

military departments has developed a "Management and Oversight of Acquisition of Services Process" to provide a review structure for services acquisitions, as required by the May 31, 2002, memorandum. The military departments are working to implement this infrastructure, which will include approval levels for services acquired through another agency's contract.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

#### B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because FAR part 37 already requires the use of performance-based contracting to the maximum extent practicable. This DFARS rule establishes internal DoD approval requirements to manage compliance with the existing FAR requirements. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002-D024.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements section 801(b) of the National Defense Authorization Act for Fiscal Year 2002, which requires DoD to establish and implement a management structure for the procurement of services. Section 801(b) became effective upon enactment on December 28, 2001. Comments received in response to this interim rule will be considered in the formation of the final rule.

#### List of Subjects in 48 CFR Part 237

Government procurement.

**Michele P. Peterson,**  
*Executive Editor, Defense Acquisition  
Regulations Council.*

■ Therefore, 48 CFR part 237 is amended as follows:

■ 1. The authority citation for 48 CFR Part 237 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

#### PART 237—SERVICE CONTRACTING

■ 2. Sections 237.170 through 237.170-3 are added to read as follows:

##### 237.170 Approval of contracts and task orders for services.

##### 237.1701-1 Scope.

This section—

- (a) Implements 10 U.S.C. 2330; and
- (b) Applies to services acquired for DoD, regardless of whether the services are acquired through—

- (1) A DoD contract or task order; or
- (2) A contract or task order awarded by an agency other than DoD.

##### 237.170-2 Prohibition on acquisition of services.

Unless approval is obtained in accordance with 237.170-3, do not acquire services through use of a contract or task order that

- (a) Is not performance based; or
- (b) Is awarded by an agency other than DoD.

##### 237.170-3 Approval requirements.

(a) Acquisition of services through a DoD contract or task order that is not performance based.

(1) For acquisitions at or below \$50,000,000, obtain the approval of the official designated by the department or agency.

(2) For acquisitions exceeding \$50,000,000, obtain the approval of the senior procurement executive.

(b) Acquisition of services through any contract or task order awarded by an agency other than DoD. Obtain approval in accordance with department or agency procedures.

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#### DEPARTMENT OF THE INTERIOR

#### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AH47

#### Endangered and Threatened Wildlife and Plants; Delisting of the *Berberis* (= *Mahonia*) *sonnei* (Truckee barberry)

**AGENCY:** Fish and Wildlife Service Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) have determined that it is appropriate to delist or remove *Berberis* (= *Mahonia*) *sonnei* (Truckee barberry) from the List of Endangered and Threatened Plants. This determination is based on a thorough review of all available data, which indicate that this plant is not a discrete taxonomic entity and does not meet the definition of a species (which includes subspecies and varieties of plants) under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). *Berberis sonnei* has been synonymized with *B. repens*, a common and wide-ranging taxon with a distribution from California northward to British Columbia and Alberta, and eastward to the Great Plains. This rule eliminates Federal protection for *Berberis sonnei* under the Act.

**DATES:** This rule is effective October 1, 2003.

**ADDRESSES:** The administrative record for this rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office of the U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W-2605, Sacramento, California 95825-1888 (telephone: 916-414-6600).

**FOR FURTHER INFORMATION CONTACT:** Kirsten Tarp or Susan Moore, at the above address (telephone: 916-414-6600; facsimile: 916-414-6713).

#### SUPPLEMENTARY INFORMATION:

##### Background

*Berberis* (= *Mahonia*) *sonnei* is a small colonial evergreen shrub known only from a 280-yard (250-meter) section of the Truckee River floodplain in the town of Truckee, Nevada County, CA. LeRoy Abrams described *Berberis sonnei* as *Mahonia sonnei* in 1934. McMinn (1939) transferred *Mahonia sonnei* to the genus *Berberis*. Separation of *Berberis* and *Mahonia* at the generic level is in dispute among taxonomists. The generic name *Berberis* will be used throughout this discussion following Yoder-Williams (1985, 1986, 1987).

The collections amateur botanist Charles Sonne made from 1884 to 1886 around the Truckee River in Nevada County, CA, provided the material from which the *Berberis sonnei* type later was taken. Sonne placed his collections in *B. aquifolium*, which at the time was the only suitable name to which he could refer his specimens (Roof 1974).

LeRoy Abrams (1934) determined that Sonne's specimens were not *Berberis aquifolium* and recognized them as a new species, *B. sonnei*, in his revision of the western barberries. Abrams distinguished the new species from *B. aquifolium* by the numerous small teeth on the leaf margins, dull color of underside leaf surfaces, and presence of papillae (small round or conic projections), concluding that these characters indicated a closer relationship with *B. repens*.

Sonne's material, and an 1881 collection by Marcus Jones at Soda Springs, Nevada County, CA, were the only specimens of *Berberis sonnei* available to botanists for many years. The actual location of Jones's collection has never been determined conclusively; it possibly was the same area later collected by Sonne (U.S. Fish and Wildlife Service 1984). Howard McMinn searched unsuccessfully for *B. sonnei* for his 1939 treatment of California shrubs. A 1944 collection from an unknown site on the Truckee River was placed in *B. repens* and went unnoticed by botanists for nearly 30 years. In 1965, an examination of Sonne's field notes revealed a reference to *B. aquifolium*, which likely could have been *B. sonnei*, from Deer Creek in Placer County, CA, but the locality is undocumented by a specimen (Roof 1974). *Berberis sonnei* was not relocated until a 1973 collection by Tahoe-Truckee high school student, Cathy Kramer, from the site presumably visited by Sonne nearly 90 years earlier (Roof 1974).

Taxonomic relationships between members of the *Berberis aquifolium* complex, which includes *B. repens* and *B. sonnei*, have long been confused. Abrams (1934) and McMinn (1939) both recognized a close relationship between *B. sonnei* and *B. repens*. McMinn (1939) first questioned the validity of *B. sonnei*, observing that *B. sonnei* perhaps was "only a more upright form of" *B. repens*. Yoder-Williams (1985, 1986, 1987) attributed frequent misclassification of herbarium specimens to the use of taxonomic characters incapable of consistently separating taxa of the group because they failed to account for variability throughout the range of the complex.

Yoder-Williams (1985, 1986, 1987) evaluated the diagnostic value of *Berberis* characters, including presence of papillae, glossiness of upper and lower leaf surfaces, plant height, and leaf tooth spination. As a result of his evaluation, Yoder-Williams concluded in several unpublished manuscripts that an analysis of possible characters to separate *Berberis sonnei* from both *B. repens* and *B. aquifolium* as treated by Abrams (1934) "failed to produce any clear distinctions," and that the taxon *B. sonnei* should be reduced to synonymy under *B. repens*. He recommended further field work and a comprehensive taxonomic revision of the entire group.

Michael Williams (1993) based his treatment of California *Berberis* on his taxonomic studies of selected members of the *B. aquifolium*. Williams's treatment of the California taxa followed earlier authors (Scoggan 1978) in placing *B. repens* as a variety of *B. aquifolium*, and additionally synonymized *B. sonnei* with *B. aquifolium* var. *repens*. The latter is a wide-ranging taxon with a distribution from the Peninsular Ranges of southern California northward to British Columbia and eastward to the Great Plains.

In the *Flora of North America* (Whittemore 1997), both *Berberis aquifolium* var. *repens* and *B. sonnei* are considered to be synonyms for *B. repens*. *Berberis repens* occurs in open forest, grassland, and shrubland. Whittemore (1997) notes that Sonne's collections from Truckee are considered to be an aberrant form of *B. repens*, and that subsequent collections from this population show the morphology typical of *B. repens* (Whittemore 1997). The range for *B. repens* is similar to that described for *B. aquifolium* ssp. *repens*.

#### Previous Federal Action

Federal Government actions on *Berberis sonnei* 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 *B. sonnei* as an endangered species. We published a notice on July 1, 1975 (40 FR 27823), of our acceptance of the report of the Smithsonian Institution as a petition within the context of section 4(c)(2) of the Act (petition provisions are now found in section 4(b)(3) of the Act) and our intention thereby to review the status of the plant taxa named therein. *Berberis*

*sonnei* was included in the July 1, 1975, notice. On June 16, 1976, we published a proposal (41 FR 24523) to determine approximately 1,700 vascular plant species, including *B. sonnei*, 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 our July 1, 1975, publication.

General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, publication (43 FR 17909). We published the final rule to list *Berberis sonnei* as an endangered species on November 6, 1979 (44 FR 64246).

On February 2, 1997, we received a petition to delist Truckee barberry (*Mahonia sonnei* [sic]) from the National Wilderness Institute. However, in April 1995, the enactment of Public Law 104-6 (P.L. 104-6) prohibited the Service from expending any of the remaining appropriated funds for the final determinations and listing of plants and animals under the Act. Subsequent Listing Priority Guidance, published on December 5, 1996 (61 FR 64479), identified all delisting actions as Tier 4, and deferred action on all delisting packages until Fiscal Years 1998 and 1999. As a result of this guidance we were unable to address the petition to delist the species. In May 1998, the Final Listing Priority Guidance for Fiscal Years 1998 and 1999 (63 FR 25508) identified all delisting actions as Tier 2 priority actions. Beginning in 1999, funding for work on delisting actions was provided through the recovery program rather than the listing program (64 FR 57114, published October 22, 1999). The basis for the National Wilderness Institute petition was original taxonomic data error. We published a proposed rule to remove *Berberis sonnei* from the Federal List of Endangered and Threatened Plants on September 3, 2002 (67 FR 56254), based on information indicating that *B. sonnei* is not a discrete taxonomic entity and does not meet the definition of a species as defined by the Act. The proposed rule also served as our combined 90-day and 12-month finding on this petition.

#### Summary of Issues and Recommendations

In the September 3, 2002, proposed rule (67 FR 56254) and associated notifications, we invited all interested parties to submit comments or information that might contribute to the final delisting determination for this species. The public comment period ended November 4, 2002. We contacted

and sent announcements of the proposed rule to appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties. We established an Internet web site for electronic submittal of comments and hearing requests by any party. In addition, we solicited formal scientific peer review of the proposal in accordance with our July 1, 1994, Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities (59 FR 34270). We requested three individuals with expertise in one or several fields, including familiarity with the species, familiarity with the geographic region in which the species occurs, and familiarity with the principles of conservation biology, to review the proposed rule by the close of the comment period. We received comments from two parties, including one designated peer reviewer. The comment is addressed in the following summary. We did not receive any requests for a public hearing.

*Issue:* Both commenters agreed with us that the morphological work and conclusion of both Michael Yoder-Williams and Alan Whitemore regarding the taxonomy of *Berberis sonnei* are scientifically sound as far as existing evidence, but requested that a molecular analysis of *B. sonnei* be conducted to determine if the molecular evidence correlates with the morphological evidence before delisting *B. sonnei*.

*Our Response:* We base our delisting decisions upon the best available commercial and scientific information. Currently, no one has performed a molecular analysis of *Berberis sonnei*. After a review of all available data, we have made the determination that *B. sonnei* is not a discrete taxonomic entity and does not meet the definition of a species. Therefore, our recommendation to delist *B. sonnei* remains unchanged. If new information becomes available through molecular analyses that shows that *B. sonnei* is a discrete taxonomic entity, we will reexamine the threats to determine if it should be listed again.

#### Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) implementing the listing provisions of the Act set forth the procedures for listing, reclassifying, or removing species from listed status. We may list a species as endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act; we must consider these same five factors in delisting a species. According to 50 CFR 424.11(d) of our regulations, we may delist a species if

the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; and/or (3) the original scientific data used at the time the species was classified were in error.

We have carefully assessed the best scientific and commercial information available regarding the taxonomic classification of *Berberis* (= *Mahonia*) *sonnei* and have determined that previous classification of the species is not taxonomically correct and that the entity listed as *B. sonnei* does not meet the definition of "species" in the Act. Therefore, we have determined that it is appropriate to delist or remove *Berberis* (= *Mahonia*) *sonnei* from the List of Endangered and Threatened Plants.

The five factors affecting the species, as described in section 4(a)(1) of the Act, and their current application to *Berberis* (= *Mahonia*) *sonnei* (Abrams) McMinn (Truckee barberry) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* *Berberis repens*, with which *B. sonnei* has been combined, is a common species ranging from California northward to British Columbia and Alberta and eastward to the Great Plains (Whitemore 1997). This wide-ranging taxon is not threatened. Although urbanization and other activities may destroy or modify its habitat in localized areas, there is no evidence that habitat destruction or modification threaten the continued existence of *B. repens*.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* The final rule adding *Berberis sonnei* to the endangered species list cited removal of plants from the one known population as a threat because *Berberis* species are widely used as ornamentals. Because *Berberis repens*, with which *B. sonnei* has been combined, is common and wide-ranging, removal of plants for ornamental purposes does not threaten this species.

C. *Disease or predation.* Neither disease nor predation were cited as threats in the final rule to list *Berberis sonnei* as an endangered species, and they do not threaten the common and wide-ranging taxon *B. repens*, with which *B. sonnei* has been combined.

D. *The inadequacy of existing regulatory mechanisms.* There is no evidence that the common and wide-ranging *Berberis repens*, with which *B. sonnei* has been combined, requires regulatory mechanisms to sustain it. The

California Department of Fish and Game tentatively plans to prepare a proposal to delist *B. sonnei* sometime in the future (Sandra Morey, California Department of Fish and Game, pers. comm. 2001).

E. *Other natural or manmade factors affecting its continued existence.* The final rule listing *Berberis sonnei* as an endangered species cited low seed set and seed viability as threats to the one known population. Neither of these factors threatens the common and wide-ranging *B. repens*, with which *B. sonnei* has been combined.

In summary, our regulations at 50 CFR 424.11(d) state that a species may be delisted if—(1) It becomes extinct, (2) it recovers, and/or (3) the original classification data were in error. We believe current scientific information demonstrates that *Berberis sonnei* does not represent a valid taxonomic entity and, therefore, does not meet the definition of "species" in section 3(15) of the Act. In addition, we have determined that *B. repens*, with which *B. sonnei* has been combined, is not an endangered or threatened species. We, therefore, conclude that *B. sonnei* no longer warrants listing under the Act.

#### Effects of the Rule

This action removes *Berberis sonnei* from the List of Endangered and Threatened Plants. The prohibitions and conservation measures provided by the Act no longer apply to this species. Therefore, interstate commerce, import, and export of *B. sonnei* are no longer prohibited under the Act. In addition, Federal agencies no longer are required to consult with us to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of *B. sonnei*. The use of *B. sonnei* must comply with State regulations. There is no designated critical habitat for this species.

#### Future Conservation Measures

There are no specific preservation or management programs for *Berberis sonnei*. Section 4(g)(1) of the Act requires us to monitor for at least 5 years species that are delisted due to recovery. Because *B. sonnei* is being delisted due to new information that demonstrates that the original classification was in error, rather than due to recovery, the Act does not require us to monitor this plant species following its delisting.

#### Effective Date

This rule relieves an existing restriction. Therefore, in accordance with 5 U.S.C. 553(d), we have determined that good cause exists to

make this rule effective immediately. Delay in implementation of this delisting could cost government agencies staff time and monies on conducting section 7 consultations. Relieving the existing restrictions associated with this listed species will enable Federal agencies to minimize any further delays in project planning and implementation.

#### **Paperwork Reduction Act**

This rule does not include any collections of information that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it has a current valid OMB control number.

#### **National Environmental Policy Act**

We have determined that an Environmental Assessment or Environmental Impact Statement, 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. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

#### **References Cited**

A complete list of all references cited herein is available upon request from the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service (*see ADDRESSES* section).

#### **Author**

The primary author of this document is Kirsten Tarp, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service (*see ADDRESSES* section).

#### **List of Subjects in 50 CFR Part 17**

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

#### **Regulation Promulgation**

■ For the reasons set out in the preamble, we hereby 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.

#### **§ 17.12 [Amended]**

■ 2. Section 17.12(h) is amended by removing the entry for *Berberis sonnei* (= *Mahonia s.*), Truckee barberry, under “FLOWERING PLANTS,” from the List of Endangered and Threatened Plants.

Dated: September 23, 2003.

**Marshall Jones,**

*Deputy Director, U.S. Fish and Wildlife Service.*

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