DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for Quercus hinckleyi (Hinckley Oak)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes to determine that a plant, *Quercus hinckleyi* (Hinckley oak), is a threatened species. Hinckley oak is known from three documented localities in Presidio County, western Texas. Each population contains fewer than 60 individuals. These small populations are threatened

by road improvements, taking, and introduction of exotic game into the habitat. A final determination that *Quercus hinckleyi* is threatened will implement the full protection provided by the Endangered Species Act of 1973 (Act), as amended. The Service seeks data and comments from the public on this proposal.

DATES: Comments from all interested parties must be received by November 16, 1987. Public hearing requests must be received by November 2, 1987.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Regional Director, U.S. Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Service's Regional Endangered Species Office, 500 Gold Avenue SW., Room 4000, Albuquerque, New Mexico.

FOR FURTHER INFORMATION CONTACT: Sue Rutman, Endangered Species Botanist, Albuquerque, New Mexico (see **ADDRESSES** above) (505/766–3972 or FTS 474–3972).

SUPPLEMENTARY INFORMATION:

Background

Quercus hinckleyi, a very localized member of the oak family (Fagaceae), is a unique component of the middle elevation Chihuahuan Desert vegetation. This small oak occurs at three localities in Presidio County, western Texas. Hinckley oak is readily identified at a distance because the grey-green leaves lend a smokey appearance to the intricately branched plants. Hinckley oaks reach a maximum height of 4 feet (1.2 meters). Plants can occur as single stems or as clonal groups that form dense thickets. The small, glabrous, holly-like (spinescent) leaves persist for more than one season. Acorns are produced annually, occur singly or paired on the branches, and mature in the fall.

Hinckley oak is restricted to dry limestone slopes between 3,500 and 4,500 feet (1100–1400 meters) in elevation. The surrounding desertscrub community is dominated by *Agave lecheguilla* (lecheguilla), *Acacia constricta* (whitethorn acacia), and *Parthenium incanum* (mariola). The area received about 8–12 inches (20–30 cm) of rain per year, and has a frost-free season of 260 days.

The type specimen of Hinckley oak was collected by Dr. C.H. Muller and Dr. L.C. Hinckley near Solitario Peak in 1950. Dr. Muller (1951) subsequently named the species in honor of his colleague, Dr. Hinckley. In 1958, Dr. M.C. Johnson collected a specimen at the type locality (number 3460, deposited at University of Texas at Austin) and noted that 150 plants occurred there. The same site presently contains about 60 plants (Miller and Powell 1982). The second population was discovered in 1984 by Mr. Jeff Clark, a former graduate student at Sul Ross University. This population is located directly west of Solitario Peak on the last ridge above Fresno Creek. The third locality, discovered on the west side of Shafter by Dr. M. Powell in 1975, contains 30–40 plants (Miller and Powell 1982). Two other sites in the Shafter area, one 0.5 mile (0.8 km) east and the other 3 miles (4.8 km) south of Shafter, have not been relocated, although the area has been searched intensively by Dr. A.M. Powell of Sul Ross University. The three known populations occur on privately owned land. Searches have been conducted but no populations of *Quercus hinckleyi* have been found in the neighboring Mexican State of Coahuila (Muller 1951).

Mr. Mike Fleming of Big Bend National Park has speculated that Hinckley oak may occur within the Park in the Dead Horse Mountains (pers. comm., 1986). Although no occurrences of Hinckley oak in the Dead Horse Mountains have been documented, Fleming's belief is supported by the presence of suitable habitat and evidence that Hinckley oak was more widely distributed in southwestern Texas prior to the area's desertification about 8,000 years ago (Van Devender *et. al.* 1978). The warming and drying trend probably precipitated the decline of Hinckley oak, and may explain the species' present limited distribution. However, the natural decline of Hinckley oak is being artifically accelerated by man-caused threats.

Federal action involving this species began with section 12 of the Endangered Species Act (Act) of 1973 (16 U.S.C. 1531 *et seq.*), which directed the Secretary of the Smithsonian Institution to prepare a report on those plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94–51, was presented to Congress on January 9, 1975. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) of its acceptance of this report as a petition within the context of section 4(c)(2), now section 4(b)(3)(A), of the Act and of its intention thereby to review the status of those plants. On June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. This list of 1,700 plant species was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document 94–51 and the July 1, 1975, **Federal Register** (40 FR 27823). *Quercus hinckleyi* was included in the July 1, 1975, notice of review and the June 16, 1976, proposal. General comments received in relation to the 1976 proposal were summarized in the April 26, 1978, **Federal Register** (43 FR 17909).

The Endangered Species Act Amendments of 1978 required that all proposals over 2 years old be withdrawn. A one-year grace period was given to proposals already over 2 years old. In the December 10, 1979, **Federal Register** (44 FR 70796), the Service published a notice of withdrawal of the June 16, 1976, proposal, along with 4 other proposals that had expired. On December 15, 1980 (45 FR 82480), and September 27, 1985 (50 FR 39526), the Service published updated notices reviewing the native plants being considered for classification as threatened or endangered. *Quercus hinckleyi* was included in these notices as a category 1 species. Category 1 comprises taxa for which the Service has sufficient biological information to support proposing them as endangered or threatened.

Section 4(b)(3)(B) of the Act, as amended in 1982, requires the Secretary to make findings on certain pending petitions within one year of their receipt. Section 2(b)(1) of the Act's Amendments of 1982 further requires that all petitions pending on October 12, 1982, be treated as having been newly submitted on that date. Because the 1980 notice of review was accepted as a petition, all of the taxa contained in the notice, including *Quercus hinckleyi*, were treated as being newly petitioned on October 12, 1982. On October 13, 1983, and on or about that date every year thereafter (the latest was October 10, 1986), the Service made one-year findings that the petition to list *Quercus hinckleyi* was warranted but precluded by other listing actions of higher priority. Biological data, supplied by Miller and Powell (1982), fully support a listing of *Quercus hinckleyi* as threatened. The present proposal is based primarily on Miller and Powell's biological data, and constitutes the final finding requirement of section 4(b)(3)(B) of the Act for the petition on this species.

Summary of Factors Affecting the Species

Section 4(a)(1) of the Act and regulations (50 CFR Part 424)

promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal Lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Quercus hinckleyi* Muller (Hinckley oak) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* In 1986, Texas highway 67 was expanded and the road is now close to the Hinckley oak population at Shafter (Poole, Texas Natural Heritage Program Biologist, pers. comm., 1986). Further expansion or a realignment of the highway may eliminate all or part of the population.

A potential threat to the two populations near Solitario Peak is the planned development of the area as an exotic game ranch. Introduced mammals may degrade the habitat by trampling soil and plants, and both introduced birds and mammals may eat the acorns, stems, or leaves of Hinckley oaks.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* The attractive Hinckley oak is currently being propagated and developed as a cultivar by the Texas A&M University Agricultural Extension Service (Miller and Powell 1982). Hinckley oak is easily propagated from acorns or from young shoots. The demand for acorns by people wishing to cultivate the plant may reduce the potential number of recruits to the native populations. However, the actual impact of acorn collecting is unknown.

C. *Disease or predation.* Native deer, small mammals, and birds eat the acrons of Hinckley oak. This form of predation has an unknown impact on Hinckley oak populations. As mentioned in Factor A, the introduction of non-native mammal and bird predators remains a potential threat. Hinckley oaks have no apparent disease problems.

D. *The inadequacy of existing regulatory mechanisms.* Hinckley oak is not currently protected by any Federal or State law.

E. *Other natural or manmade factors affecting its continued existence.* The scarcity (fewer than 200 plants) of Hinckley oak, its limited distribution, and its widely separated populations make this species vulnerable to both natural and man-caused threats. Any further reduction in plant numbers could reduct the reproductive capabilities and genetic potential of the species.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Based on this evaluation, the preferred action is to list *Quercus hinckleyi* as threatened. This action seems appropriate because, although this species has a small population size and limited distribution, it has good recovery potential and, at the present rate of decline, the danger of extinction does not appear to be in the forseeable future. For the reasons given below, no critical habitat has been proposed for this species.

Critical Habitat

Section 4(a)(3) of the Act, as aamended, requires that to the maximum extent prudent and determinable, the Secretary designate any habitat of a species that is considered to be critical habitat at the time the species is determined to be endagered or threatened. The Service finds that designation of critical habitat is not prudent for this species at this time. As discussed under Factor B in the "Summary of Factors Affecting the Species, "*Quercus hinckleyi* is threatened by taking, an activity difficult to control and not regulated by the Endangered Species Act with respect to plants, except for a prohibition against removal and reduction to possession of endangered plants from lands under Federal jurisdiction. Publication of critical habitat descriptions would make this species even more vulnerable and increase enforcement problems. All involved parties and landowners will be notified of the location and importance of protecting Hinckley oak habitat. Protection of this species' habitat will be addressed through the recovery process and through the section 7 jeopardy standard. No net benefit for the conservation of this species would accrue from designating critical habitat. Therefore, it would not be prudent to determine critical habitat for *Quercus hinckleyi* at this time.

Potential Recovery Actions

Potential recovery actions include collection of acorns to produce plants for reintroduction into suitable habitat, property protection, coordination with the Texas Highway Department and coordination with private organizations and both private landowners to develop appropriate conservation and management measures.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. Some actions may be undertaken prior to listing. See Potential Recovery Actions above. The protection required for Federal agencies and the prohibitions against taking are discussed, in part below.

Section 7(a) of the Act, as amended, requires Federal agencies 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 being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service 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. If a species is listed subsequently, 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 must enter into formal consultation with the Service. The only anticipated Federal project involving *Quercus hinckleyi* is the possible funding by the Federal Highway Administration of any maintenance and widening activities for Texas highway 67 in this part of Presidio County.

The Act and its implementing regulations found at 50 CFR 17.17 and 17.72 set forth a series of general trade prohibitions and exceptions that apply to all threatened plants. All trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.71, apply. these prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export any threatened plant, transport it in interstate or foreign commerce in the course of a commerical activity, sell or offer it for sale in interstate or foreign commerce, or remove it from areas under Federal jurisdiction and reduce it to possession.

Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. Certain exceptions can apply to agents of the Service and State conseration agencies. The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened species under certain circumstances. It is anticipated that few trade permits would ever be sought or issued because *Q. hinckelyi* is not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235–1903).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned government agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposal are hereby solicited. Comments are particularly sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to Hinckley oak;

(2) The location of any additional populations of Hinckley oak and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range and distribution of Hinckley oak; and

(4) Current or planned activities in the subject area and their possible impacts on Hinckley oak.

Final promulgation of the regulation an Hinckley oak will take into consideration the comments and any additional information received by the Service, and such communications may lead to adoption of a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of the proposal. Such requests must be made in writing and addressed to the Regional Director (see ADDRESSES section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Miller, D.J., and A.M. Powell. 1982. Status Report on *Quercus hinckleyi*. U.S. Fish and Wildlife Service, Endangered Species Office, Albuquerque, NM. 6 pp

Muller, C.H. 1951. The oaks of Texas. Contributions from the Texas Research Foundation 1:40–41.

Van Devender, T.R., C.E. Freeman, and R.D. Worthington. 1978. Full-glacial and recent vegetation of Livingston, Hills, Presidio County, Texas. Southwestern Naturalist 23:289–302.

Author

The primary author of this proposed rule is Sue Rutman, Endangered Species Botanist, U.S Fish and Wildlife Service, P.O. Box 1306, Albuquerque, New Mexico 87103 (505/766–3972 or FTS 474–3972).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Proposed Regulations Promulgation

Accordingly, it is hereby proposed 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: Pub. L. 93–205, 87 Stat. 884, Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*); Pub. L. 99–625, 100 Stat. 3500 (1986), unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under the family Fagaceae, to the List of Endangered and Threatened Plants;

§ 71.12 Endangered and threatened plants.

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(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
*	* *	*	*	*		
Fagaceae—Oak family:						
Quercus hinckleyi	Hinckley oak	U.S.A. (TX)	T		NA	NA
*	* *	*	*	*		

Dated: August 26, 1987.

Susan Recce,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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