

#165-91

Fish and Wildlife Service**50 CFR Part 17****RIN 1018-AB73****Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for a Plant, *Astragalus applegatei* (Applegate's Milk-Vetch)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) proposes to list a plant, *Astragalus applegatei* (Applegate's milk-vetch), as endangered pursuant to the Endangered Species Act of 1973, as amended (Act). This species consists of three populations in Klamath County, Oregon. The largest population contains approximately 1,000 individuals, covering approximately 6 acres on private property. Another site on private property contains one plant. The third site, which is on State land, supports 10 plants. Survival of this species is threatened primarily by loss of habitat from urban development and road construction. This proposed rule, if made final, would extend the Act's protection to this plant. The Service seeks data and comments from the public on this proposed rule.

DATES: Comments from all interested parties must be received by January 27, 1992. Public hearing requests must be received by January 10, 1992.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, 2600 SE 98th Avenue, suite 100, Portland, Oregon 97266 (503/231-6179 or FTS 429-6179). Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Parenti, Boise Field Station, U.S. Fish and Wildlife Service, 4696 Overland Road, room 576, Boise, Idaho 83705 (208/334-1931 or FTS 554-1931).

SUPPLEMENTARY INFORMATION:**Background**

Astragalus applegatei (Applegate's milk-vetch) was first discovered near Klamath Falls, Oregon, in 1927 by Morton Peck. Peck subsequently

collected the species again 2 miles (3.2 kilometers (km)) east of Keno, Oregon, in 1931, and then described it in 1936 (Peck 1936). It was thought to be extinct until it was rediscovered in 1983 by James Kagan of the Oregon Natural Heritage Program. This perennial herbaceous plant of the pea family (Fabaceae) grows to approximately 1 foot (0.3 meters) in height and reproduces only by seed. The Melissa blue butterfly (*Lycaedies argycogromon*) is a specific known pollinator. The anthers and stigma ripen at the same time, enabling self-pollination to occur. Plants produce light purple, pea-like flowers, and 0.3 to 0.5 inch (8 to 13 millimeter) seed pods at the same time during June and July. *Astragalus applegatei* can be distinguished from other species of *Astragalus* in the area by its slightly curved stems, the number and location of flowers, and its apparent inability to colonize dry, disturbed areas.

Astragalus applegatei grows in flat, open, seasonally moist remnants of floodplain alkaline grassland of the Klamath Basin. The species is a member of the *Poa nevadensis-Puccinellia lemmonii* grassland community (Oregon Natural Heritage Data Base 1985). This community is characterized as a bunchgrass flat, with about 10 to 20 percent exposed ground. The substrate is poorly drained, fine silt loam with an underlying hardpan at depths of 20 to 40 inches (51 to 102 centimeters). Periodic flooding was probably a natural feature of this habitat type. The adjacent community is alkaline open shrubland dominated by *Sarcobatus vermiculatus* and *Distichlis stricta*. *Sarcobatus vermiculatus* occasionally occurs in the grassland community.

Astragalus applegatei has been reported from four sites in Klamath County, Oregon. Extensive agricultural use has apparently extirpated the population located 2 miles (3.2 km) east of Keno, Oregon. The last known observation/collection at this site was in 1931. Further survey efforts have failed to locate the plant at this site (Yamamoto 1985). A second population at Laverne Avenue, Klamath Falls, Oregon, consists of a single, healthy plant with no sign of reproductive success.

One mile away, the third and the largest Klamath Falls population of over 1,000 plants occurs on 6 acres. This site may contain the only remaining viable population of this species. Threats to this population include development of businesses and roads. A major four lane avenue cuts through the population and has been constructed on land which may have supported some plants.

Recent construction of a culvert over a large ditch that bisects the population has destroyed some plants and their habitat. An additional road may soon be under construction through the plant area. Another part of the population is situated on land posted with signs advertising future commercial development. The Oregon Field Office of The Nature Conservancy has negotiated unsuccessfully with the private landowner to lease this land for conservation purposes.

The fourth site consists of only 10 plants in an area less than 269 square feet (25 square meters) on the State's Klamath Wildlife Management Area. The plants are older and show no evidence of reproduction. This site is threatened by low population numbers, loss of habitat, grazing, and management controls which alter natural regimes (i.e., periodic wildfire and flooding).

Astragalus applegatei may be adversely affected by lack of seasonal flooding. Irrigation and water control among the Klamath River have eliminated occasional flooding that once occurred along floodplains supporting the species. Seasonal flooding is important in that it may provide openings for the establishment of *A. applegatei* and limit dominance of other species.

Federal action on this plant began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. In that document, *Astragalus applegatei* was considered to be threatened. On July 1, 1975, the Service published a notice in the **Federal Register** (40 FR 27823) of its acceptance of the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)(A)) of the Act, and gave notice of its intention to review the status of the plant taxa named therein. As a result of this review, on June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant species, including *A. applegatei*. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the July 1, 1975, **Federal Register** publication.

General comments received in relation to the 1976 proposal are summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909). In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired.

The Service published updated notices of review for plants on December 15, 1980 (45 FR 82479), September 27, 1985 (50 FR 39525), and February 21, 1990 (55 FR 6183). In these notices, *Astragalus applegatei* was treated as a Category 1 candidate. Category 1 taxa are those for which the Service has on file substantial information on biological vulnerability and threats to support preparation of listing proposals. Section 4(b)(3)(B) of the Act requires the Secretary to make findings on certain pending petitions within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. On October 13, 1983, the Service found that the petitioned listing of this species was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act; notification of this finding was published on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, and 1990. Publication of this proposed rule constitutes the final finding on the petitioned action.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) 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 to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Astragalus applegatei* Peck (Applegate's milk-vetch) are as follows:

A. Present or threatened destruction, modification, or curtailment of habitat or range. *Astragalus applegatei* occurs at three sites near Klamath Falls, Oregon. Extensive development has

occurred in this area for many years and is continuing. At the site containing the largest *Astragalus applegatei* population, construction of a culvert in preparation to extend a new road has destroyed part of the population and habitat by compacting the soil, denuding the surface, and crushing plants under dumped dirt and wheels of construction equipment. Other plants within this population occur on adjacent land which is zoned for light industrial, general commercial, or heavy industrial use. If current land use patterns continue, this area will be further developed, eliminating this plant species.

B. Overutilization for commercial, recreational, scientific, or educational purposes. *Astragalus applegatei* was only recently rediscovered; only six collections of the species exist. Because the plants are easily accessible by road, illegal collecting for scientific or horticultural purposes or excessive visits by individuals interested in seeing rare plants could become a threat to the species should the exact location of the remaining plants be publicized.

C. Disease or predation. The effect of herbivores on this species is unknown (Yamamoto 1985). Chewed stems and rabbit-like pellets were found within the largest Klamath Falls population. Because this plant is palatable to cattle, *Astragalus applegatei* does not occur in areas grazed by domestic livestock (James Kagan, The Nature Conservancy, pers. observation, 1985).

D. The inadequacy of existing regulatory mechanisms. *Astragalus applegatei* was listed as an endangered species under the Oregon Endangered Species Act in October, 1989. This statute prohibits the "take" of State-listed plants on State-owned or State-leased lands only. One population of *Astragalus applegatei* occurs on State-owned land, while the other two populations, comprising the majority of individuals, occur on private land.

Listing of this plant under the Federal Endangered Species Act would reinforce and supplement protection available to the plant under State law. Section 6 of the Act authorizes the provision of funding to any State which has entered into a cooperative agreement with the Service for development of conservation programs. The Act also would offer additional protection to the population of this plant that occurs on State land, because it is a violation of the Act for any person to remove, cut, dig up, damage, or destroy an endangered plant in an area not under Federal jurisdiction in knowing violation of State law or regulation or in the course of any

violation of a State criminal trespass law.

Habitat of *Astragalus applegatei* may be regulated as wetlands by the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act. Under section 404 of the Clean Water Act, the Corps regulates the discharge of fill into waters of the United States, including wetlands. Nationwide Permit Number 26 has been issued to regulate fill in wetlands under 10 acres. This Nationwide permit would apply to all sites where *A. applegatei* occurs. Under this permit program, the Corps circulates a predischARGE notification to the Service and other interested parties for comment.

Individual permits are required for fill in wetlands greater than 10 acres. The review process for the issuance of individual permits is more extensive, and conditions may be included that require the avoidance or mitigation of environmental impacts. The Corps has discretionary authority and can require an individual permit if resources are believed to be important regardless of the wetland's size. In practice, however, the Corps rarely requires an individual permit when a project would qualify for a Nationwide permit, unless a threatened or endangered species occurs on the site.

E. Other natural or manmade factors affecting its continued existence. The small number of populations and of individual plants of this species increases the potential for extinction from stochastic events. The limited gene pool may depress reproductive vigor, or a single man-caused or natural environmental disturbance could destroy a significant percentage of the individuals of this species.

The Laverne Avenue population, due to its size (one plant), is immediately threatened with extirpation. Inadvertent trampling, take, or a natural event such as an extremely dry year could easily destroy this population, and for this reason it is not expected to survive (Yamamoto 1985). The Klamath Wildlife Management Area population is threatened by flooding. The plants, which occur in a small, localized area near the river, would be destroyed if extensive flooding were to occur. The largest Klamath Falls population is also vulnerable to extirpation. Continued reduction of the size of this population would render this site more susceptible to other human-caused or natural disturbances.

The Service has carefully assessed the best scientific and commercial information available concerning the past, present, and future threats faced

by this species in determining to propose this rule. Based on this evaluation, the preferred course of action is to list *Astragalus applegatei* as endangered. The few remaining number of individuals, poor species reproductive potential, and vulnerability to destruction by development and road building indicate that the species is in danger of extinction throughout all or a significant portion of its range, and therefore fits the definition of endangered as defined in the Act. Critical habitat is not being designated for this species for reasons discussed in the **Critical Habitat** section of this rule.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat concurrently with determining a species to be endangered or threatened. The Service finds that designation of critical habitat is not presently prudent for this species. Such a determination would result in no known benefit to *Astragalus applegatei*. Publication of precise maps and descriptions required when critical habitat is designated would increase the degree of threat to this plant from possible take or vandalism and, therefore, could contribute to its decline and increase enforcement problems. All involved parties and principal landowners have been notified of the location and importance of protecting this species' habitat. Protection of this species' habitat will be addressed through the recovery process and the section 7 consultation process. Therefore, the Service finds that designation of critical habitat for *A. applegatei* is not prudent at this time, because such designation would increase the degree of threat from vandalism, collecting, and other human activities, and because it is unlikely to aid in conservation of this plant.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species 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, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions

against certain activities involving 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 with the Service on any action that is likely to jeopardize the continued existence of a proposed species. If a species is subsequently listed, section 7(a)(2) requires Federal agencies to insure 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 must enter into formal consultation with the Service.

Astragalus applegatei does not occur on Federal land. Habitat for this plant, however, may be regulated by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. By regulation, nationwide permits may not be issued where a federally listed endangered or threatened species would be affected by a proposed project without first completing formal consultation pursuant to section 7 of the Act.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plants. With respect to *Astragalus applegatei*, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, would apply. These prohibitions, in part, would 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 this species in interstate or foreign commerce; remove and reduce to possession the species from areas under Federal jurisdiction; maliciously damage or destroy any such plants on any area under Federal jurisdiction; or remove, cut, dig up, damage, or destroy the plant on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of

permits to carry out otherwise prohibited activities involving endangered plant species under certain circumstances.

It is anticipated that few trade permits would ever be sought or issued because the species is uncommon in cultivation and is very rare in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, room 432-ARLSQ, Arlington, Virginia 22203-3507 (703/358-2093 or FTS 921-2093).

Public Comments Solicited

The Service intends that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning any aspect of this proposal are hereby solicited. Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to *Astragalus applegatei*;

(2) The location of any additional populations of *Astragalus applegatei* and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range and distribution of this species; and

(4) Current or planned activities in the subject area and their possible impacts on *Astragalus applegatei*.

Any final decision on this proposal to list *Astragalus applegatei* will take into consideration any comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Endangered Species Act provides for a public hearing on this proposal, if requested. Requests must be filed within 45 days of the date of publication of the proposal. Such requests must be made in writing and addressed to the Field Supervisor (see ADDRESSES section).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as

amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Oregon Natural Heritage Data Base. 1985. Unpublished plant community classification list of Oregon. Portland, Oregon.
 Peck, M. E. 1936. Six new plants from Oregon. Proc. Biol. Soc. Wash. 49: 111.
 Yamamoto, S. 1985. Unpublished status report for *Astragalus applegatei*. Oregon Natural Heritage Data Base, Portland, Oregon. 35 pp.

Authors

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List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

PART 17—[AMENDED]

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

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; Public Law 99-625, 100 Stat. 3500; unless otherwise noted.

2. It is proposed to amend § 17.12(h) by adding the following, in alphabetical order under the family Fabaceae, 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					
Fabaceae—Pea family:						
<i>Astragalus applegatei</i>	Applegate's milk-vetch.....	U.S.A. (OR) ...	E		NA	NA

Dated: October 24, 1991.
Richard N. Smith,
 Director, U.S. Fish and Wildlife Service.
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