. l.* var. *coachellae* habitat into other areas, and thereby allowing the taxon to disperse and colonize new habitat. As a result, it is also necessary to protect sufficient areas that allow for these dynamic eolian sands to shift in their distribution.

Pursuant to our regulations, we are required to identify primary constituent elements essential to the conservation of *Astragalus lentiginosus* var. *coachellae*, together with the proposed designation of critical habitat that is essential to the conservation of the species. In identifying primary constituent elements, we used the best available scientific and commercial data available. The physical ranges described below in the primary constituent elements may not capture all of the variability that is inherent in the natural systems that support *A. l.* var. *coachellae*. The primary constituent elements determined essential to the conservation of *A. l.* var. *coachellae* are the following:

1. Unconsolidated sands stored within rivers and tributaries in the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills. The unconsolidated sands stored in these rivers and tributaries are not occupied by *A. l.* var. *coachellae*, but represent the original source of the loose sand that form the sand dunes and flats that are occupied by this plant.

2. Unconsolidated sands deposited on the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills. The unconsolidated sands deposited on these alluvial fans are sporadically occupied by *A. l.* var. *coachellae*; and, importantly, are transported by wind and water to form the fluvial and eolian sand dunes and flats that are occupied in greater numbers by this plant;

3. Suitable flooding regimes to transport unconsolidated sands from rivers and tributaries to the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills;

4. Suitable wind and flooding regimes to transport unconsolidated sands deposited on the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills to the fluvial and eolian depositional areas, including areas west of Edom Hill/Willow Hole reserve, areas west of Coachella Valley Preserve, and the Whitewater Floodplain area that are occupied by *A. l.* var. *coachellae*.

5. Eolian sands on active, stabilized, and shielded sand dunes or fields, and sandy alluvial sites in washes within the San Gorgonio/Whitewater River eolian sand transport system, Mission Creek/Morongu Wash eolian sand transport system, and the Thousand Palms eolian sand transport system that are occupied by *A. l.* var. *coachellae*.

#### **Criteria Used To Identify Critical Habitat**

We are proposing to designate critical habitat on lands that we have determined contain primary constituent elements and may be in need of special management or protection for the conservation of *Astragalus lentiginosus* var. *coachellae*. These areas have the primary constituent elements described above. We have also identified and are seeking comment on whether to include a number of unoccupied areas which serve as a source of the sand identified as a primary constituent element for the species.

*Astragalus lentiginosus* var. *coachellae* is one of the species suggested for coverage by the proposed Coachella Valley MSHCP. A spatially explicit habitat model for the plant in the Coachella Valley spanning from Cabezon to Thousand Palms was created to assist in the design of preserves and to evaluate the potential benefits of the MSHCP on *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Mountain Conservancy (CVMC) 2004). We are using this habitat model to assist us in identifying specific areas essential to the conservation of the taxon.

The model was developed from occurrence data for *Astragalus lentiginosus* var. *coachellae* (Bureau of Land Management, unpublished data 2001a). Environmental variables associated with the occurrence locations were identified and maps containing those variables were combined with GIS land use and habitat information to create the model. Eight types of habitats were used in the model: (1) Margins of active dunes, (2) active shielded desert dunes, (3) stabilized desert dunes, (4) stabilized sand fields, (5) stabilized shielded sand fields, (6) ephemeral sand fields, (7) active sand fields, and (8) mesquite hummocks. The habitat types used to create the model represented conditions that result from the dynamic process of sand movement in the Coachella Valley floor. The active dunes and sand fields form where sand movement from fluvial systems cross the eolian sand transport corridor where it is relatively unobstructed. Mesquite hummocks are areas where large clumps of low-growing mesquite may form hummocks within sand dunes. The hummocks are created by the mesquite, which reduces the wind velocity occurring across the ground, thus causing sediment to fall from the wind and collect near the plant. Large sand depositions onto the valley floor are episodic (Griffiths *et al.* 2002). In between flood events that deposit large amounts of sand available for transportation onto the valley floor, strong winds are constantly moving sand forward and leaving patches of gravel or cobble in the middle of sand fields. Holland (1986) defined this mosaic of sandy patches as an "ephemeral sand field." The Coachella Valley floor now contains several development projects in front of or on top of sand sources or transport corridors that have shielded some sandy areas from being replenished with new eolian sands (CVMC 2004). Stabilized sand fields and dunes are sandy areas where sand movement is limited due to natural obstruction of wind from shrubs, herbs, and grasses (Holland 1986).

Because the model has not been refined with any field data since it was developed (CVMC 2004), we reviewed the validity of the environmental variables used to create the model with occurrence data and information about the plant's ecology. We found records for *Astragalus lentiginosus* var. *coachellae* in all of the natural communities used to create the model. The proposed critical habitat includes a mosaic of these habitat types, as well as intervening areas of ephemeral habitat to allow for the transport of wind-

dispersed seed pods and eolian sands between locations containing large areas of habitat.

*Astragalus lentiginosus* var. *coachellae* seeds germinate in response to winter rains (White 2004). Also in response to these winter rains, seasonally dormant root crowns (the point at which the root and stem of a plant meet) sprout new shoots. The date of first flowering may be as early as December and can continue into May, though the majority of flowering specimens have been collected in March and especially in April (White 2004). The first date of fruit may be as early as February, but fruit peaks in April and May as determined by seasonal collections. At maturity, the pods dry and fall to the ground, where they are then dispersed by wind. As summer progresses, the vegetation dies above the root mass, with an unknown proportion of plants persisting into the following summer and fall as dormant root crowns (White 2004). *A. l.* var. *coachellae* populations can survive drought periods as dormant seeds (seed bank), and as a consequence, the numbers of above-ground plants at any given time is only a limited temporal indication of population size (White 2004). It is not known how long *A. l.* var. *coachellae* seeds may remain viable, but studies on another *Astragalus lentiginosus* variety (var. *micans*) demonstrate that buried seeds may remain viable for at least eight years (Pavlik and Barbour 1986). Therefore, we also considered areas as essential where suitable habitat did not contain above-ground individuals, but may contain seed banks and dormant root crowns necessary for the survival and recovery of *A. l.* var. *coachellae*.

As stated earlier, the sand transport systems are very important for sustaining the various types of sandy habitats required by *Astragalus lentiginosus* var. *coachellae* in the Coachella Valley. The eolian sands in the valleys originate in the drainage basins in the surrounding mountains. Major precipitation and flooding episodes erode sediment from the hillslopes and carry it downstream through the fluvial systems. Fine-grained sediments are deposited in either bajadas (alluvial fans) or depositional areas that form the supply of sand for the eolian sand transport system. We have identified but have not at this time proposed for designation as critical habitat major channels (> 15.24 m (50 ft) in width) in the fluvial systems from mountain watersheds surrounding the Coachella Valley into the valley floors. The width of the channels selected for identification as possible critical habitat include only major

channels and not all minor tributaries in the drainages. The identified but not proposed areas also include bajadas and depositional areas where channels deposit sands for the eolian sand-transport system.

Habitat eligible for designation was mapped using GIS and refined using topographical and aerial map coverages. To accomplish this, we first identified and mapped areas of suitable habitat supporting *Astragalus lentiginosus* var. *coachellae* that contained the primary constituent elements and belonged to one of three major sand transport systems (San Gorgonio and Whitewater River system, Mission creek/Morongo Wash system, and the Indio Hills/Thousand Palms system) in the Coachella Valley; these systems support a majority of *Astragalus lentiginosus* var. *coachellae*'s population. We determined eligible habitat as consisting of large contiguous areas of suitable habitat as well as small intervening areas of unsuitable habitat for maintenance of sand movement between areas of suitable habitat. Some outlying areas of suitable habitat were not included because they were either too distant from other large areas of suitable habitat or were isolated by development. We also decided that suitable habitat outside of the preferred alternative reserve design for the draft Coachella Valley MSHCP was not necessary to this designation since adequate areas for conservation are generally being proposed within the MSHCP's reserve system.

Next, based on studies on the geomorphological processes of sediment movement in the Coachella Valley by Lancaster (1993) and Griffith *et al.* (2002), we identified and mapped drainage basins that provide sediment for the three major sand transport systems in the Coachella Valley. Based on Griffith *et al.* (2002), the drainages in eastern San Bernardino, western Little San Bernardino Mountains, northern San Jacinto Mountains, and Indio Hills, that contribute sediment to the Coachella Valley include the San Gorgonio River, Whitewater River, Snow Canyon, San Jacinto 1 and 2, Stubbes Canyon, Cottonwood Canyon, Garnet Wash, Mission Creek, Dry Morongo, lower Little Morongo Creek, lower Big Morongo south of Morongo Valley, and drainages in the southern flank of Indio Hills west of Thousand Palms Canyon. While Griffiths *et al.* (2002) identified whole drainage areas of the above-mentioned washes that contribute sediment to depositional areas on the floor of the Coachella Valley, we only included the stream channels themselves. Thus, we were

able to substantially decrease the amount of land identified for possible addition to the critical habitat designation. We are also considering major rivers and tributaries draining the surrounding mountains and hills, bajadas, and depositional areas in the floodplains where the fluvial channels deposit sediment. The combined extent of these areas are shown on the maps accompanying this proposal as "unoccupied habitat:sand source".

One of the Coachella Valley Association of Government's (CVAG) objectives for conserving *A. l. var. coachellae* in their draft Coachella Valley MSHCP is to protect ecological processes, including sand source/transport systems and biological corridors and linkages among conserved populations for seed dispersal and shifts in species distribution over time (CVMC 2004). The draft MSHCP included areas containing these ecological processes and biological corridors in their preferred alternative reserve design. Essential areas proposed for critical habitat include the same areas mentioned above as well as several other drainages that are beyond the draft MSHCP planning area boundary.

After creating a GIS coverage of the essential areas, we legally described the boundaries of the proposed critical habitat, areas proposed for exclusion, and the unoccupied habitat identified for possible inclusion using a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27.

Whenever possible, areas not containing the primary constituent elements, such as developed areas, were not included in the boundaries of proposed critical habitat. However, we did not map critical habitat in enough detail to exclude all developed areas, or other areas unlikely to contain the primary constituent elements essential for the conservation of *Astragalus lentiginosus* var. *coachellae*. Areas within the boundaries of the mapped units, such as buildings, roads, parking lots, railroad tracks, canals, and other paved areas, are excluded from the designation by text, but these exclusions do not show on the maps because their scale is too small.

#### Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to have primary constituent elements may require special management

considerations or protections. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Threats to those primary constituent elements are caused by the direct and indirect effects of urban development, golf course construction, exotic plant species, energy projects, and OHV impacts.

On private lands, urban and golf course developments destroy plants and occupied habitat directly. Large housing and golf course developments may also affect the localized wind and flooding regimes by reducing wind movement by the structures and landscaping and by changing the flooding and drainage patterns. Occupied habitats downstream and downwind of these developments, dependent upon the continuous supply of loose unconsolidated sands for their long-term existence, may be degraded by the alteration, blockage, and reduction in their supply of sand. Threats to the species may occur from urban developments that are not designed to reduce direct impacts to *Astragalus lentiginosus* var. *coachellae* and do not allow sand transport to occupied habitats downstream and downwind from these projects.

On both private and public lands, invasive exotic plant species, such as Saharan mustard (*Brassica tournefortii*), Mediterranean grass (*Schismus barbatus*), and Russian thistle (*Salsola tragus*), out compete and displace *Astragalus lentiginosus* var. *coachellae* and stabilize loose sediments and thus reduce transport of sediment to downwind habitats occupied by this species. Dense populations of Saharan mustard have recently invaded the Snow Creek area, which stabilizes the soils and thus reduces eolian sand transport to downwind depositional areas. The dense numbers of mustard may also compete with *A. l. var. coachellae* for limited resources, such as water. Russian thistle is also thought to stabilize soils as well as compete with *A. l. var. coachellae* for limited resources. Mediterranean grasses have been a problem in the Coachella Valley because they grow on loose sandy soils, which eventually causes stabilization of the soil and a degradation of suitable

habitat, as well as possibly out competing *A. l. var. coachellae* for limited resources. The survival of *A. l. var. coachellae* is threatened by these invasive species.

On both private and public lands, unauthorized OHV use may destroy plans and occupied habitats directly. The *A. l. var. coachellae* is threatened by lack of law enforcement patrols which could reduce unauthorized OHV use on private lands occupied by this plant and to direct OHV use to areas approved for this recreation activity.

On public lands, the construction and operation of sand and gravel mining, dams, and percolation ponds can directly impact plants and occupied habitat and decrease the amount of fluvial transported sediments to deposition areas downstream occupied habitats. For example, the percolation ponds constructed on Bureau of Land Management areas resulted in the direct loss of plants and occupied habitat and may have altered the transport of sand to downstream occupied habitats. Threats to the species are the lack of project design and operation of sand and gravel mining, dams, and percolation ponds to reduce direct impacts to *Astragalus lentiginosus* var. *coachellae* and that reduce sand transport to occupied habitats downstream and downwind from these facilities.

#### Proposed Critical Habitat Designation

We determined that approximately 20559 ac (8320 ha) of eligible occupied habitat exists for *Astragalus lentiginosus* var. *coachellae* in San Bernardino and Riverside Counties, California (Table 1). We are proposing a designation of 3583 ac (1450 ha) in three units as critical habitat for *A. l. var. coachellae* (Table 2). Eligible occupied habitat in Riverside County is being excluded from the proposed critical habitat designation (See Exclusions Under Section 4(b)(2) of the Act for a detailed discussion below.). The proposed critical habitat designation described below constitutes our best assessment of the areas occupied by *A. l. var. coachellae* with primary constituent elements that may require special management or protection. The three units proposed for designation as critical habitat are: (1) Whitewater River System, (2) Mission Creek and Morongo Wash System, and (3) Thousand Palms System.

TABLE 1.—AREAS DETERMINED TO BE ESSENTIAL FOR ASTRAGALUS LENTIGINOSUS VAR. COACHELLAE (COACHELLA VALLEY MILK-VETCH) AND THE AREAS PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION.

Critical habitat unit	Area determined to be essential (Ac/Ha)	Area proposed for exclusion from the proposed critical habitat designation (Ac/Ha)
1. Whitewater River System .....	9,625 ac ..... (3,895 ha) .....	6,704 ac. (2,713 ha).
2. Mission Creek/Morongu Wash System .....	5,834 ac ..... (2,361 ha) .....	5,229 ac. (2,116 ha).
3. Thousand Palms System .....	5,101 ac ..... (2,064 ha) .....	5,043 ac. (2,041 ha)
Total .....	20,559 ac ..... (8,320 ha) .....	16,976 ac. (6,870 ha).

TABLE 2.—CRITICAL HABITAT UNITS PROPOSED FOR ASTRAGALUS LENTIGINOSUS VAR. COACHELLAE (COACHELLA VALLEY MILK-VETCH) BY COUNTY AND LAND OWNERSHIP.

Critical habitat unit	County	BLM	FWS	State lands commission	Private	Total
1. Whitewater River System	Riverside, San Bernardino ...	2,537 ac ..... (986 ha) .....	0 ac ..... (0 ha) .....	32 ac ..... (13 ha) .....	452 ac ..... (183 ha) .....	2,921 ac. (1,182 ha).
2. Mission Creek and Morongu Wash System.	Riverside, San Bernardino ...	415 ac ..... (168 ha) .....	0 ac ..... (0 ha) .....	0 ac ..... (0 ha) .....	190 ac ..... (77 ha) .....	605 ac. (245 ha).
3. Thousand Palms System	Riverside .....	24 ac ..... (10 ha) .....	32 ac ..... (12 ha) .....	1 ac ..... (1 ha) .....	0 ac ..... (0 ha) .....	57 ac. (23 ha).
Total .....	.....	2,876 ac ..... (1,164 ha) .....	32 ac ..... (12 ha) .....	33 ac ..... (14 ha) .....	643 ac ..... (260 ha) .....	3,583 ac. (1,450 ha).

We present brief descriptions of all units, and reasons why their primary constituent elements may be in need of special management or protection, below.

*Unit 1: Whitewater River Unit, Riverside County, California*

Unit 1 is 2921 ac (1182 ha) in size and includes the physical and biological components necessary for the conservation of *Astragalus lentiginosus* var. *cochellae* and require special management considerations. The Whitewater Unit is comprised of Bureau of Land Management (BLM) and State Commission lands between just east of Cabezon, California in the San Gorgonio Pass to Palm Drive, south of Interstate Highway 10. This Unit is essential to the conservation of the species because it is part of a complete sand transport system for the Whitewater River System that is occupied by *A. l.* var. *cochellae*. Fluvial sediments from these drainages are transported downstream in flood events into either the San Gorgonio or Whitewater River and are then deposited in the Whitewater River fluvial deposition zones on both sides of Indian Avenue. Strong westerly and northwesterly winds funneling through the San Gorgonio Pass transport eolian sands from these fluvial depositional zones along the Whitewater River sand

transport corridor. Expansion of the Coachella Valley downwind results in a rapid decrease of wind energy toward Indio (Sharp and Saunders 1978), which results in deposition of eolian sands. Historically, the eolian depositional area was east of Palm Springs in an area called the Big Dune. Recent development has reduced or eliminated the natural transport of eolian sands into Big Dune and as a consequence much of these sands are now deposited on the windward side of this development south of Interstate 10. This sand transport system contains records of several large populations of *A. l.* var. *cochellae* in the Snow Creek area and Whitewater River floodplain. Because of the ephemeral nature of the sandy habitats in the Coachella Valley and given that there is little known about which sandy habitats are most suitable for the taxon, protecting the wide variety of sandy substrates in this unit is important for ensuring the long-term persistence and recovery of *A. l.* var. *cochellae*. We considered these other parts of the sand transport system as essential, but excluded them from this proposed rule because they are within the Coachella Valley MSHCP preferred alternative reserve design on lands that are being conserved by Permittees to the MSHCP (see Discussion in Relationship of Critical Habitat to the pending

Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP).

Unit 1 contains all of the primary constituent elements described in the Primary Constituents Element section above, including areas that receive sands from source/transport areas, which include the following: Unconsolidated sands that originate from rivers and tributaries in the San Bernardino and San Jacinto Mountains (PCE number 1); unconsolidated sands that originate from sand deposited on the alluvial fans and floodplains of the San Bernardino and San Jacinto Mountains (PCE number 2); suitable flooding regimes to transport unconsolidated sands from rivers and tributaries to the alluvial fans and floodplains of the San Bernardino and San Jacinto Mountains (PCE number 3); suitable wind regimes to transport unconsolidated sands deposited on the alluvial fans and floodplains of the San Bernardino and San Jacinto Mountains to the eolian depositional areas (PCE number 4); and eolian sands on active, stabilized, and shielded sand dunes or fields, and sandy alluvial sites in washes within the San Gorgonio/ Whitewater River eolian sand transport system (PCE number 5).

The primary constituent elements found in Unit 1 may be in need of special management or protection



because the reduction or loss of the transport of eolian sand, which maintains suitable habitat for *Astragalus lentiginosus* var. *coachellae* and the invasion of exotic weeds. There are already obstructions to sand transport within this unit, such as the percolation ponds located in the Whitewater River. The Whitewater River fluvial depositional area has been reduced by nearly 50 percent by the percolation ponds along the south edge of the river (Griffiths *et al.* 2002). The percolation ponds trap fluvial sediment that would become available for the eolian transport system. Special management may be required to alter the position of these percolation ponds so that more fluvial sediment is allowed to pass down the river channel into the depositional area (Griffiths *et al.* 2002). This unit is also threatened by obstructions in major channels (*i.e.*, sand mining operations) that transport fluvial sediment downstream to fluvial depositional areas. This unit is also threatened by the effects of invasive weeds, such as *Brassica tournefortii* (Saharan mustard) and *Shismus barbatus* (Mediterranean grass) to *A. l. var. coachellae* (63 FR 53596, October 6, 1998). Saharan mustard and Mediterranean grasses are extremely dense in the western portion of this unit, particularly around the Snow Creek area, and there are concerns that this dense population of weeds may out compete *A. l. var. coachellae* for limited resources.

*Unit 2: Mission Creek and Morongo Wash Unit, Riverside County, California*

Unit 2 is 605 ac (245 ha) in size and includes the full physical and biological components necessary for the conservation of *Astragalus lentiginosus* var. *coachellae* and supports habitats that contain the physical and biological features essential to the conservation of the species and require special management considerations. The Mission Creek and Morongo Wash Unit is BLM lands north of Interstate Highway 10 between Palm Drive and Date Palm Drive, south of 20th Avenue. This Unit is essential to the conservation of the species because it is part of a complete sand transport system for the Mission Creek/Morong Wash System that is occupied by *A. l. var. coachellae*. Fluvial sediment from these drainages is transported downstream into the Mission Creek-Morong Wash fluvial deposition zones between the west splay of Mission Creek and the east splay of Morongo Creek north of Interstate 10 and south of the Banning (San Andreas) Fault (Griffiths *et al.* 2002). Strong westerly and

northwesterly winds funneling through the San Gorgonio Pass transport eolian sands from these fluvial depositional zones across the sand transport corridor and into the aggradation areas in the Edom Hill/Willow Hole Reserve area. We considered these other parts of the sand transport system as essential, but excluded them from this proposed rule because they are within the Coachella Valley MSHCP preferred alternative reserve design on lands that are being conserved by Permittees to the MSHCP (see Discussion in Relationship of Critical Habitat to the pending Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP).

This unit provides habitat for several *A. l. var. coachellae* populations, such as a large population of nearly 1,000 plants recorded in 1982 (CVAG unpublished data 2004). This unit also contains the Edom Hill/Willow Hole Reserve area that protect significant habitat for *A. l. var. coachellae*.

Unit 2 contains all of the primary constituent elements described in the Primary Constituents Element section above, including areas that receive sands from source/transport areas, which include the following: Unconsolidated sands stored within rivers and tributaries in the San Bernardino and Little San Bernardino Mountains (PCE number 1); unconsolidated sands deposited on alluvial fans of the San Bernardino and Little San Bernardino (PCE number 2); suitable flooding regimes to transport unconsolidated sands from rivers and tributaries to the alluvial fans of the San Bernardino and Little San Bernardino Mountains which are then transported to eolian depositional areas (PCE number 3); suitable wind and flooding regimes to transport unconsolidated sands deposited on the alluvial fans of the San Bernardino and Little San Bernardino Mountains to the fluvial and eolian depositional areas (PCE number 4); and eolian sands on active, stabilized, and shielded sand dunes or fields, and sandy alluvial sites in washes within the Mission Creek/Morong Wash eolian sand transport system (PCE number 5).

The primary constituent elements found in Unit 2 may be in need of special management or protection because Unit 2 is threatened by the loss of the transport of eolian sand to maintain suitable habitat for the plant. Exotic weeds are also invading areas of suitable habitat and are a threat to *Astragalus lentiginosus* var. *coachellae*. For further information on the threats to this species in Unit 2 see the final listing rule for *A. l. var. coachellae* (63 FR 53596, October 6, 1998).

*Unit 3: Thousand Palms Unit, Riverside County, California*

Unit 3 consists of 57 ac (23 ha) in size and includes some physical and biological components necessary for the conservation of *Astragalus lentiginosus* var. *coachellae* and supports habitats that contain the physical and biological features essential to the conservation of the species and require special management considerations. The Thousand Palms Unit is comprised of BLM lands in the Coachella Valley preserve along Ramon Road. This Unit is essential to the conservation of the species because it is part of a complete sand transport system for the Coachella Valley Preserve that is occupied by *A. l. var. coachellae*. Fluvial sediment from the surrounding mountain drainages is transported downstream into the alluvial fans south of Indio Hills. Strong westerly and northwesterly winds transport eolian sands from these fluvial depositional zones across the sand transport corridor and into the aggradation areas in the Coachella Valley Preserve. We considered these other parts of the sand transport system as essential, but excluded them from this proposed rule because they are within the Coachella Valley MSHCP preferred alternative reserve design on lands that are being conserved by Permittees to the MSHCP (see Discussion in Relationship of Critical Habitat to the pending Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP).

The Coachella Valley Preserve was originally established to conserve the endangered fringe-toed lizard (*Uma inornata*) and includes Federal, State of California, and private lands. The Coachella Valley Preserve is managed to conserve sand-dependent species and the long-term viability of these lands for *A. l. var. coachellae* is dependent upon maintaining a functional sand transport system. Conserving a complete sand transport system increases the likelihood that fresh eolian and fluvial sands will be brought into areas of suitable habitat and create a variety of sandy habitats that support *A. l. var. coachellae*, such as sandy washes, dunes, and flats. Moreover, this unit is essential because it is located in the easternmost portion of *A. l. var. coachellae's* range in the Coachella Valley. Maintaining the historical range with a distribution that is hydrologically independent and physically isolated from the other units will reduce the potential vulnerability and increase the ability of this species to recover from environmental fluctuations and catastrophic events that may occur

elsewhere within the range of this species. This unit is also part of a sand transport system that supports several large populations of *A. l.* var. *coachellae*, including two records in 1995 of approximately 300 plants (CVAG unpublished data 2004).

Unit 3 contains two of the primary constituent elements described in the Primary Constituents Element section above, including suitable flooding regimes to transport unconsolidated sands from rivers and tributaries to the alluvial fans of the Indio Hills which are then transported to the eolian depositional areas (PCE number 3); and sandy alluvial sites in washes within the Thousand Palms eolian sand transport system (PCE number 5).

The primary constituent elements found within Unit 3 may be in need of special management or protection because of potential threats to fluvial transport of sediment and the eolian sand transport corridor in the Thousand Palms area.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed

species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

Activities on Federal lands that may affect *Astragalus lentiginosus* var. *coachellae* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the Army Corps under section 404 of the Clean Water Act, a

section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat to the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would often result in jeopardy to the species concerned when the area of the proposed action is occupied by the species concerned.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Activities that result in sediment from being transported downstream in stream channels, such as sand and gravel pits in stream channels;

(2) Activities that divert, dam, or affect water flow;

(3) Activities that block wind transport of eolian sands, such as development, planting of tamarisk rows;

(4) Activities that foster invasion of exotic weeds (*e. g.*, roads, landscaping, soil disturbance) and fragmentation of habitat.

All three critical habitat units are known to be occupied by *Astragalus lentiginosus* var. *coachellae* (Bureau of Land Management, unpublished data 2001a). Federal agencies already consult with us on activities in areas currently occupied by the taxon or if the taxon may be affected by the action to ensure that their actions do not jeopardize the continued existence of the *A. l.* var. *coachellae*.

#### *Exclusions Under Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we use provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that we are considering to propose as critical habitat as well as for those areas that are formally proposed for designation as critical habitat. Lands we have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species, (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs), (3) Tribal conservation plans that cover the species, (4) State conservation plans that cover the species, and (5) National Wildlife Refuge System Comprehensive Conservation Plans. A summary of the exclusions proposed in this rule follow in Table 3.

**TABLE 3.—APPROXIMATE ESSENTIAL HABITAT, EXCLUDED ESSENTIAL HABITAT, AND PROPOSED CRITICAL HABITAT (ACRES (AC); HECTARES (HA)) FOR ASTRAGALUS LENTIGINOSUS VAR. COACHELLAE IN SAN BERNARDINO AND RIVERSIDE COUNTIES, CALIFORNIA**

Total essential habitat identified for <i>Astragalus lentiginosus</i> var. <i>coachellae</i> .	20,559 ac. (8,320 ha).
Essential habitat excluded from the proposed critical habitat designation pursuant to section 4(b)(2) of the Act: Draft Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP).	16,976 ac. (6,870 ha).
Total essential habitat proposed as critical habitat.	3,583 ac. (1,450 ha).

#### *Relationship of Critical Habitat to Pending Habitat Conservation Plans and Exclusions Under 4(b)(2)*

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and implementation of an HCP. Some areas occupied by *Astragalus lentiginosus* var. *coachellae* involve a very complex HCP that addresses multiple species, covers large areas, and is important to many participating permittees. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally-listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs are designed to proactively implement

conservation actions to address future projects that are anticipated to occur within the planning area of the HCP. However, given the broad scope of these regional HCPs, not all projects envisioned to potentially occur may actually take place.

In the case of an approved regional HCP and accompanying IA (*e.g.*, those sponsored by cities, counties, or other local jurisdictions) that provide for incidental take coverage for *Astragalus lentiginosus* var. *coachellae*, a primary goal of these regional plans is to provide for the protection and management of habitat essential for the species' conservation while directing development to other areas. The regional HCP development process provides an opportunity for more intensive data collection and analysis regarding particular habitat areas occupied by *A. l.* var. *coachellae*. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks that provide for its biological needs.

In developing critical habitat designations, the Service has analyzed habitat conservation planning efforts to determine if the benefits of excluding them from critical habitat outweigh the benefits of including them in designated critical habitat. In reviewing HCPs, the Service has assessed the potential impacts of critical habitat designation on lands covered by HCPs on future partnerships, the status of HCP efforts and progress made in developing and implementing such plans, and their relationship to the conservation of species. In certain circumstances, the Service has determined that an HCP not yet completed may be considered for exclusion from critical habitat designation pursuant to section 4(b)(2) of the Act. For example, the Service determined that exclusion of the draft Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) from critical habitat designation for vernal pool species was appropriate given the sustained progress and support for the plan of the participating jurisdictions (68 FR 46684, August 6, 2003).

#### **Relationship of Critical Habitat to the Pending Coachella Valley Multiple Species Habitat Conservation Plan (MSHCP)**

The draft MSHCP has been in development from the mid-1990s to present, pursuant to an application to the Service for a Section 10(a)(1)(B) permit under the Act, under the

auspices of the following entities: Coachella Valley Association of Governments (CVAG); the cities of Cathedral City, Coachella, Desert Hot Springs, Indian Wells, Indio, La Quinta, Palm Desert, Palm Springs, and Rancho Mirage; County of Riverside; U.S. Fish and Wildlife Service; California Department of Fish and Game; Bureau of Land Management; U.S. Forest Service; and the National Park Service, who signed a Memorandum of Understanding (Planning Agreement) to govern the preparation of the MSHCP. Subsequently, California Department of Transportation, Coachella Valley Water District, Imperial Irrigation District, Riverside County Flood Control and Water Conservation District, Riverside County Regional Parks and Open Space District, Riverside County Waste Management District, California Department of Parks and Recreation, and Coachella Valley Mountains Conservancy also decided to participate in preparation of the Plan. The parties later amended the Planning Agreement to also address the requirements of the Natural Community Conservation Planning (NCCP) Act and prepare a NCCP pursuant to California Fish and Game Code Section 2810. The MSHCP/NCCP area encompasses approximately 1.2 million ac (485,623 ha), of which 69,000 ac (27,923 ha) is owned by an Indian Reservations and are not included in the MSHCP/NCCP, leaving a total of 1.1 million ac (445,154 ha) addressed by the MSHCP/NCCP in Riverside County.

CVAG estimates there are 36,398 ac (14,730 ha) of habitat for *Astragalus lentiginosus* var. *coachellae* habitat in the MSHCP/NCCP area. The draft MSHCP/NCCP proposes to conserve 19,321 ac (7,819 ha) of modeled *A. l.* var. *coachellae* habitat as part of the preferred alternative reserve design that includes large areas of suitable habitat and other important conservation areas, such as sand sources and sand transport corridors. Core habitat areas include: Snow Creek/Windy Point Conservation Area; Whitewater Floodplain Conservation Area; Willow Hole Conservation Area; and Thousand Palms Conservation Area. Other goals of this draft MSHCP/NCCP include: (1) Protecting other important conservation areas to allow for population fluctuation and promote genetic diversity; (2) protecting essential ecological processes, such as sand transport systems, necessary to maintain core habitat and other conserved areas; (3) maintaining biological corridors and linkages among all conserved

populations to the maximum extent feasible; and (4) ensuring conservation of habitat quality through biological monitoring and adaptive management actions.

The draft MSHCP/NCCP states that, although the percentage of modeled *Astragalus lentiginosus* var. *coachellae* habitat that could be lost to development appears to be substantial, the actual reduction in habitat value is expected to be considerably less severe to the species than indicated by raw acreage numbers because: (1) Conserved habitat areas are large enough to maintain self-sustaining populations of *A. l.* var. *coachellae* and incorporate key habitat elements for the species; (2) potential adverse effects within conservation areas would not eliminate or significantly impact any core populations; (3) potential development would not adversely impact the essential ecological processes (e.g., sand source and transport system) needed to maintain currently viable habitat, and (4) lands in the MSHCP/NCCP reserve system would be managed and monitored (CVMC 2004).

CVAG has demonstrated a sustained commitment to develop the MSHCP to comply with section 10(a)(1)(B) of the Act, the California Endangered Species Act, and the State's NCCP program. On November 5, 2004, the Service published a Notice of Availability of a Final Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the MSHCP.

Although not yet completed and implemented, CVAG has made significant progress in the development of its MSHCP to meet the requirements outlined in section 10(a)(1)(B) of the Act. In light of the Service's confidence that CVAG will reach a successful conclusion to its MSHCP development process, we are excluding lands within their preferred alternative reserve design from proposed critical habitat designation for *Astragalus lentiginosus* var. *coachellae*.

#### (1) Benefits of Inclusion

As stated previously, the benefits of designating critical habitat on lands within the boundaries of approved HCPs are normally small. Where HCPs are in place that include coverage for *Astragalus lentiginosus* var. *coachellae*, our experience has shown that the HCPs and their Implementing Agreements include management measures and protections designed to protect, restore, enhance, manage, and monitor habitat that benefit the long-term protection of the species. The principal benefit of designating critical habitat is that projects carried out, authorized, or

funded by Federal agencies that may affect a listed species require the action agency to consult with the Service to ensure such activities do not destroy or adversely modify designated critical habitat. In the case of the CVAG, their MSHCP will be analyzed by the Service to determine the effects of the MSHCP on the species for which the participants are seeking incidental take permits. The MSHCP currently under review by the Service reflects revisions made to the plan based on comments and input from the Service and California Department of Fish and Game.

#### (2) Benefits of Exclusion

Excluding lands within CVAG's MSHCP preferred alternative reserve design area from critical habitat designation will enhance our ability to work with them in the spirit of cooperation and partnership. A more detailed discussion concerning our rationale for excluding HCPs from critical habitat designation is outlined under the previous section. Further, the Service believes the analysis conducted to evaluate the benefits of excluding approved HCPs from critical habitat designation is applicable and appropriate to apply to CVAG's MSHCP.

#### (3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

In general, we find that the benefits of critical habitat designation on lands within pending HCPs that cover those species are small while the benefits of excluding such lands from designation of critical habitat are substantial. After weighing the small benefits of including lands within the MSHCP area against the much greater benefits derived from exclusion, we have excluded the preferred alternative reserve design in CVAG's MSHCP from proposed critical habitat. Areas within the MSHCP planning area that are still included as proposed critical habitat are lands owned by public agencies that are not signatories to the MSHCP (i.e., U.S. Forest Service and Bureau of Land Management); however, these agencies are contributing to the MSHCP's reserve design. We have requested public comments on the potential exclusion of Federal lands (e.g., Bureau of Land Management and the U.S. Forest Service) from critical habitat based on their participation in and contribution to the conservation of *Astragalus lentiginosus* var. *coachellae* under the proposed Coachella Valley Multiple Species Habitat Conservation Plan.

### Unoccupied Areas Identified for Possible Inclusion

The Act has different standards for designation of critical habitat in occupied and unoccupied habitat. For areas occupied by the species, these are:

(i) The specific areas on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection. For areas not occupied, a determination is required that the entire area is essential for the conservation of the species before it can be included in critical habitat. Congress has also cautioned the Service to be "exceedingly circumspect" in designating unoccupied habitat.

This presents a highly unusual situation with respect to critical habitat for *Astragalus lentiginosus* var. *coachellae*, in that the species depends on sand being continually replenished from outside the areas it occupies, yet Congress has directed us to be exceedingly circumspect in including unoccupied areas in critical habitat designations. We are accordingly identifying areas which serve as a source for this sand and requesting comment on whether they should be included in the designation. Aspects of the situation upon which we seek comment include whether all, only a portion, or none of the areas identified below are needed to ensure sufficient sand supplies to maintain occupied habitat in its current condition, whether the draft CVAG MSHCP will provide for sand flow sufficient to maintain the species, and whether there are threats to the sand source areas that would be addressed by designating them as critical habitat.

The identified areas are:

#### Possible Addition to Unit 1

Unit 1 is dependent on the largest sand transport system where *Astragalus lentiginosus* var. *coachellae* exists. This large sand transport system contains several mountain drainages in the San Bernardino and San Jacinto mountains that are essential for providing sediment to several large populations of *A. l.* var. *coachellae* in the Snow Creek area and Whitewater River floodplain. Protecting the wide variety of physical and ecological features of this unit is important for ensuring the long-term persistence and recovery of *A. l.* var. *coachellae*.

The Whitewater River System begins in the mountain drainages in eastern San Bernardino and northern San Jacinto Mountains, which includes the San Gorgonio River, Whitewater River,

Snow Canyon, San Jacinto Canyons 1 and 2, Stubbes Canyon, Cottonwood Canyon, and Garnet Wash (Griffiths *et al.* 2002). Major channels (>15.24 m (50 ft) in width) within each of these drainage areas were determined as being important to the conservation of the species. The San Gorgonio and Whitewater River systems constitute the primary sediment sources within the Whitewater/San Gorgonio River depositional area, contributing a total of about 76% (Griffiths *et al.* 2002). Snow Canyon, San Jacinto Canyons 1 and 2, Stubbes Canyon, and Garnet Wash contribute a total of about 19% of the sediment within the Whitewater/San Gorgonio River system (Griffiths *et al.* 2002). We are seeking public comment on the importance of these and smaller drainages to overall sediment transport to the Coachella Valley.

#### Possible Addition to Unit 2

Unit 2 is dependent upon an important sand transport system which is largely intact and sandy habitats, including active and stabilized sand dunes and fields, and alluvial sand deposits in washes are generally not shielded or blocked by upstream development. The Mission Creek and Morongo Wash System begins in the mountain drainages in the eastern San Bernardino and Little San Bernardino Mountains, including Mission Creek, Dry Morongo, lower Little Morongo Creek, lower Big Morongo south of Morongo Valley, and Long Canyon (Griffiths *et al.* 2002). Major channels (>15.24 m (50 ft) in width) within each of these drainage areas, with the exception of Long Canyon, were delineated as being essential to the conservation of the species. The depositional area in Long Canyon has been significantly reduced due to development and was therefore not considered essential for sand transport. Mission Creek and Little Morongo Creek contribute a total of about 76% of the sediment within the Mission/Morongo depositional area (Griffiths *et al.* 2002). Big Morongo Creek contributes about 11% of the sediment to the Mission/Morongo depositional area (Griffiths *et al.* 2002). We are seeking public comment on the importance of this smaller drainage to overall sediment transport to the Coachella Valley.

#### Possible Addition to Unit 3

Unit 3 is dependent upon an important sand transport system which is largely intact and sandy habitats, including active and stabilized sand dunes and fields, and alluvial sand deposits in washes are generally not shielded or blocked by upstream

development. The Coachella Valley Preserve System begins in the mountain drainages in the Indio Hills Indio Hills west of Thousand Palms Canyon. Major channels (> 15.24 m (50 ft) in width) within each of these drainage areas were delineated as being essential to the conservation of the species. We are seeking public comment on the importance of this smaller drainage to overall sediment transport to the Coachella Valley.

#### Relationship of Unoccupied Areas Identified for Possible Inclusion to Morongo Indian Reservation

Possible additions to Unit 1 include parts of the Morongo Indian Reservation located on stream and river channels in the San Gorgonio River basin containing unconsolidated sands that maintain downstream areas of suitable habitat that are occupied by *Astragalus lentiginosus* var. *coachellae*. Section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including Indian Pueblos and Tribes. In accordance with Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," and Executive Order 13175, we recognize the need to consult with federally-recognized Tribes on a government-to-government basis when considering the designation of critical habitat in an area that may impact Tribal trust resources, tribally-owned fee lands, or the exercise of Tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, we must evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands. We are committed to working with the Morongo Band of Mission Indians on matters regarding critical habitat.

#### Economic Analysis

An analysis of the economic impacts of proposing critical habitat for this species is being prepared. We will announce the availability of the draft economic analysis in the **Federal Register** as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://Carlsbad.fws.gov>, or by contacting the Carlsbad Fish and

Wildlife Office directly (see **ADDRESSES** section).

### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW.,

Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Required Determinations

#### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis can be obtained from the Internet at <http://Carlsbad.fws.gov>, or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

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

Our assessment of economic effect will be completed prior to final rulemaking based upon review of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment

a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Astragalus lentiginos* var. *coachellae* is not a significant regulatory action under Executive Order 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a

significant energy action and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the

legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. The term "small governmental jurisdiction" means governments of cities, counties, town, townships, villages, school districts, or special districts with a population of less than 50,000 (U.S.C. title 5, part I, chapter 6, section 601[5]). The lands being proposed for designation as critical habitat for *Astragalus lentiginosus* var. *coachellae* are owned by Federal, State, and local government entities. None of these government entities fit the definition of "small governmental jurisdiction." As such, Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

*Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating 31,270 ac (12,656 ha) of lands in Riverside and San Bernardino Counties, California, as critical habitat for *Astragalus lentiginosus* var. *coachellae* in a takings implication assessment. The takings implications assessment concludes that this proposed designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* does not pose significant takings implications. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation of critical

habitat in areas currently occupied by *Astragalus lentiginosus* var. *coachellae* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Astragalus lentiginosus* var. *coachellae*.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. No Indian Reservation lands are essential for the conservation of *Astragalus lentiginosus* var. *coachellae*, however, there are unoccupied areas identified for possible inclusion on the Morongo Indian Reservation that support important stream channels providing unconsolidated sands that maintain suitable habitat for this taxon. Activities conducted or planned on those lands may adversely affect the conservation of the *A. l.* var. *coachellae*. Therefore, we

are committed to working on partnerships with the Morongo Tribe on matters regarding critical habitat. Information relative to Tribal lands is included in the critical habitat unit descriptions and under Relationship of Unoccupied Areas Identified for Possible Inclusion to Morongo Indian Reservation.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (*see ADDRESSES* section).

**Author(s)**

The primary authors of this package are the Carlsbad Fish and Wildlife Office staff.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), revise the entry in the table for *Astragalus lentiginosus* var. *coachellae* under "FLOWERING PLANTS," to read as follows:

**§ 17.12 Endangered and threatened plants.**  
\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Astragalus lentiginosus</i> var. <i>coachellae</i> .	* Coachella Valley milk-vetch.	* U.S.A. (CA) .....	* Fabaceae .....	* E	* 647	* 17.96(a)	* NA
*	*	*	*	*	*	*	*

3. Amend § 17.96(a), by adding critical habitat for "*Astragalus lentiginosus* var. *coachellae*" under "FLOWERING PLANTS" in the same alphabetical order as the species occurs in § 17.12(h) to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) Flowering plants.

\* \* \* \* \*

Family Fabaceae: *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch)

(1) Critical habitat units are depicted for Riverside and San Bernardino counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for this species are the habitat components that provide:

(i) Unconsolidated sands stored within rivers and tributaries in the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills. The unconsolidated sands stored in these rivers and tributaries are not occupied by *A. l.* var. *coachellae*, but

represent the original source of the loose sand that form the sand dunes and flats that are occupied by this plant.

(ii) Unconsolidated sands deposited on the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills. The unconsolidated sands deposited on these alluvial fans are not occupied by *A. l.* var. *coachellae*; instead, these sands are transported by wind and water to form the fluvial and eolian sand dunes and flats that are occupied by this plant;

(iii) Suitable flooding regimes to transport unconsolidated sands from rivers and tributaries to the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills;

(iv) Suitable wind and flooding regimes to transport unconsolidated sands deposited on the alluvial fans of the San Bernardino, Little San Bernardino, and San Jacinto Mountains and Indio Hills to the fluvial and eolian

depositional areas, including areas west of Edom Hill/Willow Hole reserve, areas west of Coachella Valley Preserve, and the Whitewater Floodplain area that are occupied by *A. l.* var. *coachellae*.

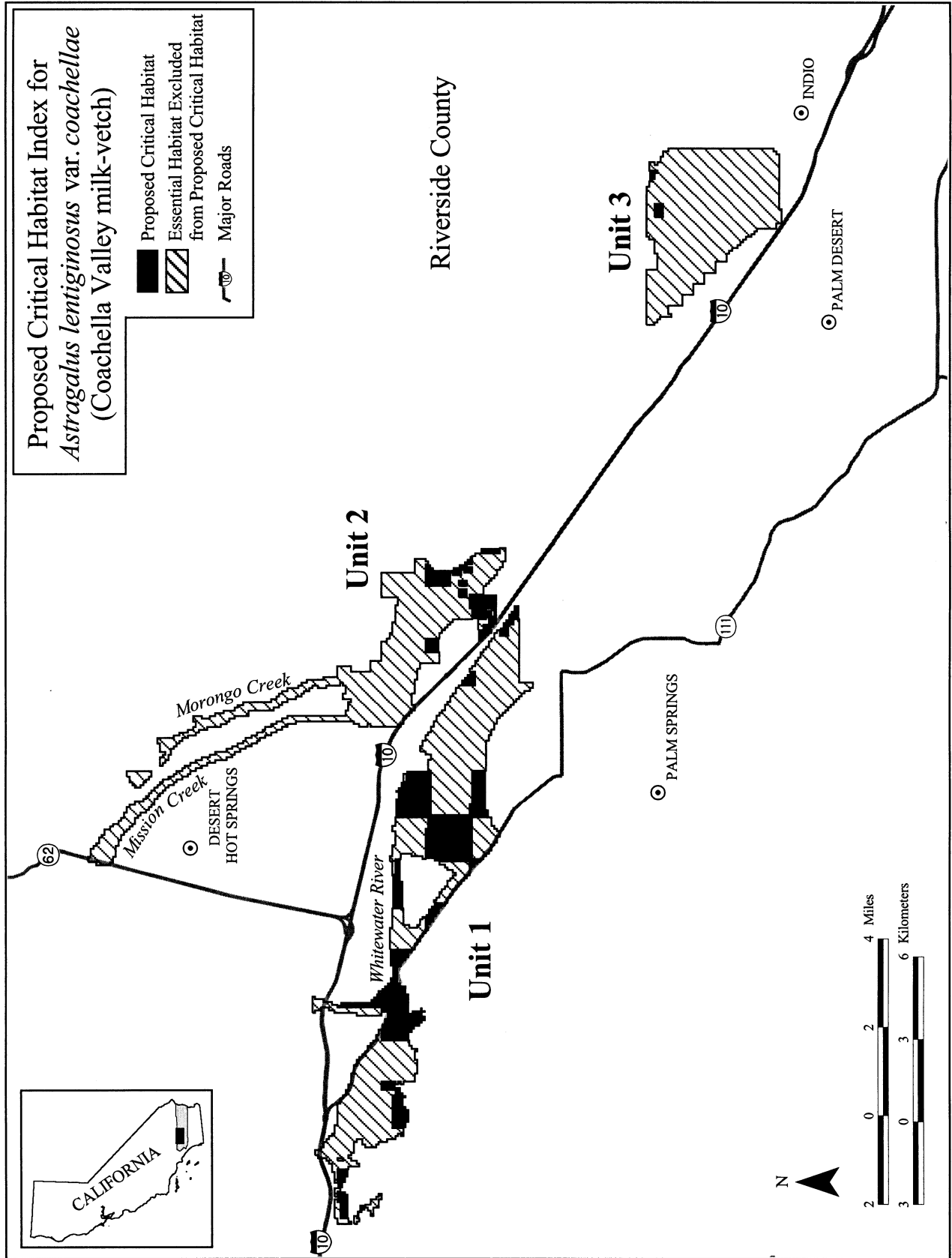
(v) Eolian sands on active, stabilized, and shielded sand dunes or fields, and sandy alluvial sites in washes within the San Gorgonio/Whitewater River eolian sand transport system, Mission Creek/Morongio Wash eolian sand transport system, and the Thousand Palms eolian sand transport system that are occupied by *A. l.* var. *coachellae*.

(3) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) The index maps of *Astragalus lentiginosus* var. *coachellae* proposed critical habitat (Map 1) follows:

**BILLING CODE 4310-55-P**





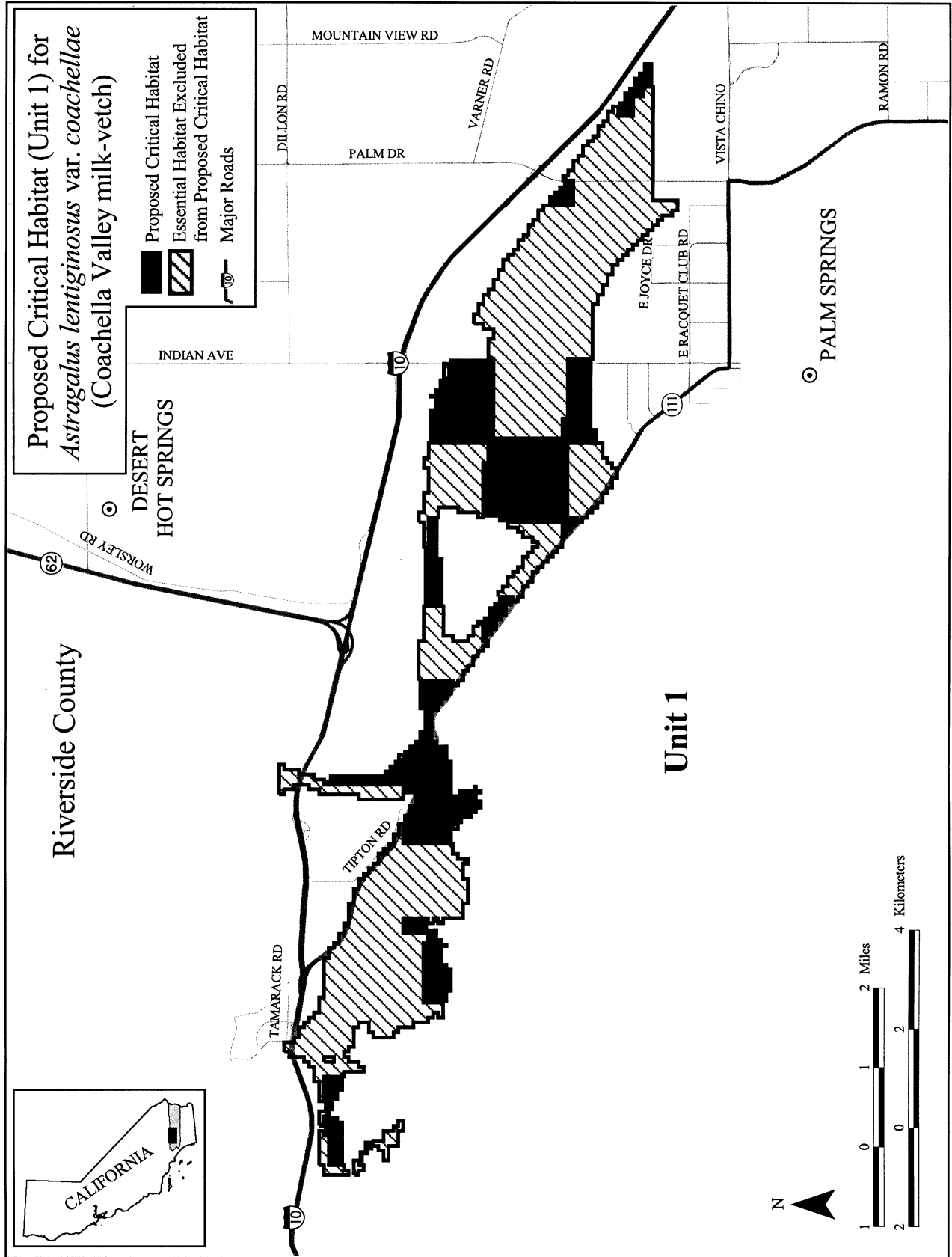
(5) Unit 1: Whitewater River Unit, Riverside and San Bernardino Counties, California.

(i) Map Unit 1: Whitewater River, Riverside County, California. From USGS 1:24,000 quadrangle maps Whitewater, Desert Hot Springs, Palm Springs and Cathedral City, California, lands bounded by the following UTM NAD27 coordinates (E, N): 526500, 3753000; 526900, 3753000; 526900, 3752700; 526800, 3752700; 526800, 3752600; 525900, 3752600; 525900, 3752900; 526500, 3752900; returning to 526500, 3753000; land bounded by 527000, 3753000; 527700, 3753000; 527700, 3752600; 527400, 3752600; 527400, 3752700; 527200, 3752700; 527200, 3752800; 527000, 3752800; returning to 527000, 3753000; land bounded by 533600, 3753000; 533700, 3753000; 533700, 3752900; 533800, 3751800; 533900, 3751800; 533900, 3751700; 534000, 3751700; 534000, 3751600; 534100, 3751600; 534100, 3751400; 534300, 3751400; 534300, 3751300; 534400, 3751300; 534400, 3751200; 534500, 3751100; 534700, 3751100; 534700, 3751000; 535100, 3751000; 535100, 3751100; 535700, 3751100; 535700, 3750400; 535400, 3750400; 535400, 3750500; 535300, 3750500; 535300, 3750600; 535200, 3750600; 535200, 3750800; 534500, 3750800; 534500, 3750700; 534400, 3750700; 534400, 3750500; 534100, 3750500; 534100, 3750400; 533400, 3750400; 533400, 3750300; 533500, 3750300; 533500, 3750000; 533600, 3750000; 533600, 3749900; 533500, 3749900; 533500, 3749800; 533400, 3749800; 533400, 3749900; 533300,

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(ii) **Note:** Unit 1 (Map 2) follows:



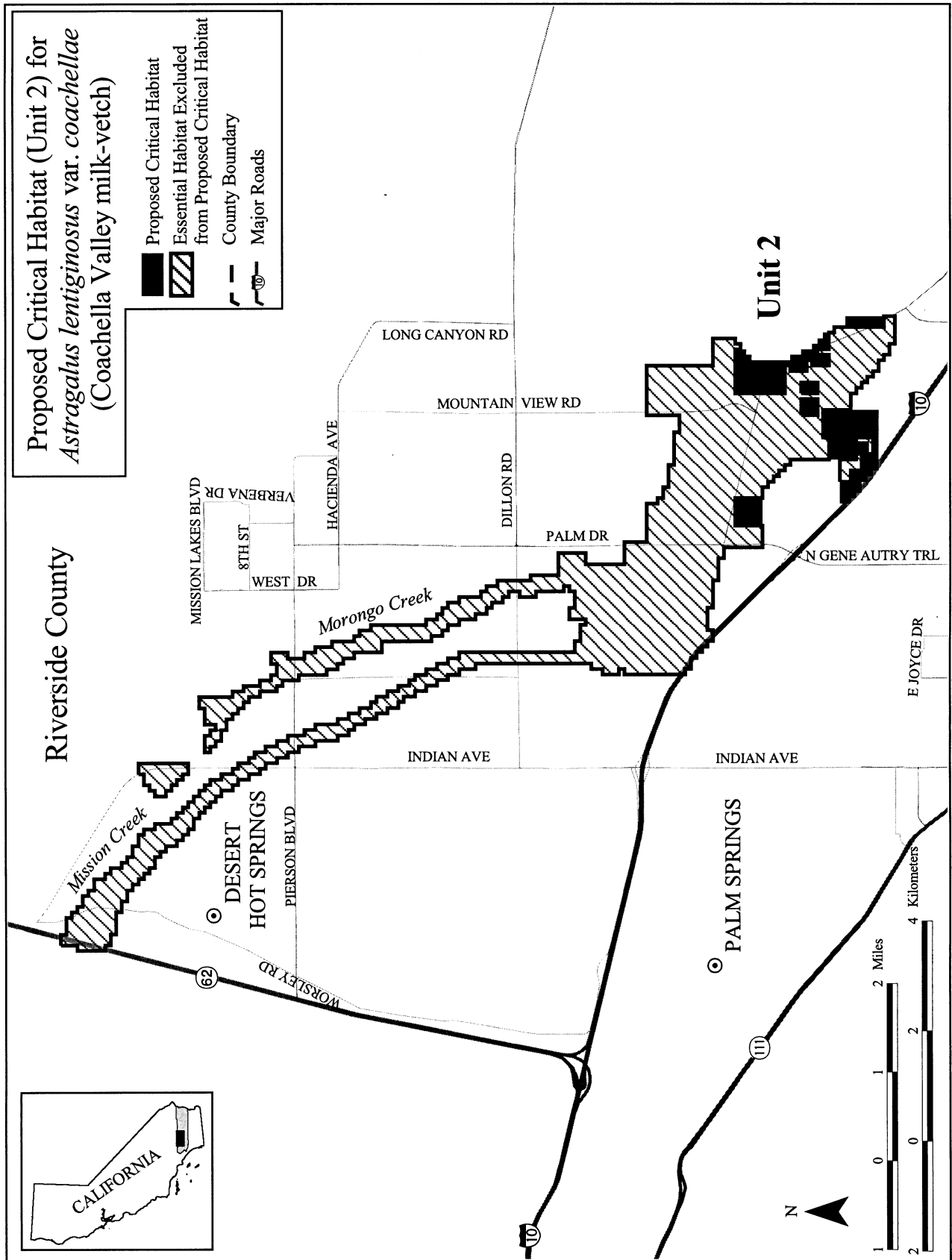
(6) Unit 2: Mission Creek and Morongo Wash Unit, Riverside and San Bernardino Counties, California.

(i) Map Unit 2: Mission Creek and Morongo Wash, Riverside County, California. From USGS 1:24,000 quadrangle maps Seven Palms Valley and Cathedral City, California, lands bounded by the following UTM NAD27 coordinates (E, N): 546500, 3749800; 547000, 3749800; 547000, 3749300; 546500, 3749300; returning to 546500, 3749800; and land bounded by 548900, 3749800; 549700, 3749800; 549700, 3749600; 549600, 3749600; 549600, 3749500; 549500, 3749500; 3748800; 549600, 3748800; 549600, 3748600; 549700, 3748600; 549700, 3748400; 549800, 3748400; 549800, 3748300; 549900, 3748300; 549900, 3748200; 550000, 3748200; 550000,

3748100; 549700, 3748100; 549700, 3748300; 549600, 3748300; 549600, 3748100; 549400, 3748100; 549400, 3748400; 549500, 3748400; 549500, 3748500; 549300, 3748500; 549300, 3748800; 549400, 3748800; 549400, 3748900; 548900, 3748900; returning to 548900, 3749800; land bounded by 548500, 3748600; 548800, 3748600; 548800, 3748300; 548500, 3748300; returning to 548500, 3748600; land bounded by 548900, 3748600; 549100, 3748600; 549100, 3748300; 548900, 3748300; returning to 548900, 3748600; land bounded by 545300, 3748500; 545500, 3748500; 545500, 3748400; 545600, 3748400; 545600, 3748300; 545700, 3748300; 545700, 3748200; 545800, 3748200; 545800, 3748000; 545300, 3748000; returning to 545300, 3748500; land bounded by 550100,

3747800; 550300, 3747800; 550300, 3747100; 550100, 3747100; returning to 550100, 3747800; and land bounded by 548100, 3748200; 548600, 3748200; 548600, 3747200; 547500, 3747200; 547500, 3747300; 547400, 3747300; 547400, 3747400; 547300, 3747400; 547300, 3747500; 547100, 3747500; 547100, 3747600; 547000, 3747600; 547000, 3747700; 546900, 3747700; 546900, 3747900; 547300, 3747900; 547300, 3747700; 547500, 3747700; 547500, 3747500; 547800, 3747500; 547800, 3747600; 547700, 3747600; 547700, 3748100; 548100, 3748100; returning to 548100, 3748200; excluding land bounded by 548000, 3747600; 548000, 3747400; 547800, 3747400; 547800, 3747300; 548100, 3747300; 548100, 3747600; 548000, 3747600.

(ii) **Note:** Unit 2 (Map 3) follows:



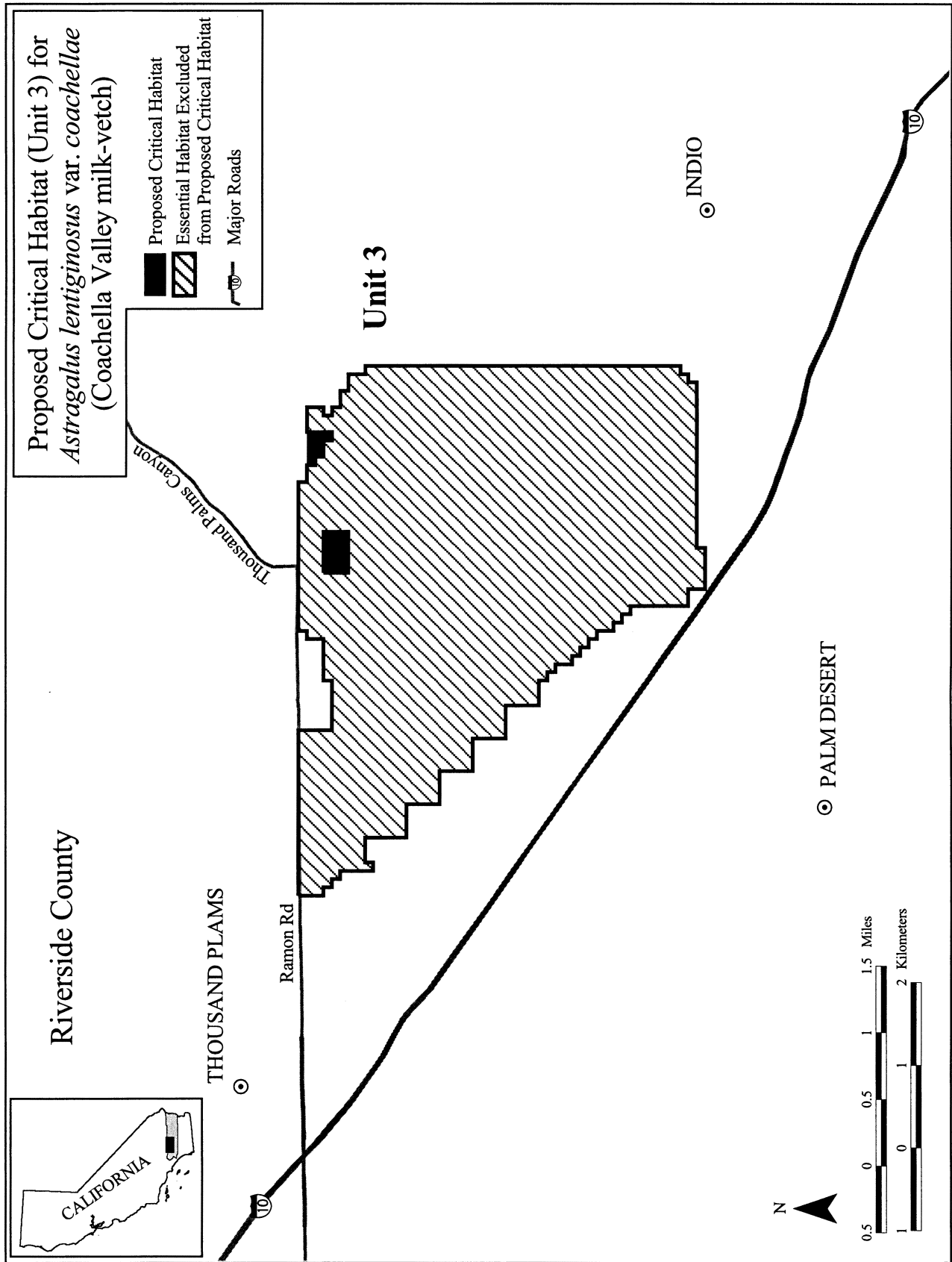
(7) Unit 3: Thousand Palms Unit, Riverside County, California.

(i) Map Unit 3: Thousand Palms, Riverside County, California. From USGS 1:24,000 quadrangle map Myoma, California, lands bounded by the

following UTM NAD27 coordinates (E, N): 563600, 3741700; 564000, 3741700; 564000, 3741400; 563900, 3741400; 563900, 3741500; 563700, 3741500; 563700, 3741600; 563600, 3741600;

returning to 563600, 3741700; and land bounded by 562300, 3741500; 562800, 3741500; 562800, 3741200; 562300, 3741200; returning to 562300, 3741500.

(ii) **Note:** Unit 3 (Map 4) follows:



\* \* \* \* \*

Dated: November 30, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and  
Parks.*

[FR Doc. 04-26690 Filed 12-13-04; 8:45 am]

**BILLING CODE 4310-55-C**