

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AE52

Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Plant *Thelypodium howellii* ssp. *spectabilis* (Howell's spectacular thelypody)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service (Service) proposes to list *Thelypodium howellii* ssp. *spectabilis* (Howell's spectacular thelypody) as threatened pursuant to the Endangered Species Act of 1973, as amended (Act). *Thelypodium howellii* ssp. *spectabilis* is known from 11 sites in Baker and Union counties, Oregon. This taxon is threatened by a variety of factors including habitat destruction and fragmentation from agricultural and urban development, grazing by domestic livestock, competition from non-native vegetation, and alterations of wetland hydrology. This proposal, if made final, would implement the Federal protection and recovery provisions afforded by the Act for the plant.

DATES: Comments from all interested parties must be received by March 16, 1998. Public hearing requests must be received by February 27, 1998.

ADDRESSES: Comments and materials concerning this proposal should be sent to the U.S. Fish and Wildlife Service, Snake River Basin Office, 1387 S. Vinnell Way, Room 368, Boise, Idaho 83709. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Robert Ruesink, Field Supervisor (see **ADDRESSES** section) (telephone 208/378-5243; facsimile 208/378-5262).

SUPPLEMENTARY INFORMATION:**Background**

Thelypodium howellii ssp. *spectabilis* is a herbaceous biennial that occurs in moist, alkaline meadow habitats at approximately 1,000 meters (m) (3,000 feet (ft)) to 1,100 m (3,500 ft) elevation in northeast Oregon. The plant is known from 11 sites (5 populations) ranging in size from 0.01 hectares (ha) (0.03 acres (ac)) to 16.8 ha (41.4 ac) in the Baker-Powder River valley in Baker and Union counties. The total occupied habitat for

this species is approximately 40 ha (100 ac). One site, historically known from Malheur County (the type locality), has not been relocated since 1927 and is considered to be extirpated (Kagan 1986). The entire extant range of this taxon lies within a 21 kilometer (km) (13 mile (mi)) radius of Haines, Oregon.

The Baker-Powder River Valley region, containing the 11 extant *Thelypodium howellii* ssp. *spectabilis* sites, is an agricultural area due to its relatively low elevation and rich soils. The region is bordered on the west by the Elkhorn Mountains and on the east by the Wallowa Mountains (Kagan 1986). Annual precipitation for the Baker Valley averages 27 centimeters (cm) (10.6 inches (in)), most falling as snow in winter. Weather patterns follow the interior continental weather systems with little maritime influence. Winters are cold and summers are warm and dry (Larkin and Salzer 1992).

Thelypodium howellii ssp. *spectabilis* grows to approximately 60 cm (2 ft) tall, with branches arising from near the base of the stem. The basal leaves are approximately 5 cm (2 in) long with wavy edges, and are arranged in a rosette. Stem leaves are shorter, narrow, and have smooth edges. Flowers appear in loose spikes at the ends of the stems. Flowers have four purple petals approximately 1.9 cm (0.75 in) in length, each of which is borne on a short (0.6 cm (0.25 in)) stalk. Fruits are long, slender pods (Greenleaf 1980, Kagan 1986).

This taxon was thought to be extinct until rediscovered by Kagan in 1980 near North Powder (Kagan 1986). The 11 sites currently known to contain *Thelypodium howellii* ssp. *spectabilis* are located near the communities of North Powder, Haines, and Baker. The North Powder *T. howellii* ssp. *spectabilis* population contains 5 sites. Two of these sites are provided some protection; the largest is subject to a conservation easement 16.8 ha (41.4 ac) on which the Oregon Department of Fish and Wildlife has the assigned management and administration responsibility; and one site near the town of North Powder, less than 0.8 ha (2.3 ac) in size, until recently, had a plant protection agreement between the landowner and The Nature Conservancy. The Haines plant population consists of three small sites located in or near the town of Haines. A 0.7 ha (1.8 ac) site west of Baker is within a 8 ha (20 ac) pasture adjacent to a road. Another site north of Baker (0.03 ha (0.08 ac)) exists in a small remnant of meadow habitat surrounded by farmland. One site approximately 8 km (5 mi) north of North Powder is located

on private land at Clover Creek (Kagan 1986, Oregon Natural Heritage Program (ONHP) 1997).

Thelypodium howellii var. *spectabilis* was first described by Peck in 1932 (Peck 1932) from a specimen collected in 1927 near Ironside, Oregon (Malheur County). In 1973, Al-Shehbaz revised the genus and elevated the variety to subspecies status (Al-Shehbaz 1973). This taxon has larger petals than *T. howellii* ssp. *howellii*, and the paired filaments are not united (Al-Shehbaz 1973, Kagan 1986, Antell 1990). In addition, although both taxa occur in eastern Oregon, habitats do not overlap (Kagan 1986). For purposes of this proposal, *T. howellii* ssp. *spectabilis* is recognized as a subspecies because of the taxonomic distinction made in 1973 (Al-Shehbaz 1973), although the plant was treated as a variety in the candidate assessment process (see Previous Federal Action section).

Thelypodium howellii ssp. *spectabilis* occurs in wet alkaline meadows in valley bottoms, usually in and around woody shrubs that dominate the habitat on the knolls and along the edge of the wet meadow habitat between the knolls. Associated species include *Sarcobatus vermiculatus* (greasewood), *Distichlis stricta* (alkali saltgrass), *Elymus cinereus* (giant wild rye), *Spartina gracilis* (alkali cordgrass), and *Poa juncifolia* (alkali bluegrass) (Kagan 1986). Soils are pluvial(rain)-deposited alkaline clays mixed with recent alluvial (material deposited by running water) silts, and are moderately well-drained (Kagan 1986).

Thelypodium howellii ssp. *spectabilis* may be dependent on periodic flooding since it appears to rapidly colonize areas adjacent to streams that have flooded (Kagan 1986). In addition, this taxon does not compete well with encroaching weedy vegetation such as *Dipsacus sylvestris* (teasel) (Davis and Youtie 1995).

Previous Federal Action

Federal government actions on the plant began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on those 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, and included *Thelypodium howellii* var. *spectabilis* as a threatened species. The Service published a notice on July 1, 1975 (40 FR 27823), of its acceptance of the report of the Smithsonian Institution as a petition within the context of section 4(c)(2) (petition provisions are now found in

section 4(b)(3) of the Act) and its intention thereby to review the status of the plant taxa named therein. The July 1, 1975, notice included the above taxon. On June 16, 1976, the Service published a proposal (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. 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, publication. *Thelypodium howellii* var. *spectabilis* was not included in the June 16, 1976, **Federal Register** document.

The Service published an updated notice of review for plants on December 15, 1980 (45 FR 82480). This notice included *Thelypodium howellii* var. *spectabilis* as a candidate. This designation for *T. howellii* var. *spectabilis* was retained in the November 28, 1983, supplement to the Notice of Review (48 FR 53640), as well as subsequent revisions on September 27, 1985 (50 FR 39526), February 21, 1990 (55 FR 6184), and September 30, 1993 (50 FR 51143).

Section 4(b)(3)(B) of the Act requires the Secretary to make findings on pending petitions that present substantial information indicating the petitioned action may be warranted within 12 months of their receipt. Section 2(b)(1) of the 1982 amendments further requires that all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. This was the case for *Thelypodium howellii* var. *spectabilis*, because the 1975 Smithsonian report had been accepted as a petition. On October 13, 1983, the Service found that the petitioned listing of the 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 Service to consider the petition as having been resubmitted on the date of the finding, pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed annually in October of 1983 through 1996. Publication of this proposal constitutes the final finding for the petitioned action.

The processing of this proposed rule conforms with the Service's final listing priority guidance published in the **Federal Register** on December 6, 1996 (61 FR 64475). The Service announced an extension of this guidance on October 23, 1997 (62 FR 55268), indicating that the 1997 guidance will remain in effect until final guidance for fiscal year 1998 is published in the **Federal Register**. The guidance clarifies the order in which the Service will process rulemakings. The guidance calls for giving highest priority to handling emergency situations (Tier 1), second highest priority (Tier 2) to resolving the listing status of the outstanding proposed listings, and third priority (Tier 3) to new proposals to add species to the list of threatened and endangered plants and animals. This proposed rule constitutes a Tier 3 action. Additionally, the Service stated in the guidance that "effective April 1, 1997, the Service will concurrently undertake all of the activities presently included in Tiers 1, 2, and 3." The Service has begun implementing a more balanced listing program, including processing more Tier 3 activities. The completion of this Tier 3 activity (a proposal for a species with high-magnitude, imminent threats) follows those guidelines.

Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) issued 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 *Thelypodium howellii* ssp. *spectabilis* are as follows:

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Most of the habitat for *Thelypodium howellii* ssp. *spectabilis* has been modified or lost to urban and agricultural development. Habitat degradation at all remaining sites for this species is due to a combination of livestock grazing, agricultural conversion, hydrological modifications, and competition from non-native vegetation (see Factor E). These activities have resulted in the extirpation of *T. howellii* ssp. *spectabilis* from about half its former range in Baker, Union, and Malheur counties. The type locality, historically known from Malheur County, is considered to be extirpated due to past agricultural development (Kagan 1986, ONHP 1997). Since 1990, at least 40 percent of sites sampled in the town of North Powder, previously containing *T. howellii* ssp. *spectabilis*, have been extirpated (Robinson, *in litt.* 1996). These sites were all located within areas subjected to grazing. Grazing, exotic species, and agricultural activities continue to threaten at least 85 percent of the remaining habitat for this species (Table 1).

TABLE 1.—SUMMARY OF THREATS

Site (Population)	Hectares (Acres)	Number plants	Ownership	Threats
Clover Creek	15.9 (39.2)	300 (Kagan 1986)	Private	Livestock grazing, herbicides.
North Powder 2 (North Powder).	0.9 (2.3)	16,000 (Salzer, <i>in litt.</i> 1996)	Private	Non-native vegetation.
Miles easement (North Powder).	16.8 (41.4)	greater than 2,500 (Robinson, <i>in litt.</i> 1996).	Private (conserv. easement)	Livestock grazing, hydrologic modifications.
Hot Creek east of I-85 (North Powder).	0.24 (0.59)	12 (Kagan, pers. comm., 1995).	Private (ODOT ¹)	Naturally occurring events.
Hot Creek North (North Powder).	0.01 (0.03)	10 (Robinson, <i>in litt.</i> 1996) ...	Private	Livestock grazing, naturally occurring events.
Powder River (North Powder)	0.03 (0.07)	100 (Robinson, <i>in litt.</i> 1996)	Private (ODOT)	Livestock grazing.
Haines Rodeo (Haines)	4.3 (10.6)	10,000 (Kagan 1986)	Private (ODOT)	Urbanization, mowing.
Haines water tower (Haines)	0.4 (1.0)	Greater than 1,000 (Robinson, <i>in litt.</i> 1996).	Unknown (private)	Urbanization.
Haines 4th and Olson (Haines).	0.1. (0.3)	Not Available	Private	Urbanization.

TABLE 1.—SUMMARY OF THREATS—Continued

Site (Population)	Hectares (Acres)	Number plants	Ownership	Threats
Baker City North	0.03 (0.08)	40 (Kagan, pers. comm., 1995).	Private	Agricultural conversion, herbicides.
Pocahontas Road	0.7 (1.8)	1,500 (Kagan 1986)	Private	Livestock grazing, weeds.

¹ Oregon Department of Transportation easement.

In 1994, a large section of habitat formally occupied by *Thelypodium howellii* ssp. *spectabilis* at the Haines rodeo grounds was destroyed when a parking lot was constructed. Within the City of Haines, all remaining habitat containing *T. howellii* ssp. *spectabilis* is being impacted by residential construction, trampling, and other activities. Urbanization represents a major threat for this species within the city limits of Haines.

Thelypodium howellii ssp. *spectabilis* is threatened by changes in hydrology related primarily to historic and current land uses such as agricultural conversion and flood control. Modifying the intensity and frequency of flooding events and soil moisture levels can significantly alter plant habitat suitability. If moisture levels stay high later in the spring or summer, species such as sedges and rushes will out compete *T. howellii* ssp. *spectabilis*; if the soil becomes too saline, *Distichlis* will out grow *T. howellii* ssp. *spectabilis* (Davis and Youtie 1995). Irrigation practices in the vicinity of *T. howellii* ssp. *spectabilis* habitat tend to increase soil moisture levels and can also increase soil salinity (Davis and Youtie 1995), making the habitat less suitable for this plant. Hydrological modifications have been observed in at least two sites containing this taxon in the vicinity of North Powder (Davis and Youtie 1995, Robinson *in litt.* 1996). In addition, it is likely that natural hydrologic processes have been altered at all of the existing sites due to surrounding land uses including agriculture and residential/urban development.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The plant is not a source for human food, nor of commercial horticulture interest. Therefore, this is not a factor to be considered in the listing decision at this time.

C. Disease or Predation

Thelypodium howellii ssp. *spectabilis* is palatable to livestock (Kagan 1986, Davis and Youtie 1995). Cattle directly consume and trample individual plants (Kagan 1986). Native herbivores (e.g.,

deer and elk) likely consume *T. howellii* ssp. *spectabilis* plants; however, there is little evidence to suggest that herbivory by native ungulates currently poses a significant threat to this taxon (Kagan 1986).

Livestock grazing can negatively impact habitat and contribute to reduced reproduction of this species (ONHP 1997). In particular, spring and early summer grazing adversely affects reproduction for *Thelypodium howellii* ssp. *spectabilis* by removing flowers and/or fruits, and individual plants get trampled during their period of active growth (generally from May through July).

In July 1995, Berta Youtie (plant ecologist, The Nature Conservancy) and Andrew Robinson (botanist, FWS, Oregon State Office) found that cattle had consumed all *Thelypodium howellii* ssp. *spectabilis* plants that were present within a pasture at Clover Creek; plants were only observed in an adjacent area that was not subject to grazing. The Clover Creek site (15.9 ha (39.2 ac)) supports the second largest remaining plant habitat area.

At another site, intentionally not grazed for the last 5 years, *Thelypodium howellii* ssp. *spectabilis* plants have expanded into previously unoccupied areas. Areas that were previously heavily grazed now contain higher densities and larger plants than marginal refugia habitat beneath *Sarcobatus* (Robinson, *in litt.* 1996). However, this site, while under a permanent conservation easement, has been subjected to trespass grazing on at least two occasions during the past 2 years (A. Robinson, pers. comm., 1997).

The Service is not opposed to grazing when best management practices are used, and maintains that best grazing management practices may be compatible with natural resource objectives under certain circumstances. Depending on site conditions, appropriate grazing practices during certain times of the year may not necessarily be detrimental to populations of *Thelypodium howellii* ssp. *spectabilis*. For example, winter grazing of light to moderate intensity, when managed to prevent erosion and trampling impacts, may be compatible with the maintenance of *Thelypodium*

habitat. However, because the plant is very palatable to livestock, grazing during the active growing season (typically spring, summer, and possibly fall) can adversely impact this species.

D. The Inadequacy of Existing Regulatory Mechanisms

Thelypodium howellii ssp. *spectabilis* is listed as endangered by the State of Oregon (Oregon Department of Agriculture). However, the State Endangered Species Act does not provide protection for species on private land. Therefore, under State law any plant protection is at the discretion of the landowner.

The Oregon Department of Transportation (ODOT) currently considers potential impacts to *Thelypodium howellii* ssp. *spectabilis* in their road maintenance activities where it occurs at three sites that are partially within ODOT rights-of-way. However, two of these sites are small, less than 0.4 ha (1 ac) in size, and the third site (at Haines rodeo ground) is threatened by activities that are not controlled by ODOT.

Thelypodium howellii ssp. *spectabilis* could potentially be affected by projects requiring a permit under section 404 of the Clean Water Act. Under section 404, the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill material into waters of the United States including navigable and isolated waterbodies, headwaters, and adjacent wetlands. Section 404 regulations require applicants to obtain an individual permit to place fill for projects affecting greater than 4 ha (10 ac) of water. Projects can qualify for authorization under Nationwide Permit 26 (NWP 26) if the discharge does not cause the loss of more than 1 ha (3 ac) of water or cause the loss of water for a distance greater than 152 m (500 linear ft) of stream bed. Projects that qualify for authorization under NWP 26 may proceed without prior notification to the Corps if the discharge would cause the loss of less than .12 ha (1/3 ac) of water (33 CFR § 330. App. A 26b.). Evaluation of impacts of such projects by the resource agencies though the section

404 process is thus not an option. Corps Division and District Engineers may require that an individual section 404 permit be obtained if projects otherwise qualifying under NWP 26 would cause greater than minimal individual or cumulative environmental impacts. Corps regulations implementing the Clean Water Act require withholding authorization under NWP 26 if the existence of a listed endangered or threatened species would be jeopardized, regardless of the significance of the affected wetland resources (33 CFR § 330.4 (f)). Candidate species receive no special consideration. Thus, this taxon currently receives insufficient protection under the Clean Water Act.

The Oregon Department of Fish and Wildlife (ODFW) currently is designated as the easement manager of a wildlife area that contains *Thelypodium howellii* ssp. *spectabilis* (Conservation Easement 1991). The conservation easement was established by the Farm Service Agency to protect a large wetland complex and related resources. However, a preliminary draft management plan (ODFW 1996) for this site does not adequately provide for the long-term maintenance of the plant and there is uncertainty about the willingness of ODFW to manage the property (J. Lauman, ODFW, *in litt.* 1996). The final management plan may better address concerns regarding the viability of this species (e.g., potential hydrological modifications of existing habitat), but development of the final plan has not yet been initiated. In addition, although this site is under a conservation easement, trespass grazing by cattle has occurred on at least two occasions in the last 2 years and continues to threaten *T. howellii* ssp. *spectabilis* habitat onsite.

One *Thelypodium howellii* ssp. *spectabilis* site had a plant protection agreement between the landowner and The Nature Conservancy. However, the agreement has expired and the amount of occupied habitat (less than 0.5 ha (1 ac)) onsite is not expected to provide for the long-term viability of the species in the absence of intensive management (B. Youtie, The Nature Conservancy, pers. comm., 1997).

E. Other Natural or Manmade Factors Affecting its Continued Existence

Mowing of *Thelypodium howellii* ssp. *spectabilis* habitat at the Haines rodeo ground typically occurs annually, and can impact this species if performed during the growing season prior to seed set. Historically, annual rodeos were held in July; however, in 1995 an additional spring rodeo was held in May. Mowing to prepare for the spring

rodeo occurs prior to seed set, and if this practice continues, it will adversely affect reproduction of the plant. The Haines rodeo ground currently supports the third largest habitat area for *T. howellii* ssp. *spectabilis*.

Competition from nonnative plant species including *Dipsacus sylvestris* (teasel), *Cirsium vulgare* (bull thistle), *C. canadensis* (Canada thistle), and *Melilotus officinalis* (yellow sweet clover) also threatens the long-term survival of *Thelypodium howellii* ssp. *spectabilis* (Davis and Youtie 1995). The rapid expansion of *D. sylvestris* is considered to be a significant threat to this species (Larkin and Salzer 1992). At several sites, the formerly mesic meadow communities containing *Sarcobatus* (greasewood) and *T. howellii* ssp. *spectabilis* have largely been replaced by nonnative species.

At least two sites containing *Thelypodium howellii* ssp. *spectabilis* are directly adjacent to fields where crops such as wheat and barley are produced. The use of dicot-specific herbicides in these areas threatens *T. howellii* ssp. *spectabilis* when overspraying occurs (J. Kagan, plant ecologist, Oregon Natural Heritage Program, pers. comm., 1997). One of these sites (Clover Creek) currently contains the second largest habitat area for this species.

Because most populations of this species are small and existing habitat is fragmented by agricultural conversion, grazing, roads, and urbanization, naturally occurring events, such as drought, represent threats to the continued existence of this species. Of the 11 sites for this species, over half (54 percent) are 0.4 ha (1 ac) or less. Only three sites are larger than 4 ha (10 ac).

Grazing by livestock tends to fragment *Thelypodium howellii* ssp. *spectabilis* populations by reducing the density of plants in openings, and restricting individuals to protected sites (e.g., beneath *Sarcobatus* plants or spiny shrubs) (Kagan 1986, Robinson, *in litt.* 1996). Such habitat fragmentation also severely restricts the potential for plant population expansion. Most known populations of *T. howellii* ssp. *spectabilis* contain a low number of individual plants and/or are limited geographically so that their future survival may depend on recovery actions such as restoring degraded habitat areas and removing competing non-native vegetation.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the species in determining to propose this rule. Most of the remaining sites that

support *Thelypodium howellii* ssp. *spectabilis* are small and fragmented, and all existing sites are vulnerable to impacts from grazing in addition to urban and agricultural development. One site is under a permanent conservation easement, although management of this site has not been completely effective at maintaining *T. howellii* ssp. *spectabilis* habitat in the past. The Service is currently working with the easement manager to better address management of the plant habitat at this site including construction of more than 6 km (4 mi) of fence to protect the habitat from livestock grazing.

Because it is possible that grazing can be managed in a manner that will not adversely affect habitat for *Thelypodium howellii* ssp. *spectabilis*, and the site containing the largest habitat area for this taxon is subject to a permanent conservation easement, we have determined that this species is not immediately threatened with extinction. However, if population declines continue, and threats are not adequately addressed, this species could be threatened with extinction in the foreseeable future. Based on this evaluation, the preferred action is to list *T. howellii* ssp. *spectabilis* as threatened. For reasons discussed below, critical habitat is not being proposed at this time.

Critical Habitat

Critical habitat is defined in section 3(5)(A) 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 determination that such areas are essential to 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 listed. The Service finds that designation of critical habitat is not prudent for *Thelypodium howellii* ssp. *spectabilis*. Service 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 designation for *Thelypodium howellii* ssp. *spectabilis* is not prudent because both of the above described situations exist. Although this biennial plant is not of horticultural interest, the listing in and of itself contributes to a certain level of risk from over-collection. This is because listing acknowledges the rarity of a species, which then creates a certain level of demand by collectors. Designating critical habitat, including the required disclosure of precise maps and descriptions of critical habitat, would further advertize the rarity of this plant and provide a road map to occupied sites causing even greater threat to *T. howellii* ssp. *spectabilis* from vandalism, trampling or unauthorized collection (M. Steenson, Portland Nursery Inc., pers. comm. 1997). Disseminating specific, sensitive location records can encourage plant poaching (M. Bosch, U.S. Forest Service, pers. comm. 1997). Easily accessible roadside populations with few individuals would be particularly susceptible to indiscriminate collection by persons interested in rare plants. Plants, unlike most animal species protected under the Act, are particularly vulnerable to trespass because of their inability to escape when collectors arrive.

Critical habitat designation for *Thelypodium howellii* ssp. *spectabilis* is also not prudent due to lack of benefit because such designation provides protection only on Federal lands or on private lands when there is Federal involvement through authorization or funding of, or participation in, a project or activity. All known occurrences of this plant are on private land, and activities constituting threats to the species, (see factors A through E in "Summary of Factors Affecting the Species") including grazing, agricultural and urban development, alterations of wetland hydrology and competition from non-native vegetation are, for the most part, not subject to section 7 consultation. Although there may occasionally be a Federal nexus for *T. howellii* ssp. *spectabilis* through regulation of wetland fill and removal activities under the Clean Water Act, the designation of critical habitat for this plant would provide no benefit beyond that provided by listing. For example, the plant is restricted to 11 known sites

(seven less than an acre in size) in unique moist alkaline meadow habitat located in valley bottoms, and any action that would adversely modify habitat at these sites also would likely jeopardize the continued existence of the species because the biological threshold for triggering either determination would be the same. In view of the limited habitat, the loss of any of the 11 sites from Corps regulated wetland fill activities would likely result in the adverse modification and jeopardy conclusion. Even as *T. howellii* ssp. *spectabilis* recovers and the known occupied sites totaling approximately 40 hectares (100 acres) increase as a result of management activities, this would hold true because the adverse modification and jeopardy thresholds would remain the same. Thus, in this case, the prohibition on adverse modification would provide no benefit beyond that provided by the prohibition on jeopardy. The designation of critical habitat, therefore, would not provide additional benefit for the species.

Moreover, if sometime in the future there is additional Federal involvement through permitting or funding, such as through Environmental Protection Agency, Federal Housing and Farm Service Agency or Federal Highway Administration action, critical habitat designation would not provide any added benefit to the species. Federal involvement, where it does occur, can be identified without the designation of critical habitat because interagency coordination requirements (e.g. Fish and Wildlife Coordination Act) are already in place. Designating critical habitat would not create a management plan for the plant, or establish numerical population goals for long-term survival of the species nor directly affect areas not designated as critical habitat. Protection of this plant will most effectively be addressed through the recovery process and the jeopardy prohibition of section 7.

The Service acknowledges that 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 suitable unoccupied habitat may also benefit this species by alerting permitting agencies to potential sites for reintroduction and allow them the opportunity to evaluate proposals that may affect these areas. However, in this case, the few existing sites of *Thelypodium howellii* ssp. *spectabilis* are known by the private landowners and, if future management actions include unoccupied habitat, any

benefit provided by designation of such habitat as critical will be accomplished more effectively and efficiently with the current coordination process.

The Service is currently working with involved agencies and landowners to periodically survey and monitor *Thelypodium howellii* ssp. *spectabilis* population status and develop plant management strategies. All involved parties and landowners have been notified of the importance of protecting the habitat of the remaining populations of *T. howellii* ssp. *spectabilis* and plant protection agreements for some sites are in place. The Nature Conservancy is close to completing a conservation easement for protecting plant habitat in Baker County (Pocahontas Road site 14417 G 8-6:J13F) (A. Robinson, pers. comm. 1997). The livestock grazing threat is being addressed by working directly with the landowners to adjust seasonal use and through fence construction to limit livestock trespass. The plant is palatable to livestock and grazing occurring April through July can be detrimental to annual seed production; grazing in other times of year has little direct effect (Davis and Youtie 1995). Altered grazing practices can only be achieved through voluntary efforts of landowners. Designation of critical habitat would not change grazing practices.

In addition to cooperative efforts between the Service and landowners, other governmental agencies offer opportunities to protect *Thelypodium howellii* ssp. *spectabilis*. All known locations of *T. howellii* ssp. *spectabilis* along road sides have been inconspicuously marked so Oregon State Highway Department crews can avoid destruction of plants during highway maintenance activities (A. Robinson, pers. comm. 1997). The Department of Agriculture, through its Wildlife Habitat Incentive Program offers funding to landowners which can be used to protect endangered plants, including *T. howellii* ssp. *spectabilis* (62 FR 49357). In view of ongoing actions and the lack of regulatory authority provided by designation of critical habitat, conservation and protection of the plant will be accomplished more effectively through procedures other than critical habitat designation.

In conclusion, the designation of critical habitat for *Thelypodium howellii* ssp. *spectabilis* is not prudent because such designation would increase the degree of threat and would not be beneficial to the species.

Available Conservation Measures

Conservation measures provided to species listed as endangered or

threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. Without the elevated profile that Federal listing affords, little likelihood exists that any additional conservation activities would be undertaken. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act 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 or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agencies that may have involvement with *Thelypodium howellii* ssp. *spectabilis* through section 7 include the U.S. Army Corps of Engineers and the Environmental Protection Agency through their permit authority under section 404 of the Clean Water Act. The Federal Housing Administration and Farm Service Agency may be affected through potential funding of housing and farm loans where this species or its habitat occurs. Highway construction and maintenance projects that receive funding from the Department of Transportation (Federal Highways Administration) will also be subject to review under section 7 of the Act.

Listing *Thelypodium howellii* ssp. *spectabilis* would provide for development of a recovery plan for the plant. A recovery plan would bring

together private, State, and Federal efforts for conservation of this species. The plan would establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan would set recovery priorities and estimate costs of various tasks necessary to accomplish them. The plan would also describe site-specific management actions necessary to achieve conservation and survival of the species. Additionally, pursuant to section 6 of the Act, the Service would be able to grant funds to an affected State such as Oregon for management actions promoting the protection and recovery of *T. howellii* ssp. *spectabilis*. Because all of the known location sites are on private land, the Service will pursue conservation easements and conservation agreements to help maintain and/or enhance habitat for the plant.

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 for threatened plants, apply. These prohibitions, with respect to any endangered or threatened species of plants, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport or ship 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. Seeds from cultivated specimens of threatened plant taxa are exempt from these prohibitions provided that a statement "Of Cultivated Origin" appears on the shipping containers. 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 plant species 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. The Service anticipates few trade permits would ever be sought or issued for the species because the plant is not common in cultivation or in the wild.

It is the policy of the Service, published in the **Federal Register** 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 effects of the listing on proposed and ongoing activities within the species' range. Collection, damage or destruction of this species on Federal land is prohibited, although in appropriate cases a Federal permit could be issued to allow collection for scientific or recovery purposes. However, *Thelypodium howellii* ssp. *spectabilis* is not known to occur on public (Federal) lands.

Activities that are unlikely to violate section 9 include livestock grazing, construction or maintenance of fences and livestock water facilities, clearing a defensible space for fire protection around one's personal residence, and landscaping, including irrigation around one's personal residence. The Service is not aware of any otherwise lawful activities being conducted or proposed by the public that will be affected by this listing and result in a violation of section 9.

Questions regarding whether specific activities may constitute a violation of section 9 should be directed to the Field Supervisor of the Snake River Basin Office (see ADDRESSES section). Requests for copies of the regulations on listed plants and inquiries regarding them may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Permits Branch, 911 NE 11th Ave., Portland, Oregon 97232-4181 (503/231-6241).

Public Comments Solicited

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

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to *Thelypodium howellii* ssp. *spectabilis*;

(2) The location of any additional populations of this species 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, distribution, and population size of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

Final promulgation of the regulation(s) on this species will take into consideration the comments and any additional information received by the Service, and such communications may lead to a final regulation that differs from this proposal.

The Act provides for one or more public hearing(s) on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor, U.S. Fish and Wildlife Service, Snake River Basin Office, 1387 S. Vinnell Way, Room 368, Boise, Idaho 83709.

National Environmental Policy Act

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

Required Determinations

The Service has examined this regulation under the Paperwork Reduction Act of 1995 and found it to contain no information collection requirements.

References Cited

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 Oregon Natural Heritage Program. 1997. Element occurrence records for *Thelypodium howellii* ssp. *spectabilis*.
 Peck, M. 1932. New species from Oregon. *Torreya* 32:150.

Author

The primary authors of this proposed rule are Edna Rey-Vizgirdas, U.S. Fish and Wildlife Service, Snake River Basin Office (see **ADDRESSES** section); telephone 208/378-5243 and Andrew F. Robinson, Jr., U.S. Fish and Wildlife Service, Oregon State Office; telephone 503/231-6179.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. Amend section 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	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Thelypodium howellii</i> ssp. <i>spectabilis</i> .	* Howell's spectacular thelypod.	* U.S.A. (OR)	* Brassicaceae	* T	*	NA	NA
*	*	*	*	*	*		*

Dated: December 29, 1997.

Jamie Rappaport Clark,

Director, Fish and Wildlife Service.

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