

represent the northernmost populations within the range of the species.

For a discussion of California gnatcatcher habitat destruction prior to its listing in 1993, refer to 58 FR 16741.

E. Other Natural or Man-Made Factors Affecting its Continued Existence

Throughout southern California, but especially in western Riverside and San Bernardino counties, coastal sage scrub vegetation is being type-converted to non-native grassland and other ruderal (weedy) habitats (Allen *et al.* 2000, Allen *et al.* 1996, Minnich and Dezzani 1998). Minnich and Dezzani (1998) resampled Vegetation Type Map plots surveyed 60 years earlier. They found that only 40.1 percent of the coastal sage scrub originally mapped was still extant, while 41.9 percent of this mapped plant community was now open coastal sage scrub mixed with a continuous layer of exotic annual grasses. The remaining 18 percent of plots were entirely converted to exotic annual grassland. This conversion from shrublands to grasslands was due to a combination of factors including invasion of European annual grasses, increased fire frequency, and possibly nitrogen deposition due to air pollution (Minnich and Dezzani 1998). Thus, even in reserve areas not threatened by habitat destruction due to development, a continuous loss of suitable habitat available to the California gnatcatcher is ongoing.

Please refer to the final listing rule (58 FR 16741) for a more detailed discussion of the California gnatcatcher in relation to the five factors.

Previous Federal Action

On March 30, 1993, we published a determination of threatened status for the coastal California gnatcatcher (58 FR 16742). At the time of the listing, we concluded that designation of critical habitat for the species was not prudent because such designation would not benefit the coastal California gnatcatcher and would make the species more vulnerable to activities prohibited under section 9 of the Act. We were aware of several instances of apparently intentional habitat destruction that had occurred during the listing process. In addition, most land occupied by the gnatcatcher was in private ownership and we did not believe a designation of critical habitat to be of benefit because of a lack of a Federal nexus.

On May 21, 1997, the U.S. Court of Appeals for the Ninth Circuit (Circuit Court) issued an opinion in *Natural Resources Defense Council v. U.S. Dept. of the Interior* (No. 95-56075; D.C. No. CV-93-999) (*NRDC v. USDO*) that

required us to reevaluate our prudence determination and issue a new decision regarding the prudence of determining critical habitat for the gnatcatcher.

On February 8, 1999, we published a notice of determination in the **Federal Register** (64 FR 5957) in which we concluded that designation of critical habitat for the gnatcatcher was prudent.

On February 7, 2000, we published a proposed rule to designate critical habitat for the coastal California gnatcatcher (65 FR 5946) on approximately 323,726 ha (799,916 ac) within Los Angeles, Orange, Riverside, San Bernardino, and San Diego counties, California. On October 24, 2000, we published a final rule designating approximately 207,890 ha (513,650 ac) of land as critical habitat for the coastal California gnatcatcher in Los Angeles, Orange, Riverside, San Bernardino, and San Diego counties, California (65 FR 63680).

Following the designation of critical habitat for the coastal California gnatcatcher, NRDC filed an amended complaint on December 20, 2000, challenging the Service's exclusion of some lands from the designation of critical habitat (*NRDC v. USDO*, CV 99-5246, (C.D.Cal)). Also in December 2000, Rancho Mission Viejo L.L.C. filed a lawsuit in the U.S. District Court for the District of Columbia, challenging the methodology used by the Service in the economic analysis of the designation of critical habitat (*Rancho Mission Viejo, LLC v. Babbitt*, CV-01-8412). In January 2001, the Building Industry Association of Southern California and several other groups filed a separate lawsuit in the U.S. District Court for the District of Columbia which also challenged the designation of critical habitat for the coastal California gnatcatcher (*Building Industry Association of Southern California et al v. Norton et al.*, CV 01-7028) (*BIA v. Norton*). On July 3, 2001, the D.C. District Court transferred the BIA and Rancho Mission Viejo suits to the U.S. District Court for the Central District of California.

On June 11, 2002, the U.S. District Court for the Central District of California granted the Service's request for a remand of the coastal California gnatcatcher critical habitat designation so that we may reconsider the economic impact associated with designating any particular area as critical habitat. The Court ordered us to complete a new proposed rule by April 11, 2003. In a subsequent order the Court held that the critical habitat designated for the should remain in place until such time as a new, final regulation becomes effective.

Critical Habitat

Section 3 defines critical habitat 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 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat.

To be included in a critical habitat designation, habitat must be either a specific area within the geographic area occupied by the species on which are found those physical or geographical features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which require special management considerations or protection, or be specific areas outside of the geographic area occupied by the species which are determined to be essential for the conservation of the species. Habitat areas that support only a subset of the primary constituent elements are included only when they still perform the functions that make them essential to the conservation of the species. Section 3(5)(c) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also 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." Accordingly, we do not designate critical habitat in areas outside the geographic area occupied by the species