

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AH00

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Deinandra conjugens* (Otay tarplant)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose designation of critical habitat for *Deinandra conjugens* [= *Hemizonia conjugens*] (Otay tarplant) pursuant to the Endangered Species Act of 1973, as amended (Act). *Deinandra conjugens* was federally listed as threatened (under the name *Hemizonia conjugens*) throughout its range in southwestern California and northwestern Baja California, Mexico in 1998. A total of approximately 2,685 hectares (ha) (6,630 acres (ac)) in San Diego County, California, are proposed for designation as critical habitat for *D. conjugens*. We have not proposed critical habitat on lands covered by an existing, legally operative, Habitat Conservation Plan (HCP) under section 10(a)(1)(B) of the Act in which *Deinandra conjugens* is a covered species. In areas where HCPs have not yet been completed, we have proposed designation of critical habitat for lands encompassing essential habitat for *Deinandra conjugens*.

If this proposal is made final, section 7 of the Act requires Federal agencies to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat.

We solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation. We may revise or further refine critical habitat boundaries prior to final designation based on habitat and plant surveys, public comments on the proposed critical habitat rule, finalization of pending habitat conservation plans, and new scientific and commercial information.

DATES: We will accept comments until the close of business on August 13,

2001. Public hearing requests must be received by July 30, 2001.

ADDRESSES: If you wish to comment, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008.

2. You may hand-deliver written comments to our Carlsbad Fish and Wildlife Office at the address given above.

3. You may send comments by electronic mail (e-mail) to: fw1cfwo_deco@fws.gov. See the Public Comments Solicited section below for file format and other information about electronic filing.

You may view comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Office, at the above address (telephone 760/431-9440; facsimile 760/431-9618).

SUPPLEMENTARY INFORMATION:**Background**

Deinandra conjugens (Otay tarplant) was known as *Hemizonia conjugens* when it was listed on October 13, 1998 (63 FR 54938). Since then, studies analyzing plant and flower morphology and genetic information prompted Baldwin (1999) to revise the Madiinae (tarplants), a tribe in the Asteraceae (sunflower family), and reclassify several species into new or different genera. As a result, *Deinandra conjugens* is now the accepted scientific name for *Hemizonia conjugens*. This taxonomic change does not alter the limits or definition of *D. conjugens*. Because this taxonomic change was published and is generally accepted by the scientific community, we are proposing to change the name of *H. conjugens* to *D. conjugens* in 50 CFR 17.12 (h), and will use *D. conjugens* in this proposed rule.

Deinandra conjugens was first described by David D. Keck (1958) as *Hemizonia conjugens* based on a specimen collected by L.R. Abrams in 1903 from river bottom land in the Otay Valley area of San Diego County, California. *Deinandra conjugens* is a glandular, aromatic annual of the Asteraceae. It has a branching stem that generally ranges from 5 to 25

centimeters (2 to 10 inches) in height with deep green or gray-green leaves covered with soft, shaggy hairs. The yellow flower heads are composed of 8 to 10 ray flowers and 13 to 21 disk flowers with hairless or sparingly downy corollas (fused petals). The phyllaries (small bracts associated with the flower heads) are ridged and have short-stalked glands and large, stalkless, flat glands near the margins. *Deinandra conjugens* occurs within the range of *D. fasciculata* [= *Hemizonia fasciculata*] (fasciculated tarplant) and *D. paniculata* [= *H. paniculata*] (San Diego tarplant). *Deinandra conjugens* can be distinguished from other members of the genus by its ridged phyllaries, black anthers (part of flower that produces pollen), and by the number of disk and ray flowers. The disk and ray flowers each produce different types of seeds (heterocarpy) which is correlated to differential germination responses (Tanowitz *et al.* 1987).

Most *Deinandra conjugens* occurrences are closely associated with particular soils, vegetation types, and elevation range within southwestern San Diego County, California, and northwestern Baja California, Mexico. The majority of *D. conjugens* occurrences are associated with clay soils and with grasslands (native, non-native, and mixed), coastal sage scrub, or maritime succulent scrub. Current information indicates that *D. conjugens* has a narrow geographic and elevation range based on information from herbarium records at the San Diego Natural History Museum (SDNHM) and CNDDDB (2000) records.

Deinandra conjugens is strongly correlated with clay soils, subsoils, or lenses (Bauder and Truesdale 2000). Clay soils are heavy (dense) soils with small particles. Such soils typically support grasslands, but may support some woody vegetation. Much of the area with clay soils and subsoils within the historical range of *D. conjugens* likely was once vegetated with native grassland and open coastal sage scrub and maritime succulent scrub, which provided suitable habitat for *D. conjugens*. Based on our Geographic Information System (GIS) analysis, most current and historical *D. conjugens* occurrences (92 percent) are found on clay soils or lenses in one of the following soil types: Diablo clay, Olivenhain cobbly loam, Linne clay loam, Salinas clay loam, Huerhuero loam, Diablo-Olivenhain complex, Stockpen gravelly clay, and San Miguel-Exchequer rocky silt loams.

Deinandra conjugens is also strongly associated with particular vegetation types. The species is found in vegetation

communities classified as, but not limited to, grasslands (native, non-native, and mixed), open coastal sage scrub, maritime succulent scrub, and the margins of some disturbed sites and cultivated fields (California Natural Diversity Data Base (CNDDB) 2000; Keck 1959; Keil 1993; Skinner and Pavlik 1994; David Hogan, San Diego Biodiversity Project, *in litt.* 1990; Bruce Baldwin, Jepson Herbarium, pers. comm. 2001; Mark Doderer, RECON, pers. comm. 2001; Scott McMillan, McMillan Biological Consulting, pers. comm. 2001). Plant species common to these vegetation communities include *Nassella* spp. (needlegrass), *Bloomeria crocea* (common goldenstar), *Dichelostemma pulchella* (blue dicks), *Chlorogalum* spp. (soap plant), *Bromus* spp. (brome grass), *Avena* spp. (oats), *Deinandra fasciculata* (fasciculated tarweed), *Lasthenia californica* (common goldfields), *Artemisia californica* (California sagebrush), *Eriogonum fasciculatum* (flat-top buckwheat), *Lotus scoparius* (deer weed), *Salvia* spp. (sage), *Mimulus aurantiacus* (bush monkeyflower), *Malacothamnus fasciculatum* (bushmallow), *Malosma laurina* (laurel sumac), *Rhus ovata* (sugar bush), *R. integrifolia* (lemonade berry), *Lycium* spp. (boxthorn), *Euphorbia misera* (cliff spurge), *Simmondsia chinensis* (jojoba), *Opuntia* spp. (prickly pear and cholla cactuses), *Ferocactus viridescens* (coastal barrel cactus), *Ambrosia chenopodiifolia* (San Diego bur sage), and *Dudleya* spp. (live-forevers).

Based on information from herbarium records at the San Diego Natural History Museum (SDNHM) and CNDDB (2000) records, *Deinandra conjugens* has a narrow geographic distribution. Additional information since the listing indicates that the historical range for *D. conjugens* in San Diego County, California, is from the Mexican border north to Spring Valley and Paradise Valley, a distance of about 24 kilometers (km) (15 miles (mi)), and from Interstate 805 east to Otay Lakes Reservoir, a distance of about 13 km (8 mi). Further, based on these museum and database records, the elevational range for *D. conjugens* appears to be between 25 and 300 meters (m) (80 and 1000 feet (ft)). Because other *Deinandra* species have been documented outside of these elevations and geographic distributions, during the same time periods, but absent *D. conjugens*, we believe these to be the elevation and range limits for this species in the United States.

Typically, *Deinandra conjugens* and other tarplants cannot produce viable seeds without cross pollinating with other individuals (i.e. are extremely self-

incompatible) (Keck 1959; Tanowitz 1982; B. Baldwin, *in litt.* 2001). Gene flow is important for the long-term survival of self-incompatible species (Ellstrand 1992) such as through pollination. Gene flow in *D. conjugens* is essentially achieved through pollen movement among populations. The movement of pollen likely occurs over short distances because most of the insects that visit *Deinandra* are relatively localized and generally travel less than 0.5 km (0.3 mi) at one time. Because small inter-population occurrences of *D. conjugens* may facilitate greater gene flow, this conservation may be critical to maintaining genetic diversity in *D. conjugens*. Pollinators of *D. conjugens* include, but are not limited to, bee flies (Bombyliidae); hover flies (Syrphidae); digger, carpenter, and cuckoo bees (Anthophoridae); and metallic bees (Halictidae) (Krombein *et al.* 1979; M. Doderer, pers. comm. 2001). The following bee species have been documented visiting *Deinandra* species: *Nomia melanderi*, *Colletes angelicus*, *Nomadopsis helianthi*, *Ventralis claypolei ausralior*, *Anthidiellum notatum robertsoni*, *Heriades occidentalis*, *Anthocopa hemizoniae*, *Ashmeadiella californica californica*, *Svastra sabinensis nubila*, *Melissodes tessellata*, *M. moorei*, *M. personatella*, *M. robustior*, *M. semilupina*, *M. lupina*, *M. stearnsi*, *Anthophora urbana urbana*, and *A. curta curta* (Krombein *et al.* 1979).

Deinandra conjugens fruits are each one-seeded and are likely to be dispersed by small to large-sized mammals and birds based on the sticky nature of the remaining flower parts that are attached to the fruits and the discontinuous distribution of other tarplants (B. Baldwin, *in litt.* 2001; M. Doderer, pers. comm. 2001; Elizabeth Friar, Claremont Graduate University, pers. comm. 2001; Gjon Hazard, U. S. Fish and Wildlife Service (Service), pers. comm. 2001). Likely seed/fruit dispersal organisms include, but are not limited to, mule deer (*Odocoileus hemionus*), gray foxes (*Urocyon cinereoargenteus*), coyotes (*Canis latrans*), black-tailed jackrabbits (*Lepus californicus bennettii*), bobcats (*Felis rufus*), striped skunks (*Mephitis mephitis*), opossums (*Didelphis virginiana*), racoons (*Procyon lotor*), and small land birds.

The *Deinandra conjugens* seed bank (a reserve of dormant seeds, generally found in the soil) is important for its year-to-year and long-term survival (Given 1994, Rice 1989). A seed bank includes all of the seeds in a population and generally covers a larger area than

the extent of observable plants seen in a given year. The number and location of standing plants in a population varies annually due to a number of factors, including the amount and timing of rainfall, temperature, soil conditions, and the extent and nature of the seed bank. Large annual fluctuations in the number of standing plants in a given site have been documented. Population size has ranged from 1 to over 5,400 standing plants at a site on northwest Otay Mesa (CNDDB 2000; City of San Diego, *in litt.* 1999), from approximately 100 to 50,000 in a site in Rice Canyon (CNDDB 2000), and from approximately 280,000 to 1.9 million at San Miguel Ranch South (CNDDB 2000; Merkel & Associates, *in litt.* 1999). In any given year, the observable plants in a population are only the portion of the individuals from the seed bank that germinated that year. These annual fluctuations make it look as though a population of annual plants "moves" from year to year, when in actuality, a different portion of a population germinates and flowers each year. The occurrence and spatial distribution of a standing population of plants is generally the result of the occurrence and spatial distribution of the micro-environmental conditions conducive to the germination of the seeds and growth of the plants within the seed bank of a population.

Determining the size/magnitude of a given *Deinandra conjugens* population is difficult due to the major fluctuations that have been documented in known sites (CNDDB 2000; Merkel & Associates, *in litt.* 1999). Conditions during some years are better for growth and reproduction of *D. conjugens* in some populations (and even some portions of a population) than other years. Because the number of standing plants in a given population can vary by orders of magnitude from one year to the next, the number of standing plants observed in a population in any one year does not indicate the magnitude of that population.

The largest number of *Deinandra conjugens* plants were recorded in 1998 when it was estimated that there were over 2 million individuals for the species as a whole (CNDDB 2000; Merkel & Associates, *in litt.* 1999). However, the number of standing plants in most years is probably considerably fewer. To demonstrate this variability, the species was thought to be extinct as a result of extensive development within its range until its rediscovery in Estado de Baja California, Mexico in 1977 (Tanowitz 1978). Conversely, the largest population (Rancho San Miguel) supported about 1.9 million plants

during 1998 when southern California experienced El Niño weather conditions, which resulted in a particularly wet and prolonged growing season (Merkel & Associates, *in litt.* 1999).

In 1998, the five largest populations of *Deinandra conjugens* (Rancho San Miguel, Rice Canyon, Dennery Canyon, Poggi Canyon, and Proctor Valley) were known to support about 98 percent of all reported standing plants (CNDDDB 2000; San Diego Gas and Electric 1995; Roberts 1997; Merkel & Associates, *in litt.* 1999; Sandra Morey, California Department of Fish and Game (CDFG), *in litt.* 1994; Ogden Environmental 1992; Brenda Stone, California Department of Transportation, *in litt.* 1994) with each reportedly containing more than 10,000 standing plants. Of the remaining populations, 8 are reported to support from 1,000 to 8,000 plants each; 9 are reported to support fewer than 1,000 plants each; and 3 are considered to be extirpated (CNDDDB 2000). These populations occur on Federal, local, and private lands (CNDDDB 2000).

The smaller populations of *Deinandra conjugens* are essential to the survival and conservation of the species because they are strategically located between larger populations and facilitate gene flow among them. Gene flow has been demonstrated to reduce local and global extinction rates in a number of species (Hanski 1998; B. Baldwin, *in litt.* 2001). Processes such as mutation, genetic migration, and random genetic drift are known to adversely affect small populations (Barrett and Kohn 1991). Adverse effects from these processes on *D. conjugens* are magnified by its self-incompatibility (Keck 1959; Tanowitz 1982; B. Baldwin, *in litt.* 2001). Maintaining gene flow among the populations is essential to counter the adverse effects from the processes mentioned above, and to ensure the long-term survival and conservation of this species.

Deinandra conjugens has a limited distribution consisting of at least 25 historical populations near Otay Mesa in southern San Diego County and one population near the United States border in Baja California, Mexico (CDFG 1994; Roberts 1997; CNDDDB 2000; Reiser 1996; herbarium records at the SDNHM; S. Morey, *in litt.* 1994). Three of the 25 historic localities of *D. conjugens* in the United States are considered to be extirpated (CNDDDB 2000; D. Hogan, *in litt.* 1990; S. Morey, *in litt.* 1994). At the time the species was listed in 1998, we estimated that 70 percent of the suitable habitat for this species within its known range had

been lost to development or agriculture (63 FR 54938). Since the listing, additional habitat has been lost to development (e.g., urban, commercial, industrial, residential) and agriculture (e.g., grazing, farming).

Deinandra conjugens appears to tolerate mild levels of disturbance such as light grazing (D. Hogan, *in litt.* 1990; Barry Tanowitz, University of California, *in litt.* 1977). Such mild disturbances may create sites conducive to germination (B. Tanowitz, *in litt.* 1977). However, the species is otherwise threatened by urbanization and related activities, intensive agriculture, and the invasion of non-native species which may result in significant disturbance to populations (63 FR 54938). Because of these threats, we anticipate that intensive long-term monitoring and management will be needed to conserve this species.

At the time the species was listed in 1998, we estimated that about 11,930 ha (30,310 ac) of land with clay soils or clay subsoils were within the general range of *Deinandra conjugens* in San Diego County, California (63 FR 54938). Also at that time, about 4,200 ha (10,600 ac) (about 37 percent) of this area had been urbanized and about 4,155 ha (10,555 ac) (about 37 percent) had been heavily cultivated and grazed (63 FR 54938). Additional areas have been lost to urbanization since this time. New information from herbarium records at the SDNHM indicates that the historic range of *D. conjugens* extended further to the north and northwest. Most of the habitat in this additional area has already been lost to development. Much of the cultivated and grazed lands in this range could be restored to support *D. conjugens*, which can grow in the margins of cultivated fields (S. McMillan, pers. comm. 2001; M. Doder, pers. comm. 2001). However, most of these lands will likely be unavailable for the species because of proposed land use (FWS GIS database 2001 which includes coverages from San Diego Association of Governments).

Previous Federal Action

On December 15, 1980, we published a Notice of Review of plants which included *Deinandra conjugens* as a category 1 candidate taxon (45 FR 82480). Category 1 taxa were those taxa for which substantial information on biological vulnerability and threats are available to support preparation of listing proposals. On November 28, 1983, we published a supplement to the 1980 Notice of Review that treated *D. conjugens* as category 2 candidate taxa (48 FR 53640). Category 2 candidates were taxa for which data in our

possession indicated listing was possibly appropriate but for which substantial information on biological vulnerability and threats were not known or on file to support preparation of proposed rules.

On December 14, 1990, we received a petition dated December 5, 1990, from Mr. David Hogan of the San Diego Biodiversity Project, to list *Deinandra conjugens* as endangered. The petition also requested designation of critical habitat. Because *D. conjugens* was included in the Smithsonian Institution's Report of 1975, designated as House Document No. 94-51, that had been accepted as a petition, we regarded Mr. Hogan's petition to list this taxon as a second petition. We ultimately responded to the petitions by publishing a proposed rule to list *D. conjugens* as endangered on August 9, 1995 (60 FR 40549). On October 13, 1998, we published a final rule listing *D. conjugens* as threatened (63 FR 54938). At that time, we indicated that designation of critical habitat was not prudent.

On July 15, 1999, the California Native Plant Society (CNPS) and Southwest Center for Biological Diversity (SWCBD) filed a lawsuit in Federal District Court for the Southern District of California, in part, challenging our decision not to designate critical habitat for *Deinandra conjugens* (*California Native Plant Society; et al. v. Babbitt, et al.*, 99CV1454 L (S.D.Cal.)). On December 21, 2000, we entered into a stipulated settlement agreement with the plaintiffs under which we agreed to reevaluate the prudence determination for *D. conjugens*. Under the settlement agreement, if we determine that critical habitat is prudent, we are to publish in the **Federal Register** a proposed rule to designate critical habitat by June 5, 2001, with a final determination to be completed by May 30, 2002. This proposed critical habitat determination is consistent with this stipulated settlement agreement.

Critical Habitat

Critical habitat is defined in section 3 of the Act 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 species 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 with regard to actions carried out, funded, permitted, 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. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that lack a Federal nexus, critical habitat designation would not afford any additional protections under the Act with respect to such activities.

To be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat, to the extent such habitat is determinable, at the time of listing. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. We

will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation. Within the geographic area occupied by the species, we will not designate areas that do not now have the primary constituent elements, as defined at 50 CFR 424.12(b), that provide essential life cycle needs of the species.

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act, and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should, at a minimum, be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, unpublished materials, and expert opinion.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do not signal that habitat outside the designation is unimportant

or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. At the time of the final listing determination (63 FR 54938), we concluded that designation of critical habitat for *Deinandra conjugens* was not prudent because such designation would not benefit the species. Our regulations (50 CFR 424.12(a)(1)) state that 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 human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

In our final rule, we concluded that the designation of critical habitat for *Deinandra conjugens* was not prudent, explaining that such designation would not benefit the species because it occurs primarily on private lands with little or no Federal involvement (63 FR 54954).

We now conclude that there may be some additional benefits to designating critical habitat. While a critical habitat designation for habitat currently occupied by this species would not likely change the section 7 consultation because an action that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, there may be instances where section 7 consultation

would be triggered only if critical habitat is designated (for example, if we designated unoccupied habitat, or if occupied habitat became unoccupied in the future).

There may also be some educational or informational benefits to designating critical habitat. Critical habitat may be used as a tool to help identify areas within the range of *Deinandra conjugens* essential for the conservation of the species. For example, designation of critical habitat on non-Federal lands may provide some educational benefit by formally identifying on a range-wide basis those areas essential to the conservation of the species and, thus, areas that are likely to be the focus of recovery efforts for *D. conjugens*.

In addition, three significant occurrences of *Deinandra conjugens* now occur on Federal lands, two on the Otay-Sweetwater Unit of the San Diego National Wildlife Refuge (SDNWR) and one on Brown Field, which is under the authority of the Immigration and Naturalization Service-Border Patrol (INS). The land that contains the two occurrences on SDNWR was acquired after the species was listed and the occurrence on the INS site was only known as a point locality, but was determined to be much more extensive (with more than 5,000 standing plants) after the species was listed.

Based on our discussion above, we now conclude that there may be some additional benefits to designating critical habitat on lands essential for the conservation of *Deinandra conjugens*. Therefore, it is prudent to propose the designation of critical habitat for *D. conjugens*.

Methods

In determining areas that are essential to conserve *Deinandra conjugens*, we used the best scientific data available. We reviewed available information that pertains to the habitat requirements of this species, including data from research and survey observations published in peer-reviewed articles; regional GIS coverages (e.g., soils, known locations, vegetation, land ownership, and habitat conservation plan (HCP) boundaries); information from herbarium collections such as from SDNHM; data from the CNDDDB (2000); data collected from project-specific and other miscellaneous reports submitted to us; additional data from the San Diego County Multiple Species Conservation Program (MSCP), such as information from various Subarea or draft Subarea Plans (e.g., City of San Diego, County of San Diego, City of La Mesa, and City of Chula Vista); information in the San Diego Gas and

Electric HCP (1995); and a habitat evaluation model for the Otay Mesa Generating Project.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we must consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. All areas proposed as critical habitat for *Deinandra conjugens* are within the historical range and contain one or more of these physical or biological features (primary constituent elements) essential for the conservation of the species.

The proposed critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *Deinandra conjugens* throughout its range, and provide those habitat components essential for the conservation of the species. Habitat components that are essential for *D. conjugens* are found in vegetation communities classified as, but not limited to, grasslands (native, non-native, and mixed), coastal sage scrub, or maritime succulent scrub in southwestern San Diego County, California. These habitat components provide for: (1) Individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; (2) areas that allow gene flow and provide connectivity or linkage between or within larger populations, including open spaces and disturbed areas that in some instances may also contain introduced plant species; (3) areas that provide basic requirements for growth such as water, light, minerals (i.e., watersheds); and (4) areas that support populations of pollinators and seed dispersal organisms.

The long-term survival and conservation of *Deinandra conjugens* is dependent upon a number of factors, including the protection and management of existing population sites, the protection of inter-population occurrences, the maintenance of normal

ecological functions within these sites, the preservation of the connectivity between sites to maintain the natural order of gene flow between sites through pollinator activity and seed dispersal mechanisms, the protection and maintenance of sites for the survival of pollinators and seed dispersal agents, and the preservation of suitable micro-habitat sites that could be recolonized and allow a population to survive a catastrophic event. The small fragmented range of this species, coupled with its breeding system (i.e., its self-incompatibility and annual nature), makes it especially vulnerable to natural and anthropogenic effects including disturbance from human and agricultural activities; spread of non-native species; and nearby use of herbicides, pesticides, and other contaminants (63 FR 54938; B. Baldwin, pers. comm. 2001; S. McMillan, pers. comm. 2001).

Based on our current knowledge of this species, the primary constituent elements of *Deinandra conjugens* critical habitat consist of, but are not limited to:

(1) soils with a high clay content (generally >25 percent) (or clay intrusions or lenses) that are associated with grasslands (native, non-native, and mixed), open coastal sage scrub, or maritime succulent scrub communities between 25 m (80 ft) and 300 m (1000 ft) elevation; and

(2) plant communities associated with *Deinandra conjugens* which include, but are not limited to grasslands (native, non-native, and mixed), open coastal sage scrub, and maritime succulent scrub between 25 and 300 m (80 and 1,000 ft) elevation in southwestern San Diego County, California. Species common to these communities include *Nassella* spp. (needlegrasses), *Bloomeria crocea* (common goldenstar), *Dichelostemma pulchella* (blue dicks), *Chlorogalum* spp. (soap plants), *Bromus* spp. (brome grasses), *Avena* spp. (oats), *Deinandra fasciculata* (fascicled tarweed), *Lasthenia californica* (common goldfields), *Artemisia californica* (California sagebrush), *Eriogonum fasciculatum* (flat-top buckwheat), *Lotus scoparius* (deer weed), *Salvia* spp. (sages), *Mimulus aurantiacus* (bush monkeyflower), *Malacothamnus fasciculatum* (bushmallow), *Malosma laurina* (laurel sumac), *Rhus ovata* (sugar bush), *R. integrifolia* (lemonade berry), *Lycium* spp. (boxthorns), *Euphorbia misera* (cliff spurge), *Simmondsia chinensis* (jojoba), *Opuntia* spp. (prickly pear and cholla cactuses), *Ferocactus viridescens* (coastal barrel cactus), *Ambrosia chenopodiifolia* (San Diego bur sage),

and *Dudleya* spp. (live-forevers). These plant communities contain natural openings that provide nesting, foraging, and dispersal sites for *D. conjugens* pollen and seed dispersal agents. These openings may have soil inclusions that contain a significantly higher concentration of sandy soils than the adjacent clay soils.

Criteria Used To Identify Critical Habitat

In our proposed delineation of critical habitat for *Deinandra conjugens*, we selected areas essential to the conservation of the species from within its known historical range. We used data from documented occurrences, various GIS layers, and recent aerial photography. These data include *D. conjugens* locations, soils, vegetation, elevation, topography, and current land uses.

We began by using the GIS layers to identify areas of suitable habitat within the geographic distribution of this species. We selected areas with appropriate soils and vegetation that are limited to the elevational range of the species within its known distribution. We then selected soils and plant communities that overlapped known *Deinandra conjugens* occurrences. Areas occupied by *D. conjugens* can not be determined accurately either by cursory field examination or by the limited data from historic observations. The entire population of an annual plant (which includes all of the seeds in the subterranean seed bank and the observable plants above ground) is not visible at any one time. The entire seed bank does not germinate at once, and the visible population of plants rarely reflects the extent of the seed bank. There may be no visible evidence of a plant population for a year or even a span of several years, until local climatic and other conditions are suitable for seed germination. The extent and distribution of the observable plant population may move, shrink, or grow as conditions change, without a similar change in the distribution of the seed bank. As a result, the mapping of *D. conjugens* occurrences has been variable, depending both on the scale of the mapping and the year in which the surveys were conducted (documented examples include records ranging from one to more than 5,400 plants for one population, from about 100 to 50,000 in another, and from 280,000 to 1.9 million plants in another population). In the

closely related *Holocarpa macradenia* (Santa Cruz tarplant), seemingly unoccupied habitat has been determined to contain a viable seed bank where standing plants have not been seen in over 7 years (Bainbridge, *in litt.* 1999). By overlapping known occurrences of *D. conjugens* with appropriate soil types, elevations, and other habitat characteristics, we have included what we believe is the likely distribution of the seed bank around known historical occurrences of *D. conjugens*.

We then eliminated areas that did not contain both appropriate soils and appropriate vegetation such as, but not limited to, currently used agriculture fields, housing developments, and open water. Next, we eliminated all areas above 300 m (1000 ft) elevation, the upper limit of the known distribution of *D. conjugens*, based on herbarium records. We also compared the remaining areas of suitable *D. conjugens* habitat with recent project information and aerial photography so we did not include areas that have recently been developed or had negative surveys for *D. conjugens*.

We conducted this analysis to facilitate delineating suitable habitat containing the primary constituent elements. The long-term survival and conservation of *D. conjugens* is dependent upon the protection and management of existing occurrences, including the seed bank, and the maintenance of ecological functions within these areas, including connectivity within and among sites to allow effective pollinator activity and seed dispersal.

The boundaries of proposed critical habitat for *Deinandra conjugens*, shown on the attached maps and defined in the legal description, are based on a 100-meter Universal Transverse Mercator (UTM) grid, boundaries that have been legally described for the City of Chula Vista's draft preserve design for their draft MSCP Subarea Plan and the County of San Diego's major and minor amendment areas for their MSCP Subarea Plan, Sweetwater Authority lands (a water district in San Diego County), Otay Water District lands, Federal lands (e.g., INS, SDNWR), and Trust for Public Lands property. This grid was overlaid on those areas determined to be essential and indicated by the *D. conjugens* habitat analysis where we did not have legal descriptions for boundaries.

As we discuss in detail below (see "Relationship To Habitat Conservation Plans and Other Planning Efforts"), lands that are covered by an existing, legally operative, HCP with an operative implementing agreement (IA) in which *Deinandra conjugens* is a covered species are not being proposed for designation as critical habitat and have not been included in the mapped areas because the benefits of exclusion outweigh the benefits of inclusion pursuant to section 4(b)(2) of the Act. Areas excluded based on this criterion include lands within the MSCP for the County and City of San Diego, with the exception of those lands within the major and minor amendment areas, where the impacts to and conservation of *D. conjugens* have not been addressed. Apart from the lands with operative HCPs, the majority of the remaining occupied habitat for *D. conjugens* falls within designated or draft preserve areas within the MSCP.

In defining critical habitat boundaries, we made an effort to exclude all developed areas, such as towns or housing developments, and lands unlikely to contain the primary constituent elements essential for conservation of *Deinandra conjugens*. Our 100-m UTM grid minimum mapping unit was designed to minimize the amount of development along the urban edge included in our designation. Lands containing existing features and structures, such as buildings, roads, railroads, urban development, and other similar developed features that do not contain primary constituent elements, are not considered critical habitat and are not proposed as critical habitat. Federal actions limited to those areas would not trigger a section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

The proposed critical habitat units described below constitute our best assessment of areas that are essential for the species' conservation. We anticipate that in the time between the proposed rule and the final rule, and based upon the additional information received during the public comment period and field surveys, that the boundaries of the mapping units may be refined.

Critical Habitat Proposal

The approximate area encompassing the proposed designation of critical habitat by county and land ownership is shown in Table 1.

TABLE 1.—APPROXIMATE PROPOSED CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)) BY COUNTY AND LAND OWNERSHIP

[Area estimates reflect critical habitat unit boundaries, not primary constituent elements within ¹]

County	Federal ²	State/Local	Private	Total
San Diego	625 ha (1,545 ac) ...	590 ha (1,455 ac) ...	1,470 ha (3,630 ac)	2,685 ha (6,630 ac)
Total	625 ha (1,545 ac) ...	590 ha (1,455 ac) ...	1,470 ha (3,630 ac)	2,685 ha (6,630 ac)

¹ Approximate hectares have been converted to acres (1 ha = 2.47 ac). Based on the level of imprecision of mapping at this scale, approximate hectares and acres have been rounded to the nearest 5.

² Federal lands include the Service and INS lands.

Critical habitat includes habitat throughout the species' current range in the United States (San Diego County, California). Lands proposed are under Federal, State, local, and private ownership. Federal lands include areas owned or managed by the Service and INS. Lands proposed as critical habitat have been divided into three critical habitat units. We are proposing to designate critical habitat on lands that are considered essential to the conservation of *Deinandra conjugens*. Each of the critical habitat units for *D. conjugens* is considered to be occupied by either seeds as part of the seed bank or standing plants. A brief description of each unit, and reasons for proposing to designate it as critical habitat, are presented below.

Unit 1: Sweetwater/Proctor Valley Unit

The Sweetwater/Proctor Valley Unit encompasses approximately 1,565 ha (3,865 ac) at the northeastern limit of this species' distribution. This unit is south and east of State Route 54, south and west of State Route 94, and north of Upper Otay Reservoir. It includes portions of the Otay/Sweetwater Unit of SDNWR; lands belonging to the Sweetwater Authority around the Sweetwater Reservoir; lands belonging to the Otay Water District; lands that are proposed as preserve under the City of Chula Vista's Subarea Plan; portions of two project areas within the City of Chula Vista's Subarea Plan, but outside of the proposed preserve lands; and lands that are within major and minor amendment areas within the County of San Diego's Subarea Plan. Two areas in this unit have not been proposed as critical habitat, including the alignment for State Route 125 south and the San Diego County Park campground realignment and expansion because these areas have been analyzed and determined not to be essential.

This unit contains several large populations of *Deinandra conjugens*, including a portion of the Rancho San Miguel population estimated to contain approximately 855,000 standing *D. conjugens* plants during the 1995 and

1998 growing seasons (CNDDDB 2000; Merkel & Associates, *in litt.* 1999). The Rolling Hills population, which had approximately 27,000 standing plants in the 2000 growing season (Stephen Neudecker, Helix Environmental Planning, Inc., *in litt.* 2001), and the Proctor Valley population, which had approximately 10,000 standing plants in the 1990 growing season (CNDDDB 2000), are also included. This unit also contains an area on the north side of the Sweetwater Reservoir where reports indicate there are approximately 2,000 standing plants (Roberts 1997), and an area on the north portion of the SDNWR that had approximately 2,000 standing plants in 1993 (CNDDDB 2000). Additionally, there are a number of new occurrences in this unit between the populations that were documented since the species was listed in 1998. These newly discovered "inter-population" occurrences provide genetic connectivity throughout this unit and among the *Deinandra conjugens* populations. One of these newly discovered occurrences had approximately 1,000 standing plants in 2000 (S. McMillan, *in litt.* 2001) and another had over 27,000 standing plants (S. Neudecker, *in litt.* 2001).

This unit contains multiple large *Deinandra conjugens* populations that are capable of producing large numbers of individuals in good years, which is important for this species to survive through a variety of natural and environmental changes, as well as stochastic (random) events. This unit contains populations in the north and eastern portions of this species' distribution which may be important for its long-term survival and conservation. The populations in this unit can maintain genetic connectivity within and among themselves, and they may maintain genetic connectivity with the Otay Valley/Big Murphy's Unit. Therefore, the populations in this unit are essential to the survival and conservation of the species.

Unit 2: Chula Vista Unit

The Chula Vista Unit encompasses approximately 210 ha (515 ac) at the western portion of this plant's range. Most of the occurrences and populations in this unit are found in the remaining habitat patches along canyon edges that were not optimum for urbanization. This unit contains lands that are proposed as preserve under the City of Chula Vista's Subarea Plan, lands that are in a minor amendment area under the County of San Diego's Subarea Plan, or lands that are in a minor amendment area under the City of Chula Vista's Subarea Plan.

This unit contains the Rice Canyon population, which had more than 50,000 standing plants in 1994 (CNDDDB 2000), and portions of (occurrences within) the Poggi Canyon population that had a reported 10,000 standing plants in 1990 (CNDDDB 2000). This unit contains populations in the western portion of this species' distribution which though currently isolated from each other may contain significant amounts of genetic diversity and are, therefore, essential to the survival and conservation of the species. Peripheral populations may have genetic characteristics essential to overall long-term conservation of the species (i.e. they may be genetically different than more central populations) (Lesica and Allendorf, 1995).

Unit 3: Otay Valley/Big Murphy's Unit

The Otay Valley/Big Murphy's Unit encompasses approximately 910 ha (2,249 ac). It is east of Interstate 805, north of the International Boundary between the United States and Mexico on the east side, north of State Route 905 on the west side, west of Otay Mountain, and along the north rim of Otay Valley including Salt Creek and Wolf Canyon. This unit includes lands owned by INS, lands that are proposed as preserve under the City of Chula Vista's Subarea Plan, and lands that are in major and minor amendment areas in the County of San Diego's Subarea Plan. Areas in this unit that are within the alignment for State Route 125 south

have not been proposed as critical habitat because these areas have been analyzed and determined not to be essential.

This unit contains several large populations of *Deinandra conjugens* that are capable of producing large numbers of individuals in good years which are important for this plant to survive through a variety of natural and environmental changes as well as stochastic events. It also contains the Otay River Valley population which was reported to have approximately 4,000 standing plants (Roberts 1997), the Wolf Canyon population which was reported to have approximately 4,000 standing plants (Roberts 1997), the Brown Field population which had a reported 5,600 individuals in 1998 (U.S. Army Corps of Engineers (Corps) 2000), and the upper Salt Creek population which was reported to have over 1,000 standing plants (Roberts 1997).

Unit 3 contains populations in the southern and eastern portions of this species' distribution, which may be important for its long-term survival and conservation. One population in this unit is located at the southwest edge of this species' range in the United States. This population may have connectivity with *Deinandra conjugens* populations in northwestern Baja California, Mexico. Because this population is at the extreme southwest portion of this species' range in the United States, it may contain important genes that are not found in other populations.

Based on the proposed preserve design for the City of Chula Vista's Subarea Plan, and the designated preserve designs for the City and County of San Diego HCPs, these populations may all retain connectivity among themselves because the habitat mosaic does not have large gaps. The occurrences in this unit may also provide and receive pollen or fruits from *Deinandra conjugens* populations in the Sweetwater/Proctor Valley Unit.

This connectivity will facilitate gene flow within this unit and among other units which, in turn, may allow evolutionary processes that affect *Deinandra conjugens* to continue relatively unimpeded. Maintaining the *D. conjugens* populations and their genetic connectivity (both within and among units) is essential to the survival and conservation of this species. A portion of the *D. conjugens* population north of Otay Valley and west of Otay Lakes is located within proposed critical habitat, and a portion is located outside of proposed critical habitat in the proposed development area for the City of Chula Vista's Subarea Plan. This portion of the population may provide

important genetic connectivity between the Salt Creek and Otay Valley populations.

Because this unit contains a number of large *Deinandra conjugens* populations, these populations will maintain genetic connectivity within and among themselves, they will maintain genetic connectivity with the Sweetwater/Proctor Valley Unit and possibly with plants in Mexico, and they may contain essential genetic diversity; therefore, the populations in this unit are essential to the survival and conservation of the species.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the action agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, we would ensure that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in instances where critical habitat is subsequently designated, and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinstatement of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect *Deinandra conjugens* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., from the Federal Highway Administration,

Federal Aviation Administration (FAA), or Federal Emergency Management Agency (FEMA)); permits from the Department of Housing and Urban Development (HUD); activities by INS on their land or land under their jurisdiction; activities funded by the U.S. Environmental Protection Agency (EPA), Department of Energy (DOE), or any other Federal agency; regulation of airport improvement activities by FAA; and construction of communication sites licensed by the Federal Communications Commission (FCC) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that destroy or adversely modify critical habitat include those that appreciably reduce the value of critical habitat for both the survival and recovery of *Deinandra conjugens*. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat include, but are not limited to:

(1) Removing, thinning, or destroying *Deinandra conjugens* habitat (as defined in the primary constituent elements discussion), whether by burning, mechanical, chemical, or other means (e.g., plowing, grubbing, grading, grazing, woodcutting, construction, road building, mining, herbicide application, etc.);

(2) Activities that appreciably degrade or destroy *Deinandra conjugens* habitat (and its PCEs), including, but not limited to, livestock grazing, clearing, discing, farming, residential or commercial development, introducing or encouraging the spread of nonnative species, off-road vehicle use, and heavy recreational use;

(3) Appreciably decreasing habitat value or quality through indirect effects (e.g., edge effects, invasion of exotic plants or animals, or fragmentation); and

(4) Activities that alter watershed characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain

grassland, scrub, and chaparral communities. These activities could include, but are not limited to, maintaining an unnatural fire regime either through fire suppression or prescribed fires that are too frequent or poorly-timed; residential and commercial development, including road building and golf course installations; agricultural activities, including row crops and livestock grazing; and vegetation manipulation such as clearing or grubbing in the watershed upslope from *D. conjugens*.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE. 11th Ave., Portland, Oregon 97232 (telephone 503/231-2063; facsimile 503/231-6243).

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery, and actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is occupied by the species concerned. Because we are designating areas that are occupied either by standing plants or the underground seedbank of *Deinandra conjugens*, and Federal agencies already consult with us on activities in areas where the species may be present to ensure that their actions do not jeopardize the continued existence of the species, the designation of critical habitat is not likely to result in a

significant regulatory burden above that already in place due to the presence of the listed species. Actions on which Federal agencies consult with us include, but are not limited to:

(1) Regulation of activities affecting waters of the U.S. by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of airport improvement activities by the FAA jurisdiction;

(4) Road construction, right of way designation, or regulation of agricultural activities by Federal agencies;

(5) Development on private lands requiring permits from other Federal agencies such as HUD;

(6) Construction of communication sites licensed by the FCC;

(7) Authorization of Federal grants or loans;

(8) Construction of roads and fences along the International Boundary between the United States and Mexico, and other activities associated with immigration enforcement by the INS;

(9) Activities funded by the EPA, DOE, or any other Federal agency; and

(10) Hazard mitigation and post-disaster repairs funded by the FEMA.

Relationship to Habitat Conservation Plans and Other Planning Efforts

Exclusions Under Section 4(b)(2)

Subsection 4(b)(2) of the Act allows us to exclude areas from critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. For the following reasons, we believe that, in most instances, the benefits of excluding HCPs for which *Deinandra conjugens* is a covered species from critical habitat designations will outweigh the benefits of including them.

(1) Benefits of Inclusion

The benefits of including HCP lands in critical habitat are normally small. The principal benefit of any designated critical habitat is that activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or non-existent. Currently approved and permitted HCPs are already designed to ensure the long-term survival of covered species within the plan area. Where we have an approved HCP, lands that we ordinarily

would define as critical habitat for the covered species will normally be protected in reserves and other conservation lands by the terms of the HCPs and their IAs. These HCPs and IAs include management measures and protections for conservation lands that are crafted to protect, restore, and enhance their value as habitat for covered species.

In addition, an HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification of critical habitat, unless critical habitat has already been designated within the proposed plan area, it will look at the very similar concept of jeopardy to the listed species in the plan area. Because HCPs, particularly large regional HCPs, address land use within the plan boundaries, habitat issues within the plan boundaries will have been thoroughly addressed in the HCP and the consultation on the HCP. Our experience is also that, under most circumstances, consultations under the jeopardy standard will reach the same result as consultations under the adverse modification standard. Implementing regulations (50 CFR part 402) define "jeopardize the continued existence of" and "destruction or adverse modification of" in virtually identical terms. Jeopardize the continued existence of means to engage in an action "that reasonably would be expected * * * to reduce appreciably the likelihood of both the survival and recovery of a listed species." Destruction or adverse modification means an "alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species, in the case of critical habitat by reducing the value of the habitat so designated. Thus, actions satisfying the standard for adverse modification are nearly always found to also jeopardize the species concerned, and the existence of a critical habitat designation does not materially affect the outcome of consultation. Additional measures to protect the habitat from adverse modification are not likely to be required.

Further, HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5-Point Policy for HCPs (65 FR 35242) and the HCP No Surprises regulation (63 FR

8859). Such assurances are typically not provided by section 7 consultations which, in contrast to HCPs, often do not commit the project proponent to long term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP provides.

The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide conservation efforts and assist in species recovery and the creation of innovative solutions to conserve species while allowing for development. The educational benefits of critical habitat, including informing the public of areas that are important for the long-term survival and conservation of the species, are essentially the same as those that would occur from the public notice and comment procedures required to establish an HCP, as well as the public participation that occurs in the development of many regional HCPs. For these reasons, then, we believe that designation of critical habitat has little benefit in areas covered by HCPs.

(2) Benefits of Exclusion

The benefits of excluding HCPs from being designated as critical habitat may be more significant. They include relieving landowners, communities and counties of any additional minor regulatory review that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery of covered species. Most regional plans benefit many species, both listed and unlisted. Imposing an additional regulatory review after HCP completion may jeopardize conservation efforts and partnerships in many areas and could be viewed as a disincentive to those developing HCPs. Excluding HCPs provides us with an opportunity to streamline regulatory compliance and confirms regulatory assurances for HCP participants.

A related benefit of excluding HCPs is that it would encourage the continued development of partnerships with HCP participants, including States, local governments, conservation organizations, and private landowners, that together, can implement conservation actions we would be unable to accomplish alone. By excluding areas covered by HCPs from critical habitat designation, we preserve these partnerships, and, we believe, set the stage for more effective conservation actions in the future.

In general, then, we believe the benefits of critical habitat designation to be small in areas covered by approved HCPs. We also believe that the benefits of excluding HCPs from designation are significant. Weighing the small benefits of inclusion against the benefits of exclusion, including the benefits of relieving property owners of an additional layer of approvals and regulation, together with the encouragement of conservation partnerships, would generally result in HCPs being excluded from critical habitat designation under section 4(b)(2) of the Act.

Not all HCPs are alike with regard to species coverage and design. Within this general analytical framework, we need to evaluate completed and legally operative HCPs in which *Deinandra conjugens* is a covered species on a case-by-case basis to determine whether the benefits of excluding these particular areas outweigh the benefits of including them.

Section 4(b)(2) Evaluation of Specific HCPs

We expect that critical habitat may be used as a tool to identify those areas essential for the conservation of the species, and we will encourage development of HCPs for such areas on non-Federal lands. Habitat conservation plans currently under development are intended to provide for protection and management of habitat areas essential for the conservation of *Deinandra conjugens*, while directing development and habitat modification to nonessential areas of lower habitat value.

Only HCPs within or adjacent to the boundaries of the proposed critical habitat units are discussed herein. Those approved and legally operative HCPs that provide coverage for *Deinandra conjugens* have been excluded from this proposed designation.

We have worked with local jurisdictions to complete several HCPs that include areas where the species occurs. These HCPs include the San Diego Gas and Electric HCP and two Subarea Plans under the MSCP. Both the City of San Diego's Subarea Plan and the County of San Diego's Subarea Plan have received coverage for *Deinandra conjugens*. The San Diego MSCP encompasses approximately 236,000 ha (582,000 ac) of land in southwestern San Diego County, and involves multiple jurisdictions. Approximately 69,600 ha (172,000 ac) are targeted to be conserved within the preserve system. The Service and the California Department of Fish and Game approved the overall MSCP and the City of San

Diego's Subarea Plan in July 1997. The County of San Diego's plan was approved in 1998. San Diego Gas and Electric, which has easements throughout the MSCP, completed its plan in 1995.

We find that the benefits of excluding lands covered by these HCPs would be significant in preserving positive relationships with our conservation partners, lessening potential additional regulatory review and potential economic burdens, reinforcing the regulatory assurances provided for in the implementing agreements for the approved HCPs, and providing for more established and cooperative partnerships for future conservation efforts.

In summary, the benefits of including these approved HCPs in critical habitat for *Deinandra conjugens* include increased educational benefits and minor additional management protections and measures. The benefits of excluding these HCPs from designated critical habitat for *D. conjugens* include additional conservation measures for this and other listed species, preservation of partnerships that may lead to future conservation, and the avoidance of the minor regulatory and economic burdens associated with the designation of critical habitat. Therefore, we believe the benefits of exclusion outweigh the benefits of including these areas. Furthermore, we have determined that these exclusions will not result in the extinction of the species. We have already completed section 7 consultation on the impacts of these HCPs on the species. We determined that the approved HCPs will not jeopardize the continued existence of *D. conjugens*, which means that they will not appreciably reduce the likelihood of the survival and recovery of the species.

The Sweetwater Authority is currently working on an HCP and the City of Chula Vista is expected to complete their HCP subarea planning processes in the near future. We have worked and continue to work closely with the City of Chula Vista on the design of their preserve, specifically in relation to the conservation of *Deinandra conjugens*. The City of Chula Vista's draft HCP proposes to conserve many of the large, essential *D. conjugens* populations, areas for connectivity within and among these populations, habitat to support pollinators and fruit dispersal agents, and includes criteria for conservation of *D. conjugens* within certain areas that have not yet been surveyed. The majority of the draft preserve contains clay soils and the

appropriate vegetation types for *D. conjugens*.

In the event that future HCPs, in addition to those under development by City of Chula Vista and Sweetwater Authority, covering *Deinandra conjugens* are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of *D. conjugens* by either directing development and habitat modification to nonessential areas or appropriately modifying activities within essential habitat areas so that such activities will not destroy or adversely modify the primary constituent elements. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by *D. conjugens*. The process also enables us to conduct detailed evaluations of the importance of such lands to the long term survival of the species in the context of constructing a biologically configured system of interlinked habitat blocks. We fully expect that HCPs undertaken by local jurisdictions (e.g., counties, cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of the species. We believe and fully expect that our analyses of these proposed HCPs and proposed permits under section 7 will show that covered activities carried out in accordance with the provisions of the HCPs and biological opinions will not result in destruction or adverse modification of critical habitat.

We will provide technical assistance and work closely with applicants with respect to HCPs currently under development and future HCPs to identify lands essential for the long-term conservation of *Deinandra conjugens* and appropriate management for those lands. The minimization and mitigation measures provided under these HCPs are expected to protect the essential habitat lands proposed as critical habitat in this rule. If an HCP that addresses *D. conjugens* as a covered species is ultimately approved, we will reassess the critical habitat boundaries in light of the HCP. We intend to undertake this review when the HCP is approved, but funding and priority constraints may influence the timing of such a review.

Should additional information become available that changes our analysis of the benefits of excluding any of these (or other) areas compared to the benefits of including them in the critical

habitat designation, we may revise this proposed designation accordingly. Similarly, if new information indicates any of these areas should not be included in the critical habitat designation because they no longer meet the definition of critical habitat, we may revise this proposed critical habitat designation.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species. We will conduct an analysis of the economic impacts of designating these areas as critical habitat prior to a final determination. When completed, we will announce the availability of the draft economic analysis with a notice in the **Federal Register**, and we will open a public comment period on the draft economic analyses and proposed rule at that time.

Public Comments Solicited

We intend that any final action resulting from this proposal to be as accurate and effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of *Deinandra conjugens* habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use practices and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families; and,

(5) Economic and other values associated with designating critical habitat for *Deinandra conjugens*, such as those derived from non-consumptive uses (e.g., hiking, camping, bird-watching, enhanced watershed protection, improved air quality, increased soil retention, "existence values," and reductions in administrative costs); and

(6) 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 comments.

If you wish to comment on this proposed rule, you may submit your comments and materials by any one of several methods (see **ADDRESSES** section). If submitting comments by electronic format, please submit them in ASCII file format and avoid the use of special characters and encryption. Please include "Attn: 1018-AH00" and your name and return e-mail address in your e-mail message. Please note that the e-mail address will be closed out at the termination of the public comment period. If you do not receive confirmation from the system that we have received your message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760/431-9440.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and

independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the public comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations/notices that are easy to understand. We invite your comments on how to make this notice easier to understand including answers to questions such as the following: (1) Are the requirements in the notice clearly stated? (2) Does the notice contain technical language or jargon that interferes with the clarity? (3) Does the format of the notice (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the notice? What else could we do to make the notice easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW, Washington, DC 20240. You may e-mail your comments to this address: Execsec@ios.doi.gov.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria

discussed below. We are preparing a draft analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific areas as critical habitat. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments.

(a) While we will prepare an economic analysis to assist us in considering whether areas should be excluded pursuant to section 4 of the Act, we do not believe this rule will have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, we do not believe a cost benefit and economic analysis pursuant to EO 12866 is required.

Deinandra conjugens was listed a threatened species in 1998. In fiscal years 1998 through 2001, we have conducted, or are in the process of conducting, an estimated eight formal section 7 consultations with other Federal agencies to ensure that their actions will not jeopardize the continued existence of *Deinandra conjugens*. We have also issued section 10(a)(1)(B) incidental take permits for approximately three projects in areas where the species occurs.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; the Act does not impose any restrictions through critical habitat designation on non-Federal persons unless they are conducting activities funded or otherwise sponsored, authorized, or permitted by a Federal agency. Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause adverse modification of the proposed critical habitat would currently be considered as "jeopardy" under the Act (see Table 2). Accordingly, the designation of critical habitat for *Deinandra conjugens* is not anticipated to have any significant incremental impacts on actions proposed by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal "sponsorship" of their actions are not restricted by the designation of critical habitat.

(b) This rule is not expected to create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of *Deinandra conjugens* since the listing in 1998. The prohibition against adverse modification of critical habitat is expected to impose few, if any, additional restrictions to those that currently exist. Because of the

potential for impacts on other Federal agency activities, we will continue to review this action for any inconsistencies with other Federal agencies' actions.

(c) This rule is not expected to materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not

jeopardize the continued existence of the species, and as discussed above we do not anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have any significant incremental effects.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

TABLE 2.—IMPACTS OF DEINANDRA CONJUGENS LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities potentially affected by species listing only ¹	Additional activities potentially affected by critical habitat designation ²
Federal Activities Potentially Affected ³ .	Activities the Federal Government carries out such as removing, thinning, or destroying <i>Deinandra conjugens</i> habitat (as defined in the primary constituent elements discussion), whether by burning or mechanical, chemical, or other means (e.g., woodcutting, grubbing, grading, overgrazing, construction, road building, mining, herbicide application, etc.) and appreciably decreasing habitat value or quality through indirect effects (e.g., edge effects, invasion of exotic plants or animals, or fragmentation).	None.
Private Activities Potentially Affected ⁴ .	Activities such as removing, thinning, or destroying <i>Deinandra conjugens</i> habitat (as defined in the primary constituent elements discussion), whether by burning or mechanical, chemical, or other means (e.g., woodcutting, grubbing, grading, overgrazing, construction, road building, mining, herbicide application, etc.) and appreciably decreasing habitat value or quality through indirect effects (e.g., edge effects, invasion of exotic plants or animals, or fragmentation that require a Federal action (permit, authorization, or funding).	None.

¹ This column represents the activities potentially affected by listing the *Deinandra conjugens* as a threatened species (October 13, 1998, 63 FR 54938) under the Endangered Species Act.

² This column represents the activities potentially affected by the critical habitat designation in addition to those activities potentially affected by listing the species.

³ Activities initiated by a Federal agency.

⁴ Activities initiated by a private entity that may need Federal authorization or funding.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our determination.

The areas we are proposing as critical habitat are already occupied, by either or both standing plants and the seed bank, by *Deinandra conjugens*. As a result, Federal agencies funding,

permitting, or implementing activities in these areas are already required to consult with us under section 7 of the Act, to avoid jeopardizing the continued existence of this species. While the designation of critical habitat will require that agencies ensure, through section 7 consultation, that their activities do not destroy or adversely modify critical habitat, for the reasons discussed above we do not believe this will result in any additional regulatory burden on the Federal agencies or their applicants. As a result, this proposed rule, if finalized, would not result in a significant economic burden on Federal agencies or their applicants.

Therefore, we are certifying that this proposed rule is not expected to have a significant adverse impact on a substantial number of small entities. Thus, no regulatory flexibility analysis is necessary.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (EO 13211) which applies to regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of

Energy Effects when undertaking certain actions. Because this proposed rule is not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule, as proposed, will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that they proposed activities requiring Federal funds, permits or other authorization. Activities with a Federal nexus may not destroy or adversely modify critical habitat. However, as discussed in section 1, these activities are currently subject to equivalent restrictions as a result of the listing of the species, and no further restrictions are anticipated.

(b) This rule, as proposed, will not produce a Federal mandate of \$100 million or greater in any year, that is, it

is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease current restrictions on private property concerning *Deinandra conjugens*. Due to current public knowledge of the species’ protection, and the fact that critical habitat provides no additional incremental restrictions, we do not anticipate that property values will be affected by the critical habitat designation. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated development of this critical habitat designation, with appropriate State resource agencies in California. The designation of critical habitat within the geographic range occupied by *Deinandra conjugens* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While

this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Deinandra conjugens*.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act is required. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB Control Number.

National Environmental Policy Act

We have determined we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This proposed determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President’s memorandum of April 29, 1994,

“Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), E.O. 13175, and 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of *Deinandra conjugens* because these lands do not support populations, or provide essential habitat. Therefore, critical habitat for *Deinandra conjugens* has not been designated on Tribal lands.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author

The primary author of this proposed rule is Mark A. Elvin (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we proposed to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), remove the entry for *Hemizonia conjugens* and add the following in alphabetical order under “FLOWERING PLANTS” to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *
(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
<i>Deinandra conjugens</i> [= <i>Hemizonia conjugens</i>].	Otay tarplant	U.S.A. (CA), Mexico	Asteraceae—Sunflower.	T	649	17.96(b)	NA
*	*	*	*	*	*	*	*

3. In § 17.96, as proposed to be amended at 65 FR 66865, November 7, 2000, add critical habitat for the Otay tarplant (*Deinandra conjugens*) under paragraph (b) by adding an entry for *Deinandra conjugens* in alphabetical order under Asteraceae to read as follows:

§ 17.96 Critical habitat—plants.

* * * * *

(b) Single-species critical habitat—flowering plants.

* * * * *

Family Asteraceae: *Deinandra conjugens* (Otay tarplant)

(1) Critical habitat units are depicted for San Diego County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Deinandra conjugens* are those habitat components that are essential for the primary biological needs of the species. Based on our current knowledge of this species, the primary constituent elements for *Deinandra conjugens* consist of, but are not limited to:

(i) Soils with a high clay content (generally >25 percent) (or clay intrusions or lenses) that are associated

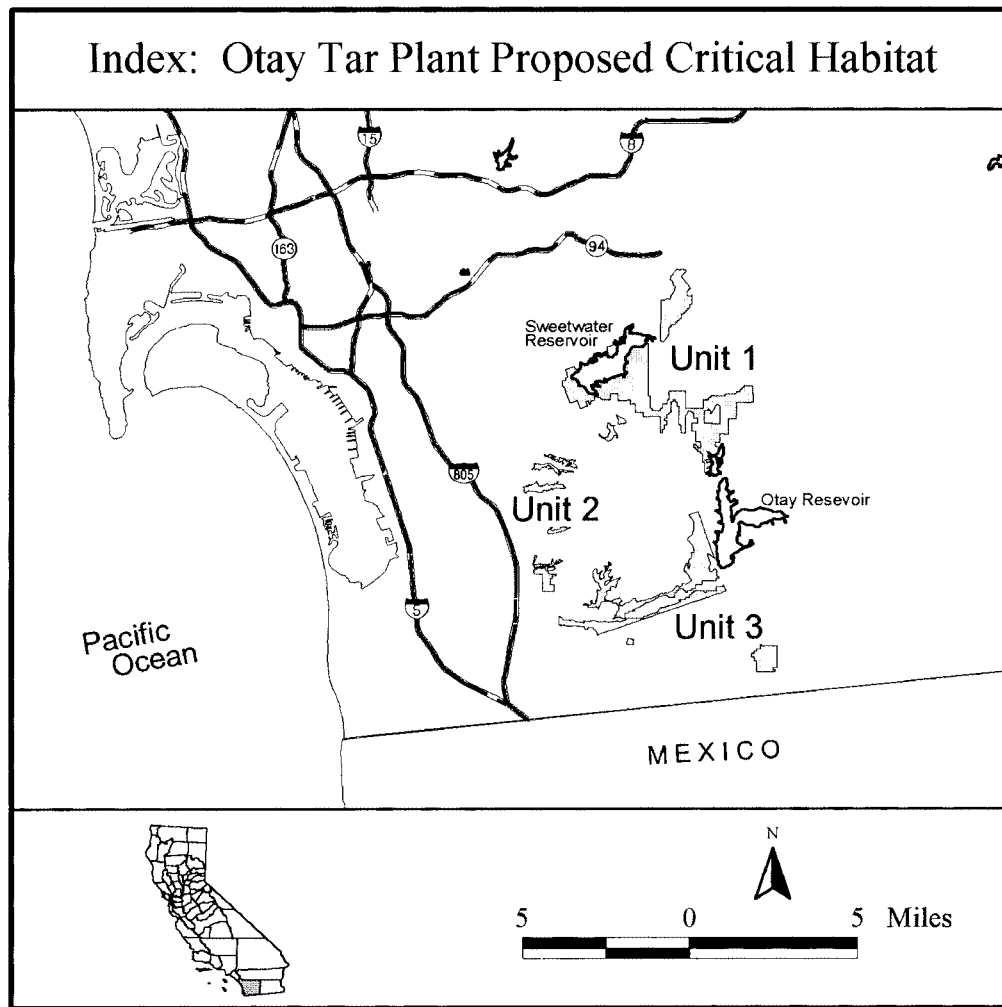
with grasslands (native, non-native, and mixed), open coastal sage scrub, or maritime succulent scrub communities between 25 m (80 ft) and 300 m (1,000 ft) elevation;

(ii) Plant communities associated with *Deinandra conjugens* which include but are not limited to grasslands (native, non-native, and mixed), open coastal sage scrub, and maritime succulent scrub between 25 and 300 m (80 and 1,000 ft) elevation in southern San Diego County, California. Species common to these communities include *Nassella* spp. (needlegrasses), *Bloomeria crocea* (common goldenstar), *Dichelostemma pulchella* (blue dicks), *Chlorogalum* spp. (soap plants), *Bromus* spp. (brome grasses), *Avena* spp. (oats), *Deinandra fasciculata* (fascicled tarweed), *Lasthenia californica* (common goldfields), *Artemisia californica* (California sagebrush), *Eriogonum fasciculatum* (flat-top buckwheat), *Lotus scoparius* (deer weed), *Salvia* spp. (sages), *Mimulus aurantiacus* (bush monkeyflower), *Malacothamnus fasciculatum* (bushmallow), *Malosma laurina* (laurel sumac), *Rhus ovata* (sugar bush), *R. integrifolia* (lemonade berry), *Lycium* spp. (boxthorns), *Euphorbia misera* (cliff

spurge), *Simmondsia chinensis* (jojoba), *Opuntia* spp. (prickly pear and cholla cactuses), *Ferocactus viridescens* (coastal barrel cactus), *Ambrosia chenopodiifolia* (San Diego bur sage), and *Dudleya* spp. (live-forevers). These plant communities contain natural openings that provide nesting, foraging, and dispersal sites for *D. conjugens* pollen and seed dispersal agents. These openings may have soil inclusions that contain a significantly higher concentration of sandy soils than the adjacent clay soils.

(iii) Critical habitat does not include non-Federal lands covered by a legally operative Habitat Conservation Plan issued under section 10(a)(1)(B) of the Act in which *Deinandra conjugens* is a covered species on or before June 13, 2001.

(iv) Existing features and structures, such as buildings, paved or unpaved roads, and other landscaped areas not containing primary constituent elements, are not considered critical habitat. Federal actions limited to those areas, therefore, would not trigger a section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

**BILLING CODE 4310-55-U**

Map Unit 1: Sweetwater/Proctor Valley, San Diego County, California.

Unit 1a: From USGS 1:24,000 quadrangle map Jamul Mountains, beginning at the San Diego National Wildlife Refuge (SDNWR) boundary at UTM NAD27 x-coordinate 505100; thence south following UTM NAD27 coordinates (E, N): 505100, 3620400; 505000, 3620400; 505000, 3620200; 504900, 3620200; 504900, 3620100; 504800, 3620100; 504800, 3620000; 504700, 3620000; 504700, 3619900; 504600, 3619900; 504600, 3619700; 504500, 3619700; 504500, 3619600; 504400, 3619600; 504400, 3619500; 504300, 3619500; 504300, 3619400; 504100, 3619400; 504100, 3619300; 504000, 3619300; thence south to the SDNWR boundary at UTM x-coordinate 504000; thence south following the SDNWR boundary returning to the point of beginning on the SDNWR boundary at UTM x-coordinate 505100.

Unit 1b: From USGS 1:24,000 quadrangle maps National City and Jamul Mountains, beginning at the

Sweetwater Reservoir at UTM NAD27 y-coordinate 3618500; thence east and following UTM NAD27 coordinates 503000, 3618500; 503000, 3616000; 503100, 3616000; 503100, 3615400; 503200, 3615400; 503200, 3615300; 503600, 3615300; 503600, 3615400; 503700, 3615400; 503700, 3615600; 503900, 3615600; 503900, 3615800; thence east to the Otay Water District (OWD) boundary at UTM NAD27 y-coordinate 3615800; thence north following the OWD boundary to the City of Chula Vista Preserve Design (CCVPD) boundary; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 505900; thence north following UTM NAD27 coordinates 505900, 3615900; 506000, 3615900; 506000, 3616000; 506700, 3616000, 506700, 3616100; thence east to the SDNWR boundary at UTM NAD27 y-coordinate 3616100; thence east following the SDNWR boundary to UTM NAD27 x-coordinate 507200; thence north following UTM NAD27 coordinates 507200, 3616200; 507400, 3616200; 507400, 3616300; 507500,

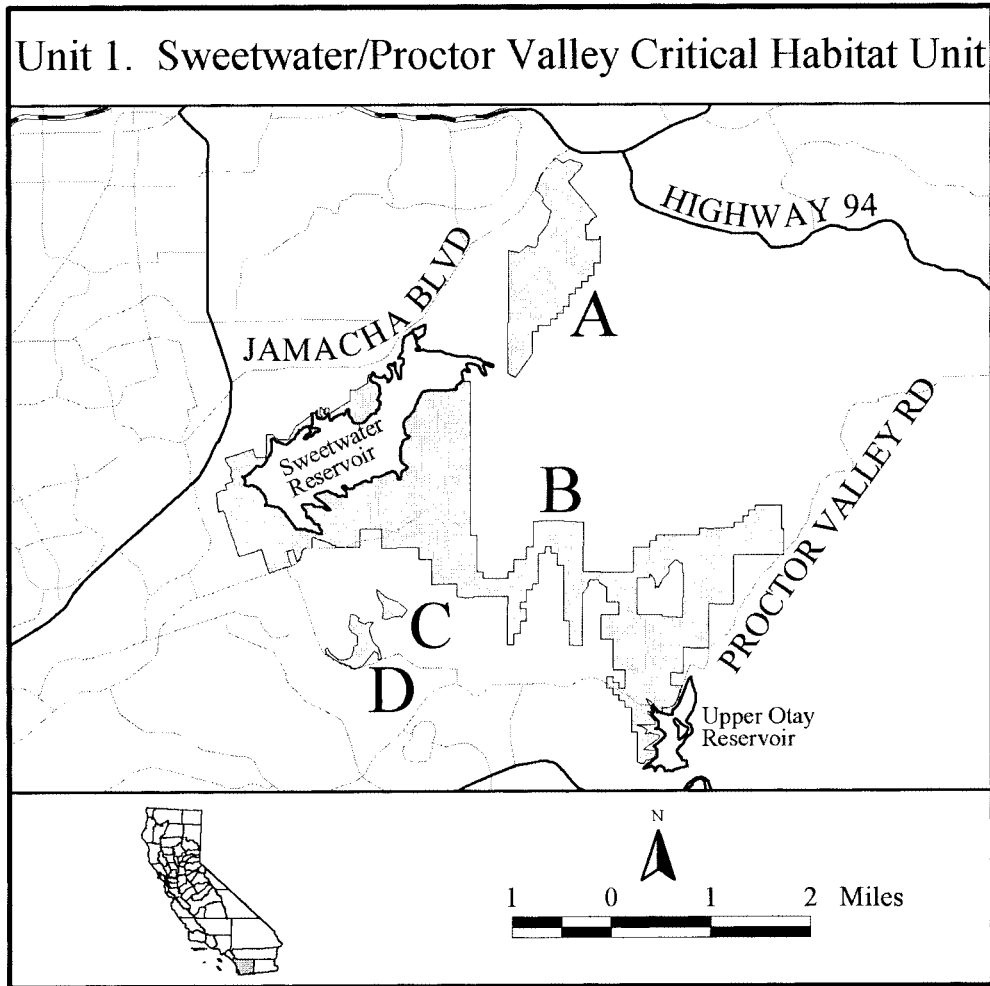
3616300; 507500, 3616400; 507600, 3616400; thence north to the County of San Diego Major Amendment (CSDMjA) boundary at UTM NAD27 x-coordinate 507600; thence east following the CSDMjA boundary to the SDNWR boundary; thence south following the SDNWR boundary to the CSDMjA boundary; thence south following the CSDMjA boundary to UTM NAD27 x-coordinate 506100; thence south following UTM NAD27 coordinates 506100, 3613100; 506000, 3613100; thence north to the City of Chula Vista (CCV) boundary at UTM NAD27 x-coordinate 506000; thence northwest following the CCV boundary to UTM NAD27 x-coordinate 505700; thence north following UTM NAD27 coordinates 505700, 3612800; 505600, 3612800; 505600, 3613200; 505500, 3613200; 505500, 3613300; 505400, 3613300; 505400, 3613400; 505300, 3613400; 505300, 3613500; 505200, 3613500; 505200, 3613700; 505300, 3613700; 505300, 3613600; 505400, 3613600; 505400, 3613500; 505500, 3613500; 505500, 3613800; 505300,

3613800; 505300, 3614300; 505100, 3614300; 505100, 3614700; 505400, 3614700; 505400, 3614900; 505200, 3614900; 505200, 3615100; thence north to the CCVPD boundary at UTM NAD27 x-coordinate 505200; thence west following the CCVPD boundary to the OWD boundary; thence south following the OWD boundary to UTM NAD27 x-coordinate 504600; thence north following UTM NAD27 coordinates 504600, 3614600; 504500, 3614600; 504500, 3615500; 504400, 3615500; 504400, 3615700; 504300, 3615700; 504300, 3615800; 504200, 3615800; 504200, 3615700; 504100, 3615700; 504100, 3615200; 504000, 3615200; 504000, 3615100; 503900, 3615100; 503900, 3614900; 503800, 3614900; 503800, 3614800; 503900, 3614800; 503900, 3614600; 503800, 3614600; 503800, 3614400; 503700, 3614400; thence south to the OWD boundary at

UTM NAD27 x-coordinate 503700; thence west following the OWD boundary to the Multiple Habitat Planning Area (MHPA) boundary; thence west following the MHPA to the SDNWR boundary; thence south following the SDNWR boundary to UTM NAD27 y-coordinate 3616100; thence west following UTM NAD27 coordinates 501200, 3616100; 501200, 3615800; 500800, 3615800; thence north to the Sweetwater Authority Water District (SWAWD) boundary at UTM NAD27 x-coordinate 500800; thence west following the SWAWD boundary to the County of San Diego Minor Amendment (CSDMnA) boundary; thence west following the CSDMnA boundary to the SWAWD boundary; thence west following the SWAWD boundary to approximately UTM NAD27 coordinates 5014000, 3618650 where the SWAWD meets the

Sweetwater Reservoir shoreline; thence south following the Sweetwater Reservoir shoreline back to the point of beginning at UTM NAD27 y-coordinate 3618500; excluding lands bounded by the CCVPD boundary at UTM NAD27 x-coordinate 505800; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 506100; thence north and following UTM NAD27 coordinates 506100, 3614700; 505700, 3614700; 505700, 3615300; 505800, 3615300; thence north returning to the point of beginning on the CCVPD boundary at UTM NAD27 x-coordinate 505800; excluding the proposed State Route 125 easement.

Unit 1 c and d: From USGS 1:24,000 quadrangle map Jamul Mountains, the lands bounded by the CCVPD boundary at Horseshoe Bend and Gobblers Knob.



Map Unit 2: Chula Vista, San Diego County, California.
Unit 2a: From USGS 1:24,000 quadrangle maps National City, the

lands bounded by the CCVPD boundary in Long Canyon and between UTM NAD27 coordinates 497900 and 499700.

Unit 2b and c: From USGS 1:24,000 quadrangle map National City, the lands bounded by the CCVPD boundary south of Otay Lakes Road and between UTM

NAD27 x-coordinates 497300 and 499500.

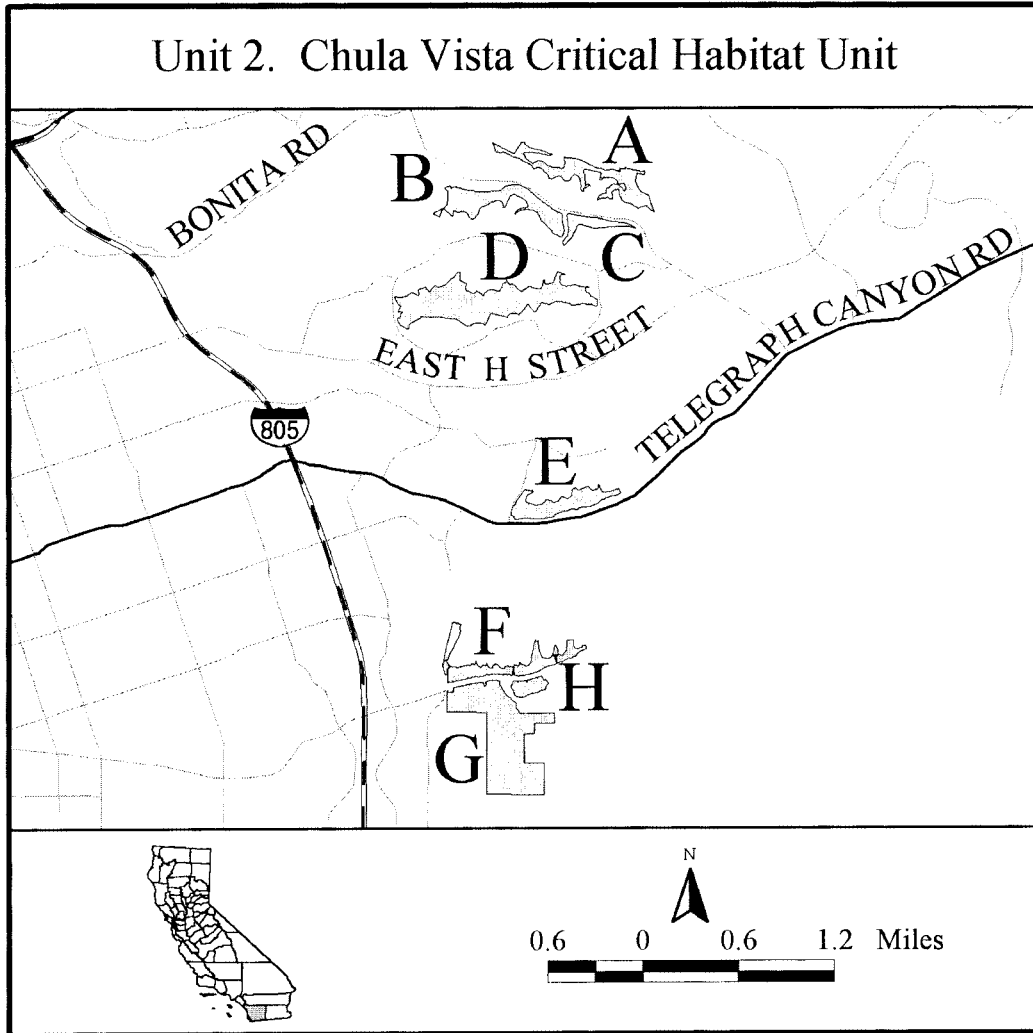
Unit 2d: From USGS 1:24,000 quadrangle map National City, the lands bounded by the CCVPD boundary in Rice Canyon and between UTM NAD27 x-coordinates 496900 and 499100.

Unit 2e: From USGS 1:24,000 quadrangle maps National City and Imperial Beach, the lands bounded by the CCVPD boundary in Telegraph Canyon and between UTM NAD27 x-coordinates 498100 and 499300.

Unit 2f and h: From USGS 1:24,000 quadrangle map Imperial Beach, the lands bounded by the CCVPD boundary in Poggi Canyon and between UTM NAD27 x-coordinates 497400 and 499000.

Unit 2g: From USGS 1:24,000 quadrangle map Imperial Beach, beginning at the CCV boundary at UTM NAD27 x-coordinate 498600; thence south following UTM NAD27 coordinates 498600, 3607300; 498400,

3607300; 498400, 3607200; 498300, 3607200; 498300, 3606900; 498500, 3606900; thence south to the CCV boundary at UTM NAD27 x-coordinate 498500; thence west following the CCV boundary to the CCVPD boundary; thence west following the CCVPD boundary to the CCV boundary; thence east returning to the point of beginning on the CCV boundary at UTM NAD27 x-coordinate 498600.



Map Unit 3: Otay Valley/Big Murphy's, San Diego County, California.

Unit 3a: From USGS 1:24,000 quadrangle maps Imperial Beach, Otay Mesa, and Jamul Mountains beginning on the CCVPD boundary at UTM NAD27 x-coordinate 499900; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 506400; thence south following the UTM NAD27 coordinates 506400, 3607200; 506300, 3607200; 506300, 3607100; 505600,

3607100; 505600, 3606900; 505300, 3606900; 505300, 3606700; 505100, 3606700; 505100, 3606600; 504900, 3606600; 504900, 3606500; 504800, 3606500; 504800, 3606600; 504700, 3606600; 504700, 3606700; 504500, 3606700; 504500, 3606600; 504400, 3606600; 504400, 3606500; 504300, 3606500; 504300, 3606300; thence west to the CCVPD boundary at UTM y-coordinate 3606300; thence north following the CCVPD boundary to UTM

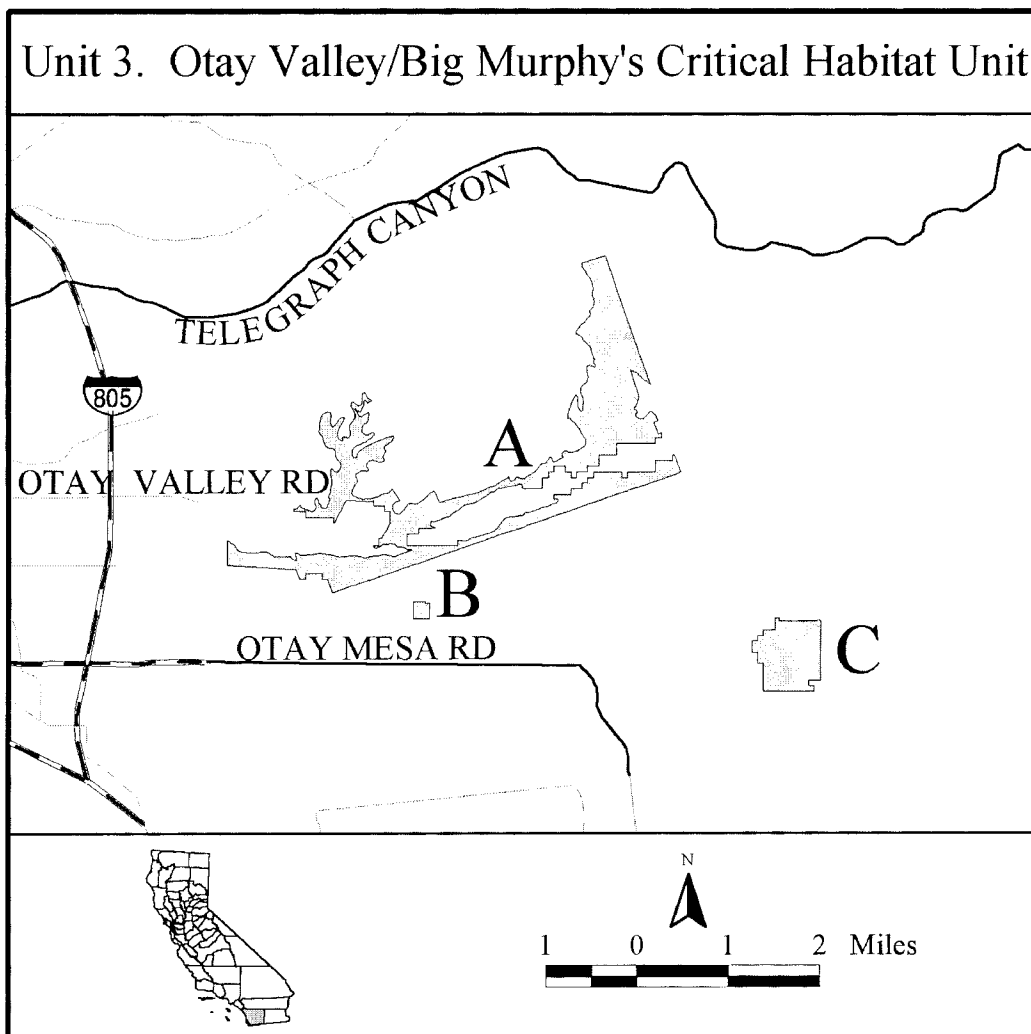
NAD27 x-coordinate 502400; thence south following UTM NAD27 coordinates 502100, 3605600; 502100, 3605500; 501900, 3605500; 501900, 3605300; 502800, 3605300; 502800, 3605400; thence east to the CCVPD boundary at UTM NAD27 y-coordinate 3605400; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 504500; thence north following UTM NAD27 coordinates 504500, 3606200; 504800, 3606200;

504800, 3606300; 505000, 3606300; 505000, 3606400; 505100, 3606400; 505100, 3606500; 505200, 3606500; 505200, 3606600; 505700, 3606600; 505700, 3606500; 505800, 3606500; 505800, 3606600; 506300, 3606600; 506300, 3606800; 506600, 3606800; 506600, 3606900; thence east to the CCVPD boundary at UTM NAD27 y-coordinate 3606900; thence south following the CCVPD boundary to the CCV boundary; thence west following the CCV boundary to the CCVPD boundary; thence north following the CCVPD boundary to the UTM NAD27 y-coordinate 3604700; thence west following UTM NAD27 coordinates 500400, 3604700; 500400, 3604800; 500100, 3604800; 500100, 3604700; thence west to the CCV boundary at UTM NAD27 y-coordinate 3604700; thence north along the CCV boundary to the CCVPD boundary; thence east following the CCVPD boundary to UTM

NAD27 x-coordinate 501300; thence north following UTM NAD27 coordinates 501300, 3605300; 501400, 3605300; thence north to the CCVPD boundary at UTM NAD27 x-coordinate 501400; thence north following the CCVPD boundary to UTM NAD27 x-coordinate 501600; thence north following UTM NAD27 coordinates 501600, 3605900; 501500, 3605900; 501500, 3606000; 501300, 3606000; 501300, 3606100; thence north to the CCVPD boundary at UTM NAD27 x-coordinate 501300; thence east following the CCVPD boundary to UTM NAD27 y-coordinate 3605700; thence east following UTM NAD27 coordinates 500600, 3605700; 500600, 3605800; 500100, 3605800; 500100, 3605900; 499900, 3605900; thence north returning to the point of beginning on the CCVPD boundary at UTM NAD27 x-coordinate 499900; excluding the proposed State Route 125 easement.

Unit 3b: From USGS 1:24,000 quadrangle map Otay Mesa, the southern half of the Immigration and Nationalization Service land at Brownfield.

Unit 3c: From USGS 1:24,000 quadrangle map Otay Mesa, beginning on the CSDMjA boundary at UTM NAD27 y-coordinate 3604000; thence south following the CSDMjA boundary to UTM NAD27 x-coordinate 509200; thence south following UTM NAD27 coordinates 509200, 3602900; 509000, 3602900; 509000, 3602800; 509100, 3602800; 509100, 3602700; 508200, 3602700; 508200, 3603200; 508100, 3603200; 508100, 3603400; 508000, 3603400; 508000, 3603600; 508100, 3603600; 508100, 3603700; 508200, 3603700; 508200, 3603800; 508400, 3603800; 508400, 3604000; returning to the point of beginning on the CSDMjA boundary at UTM NAD27 y-coordinate 3604000.



Dated: June 1, 2001.

Marshall P. Jones, Jr.,
*Acting Assistant Secretary for Fish and
Wildlife and Parks.*

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