

during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this prominently at the beginning of your comment, but you should be aware that the Service may be required to disclose your name and address under the Freedom of Information Act. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

References Cited

A complete list of all references cited in this notice is available upon request from the New Mexico Ecological Services Field Office (see **ADDRESSES**).

Author

The primary authors of this rule are the New Mexico Ecological Services Field Office staff (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 14, 2006.

H. Dale Hall,

Director, Fish and Wildlife Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Tricolored Blackbird as Threatened or Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list the tricolored blackbird (*Agelaius tricolor*) as threatened or endangered under the

Endangered Species Act of 1973, as amended. We find that the petition does not present substantial scientific or commercial information indicating that listing the tricolored blackbird may be warranted. Therefore, we will not be initiating a status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of, or threats to, the tricolored blackbird or its habitat at any time.

DATES: The finding announced in this document was made on December 5, 2006. You may submit new information concerning this species for our consideration at any time.

ADDRESSES: The complete file for this finding is available for public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W-2605, Sacramento, California 95825-1846. New information, materials, comments, or questions concerning this species may be submitted to us at any time.

FOR FURTHER INFORMATION CONTACT: Susan Moore, Field Supervisor or Arnold Roessler, Listing Branch Chief of the Sacramento Fish and Wildlife Office (see **ADDRESSES**), by telephone at (916) 414-6600, or by facsimile to (916) 414-6712. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800/877-8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and the finding is to be published in the **Federal Register**.

This finding summarizes information included in the petition and information available to us at the time of the petition review. A 90-day finding under section 4(b)(3)(A) of the Act and section 424.14(b) of our regulations is limited to a determination of whether the

information in the petition meets the "substantial information" threshold. Substantial information is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)).

Previous Federal Action

In 1990, the California Department of Fish and Game (CDFG) added the tricolored blackbird to its list of Bird Species of Special Concern. In 1991 the Yolo Chapter of the National Audubon Society submitted a petition to the Service and to the California Fish and Game Commission to list the tricolored blackbird as a threatened or endangered species. Researchers (Hamilton *et al.* 1995, p. 7) working on the species in 1992 found that the population had increased from the late 1980s; thus, the petitioners withdrew their petition based on new information that the population numbers had increased. The Service included this species as a candidate (Category 2) for Federal listing as either threatened or endangered in the 1991 and 1994 Candidate Notice of Review (CNOR) (59 FR 58981, p. 58990, issued November 15, 1994). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed listing rule was possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule. In the CNOR published on February 28, 1996, the Service announced a revised list of plant and animal taxa that were regarded as candidates for possible addition to the List of Threatened and Endangered Species (61 FR 7595). The revised candidate list included only former Category 1 species. All former Category 2 species were dropped from the list in order to reduce confusion about the conservation status of these species, and to clarify that the Service no longer regarded these species as candidates for listing. Since the tricolored blackbird was a Category 2 species, it was no longer recognized as a candidate species as of the February 28, 1996, CNOR. The tricolored blackbird is now considered a U.S. Fish and Wildlife Service Bird of Conservation Concern (USFWS 2002). This designation is a result of mandates required through the Fish and Wildlife Conservation Act, which in part requires the Service to identify nongame migratory bird species that, without additional conservation actions, are likely to become candidates for listing under the Act. One of the goals of identifying species of conservation concern is to draw attention to the

species in greatest need of conservation action and to focus funding and efforts on conserving the species and preclude the need for listing.

On April 8, 2004, we received a petition to list the tricolored blackbird as a threatened or endangered species from the Center for Biological Diversity (Center for Biological Diversity 2004). The petitioner also requested an emergency listing of the species. The submission clearly identified itself as a petition and included the requisite identification information of the petitioner, as required in 50 CFR 424.14(a). In our May 25, 2004, response letter to the petitioner, we said that we had reviewed the petition and determined that an emergency listing was not warranted, and that because of other court-ordered listing and critical habitat actions and settlements, we would not be able to otherwise address the petition to list the tricolored blackbird at that time, but would complete the action when workload and funding allowed.

On July 15, 2005, we received a 60-day notice of intent to sue filed by the Center for Biological Diversity for lack of response to the petition to list the tricolored blackbird. On February 13, 2006, the Center for Biological Diversity filed a complaint for declaratory judgment and injunctive relief in Federal District Court for the Northern District of California (*Center for Biological Diversity v. Norton et al.*, No. C-06-0928), for our failure to issue a mandatory 90-day finding on the petition to list the tricolored blackbird. On May 11, 2006, we reached an agreement with the plaintiff to complete the 90-day finding by December 6, 2006, and if substantial, to complete the 12-month finding by October 18, 2007. This notice constitutes the 90-day finding for the April 8, 2004, petition to list the tricolored blackbird.

Species Information

Description and Taxonomy

The tricolored blackbird (*Agelaius tricolor*) is a medium-sized blackbird species in which males and females differ in plumage, size, and behavior. Adult male plumage is entirely black with a blue gloss in full sunlight. Adult males also have white and red wing plumage, are generally larger than females, and perform a display when breeding (Beedy and Hamilton 1999, pp. 1, 10). Immature male plumage is duller black than adult male plumage and is mottled with gray, eventually becoming mostly dull black with mixed black shoulder patch (Beedy and Hamilton 1999, p. 2). Adult female plumage is

primarily black, with grayish streaks. The chin and throat are relatively whitish, rarely with faint pinkish or peach wash and the shoulder patch is small and reddish. Immature female plumage is similar to that of the adult female, except the reddish shoulder patch is absent (Beedy and Hamilton 1999, p. 2). Individuals range from 18 to 24 centimeters (cm) (7 to 9 inches (in)) in length, and from 40 to 70 grams (g) (1 to 2 ounces (oz)) in body mass, depending on gender and season (Beedy and Hamilton 1999, p. 2).

The tricolored blackbird is a highly colonial species and forms the largest breeding colonies of any North American passerine (perching) bird species (Orians and Collier 1962, p. 450; Cook and Toft 2005, p. 74). Breeding colonies can attract thousands of birds to a single site. During a 1931–1936 study, Neff (1937, pp. 75, 76) described locating a colony of tricolored blackbirds in 1934 that was estimated to have more than 200,000 nests. If we take the number of nests reported, and multiply by 1.5 (mean estimated sex ratio of 2 females per male), we can calculate an estimated number of breeding adults (Orians 1961a, pp. 300, 308). Using this calculation, we estimate that Neff (1937, pp. 75, 76) documented about 300,000 breeding adults in the one colony. However, a breeding colony can also contain as few as six nests (about nine breeding adults), which Neff (1937, p. 79) described finding in 1932 in Solano County. The highly synchronized and colonial breeding behavior of the tricolored blackbird may have adapted to exploit a changing environment where the locations of secure nesting habitat and plentiful food supplies were variable from year to year (Orians 1961a, pp. 297, 305, 306; Orians and Collier 1962, p. 456; Payne 1969, p. 9).

Habitat

Breeding

Tricolored blackbirds have three basic requirements in selecting a breeding colony site: (1) Open and accessible water; (2) a protective nesting substrate, such as flooded, spiny, or thorny vegetation; and (3) a suitable foraging area within a few kilometers of the nesting site to provide adequate food such as insects (Hamilton *et al.* 1995, p. 25; Beedy and Hamilton 1997, p. 4).

Neff (1937, pp. 67, 73) documented that the majority of tricolored blackbird breeding colony sites he observed were in marsh habitat dominated with cattails (*Typha* spp.) or bulrushes (tules) (*Schoenoplectus* spp. and *Scirpus* spp), or both. Neff (1937, p. 78) also stated

that, while cattail and bulrushes were favored nesting substrates for the species, there was a surprising adaptability in the nest sites chosen. Vegetation such as barley (*Hordeum* spp.), mustard (*Brassica nigra*), blackberries (*Rubus* spp.), thistles (*Cirsium* and *Centaurea* spp.), nettles (*Urtica* sp.), and willows (*Salix* spp.) were used as nesting substrate, even when seemingly available cattail and bulrush marshes were nearby. These observations led Neff to conclude that marshes were not necessary for the continued existence of the tricolored blackbird, although he could not determine if there had been a change in habitat preference during the history of the species (Neff 1937, p. 78).

In recent decades many colonies of breeding tricolored blackbirds have been found to use nesting substrates such as giant cane (*Arundo donax*), safflower (*Carthamus tinctorius*), tamarisk (*Tamarix* spp.), mule fat (*Baccharis salicifolia*), Fremont cottonwood (*Populus fremontii*), California ash (*Fraxinus latifolia*), Himalayan blackberries (*Rubus discolor*), and wheat (*Triticum* spp.) (Beedy and Hamilton 1999, p. 5). The species has also been found in silage and grain fields in the San Joaquin Valley (Collier 1968, pp. 20, 21).

Dairies and feedlots have been recently documented as habitat components for many tricolored blackbirds. In 1994, approximately 55 percent of all observed breeding colonies were associated with dairies (Hamilton *et al.* 1995, pp. 5, 64). In some colonies, water source, nesting substrate, and foraging area were all available under the management of a single dairy operation.

Hamilton (1998, p. 218) extensively studied the breeding season movements of tricolored blackbirds in the Central Valley of California, from 1994 to 1997. Hamilton (1998, p. 218) concluded from his data that tricolored blackbirds nest again in the same year at different localities, a pattern called itinerant breeding. Initiation of nesting in tricolored blackbirds occurs in late March to early April throughout California, but primarily in the San Joaquin Valley. Nesting occurs again in May to June in the Sacramento Valley and foothill rice growing areas (Hamilton 1998, pp. 223, 224; Beedy and Hamilton 1999, p. 4). Subsequent nesting efforts for tricolored blackbirds at some colonies may result in producing as many fledglings as the initial effort, but the usual nesting success is only a fraction of the initial effort (Beedy and Hamilton 1999, p. 11).

Foraging

Tricolored blackbirds rapidly exploit any locally abundant insect prey, including grasshoppers (Orthoptera), beetles and weevils (Coleoptera), caddis fly larvae (Trichoptera), moth and butterfly larvae (Lepidoptera) (Grase and DeHaven 1978, p. 257), dragonfly nymphs (Odonata), and lakeshore midges (Diptera), as well as grains, snails, and small clams (Beedy and Hamilton 1999, p. 6). Tricolored blackbird foraging habitat during all seasons includes dry seasonal pools, pastures, rice fields, feedlots, dairies, and agricultural fields that are continuously mowed, such as alfalfa. The species is also known to forage in other areas, such as grasslands, marsh borders, and scrub, and saltbrush (*Atriplex* spp.), but rarely utilizes typically weed free areas such as vineyards, intensely managed orchards, and row crops (Beedy and Hamilton 1997, p. 5).

Nesting tricolored blackbirds usually forage within 5 kilometers (km) (3 miles (mi)) of the breeding colony site (Orians 1961b, p. 299). However, Beedy and Hamilton (1997, p. 5) observed tricolored blackbirds foraging up to 13 km (8 mi) from the breeding colony. Orians (1961a, p. 305) explained that the colonial structure of the tricolored blackbird is very energy demanding when compared to a similar species such as the red-winged blackbird, due to the large amount of energy expended while flying to and from distant feeding sites while providing forage for young. Food that can be rapidly exploited at the foraging site needs to meet the high energy requirement of the tricolored blackbird. Orians and Collier (1962, pp. 456–458) stated that because of the tricolored blackbird's high energy requirement, the species has an unpredictable breeding distribution and in unfavorable years has lower reproductive success than the red-winged blackbird. The presence of abundant and easily available food is a requirement for a successful tricolored blackbird colony and breeding location, and colony size can vary year to year depending on food availability and other environmental conditions (Orians 1961a, p. 308).

Range and Distribution

The tricolored blackbird is largely native to California, where more than 95 percent of the population occurs. Neff (1937, p. 63) described the range of the tricolored blackbird as largely endemic to the lowlands of California, west of the Sierra Nevada, but also sparsely occurring in southernmost Oregon and

northwestern Baja California. The elevational range of the tricolored blackbird was documented by Neff (1937, p. 80) as going from sea level in San Diego and Santa Cruz Counties to about 1,200 meters (m) (3,937 feet (ft)) at Klamath Lake, Oregon. High-elevation colonies have been found in California at 1,158 m (3,800 ft) near Tehachapi, Kern County (Collier 1968, pp. 9, 10). DeHaven *et al.* (1975, p. 171) stated that the overall geographic range of the species had not changed very much in the past 30 years, and that colonies were still found in southern Oregon through Shasta County, California, along the coast from Sonoma County, throughout the Central Valley, and south to northwestern Baja California, Mexico. Sparse colonies have also been documented in Washington and Nevada (Beedy and Hamilton 1999, p. 3).

United States

California. Active tricolored blackbird breeding colonies have been recorded in 46 counties in California since the 1980s, with the largest colonies being observed in the Central Valley (Beedy and Hamilton 1999, p. 3). The species currently breeds west of the Cascade Range, into the foothills east of the Sierra Nevada, north in Honey Lake basin in Lassen County, and in marshes of the Klamath basin in Siskiyou and Modoc Counties. The species also breeds from Humboldt to Shasta Counties, continuing south to southwestern San Bernardino County, western Riverside County, and western and southern San Diego County (Beedy and Hamilton 1999, p. 3).

Oregon. The most reoccurring breeding colonies in Oregon occur in southern Klamath and southern Jackson Counties. A few other isolated breeding occurrences have been documented in northeastern Multnomah County, John Day Fossil Beds National Monument in Wheeler County, Umatilla County, and Lake County in southern Oregon. Tricolored blackbird breeding colonies in Oregon range from dozens to a few thousand breeding adults (Beedy and Hamilton 1999, p. 3; Marshall *et al.* 2003, pp. 578–580).

Washington. A small breeding colony was reported in Grant County in 1998, the first recorded observation for the State (Beedy and Hamilton 1999, p. 3). Since 1999, the species has been recorded every month, except during the month of August, in Adams County (Seattle Audubon Society Web site 2006). A small breeding colony was discovered along Crab Creek, Grant County in 1998. In 2005, an additional larger colony was recorded near Texas

Lake in Whitman County (Seattle Audubon Society Web site, 2006).

Nevada. The first recorded breeding colony of tricolored blackbirds was documented in 1996, in Carson Valley, Douglas County, in western Nevada (Beedy and Hamilton 1999, p. 3). More recent observations have found a recurring colony in a small freshwater marsh in the Carson Valley that is not known to exceed 20 breeding pairs of tricolored blackbirds per year (Floyd *et al.* 2006).

Mexico

Baja California. Tricolored blackbirds breed primarily in emergent marsh from the central and western portions of Baja California Norte, south to El Rosario, Mexico (Beedy and Hamilton 1999, p. 3; Hamilton 2006). Tricolored blackbird breeding colonies on Baja range from a handful of breeding adults to a few thousand, with very few birds being observed in winter months (Erickson 2006).

Winter Range

In the winter, tricolored blackbirds reside within a portion of their breeding range, with concentrations in coastal areas such as Monterey, Marin, Sonoma, and Santa Cruz Counties, and in and around the Sacramento-San Joaquin River Delta in California (Beedy and Hamilton 1999, p. 3). Some small populations may remain during the winter within Oregon, Nevada, other portions of California, and Baja California, Mexico (Beedy and Hamilton 1999, p. 3).

Population Studies

Population studies on tricolored blackbirds began with the studies of Neff, who conducted observations on the species from 1931 through 1936 covering portions of the range (Neff 1937, p. 62). Location and level of survey effort varied from year to year. Neff (1937, pp. 61–80) found up to 491,000 nests and an estimated 737,000 breeding birds in 1934 within the Sacramento Valley.

While completing life history studies in Colusa and Yuba Counties, Orians (1961a, p. 285, 286, 297) located a colony in 1960 with more than 100,000 nests (estimated 150,000 breeding birds) in Colusa County, and several other colonies from 1957 through 1960 which contained nearly 100,000 nests each. Orians (1961a, p. 309) stated that tricolored blackbirds were in no threat of immediate extinction and that their ecology led them to be highly adaptable birds.

DeHaven *et al.* (1975 p. 166) completed a population survey in each

breeding season (April-June) from 1969 through 1972. DeHaven *et al.* (1975) estimated the population size of tricolored blackbird colonies using either of two methods: (1) Counting the number of breeding birds, or (2) Counting nests to estimate the number of breeding birds. In 1969 and 1970, the surveys were concentrated in the Central Valley, but there were also reports from Riverside and Siskiyou Counties (DeHaven *et al.* 1975, p. 166). In 1969, an estimated 181,000 breeding birds were located in the 19 counties surveyed. In 1970, an estimated 84,850 breeding birds were located in the 19 counties surveyed. In 1971, surveys attempted to include the entire breeding range, except Baja California, from San Diego to southern Oregon. An estimated 167,540 breeding birds were reported from 24 counties in California and Oregon. In 1972, an estimated 97,850 breeding birds were reported from 14 counties from the northern San Joaquin valley through to southern Oregon (DeHaven *et al.* 1975, pp. 169, 170, 177). DeHaven *et al.* (1975, p. 179) concluded the population had declined compared to the surveys conducted by Neff in the 1930s.

In 1994, the National Audubon Society, CDFG, the Service, University of California at Davis (UCD), and experienced volunteers initiated a one-day, rangewide population census in California of the tricolored blackbird (Beedy and Hamilton 1997, pp. 12, 13). Nearly all areas of the species' range were surveyed (Hamilton *et al.* 1995, p. 7). The survey was conducted from April 22 through April 24, 1994, with the assumption that the minimum number of birds entering the 1994 breeding season would be documented (Hamilton *et al.* 1995, pp. 14, 15). Census participants located an estimated 324,621 breeding birds across the range. This number was significantly higher than estimates of between 84,850 to 181,000 breeding birds reported by DeHaven *et al.* (1975).

In 1997, a CDFG-coordinated population survey was conducted following the methods in Hamilton *et al.* (1995) (Beedy and Hamilton 1997, p.13). On April 27, 1997, census participants located an estimated 217,696 breeding tricolored blackbirds as compared to an estimated 324,621 breeding birds in 1994.

In 2000, the Service sponsored a population estimate survey, which was coordinated by UCD and the California Audubon Society between April 21 and 24, 2000 (Hamilton 2000). The 2000 survey attempted to: (1) Locate all tricolored blackbird colonies throughout their current (April 21–24, 2000)

distribution in California; (2) Estimate their numbers; and (3) Determine the outcome of their nesting activity (Hamilton 2000, pp. 7–8). As in past surveys in 1994 and 1997, focus on a particular date avoided counting birds twice as they moved to different areas during the breeding season. Approximately 153,995 breeding birds were located throughout California during the April census (Hamilton 2000, p. 27). Hamilton (2000, p. 8) stated that this population estimate represented an uneven portion of the species' breeding range, because intensively farmed agricultural areas in the Central Valley are seldom surveyed, and as a result, colonies are likely not located.

In 2004, a survey was conducted in the Central Valley and four counties outside the Central Valley (Siskiyou, Santa Clara, Monterey, and Riverside) from April 16 to April 19, 2004 (Green and Edson 2004, p. 23). The goal of the 2004 survey was to visit all historical breeding colonies in the Central Valley where 2,000 or more birds were previously found. Of the 184 historic colony sites surveyed (out of 216 historic records), 28 sites surveyed supported active colonies (Green and Edson 2004, p. 25). Although no formal breeding population estimate was made for 2004, Green and Edson (2004, pp. 25, 27) reported that colony sizes recorded in 2004 were between 5 and 102,000 breeding adults.

Hamilton (2004, p. 32), using his own data and data collected by Green and Edson (2004), estimated that 223,069 young fledged from the entire breeding season in 2004 (Hamilton 2004, p. 39). Approximately 97,733 of the 223,069 fledged from a colony on Delevan National Wildlife Refuge (NWR) of an estimated 136,000 breeding birds (Hamilton 2004, p. 38). This colony is the largest documented since the 1960s. In 2005, Hamilton and Meese (2006, p. 6), using the same methods as in the 1994, 1997, and 2000 surveys, estimated 260,000 breeding birds in the population.

Threats Analysis

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal list of endangered and threatened species. 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) of the Act: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D)

Inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence. In making this finding, we evaluated whether threats to the tricolored blackbird as presented in the petition and other information available in our files at the time of the petition review may pose a concern with respect to the species' survival such that listing under the Act may be warranted. Our evaluation of these threats is presented below.

For the five-factor threats analysis, we have included the information submitted by the petitioner in its entirety for each factor, and then included our evaluation of the information provided by the petition and our evaluation of other information available to us regarding threats to the species.

A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Information Provided by the Petitioner Destruction of Native Habitats

The petitioner claims that loss and degradation of native breeding habitat for the tricolored blackbird threaten the species and have led to a significant decline in the overall population size throughout its range. The petitioner cites the studies conducted in the 1930s (Neff 1937) to support this claim. The population studies conducted by Neff (1937, p. 77) state that many favorable habitats of the tricolored blackbird, including emergent vegetation growth, have been destroyed by reclamation, drainage, dredging, reservoir construction, and clearing of marshes and canals.

According to the petition, only 560,000 acres (ac) (226,624 hectares (ha)) of the original 4 million ac (1.6 million ha) of wetlands in the Central Valley still existed by 1939, and by the mid 1980s only 243,000 ac (98,339 ha) of wetlands remained (Beedy and Hamilton 1997, pp. 10, 11). The petition further states that native perennial grasslands have been reduced by more than 99 percent in the Central Valley and surrounding foothills of California (Beedy and Hamilton 1997, p. 11). The petition claims that the remaining marsh nesting habitat for tricolored blackbirds has been reduced to small isolated patches, and these patches support high concentrations of tricolored blackbird predators (predation is addressed under Factor C, below).

The petition also discusses the loss of breeding habitat at sites where colonies once occurred, such as in Yolo County

during the 1930s. Colonies were not relocated due to little or no habitat remaining during subsequent studies between 1969 and 1972 (DeHaven *et al.* 1975, p. 179).

Colony Destruction by Agricultural Activities

The petition cites a white paper and briefing statement (USFWS 2000, p. 1) to claim that tricolored blackbirds nest in grain silage fields at the same time that forage is harvested for optimum moisture content. The petition asserts that harvesting of grain silage causes nest destruction and direct mortality and further claims that this threatens most of the remaining breeding population of the species. In addition, the petition cites Beedy and Hamilton (1997, p. 17) to support the claim that many agricultural areas within the range of the tricolored blackbird have been converted to urban uses and that the urbanization of agricultural lands will continue to result in loss of habitat used by the tricolored blackbird.

The petition states that tricolored blackbirds have been adaptive in their choice of nesting substrates and have shown an increasing trend towards use of upland substrates for nesting since the 1930s (Cook and Toft 2005, p. 75). The petition also states that use of silage fields at dairies is a relatively recent phenomenon and is a primary nest site selection substrate (Beedy and Hamilton 1997, pp. 4, 18; Beedy and Hamilton 1999, p. 5).

The petition provides data compiled from various surveys that provide examples of recent breeding failures because of silage harvest. The petition concedes that the list is not complete, and states that the concentration of most of the tricolored blackbird reproductive effort into a few large colonies that are selecting grain silage as a nesting substrate has greatly increased the risk of extinction should the annual destruction of such a large proportion of nests continue unabated (Cook and Toft 2005, p. 85).

Destruction of Other Suitable Upland Breeding Substrates and Surrounding Habitats

The petition claims that more recent important nesting substrates include agricultural fields (especially grain silage) and Himalayan blackberry (DeHaven *et al.* 1975, pp. 171, 172; Hamilton *et al.* 1995, p. 25; Cook 1996, pp. 23, 24). The petition claims that the lack of protection and loss of non-native nesting substrates such as Himalayan blackberry, thistle, and prickly lettuce are a threat to the tricolored blackbird. These non-native nesting substrates

occur on private property and are often subject to removal. The petition states that Himalayan blackberry supports the highest density of nesting tricolored blackbirds among all other substrates, and that reproductive success is higher than in other commonly used substrates such as emergent marsh and silage (Cook and Toft 2005, pp. 85–86).

Curtailement of the Species' Range

The petitioner contends that the loss of wetland and grassland habitats has led to tricolored blackbirds remaining in a few large but isolated population centers. However, the petitioner does not claim that the range of the species has declined significantly. The petition claims that the species is found throughout its former range, including small populations in Washington, Oregon, and Nevada, but that few if any reports of tricolored blackbird nesting have been confirmed since 1999.

Evaluation of Information in the Petition and Information Available to Us at the Time of Petition Review

Destruction of Native Habitats

The petitioner cited Neff (1937, p. 77) and Beedy and Hamilton (1997, pp. 10, 11) to support the claim that there has been significant native habitat loss for the tricolored blackbird. The petition claims this is a threat to the species and that by 1939, 86 percent of native marsh habitat had been reduced in the Central Valley. We agree with the petitioner that wetland loss has occurred for many decades in the Central Valley of California, resulting in loss of tricolored blackbird habitat. However, our review of the literature found that while Neff (1937, pp. 78–79) does discuss that habitat loss had occurred prior to and during his studies from 1931 to 1936, he did state that all of the threats to the species during his studies, such as human activities, predators, weather, or other factors, had only minimal impact on the species. Further, Neff (1937 p. 78) stated that tricolored blackbirds showed surprising adaptability in their choice of nesting substrates, even when seemingly favorable native wetland marshes were available, and that tricolored blackbirds were nesting in almost every county in which they had nested during the period 40–70 years prior to his studies (approximately 1867 to 1897).

Furthermore, Orians (1961a, p. 309) stated that Neff's (1937, p. 62) studies were initiated due to the concern that tricolored blackbirds may not adapt well to conditions such as water drainage and conversion of grasslands to cultivation. Orians (1961a, pp. 309, 310)

stated that tricolored blackbirds were not in danger of immediate extinction, but that they were highly adaptable in their choice of nesting substrate and in utilizing the abundant food supply of insects in agricultural lands of the California Central Valley. Because of the species' apparent ability to utilize a range of habitat types, we do not believe that historic habitat losses have been demonstrated to be a substantial threat to the species.

DeHaven *et al.* (1975, pp. 175, 176, 179) also state that suitable nesting habitat for the tricolored blackbird had been lost in some local areas. However, they also state that these local losses in habitat have not contributed significantly to any overall population decline of the species, and that tricolored blackbirds leave many apparently suitable nesting sites unused, likely because of yearly food availability and water supply and other potentially unknown factors. DeHaven *et al.* (1975, pp. 166–180) stated that more research was needed to help isolate a cause for the apparent decline from 1969 to 1972, as compared to Neff's (1937, pp. 66, 67) population estimates from 1931 to 1936. Because no complete surveys were conducted between 1937 and 1969, it is difficult to draw conclusions. Based on the limited number of surveys during this time period, it is possible that no decline did occur, and that population numbers are within a range of variability that would be expected for this species.

As stated earlier in the Population Studies section, status surveys for tricolored blackbirds began with the studies of Neff from 1931 to 1936 (Neff 1937, pp. 61–81), where Neff estimated between 95,000 and 737,000 breeding birds for the 5-year timeframe. DeHaven *et al.* (1975, pp. 166–180) estimated a rangewide population of between 84,850 and 181,000 breeding birds between 1969 and 1972. More recent surveys estimated 324,621 breeding birds in 1994; 217,696 in 1997; 162,000 in 2000; and 260,000 in 2005. Based on these population estimates, we do not agree with the petitioner's assertion that the population is in decline. That relatively low numbers were recorded since Neff's (1937) high estimate of 737,000 birds in the 1930s does not in our view provide substantial information that the species may warrant listing because of the uncertainty of Neff's estimating procedures and recent comparable studies show the species to be stable or increasing since the 1970s.

Colony Destruction by Agricultural Activities

The petition cites a Service white paper and briefing statement (Service 2000) stating that harvesting of grain silage causes nest destruction and direct mortality, which threatens most of the remaining breeding population of the species. We agree that active colonies nesting in silage should be protected, and that loss of tricolored blackbirds and reduction of nesting success occurs and may cause localized declines. The white paper and briefing statement was developed to inform and provide recommendations to Service management for managing tricolored blackbird use of dairy silage as a nesting substrate. The paper outlined concerns of using silage buyouts as a long-term solution to tricolored blackbird conservation. However, no information provided by the petitioners or other information otherwise available to us including the white paper or information cited in the paper (i.e. DeHaven 2000) suggests that silage harvest has or will contribute to a rangewide population decline. Population numbers since the 1970s, as discussed above, appear to be somewhat stable. Tricolored blackbirds may breed more than one time in the breeding season if a prior breeding effort failed (Hamilton 1998, pp. 223, 224). Although the subsequent breeding effort may be smaller than the initial effort (Beedy and Hamilton 1999, p. 11), the ability to re-nest probably mitigates the occasional loss of nests with silage cutting. Hamilton (2004, p. 43) also stated that the claim of declines in the tricolored blackbird population due to the harvesting of silage is not based upon a complete analysis of existing data.

Destruction of Other Suitable Upland Breeding Substrates and Surrounding Habitats

The petition cites Cook and Toft (2005, pp. 85, 86) as stating that Himalayan blackberry supports the highest density of tricolored blackbird nesting among all other substrates, and that therefore lack of protection of this habitat is a threat to the tricolored blackbird. We agree that tricolored blackbirds may nest in non-native substrates such as Himalayan blackberry, thistles, and prickly lettuce, as stated by the petition. However, we have no information and the petitioner provided no information to suggest that the lack of protection of non-native substrates such as Himalayan blackberry is a threat to the continued existence of the tricolored blackbird. Again, as stated above, the most recent surveys estimate

the tricolored blackbird population has increased from 162,000 to 260,000 breeding birds since 2000, and the number of birds appear to be consistent with, or higher than, the numbers of birds found in the 1970s. Further, no information is available to suggest that breeding habitat should be considered limiting, or that its loss should be considered a substantial threat. For these reasons, we reject the petitioner's assertions that lack of protection for breeding habitat should be considered a threat.

Range and Distribution

The petition does not specifically claim that a reduction in range has occurred for the species, but it does state that few if any breeding reports outside of California have been confirmed since 1999. We reviewed currently available information on tricolored blackbird breeding from Washington, Oregon, and Nevada, and found that this information supports the contention that the species continues to breed in these areas and documents new areas where it has been found between 2003 and 2006 (Marshall *et al.* 2003, pp. 578–580; Floyd *et al.* 2006; Seattle Audubon Society Web site, 2006). Based on this recent information we disagree with the petitioner that few if any breeding reports outside of California have been confirmed since 1999, but that the most current information shows new breeding colonies in all three states.

Summary of Factor A

To summarize Factor A, information included in the petition and information otherwise available to us demonstrate that destruction of native habitats, direct nest loss and mortality caused by agricultural activities, and destruction of other suitable breeding habitats has occurred and may continue to impact the local abundance and viability of tricolored blackbirds. Loss of wetlands has occurred in the Central Valley of California in tricolored blackbird habitat for many decades. However, the population has increased in recent survey years and appears to be stable since the 1970s. The petition has presented no information that suggests that the habitat loss experienced is having an impact on the population levels of the tricolored blackbird. Additionally, the harvesting of silage during the tricolored blackbird breeding period can have localized negative impacts on species habitat and populations due to direct mortality and nest destruction. However, we currently have no information and the petition provided no information on how the

loss of a local breeding effort affects the population in subsequent years, or to support a determination that silage harvesting is a substantial risk to the rangewide population and continued existence of the tricolored blackbird. The species is found throughout the majority of its historical range, with additional new breeding populations documented in Washington, Oregon, and Nevada. Therefore, we find that the petition and other information otherwise available to us does not contain substantial scientific or commercial information indicating that the continued existence of the species is threatened by the present or threatened destruction, modification, or curtailment of the species' habitat or range.

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

Information Provided by the Petitioner

The petition claims that a history of widespread persecution of blackbird species has likely contributed to a decline in the tricolored blackbird. The petition cites Neff (1942, pp. 46, 47) who stated that in 1928 and 1929, market hunting for blackbirds in the Central Valley of California became a thriving business and a market was created in large cities by Italian produce firms. Market hunters killed thousands of blackbirds; it was reported that one group of market hunters shipped nearly 400,000 blackbirds from the Sacramento Valley in five seasons (Neff 1942, pp. 46). Market hunting started to decrease by 1936 and 1937, with an estimated 88,000 birds being shipped (Neff 1942, pp. 47).

The petition also cites Neff (1942, pp. 46, 47) as stating that numerous blackbirds were reportedly shot by ranchers, used by people as target practice, and poisoned to control damage to crops. The petitioners state that these killings were a source of high adult mortality. The petitioners also state that poisoning of thousands of blackbird species to control rice crop damage in the Central Valley of California continued until the 1960s (Beedy and Hamilton 1997, p. 18). The petition states that due to improved harvesting methods, rice varieties that ripen faster, and fewer individual blackbirds, extermination programs have ceased; however, the historic occurrence of blackbird poisoning has likely contributed to the species' population decline (Beedy and Hamilton 1997, p. 18).

Evaluation of Information in the Petition and Information Available to Us at the Time of Petition Review

We agree that tricolored blackbirds were deliberately killed historically for market use, sport hunting, or protection of crops by use of poisons or guns; however, we are not aware of a current market, sport hunting or protection of crops by the use of poison on the tricolored blackbird. No information was provided by the petitioners or was available to us that documents any historic or current information describing how poisoning or market hunting may have contributed to the overall decline of the species' population size or reduction in its range. Therefore, we find that the petition does not contain substantial scientific or commercial information to indicate that the tricolored blackbird is threatened by overutilization for commercial, recreational, scientific, or educational purposes.

C. Disease or Predation

Information Provided by the Petitioner

The petition cites several papers (Hamilton *et al.* 1995, p. 21; Beedy and Hamilton 1997, p. 10; Hamilton 2000, p. 14) that describe predation as major cause of large-scale nesting failures in many tricolored blackbird colonies, especially those colonies that nest in native emergent marsh. The petition cites Hamilton *et al.* (1995, pp. 21, 35) and Hamilton (2000, pp. 13, 14) to claim that black-crowned night-heron and raccoon predation on tricolored blackbird colonies in marshes can destroy all or the majority of nests within such colonies, which results in nest failure of the entire colony. The petition states that tricolored blackbirds nesting at Kern NWR in Kern County and the Maxwell I and II colonies in Colusa County failed due to black-crowned night-heron predation. The petitioners also state that black-crowned night-heron predation on the tricolored blackbird is of special concern at National Wildlife Refuges, because the refuges are becoming more important nesting sites for black-crowned night-herons and tricolored blackbirds as private lands are converted to other uses, and as grain silage fields may be harvested during the tricolored blackbird nesting season. The petition cites Cook and Toft (2005, pp. 80–82) to claim that tricolored blackbird reproductive success was much lower in native emergent marsh than in any other nesting substrate, except for silage that was lost to harvesting operations.

The petition also cites a long list of historic, native predators that may have

preyed upon tricolored blackbirds, and claims there have been recent reports of predation on tricolored blackbird colonies by feral cats (*Felis catus*) (Beedy and Hamilton 1997, p. 17). The petition also states that tricolored blackbirds are not aggressive towards predators and will sit silently instead of attacking, unlike the behavior of red-winged blackbirds (Beedy and Hamilton 1997, p. 17, Beedy and Hamilton 1999, p. 12).

The petition does not discuss or provide any information on how disease threatens the tricolored blackbird.

Evaluation of Information in the Petition and Information Available to Us at the Time of Petition Review

The petition infers from Hamilton *et al.* (1999) that reproductive success of tricolored blackbirds in cattail marshes is low because of the high rate of predation that this nesting substrate endures due to high concentration of predators such as raccoons and black-crowned night-herons. Hamilton *et al.* (1999, p. 12) stated that expansion of large cattail nesting areas for tricolored blackbirds should be avoided, due to high predation of colonies in this type of nesting substrate. However, Hamilton (2000 p. 20) withdrew the previous statement made in 1999 due to observations made in 2000 of low or absent black-crowned night-heron predation on other tricolored blackbird colonies nesting in cattails. In 2000, Hamilton (2000, p. 28) observed large tricolored blackbird colonies in cattails which were not preyed upon by black-crowned night-herons. The large colonies include the two colonies on Delevan NWR that contained approximately 37,000 breeding adults and produced approximately 34,000 successful fledglings. In 2004 at Delevan NWR in Colusa County, a large colony (approximately 135,000 breeding adults) successfully nested in a cattail marsh, producing approximately 97,000 fledglings (Hamilton 2004, p. 35). While some predation probably occurs at all tricolored blackbird colonies, there is insufficient information to suggest or conclude that predation on nests in cattail marshes is a threat at the population level.

The petitioners cited an example that tricolored blackbirds nesting at Kern NWR in Kern County and at Maxwell I and II in Colusa County failed due to black-crowned night-heron predation. We presume that the petitioners used Hamilton (2000, pp. 28, 29) for the Maxwell example, since no reference was given. The data provided by Hamilton (2000, p. 28) indicate the Maxwell I nesting site produced

approximately 1,199 successful fledglings from about 5,000 breeding adults, while the Maxwell II nesting site only produced 38 successful fledglings from about 2,000 breeding adult tricolored blackbirds. No information was provided or available to determine why the fledgling rate at Maxwell II was low. We also could not determine what documentation the petitioners used to support their claim that a colony at Kern NWR failed due to predation. According to DeHaven (2000, pp. 17, 18), predation is reported by researchers about as frequently in the 1990s as it was in the 1970s, and it is not known if the losses to tricolored blackbird colonies from predation are within a historical and normal range that would be expected of a colonial nesting species.

Payne (1969, p. 26) states that the loss to any one breeding effort of a tricolored blackbird colony may be reduced due to the species' dense colony structure; a colony is likely to occur within the territory of only one predaceous raptor. Although tricolored blackbirds have demonstrated that they are not aggressive defenders against predators, there is no information available to us or submitted by the petitioner that shows that lack of aggression towards predators may threaten the continued existence of the tricolored blackbird.

The petitioner cited Beedy and Hamilton (1997, p. 17) as stating that predation on tricolored blackbird nests by feral cats is a recent phenomenon. We found that Beedy and Hamilton (1997, p. 17) cited Payne (1969, p. 25) who reported predation of tricolored blackbirds by feral cats. Payne (1969, p. 25) states that dozens of tricolored blackbird adults were found dead around a marsh in Marysville, California, and appeared to have been killed by numerous feral cats. While the Service agrees that predation on the species' nests by feral cats is a more recent occurrence than other predation reported in the early 1900s, there is no current evidence available to us or supplied by the petitioner to suggest that feral cat predation is significant range wide, or a threat to the continued existence of the tricolored blackbird.

Summary of Factor C

To summarize factor C, information provided in the petition and other available information suggests that predation on tricolored blackbird colonies does occur. Predation on tricolored blackbird colonies nesting in cattail marshes by black-crowned night-herons has been documented. While the Service agrees that predation occurrences may be the potential cause of some nesting failures, especially in

cattail marshes, evidence also demonstrates that tricolored blackbirds can breed successfully in cattail marshes. There is no evidence that predation has increased above natural levels and is often localized in nature. We are not aware of any information indicating that predation has caused a reduction in the range or population size of the species, or that a reduction in the population of this species is likely to occur in the future due to predation. Therefore, we find that the petition does not contain substantial scientific or commercial information to document disease or predation may be a factor that threatens the tricolored blackbird.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided by the Petitioner

The petition claims that the tricolored blackbird is not protected by existing regulatory mechanisms. The petition stated that the tricolored blackbird is considered a non-game bird of management concern by the Service. The petition also stated that the tricolored blackbird is considered a species of special concern by the CDFG. Additionally, the petition states that the tricolored blackbird is not listed under the Act or the California Endangered Species Act (California Fish and Game Code section 2070 *et seq.*). The petition claims that current designations do not provide specific legal protection to the species aside from the requirement that a project may trigger California Environmental Quality Act (CEQA) review where the impacts of the proposed action on the species must be analyzed. Actions that do not trigger CEQA would not require review. The petition also claims CEQA's mandates for environmental protection have not been implemented to protect the tricolored blackbird.

The petition states that the Migratory Bird Treaty Act (MBTA) should afford the species protection; however, the petition further states that the statute is rarely if ever enforced against private landowner violators, and that enforcement agencies have turned a "blind eye" to annual violations of the MBTA by private landowners. The petition states that the statute strictly prohibits all "taking" (to "pursue, hunt, shoot, wound, kill, capture, or collect," or attempt to do so) of migratory birds unless authorized by a permit issued under Department of the Interior regulations (16 U.S.C. 703) and under 50 CFR 10.12. The petition claims that private property owners who destroy tricolored blackbird nests are in clear

violation of the MBTA and its implementing regulations.

Additionally, the petition claims that private landowners with dairies or other commercial agricultural operations on their property are in violation of the California Business and Professions Code Section 17200, and the MBTA. The petition states that the code defines "unfair competition" to include "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." A business practice constitutes unfair competition if it is forbidden by any law, whether civil or criminal, whether Federal, State, or municipal, or whether statutory, regulatory, or court-made. The petition claims that private business owners who are destroying tricolored blackbird nests are vulnerable to enforcement actions under both the MBTA and the California Business and Professions code.

Evaluation of Information in the Petition and Information Available to Us at the Time of Petition Review

The tricolored blackbird is considered a U.S. Fish and Wildlife Service Bird of Conservation Concern (USFWS 2002). In general, species are classified as such because of (1) Documented or apparent population declines, (2) Small or restricted population, or (3) Dependence on restricted or vulnerable habitats. This designation is a result of mandates required through the Fish and Wildlife Conservation Act, which in part requires the Service to identify non-game migratory bird species that, without additional conservation actions, are likely to become candidates for listing under the Act. While all of the bird species included in the list are priorities for conservation action, the list makes no finding with regard to whether they warrant consideration for federal listing. The goal is to prevent or remove the need for additional listings by implementing proactive management and conservation actions.

In May 1990, the CDFG added the tricolored blackbird to its species of concern list. In general CDFG classifies species as such because they (1) Are declining at a rate that could result in listing, or (2) historically occurred in low numbers and known threats to their persistence currently exist. This classification offers no legal protection in itself, but encourages consideration of the species in impact analyses, mitigation planning, and other environmental documentation (Beedy *et al.* 1991, p. 5).

Local governments are typically the lead agency for conducting CEQA review of projects to convert native vegetation; thus, CDFG considers an

environmental document prepared by the lead agency. CDFG considers potential impacts of the proposed project and provides information to the lead agency about possible impacts to wildlife species and habitat. CDFG can provide advisory recommendations for avoiding, minimizing, and mitigating impacts of the project. Recommended measures to reduce or avoid impacts do not become mandatory, unless adopted by the lead agency. Changes in agricultural uses, including those that may result in impacts to tricolored blackbirds, do not typically trigger CEQA requirements or allow for CDFG review (Gustafson and Steele 2004, p. 31).

The Migratory Bird Treaty Act implements various treaties and conventions between the United States and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Under the MBTA, taking, killing or possessing migratory birds is unlawful. Unless permitted by regulations, the MBTA provides that it is unlawful to pursue, hunt, take, capture or kill; attempt to take, capture, or kill; possess; offer to or sell, barter, purchase, or deliver; or cause to be shipped, exported, imported, transported, carried, or received, any migratory bird, part, nest, egg or product, manufactured or not (16 U.S.C. 703). According to the MBTA, a person, association, partnership, or corporation that violates the MBTA or its regulations is guilty of a misdemeanor and subject to a fine of up to \$15,000, jail up to 6 months, or both. Anyone who knowingly takes a migratory bird and intends to, offers to, or actually sells or barbers the bird is guilty of a felony, with fines up to \$2,000, jail up to 2 years, or both (16 U.S.C. 707).

Historically for the tricolored blackbird, the majority of breeding occurred in marshes and blackberry thickets. More recently, the species may nest in the grain silage fields associated with dairies. These grain silage fields are often harvested (when moisture content of the forage is optimal) while nesting species are still present (DeHaven 2000, p. 1). The Service agrees with the petitioner that harvesting of silage while the species is still nesting would be a violation of the MBTA if eggs and young are destroyed. We pursue investigation of such MBTA violations as we are made aware of their occurrence.

As stated in the petition, the MBTA is the current Federal regulatory mechanism in place to protect the tricolored blackbird throughout its range in the United States. The petition claims that the Service turns a "blind eye" to

violations of the MBTA. We are unaware of, and were not provided by the petitioners, with information that documents lack of enforcement of specific violations under the MBTA. Therefore, we believe that the MBTA provides protections for the species.

In an effort to conserve and protect the tricolored blackbird, the Service and CDFG have been cooperating with public and private stakeholders to address and prevent violations of the MBTA and CEQA. The petition acknowledges these efforts and cites a 2000 example of Tevelde Farm in which the agencies arranged to compensate the farm to delay harvesting of silage to allow approximately 20,000 tricolored blackbirds to fledge. The Service and CDFG have been funding private landowners for purchase of silage crops or delay of harvesting activities since 1993 to avoid taking of nesting tricolored blackbirds in silage and to enhance reproductive success. The Service recognizes that these silage purchases or reimbursements for delay of harvest are not long-term solutions, and will be used as a short-term approach until a long-term management strategy can be devised to increase protection of the tricolored blackbird.

Summary of Factor D

To summarize Factor D, existing Federal and State regulations currently provide protection for the tricolored blackbird through the Federal Migratory Bird Treaty Act and CEQA review process. The petitioners only provide speculation on the lack of regulatory enforcement of the MBTA and CEQA and do not mention specific instances where these Acts were not enforced. Further, there is no evidence that lack of regulatory mechanisms is causing a population decline. Due to this lack of information, we are unable to determine that the inadequacy of existing regulatory mechanisms has led to reduction in the population size across all or within the range of the species, or that a reduction in the population of this species is likely to occur in the future. Therefore, we find that the petition does not present substantial scientific or commercial information that lack of regulatory mechanisms may present a threat to the tricolored blackbird.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Information Provided by the Petitioner Chemical Contaminants

The petition claims that chemical contaminants are a threat to birds,

including the tricolored blackbird, and those contaminants can cause mortality and nesting failures. While the petition acknowledges that the "link between environmental contaminants and nesting failure of tricolor[ed]s is largely unstudied," the petition claims that some mortality of tricolored blackbirds has been documented due to chemical toxicity and this source of mortality could become more substantial if tricolored blackbird populations continue to decline. Citing Beedy and Hayworth (1992, pp. 33–35), the petition describes a complete nesting failure of approximately 50,000 tricolored blackbirds, at Kesterson Reservoir in Merced County in 1986. The petition also cites Beedy and Hayworth (1992, pp. 33–35), who collected dead nestlings, of which some had club feet, along with other species of birds that had similar deformities, and sampled tricolored blackbird nestlings and found them to have higher concentration of selenium in their livers than that of red-winged blackbirds sampled at a nearby location. The petition cites Beedy and Hamilton (1997, pp. 18, 19) who stated that the suspected cause of tricolored blackbird nestling deaths in 1986 was from selenium contamination.

The petition further cites Beedy and Hamilton (1999, p. 18): Reporting biologist William J. Hamilton III personally observed a tricolored blackbird colony that failed to hatch due to mosquito abatement spraying in Kern County. The petition also cites the California Department of Pesticide Regulation (CDPR) data (CDPR Web site data 2002) detailing types and quantities of chemicals used in Sacramento, San Joaquin, Merced, Fresno, and Tulare Counties. The petition cites EXOTOXNET (2004) to describe which chemicals are toxic to birds in general. The petition additionally states that although tricolored blackbirds were not studied directly, many of the chemicals listed by the CDPR data are highly toxic to birds and are used within the known breeding range of the species.

Evaluation of Information in the Petition and Information Available to Us at the Time of Petition Review

Beedy and Hayworth (1992, p. 42) describe that in April 1986, approximately 47,000 tricolored blackbirds tried to nest at Kesterson Reservoir. Surveys were conducted from April 18 to 23, 1986, of 162 tricolored blackbird nests. The study found that 84.6 percent of those nests were either empty or contained addled eggs or dead chicks, and 266 additional chicks were found dead on levee roads. Only 100

birds were fledged from the Kesterson Reservoir colony, which suggests a near nesting failure in the 1986 breeding season. Some of the dead nestlings from 1986, along with dead nestlings from further studies in 1987, were examined for deformities and their livers were screened for toxins, and some of the nestlings from both years were determined to have club feet and high levels of selenium in their livers. Beedy and Hayworth (1992, pp. 41, 42) state that more research was needed to determine if selenium contamination was the reason of nestling mortality, and if the nesting failures observed were an isolated incident or a widespread general decline of the tricolored blackbird, since the cause and magnitude of nestling mortality vary tremendously between colonies. Additionally, in 1986, the U.S. Department of the Interior decided to close the San Luis Drain, so selenium and salt no longer concentrate at Kesterson, and tricolored blackbirds no longer nest there. Aside from the nesting failure due to the potential selenium contamination in 1986, we were provided no information in the petition nor have we received any other information of other potential selenium-related nesting failures in tricolored blackbirds or any information supporting the idea that selenium contamination is currently a threat to the tricolored blackbird. There also was no information provided by the petition or otherwise available that describes what effect the nesting failure at Kesterson had on the tricolored blackbird population in 1986 or subsequent nesting seasons.

The petition did not provide, and we are not aware of, any information or data to support the observation William J. Hamilton III made in Kern County of a complete nesting failure due to the spraying of mosquito abatement. We are not aware of any information or data that documents this nesting failure or whether the nesting failure was due to chemical contamination or other factors. While providing information on pesticide use in five counties in California from the CDPR, the petition did not provide information beyond speculation regarding the effects of these chemicals on the tricolored blackbird. Hamilton *et al.* (1995, p. 38) stated that limited evidence shows that chemical use in agricultural areas causes some direct mortality, but the toxins do not seem to be creating a serious problem for tricolored blackbirds. Hamilton *et al.* (1995, p. 38) go on to state that there is no evidence to show that mortality caused by

agricultural chemical contamination has depressed tricolored blackbird numbers below a carrying capacity in any year. Hamilton (2000, p. 20) stated that there was no documented evidence, since the work of Beedy and Hayworth (1992), that toxic contaminants have adversely affected the tricolored blackbird, and those instances provided by the petitioners as documentation of nest failure due to chemical toxicity were not substantiated.

Summary of Factor E

To summarize factor E, we agree that high selenium concentrations have been documented in some of the dead nestlings at Kesterson Reservoir. However, whether the selenium toxicosis was the cause of death of these tricolored blackbird nestlings or cause for the complete nesting failure observed in 1986, or from other factors, is still unknown. No information was provided suggesting that there are ongoing dieoffs such as occurred in 1986. In addition, neither the petition nor other available information provides anything more than speculation on the types and magnitudes of effects these chemicals may have on the tricolored blackbird. Due to this lack of information, we are unable to determine that use of toxic chemicals within the range of the species has led to reduction in the population size of the species, or that a reduction in the population of this species is likely to occur in the future. Therefore, we find the petition does not contain substantial scientific or commercial information that other natural or manmade factors may be a factor threatening the continued existence of the tricolored blackbird.

Finding

We evaluated each of the five listing factors individually, and because the threats to the tricolored blackbird are not mutually exclusive, we also evaluated the collective effect of these threats. The petition focused on all five listing factors. We have reviewed the petition and supporting literature, as well as other information in our files on the tricolored blackbird. After our review we find that the petition did not present substantial information that indicates rangewide declines, a substantial reduction in population numbers, or substantiated threats to existing populations that rise to the level that would indicate the listing of the tricolored blackbird is warranted or likely to become so in the foreseeable future. Threats to the tricolored blackbird, as described by the petition, included loss of native habitats, agricultural activities causing nest

destruction and direct mortality of birds, destruction of other suitable breeding substrates and surrounding habitats, overutilization of the species, predation, lack of existing regulatory mechanisms, and chemical contamination.

While these threats may affect local populations of tricolored blackbirds, the information provided in the petition was speculative in nature. The petition did not provide specific information to document the degree that the species has been affected by these threats, or that these threats have led to a significant decline in the range or distribution of the species or are likely to do so in the future.

Surveys conducted for the tricolored blackbird that we are aware of and that were discussed in the petitioner's information did not use a consistent level of effort in surveying and the petitioners did not base their conclusion on the most current population information available. Therefore, population and distribution trends have varied throughout survey years due to survey methods in addition to the likely natural population fluctuations. At present the most recent studies indicate that, since 2000, the rangewide population of tricolored blackbirds has increased regardless of any potential habitat loss, predation, or chemical contamination.

We have reviewed the petition and supporting information provided with the petition and evaluated that information in relation to other pertinent literature and information available to us at the time of the petition review. Based on this review and evaluation, we find that the petition and other available information does not present substantial information demonstrating that listing the tricolored blackbird as threatened or endangered may be warranted at this time. We encourage interested parties to continue to gather data that will assist with the conservation of the tricolored blackbird.

References Cited

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

Author

The primary authors of this notice are staff of Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Sacramento, CA 95825.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 28, 2006.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E6-20547 Filed 12-4-06; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 061124308-6308-01; I.D. 101906C]

RIN 0648-AV02

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Atlantic; Commercial King Mackerel Fishery of the Atlantic; Consideration of a Control Date

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: This notice announces that the South Atlantic Fishery Management Council (SAFMC) is considering additional management measures to further limit the number of participants or levels of participation in the commercial fishery for Atlantic group king mackerel in the exclusive economic zone (EEZ) of the South Atlantic and Mid-Atlantic region. If such management measures are implemented, the SAFMC is considering June 15, 2004, as a possible control date where anyone who entered the fishery after that date would not be assured of future access.

DATES: Comments must be received by January 4, 2007.

ADDRESSES: You may submit comments by any of the following methods:

- E-mail: 0648-AV02.ANPR@noaa.gov. Include in the subject line of the e-mail comment the following document identifier: "0648-AV02".
- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.