

SUMMARY: The Service proposes to determine the Beaver Dam Slope population of the desert tortoise (*Gopherus agassizii*) to be an Endangered population and to identify Critical Habitat for this population. This action is being taken because the habitat where this population dwells is subject to intense alteration, and collection of individuals is a threat to the continued survival of this tortoise. The proposed action, if completed, would protect the population of this tortoise and its habitat. The Beaver Dam Slope is located in southwestern Utah.

DATES: Comments from the public must be received by October 23, 1978. Comments from the Governor of Utah must be received by November 22, 1978.

ADDRESSES: Submit comments to Director (OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Comments and materials received will be available for public inspection during normal business hours at the Service's Office of Endangered Species, Suite 1100, 1612 K Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT:

Mr. Keith M. Schreiner, Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, 202-343-7814.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 8, 1977, the U.S. Fish and Wildlife Service was petitioned by Dr. Glenn R. Steward, on behalf of the Desert Tortoise Council, to list the Utah desert tortoise population as Endangered under provisions of the Endangered Species Act of 1973. Included in the petition was a recommendation for Critical Habitat to include roughly a 50-square-mile section of southwestern Utah bordered by the State boundaries of Arizona to the south and Nevada to the west; various land sections form the boundaries to the north and east. The main threats to this unique population include competition from grazing animals, overgrazed habitat, and problems with collection of individuals.

After careful review of the petition by the Office of Endangered Species, the Director of the Service notified the Desert Tortoise Council on August 30, 1977, that the petition did indeed qualify as a formal petition.

Donald A. Smith, Director of the Utah Division of Wildlife Resources, responded for the State, acknowledging that the tortoise population is declining and took no exception to the

[4310-55]

[50 CFR Part 17]

**ENDANGERED AND THREATENED WILDLIFE
AND PLANTS**

Proposed Endangered Status and Critical Habitat for the Beaver Dam Slope Population of the Desert Tortoise

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

data presented in the petition. However, he did indicate that the State would object to listing the population at this time. Mr. Smith's main concern was that a Federal listing would prompt attempts to use the Act to eliminate or drastically reduce grazing and provide legal arguments against grazing adjustments. As such, the State would prefer to adopt a scientifically documented case for reduction of grazing which, while still allowing some grazing activity, would include an amount of forage sufficient to provide the year-round needs of the tortoise population. If these measures failed, then other measures (unspecified in his letter) would have to be taken, although it might take several years to document the efforts.

Mr. Smith objected to Dr. Stewart's comments on the undesirability of reintroducing individuals from Paradise Canyon and the St. George area to Beaver Dam Slope. The State would favor such reintroduction. Mr. Smith doubts that collecting would be much affected by listing the population under the Act, as Utah already protects the tortoise. Also, the recovery of the population hinges on the recovery of the habitat, and Mr. Smith doubts that Federal listing will hasten that recovery. Finally, Mr. Smith stated that the State will continue to work closely with BLM to insure a viable population of the desert tortoise within this portion of its range.

On April 4, 1978, personnel from the Fish and Wildlife Service visited the Beaver Dam Slope locality to look for tortoise and see the habitat. Two tortoises were found and the effects of cattle grazing on the area noted.

This proposal is based on the information contained in the Desert Tortoise Council's petition, additional information from the literature, reports from the Bureau of Land Management, and the on-site review of the Beaver Dam Slope by Fish and Wildlife Service personnel.

From 1936 to 1946, the Beaver Dam Slope population was studied by Drs. Angus M. Woodbury and Ross Hardy. While the whole Beaver Dam Slope was surveyed, Woodbury and Hardy concentrated their efforts in a two-square-mile area where they found the greatest concentration of tortoises. Some 270 tortoises were marked here. For many years, their study was the only source of detailed information on the ecology of wild desert tortoises. A few of the tortoises marked some 30 years ago still survive, making this one of the oldest marked populations of vertebrates anywhere in the world. Although 2,000 tortoises may have inhabited this area at one time, fewer than 350 are estimated to remain. The present average annual population loss from all causes is estimated to be

seven percent. Natality is estimated at 1.5 percent. Thus, the population is declining at 5.5 percent. If this rate of decline continued for 40 years, there would be fewer than 40 remaining on Beaver Dam Slope. The recruitment to the population has lagged for many years and is evident from the population's age-class structure. The bulk of the population is composed of adults, many of them quite old.

Section 4(a) of the Act (16 U.S.C. 1531 et seq.) states:

"General.—(1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, sporting, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence."

This authority has been delegated to the Director.

SUMMARY OF FACTORS AFFECTING THE SPECIES

These findings are summarized herein under each of the five criteria of section 4(a) of the act. These factors, and their application to the Beaver Dam Slope population of the desert tortoise, are as follows:

1. *The present or threatened destruction, modification, or curtailment of its habitat or range.*—The Beaver Dam Slope has had a long history of overgrazing. Although both sheep and cattle have grazed in the past, presently only cattle are using the range. Overgrazing has modified the habitat, especially by reduction of the availability of perennial grasses and destruction of native vegetation, especially creosote bush, around which tortoises construct their burrows. Livestock also caves in burrows, perhaps steps on young tortoises, and tramples forage.

2. *Overutilization for commercial, sporting, scientific, or educational purposes.*—Collection of individuals for pets is thought to have had severe effects on the population in the past, especially since females were collected more than males because they are sedentary and easier to find. Collection is probably not a major factor at present although any removal of individuals not in connection with conservation efforts would probably be detrimental.

3. *Disease or predation.*—Predation by natural or feral animals may be contributing to the decline of the population, especially as it affects eggs and young tortoises, both of which are very vulnerable.

4. *The inadequacy of existing regulatory mechanisms.*—Not applicable.

5. *Other natural or manmade factors affecting its continued existence.*—Competition for food items between tortoises and cattle may be contributing to a decline in this population, both directly (for food items) and indirectly (in terms of adequate diet needed for successful reproduction). Dietary overlap is as high as 37.5 percent between cattle and tortoises, based on fecal samples.

CRITICAL HABITAT

Section 7 of the act, entitled "Interagency Cooperation," states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

A definition of the term "Critical Habitat" was published jointly by the Fish and Wildlife Service and the National Marine Fisheries Service in the FEDERAL REGISTER of January 4, 1978 (43 FR 870-876) and is reprinted below:

"Critical habitat" means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: Physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

As specified in the regulations for Interagency Cooperation as published in the January 4, 1978, FEDERAL REGISTER (43 FR 870), the Director will consider the physiological, behavioral, ecological, and evolutionary requirements for survival and recovery of listed species in determining what areas or parts of habitat are critical. These requirements include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and, generally,

(5) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

With respect to the Beaver Dam Slope population of the desert tortoise, the area proposed as Critical Habitat satisfies all known criteria for the evolutionary, ecological, behavioral, and physiological requirements of the species. Nesting and successful incubation of eggs apparently occurs, as young tortoises are occasionally encountered. Nesting often occurs at the mouths of hibernation dens. Shelter and hibernation dens are present both in the dry washes and on adjacent creosote flats. Forage plants, especially *Bromus rubens*, *Erodium cicutarium*, and *Muhlenbergia porteri*, are present in sufficient quantity to maintain the tortoise. The population inhabiting this locality is marginally self-sufficient and reproducing, but should recover especially if grazing pressure and associated habitat destruction are relaxed.

Critical Habitat of the Beaver Dam Slope population of the desert tortoise, exclusive of those existing man-made structures or settlements which are not necessary to the normal needs or survival of the population, is proposed as follows:

Utah, Washington County. E½ secs. 13 and 24, T. 43 S., R. 20 W.; S½ sec. 7, all of secs. 8 through 28, E½ sec. 29, SE¼ sec. 5, SW¼ sec. 4, T. 43 S., R. 19 W.; all of secs. 7 through 10, 15 through 22, 28 through 30, and W½ sec. 27, T. 43 S., R. 18 W.

The areas delineated do not necessarily include the entire Critical Habitat of this tortoise, and modifications to Critical Habitat descriptions may be proposed in the future. In accordance with section 7 of the act, all Federal departments and agencies would be required to insure that actions authorized, funded, or carried out by them do not result in the destruction or adverse modification of the Critical Habitat of the Beaver Dam Slope population of the desert tortoise.

There may be many kinds of actions which can be carried out within the Critical Habitat of a species which would not be expected to adversely affect that species.

This point has not been well understood by some persons. There has been widespread and erroneous belief that a Critical Habitat designation is something akin to establishment of a wilderness area or wildlife refuge, and automatically closes an area to most human uses. Actually, a Critical Habitat designation applies only to Federal agencies, and essentially is an official notification to these agencies that their responsibilities pursuant to section 7 of the act are applicable in a certain area.

A Critical Habitat designation must be based solely on biological factors. There may be questions of whether and how much habitat is critical, in accordance with the above interpretation, or how to best legally delineate this habitat, but any resultant designation must correspond with the best available biological data. It would not be in accordance with the law to involve other motives; for example, to enlarge a Critical Habitat delineation so as to cover additional habitat under section 7 provisions, or to reduce a delineation so that actions in the omitted area would not be subject to evaluation.

There may indeed be legitimate questions of whether, and to what extent, certain kinds of actions would adversely affect listed species. These questions, however, are not relevant to the biological basis of Critical Habitat delineations. Such questions should, and can more conveniently, be dealt with after Critical Habitat has been designated. All Federal departments and agencies shall, in accordance with section 7 of the act, consult with the Secretary of the Interior with respect to any action which is considered likely to affect Critical Habitat. Consultation pursuant to section 7 should be carried out using the procedures contained in the January 4, 1978, FEDERAL REGISTER (43 FR 870-876).

EFFECT OF THE RULEMAKING

In addition to the effects discussed above, the effects of these determinations and this rulemaking include, but are not necessarily limited to, those discussed below.

Endangered species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all endangered species. All of those prohibitions and exceptions also apply to any threatened species unless a special rule pertaining to that threatened species has been published and indicates otherwise. The regulations referred to above, which pertain to endangered species, are found at § 17.21 of title 50, and are summarized below.

With respect to the Beaver Dam Slope population of the desert tortoise in the United States, all prohibitions of section 9(a)(1) of the act, as implemented by 50 CFR 17.21, would apply. These prohibitions, in part, would make it illegal for any person subject to the jurisdiction of the United States to take, import or export, ship in interstate commerce in the course of a commercial activity, or sell or offer for sale this species in interstate or foreign commerce. It also would be illegal to possess, sell, deliver, carry, transport, or ship any such wildlife which was illegally taken. Certain ex-

ceptions would apply to agents of the Service and State conservation agencies.

Regulations published in the FEDERAL REGISTER of September 26, 1975 (40 FR 44412) provided for the issuance of permits to carry out otherwise prohibited activities involving Endangered or Threatened species under certain circumstances. Such permits involving Endangered species are available for scientific purposes or to enhance the propagation or survival of the species. In some instances, permits may be issued during a specified period of time to relieve undue economic hardship which would be suffered if such relief were not available.

Pursuant to section 4(b) of the Act, the Director will notify the Governor of Utah with respect to this proposal and request his comments and recommendations before making final determinations.

PUBLIC COMMENTS SOLICITED

The Director intends that the rules finally adopted will be as accurate and effective as possible in the conservation of any Endangered or Threatened species. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, private interests, or any other interested party concerning any aspect of these proposed rules are hereby solicited. Comments particularly are sought concerning:

- (1) Biological or other relevant data concerning any threat (or the lack thereof) to the population included in this proposal;
- (2) The location of, or the reasons why, any habitat of this population should or should not be determined to be Critical Habitat as provided for by section 7 of the Act;
- (3) Additional information concerning the range and distribution of this population.

Final promulgation of the regulations on the Beaver Dam Slope population of the desert tortoise will take into consideration the comments and any additional information received by the Director, and such communications may lead him to adopt final regulations that differ from this proposal.

An environmental assessment has been prepared in conjunction with this proposal. It is on file in the Service's Office of Endangered Species, 1612 K Street NW., Washington, D.C., and may be examined during regular business hours. A determination will be made at the time of final rulemaking as to whether this is a major Federal action which would significantly affect the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969.

The primary author of this proposed rulemaking is Dr. C. Kenneth Dodd,

PROPOSED RULES

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Jr., Office of Endangered Species, 202-343-7814.

Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

REGULATIONS PROMULGATION

Accordingly, it is hereby proposed to amend Part 17, Subchapter B, of

1. It is proposed to amend § 17.11 by adding, in alphabetical order under **REPTILES**, the following to the list of animals:

§ 17.11 Endangered and threatened wildlife

Species		Range			Status	When listed	Special rules
Common name	Scientific name	Population	Known distribution	Portion endangered			
Reptiles:							
Tortoise, desert	<i>Gopherus agassizii</i>	Beaver Dam Slope	U.S.A. (Utah)	Entire	E ₁		NA

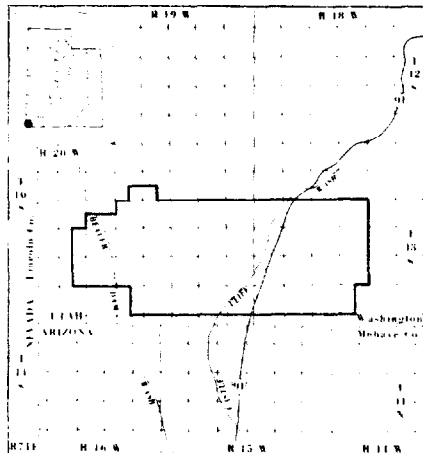
2. Also, The Service proposes to amend § 17.95(c) by adding Critical Habitat of the Beaver Dam Slope population of the desert tortoise after that of the Illinois mud turtle as follows:

(c) *Reptiles*. * * *

BEAVER DAM SLOPE POPULATION OF THE DESERT TORTOISE

(*Gopherus agassizii*)

Utah, Washington County, E½ secs. 13 and 24, T. 43 S., R. 20 W.; S½ sec. 7, all of secs. 8 through 28, E½ sec. 29, SE¼ sec. 5, SW¼ sec. 4, T. 43 S., R. 19 W.; all of secs. 7 through 10, 15 through 22, 28 through 30, and W½ sec. 27, T. 43 S., R. 18 W.



NOTE.—The Service has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular A-107.

Dated: August 11, 1978.

LYNN A. GREENWALT,
Director,
Fish and Wildlife Service.

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