

California Native Plant Society

And

Center for Biological Diversity

January 7, 2005

Field Supervisor
Ventura Fish and Wildlife Office
U.S. Fish and Wildlife Service
2493 Portola Road, Suite B
Ventura, CA 93003

RE: Comments on the Draft Economic Analysis and Proposed Designation of Critical Habitat for *Astragalus jaegerianus* (Lane Mountain Milkvetch)

Dear Field Supervisor:

The California Native Plant Society (CNPS) is a non-profit organization of more than 10,000 laypersons and professional botanists organized into 32 chapters throughout California. The mission of the California Native Plant Society is to increase understanding and appreciation of California's native plants and to conserve them and their natural habitats, through education, science, advocacy, horticulture and land stewardship. Our members and chapters work closely with the U.S. Fish and Wildlife Service (USFWS) and other State and Federal agencies to manage and conserve rare and common botanical resources in California. The Center for Biological Diversity (Center) is a non-profit organization with over 11,000 members in CA and across the nation, dedicated to Protecting endangered species and wild places through science, policy, education, and environmental law.

The CNPS and the Center support the establishment of Critical Habitat for the conservation of *Astragalus jaegerianus* throughout the range of the species (CNPS-Center letter dated 6/7/04). We have reviewed Draft Economic Analysis of Critical Habitat Designation for the Lane Mountain Milkvetch, *Astragalus jaegerianus* and offer the following comments on the document. We have divided these comments into two sections: general comments and document specific comments.

General Comments:

The Economic Analysis fails to clearly state the fact that Critical Habitat designation for plants has no legal impacts on private lands. Lacking a federal nexus, private landowners bear no burden from the designation of Critical Habitat on their property. Thus the economic impacts to private landowners from this designation will be zero.



Dedicated to the preservation of California native flora

The Economic Analysis also fails to acknowledge any benefit of conserving a species that is threatened by extinction from proposed activities. Estimating the dollar value of the Lane Mountain Milkvetch (LMMV) based only on the measures of the existing market for the plant is an inaccurate valuation. There are many other potential values, destined to grow with our knowledge of the species, and its role in desert ecosystems, in science, wildlife habitat, medicine, aesthetic and in ways still unforeseen. Certainly this species, a member of the Fabaceae, fixes nitrogen - an essential nutrient for both plants and wildlife. Nitrogen is often a limiting nutrient in desert ecosystems. It is not possible to calculate a precise value for this nitrogen fixation, but this ecosystem service should at least be mentioned as a benefit of conservation of this species.

Further, what price can be put on species conservation that allows future generations to enjoy and appreciate the natural heritage of California and San Bernardino County? What value can be put on the ability of evolutionary processes to continue to work on the unique genotype that we recognize as the LMMV? What is the value of conserving the full suite of species and ecosystem functions in the few unique habitats where LMMV still survives? While these costs may be hard to quantify by a dollar value, they still exist. Methods are available to estimate such values (see ecological economics references at end of these comments). We request that they be acknowledged in the Final Economic Analysis.

The Economic Analysis never clearly identifies the economic benefits of the designation of Critical Habitat, only the costs. The absence of these types of data suggests an inherent bias in the Economic Analysis.

The estimation of economic cost is not substantiated, and is based on “totals” that have no supporting . In the absence of documentation of methods by which “costs” were calculated, neither decisionmakers nor the public can judge the validity of the estimates.

The Economic Analysis also confuses the economic costs by including costs of conservation efforts for the species (not its Critical Habitat) with conservation of the proposed Critical Habitat for the next 20 years. While we can see using the costs of species conservation as a partial basis for evaluating the economic costs of Critical Habitat. We contend that it is not appropriate to include “pre-designation” estimates as part of the Critical Habitat economic costs estimate because these costs are associated with measure taken for the listed species not its Critical Habitat.

The Economic Analysis generally underestimates the benefits and therefore overestimates the costs of actions associated with LMMV conservation and Critical Habitat conservation. Many of the conservation efforts benefit a number of rare species, including the desert tortoise, the state-listed Mojave ground

squirrel, the desert cymopterus, Clokey's cryptantha and others. It is therefore neither accurate nor appropriate to allocate all costs to LMMV conservation. Throughout this analysis, costs should be prorated among all species that benefit from this critical habitat designation and other conservation actions.

While the CNPS has been stakeholder in the West Mojave Plan (WMP) for over twelve years, we have yet to see a Final Environmental Impact Statement, a Biological Opinion or a Record of Decision for federal actions, much less a Final Environmental Impact Report or certification from the state. We have seen several Drafts however, including widely varying proposed actions and predicted outcomes. Therefore, we contend that the analysis of the WMP and its conservation measures for the LMMV as part of this Economic Analysis remain speculative at best, and need to be represented as such or deleted from the document.

Document Specific Comments:

Page ES-3 Result of Analysis, 5. The CNPS and the Center request that our concerns about the potential jeopardy to LMMV's existence be included in the document, based on the fact that the Army is likely to impact over ¼ of all of the known habitat for the LMMV with tank training. Again, the document appears biased in stating the concerns of the Army regarding the *possible* (not certain) impact of critical habitat designation on its ability to train, while the plants potential extinction is not addressed. While both of our groups questioned the appropriateness of the type of training occurring at Ft. Irwin in the context of our current wars, which occur primarily in urban settings, we request at a minimum that our alternative concern scenario be incorporated into the final Economic Analysis.

Page ES-4 Exhibit ES-2 and 6. Pre-designation costs. The conservation measures associated with Fort Irwin expansion and the West Mojave Plan (WMP) are over-estimated, because many of the consultations, Biological Assessments, Biological Opinions, Key Elements Report, Draft Environmental Impact Reports and Statements and other reports cover a suite of species, some being federally or state-listed and others just rare. Nowhere in the document was there clearly a breakdown of exactly how much time (therefore cost) was spent strictly on the LMMV. At least for the WMP, an estimate of cost needs to be made by the ratio of Critical Habitat acreage to the whole of the WMP acreage, or as a percentage of the total number of species covered in the WMP.

Page ES-5, 8. Again, the document fails to prorate costs based on their benefit to a suite of other species that use the same habitat.

Page ES-5 Exhibit ES-3.

- The costs of Unit 1 are excessive. See comments for Page 4-27, Exhibit 4-4 and Supporting Text.

- Fort Irwin must purchase or condemn by eminent domain (Page 1-8, footnote 21), the 607 acres within the boundaries of the expansion anyway. To attribute these costs to LMMV Critical Habitat is incorrect.
- Fort Irwin must purchase additional acres outside of the boundaries of the expansion as mitigation for land impact. Again, to attribute these costs solely to LMMV Critical Habitat is conservation is inaccurate and incorrect.

These statements and costs must be deleted from the document.

Page ES-6, 11.

- The \$7.45 million estimate is excessive, and is likely to be several years of mitigation fees from the entire WMP. See comments for Page 4-27, 185.
- Again, DOD monitoring and maintenance does not appear to be pro-rated to include the other sensitive species that occur on DOD lands. Again, see comments for Page 4-27, 185.

Page 1-2, 1.1 Approach to Estimating Economic Effects, 23, 3rd Sentence. This sentence gives the false impression that a Critical Habitat Designation (CHD) affects private lands. In fact, absent a federal nexus, CHD for plants has no mandatory legal implications on private lands.

Page 1-8, 1.2.4 Benefits, 45. As part of the complete evaluation of Economic Analysis, the inclusion of the “discussion” of “the benefits of proposed CHD that are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking” which is supposedly to be included in the “preamble to the final rulemaking” is requisite in this Economic Analysis. The failure to include this most important issue as part of the Economic Analysis provides no opportunity for the CNPS or the Center to evaluate the merits of the opinions. Therefore, we request that this draft be re-issued and include this most important analysis.

Page 2-2, 54, 4th sentence. The low “observability factor” suggests that field botanists may not have been adequately trained or experienced.

Page 2-9, 72. “Limited Areas”. Actually most all of the BLM land is currently Multiple Use Class (MUC) Moderate, and the Motor Vehicle Access is currently in 2 types of “limited” use: 1) limited to approved routes (of which there are none, because route designation – apart of the WMP – is still a draft document) or 2) limited to existing routes. We do agree that in this area, off-road use is not permitted.

Page 2-10, 75. While the CNPS and the Center support a mineral withdrawal for all lands that support the LMMV, there currently is no guarantee that this will actually happen within the LMMV critical habitat.

Page 3-6, 90. Rarely do ORV enthusiasts buy motorcycles/equipment for a single event. Therefore, the costs to participate in a dual sport event are overstated. This estimate must be recalculated or deleted.

Page 4-1, 100. Please refer to our comments on the appropriateness of “pre-designation” costs above.

Page 4-2, Exhibit 4-1. We question the validity of a four-fold range in costs for consultations. Surely the federal agencies can and should keep better track of their cost accounting than ± 4 times the cost. Please include a more realistic valuation of the consultations.

Page 4-4 Exhibit 4-2 (and supporting text). Despite our contention that pre-designation valuations are not part of a Critical Habitat Economic Analysis, we offer the following comments on this table

- The Key Elements Report mentions the LMMV autonomously only twice – once to identify that at the time it did not have Critical Habitat Designation and secondly to identify that two out of the three location of the plants were within the Fort Irwin Expansion area. Otherwise, all reference to the LMMV was linked directly to the desert tortoise. Therefore, we question how the cost for the LMMV in the Key Elements required an outlay of 20-85 thousand dollars. A simple spreadsheet of how those costs were incurred needs to be included throughout this table to clearly identify the method used to calculate these costs.
- The 2001-2003 DOD funded LMMV surveys included lands outside of Critical Habitat, and therefore not all of the cost would be include in the analysis.
- All of the consultation (formal and informal) did not focus only on the LMMV, but included other species of concern, including the desert tortoise. Therefore, the costs associated with LMMV need to be prorated for species discussions only.
- The expense attributed to the WMP needs to also be pro-rated to the amount of time taken to develop the LMMV section of the WMP.

Page 4-7, last sentence of 113. This concern is specious. Neither the Center nor CNPS would either wish to litigate or be able to litigate unless the DOD failed to comply with Endangered Species Act mandates for protection of listed species and critical habitat. Therefore unless DOD plans to break the law, there is no reason to anticipate litigation. Our goal is to conserve the LMMV and its Critical Habitat as defined by the Endangered Species Act.

Page 4-7, 116. As described above, the Key Elements Report dealt primarily with the desert tortoise. This analysis should document precisely how an 18-page report can cost between \$20,400 to \$85,200. It should add a spreadsheet of costs for this report to the supplemental Economic Analysis. The majority of

the participants are all federal employees, whose time/expenses would be tracked.

Page 4-8, 119. While DOD has committed, but not appropriated “\$75 million for conservation,” these monies will be used for a variety of mitigation measures, not just conservation of the LMMV. Please clarify this misleading statement and provide an estimate of the fraction of these funds that will be used for LMMV conservation. Again this estimate should be prorated to allocate costs across the suite of imperiled species that share LMMV habitat and thus also benefit from its conservation.

Page 4-13, 130. The Integrated Natural Resources Management Plan (INRMP) would need to be updated whenever any “new” federally listed species discovered or if a new species was listed that occurred on a military base. The cost is not part of the Critical Habitat designation and should be deleted.

Page 4-17, 149. While the Fish and Wildlife Service “concluded in its BO that the addition of training lands at Fort Irwin is not likely to jeopardize the continued existence of the LMMV”, that BO did not consider the adverse modification with regards to species recovery. As you know, the two recent court rulings (Gifford Pinchot Task Force v. USFWS and The Center vs. BLM) have invalidated the Fish and Wildlife Service’s definition of adverse modification. This statement should be corrected to reflect current case law.

Page 4-17, 150. It is not clear if the estimated costs include multiple species that were part of the BA. This should be clarified.

Page 4-18, part of 151. This section fails to document how these costs were actually calculated, other than by personal communication. Additionally the monitoring and fence maintenance is an assumption, not an actual cost of how much monitoring or maintenance was actually done.

Page 4-22, 165. We contend the estimate of cost for route evaluation/designation is highly inflated. If \$700,000 was spent surveying routes in the WMP’s 9.4 million acres, please justify the cost of \$20,000-\$30,000 to survey the 25 miles of routes (or 14, 597 acres) in the LMMV proposed Critical Habitat on BLM land.

Page 4-23 167. The CNPS and the Center requests the basis for the “anticipation” that “5-25% of the route maintenance costs of the WMP are applicable to the LMMV”. That both vague and highly overvalued, based on the fact, that Critical Habitat as proposed makes up less than 0.2% (14,597 acres) of the WMP or 21 miles of routes (Page 4-21, 162)! Please show verification of how this amount was calculated.

Page 4-25, 175. The cost of the WMP development seems underestimated. Please provide the data set from which this was calculated.

Page 4-26 177. This analysis is flawed and should be deleted. No annual reporting will occur because the WMP is not a functional document. Even under the WMP, annual monitoring is not required.

Page 4-27, Exhibit 4-4 and Supporting Text:

- Costs on reporting on NASA are greatly inflated. Please provide the data that support this calculation. This cost suggests that annual monitoring would require a \$50,000 expenditure each year. That is unrealistic.
- Comments on land acquisition are the same as for Exhibit ES-3

Page 4-27, 185. Please include in the supplemental Economic Analysis the data used to calculate the \$7.45 million cost for LMMV conservation under WMP. Maintenance of 21 miles of road and the \$550,000 for all of the validity exams, plus ranger salaries for 20 years just doesn't seem to add up.

Page 4-32, 194. How did NASA calculate the costs for the first year's surveys and reports? The DOD already surveyed NASA's land in their quest for conservation opportunities. The CNPS and the Center question why costs for redundant surveys are included in this analysis. Furthermore, \$30,000 for an annual report is unrealistic. Please provide the data on which these calculations were based.

Page 4-33, 197. Same comment at Page 4-23 167.

With regards to the questions that were posed to the public in the Federal Register Announcement,

1) Reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Acts, including the benefits of exclusion outweigh the benefits of specifying such area as part of CH. The CNPS and the Center contend that the Economic Analysis does not present any verifiable data sets which provide reasons that any habitat should not be included as part of Critical Habitat.

- 2) Specific information on the amount and distribution of *Astragalus jaegerianus* habitat and what habitat is essential to the conservation of this species and why.

The CNPS and the Center refer you to our original 6/7/04 letter on this subject.

3) Land use designations and current or planned activities in the subject area and their possible impacts on proposed habitat
The CNPS and the Center refer you to our original 6/7/04 letter on this subject.

- 4) Any foreseeable economic, national security or other potential impacts resulting from the proposed designation of critical habitat: in particular any impacts on small entities or families.

The CNPS and the Center contend that neither the Proposed Critical Habitat Designation nor the Economic Analysis present any verifiable data, which support the contention, that designation is likely to create adverse economic, national security or other impacts.

- 5) Whether the economic analysis identifies all State and local costs attributable to the proposed critical habitat designation. If not what costs are overlooked.

The CNPS and the Center contend that there are several beneficial costs that were overlooked (see above comments)

- 6) Whether the economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of Critical Habitat.

The CNPS and the Center contend that many assumptions were incorrectly made in the Economic Analysis (see above comments)

- 7) Whether economic analysis correctly assesses the effect on regional costs associated with land use controls that derive from designation.

The CNPS and the Center contend that the Economic Analysis incorrectly assesses the regional costs of the designation

- 8) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final Critical Habitat designation.

The CNPS and the Center contend that the Economic Analysis does not make a case for any economic impacts that would be a cause of exclusion of any areas from the final Critical Habitat designation

- 9) Whether the EA appropriately identifies all costs that could result from the designation.

The CNPS and the Center contend that the Economic Analysis inflated the costs that could result from the designation and attributed incorrect costs to the designation. See comments above

- 10) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding or to assist us in accommodating public concern and comment.

The CNPS and the Center request that the data used for the calculation of costs be included in as part of a supplemental Draft Economic Analysis, so that we can truly evaluate how these costs were calculated.

Finally we emphasize that the flaws in the analysis render it unreliable and that it should under no circumstances be used to designate CH or to exclude areas from CH. For one, the decision to omit or eliminate key benefits information is contrary to the Endangered Species Act's mandate to assess the benefits of specifying areas as critical habitat. 16 U.S.C. § 1533(b)(2). We also note that any management actions and associated economic impacts that result from the listing of the LMMV alone may not be considered in the ultimate determination of critical habitat boundaries (in other words to justify excluding areas from CH).

Thank you for the opportunity to submit these comments. We look forward to seeing a supplemental Economic Analysis put out for public review in the very near future.

Sincerely,

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