Management and Budget under 44 U.S.C. 3501 et seq.

List of Subjects in 43 CFR Part 8560

Grazing land, Livestock, National Wilderness Preservation System, Oil and gas exploration, Penalties, Public lands-mineral resources, Public lands-recreation, Recreation.

Under the authority of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701) and the Wilderness Act of 1964 (16 U.S.C. 1131), Group 8500, Subchaper H, Chapter II, Title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: April 11, 1986.

J. Steven Griles,

Assistant Secretary of the Interior.

GROUP 8500—WILDERNESS MANAGEMENT

PART 8560—WILDERNESS AREAS

1. The authority citation for Part 8560 continues to read as follows:

Authority: 43 U.S.C. 1701 et seq., 16 U.S.C. 1131 et seq.

2. Section 8560.4–6 is amended by adding paragraph (j) to read as follows:

§ 8560.4–6 Mining law administration.

* * * * *

(j) Where there exists no current approved mineral examination report concluding that unpatented mining claims are valid, prior to approving plans of operations or allowing previously approved operations to continue on unpatented mining claims after the date on which the lands were withdrawn from appropriation under the mining laws, the authorized officer shall cause a mineral examination of the unpatented mining claim to be conducted by a Bureau of Land Management mineral examiner to determine whether or not the claim was valid prior to the withdrawal and remains valid. If the approved mineral examination report concludes that the claim lacks a discovery of a valuable mineral deposit, or is invalid for any other reason, the authorized officer shall either deny the plan of operation or, in the case of an existing approved operation, issue a notice ordering the cessation of operations and shall promptly initiate contest proceedings to determine the status of the claim conclusively. However, neither the adverse conclusions of an approved mineral examination report nor the pendency of contest proceedings shall constitute grounds to disallow a plan of operations to the extent the plan proposes operations that will cause only insignificant surface disturbance and are for the purpose of: (1) Taking samples or gathering other evidence of claim validity to confirm and corroborate mineral exposures which are physically disclosed and existing on the claim prior to the withdrawal date, or (2) performing the minimum necessary annual assessment work as required by subsection 3851.1 of this title. Surface disturbance exceeding the insignificant level is permissible only when it is the minimum disturbance necessary to remove mineral samples to confirm and corroborate preexisting exposures of a valuable mineral deposit discovered prior to the withdrawal. The requirement in this subsection for a mineral examination shall not cause a suspension of the time limitations governing approval of operating plans contained in subsection 3809.1–6 of this title. Once a final administrative decision is rendered declaring a claim to be null and void, all operations, except required reclamation work, shall be disallowed and shall cease unless and until such decision is reversed in a judicial review action.

[FR Doc. 86–9446 Filed 4–28–86; 8:45 am]
BILLING CODE 4310–84–M

LEGAL SERVICES CORPORATION

45 CFR Part 1625

Procedures Governing Denial of Refunding

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Corporation's regulations governing denial of an application for the refunding of a grant. Some of these revisions are required to comply with the provisions of the Corporation's appropriations acts for 1984, 1985, and 1986 (Pub. L. 98–166, 98–411, and 99–180). Other revisions are designed to improve the procedures and to ensure that they comply fully with the provisions of the Legal Services Corporation Act, as amended (42 U.S.C. 2996 et seq.) (the Act) and the cited appropriations acts, all of which require procedures which provide for a "timely, full, and fair" hearing. This rule (1) specifies new and more detailed procedures for denial of refunding, (2) establishes new and generally shorter time limits within which procedural steps in denying refunding must be taken, and (3) changes the burden of proof in denial of refunding proceedings. The regulations, as revised, are fully consistent with the requirements of both the Act and the appropriations acts.

EFFECTIVE DATE: This regulation is effective May 29, 1986.

FOR FURTHER INFORMATION CONTACT: John H. Bayly, Jr. General Counsel (202) 863–1820.

SUPPLEMENTARY INFORMATION:

Background

The Corporation has discovered that amendments to this part which were published as a final rule in the **Federal Register** of July 29, 1985 (50 FR 30714) were not properly adopted. Since this rulemaking proceeding covers the same areas, the amendments made in the July 29, 1985 publication are revoked through this final rule.

Pub. L. 98–166, which appropriated the Corporation's funding for the fiscal year ending on September 30, 1984, provided for revision of the Corporation's procedures under section 1011(2) of the Act. This requirement has been continued in appropriations acts for subsequent years. The appropriations acts provide that the proceedings must be in the form of a hearing to show cause, that the recipient has the burden of proof, and that all denial of refunding proceedings must be completed within 90 days, of which 30 days are allowed for the recipient to request a hearing, 30 days for completion of the hearing, and 30 days for rendering of the final decision.

Changes, including several deadline changes, have been necessitated by the acts. These changes are concentrated ir §§ 1625.4, 1625.5, 1625.6, 1625.7, 1625.8, 1625.9, 1625.10, 1625.11, and 1625.12. Additional changes have been made to conform other sections to these revisions and to simplify, expedite, and ensure the fairness of the proceeding. The entire part, as revised, is republished for clarity and ease of use.

Notice of Proposed Rulemaking

Proposed new procedures were published in the **Federal Register** on February 7, 1986 (51 FR 4882) and opportunity for comment provided until March 10, 1986. Sixty-two timely comments were received. Several late comments were also received. In addition, oral comments were received directly by the Operations and Regulations Committee of the Board of Directors (Board) at its meeting in Tampa, Fla., February 20, 1986, and again in Jackson, Miss., March 12, 1986. All timely comments were considered in the development of the final rule. Late comments were also reviewed and no new or unforseen issues were raised.

Numerous changes, substantive and technical, were made as a result of our consideration of the comments.

Comments

The most comprehensive comments were made by Alan W. Houseman of the Center for Law and Social Policy, for the Project Advisory Group (PAG). Mr. Houseman made his comments in a series of proposed changes and analyses and in oral comments before the Corporation and the Board. Some forty grant recipients made individual comments. Some specifically endorsed the PAG comments. Generally, however, they repeated one or more of the PAG comments and suggestions. A number of bar groups commented. Generally, they also identified one or more of the points made by the comprehensive PAG comment. Four of the comments, one of which was a grant recipient, favored the proposal.

The issues which drew the most interest were:

1. The placing of the burden of going forward and the burden of ultimate persuasion on the recipient (§ 1625.9) (48 comments);

2. The use of written testimony exclusively to put on the direct case and the use of the hearing for cross-examination and rebuttal testimony only (§ 1625.8(d)) (20 comments);

3. Application of the attorney-client privilege (§ 1625.8(f)) redesignated (e) (50 comments);

4. The criteria to be used in applying the standards set out in §§ 1625.3 and 1625.9, particularly §§ 1625.3(d) and 1625.9(d) in connection with the selection of another organization to serve the clients (28 comments); and

5. The potential for conflict in personally involving the President of the Corporation prior to final decision and for ex parte contacts with the hearing examiner (§ 1625.4(f)) (21 comments);

General Issues

Several comments suggested that many of the requirements were not necessary to comply with the appropriations acts and that these requirements should be dropped. We believe that the provisions are necessary to comply with the Act, which requires hearings under these proceedings to be "timely, full, and fair" (section 1011(2); 42 U.S.C. 2996j) and the appropriations acts which, more specifically, require the proceedings to be completed within no more than 90 days (divided into three periods of no more than 30 days each). Since several previous denial of refunding proceedings have lasted an unresonably long time, during which provision of legal services to eligible clients was adversely affected, it is reasonable for us to interpret "timely" in the Act to be consistent with the Congressional determination that the preceedings should be completed in no more than 90 days. Clients should not be left for more than one-fourth of a year with a legal services provider whose future is uncertain because of serious doubts as to its ability to provide quality legal services in an effective manner within the law. We believe that the procedures adopted by this part provide full and fair procedures for recipients, eligible clients, and taxpayers.

Many commenters were concerned about the propriety of having the Corporation President involved in a defunding proceeding prior to final decision, particularly under § 1625.4(f). They were also concerned about the fact that the hearing examiner would be selected before the recipient is notified (§ 1625.4(d)(1)), and that he could be asked *ex parte* to issue an order under § 1625.4(f). One of the remedies proposed was that the hearing examiner not be selected until after the recipient is notified under § 1625.4(d). It was also suggested that the hearing examiner be authorized to limit or quash a § 1625.4(f) requirement. In addition, it was noted, generally in connection with comments under § 1625.9, that the recipient should be able to challenge any law, regulation or guideline of the Corporation and that this is desirable to make the doctrine of exhaustion of administrative remedies applicable.

We respond to all four comments. The provisions giving a role to the President or to the hearing examiner, prior to the service of notice, have been revised to eliminate such a role for either. In addition, it is specifically provided that the hearing examiner may rule on a motion to limit or quash a requirement under § 1625.4(f), and challenges to any relevant law, regulation, or guideline may be made and briefed under § 1625.8(g)(2); this provision specifically implements the doctrine of exhaustion of administrative remedies by stating that an argument not timely made in the proceeding is waived unless recipient can show that it could not have made the argument prior to that time.

Concern was also raised that the Corporation could go back indefinitely in pursuing a matter and that there should be some time limit. One comment suggested 30 days from the date the Corporation has knowledge of the basis for its action. Another noted that its state statute of limitations on contract proceedings was 6 years. If an event occurs during a fiscal year, is questioned during a monitoring trip the following year, and the investigation completed and a proceeding initiated the year after that, this would not be an unlikely sequence of events and would take 3 years. There is also the possibility that there could be a deliberate covering up of an event so that it is not discovered for some time. Accordingly, under § 1625.3(b) we have provided for a six-year notice limitation for failure to comply with any rule, regulation, guideline, or instruction of the Corporation, or a term or condition of a current or former grant or contract. Some commentors were concerned that failure to comply at a time when a requirement was not in effect may be the basis for denial of refunding. We provide specifically that it will not.

A new paragraph (3) of § 1625.8(e) was considered initially by the Board at its Tampa, Fla., meeting, February 19–21, 1986. As part of the process of assuring openness and avoiding surprise, it provides that a recipient cannot use a witness or evidence in a proceeding where it failed to comply with its obligations (under, e.g., 42 U.S.C. 2996f(d), 2996g(b)) to provide the evidence or witness to the Corporation on request prior to the initiation of the proceeding, unless it is able to show good cause for its failure to comply at an earlier date. One comment suggested that the paragraph should be published for comment, citing cases. We found the cases supported the decision to adopt the provision. The key case cited was *Air Transport Association of America* v. *CAB*, 732 F.2d 219 (D.C. Cir. 1984). In that case, the Court ruled that the published proposal was sufficiently descriptive of the subject and issues involved that interested parties could offer informed criticism and comments. The critical elements of the proposal did not change and the final rule was a logical outgrowth of the proposed rule. Here, we add a provision designed to spur disclosure and avoid surprise. Given the need to combine adequacy of hearing and compliance with deadlines, such a proviso is very clearly a logical outgrowth of the proposed rule.

Sections 1625.3 and 1625.4

It was proposed that the Corporation's notice to a recipient in § 1625.4(a) be tied specifically to the four grounds for denial specified in § 1625.3. In effect, the substance of § 1625.3 would be repeated in § 1625.4(a). We do not believe the inclusion would improve clarity. Instead, we expanded § 1625.4(c) to spell out clearly that the Corporation must provide a detailed memorandum of points and authorities to apply the facts recited under § 1625.4(b) to the specific

grounds for denial under § 1625.3. It should be noted that the recipient's obligation under § 1625.5(d) to submit its memorandum of points and authorities, is not spelled out in identical language to that of the Corporation under § 1625.4(c). That does not mean that its obligations do not match those of the Corporation—they do. Any issue of fact or law not joined is considered admitted.

It was also suggested that, where another organization is identified in a statement under § 1625.4(a) as being better able to serve the clients, relevant information about that organization, its staff, officers and board, its experience, and the basis for our finding, should be included in the § 1625.4(a) statement. A prima facie case will include all needed information about the organization and its principal officials, as well as provide a factual basis for the allegation that it is better able to serve the clients. In addition, the language of §§ 1625.5(e) and 1625.7(d), dealing with the ability of the recipient to secure production of documents or witnesses of the Corporation, is revised to make clear that an organization identified under § 1625.4(a)(2) as being better able to serve the client community may be required to produce a document or employee, subject to the sanctions set forth in § 1625.8(e).

It was suggested that when we name the hearing examiner under § 1625.4(d), we provide a résumé and the information on which we made our determination under § 1625.6(a). We think it would be helpful to include a summary of the hearing examiner's professional qualifications, his or her current business address and phone number, and a statement that he or she supports the purposes of the Act.

It was suggested that the provisions of former § 1625.4(c) advising the recipient of its right to interim and termination funding under §§ 1625.15 and 1625.16 be preserved in a new § 1625.4(g). We think this is unnecessary since under § 1625.4(e) we send all of Part 1625 to the recipient with the show cause order.

Section 1625.5

Under § 1625.5(c), it was suggested that we strike the provision that the recipient may not rest on mere allegations or denials, but must recite specific facts to assure that a genuine issue of fact is involved. There is apparent concern that there may be situations where a recipient can only deny. For example, comments suggested that if the Corporation alleged that a recipient engaged in lobbying by mailing a specific letter and in fact the recipient had not mailed the letter, it could only deny the allegation. We shortened the language of the provision, eliminating the reference to mere allegations and denials, but retained the requirement that the recipient must provide sworn evidence of specific facts showing there is a genuine issue of material fact at issue. We think the official responsible for the denial must sign an affidavit on personal knowledge that he has checked records and done what is possible to find evidence in order to put a material fact in issue and to avoid issuance of an adverse summary judgment.

It was suggested that a recipient should be able to request the hearing examiner to add parties under § 1625.5(e). We do not agree. Where an organization is alleged to be better able to serve eligible clients, it should be identified pursuant to § 1625.4(a)(2) (as we noted above), and adverse inferences should be available if it refuses to make its documents or employees available for the hearing (§§ 1625.5(e), 1625.7(d) and 1625.8(e)(1)). But, we see no reason why it should be a party. With respect to other persons, we fail to see how they could be involved as parties, although many could be witnesses, and we do not think that witness availability may be solved in this fashion. Certainly, denial of refunding will have indirect impact on other persons (the recipient's clients, employees, landlord, suppliers, contractors, and grantees may all incur at least some costs of adjustment to a possible denial of refunding; either the particular organization that is alleged to be better for the clients or some other or new recipient chosen after appropriate competition may gain by receiving the grant funds that the original provider would have received if it had been refunded). None of these persons must be present as a party for resolution of the only question at issue during a proceeding under this part: If the Corporation has presented a prima facie case for denial of refunding, can the existing recipient show cause why refunding should be granted? Accordingly, we have clarified language in § 1625.7(d)(3) regarding the obligation of an organization identified under § 1625.3(d) to produce documents and employees; and we have added a new § 1625.7(c)(5) limiting the proceeding to the Corporation and the recipient, except that a state support center which is a subgrantee or a subrecipient when this regulation becomes effective, may be included as a party, but only during the term of the subgrant that is in force at the time the regulation becomes effective. This will provide adequate time for state support centers now funded through recipients to seek to become direct recipients if they so desire.

It was also suggested under § 1625.5(e) that the recipient should be able to require the Corporation or another party to produce a board member or another person, other than a current employee, as a witness. Congress, however, has given the Corporation no power to subpoena third parties, including board members. We believe that both parties should bear the consequences under § 1625.8(e) if their current employees are unavailable without good cause, but that no adverse inferences may be made from a party's failure to do what it has no power to do. Certainly, either party may be sanctioned for its efforts to persuade witnesses to refuse to cooperate with the other party or for failure to produce information in its possession, custody, or control which may assist the other party to locate favorable witnesses or evidence.

Section 1625.6

It was also suggested that the period of time to object to the hearing examiner under § 1625.6(b), be extended from 5 to 20 days. It is claimed that the recipient needs the time to make the objection, yet no actual problems are cited as having resulted from the existing provision. The proposal would leave only seventeen (17) days to dispose of the objection, choose another examiner, if necessary, and allow the new examiner to prepare for the prehearing conference. Meanwhile, there would not be a hearing examiner available to rule on the recipient's request to limit or quash the Corporation's requirement for production of documents or witnesses (§ 1625.4(f) or to dismiss the proceeding (§ 1625.7(a)(1)) before the recipient has to make a detailed response. We believe that a more practical approach would be to give the recipient an additional five (5) days (for a total of 10) upon written request, provided it gives the basis of its objection and explains why, despite due diligence, it is unable to make its objection without the extension. This will give the recipient time to ascertain if there is a problem and then to prepare an adequate objection; at the same time, the Corporation will be on notice at an early date that it may need to locate another hearing examiner.

Section 1625.7

It was suggested that the examiner be authorized under § 1625.7(a)(2) to extend the original 30-day period within which the recipient must request a hearing to protest a denial of refunding, or be deemed to have waived its right to it.

Since Congress has indicated that this is an adequate amount of time, we do not think it necessary to make such a change. There may be circumstances where the record shows that a recipient did try to request a hearing and, through extraordinary circumstances, such as an act of God, was unable to do so until a day or two after the 30th day, although extraordinary efforts were made to overcome the adverse circumstances, inform the Corporation of its desire for a hearing, and comply as much as possible with the requirements of § 1625.5. Under such unusual circumstances, constructive notice and service could be found a day or two late, where the record shows good faith, absence of intent to delay, and the Corporation is not prejudiced. No change is needed to permit this.

It is suggested that summary judgment under § 1625.7(a)(3) be limited to the grounds specified in § 1625.3 (a) and (b). Several comments took the view that the grounds specified in paragraphs (c) and (d) of the section were too complex to be the subject of a summary judgment proceeding. We disagree. The summary judgment language is taken from F.R. Civ. P. 56 and is generally applicable to all litigation, although in practice some kinds of claims may only rarely be subject to actual imposition of summary judgment. "[I]t cannot be stated too strongly that no type of action or issue is immune from a summary adjudication and that there will be instances when the rendition of a summary judgment is clearly called for, although the particular action or issue is one which does not lend itself to a summary adjudication as a general proposition." (6 Moore's Federal Practice ¶ 56.17[1]). The suggestion is rejected.

It is suggested that we change the proviso at the end of § 1625.7(d)(2), limiting the opportunity to make a delayed request that the opponent produce a document or a witness. Such a delay request is permitted only in situations which could not be anticipated and where failure to permit it would result in a manifest injustice. It is suggested that we strike the manifest injustice standard and that we permit delayed requests where the situation could not be anticipated, or the request is in response to new witnesses, testimony, or documents. We cannot accept the proposal. The whole purpose of the obligations spelled out in §§ 1625.4 and 1625.5 is to avoid surprise. It must be remembered that recipients will not be forced to wait until the witnesses testify to react to the Corporation's case. They will have it six weeks in advance of the hearing. They will have it a month before they must answer.

Sections 1625.7 and 1625.8

It is suggested in §§ 1625.7 and 1625.8 that direct testimony be permitted because it may be necessary or desirable later. We have revised §§ 1625.7 (b) and (c) and § 1625.8(d) to allow either party to choose to present direct testimony from its witnesses. The testimony will be limited to the scope of the witness' affidavit and the party will, of course, be required to make these direct witnesses available at that time for a complete cross-examination on both the written and oral testimony. The time used by a party for its witnesses will include the other party's cross-examination of them and will reduce the amount of time available to call the affiant of the other party or make other use of the time allotted for its use during the hearing. Therefore, neither party is likely to make excessive use of the opportunity to present direct testimony.

Each party will be required pursuant to § 1625.7(c)(6) to arrange for the testimony of the witnesses it will rely on and bear the associated expenses. This includes witnesses associated with the other party, except that each party must produce its own affiants for cross-examination. In addition, the hearing examiner may require either party to produce a document or a witness and to bear the expense thereof. He has 7 days to rule on motions regarding requests for documents or witnesses.

Section 1625.8

It was suggested that we strike the provision in § 1625.8(b) (now (a)) that the hearing will normally be held in or near a city with a commercial airport and a U.S. District Court. The concern is that a program could be burdened if a location were chosen that is substantially more inconvenient for the recipient than another location where both locations have an airport and a federal court. Another concern was that a location with an airport and a federal court would be less convenient than the recipient's headquarters. Choice of venue must balance the convenience of witnesses, counsel for both parties, and the hearing examiner. The Corporation would probably prefer Washington, D.C., and the recipients' lawyers would probably prefer their own community. We have revised the proposed provision to eliminate the requirement that the hearing be held at a city with a federal court and to clarify that the hearing will be held at a place in or near a city with a commercial airport that is convenient to the Corporation, the recipient, the community served, and the witnesses.

It is suggested that § 1625.8(f) (renumbered (e)) be revised to provide that if the Corporation fails to produce a witness or document from an organization determined under § 1625.3(d) to be better able to serve the client community, or if it fails to produce one or more members of a monitoring team where it relies on the team report and produces only those team members it needs, the proceeding should be dismissed. We provide in § 1625.8(f) that technical rules of evidence do not apply. While we have not changed this section and no one has commented directly on it, we think it requires discussion here in connection with this proposal and the availability of monitoring reports and monitors. Administrative proceedings subject to the Administrative Procedure Act (APA) often contain hearsay in the documents submitted. This is generally not considered harmful, however, as the hearing examiner is considered competent to give appropriate weight to, or disregard, such evidence. Thus, the Attorney General's Manual on the APA at p. 76, quotes from the Committee Reports on the APA as follows:

> "[T]he mere admission of evidence is not to be taken as prejudicial error (there being no jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice" H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208).

It is also stated in the Manual that agency action must be supported by "reliable, probative, and substantial evidence" and that "[T]hese are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand". H.R. Rep. p. 36, Sen. Rep. p. 22 (Sen. Doc. pp. 270, 208). In our situation, where a monitoring report contains input from 5 monitors, only 3 of whom are called by the Corporation, it could have some heresay, and it would be the examiner's responsibility to give such heresay the weight it deserves, or no weight at all, as appropriate.

With respect to access to witnesses, § 1625.8(e) (as renumbered) gives the examiner the power to draw the adverse inference which is in proportion to the loss. We do not see how adverse inferences can be drawn where a party does not use someone as a witness. Presumably, it does not need that person for its case. Similarly, where there are no subpoena powers, and a party asks that the opponent produce a person not under its control, such as a board member, former employee, or former

consultant, it cannot be assumed that that person is under the control of the opponent. Consequently, no adverse inferences can be drawn.

The dismissal proposal is far to broad and is rejected. For clarification, however, we added specific language, in new paragraph (4) of § 1625.8(e), that no adverse inference can be drawn for failure to produce a document or witness not under the actual control of the party, (or, in the case of the Corporation, an organization identified under § 1625.4(a)(2)). In addition, we provide in § 1625.8(k) that the APA and the Federal Rules of Civil Procedure are to be used as guides where relevant. While the APA does not, per se, apply to the Legal Services Corporation, because we are not an agency of the Federal Government (42 U.S.C. 2996d(e)(1)), we must have suitable guidelines and, since we are a creature of Federal law and are federally funded, we believe that the APA and the Federal Rules of Civil Procedure are the appropriate guides to the extent that they are relevant. Their use for such guidance should eliminate many of the concerns of commenters concerning various details of the procedures, fill in any missing details in the procedures, and provide reliable precedents for the interpretation of the many provisions in this part which have been adapted from these sources.

It is suggested that we strike the provisions in § 1625.8(f) (now (e)) permitting the examiner to review the exercise of the attorney-client privilege. A full and fair hearing before an independent hearing examiner implies that the hearing examiner—like a judge or an administrative law judge—will have the power to rule on questions of privilege and to issue appropriate protective orders. The statutory provision that prohibits the Corporation from having access to reports or records subject to the attorney-client privilege (section 1009(d) of the Act, 42 U.S.C. 2996b(d)) does not apply to the hearing examiner since the statute also requires that the hearing examiner be independent of the Corporation (section 1011(2), 42 U.S.C. 2996j(2)). There have been instances during monitoring where the privilege has been invoked under circumstances where it seemed frivolous, a sham, or an excuse. Yet, we are expected to monitor "to insure that the provisions of [the Act] and the bylaws of the Corporation and applicable rules, regulations, and guidelines promulgated pursuant to [the Act] are carried out" (42 U.S.C. 2996f(d)). Obviously, there must be an adequate balancing of interests to achieve legislative purposes, assure fiduciary accountability,and protect taxpayer dollars.

The Corporation is not in an adversary relationship with the recipients' clients. We seek nothing from or about individual persons represented by the recipients. We do not want to know their secrets or confidences. We do not see how they can be harmed by provisions that prevent recipients' attorneys from attempting to use the privilege as a shield to make selective presentations under the guise of full disclosure. The privilege, of course, is intended for the protection of the client, not for the attorney.

We provide that the hearing examiner may look at the document with the privileged matter expunged and, if he thinks exercise of the privilege is in bad faith or in error, he can ask to see the document for *in camera* inspection, and may issue such finding or order as the facts may warrant, but he may not disclose any of this privileged information to the President. In addition, authority is given the examiner to issue such protective orders as necessary to protect client confidences and to prohibit unjusitifed dissemination of evidence (§ 1625.7(c)(3)).

Several commenters were particularly concerned about the provision permitting the hearing examiner to require a good faith effort by the attorney to get the client to waive the privilege. Several referred to the American Bar Association Ethics Committee Informal Opinion No. 1287 (June 7, 1974) (apparently inadvertently cited as No. 1267).

The Corporation considered clarifying language to incorporate the language of Informal Opinion No. 1287 because we think our purpose was misunderstood. Some recipients, for example, have refused access by Corporation auditors to the accounting records regarding the client trust accounts on the ground their records contain client names. It is plausible that many clients would be happy to sign a waiver limited to that necessary for the Corporation to ascertain, *inter alia*, if all funds to which they may be entitled have been paid promptly to them and that all the funds have been accounted for properly. A recipients' assertion of the privilege in such circumstances and refusal to offer the client the opportunity to waive—fully consistent with relevant ABA opinions—would appear highly questionable. However, because of the importance and sensitivity of the privilege and to avoid any possible semblance that clients of recipients are entitled to any less confidentiality and dignity than any other clients, we deleted all reference to efforts to obtain a waiver.

Sections 1625.8 and 1625.9

It is suggested that § 1625.8 and § 1625.9 be revised to provide that the Corporation will proceed first. We think that the Corporation should put on its entire case, in writing, with its show cause order. If it cannot do that, it should not initiate the proceeding. If it fails to make a prima facie case, the recipient should not have to make a detailed response. A specific provision has been added to permit the recipient to challenge a prima facie case (§ 1625.7(a)(1)) and if it makes timely request and prevails it can avoid having to make a response under § 1625.5. The recipient's response will reduce the disagreement to specific issues of fact, or argument as to whether the facts constitute a lawful basis for denial of refunding. The rule clearly specifies that, after the recipient has applied for refunding, the initial burden of going forward is placed on the Corporation, and only if the Corporation makes a prima facie case in its initial affidavits and other submissions does the burden shift to the recipient to show cause why it should receive refunding. Then, the Corporation has an opportunity to rebut and the recipient has the opportunity for sur-rebuttal. Accordingly, § 1625.9 is revised to omit the reference to the burden of going forward.

Section 1625.9

It is suggested that under § 1625.9 the Corporation shall have the burden of going forward to establish a prima facie case by a preponderance of admissible evidence. Perhaps no other provision of the regulations, with the possible exception of the comments on attorney-client privilege, drew more comments. Most argued that a show cause proceeding does not shift the burden of proof, while ignoring the statements of Senators Hatch and Rudman (Cong. Rec. Oct. 21, 1983, P. S14446) that Congress intended to shift the burden of proof to the recipient. The only House exchange, between Congressmen Morrison and Smith, is fully consistent with this interpretation (Cong. Rec. Nov. 9, 1983, P. H9562). We recognize that there are state court decisions which state that a show cause proceeding does not always shift the burden of proof (i.e., persuasion), although it may shift the burden of going forward where a prima facie case is made at the time of issuance of the show cause order. We must recognize here, however, that it was the Congressional intent that the burden be shifted, even though many

commenters may have disagreed with the method used. In light of the legislative record, the suggestion must be rejected. As noted above, however, the reference to the burden of going forward is deleted.

A great many comments also addressed the way we explained the recipient's burden of proof under each of the four standards set out in § 1625.9. The descriptive language used in § 1625.9 is the reverse of that used in § 1625.3. For example, where § 1625.3(b) provides that there can be a denial of refunding where there has been "significant *failure* (emphasis supplied) by a recipient to comply" with the cited sections of the Act and the regulations, § 1625.9(b) provides that the recipient must show "by a preponderance of admissible evidence . . . that it has *complied*" (emphasis supplied) with those cited sections of the Act and the regulations. The comments suggested that the Corporation's burden as well as that of the recipient should be spelled out under each ground. We do not think it is necessary to do this.

The new § 1625.9(c) standard is different from the standard in old § 1625.3(c). We have conformed § 1625.3(c) to that of § 1625.9(c) to insure that the standards under both sections as revised are fully consistent. The conforming change is as follows: Under old (c), except in "unusual circumstances", a recipient which had had a significant failure to provide adequate service had to receive notice and opportunity to take corrective action before formal proceedings could be commenced. Under the new standard, the recipient cannot claim that it was not notified and given an opportunity to take corrective action unless it could not reasonably be expected to have prevented or corrected its failure without such notice and opportunity to correct. We think this a considerable improvement in the regulations. The old requirement could be used repeatedly by a neglectful or incompetent recipient to buy time and avoid a formal proceeding. In effect, the Corporation would be responsible for continuous current awareness of all recipients' compliance with this requirement at all times—an impossible obligation. Under the new standard, a recipient will be able to claim it should have been given notice and opportunity to take corrective action only where without such notice it could not reasonably have been expected to have prevented or corrected the failure. Thus, recipients are expected to maintain adequate self-appraisal procedures and standards and to take necessary corrective action on their own, and cannot wait until the Corporation makes a monitoring trip or receives a complaint, knowing they will have an opportunity to correct before a formal action can be taken. Clients deserve better than that.

Section 1625.11

It is recommended that, on review by the President under § 1625.11, the examiner's decision shall be modified or reversed only if there was abuse of discretion or clear error of law. We do not think the President can limit his review in this fashion. This is the standard for court review of a final agency action and the examiner's action is not final. On review of an initial decision of an administrative law judge, an agency subject to the Administrative Procedure Act generally has all the powers it would have had in making the initial decision. *See* 5 U.S.C. 557(b). The analogy is persuasive and the suggestion is rejected.

Other Matters

1. One comment complained about the rewording of the statement of purpose. We believe we reflect Congressional intent in the Act and the appropriations riders as accurately as practicable. We have not changed it.

2. Several comments reargued the changes made in 1983 when denial of refunding procedures (Part 1625) were split from termination actions (Part 1606). Those suggested changes were discussed and considered in full at that time. We think it is unnecessary to reargue them. Accordingly, we will not discuss suggestions concerning the 1983 changes any further. However, we did accept the suggestions that challenges to Corporation rules may be made in proceedings under this part, but required that the challenges be made no later than the request for a hearing or that they be waived.

3. Various changes were made to conform sections and to provide a consistent and coherent set of procedures. These changes include the following:

a. The title "presiding officer" was changed to "hearing examiner" throughout to reflect the language of the Act and appropriations riders.

b. The earliest date on which the Corporation can require a recipient's employee to testify under § 1625.4(f) will be after the date on which the recipient requests a hearing under § 1625.4(d).

c. Depositions, if available, and relevant papers and parts of papers, must accompany affidavits under § 1625.4(b) and § 1625.5(c).

d. Each party will give a list of all its witnesses, including its own and opponents' affiants and all others who are to testify, to one another and to the hearing examiner, 24 hours before the prehearing conference under § 1625.7(b). They will indicate whether they want the witness for cross-examination or direct testimony, and, if they expect the opponent to produce the witness, they will explain the basis for this expectation.

e. Under § 1625.7(c)(4), the hearing examiner may not go into matters not necessary for his or her decision. For example, it would be improper to allow explanation of the Corporation's exercise of investigative or prosecutorial discretion in bringing the action against the particular recipient rather than whether the facts found justify refunding under applicable legal standards.

f. Section 1625.10(b) has been revised to more comprehensively spell out what the initial decision will contain. It will be a part of the record, and will have a statement of findings and conclusions, and the reasons or basis for them, on all material issues of fact, law or discretion presented. The last sentence of old paragraph (b) is made into a new paragraph (c).

g. Section 1625.11 has been revised to reduce from 10 to 7 days, the time within which

(1) The Corporation or the recipient can ask for review of the hearing examiner's decision,

(2) an initial decision becomes final, and

(3) The President must make his decision.

h. Section 1625.12 has been revised to conform the provisions dealing with time to the new statutory requirements. Thus, any extensions of time must not prevent completion of the hearing within 60 days of the receipt by the recipient of the notice under § 1625.4, or prevent the President from reaching a final decision (including time to consider a request for review) within 90 days of the notice, unless extraordinary circumstances require an extension to prevent a manifest injustice.

The time computation language of paragraph (a) of the section is taken from Rule 6 of the Federal Rules of Civil Procedure. By mutual agreement any time period may be shortened. In addition, former paragraph (a) of § 1625.15 has been transferred to the section as new paragraph (d). We believe it is more appropriate here since it relates to time requirements. Paragraph (e) of the section permits waiver or modification of any provision except paragraph (b) of section 12 which deals with enlargement of time.

List of Subjects in 45 CFR Part 1625

Administrative practice and procedure, Legal Services,

For the reasons set out above, 45 CFR Part 1625 is revised to read as follows:

PART 1625—DENIAL OF REFUNDING

Sec.

Authority: Sec. 1006(b)(1) and (3), 1007(a)(1), (3) and (9), 1007(d) and (e), 1008(e), and 1011(2) of the Legal Services Corporation Act, as amended, (42 U.S.C. 2996e(b)(1) and (3), 2996f (a)(1), (3) and (9), 2996f(d) and (e), 2996g(e) and 2996(j); Pub. L. 98–166, 97 Stat. 1071; Pub. L. 98–411, 98 Stat. 1545; Pub. L. 99–180, 99 Stat. 1136.

§ 1625.1 Purpose.

This part is intended to provide timely, full, fair, and impartial procedures for allowing a recipient to show cause why its funding should be continued when the Corporation has made a preliminary determination that an application for refunding of a grant or contract should be denied. This part is further intended to provide for completion of these procedures in a timely manner so that funding issues are expeditiously resolved so as to avoid unnecessary and protracted disruption in the delivery of legal services to eligible clients.

§ 1625.2 Definitions.

"Denial of refunding" means a decision that, after the expiration of a grant or contract, a recipient:

(a) Will not be provided financial assistance; or

(b) Will have its annual level of financial support reduced to an extent that is not required either by a change of law, or a reduction in the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding, or by the uniform application of a statistical formula for the reallocation of funding among the members of the same class, and is more than 10 percent below the recipient's annual level of financial assistance under its current grant or contract.

§ 1625.3 Grounds for denial of refunding.

Refunding may be denied when:

(a) Denial is required by, or will implement, a provision of law, a Corporation rule, regulation, guideline, or instruction that is generally applicable to all recipients of the same class, or a funding policy, standard, or criterion approved by the Board; or

(b) There has been significant failure by a recipient to comply with a provision of law, or a rule, regulation, guideline, or instruction issued by the Corporation, or a term or condition of a current or prior grant from or contract with the Corporation; provided, however, that a recipient's failure to comply with any of the requirements in this paragraph at a time when the requirement was not in effect or at a time more than 6 years prior to the date the recipient receives notice of the failure pursuant to § 1625.4 shall not be a basis for denial of refunding; or

(c) There has been significant failure by a recipient to use its resources to provide economical and effective legal assistance of highly quality as measured by generally accepted professional standards, the provisions of the act, or a rule, regulation, or guideline issued by the Corporation. If the recipient could not reasonably be expected to have prevented or corrected its failure without notice from the Corporation and an opportunity to have taken effective corrective action, refunding shall not be denied for this cause unless the Corporation has given the recipient such notice and opportunity; or

(d) The Corporation finds that another organization, whether a current recipient or not, could better serve eligible clients in the recipient's service area.

§ 1625.4 Notice.

When there is reason to believe that refunding should be denied, the Corporation shall serve a written notice upon the recipient, and the Chairperson of its governing board, which shall include:

(a)(1) A short and plain statement, in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a single set of circumstances, of the factual grounds for the denial of refunding;

(2) It the ground specified in § 1625.3(d) is asserted, the statement shall identify the other organization and specify the basis for the Corporation's assertion that it could better and more economically serve eligible clients;

(b) An affidavit or affidavits covering the direct testimony of each witness upon whom Corporation's counsel relies; such affidavit(s) shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein; sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be appended thereto; depositions, if available, shall be included;

(c) A memorandum of points of law and authorities showing with particularity:

(1) that the affidavit(s), paper(s), and deposition testimony specified in paragraph (b) of this section constitute evidence of such discrete factual allegations as were identified in paragraph (a)(1) of this section and as are sufficient under applicable law to support denial of refunding;

(2) the legal standards, rulings, statutes, regulations, or decisional law upon which the Corporation relies in advancing its theories or arguments in support of denial of refunding with particularized reference and adequate citation to competent authority; and

(3) as proximately as reasonably possible, the logical nexus and points of reference among (i) affidavit(s), paper(s), and deposition testimony specified in paragraph (b) of this section, (ii) the factual grounds as identified in enumerated paragraphs specified by paragraph (a)(1) of this section, and (iii) the legal theories or arguments advanced by the Corporation to justify denial of refunding.

(d) A directive to show cause, signed by an official of the Corporation other than the President, which shall inform the recipient that, if within 30 days of the recipient's receipt of this notice the Corporation receives a request for a hearing as specified in § 1625.5 of this part and accompanied or preceded by all documents specified by paragraph (f) of this section, a hearing will be held; the directive shall identify;

(1) The name, business address, telephone number, and brief summary of professional qualifications of the hearing examiner and a statement that the examiner supports the purposes of the Act;

(2) The name, address, and phone number of the Corporation's counsel;

(3) The time and place of the pre-hearing conference and the last date upon which it may be held, which date shall be no more than 37 days after the date of the notice; and

(4) The time and place of the hearing and the last date on which it can start, which date shall be no more than 44 days after the date of the notice;

(e) A copy of these procedures as contained in Part 1625.

(f) A requirement, signed by an official of the Corporation other than the President, may be included that the recipient produce a specific document or documents in its possession, custody, or control no later than the time the recipient requests a hearing or produce a person in its employ to testify in a pre-hearing deposition at a date (subsequent to the recipient's request for a hearing), place, and time to be specified in the requirement or to be available to testify at the show cause hearing; provided, however, that the recipient may serve a motion within 10 days of its receipt of the notice, for the hearing examiner to limit or quash the requirement; the hearing examiner shall rule on such motion within 7 days; if an objection to the hearing examiner, filed pursuant to § 1625.6(b) has delayed such ruling, the hearing examiner shall promptly rule when the objection is resolved.

§ 1625.5 Request for hearing.

Within 30 days of receipt of the notice, the recipient shall serve upon the Corporation a request for a hearing, which must include:

(a) A short and plain statement in numbered paragraphs, that is either an admission or a denial of each of the numbered paragraphs in the notice; any averment in the notice which is not specifically denied is deemed admitted;

(b) A short and plain statement, in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a single set of circumstances, of all factual grounds on which the recipient will rely to show cause why refunding should not be denied;

(c) An affidavit or affidavits covering the direct testimony of each witness upon whom recipient's counsel relies and appending all exhibits to such testimony; such affidavit(s) shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein; sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be appended thereto; depositions, if available, shall be included; the recipient, must set forth by affidavit, sworn or certified copies of papers, and depositions, specific facts showing that there is a genuine issue of material fact for a show cause hearing;

(d) A memorandum of points and authorities showing that the Corporation has failed to provide affidavits or other evidence sufficient to deny refunding or that the affidavit(s) specified in paragraph (c) of this section constitute evidence of facts necessary to show cause why refunding should not be denied under applicable legal standards.

(e) The recipient may serve a request on the hearing examiner that the Corporation be required, upon sufficient notice, to produce a specific document or documents in the possession, custody, or control of the Corporation or of another organization identified under § 1625.4(a)(2) or produce a person in its employ (or that of such other organization) to testify in a pre-hearing deposition at a date, place, and time to be specified in the requirement or to be available to testify at the show cause hearing.

§ 1625.6 Hearing examiner.

(a) The hearing examiner shall be appointed by the President, and shall be a person who is familiar with legal services and supportive of the purposes of the Act, who is independent, and who is not an employee of the Corporation.

(b) Within 5 days of receipt of notice of the name of the hearing examiner, the recipient may file a written notice that it objects to the hearing examiner on the basis that this person does not fit the criteria of paragraph (a) of this section or has made statements or taken actions indicating personal bias against the recipient. The recipient will be granted a 5-day extension for presenting the basis of its objection if it files a timely notice of objection and a statement as to why it is unable with due diligence to present the basis of its objection without the extension.

(c) The President shall consider the recipient's objection(s) with any supporting documentation and, within 10 days thereafter, issue a written notice of a decision either to retain or replace the hearing examiner.

(d) No objection to the appointment of a hearing examiner may be made unless presented in the manner specified in this section.

§ 1625.7 Pre-hearing procedures.

(a)(1) On or before the date it requests a hearing, the recipient may serve a motion for an interim decision that the notice fails to state an adequate basis for the denial of its application for refunding. The hearing examiner shall rule on such motion within 7 days and shall grant the motion if he or she finds that the facts sworn to in the notice do not provide an adequate basis to deny the application for refunding.

(2) If the recipient fails to make a request for hearing in such a timely fashion that it is received by the Corporation within 30 days of receipt of the notice by the recipient, the recipient shall be deemed to have waived its right to a hearing and a final decision shall be entered by the President.

(3) If the recipient makes timely request for a hearing, the hearing examiner may, *sua sponte* or on the motion of a party, review the notice, the request for a hearing, and all documents submitted by the recipient pursuant to requirement(s) issued pursuant to § 1625.4(f) to determine before the date set for the hearing whether there is any genuine issue as to any material fact and whether a party is entitled to summary judgment or partial summary judgment as a matter of law. If, considering the papers in the light most favorable to the opposing party, the hearing examiner finds that the parties' submissions, admissions on file, affidavits, and any other matter on the record show that there is no genuine issues as to any material fact and that either party is entitled to summary judgment as a matter of law, the hearing examiner shall issue to the President a written initial decision pursuant to § 1625.10(b). If such a decision with a partial summary judgment should become final pursuant to § 1625.11, the hearing examiner may exclude further evidence relevant only to an issue or issues resolved by such decision.

(b) If the recipient makes a timely request for a hearing, a pre-hearing conference shall be held within 7 days. At least 24 hours prior to the pre-hearing conference, each party shall cause to be delivered in person to the hearing examiner and counsel for the opposing party a list including all its affiants it intends to call for direct testimony, all the other party's affiants it will require the party to produce for cross-examination, and all other persons who are to testify on direct or cross-examination. For each person on its list, the party will indicate whether the person will be called for direct testimony or for cross-examination and whether the party will require the opposing party to produce the witness (and, if so, the basis). At the pre-hearing conference, the matters to be considered shall include:

(1) Whether summary judgment or partial summary judgment ought to be issued;

(2) Proposals to define and narrow the issues;

(3) Efforts to stipulate the facts, in whole or in part;

(4) The order of presentation of exhibits and witnesses, along with their number and identity;

(5) The possibility of presenting the case on written submission or oral argument;

(6) Any necessary variation in the date, time, and place of the hearing;

(7) The possibility of settlement; and

(8) Such other matters as may be appropriate.

(c) (1) The hearing examiner may establish specific procedures consistent with this part for conduct of the show cause hearing.

(2) The hearing examiner may require or permit written submission of additional statements discussing any matter described in paragraph (b) of this section as well as any other arguments and supporting material at any time prior to completion of the show cause hearing.

(3) The hearing examiner may issue appropriate protective orders to prohibit the parties from disseminating evidence to other than specifically named individuals or such other restrictions as may be necessary to protect client confidences.

(4) The hearing examiner may not consider any issue not necessary for a determination of whether the recipient's refunding application will be denied.

(5) The only two parties to the proceeding will be the Corporation and the recipient; provided, however, that a state support center which is a subgrantee or a subrecipient as of the time of the effective date of this regulation may be joined as a party by the hearing examiner but only during the remaining term of such existing subgrant or other agreement.

(6) The hearing examiner shall require each party to make arrangements for the testimony and cross-examination of the witnesses and affiants it will rely upon and bear the expenses associated with the testimony.

(d) (1) The hearing examiner may, at any time prior to the completion of the hearing, require either party, upon sufficient notice, to produce a relevant document in its possession, custody or control; the hearing examiner may require either party to produce a person in its employ to testify at the hearing.

(2) The hearing examiner shall not issue such requirements at the request of the Corporation's counsel if request is not made within seven days of the Corporation's receipt of the request for a hearing, or at the request of the recipient, if request is not made at or before the time it makes a request for a hearing, unless the requesting party can show that it could not have anticipated its need to request the requirement and failure to issue the requirement would cause a manifest injustice.

(3) In proceedings under § 1625.3(d) the hearing examiner may likewise require the Corporation to produce a document in the possession, custody or control of another organization identified pursuant to § 1625.4(a)(2) or a person in the employ of such other organization, subject to the sanctions set forth in § 1625.8(f).

(4) The hearing examiner shall rule on motions respecting requirements for the production of documents or witnesses within 7 days.

§ 1625.8 Conduct of the hearing.

(a) The show cause hearing shall be held within 7 days after the pre-hearing conference in or near a city having an airport with regularly scheduled airline service and convenient to the Corporation, to the recipient, the community it serves, and to witnesses determined by the hearing examiner to be necessary for the show cause hearing.

(b) The hearing examiner shall preside over the show cause hearing, avoid delay, maintain order, conduct a full and fair show cause hearing, and insure that an adequate record of the facts and issues is made.

(c) The show cause hearing shall be open to the public, unless, in the interests of justice or maintaining order, the hearing examiner shall determine otherwise.

(d) (1) Since each party will have presented the direct testimony of its witnesses by their affidavits, the show cause hearing will be limited, except as hereinafter provided, to cross-examination of the other party's affiants, examination of those employee(s) of the other party from whom the party was unable, despite due diligence, to obtain affidavit(s) or pre-hearing deposition(s), and rebuttal testimony (if allowed).

(2) The recipient will proceed first and will be allowed a total of up to 7 days to cross-examine the Corporation's affiant(s) or to present testimony from the Corporation's or the other organization's employee(s).

(3) The Corporation will then be allowed a total of up to 7 days to cross-examine the recipient's affiant(s), to present testimony from the recipient's employee(s), or to adduce rebuttal testimony.

(4) The recipient will then be allowed a total of up to one day of sur-rebuttal testimony.

(5) During the time allotted to a party, it may present its affiant(s) for direct testimony limited to the scope of the respective affidavits(s) and for cross-examination by the opposing party at that time.

(6) The hearing examiner will allow a total of up to one day divided evenly between the parties for closing arguments.

(e) (1) If either party fails, without good cause, to produce a person or document required to be produced under §§ 1625.4(f), 1625.5(e), or 1625.7(d), the hearing examiner may make a finding adverse to the party or any lesser determination.

(2) If a document is withheld on the basis of privilege, the hearing examiner may require the party to provide a version of the document that does not contain privileged information, explain the basis of the withholding, and, if it appears that the privilege is not asserted in good faith or is asserted in error, require production of the document for *in camera* inspection. After such inspection, the hearing examiner may issue such finding or order as the facts may warrant. The hearing examiner shall not disclose to the President of the Corporation information on which a claim of privilege or confidentiality is made.

(3) A recipient may neither introduce into the record nor rely upon any statement by a witness, any document, or other evidence if the Corporation, subsequent to the effective date of this regulation, had requested the recipient to arrange for that witness to cooperate in an interview or to produce the document or other evidence prior to issuance of the notice, unless the recipient is able to show good cause for its failure to comply with the request at an earlier date than it did.

(4) No adverse inference may be made if a party fails to produce a document which is not in the party's possession, custody, or control or that of another organization that is actually controlled by the party (or, for the Corporation, another organization identified under § 1625.4(a)(2)); no adverse inference may be made if a party fails to produce a witness that is not an employee of the party or of another organization that is actually controlled by the party or, for the Corporation, another organization identified under § 1625.4(a)(2).

(f) Technical rules of evidence shall not apply. The hearing examiner shall make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(g) (1) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(2) The validity of rules, regulations, guidelines and instructions duly published under § 1008(e) of the Act may be challenged only in a complete brief served no later than the request for a hearing; no argument which could have been included in such a brief, but was not, may be raised at a later time.

(h) The hearing will be recorded at Corporation expense. The Corporation will send one copy of the transcript to the recipient and the hearing examiner as soon as it is received.

(i) At the discretion of the hearing examiner, the recipient and the Corporation may be required or allowed to submit post-hearing briefs or proposed findings and conclusions. The recipient's brief shall be served within 5 days of the close of the hearing and the Corporation's 4 days thereafter. Either party should note any relevant transcript errors in an addendum to its post-hearing brief (or if no brief will be submitted, in a letter submitted within the time limit set for a brief; if the transcript or a part of the transcript is not received 4 or more days before the time set for its brief, errors must be noted within 4 days of receipt of the transcript or part of the transcript).

(j) The transcript and any post-hearing briefs or letters will become part of the record.

(k) The Federal Rules of Civil Procedure and the Administrative Procedure Act shall provide guidance for all actions under this part when relevant procedures or rules therein are not inconsistent with the provisions of this part or of relevant laws specifically applicable to such an action.

§ 1625.9 Burden of persuasion.

The recipient shall have the ultimate burden of persuasion by a preponderance of the evidence on the record that the application for refunding should not be denied. If the Corporation has asserted, as a ground for the denial of the application for refunding, the grounds specified in:

(a) Section 1625.3(a), the recipient must establish by a preponderance of the evidence on the record that it is not in a class of recipients affected by the law, the Corporation's rule, regulation, guideline, or instruction, or a funding policy, standard, or criterion approved by the Board or that the proposed action is not required by or will not implement such policy;

(b) Section 1625.3(b), the recipient must establish by a preponderance of the evidence on the record that:

(1) It has complied during the specified period of time in all respects with each specified provision of law, with each specified provision of the Corporation's rules, regulations, guidelines, and instructions, and with each specified term and condition of current or prior grants from, or contracts with, the Corporation as specified in the notice; or

(2) All of its violations are merely minor, technical or insignificant;

(c) Section 1625.3(c), the recipient must establish by a preponderance of the evidence on the record that:

(1) It has provided economical and effective legal assistance of high quality as measured by generally accepted professional standards, the provisions of the act, or a rule, regulation, or guideline issued by the Corporation; or

(2) The Corporation has not given the recipient prior notice of its failure and an opportunity to take effective corrective action and the recipient could not reasonably be expected to have prevented or corrected its failure without notice from the Corporation and an opportunity to have taken effective corrective action before it received the notice specified in § 1625.4 of this part;

(d) Section 1625.3(d), the recipient must establish by a preponderance of the evidence on the record that it could serve eligible clients in its service area better and more economically than the other organization specified in the notice.

§ 1625.10 Initial decision.

(a) Within 16 days of the completion of the hearing, the hearing examiner shall cause an initial decision to be served upon the parties:

(1) Granting refunding; or

(2) Granting refunding subject to any modification or condition that may appear necessary and appropriate on the basis of information disclosed at the hearing or adduced from the record; or

(3) Denying refunding.

(b) The initial decision shall be a part of the record and shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.

(c) Findings of fact shall be based solely on evidence disclosed at the hearing or adduced from the record or on matters of which official notice is taken.

§ 1625.11 Final decision.

(a) If neither the Corporation's counsel nor the recipient requests review by the President, the initial decision shall become final 7 days after receipt by the recipient.

(b) The recipient or the Corporation's counsel may seek review by the President of the initial decision. A request shall be made in writing to the President and the other party shall be served within 7 days of receipt by the party of the initial decision, and shall state in detail the reasons for seeking review.

(c) Within 7 days after receipt of a request for review of the initial decision, the President shall adopt, modify or reverse the initial decision, or shall direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1625.10(b).

(d) A decision by the President shall become final upon service on the recipient.

§ 1625.12 Time and waiver.

(a) *Computation of time.* In computing any period of time prescribed or allowed by this part or by order of the President or the hearing examiner, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. All periods shall otherwise include Saturdays, Sundays, and legal holidays. A deadline for a party or the hearing examiner to submit a document is met only if the document is actually received by counsel for the other party and by the hearing examiner by the end of the relevant time period.

(b) *Enlargement of time.* The President or the hearing examiner may enlarge any period of time on agreement of the parties if, and only if, the President or the hearing examiner makes a determination in writing or on the record either that:

(1) The enlargement will not prevent completion of the hearing within 60 days from receipt of the notice by the recipient or prevent the President from reaching a final decision—with at least 7 days to consider the request for review—within 90 days from receipt of notice by the recipient; or

(2) The existence of extraordinary circumstances require the enlargement of time to prevent manifest injustice.

(c) *Reduction of time.* On agreement of the parties and the hearing examiner, any period of time may be shortened.

(d) Failure by the Corporation to meet a time requirement of this part shall not entitle a recipient to refunding of its grant or contract.

(e) Any provision of the rules in this part, excepting those in § 1625.12(b), may be waived or modified:

(1) By the hearing examiner with the assent of the recipient and counsel for the Corporation; or

(2) By the President for good cause shown.

§ 1625.13 Right to counsel.

At a hearing under § 1625.8, the Corporation and the recipient each shall be entitled to be represented by counsel, or by an employee.

§ 1625.14 Reimbursement.

If refunding is granted after a notice has been issued under § 1625.4, a recipient shall be entitled to receive reimbursement from the Corporation for reasonable and actual expenses including attorney's fees up to the hourly equivalent of the rate of level V of the executive schedule specified in Section 5316, of Title 5, United States Code, that were required in connection with proceedings under this part, to the extent it has prevailed and where the hearing examiner finds the Corporation's position to have been substantially without merit.

§ 1625.15 Interim funding.

Pending a final determination under this part, the Corporation shall provide the recipient with interim funding necessary to maintain its current level of legal assistance activities for eligible clients under the Act.

§ 1625.16 Termination funding.

After a final decision to deny refunding, and without regard to whether a hearing has occurred, the Corporation may authorize temporary funding if necessary to enable a recipient to close or transfer current matters in a manner consistent with the professional responsibility of the recipient and the recipient's attorneys to their present clients.

Dated: April 24, 1986.

John H. Bayly, Jr.,

General Counsel.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Hibiscadelphus Distans (Kauai Hau Kuahiwi)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines *Hibiscadelphus distans* (Kauai hau kuahiwi) to be an endangered species, under the authority contained in the Endangered Species Act of 1973, as amended (Act). Only ten individuals of this endemic tree remain in the wild, occurring in the State-owned Pu'u Ka Pele Forest Reserve, on the island of Kauai, Hawaii. Imminent threats to this species and its habitat exist from feral goat browsing, fire, competition with exotic species, and human disturbance. This determination that *Hibiscadelphus distans* is an endangered species implements the protection provided under the Act.

DATE: The effective date of this rule is May 29, 1986.

ADDRESS: The complete file for this rule is available for inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1692, 500 NE. Multnomah Street, Portland, Oregon 97232.

FOR FURTHER INFORMATION CONTACT: Mr. Wayne S. White, Chief, Division of Endangered Species, at the above address (503/231-6131 or FTS 429-6131).

SUPPLEMENTARY INFORMATION:

Background

Hibiscadelphus distans was discovered by L. Earl Bishop and Derral Herbst in 1972 and was described by them as a new species the following year (Bishop and Herbst 1973). It likely was more abundant and more widely distributed at one time, but today only ten individuals are known to exist. It occurs on State-owned land within the Pu'u Ka Pele Forest Reserve, Koai'e Valley, Waimea Canyon, island and county of Kauai, Hawaii.

This species is a small tree, up to 5.5 meters (18 feet) tall, with green, heart-shaped leaves and smooth bark. Its flowers are approximately 2.5 centimeters (1 inch) long and are greenish yellow, turning maroon with age. The plants live within an area of approximately 0.02 hectares (2,000 square feet) on a steep rock bluff at an elevation of about 300 meters (1,000 feet). This area is a remnant of a native, open, dryland forest and receives approximately 150 centimeters (60 inches) of rain annually. The area's yearly mean temperature ranges from 18.5 to 25.7 degrees Centigrade (65 to 78 degrees Fahrenheit). Associated species include *Sapindus oahuensis* (lonomea), *Erythrina sandwicensis* (wiliwili), *Diospyros ferrea*, (lama), and *Melia azedarach* (chinaberry). The ground cover is sparse and consists chiefly of exotic grasses and forbs (Herbst 1978).

Although goats are not known to browse on the present plant population, browsing by an existing large feral goat population probably was responsible for the species' decline and could threaten the continued existence of the remaining plants. Other threats come from fire, competition with exotic species, and human disturbance. A cooperative effort between Federal and State agencies is needed to protect the remaining plants and to provide for species' recovery.

The Secretary of the Smithsonian Institution, as directed by section 12 of the Endangered Species Act of 1973 (Act), prepared a report on those plants considered to be endangered, threatened, or extinct in the United States. This report (House Document No. 94-51) was presented to Congress on January 9, 1975. On July 1, 1975, the Fish and Wildlife Service published a notice in the **Federal Register** (40 FR 27823) accepting this report as a petition within the context of section 4(c)(2) of the Act (petition acceptance provisions are now contained in section 4(b)(3)(A)), and giving notice of its intention to review the status of the plant taxa named therein, including *Hibiscadelphus distans*. As a result of this review, on June 16, 1976, the Service published a proposed rule in the **Federal Register** (41 FR 24523) to determine approximately 1,700 vascular plant species, including *Hibiscadelphus distans*, to be endangered pursuant to section 4 of the Act. In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, the Service published a notice in the **Federal Register** (44 FR 70796) of the withdrawal of that portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired. The Service published an updated notice of review for plants on December 15, 1980 (45 FR 82480), including *Hibiscadelphus distans*. On October 13, 1983, and October 12, 1984, findings were made that listing *Hibiscadelphus distans* was warranted, but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act. Such a finding requires the petition to be recycled, pursuant to section 4(b)(3)(C)(i) of the Act. A proposal, constituting a final finding that the petitioned action was warranted, was published on July 16, 1985 (50 FR 28873), based on information available in 1976 and gathered after that time and summarized in a detailed status report prepared by the Service (Herbst 1978). The Service now

determines *Hibiscadelphus distans* to be an endangered species with the publication of this final rule.

Summary of Comments and Recommendations

In the July 16, 1985, proposed rule (50 FR 28873) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice that invited general public comment was published in *The Garden Island* on August 16, 1985, and in the *Honolulu Star Bulletin* and the *Honolulu Advertiser* on August 21, 1985. Four letters of comment were received and are discussed below. A public hearing was requested and held in Lihue, Kauai, Hawaii on November 7, 1985. The comment period was reopened following the public hearing, closing again December 9, 1985 (50 FR 42196). One person testified at the hearing; his testimony is included in the following summary.

Comments were received from the Governor of the State of Hawaii, the Western Regional Office of the National Audubon Society, and a Professor of Botany at the University of Hawaii. Testimony at the public hearing was presented by the Administrator of the Division of Forestry and Wildlife of the State Department of Land and Natural Resources. All comments and testimony supported the listing of *Hibiscadelphus distans* as an endangered species. The Governor further stated that the trees had been identified in the State Threatened and Endangered Species Plan as among the ten highest Kauai district priorities for protection, and that the State intends to request funding to fence the plants. The University Professor expressed reservations over the Service's failure to propose designation of critical habitat for this species. The Service continues to believe that threats of collecting and vandalism would be exacerbated by such designation and that designation of critical habitat is therefore not prudent.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that *Hibiscadelphus distans* should be classified as an endangered species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Hibiscadelphus distans* Bishop and Herbst (Kauai hau kuahiwi) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The habitat of *Hibiscadelphus distans* is subject to disturbance from several sources. Large herds of feral goats browse within the canyon and have destroyed surrounding vegetation. Goats may also dislodge stones from the ledges above the species, potentially damaging the trees and destroying seedlings (Herbst 1978). The presence of large goat herds results from specific game-management practices aimed at maintaining high goat population levels for hunting.

Human disturbance also presents a serious threat to the species. A hiking trail passes below the ledge where *Hibiscadelphus distans* is found, and activity by hikers straying off this path may impact the species by dislodging stones and increasing erosion of the friable soil. Trees may suffer additional damage by being used as "hand-holds" by hikers scaling the steep embankment.

The habitat disturbances created by people and feral goats have favored the introduction and spread of exotic vegetation. Today, small pockets of native plants can be found, but much of the canyon has been taken over by exotic species. Competition with exotic species and environmental changes brought about by changes in the vegetation have had a serious impact on many of the area's native species of plants and animals.

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* The area where *Hibiscadelphus distans* exists is easily accessible to people and has already experienced incidents of unauthorized collecting and vandalism. When the Hawaii State Department of Forestry and Wildlife labeled other native plants along the trail system adjacent to the species' habitat, many of the labeled plants were dug up or damaged by people using the trail. Removal of or damage to any of the few remaining individuals of *Hibiscadelphus distans* could seriously jeopardize the chances of the species' survival.

C. *Disease or Predation.* Browsing by feral goats upon *Hibiscadelphus distans* is probably responsible for the species' currently depleted status. Although the remaining plants apparently are free from browsing pressure, the situation is still precarious. Should this pressure increase, through either environmental changes or game management practices, goats may be driven into areas they usually avoid, imperiling the few remaining trees.

D. *The inadequacy of existing regulatory mechanisms. Hibiscadelphus distans* is found in an area within the State-owned Pu'u Ka Pele Forest Reserve. State regulations prohibit the removal, destruction, or damage of plants found on State forest land. However, these regulations are difficult to enforce due to limited personnel. The Endangered Species Act will offer additional protection to this species.

E. *Other natural or manmade factors affecting its continued existence.* The small extant population (10 individuals) remaining makes *Hibiscadelphus distans* vulnerable to any catastrophe, natural or man-caused, that may impact the area. Reduction of the gene pool and genetic variability, resulting from a small population size, could have detrimental effects on the continued existence of the species. The presence of a trail rest shelter with a small fire pit near this lone population adds a potential threat of destruction by fire during the dry season.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Hibiscadelphus distans* as endangered. Only 10 individuals remain in the wild, and these face threats from feral goats, fire, competition with exotic species, and human disturbance. Given these circumstances, the determination of endangered status seems warranted. The following "Critical Habitat" section discusses the reasons for which critical habitat is not being designated at this time.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for *Hibiscadelphus distans* at this time. As discussed under Factor "B" in the "Summary of Factors Affecting the Species," this species potentially is subject to taking and vandalism. Other native plants along a trail near the area where the species occurs have already

experienced incidents of unauthorized taking and vandalism. Publication of a critical habitat description in the **Federal Register** would subject the few remaining individuals of *H. distans* to an increased risk of taking and vandalism. Since the plant is only known to occur on State land, and the State of Hawaii is aware of its status, the value of critical habitat as a notification to Federal agencies would not be great enough to offset the potential risk, and thus no net benefit would accrue to the species from the designation of critical habitat.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking are discussed, in part, below:

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402 and are now under revision (see proposal at 48 FR 29990; June 29, 1983). Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. No Federal activities are known or expected to affect *Hibiscadelphus distans*.

The Act and its implementing regulations, found at 50 CFR 17.61, 17.62, and 17.63, set forth a series of general trade prohibitions and exceptions that apply to all endangered plant species. All trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export any endangered plant, transport it in interstate or foreign commerce in the course of a commercial activity, sell it or offer it for sale in interstate or foreign commerce, or remove it from areas under Federal jurisdiction and reduce it to possession. Certain exceptions can apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62 and 17.63 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered species under certain circumstances. Due to the numerous threats to *H. distans* and its depleted state in the wild, it may be necessary to propagate this species in nurseries. Several specimens are presently found in cultivation and seeds have been sent to Dr. P. Fryxell at Texas A&M University. Requests for trade permits for scientific purposes and for enhancing the propagation of the species, allowed under § 17.62, may result if an artificial propagation plan is pursued. Otherwise, it is anticipated that few trade permits would ever be sought or issued, since the species is not common in cultivation or in the wild. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235–1903).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

Bishop, L.E., and D. Herbst. 1973. A new *Hibiscadelphus* (Malvaceae) from Kauai. Brittonia 25:290–293.

Herbst, D. 1978. Unpublished status survey of *Hibiscadelphus distans* Bishop and Herbst (Kauai hau kuahiwi). U.S. Fish and Wildlife Service. 21 pp.

Author

The primary author of this final rule is Dr. Derral R. Herbst, Office of Environmental Services, U.S. Fish and Wildlife Service, Pacific Islands, 300 Ala Moana Boulevard, Room 6307, P.O. Box 50167, Hawaii 96850 (808/546–7530 or FTS 546–7530).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulation Promulgation

PART 17—[AMENDED]

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, is amended as set forth below:

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

Authority: Pub. L. 93–205, 87 Stat. 884; Pub. L. 94–359, 90 Stat. 911; Pub. L. 95–632, 92 Stat. 3751; Pub. L. 96–159, 93 Stat. 1225; Pub. L. 97–304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Amend § 17.12(h) by adding the following, in alphabetical order under the family Malvaceae, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
Malvaceae—Mallow family:						
Hibiscadelphus distans	Kauai hau kuahiwi	U.S.A. (HI)	E	225	NA	NA

Dated: April 7, 1986.

Susan Recce,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 86-9529 Filed 4-28-86; 8:45 am]

BILLING CODE 4310-55-M

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Tumamoca Macdougalii To Be Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service determines a plant, *Tumamoca macdougalii* (Tumamoc globe-berry), to be an endangered species under the authority contained in the Endangered Species Act of 1973 (Act), as amended. This monotypic genus is known from northern Sonora, Mexico, and from Arizona where it occurs on Federal, State, Indian, Pima County, City of Tucson, and private lands. The species is threatened with habitat destruction from increased agricultural development, urbanization, a proposed Central Arizona Project (CAP) aqueduct, grazing, and collection. This action implements the protection provided by the Act.

DATE: The effective date of this rule is May 29, 1986.

ADDRESS: The complete file for this rule is available for public inspection during normal business hours, by appointment, at the Service's Regional Office of Endangered Species, 500 Gold Avenue SW., Room 4000, Albuquerque, New Mexico.

FOR FURTHER INFORMATION CONTACT: Peggy Olwell, Endangered Species Botanist, Office of Endangered Species, PO Box 1306, Albuquerque, New Mexico 87103 (505/766-3972 or FTS 474-3972).

SUPPLEMENTARY INFORMATION:

Background

Tumamoca macdougalii was first collected on July 31, 1908, by D.J. Macdougal, a scientist at the Carnegie Desert Laboratory, on Tumamoc Hill, west of Tucson, Arizona. The specimen was sent to J.N. Rose, a botanist at the U.S. National Herbarium, who described it as a new genus and species in honor of the type locality and its collector (Rose 1912). This plant is a delicate perennial vine in the gourd family. It grows from a tuberous root and has slender herbaceous stems (Toolin 1982). Its thin leaves have three main lobes, each divided into narrow segments. The plant bears small, yellow, male and female flowers and produces small, red, watermelon-like fruits. Flowering begins before the summer rains, with female flowers either being aborted or not produced until after rains later in the season; fruit set normally occurs in August and September. The population biology and ecological requirements are poorly understood (Toolin 1982), and additional studies are needed.

Historically, *Tumamoca macdougalii* has been found in 16 very scattered populations from Pima County, Arizona to northern Sonora, Mexico. Toolin (1982) searched known localities in Mexico and was unable to relocate any Mexican populations. However, in October 1985, a reconnaissance of the historic Mexican localities identified 5 populations with approximately 60 plants. There were no large numbers of juveniles found in these populations (Reichenbacher, F.W. Reichenbacher and Assoc., Tucson, pers. comm., 1985). Reichenbacher (1984) reported 10 U.S. populations containing a total of 38 adults, 11 juveniles and 126 seedlings. Extensive field surveys of 53,500 acres in Avra Valley conducted from August to November, 1984, increased the known U.S. populations to 30, containing 290 reproducing adults, 65 probable adults, and 1,627 juveniles (Reichenbacher 1985a; Boyd, Tierra Madre Consultants, Riverside, California, pers. comm., 1984). Continued surveying in the summer of 1985 increased the total known U.S. individuals to 2,300 of which 433 are adults (Reichenbacher, pers. comm., 1985).

These populations occur on private, Federal, State, Indian, Pima County, and City of Tucson lands.

Tumamoca macdougalii occurs in the Arizona Upland Subdivision of the Desert Scrub Formation at elevations of 450–795 meters (1,476–2,608 feet) in rocky to gravelly, sandy, silty, and clayey soils derived from granite, basalt, and rhyolite. The vegetation is palo-verde/cactus shrub and creosote bush/bursage desert scrub. Dominant associate species are creosote bush (*Larrea divaricata*), palo-verde (*Cercidium* spp.), white thorn acacia (*Acacia constricta*), saguaro cactus (*Carnegia gigantea*), prickly pear (*Opuntia phaeacantha*), cane cholla (*Opuntia versicolor*), mesquite (*Prosopis juliflora*), ironwood (*Olneya tesota*), and triangle leaf bursage (*Ambrosia deltoidea*). No symbiotic relationship is known for the Tumamoc globe-berry; however, it is usually found under trees and shrubs (nurse plants), which provide shade and protection, as well as support for the vine. The nurse plants for *Tumamoca macdougalii* include creosote bush, triangle leaf bursage, white thorn acacia, all-scale, palo-verde, and pencil cholla (Reichenbacher 1984).

In the **Federal Register** of December 15, 1980 (45 FR 82480), the Service published a notice of review covering plants being considered for classification as endangered or threatened. In that notice, *Tumamoca macdougalii* was included in category 1. That category comprises taxa for which the Service has sufficient biological information to support the appropriateness of their being proposed to be listed as endangered or threatened species.

The Endangered Species Act Amendments of 1982 required that all petitions pending as of October 13, 1982, be treated as having been newly submitted on that date. The species covered in the December 15, 1980, notice of review were considered to be petitioned, and the deadline for a finding on those species, including *Tumamoca macdougalii*, was October 13, 1983. On October 13, 1983, and again on October 12, 1984, the petition finding was made that listing *Tumamoca macdougalii* was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act. Such a finding requires a recycling of the petition, pursuant to section 4(b)(3)(C)(i) of the Act. A proposed rule published May 20, 1985 (50 FR 20806), constituted the next required finding that the petitioned action was warranted in accordance with section 4(b)(3)(B)(ii) of the Act.

A survey of the Papago Indian Reservation (Reichenbacher 1985b) and field investigations carried out during