

October (Romsper and Burk 1979). However, the overall impact of seed weevils on the reproductive output of *A. m. var. peirsonii* is not known at this time. Weevils were noted on nearly all of the *A. m. var. peirsonii* plants encountered in 2003 by Porter (Porter, *in litt.* 2003). Herbivory of leaves, leaflets, and stem tips by rodents was also noted by Porter (*in litt.* 2002a; *in litt.* 2003).

We have not yet developed a recovery plan or a conservation strategy for *Astragalus magdalenae* var. *peirsonii*. Based on our current understanding of the species' biology, the primary conservation needs include: maintenance of the major occurrences of *A. m. var. peirsonii* to conserve genetic diversity; management of the species' habitat to prevent catastrophic population declines; and collection of additional information concerning recreational use-patterns in the Algodones Dunes, the direct and indirect effects of OHV use on this species, and biological factors affecting milk-vetch demographics.

#### Previous Federal Action

The final rule listing *A. m. var. peirsonii* as threatened was published in the **Federal Register** on October 6, 1998 (63 FR 53596). At the time we listed the plant we determined that designation of critical habitat was not prudent based on concerns about potential, deliberate acts of vandalism that could result from such a designation.

On October 25, 2001, we received a petition to delist *Astragalus magdalenae* var. *peirsonii*, dated October 24, 2001, from David P. Hubbard, Ted. J. Griswold, and Philip J. Giacinti, Jr. of Procopio, Cory, Hargreaves & Savitch LLP on behalf of the American Sand Association (ASA), San Diego Off-Road Coalition (SDO-RC), and Off-Road Business Association (O-RBA). On November 20, 2001, we sent a letter to David P. Hubbard of Procopio, Cory, Hargreaves & Savitch LLP acknowledging receipt of their petition. The Service is in the process of making the 90-day finding on the petition.

On November 15, 2001, the Center for Biological Diversity and California Native Plant Society filed a lawsuit in the U.S. District Court for the Southern District of California challenging our determination not to designate critical habitat for eight desert plants, including *Astragalus magdalenae* var. *peirsonii* (*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 Fund v. Norton*, No. 01 CV

2145). Following the filing of these suits, the ASA, California Off-Road Vehicle Association, American Motorcycle Association, Inc.—District 37, the SDO-RC, and the O-RBA filed a motion to intervene. The motion was granted by the Court but limited the interveners' participation to resolution of an appropriate timeline for reconsideration of the critical habitat determination for *A. m. var. peirsonii*. On July 1, 2002, the court ordered the Service to complete a review of the prudency determination and, if prudent, to propose critical habitat for the plant on or before July 28, 2003.

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

In 30 years of implementing the ESA, we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Our 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. We believe 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 ESA 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 306 species or 25 percent of the 1,211 listed species in the United States under our jurisdiction have designated critical habitat. We address the habitat needs of all 1,211 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. We believe that it is these measures that may make the difference between extinction and survival for many species.

#### 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 us 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 us with little ability to prioritize our 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, our 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 us 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 NEPA; all are part of the cost of critical habitat designation. 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.