

Title 50—Wildlife and Fisheries

CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Determination That Six Species of Butterflies are Endangered Species

The Director, U.S. Fish and Wildlife Service (hereinafter the Director and the Service, respectively) hereby issues a Rulemaking pursuant to Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884; hereinafter the Act) which determines the following butterflies to be Endangered species:

- Lotis Blue (*Lycaeides argyrognomon lotis*)
- El Segundo Blue (*Shifimiaeoides battoides allyni*)
- Smith's Blue (*Shifimiaeoides enoptes smithi*)
- Mission Blue (*Icaricia icarioides missionensis*)
- San Bruno Elfyn (*Callophrys mossi bayensis*)
- Lange's Metalmark (*Apodemia mormo langet*)

BACKGROUND

On March 20, 1975, the Service published a Notice of Review for 41 U.S. butterflies in the FEDERAL REGISTER (40 FR 1269) advising that sufficient evidence was on file to warrant a status review of the species with regard to their possible qualification for determination as Endangered or Threatened species under provisions of the Act. The six subject butterflies in this Final Rule were among the 41 reviewed.

Subsequently, on October 14, 1975, the Service published Proposed Rules in the FEDERAL REGISTER (40 FR 48139-48140) advising that sufficient evidence was on file to support proposing a determination that the six subject butterfly species were Endangered species as provided for by the Act. That proposal summarized the factors thought to be contributing to the likelihood that each species could become extinct within the foreseeable future; specified the prohibitions which would be applicable to each species if such a determination were made; and solicited comments, suggestions, objections and factual information from any interested person.

Section 4(b)(1)(A) of the Act requires that the Governor of each State within which a resident species of wildlife is known to occur, be notified and be provided 90 days to comment before any such species is determined to be a Threatened Species or an Endangered species. A letter was sent to the Governor of California on March 17, 1975, notifying him of the Review of Status Notice which included, among others, the six butterflies. As a direct result of this letter a report was prepared for the Califor-

nia Department of Food and Agriculture by Mr. Julian Donahue, Curator of Entomology at the Natural History Museum of Los Angeles County. Eighteen prominent professional and amateur California lepidopterists contributed data and opinions which contributed to the formulation of this report. The final report was submitted to the California Department of Food and Agriculture on May 22, 1975. This report recommended that of 24 California species included in the Review of Status Notice, 6 butterflies be considered Endangered, and 7 be considered Threatened. The El Segundo Blue, Mission Blue, San Bruno Elfyn, and Lange's Metalmark were among those thought to qualify as Endangered, while the Lotis Blue and Smith's Blue were among those thought to be Threatened.

In a June 20, 1975 letter from Director Fullerton of the California Department of Fish and Game to the Director, the San Bruno Elfyn, Mission Blue, El Segundo Blue, and Lange's Metalmark were recommended for Endangered species determination.

On September 11, 1975, Acting Director, Harold O'Connor responded to Mr. Fullerton stating the Office of Endangered Species staff was concerned with the State's recommendation, and that in addition, because of information not available to the State during their evaluation process, the Lotis Blue and Smith's Blue were felt to qualify as candidates for Endangered species determination.

SUMMARY OF COMMENTS AND RECOMMENDATIONS

Section 4(b)(1)(C) of the Act requires that a " \* \* \* summary of all comments and recommendations received \* \* \*" be published in the FEDERAL REGISTER prior to adding any species to or removing any species from the "List of Endangered and Threatened Wildlife."

In the March 20, 1975, FEDERAL REGISTER Notice (40 FR 12691) and the associated February 18, 1975, News Release, all interested parties were invited to submit factual reports or information which might contribute to the Review of Status for the included butterfly species.

The October 14, 1975, Proposed Rulemaking which appeared in the FEDERAL REGISTER (40 FR 48139-48140) constituted the onset of the official 60-day public comment period. This period expired on December 12, 1975. An associated News Release was made available on September 7, 1975, and erroneously stated that November 3, 1975, was the final date for receipt of public comments.

Because response from the public was sought on two occasions, all comments specifically pertaining to the 6 subject butterflies received during the period February 18, 1975, to December 12, 1975, were considered.

Letters from 25 persons, including official representatives of 3 conservation organizations, and the U.S. Department of Agriculture were received.

Comments from 18 persons (including 6 biologists and the 3 conservation organizations) fully supported the proposed rule; seven persons, including the Animal

and Plant Health Inspection Service, U.S. Department of Agriculture, objected to the proposed determination.

Eighteen persons, including 4 of those in opposition, specifically mentioned habitat preservation or protection as the key to the continued survival of these 6 butterflies.

In its June 20, 1975, letter (see above), the State of California, as represented by Mr. E. C. Fullerton, Director of the State's Department of Fish and Game, stated that those butterflies classified as Threatened in Mr. Donahue's report "not be given threatened status until in-depth studies can be completed on them." Mr. Fullerton also urged "that Federal funding be provided as soon as possible to gather the baseline knowledge needed to avert extinction of endangered forms and to better assess those which may be approaching endangerment."

In addition, Mr. Fullerton sent a second letter, also dated June 20, 1975, which expressed a number of concerns, primarily relating to the application of the Act to "insects, Arthropods, and lower Phyla," as well as a number of matters not properly under the purview of Federal Endangered Species legislation. Mr. Fullerton suggested that the Director provide clarification on these issues to the States prior to the "listing of any butterflies \* \* \*." The Director responded to Mr. Fullerton's concerns in a letter dated March 30, 1976. Since neither the concerns expressed nor the Director's response relate directly to the subject species, they will not be summarized. However, these letters are on file at the Office of Endangered Species, 1612 K St., N.W., Washington, D.C., and may be examined by interested parties.

In a letter dated January 7, 1976, Mr. Fullerton requested the information which led to the Director's inclusion of the Lotis Blue and Smith's Blue in the Proposed Rule of October 14, 1975 (40 FR 48139-48140). A summary of this information was also included in the March 30, 1976 letter from the Director to Mr. Fullerton. This information is summarized in this Final Rule, and is dealt with in further detail in an Environmental Impact Assessment on file at the Office of Endangered Species.

In a letter dated December 8, 1975, which was addressed to the Director, Dr. H. S. Shirakawa, Acting Director, National Program Planning Staff, Plant Protection and Quarantine Programs, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, specifically commented on the qualifications of the 6 subject species for determination under provisions of the Act. Dr. Shirakawa suggests that "no scientific case has been made for listing any of the six proposed species." This assessment was made primarily because no biometric or population surveys exist for any of the species. In addition, he asserts that the data for the Lotis Blue is vague. He states further that the host plant of Lange's Metalmark, *Eriogonum nudum* ssp., should be listed instead of the butterfly itself, since the butterfly cannot exist on other subspecies of *E.*

radius. With regard to the San Bruno Elfin, he states that "its habitat is an excellent real estate area with a high human population density," and that "there is some confusion as to what species and subspecies this butterfly belongs." For the El Segundo Blue he mentions the fact that the caterpillar host plant has a range many times that of the butterfly, and implies that the entire range of the plant may not have been adequately surveyed for the butterfly.

With regard to the adequacy of data employed in the status assessment for the six subject species Section 4(b)(1) of the Act states "The Secretary shall make determinations required by subsection (a) of the section on the basis of the best scientific and commercial data available to him \* \* \*." Thus, even though accurate population estimates for all these species may not be available, their determination is not precluded. In fact, the small limits or ranges of these butterflies and potential threats to their continued existence, rather than their absolute population numbers, constitute the chief basis for their determination as Endangered.

With regard to the Lotis Blue, the status of one population is known, while that of another has not been recently documented. The Lange's Metalmark feeds only on *Eriogonum nudum* var. *pauciflorum*, the only *Eriogonum* which exists on its range. Although the Antioch population (Contra Costa County, California) of this plant appears to be differentiated, that variety ranges from southern Oregon to southern California according to Dr. James Reveal, the expert botanist knowledgeable about this group of plants. Lange's Metalmark is an isolated subspecies of a widespread butterfly which feeds on many species of *Eriogonum* throughout its range. Thus, determination of the host plant as Endangered or Threatened would not serve the plight of the insect, and it is not justified on the basis of present biological and taxonomic information.

The San Bruno Elfin's habitat does not presently have a high population density, although portions of its range, those which are not too steep, might have potential real estate value. In any event, neither of these factors is pertinent to the determination of Endangered or Threatened species according to the stipulations of Section 4 of the Act. With regard to the San Bruno Elfin's scientific name, the butterfly has been most recently considered to belong to the subspecies *indivisa* of the genus *Callophrys*. Integration to the species *moosi* is based upon the recent discovery that it is not conspecific with *Callophrys (Incisalia) jolla*.

*Eriogonum parvifolium*, the El Segundo Blue's host, is a plant of southern California's coastal sand dune ecosystems. Most sand dunes where this plant occurs have been sampled for butterflies, and the El Segundo Blue has been found only on remnants of the El Segundo Dune ecosystem.

Among the individuals who disapproved of the proposal all were either

amateur or professional lepidopterists who were concerned with the taking prohibitions for listed species. Most of these individuals cited the fact that many individuals of most of the candidates could be collected in a single day with no apparent ill effect on the populations' long-term survival. This fact was used as an argument against a proposed Endangered determination together with the mandatory application of the Act's Section 9 taking prohibition. An examination of the available data summarized in another part of this Final Rule indicates factors other than collecting are responsible for the present Endangered state of the six subject species. Once determined to be Endangered, taking of these butterflies for scientific purposes, or to enhance their propagational or survival could be allowed by permit. For any species as narrowly delimited as those under present consideration, any further significant reduction of their population numbers might bring about a serious loss of genetic variability and a concomitant loss of evolutionary adaptability.

Other opposing comments related to the proposition that subspecies should not be determined under the Act; that the Final Rule might be prejudicial against amateur, as opposed to professional, lepidopterists; and that determination of Endangered species that occur on private property is an attempt to control or confiscate these lands.

The first point is not germane. The Act defines the term "species" as follows:

The term "species" includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or small taxon common spatial arrangement that interbreed when mature.

Thus subspecies of wildlife in the nomenclatorial sense are considered as species in the legal intent of the Act.

That professional biologists might be more likely to obtain a permit for taking of the subject species than would amateur lepidopterists is not true, as the qualifications for prospective permittees do not include stipulations of professional or educational standing. It should be noted that such permits are granted for scientific purposes or to increase the likelihood of survival or propagation, and are not issued for the accumulation of specimens of taxa already adequately represented in scientific collections.

Although land acquisition on behalf of Endangered or threatened species is provided for through provisions detailed in Section 5 of the Act, such acquisition does not constitute confiscation or Federal control of private lands.

#### CONCLUSION

After a thorough review and consideration of all the information available, the Director has determined that the Lotis Blue, El Segundo Blue, Smith's Blue, Mission Blue, San Bruno Elfin, and Lange's Metalmark are in danger of extinction throughout all or a significant portion of their range due to one or more of the factors described in Section 4(a) of the Act. This review amplifies and substantiates the description of those

factors included in the Proposed Rule-making (46 FR 46139-48140). Those factors were described as follows:

1. The present or threatened destruction, modification, or curtailment of its habitat or range.

*San Bruno elfin*. This butterfly is limited in occurrence to a few moist canyons in San Mateo County, California. Proposed development poses a serious threat to its continued existence. The occurrence of the butterfly is dependent upon present riparian vegetation and historic elements, the most important of which is its caterpillar host plant, sump-crop (*Sedum snail-plant*).

*Lotis blue*. At present this butterfly is definitely known to occur only in a few isolated bogs in Mendocino County, California. The principal portion of the butterfly's habitat occurs on a powerline right-of-way. Formerly, a population of the Lotis blue occurred at Point Arena, Mendocino County, California, but it has not been found there for over 30 years and the population is presumed to be extirpated.

*Mission blue*. This butterfly is limited in distribution to two small isolated populations which occur on the summits of Twin Peaks, San Francisco County, and the San Bruno Mountains, San Mateo County, California. In San Francisco County, the Mission blue was formerly more widespread on the higher hills within the county, but due to expansion of the city and plantings of exotic plants, such as eucalyptus, is now reduced to a tiny remnant on Twin Peaks and may soon become extirpated. In the San Bruno Mountains, the species is uncommon, and proposed developments there would probably eliminate the butterfly.

*Smith's blue*. This butterfly is known from coastal sand dunes in Monterey County, California. Its largest population occurs on the most coastal portion of the Monterey dune complex at Seaside and probably Fort Ord (U.S. Army), Monterey County, California. The Seaside and Marina populations have been almost extirpated by housing developments and highway construction, while the Fort Ord populations have been most seriously impacted by heavy foot and vehicular traffic, as well as the spread of introduced ice-plant (*Mesembryanthemum* spp.).

*El Segundo blue*. This butterfly was formerly widespread on the El Segundo sand hills (96 sq. km.), Los Angeles County, California. Now, due to public and private development, the El Segundo blue is limited to a few acres near El Segundo and a larger area at the west end of the Los Angeles International Airport. Any further development on these few remaining sites could well bring about the species' extinction.

*Lange's metalmark*. Originally from sand dunes from near Antioch and Oakley, Contra Costa County, California. The butterfly has not been found at Oakley for more than 30 years. Near Antioch, the populations are now largely restricted to a few acres north of Wilbur Road. Alteration of the species' habitat has been due largely to industrial and agricultural development.

2. Overutilization for commercial, sporting, scientific, or educational purposes.

Not applicable for any of the species.

3. Disease or predation.

Not applicable for any of the species.

4. The inadequacy of existing regulatory mechanisms.

There currently exist no regulations pertaining to the protection and conservation of any of these species.

5. Other natural or man-made factors affecting its continued existence.

Not applicable for any of the species.

EFFECT OF THE RULEMAKING

The effects of these determinations and this rulemaking include, but not necessarily limited to, those discussed below.

Endangered Species regulations already published in Title 50 of the Code of Federal Regulations set forth a series of general prohibitions and exceptions which apply to all Endangered Species. The regulations referred to above, which pertain to Endangered Species, are found at Section 17.21 of Title 50 and, for the convenience of the reader, are reprinted below:

§ 17.21 Prohibitions. (a) Except as provided in Subpart A of this part, or under permits issued pursuant to § 17.22 or § 17.23, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed, any of the acts described in paragraphs (b) through (f) of this section in regard to any endangered wildlife.

(b) *Import or export.* It is unlawful to import or to export any endangered wildlife. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(c) *Take.* (1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas. The high seas shall be all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.

(2) Notwithstanding paragraph (c)(1) of this section, any person may take endangered wildlife in defense of his own life or the lives of others.

(3) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service, or a State conservation agency, who is designated by his agency for such purposes, may, when acting in the course of his official duties, take endangered wildlife without a permit if such action is necessary to:

- (i) Aid a sick, injured or orphaned specimen; or
- (ii) Dispose of a dead specimen; or
- (iii) Salvage a dead specimen which may be useful for scientific study; or
- (iv) Remove specimens which constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area.

(4) Any taking pursuant to paragraphs (c) (2) and (3) of this section must be reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, within 5 days. The specimen may only be retained, disposed of, or salvaged in accordance with the laws and from the Service.

(5) *Possession of or offer to sell endangered wildlife.* (1) It is unlawful to possess, to deliver, carry, transport, or ship, by any means whatsoever, any endangered wildlife which was taken in violation of paragraph (c) of this section.

*Example.* A person captures a whooping crane in Texas and gives it to a second person, who puts it in a closed van and drives

thirty miles to another location in Texas. The second person then gives the whooping crane to a third person, who is apprehended with the bird in his possession. All three have violated the law--the first by illegally taking the whooping crane; the second by transporting an illegally taken whooping crane; and the third by possessing an illegally taken whooping crane.

(2) Notwithstanding paragraph (d)(1) of this section, Federal and State law enforcement officers may possess, deliver, carry, transport or ship any endangered wildlife taken in violation of the Act as necessary in performing their official duties.

(e) *Interstate or foreign commerce.* It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.

(f) *Sale or offer for sale.* (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered wildlife.

(2) An advertisement for the sale of endangered wildlife which carries a warning to the effect that no sale may be consummated until a permit has been obtained from the U.S. Fish and Wildlife Service shall not be considered an offer for sale within the meaning of this subsection.

The determination set forth in these Rules also makes all six species eligible for the consideration provided by Section 7 of the Act. That Section reads as follows:

INTERAGENCY COOPERATION

Section 7. The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Although no "Critical Habitat" has yet been determined for any of the six subject species, the other provisions of Section 7 are applicable.

Regulations which appear in Section 17, Title 50 of the Code of Federal Regulations were first published in the FEDERAL REGISTER of September 26, 1975 (40 FR 44412), and provide for the issuance of permits to carry out otherwise prohibited activities involving Endangered or Threatened Species under certain circumstances. Such permits involving Endangered species are available for scientific purposes or to enhance the propagation or survival of the species.

EFFECT UPON THE STATES

The determination that these six species are Endangered Species will require the State of California to consider these species when it is negotiating to enter into Cooperative Agreements pursuant to Section 6 of the Act.

California has State laws which recognize the List of Threatened or Endangered Wildlife promulgated pursuant to the Act and provide State protection to these species. This determination will make these six species eligible for such consideration as those State laws provide.

EFFECT INTERNATIONALLY

In addition to the protection provided by the Act, the Service will review these six species to determine whether they should be proposed to the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora for placement upon the appropriate Appendix (ices) to that Convention or whether they should be considered under other, appropriate international agreements.

NATIONAL ENVIRONMENTAL POLICY ACT

An Environmental Assessment has been prepared and is on file in the Service's Washington Office of Endangered Species. It addresses this action as it involves all six butterflies. The assessment is the basis for a decision that these determinations are not major Federal actions which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969.

FORMAT

These final Rules are published in a format different from that set forth in the Proposed Rulemaking. This new format was adopted by Rules published in the FEDERAL REGISTER of September 26, 1975 (40 FR 44412) and represents no substantive change.

EFFECTIVE DATE

Considering the long period during which the public has had notice of the Proposal to determine these species to be Endangered, and in view of the precarious status of the species and in view of the fact that the adult flights of four of these insects will closely follow the publication date, it has been determined that there is good cause to make this rulemaking effective on June 8, 1976.

Dated: May 26, 1976.

LYNN A. GREENWALT,  
*Director,*  
*Fish and Wildlife Service.*

Accordingly, § 17.11 of Part 17 of Chapter 1 of Title 50 of the U.S. Code of Federal Regulations is amended as follows:

1. By adding the Letis Blue, El Segundo Blue, Golden Blue, and the San Bruno Blue, and the Logger's March to the list under "Insects," to § 17.11(d) as indicated below:

§ 17.11 Endangered and threatened wildlife.

(h) \* \* \*

## RULES AND REGULATIONS

Species		Population	Range		Status	When listed	Special rules
Common name	Scientific name		Known distribution	Portion of range where threatened or endangered			
INSECTS							
Butterfly, Lotis blue.....	<i>Lycnaeides argyrognomon lotis</i> .....	Not available...	United States of America (California).	Entire.....	E	14	Not available.
Butterfly, El Segundo blue.....	<i>Shifimiacoides battoides allyni</i> .....	do.....	do.....	do.....	E	14	Do.
Butterfly, Smith's blue.....	<i>Shifimiacoides enoptes smithi</i> .....	do.....	do.....	do.....	E	14	Do.
Butterfly, mission blue.....	<i>Icaricia icarioides missionensis</i> .....	do.....	do.....	do.....	E	14	Do.
Butterfly, San Bruno Elfin.....	<i>Callophrys mossi bayensis</i> .....	do.....	do.....	do.....	E	14	Do.
Butterfly, Lange's metalmark.....	<i>Apodemis morano lange</i> .....	do.....	do.....	do.....	E	14	Do.

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