

contracting officer. The statement shall require the Protege firm to notify the Contractor if it is suspended or debarred.

(g) The application will be evaluated on the extent to which the offeror's proposal addresses the items listed in paragraphs (e) and (f) of this section. To the maximum extent possible, the application should be limited to not more than 10 single pages, double spaced. The offeror may identify more than one Protege in its application.

(h) If the offeror is determined to be in the competitive range, or is awarded a contract without discussions, the offeror will be advised by the contracting officer whether their application is approved or rejected. The contracting officer, if necessary, may request additional information in connection with the offeror's submission of its revised or best and final offer. If the successful offeror has submitted an approved application, they shall comply with the clause titled "Mentor-Protege Program."

(i) Subcontracts of \$1,000,000 or less awarded to firms approved as Proteges under the Program are exempt from the requirements for competition set forth in FAR 44.202-2(a)(5), and 52.244-5(b). However, price reasonableness must still be determined and the requirements in FAR 44.202-2(a)(8) for cost and price analysis continue to apply.

(j) Costs incurred by the offeror in fulfilling their agreement(s) with a Protege firm(s) are not reimbursable as a direct cost under the contract. Unless EPA is the responsible audit agency under FAR 42.703-1, offerors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates. Where EPA is the responsible audit agency, these costs will be considered in determining indirect cost rates.

(k) Submission of Application and Questions Concerning the Program.

The application for the Program for Headquarters and Regional procurements shall be submitted to the contracting officer, and to the EPA OSDBU at the following address: Socioeconomic Business Program Officer, Office of Small and Disadvantaged Business Utilization, U.S. Environmental Protection Agency, Ariel Rios Building (1230A), 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Telephone: (202) 564-4322, Fax: (202) 565-2473.

The application for the Program for RTP procurements shall be submitted to the contracting officer, and to the Small Business Specialist at the following address: Small Business Program Officer, RTP Procurement Operations Division (E105-02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, Telephone: (919) 541-2249, Fax: (919) 541-5539.

The application for the Program for Cincinnati procurements shall be submitted to the contracting officer, and to the Small Business Specialist at the following address: Small and Disadvantaged Business Utilization Officer, Cincinnati Procurement Operations Division (CPOD-Norwood), U.S. Environmental Protection Agency, 26 West Martin Luther King Drive, Cincinnati, OH 45268, Telephone: (513) 487-2024 Fax: (513) 487-2004.

(End of provision)

Dated: February 28, 2002.

Judy S. Davis,

Director, Office of Acquisition Management.

[FR Doc. 02-5743 Filed 3-13-02; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AI35

Endangered and Threatened Wildlife and Plants: Listing the Desert Yellowhead as Threatened

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), determine *Yermo xanthocephalus* (desert yellowhead) to be threatened under the authority of the Endangered Species Act of 1973, as amended. This plant is a recently described Wyoming endemic known only from the south end of Cedar Rim on the summit of Beaver Rim in southern Fremont County, Wyoming. It is known from a single population with plants found scattered over an area of 20 hectares (50 acres). The total area actually occupied by the population is only 3.37 hectares (8.33 acres) within the 20 hectares. In 2001 this population contained 11,967 plants and existed entirely on Federal lands. Surface disturbances associated with oil and gas development, compaction by vehicles, trampling by livestock, and randomly occurring, catastrophic events threaten the existing population.

EFFECTIVE DATE: April 15, 2002.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 4000 Airport Parkway, Cheyenne, WY 82001.

FOR FURTHER INFORMATION CONTACT:

Mike Long, Field Supervisor, Wyoming Field Office (see **ADDRESSES** section), telephone 307/772-2374; facsimile (307) 772-2358.

SUPPLEMENTARY INFORMATION:

Background

Yermo xanthocephalus was discovered by Wyoming botanist Robert Dorn while conducting field work in the Beaver Rim area of central Wyoming in 1990. Dorn discovered a small population of an unusual species of

Composite (Asteraceae). Dorn's closer examination revealed that the species was unknown to science and represented a new genus. Dorn (1991) named his discovery *Y. xanthocephalus*, or literally "desert yellowhead."

Yermo xanthocephalus is a tap-rooted, glabrous (hairless) perennial herb with leafy stems to 30 centimeters (cm) (12 inches (in)) high. The leathery leaves are alternate, lance-shaped to oval, 4 to 25 cm (1.5 to 10 in) long and often folded along the midvein. Leaf edges are smooth or toothed. Flower heads are many (25 to 180) and crowded at the top of the stem. Each head contains four to six yellow disk flowers (ray flowers are absent) surrounded by five yellow, keeled involucre (whorled) bracts (small leaves beneath the flower). The pappus (the outer whorl of flowering parts) consists of many white bristles.

The species is restricted to shallow deflation hollows in outcrops of Miocene sandstones of the Split Rock Formation (Van Houten 1964). These wind-excavated hollows accumulate drifting snow and may be more mesic (moist) than surrounding areas. The vegetation of these sites is typically sparse, consisting primarily of low-cushion plants and scattered clumps of Indian ricegrass (*Stipa hymenoides*).

Dorn observed approximately 500 plants within 1 hectare (2.5 acres) in 1990 on Federal land managed by the Bureau of Land Management (BLM). Surveys conducted since 1990 by Richard Scott, Curator of the Central Wyoming College Herbarium in Riverton, have failed to locate additional populations on outcrops of the White River, Wagon Bed, and Wind River formations in the Beaver Rim area. The estimate of the plant population's size has increased from 500 in 1990 to 11,967 plants in 2001. However, Dorn's original estimate of 500 plants was a visual estimate and did not include 2 nearby subpopulations, while Scott has been counting all plants in all 3 subpopulations using a monitoring grid. Therefore, the difference in estimates may be largely the result of different techniques used over differing acreages and cannot be assumed to show a significantly increasing trend in population size between 1990 and 2001. Based upon Scott's data collected from 1995 through 2001, the actual population count has increased from 9,293 in 1995 to 11,967 in 2001, possibly in response to higher than normal precipitation over the study period (R. Scott, Central Wyoming College, pers. comm., 2001).

Previous Federal Action

In the plant notice of review published on September 30, 1993 (58 FR 51144), we designated *Yermo xanthocephalus* a Category 2 species for potential listing under the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*). At that time, Category 2 species were those for which data in our possession indicated listing was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support a proposed rule. On February 28, 1996, we published a Notice of Review in the **Federal Register** (61 FR 7596) that discontinued the designation of Category 2 species as candidates, and this species was upgraded to candidate status at that time. A candidate is a species for which we possess substantial information on biological vulnerability and threats to support preparation of a listing proposal.

On November 24, 1997, we received a petition from the Biodiversity Legal Foundation and Biodiversity Associates alleging that *Yermo xanthocephalus* warranted emergency listing. On December 22, 1997, we notified the petitioners that emergency listing was not appropriate because BLM regulations provided some conservation measures for the species, and current exploratory oil and gas activities near the known occupied habitat of *Y. xanthocephalus* were being coordinated with our staff in the Wyoming Field Office. In addition, we notified the petitioners that petitions for candidate species are considered second petitions, because candidate species are species for which we have already decided that listing is warranted. Therefore, no 90-day finding was required for Biodiversity Legal Foundation's petition.

The proposed rule to list *Yermo xanthocephalus* as threatened was published in the **Federal Register** on December 22, 1998 (63 FR 70745). With a **Federal Register** publication on September 5, 2000 (65 FR 53691), we reopened the comment period. In the same publication, we sought comments regarding a draft conservation agreement, assessment, and strategy submitted by BLM for our consideration when making this listing decision. The conservation agreement, assessment, and strategy was never finalized or signed and has not been considered as a firm commitment to perform the actions when assessing conservation commitments in making this listing decision.

On August 9, 1999, BLM segregated (proposed withdrawal of) 3,759.12 acres surrounding the population of *Yermo xanthocephalus* for 2 years from location and entry under the General Mining Act of 1872, and from settlement, sale, location, and entry under the general land laws (64 FR 43209). However, this segregation expired on August 9, 2001, with no finalized withdrawal in place.

On November, 12, 2001, Biodiversity Legal Foundation, Biodiversity Associates, Center for Native Ecosystems, and Wyoming Outdoor Council filed a complaint in the U.S. District Court of Colorado alleging that the Service failed to make a timely final listing determination and critical habitat designation for *Yermo xanthocephalus*.

Summary of Comments and Recommendations

In the December 22, 1998, proposed rule (63 FR 70745) we requested that all interested parties submit factual reports and information that might contribute to the development of this final rule. The comment period for the proposed rule was open from December 22, 1998, through February 22, 1999. On September 5, 2000, the comment period was reopened (65 FR 53691) to accommodate the public notice requirement of the Act, consider any new scientific information, and allow for comments on the draft conservation agreement submitted by BLM. We published legal notices in the "Casper Star Tribune" on September 5, 2000, and in the "Riverton Ranger" and the "Lander Journal" on September 6, 2000. The reopened comment period closed October 5, 2000.

During the initial comment period, 12 sets of comments were received. During the reopened comment period, we received 3 sets of comments regarding the proposed listing action. Additionally, 4 sets of comments were received by BLM regarding its draft conservation agreement, assessment, and strategy. We had no requests for a public hearing during either comment period. Of the comments we received, 8 supported, 3 opposed, and 4 were neutral regarding the proposed threatened status for *Yermo xanthocephalus*.

We updated the final rule to reflect comments and information we received during the comment period. We address opposing comments and other substantive comments concerning the rule below.

Issue 1: *Yermo xanthocephalus* warrants endangered status, not threatened status.

Response: As mentioned above, the population of *Yermo xanthocephalus* has increased from 9,293 individuals in 1995 to 11,967 individuals in 2001. The future existence of the species is threatened by potential oil and gas development and other factors, including its extremely limited range. Although we believe the species is likely to become endangered in the foreseeable future if the threats to the habitat are realized, the population has shown stability since 1995. Additionally, the population occurs on Federal land and BLM is cooperating with interested parties to conserve the plant. A monitoring and research program is being implemented as well. As a result, *Y. xanthocephalus* does not meet the definition of an endangered species under the Act because it is not in imminent danger of extinction in the foreseeable future. Therefore, listing as threatened is appropriate.

Issue 2: Listing of *Yermo xanthocephalus* is not warranted since the population has increased from 500 plants in 1990 to an estimated 15,000 plants in 1998.

Response: The proposed rule did indicate that the population contained an estimated 15,000 plants. The actual population size (based upon counting of all plants) was 11,635. The population has fluctuated between 9,293 and 13,244 since 1995, with the 2001 population being comprised of 11,927 individual plants. However, a meaningful comparison of the recent numbers with Dorn's initial estimate is not possible. The 1990 estimate of 500 plants made by Dorn was based purely on a visual estimate of 1 subpopulation within 1 hectare (2.5 acres). Subsequent surveys since 1995 by Dick Scott have involved counting all plants in all three subpopulations. It is not possible to make trend estimates comparing such different survey methods implemented on disparate acreages.

Issue 3: Listing *Yermo xanthocephalus* will draw attention to its location and increase the risk of harm through vandalism or collection. Similarly, critical habitat designation is not prudent because it will increase these risks.

Response: We remain concerned that publication of precise maps and descriptions of critical habitat in the **Federal Register** and local newspapers could increase the vulnerability of this plant to incidents of collection, general vandalism, and trampling by curiosity-seekers. However, we do not believe the listing of *Yermo xanthocephalus* increases the likelihood of such activities. The general location of *Y. xanthocephalus* is widely known by

many citizens. At this time we have no specific evidence of taking, vandalism, collection or trade of this species. We do not believe listing the species will increase this threat. Additionally, in the absence of specific evidence, we cannot conclude that designation of critical habitat would not be prudent based on increased threat. See the Critical Habitat section below for more detailed discussion of this issue.

Issue 4: Livestock use of the area and associated potential adverse effects to *Yermo xanthocephalus* are not characterized correctly.

Response: We have adjusted our description of livestock use in the area to better reflect information provided during the comment period. We acknowledge that livestock grazing may not currently be resulting in significant adverse effects to the *Yermo xanthocephalus* population. However, we believe a low level of adverse effect is occurring with the potential to become more significant in the future.

Issue 5: The existing data contain significant gaps and the Service should complete studies prior to making a listing determination.

Response: We thoroughly reviewed all scientific data available on *Yermo xanthocephalus* in preparing the proposed rule. We contacted experts and reviewed data collected since intensive population monitoring began in 1995. We based our opinion on the best scientific and commercial data available, as required by section 4(b)(1) of the Act. We have reviewed this information and any new information available since the date of the proposed rule in making this final listing decision.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we requested the expert opinions of three independent specialists regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information in the proposed rule. The purpose of such review is to ensure that the listing decision is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists. Two of the specialists responded with comments. We have incorporated their comments into the final rule, as appropriate, and summarized their observations below.

One reviewer questioned the adequacy of the Act to appropriately protect *Yermo xanthocephalus* without making it more vulnerable to collectors and vandals. Additionally, the reviewer

believed that certain land use changes (such as restriction of cattle and wildlife grazing) might be detrimental to the plant.

The second reviewer believed the evidence supported listing *Yermo xanthocephalus* as either threatened or endangered. The reviewer provided information regarding unsuccessful attempts to locate *Y. xanthocephalus* in other suitable habitat and indicated it is unlikely other populations of *Y. xanthocephalus* will be found. This reviewer expressed concerns regarding the likelihood that adequate funding and commitment will be provided to implement the BLM conservation strategy for the species. Additionally, the reviewer indicated a need for captive propagation and establishment of new populations as necessary conservation measures that should be implemented.

Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act set forth the procedures for adding species to the Federal lists. A species may be determined endangered or threatened due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Yermo xanthocephalus* (desert yellowhead) are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range: The entire known range of *Yermo xanthocephalus* consists of an area of 20 hectares (50 acres) in southern Fremont County, Wyoming. Surveys conducted since 1990 have failed to find additional populations, although there are a number of sites with similar soils, drainage and plant associations in the area. Surveys conducted since 1995 by Dr. Ron Hartman in similar potential habitat within the North Platte watershed, Washakie basin, Great Divide basin, and Green River basin have proved equally unsuccessful in locating additional populations (W. Fertig, University of Wyoming, *in litt.*, 1999). The plant is easily recognized during its summer flowering season, so it seems likely that surveys would have found additional populations if they exist. Therefore, the species is vulnerable to extinction from even small-scale habitat degradation due to its small population size and limited geographic range.

The known population is threatened by surface disturbances associated with recreation, oil and gas development, mineral extraction, trampling by

livestock, and soil compaction by vehicles (Fertig 1995). Recreational off-road vehicle use presents a threat to *Yermo xanthocephalus* through the crushing of plants and compaction or erosion of soil. This threat is greatest in the spring and summer when plants are in flower or heavy with fruit. No physical barriers prevent vehicle use in the immediate area of the *Y. xanthocephalus* population. The known population is several miles from Wyoming State Highway 135 and other maintained roads. In 1996, Highway 135 had an estimated daily traffic of 360 vehicles (Wyoming Department of Transportation 1996). A two-track, four-wheel drive trail leading to an abandoned oil well bisects the population, and is open to hunters or other recreationists using four-wheel drive trucks and other smaller all-terrain vehicles (ATVs). The most common activities that attract users to the area are hunting, rock collecting, and searching for human artifacts (such as arrowheads). The population is a few miles north of the Sweetwater Crossing on the Oregon-California Trail, which is a popular tourist attraction. There has been no significant surface disturbance caused by vehicles during the past 6 years that the site has been under study (R. Scott, Central Wyoming College, pers. comm., 2001). However, Scott (2000) has noted light vehicular traffic and fresh tire tracks in the site. The BLM Resource Management Plan limits vehicle use to existing roads (including established two-tracks), but the potential for habitat and plant destruction by ATVs remains a threat.

Oil and gas development also threaten the known population. In 1997, BLM leased for oil and gas development a 1,160-acre tract (designated WYW140702) that encompasses the *Yermo xanthocephalus* population. An adjacent lease (WYW138846) consisting of 2,080 acres was purchased by the same operator in May 1996. Both leases are for a 10-year period, and no specific lease stipulations were included to protect the plant. Construction of well pads, access roads, and pipelines through occupied habitat would result in direct destruction or crushing of plants and soil compaction and erosion. The 1920 Mineral Leasing Act promotes maximum recovery of Federal mineral resources. However, the 1987 Amendments to the Mineral Leasing Act (30 U.S.C. 226(g)) require lessees to have an approved operating plan that protects surface resources prior to submitting Applications for Permission to Drill. The BLM regulations provide that

species that are candidates for listing under the Act be afforded protection.

The current lessee is aware that the plant exists in the area, and has been very cooperative with BLM staff. The current drilling plan proposes exploration in locations that should not pose a threat to *Yermo xanthocephalus*, but the current operator is free to sell its leases to other companies that could revise the drilling plan. An existing two-track road leading to an abandoned oil well currently bisects the only population of *Y. xanthocephalus*.

Redrilling of abandoned wells in search of producing formations that may have been previously overlooked is a common technique used during oil and gas exploration. Permits to drill can be conditioned by BLM to provide some protection to sensitive species by requiring a proposed drill pad be relocated up to 200 meters (656 feet). Candidate, proposed, and listed species can be protected by prohibiting surface occupancy in known populations.

Although the current oil and gas exploratory wells pose no threat to *Yermo xanthocephalus*, the discovery of an oil or gas pool on the lease areas would precipitate field developments that would introduce new threats to the plant and its habitat. In-field development could involve up to eight wells per section, depending on the characteristics of the producing formations. This intensified drilling activity would result in a new network of additional roads and well pads, and more human intrusion into what is now a remote area.

Seismic explorations for oil and gas producing formations also present a threat to *Yermo xanthocephalus* and its habitat through use of explosives, direct trampling, and soil compaction. However, these activities were carried out in the lease area during the early 1990s, so a permit application for further exploration is not likely. In addition, seismic explorations on BLM surface now require environmental analysis prior to permitting, and BLM will protect occupied *Y. xanthocephalus* habitat from damage if a request for further exploration is received (J. Kelly, BLM, pers. comm., 1998).

The known *Yermo xanthocephalus* population is located in an area managed by BLM's Lander Field Office, and locatable mineral resources, such as gold and uranium, are known to exist in that part of Wyoming. Private parties can stake a mining claim, explore for, and extract locatable minerals in accordance with the 1872 General Mining Law, and such activity could jeopardize the known population of *Y.*

xanthocephalus. Uranium and zeolites, a locatable mineral with properties useful in water softening, manufacturing of catalysts, and pollution control, are found in the Beaver Rim area. Zeolites also may have marketability for use in processes to remove radioactive products from radioactive wastes (Bureau of Land Management 1986). The BLM's authority to regulate mineral claims under the 1872 General Mining Law is limited, although mining activities in areas with 5 or more acres of surface disturbance of unpatented BLM land are required to have an approved operating plan under 43 CFR 3809. Although the staking of locatable mineral claims on or near the plant's habitat is not likely, official withdrawal of the area from locatable mineral claims would remove this threat.

Livestock grazing also may present a threat to *Yermo xanthocephalus* habitat, which is within an existing grazing allotment. Although Fertig (1995) indicated livestock appear to use the *Y. xanthocephalus* habitat primarily as a travel corridor between adjacent sagebrush-grassland pastures, the area is actually a large pasture and livestock trampling of plants occurs only as cattle casually move along "cow trails" or two-tracks while grazing or moving to water. Scott (2000) noted signs of moderate horse traffic adjacent to the site. There are no existing barriers to prevent livestock access to the habitat. Fencing of the area would protect the plants from this threat, but also would probably result in a change in the associated plant community in the habitat. This change could result in unanticipated adverse impacts to the survival of *Y. xanthocephalus*.

B. Overutilization for commercial, recreational, scientific, or educational purposes: *Yermo xanthocephalus* is vulnerable to over-collecting conducted for scientific or educational purposes because of its small extant population size and habitat. The leaves of *Y. xanthocephalus* contain a chemical that produces a mild numbing sensation in the human mouth when even tiny portions are tasted (R. Scott, pers. comm., 1998). This could indicate potential medicinal qualities that could prove attractive to pharmaceutical companies, but the potential for this to be a threat to the existing population is currently unknown.

C. Disease or predation: Cattle graze in the immediate vicinity of occupied *Yermo xanthocephalus* habitat, but observation on the site indicate that the plant is not palatable to grazers. Tracks reveal that domestic and wild animals grazing the area spit out *Y. xanthocephalus* leaves and flowers after

tasting (R. Scott, pers. comm., 1998). Predation of *Y. xanthocephalus* fruit by insects does occur, and in 1990 fruit production appeared low because of insect predation. However, it is unknown whether or not the extent of current predation differs from historical levels. Therefore, the degree of threat that this factor poses to the species is unknown.

D. The inadequacy of existing regulatory mechanisms: The State of Wyoming has no endangered species act or other laws to provide protection to plant species. The current BLM Lander Resource Management Plan (RMP), which covers the known population of *Yermo xanthocephalus*, was approved in 1987, 3 years prior to the species' discovery. Therefore, the plan does not specifically mention the species. The RMP protects special status plant species in general across the entire Resource Area, and provides no-surface-occupancy restrictions for threatened and endangered species impacted by oil and gas development. As *Y. xanthocephalus* is not currently listed, and no specific stipulations were included with the current oil and gas leases, attempts by BLM to restrict activities by imposing conditions during the application to drill stage are appealable by the operator. On April 9, 2001, BLM approved a list of sensitive species occurring on BLM properties in Wyoming. The list is intended to heighten awareness of the conservation needs of the species and encourage protective measures where possible. However, there are no protective measures mandated for the species. Additionally, *Y. xanthocephalus* is not currently on the sensitive species list and would have to be officially added.

E. Other natural or manmade factors affecting its continued existence: Species with small population size and restricted distribution are vulnerable to extinction by natural processes and human disturbance (Levin et al. 1996). Random events causing population fluctuations or population extirpations become a serious concern when the number of individuals or the geographic distribution of the species is very limited. A single human-caused or natural environmental disturbance could destroy the entire population of *Yermo xanthocephalus*.

This species physically occupies an area of 3.37 hectares (8.33 acres), and while the total number of plants known to exist through actual counting of each plant has increased from 9,293 in 1995 to 11,967 in 2001 (with a high of 13,244 in 2000), this increase may be due to higher than normal precipitation during study years (R. Scott, Central Wyoming

College, pers. comm., 2001). The establishment of this species is probably episodic and dependent on suitable spring and summer moisture conditions (Fertig 1995). Total fruit production appeared low due to heavy herbivory by insects and drought-induced abortion in 1990 (Dorn 1991). Dorn further speculated that in typical years recruitment of seedlings is probably extremely low or nil. However, observations since then have not supported that reproduction is necessarily low or that heavy herbivory by insects causes low reproduction. Drought-induced abortion has not been studied (Bureau of Land Management 1998). A decrease in population size from 12,099 plants in 1997 to 11,635 plants in 1998 may have been due to overall decreased precipitation (R. Scott, Central Wyoming College, pers. comm., 2001). A similar decrease in population size from 13,244 plants in 2000 to 11,967 in 2001 was noted and seems to have coincided with decreased precipitation. Therefore, a series of drought years could result in a severe reduction in population size and eventual extinction.

As described by Fertig (1995), the species is characterized by a long-lived perennial growth form, adaptation to severe habitats, and low annual reproductive output. This low reproductive output makes the species increasingly vulnerable to extinction due to chance events as population size declines, because it is unlikely that the species will exhibit a high rate of population growth, even if environmental conditions improve after such an event.

In addition to the above factors, threats to *Yermo xanthocephalus* are increased when people use the occupied area for recreational purposes. For example, erosion or trampling of plants is possible due to hikers or off-road vehicle use. The species occurs on barren sites with less than 25 percent total vegetative cover, and may be intolerant of competition (Fertig 1995). Competition from plants not native to the area would pose a greater threat than competition from species with which *Y. xanthocephalus* has evolved. Non-native plants that might outcompete *Y. xanthocephalus* could be introduced to the area if their seeds are carried in on the footwear or clothing of recreationists.

An additional threat that affects *Yermo xanthocephalus* is that posed by its small population size. Populations of plants that remain very small for several generations or that have gone through a past episode of rapid population decline may lose much of their previous genetic

variability (Godt et al. 1996). When a population's genetic variability falls to low levels, its long-term persistence may be jeopardized because its ability to respond to changing environmental conditions is reduced. In addition, the potential for inbreeding depression increases, which means that fertility rates and survival rates of offspring may decrease. Although environmental and demographic factors usually supercede genetic factors in threatening species viability, inbreeding depression and the low genetic diversity may enhance the probability of extinction of rare plant species (Levin et al. 1996).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Yermo xanthocephalus* in determining to issue this final rule. Based on this evaluation, the preferred action is to list *Y. xanthocephalus* as threatened. Although the population has increased since 1995, the future existence of the species is still threatened by potential oil and gas in-field development and by its extremely limited habitat and population size. While not in immediate danger of extinction, *Y. xanthocephalus* is likely to become an endangered species in the foreseeable future if the threats to the habitat are realized and if present threats posed by small population size and limited geographic range continue to exist. We have determined that threatened status would provide adequate protection from the described threats. As the species occurs only on Federal surface, a classification as endangered, if warranted, would provide no additional level of protection.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical 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 geographical 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 needed to bring the species to the point at which listing under the Act is no longer necessary.

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, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. 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 threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

Critical habitat receives consideration under section 7 of the Act with regard to actions carried out, authorized, or funded by a Federal agency (see Available Conservation Measures section). As such, designation of critical habitat may affect activities on Federal lands and may affect activities on non-Federal lands where such a Federal nexus exists. Under section 7 of the Act, Federal agencies are required to ensure that their actions do not jeopardize the continued existence of a species or result in destruction or adverse modification of critical habitat. However, both jeopardizing the continued existence of a species and adverse modification of critical habitat often have similar standards and thus similar thresholds for violation of section 7 of the Act.

Critical habitat designation, in some situations, may provide some value to the species by identifying areas important for species conservation and calling attention to those areas in special need of protection. Critical habitat designation of unoccupied habitat also may benefit these species by alerting permitting agencies to potential sites for reintroduction and allowing them the opportunity to evaluate proposals that may affect those areas.

In the proposed rule, we found that the designation of critical habitat for *Yermo xanthocephalus* was not prudent because the minimal benefits of such designation would be far outweighed by the increase of threats from over collection or other human activities. We believed critical habitat designation would provide no additional benefit to the species beyond that conferred under sections 7 and 9 of the Act by listing. We indicated protection of *Y. xanthocephalus* would be most effectively addressed through the recovery process under section 4 of the Act and the consultation process under section 7 of the Act, and the current interagency coordination processes.

Given the extremely limited range of *Yermo xanthocephalus*, we believed any case of adverse modification of its habitat also would constitute jeopardy

for the taxon. The designation of critical habitat for the purpose of informing Federal agencies of the location of occupied *Y. xanthocephalus* habitat was not thought to be necessary because BLM currently permits the surveys and monitoring of the only extant population. *Yermo xanthocephalus* is not known to have previously existed on any other sites. If future management actions include unoccupied habitat, the Service believed any benefit provided by designation of such habitat as critical would be conferred more effectively and efficiently through the current coordination process.

In the proposed rule, we indicated vandalism and unauthorized collection of *Yermo xanthocephalus* could be a significant threat to the species' survival and recovery, because of the plant's rarity and the fact that it is a monotypic genus. Critical habitat designation would require publication of the legal description of the 20 hectares (50 acres) habitat site in the **Federal Register**, providing information that might encourage collectors.

We received two comments agreeing with our prudency determination based upon possible adverse effects from collecting if the location of the plant is disclosed. Two commenters also expressed concern that the listing alone may draw attention to the plant's location and possibly lead to adverse effects from collection or vandalism.

Recent court decisions (e.g., *Natural Resources Defense Council v. U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)) have forced us to reevaluate our "not prudent" finding. The *Conservation Council* ruling is particularly relevant to our determination. In that case, the court held that in order to conclude that designation would increase the risk to the species, the Service must have evidence of specific threats (such as instances of collection and vandalism) that would be increased by designation of critical habitat. The court said that without species-specific evidence, the fact that there are few plants and that even a single taking could cause the species to become extinct was not sufficient justification for a "not prudent" finding based on increased threat.

We remain concerned that publication of precise maps and descriptions of critical habitat in the **Federal Register** and local newspapers could increase the vulnerability of this plant to incidents of collection, general vandalism, and trampling by curiosity-seekers. Due to the relatively low numbers of

individuals, small area covered by the population, and the inherent transportability of plants, *Yermo xanthocephalus* is vulnerable to collection and other disturbance. However, at this time we have no specific evidence of taking, vandalism, collection or trade of this species. This may be due to its fairly recent description as a new species to science and its remote location. Nonetheless, in the absence of specific evidence, we cannot conclude that designation would not be prudent based on increased threat.

Without a finding that critical habitat would increase threats to a species, then designation would be prudent if it would provide any benefits to the species. As to benefits of designation on Federal land, the court ruled in *Conservation Council of Hawaii v. Babbitt* that if even as a general rule an action that would adversely modify critical habitat was likely to jeopardize the continued existence of the species, the Service must consider the adverse modification/jeopardy relationship for each species individually. The court also ruled that designation of critical habitat on any type of land serves to educate the public and government officials that this habitat is essential to the protection of the species.

With this taxon, designation of critical habitat may provide some minor benefits. The primary regulatory effect of critical habitat designation is to require Federal agencies to consult before taking any action that could destroy or adversely modify critical habitat. A critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome, because an action that destroys or adversely modifies such critical habitat also would be likely to result in jeopardy to the species. However, there may be instances where section 7 consultation would be triggered only if critical habitat is designated. Examples could include designated unoccupied habitat or occupied habitat that may become unoccupied in the future. No such habitat is known at this time, but some may be found in the future. Additionally, there will be educational or informational benefits from designating critical habitat.

Reevaluating our prudency determination under the standards mandated by court decisions, we find that designation of critical habitat for *Yermo xanthocephalus* is prudent. However, our budget for listing activities is currently insufficient to allow us to immediately complete all the listing actions required by the Act.

Listing *Y. xanthocephalus* as threatened without designation of critical habitat will allow us to concentrate our limited resources on other listing actions that must be addressed, while allowing us to invoke the protections needed for the conservation of this species without further delay. This is consistent with section 4(b)(6)(C)(i) of the Act, which states that final listing decisions may be issued without critical habitat designations when it is essential that such determinations be promptly published. We will prepare a critical habitat designation in the future at such time when our available resources and priorities allow.

Available Conservation Measures

Conservation measures provided to a species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, local and private agencies, groups, and individuals. The Act provides for possible land acquisition, cooperation with the States, and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities impacting listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies 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 being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer informally 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. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such 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 must enter into formal consultation with us.

Thus, the Act will require BLM to evaluate potential impacts to *Yermo xanthocephalus* that may result from activities it authorizes or permits, such as oil and gas development, grazing, and

recreational use. No special land management designations or conservation agreements currently exist to provide special protection for *Y. xanthocephalus*. Section 43 U.S.C. 1712(c)(3) allows BLM to protect tracts as Areas of Critical Environmental Concern (ACEC). Designation of the plant's habitat as an ACEC is a long process and would not, in itself, afford the species protection, unless a management plan for the ACEC identified the protective measures to be put in place. The BLM has prepared a draft conservation agreement, assessment, and strategy which outlines management, inventory, and monitoring actions to be taken to ensure the conservation of this species. However, the draft has not been finalized or signed.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all threatened plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.71, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Section 4(d) of the Act allows for the provision of such protection to threatened species through regulation. This protection may apply to this species in the future if regulations are promulgated. Seeds from cultivated specimens of threatened plants are exempt from these prohibitions provided that their containers are marked "Of Cultivated Origin." Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies.

The Act and 50 CFR 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving threatened plants under certain circumstances. Such permits are available for scientific purposes and to enhance the propagation or survival of the species. For threatened plants, permits also are available for botanical or horticultural exhibition, educational purposes, or special purposes consistent with the purposes of the Act. We

anticipate that few trade permits will ever be sought or issued for *Yermo xanthocephalus* because the species is not in cultivation or common in the wild. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225 (telephone (303) 236-7400, facsimile (303) 236-0027).

We adopted a policy on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on future and ongoing activities within a species' range. We believe that based upon the best available information, the actions listed below would not result in a violation of section 9 of the Act provided these activities are carried out in accordance with existing regulation and permit requirements:

(1) Activities authorized, funded, or carried out by Federal agencies (e.g., grazing management, agricultural conversions, range management, rodent control, mineral development, road construction, human recreation, pesticide application, controlled burns) and construction/maintenance of facilities (e.g., fences, power lines, pipelines, utility lines) when such activity is conducted according to any reasonable and prudent measures given by the Service in a consultation conducted under section 7 of the Act; and

(2) Casual, dispersed human activities on foot (e.g., bird watching, sightseeing, photography, and hiking).

The actions listed below may potentially result in a violation of section 9 of the Act; however, possible violations are not limited to these actions alone:

(1) Unauthorized collecting of the species on Federal Lands;

(2) Interstate or foreign commerce and import/export without previously obtaining an appropriate permit. Permits to conduct activities are available for purposes of scientific research and enhancement of propagation or survival of the species.

Questions regarding whether specific activities, such as changes in land use, will constitute a violation of section 9 should be directed to the Wyoming Field Office (see ADDRESSES section).

Required Determinations

We have determined that Environmental Assessments and

Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared concerning regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new requests or requirements for collection of information, other than those associated with permits, already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget control number 1018-0094, which is valid through July 31, 2004. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a currently valid control number. For additional information concerning permit and associated requirements for threatened species, see 50 CFR 17.32.

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Author

The primary author of this proposed rule is Mary Jennings of the Wyoming Field Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, we 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. Amend § 17.12(h) by adding the following, in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species			Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
<i>Yermo xanthocephalus</i>	Desert yellowhead	U.S.A. (WY)	T	723	NA	NA	
*	*	*	*	*	*		*

Dated: March 8, 2002.

Steve Williams,

Director, Fish and Wildlife Service.

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