

particular area as critical habitat. An area may be excluded from critical habitat if it is determined, following an analysis, that the benefits of such 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. Consequently, we may exclude an area from designated critical habitat based on economic impacts, or other relevant impacts such as preservation of conservation partnerships and national security, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

In our critical habitat designations we have used both the provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas which are proposed for designation as critical habitat and those areas which are subsequently finalized (*i.e.*, designated).

#### Prudency Determination

Section 4(a)(3) of the Act and its implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is listed as endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species. In our October 6, 1998, final rule (63 FR 53596), we determined that designation of critical habitat would provide little conservation benefit over that provided by listing. We determined that designation of critical habitat was not prudent based on the increased threat of vandalism and stated that designation of critical habitat could lead to acts of vandalism, may provoke deliberate incidents of vandalism by OHV users and may serve to encourage acts of vandalism.

However, in the past few years, several of our determinations that the designation of critical habitat would not be prudent have been overturned by court decisions. For example, in *Conservation Council for Hawaii v. Babbitt*, the United States District Court for the District of Hawaii ruled that the Service could not rely on the "increased threat" rationale for a "not prudent" determination without specific evidence

of the threat to the species at issue (2 F. Supp. 2d 1280 [D. Hawaii 1998]). Additionally, in *Natural Resources Defense Council v. U.S. Department of the Interior*, the United States Court of Appeals for the Ninth Circuit ruled that the Service must balance, in order to invoke the "increased threat rationale," the threat against the benefit to the species of designating critical habitat (113 F. 3d 1121, 1125 [9th Cir. 1997]).

We continue to be concerned that Peirson's milk-vetch is vulnerable to impacts from OHV use in the area, vandalism, or disturbance of their habitat and that these threats might be increased by the designation of critical habitat, publication of critical habitat maps, and further dissemination of location and habitat information. The periodically low numbers and restricted range of this plant taxon make it vulnerable. At this time, we do have some limited specific evidence for vandalism, and other unauthorized human disturbance specific to this plant and its habitat.

The courts also have ruled that, in the absence of a finding that the designation of critical habitat would increase threats to a species, the existence of another type of protection, even if it offers potentially greater protection to the species, does not justify a "not prudent" finding (*Conservation Council for Hawaii v. Babbitt* 2 F. Supp. 2d 1280). We are already working with Federal and State agencies and organizations in carrying out conservation activities for this plant and conducting surveys for additional occurrences of the species and to assess habitat conditions. These entities are fully aware of the distribution, status, and habitat requirements for this plant.

We have reconsidered our evaluation of the threats posed by vandalism in the prudency determination. We have determined that the threats to Peirson's milk-vetch from specific instances of vandalism we previously identified are limited, if not speculative. Accordingly, we withdraw our previous determination that the designation of critical habitat is not prudent for Peirson's milk-vetch. Therefore, we determine that the designation of critical habitat is prudent for Peirson's milk-vetch. At this time, we have sufficient information necessary to identify specific areas as essential to the conservation of this plant taxon and are therefore proposing critical habitat (*see* "Methods and Analysis used to Identify Proposed Critical Habitat" section below for a discussion of information used in our reevaluation).

#### Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12, we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of *Astragalus magdalenae* var. *peirsonii*. This included information from our own documents on this plant and related taxa, available information that pertains to the biology and habitat requirements of this taxon, including data from research and survey observations, such as Westec (1977), BLM surveys conducted from 1998 to 2002 primarily summarized by Willoughby (BLM 2000, 2001), Thomas Olsen Associates (TOA) (2001), and Phillips and Kennedy (2002); the California Natural Diversity Database (2003); peer-reviewed journal articles and book excerpts regarding *A. m. var. peirsonii*, similar species, or more generalized issues of conservation biology; unpublished biological documents and discussions with botanical experts regarding *A. m. var. peirsonii* and related species; site visits; and discussions.

The area proposed for critical habitat is occupied by *Astragalus magdalenae* var. *peirsonii* as demonstrated by repeated surveys summarized by BLM (BLM 2000, 2001), and independently confirmed by TOA (TOA 2001). This plant may be present as standing plants, as seed bank in the sand or as plants persisting as perennial root crowns in the sand. During any given year, the suitable habitat for *A. m. var. peirsonii* may be occupied by various combinations of these three life history phases. The dynamics of dune morphology, local rainfall patterns and amounts, as well as the spatial distribution of the seed bank, and seed scarification each contribute to the patchy or mosaic nature of the distribution of standing plants of *A. m. var. peirsonii*. Local rainfall patterns and amounts are likely to cause shifts in the proportions of these three life history phases. All areas proposed as critical habitat contain at least one of the primary constituent elements and have been determined to be essential to the conservation of the species, as described below.

Areas proposed as critical habitat are occupied, in any given year, by standing plants, root crowns, or the soil seed bank. Likewise, areas of unsurveyed, suitable habitat that are contiguous with areas where standing plants have been documented by BLM surveys (BLM 2000, 2001), are reasonably likely to support standing plants, root crowns, or