HEARING ON THE IMPLEMENTATION OF THE ENDANGERED SPECIES ACT OF 1973

HEARING

BEFORE THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

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HEARING ON THE IMPLEMENTATION OF THE ENDANGERED SPECIES ACT OF 1973

THURSDAY, MARCH 5, 1998

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC.

The Committee met, pursuant to notice, at 11:06 a.m., in room 1324, Longworth House Office Building, the Honorable Richard W. Pombo presiding.

Members present: Representatives Young, Hansen, Saxton, Gilchrest, Pombo, Cubin, Chenoweth, Radanovich, Shadegg, Schaffer, Miller, Farr, Delahunt, John, Green, Doggett, Herger and Lewis.

Mr. POMBO. [presiding] Good morning. Today we have invited the Honorable Jamie Clark, the new Director of the Fish and Wildlife Service, to testify before the Committee on the national and regional implications of the enforcement of the Endangered Species Act.

We welcome you for this first appearance before the Committee as the new Director and wish you well in your new duties. We wish you success in finding ways to bring back a common sense and people-friendly approach to protecting endangered species.

We have invited the Honorable Rolland Schmitten, the Director of the National Marine Fisheries Services, to testify. Mr. Schmitten has testified on many occasions in the past, and we welcome you here once again.

The Chairman has asked both of you to bring with you members of your staff from your regional offices who can answer specific questions regarding the enforcement of the Endangered Species Act within those regions.

During 1997 the Chairman requested that both the Fish and Wildlife Service and National Marine Fisheries Service provide statistics on the distribution of your funds to each region, as well as the numbers of incidental take permits and Section 7 consultants by region.

The Chairman also asked for your employee staffing levels by region. The Chairman asked the staff to compile a staff report summarizing that information which is being distributing to the members of the Committee as a background memo. The information which was provided, I found to be very disturbing.

I feel strongly that Congress must ensure that the Act is implemented the way it was intended to be implemented by those in Congress who voted for it. I don't believe that Congress intended for the Endangered Species Act to be used as a tool by the govern-

ment, or by fringe groups, to stop all development in the West. Your statistics confirm what many of us believed, that the ESA has been enforced with a very heavy hand in the West and a very light hand in the Northeast. Those statistics also lend support to the belief held by some people that your enforcement of the ESA has been based on politics which favor those heavily populated areas of the country.

My instincts and experience tell me that the approach taken in the Northeast and upper Midwest is based on common sense and a respect for private property. I don't think the West has seen the same courtesy or respect. I realize that most of the land in the West is owned by the Federal Government and there are many who believe that gives the government the right to control all of the land in the West, but there is something fundamentally unfair about that approach. It places all the burdens of protecting the environment on one area and on a limited number of people. We should all bear the burdens and the responsibilities equally and fairly.

I am not in favor of simply mistreating people in the East the way Westerners have been mistreated. I think all of our people deserve fair and respectful treatment. I simply believe that it is time to stop and take a good look at whether these policies are evenhandedly enforced and, if not, find a way to bring about a fairer system.

Mr. Miller, did you have an opening statement?

STATEMENT OF HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MILLER. This is an East/West battle going on here, huh? Well, Mr. Chairman, I look forward to these hearings. I am not sure whether or not the Habitat Conservation Plans are in the East or the West is really the crux of the problem that we have. I think it is much more a problem that we have—we continue to list species and not provide for their recovery and, in that respect, the Endangered Species Act is probably not working very well for the environment, for the landowners, for private business or government itself. But I am also deeply concerned that we see actions taken after the listing of species that are inconsistent with the recovery of that species and, therefore, place additional burdens on remaining landowners and people who seek to develop their property.

As I have stated before, when I introduced my legislation, and will continue to state throughout this debate, I think the test should be, for plans for recovery, is whether or not they provide for the recovery of the species. In this morning's hearing, I think we will hear some evidence that we continue to take actions, and the government continues to allow actions that are inconsistent with the recovery of the various species that they have—they themselves have listed.

If we want to get into some discussion of East versus West, that is fine. I am not sure that will lead to the kind of examination that is necessary for providing the reforming and the strengthening of the Endangered Species Act, but I look forward to hearing from the witnesses this morning.

Mr. POMBO. Mr. Hansen.

STATEMENT OF HON. JAMES V. HANSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. HANSEN. Thank you, Mr. Chairman. I think this is a very important hearing that we are going to have. When this thing passed in 1973, I think the intent of the Act has not been carried out. I still remember the last conversation I had with ex-Speaker Tom Foley, and he said I wish I had never voted for this Act. I have sometimes reflected on that and wondered why he would say that. However, in the state that I represent, in the State of Utah, we put an awful lot of money in things like the desert tortoise, and yet we find that in other—where it is doing very well, in other places it is having problems.

I was yesterday hit by the State of Utah and a few people that want $120 million to save four fish in the Colorado River, and when I was a young man, they were considered trash fish. It is interesting enough and that the Colorado squawfish is one of those, which its cousin is in the Columbia River where it is a predator, yet in the Colorado River, it is an endangered fish.

I would hope we could bring some sense to this Act. Mr. Chairman, in my humble opinion, there should be a peer review. The way this listing has coming about is not really fair and it seems to me that every state should, and if they would check how the Park Service, we do have a peer review, and it would seem reasonable to me that we adopt the kind of thing we have in the Park Service and apply it to the other areas.

Now, anyone can come along, and as you go back and check out how many of these things were listed, you find out it was not listed by science, it was listed more by emotion. I would hope we would have a listing process that is refined, a peer review process that works, and a de-listing process that works. The American alligator is a classic example of something that should have been de-listed and we had to go to court to get it off the list. So I honestly think this is the time we should work at it.

There is nothing sacred about the 1973 law, and every piece of legislation I have ever been part of for 38 years, from time to time, they have to be changed. If I have ever seen a piece of legislation that deserves and needs to be changed for the benefit, not only of the things this was originally to take care of, the grizzly bear or the bald eagle and things such as that, now that we are down to the slimy slug and those kind of things, I think we should be very careful on this Act, and possibly at a point where we should make some definite changes in it.

I thank the Chair for recognizing me.

Mr. SAXTON. Mr. Chairman.

Mr. POMBO. Mr. Saxton.

STATEMENT OF HON. JIM SAXTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. SAXTON. I thank the Chairman. Mr. Chairman, let me just say a word, for the moment at least, not so much about the substance of the matter that we are dealing with, but about the—I guess it is a political odyssey that we have been going through try-

ing to arrive at enough common ground that we could get a Bill to agree on.

First of all, let me commend you, Mr. Chairman, for the most—years of work that you have put into this. I know you traveled all over the country. I know that you have communicated with Mr. Miller and others on the Committee, including myself. During the last 12 months or so, we have met more times than I can remember to discuss the situation, and today's hearing is, hopefully, another step in trying to arrive at some kind of a consensus that we can all agree on.

I don't think it is any secret to anyone that we have been unable to find that consensus. While today is certainly a good step in that direction, I just want everybody to know that Mr. Dingle and I, and perhaps some others, are preparing some legislation which will include many of the things that previous statements here this morning have mentioned, things like peer review and other issues that are very important. Some of the Bill will be like the Kempthorne Bill, which is much talked about and discussed. Some of it will certainly be issues that Mr. Young, Mr. Pombo can agree on, and some of it will have to do with what Mr. Miller just focused on in his statement, the issue of recovery. They are all important issues and all things that we need to agree on.

So, fortunately, Mr. Dingle and I seem to have a lot of common ground and, frankly, we are consulting with others all along the way, trying to develop consensus language, and I hope that we, once the Bill is drafted, I hope that we can focus on it to try to make arrangements with everyone who is interested so that we can perhaps use this as a vehicle inasmuch as other things have failed to produce the consensus that we need.

So I look forward to hearing from this morning's witnesses. I hope that we will all become additionally enlightened so that we can move the process forward.

Mr. POMBO. Thank you.

Does any other member have an opening statement?

Mr. Schaffer.

STATEMENT OF HON. BOB SCHAFFER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. SCHAFFER. Thank you, Mr. Chairman. I would just merely point out the Endangered Species Act is one of those sections of the laws which I hear about perhaps most from state legislators, county commissioners, and constituents back in my State of Colorado. In particular, the lack of clarity in the law presents, I believe, a credible argument which would explain the inordinate amount of lawsuits that we see filed, both on behalf of species that some believe ought to be listed and, conversely, by those who believe that some species that have moved forward toward listing should not be listed.

But even more egregious, I think, is when you take a look at the amount of money that is being expended by states and regions in order to comply with various Endangered Species Act related mandates and dictates, the Chairman's concerns are borne out just by that statistic alone, when you see the disproportionate amount of funds that are spent in the West with respect to compliance.

I have not done the math on this, but I would guess that when you take those dollar amounts and spread them out by the number of people who actually live in those areas, it is very clear and apparent that the Endangered Species Act is not applied evenly and managed in a way that takes into account any sense of fairness, geographically or with respect to citizens and taxpayers throughout the country.

This Act is one that many people have complained about for a long time, and for one reason or another, we have not been able to move any responsible reform through the Congress over the past few years. I am hoping that with the expertise and sincerity of the people who are here before us today, that we may be able to take one large step in the right direction toward getting an Endangered Species Act eventually that actually protects endangered species and does so in the fairest and most efficient way possible.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Gilchrest.

STATEMENT OF HON. WAYNE GILCHREST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. GILCHREST. Mr. Pombo, thank you.

I hope we can work through this process.

Good morning, Mr. Lewis.

Mr. LEWIS. Hello, my friend.

Mr. GILCHREST. I think intelligent human beings, of which we all are—we all are, can get together and create an equitable Endangered Species Act for the East and the West, all across this country. I think one of our goals is to create a law that is equitably applied everywhere. I also think we can create a law that will help decentralize the total centralization of the Act as it now applies to the country. The Federal Government cannot save biological diversity in the United States, we can't do it alone. The law has to be a partnership with state, local government, and so on.

I also think we can create a law where individuals across this great country would want to participate in this Act, would want to find a snaildarter on their property, would want to find some endangered plant or insect or animal so that they could participate and that structure is an incentive approach. I think we can do all of that.

All of this has to do with recovery plans, habitat plans, ecosystem approaches, watersheds, all of these things, we can get together and figure this out.

Now, two last quick comments. No. 1, the land lasts longer than any one person's lifetime. So what we do on it has an impact on future generations, our children. And the last thing, I recently read something that I found intriguing, sort of a perspective on all of this. If you took a book of a thousand pages, each page represented 100 million years of human history, or of Earth's history, the planet Earth, the history of planet Earth, you consolidated in a book of a thousand pages, the last 10,000 years would be found on the last line of the last page and that is the last word of the last page.

A lot happened prior to us coming. The last comment is we do not have an option, I think, we have to understand the mechanics of natural processes on this infinitesimal blue and white speck we

call Earth in the midst of an infinite, hostile Universe. We are responsible adults. We are charged with the responsibility of doing the nation's business, and part of that is figuring how we can reasonably, fairly, equitably protect biological diversity.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Farr.

STATEMENT OF HON. SAM FARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. FARR. Thank you, Mr. Chairman.

I can't help but look down and see my colleague, Jerry Lewis, there, and I want to tell you a story about something that works, that he had something to do with, because he sits on the Appropriations Committee.

One difficulty in trying to understand a lot of this stuff is in understanding the development of HCPs, Habitat Conservation Plans. We had the largest military base in the United States in my District, Fort Ord, which is also the largest base closed, 28,000 acres, and most of it is undeveloped land. The Army used it for maneuvers. In the assessment, there were something like 46 endangered or threatened species of plants and animals listed on this base. What happened at that point was that everybody sat down and said, before we decide what we are going to do in reusing it, where everything is going to go, let's do a Habitat Conservation Plan. Then everybody who comes in thereafter will be part of the responsibility for maintaining it.

This is a unique situation because you have all this real estate and one ownership and, essentially, you can do the plan ahead of time, rather than trying to go in backward. But, I'll tell you, when it is done that way, it works really well. Everybody comes to the table knowing exactly what their responsibility is and it is a long-term management plan.

My experience in being in local government, where you have to issue all these permits, is that essentially people come in with a foregone conclusion of what they want to do. Then they find out that they didn't ask the right questions and a lot of things they want to do end up going in the wrong place or doing the wrong thing. It would have been far better to sit down ahead of time.

Obviously, there are some problems with this law and we can address them. I am pleased that Congressman Miller, who has the only Endangered Species Recovery Bill that has been introduced in the House this session, is here. But I am here to tell you that once you get the rules on the table and let everybody who is going to play know where they are, you can come to a reasonable, common sense, workable solution.

A lot of what Mr. Gilchrest said is true. A lot of this endangered species stuff is the canary in the mine shaft. I mean we may not think they are very important, but they are an early warning system for things that may be going wrong. There are also incredible plants out there which we are just learning from medical science, may be beneficial to treatment of our illnesses.

The reason I brought up Congressman Lewis' name is that that plan at Fort Ord wouldn't have worked without his support. So I know you are here to talk about some things that don't work, but

I want to tell you that you helped make that work and I appreciate it.

Mr. POMBO. Thank you, Director Clark.

Let me ask at this time unanimous consent to allow our colleagues, Wally Herger and Mr. Lewis, to sit on the dais as part of the Committee for this hearing.

Hearing no objection, welcome.

I would like at this time to ask Mr. Lewis if he had a statement he would like to make.

STATEMENT OF HON. JERRY LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. LEWIS. Thank you very much, Mr. Chairman, I would ask unanimous consent to have my entire statement included in the record and I will be very brief in view of your schedule difficulty. I appreciate this courtesy.

I must say as Sam Farr mentioned our working together I can't help but look and see your Ranking Member, George Miller. George Miller and I first began working together in the early 1970 on issues that relate to subjects like the ones that you are dealing with today.

In the old days I had the privilege of chairing a committee dealing with the environment in California, and many of the questions that we have before us today we discussed then. One of the major issues facing our state that will hopefully be before your full Committee at least shortly involves the impact of the wrong kinds of environmental activism and other decisions relative to the Salton Sea and its ecosystem.

Today I have come to specifically express my concern about what has happened with the Endangered Species Act, and maybe give some specific illustrations of a problem that I hope the Committee would be addressing as they go about trying to make sense out of the Endangered Species Act.

In San Bernardino County we have a major project that involves a huge flood control responsibility, the Santa Ana mainstream project which involves the largest unprotected flood plain in the country. We are in the process of constructing a $1.5 billion project to try to deal with that.

At this point in time we are moving toward completing the Seven Oaks dam and just recently we were in a position of having that work stopped briefly, and potentially for the long term, because of the questions that swirled around the emergency listing of the San Bernardino Kangaroo Rat.

To say the least, that action by the Fish and Wildlife Service raised a number of questions in my mind's eye. As a result of this listing, we see a prime example of the debate and discussion too often being dominated by the fringes, the extremes of concern about our environment.

Within this region is a small little critter known as the Delhi Sands Flower Loving Fly. When it first came to our attention, the flower loving fly was in the area where the county was going to put a county hospital. As the process went forward to try to make sense out of that territory—we could only find at best three or four such flies around. In order to mitigate this gnat-like fly—the coun-

ty ended up spending about $3.5 million before we even were able to break ground and build that county hospital. That is not the intention of the Endangered Species Act.

The Kangaroo Rat which I first heard about it when I was 4 or 5 years old. One of my friends moved from Oklahoma and he said have you ever seen a Kangaroo Rat, and I had never heard of it and here I am, all these years later, and we have got 19 subspecies and many of them protected under endangered designation.

I have within the file for your review a press release from the Secretary's office of 2 years ago where he said the Kangaroo Rat, the San Bernardino rat, would not be emergency listed, and yet just recently because of an internal problem that relates to regulation, a small territory was designated or was the target—we created a new federally protected species which impacts the whole region that involves this Santa Ana Project I mentioned is put on hold.

Presently, in my district there is a National Training Center for the Army, a fabulous facility that involves training and retraining of our troops, the strength of America's defense system.

Today that facility needs to be expanded. Another endangered species is involved—the Desert Tortoise—and yet just adjacent to this territory, you can throw a stone and hit the East Mojave National Preserve—there is enough territory there that is public territory to entirely encompass easily Mr. Gilchrest's and Mr. Saxton's states combined. With regard to the tortoise, you can take their eggs and put them over in the East Mojave territory and it won't hurt it a bit, and yet that endangerment is impacting potentially a very serious element of our ability to defend the country and freedom around the world.

It is time for us to rethink where we have been with regard to the ESA. That is the fundamental thrust of my testimony. I think I have credentials that suggest I care about the environment. I know that you all do as well.

It is time that the fringes of the debate, those who want to do nothing about endangered species in terms of protection and those who would use the environment to close down our economy, to be out of the debate and those of us in the center take over this discussion and make sense out of the Endangered Species Act, and I appreciate both your patience and your time.

[The prepared statement of Mr. Lewis follows.]

STATEMENT OF HON. JERRY LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I would like to thank the Chairman and the Ranking Member for allowing me the opportunity to participate in this important hearing. I am here, in part, to express my concerns over what appears to be the arbitrary application of the Endangered Species Act in my Congressional District. I would also like to touch briefly on regional Fish and Wildlife Service funding issues as well as the Fish and Wildlife Service's role with respect to the proposed expansion of the Army's National Training Center at Fort Irwin.

My Congressional District includes nearly all of San Bernardino County's 20,000 square miles and all of Inyo County's 10,000 square miles. The 40th Congressional District covers roughly one-fifth of California. Because I represent a territory that covers such huge expanses of land, I am concerned over the proliferation of listings—primarily emergency listings under the Endangered Species Act. In the two counties I represent there are over 40 species listed as threatened or endangered and another 10 proposed and candidate species.

While many of these species do deserve Federal protection, the listing of species like the Delhi Sands Flower Loving Fly, the San Bernardino Merriam's Kangaroo Rat, and the Cushenberry milk-vetch, buckwheat, and oxytheca have seriously disrupted potential water supplies, flood protection and economic development efforts in San Bernardino County. In fact, the listing of the Delhi Sands Flower Loving Fly caused an additional expense of $3.5 million for a County Hospital which was under construction when this species was listed. The listing of this species also precluded ongoing development of a groundwater aquifer by the West San Bernardino Water District.

I have said, time and time again, that it was a positive step forward when we began to focus on the word environment during the 1960's. However, I truly believe that the pendulum has moved far from center in recent years and it is now time to rethink how we balance the needs of the environment with economic impacts and the common-sense application of positive environmental steps. I must say that it strikes me as odd when we place species like flies, rats, and weeds above health care services for the poorest of the poor and clean, potable water sources for county residents. I am hopeful that over the next several years my friend from California, Mr. Miller, will work with Don Young, Richard Pombo, John Dingell, the Administration and other to make positive changes to the Endangered Species Act.

San Bernardino Kangaroo Rat

I want to call your attention to a press release issued by the Fish and Wildlife Service's Pacific Regional office and dated October 28, 1994 which states, "the Department of Interior has no plans to list the San Bernardino Kangaroo Rat on an emergency basis as a federally designated or threatened species . . ." The statement went on to say, "any proposed listing of the species would be made on the best available scientific information, which would be made available to the public, to other Federal agencies, state and local agencies, and to interested organizations for thorough review and critique well before any final decision would be made." The emergency listing of the San Bernardino Kangaroo Rat on January 27, 1998 seems to contradict your earlier press statement. I have heard a lot about the Service's "No Surprises" initiative. I must say that this emergency listing was an unfortunate surprise to residents in my territory.

Would you please explain?

What was the urgent threat to K-Rat habitat that precluded listing this species through the normal listing process? How has this changed since Oct. 1994?

It has been suggested that the emergency listing of the San Bernardino K-Rat was nothing more than a lever to get the Fish and Wildlife Service involved in Section 7 Consultations on activities such as flood control, sand and gravel mining operations, and land development projects. When the emergency listing had the unexpected ramification of stopping construction on the Seven Oaks Dam—which is the cornerstone of the $1.5 billion Santa Ana Mainstem flood control project which provides flood protection for millions of lives and billions in property in San Bernardino, Riverside and Orange Counties—the FWS moved with record speed to allow construction to resume.

If construction on this project truly has negative impacts K-Rat habitat, why did the FWS allow work to continue so quickly?

Has the FWS stated that it intends to propose that the gates to regulate outletting flows be omitted from the dam construction of the Seven Oaks Dam?

Why can't the FWS be so responsive to average citizens and small business men and women impacted by this and similar listings?

Did the FWS just try to defray public outcry by quickly allowing the contractor to go back to work on this important flood control project?

Was there scientific data to back the decision to allow work to continue on the Seven Oaks Dam project?

As a result of this emergency listing, what long-term impacts will this emergency listing have on the operations and maintenance of the Santa Ana Mainstem project?

Ft. Irwin Expansion

As you know, the Army which operates the National Training Center at Ft. Irwin, has identified a need for additional acreage (roughly 330,000 acres) to conduct modern day desert warfare maneuvers. I know that FWS has been working with the Bureau of Land Management, the Army and other interested parties. Would you please give me an idea as to what progress is taking place with regard to this necessary and important expansion?

Regional Funding Disparity

The Interior Appropriations Subcommittee provided the Fish and Wildlife Service $63 million for their regional offices in fiscal year 1997. Region I, which covers the

Western United States, received over $34 million (over half of the entire regional budget) for enforcement of the ESA while Region VII received only $717,000. Why are we not doing more endangered species work in the Midwest, the South and the Northeast. Over 35 percent of the species listed by the FWS are in California. Are we not listing species in other regions because we aren't providing adequate funding? Are we listing species such as rats and flies in the Pacific region because their budget is so flush?

Fiscal Year 1997 Regional Allocations for FWS

Region I—$34,169,000 (Pacific)
Region II—$6,548,000 (Southwest)
Region III—$2,264,000 (Great Lakes States)
Region IV—$12,664,000 (Southeast)
Region V—$2,949,000 (Northeast)
Region VI—$4,902,000 (Rocky Mtn States)
Region VII—$717,000 (Alaska)

Questions for the Record

Would you support the listing of species only under the ESA, as compared to the listing of subspecies or populations?

Why does the FWS need to review and list separately the Stephens Kangaroo Rat, the San Bernardino Kangaroo Rat, and the Tipton Kangaroo Rat? If viewed collectively, would a listing still be appropriate?

In late January, the Service emergency listed the San Bernardino K-Rat as endangered. This was done on an emergency basis because a miner allegedly made threats to disturb this species' habitat in the short term. If it can be firmly established that there were no such threats that such actions will not be taken by that operator during consideration of a permanent listing, would you support the withdrawal of that emergency listing? Are you aware that the Secretary, by law, is required to withdraw an emergency listing if there is no substantial evidence to support the finding of an emergency?

Would you support requiring that the ESA listings include an analysis of economic impacts?

The emergency listing of the the San Bernardino K-Rat has already, and will continue to create major economic disruptions in San Bernardino County, including interfering with the completion or operation of major highway, water pipeline, flood control and other public works projects. What is FWS's role in finding a workable solution to this situatuion? Will you provide funding to the County which will enable them to undertake a conservation planning process? If the County had a Habitat Conservation Plan in place, would the Service have moved forward with an emergency listing?

Would you please provide a list of species de-listed in Region I over the last 10 years?

Mr. POMBO. We have a vote going on on the floor. We are going to break for just a minute.

Most of the members of the Committee went over and voted as soon as the bells went off and as soon as they come back, we will call the hearing back to order, but it should just take a minute.

Mr. LEWIS. You notice they left immediately as I sat down. I appreciate it.

[Laughter.]

Mr. POMBO. It is no reflection on you, but we—don't go anywhere. We are just going to break for just a minute.

[Recess.]

Mr. HANSEN. [presiding] As is obvious to everyone here, we have a vote going on. I would appreciate it if we could get the first panel seated so we can move along. This is going to be a heavy hearing today.

Our first panel is Jamie Rappaport Clark, Director of the Fish and Wildlife Service, will be—the Honorable—will be the first one we will have up, and she will be accompanied by LaVerne Smith, Michael Spear, Renne Lohoefener—is that it? Lohoefener, well,

that's pretty close, John Blakenship, Dave Fleming, and Paul Nickerson.

So if you folks would come up and be seated.

We really do not want to start until we get a few more members here, so if you—we want you ready to go.

I imagine you have been told by the Committee that we follow the 5-minute rule in here and I hope you can get your testimony in in that length of time. Please keep in mind that any prepared or written testimony that you may have we'll take in its entirety, and with that, if we could just hold for just a moment I am sure that a lot of members will be coming back and they've asked me to take the Chair until Mr. Pombo comes back.

Does the gentlelady from the Virgin Islands have a statement she would like to make at this hearing?

Ms. CHRISTIAN-GREEN. No, Mr. Chairman.

Mr. POMBO. You would have our undivided attention.

Ms. CHRISTIAN-GREEN. I know. I was so busy yesterday I didn't have a chance to review some of the material, so I am sure I will have questions as we go along. I am particularly interested in hearing from the Director, Fish and Wildlife, and the Marine Fisheries Service because we have some issues at home, but I have no opening statement.

I would just like to welcome the panelists this morning.

Mr. HANSEN. Thank you.

Mr. Radanovich, by any chance do you have an opening statement that you would like to make?

STATEMENT OF HON. GEORGE P. RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman. Yes, just briefly I did want to point out my appreciation to the Chairman for conducting a hearing on this specific issue, and just some general thoughts on the current state of environmentalism and environmentalism protection in this country.

I think the offer or the challenge, I think, of the environmental community is to really begin to focus environmental protection at the private property rights and private property incentives and local control levels.

I think that right now the evidence that we are reviewing today is kind of encouraging amongst people that are in control of resources in this country, an attitude of shoot, shovel, and shut-up, which is basically the reaction to finding out that they have an endangered species on their property.

I think that the real challenge to the environmental community is to begin to develop some environmental policy that is not an enemy of probably the very best approach that we can take to the environment, and that is of stewardship, which is a personal responsibility. It happens at the local level, and until you can identify a policy that encourages people to want to provide habitat and maintain and increase endangered species on their own property then you really haven't done your job and that is all I have to say. Thank you.

Mr. HANSEN. Mr. Herger of California, who has been invited to sit on the dais with us—we are kind of marking time—would you have an opening statement that you would like to make?

STATEMENT OF HON. WALLY HERGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HERGER. Mr. Chairman, I would like to thank you for holding this very important hearing and I also appreciate the Committee's indulgence in allowing me to sit on the dais.

This issue is of incredible importance to the 572,000 people who I represent in Northern California, both in the way of jobs—the some 36 mills that have closed because of Spotted Owls in areas where we find more Spotted Owls in Northern California than they thought they had in all of Washington, Oregon, and Northern California together to begin with, but even more tragically than the incredible unemployment, double digit in just about each of my 10 counties, is the loss of human life that we experienced a year ago, January 2nd, in which a levee broke on the Feather River in which it was determined in 1990 by the Corps of Engineers that there would be a loss of life in this levee—loss of life and loss of property—if this levee were not repaired, and yet it took 6 years through mitigation and hoops to jump through, through the Endangered Species Act, to finally come up with a plan that would have allowed them to have repaired it in the summer of 1997.

Tragically the levee broke 6 months earlier and three people were drowned right in front of that levee along with all the property and some 250 homes that were inundated, so this is an incredibly important issue.

I am absolutely certain that we can both protect and preserve endangered species and protect human life and property at the same time. They are not mutually exclusive, but the way the way is being interpreted at this time for all practical purposes they are mutually exclusive and again I appreciate the Chairman's holding this hearing so that we can work to correct that.

Mr. HANSEN. Thank you. Director Clark, I don't want to be unfair and ask you any unfair questions right now, and I would like to have a few more members here to hear your opening statement.

If I may deviate, respectfully, for just a moment, while we are waiting for Mr. Pombo and others to come back, I am constantly asked a question about the cost of the mitigation and the work that is done by Fish and Wildlife on our endangered species.

For example, the State of Utah wants me to put $120 million in a bill for recovery of four fish in the Colorado River.

People in Washington County want me to get them more money for the deal that has been worked out on the HCP and Washington County on the Desert Tortoise.

People in Iron County want to do something on the Prairie Dog and the list goes on and on.

Let me just ask you a quickie before we turn you on, if I could, and I apologize.

Ms. CLARK. That's all right.

Mr. HANSEN. Has anyone projected the cost of all the endangered and threatened species in America if we went through the recovery program, what that would be?

Ms. CLARK. Well, Mr. Chairman, I believe that there has been—there have been studies that have been done in the past and there have been all kinds of subjective determinations and evaluations of the cost of species recovery.

There have also been the same kinds of studies and evaluations on the, quote, costs of species extinction, and the cost to the American public of not having those species around.

All of our species don't have recovery plans I am, you know, concerned to admit, but the ultimate cost of species recovery for all of our almost 1,200 listed species hasn't been evaluated.

Mr. HANSEN. Mr. Pombo and Mr. Miller, we have not started. I am sure Director Clark is ready to start.

I'll relinquish the chair to my friend from California.

Mr. POMBO. [presiding] Mrs. Chenoweth, did you have an opening statement that you wanted to give before we got started?

STATEMENT OF HON. HELEN CHENOWETH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mrs. CHENOWETH. Mr. Chairman, I do have an opening statement, but I know you are anxious to move things along and so I would like to just submit it for the record, thank you.

Mr. POMBO. Without objection, it will be included in the record.

[The prepared statement of Mrs. Chenoweth follows.]

STATEMENT OF HON. HELEN CHENOWETH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. Chairman, thank you for holding this very important hearing. I thank you for your very strong leadership; not only on the issue of Endangered Species Act reform, but of all resource issues. I appreciate you.

We in the West have known for quite sometime that something was amiss. We have struggled and struggled to recover species—to the tune of billions of dollars and the loss of thousands of jobs. Some of the Western species have even become national issues—the Spotted Owl, Grizzly Bear, Wolf and Pacific Salmon all come to mind.

Through all of the controversy and costs, it has seemed that the West has been the primary focus of ESA activity.

Some steps toward recovery have been made. On others, we have to engage in new thinking; the current policies are not working. But whatever your view, since enactment in 1973 of the Endangered Species Act, the west has paid a heavy, heavy price. Just ask some of the thousands of loggers now out of work. Or ask the school teachers whose school districts, once dependent on timber receipts for schools, can no longer afford school books.

Yes, we in the West have paid a heavy, heavy price. Something is indeed amiss. And now we know. . . .

In the East, enforcement of the Endangered Species Act has been done on a wink and a nod. It would appear that politics and economics, rather than science, has played the central role in determining whether to list a species as threatened or endangered.

Let me explain. In the Pacific Northwest, among the number of high profile (and even emotional) species we are grappling with is the Pacific Salmon. The National Marine Fisheries Service (NMFS) has decided to consider the Pacific Salmon by stream segment. As a result, we have separate Federal listings for the Chinook Salmon-*Sacramento River Winter*; Chinook Salmon-*Snake River Fall*; Chinook Salmon-*Snake River Spring/Summer*; Coho Salmon-*Central California Coast*; Coho Salmon-*Southern Oregon/Northern California*; and the Sockeye Salmon-*Snake River*. Each of these species carries with it its own critical habitat designations, which have wreaked havoc on various communities and families.

Yet, in the East, there is the Atlantic Salmon. In September, 1995, it was proposed for listing by both the Fish & Wildlife Service (FWS) and NMFS. Let me quote from the September 29, 1995 *Federal Register,* "The NMFS and FWS have completed a status review of U.S. Atlantic Salmon populations and identified a **DIS-**

TINCT POPULATION SEGMENT in seven Maine Rivers. Atlantic Salmon in these rivers are likely to become endangered in the foreseeable future and therefore are being proposed for listing . . ."

But, interestingly enough, just last December, NMFS withdrew its proposed listing rule, citing Maine's conservation efforts. It appears NMFS considered Atlantic Salmon in the aggregate, and the Pacific Salmon by stream segments. Why?

I can't help but draw comparisons to my state of Idaho. We have bent over backward to protect the Pacific Salmon; Idaho (we) provide water . . . at the cost of farmers; protect habitat . . . at a cost to the timber and cattle industry; and have spent millions on hatcheries . . . at a cost to the Idaho taxpayer.

Yet, NMFS continued on its journey to list one of the Distinct Population Segments of Salmon in Idaho—despite all of our efforts!

Now, you can call me a cynic, but I believe in calling a spade a spade. And in this case, I believe population and politics played a very large role in a listing of the Pacific Salmon, and a refusal to list the Atlantic Salmon. To me, this demonstrates an agency (and administration) that is out of control. I would like not to believe this, but the numbers prove my point.

Idaho is in NMFS' Northwest district, and Region 1 of the FWS. I ask the Committee to note that more than half of NMFS' budget goes to its Northwest district; and more than half of the FWS budget goes to Region 1 . . . both which include Idaho.

This has allowed the agencies to literally play god, and to dictate policy without any input from the state.

Mr. Chairman, I could go on and on. But I won't. But one thing is clear. The playing field is tilted against the West, and with all of the money and emotions, the agencies are out of control.

The grizzly bear is one such instance. Over the clear objections of IDAHO's ENTIRE CONGRESSIONAL DELEGATION and the GOVERNOR, the Fish & Wildlife Service is attempting to introduce a Section 10(j) experimental population into Idaho.

Yes, Mr. Chairman, the agencies are playing god . . . and playing on the emotions of the public. Never mind the threat to families and workers the mighty grizzly presents. And further there is even a question whether the designated habitat can support a population. There is truly a political agenda here.

I am not advocating injuring the East like we in the West have been injured. But what I am advocating is that we inject some sanity and FAIRNESS into the debate. The West is not just one big National Park for Easterners to play in. We have communities, families and industries that have been hurt, seriously hurt, by out of control agencies.

Thank you, Mr. Chairman.

Mr. POMBO. At this point, I would also like to include in the record the opening statements of several members who have requested that, including Bob Smith, Jerry Lewis, Bill Thomas, and the Chairman, Don Young as well as statements from the public.

We have one from Gordon Ross, who is a Commissioner in Coos County, Oregon. Without objection I would like to include those in the record as well.

Without objection, statements of all members will be included in the record at this point and as well the official hearing record will be held open for 10 days to allow other people to enter their statements into the record.

[The prepared statement of Hon. Robert Smith follows:]

STATEMENT OF HON. BILL THOMAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I appreciate the opportunity to give this statement to the Committee and to discuss the concerns of my constituents from Kern and Tulare Counties in California's 21st District. I have two goals in addressing you today. First, I want to remind you of the testimony of my constituents when the Resources Committee Task Force on Endangered Species Act met in Bakersfield. Their testimony related many seemingly arbitrary decisions by Federal authorities. Second, I want to suggest some ideas that may help the Committee build a broader coalition to create a fairer and more effective law to conserve endangered species.

Tales from the 21st District

My District has been deeply affected by the presence of over 20 Federal endangered and almost 100 candidate species. Kern County embraces more than 8,000 square miles of desert, mountain and valley terrain (equal to the size of Massachusetts) including two important military facilities, Edwards Air Force Base and the Naval Air Warfare Center at China Lake. As you consider testimony on how Federal authorities implement the Endangered Species Act, please remember that:

Farmers in Kern County saw their farm sales drop, in some cases to nothing, within a few years after the Federal Government decided that fish in the San Joaquin Bay Delta in Northern California needed more water. Some farmers went bankrupt when water costs increased six-fold within a few years in the early 1990's. There are many examples of people being saddled with costly but useless requirements. In one instance, Federal authorities made the Kern Water Agency survey for the *possible* presence of the Tipton Kangaroo Rat, at a cost of over $27,000 even though no rat was suspected to live on the property and none was ever found. In another example, Federal authorities ordered a halt to construction of a highway overpass until a pregnant Kit fox had the chance to give birth. Only after several months did Federal bureaucrats allow the construction to continue when the fox proved to be not pregnant after all and, in fact, not even female.

How does Kern County cope with this bureaucratic mire that threatens to stifle its economy? Those who can afford to participate take part in the Kern County Valley Floor Habitat Conservation Plan which encompasses approximately 3200 square miles—covering more land than 18 Congressional districts in New York. That is more land subject to a habitat conservation plan than in all the land in all the conservation plans in the continental U.S. east of Nevada. I assume this is the reason that many of my colleagues do not constantly hear from their constituents about the enormous cost imposed on them by the presence of endangered species. Many states have no land tied up in conservation plans and do not have to obtain complex permits from various Federal bureaucracies whenever seemingly common occurrences take place—building a house, drilling a water well, putting up a highway overpass, or farming a piece of land.

Real Conservation

The current system of endangered species protection simply is not working. If you tell a farmer that he can not use his property when it is the "habitat" (real or potential) of some species, then that farmer is going to make certain he does not have that "habitat." Environmental activists may decry this "selfish" response, but you might as well ask why people are not willing to bankrupt their families on behalf of a jumping rat. Landowners, like anyone else, are going to look after their families and their livelihoods before worrying about protecting obscure species that look like simple weeds and rats.

Those who actually want to protect species should recognize this requires the *cooperation* of private landowners. Holding a bureaucratic gun to their heads will not bring cooperation and will not help species recover. A landowner who must set aside a portion of his land, often several times the portion he uses, is left making a living with less. The land he has left to work with must produce enough to make up for the several acres set aside for species conservation. So, to my colleagues, both Republican and Democrat, who have resisted reform of the Endangered Species Act, I issue this challenge: stop using the stick on private landowners and try using the carrot. Give landowner incentives a chance. Congress needs to make habitat affordable for these people who rely upon the land for their livelihood and who provide basic necessities like food to people in our country.

The second suggestion I make is to pursue a *fair process* for implementing species conservation. Just as centralized, closed, autocratic decision-making by Federal authorities has prevented the cooperation of landowners, it has also undermined the legitimacy of conservation efforts. You have heard the stories about species being listed with insufficient evidence, biased implementation by Federal authorities against the West, spurious scientific studies, and people not being permitted equal access to listing documentation. All of this boils down to an unfair process that needs reforming. Consider our own experience in Congress. Even when a group loses an issue, there is respect for the result if a fair process has been followed: notice of the issue, careful study by both sides, unbiased expert evaluation of the evidence, equal access to information, and equal impact on all regions of the country. As controversial a program as endangered species protection demands such a fair process. Therefore, I strongly urge you to consider reforms that make this process fair, open, and transparent for all affected parties.

Until such steps are taken, the Act will continue to fail to achieve its goal of Federal wildlife protection which reflects the will of the American people.

[The prepared statement of Mrs. Cubin follows.]

STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mr. Chairman, thank you for holding this oversight hearing today on the Endangered Species Act. I appreciate having the opportunity to express some of my general concerns with the implementation of the Act and its impact on my State of Wyoming.

As some of my colleagues may be aware, in 1994 the U.S. Fish and Wildlife Service was petitioned by the Biodiversity Legal Foundation to list the Preble's Meadow Jumping Mouse as an endangered species. The Service subsequently published a 90-day finding in December, 1994 that the requested action may be warranted. The proposed rule for listing the mouse as endangered was published on March 25 last year and I understand a final decision about the listing will be made later this month. I have several concerns about the testing of the mouse as an endangered species in Wyoming.

It is my understanding that the Wyoming Game and Fish Department conducted over 7,000 trap-nights in potential habitat in southeast Wyoming between 1990 and 1993 without recording any evidence of the mouse. The Medicine Bow National Forest also channeled an extensive portion of its annual endangered Species funds into surveys for the Preble's meadow jumping mouse in 1995, but no present populations were located. The Game and Fish Department further surveyed their habitat units in southeastern Wyoming. NO Preble's mice were found.

I am also told that extensive work in Colorado has confirmed the absence of this species from many historical areas and, rightfully so, private landowners have refused to allow Fish and Wildlife Service employees on their land to do surveys. Without this information, the listing decision will have to be made from available data, which, in my view, and I might add the view of the Wyoming Game and Fish Department is inadequate at best.

If the Preble's meadow jumping mouse is listed as an endangered species, all public lands with suitable habitat will have to be surveyed for this species prior to any activity which may affect the species or the habitat. Although such surveys are not required for activities on private lands, any landowner requesting Federal funds or requiring a Federal permit for work on their lands will likely be required to have surveys for the mouse conducted if the proposed work will affect potential Preble's habitat.

Because the Preble's habitat consists mainly of riparian grounds, including numerous areas with thick ground cover where grazing occurs, the ranchers in my State are very concerned about the impact of listing the Preble's mouse could have on their industry. In fact a briefing paper provided to my office on the mouse and its habitat states, "Reducing or eliminating livestock grazing in riparian areas, especially during the months that the mice are active, and discouraging road building into riparian areas may be useful management tools."

Once again, we appear to be putting the cart before the horse with respect to the listing of a species. We don't have adequate data to support listing, we don't really know much about its population, we haven't adequately assessed all possible impacts, yet we are moving ahead with listing. I'm beginning to wonder why we don't just list everything that moves, with the exception of people and then this problem would be solved. But I don't believe we want to do that. We don't have the resources to manage the species or protect their habitat or perform necessary services as it is now. So why should we add to that burden? My guess is, this is just one more avenue for the environmental community to stop what they perceive to be unnecessary development along the Front Range of Colorado and Wyoming. I think that is a travesty and I hope that if this Committee considers legislation to reform the Endangered Species Act either now or in the future, we do something to alter the criteria for listing.

[The prepared statement of Mr. Pallone follows.]

STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, I would like to thank you for holding this oversight hearing on the Endangered Species Act. I am looking forward to the testimony today by Jamie Rappaport Clark, the Director of the U.S. Fish and Wildlife Service, various regional administrators, as well as Rolland Schmitten, Director of the National Marine Fisheries Service to discuss the various aspects of the Endangered Species Act.

While the current endangered species Act has fueled a debate between those who want a clean environment and those who want a healthy economy, today's hearing will discuss the implementation of the Act by the two agencies with jurisdiction: the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

We all are aware that the current law has limitations. Too many species get put on the threatened or endangered list and not enough get taken off. Current practices have been criticized as ineffective and inefficient. Not enough attention has been placed on recovery or preventing species from getting to the point where they need to be listed. Half of all species on the endangered list do not have recovery plans. The question I have for the agencies today is, how can we do better?

In closing Mr. Chairman, I would like to welcome the panel today and I look forward to hearing their testimony on this contentious topic.

[The prepared statement of Mr. Ross follows.]

STATEMENT OF HON. GORDON ROSS, COMMISSIONER, COOS COUNTY, OREGON

Mr. Chairman:

My name is Gordon Ross. I am a fourth generation resident of Coos County, Oregon, and at present one of three county commissioners for Coos County. I'm also on the Board of Directors of the Association of Oregon and California Revested Railroad Grant Land Counties. (O & C Counties).

Coos County is located on the south coast of Oregon with an approximate population of 62,000. Our principal industries are lumber, fishing, agriculture and recreation. Coos County has two National Forests; the Siskiyou and the Siuslaw, the Coos Bay BLM District that manages O & C, Coos Bay Wagon Road and Public Domain Lands managed under the President's Northwest Forest Plan. The Elliott State Forest and our County owned forest that is managed under the Oregon Forest Practices Act are all within our boundaries. Our current unemployment rate is between 10 and 12 percent, almost three times Oregon's urban area unemployment rate. The Endangered Species Act is putting our industries and our County at risk. Coos County and the West are being held hostage by the Endangered Species Act and the whole nation is suffering for it. Since the listing of the Northern Spotted Owl and the implementation of the Northwest Forest Plan the soft wood timber imported into the United States has risen from 12 billion board feet to 17 billion board feet, an increase of imports of 5 billion board feet per year. The increase in imports corresponds almost exactly with the decline in domestic harvest on Federal lands, caused mostly by listings under the Endangered Species Act

Presently, as we work with the National Marine Fisheries Service to avoid a Coho salmon listing in Oregon, we have on our table a draft letter from them that proposes changes to the Oregon Forest Practices Act that would further reduce the harvest of timber on private, state and county lands. As we try to understand NMFS's proposal, our estimates run between a 60 and 80 percent reduction in annual harvest

Coos County operates a 15,000-acre forest that generates revenues that fund public health and safety programs for the benefit of all county citizens. The County forest is harvested on a sustained yield basis under the regulatory requirements of the Oregon Forest Practices Act. Our Winchester Creek timber sale, due to sell March 10, contains just short of a million and a half-dollars worth of timber. Under Oregon's present statute we must leave $82,000 worth of timber along streams, under the Governor's voluntary stream side set back we will have to leave $167 000 on the land; but if the National Marine Fisheries Service scenario were place] in Oregon law, around $1,000,000 or two thirds of the sale would be lost. This is not an isolated or unique example. Most of our timber sales would be similarly impacted if the National Marine Fisheries Service prevails. This would be a death blow to programs now being supported by Coos County's timber sales program including Women's Crises Center, kelp-line, homeless shelter, retired senior volunteer programs, wildlife service, natural resource conservation programs, extension service, all health department programs from teen pregnancy prevention and water monitoring to immunization.

When we consider the entire annual harvest program, of 190 acres, we would experience a loss that would completely eliminate all County programs for public health and safety. Because 37 percent of Coos County's private sector agricultural income is from wood lots the same reduction in revenue will be experienced in the private sector so additional taxes to support these programs are not an option. In short the Endangered Species Act is crippling us in the West. Eventually it will be felt nation wide.

We have examined the "Statement of Cooperation" among the U.S. Fish and Wildlife Service, National Marine Fisheries Service and the State of Maine, which formally accepted the State of Maine Atlantic Salmon Conservation Plan. We note that the forest practices requirements under plan are not nearly as strict as Oregon's current forest practices rules and we ask the question, why are the people of Coos County specifically and the West in general being treated differently?

Mr. POMBO. Having said that, Ms. Clark, we are finally to that point. If you are prepared, you may begin.

STATEMENT OF HON. JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC; ACCOMPANIED BY LA VERNE SMITH, CHIEF, ENDANGERED SPECIES DIVISION, ARLINGTON, VIRGINIA; MICHAEL SPEAR, REGIONAL DIRECTOR (REGION 1), PORTLAND, OREGON; RENNE LOHOEFENER, ASSISTANT REGIONAL DIRECTOR FOR ECOLOGICAL SERVICES (REGION 2), ALBUQUERQUE, NEW MEXICO; JOHN BLAKENSHIP, ASSISTANT REGIONAL DIRECTOR FOR ECOLOGICAL SERVICES (REGION 3), MINNEAPOLIS, MINNESOTA; DAVID FLEMING, CHIEF OF THE REGIONAL ENDANGERED SPECIES OFFICE (REGION 4), ATLANTA, GEORGIA; AND PAUL NICKERSON, ENDANGERED SPECIES COORDINATOR (REGION 5), HADLEY, MASSACHUSETTS

Ms. CLARK. Thank you, Mr. Chairman, and again thank you for this opportunity this morning to discuss the Endangered Species Act.

I am joined today by some of the most foremost experts in the field of endangered species conservation from the Fish and Wildlife Service. I hope to provide the Committee with direct responses to any questions that the members might have, but if I cannot, I will turn to these experts with me today.

Answers to the questions in your invitation letter are in my written testimony. Therefore, this morning I will outline some of the challenges we have been facing and the opportunities we have discovered by taking new approaches to species conservation.

Over the past several years, the Clinton Administration has produced a remarkable record of success through a simple commitment to making the Endangered Species Act work. We are working more closely than ever before with the National Marine Fisheries Service to improve the efficiency and the effectiveness of the Endangered Species Act.

Since 1994 we have implemented a series of innovative policy reforms to improve the Act's effectiveness while encouraging Americans to protect endangered and threatened species on their own lands. As a result, we are now enjoying an endangered species program that works better than ever before for both species and for people.

We strengthened the science that has been the foundation of species conservation by instituting improved and consistent peer review. We streamlined the Section 7 Federal agency consultation process. We have increased the roles of states, tribes, landowners and other conservation partners in recovery planning and implementation.

We have expanded the use of candidate conservation agreements and plans to help conserve species before they need to be listed.

Through these agreements we have successfully kept species off the endangered species list including the Copperbelly Water Snake and the Atlantic Salmon, and in exchange for long-term species conservation commitments we have offered economic certainty to landowners through our no surprises policy, which has been a key tool in revolutionizing the HCP process.

The record is clear. Prior to 1994 only 14 landowners successfully developed HCPs in over 10 years. Today over 225 HCPs cover over five million acres and another 200 are under development.

Finally, we are improving our monitoring programs and increasing the use of adaptive management to ensure the success of all of our endangered species programs.

These reforms have bred a new generation of conservation successes. Some are small and simple, like Mary Presley's HCP to protect the Florida Scrubjay on her one-half acre of land by leaving 30 percent of her lot uncleared. She says she likes it that way for privacy as well as for the birds.

Other successes are large and complex, as in San Diego, where the entire community has rallied around a plan to protect 172,000 acres of land for over 80 listed and candidate species while allowing for careful development.

Another example is a mosaic of protection provided by Safe Harbor agreements that span from Louisiana to North Carolina that will contribute to the eventual recovery of the Red Cockaded Woodpecker in the foreseeable future.

Successes are also occurring between government agencies like the Fish and Wildlife Service and the Forest Service. Through the streamlining of Section 7 we expect that within 6 months we will ensure that as many as 600 grazing allotments are in compliance with the Endangered Species Act in the Southwest.

We are confident that this process will result in an appropriate balance between traditional land uses and species conservation.

These types of successes are being duplicated all over the country, as people and communities are creating innovative ways to protect endangered and threatened species while achieving economic goals. Over the next several years we will begin to turn the page to a new era of success as we expect to process delistings and reclassifications for as many as two dozen species. This is an exciting juncture for us because recovery is the ultimate Endangered Species Act success story.

To conclude, Mr. Chairman, I don't pretend to tell you that the business of endangered species conservation is all sweetness and light. It's not. It's hard work, and it's often controversial. But I am proud to tell you that we're doing it better now, in close cooperation with all the Federal agencies, with less need for regulation, and more opportunities and incentives for cooperation from landowners than ever before.

Reauthorization of the Endangered Species Act is long overdue, and S. 1180 as reported from the Senate Environment and Public Works Committee represents a constructive step in that direction. The bill incorporates many of the reforms we've made, and will yield a stronger and more user-friendly law.

I look forward to working cooperatively with your Committee and other Members of the House to reauthorize an Endangered Species

Act that will continue to make America the world leaders in species conservation as we enter the 21st century.

Thank you again for this invitation, and I'd be happy to answer any questions you or other members may have.

[The prepared statement of Ms. Clark may be found at end of hearing.]

Mr. POMBO. Thank you very much for your testimony.

One of the purposes of this hearing was to discuss some of the differences between the different regions of the country in how the Act was being implemented specifically in those different regions of the country. Everybody's been given a copy of the handouts that include these figures.

The first one, Ms. Kennedy, if you could put that one up that shows—yes. On this particular slide what we're seeing is the differences between full-time employee hours in the different regions of the country, in particular to draw your attention to Region 1, which has 368 positions, versus Region 5, which has 31 positions, and Region 3, which has 24 positions.

Could you explain to me why there's that disparity in the numbers of people that are employed?

Ms. CLARK. I'd be glad to. And if I didn't feel like I was in the center seat of an airplane, I could get up and maybe point out some of the differences on our map.

I think what's important to note is that we employ our forces and we allocate our resources based on where the biological diversity of the country is, and while there's—why there's a lot of discussion about East versus West, in reality—and it might be easy to look at this map for a moment—these maps—the issue is really North versus South. As you get closer to the equator, it's not a surprise that biological richness, ecological—biological diversity is much more apparent, and so it's not a surprise to us that you'll see through the whole band of the southern tier a much more rich area.

We send our forces and we employ our bodies, our full-time equivalent positions, to the areas of the country where the species occur. That's not to say that we don't have hot spots. We have hot spots in California, southern California in particular, we have hot spots in the islands due to the localized occurrences and local endemism of many of the species. And we have hot spots in the Southeast like Florida, Mississippi, Georgia, Alabama. So it is absolutely untrue that—where we put our bodies and our resources is where the activity is.

Mr. POMBO. Put up the second one, which does show the numbers of species that are listed in the different regions.

If you go throughout the southern tier, as you speak of, that is where the majority of listings are, but if you look at the positions in Region 2 and Region 4, you have about two-thirds the number of positions in those two regions as you do in Region 1. So there is—there is still a big disparity even if you put Region 2 and 4 together.

Ms. CLARK. Right.

Mr. POMBO. As contrasted with Region 1.

Ms. CLARK. Well, I'd be the first to admit that we don't have enough resources to provide adequate technical assistance and sup-

port to implement the Endangered Species Act nationwide. The endangered species budget in the Fish and Wildlife Service is without a doubt the most carefully tracked budget that we have among all of our allocations. It's based on a formula. It's based on some capability funding in each region. And then it's a direct allocation based on the demand of the resource need in each of the regions in the country.

Mr. POMBO. If I could have you put up 11. I believe it's No. 11.

You talk about the biodiversity within the southern regions, the differences that we have in Region 1 and through the southern region. And yet one of the things that I think that we can all agree on is one of the major problems with endangered species is the destruction of habitat.

1If you look at the eastern regions, the Northeast in particular, the upper Midwest, if any part of the country has had a destruction of habitat, I would say that it is much greater in that region of the country versus the South and the West. And apparently those States that are within that region that have their own State Endangered Species Act recognize that as well.

This particular chart shows the numbers of species that are listed under the State Endangered Species Act in those respective States versus the numbers that were federally listed under the Federal ESA. You contrast the difference say between New Jersey, which has 393 different species that are listed under their State Endangered Species Act; 15 are listed under the Federal Endangered Species Act. You contrast that with California, which has 292 on their State list; 214 are listed on the Federal ESA with 65 proposed and 26 candidate species.

So looking at that I would say that there's an obvious difference between the effort that has been put in to list under the Federal ESA versus one region of the country and in this case California in particular.

Ms. CLARK. Well, Mr. Chairman, it actually doesn't have anything to do with the level of effort. It has a lot to do with the uniqueness of the lands. And in fact it really depends on the lens you look through.

Many of the States in the New England area are about the size of a few counties out west. And when the State's looking through a lens, they're looking at their own political boundary. And to give you a classic example, the purple martin is listed as threatened in New Hampshire, and the flowering dogwood is listed as endangered in the State of Maine. That's fine. That's because the lens that they're looking at is their own State boundaries.

The Federal Endangered Species Act causes us to evaluate the status of the species throughout its range. Many of the species in the northern climes have wide-ranging activity, and so the flowering dogwood, while it might be endangered in the State of Maine, is certainly not endangered throughout its range. So it would never qualify for the Federal Endangered Species Act listing.

Mr. POMBO. Let me ask you specifically about a species that's listed under the Federal ESA, the American burying beetle, and there have been a number of activities to try to recover that in particular. Connecticut has it listed as a historic species on their endangered species list. They say that it was part of its historic habi-

tat, and they have seen fit to list it as a historic species. What efforts are being made by your Agency to reintroduce the American burying beetle into its historic habitat in the Northeast?

Ms. CLARK. Mr. Chairman, I do know that we have a lot of efforts under way to recover the American burying beetle, but I'll turn to Paul Nickerson, who's chief of our Endangered Species Office in Hadley, Massachusetts, to let him respond.

Mr. NICKERSON. Mr. Chairman, at this point no efforts in Connecticut. However, we have a very aggressive effort to reintroduce the burying beetle on Penikese Island in Massachusetts, which to this point has been successful. We have several years of carryover populations, and we feel we're well under way to furthering our recovery goal there.

Whether we'll get to Connecticut or not remains to be seen. But one step at a time, and the feeling was Massachusetts, Penikese Island and Martha's Vineyard is another place we've successfully reintroduced. So we're moving toward recovery for that species, but not Connecticut yet.

Mr. POMBO. Are there takes of the American burying beetle occurring within the Northeast or are you issuing permits?

Mr. NICKERSON. No, sir. We've had one Section 7 consultation on the American burying beetle on Block Island. There has been no need for us to issue any permits with the exception of recovery-type permits for scientific study.

Mr. POMBO. May I ask on another specific species, the Karner blue butterfly, which is federally listed? It is found in portions of New Hampshire, New York, Michigan, Wisconsin, Indiana, and Minnesota. But I can find no permits issues for that—for the Karner blue butterfly.

Are takes occurring without permits?

Mr. NICKERSON. No, sir. There's two reasons for that. Its distribution in New Hampshire is very limited. We've got an easement on the last site. It's managed under our Great Bay National Wildlife Refuge. So there's no need to worry about take permits there. We've already worked it out with the landowners so that the management regime is in place.

Insofar as New York is concerned, the State of New York has a very aggressive endangered species program, and they take care of any takes that they either anticipate or that they know occur. In the event they need help from our law enforcement folks, they bring us to the table. But normally they negotiate these things out with the landowners or the town officials ahead of time. An example is mosquito spraying in one of the counties, and they identify particular areas where the Karner blue occurs, and no spraying is allowed in those areas. So it's being taken care of by our State partners, and we like it that way.

Mr. POMBO. California also has an aggressive Endangered Species Act, and we don't seem to have that same level of cooperation, and that does concern me. There are distinct populations on the Karner blue butterfly, distinct population segments that you have identified. Are you requiring a migration corridor between those distinct populations?

Mr. NICKERSON. The recovery plan is still in preparation, so we've not gotten to that point yet. Our goal now in conjunction

with the State and the Nature Conservancy is to continue to identify the sites where the Karner blue occurs and protect those sites.

One more thing we've done, in conjunction with Niagara Mohawk, they maintain power line corridors and they have to spray. What that can do if it's done correctly is promote the growth of lupin, which is a host plant for the Karner blue. We've issued them a recovery permit knowing that under certain circumstances there will be take, but that in the long run we'll be able to preserve the habitat, and those power line corridors can get at part of what you're saying. We've not done it in total because of the nature of the Karner blue.

When fire was prevalent, fire used to do what you say for us. The habitat would succeed, and yet there would be a fire somewhere else, and the early succession plants such as lupin would come up. Now we've eliminated fire, so now lawn mowers and sometimes herbicides and other means of ecological suppression—in other words, retarding the logical succession of plants, is doing that for us.

Mr. POMBO. You are adopting a recovery plan for that particular species. It's not complete. Am I to understand that?

Mr. NICKERSON. Yes, that's correct. It's in preparation.

Now another interesting thing, the State of New York has written their own, so this is another case where our State partners are a little bit ahead of us, because they can focus solely on activities within New York.

Mr. POMBO. My time has expired, but I'm sure I'll have an opportunity to continue questioning.

Mr. Miller.

Mr. MILLER. Thank you, Mr. Chairman.

Again, I'm not quite sure what we're getting at in this hearing, but going back to your—this original map that was up on the wall that deals with listings of critical habitat by region and other aspects of activity in the region, I think that the Director has responded quite correctly that the deployment of resources are driven by the activity that's taking place and the biodiversity of those regions.

But if we also look at this map, I think if you look at that area west of the Mississippi you're talking about 71 percent of the land mass in the United States, and if you take the HCPs in the West and the HCPs in the East, you have 129 HCPs or one for every 16,000 roughly square miles, and in the East you have 50, one for roughly every 17,000 square miles in those two regions.

The Director has already pointed out the issue of biodiversity. The West and South have a greater abundance of species than the Midwest and the Northeast, where there are fewer HCPs. California has 6,205 species of vertebrates and vascular plants; Florida, 3,745; Texas, 5,473. By contrast, Wyoming has 2,758; Iowa; 2,129; Maine has 2,058.

Then if you want to put another overlay on this map, you could put the overlay of growth. You're deploying your resources where we're having the greatest interaction between open space and urban populations. In the high-growth area of Texas where about 6 million people a decade are moving to Texas are increasing their population. In California, 10 million new people a decade. The Pa-

cific Northwest is currently a hot spot in-migration of individuals. Florida is legendary in terms of its in-migration of individuals. And the Carolinas have been the hot area in the Southeast.

So now we have—we've put an overlay of land mass, we've put an overlay of HCPs, we've put an overlay of biodiversity, and now let's overlay population on top of that.

Then with that population let's overlay economic activity. The hottest regions in the country right now are not the Northeast. People are leaving. That's why their Congressmen are worried about reapportionment. They're not going to have a seat because they don't have people. Maybe we can do an HCP for them.

[Laughter.]

Mr. MILLER. We can combine the reason the Minnesota—many of the Minnesota and Wisconsin delegations voted against Puerto Rico last night. They couldn't figure out where the six seats were going to come if they didn't come out of Minnesota, Wisconsin, and the Northeast. So maybe we can do a big HCP of the Northeast and Minnesota and they'll all get along fine.

So let's go to economic activity. The average housing starts in the Northeast were 132,000 a month. In the Midwest, 320,000 a month. In the South, 661,000. In the West, 361,000. So you start to see now we're bulldozing the land. We're trying to make room for people who are moving to these areas because of the economic activity, apparently economic activity not threatened by the Endangered Species Act at this point, because we're still creating those numbers of new housing in those regions where the greatest number of people are being deployed to monitor and enforce the law. Somehow the economic activity is beating the pants off the rest of the Nation.

Then we can overlay the question of what have we been doing in these regions that might have caused the problem. We can go to hydroelectric rates. And we can start to see that in the West we've been the beneficiaries of the Federal Treasury building large dams on complex river systems that have completely screwed up the fisheries of that region. So I suspect there's a reason why NMFS is out west, because of the complex decisions we've made about damming some of the great rivers of the West when we with all due respect knew much less than we know now. And there's an awful lot of people.

I notice with the announcing of the listing in the Northwest last week or the week before, Boeing, Microsoft, Republican State legislators, the mayor of Seattle and others were saying this is a problem we've got to work out. This is vital to our region. And we support the listing and we support engaging in how to solve the problem. So apparently they think this is rational. They're getting the economic activity, they're getting the in-migration, and they're getting the cheap hydroelectric rates.

Now maybe they won't need them, because I see that British Columbia's offering cheaper hydroelectric rates, so the aluminum companies are thinking about going to British Columbia as opposed to staying in the Northwest. But we've benefited from some of the lowest electrical rates. But we got there by damming some of the more complex river systems in the country. And we're paying the price. And a big part of this workload is about fisheries, it's about

salmon, and it's about the problems in the Northwest and in California which are dramatically supported by the population.

Then we can overlay public lands, where we're more likely to encounter these problems and monitor these problems because in those public lands we also have a great number of wilderness areas, we have a number of national parks, we have great economic activity, people come visit those, and they're candidates for the protection of the species. And the fact is the West enjoys those benefits, again at the behest of the rest of the country.

I suspect if we're starting to ask about the allocation of resources, the East might say why are there so many National Park Service out west. Well, it's because where the parks are. And so, you know, this map doesn't tell a story and the charges for the moment don't seem to tell the story either.

Would you like to think about the West? Would you like to think about the Southeast or the South or the Florida Panhandle or Texas or the Southwest, Arizona and others, that are growing at this rate without the monitoring and enforcement? Would you just like to show up in court at some particular time?

So those are the choices. Or you can try to get ahead of the curve, you can try to get ahead of the curve, and deal with the issues of habitat conservation plans and prelisting activities and avoidance systems and all the things that these people at this table are doing so that we can continue to build those 600,000 homes in the South and the 300,000 homes out in California and we can continue to have a thriving economy. Or we can just wait and meet at the courthouse door when the judge says shut it down.

And so this is an interesting argument. I think this is War on the West, Part 2. I don't think you're going to make it meet the burden of proof. Because it just doesn't add up. There are reasons why these agencies are deploying their people. There are reasons why they're welcomed by local government and developers and others so we can solve these problems and we can get on with the activity.

And there's reasons why they're welcome there by the people who live in these regions because they want to continue to see the salmon thrive, they want to be able to continue to take their kids fishing, those of us in the Delta realize the millions and millions of dollars that are generated through fishing days and activities and recreation, as do other people in the local communities, whether it's West Yellowstone or the Seattle Sound or the Delta or wherever else we've come to understand the engine, the economic engine that the West is. There's a reason people pack up and leave San Jose, California and Palo Alto and go to Boise, Idaho.

Screw around with the Endangered Species Act and there will be a reason—there will be no reason to leave, because they'll look the same, and the benefits will be the same. In Money magazine—what is it, Money magazine, the most livable places in America, schools and then environment are the two foremost reasons why people decide it's a good community. There's a reason people are moving to the Northwest—economic opportunity and a wonderful environment. There's a reason we lost many people to California to Boise or Salt Lake City—economic opportunity and a wonderful environment. OK?

So the West isn't doing—this isn't about a war on the West, this is about an area, whether it's the West or the Southeast, or the Southwest, Florida, that's doing extremely well, extremely well economically, and accommodating a massive inflow of population of both businesses and families and residents and somehow staying way ahead of the curve, and has benefited from an awful lot of public money being spent there to develop inexpensive energy with the attendant cost. And obviously a sophisticated population that understands the struggle to preserve the reasons why a lot of people went to the West and what they hope to preserve for their families in terms of their communities.

Finally, it needs to be said that I find nothing wrong with the Endangered Species Act—I find a great deal wrong with the Endangered Species Act. Hopefully we'll get into some of that in round 2 of our questioning.

Mr. POMBO. Mr. Young.

Chairman YOUNG. [presiding]. I have to go to another meeting, but my understanding of ESA is that the take of listed species is prohibited even if the take is accidental or incidental to some lawful activity. The term "take" includes modification or destruction of habitat. So if I clear land to build a house or cut down trees that are the home of an endangered species, that is a violation of the ESA unless I get a Section 10 incidental take permit. Now, this is a question. Is an incidental take permit mandatory if you are impacting species on the habitat?

Ms. CLARK. Let me see if I can repeat the answer back in the form of both a question and an answer.

Take of listed species has its strict definition in the regulations. Where there's significant habitat destruction that significantly impairs the breeding, feeding requirements of a species, then yes, Mr. Young, it does constitute a take under the Endangered Species Act.

Chairman YOUNG. All right. An incidental take permit is mandatory. And as I said, now, the question is, you have never issued a Section 10 incidental take permit in Region 3 and only one in Region 5. Does that mean there are no takes of species occurring in those regions?

Ms. CLARK. Well, there are also other ways to issue take authority, and certainly Section 7 of the Endangered Species Act, working with other Federal agencies, is one of those ways.

Chairman YOUNG. But the question is now, there has been an awful lot of violation issues on taking in the western region. A lot. It is my understanding you never issued in Section 10 take permit in region 3 and only one in region 5. Do you mean there's no negative impact on species—and that's one of the most heavily impacted areas—has anybody ever looked at what's happened around here, how many houses are being built and how many trees are being cut down and how many species are being impacted upon? And I don't hear a peep, not federally or locally.

I mean, I've got great big maple trees every day being cut down, a habitat for all kinds of species, and that's what concerns me the most. It seems like—and by the way, I heard the term law enforcement officers Fish & Wildlife. That's one of your biggest problems: attitude. We are going to call them the law enforcement officers. There is no real cooperation between the individual land owner—

we're talking about private land—and by the way, and this hasn't changed now, ma'am, is that in Alaska, with all the land we had that's federally owned, it was never looked at by Fish & Wildlife on the Federal lands. It was only looked at on private lands and those lands that had been leased for endangered species. Now, are we cataloguing all the species on the Federal land today?

Ms. CLARK. We're working very hard to conduct biological evaluations of all of our national wildlife refuge lands.

Chairman YOUNG. Well, that's a good answer, but are you doing it?

Ms. CLARK. Are we doing it?

Chairman YOUNG. Or are you just concentrating on private land?

Ms. CLARK. We are absolutely doing it given our available resources.

Chairman YOUNG. OK. Now, the second question. This is probably why the Act has to be changed. I had a group come in from California today—the other day talking about a water project, $4 billion. One billion was supposedly to rehabilitate the salmon run in California, one billion dollars. How many hot lunch programs, how many social programs, how many housing for the elderly and the poor could that one billion dollars cost?

Thirdly, it's my understanding that the Fish & Wildlife has told those people that they cannot try to rehabilitate the species; it has to come from the natural stock. Now, is that the attitude of the Fish & Wildlife, that you're only going to use the natural species and none of the other proposed methods that could be done?

Ms. CLARK. The attitude of the Fish & Wildlife Service is to work cooperatively with all of our partners to recover endangered species as quickly and efficiently as possible.

Chairman YOUNG. Does that include the artificial propagation of fish, et cetera, et cetera, so we get more fish?

Ms. CLARK. The artificial insemination or the artificial stocking?

Chairman YOUNG. Yes. Can you do that?

Ms. CLARK. It really——

Chairman YOUNG. The reason I say this is—I was going to save it until Rolland's questions, but on the Willamette River, I believe—let's think about this a moment—now they're going to save the endangered species of nady chinook salmon, but there have been, to my knowledge, for 50 years five hatcheries on that river. Now, how in the world are you going to save the nady—is there going to be a litmus test for the fish? You come from the hatchery and you're a natural fish, but the river has been listed as endangered habitat for all fish.

Ms. CLARK. Mr. Young, as much as I would like to respond to your question, and I wish I had the information, I'm going to have to punt it to my colleague, Rolland Schmitten. This is an issue——

Chairman YOUNG. Well, Rolland Schmitten right now is on my list, if you want to know the truth.

Ms. CLARK. OK. Well, then, I will try to continue to answer the question.

Chairman YOUNG. But you're part of the Fish & Wildlife group that actually backs this up. But I'm just suggesting there has to be some logic to the actions of the agencies to make this thing

work. One of my pet peeves is, very frankly, is I've been told that the answer is they're not the same DNA.

Ms. CLARK. Control propagation and reintroduction are important tools supporting recovery of endangered species, specie-specific activities and whether or not it works for specific stocks of salmon is an individualized evaluation that's conducted by the——

Chairman YOUNG. Again, I'm not particularly picking on you; I'm just suggesting somewhere along, this government better wake up and you better wake up, because the public is going to start hearing about these billion-dollar projects to protect a species that can't be protected.

A billion dollars, like I say, is a tremendous amount of money. It could be spent for other purposes other than that one fish when it can be rehabilitated by, frankly, bringing in the smelt or some fish from some other area, from a hatchery, and reestablishing the fishery, just like the sockeye salmon on the Columbia River. That's what Rolland has told me has got to be protected.

Did you see the project on the Columbia River, how much that is going to cost? A tremendous amount of money. And not only that, when they get done, they won't be able to achieve the goal. And here's where your credibility starts getting very weak.

The Endangered Species Act, like I say, I'm the only person in this room that has ever voted for it, probably the worst vote I ever made in my life because it wasn't done as we were told it was going to be done. Now we have vertebrae and all these other good things involved and no logic applied to it.

So I just—I'm just very concerned, but I'm also going to suggest agencies better start coming up with some ideas as to how they can best approach to reestablish some of the species or you're going to get hurt and so are the species, and that ought to be your main goal.

Ms. CLARK. Our main goal is recovery of endangered species, Mr. Young.

Mr. POMBO. [presiding] Mr. Farr.

Mr. FARR. In light of the previous discussions, let me get more specific. All politics is local. The politics I would like to ask you about is the creation of a Fish & Wildlife Service office in Sacramento. I think your explanation of what's happening and where the workload is and where the issues are and the incredible seminar we just got from George Miller on economic development and prosperity in America relative to the Endangered Species Act—all these indicate that we ought to have an office. Because your regional office is in Portland while an awful lot of the workload, particularly with the CalFed, is in California, it requires that people travel all the way from Portland to northern California do that work.

Is there going to be an opening of an office in Sacramento?

Ms. CLARK. Mr. Farr, we have a reprogramming letter that is before this body awaiting response on the establishment of a regional office in Sacramento. It is my wish and it is the wish of the department that we have middle and senior level management in California to provide that technical assistance and policy oversight. We're awaiting a response from both the House and Senate Appropriations Committee on a reprogramming for fiscal year 1998, and

the President, in support of this regional office, submitted a $3 million budget initiative in fiscal year 1999 to support the completion of the regional office.

Mr. FARR. Thank you. So we have to deliver the money?

Ms. CLARK. You have to deliver the response that it's OK to reprogram 1998 dollars.

Mr. FARR. OK. With regard to the steelhead and other salmon species, can you comment on the status of the development of the California State Management Plan and whether that plan, the California plan, would be acceptable to the National Marine Fisheries Service?

Ms. CLARK. Mr. Farr, I'll have again to defer that to my colleagues in the National Marine Fisheries Service. The next panel—I mean, we're happy to squeeze more in, but——

Mr. FARR. Oh, the next panel. All right.

Ms. CLARK. Excuse me?

Mr. FARR. That's the next panel?

Well, I think what's important, though, is that we have in California been developing state management plans, and sometimes these plans were ahead of the Federal listings. So what happens is when the Federal listing, particularly with salmon, comes along, it preempts essentially the deals that have been made and people they have in place, and there's big confusion about that. If the state plan is working, why upset it? I just want to leave that message out there.

Ms. CLARK. Mr. Farr, if I could respond in a general fashion, the Fish & Wildlife Service is absolutely, as I certainly believe the National Marine Fisheries Service is, supportive of state management plans and we have certainly shown that in areas like the Atlantic Salmon and Coho, where we have deferred to state management in lieu of listing.

Mr. FARR. The last question is, what steps is the Fish & Wildlife Service taking to investigate and address the causes of the sea otter decline, a federally listed threatened species, and will additional funds be made available in fiscal year 1999 for this purpose?

Ms. CLARK. We are working with the Friends of the Sea Otter, a public-private partnership group, to evaluate the otter. I know that we have had some declines due possibly to disease and certainly possibly to the effects of El Niño. I would be glad to get back to you with more specifics, but I don't have a specific response on available allocations or appropriations at this time.

Mr. FARR. Could you get back to me?

Ms. CLARK. I would be happy to.

Mr. FARR. Thank you.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Schaffer.

Mr. SCHAFFER. Thank you, Mr. Chairman.

Ms. Clark, your earlier comments in response to the Chairman, you mentioned that the Fish & Wildlife Service does not look at political boundaries but only looks—considers biological ranges of certain species, and I want to talk about the cactus ferrugineous pygmy owl in that respect because it is a species that you have moved to protect, and yet I'm told that this is a very bountiful species in Mexico.

Do you consider the biologic range of species when they happen to—when that range crosses the United States border, including Mexico, Canada, other ranges that may occur?

Ms. CLARK. Yes, Congressman, we absolutely do evaluate and consider the status of the species throughout its range, but we also put our own joint policy with National Marine Fisheries Service, consider independently the range in the United States, and we have the ability to evaluate the status and add to the list distinct population segments in the United States that are threatened with extinction, and so we have listed the U.S. population of the cactus ferrugineous pygmy owl in Arizona because of its status in the United States.

Mr. SCHAFFER. What is the origin of that policy? Is that based in statute? Is that based on a regulatory level, agency level? Where did you come up with that?

Ms. CLARK. It's joint inner-agency policy that was done—it's not—wait a second. Let me back up. The law gives us—in the definition of species, species are defined as species, sub-species or any distinct vertebrate population segment which—and then it goes on in the definition. We have defined——

Mr. SCHAFFER. But does the definition include within a range or within a political boundary?

Ms. CLARK. The definition is very straightforward, and as I said, it just says distinct vertebrate segment or distinct vertebrate population segment. We defined in policy that was submitted for public notice and comment what distinct population segment means, and part of it was discreteness—the discreteness, which is where it occurs, and if there's a physical separation, then discreteness is also—can be determined by international borders, significance, significance of that population to the species as a whole, and whether or not that population is threatened or endangered.

Mr. SCHAFFER. When you mention that your primary objective as an agency is to preserve species and to help them reestablish themselves if they're deemed to be threatened in some way, how does that square with the plentiful nature of this owl in this case that just happens to be on the other side of the border but maybe not so plentiful in the northern portion of its range in the United States? It seems that the focus is the quantity of owls within a political boundary rather than the strength and health of the species overall.

Ms. CLARK. Well, we have used the United States borders in our policy determinations because that's also where we control recovery. I guess you could make an analogy to the——

Mr. SCHAFFER. Let me ask, with respect to applying sound science to the strength and integrity of that species, what relevance does a political border have to play in the scientific assessment of the strength of the species?

Ms. CLARK. I have two answers to that question. First, just to kind of clarify our belief of the population status, I'm not so sure it's as plentiful as the suggestion is in Mexico.

Mr. SCHAFFER. If you're not sure, why is it listed?

Ms. CLARK. Because it is endangered with extinction in the United States.

Mr. SCHAFFER. You just said you're not sure about that.

Ms. CLARK. No, I was referring to your status evaluation of being plentiful in Mexico, and we don't believe it's plentiful in Mexico either, but we have listed it in the United States based on our policy.

You could analogize it with state listings. States are looking through the lens of their state borders and the Federal Endangered Species Act is charged with protecting and preventing species' extinction in the United States, and that's what we have done with the pygmy owl.

Mr. SCHAFFER. So your comment that you look at biologic ranges is not accurate, then; it is political borders that you look at?

Ms. CLARK. No.

Mr. SCHAFFER. The United States.

Ms. CLARK. No. We look at the entire range of the species and we have listed many cross-border species, but we also have the opportunity and the authority, we believe, to use the international borders as a border when listing distinct population segments.

Mr. SCHAFFER. I'm curious about the legality of these cross-border listings and the lack of information, particularly that you're unsure as to the extent of the strength of the species. I don't want to take a lot of time here, but that's something I can tell you I'm interested in, first on the legal side of listing species that share two different political jurisdictions, international jurisdictions within their biologic range, but also in the case of owl here, whether we have any idea of whether it's really endangered or threatened or not when we consider the full range.

Mr. Chairman, is there going to be another round of questioning of these witnesses?

Mr. POMBO. Yes.

Mr. SCHAFFER. OK. I've got more comments, and I'll wait. Thank you.

Mr. POMBO. Ms. Christian-Green, do you have any questions.

Ms. CHRISTIAN-GREEN. I have no questions.

Mr. POMBO. Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

Just a couple of questions relative to the number of positions based on employee hours of enforcing ESA. Region 1 is bigger than Region 5, but if you looked at 368 positions in Region 1 and 31 positions in Region 5, I would assume the explanation for that is that, if you looked at Region 5 and the amount of open space left there is small compared to the amount of open space left in Region 1, so there is potentially more ground to cover and more species that have been dislocated or fragmented, but are still surviving out there, that you want to save. Is that a fair assumption?

Ms. CLARK. Well, first, Mr. Gilchrest, is I could make one clarification. These, our charts, or my charts, those positions are not hours enforcing the ESA. Those are positions——

Mr. GILCHREST. Those are people.

Ms. CLARK. Those are bodies.

Mr. GILCHREST. Those are humans.

Ms. CLARK. So it is not an hours issue.

Mr. GILCHREST. I understand.

Ms. CLARK. So those are positions that are implementing that the Endangered Species Act.

Mr. GILCHREST. So you have 368 people in Region 1, 31 people in Region 5.

Ms. CLARK. Implementing the Endangered Species Act in Region 1, right. That's how I read this chart.

In Region 5, as we discussed a little bit earlier, regardless of the splendor of New England, the ecological and biological diversity is not as rich as it is in the Southern parts of the United States. So we deploy our resources and allocate our dollars based on the——

Mr. GILCHREST. Is that because of climate or——

Ms. CLARK. Climate, soil types. Just the differences in the geography. As you get closer—like the tropical Rain Forest, as you get closer to the equator, biological richness increases exponentially.

Mr. GILCHREST. So biological richness, there is more biological diversity——

Ms. CLARK. As you go toward the equator.

Mr. GILCHREST. [continuing] in Region 1 as opposed to Region 5?

Ms. CLARK. Well, it is easier to look at this map. As you go from—if you kind of cut, if you bisect laterally the United States, you can see, and California is a big long state, but it is really the Southern part of California, across the arid desert Southwest, Texas and then kind of the richness of the Southeast. You have Hawaii, and Puerto Rico and the Virgin Islands that are in that same category, closer to the equator.

Mr. GILCHREST. So because of the sheer diversity, that is how you base——

Ms. CLARK. That is what dictates where our resources go. It is very, very oriented. We maintain capability funding and capability personnel in each region of the country, but then the rest of the allocation is based on the resource demands and the resource needs and it is driven by the biological resource issues.

Mr. GILCHREST. Does the Fish and Wildlife service have a specific policy as far as when something is either listed or getting ready to be listed, so that the community in the area potentially impacted is educated and communicated to to understand the nature of this proposed listing? Is there a method of communication, either inter-agency communication to the community, Fish and Wildlife Communication to the community?

Ms. CLARK. Our regions spend a lot of time on information and education. That is one of the sole purposes of the candidate list, which is that the list of species that are awaiting proposal, those are the species of concern that we believe are in trouble.

Mr. GILCHREST. Do you communicate that via the planning commission for a county, the local county government, or the city mayor, in some continuing effort?

Ms. CLARK. We spent a lot of time communicating and coordinating. Could we do better? Absolutely. Could we communicate kind of what is in the hopper and what is on the horizon? Absolutely. We are kind of expanding our opportunities and capabilities to do that, given our available resources. But, absolutely, the desire to inform and keep everyone on the same sheet of music with declining species issues is very——

Mr. GILCHREST. Is it done in any official regular format where local government, like the county commissioners or the planning commission will know that three times this year, twice this year,

someone from the Fish and Wildlife Service is going to come in, because these are the people that plan the activity, where the industry sites will go and where the housing will go, all of those things, to discuss this issue of biological diversity, what keeps a species alive, what is a Habitat Conservation Plan, those kinds of things?

Ms. CLARK. Well, certainly, and I will be happy to pass to some of my colleagues, but at the local levels, our folks are communicating within the local environment frequently. Is it done on a structured or regular basis? I can't answer that. We annually publish candidate lists. We routinely communicate with local planning commissions and local landowners, and certainly have a tremendously close relationship with the states, the tribes, landowners, and we continue to try to improve our effectiveness in that area.

Mr. GILCHREST. I almost think the structured approach, having had some experiences with these kinds of problems in Maryland, in the long run would pay big dividends.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Herger.

Mr. HERGER. Thank you very much, Mr. Chairman.

I would just like to just briefly followup on that, Ms. Clark. I am very concerned, very concerned on the way you are administrating the law, and I am certainly very concerned the way Mr. Spear, who is over our area, is administrating the law of Region 1. I feel it is incredibly discriminatory. It seems to me that you are discriminating against some species over others.

I guess my question would be, a couple, this is more in the way of a comment, because I do have a more specific question I want to direct to Mr. Spear. But, again, we have nine states in Region 5, we have endangered species in that area, and yet you only have 31 people who are somehow protecting those endangered species. We had reference on a declared war in the West earlier by a statement of one of my colleagues.

We look at, right in the region right next to Region 5, around the Great Lakes, Region 3, 24 positions. Do we not have endangered species in those areas? It seems to me that you are discriminating against some species over other species. I would be very unhappy if I lived in those regions and to see what lack of attention that you are giving to those species that are there.

And yet we go over to Region 1, the region that I live in, including Northern California, not 31 positions, Region 5, nine states; not 24 positions, Region 3, eight states; we have five states that are a larger area, five states, 368 positions that you have out harassing—harassing the people, my constituents.

You also made a statement, Ms. Clark, as I understood it, that where and when there is a regional plan, that you try to respect those regional plans. Now, this is where I want to bring, direct my fire to Mr. Spear, the Director of our area. We are very unhappy with the job you do in our area, Mr. Spear. We are very happy to hear one thing, at least we are trying to bring an office closer to us so we don't have to try to communicate with you way up in Portland, to where we feel so incredibly discriminated against down in our area in the way you are managing.

But I would like to ask you now the question, under the current Administration's Northwest Forest Plan, approximately 4 million of

the program's 24 million acres were supposed to be managed to allow continued timber harvests. Now, again, we have discovered more spotted owls in just Northern California, more pairs, than they thought they had in all of Washington, all of Oregon, all of California put together, just in our area. So 4 million out of 24 million, we were supposed to allow for our people to be able to survive, allow our economy to survive in that area in which 36 mills in my District alone have closed in just several years, pretty much because of your policies and the way you have run those misdirected policies.

But in the formulation of the plan, all threatened and endangered species found in these matrix lands were reviewed and considered in the final plan. At the same time, the Fish and Wildlife Service also granted a no-take provision for the entire Northwest Forest Plan. However, according to local officials, Fish and Wildlife Service has assumed control over all activities on the matrix lands, and through the ESA's consultation requirements, the agency is imposing additional review and mitigations requirements on top of those already agreed to under the Northwest Forest Plan.

In the words of one local official, "The Fish and Wildlife Service in nickel-and-diming those forests to death with added regulations at the project level."

My question, how does your agency, Mr. Spear, justify these added requirements in light of its previous agreements and, as things now stand, the Forest Service's and BLM's hands are tied and these other agencies have to follow your recommendations from the Fish and Wildlife Service, an agency that has no real ownership in the affected lands, again, how does your agency justify these added requirements in light of its previous agreements?

Ms. CLARK. Mr. Herger, if I could respond for a moment to the discrimination issue, and then I will pass it to Mr. Spear to talk about the Northwest Forest Plan. I will continue to respectfully disagree that we are discriminating anywhere in the country to address species' needs.

Mr. HERGER. Why don't you put personnel there to show that what you are saying is indeed correct then?

Ms. CLARK. Again, I will respectfully disagree. We employ our personnel where the species and the biological resources are most in need of technical assistance.

Mr. HERGER. How can you find them if you have nobody there?

Ms. CLARK. Well, also contrary to popular belief, Congressman, we don't find these by ourselves. We work very closely with the states. We work very closely with the university system. We work very closely with our partners like the Nature Conservancy to identify those species that are either locally or globally in danger of being threatened or becoming extinct.

We talked about the differences in vegetation climes and the differences in biological richness as you get closer to the equator. So, again, I suppose we could have a debate, and it is a debate I would welcome, on whether or not the Fish and Wildlife Service has enough resources to deploy across the country. But, certainly, we use our available resources to the best of our ability to put them where the biological resources are most in need of support.

With that, I will pass it to Mike to talk about the Northwest.

Mr. SPEAR. Mr. Herger, the issue of our impact on the matrix lands of the Northwest Forest Plan is something I am familiar with. Of course, I don't know the details of every timber sale that have come before our people, et cetera. But I know of the situation you are talking of. I can say a couple of things for sure, we are not intimidating or harassing, or tieing the hands of the BLM and the Forest Service officials. Matter of fact, there is—throughout the Forest Plan area, I think is one of the most cooperative relationships that developed as a result of the Forest Plan, and we are a partner, along with the BLM and the Forest Service, in implementing that plan.

Specifically, on the matrix lands, when the biological opinion was written for the overall Forest Plans, it was not written to say that there would never be any further review of the matrix lands. It was written in a programmatic nature across the landscape, to indicate that the layout of the Forest Plan, with the late successional reserves, and the matrix lands and the other features, as a whole, should bring about, through the life of the plan, the recovery, the support and recovery for the spotted owl, as well as the other endangered species.

One of the things we have learned since this plan went into effect, as any plan, you learn down at the local level some of the specifics, that much of the late successional reserves that were set aside under the Forest Plan, in the terminology of our people, were stumps. There were not—we knew that there was not a lot of late successional reserves, but we also, at the time it was done, didn't realize the extent to which those lands are currently cut over and it will take a long time to truly support the owl as was intended under that plan.

As a result of that, our people do examine the matrix lands in those areas where the late successional reserves are weak and try to develop opinions so that we can carry the owl through in those areas where, for all intents and purposes, that which the Forest Plan said was there, in that late successional habitat, really isn't there.

Now, I will also add something here that—you have used the same term I used, nickel-diming of folks out in the field. I have given very specific direction to the field. We are not going to get into the nickel-diming, that there was a generic approach taken to these matrix lands. But it is a very difficult job our people have to do in the field to try to come up with a prescription that allows, in those areas where the late successional reserves are weak, or almost non-existent, allows the species to even exist in the interim while those reserves are growing back. But we are not to get into nickel-diming and I would be happy to look into any circumstances, specifics that you consider in that way, because that obviously is not to the benefit, in the long run, of the species or the people or the plan.

Mr. HERGER. Well, I appreciate your comment. What you are saying sounds very nice, but it has nothing—it doesn't seem to relate at all with the people I talk to, the Forest Service people that I am talking with. I wish I had more time, obviously, I don't. I appreciate the consideration, the Chairman letting us go more.

But, again, I would like to get in the fact that we have more owls there just in our Northern California than we have had in all the other states. We can go on and on and on, it is just incredible what the Fish and Wildlife Service is doing to our area, what it is doing to our economy and what is doing to forest health, where we have forests that are burning down because we are unable to be able to go in and begin to thin and begin restoring at the historic level.

Anyway, it is quite involved. Hopefully, we can get your office closer to our area. Hopefully, we can get you down a little more often where we can look at this area. But it is really a disgrace to management. Thank you.

Mr. POMBO. The good news and the bad news. The bad news is we have another vote on the floor. The good news is it is supposed to be the last vote of the day. So we are going to break. I am going to go ahead and recess the hearing temporarily. We will be back as soon as we can to finish the members who have not had an opportunity to ask questions, and there will be another round of questioning. But we will return as quickly as we can, and I would encourage my colleagues to hurry and vote and come back so that we can keep this going.

I apologize to the panel for the delay, but this is something we can't avoid.

[Recess.]

Mr. POMBO. We're going to go ahead and call the hearing back to order. Take your seats, please.

At this point, I'll turn to Ms. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman.

Ms. Smith, I'm going to ask these first questions and hopefully we can cover them with the questioning and the answering as briefly as possible because there are some state issues that I really want to cover as well.

But I want to get some information straight. It is correct, did I understand correctly that there have been no takings of endangered species in Regions 3 and 5, no incidental permits granted; is that right?

Ms. CLARK. To my knowledge, there have been no Section 10 incidental take—oh, excuse me, there has been one in New England. That doesn't mean, though, that we haven't granted incidental take authority through Section 7 of the Endangered Species Act.

Mrs. CUBIN. Do you have any idea how many Section 10's there have been in Region 6?

Ms. CLARK.I don't, but I believe Chairman Pombo's charts lay it out. There have been seven habitat conservation plans.

Mrs. CUBIN. No, I'm talking about takings. I'm talking about takings in Section 6, where people have been prosecuted or whether——

Ms. CLARK. OK. Let me see if I can separate it so I make sure I answer your question correctly. When we grant take authority under either Section 7 or Section 10, that is an incidental take—granting incidental take or take that's incidental to otherwise lawful activities. I'm not sure that the take that you're asking about or referring to is the level of, quote, prosecutorial activity that we've engaged in for illegal takings.

Mrs. CUBIN. OK. That is what I'm trying to get at.

Ms. CLARK. I'm trying to figure out

Mrs. CUBIN. OK. That's what I'm trying to get at.

Ms. CLARK. OK.

Mrs. CUBIN. If you combine Section 3 and Section 5, there are, according to these figures, 73 listed species. The geographic region, certainly Section 3 and Section 5, would be larger than Section 6. There are 102 employees trying to protect the endangered species in Section 6 and 55 in Regions 3 and 5.

What I'm getting to, what I'm trying to point to, do you honestly think or is there a little room for doubt in your mind that there are enough personnel in Section 3 and Section—excuse me—Region 3 and Region 5 to protect the species that are in need of biological support? Don't you see any incongruity there at all?

Ms. CLARK. I would answer that in a much more nationwide way. I believe that——

Mrs. CUBIN. Well, I don't want you to answer it in a nationwide way. I want you to answer the question I asked.

Ms. CLARK. OK. The question that you asked, do we have enough personnel in regions——

Mrs. CUBIN. No, no, no. The question is, is there any room for doubt or any room in your mind that maybe you need to reexamine the status quo, because can you not understand why people like Mr. Herger felt that there is discrimination against protecting species in the east and against people who live on the land and make their living off the resources in the west?

Ms. CLARK. There is absolutely no doubt in my mind that our available resources are deployed based on the biological diversity.

Mrs. CUBIN. And you don't think you need to look in—you don't think you need to review that at all?

Ms. CLARK. No, Mrs. Cubin, I don't. I do believe there is—there is definitely doubt in my mind whether we have enough resources to implement the Endangered Species Act nationwide, but given our available resources, I believe they are the same——

Mrs. CUBIN. But even though there are 60 or 72 endangered species in Sections 3 and 5, there are 45 in Section 6—or Region 6—excuse me for saying that—there are twice as many people to protect half as many species in Region 6.

Now, come on. You know as well as I do that private property owners that—like you said, nature conservancy, they don't just help in the east, they help in the west as well.

Ms. CLARK. I agree.

Mrs. CUBIN. You have the same resources in the west as you do in the east to supplement your budgets and to supplement your job. I just don't see how you can with a good conscience sit there and say that there is no lopsided or that you won't even look into the possibility that the ESA is administered differently in the west than it is in the east.

Ms. CLARK. We are constantly evaluating implementation of the Endangered Species Act to ensure that it's implemented in as fair, flexible manner as we can make possible. As I suggested before and submitted as part of the record for my official testimony, we have an allocation methodology that puts our resources where the species are in most need of biological support.

Mrs. CUBIN. That rote answer is getting a little tedious.

As you know and as a lot of my colleagues know—well, I see my time is up, Mr. Chairman, and we're going to do a second round, so I can do that later. I want to do a state issue, but I'll do it later.

Mr. POMBO. OK.

If I could have you put up No. 8, it was earlier stated that the differences between HCP's Section 10 take permits in different parts of the country—on this particular slide, you can see that in Region 3 and Region 5, there has been one HCP that has been put together, and I believe the one is on the piping plover.

I had a gentleman in my office—it's been several months ago now—who had a problem with a development that involved the piping plover. I could not find any issuance of a Section 10 take permit on that particular project, that it had ever occurred. Have you issued Section 10 take permits, incidental take permits on piping plover?

Ms. CLARK. Mr. Chairman, do you know where this development was?

Mr. POMBO. I believe it was in Long Island.

Ms. CLARK. OK.

Mr. POMBO. But have you issued any at all in Region 5?

Mr. NICKERSON. No. The piping plover is a small shore bird that literally relies on about 100-foot-wide strip of beach just above the high tide line. Virtually all the development that has done damage to the bird has taken place. We are not aware of any additional development. The biggest problem the plover faces now is disturbance from vehicles, predation, to some degree vandalism. We feel that working with both the state agencies, the county agencies, the Federal agencies that run beaches, we are able to keep on top of that to the point where plover numbers are increasing. We have not issued any sort of permit such as you say on Long Island.

We have done Section 7 consultations. We have done a number of those but no incidental take permits pursuant to Section 10 on Long Island have been issued.

Mr. POMBO. It's my understanding from reading the press reports that you have what you refer to as symbolic fencing to fence off the piping plover area, that an effort is made to put up signs to tell people to stay out of that particular area. But you at no time have found it necessary to issue a Section 10 incidental take permit?

Mr. NICKERSON. Only for the State of Massachusetts. We have not. The other thing we do for plovers is we erect predatory ex-closures around the nest because we have a problem with foxes and certain Avian predators. Symbolic fencing and education done both at the state, Federal and town level seems to work well enough. We're able to continually increase the numbers of nesting pairs without anything additional, any additional measures.

Mr. POMBO. How much habitat has been set aside as habitat for recovery of the piping plover? Have you set aside a considerable amount of habitat? Has there been a requirement as mitigation on new developments? Have you done any of that?

Mr. NICKERSON. No, sir. We haven't set aside any. There is—a fair percentage of the beachfront habitat is already federally owned, and what's left really isn't up for sale because of a number of——

Mr. POMBO. Excuse me, what did you——

Mr. NICKERSON. I said, what's left really isn't up for sale. Remember, I said this species is——

Mr. POMBO. Is not up for sale?

Mr. NICKERSON. No. No one sells beaches anymore, and no one builds on them. We've learned our lesson about that. So development with this species is not a problem, sir. The thing that we have to do and do carefully is work with the Corps on Long Island as they embark on various beachfront stabilization projects to ensure, through Section 7, that those things can go forward in such a way that the plover habitat can remain protected. But development for this species now is not a problem, sir.

Mr. POMBO. Just to stay with you for a minute, just to ask a question on the burying beetle again, is the land where you are trying to reintroduce the beetle, is that currently inhabited? I forget the name of the island that you cited.

Mr. NICKERSON. There are two places, sir, Penikese Island, which is owned by the State of Massachusetts, and it's inherited seasonally by a—I need to put this nicely—kind of a place for troubled young men for rehabilitation sort of thing. Martha's Vineyard, of course you've heard of, that is inhabited both by people and now by American burying beetles and the reintroductions there so far have been successful.

Mr. POMBO. Do you have an estimated cost on the reintroduction of that species?

Mr. NICKERSON. Based on the ease with which we're able to do it, it would be minimal, sir. No, not precisely. It would be less than $5,000.

Mr. POMBO. Total?

Mr. NICKERSON. Yes, sir.

Mr. POMBO. And how many have you reestablished in that area? How many beetles have you reestablished in that area?

Mr. NICKERSON. We do annual censuses. What we try to do is—it's a complex process because the burying beetle feeds on carrient. So what we have to do is place carrient and let the beetle eat cloves, and we try to have 100 to 200 pairs on each site, and we have to reassess that every year because depending upon prey availability, those numbers do go up and down.

Mr. POMBO. Could you for the record provide the total cost and the numbers of species that you have reintroduced to that area? Could you do that for me?

Mr. NICKERSON.Number of burying beetles, you mean?

Mr. POMBO. Yes.

Mr. NICKERSON. Yes, sir, I could. Sure.

Mr. POMBO. I would appreciate that.

In the—I've got to get the name of this report right—the fiscal year 1997 allocation of endangered species funding white paper, Ms. Clark, you state in there on page 5 that regions with the smallest numbers of listed and candidate species may have fallen below the level of having a minimum endangered species program capability.

That kind of sends the message to me that a decision is being made that you will maintain a skeleton crew to keep the endangered species program in place within those regions, but you're be-

ginning to rely more and more upon the state and other outside agencies for enforcement of the Act. In fact, I believe you said that you considered the nature conservancy your partners in this venture earlier in response to a question.

Would that be accurate?

Ms. CLARK. Mr. Chairman, not entirely. That statement that you read that suggests that—was an acknowledgement that regions with smaller numbers of endangered species or listed species have fallen below minimum capability was a correct statement, which is why this kind of elaborate allocation methodology has been refined, and going on in the white paper is—that was the beginning of the rationale for why we have capability funding in each region, to maintain at least a base level of endangered species' expertise.

Again, I would be happy to go back and have the discussion on whether or not we have enough money nationwide to implement the law, but we have capability funding in each region, and then we deploy the allocation and the bodies to where the biological needs are.

I would make one note, however. While your charts have the numbers of positions, that doesn't necessarily compute with the notion that all of those positions are filed. We haven't moved bodies around the country to align directly, but there is enough money in the program to fill all those positions today anyway.

Mr. POMBO. I realize that those are the maximum positions and that's what was provided to the Committee by——

Ms. CLARK. Correct.

Mr. POMBO. [continuing] your agency.

Ms. CLARK. I was just clarifying.

Mr. POMBO. In Region 5, for example, you have—I believe it's 25 people currently, but you have, you told us, an FTE of 31 positions.

Ms. CLARK. That's correct. I was just clarifying——

Mr. POMBO. So you have less in Region 5 than what we have portrayed on this.

Ms. CLARK. I was just clarifying the difference between FTEs authorized and FTEs filled based on available appropriations.

Mr. POMBO. And maybe we should have also include the numbers of people you actually have, because I do know that in Region 5, you have less than—less numbers than we actually stated that you did.

Ms. CLARK. That's correct.

Mr. POMBO. So the disparity is actually larger than this slide shows.

Ms. CLARK. The disparity may or may not be larger, but there is a disparity nationwide.

Mr. POMBO. Just to followup on the HCPs, it was stated earlier that there is a difference between the different regions in the numbers of HCPs that have been put together. It's obvious from the slide that the majority of the work that has been done has been done in the west and in the southwest, and next to nothing has been done in Regions 3 and 5 in terms of putting together HCPs.

But you also, I believe, stated that a lot of the activity that is occurring in Region 3 and Region 5 is occurring on publicly owned lands. For example, the reintroduction in Massachusetts, some of the public beaches are being used for recovery areas, a lot of the

recovery plans that are being put together and recovery efforts are being done on public lands.

Chris, if you could put up I believe it's the final slide on the percentage of federally managed land by state.

In terms of the ability of your Fish and Wildlife managers to use public lands as a means of recovery, as a means of lessening the impact on privately owned lands, we've had testimony in the past that the vast majority of endangered species that are found in California are found on private property. People have testified to that before the Committee in the past.

It appears from this slide here that if the same kind of effort was put into using public lands as a means of recovering species, as a means of providing habitat for endangered and threatened species, for species that are on the candidate list, that it would be much easier to do that in the West than it would be in the East, and yet in the East we find an effort, a very serious effort being made to use publicly owned lands to lessen the impact on people, to lessen the impact on economy, and it appears from testimony that we've received here today and previously that a real effort is being made in the West to go after the privately owned lands. And I think that there is a disparity, and it may be a philosophy between the different regional managers, it may be a court-ordered philosophy that is being imposed upon Region 1. I don't know, but I'd like you to comment on that.

Ms. CLARK. Sure, I'd be happy to. First of all, the species themselves don't care whose land they're on. I mean, they don't recognize land ownership or political boundaries. That's a fact.

Secondly, we were discussing kind of the Federal connectivity. There are multiple Federal connectivities. First you have the Federal land base. And nationwide we work very diligently with our Federal partners to recover species on Federal lands. And we have in essence, quote, shifted the burden to the Federal land base. But there are other Federal activities that are subject to the consultation requirement of the Endangered Species Act, and that consultation workload is growing all the time. There are other agencies that either authorize or undergo activities that aren't tied to the land base, and we work with them in their kind of affirmative obligations to conserve and recovery endangered species. We have, you know, continued——

Mr. POMBO. If I can interrupt you. Everybody from the West is very familiar with Section 7 consultations and that process. You know, California is nearly half owned by the Federal Government. A lot of activity that occurs occurs on Federal lands. We all realize that. But if you contrast that with the Section 10 permits, incidental-take permits, the HCP that's occurred in California, even though the government owns over half of California, the HCP activity, the, you know, the conflicts that occur between private landowners and Fish and Wildlife Service over the management of those lands, it is by far much higher in the West in California than it is in the Northeast.

And from what I'm hearing, it appears that there's a real effort to try to avoid those kind of conflicts from the regional manager out of the Northeast versus what we live through every day in the

West. I think there's a very different philosophy that's occurring because of that.

Unfortunately my time has expired.

Mr. Schaffer, were you prepared to ask a second round?

Mrs. CHENOWETH. Mr. Chairman, point of order.

Mr. Chairman, point of order.

Mr. POMBO. Oh, excuse me.

Mrs. CHENOWETH. If you don't mind, I haven't had my first round of questioning, and I have a hearing that I have to chair.

Mr. POMBO. I'm sure Mr. Schaffer will yield. I'm sorry. I did not realize. I didn't go to you.

Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you very much.

Director Clark, in the East I think that it's pretty clear to us that the enforcement of the Endangered Species Act has really been done on a wink and a nod, and I think that it's been made clear to us, not only by the actions but by the information that is coming out of this hearing. I don't think it's any surprise to you to know that your answers are not satisfying the Committee, and it would appear that in large part politics and economics rather than science has played the central role in determining whether species are listed, whether there has been a partnership formed with States. Because in Idaho, for instance, the bull trout was listed or considered for listing by the State and the habitat was in the process of being protected by the State, and that is a State species, and yet the Fish and Wildlife Service came in and without regard to the fact that the State said no, thank you, we can handle the species ourselves, it is a State species, Fish and Wildlife Service went ahead and listed it.

Also in the Pacific Northwest among the number of very high profile and emotional species that we're grappling with is the Pacific salmon, and the National Marine Fisheries Service as well as your agency decided to consider the Pacific salmon by stream segment, and in fact we have separate Federal listings. For instance the winter chinook salmon is on the Sacramento River in California. We have the fall chinook salmon in the Snake River. We have the spring and summer chinook salmon in the Snake River, the coho salmon in the central California coast, the coho salmon in the southern Oregon, northern California, and the sockeye salmon in the Snake River. Each of these species carries with it its own critical habitats and designations, which have wreaked havoc on various communities and families in the Northwest.

Yet in the East there is the Atlantic salmon. And in fact in September 1995 the Fish and Wildlife Service and National Marine Fisheries Service proposed the Atlantic salmon for listing. And on September 29, 1995, in the Federal Register, it states the National Marine Fisheries Service and the Fish and Wildlife Service have completed a status review of the U.S. Atlantic salmon population and identified it as a distinct population segment in seven Maine rivers. Atlantic salmon in these rivers are likely—likely to become endangered in the foreseeable future and therefore are being proposed for listing.

Interestingly for some reason the East was not subjected indeed to what the West has been subjected to in the issue of the salmon,

but just last December I know that National Marine Fisheries Service and your Agency withdrew its proposed listing, citing the Maine conservation efforts.

Well, I can tell you that in the West we have bent over backward in order to protect the Pacific salmon, and indeed the Pacific salmon of course through chemical imprinting was the species that was used to populate the Great Lakes. So it is a hearty species, but nevertheless its listing has created great distress to the West, and yet the Atlantic salmon in spite of your proposal in September 1995 was not listed.

Now that compared to what you see that the Chairman has thrown up there on the wall in terms of the overheads and the charts, it's eminently clear to us that there really has been more pressure put on the West than on the East, and I for one do not want to see the Eastern States subjected to what the Western States have been subjected to.

But I do think that as we saw the other night in a report from the Charleton Research Company by far and away the American population would much prefer that the States and local units of government handle endangered species. And looking at the number of species that were listed as threatened or endangered by the States as compared to those that were listed by the Federal Government and the success of the States in working in partnerships with private property owners and various other organizations, I just can't help but conclude that the Federal effort has been a dismal failure, that we should look in the future to having the States manage populations of threatened or endangered species, and then States like Wyoming and Idaho would not have to deal with over the objections of their Governor, their State legislature, every single one of their county commissioners, the imposition of the grizzly bear being transpopulated into Idaho over the objections of the State. And that we could see Idaho manage species like the bull trout to a full recovery.

So I hope that in the future, and I didn't have an opening statement, Mr. Chairman, and I see my time is up, but I do hope that in the future this body will look more closely at seeing the States take a firmer role and seeing the Federal Government back out of this position.

Thank you.

Ms. CLARK. If I could respond, Mr. Chairman

Mrs. Chenoweth, I could not agree with you more about the States' role in species conservation, and in fact I stood along with Secretary Babbitt and our partners at NOAA, NMFS, and the Governor of Maine and the Maine delegation, and celebrated the removal—the withdrawal of the Atlantic salmon proposed rule based on the State of Maine conservation plan. I've met with the States in the Northwest about the bull trout, and we have said all along standards are the same. The standards are the elimination of the threats. And we believe in the Atlantic salmon case the State of Maine stepped forward, addressed the threats to those species just as the State of Oregon did with the coho such that the Federal Government did not step in.

Contrary to popular belief, adding species to the list is not success for the Federal Government. I think it's very symptomatic of

the collapse of biological diversity in the country. We don't consider adding species to the list something that we celebrate. It is clearly a failure in that area. We have been working with the States on the bull trout. I would be thrilled if we could collaboratively pull off a conservation plan that would address all the threats to the bull trout so that we were faced with yet again another announcement of success come this June when the statutory deadline is up and is obliging us to make a decision.

Fairness East to West, fairness North to South, you know, I apologize if we're not communicating it clearly to this Committee, but again we have continued to deploy our limited resources where the biological needs are and, you know, whether we are doing it to the satisfaction of the Committee or to the public I guess remains to be seen.

On the conservation plan front, we've worked really hard in this administration to use the flexibilities of the Endangered Species Act while ensuring that our policies are fair and flexible.

I firmly believe we use the best available science. I firmly stand behind the collaborative nature of our work. Conservation plans are drafted by the landowner. We've put a tremendous amount of resources into providing technical assistance to those landowners and the development of those plans to ease the conflict between economic development and species conservation. We stand behind that goal, and I think we've been very successful.

Is there a lot of work to be done? Absolutely. Can we get better at this? Sure, and we're continuing to try to get better, providing incentives, providing the commitment. The American public also wants to preserve their natural heritage, and we're struggling as members of the American public to ensure that our natural heritage is in fact conserved.

Mrs. CHENOWETH. Mr. Chairman, I'd like to respond to that.

Indeed, the listing of the Atlantic salmon and the Pacific salmon was not equal. It was not fair. You employed different standards to the Pacific salmon than you did to the Atlantic salmon. The National Marine Fisheries Service further defined distinct population segments, as is required by Congress, and formed another requirement called evolutionarily significant units. This happened in a Federal Register listing dated February 7, 1996.

So you see, you didn't nor did National Marine Fisheries Service, neither agency employed the same standard or the same—for a population of salmon on the east coast than you did on the west coast. And that's what we're blanching at. That is unfair. The Federal Register speaks for itself. And it's unfair to employ different criteria in different regions, and I think that's why we're seeing the disparity in the numbers on these charts.

Thank you very much.

Mr. POMBO. Mr. Schaffer.

Mr. SCHAFFER. Thank you, Mr. Chairman.

Soon the Secretary of the Interior through your Agency will be making an important decision concerning whether to list the Preble Meadows jumping mouse in Colorado as threatened or endangered under the Endangered Species Act. I'm going to present you here in a minute a request on behalf of me, Senator Wayne Allard, Congressmen Joel Hefley and Scott McInnis that you extend the period

for considering whether to list or that you conclude listing as warranted but precluded. I also present a letter from the chairman of the Colorado State—chairman of the Senate and House Agriculture and Resources Committees.

Their letters cite the importance of individuals and local and State governments in light of existing and developing efforts to promote the Preble Meadows jumping mouse the need to solicit additional data and profound impacts that listing would have on Colorado's Front Range. We strongly urge the Service to extend the period for evaluating its proposed listing for 6 months or to conclude that listing as warranted but precluded under the Act.

The State of Colorado has taken steps to ensure that we fulfill our obligations without the need for Federal involvement. Colorado's General Assembly is considering a State law to address the issue, and a broad-based coalition of landowners, State, and local government officials and conservationists has been convened to protect the mouse and its habitat in a way that respects property interests and accommodates economic and social development along the Front Range.

Recent studies have called into question the classification of the mouse and demonstrated that its habitat may be more extensive than previously thought. In addition, there are serious disagreements as to the effect of water diversions, grazing, and agricultural activities, and moreover the largest known populations of the Preble Meadows jumping mouse exist on Rocky Flats and the Air Force Academy and other Federal lands. The action or inaction of those Federal agencies with mouse populations onsite will play a decisive role in the fate of the species.

It's vitally important to the people of Colorado that additional data is gathered and that the State be given the full opportunity to deal with the situation without listing under the Act. A 6-month extension is best for the species and for the people of Colorado's Front Range, and I strongly urge that the extension be granted, that the Service make a warranted but precluded finding under the Endangered Species Act.

And the letter is here signed by those that I mentioned, and also for the record without——

Mr. POMBO. Without objection.

Mr. SCHAFFER. I submit this for the Committee's consideration. Thank you, Mr. Chairman.

[The information referred to may be found at the end of the hearing.]

Mr. POMBO. Mr. Farr.

Mr. FARR. Thank you, Mr. Chairman.

I'm just sitting here listening. I am really interested in the contrasting views in this Committee. I think it reflects the politics of the Nation and now when one side sees evil, the other side sees good.

In California we have over our state library the slogan that says, "Bring me men to match my mountains." California now reflects that. Thirty two million people, one out of every nine Americans, now lives in California. I am really shocked at what I am hearing today. I am hearing that the War on the West is an argument that there is too much government in California. Yet our delegation is

constantly writing letters and trying to get more government related to highways and more money, more hospitals, more harbors, certainly more water money, certainly more Corps of Engineers money.

What we seem to be saying is that if there is a War on the West, let FEMA begin the war because we want more Federal involvement in the West, particularly when it comes to natural disasters.

But my question is really one more generic to this country. It appears to me from the testimony that you have given today, that the viewpoint depends on where you stand.

Often Washington forgets that there are state governments out there as well trying to do in some cases what the Federal Government is doing and hopefully in most cases bragging that they are doing a better job.

The Staff writeup addresses the way the states have responded to the listing of the salmon. It seems to me that where there are strong, really strong state plans, and there is state money to enforce those plans, there is less Federal help, less Federal governance, less Federal bureaucracy, to put it in their terms. I have heard that, for example, New Jersey has a very strong endangered species state plan. There are probably less resources that the Federal Government has to give there.

Regarding your observation and the plan on the salmon, I think the Staff report mentioned that two different scenarios. On the one hand, Oregon and Washington embrace, so to speak, the listing with the idea that they will get in and work to save the species because they have strong resource concerns expressed politically in their states. California, on the other hand, has taken "How could you do this to us? You are not collaborating" position. So the question is, is it indeed true that where the states are strong you need less Federal involvement?

And then after you have answered that question, I want to get specific on El Niño and California. Specifically, can you update me, because I am catching a plane out of here to go back and report this, on whether ESA requirements can be modified to facilitate the disaster response.

Ms. CLARK. In response to the first part of your question, Mr. Farr, absolutely where the states step up it lessens the need for the Federal involvement.

We work very closely with the states to leverage not only our expertise but our resources to ensure for long-term species conservation. I think the Atlantic Salmon is a classic example of that. That is being repeated in many parts of the country.

We are not looking to duplicate state activities. We are looking to complement state activities. I wholeheartedly agree with you on the importance and the capabilities of the states' involvement in long-term species conservation.

As for El Niño, the Fish and Wildlife Service, and I will pass the baton to Mike Spear in a minute, we have been working hand in hand with all of the kind of emergency teams in the state of California. The emergency provisions of the Endangered Species Act remain in effect and I really have been collaborating and coordinating not only in the information sharing but in the response to the disaster activity in California.

Mr. FARR. Do the emergency provisions allow for discretionary waivers or discretionary judgments to be made?

Ms. CLARK. The emergency provisions of the Endangered Species Act allow for the safety and the health of the populations to be addressed first. Absolutely.

The health and safety of Californians are top priority. We work along-side of the disaster relief agencies to provide guidance to try to minimize impacts on species, but certainly safety of the human population is top priority.

Mr. FARR. There are those that are concerned that the incident, which started I think February 2nd, is ongoing. We are having road problems every day now as the saturated land adjusts. Because this is a federally declared disaster, a continuing disaster in Federal terms, then throughout the period you can use this discretion?

Ms. CLARK. We are continuing the emergency provisions of the Endangered Species Act.

Mr. FARR. Which allows us then to get in to do the repairs with out——

Ms. CLARK. Protection of human life and limb is top priority and we are just—we are there supporting the disaster agencies in ensuring that that occurs.

Mr. FARR. Well, I hope the record will reflect what we just heard, so that we don't hear these kneejerk reactions that the Federal Government isn't in a position to be able to waive or care about the concerns of disaster cleanup and response. Thank you.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Spear, did you wish to respond?

Mr. SPEAR. I wanted to add to Mr. Farr that, you know, not only are we responding in the emergency and allowing the emergency provisions to take place but because this was an anticipated event, last Fall there was a lot of effort and coordination between state and Federal agencies, very close relationships between our people, the Corps of Engineers, a lot of clearing of flood channels was done. The Corps of Engineers put out regional general permits.

In other words there was a lot of anticipatory efforts to ensure that flood waters would move as smoothly as possible off of the lands so, you know, we always look back and we learn lessons, and we learned some very valuable lessons in January 1997 when this faced us head-on very quickly.

So this year has gone quite smoothly, partly because obviously there has been a day of respite between some of the storms and it's not quite as bad a flooding as last year, but there was a lot of anticipation. The relationships have been established between agencies. All the rules are clear now I think, and so I would say we have—considering the amount of damage that has gone on—there's been minimal, minimal trouble so far, and I anticipate that we won't have any throughout the rest of the year in terms of how to deal with these flooding problems.

Mr. FARR. What a difference a year makes.

Mr. POMBO. Before I go back to Mrs. Cubin, just to followup on Mr. Farr's question about disaster activities, in order for us to do activity in California, there is often a mitigation rate of 5 to 1. If you want to fix something on a particular levee bank, Fish and

Wildlife puts in a 5 to 1 mitigation rate where if you are destroying one acre of habitat for an endangered species you have to replace that with five acres.

Is that similar throughout the rest of the country? For example, in the Northeast with the Piping Plover habitat, when you want to come in and repair erosion on beaches, do you require the local city to create five new acres of Piping Plover habitat for every acre that they are repairing?

Mr. NICKERSON. No, because the beach is the beach. The amount of beach doesn't change. What may happen is the shape of the beach or the configuration of the dunes behind the beach may to a greater or lesser degree influence the effectiveness of the habitat to support Piping Plovers, so there is no need for that kind of a requirement.

Mr. POMBO. Well, let me just follow what you just said. Many people in my area would argue that the levee is the levee and you repair it the elderberry bushes, for example, will regrow where you repaired the levee, where you fixed the levee, but the requirement in Region 1 is that you plant five acres of elderberry bushes some where else and they require you to produce so many branches on each elderberry bush that you grow and to maintain those over a period of time, so that we are increasing the amount of habitat that is available for the beetle.

Now it would seem that if the exact same standard was applied that you would require that city, that whatever agency is responsible for that beach to produce more I believe it is fine grasses and low-lying sand dunes for the Piping Plover as a mitigation rate of repairing that activity.

Mr. NICKERSON. No, it doesn't work that way, because we are not really losing habitat. Storm damage affects temporary habitat loss or modification and which may or may not render a particular beach better or worse for Plovers. Most of the repair work involves sand deposition, and we work with the Corps——

Mr. POMBO. I understand what you are saying but, see, our guys would argue exactly what you are saying that they are not losing any levee bank—the levee bank is still there——

Mr. NICKERSON. It's difficult for me to draw a parallel. I am not familiar with the——

Mr. POMBO. I just think that there it is——

Mr. NICKERSON. [continuing] the physical description——

Mr. POMBO. [continuing] is being done. Mrs. Cubin.

Mrs. CUBIN. Question for you, Mr. Chairman. Some of those levees failed in the past and there was loss to human life.

How many lives were lost when those levees were not allowed to be repaired?

Mr. POMBO. I believe that there were nine——

Mrs. CUBIN. Nine lives?

Mr. POMBO. [continuing] nine lives that were lost.

Mrs. CUBIN. Thank you.

I have been informed by the Wyoming Game and Fish Department that they conducted over 7,000 trap nights in potential habitat in southeast Wyoming between 1990 and 1993 without recording any evidence of the——

Mr. POMBO. Black Footed Ferret?

Mrs. CUBIN. No, a mouse——

Mr. POMBO. The Prebble Meadow——

Mrs. CUBIN. The Prebble Meadow Jumping Mouse, right, and the Medicine Bow National Forest also channeled an extensive portion of its annual endangered species fund into surveys for the Prebble Meadow Jumping Mouse in 1995, but no present populations were located.

The Game and Fish Department further surveyed their habitat units in southeastern Wyoming and again said that no mice were found to be present.

I am told that extensive work in Colorado has confirmed the absence of this species from many historical areas and rightfully so, because private landowners have refused to allow the Fish and Game—or the Fish and Wildlife employees on their land to do surveys, so without this information about the private land, the listing decision will have to come from available data, which in my view, and I might add in the view of the Wyoming Game and Fish Department, is at the very best inadequate.

If the Prebble Meadow Jumping Mouse is listed as an endangered species, all public lands with suitable habitat will have to be surveyed for the species prior to any activity which may affect the species or the habitat.

Although those surveys are not required on private land, in order for anyone who is requesting Federal funds or a Federal permit for work on their lands, they would likely be required to allow those surveys on their lands as well—and then, just to finish this up—the Jumping Mouse's habitat seems to be riparian areas. The grazers in my state are very, very concerned that they are going to lose the use of their private land based on inadequate information, incomplete information, and yet you intend to move forward and list the mouse.

Do you really think that your information is adequate, that the data that you have is adequate, since you don't have any idea what exists on the private lands?

Ms. CLARK. Well, first, Mrs. Cubin, we haven't made a decision of whether or not to list the mouse. We have proposed it and I certainly hope that the Wyoming data have been submitted for the record because that is going to be very important data in our consideration.

We make decisions on whether or not a species should be added to the list based on the best available science, and what we attempt to do is complete a status review as possible when we are evaluating the status of that species.

I am not in a position to give you an endpoint for this decision yet. I do know that Colorado has been working very closely with us on the development of conservation measures. I don't believe Wyoming has been as assertive or aggressive in that arena but certainly the data that had been developed or evaluated by the state of Wyoming will be very helpful in our decisionmaking.

Mrs. CUBIN. What is puzzling to me is that you mentioned earlier the problem with resources and that you need more money, you need more resources, and so even considering listing another species where you can't have the data because you haven't been on the

land for the surveys or for counting, it doesn't seem, you know, very wise to me.

The other thing that I want to tie this into—are you aware that the population targets for Grizzly Bears have changed two or three times?

Ms. CLARK. I am aware that there is ongoing evaluation of the kind of recovery plan and we are re-evaluating the mortality requirements for female cub ratios.

Mrs. CUBIN. No, the question is that they have changed two or three——

Ms. CLARK. I don't know how many times they have changed.

Mrs. CUBIN. But they have changed. You are aware of that?

Ms. CLARK. Yes.

Mrs. CUBIN. They have changed two or three times and the Wyoming Game and Fish Department tells me that the reason that the population targets for the bear have changed two to three times is that when the recovery plan for the bear was first put together, they didn't have adequate knowledge about the bear's population and habitats, breeding habits, and so on, but now, 10 years later, they do.

They have better modeling and I am not at this point in time arguing that the number is such that it should be considered recovered but my point is I am hopeful that you will take into consideration the situation with the Grizzly Bear before listing something like the Jumping Mouse where you plain don't have the information.

My time is up. Are you going to have a third round of questions?

Ms. CLARK. If I could just respond——

Mrs. CUBIN. I'll just submit my questions in writing, but please do respond.

Ms. CLARK. To be very frank, we could always have more science and better science. Again, we make the decisions at the required timeframe based on the best available science we have.

With the Prebble Meadow Jumping Mouse, we have conducted some survey, you're right. The fact that private landowners have not granted the Fish and Wildlife Service access to their private lands doesn't give us the right to trespass to survey.

We absolutely do not do that, so we have surveyed as much as we can working with the states and other folks to get the best evaluation of the status of the species, so I just wanted to make sure and clear that our lack of information on private lands is not because we didn't want to survey but we are absolutely not going to trespass against private landowners' desires.

Mrs. CUBIN. Yes, and I know that that is in fact the case, and do appreciate your respect for private property rights, but my point is that, you know, there is so much private land there that I don't know how you can determine that a species is endangered when you can't make a survey of the private land, which if people weren't so terrified that they would lose their livelihood, that they would lose the right to use the property that they rightfully own because a species might be identified on their property.

If it were easier for a rancher for example to—if they had a higher level of assurance that they could work with the Fish and Wild life Service instead of being at odds all the time, then I think—I

don't think there are better stewards of the land than the people that live on it——

Ms. CLARK. I agree.

Mrs. CUBIN. [continuing] and I think that, you know, if you could make inroads anywhere it would be to help with that trust level and by not making arbitrary decisions, as Mrs. Chenoweth or what appeared to be as Mrs. Chenoweth suggested with the salmon in the Atlantic and the Pacific.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Herger.

Mr. HERGER. Thank you, Mr. Chairman.

Ms. Clark, if I could ask, in what way are economic impacts considered in the ESA?

Ms. CLARK. The decision on whether or not to add a species to the list is based solely on science and the biological status of the species. Certainly, economics factor in when we are determining pathways to recovery and trying to determine the most efficient way to recover a listed species, and we do factor in the economic realities of different recovery regimes.

Mr. HERGER. Are they considered in the designation of the critical habitat?

Ms. CLARK. Oh, yes, absolutely. I forgot that. When we designate critical habitat, we do consider economics and other relevant factors when determining those areas essential to the conservation.

Mr. HERGER. So then would you agree that the critical habitat designations and its economic analysis, which can exclude areas, offers a counterpoint to the listing of a species that is a balance between science and economics through the exclusion process?

Ms. CLARK. That is an interesting question. I am trying to formulate it in my own mind. Whether or not a species deserves Endangered Species Act protection is a science question and a biological matter. When we are determining the critical habitat, economics does factor in, but there isn't necessarily a 1 to 1 ratio for those two pieces of the Endangered Species Act.

Mr. HERGER. Well, just looking at the law and reading from the law——

Ms. CLARK. Right.

Mr. HERGER. [continuing] of 1982, and the report language, it says here, "The balancing between science and economics should occur consequent to listing through the exemption process."

Ms. CLARK. Through the exemption—in determining critical habitat, that is absolutely correct.

Mr. HERGER. Right.

Ms. CLARK. And I agree with that.

Mr. HERGER. Of all the species listed, could you tell me how many critical habitats have been designated with them? And I might mention again, this is included in the law, that when we designate a species as being endangered, the law says we are supposed to list with it critical habitat in order to save that species. My question is, at the time that we are listing these species, how many times when we are listing these species are we, along with it, designating these critical habitats for them?

Ms. CLARK. I believe, and we are all sitting here looking at numbers, there are about—around 100.

Mr. HERGER. By law, by the way.

Ms. CLARK. Unless it is determined not to be prudent or it isn't determinable. We are obliged to designate critical habitat unless not prudent or not determinable.

For many of our species and, obviously, the majority of our species, we believe the strict designation of critical habitat are those areas essential to the conservation of the species.

Is it necessary? Working with other Federal agencies, working with the states and other landowners, we can achieve habitat protection and species conservation without legal designation of critical habitat.

Mr. HERGER. Now, is this a choice on the Department on Fish and Wildlife to ignore the law which states that you will designate a critical habitat?

Ms. CLARK. No, it is absolutely not a choice to ignore——

Mr. HERGER. But why are you not doing that? Because my understanding of the law is that, at the time you list, the law says you will designate critical habitat. You are indicating you are not. The statistics I have indeed show that you are not, and have not been. As a matter of fact, the numbers I have, November 1997, there were 1,119 species listed in the United States, and only 139 or 12 percent have critical habitat designation. Could you tell me why this is the case? And as such, would you agree that in the vast majority of these cases, no economic benefits, therefore, because of your choice to ignore the law, no economic benefits were weighed, so that there really is no balance between science and economics, as was intended by the law?

Ms. CLARK. Let me see if I can try this. We are absolutely required to designate critical habitat for species when we list them, unless we determine that they are not prudent, or that critical habitat is not determinable. It is not prudent if we make the administrative case that it is either—provides no conservation benefit to the species by designating critical habitat, or it would increase the threat of vandalism to the species.

Way over half of our endangered species, our listed species today are plants. Many of them are found on private lands. Critical habitat has virtually no effect on private land. The balancing of economics comes only with the habitat designation. It doesn't affect the science of the listing of the species.

Mr. HERGER. I would like to read from the law.

Ms. CLARK. OK.

Mr. HERGER. The law which, obviously, it is very apparent that you have chose to ignore, and almost 90 percent of the time. As a matter of fact, precisely 88 percent of the time, your department has chosen to ignore. Let me read from the law.

By not more than one additional year should you be coming up with a critical habitat and I just wonder, could it be the reason why you have chosen to ignore this law, not implement it, except for only 12 percent of the time, is because you purposely do not want to weigh, as it says here, an economic balance between science and economics? Could that be the reason why you are not implementing this part of the stated law?

Ms. CLARK. No, it is not, Congressman.

Mr. HERGER. Can you see where that is the end result? And, again, I am talking from experience. Nine national forests are in the area I represent, parts of or all of nine national forests. The unemployment rate is in excess of 10 percent in virtually each of my counties, has been as high as 20 percent or more in some of my counties. Thirty-six mills shut down. Forests that are two and three times denser than they have been historically. More Northern Spotted Owl found there in just Northern California than all the other three states put together. Again, we go on and on.

I just wonder is there a political agenda by the Clinton/Gore Administration to ignore this law?

Ms. CLARK. No, there is not any political agenda. As I said before, species are added to the list based on biology. Whether or not we designate critical habitat, which is just the habitat overlay, it has—I mean the species and all the protections of the Endangered Species Act are already afforded to the species, if and when we designate critical habitat, we can balance out geographic areas only from critical habitat designation, not for the protection of the species by itself, by weighing in economic and other relevant factors.

Mr. HERGER. I believe the results and the facts speak for themselves, Mrs. Clark, despite what seems to be not a very adequate explanation of the law and how it is not being obeyed. But I might also mention, I might ask a question, just in reference to what you are saying, in balance, why is it that we have so many owls in Northern California? Some have reasoned that as you move south out of Washington and Oregon, you get into more climates that are easier to live in and, obviously, we have far more owls than we do up in Northern Washington, but yet it is still listed in my area even though there's owls virtually every place. Why has this balance not been, then, as you have just spoken of, why is it not being practiced in Northern California with respect to the Northern Spotted Owl?

Ms. CLARK. Whether or not a species should be listed under the Endangered Species Act is based on a consideration of the status throughout its range, and we are evaluating the status of the spotted owl throughout the range of Washington, Oregon and California, and believe it is threatened at this time.

The balance that you are referring to is tied to whether——

Mr. HERGER. You referred to it. You are the one who mentioned balance in your statement.

Ms. CLARK. OK. The balance that I referred to is tied to whether or not we designate by statute critical habitat for the Northern Spotted Owl, not whether we protect the species itself throughout its range.

Mr. HERGER. My time is up. I have no idea what you have been saying, but, in any event, I wish you would read the law.

Ms. CLARK. I think we have been competing with each other.

Mr. HERGER. I wish you would look at the law, Ms. Clark, and Mr. Spear, who is your designee for our area. You are not doing that at this time, and many, many lives are suffering, as well as the environment, directly because of that. Thank you.

Mr. POMBO. Mr. Herger, if I may—Ms. Clark, if you could try to answer that question in writing for the record, it would be appreciated by the Committee, and I am sure by Mr. Herger as well.

Ms. CLARK. I would be happy to. Thank you.

Mr. POMBO. I think that there was a little bit of confusion as to exactly what the question was in terms of what the answer was, so if you could answer that for the record, I would appreciate it.

I just had one final question, and then I will dismiss this panel. Mr. Spear, with the recent proposal that lists the Chinook salmon in the Pacific States, everybody is kind of under the impression that there will be a need for increased water flows from that area. With everything we have gone through with CalFed over the past several years, and I know you have participated in that process, do you feel that this endangers that process, the increased water and will it force us to go back to the drawing board in terms of the impact on urban and agricultural interests?

Mr. SPEAR. Mr. Chairman, I will answer this carefully, because this is really a question for National Marine Fisheries Service.

Mr. POMBO. I am going to ask them, too, but I want to——

Mr. SPEAR. OK. But I have been close to it, so I will provide some answer. I believe that the process as a whole, the contributions by ourselves, National Marine Fisheries Services, State Fish and Game, have taken into account a great extent the status of these fish in the development of alternatives. As you know, we are getting ready to come out with the draft documents. So, I would say as a general matter, that this is something that has been generally brought into the process, and I don't think we will see a situation where everything has to stop and start over again.

Mr. POMBO. This is where we run into a problem. We think a deal is a deal. Urban interests give up, environmental interests give up, agricultural interests give up, for the sake of coming up with a water policy that we can deal with in the Delta, and then you have a new listing that comes in and most of the people that are looking at this process are now saying, wait a minute, how is a deal a deal if all of sudden we are going to have to increase here, or we are going to have to change that.

I think that, as you look at this, there is going to be continued concern on the part of the stakeholders who thought they had signed off on something, going into this process. I am already hearing from my constituents on this one.

Mr. SPEAR. I think I can take it in a more general note now because you have gotten into the realm of what we call in the CalFed, the assurances package. Unlike in 1994, where the accord was signed and everybody had a pretty clear understanding in their mind about what they thought it meant, there was obviously some things that were—that didn't fit exactly.

The one that we are talking about now is very rigorous assurance packages which will include the species, even whether or not there had been a listing that would have included consideration for the Spring Chinook, Fall Chinook and all of those fish of the Sacramento system——

Mr. POMBO. So you are saying that that was already taken into account?

Mr. SPEAR. In other words, the insurance package had been intended to deal with those species regardless of a listing. Now, we all know that we are not there yet. We don't have a deal. We don't have a package. But the plan was to specifically include them, and

a lot of other unlisted species, basically, every species that we can think might be affected, were going to be rigorously dealt with in what is the biggest HCP that has been or ever will be developed, more likely, if we ever get through CalFed. So that we would provide the——

Mr. POMBO. If it will ever happen.

Mr. SPEAR. [continuing] provide the certainty for the future. But that—that is what everybody wanted. Whether it was the environmental side or the water side, they want to know what are we getting with this, so that we write it down.

Mr. POMBO. Well, thank you. I want to thank the panel for your testimony, Ms. Clark. I appreciate you coming in. I know it has been a long afternoon. I greatly appreciate it. All of the people from the different regions, thank you as well.

I will tell you that I know a number of members had additional questions, and they will submit those to you in writing. If you could please answer those in a timely manner and have those back to the Committee as quickly as possible, it would be of great benefit to all of us to complete that hearing.

So thank you very much.

Ms. CLARK. Thank you, Mr. Chairman.

Mr. POMBO. I would like to call up the second panel.

Well, to start off with this panel, I apologize to you. I realize that it's been a long afternoon and you've been waiting patiently for us to get to you. You're probably wishing that we wouldn't.

[Laughter.]

Mr. POMBO. But I appreciate you hanging around. Mr. Schmitten, if you want to give your testimony, we're prepared.

STATEMENT OF HON. ROLLAND SCHMITTEN, DIRECTOR, NATIONAL MARINE FISHERIES SERVICE, U.S. DEPARTMENT OF COMMERCE, WASHINGTON, DC, ACCOMPANIED BY WILLIAM W. STELLE, JR., REGIONAL ADMINISTRATOR FOR NORTHWEST REGION, SEATTLE, WASHINGTON; WILLIAM HOGARTH, REGIONAL ADMINISTRATOR FOR SOUTHWEST REGION, LONG BEACH, CALIFORNIA; CHRIS MANTZARIS, DIVISION CHIEF, NORTHEAST REGION, GLOUCESTER, MASSACHUSETTS; AND ANDREW J. KEMMERER, REGIONAL ADMINISTRATOR FOR SOUTHEAST REGION, ST. PETERSBURG, FLORIDA

Mr. SCHMTTTEN. Well, thank you very much, Mr. Chairman and members of the Committee. I am very pleased to be here on behalf of my agency, the National Marine Fisheries Service. We are a part of NOAA; that's the National Oceanic and Atmospheric Administration. With me today are regional administrators from the Northwest, Mr. Will Stelle; from the Southwest, Dr. Bill Hogarth; from the Southeast, Dr. Andy Kemmerer; and from the Northeast, Mr. Chris Mantzaris.

I'd like to begin by saying that the agency is a full partner with the U.S. Fish and Wildlife Service in administrating the Endangered Species Act. And we work with other agencies. In fact, we do seek those partnerships and to decentralize as mentioned by Congressman Gilcrest with our states, our industries, tribes out West and private landowners.

Our responsibility is different under the ESA, but it is to recover threatened and endangered marine species that live in the oceans and coastal waters, and it's that distinction that differentiates us from the U.S. Fish and Wildlife Service. Mr. Chairman, we're responsible for 38 listed species. We also have 19 species that have been proposed for listing.

Some of the more familiar species are all the great whales, with the exception of the gray whale which we have delisted; Pacific and Atlantic salmon; sea turtles; Hawaiian monk seals; and stellar sea lions. I truly welcome this opportunity to discuss with you today how we implement the Endangered Species Act in all five regions.

Mr. Chairman, I think that several on the Committee know my background. Prior to coming in to my current position, I spent 4 years as a state director of fisheries in the West, followed by 10 years as a regional director for the National Marine Fisheries Service in the Northwest. And it was actually during that period that my agency listed the first salmon species.

Then, we utilized the standard approach to ESA listing that the Federal Government had employed for many years. And, in general, that approach was to view the Act as solely a Federal responsibility and to unilaterally conduct the biological reviews, to make the proposals in the final listing and then to develop and promulgate the recovery plans.

One could read that approach into the Act. It flew in the face of the years of working with and seeking partnerships with the states and tribes on nearly all resource issues. Further, in the case of West Coast salmon, it was the states and the tribes that had collected the necessary data from which a decision could be made. And they had competent scientists that could and should be used as part of the process.

Since coming to the other Washington, I have supported identifying and using the flexibility that exists in the Act to allow partnering in making critical decisions in the ESA process. Frankly, if we ever expect to get support for our listing decisions, we must include states and tribes in our process. During the past 4 years, I'm pleased with the progress that we have made.

We set out to make the ESA more accessible, more flexible, and I think we've done so. On February 23rd, our two agencies published the final "No Surprises" policy and regulations. And it's this rule that's the cornerstone of reforms that have been made to encourage the landowner to participate in protection and recovery of species.

In effect, it is the answer that industry wants for consistency in making business decisions and how much protection is really necessary. Another goal of this Administration and the agency is to encourage states to participate in the recovery of species. And we have two landmark state conservation plans that are partially responsible for the agency not going forward with a final listing determination.

Two state conservation plans—one in Maine, one in Oregon—demonstrate our commitment to work with states and that we want them to be a partner in the ESA decisionmaking process. Also, through habitat conservation plans, HCPs, the two agencies have expanded species protection to over five million acres of land.

The agency is currently working on 50 large-scale HCPs from California to the Pacific Northwest. I think it really illustrates the collaboration of our agencies. In fact, of all the salmon listings to date and all the HCPs, the Fish and Wildlife Service has been jointly a part of the process through its entirety.

Just last week, you're probably aware that the two agencies, the State of California and the Pacific Lumber Company reached an agreement on the principles related to the company's submission of an HCP. This is for 207,000 acres. Mr. Chairman, I see I have a red light, so let me just summarize for you and attempt to handle the Committee's questions.

In summary, we are working in partnership with the Fish and Wildlife Service and are sure that we are consistent in our treatment of activities that may affect listed species. We have provided guidance to our regions to ensure that they are fair and provide consistent advice to the Federal, private, state and tribal landowners.

And just finally, I would like to emphasize that this Administration has truly taken some unprecedented actions in the past 5 years to use and show the flexibility that is inherent in the ESA and to make it work for everyone—Federal agencies, states, industries, tribes, et cetera. It's only through partnerships with industries and others that the species have the best chance for survival. Mr. Chairman, I thank you very much.

[The prepared statement of Mr. Schmitten may be found at the end of the hearing.]

Mr. POMBO. Thank you.

Just to pick up on the last point you made, in terms of the flexibility in the Act—and I've always pushed to give the agencies greater flexibility. And I'm beginning to wonder if that's really the right thing to do. You recently withdrew a listing proposal for the Atlantic salmon and turned over the conservation efforts to the State of Maine. Which type of activities has the State of Maine agreed to undertake as part of that agreement?

Mr. SCHMITTEN. Mr. Chairman, that's a good question because many are asking it. Let me just take you through, first of all, the similarities because people say what are the similarities, what are the consistencies between what your agency has done and Fish and Wildlife with Maine and Oregon showing the components of the plan and also compare the two state conservation plans.

First of all, the similarity, the key point, is that the plans that the states submit must address the threats to the species. And the plan must provide how those threats will be removed before the agency can accept the plan. The factors to be considered are the same factors in 4 (a) of the Act, and those are the factors that are for listing criteria.

Also, in any plan we look for the sufficiency funding, not necessarily how much anyone gives, but if it is sufficient to get the job done, as well as the ability to promulgate the regulatory requirements. We look for the ability to monitor what the states have put forward, and we never lose sight of the fact that the agencies retain the ability to go back and list if the plans aren't working.

Now, let's look at the State of Maine and the threats. First of all, on forestry there were no major threats. On agriculture, there were

no major threats. For agriculture, at most, there were some cranberry bogs that had some water issues, and those have been corrected. For fish, which is a big issue for the State of Oregon and the coho listing, commercial fishing has been banned for over a decade.

Recreational fishing is catch and release. On hydro, the State of Maine has no hydro facilities in the seven rivers. So what are the threats? The key threat for the State of Maine was the agriculture industry, the potential for strain as fish leave or break out of the facilities. In addition, hatcheries are not an issue in the State of Maine.

If you were to look at the flip side for the State of Oregon, the critical issue was habitat. In fact, in our initial review of the State's plan, we actually went back for a specific MOA to bolster or give us assurances for the needs of habitat before we could accept that plan. Harvest was a major component that the State put forward that we could accept as that reduces the overall harvest impact.

On hatcheries, there was a realization that hatcheries do have an impact on wild stocks and they took some dramatic steps to ease those. There is some hydropower, but not a lot of hydropower. The key difference is that nearly half of the State of Oregon is affected in the habitat, and I think that's where you see the key differences between the two plans.

Mr. POMBO. So you determined that forestry, grazing, agriculture were not factors in Maine? You determined that commercial fishing was not a factor? You determined that the dams they had were not a factor and that they were, in your example of Oregon, they were in that case? And you stated that the agency retained the ability to list at a future date in Maine, but did list in Oregon?

Mr. SCHMITTEN. Mr. Chairman, may I correct that?

Mr. POMBO. Yeah.

Mr. SCHMITTEN. Mr. Chairman, no, we accepted both states' conservation plans. I was illustrating the differences. I think if you were to sum it up, the standards are the same, the threats were different.

Mr. POMBO. The standards were the same and I just—I don't know. And if they were, I'll followup on that but in terms of this overall plan, you looked at what Maine was doing and you said that it was—that that would fit, that that would do what you wanted to recover the species in Maine, and made that decision.

You just heard Mr. Spear testify that the CALFED process that we're going through is taking into account the impact on all of the listed species, as well as those that—all of them that they could determine—any candidate species and anything, that that process was taken into account, all of those.

We are spending hundreds of millions of dollars in this process. The economic impact on California, the CALFED process is going to be substantial. You have all of the major stakeholders that are involved with that particular process. Now, what are we missing in terms of telling us, OK, take care of your species. We will retain the right to list in the future, but, you know I don't understand what the difference is. What are we not doing in California that they did in Maine?

Mr. SCHMITTEN. California has not submitted a specific state conservation plan, for instance, for the winter-run Sacramento chinook. The CALFED plan is an excellent plan. It's——

Mr. POMBO. If I could interrupt you just for a second, we have not submitted a specific plan on that, but the entire CALFED process that involves the Delta and its—the tributaries leading into the Delta, as has already been testified to, that they have taken into account all of that, and it's my understanding that March 16th, their proposal is going to be ready by the end of this year.

They should have a proposal enacted that everybody's signed off on. I believe they are going as fast as they possibly can in putting this process together, and yet, that does not seem to carry the same weight with your agency as what they did in—Maine did.

Mr. SCHMITTEN. Mr. Chairman, it's difficult to compare the two. They are both good plans. First, let me say the pieces that are currently missing in the CALFED plan. First, it does not address coho. It was built around the Delta Smelt, as well as the winter run Sacramento Chinook. The issue of water, I think, is resolved for all intent and purposes. You asked that question to Director Clark.

We don't look at additional water needs. If we do, we have indicated it would come from voluntary sources. What we will be looking to add to the CALFED plan will be aspects of both hatchery and harvest that are currently not there. We're working very closely with the State, and I give the State a lot of credit. This is a good plan and I see no reason that this plan won't be adopted.

Mr. POMBO. And just so I understand what you just said, any additional water will come from voluntary sources?

Mr. SCHMITTEN. That's correct.

Mr. POMBO. You hear that?

Mr. SCHMITTEN. And I additionally said where the shortfalls are in the plan that we need to work with the states right now, and we've indicated this with the hatchery and harvest.

Mr. POMBO. I'm going to relinquish for the moment, but I will get back.

Mr. MILLER. What's with the implication of doing hatcheries and harvest with the fishermen?

Mr. SCHMITTEN. First of all, the key implication is that they need to be at the table with us, and that's important and that may be different than from the past, Mr. Miller. Second, there's a big potential on harvest. I'm now going to shift to our proposal to list fall chinook, which I suspect you're probably talking about. About 60 to 70 percent of the harvest currently is on fall chinook.

I think what we need to do is look for ways of mitigating that, for instance, marking hatchery fish so you can separate and identify hatchery fish from wild fish.

Mr. MILLER. OK. Let me ask you a question with respect to Headwaters. My quick look at Headwaters suggests that somehow this—the suggestions for, at least for buffers; I'm not quite clear on slope management yet—but the suggestions on buffers are somewhat less than what we saw in the Northwest proposals on Option 9. Why is that?

Mr. SCHMITTEN. Mr. Miller, some have asked that the FEMAT standards were not applied as they were in the Northwest. The answer there is that FEMAT was not intended to be applied to pri-

vate lands. FEMAT was intended to be applied in the Federal lands initially coming from the spotted owl, but ultimately going to the Forest Plan.

FEMAT is intended to put the burden, the majority of recovery on Federal lands and not on private lands. So it's a case of apples and oranges. Those standards were never meant to be put on to PALCO.

Mr. MILLER. I guess I'm not following you. If the rivers and the streams run through private lands, how do you protect that particular stream, those particular buffer zones? Isn't the mission to recover the species——

Mr. SCHMITTEN. Oh, absolutely.

Mr. MILLER. [continuing] and that habitat?

Mr. SCHMITTEN. I was just going to now go into how we did approach this, and we approached it scientifically. We established the necessary and functioning aquatic habitats that we felt were necessary for the long-term survival of these species.

We think that we've got an excellent plan, especially over the long-term, of a suite of many species, not just anadromous species, but for the many species in the agreement. I'm going to ask Dr. Hogarth if he has additions or comments on that.

Mr. HOGARTH. Just briefly, I think the one thing you have to look at is the degree of flexibility. Also we looked at the risks involved. There is a risk assessment that goes with it. In the Federal lands, we have a higher degree of certainty than we would probably have on private ownership. And that's because of the idea of recovery or properly functioning habitat.

Mr. MILLER. Wait a minute. Just back up. Do that all again for me.

Mr. HOGARTH. What we're looking for in any of these habitat conservation plans is properly functioning aquatic habitat.

Mr. MILLER. OK.

Mr. HOGARTH. And that means we want to make sure that the conditions (prescriptions) that we put on will provide for sediment control, temperature, and to a large degree, the protection that the salmon need, the conditions that will provide for their long-term survival.

You look at it, there is a difference in the risk factor. They probably have a higher degree of certainty on Federal land or public land, than we would on private land. We try to accomplish—we feel like we've accomplished the same thing and maybe with a little difference in risk. We look at the site as a whole.

In the Pacific Lumber Company, we do have in Class 1s, for example, a 170-foot buffer. We feel like that will provide the canopy cover we need and will provide the large woody debris that we need. We have a prescription for the number of trees they have to leave per acre, greater than 40-inch diameter. We have prescriptions for Class 2; we have prescriptions for Class 3.

We've got road work. You take it as a package, and we look at it site-specific is what we've had to do. And we feel very comfortable that the salmon will have the protection they need on the Palco property.

Mr. MILLER. The FEMAT standards you suggest are for Federal lands. What about the MANTAC standards? Weren't those——

Mr. HOGARTH. The MANTECH is also science. To be honest with you, we looked all the science. We looked at MANTECH. The science was ultimate, including the FEMAT science, but still went to the site and we tried to develop site-specific. One thing we are doing with Pacific Lumber Company over the next three and a half years, is that we will have a geophysicist onsite doing water sewer analysis.

And we will look at those mass waste analysis to determine what should the prescriptions be.

Mr. MILLER. Is MANTAC good science?

Mr. HOGARTH. I think it's good science. I think all of it's good science. We looked into all science.

Mr. MILLER. All science is good science?

Mr. HOGARTH. No, we feel like——

Mr. MILLER. I'm asking——

Mr. HOGARTH. Not all science is good science.

Mr. MILLER. [continuing] MANTAC's relied upon; right?

Fairly heavily?

Mr. HOGARTH. It's hard to say we've relied on any one—we didn't rely on any one body of science.

Mr. MILLER. So we have lands where you claim there's a higher degree of risk, in terms of management as opposed to Federal lands, and yet we have lesser standards on those lands?

Mr. HOGARTH. No. We said that there's a risk and that we accepted as probably higher risks on private lands than the risk that we accept on Federal lands.

Mr. MILLER. Why are we accepting that? Isn't the test whether or not the fisheries and riparian areas are taken care of or not?

Mr. HOGARTH. Congressman——

Mr. MILLER. Why are we——

Mr. HOGARTH. I think if we—you know, we have developed the prescriptions on this site for what we think provides for properly functioning aquatic habitat. Now, we do not feel it takes a 300-foot buffer, for example, with a 50-foot no-cut. We have an 170-foot buffer with a 30-foot no-cut and with prescriptions of entry, and this type of thing, within the—up to 100 foot.

And we are willing to look at, you know, each one of these HCPs and probably will have a different prescription based on conditions onsite and what we know about streams, the conditions onsite and the length of time for the permit, and this type of thing.

Mr. MILLER. Well, I appreciate your answer, but I'm a little troubled by it. And I realize this is in the preliminary stage, but you know, it would be a tragedy if we put out this kind of public money to preserve the head water groves and in the process destroyed the fisheries.

And, you know, this is some fairly difficult terrain. That's why some people suggest we shouldn't be, you know, we shouldn't be buying it. But the fact is that it has what others believe is obviously very valuable assets. And, you know, we don't get many opportunities to get in there at this stage of the game.

If we do, we ought to be doing it right, and I don't think the test is whether it's public or private land. We're negotiating a deal here where we're paying for everything we're taking. And the question

is whether the results of that action and the question is, that's got to be measured against the protection of this fisheries.

Mr. HOGARTH. If I may, Mr. Chairman——

Mr. MILLER. And I don't know why when, you know, when you're negotiating this deal and we're putting up the money and we're dealing with it in this fashion why I'm accepting a higher degree of risk with respect to this than I would be willing to accept on the public's lands.

Mr. HOGARTH. It's my opinion based on the team of biologists that we had working—and we had a local group consisting the National Marine Fisheries Service, Fish and Wildlife Service, state of California, and EPA. We had our prescriptions reviewed by outside scientists from the Northwest region and the Southwest region at the Alaska Center. We had our prescriptions reviewed.

The bottom line is if we had felt we needed a 300-foot buffer on Class 1s, we would have recommended a 300-foot buffer. The team felt like based on the conditions on PALCO's site and the length for the permit that the prescriptions we put forward will protect salmon over the life of that permit.

And we did not look at any one group—say that FEMAT is a standard you've got to accept; MANTECH has a study you've got to accept. We looked at what was necessary and what we felt like would do the job.

Mr. MILLER. But this is the negotiations, and I have great respect for you and I have great respect for the people sitting on the side of the table. But I think the bottom line is whether or not these are the best standards for this situation or are these the best standards that we can get in these negotiations. And there's a world of difference between those two.

Because if the standards aren't sufficient, somebody ought to say so, and then we can deal with the negotiations on that basis. My concern is that we may be accepting here something that is less than necessary to provide the level of protection that is needed because this is the best we can do in this negotiation.

And I want to say again, it'll be a tragedy if people believe that somehow the saving the headwaters or putting out all of this money and in the process we look back here a decade and we've blown the opportunity on the fisheries. This is a package. This is a package.

And, you know, I appreciate the context it's a grove, the ancient forest, and all the rest of that, but part of that package is the impasse of this Federal action purchasing this lands and allowing these cuts to take place, all of which are rather dubious outside of these negotiations that, in fact, we end up with the right package in terms of protections of these fisheries.

And I'm a little concerned when I see, you know, these buffers and no-cuts being adopted that are unlike what we've seen on life forced elsewhere. I'll give you the benefit of the doubt for a minute, but I just want to tell you looking at the preliminary information, I'm a little worried that what we've got here is a bit of a political compromise in terms of this long-term protection.

And I appreciate these are tough negotiations. There's a lot of pressure on people here. Everybody wants this done, and they want

it done right away. And there's—people have got reputations riding on this politically, but it ought to be done right.

And I just send up a bit of a warning here—concern that we not get into a position where we haven't done it that way and to come back and revisit this—this is a major—as all of my colleagues in Congress will tell you, this is a major Federal action with respect to the allocation of resources. You know, this delegation is paying dearly for this decision, and it ought to come out right.

Mr. POMBO. Mr. Herger.

Mr. HERGER. Thank you, Mr. Chairman. Mr. Hogarth, your agency recently announced a propose endangered listing for the spring run Chinook salmon in California Central and Sacramento Valley. This listing has the potential of closing down one of the world's most rich agricultural regions and to derail important water use agreements throughout California. What is most confusing about this proposed listing, however, has to do with its timing.

Not only is the EIS for California's CALFED Program due next week, but California's experiencing its most abundant salmon returns ever counted. My question—my first question is, how are you going to integrate the EIS in the listing process?

Mr. SCHMITTEN. Mr. Chairman, I'll start and then I'll pass over the mike to Dr. Hogarth. First, on the timing issue, the timing is set by law for the proposals to list. We've been a party to CALFED. We had shared our biological review team findings with the State so there are no surprises here. The State was fully aware of the directions that we were going.

The issue on numbers of fish, the biological review team is established to simply look at the science and does include other Federal agencies' scientists on that team. They do acknowledge the large number of fish, but when they did a very careful and close examination, it showed that there was a strong reliance of hatchery fish and that it certainly has been shown elsewhere that a major dependence on hatchery fish to wild fish puts the wild fish at risk.

Further, it was shown that in the ocean harvest, the takes are around 70 percent which, again, exacerbates if you have a weak run of natural fish, and you have a strong run of hatchery fish and you're harvesting. Though, at 70 percent on both you can see what that does to the lesser run.

These are lessons that have been learned out of the Northwest, so where are we? We have a year to look at these issues. There are solutions that we can examine. One would be a possible mass marking of all hatchery fish which would resolve the issue, I think, of harvest. We could look at ways of preventing strain. By doing that, we can keep our genetic integrity, which we want to do to bolster the weak runs until we can get a balance between the two.

And I think that we certainly will continue to be a part of the CALFED process, which is separate, and we've identified that it is not a water issue in that regime; it's an issue of hatchery and harvest.

Mr. HOGARTH. Just quickly to respond to this, you know, the spring run is really by all standards, as you mentioned, in danger. And I think everyone that looks at it from a state's perspective will agree with that. The fall run is the one that supports the fishery. And it's the one that we're concerned with the fact that the San

Joaquin Valley is pretty much land of less than 4,000 fish, while the Sacramento River has the larger runs of 200,000 to 300,000 fish.

They said they are natural, but we don't know if they are natural. We just know they don't go back to the hatchery. So over the next year, we'll be working with the state of California. We've already initiated looking at the hatchery practices, the marking of the fish and try to get a better hold.

And in the spring run that you mentioned in Central Valley, we know it's the fact that they've lost a great deal of their habitat. The upper reaches of the habitat for spring run had been taken away by the construction of dams. And there's one dam that seems to be obsolete that we'll be looking at so we get it removed to help restore some of the habitat.

So there are two issues—spring run and fall run—and fall run is more connected with the hatchery harvest than San Joaquin versus Sacramento. There are just questions that we have to resolve over the next year. And we realize that the CalFed process has put over $80 million in restoration budgets and working. And we're very much working through the CalFed project, and we'll continue to work with it.

Mr. HERGER. Let me just state my—again, my major concern is one of—is what we're doing justifying the need? And I want to get back again referring to we're having the largest run perhaps recorded in recent times. I would also ask you could you explain what definitive science that we have that justifies the listing and what the difference is between what comes out of the hatchery and what is the wild run.

Mr. SCHMITTEN. Let me indicate that——

Mr. HERGER. And keep in mind the backdrop here. We're looking at a—we're looking at people's lives; we're looking at people that are some of families that are five- and six-generation ranching, farming families here that are being affected. We have maybe more fish than we've seen in recent times. I could go on and say a quote Mr. Hogarth where he mentioned that, "Whether these populations recover due to listing action or implementation of a viable state restoration plan is no concern to the fish," end of quote.

And I can list a half a dozen or more different projects that the state of California has done—Shasta Dam water temperature control, control of pollution from Iron Mountain; Bureau of Reclamation installed a temperature control at Lewiston and Whiskey Town Reservoir. It goes on and on on what we're doing. We have more fish than we've seen before.

We have farmers than we're probably going to bankrupt here, and I don't know if we can show a difference between what is coming out of hatcheries and what is—what you would call wild, and yet, they are being listed. The people that I represent can see no rhyme or reason to what you're doing.

Mr. SCHMITTEN. Well, Congressman, I think there are three questions here. First the background. I am aware of the background. I grew up in the related background. I know the small communities; I know the dependencies. So I understand that. This is not an issue of the environment or the economy.

It's an issue where we need both. It's simply the Act has indicated that for wild species—and that's what we're looking at here—it requires that we do——

Mr. HERGER. Can you tell the difference? Do you know the difference?

Mr. SCHMITTEN. Absolutely.

Mr. HERGER. We can tell the difference? In what way? How do you tell the difference?

Mr. SCHMITTEN. It's genetics through DNA. It's the same type of thing they do for human fingerprinting today. They use tissue samples, and, I mean, for the human sector, you can do it to the individual. We can do it for at least the distinct population segments that the Act requires. And, yes, specifically we can tell the difference.

Mr. POMBO. Mr. Schmitten, in the Pacific Northwest you've listed endangered species, sub-species, distinct population segments as being endangered down to being able to tell a population from a specific stream. With declining numbers, that population will be listed as threatened or endangered.

Are you doing—are you breaking it down to the exact same level in all the regions of the country? For example, with the Atlantic salmon, did we look at species, sub-species, distinct population segments. Did we break it down to that level?

Mr. SCHMITTEN. Mr. Chairman, these are excellent questions. First, back to our process of ESUs and distinct population segments, we have vetted those through the National Academy of Science and peer reviewed them. The agency used our joint policy—and that's Fish and Wildlife and NMFS's policy—on a distinct population segments, as well as the ESU policy for Pacific and Atlantic salmon. So the answer is, yes, we did.

Mr. POMBO. I'm a little bit confused by your answer because according to the Federal Register, what was put into the Federal Register, the policy applies only to species of salmon native to the Pacific. Under this policy, a stock of Pacific salmon is considered a DPS if it represents an evolutionarly-significant unit, or ESU, of a biological species.

The stock must satisfy two criteria to be considered an ESU, and then it goes on from there. But it specifically says in here, this only applies to Pacific salmon.

Mr. SCHMITTEN. Mr. Chairman, I carefully used the phrase or the sentence that said NMFS used our joint Fish and Wildlife Service and National Marine Fisheries Service policy on distinct population segments. And I said, as well as the ESU, it is one in the same. We used the distinct population segment process. It is the same as the ESU process.

Mr. POMBO. So you're telling me there's no difference between a distinct population segment and an ESU?

Mr. SCHMITTEN. The director wants to speak on this.

Mr. HERGER. Mr. Chairman, let me just focus a little bit on this concept of the evolutionarily significant units, which was the scientific method developed in the Northwest for purposes of trying to apply the distinct population segment definition on the Endangered Species Act to Pacific salmonids.

And the ESU policy which as the director said has been reviewed and basically endorsed by the academy twice is directed to the application of the distinct population segment definition to Pacific salmonids. So it is consistent with—it is simply the application of it to Pacific salmon.

Mr. POMBO. Is it done in——

Mr. HERGER. The agency used the basic distinct population segment concept. We didn't develop a separate ESU policy for Atlantic salmon.

Mr. POMBO. Have you listed under ESUs in the Pacific Northwest? Are there species listed under that criteria as a evolutionary significant unit?

Mr. HERGER. Yes, ESUs. The answer is, yes, sir. The ESU policy, which is basically a scientific methodology to relate neighboring run is the application of the distinct population segment concept of statute to Pacific salmonids.

It is the basis by which we identify distinct population segments of Pacific salmon for purposes of making judgments about whether or not those population segments are at risk of extinction or not, so, yes, all of our Pacific salmon listings are governed by the ESU scientific methodology.

Mr. POMBO. And that's broken down to specific rivers, specific streams——

Mr. HERGER. It's——

Mr. POMBO. [continuing] population segments that are coming out of a specific stream or specific area?

Mr. HERGER. Mr. Chairman, again the application of this—the identification of what runs, neighboring runs should be clustered together into a unit for the purposes of judging whether or not that unit is at risk of extinction or not is the technique governed by the ESU protocol.

Mr. POMBO. So, all of your species that you have listed in the Pacific Northwest fall under this criteria——

Mr. HERGER. Protocol.

Mr. POMBO. [continuing] under this protocol.

Mr. HERGER. Yes, it has resulted——

Mr. POMBO. What about the Northeast? Are all of the species that are listed in the Northeast under the same?

Mr. HERGER. The ESU protocol was designed specifically for Pacific salmonids. It was not designed for Atlantic salmon and it did not govern the listing decision—the identification of Atlantic salmon as a distinct population segment. That was done on general statutory distinct population segment grounds.

We have not developed a separate scientific protocol for Atlantic salmon as we did and have done for Pacific salmon.

Mr. POMBO. Why is there a difference? Why did you develop it for the Northwest? And, Chris, if you could put up slide number 6. Why did you develop a separate listing procedure or separate protocol for the Pacific versus the Atlantic?

Mr. HERGER. Mr. Chairman, we used the same principles. I think the confusion is the terminology. When we first looked at distinct population segments, we asked our sign tests how does that apply to salmon? Are they all one in the same? The Act says you can go

down to a distinct population segment, so we had to come up with the confines of that.

The scientists broke it down, gave it a term, evolutionary significant units; a couple of components in it—one, genetic integrity which we can now determine; two, uniqueness and succinctness, the most southern run, the timing of the run—spring versus fall that really separates them. Those features together blend into meeting the Act distinct population segments, so we use the same process. You shouldn't be concerned with ESU.

Mr. POMBO. Well, I am concerned, really, and I'll tell you why is that over the past—between 1993 and 1997, 71 percent of your listing program dollars went into the Pacific Northwest. A huge amount of effort and listing has gone into the Pacific Northwest.

And you contrast that with any other region of the country, there's a huge difference, and it's obvious that with this different policies that's in place for the Pacific versus the Northeast or the Southeast, or anywhere else, that a huge amount of effort has been put into listing on the Northwest down to the point where we're doing DNA testing to tell the differences, and everything else.

And one of the questions we get back is, if they spent just as much money finding things to list in the Northeast, would they not have the same kind of impact that we're having on—out in the Northwest? And don't misunderstand me. I'm not saying that we should not know what endangered species we have in the Northwest. That's not what I'm saying.

What I am saying is that there are two regions of the country that did not receive any funding under the listing program—sow row funding under the listing program, and the Northwest received almost three-quarters of the listing money. That just inherently will make a difference between the number of species that you have listed in one particular area over the other areas.

And that causes people to say, you are implementing this law differently in the Pacific Northwest than you are in the Northeast or the Southeast, or anywhere else. Just the simple fact of the way that you appropriate funds, where you put your efforts into and when you come in and testify and say that we can tell the difference between a hatchery fish and a wild fish because we do DNA testing on them and we can tell down to doing DNA testing the difference.

A lot of people begin to ask, why in this region of the country are we doing DNA testing on the fish to tell if they came from a hatchery or if they are wild where in another area of the country they are withdrawing a listing on the Atlantic salmon.

I mean, these are the questions that we get all the time, and you guys, you biologists, all you guys can get together and talk and you all understand what you're saying. Well, you know, 99.9 percent of the people in the world say, there's something wrong here. And, you know, so that's what we have to deal with.

Mr. SCHMITTEN. Mr. Chairman, if I may. First, until today I had never heard that there may be discrimination between the East and West. When I saw this chart I guess three things popped into my mind—first, that our dollars are directed to where the problems are, and obviously you can tell the Northwest is exactly where we

have had salmon problems, also where the petitions are—we don't generate all the examination.

The public submits petitions, and that's where they are coming from. Second, I think that it's illustrative of where some of the healthy ecosystems are, and it's a good example of why Alaska and the region is not there. They have three listed species in Alaska, so they are not exempt, but there are two whales and a stellar sea lion.

And then third, that while we show the listings and we show the funding, if you were to show, then, the recovery elements of ESA, I would find that there is staff in every single region around the country. Going back to Alaska recovery, we have the third largest volume of dollars, $4 million and 12 FTEs. So, I read that as simply showing exactly the conditions that we're in today.

Mr. POMBO. Two-thirds of your staff are in the Northwest region?

Mr. SCHMITTEN. Yes. And I don't know—the 71 percent I'll agree to. Two-thirds of our listings are in the Northwest region.

Mr. POMBO. Did you do DNA testing in——

Mr. SCHMITTEN. In the Atlantic salmon, as well as the Pacific salmon, yes.

Mr. POMBO. And how many different distinct population segments did you identify there?

Mr. SCHMITTEN. Let me ask the regional representative.

Mr. MANTZARIS. Thank you. What we found is that initially when we proposed this species to be listed, the seven rivers that had specific genetic markings, that showed similarity in each of those seven rivers.

However, on increased genetic testing, we found that some of the allelle or genetic markings within those fish extended beyond those seven rivers and were similar to fish in rivers to the South. So in the final proposal, we expanded the DPS to include those other rivers to the South.

But our focus right now is on those seven rivers and as we get more information, we'll determine whether we should include those southern Maine rivers in one DPS. So right now, instead of having one DPS that includes seven rivers, we have one DPS which we call the Gulf of Maine DPS.

Mr. POMBO. You have one DPS that includes seven rivers?

Mr. Mantzaris. Initially, we started that way, but now what we've done, we've expanded it to call it the Gulf of Maine DPS which we have——

Mr. POMBO. So that includes the DPSs for the entire Gulf of Maine?

Mr. MANTZARIS. Yes, the entire Gulf of Maine, but there are rivers that we haven't fully investigated. But as we investigate those additional rivers——

Mr. POMBO. Does that DPS make it bigger?

Mr. MANTZARIS. It could be made bigger, yes. It could be, but we don't have sufficient information to determine whether it can be made bigger or not, at this time.

Mr. POMBO. So to me, that doesn't sound like the same thing where we have distinct population segments from individual rivers, individual streams, different times of the year. I mean, we've broken this down——

Mr. SCHMITTEN. I think because the genetics has turned out to be different on the Northwest as it has in the Northeast. What we found in the Northeast is that the genetic testing has shown that there are specific differences—there's great differences——

Mr. POMBO. There's no differences between the rivers?

Mr. SCHMITTEN. Wait; there's great differences between North America and Europe. There's a very distinct difference there.

Mr. POMBO. Just specifically with what you're dealing with, is there differences between the rivers?

Mr. SCHMITTEN. Yes, there are differences between the rivers, but there are also similarities.

Mr. POMBO. Are there similarities between the rivers, between the different population segments that you've got in the Northwest?

Mr. MANTZARIS. If I understand the question, yes, there are similarities. The question is——

Mr. POMBO. So you both have similarities. He's put the entire gulf together. We've split it up into different streams, so——

Mr. STELLE. Mr. Chairman, I would entreat you to understand the issue of scale here. For instance, in the Pacific Northwest, the clusterings that we have used for the listing process encompass one cluster as the entire Snake Basin drainage, which is a huge geographic area. It is not just one simple, small river.

Another cluster is the entire upper Columbia River. A third cluster runs from Southwest Oregon down to San Francisco so these are large clusters. We are not splitting hairs here. We're trying to cluster into related units on a good solid scientific foundation.

There are similarities between the clusters. There are also very distinct differences between those clusters—warrant us as treating different purposes.

Mr. POMBO. I'm not questioning the—that you can find differences—the sciences that you've used at this point. I'll just leave it at that. Mr. Miller.

Mr. MILLER. Speaking of some of these clusters, on the—my understanding is on the coho that we don't have in place yet the avoidance guidelines in Northern California; is that correct?

Mr. HOGARTH. That we do not have a 4 (d) Rule in place; that's correct.

Mr. MILLER. Why and when?

Mr. HOGARTH. I don't know what the schedule for it is. We can get back to you.

Status of the Guidelines

The NMFS Take Avoidance Guidelines for Coho Salmon will be released when they have had the benefit of outside technical and peer review. Under the terms of the MOA NMFS recently signed with California, NMFS and the State will be conducting a joint review of the California Forest Practice Rules. NMFS and the State intend to utilize the expertise of the Governor's Watershed Protection and Restoration Council's (WPRC) Science Panel to review both the Guidelines and proposed changes in the State forest practice rules agreed to by NMFS, the California Department of Forestry, the California Department of Fish and Game, and the State Regional Water Quality Control Board.

Considering that adoption of Guidelines and changes in the forest practice rules will have long-term benefits for the resource and potential economic impacts on the industry and private landowners, we believe it is imperative that the process and agreement with the State be allowed to be implemented. It is essential that the best possible standards be produced as an outcome of the WPRC process.

Challenges

The NMFS Take Avoidance Guidelines for Coho Salmon have been difficult to develop because of the complexity of dealing with a species that has an extensive geographic range and where various stages of the coho life cycle occupy coastal streams at all times. Specifically, juvenile coho reside in freshwater for up to 18-months before returning to the ocean. At any point in time, the fry, juveniles and adults will be in the stream system.

Guidelines cannot be selective with regard to how they are applied to the land yet "one size fits all" Guidelines have the potential to have a tremendous economic impact if not carefully considered in their development. Large industrial timber companies have the land base to provide certain levels of protection and conservation while maintaining the economic viability of their companies. Small forest landowners, and ranchers that rely on selective timber harvest to augment their income do not have this flexibility.

NMFS intent is to utilize the Endangered Species Act to recover coho salmon, and not to create an economic hardship for small landowners. Within the range of coho salmon in Northern California, approximately 8 million acres of timber land is divided in ownership between the industrial timber companies and small landowners. Presently, NMFS is engaged in the development of Habitat Conservation Plans (HCPs) with every large industrial timber owner in Northern California to permit incidental take of coho. Small landowners do not have the resources to engage in this level of conservation planning. With this in mind, NMFS is and continues to be aware of the importance of instituting Guidelines that do not discriminate based on the size of the landowner.

To meet this shortcoming of the Guidelines approach, NMFS is seeking to develop alternatives for small landowners through either low effect HCPs, enhanced non-industrial timber management plans, or through the State WPRC process. This effort takes time to develop to assure that we have a scientifically and technically sound approach. The premature implementation of Guidelines has the potential to seriously undermine the cooperation of landowners who ultimately are the only stakeholders that can assist in recovering coho salmon.

Mr. MILLER. I mean, because——

Mr. HOGARTH. Wait a minute.

Mr. SCHMITTEN. Mr. Miller, are you talking about take avoidance or——

Mr. MILLER. Yeah.

Mr. SCHMITTEN. [continuing] or the 4 (d)? There is a difference.

Mr. MILLER. [continuing] because you have the 4 (d)——

Mr. SCHMITTEN. OK.

Mr. MILLER. [continuing] and right now that's being borne by people not fishing, but there's other activities taking place in the area that have an impact, and we're supposed to make some decisions about how to avoid some of those, are we not?

Mr. HOGARTH. That's——

Mr. MILLER. Isn't that what the avoidance guidelines do?

Mr. HOGARTH. That's underway already as far as when we listed, then the Section 7 consultation started with the Corps of Engineers, with the Federal highways. That is underway, yes, sir.

Mr. MILLER. When is that going to happen?

Mr. HOGARTH. It's already happening.

Mr. MILLER. When are they going to be done, though? I mean, when are people going to have——

Mr. HOGARTH. Well, we go——

Mr. MILLER. [continuing] to alter their activities in I mean, we're going forward—we're going forward with force activities. We're going to continue in the highway activities. When are——

Mr. HOGARTH. Each one of those projects comes to us for Section 7 consultation. You do it project by project.

Mr. MILLER. Right.

Mr. HOGARTH. The state has—on Coho, the state did not come forward with any plan.

Mr. MILLER. I'm sorry.

Mr. HOGARTH. On Coho, we do not have any agreement with the state of California. But what we're having to do is we do these all from a Federal perspective.

Mr. MILLER. Are those going to start to fall into place?

Mr. HOGARTH. What I'm trying to say, they've already started. Any activities since Coho has been listed has to come to us for a Section 7 consultation. And we determine whether it'll have an impact in what we do from that point.

Mr. MILLER. And where are we in that process? Are there activities that——

Mr. HOGARTH. The activity's ongoing. There are ongoing activities.

Mr. MILLER. Those cover what areas, highways——

Mr. HOGARTH. Highways, Corps of Engineers, Forest, and the council meeting sets—the council sets the harvest regulations based on the listings.

Mr. MILLER. Those activities cover on private land also?

Mr. HOGARTH. Yes, sir.

Mr. MILLER. So if I—I don't—I guess I'm missing something here in terms of what comes first here, the chicken or the egg. You have an engaged activity. If they've got to count any activities in these areas and these watersheds now, you've got to come to you; right?

Mr. HOGARTH. That's correct; yes, sir.

Mr. MILLER. Whether it's on private land and each one's judged independently——

Mr. HOGARTH. That's correct.

Mr. MILLER. [continuing] and the decision's made about those activities?

Mr. HOGARTH. That's correct.

Mr. Miller. Is anybody taking action on private land and/or public land, a public agency all got to go through this process?

Mr. HOGARTH. That's correct with the emphasis right now kicked in first on Federal land.

Mr. MILLER. It's—we're back again.

Mr. HOGARTH. (Laughter.)

Mr. MILLER. I mean, I appreciate, you know—I mean, appreciate what's going on here. I mean the Federal lands are becoming the sink for all of these activities and maybe that's fine and then people—but then people shouldn't come just about cutting on the Federal forest, and what have you.

But the emphasis on—so other people are just going along merrily their way?

Mr. HOGARTH. No, sir, they don't go merrily their way, but the——

Mr. MILLER. I mean, that's just puts a burden on the Federal lands then people tell you they don't like what you're doing on the Federal lands, but the private people are benefiting by what you're doing on Federal lands.

Mr. HOGARTH. Part of what you say is correct, yes, sir. But, you know, the process——

Mr. MILLER. Where's the gatekeeper on this?

Mr. HOGARTH. It's us and we do our best with what we have to get the total job done. I mean, it's not that we could go into every project because we couldn't cover it.

Mr. MILLER. I hate to break the news to Mr. Pombo, but I think we need more of your people in the West and—[laughter]—and in the Pacific Northwest.

Mr. HOGARTH. Well, for example, in timber harvest plans—what we do with timber harvest plans right now is that we rely on the state fish and game, and they have a problem with those timber harvest plans, they come to us. But we have a stack now that's as tall as I am.

Mr. MILLER. But what do you mean, they have a problem? You're the people that are there now there are looking at a listing and aren't you the gatekeeper as whether or not these activities are in consistence with the recovery or not?

Mr. HOGARTH. Congressman Miller, you made a statement earlier today, which I'll agree with, about the size of California and activities in California. With the staff I have in the Southwest region, we have to set priorities. And when we feel like that timber harvest plans, for example, that fish and game is looking at those timber harvest plans and if they feel one is controversial or we get word that one is controversial, then we will review it.

And we just did that on several. One company, we went in to them and said that we've made a petition to the Board of Forestry. We feel like those timber harvest plans were not sufficient to protect—the protection we needed. But we do not review every one of them and what I'm saying, we set priorities on where we think we get the most for the people we have. That's why we need more cooperation——

Mr. MILLER. Well, it's obviously a war in the West because we're being deprived of our resources.

Mr. HOGARTH. We've got to have more resources or we've got to have a better working relationship with state of California.

Mr. MILLER. Well, you know, to take the scenario that you just outlined this thing's going to spiral downhill, and the restrictions are going to get more and more difficult on the fishing industry or on the timber industry or on private—because you're not going to get recovery.

I mean, if you can't monitor it and you can't enforce it adequately—and I appreciate—you know, listen, I have great respect for trying to allocate the resources around to all these problems but, I mean, that's kind of where we're falling down here in terms of recovery.

I mean, we have made a listing; we've made a listing, determined that the call of these watersheds are in trouble. There's action should be avoided. It's easier to tell a fisherman, OK, you stop fishing; OK. That one's kind of clear. But the burden's on them, and this is supposed to be about trying to lighten the touch on various aspects of our economy, whether it's recreation or commercial fishing or logging or farming, or what have you so you can kind of lighten the touch and still bring about recovery.

But what you're saying because of inadequate resources, you just kind of—you're going to end up clamping down on Federal forest lands because you don't—because the plans on state lands may or

may not be adequate. Now, if that doesn't work out, we're going to clamp down tougher on the fisherman or for a longer period of time, or what have you, because we weren't able to bring these other parties to the table.

Mr. HOGARTH. Well——

Mr. MILLER. I'm not asking you to agree with that; I'm just saying this sounds like a downward spiral where we just end up with more and more difficulty with respect to trying to get these species recovered and off the list, and we can get on with other activities.

Mr. SCHMITTEN. Mr. Miller, maybe I can turn the spiral upward. We made a listing. The first thing we do is engage in Section 7 consultation with all Federal actions that may affect. We also have promulgated the 4 (d) rule which applies—take (ph). Now the next process, a piece in this, will be the recovery plan.

Once the recovery plan is in place, then I think that's the holistic plan for where we go. And we simply—do you want us there—we want to get there and we're just not quite there. We've just listed Coho.

Mr. MILLER. I'm just concerned that in the——

Mr. HOGARTH. In the interim, we may lose——

Mr. MILLER. People are rushing—logging private lands or rushing to get activities done before—before you have your recovery plan, and they are making the problem worse because we don't have the gatekeeper to avoid these actions that should be avoided so that we have a better chance of recovery and maybe a chance at sooner recovering.

Mr. SCHMITTEN. And I think we're in agreement that's a concern. I hear Dr. Hogarth saying that he's being the best gatekeeper in this interim period as he possibly can. We share your concern.

Mr. MILLER. One last on just—on one of the other—the other one was on the steel head. What's with these negotiations with the state? Is that going to come to fruition or is that going to avoid the problems or—I mean, it took you a long time to hammer this thing out in Oregon and Maine or—Maine.

Mr. SCHMITTEN. It took us about a year and a half with Oregon. We have been working since last March with the state of California, not making good progress until recently. First, can we get there? Let me absolutely guarantee you by March 13th, which I think is next week, we will have an announcement to make on whether we're there or not, whether we list or not.

We will meet that deadline. The court has given us the ability to go to March 13th, and we've made good progress with both Oregon and California during this time.

Mr. MILLER. Well, I just—I mean, not to put this in the same context as the headwaters, but you know, the law has—puts obligations on you with you know, with your decision with respect to steel head.

And, you know, I appreciate you've been working since last March, but if most of that time from last March has been unproductive—you've been working the last few weeks because the court has put a deadline on us, I would hope that we not—we don't accept in lieu of listing an inadequate plan for the state to take this over because the state would rather take it over than have the Federal Government tell them what to do or have a listing that, you

know—I just think that you ought not to get out of the driver's seat here because the state dragged its feet for 9 months and now perceives that you're serious and the date is serious about the jeopardy here.

And action has to be taken, and so now we're in a hurry-up slam bang deal to make this look like the state can handle its affairs when the state wasn't participating up until the eleventh hour here and that we not get—we not buy ourselves an agreement in lieu of listing—when that is not satisfactory. And I'm not casting dispersions on your judgment; I'm just saying that know, you know, the state has try today avoid this, you know, in any kind of meaningful discussion.

And then, now all of a sudden, we're running because the court's going to say on March 13th whether you're in contempt or whether this is adequate or not when we ought to keep the focus here. This is, again, about whether listing is necessary to provide for the recovery of this species.

Mr. SCHMITTEN. I agree. A fair amount of the decision will be the piece—the fact that the species needs come first. Second, science will drive the process; third, I can assure you that the agency will not accept an inadequate plan, and that's exactly the tenets that we've set forward to the state in our negotiations.

Mr. MILLER. You know, I'm just concerned and, again, I go back to headwaters but I'm concerned that, you know, we have tough requirements under the law, but there's the law. And I think there's, you know, there's a perception somehow that this law is so terribly unpopular that you would rather avoid a listing or avoid this because what would the public say, you know, as opposed to the headwater deals collapsing?

Mr. SCHMITTEN. Well, that's not necessarily your choice, because the law puts requirements upon you; and either we have an agreement that will provide for the—for those protections of that habitat and the fisheries or we don't. And if the headwaters is going to collapse because of that, the public ought to know that. And then we can decide where the chips fall because I suspect that the people on the other side of the table wouldn't want that either.

But we ought not to make a secret little deal that's inadequate. We ought to make a deal that publicly we can assure people will bring about the results that are part of this package in terms of saving the headwaters, because it's not just about keeping trees vertical. It's about an ecosystem that people think is important and these riparian areas are part of that.

And we have enough history to know how quickly we can get into trouble on these riparian areas and how long it takes to recover them. That's why you've got all these people deployed in the Northwest. It was real easy to screw them up. Now, we've got a fire and boat drill going up there trying to figure out how to save these huge and complex watersheds.

And in this case, we ought not to repeat that for the sake of getting some dammed deal. You know, if everybody bows down when they say headwaters, but it ought not to be the instrument by which we destroy riparian areas.

I think we can't lose sight of the goal. Certainly, what we're looking for is an opportunity for a better result. If we can do better for

the resource, a partner—and I've heard the Committee over the last 2 or 3 years ask us to work closer with the states—if we can get a better deal, why shouldn't we?

And if you look, we are not out to avoid listings. If you look at the record across the country, there's over a thousand listed species. There's less than a dozen accepted state conservation plans. We're very frugal. They have to meet the tenets that we laid out, and we discussed this a little bit ago. We will not accept a bad deal.

Mr. MILLER. Thank you.

Mr. POMBO. Mr. Herger.

Mr. HERGER. Well, thank you, Mr. Chairman. Mr. Inspector Schmitten, I appreciate the last comment that you made, and I'd like to emphasize that on working for a better deal and better results. I have to believe without any shadow of a doubt that that's what the American public—certainly all those that I represent in my area are looking for. They are looking for better results.

I firmly believe with no doubt in my mind whatsoever that we can both manage for our environment and protect our endangered species and not destroy our economy simultaneously, but yet, that is what's happening. That is certainly what's happening in the area that I represent.

And I'd like to address another concern that we have in our area. In California in the Pacific Northwest, there's a substantial overlap of jurisdiction between NMFS and the Fish and Wildlife Service, particularly in the issuance of Section 10, Incidental Take (ph) Permits and Section 7, consultations.

For example, in Northern California if a timber company wants to obtain a Section 10 Incidental Take Permit, it must get one from both agencies because the presence of spotted owls and marbled marriates, which are under the jurisdiction of the Fish and Wildlife Service, and also from the NMFS because of the presence of salmon streams. I'm aware of examples of forestry practices which must be approved not only by the Forest Service, but also by NMFS and the Fish and Wildlife Service.

In issuing a Section 10 permit, the law requires that the secretary issue the permit if the take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, however NMFS is requiring that incidental take permits actually contribute to recovery versus simply not reducing the likelihood of recovery.

Isn't this beyond the statutory authority of the agency to require the private landowner to actually contribute to recovery?

Mr. SCHMITTEN. Congressman, first on the overlap, there is not overlap. In fact, to avoid duplication we assigned teams in which both agencies are on so the private landowner, then, doesn't have to go to NMFS and have to go to the Fish and Wildlife or together. Earlier in my sworn—in my testimony, I indicated that every single salmon ACP that we have done, we've done with the Fish and Wildlife on the team. So there is a team.

As far as the standard, the administration is not using different standards. We're very carefully applying the Section 10 (a) 2 (p) 4 of the Act where it says that we're not to appreciably reduce the likely hid of survival and recovery of the species in the wild. We're

diligent about that, and we are not inconsistent with our application on private lands.

Mr. HERGER. Well, I would—I'd like to give you some examples not here but afterwards——

Mr. SCHMITTEN. I'd appreciate that.

Mr. HERGER. I certainly—I can tell you this is a problem, not only in the private sector, but——

Mr. POMBO. If the gentleman would yield for just a second, I didn't understand your answer to the question he asked about whether or not this was above and beyond the scope that a Section 10 permit requires to contribute to the recovery of a species versus that it doesn't lead to the endangerment of the species. I forget the exact term, but I didn't understand exactly how you answered that.

Mr. SCHMITTEN. I said a couple of things; one that we're not using inconsistent standards. And by that I mean our agencies, both Fish and Wildlife and the National Marine Fishery Service, at the fundamental principle that guides us is the Section 10 (a) 2 (b) 4 of the Act in that that indicates both survival and recovery. It's a two-prong approach, and it's not a conjunction nor—it's an end.

I guess an example, Mr. Chairman, might be where the ACPs are lengthy in duration, say 50 to 100 years. The difference between survival and recovery is just not very well-defined scientifically. So in our approach in the long-term ACPs is we simply seem to continue the long-term survival of the species, and we do that by seeking proper-functioning habitat. This is a difficult one to get, so——

Mr. POMBO. If the gentleman would continue to yield on that point, in the Act the taking will not appreciably reduce the likelihood of the survival and recovery of the species. It seems like what you're saying is different than what the Act says; that it's a different standard than what the Act says. If it wasn't, then why didn't you just stick to the—what the Act says?

Mr. SCHMITTEN. We believe we are sticking to what the Act says; it says not appreciably reduce the likelihood of the survival and recovery of the species. And I tried to cite an illustration where it's difficult to grasp, and that would be, say, a long-term ACP of 50 or 70 years where you can't—that area's great. Science can't tell you what's recovery, what's survival.

Mr. POMBO. But isn't——

Mr. SCHMITTEN. So——

Mr. POMBO. Doesn't your standard contribute to the recovery of the species? Isn't that what you're saying?

Mr. SCHMITTEN. Yes. And what we're saying is that to seek——

Mr. POMBO. That's not in the Act, though.

Mr. SCHMITTEN. To seek that standard in the Act, we're saying if we can get proper-functioning habitat, that satisfies whether it's survival or recovery. That will get you there.

Mr. POMBO. I just think it's a different standard. If it was the same standard, you would use what it says here; you wouldn't say "contribute to the recovery of"——

Mr. SCHMITTEN. We believe——

Mr. POMBO. [continuing] because that's not what—I have the Act, I can show you the language that's in the Act. It doesn't say that a Section 10 permit must contribute to the recovery of the Act—to the species. It doesn't say it. It must contribute to the recovery

of the species. That's not what it says. And if you're trying to tell me that it's the same thing—if it was the same thing, you wouldn't use different words.

Mr. SCHMITTEN. Mr. Chairman, let me do this for you. I think it would be quickest for the Committee if I submitted our approach in writing for you. And then, if you need me to followup, I would do that. We believe firmly that we're adhering to the standards.

Fish and Wildlife concurs with where we are, and we think that in the areas the only anomaly might be long-term ACPs where no one can define what it is. We think that we have an approach that is consistent, and that's a proper-functioning habitat.

Mr. POMBO. It's nice that Fish and Wildlife concurs with what you're doing; that's great. But, you know, we're kind of responsible——

Mr. SCHMITTEN. Yes.

Mr. POMBO. [continuing] and I'm not exactly sure if you've kind of expanded the authority of the Act, and I would like you to——

Mr. SCHMITTEN. I'll submit that, then, in writing for the Committee.

Mr. POMBO. Mr. Herger.

Mr. HERGER. Thank you, Mr. Chairman. And thank you very much for your addressing this concern that both of us have and certainly our districts have. But, Mr. Director, I have to tell you my question was directly to private land. I'd like to move now to Federal land. Just in talking, for example, with the Klamath National Forest, they are having very dramatic problems on coordinating between the Fish and Wildlife and your organization in coming up with a plan.

And it seems to be overlap. Are you—how would you address that? Are you—do you recognize that we have a, what is perceived by the people I represent, as a major problem of overlapping and coming up with one policy? Let's now take the example of forest practices within the Klamath National Forest up in Northern California.

Mr. SCHMITTEN. Congressman, further, I have not heard that we have any problem. In fact, in our Section 7 activity with other Federal agencies, we have specifically tailored a program—this goes back to when I was a regional director in the West where we looked at these as programmatic activities so we did all the grazing at one time, all the timber so we would not slow down any of the affected parties.

We have done literally thousands of Section 7s. To this date, we are caught up. I have not heard a complaint in 2 years that we're in arrears on any of our Section 7 activity.

Mr. HERGER. Well, thank you, and I'll get some more information and come back to you.

Mr. HOGARTH. I'll check on that, Congressman.

Mr. HERGER. Thank you. I appreciate that. Thank you, Mr. Chairman.

Mr. POMBO. Before we close the hearing, I just wanted to give you the opportunity to correct one thing. You said that there was no duplication between Fish and Wildlife and the National Marine Fisheries. We have lists of different permits, take permits, that

were required by you and the same people being required to do it with Fish and Wildlife Service for different species. So, the fact——

Mr. SCHMITTEN. Mr. Chairman, that'd be right. For our species, we simply are working together with Fish and Wildlife so there should be no duplication. I could be——

Mr. POMBO. On the same species, there may not be a duplication, but——

Mr. SCHMITTEN. That's my very point that I've made to the Committee.

Mr. POMBO. Well, I guess there may be. I'm not sure. I mean, we have one here where they already got a permit for Marble Marriet, and they've applied for or are in negotiations on one on the Coho. And so, they already did what they had to do to satisfy Fish and Wildlife Service, and now they are in with you on the Coho.

So there is some duplication in terms of having to go through several different agencies in order to proceed. And I think that was the point that Mr. Herger was trying to make.

Mr. SCHMITTEN. Mr. Chairman, this is something I welcome getting into because that's what I want to avoid and have gone truly out of my way to make this a one-stop shopping. We should not put people through multiple hoops when they seek Federal permits and especially if it's a permit that both agencies are involved in, so this is something I would welcome the chance to look into any issues that you raise like that.

Mr. POMBO. Well, I know there are other members that are concerned about this, and that's one of the reasons why I wanted to clarify that.

Mr. SCHMITTEN. I think you'll find——

Mr. POMBO. And I know that that's something, and we just looked at this and we found one right off the top that they already did everything they had to do to satisfy one Federal agency—actually two because they already satisfied the Forest Service——

Mr. SCHMITTEN. Yes.

Mr. POMBO. [continuing] then they satisfied Fish and Wildlife. Now, they are back in negotiations trying to satisfy you. I don't know how long this one—particular one's been going on, but I would suspect if they've already satisfied Fish and Wildlife Service, you're talking about a long period of time.

Mr. SCHMITTEN. I assure you; this is what we want to avoid. For instance, in the Northwest, we have teams now where the Forest Service is there; BLM is there, Fish and Wildlife, National Marine Fishery Service, Club Fed, you've got. Even EPA, Fish and Wildlife, National Marine Fishery Service are trying to avoid the very thing you suggested.

And you potentially have some sites. You share those with me and those are the type of things that I can fix——

Mr. POMBO. Well, thank you.

Mr. SCHMITTEN. [continung] in holding up the standard.

Mr. POMBO. I know there are more questions we can ask, but it's been a long afternoon, and I'm sure there will be further questions that we would submit to you. I apologize to you for the delay in bringing your panel up, but all of you, thank you for being here and being able to answer our questions.

And the things that we ask that you respond to in writing, if you could do that in a timely manner, it would help a great deal. But, thank you very much.

Mr. SCHMITTEN. Thank you very much, Mr. Chairman.

Mr. POMBO. And the hearing is adjourned.

[Whereupon, at 3:42 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF HON. JOHN B. SHADEGG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Let me start by asking my colleagues a simple question: how many of you have schools in your state which have had construction delays because a species on the endangered list MIGHT be present?

In Arizona, we have the very dubious distinction of being faced with this situation. In Tucson, the Amphitheatre School District needs a new high school. The Canyon del Oro High School which is currently being used by the district is overcrowded: it was built for only 1,800 students and is now being used by over 2,800 students. Needless to say, this is severe overcrowding and it will only get worse since Tucson is in one of the fastest growing regions in the country. These excess students are being taught in portable classrooms; not exactly the high-quality learning environment we want for our children.

The school district is trying to lessen the overcrowding by building a new school on a plot of vacant land and, as required by law, the school district performed an environmental assessment on the property. That environmental assessment revealed that no species on the endangered list are present on the property. Let me repeat that, not one species on the endangered list is present on the property.

Despite the fact that there are no endangered species on the property the Amphitheatre School District has been forced to wait while the Fish and Wildlife Service prepares a formal biological opinion under the Endangered Species Act. Why? Because surveys have revealed that there may be a Cactus Ferruginous Pygmy Owl between one and six miles from the site of the proposed school!

It is ludicrous that construction of this badly needed school would be delayed be cause there is a species not on the site, but in the neighborhood. What is even more ludicrous is that the Cactus Ferruginous Pygmy Owl is not even endangered! There are well over a thousand of the birds in Texas and hundreds, if not thousands more in Mexico, a fact that the Fish and Wildlife Service itself has acknowledged.

Because of this situation, the school district has been forced to delay construction of the new school and to look at alternative sites. The delay adds at least one more year to the date when the new school will be able to open. That is at least one more year that children in this school district will need to learn under overcrowded conditions.

I would not wish this problem on any state. However, it is apparent that quite a number of my colleagues really do not understand just how serious this problem is. That is the only conclusion I can come to because so many of my colleagues continue to support the status quo in regard to the Endangered Species Act. I firmly believe that much of their support comes from a "Not In My Backyard" syndrome: they don't face the problem in their states and really don't care what happens in someone else's state.

I would like to commend my colleague Don Young for holding this hearing. It is crucial that we look at just how the Endangered Species Act is applied in different regions of the United States and whether all regions are being treated in a fair and equal manner. As the facts show, clearly this is not the case. In the Southwest Region where Arizona is located, there are 119 species listed under the Act. In contrast the Northeast Region has only 39 listed species: less than one third the number listed in the Southwest! On a more fundamental level, it is important for people to understand that the Endangered Species Act simply is not working. The Act has been in place since 1973 and currently has 1,679 species listed under it, however, in the 25 years that it has been in existence, only eight species have been delisted. This is not a success story, this is an abject failure.

I am glad that we have this opportunity to bring facts like these before the American People and hope that, by bringing out the problems with the current Endangered Species Act, we can move expeditiously to enact meaningful reforms. It is vital that we help people to understand that a "one size fits all" policy simply does not work.

STATEMENT OF HON. ROBERT F. (BOB) SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. Chairman—

The Endangered Species Act is the most powerful law in the country today. Its impact on private property, economic production, and our standard of living is unprecedented; because of its power, the enforcement of this law must be carefully scrutinized. I commend you on your decision to hold this important hearing.

The total impact of the implementation of the Endangered Species Act is sometimes difficult to ascertain. We do know, however, that it has led to a greater reli-

ance on imported wood products, higher energy costs, restrictions on the use of our nation's waterways, and more rigid regulations on the use of private land. Ultimately, my biggest concern about the Act is the emotional burden it places on hard-working farmers who have been forced to deal with a question fundamental to their very existence: will they have enough water to grow their crops and provide for their families?

This is a critical aspect of the law that is too often overlooked. As Federal agencies focus on the rigid regulations written to implement the Act, they often lose sight of the fact that we are placing people's livelihoods at stake over a biologist's judgment. This is an awesome responsibility. Do we cut off water to a farmer and ruin his crops because one biologist believes that a lake ought to have six additional inches of water in it? Or for an additional 50 cubic feet per second of flow in a river? If such a decision is made, Federal agencies bear the burden of proof. Solid scientific evidence must be driving these issues; too often it does not.

The listing of a species must contain two key components. First, we ought to have rigid standards placed on the scientific evidence being used to support the listing. The data should be collected using commonly-held scientific practices, peer reviewed by a broad array of experts in the field, and closely scrutinized by agencies and affected interests before being adopted. If the Federal agencies rush to judgment under the threat of a lawsuit, the burden of proof to delist then falls on landowners. This is wrong. It should be the agencies' burden to prove that a species merits listing, not a landowners' burden to prove it does not. Second, there must be a comprehensive plan adopted that specifies realistic numerical targets for species recovery. Without such a common understanding of the goals, how can landowners participate in the species recovery? If they are forced to comply with an ever-expanding list of Federal requirements and shifting standards, the Federal Government will lose the most effective partner they have in the effort to save legitimately threatened species.

When the Federal Government's efforts degenerate into incrementalism and loosely defined goals, the recovery of species will never be successful. If, however, we can adopt a common understanding of the key issues that lay before us—principally, the adherence to strictly scrutinized and peer reviewed science, and a detailed recovery plan—we can make progress. The need to provide more stability to the victims of misguided agency decisions require that we act to make this law better. I look forward to working with my colleagues in the Congress to achieve this goal.

Mr. Chairman, thank you again for calling this very important hearing, and I look forward to discussing this matter in greater detail with our witnesses.

STATEMENT OF HON. DON AMENT, STATE SENATOR, AND HON. LEWIS H. ENTZ, STATE REPRESENTATIVE, DENVER, COLORADO

Members of the House Committee on Resources:

It has come to our attention that the Director of the United States Fish and Wildlife Service (USFWS) will be appearing before your Committee on Thursday to address the issue of whether or not to list the Preble's Meadow Jumping Mouse (PMJM) as threatened or endangered under the Endangered Species Act.

As chairmen of the Senate and House agriculture committees we spend a great deal of time addressing the endangered species issue. At the state level we have held hearings regarding endangered species and understand the importance of extensive public comment. We have also been successful in developing recovery programs at the state level as a means of avoiding a Federal listing of certain species.

In this respect we request that the USFWS extend the comment period on the Preble's mouse. This extension would allow sufficient time for all parties affected to provide the USFWS with information and possible recovery options. It is vital that all local concerns be heard at the Federal level and the extension of the comment period will allow this to take place.

All too often the concerns of individuals and efforts by local and state governments are lost in the process at the Federal level. We urge your Committee to support an extension of the comment period in support of the citizens who will be directly affected by the decision of the USFWS.

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

February 27, 1998

MEMORANDUM

TO: Committee on Resources

FROM: Committee Staff

SUBJECT: Hearing on Implementation of the Endangered Species Act

At 11:00 a.m. on Thursday, March 5, 1998, in Room 1324 of the Longworth HOB, Washington, D C, the Committee on Resources will hold an oversight hearing on the Endangered Species Act of 1973.

Those invited to testify include Honorable Jamie Rappaport Clark, Director of the U.S. Fish and Wildlife Service, accompanied by various FWS officials, and Honorable Rolland Schmitten, Director of the National Marine Fisheries Service, also accompanied by various NMFS officials.

INTRODUCTION:

Data on funding, listing effort, consultation and permitting statistics, as well as litigation effort, obtained from the various federal agencies illustrate the disparate impact of the current enforcement of the Endangered Species Act on different geographic regions of the country. The reasons for the disparity in treatment is difficult to define, however, all enforcement effort derives from the listing of species. These disparities raise substantial questions of fairness and rationality. In addition, there may be substantial biological consequences for species in those areas of the country receiving inadequate funding for ESA programs.

HISTORY OF THE ESA

Prior to 1966, authority for wildlife protection rested primarily with the states, except where the wildlife was highly migratory or where wildlife taken in violation of state or federal law was transported across state boundaries. In response to a concern that various species had

http://www.house.gov/resources/

become or were in danger of becoming extinct, Congress passed the Endangered Species Act of 1973 (ESA, Public Law 93-205, 16 U.S.C. 1531 et seq.) which has became our Nation's strictest and most stringent environmental law.

Under the ESA, the Secretary of the U.S. Department of Interior, through the U.S. Fish and Wildlife Service (FWS) has responsibility for plants, wildlife, and inland fishes. The Secretary of Commerce through the National Marine Fisheries Service (NMFS), is responsible for implementing the ESA with respect to ocean going fish and marine animals.

REGIONAL ENFORCEMENT:

The ESA is enforced on a regional basis both by the FWS and the NMFS. Both agencies are divided into geographic regions headed by a Regional Director or Administrator who has a great deal of discretion to enforce the ESA within his or her own region. This discretion, coupled with inconsistent judicial precedent in different federal court circuits, has left a patchwork of inconsistent and discriminatory implementation of the ESA. In the far West, the ESA has been implemented with a far greater emphasis on regulatory control, while in the upper Midwest and Northeast, there appears to be minimal enforcement and much less emphasis on the protection of habitat as a tool for reversal in the decline of species.

FWS:

The Fish and Wildlife Service is divided into seven geographic regions each headed by a Regional Director.

Region 1: Washington, Oregon, California, Idaho, Nevada, and Hawaii.
Region 2: Arizona, New Mexico, Texas, Oklahoma.
Region 3: Minnesota, Iowa, Missouri, Illinois, Michigan, Wisconsin, Indiana, and Ohio.
Region 4: Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, Georgia, Florida, South Carolina, North Carolina, Puerto Rico, and the Virgin Islands
Region 5: Virginia, West Virginia, Maryland, Pennsylvania, Delaware, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine.
Region 6: Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, Nebraska, and Kansas.
Region 7: Alaska.

NMFS:

The National Marine Fisheries Service, headquartered in Silver Spring, Maryland, also implements the ESA on a regional basis, with a great deal of enforcement discretion provided to the Regional Administrators. The NMFS regions are as follows:

Northeast Region: Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, Pennsylvania, Ohio, Michigan, Wisconsin, Indiana, Illinois, Iowa (although since most of their jurisdiction over salt water fish, they have little impact on noncoastal states, except in the Northwest States where salmon spawn in the inland states.)

Southeast Region: North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, New Mexico, Oklahoma, Arkansas, Tennessee, Kentucky, Missouri, Kansas.

Southwest Region: Arizona, California, Nevada, and Hawaii.

Northwest Region: Oregon, Washington, Idaho, Montana, Wyoming, Utah, Colorado, North Dakota, South Dakota, and Nebraska.

THE LISTING PROCESS:

For a species to receive the protections afforded by the ESA, it must go through a formal rulemaking process and be placed on either an endangered species list or a threatened species list. The ESA defines a "*species*" to include not only a full species, but to also include any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.

The Secretary is required to make a decision to list a species as endangered or threatened based on "*best scientific and commercial data available*"at the time of listing. A decision to list a species may be based on a recommendation made by the Secretary or by a petition filed by an interested private citizen. As of November 30, 1997, a total of 1,679 species were listed. Of those, 1,119 are listed in the United States and 560 are listed as foreign species. Of the species listed in the U.S. 890 are listed as "*endangered*" and 229 are listed as "*threatened*".

Anyone may petition the Service to list, delist, or reclassify a species. The listing of a species may occur as the result of a petition or an employee of either the Fish and Wildlife Service or NMFS may propose a species for listing. Once a petition is received the Service has 90 days to review the petition and determine whether the petition has set forth facts that call for further review. If the Service finds that the petition merits further review, they begin a status review that will result in one of three findings:

(1) warranted and the formal rulemaking is begun by publishing a proposed listing rule.
(2) the listing is not warranted and this finding is also published in the Federal Register.
(3) the listing is warranted but is precluded because of the need to list other species that are of a higher priority.

This chart shows the number of petitions received by the Fish and Wildlife Service by region.

Lead Region	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	Total
1 (West)	25	119	37	7	3	191
2 (S.West)	7	55	9	2	1	74
3 (Midwest)	0	1	1	0	0	2
4 (South)	3	10	4	0	1	18
5 (NEast)	0	4	2	1	1	8
6 (Mountain & Great Plains States)	13 (8 on grizzlies)	10	7	0	2	32
7 (Alaska)	1	3	2	0	2	8
OSA (Foreign)	3	61	1	1	0	66
Total	52 Taxa	263	63	11	10	399

*OSA - Office of Scientific Authority (foreign species)

A "proposed species" is one that has not yet been finally listed, but a proposed rule has been published in the Federal Register in order to receive public comment. A "candidate species" is one that has been found to be warranted or where a petition has presented substantial information that a species may be warranted for listing, but has not yet been the subject of a proposed listing rule. The attached MAP No. shows listed, proposed, and candidate species, by region, under the Fish and Wildlife Service.

	Listed	Proposed	Candidates
Region 1-Far West	543	84	87
Region 2-Southwest	119	7	34
Region 3-Midwest	34	2	1
Region 4-South	300	7	11
Region 5-Northeast	39	2	3
Region 6-Mountain West & Great Plains	45	3	30
Region 7- Alaska	4	0	1

Atlantic Species	Pacific Species	Gulf of Mexico/Southern Atalantic Species
Blue Whale	Blue Whale	
Bowhead Whale	Bowhead Whale	
Fin Whale	Fin Whale	
Humpback Whale	Humpback whale	
Northern Right Whale		
Sei Whale	Sei whale	
Sperm Whale	Sperm Whale	
	Chinook Salmon (Sacramento River Winter)	
	Chinook Salmon (Snake River Fall)	
	Chinook Salmon (Snake River Spring/Summer)	
	Coho Salmon (Central California Coast)	
	Coho Salmon (Southern Oregon/Northern Cal.	
	Cutthroat Trout (Umpqua River)	
	Sockeye Salmon (Snake River)	
		Gulf Sturgeon
Shortnose Sturgeon (Inland)		
		Caribbean Monk Seal
	Guadalupe Fur Seal	
	Hawaiian Monk Seal	
	Stellar Sea Lion	
	Green Sea Turtle	Green Sea Turtle
		Hawksbill Sea Turtle
		Kemp's Ridley Sea Turtle
		Leatherback Sea Turtle
		Loggerhead Sea Turtle
	Olive Ridley Sea Turtle	

The NMFS has only three proposed species -- the Atlantic Salmon, the Steelhead, and Johnson's Sea Grass.

The above shows that the overwhelming number of listed, proposed, or candidate species are found in the West, particularly in Region 1. Most of those species are found in California or Hawaii. Hawaii, because of its small size and isolation has a unique problem with loss of species and biodiversity. California, with the largest number of listed, proposed, or candidate species, in the lower 48, has been impacted the most by the ESA. Some history is necessary in order to explain why this is so.

In May, 1992 suit was filed by The Fund for Animals, Defenders of Wildlife, the Biodiversity Legal Foundation, and others against the Department of Interior to force the agency to substantially speed up the listing process. At that time there was a backlog of some 600 "Category I" candidate species awaiting listing. In December, 1992 a settlement was reached between the parties to the suit to list certain species by certain dates. The settlement listed 443 plant and animal species for which a final listing decision must be reached by September, 1996. Of those over 400 species, 310 were found in Region 1 alone with 162 located in California. This settlement has had an enormous impact on the listing program of the Fish and Wildlife Service. The U.S. District Court for the D.C. Circuit continues to oversee the case and to require additional listings pursuant to the settlement.

CRITICAL HABITAT DESIGNATIONS:

At the time a species is listed, the Fish and Wildlife Service or NMFS, is required to designate critical habitat for the species. The only exception to this rule is where the Secretary finds that it is not prudent to do so. Other federal agencies have greater consultation responsibilities in those areas designated as critical habitat. The failure to designate critical habitat has resulted in numerous lawsuits against the FWS or NMFS. However, critical habitat has not been designated for all species.

The NMFS has designated critical habitat in both the Atlantic and Pacific Oceans. They have designated critical habitat in the Atlantic Ocean for the northern right whale. In the Pacific they have designated critical habitat for theHawiian monk seal, the stellar sea lion, and two species of salmon. Critical habitat for the leatherback sea turtle has been designated around St. Croix in the U.S. Virgin Islands. (50 CRF 226)

Some designations for a species may involve areas in more than one state and many times involve multiple areas within a state. (50 CFR 17.95).

Number of designations of critical habitat by State for Fish and Wildlife Species:

Western States	**Eastern States**	**Southern States**
California - 25	Massachusetts - 1	Virginia -3
Washington -2	New Hampshire -1	West Virginia - 2
Oregon -1	Maryland - 1	North Carolina - 4
Utah -8	Missouri-2	Georgia -2
Nevada -15	Illinois - 1	Florida -7
Idaho-1	Indiana-1	Alabama - 4
Colorado -9	Michigan -1	Mississippi - 1
Arizona -16	Minnesota -1	Arkansas -1
New Mexico- 3		Tennessee - 8
Hawaii -4		Kentucky- 2
Texas - 8		Puerto Rico- 7
Kansas - 1		Virgin Islands -2
Nebraska - 1		
Oklahoma -2		
Total for West -96	Total for East -- 9	Total for South -- 43

ALLOCATION OF FUNDS FOR LISTING:

Fish and Wildlife Service:

The following charts show the Fish and Wildlife Service budgets for their endangered species programs from 1993 through 1997 broken down on a regional basis. Clearly, over half of their ESA budget is spent in Region 1 alone.

In 1993, the **total listing budget** for all of the regions was $5,080,000 of which Region 1 only received $1,933,000 or less than two-fifths. That was the year the Fund for Animals settlement listings began. In 1996, the total listing budget was $4,599,000 with Region 1 receiving $2,637,000 or more than half. In contrast, the listing budget in 1997 for Regions 3 (the Midwest) and 5 (Northeast), is only $152,000 and $158,000 respectively. The Region 1 budget for listings is 15 times that provided for Region 3 and Region 5.

This chart based on information provided by Fish and Wildlife Service shows the number of Full Time Employee Hours (FTE's) in each, with 569 FTE's (out of 770) assigned to enforce the ESA in the three western regions. Fifty five employees are assigned to enforce the ESA in Region 3 & 5 combined.

Program	Region 1 (West)	Region 2 (SW)	Region 3 (MW)	Region 4 (South)	Region 5 (NE)	Region 6 (Mtn)	Region 7 (Ak.)
Candidate Conservation	13	5	0	7	3	4	2
Listing	47	18	4	15	4	9	3
Consultation	98	43	13	51	16	34	5
Recovery	210	33	7	56	8	55	7
Total -All regions - 770	368	99	24	129	31	102	17

National Marine Fisheries Service:

NMFS is spending almost all of its listing and consultation budgets in the West. There are no funds budgeted in the East for listing although the Atlantic Salmon has awaited listing for several years and the listing proposal was withdrawn in late 1997.

HCPs and SECTION 10 PERMITS -- INDICATORS OF ENFORCEMENT:

Prior to 1982, if a threatened or endangered species were found on private property, a landowner's only options were to abandon or limit his use of the property, or risk civil and criminal prosecution under the Act.

In 1982, Congress added Section 10(a) to the ESA. This section authorizes the Service to issue an incidental take permit (ITP) to private property owners allowing them to incidentally "take" listed species as a result of otherwise lawful activity, providing the applicant meets certain requirements. One requirement is the submission of a "conservation plan" that seeks to minimize and mitigate all impacts on the species ("Habitat Conservation Plans" or HCP's). Not only is a direct action against a listed species an unlawful "take" of the species, but the modification of the habitat of the species is also unlawful "take" of the species. If a landowner has land which is occupied or likely to be occupied by a listed species, the law requires them to obtain a Section 10 permit to use their land. Otherwise they are in violation of the ESA.

Specifically, an HCP must identify the impacts that will likely result from the taking, state how the applicant will minimize and mitigate those impacts, give alternatives and the reasons those alternatives will not be used, and list other measures the Service may require as necessary or appropriate. If the Service finds the plan meets these requirements and will not appreciably reduce the likelihood of survival and recovery for the species, and the applicant ensures adequate funding, the Service must issue the permit.

One of the more controversial elements of Section 10(a) is the requirement that the permit applicant "mitigate" the take of the species. Mitigation has generally taken the form of land set-asides, special land acquisition fees, and assessments. Other criticisms of the plans include the enormous costs and delays often associated with the process. Major plans can take years and millions of dollars to finalize, with private landowners bearing most of the costs.

As of September 30, 1997 the Fish and Wildlife Service had issued 225 permits or HCP's. **Only one was in Region 5 and there were none in Region 3.**

Region 1: 59 HCP's covering 3,945,963 acres.
Region 2: 63 HCP's covering over 640,600 acres.*
Region 3: 0 HCP's covering 0 land.
Region 4: 49 HCP's covering 647,816 acres.**
Region 5: 1 CP along the shore of Cape Cod, Massachusetts***
Region 6: 7 HCP's all in Utah of 135,256 acres.
Region 7: 0 HCP's in Alaska.

*(Every HCP for this region is in Texas and most of these were in Travis County, around Austin. Most were single lots and one was the Peregrine Fund falcon reintroduction program.)

**Most of these were in coastal Florida or coastal Alabama plus 50 miles of beach in Volusia County, Florida.

***(Not a true HCP, since no habitat is protected-for the piping plover.)

Some of the HCP's include "safe harbors" agreements. Safe harbor agreements are

designed to encourage the creation and maintenance of habitat by holding a landowner harmless from future ESA liability if his habitat protection measures attract new endangered species to the property. There are 5 Safe Harbors nationally: **Region 1**--2 agreements; **Region 2** -- 2 agreements; and **Region 4**-- 1 agreement (Sandhills). There are **none** in the other regions.

A Candidate Conservation Agreement (CCA) allows a nonfederal or federal person to avoid ESA restrictions, while at the same time providing protection of the species. If an individual includes non-listed species in a CCA, the Service will decline to list a species either because it is managed under the CCA or by issuing a species permit to cover the species if it does become a listed species. Since these agreements allow the Service to forebear or forego its statutory obligation, they have been challenged in court. In at least one case in Texas involving the Barton Springs Salamander, the agreement was struck down by a federal judge and the judge ordered the listing of the species without regard to the conservation agreement. Although they have been advertised as a incentive for private landowners to conserve species, **most of these involve other governmental entities and not private property owners**. As of June 11, 1997 there were 34 final conservation agreements. By regions they were:

Region 1: 13 (Most were with other federal agencies and/or state agencies)
Region 2: 6 (One was struck down, the others were with other federal and state agencies)
Region 3: 1 (Copperbelly Watersnake with Indiana, Illinois, and Kentucky - DNR and with coal council.)
Region 4: 7 (Some are the same agreement - with federal, state, and private power companies.)
Region 5: 1 (With the U.S. Forest Service.)
Region 6: 6 (With other federal and state agencies and tribes.)
Region 7: 1 (An Air Force base.)

The National Marine Fisheries Service also issues HCP's by region. They do not provide the amount of acreage affected. NMFS has issued 8 "Section 10" permits and appears to have completed 5 HCP's. Some of these were multi species HCP's issued by both the Fish and Wildlife Service and NMFS. Most of the permits were for release of fish from hatcheries. While NMFS states that they have no state conservation agreements, they have failed to list the Atlantic Salmon because of the state conservation measures being implemented.

Most of the HCP's in the West require either the permanent preservation of land for habitat or the payment of money into a fund for the acquisition of habitat. There are no comparable HCP's in the East. For example, the HCP for Orange County, California requires the preservation of 38,000 acres of land in a Nature Reserve. One private landowner contributed over 21,000 acres to make the HCP possible and to allow for the landowner to use other portions of its property for development.

An HCP developed by the City of San Diego will set aside in preservation status 172,000 acres of land. This HCP is expected to cost $650 million, which will come from federal, state, and local funding, including future permit fees on development.

Riverside County, California has agreed to a 30 year HCP which sets aside over 41,000 acres of reserves for the Stephens Kangaroo Rat. The total additional cost of the plan is projected at more $45,000,000. Of this amount, more than $41,000,000 comes from local

funding, to be generated from permit fees.

The Balcones Canyonlands Conservation Plan (BCCP) encompasses 561,000 acres (87% of Travis County, Texas), of which 100,000 acres are currently developed. Under the plan, 30,000 to 60,000 acres may be developed in the next thirty years. The total cost of the plan, including debt on bond issues, land purchases and maintenance, is $160 million.

In contrast, the only plan in Region 5 does not require the setting aside of a single acre of land and costs are minimal.

ENDANGERED SPECIES IN REGION 3 AND REGION 5:

There are endangered and threatened species in both Region 3 and Region 5 that likely warrant the protection of a Section 10 permit.

There are a total of 59 listed species and 8 candidate species in Region 3. These are the species listed in Region 3, non of which have an HCP in effect.*

Mammals

Gray wolf- T (E - Wis)
Gray Bat - E
Indiana Bat -E
Ozark big-eared bat-E

Birds

American Peregrine Falcon - E
Bald Eagle- T
Kirtlands' warbler -E
Least Tern- E
Piping Plover-T (E-Wis.)

Fishes

Neosho madtom- T
Niangua darter- T
Ozark cavefish-T
Pallid Sturgeon -E
Scioto madtom- E

Clams

Clubshell-E
Cracking pearlymussel -E
Curtis' pearlymussel - E
Fanshell clam -E
Fat pocketbook Clam -E
Higgins eye pearlymussel -E
Northern riffleshell-E
Orange-foot pimpleback pearly mussel- E
Pink mucket pearlymussel- E
Purple cat's paw pearlymussel- E
Ring pink mussel -E
Rough pigtoe-E
Tubercled-blossom pearlymussel -E
Winged mapleleaf mussel -E
White Cat's paw pearlymussel- E
White wartyback pearlymussel-E

Snails

Iowa Pleistocene snail -E

Insects

American burying beetle-E
Hine's emerald dragonfly -E
Hungerford's crawling water beetle-E
Karner Blue butterfly - E
Mitchell's satyr butterfly -E

Plants

American hart'tongue fern - T
Dwarf lake iris - T
Decurrent false aster -T
Eastern prairie fringed orchid -T
Fassett's locoweed -T
Geocarpon -T
Houghton's goldenrod -T
Lakeside daisy -T
Leafy prairie clover- E
Leedy's roseroot- T
Mead's milkweed - T
Minnesota dwarf trout lily -E
Michigan monkey flower-E
Missouri bladder-pod - E
Northern wild monkshood - T
Pitcher's thistle -T
Pondberry- E
Prairie bush-clover- T
Prices potato-bean - T
Running buffalo clover-E
Small whorled pogonia -T
Western prairie fringed orchid -T
Virginia spiraea - T

In Region 5 there are also listed species*.

Connecticut -- 14 species	New Hampshire 10 species	Vermont --7 species
Delaware------ 13 species	New Jersey -- 15 species	Virginia -48 species
Maine --------- 8 species	New York -- 19 species	West Virginia - 18 species
Maryland ------20 species	Pennsylvania - 10 species	District of Columbia-2
Massachusetts -16 species	Rhode Island-- 12 species	

*Source: U.S. Fish and Wildlife Service, Region 3 and 5 Internet Web Sites

Almost all the northeastern and midwestern states have their own lists of endangered and threatened species. The contrast between the number of state and federally listed species in these states is striking, particularly in comparison to the listings in California which has one of the strictest state ESA's in the nation.

	State listed species	Federally listed species
Connecticut	224	14
Massachusetts	425	16
New York	211	19
Virginia	117	48
New Jersey	393	15
Maryland	433	37
Michigan	327	20
Minnesota	197	11
Iowa	237	13
California	292	214 (65 proposed) (26 candidates)

In California many of the species are duplicate listings by both the state and federal government.

One reason some have offered to explain the small number of listed species in the northeast and upper midwest is that since these areas have been heavily developed and habitats have been drastically altered for almost 400 years, many of their native species are now probably extinct. However a review of the lists of species which have gone extinct in North America since the year 1500 reveals that only a small number of species are believed to be extinct in these areas as compared to other areas of the continent. Out of a list of 334 species of both plants and animals, only 16 vertibrates and 10 plants which are found in the northeast or upper midwest are believed to be extinct. Of the vertibrates, 7 were in Region 3 (Midwest) and 9 were in Region 5 (Northeast). Of the total 16 vertebrates, 7 were fish species, 4 were birds, and 5 were mammals (including one whale). Therefore, it does not appear, based on the lists of extinctions, that the intense development of the northeast over a period of 400 years has resulted in substantial numbers of extinctions.

The conservation plan for the piping plover is the only final plan of it's kind in either

Region 5 or Region 3 and it does not require the protection of plover habitat. The piping plover conservation plan is a two year agreement between the Fish and Wildlife Service and the State of Massachusetts. The plan calls for restrictions on vehicular traffic on beaches during the plover nesting season. It also calls for "symbolic" fences around nest sites. "Symbolic" fencing consists of signs and string alerting beach goers to the presence of the plover nest sites. This is in sharp contrast to the many thousands of acres of land being placed in permanent preservation and being fenced in many areas of California.

STATE SPENDING FOR FEDERALLY LISTED SPECIES:

The International Association of Fish and Wildlife Agents assembles statistics on state funding of protection efforts for federally listed species on an annual basis. The information is given to the U.S. Fish and Wildlife Service to be included in the Annual Report to Congress of Costs associated with the Endangered Species Act. The last year that this information was gathered was for 1995.

Total **state** funds spent by states in 1995 in each Region are as follows:

Region 1 ---$3,145,000
Region 2 --- 1,250,000
Region 3 --- 835,000
Region 4 --- 1,695,000
Region 5 --- 730,000
Region 6 --- 2,345,000

The top spenders were:

Washington	-$1,500,000
Wyoming	- 1,300,000
Arizona	1, 000,000
Florida	800,000
California	600,000
Montana	575,000
Oregon	480,000
Hawaii	360,000
South Carolina	300,000
Virginia	250,000

LAWSUITS FOCUS ESA ENFORCMENT EFFORT:

It is clear that lawsuits filed by environmental organizations greatly influence how the ESA is implemented. Many listings are the result of a lawsuit and court order requiring the listing of species after the Fish and Wildlife Service or NMFS have determined that a listing is not warranted or is precluded for some legal reason. In addition, the designation of critical habitat is frequently the result of a court order. Court orders have been responsible for injunctions closing down various activities around the country for failure to consult under Section 7 of the ESA.

Ordinarily the federal government brings suit or presses charges against citizens who violate the ESA. However, the ESA also authorizes citizens to sue to enforce the provisions of the ESA. "Any citizen" may sue the government and other private citizens whom they believe to be in violation of any provision of the ESA (except that prior to March, 1997 some courts have limited this to environmentalists as per "Bennett v. Spear"). Citizens must give 60 days notice before a suit may be filed. The judge may award the citizen bringing the suit all costs of litigation, including reasonable attorney and expert witness fees when the judge determines the award to be appropriate.

In March, 1997, the United States Supreme Court reversed a decision of the 9th Circuit Court of Appeal in the case of Bennett v. Spear, 117 S.Ct. 1154 (March 19, 1997) which will greatly affect future litigation under the ESA. The Supreme Court held that persons who were asserting an economic injury as a result of action under the ESA, had standing to challenge the action in court. In Bennett, the 9th Circuit Court of Appeal had previously denied the right of economically damaged ranchers to use the citizen suit provision to enforce certain requirements of ESA, because they asserted an economic injury as their motive for bringing suit. The 9th Circuit limited the right to use the citizen suit provision only to those with the "correct" motive -- protecting endangered species.

Prior to the Supreme Court's ruling in Bennett, the Administration consistently opposed standing in court for persons economically injured by the ESA thus stopping judicial review of many of their decisions. This standing barrier has also been used to preclude judicial review under other environmental laws as well, including the National Environmental Policy Act, the National Forest Management Act and others.

Therefore, most lawsuits under the ESA have been brought by environmental organizations and their members. Many of these groups focus their efforts on litigation as their priority activity.

The Department of Justice has provided a list of pending lawsuits filed under the ESA between 1990 and 1996 as well as a list of cases in which attorneys fees have been paid which, along with a number of other important cases totaled 262 cases.

By FWS region affected, the break down of those cases is as followed:

Region 1 (West):	103 lawsuits
Region 2 (Southwest):	44 lawsuits
Region 3 (Midwest):	4 lawsuits
Region 4 (South):	20 lawsuits
Region 5 (N.East):	8 lawsuits
Region 6 (Mtn & Plains):	29 lawsuits
Region 7 (Alaska):	4 lawsuits

In addition, some 25 other cases are pending in the District of Columbia Federal Court. These are primarily cases challenging a decision made under the ESA, but limiting the case to the Administrative Record developed by the agency. Most of these cases impact species found in the west.

Some groups seek out certain friendly jurisdictions to file suit in order to set judicial precedent. The 9th Circuit Court of Appeal has become well known as a jurisdiction in which the environmental community will find a receptive court willing to issue injunctions and award

substantial attorney fees. The jurisdiction of the 9th Circuit includes the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii. Of the above 262 cases, 141 were filed in courts under the jurisdiction of the 9th Circuit.

The Justice Department and the Department of Interior have failed to seek judicial review of many of these decisions in the Supreme Court, leaving the ESA case law an inconsistent, unfair, and discriminatory mess.

Environmentalists in the West are far more active and likely to file an ESA lawsuit than environmentalists in the East generally. An article in the ***Albuquerque Journal*** on August 24, 1997 reported that "Environmental activists in the Southwest, more so than in other regions of the country, are suing to protect endangered species". The article cited the many cases filed by a group known as the Southwest Center for Biological Diversity based in Tucson, Arizona. One active member of the group who frequently allows himself to be named plaintiff for the group is Dr. Robin Silver. SCBD and Dr. Silver have received over $420,000 in attorneys fees and court costs from the U.S. treasury thus far and have numerous other suits pending in which they will receive additional funds from the taxpayer.

Federal court judges awarded attorneys fees ranging from a low of $1,000 to $3,550,000 in some 101 cases filed under the ESA in the last ten years according to information submitted to the Committee on Resources by the Justice Department. In ESA related cases the taxpayers have paid $9,915,937 to private attorneys.

Of the 100 cases in which environmental plaintiffs received attorneys fees from the U.S. taxpayers, 60 were in the 9th Circuit although there are 11 Appellate Circuit jurisdictions. Another 14 were in the D.C. Circuit, and the remainder were generally in the west and south.

The award of substantial attorneys fees to plaintiffs who sue in jurisdictions where they are likely to win, encourages constant, expensive and time consuming litigation in those areas. Many times this litigation makes it much more difficult to actually protect the endangered species at issue by taking time and money from ESA programs and transferring the money to lawyers for litigants.

JEOPARDY FINDINGS UNDER SECTION 7:

Section 7 of the ESA provides that when any Federal agency takes an action, authorizes an action, or funds an action which might affect a listed species, the agency is required to consult with Fish and Wildlife Service (or NMFS in cases involving marine species such as salmon or sea turtles) to ensure that the action will not likely jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of that species. This consultation requirement applies to all actions to conserve listed species or their habitat; to the promulgation of regulations by federal agencies; to the granting of licenses, contracts, leases, easements, rights-or-way, permits, or grants-in-aid; or to actions directly or indirectly causing modifications to the land, water, or air. This includes permits under Section 404 of the Clean Water Act. More recently, the Fish and Wildlife Service is also taking the position that permits issued by a state under the National Pollution Discharge Elimination System (NPDES) are also "federal actions" for the purpose of Section 7 due to the delegation of federal authority to the state.

A federal agency may not proceed with an activity that "may affect" a listed species until they have consulted with the appropriate Service. If an agency proceeds with its activities, it may

be subject to a lawsuit and a federal court injunction halting its actions. Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Circuit, 1994)

If the Fish and Wildlife Service (or NMFS) determines that jeopardy to the species will occur should the federal action proceed, they are required to issue a biological opinion stating whether there are other reasonable and prudent alternatives that may be used that would allow the activity to proceed. If the federal action agency proceeds without obtaining a statement from the Fish and Wildlife Service (or NMFS), they may find themselves in violation of the ESA, subject to injunction from a federal court and the subject of continuing litigation. Therefore, for all practical purposes the Fish and Wildlife Service (or NMFS), through its use of jeopardy findings and the biological opinion, is allowed to exercise a veto over all other federal actions affecting endangered or threatened species. The practical result for both public and private sector permit applicants has been lengthy delays in obtaining federal approvals and permits, increased costs, and in some cases the inability to use private property subject to a federal permitting system.

The NMFS apparently does few Section 7 consultations, however, some of these have had significant impacts -- Salmon, for example. Since 1990 the Northwest Region and the Southwest Region together account for 145 consultations that resulted in findings of no jeopardy, with 14 findings of jeopardy. The East had 141 consultations that resulted in no jeopardy and 9 that resulted in jeopardy.

The Fish and Wildlife Service provided a summary of all consultations by region for FY 1990 through 1996. Over the period 1990 to 1996 the total jeopardy findings for each Region are as follows:

Section 7 Jeopardy Findings by FWS, 1990-96

Region 1:	72 jeopardies
Region 2:	8 jeopardies
Region 3:	8 jeopardies
Region 4:	67 jeopardies
Region 5:	3 jeopardies
Region 6:	269 jeopardies
Region 7:	0 jeopardies

Most of the formal consultations over that time period occurred in Regions 1, 4, and 6.

Formal Consultations by FWS, 1990-96.

Region 1:	2,809
Region 2:	288
Region 3:	46
Region 4:	805
Region 5:	81
Region 6:	716
Region 7:	23

Year	1990	1991	1992	1993	1994	1995	1996	1997
Region 1	5	6	9	8	11	10	23	9
Region 2	0	0	0	1	0	0	1	5
Region 3	1	0	2	0	1	2	0	2
Region 4	1	1	1	1	1	2	2	2
Region 5	1	0	4	2	5	4	5	6
Region 6	1	1	1	1	1	1	1	0
Region 7	0	0	0	0	0	0	0	0

Attachments:

1. Map illustrating Full Time Employee Hours by Region- FWS.
2. Map showing numbers of candidates, proposed, and listed species and critical habitat designations by region- FWS.
3. Map showing listings by the NMFS.
4. Pie Chart showing FWS funding for 1997.
5. Pie Chart showing FWS listing funding by Region.
6. Pie Chart showing NMFS listing funding by Region.
7. Pie Chart showing FWS petition findings by Region.
8. Map showing FWS HCP's by Region.
9. Map showing FWS Consultations and Jeopardy Findings by Region.
10. Map showing Appellate Cases by Region.
11. Map showing percentage of federally managed lands.
12. Chart comparing certain state and federal listing numbers.
13. List of pending ESA cases by state.
14. List of plaintiffs to whom attorneys fees were awarded in ESA cases.

Attachment No. 13

1990-1997: Pending Cases by State

Alabama:

Alabama Tombigbee Rivers Coalition v. U.S.: 93-2322 (S.D. Alabama) Alabama Stugeon
Alabama Wilderness Alliance v. Carter, 96-1604 (M.D. Alabama)
Alabama Wilderness Alliance v. Carter: 96-101 (M.D. Alabama)
Alabama Sturgeon v. Babbitt: 95-1045 (M.D.Alabama) Alabama Sturgeon.

Alaska:

Alaska Wildlife Alliance v. Marvin Jensen, et al.: 90-345 (Alaska)
Tony Knowles v. NMFS: 95-121 (Alaska) Alaska Harvest 94 BIOP

Arizona:

Defenders of Wildlife, et al. v. Rogers: 96-2045 (Arizona) Flat-Tailed Horn Lizard
Dr. Robin Silver v. Thomas (FWS) 94-1610 (Arizona) 924 F. Supp. 976, failure to consult with FWS about impact of land management plans and timber harvests on Mexican Spotted Owl. - Attorney fees -$231,393.75.
Dr. Robin Silver, et al. V. Babbitt: 94-0337 (Arizona) 924 F. Supp. 976- failure to consult on management plans, and critical habitat for Mexican Spotted Owl-Attorney fees -$4,000, $102,418.86.
Forest Guardians, et al. V. Jack Ward Thomas: 96-2258 (Arizona) Spotted Owl, Mexican & Goshawk- Court found that privity existed between Forest Guardians, Dr. Robin Silver, and the Southwest Center for Biological Diversity as to constitute Res Judicata with regard to other suits.
R. Charles Bryfogle v. Jack Ward Thomas, Chief, U.S. Forest Service: 95-615 (D.Arizona) Mt. Graham-Bryfogle
Southwest Center for Biological Diversity v. Babbitt: 94-1969 (Arizona) Southwestern Willow Flycatcher-Attorney fees -$15,509.11
Southwest Center for Biological Diversity, et al. v. Babbitt: 94-2036 (Arizona) Northern Goshawk population west of 100th meridian & dispute over term "distinct population segment"-Attorney fees -$40,000.00
Southwest Center for Biological Diversity v. USFS: 95-879 (D. Arizona) 932 F. Supp. 1189 - Mexican Spotted Owl/Salvage.
Southwest Center for Biological Diversity v. Perry: 94-814 (Arizona) Virgin Spikedace
Southwest Center for Biological Diversity v. BLM: 96-11 (D., Arizona) Safford District Grazing.
Southwest Center for Biological Diversity v. John G. Rogers, Jr.: 96-018 (D., Arizona) 950 F.

Supp. 278, Critical habitat for spikedace and loach minnow.
Southwest Center For Biological Diversity vs. U.S.Bur. Rec.: 97-786 (Arizona) Southwestern Willow Flycatcher Spikedace/Loach Minnow.
State of Arizona, ex rel. M. Jean Hassell V. Babbitt, 95-2893 (D. Arizona) Mexican Spotted Owl.

Arkansas:

Gary Wood v. Arkansas Game and Fish Commission, et al. 92-602 (W.D. Arkansas)
Newton County Wildlife Association v. Rogers: 95-673 (E.D. Arkansas) Bald Eagles

California:

Barcellos and Wolfsen, Inc. Et al. V. Westlands Water District: 79-106 (E.D. California)
California Trout, v. Babbitt: 95-3961 (N.D. California) Santa Ana Speckled Dace.-Attorney fees -$40,000.00
California Native Plant Society v. Lujan: 91-0038 (E.D. California) Plant listings--Attorney fees$16,678.25
Cargill, Inc. V. COE, et al.: 92-20756 (N.D. California)
Environmental Defense Center v. Babbitt: 94-5561 (C.D. California) Western Snowy Plover
Environmental Defense Center v. Babbitt: 96-96-6987 (California, Cen) Channel Island Plants
Firebaugh Canal Company and Central California Irrigation District v. U.S. and DOI: 92-5554 (E.D. California) Westlands Water District
Golden Gate Audubon Society, et al. V. Carol Browner: 93-646 (E.D. California) Winter Run Chinook
Iron Mountain Mine v. Bureau of Reclamation: 91-768 (E.D. California) Salmon
John Teresi v. USA: 95-2301 (E.D. California) Fairy Shrimp--Attorney fees-$72,500.00
Lockheed Martin Corporation v. DOI: 97-0051 (California, Cen) Steven's Kangaroo Rat
Marbled Murrelet v. Babbitt & Pacific Lumber Co.: 93-1400 (N.D. California) 880 F. Supp. 1343; 83 F. 3d 1060; 117 S. Ct. 942; 163 FRD 308: citizen suit against PALCO to enjoin jogging on private property to conserve marbled murrelet habitat. Allowed attorneys fees over $1,110,340 after issuance of injunction.
Marbled Murrelet, et al. V. Babbitt, 95-3261 (N.D. California) Marbled Murrelet/Spotted Owl. Suit to enjoin PALCO from harvesting 200,000 acres of private land.
National Audubon Society v. Babbitt: 94-0105 (S.D. California) Snowy Plover--Attorney fees-$7,540.61
National Parks and Conservation Assoc. V. Kennedy: 96-7412 (California, cen) Snowy Plover
National Audubon Society v. Babbitt: 94-0091 (S.D. California) Least Bell's Vireo
Natural Resources Defense Council, Inc. Et al. V. U. S. Dept. Of Interior: 95-5909 (C.D. California) California Gnatcatcher
Oregon Natural Resources Council v. Schmitten; 95-3117 (N.D. California) Steelhead Trout--Attorney fees-$120,952.54
Oregon Natural Resources Council, et al. V. Brown: 95-1844 (N.D. California) Coho Silver Salmon
Pacific Federation of Fishermen's Association v. Marcus: 95-4474 (N.D. California) Coho

Salmon/Steelhead Trout.

Sierra Club v. Babbitt: 95-299 (E.D. California) Listing of Peninsular Big Horn Sheep. Judge held that Congressional restrictions on budget and lack of resources excused failure to list.

Southwest Center for Biological Diversity v. Babbitt: 95-3688 (S.D., California) Coastal Cactus Wren.

U. S. v. Pacific Lumber Company: No. _____ (N.D. California) Marbled Murrelet

U.S. v. Pacific Shores Property Owners Association: No. ___ (N.D. California)

Westlands Water District v. U.S.: 93-5327 (E.D. California) Bay Delta

Colorado:

Biodiversity Legal Foundation v. Babbitt: 96-2951 (Colorado) Lesser Prairie Chicken

Biodiversity Legal Foundation v. Babbitt; 95-2575 (D.,Colorado.) Columbian Sharp-Tailed Grouse

Four Corners Action Coalition, et. Al. V. Underwood: 92-341 (Colorado) Animas-Laplata dam

Friends of Animals v. Babbitt: 95- 1350 (D. Colorado) Gray Wolves

District of Columbia:

Biodiversity Legal Foundation v. Babbitt: No. 96-00227 (D.C.- affects Alaska) Suit to list the Alexander Archipelago Wolf in the Tongass Forest in Alaska.

Biodiversity Legal Foundation v. Babbitt: No. 96-312 (D.C.-affects Colorado) -Preble Meadow Jumping Mouse.

Biodiversity Legal Foundation, et al. V. Babbitt: 93-1788 (D.C.-Montana) Suit to reclassify Cabinet/Yaak Grizzly Bear--combined with 93-1174.

D.C. "Jasper" Carlton, et al. V. Babbitt: 93-1174 (D.C.-Wyoming/Montana) Suit to force the listing of the Grizzly Bear as endangered rather than threatened.

Biodiversity Legal Foundation v. Babbitt: 95-816 (D.C.) North American Wolverine--Attorney fees-$500.00

Building Industry Asso. of California v. Babbitt: 95-0726 (D.C.-California) Fairy Shrimp

Defenders of Wildlife, et al. V. Babbitt: No. 96-160 (D.C.) At 958 F.Supp. 670- Canadian Lynx- Court reversed the FWS decision not to list Canadian Lynx- FWS acted arbitrarily and capriciously, requires protection of population segment.

Defenders of Wildlife v. Lujan: 91-1993 (D.C.) Gray Wolf

Defenders of Wildlife, et al. V. Babbitt: 97-777 (D.C.) Piping plover- critical habitat around Great Lakes.

Endangered Species Committee of the Building Industry Association of Southern Cal. Et al. V. Babbitt: 92-2610 (D.C.) California Gnatcatcher.

Fund for Animals and Jasper Carlton v. Lujan: 92-800 (D.C.) 90 Day Reg. Moratorium and ESA listings --Attorney fees-$67,500.00, $24,500.00.

National Association of Home Builders v. Babbitt: 95-1973 (D.C.-California) Delhi Sands Flower Loving Fly-Commerce Clause challenge to ESA.

National Audubon Society v. Babbitt: 94-1106 (D.C.) Grizzly bears.

National Association of Home Builders v. Babbitt, 95-01374 (D.C.) -Coffin Cave Mold Beetle.

National Association of Home Builders v. Babbitt: 95-1552 (D.C.-Texas) Golden Cheeked

Warbler.
Native Forest Council, et al. v. USFS: 95-526 (D.C.) Owls.
Nebraska v. Wyoming, et al. Civ. No. 5 (D.C.) North Platte River.
Northwest Forest Resource Council, et. al. V. Dombeck, et al. 94-1031 (D.C.) Northern Spotted Owl.
Mount Graham Coalition v. U.S. F.S. 94-437 (D.C.) Red Squirrel.
Safari Club Internation v. Lujan: 91-2523 (D.C.) African elephants.
Scott Timber Company v. Bruce Babbitt: 94-02177 (D.C.) Marbled Murrelet.
Spirit of the Sage Council, et al. V. Babbitt: 96-2503 (D.C.) Pacific Pocket Mouse and challenge to "no surprises" policy for HCP. Settled in part.
The Fund for Animals v. Babbitt: 94-1021 (D.C.) Challenge to adequacy of Grizzly Bear recovery plan and designation of critical habitat.
The Fund for Animals v. Thomas, USFS: 95-1177 (D.C.) Baiting of game by hunters on federal forest lands, asserted NEPA and ESA.
The Fund For Animals, et al. V. Babbitt: 97-1126 (D.C.) Wolves/Grizzly Bears.

Florida:
Carl Hagenkotter, III v. Dept. Commerce: 94-10039 (S.D. Florida) TEDS
Florida Key Deer, et al. V. Robert H. Morris: 90-10037 (S.D. Florida) FEMA Flood Insurance--Attorney fees-$130,000.00
The Fund for Animals, Inc., et al. V. Col. Terry R. Rice, COE: 94-1913 (M.D.Florida) Florida Panthers.
Lloyd A. Good, Jr. v. U.S.A.: 94-442 (S.D. Florida) Lower Keys Marsh Rabbit.

Georgia:
Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Engineers: 95-1394 (N.D. Georgia) Challenge to county road construction project, wetlands, and court ruled ESA was complied with in issuing a wetlands permit.

Hawaii:
Conservation Council for Hawaii V. Babbitt: 97-98 (Hawaii) Critical habitat for Hawaiian plant taxa.

Idaho:
Eugene G. Hussey v. U.S.: 95- 0360 (D. Idaho) Gray Wolves.
Idaho Sportmen's Coalition, Inc. V. U.S.F.S: 93-0350 (Idaho) Cove-Mallard Timber Sale.
Idaho Conservation League v. Thomas: 95-0425 (D. Idaho) Challenge to salvage sale.
Idaho Farm Federation, et al. V. Babbitt, et al.:93-0168 (Idaho) Bruneau Hot Spring Snail.
Idaho Sporting Congress, Inc. V. USFS: 95-419 (D. Idaho)
Idaho Farm Bureau Federation v. Babbitt: 93-0267 (Idaho) 900 F. Supp. 1349. Suit challenging the listing of Five Snake River Mollusks.
Idaho Conservation League, et al. V. James Caswell, et. Al.: 93-0280 (Idaho) Grizzly Bears.

Pacific Rivers Council, et al. V. Thomas & numerous private defendants: 94-0159 (Idaho) Grazing on national forest land that was critical habitat for chinook salmon.

Illinois:

People of the State of Illinois v. U.S Dept. Of Housing and Urban Development: 95-944 (S.D. Illinois) False Aster.

William Cronin, Mark Donham v. Babbitt: 95-4213 (S.D. Illinois) Indiana Bat.

Kentucky:

Kentucky Heartwood, et al. V. Glickman, 95-225 (E.D. Kentucky) Indiana Bat Salvage sale.

Louisiana:

Honey Island Swamp Tours, Inc. Et al. V. Witherspoon: 95-0319 (E.D. Louisiana) Gulf Sturgeon.

Orleans Audubon Society v. Babbitt: 94-3510 (E.D. Louisiana) Critical habitat for the Gulf Sturgeon.

Maine:

Atlantic Salmon Federation v. Maine Board of Environmental Protection: 93-591 (Maine) Atlantic Salmon.

Massachusetts:

Restore: The North Woods v. Babbitt: 97-10759 (Massachusetts) Harlequin duck.

Richard Max Strahan v. Kramek (U.S. Coast Guard): 96-11898 (Massachusetts) Northern Right Whale.

Richard Max Strahan v. Rear Adm. John L. Linnon & Adm. William J. Kime: 94-11128 (Massachusetts) whales.

Michigan:

Ozark Chapter/Sierra Club v. Thomas: 96-12 (E.D. Michigan)

Minnesota:

Jeffrey Mausolf, et. al. V. Babbitt: 95-1201 (8th Cir., Minnesota)Wolf/Eagle--Attorney fees-$28,821.50

Montana:

Cathy & Peter Balasky, et al. V. Richard Hopkins, 95-75 (D.Montana) Grizzly Bears.

Friends of the Wild Swan, et al. V. Babbitt: 96-172 (Montana) Swan Valley Grizzly Bear.

Friends of the Wild Swan et.al. V. USFW: 95-45 (D. Montana)Bull Trout.

Inland Empire Public Lands Council, et al. V. Glickman, 95-133 (D.Montana) Cabinet Yaak Grizzly Bears/salvage sale challenge.

Montana Ecosystems Defense Council v. David P. Garber, et al.: 91-78 (Montana) Grizzly

Bears.
Resources Limited, Inc.et al. V. F. Dale Robertson, et al.: 89-41 (Montana) Flathead Forest/Grizzlies- Attorney fees -$90,000.00; $47,000.00
Swan View Coalition, Inc. V. U.S. F.S.: 93-7 (Montana) Flatheard Forest/Grizzlies-Attorney fees -$23,700.00
Swan View Coalition, Inc. V. U.S.F.S.: 96-96-165 (Montana) Grizzly Bears.
Swan View Coalition v. Turner: 89-121 (Montana) Flathead II Grizzlies
The Ecology Center, Inc. & Alliance for the Wild Rockies v. Gorman: 94-54 (Montana) Impacts of grazing on Grizzly bears

Nebraska:
J. Michael Jess v. Steven G. West: 88-308 (Nebraska) Deer Creek

New Hampshire:
Restore: The North Woods v. Babbitt: 95-37 (New Hampshire) Atlantic Salmon-Attorney fees - $5,400.00

New Mexico:
Board of County Commissioners v. U.S. F.W.S.:93-730 (New Mexico) Spikedace/Loachminnow
Coalition of and New Mexico Counties v. USFWS: 95-12185 (New Mexico) Mexican Spotted Owl.
Coalition of /New Mexico Counties for Stable Economic Growth: 94-1058 (New Mexico) Suit to delist Mexican Spotted Owl.
Forest Guardians, et al. V. Babbitt: 97-0453 (New Mexico) Rio Grande Silvery Minnow
Zuni Mountain Coalition, et al. V. Espy: 94-0671 (New Mexico) Mexican Spotted Owl-Forest.
Mike McMullen v. U.S.: 91-0194 (New Mexico) Calvin/Bengal Tiger.
Speerex, Lts.: Stephen W. Speer, et al. V. U.S. 97-351 (New Mexico) Hunter Wash Coyote/willow flat.

New York:
Earth Island Institute v. Christopher: 94-06-00321 (S.D. Court of Trade, New York) Embargo against importation of shrimp harvested with commercial fishing technology that could adversely affect sea turtles- Attorney fees- $340,467 awarded, but not yet paid.

North Carolina:
Charles G. Gibbs, Sr. v. Babbitt: 97-41 (North Carolina, East) Challenge to reintroduction of the Red Wolf.

Oregon:
Brad Bennett v. Marvin Plenert, et al.: 93-6076 (Oregon) Klamath sucker fish & standing issue.
Aluminum Co. Of America v. NMFS: 94-698 (Oregon) Salmon/FACA.
American Rivers, et.al. V. National Marine Fisheries Service, 96-384 (D.Oregon) FCRPS 1995

Bio Opinion.

American Rivers, et al. V. NMFS: 94-940 (Oregon) FCRPS-94 HYDRO Bio.

Citizens Utility Board v. BPA: 95-70074 (Oregon) BPA Contract Negotiations.

CLR Timber Holdings, Inc. V. Babbitt: 94-6403 (Oregon) Marbled Murrelet- Attorney fees- $40,000.00.

D.R. Johnson Lumber Co. V. Elaine Zielinski, Dir., BLM: 94-6371 (Oregon) Northern Spotted Owl.

Douglas County v. Lujan, et al. 91-6423 (Oregon) Spotted Owl.

Friends of the Wild Swan, Inc.; Alliance for the Wild Rockies, et al. V. U.S. FWS: (Oregon)Challenge to "warranted but precluded finding" for Bull Trout.

Idaho Department of Fish and Game v. N.M.F.S.: 93-1603 (Oregon) 1993 Hydro Transfer-Salmon-Attorney fees -Attorney fees-$8,405.06.

Kenneth D. Peterson, Jr. etal. V. The State of Washington, et al.:94-00167 (Oregon) Gillnet Closure-1994.

Roger Nicholson, et al. V. USA, 95-3019 (D. Oregon) Sucker Contract.

Northwest Forest Resources Council v. Glickman, 95-6244 (D.Oregon)-Attorney fees- $298,144.36

Northwest Environmental Defense Center; Save Our Ecosystems and West Eugene Wetlands Friends v. West: 95-1965 (D. Oregon) Lomatium Bradshawii.

Northwest Forest Resource Council, et al. V. Department of the Interior: 92-5554 (Oregon) Pacfish.

Northwest Resources Information Center v. NMFS: 93-469 (Oregon) Fish Transport.

Oregon Council of the Federation of Fly Fisher V. Brown: 95-1969 (D. Oregon) Cutthroat Trout.-Attorney fees-$24,706.49.

Oregon Natural Resources Council v. Bureau of Reclamation: 91-6284 (Oregon) Shortnose Sucker.

Oregon Natural Resources Council v. U.S. Dept. Of Agriculture: 94-705 (Oregon) Grasshopper program.

Pacific Rivers Council v. Thomas: 92-1322 (Oregon)Salmon-Umatilla National Forest-Attorney fees-$165,000.00.

Sierra Club, et al. V. Lujan: 92-248 (Oregon) Spotted Owl.

Walter J. Hickel, et al. V. NMFS: 94-460 (Oregon) Alaska Hydro.

Wendell Wood, et al. V. Lujan, et. Al.: 91-6496 (Oregon) Shortnose Sucker-Attorney fees- $550.00, $14,547.05.

Texas:

Center for Marine Conservation,.et al. V. Brown: 94-660 (S.D. Texas) Suit to enforce TEDS.

Riverside and Landowners Protection Coalition, Inc. V. Babbitt: 94-2179 (N.D. Texas) Golden Cheeked Warbler.

Save Our Springs Alliance, Inc. et al. V. Babbitt: 96-168 (Texas, W.D.) Barton Springs Salamander.

Save Our Springs Legal Defense Fund, Inc. V. Babbitt, 95-230 (W.D. Texas) Barton Springs Salamander.

Sierra Club v. Lujan: 91-069 (W.D. Texas) Edwards Aquifer-Attorney fees- $3,550,000.00.

Sierra Club, et al. V. Richard Lyng: 85-69 (E.D. Texas) Southern Pine Beetle/RCW-Attorney

fees-$149,647.50.
Sierra Club, et.al v. Glickman, et al.:95- 091 (W.D. Texas) Edwards Acquifer.
Sierra Club v. Babbitt: 96-19 (W.D., Texas) NBS-San Marcos Hatchery.
State of Texas v. Babbitt: 94-271 (W.D. Texas) Golden Cheeked Warbler.
Texas General Land Office v. USFWS (Coastal Oilspill Simulation System): 94-476 (S.D. Texas) COSS.
Texas Shrimp Association v. Daley: 97-97-343 (Texas, SD) Sea Turtles.
Texas Shrimp Association v. Brown: 95-265 (S.D. Texas) Sea Turtles--- Also called Center for Marine Conservation v. Brown & Texas Shrimp Assoc.
Williamson County Commissioners Court v. Babbitt: 94-219 (W.D. Texas) Golden Cheeked Warbler.

Utah:
Darrell G. Hafen: v. Babbitt: 94-236 (Utah) Desert Tortoise.
U.S. v. Drake, No. ____ (D. Utah) Prairie Dog Take.
Southern Utah Wilderness Alliance v. Pietrzak, 94-1050 (Utah) Virgin Spindace.
Southern Utah Wilderness Alliance v. Smith: 94-983 (Utah) Welsh's Mildweed.

Virginia:
The New River Valley Greens, et als. V. U.S. Dept. Of Transportation: 95-1203 (W.D. Virginia.)

Washington:
Dioxin/Organochlorine Center and Columbia River United v. Dana A. Rasmussen, Re. Adm. EPA: 93-0033 (W.D. Washington).
Friends of Animals, Inc.et al. V. Babbitt: 97-5334 (Washington, W.D.) Columbian White Tailed Deer.
Idaho Rivers United v. NMFS: 94-1576 (W.D. Washington) Challenge to approval of Beartrack gold Mine.
Jim Ramsey, et al. V. Brown: 94-761 (W.D. Washington) Harvest, 1994.
Marbled Murrelet, et al. V. Luian: 91-522 (W.D. Washington)- Listing & designation of critical habitat for the marbled murrelet-- Attorney fees-$61,109.47.
Northwest Forest Resources Council, et al. V. Babbitt: 94-622 (W.D. Washington) Marbled Murrelet.
Pacific Crest Biodiversity Project v. Dan Glickman: 95-5174 (W.D. Washington).
Pacific Coast Federation of Fishermen v. NMFS 97-775 (Washington, West) Umpqua Cutthroat Trout.
Pilchuk Audubon Society, et al. V. Glickman, 95-1234 (W.D. Washington) Marbled Murrelet.
U.S. v. Crown Pacific, No. ____ (W.D. Washington) Winter Run Chinook Salmon.
U.S. v. Anderson and Middleton Lumber Co.: 93-5697 (W.D. Washington)-Spotted Owl.

Wyoming:
Wyoming Farm Bureau Federation, et al. V. Babbitt: 94-286 (Wyoming) Gray Wolves.

Other:

Idaho Rivers United et al. V. Bonneville Power Administration: (Original Appeal) BPA Contract Waivers.

Idaho Rivers United, et al. V. Bonneville Power Administration: 95-70340 (9th Cir.) BPA Contract Waivers.

State of Idaho v. Interstate Commerce Commission: 93-1015 (Original appeal)

Timber Products Co. V. U.S.: 95-56 (Orig. In Court of Claims) Spotted Owl.

Southwest Center for Biological Diversity v. Bruce Babbitt: 95-02138 (D.Col. - Alaska), 939 F. Supp. 49; Queen Charlotte Goshawk-living on Tongass Forest in Alaska.

Friends of the Wild Swan, Inc. Et al.v. USFS, et al.: 94-1455 -JO (Oregon) Suit alleging violations of NFMA, APA for failure to implement forest management plans to protect bull trout.

Southwest Center for Biological Diversity v. FERC and Fred Trevey, Coconino National Forest Supervisor, & Phelps Dodge Corp. (Intervenor and Defendant) 96-0843 (Arizona)- Suit requiring Sec. 7 consultation. Allege ESA violation by failing to consult on the ongoing effects of the Blue Ridge Hydro Project on the Little Colorado River Spinedace.

Mount Graham Coalition, et al. V. Thomas, et al.: 96-16017 (Arizona) 89 F. 3d. 554, Suit to challenge appropriations act rider that allowed the Mt. Graham telescope to be built. Had been opposed based on presence of red squirrel.

Biodiversity Legal Foundation, et al. V. Babbitt: 95-5033, 96-5054, 96-5055 (D. Col., Ct. Of App.)

Hawksbill Seaturtle v. FEMA: 96-114, (Virgin Islands) Injunction to stop construction of temporary emergency housing facility destroyed in hurricane, turtles.

Hawksbill Seaturtle v. FEMA: 96-650 (D. Col., --Virgin Islands) Suit to enjoin construction of temporary housing under ESA.

Virgin Islands Tree Boa v. Witt: 1996- 08 (Virgin Islands) Suit to enjoin temporary housing.

Baker v. U.S.D.A.: 94-0160 (Idaho) 928 F. Supp. 1513 , decided 1/26/96 - ESA application to evaluation of mining plan.

Maricopa Audubon Society, Dr. Robin Silver v. U.S.F.S.: 94-1244 (New Mexico) FOIA request for management territory maps used to protect Goshawks.

Loggerhead Turtle, et al. V. County Council of Volusia County, Florida: 95-587 (Florida) Sued for violation of ESA by county that lights and vehicular access to beach were taking turtles.

Van Scoy v. Shell Oil Co.: 94-3327: (N.D., California) Plaintiff sued Shell that selenium discharge was section 9 take under ESA.

Mountain States Legal Foundation v. Glickman: 92-0097 (D. Col.) Groups sued to prevent implementation of timber harvest alternative.

American Rivers v. NMFS: 94-940 (Oregon) Suit that alleged that operation of Columbia River Power system jeopardized the continued existence of listed salmon.

American Bald Eagle v. Ilyas Bhatti: 92-2387 (1st. Cir., Mass.) Injunction sought against deer hunting on state reservation based on risk to eagles.

Maine Audubon Society v. Purslow: 90-1057 (1st Cir., Maine) 907 F. 2d. 265: Suit against private persons under ESA.

Conservation Law Foundation of New England, Inc. V. Secretary of the Interior: 85-1860, (1st Cir., Mass) Suit to injoin oil and gas exploration on OCS in New England.

Romero-Barceló v. Brown: 79-1626 (1st Cir., Puerto Rico) Suit to enjoin the Navy from using land in Puerto Rico for certain training exercises.
Greater Gila Biodiversity Project v. U.S.F.S.: 94-1288 (Arizona)

Attachment No. 14:

Attorney Fees Award by Organization

Name	Court #	District	Amount
Alaska Wilderness Recreation and Tourism Assoc. v. Gary A. Morrison, et al. (Tongass Nat'l Forest)	94-033	Alaska	853.20
Bay Institute of San Francisco v. Lujan - Delta Smelt	92-2132	California East	60,000.00
Bay Institute of San Francisco, et al. v. Babbitt- Delta Smelt	94-0265	California East	5,000.00
Biodiversity Legal Foundation v. Babbitt (Category 2 Species)	96-641	District of Columbia	10,000.00
Biodiversity Legal Foundation v. Babbitt	95-601	Colorado	1,000.00
Biodiversity Legal Foundation v. Babbitt	95-382	Colorado	8,000.00
Biodiversity Legal Foundation v. Babbitt	95-1815	Colorado	3,500.00
Biodiversity Legal Foundation v. Babbitt (Pending see above)-N.Am. Wolverine	95-816	Colorado	500.00
Biodiversity Legal Foundation, et al. v. Babbitt- Flatwoods Salamander	94-0920	District of Columbia	5,000.00
Biodiversity Legal Foundation v. Babbitt- "	94-0920	District of Columbia	3,815.00
Biodiversity Legal Foundation, et al. v. Babbitt- Western Boreal Toad	94-1086	Colorado	1,408.19
Biodiversity Legal Foundation v. Babbitt- Selkirk Mountain Woodland Caribou	94-02441	District of Columbia	4,000.00
Biodiversity Legal Foundation v. Babbitt	95-2509	Colorado	3,435.61

Name	Court #	District	Amount
California Trout, et al v. Babbitt (Santa Ana Speckled Dace)(Pending see above)	95-3961	California North	40,000.00
California Native Plant Society v. Manuel Lujan, Jr. (Pending see above)- Plant listings	91-0038	California East	16,678.25
Canadian Lynx, Greater Ecosystem Alliance v. Lujan-Listing of Can. Lynx	92-1269	Washington West	2,000.00
Canadian Lynx, Greater Ecosystem Alliance v. Lujan-Listing of Can. Lynx	92-1269	Washington West	9,500.00
Citizens Cmte to Save Our Canyons, et al v. USFS, Bernie Weingardt, Dale Boswort (John Paul Area)	95-68	Utah	145.50
Clemmys Karmorata v. USFWS- Western Pond Turtle, Red Legged	93-6135	Oregon	2,522.30
CLR Timber Holdings, Inc. et al v. Bruce Babbitt, et al (Marbled Murrelett)	94-6403	Oregon	40,000.00
Colorado Wildlife Federation v. Turner- Razorback Sucker	92-884	Colorado	5,000.00
Colorado Wildlife Federation v. Turner- Razorback Sucker	92-884	Colorado	31,351.90

Name	Court #	District	Amount
California Trout, et al v. Babbitt (Santa Ana Speckled Dace)(Pending see above)	95-3961	California North	40,000.00
California Native Plant Society v. Manuel Lujan, Jr. (Pending see above)- Plant listings	91-0038	California East	16,678.25
Canadian Lynx, Greater Ecosystem Alliance v. Lujan-Listing of Can. Lynx	92-1269	Washington West	2,000.00
Canadian Lynx, Greater Ecosystem Alliance v. Lujan-Listing of Can. Lynx	92-1269	Washington West	9,500.00
Citizens Cmte to Save Our Canyons, et al v. USFS, Bernie Weingardt, Dale Boswort (John Paul Area)	95-68	Utah	145.50
Clemmys Karmorata v. USFWS- Western Pond Turtle, Red Legged	93-6135	Oregon	2,522.30
CLR Timber Holdings, Inc. et al v. Bruce Babbitt, et al (Marbled Murrelett)	94-6403	Oregon	40,000.00
Colorado Wildlife Federation v. Turner- Razorback Sucker	92-884	Colorado	5,000.00
Colorado Wildlife Federation v. Turner- Razorback Sucker	92-884	Colorado	31,351.90

Name	Court #	District	Amount
Colorado Environmental Coalition v. J. Turner- Razorback Sucker	91-1765	Colorado	5,168.40
Conservation Council for Hawaii, et al v. Manuel Lujan and John F. Turner	89-00953	Hawaii	44,635.25
Defenders of Wildlife v. Thomas- Strychnine	Strychnine	Minnesota	122,500.00
Desert Tortoise, et al. v. Lujan- Ward Valley- Tortoise	93-0114	California North	69,000.00
Dioxin/Organi-chlorine Center and Columbia River United v. Dana Rasmussen	91-1442	Washington West	61,500.00
Earth Island Institute, et al v. Manuel Lujan- 5 Year Review	91-6015	Oregon	32,338.70
Edward Wilkinson Mudd Jr. v. William Reilly Admin., EPA-- CWA/ESA consultation	91-1392	Alabama North	39,000.00
Energy and Resource Advocates, et al vs. Kenneth R. Quitoriano, et al and James D. Watkins (Energy Dept.)-- (Purex Waste)	90-2479	California North	10,000.00
Environmental Defense Center v. Babbitt- -Red Leggedfrog/salamander	94-0743	California Central	4,074.75

Name	Court #	District	Amount
Environmental Defense Center v. Babbitt-- Fairy Shrimp	94-0788	California Central	3,815.00
Environmental Defense Center v. Bruce Babbitt --Western Pond Turtle	93-1847	California Central	4,700.00
Environmental Defense Center v. Babbitt --Red Legged Frog	95-2867	California Central	44,511.53
Environmental Defense Center v. Lujan-- Tidewater Goby	92-6082	California Central	7,500.00
Environmental Defense Center Babbitt-- California Tiger Salamander	93-3379	California Central	4,300.00
Environmental Defense Center v. Bruce Babbitt-- Southwestern Willow Flycatcher	93-1848	California Central	4,700.00
Environmental Defense Fund v. Lujan-- Desert Tortoise	89-2034	District of Columbia	2,237.50
Florida Key Deer, et al v. Robert H. Morris-- Fema/Flood Insurance	90-10037	Florida South	130,000.00
Friends of the Wild Swan, Inc., Alliance for the Wild Rockies, Inc., et al. v. Babbitt--- Bull Trout Listing	94-0246	District of Columbia	4,500.00
Friends of Walker Creek Wetlands v. Dept. Of the Interior-- Nelson's Checker Mallow	92-1626	Oregon	12,000.00
Fund for Animals v. Manuel Lujan, et al. (Pending see above) ESA Listings	92-800	District of Columbia	67,500.00
Fund for Animals v. Manuel Lujan (Pending see above)(ESA Listings)	92-800	District of Columbia	24,500.00

Name	Court #	District	Amount
Fund for Animals, Swan View Coalition, D.C. "Jasper" Carlton (Director, of Biodiversity Legal Foundation) v. Turner-- Grizzly Bears	91-2201	District of Columbia	36,000.00
Greater Gila Biodiversity Project v. USFWS--Pygmy Owls	94-0288	Arizona	2,048.91
Greater Gila Biodiversity Project v. USFWS-- Loach Minnow	93-1913	Arizona	11,000.00
Greater Yellowstone Coalition, et al. v. F. Dale Robertson (USFWS)-- Grizzly bears	93-1495	District of Columbia	32,750.00
Greenpeace v. Baldridge	86-0129	Hawaii	88,794.01
Hawaiian Crow v. Manuel Lujan-- Hawaiin crow	91-00191	Hawaii	195,000.00
Hughes River Watershed Conservancy, et al v. Dan Glickman, et al	1-94-113	West Virginia North	63,367.71
Idaho Department of Fish and Game v. NMFS--hydro transfer/salmon	93-1603	Oregon	8,405.06
Idaho Conservation League v. Manuel Lujan, et al.---Bruneau Hot Springs Snail	92-0260	Idaho	21,166.00
Idaho Conservation League v. Babbitt-- White Sturgeon	94-0351	Idaho	5,000.00

Name	Court #	District	Amount
Idaho Conservation League, et al. v. Lujan-- Idaho Springsnail	92-0406	Idaho	8,000.00
Jeffrey Mausolf, William Kullberg, Arlys Strehlo; Minnesota United Snowmobilers Association v. Babbitt (Wolf/Eagle)(Pending see above)	95-1201	Minnesota	28,821.50
La Compania Ocho Inc., et al v USFS, et al (Carson Nat'l Forest)	94-317	New Mexico	303,635.67
Marbled Murrelet et al v. Manuel Lujan (Pending see above)--Listing and critical habitat for marbled murelet	91-522	Washington West	61,109.47
Mountain Lion Foundation v. Babbitt-- Santa Ana Mountain Lion	94-1165	California East	6,500.00
National Audubon Society et al. v. Babbitt et al.-- Guam species	93-1152	District of Columbia	22,500.00
National Audubon Society v. Lujan--Least Bell's vireo	92-209	California South	7,348.75
National Audubon Society v. Babbitt, et al.-- Snowy Plover	94-0105	California South	7,540.61
National Wildlife Foundation, et al. v. Endangered Species Committee, et al.	79-1851	District of Columbia	20,000.00
National Wildlife Federation, et al v. Robert Mosbacher (Commerce)	89-2089	District of Columbia	42,500.00
Native Plant Society of Oregon v. U.S. DOI-- Oregon Plants	93-180	Oregon	13,046.19

Name	Court #	District	Amount
Natural Resources Defense Council, et al. v. Bruce Babbitt-- Desert Tortoise	93-0301	California North	262,096.76
Natural Resources Defense Council v. Donald Hodel (Kesterson)	85-1214	California East	57,000.00
Natural Resources Defense Council v. Donald Hodel (Kesterson)	85-1214	California East	518,000.00
Northern Spotted Owl, et al v. Donald Hodel, et al.-- Spotted Owl Listing	88-573	Washington West	56,718.00
Northwest Forest Resource Council v. Dan Glickman (Emergency Salvage Timber Sale)(Pending see above)	95-6244	Oregon	298,144.36
Northwest Coalition for Alternatives to Pesticides v. Babbitt	94-6339	Oregon	10,500.00
Oregon Council of the Federation of Fly Fishers v. Brown (Cutthroat Trout)(Pending see above)	95-1969	Oregon	24,706.49
Oregon Trout Inc., et al v. USFS (Trout Creek Salvage Sale)	96-1460	Oregon	21,400.00
Oregon Natural Resources Council v. Babbitt-- Western lily	94-666	Oregon	4,000.00
Oregon Natural Resources Council v. Department of Commerce	93-293	Oregon	16,200.00

Name	Court #	District	Amount
Oregon Natural Resources Council v. Schmitten (Steelhead Trout)(Pending see above)	95-3117	California North	120,952.54
Pacific Rivers Council v. Thomas (Pending see above)- Salmon/Umatilla Forest	92-1322	Oregon	165,000.00
Resources Limited Inc., et al v. F. Dale Robertson, et al (Pending see above)--Flathead Forest/ Grizzlies	89-41	Montana	90,000.00 47,000.00
Restore: The North Woods v. Babbitt (Pending see above)--Atlantic salmon	95-37	New Hampshire	5 400.00
Save Our Springs Legal Defense Fund, Inc v. Babbitt (Barton Springs Salamander)(Pending see above)	95-230	Texas West	72,500.00
Save our Ecosystems, et al v. Federal Hwy Admin. (West Eugene Parkway)	96-6161	Oregon	2,560.80
Sierra Club and League for Coastal Protection v. John Marsh, et al.	86-1942	California South	44,774.16
Sierra Club Legal Defense Fund v. Manual Lujan	89-1140	District of Columbia	9,000.00
Sierra Club v. Lujan (Pending see above)--Edwards Aquifer** same case but Justice split the fee in four portions.	91-069	Texas West	666,666.67
Sierra Club v. Lujan (Pending see above)--Edwards Aquifer	91-069	Texas West	666,666.67

Name	Court #	District	Amount
Sierra Club v. Lujan (Pending see above)--Edwards Aquifer	91-069	Texas West	666,666.66
Sierra Club v. Lujan (Pending see above)--Edwards Aquifer	91-069	Texas West	1,550,000.00
Sierra Club, et al., v. Bruce Babbitt, et al.--10 species of plants and animals	93-1717	California South	11,368.76
Sierra Club, et al v. James A. Baker, et al--Turtles??	89-3005	District of Columbia	18,583.72
Sierra Club, et al v. Richard Lyng (Pending see above)-- Southern Pine Beetle and Red Cockaded Woodpecker.	85-69	Texas East	149,647.50
Sierra Club, et al., v. David Garber, et al.	93-069	Montana	55,000.00
Silver Rice Rat, et al v. Manuel Lujan--Silver Rice Rat Listing	89-3409	District of Columbia	19,500.00
Southern Utah Wilderness Alliance v. Bruce Babbitt-Virgin River Chub	93-2376	Colorado	8,500.00
Southern Utah Wilderness Alliance v. Morgenweck--Virgin Spinedace	94-717	Colorado	4,200.00
Southwest Center for Biological Diversity v. Babbitt (SW Willow Flycatcher)(Pending see above)	94-1969	Arizona	15,509.11
Southwest Center for Biological Diversity, et al. v. USFWS--Loach Minnow/spinedace	94-0739	Arizona	1,000.00
Southwest Center for Biological Diversity v. Babbitt (Pending see above)	94-2036	Arizona	40,000.00
Southwest Center for Biological Diversity v. Babbitt	94-1946	Arizona	1,971.01
Southwest Center for Biological Diversity, et al. v. USFWS--Jaguar listing	94-0696	Arizona	1,665.00

Name	Court #	District	Amount
Southwest Center for Biological Diversity v. Babbitt--Arizona Willow	94-1034	Arizona	5,145.00
Southwest Center for Biological Diversity v. Babbitt (Laguna Mtn Skipper)	96-1170	California South	17,000.00
Dr. Robin Silver et al. v. Babbitt (Pending see above)	94-0337	Arizona	4,000.00
Dr. Robin Silver v. Thomas (USFWS) (Mexican Spotted Owl)(Pending see above)	94-1610	Arizona	231,393.75
Dr. Robin Silver, et al. v. Babbitt (Pending see above)-Mexican spotted owl	94-0337	Arizona	102,418.86
Steven Krichbaum (w/ Virginias for Wilderness) & Michael Jones v. USFS, William Damon (GW Nat'l Forest)	96-0108	Virginia West	345.00
Swan View Coalition Inc v. USFS (Flathead Forest/Grizzlies)(Pending see above)	93-7	Montana	23,700.00
Wendell Wood, et al v. Manuel Lujan et al (Pending see above) -Short nose sucker	91-6496	Oregon	550.00
Wendell Wood, et al v. Manuel Lujan, et al (Pending see above)--same	91-6496	Oregon	14,547.05
Western Snowy Plover v. Lujan--Western Snowy Plover	91-1421	Washington West	7,710.92
World Wildlife Fund v. Donald P. Hodel et al.--Panda	88-573		56,000.00

Name	Affiliation
Steven Krichbaum	Virginians for Wilderness
Dr. Robin Silver	Southwest Center for Biological Diversity
Edward Wilkinson Mudd Jr.	
Jeffrey Mausolf	Minnesota United Snowmobiles Association
Michael Jones	
Wendell Wood	

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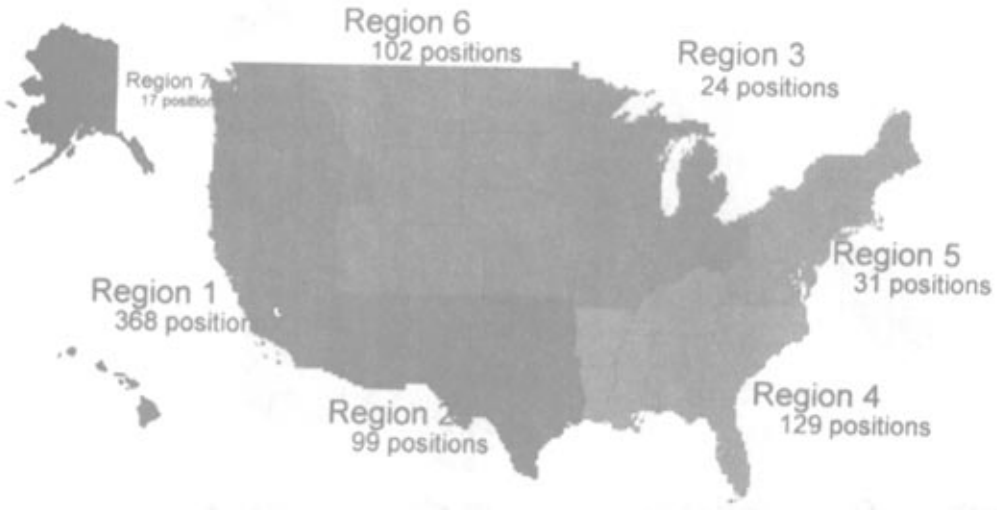
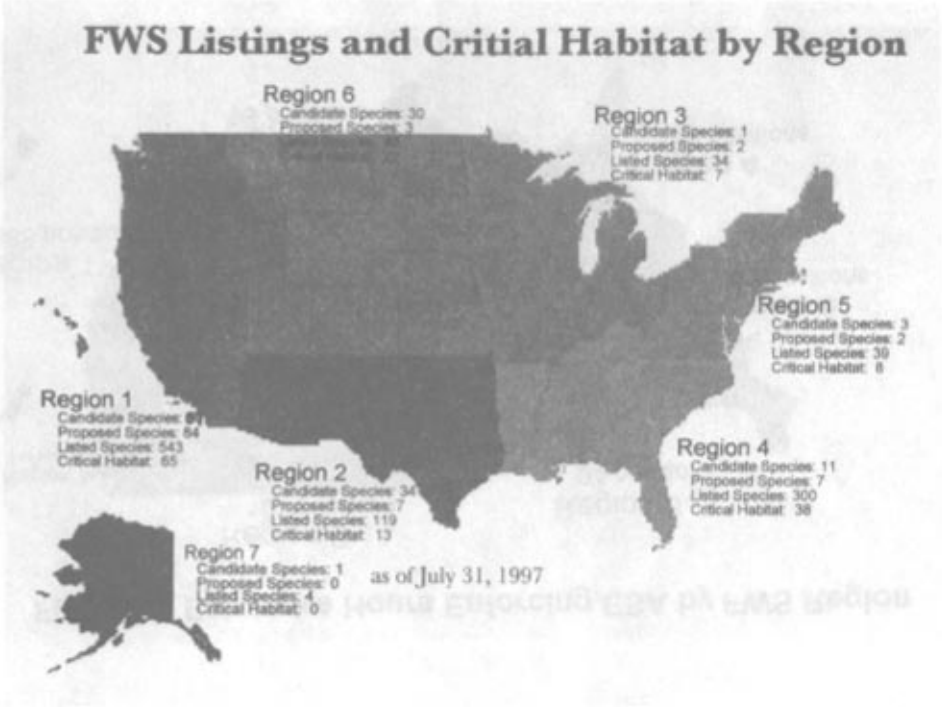
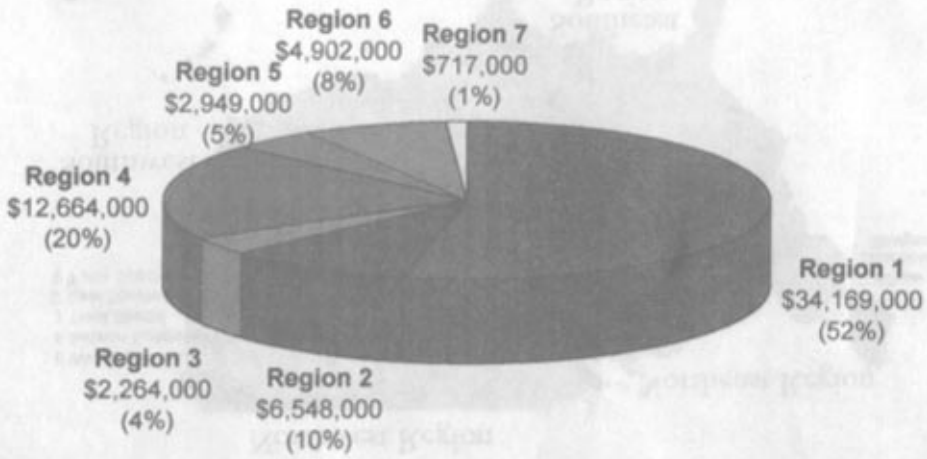
Full Time Employee Hours Enforcing ESA by FWS Region

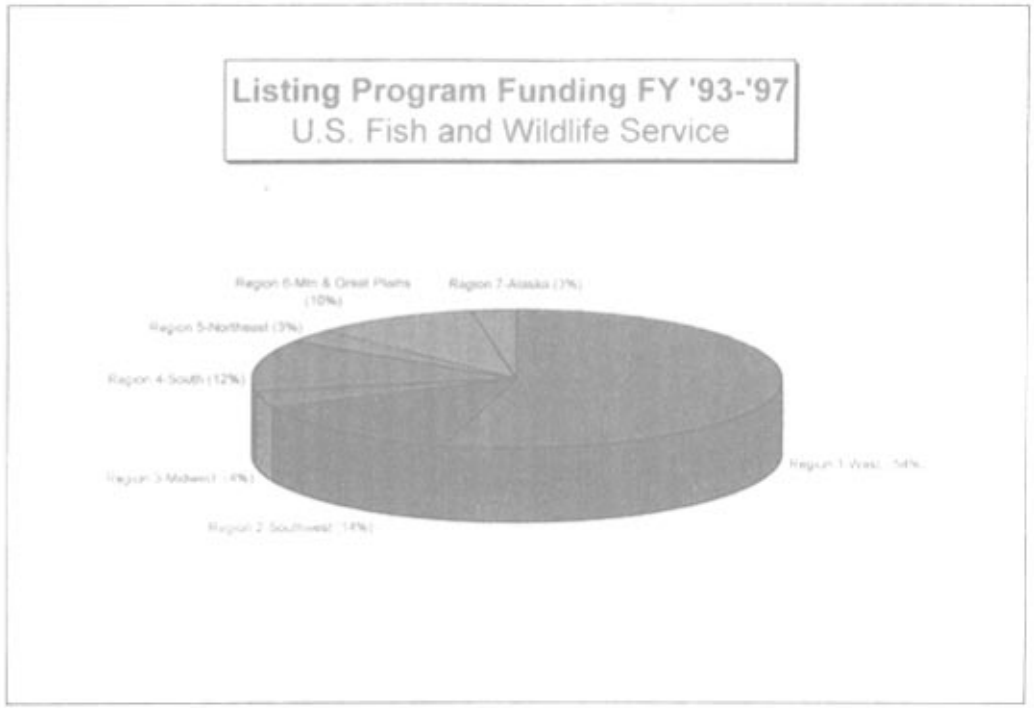



FWS Listings and Critial Habitat by Region
Region 6
Candidate Species: 30
Proposed Species: 3
Region 3
Candidate Species: 1
Proposed Species: 2
Listed Species: 34
Critical Habitat: 7
Region 5
Candidate Species: 3
Proposed Species: 2
Listed Species: 39
Critical Habitat: 8
Region 1
Candidate Species: 61
Proposed Species: 64
Listed Species: 543
Critical Habitat: 65
Region 4
Candidate Species: 11
Proposed Species: 7
Listed Species: 300
Critical Habitat: 38
Region 2
Candidate Species: 34
Proposed Species: 7
Listed Species: 119
Critical Habitat: 13
Region 7
Candidate Species: 1
Proposed Species: 0
Listed Species: 4
Critical Habitat: 0
as of July 31, 1997

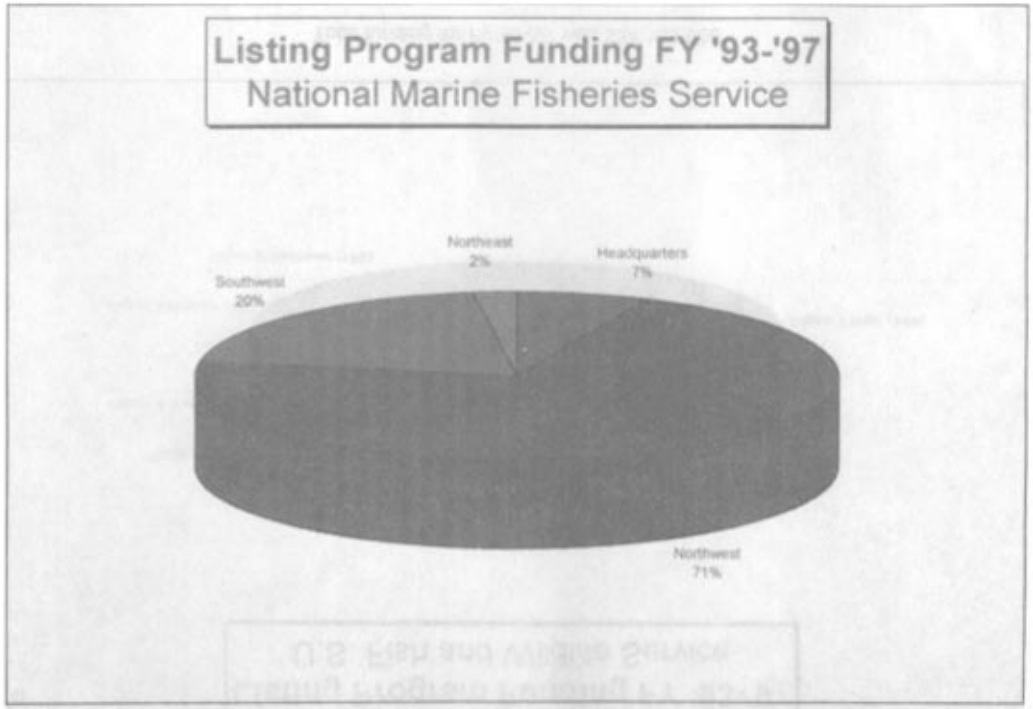
National Marine Fisheries Service (NMFS) Regions

FWS Funding by Region for 1997

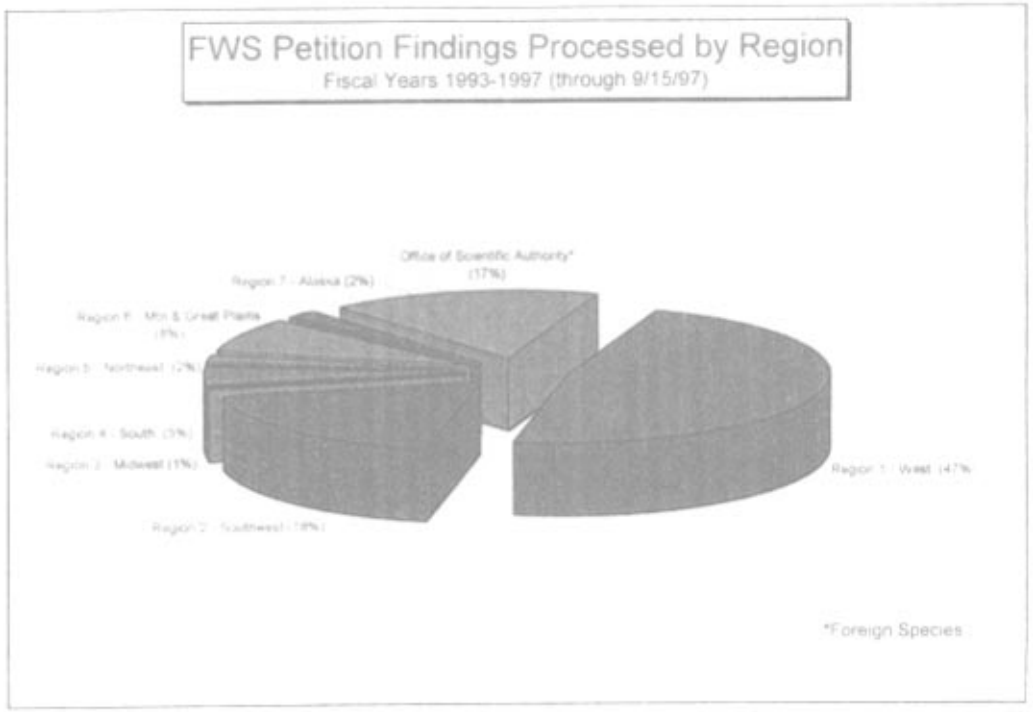


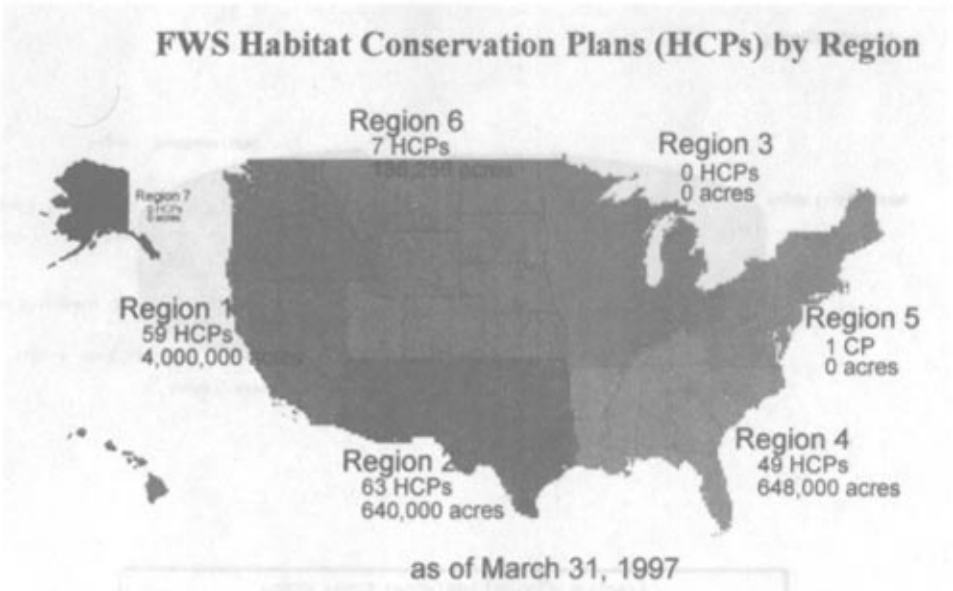


Total funding for Fy '93-'97 was $24,353,000

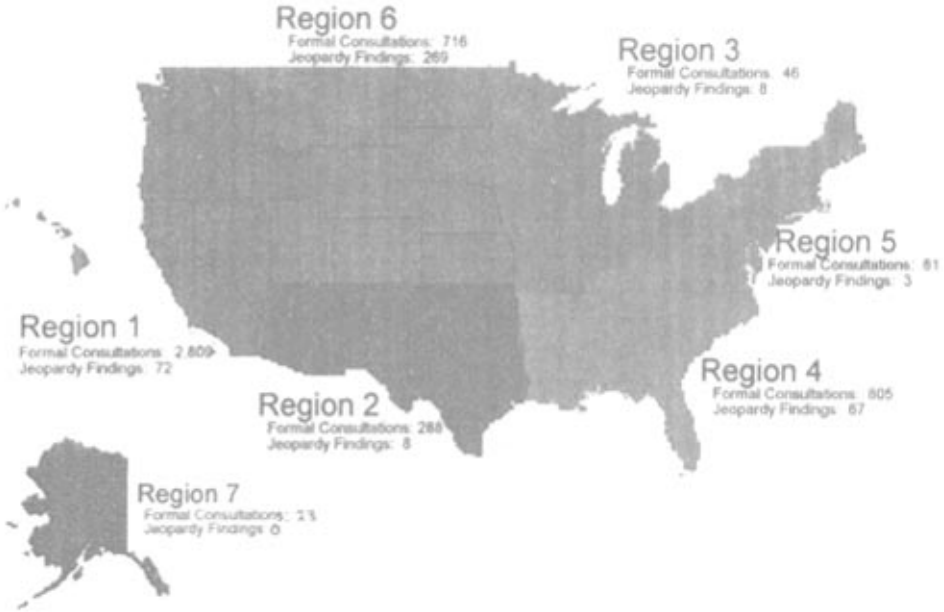


Total Funding for the Listing Program was $9,010,000
Alaska and the Southeast Region did not receive funding from the Listing Program


FWS Petition Findings Processed by Region
Fiscal Years 1993-1997 (through 9/15/97)
Office of Scientific Authority*
(17%)
Region 7 - Alaska (2%)
Region 6 - Mtn & Great Plains
(8%)
Region 5 - Northeast (2%)
Region 4 - South (3%)
Region 3 - Midwest (1%)
Region 2 - Southwest (18%)
Region 1 - West (47%)
*Foreign Species

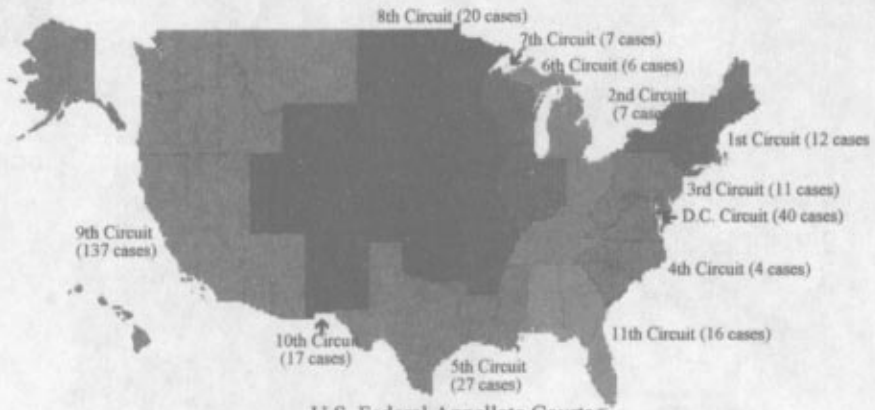

FWS Habitat Conservation Plans (HCPs) by Region
Region 6
7 HCPs
Region 3
0 HCPs
0 acres
Region 7
Region 1
59 HCPs
4,000,000
Region 5
1 CP
0 acres
Region 4
49 HCPs
648,000 acres
Region 2
63 HCPs
640,000 acres
as of March 31, 1997

FWS Formal Consultations and Section 7 Jeopardy Findings: 1990-1996



Number of Appeals of Cases per Circuit*

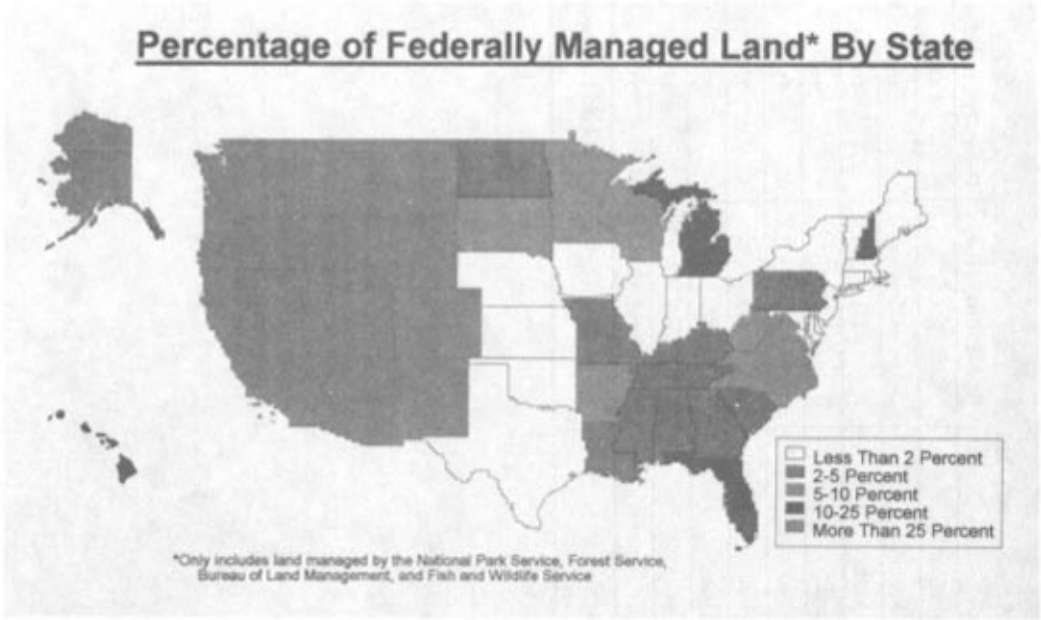
As found on WESTLAW



U.S. Federal Appellate Courts

*This map shows only those cases in which an appeal was filed and a decision rendered in cases involving endangered species. Does not show all cases filed.

	State Listed Species	Federally Listed Species
Connecticut	224	14
Massachusetts	425	16
New York	211	19
Virginia	117	48
New Jersey	393	15
Maryland	433	37
Michigan	327	20
Minnesota	197	11
Iowa	237	13
California	292	214 (65 Proposed) (26 Candidate)


Percentage of Federally Managed Land* By State
Less Than 2 Percent
2-5 Percent
5-10 Percent
10-25 Percent
More Than 25 Percent
*Only includes land managed by the National Park Service, Forest Service, Bureau of Land Management, and Fish and Wildlife Service

TESTIMONY OF JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE, COMMITTEE ON RESOURCES, ON IMPLEMENTATION AND ENFORCEMENT OF THE ENDANGERED SPECIES ACT.

March 5, 1998

Mr. Chairman, I appreciate this opportunity to discuss the Endangered Species Act. I am accompanied by LaVerne Smith, Chief of our Division of Endangered Species; Mike Spear, the Regional Director of our Region 1; Renne Lohoefener, Assistant Regional Director for Ecological Services, Region 2; John Blankenship, Assistant Regional Director for Ecological Services, Region 3; Dave Flemming, Chief of the Regional Endangered Species Office, Region 4; and Paul Nickerson, Endangered Species Coordinator, Region 5. It is my hope that I can provide the Committee with direct responses to any questions that members may have, but if I cannot, I will turn to one or more of these experts.

Today, the U.S. Fish and Wildlife Service (Service) is working more closely than ever before with the National Marine Fisheries Service to improve the efficiency and effectiveness of the Endangered Species Act (ESA). We have instituted bold reforms that have, in many respects, revolutionized species conservation in the United States and made implementation of the ESA more effective and efficient in conserving species while also providing greater flexibility and certainty to businesses and private landowners. We have streamlined the consultation and permitting components of the Federal Endangered Species Program. We have strengthened our historical commitment to basing species conservation decisions on sound science. We have increased Federal agency, State, Tribal, and private sector involvement in species conservation. We are proud that our efforts have produced better species conservation and recovery, while promoting cooperation rather than confrontation.

Key reforms have included:

- Using Candidate Conservation Agreements to remove threats and prevent species from becoming endangered or threatened;
- Providing certainty to landowners through Habitat Conservation Plans (HCPs) and the use of new tools like "No Surprises" assurances and "Safe Harbor" agreements;
- Instituting improved peer review processes and ensuring that sound science underlies all listing and recovery actions;
- Increasing the state role in species conservation and recovery;
- Issuing a landmark Secretarial Order harmonizing ESA implementation with Tribal trust responsibilities;
- Streamlining processes for Habitat Conservation Plans and Section 7 consultation;
- Improving monitoring programs under sections 7 and 10, and increasing the use of adaptive management to ensure the successful implementation of Habitat Conservation Plans; and
- Beginning efforts to more promptly recover, downlist and delist species.

I am submitting for the Record a number of Appendices to my statement. Appendix 1 contains a copy of "Making the ESA Work Better," a publication outlining the many reforms enumerated above.

The Administration recognizes that increased funding support is essential to continue our successful record of reform. Therefore, I am pleased to highlight a budget increase for the Endangered Species Program in the President's FY 1999 proposal that will provide the Service the capability to provide greater technical assistance to private landowners and to greatly expedite recovery of species and their eventual delisting.

Our goal is to implement the ESA in a consistent manner between the Service and the National Marine Fisheries Service, as well as among all the various Regional and Field Offices of the two agencies. Obviously, this is no easy task. The Service has 7 Regional Offices and 78 Ecological Service Field Offices, as well as numerous Refuges, Hatcheries, and Fisheries offices, that contribute to implementation of the ESA. To promote consistency, the Service has co-issued with the National Marine Fisheries Service (NMFS) numerous handbooks and directives, and provided extensive employee training. This is an ongoing collaborative process that is refined as we receive input and questions from the field, where implementation is occurring.

I would now like to address the five issues identified in your letter of invitation to this hearing.

Issue 1: *The criteria and process for issuance of section 10 incidental take permits.*

Section 10(a) of the ESA sets the criteria and process for issuance of incidental take permits. These statutory requirements are interpreted and detailed in the Services' implementing regulations, administrative guidelines in the Services' Habitat Conservation Planning Handbook, and the Services' final "No Surprises" rule. A copy of that Handbook is Appendix 2 to my statement. Section 10(a)(2)(A) of the ESA requires an applicant to develop a conservation plan before an incidental take permit can be issued. Conservation plans under the ESA have come to be known as "habitat conservation plans" or "HCPs" for short.

STATUTORY REQUIREMENTS

In the 1982 amendments to the ESA, Congress established a mechanism allowing a permit for the "incidental take" of endangered and threatened species by non-Federal entities (i.e., take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity"). The permit allows a landowner to legally proceed with an activity that would otherwise result in illegal take. Prior to 1982, take could only be permitted for scientific purposes or to promote species conservation through activities like captive breeding. The section 10 (a)(1)(B) "incidental take permit" process was designed to address non-Federal land or water use or development activities that do not involve a Federal action subject to section 7 consultation. The

ESA does not prohibit taking of listed plant species on non-Federal land, unless it is prohibited under State law. Nevertheless, issuance of an incidental take permit is a Federal action subject to consultation under section 7 and consultation must address any effects of an HCP on listed plant species. A permit may not be approved if it would result in jeopardy to a listed plant or animal species.

DETERMINATION OF TAKE

The first steps in the process leading to an HCP and an incidental take permit are the determination that take is likely to occur during a proposed non-Federal activity, and a decision by the landowner or project sponsor to apply for a permit, which must be approved by the Service. Service biologists work with landowners, assessing the situation, advising them how their activities may impact the species, and providing guidance about the HCP application process. While Service personnel provide detailed guidance and technical assistance throughout the process, the development of an HCP is driven by the applicant. The applicant, with the Service's technical assistance, first considers whether take during proposed project activities can be avoided through relocation of project facilities, timing restrictions, or similar measures, depending on the nature and extent of the proposed activity and the biology of the species involved. If take cannot be avoided, the Service then recommends that an incidental take permit be obtained.

Once the decision to obtain a permit has been made, the section 10 process consists of three phases: (1) Habitat Conservation Plan development; (2) permit processing; and (3) monitoring and reporting.

HABITAT CONSERVATION PLAN DEVELOPMENT PHASE

The HCP development phase is the period during which the applicant's project or activity is integrated with species protection needs. This phase is typically conducted by the applicant with technical assistance from Service Field Office biologists and ends when a "complete application package" is forwarded to the appropriate permit issuing office. A complete application package consists of a permit application form, a fee for processing, a completed HCP, a draft National Environmental Policy Act (NEPA) document, and in some cases, an Implementing Agreement: An agreement between the applicants, the Service and any other entity involved that establishes a common understanding of the actions that will be undertaken to minimize and mitigate the effects on listed and unlisted species and their habitats in the proposed project area.

An HCP specifies:

(1) the impacts likely to result from the take;
(2) the measures the permit applicant will undertake to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
(3) the alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
(4) other measures that may be necessary or appropriate to consider for a specific plan.

PERMIT PROCESSING PHASE

The permit application processing phase involves review of the application package by the appropriate Regional Office, announcement in the Federal Register of the receipt of the permit application, availability of the NEPA analysis for public review and comment, intra-Service consultation under section 7 of the ESA, and determination of whether the HCP meets the requirements of the Endangered Species Act.

Authority to approve HCPs and issue incidental take permits is delegated to the Services' Regional Directors and those decisions are based on several explicit findings:

- Take will be incidental to an otherwise lawful activity;
- Impacts will be minimized and mitigated to the maximum extent practicable;
- Funding will be provided to properly implement the HCP;
- Take will not appreciably reduce the likelihood of survival and recovery of the species; and
- Other necessary or appropriate measures in the HCP are met.

If the Service, after considering public comment, finds that the HCP is complete and the permit issuance criteria have been satisfied, a permit is issued.

The basic procedures are uniform and are followed in the processing of all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved. The Service works to complete all steps as expeditiously as possible. Procedurally, the most variable factor in permit processing is the level of NEPA analysis required for the proposed HCP due to the size or scope of the proposed action.

In order to encourage HCP development and manage the associated workload, the Services have streamlined the development and application process and produced an HCP Handbook as a guide (see Appendix 2). The handbook makes a number of improvements over the prior process. First, the handbook establishes a category of "low-effect HCPs" applying to activities that are minor in scope and impact. These HCPs receive faster handling during the permit processing phase. Second, the handbook provides clear guidance to Service personnel about section 10 program standards and procedures. Third, the handbook outlines numerous mechanisms to accelerate the permit processing phase for all HCPs. Finally, specific time periods are established in the handbook for processing an incidental take permit application once an HCP is submitted to the Service:

HCP With an Environmental Impact Statement.....less than 10 months;
HCP With an Environmental Assessment.....3 to 5 months; and
Low-effect HCP.....less than 3 months.

MONITORING AND REPORTING

After the permit has been issued, monitoring and reporting activities are key to the success of an HCP. Monitoring is essential in determining whether the provisions have been implemented, if the implemented provisions meet the conservation goal, and in identifying conservation actions that are working well for use in other similar HCP situations. If monitoring reveals that the conservation actions are not meeting the species' needs and adaptive management provisions for this purpose were incorporated into an HCP during the development stage, mutually agreed upon adjustments could be employed to modify those actions and improve their effectiveness. To ensure effective and consistent monitoring of HCP implementation, newly adopted guidance provides the field and regional offices with monitoring standards.

The Service or any party designated as responsible by the Service (e.g., a State wildlife agency, local government, or the applicant) in the HCP is required to monitor the project for compliance with the terms of the incidental take permit and HCP. Any party responsible for monitoring compliance with a permit must report periodically to the Service in order to maintain the Service's overall oversight responsibility for the implementation of the HCP's terms and conditions. For regional and other large-scale or long-term HCPs, monitoring programs must provide long-term assurances that the HCP will be implemented correctly, and that monitoring for compliance and desired results will be conducted. This includes periodic accounting of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements. Monitoring plans for HCPs establish target milestones, to the extent practicable, or reporting requirements throughout the life of the HCP, and address actions to be taken in case of unforeseen circumstances.

MITIGATION AND ENFORCEMENT

Minimization and mitigation actions are required under Section 10 and consist of measures that reduce or offset potential adverse effects of a proposed activity on species covered by an HCP. They address specific needs of the covered species involved and must be measurable and enforceable. Through minimization and mitigation, development can proceed along with species conservation efforts.

The operating conservation program of an HCP is project-dependent and may take many forms. Commonly employed mitigation measures include preservation of some or all existing habitat, enhancement or restoration of degraded or former habitat, creation of new habitats, establishment of buffer areas around existing habitats, modifications of land use practices, and restrictions on human access. Although no specific HCP mitigation standards are specified under the ESA, the Service is committed to using the best scientific information available during the development, review, and monitoring of HCPs and ensuring that conservation strategies are as consistent as possible.

The HCP Handbook states that the minimization and mitigation strategies should take into account listing information and recovery plans, which are peer reviewed, as well as all other

scientific and commercial data available. Certain conditions may also apply to these strategies, for example, when a mitigation program involves creation of new habitat or restoration of degraded habitats, HCP permittees must ensure that techniques used are proven and reliable or, if relatively new, that contingency measures or adaptive management procedures are included to correct failures, if they should occur. The Service often incorporates adaptive management concepts into the HCP to minimize the uncertainty where there are significant data gaps in the scientific information regarding a species. The Handbook also states that, where appropriate, technical scientific comments should be solicited from species experts within or outside the Services and from the recovery team, and from the public during the comment period for the HCP permit. Also, the intra-Service section 7(a)(2) consultation conducted requires the use of "the best scientific and commercial data available" for fulfilling the provisions of the ESA, as well as addressing any potential "adverse modification of critical habitat."

While an incidental take permit has an expiration date, some of the mitigation identified in the HCP can be in perpetuity, such as establishment of protected areas. Violation of the terms of an incidental take permit would result in illegal take under section 9 of the ESA. If the violation is deemed technical and inadvertent in nature, the Service sends the permittee a notice of noncompliance by certified mail or recommends alternative actions to the permittee in order to regain compliance with the terms of the permit.

REGULATORY CERTAINTY

In addition to the streamlining of procedural requirements for developing and approving HCPs, another major reason for the vast growth in the use of HCPs by landowners is the incentive provided through the "No Surprises" policy. This policy guarantees certainty for private landowners who provide conservation benefits to species. The 1994 No Surprises Policy, which was the basis for a recently issued final rule, was developed to reduce the concerns and fears of private landowners that further regulatory restrictions might be imposed if they enter into an agreement with the government.

The Services' No Surprises final rule (February 23, 1998, 63 FR 8859) establishes a simple principle. The Federal Government will not require, without the consent of the permittee, the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, including quantity and timing of water delivery, or other natural resources beyond the level otherwise mutually agreed upon for the species covered by the conservation plan. These assurances will be provided if the permittee is abiding by all of the permit terms and conditions in good faith or has fully implemented their commitments under an approved HCP when negotiating provisions for unforeseen circumstances. This rule does not preempt or affect any Federal reserved water rights.

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Service may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are

limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Moreover, as previously noted, such additional conservation and mitigation measures may not not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan, without the consent of the permittee.

Issue 2: *A general description of the habitat conservation plans issued throughout the Service's Regions.*

SUMMARY OF PERMITS ISSUED

In just a few years, the HCP process has been transformed from relative obscurity to one of tremendous prominence in species conservation. Prior to 1992, only 14 HCPs were in place. As of January 30, 1998, 230 HCPs had been approved, covering 5.9 million acres and protecting hundreds of species, and we expect by fiscal year 1999 there will be approximately 400 HCPs in some stage of development or implementation. Not only has the number of HCPs grown, but their size and complexity have greatly increased in recent years. Most of the earlier HCPs were for planning areas of less than 1,000 acres, but of the more than 200 HCPs approved as of September 1997, approximately 25 exceeded 10,000 acres; 25 exceeded 100,000 acres; and 18 exceeded 500,000 acres.

HCPs have evolved from a process adapted primarily to address single developments, to one that includes broad-based, landscape-level planning tools utilized to achieve long-term biological goals. Large-scale, regional HCPs have significantly reduced regulatory burdens on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistical impacts of endangered species conservation, and bringing a broad range of landowner activities under legal protection of HCPs.

One of the great strengths of the HCP process is its flexibility. Conservation plans vary enormously in size and scope and in the activities they address--from half-acre lots to millions of acres, from forestry and agricultural activities to beach development, and from a single species to dozens of species. Another key is creativity. The ESA and its implementing regulations establish basic biological standards for HCPs but otherwise allow creativity on the part of the applicants. As a result, the HCP program has produced remarkable innovation. The booklet "The Quiet Revolution" provides many HCP examples (See Appendix 3) and Appendix 4 provides a complete list of all current HCPs. Examples follow of some of our most successful HCPs around the country.

REGION 1
Central and Coastal Orange County

Location: California Acreage: 208,000

Species Covered: This HCP will protect 7 listed species and 37 other rare species including the coastal California gnatcatcher, peregrine falcon, Riverside fairy shrimp, arroyo southwestern toad, least Bell's vireo, southwestern willow flycatcher, and the Pacific pocket mouse.

Challenge: The Service, along with Orange County, the Irvine Company and 11 other participating landowners worked to develop the first California Natural Community Conservation Planning Program aimed at providing continued economic development and the protection of plant and wildlife populations and the habitats upon which they depend.

Benefit: The implementation of the HCP provides a long-term growth plan for the area and establishes a 37,000 acre Reserve System containing approximately 18,500 acres of coastal sage scrub, 7,000 acres of chaparral, 5,700 acres of grasslands, and other habitat types. The HCP includes guidelines ensuring that any future development in the area will protect the reserve.

REGION 2
Balcones Canyonlands

Location: Texas Acreage: 111,428

Species Covered: This HCP conserves 8 listed species--golden-cheeked warbler, black-capped vireo, and 6 cave invertebrates and 27 rare species that are not Federally protected.

Challenge: The Austin area is an extremely fast-growing metropolitan area. The HCP was needed to allow necessary development for the expanding growth of the community while protecting listed species.

Benefit: The public will gain a large preserve that will protect species and watersheds while providing outdoor open-space opportunities. Economic growth and land planning will be able to proceed without jeopardizing plants and animals, and decisions over endangered species issues will return to local control.

REGION 3
Karner Blue Butterfly
(Pending)

Location: Wisconsin Acreage: Statewide

Species Covered: Karner blue butterfly

Challenge: A statewide approach is currently under development which allows for large-scale ecosystem planning and alleviates the need for processing multiple individual permits. The Wisconsin Department of Natural Resources is the lead agency in this planning effort and is

working with 28 partners, including county forests, utility companies, and the forest products industry, The Nature Conservancy, and the Wisconsin Departments of Agriculture and Transportation.

Benefits: This HCP, once completed, will allow the Karner blue butterfly to be conserved while the habitat it depends on is still used and is managed on an ecosystem scale, in turn, conserving other species.

REGION 4
Homeowner

Location: Florida Acreage: 0.5

Species Covered: Florida scrub jay

Challenge: The challenge facing a private landowner was how the Service could help her develop a plan that allowed her to build a private residence in scrub jay habitat while protecting the listed scrub jay.

Benefits: The private landowner was able to build a private residence on land inhabited by the threatened scrub jay. The HCP also promoted native landscaping as a means to offset the minor loss of jay habitat from the construction of the residence.

The Potlatch Corporation

Location: Arkansas Acreage: 15,000

Species Covered: Red-cockaded woodpecker

Challenge: The Potlatch timber company believed that its current management activities benefited the red-cockaded woodpecker and complied with the law, but wanted certainty that its future plans could proceed without hampering survival of the woodpecker.

Benefits: The approved Potlatch HCP provides the company with flexible management options while ensuring that forty-four groups of red-cockaded woodpeckers on the company's lands will be maintained and protected.

REGION 5
Massachusetts Division of Fisheries and Wildlife

Location: Massachusetts Acreage: 200 miles of coastline

Species Covered: Piping plover

Challenge: The Service and the Massachusetts Division of Fisheries and Wildlife were challenged to develop an HCP that provides increased management flexibility to facilitate continued public access to public beaches, while reducing potential impacts to the piping plover population.

Benefits: The HCP conserves the piping plover population by limiting activities that can occur at any one site. Landowners participating in the plan are provided additional flexibility for managing their beach property and are provided a mechanism to allow vehicle access.

Issue 3: *The manner in which listing and delisting decisions are made.*

LISTING AND DELISTING

Procedures for listing and delisting species are set forth in Section 4 and the Services' listing regulations at 50 CFR 424. The Secretary is required to list or reclassify a species if, after reviewing the species' status based on the best scientific and commercial data available, it is found that the species is endangered or threatened, as defined in Section 3, because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;
(2) Overutilization for commercial, recreational, scientific, or educational purposes;
(3) Disease or predation;
(4) The inadequacy of existing regulatory mechanisms; or
(5) Other natural or manmade factors affecting its continued existence.

Removal of a species from the list of endangered and threatened wildlife and plants must also be supported by the best scientific and commercial data available to the Secretary. A species may be delisted only if data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) Recovery. The principal goal of the Service is to return listed species to a point at which protection under the ESA is no longer required. A species may be delisted on the basis of recovery only if the best scientific data available indicate that it is no longer endangered or threatened because threats have been eliminated or minimized.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

All Field and Regional Offices adhere to the same standards when recommending the listing or delisting of a species as endangered or threatened. Guidance to the Field and Regional offices is provided by the Services' Listing Handbook (Appendix 5). While the research and recommendations come from the field biologists and are reviewed by the Regional offices, ultimately, to ensure consistency, the final decisions on all petition findings and listing actions, both proposed and final, rest with the Director.

CANDIDATE LIST

The Service maintains a list of "candidates" identified by accepted petitions and other sources (September 19, 1997; 62 FR 49398-49411). A candidate species is one for which the Service has substantial information to support a proposal to list. In general, species to be considered for listing are selected from among those recognized as candidates in accordance with the Service's listing priority system.

In order to determine if a species is in need of Federal protection and should be added to the candidate list, Service biologists consider the species' current status, population trends and the threats to continued survival. After a species becomes a candidate, monitoring of its status continues. To collect status information, Service biologists work closely with scientific, conservation and corporate partners, other Federal agencies, and State and Tribal governments to compile and analyze data. A current candidate list is included in Appendix 6.

Information relevant in assessing the status and trends of a species for either listing or candidate determination includes the number of individuals, number of populations (biological security of many species is more a function of the number of healthy populations than of the total number of individuals in the wild), size of populations (small isolated populations are highly vulnerable to extirpation, and thus contribute less to the overall security of a species), historic and current rate of decline, current recruitment rates (below-normal recruitment may signify extreme vulnerability in a long-lived species, even though it exists in relatively large numbers), distribution of populations, quantity and quality of available habitat, and genetic diversity. The assessment of threats must include past and ongoing impacts and projected future impacts to the species. Threat assessment is also the prime consideration in determining priority in the listing process.

The Service works with a broad range of experts and institutions to ensure use of the best available scientific and commercial information. Candidate species information comes from many varied sources: The scientific community, including museums, universities, and scientific/professional societies; State heritage programs and wildlife, fish, and plant conservation agencies; The Nature Conservancy and other private conservation groups; other individuals such as consultants, knowledgeable amateurs, and industry biologists; Native American Tribal Councils; international specialists; Federal agencies; and other Service programs.

LISTING PRIORITIZATION

After determining that a species needs to be listed, it is long-standing Service policy that the highest priority be given to those species believed to face the greatest threat of extinction. The Service adopted guidelines on September 21, 1983 (48 FR 43098) (See Appendix 7), that govern the assignment of priorities to species under consideration for listing. This system provides a rational way to allocate available appropriations to the highest-priority species when adding a species to the list or reclassifying a species. The system places greatest importance on the immediacy and magnitude of threats, but also factors in the degree of taxonomic distinctiveness by assigning priority in descending order to monotypic genera, full species, and subspecies.

In carrying out the listing program, four basic principles govern the Service's implementation process:

(1) Highest priority is given to protecting species most in need, based on the priorities established in the 1983 guidance;
(2) Biological need, not the preference of litigants, drives the listing process;
(3) Sound science, including peer review, forms the foundation of each and every listing action; and
(4) Public comment and participation in the petition and rulemaking processes are enhanced to ensure that the States, other Federal agencies, and the affected public are provided every opportunity to provide comments or information (See Figure 2).

LISTING MORATORIUM

Public Law 104-6, enacted in April 1995, established a moratorium on the issuance of final listing rules and rescinded $1.5 million from the Service's listing budget for fiscal year 1995. This action and limitations on funding contained in the short-term Continuing Resolution virtually shut down the Service's listing program from October 1, 1995 to April 26, 1996. As a result, the Service faced a tremendous "listing backlog"after the moratorium was lifted: proposed listings for 243 species; petitions for 57; and 182 candidate species awaiting proposal. The Service faced the daunting task of allocating available resources to address this listing backlog. The Service published Final Listing Priority Guidance, on December 5, 1996 (See Appendix 8), providing an organized system for dealing with the workload. The guidance established four tiers or classes of listing actions as a way of allocating resources, preferentially, to those activities judged to be most urgent. The first tier included emergency listings required to forestall immediate threats to species. Less urgent listing actions were assigned to progressively lower tiers. Currently, the Service has achieved a more balanced listing program. By the end of FY 97 the Service had reduced the backlog of listing proposals from 243 to 99. Beginning in FY 98, the Service expects to also return to working on a limited number of reclassification and delisting actions. A proposal to adopt modified listing priority guidance for FY 98 will be published this week. Species that may be considered this year for delisting or reclassification include the American peregrine falcon, the Columbian white tailed deer, the Gulf Coast population of the brown pelican, the bald

eagle and the Aleutian Canada goose.

Issue 4: *Funding of programs, allocation of employees, and other matters pertaining to implementation and enforcement at the regional level.*

Allocation Methodology

In FY 95, the Service adopted a workload-based budget allocation methodology for the Endangered Species Program in response to the Government Performance and Results Act of 1993 and subsequent directives from the Department of the Interior, the Office of Management and Budget, and the Service Director. The workload-based formulas were to be used in allocating the fiscal year 1996 budget, but as a result of severe cuts in Endangered Species funding in FY 96 and the series of Continuing Resolutions that extended through April 1996, the workload-based allocation was only partially implemented in FY 96. The system has been fully implemented in allocating both the FY 97 and FY 98 Endangered Species Program budgets. Funding is allocated using this methodology and personnel allocations are tied to the dollar allocations.

Endangered species are not evenly distributed across the United States. Therefore, the goal of the workload-based allocation is to direct funding and personnel resources to areas of the country where fish and wildlife resources most require protection under the ESA. Areas of high biological diversity, including the endangered and threatened species often found in such areas, are more concentrated in some areas of the country than in others. The Service places priority on funding program activities in such resource-rich areas.

In addition to taking into account the geographic distribution of fish and wildlife resources, the Service considers other complexity factors in allocating Endangered Species Program funds. The costs of conserving members of certain taxonomic groups vary greatly. The number of States, territories, and countries of occurrence are used as a measure of the extent of the range of the species. Generally, the more widespread a species, the more costly will be conservation, consultation, and recovery measures. Such complexities are factored into the workload-based methodology used by the Service to allocate Endangered Species Program funds among Regions.

To allow for such resource-based prioritization while also ensuring that all Regions have a minimum level of funding necessary to fully participate in the Endangered Species Program, each Region receives a "capability funding" that is taken off the top before the funds are spread among Regions using the workload factors. The capability funding levels are set with the overall resources and demands of the program taken into account.

Issue 5: *General criteria for requiring mitigation and examples of mitigation required in each region in the context both of section 10 permits and section 7 incidental take statements.*

Section 10 permits are issued to non-federal entities where a determination of "take" is likely to occur during implementation of a non-federal activity. The applicant must "minimize and mitigate" to the maximum extent practical the impacts of any "take" authorized, and Service must ensure that the permit "is not likely to jeopardize the continued existence of listed species." Section 7 outlines procedures for Federal agency cooperation to conserve listed species. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the Service to ensure proposed Federal activities are "not likely to jeopardize the continued existence of listed species."

SECTION 7 CRITERIA

In addition to the section 7(a)(2) requirements of the ESA, section 7(a)(1) directs the Secretary (Secretaries of the Interior and Commerce) to review other programs administered by them and utilize such programs to further the purposes of the ESA. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species.

Through section 7(a)(2), the Service consults formally on any action that is federally funded, authorized, or carried out that may affect a listed species. A biological opinion, the written statement provided through a formal consultation, presents the Service's opinion on whether or not the Federal action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. A copy of the draft handbook for conducting such consultations is Appendix 11 to my statement.

Section 7(b)(4) of the ESA requires that the Secretary, when consulting with a Federal agency on a proposed action that satisfies the requirements of section 7(a)(2), to ". . . provide the Federal agency and the applicant concerned, if any, with a written statement that . . . specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact . . . " of incidental take. The Service provides, as an attachment to a "non-jeopardy" biological opinion or to any reasonable and prudent alternative, a statement of anticipated incidental take with reasonable and prudent measures (RPMs) and terms and conditions, as appropriate, to minimize the impacts of the take. Terms and conditions are provisions to implement the RPMs. If adopted by the action agency, they also become binding conditions of any grant or permit issued to any applicant, as appropriate, for the incidental take exemption to apply. Terms and conditions of an incidental take statement must include reporting and monitoring requirements that assure adequate action agency oversight of any incidental take.

RPMs are actions the Secretary believes necessary or appropriate to minimize the impacts of incidental take. When preparing incidental take statements, the Services must specify RPMs and implementing terms and conditions, which involve only minor changes and that do not alter the basic design, location, scope, duration, or timing of the action to minimize the impacts of incidental take. Measures are considered reasonable and prudent when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The Service cannot require mitigation for proposed project impacts through Reasonable and Prudent Measures.

For a determination of jeopardy or adverse modification of designated critical habitat, the Services are obligated to identify, if possible, Reasonable and Prudent Alternatives (RPAs) in the biological opinion. RPAs include those alternative actions identified during formal consultation that: (1) can be implemented in a manner consistent with the intended purpose of the action; (2) can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction; (3) are economically and technologically feasible; and (4) the Secretary believes would avoid the likelihood of jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat.

If the Administration's budget request is fully funded, we will be in a position to further the streamlining of Section 7 consultations with Federal agencies and generally increase our ability to respond to the consultation needs of agencies and permit applicants, thus hopefully avoiding or lessening additional litigation for agency activities.

SECTION 10 CRITERIA

The Service must ensure that the incidental take that may result from the proposed HCP is consistent with the section 10 issuance criteria (i.e., that it will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild") and they must develop a mitigation program that is also consistent with the issuance criteria (i.e., that will minimize and mitigate "to the maximum extent practicable") or the permit cannot be issued. Mitigation programs for HCPs, however, will be as varied as the projects they address. Some will be simple, while those for large-scale, regional planning efforts may be quite complex. The Service must ensure that mitigation programs address the specific needs of the species covered by the HCP, while also ensuring that they are based on sound biological information and are commensurate with the impacts they address. A monitoring plan must also be developed that establishes reporting requirements and biological criteria for measuring program success.

Mitigation actions under HCPs usually take one of the following forms: avoiding the impact (to the extent practicable); minimizing the impact; rectifying the impact; reducing or eliminating the impact over time; or compensating for the impact. For example, project effects can be (1) avoided by relocating project facilities within the project area; (2) minimized through timing restrictions and buffer zones; (3) rectified by restoration and

revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management, monitoring, and adaptive management; and (5) compensated by habitat restoration or protection at an onsite or offsite location.

In practice, HCPs often use several of these strategies simultaneously or consecutively. Mitigation measures required by individual Service offices for HCPs must also be as consistent as possible for the same species. This can be challenging when a species encompasses multiple geographic areas and the effects of the HCP may be biologically distinct, but consistency is essential. The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained. A first step is the establishment of specific standards (e.g., for survey methods, buffer zones, or mitigation methods), and consistent implementation of those standards. The Service coordinates these standards between biologists in the same office and between Regional Offices to ensure consistency throughout the nation. Mitigation standards are also developed in coordination with state wildlife agencies.

Critical Funding Needs

Clinton Administration Reforms

Employing the flexibility that past Congresses have built into the law, the Clinton Administration has used innovation and administrative reforms to craft a *"New Endangered Species Act"* over the past five years. As a result, America now enjoys the success of an ESA that works much better. Major steps have been taken to make the ESA more effective in conserving endangered and threatened species while enhancing its flexibility for businesses and private landowners. The ESA now produces cooperation instead of confrontation and conservation rather than chaos.

Escalating Workloads

As of January 31, there are 1,125 domestic species on the List of Endangered and Threatened Species; this represents nearly a doubling of the list in just 5 years. Accordingly, Section 7 (Interagency Cooperation), HCP and Recovery workloads have increased tremendously at the same time that the Administration has been working to streamline and expedite the consultation and HCP processes. By FY 99, the Service anticipates that approximately 400 HCPs will be completed or under development, constituting a four-fold increase in just the past 5 years. In addition, private landowner interest in two new conservation tools, Candidate Conservation Agreements and Safe Harbor Agreements, is already great and is expected to grow significantly. The demand for these new types of voluntary conservation agreements and the tremendous growth in the number of HCP applicants have combined to generate significantly increased workload pressures.

While trying to deliver all of the Administration's reforms and responding to the increased workload, the Endangered Species Program budget experienced a decrease in FY 96 and only modest increases in FY 97 and FY 98. To continue to implement fully the Administration's

reforms and continue on a proactive course with other Federal agencies, the States, and private landowners, critical funding shortfalls must be addressed.

The President's FY 99 Budget Request for Endangered species is a very important step in providing adequate funding to allow the Service to provide technical assistance to landowners, to provide for financial incentives for private landowners to enter into Safe Harbor Agreements, for candidate conservation agreements, increases in the consultation program to assist other Federal agencies and to increase recovery actions. A copy of our budget justification is Appendix 9 to my statement. A paper explaining our allocation of funds between Regions is Appendix 10.

Both the Fish and Wildlife Service and the National Marine Fisheries Service have taken great efforts to ensure that their implementation of the ESA is scientifically sound and consistently enforced throughout the country. We believe that with the full implementation of the Administration's reforms, the Endangered Species Act will protect the biological resources of the Nation without imposing undue burdens on individual citizens.

Mr. Chairman this concludes my prepared testimony. I would be pleased to respond to any questions you might have.

LIST OF APPENDICES SUBMITTED WITH FORMAL STATEMENT

Appendix 1: Making the ESA Work Better

Appendix 2: Habitat Conservation Planning Handbook

Appendix 3: The Quiet Revolution

Appendix 4: Current List of all HCPs Nationwide

Appendix 5: Endangered Species Listing Handbook

Appendix 6: Endangered and Threatened Species; Review of Plant and Animal Taxa; Proposed Rule; 50 CFR Part 17; September 19, 1997.

Appendix 7: Endangered and Threatened Species Listing and Recovery Priority Guidance; 48 FR 43098-43105, September 21, 1983 and correction at 48 FR 51985, November 15, 1983.

Appendix 8: Endangered and Threatened Wildlife and Plants; Extension of Listing Priority Guidance for Fiscal Year 1997; 62 FR 55268-55269, October, 23 1997.

Appendix 9: FY 99 Budget Justification

Appendix 10: White Paper on Funding Allocation

Appendix 11: Section 7 Consultation Draft Handbook

TESTIMONY OF

ROLLAND A. SCHMITTEN

ASSISTANT ADMINISTRATOR FOR FISHERIES

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

U.S. DEPARTMENT OF COMMERCE

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RESOURCES

March 5, 1998

Mr. Chairman and members of the Committee, I am pleased to be here today on behalf of the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA). NMFS is a partner with the U.S. Fish and Wildlife Service (FWS) in administering the Endangered Species Act (ESA) and works with other agencies, states, Tribes, industries and private landowners to implement the Act. We are responsible for protecting many endangered species that live in the ocean and coastal waters of our nation. Some of the more familiar species that we protect are Pacific and Atlantic salmon, steelhead trout, sea turtles, whales, Hawaiian monk seals and steller sea lions.

I welcome the opportunity to discuss with you today the manner in which we implement the ESA in our five Regions. First, I want to emphasize that NMFS and FWS have taken many steps to ensure that the two agencies are implementing the Act consistently. These efforts began

earnestly in 1994 when Interior Secretary Babbitt and NOAA Administrator Baker announced a series of policy reforms and legislative ideas to improve the effectiveness of the ESA by making it easier for citizens to understand and by tapping into its flexibility for businesses and private landowners. To carry out the Administration's 10 Point Plan, NMFS and FWS have developed joint policies and guidance on almost every aspect of the ESA including section 7 consultations, Habitat Conservation Plans, assurances to private landowners (No Surprises, Safe Harbor and Candidate Conservation Agreements,) scientific peer review, scientific information standards, public participation in developing and implementing recovery plans, and the role of state agencies. A Secretarial Order on the ESA and Federal-Tribal trust responsibilities has also been issued. We are committed to consistent implementation of the ESA not only between our two agencies, but among all of our Regions.

NMFS employs about 260 people throughout its regions, field offices, science centers and headquarters to carry out our ESA responsibilities. Our total ESA funding for FY98 is $29.2 million and our FY99 request is $37.9 million. The requested increase covers additional money for Pacific salmon including recovery activities, Federal and State partnerships and actions to improve our science and management capabilities. The remainder of the increase would be used for activities to recover highly endangered marine mammals -- right whales, Hawaiian monk seals and steller sea lions. Base funding is used for Pacific salmon, marine mammals, sea turtles and other species.

Currently, NMFS is responsible for 38 listed species. Of the 19 species currently

proposed for listing, 17 are stocks of chinook, sockeye and chum salmon and steelhead trout that range from southern California to the Canadian border. Because the range of marine and anadromous species usually covers vast geographic areas, their habitat often includes a combination of private, state and Federal lands and waters.

Now, I would like to address the specific issues identified in your letter of invitation to this hearing.

ISSUE 1: THE CRITERIA AND PROCESS FOR ISSUANCE OF SECTION 10 INCIDENTAL TAKE PERMITS

The process for issuing incidental take permits and the criteria that applicants must satisfy is based on regulations published by NMFS in 1990 and 1998. Consistency between NMFS and FWS and among the Regions when issuing section 10 permits is assured through the Habitat Conservation Planning guidance issued jointly by both Services in 1996, and a final joint policy (with separate implementing regulations) on No Surprise assurances published February 23 in the FEDERAL REGISTER. Before NMFS issues a section 10 incidental take permit, it must be satisfied that the applicant has complied with the criteria for issuing a permit including the submission of an acceptable habitat conservation plan (HCP).

Because many HCP permits cover large tracts of land and may be in effect for many decades, these plans will determine, to a significant degree, the long term viability of many

anadromous species, particularly those whose populations are severely depressed. A permit holder must be required to implement measures that are necessary to ensure that the holder's activities do not appreciably reduce the survival and recovery of the species. In general, the objective of NMFS is the same in each HCP and for each species listed on a permit. Each HCP must provide for the essential habitat functions needed for the long-term survival of the species while permitting incidental take. The prevailing scientific view is that long-term survival of imperiled salmonid species requires protection and restoration of local populations and their habitats. The measures sought by NMFS are designed to provide habitat that will support a diversity of local breeding populations and, therefore, are necessary for the species long-term survival.

ISSUE 2: A GENERAL DESCRIPTION OF THE HABITAT CONSERVATION PLANS ISSUED IN THE REGIONS

Currently, NMFS is working on about 50 large scale HCPs that are in various stages of development in California and the Pacific Northwest. A general description of each HCP is attached. To date, all large scale HCPs have been developed jointly with the Fish and Wildlife Service.

In addition to the large scale HCPs, NMFS has issued nine incidental take permits for activities such as state commercial and recreational fishing and state hatchery programs (list attached). The only East Coast permit was granted to North Carolina in 1996 for a 5-year period,

and replaced the annual "Algae Rule" amendment to Federal regulations that allowed using limited net tow times on shrimp trawlers in lieu of using turtle excluder devices (TEDs) because of high algae concentrations. The State was required to have an observer program to monitor takes under this permit.

ISSUE 3: THE MANNER IN WHICH LISTING AND DELISTING DECISIONS ARE MADE

The ESA and joint regulations by NMFS and FWS provide clear guidance on the factors that must be used to determine whether a species warrants the protection of being added to the list of threatened and endangered species or whether a species should be delisted. Listing determinations are made solely on the basis of the best available scientific and commercial information regarding the species status, without reference to possible economic or other impacts of a determination. The regulations also require that we review the status of the species and determine whether a species is endangered or threatened because of the five factors that are specifically listed in the Act. Also, we must take into account efforts that are in progress by a state to protect the species. Between the time a species is proposed for listing and a final listing determination, it is NMFS' published policy to solicit the expert opinion of three independent specialists regarding the pertinent scientific or commercial data on the species being considered for listing. These peer review opinions are taken into account when NMFS makes the final determination and they are included in the final published notice.

With the decline of so many West Coast salmonids, NMFS began receiving numerous petitions to list additional populations. In response, the Northwest and Southwest regions initiated coast-wide status reviews of all salmon and steelhead stocks on a species-by-species basis. To handle these reviews, the regions formed Biological Review Teams made up of scientists from the Northwest Fisheries Science Center, Southwest Region, Southwest Fisheries Science Center and U.S. Geological Survey's Biological Resources Division. The teams conduct their reviews solely on the basis of the best scientific information available on the current status of the stocks and the present threats to their continued survival. Based on their reviews, the teams advise the regions on the identities of various ESUs (evolutionary significant units) and whether each ESU is in danger of extinction or likely to become in danger of extinction in the foreseeable future. To expand the review to experts outside the Federal government, a Pacific Salmon Biological Technical Committee consisting of tribal, state, federal, industry and academic scientists assists the team in compiling and reviewing scientific information pertinent to the status review. The regions consider the analysis from the team and any conservation measures being undertaken by states, tribes, industries, local entities and the Federal government to determine whether those conservation measures mitigate threats to the species and whether a listing is warranted. Under certain circumstances, the regions may ask the team for a formal analysis of the likely effects of specific and quantifiable conservation measures, as was done in the case of hatchery and harvest reforms for Oregon coastal coho.

ISSUE 4: FUNDING OF PROGRAMS, ALLOCATION OF STAFF AND OTHER MATTERS PERTAINING TO IMPLEMENTATION AND ENFORCEMENT AT THE REGIONAL LEVEL

Attached is a description of the funding in FY98 for each NMFS Region, and the number of employees who work on issues related to the ESA. Also attached is the justification for the FY99 budget request and a summary of each region's major activities and accomplishments.

NMFS considers the protection of threatened and endangered species as one of its highest enforcement priorities. The Office of Law Enforcement is developing new techniques to meet the ever-increasing demands of the ESA. One technique is to create a highly mobile, rapid-response marine enforcement team to protect sea turtles in the southeastern United States. On the West Coast, NMFS is designating an ESA enforcement coordinator for multi-regional action teams and multi-disciplinary ESA response teams. Although protecting listed species is only one of many enforcement responsibilities, potential violations receive high level scrutiny by Special Agents and Fishery Patrol Officers in all regions. The rapid expansion of the number of listed species, particularly salmon, and the need to monitor large geographic areas, has placed greater pressure on the limited resources of the enforcement staff. In 1997, the Office of Law Enforcement investigated 144 cases that included 151 counts for violations of the ESA.

ISSUE 5: THE GENERAL CRITERIA FOR REQUIRING MITIGATION AND EXAMPLES OF MITIGATION REQUIRED IN EACH REGION IN THE CONTEXT OF SECTION 10 PERMITS AND SECTION 7 INCIDENTAL TAKE STATEMENTS

When identifying measures to minimize or mitigate an incidental taking, NMFS uses the criteria identified in its regulations for both section 7 and section 10, the guidance in the Habitat Conservation Planning handbook and the interim Section 7 Consultation handbook. Whether issuing an incidental take permit under section 10 or conducting a consultation with a Federal agency under section 7, NMFS first determines whether the Federal or private action results in jeopardy for the species. This determination is made based on the biological requirements of the species, the current status of the species, the environmental baseline, and the effects of the proposed or continuing action on the species that is the subject of the opinion or permit.

If it is a section 7 consultation, and the determination is that the action is likely to jeopardize the species, NMFS identifies the reasonable and prudent alternatives that if taken would avoid the likelihood of jeopardy. Any action that results in a taking incidental to the proposed or continuing action requires NMFS to attach an incidental take statement to the opinion which identifies the reasonable and prudent measures (and the terms and conditions to implement the measures) that minimize the effect of the taking. Based on NMFS regulations, reasonable and prudent measures and the terms and conditions that implement them cannot alter the basic design, location, scope, duration or timing of the action, and may involve only minor changes.

If the subject is a section 10 incidental take permit (which requires the applicant to first submit an acceptable habitat conservation plan or HCP), NMFS will describe in the permit and in an implementing agreement (if applicable) the measures that must be taken to monitor, minimize

and mitigate the impacts of the taking. NMFS will not issue a section 10 incidental take permit that is likely to jeopardize a species. The applicant would have to modify the project so that it would not appreciably reduce the likelihood of the survival and recovery of the species in the wild in order to obtain a permit.

The Services assist the applicant in evaluating alternatives, and is flexible when prescribing mitigating measures. We do not impose one-size-fits-all prescriptions on applicants. When participants provide an unusual, but scientifically credible analysis of effects, or a creative but effective solution for mitigating the effects of incidental taking, we will approve their approach. The Services work with the Federal agencies, the applicant and the private, state or Tribal landowner to ensure that the measures are understood and technically feasible. Also, when a Federal agency consults with both NMFS and FWS on the same action, the two Services work together with the agency and the applicant to ensure that the measures are compatible and the agency is not overloaded with separate or conflicting requirements.

Examples of some of the terms and conditions to minimize incidental take through section 7 biological opinions follow. All of the measures described were agreed to by the individual Federal agencies and applicants and are consistent with the section 7 regulations on the criteria for reasonable and prudent measures. In some cases, the requirements are the result of a jeopardy opinion, and may change the scope or timing of the described action (e.g. dredging windows).

NMFS consulted with the State of Massachusetts and EPA concerning a sewage discharge permit for Boston harbor. The incidental take statement from the resulting biological opinion included requirements to: 1) monitor the effluent to detect large scale biological changes to avoid any possible impacts to endangered right whales and their habitat, 2) conduct observer programs and noise measurements associated with the use of explosives, and 3) use observers and turtle deflectors on dredges to ensure that the estimated incidental take is not exceeded. Consultations with the U.S. Coast Guard resulted in the requirement of the following measures: posting lookouts, reducing speed, providing training, and improving vessel operations to avoid interactions with listed species. Biological opinions related to commercial fishing activities have required educating fishermen about methods to reduce the incidental take of listed species and posting observers on vessels to determine areas and seasons of conflicts with listed species for future consideration in refining the measures required in an incidental take statement. In consultations with power plants, the measures include requiring the modification of water intakes to reduce and eliminate takes of listed species. Protocols for transporting listed fish above dams to allow access to spawning grounds were also required. Other examples are requirements for observer programs associated with the explosive removal of oil rigs to ensure that detonations do not occur until listed species are no longer in the area; using turtle deflectors on dredge dragheads in channels and offshore sand "borrow areas" to protect sea turtles; and educational programs to teach crews on dredges and Navy and Coast Guard vessels how to reduce interactions with listed species.

ESA ACTIVITIES AND ACCOMPLISHMENTS OF EACH REGION

Northeast Region

NMFS' Northeast Region ESA program focuses on the protection of sea turtles, Atlantic salmon, sturgeon, and marine mammals.

Atlantic Salmon: In December 1997, NMFS and FWS withdrew their proposal to list a distinct population segment of Atlantic salmon as threatened under the ESA. That determination was based, in part, on the adequacy of existing protective mechanisms including a conservation plan developed by the State of Maine. NMFS has placed this population of Atlantic salmon on its candidate species list, and is actively monitoring the implementation of the State plan to determine whether it is effective and whether further action is needed to protect Atlantic salmon.

Atlantic sturgeon: In June 1997, NMFS received a petition to list Atlantic sturgeon throughout its range. NMFS and FWS are jointing conducting a status review of the species along with a team that includes Federal and state agency representatives. Several states oppose a listing and prefer to allow the Atlantic States Marine Fisheries Commission to complete an amendment to their fishery management plan that will close the commercial fishery coast wide. A 12-month finding by NMFS and FWS is due this June.

Shortnose Sturgeon: The Region published a draft recovery plan for this species earlier this year. Shortnose sturgeon are listed throughout their range from the Saint John's River in Canada to the St. John's River in Florida. The recovery describes a river-by-river approach for recovery and sets up measures to work cooperatively with Federal and state agencies and other interests to assess river populations, threats, and methods for recovery.

Marine Mammals: To protect marine mammals, the Northeast Region participates in teams mandated by the Marine Mammal Protection Act (MMPA) to reduce to acceptable levels the number of marine mammals caught incidental to commercial fisheries. The Atlantic Large Whale Take Reduction Plan contains regulations to reduce the impact of fishing interactions on one of the most critically endangered marine mammals, the right whale, by ensuring that gear regulated by this plan is either removed or significantly restricted in the three right whale critical habitats found in U.S. waters: Cape Cod Bay, Great South Channel and the Georgia-Florida border region. However, the main focus of the plan is to achieve the MMPA's long-term goal of reducing the incidental take of four large whale species (right, humpback, fin and minke whales) through a combination of gear modifications supplemented by progressive gear research, expanded disentanglement efforts, extensive outreach efforts in key areas, and a right whale surveillance (Early Warning System) program.

The Early Warning System is a partnership of 14 Federal and state agencies, private industry, port authorities, private conservation groups and Canada. Its purpose is to reduce ship strikes of right whales through a combination of dedicated and opportunistic aerial and ship surveys. If a right whale is spotted, the location is broadcast over marine radio bands to alert mariners of the whale's locations so they will post look-outs and avoid ship collisions. Each organization has a specific responsibility and has contributed by either providing funds, developing educational material, offering staff time or office space.

The combined effect of the actions taken under the plan will provide adequate protection for large whales and allow NMFS and the take reduction team to monitor the progress of the plan. The effectiveness of the program ultimately relies on the cooperative efforts of all entities

habitat off the coasts of Georgia and Florida. This area is the animal's only known calving grounds. The team has produced a "Partnering Document" that describes the actions each entity has agreed to take to avoid ship collisions and was awarded the prestigious Coastal America Award for its efforts.

Sea Turtles: The Region has developed, implemented, and modified requirements for shrimp vessels in the region to use Turtle Excluder Devices (TEDs). The development of TEDs allowed the fishery to continue operating by reducing conflicts between the shrimp fishery and listed sea turtles. A panel of gear experts, including members of the shrimp industry, has been instrumental at successfully developing and testing new TEDs to address and reduce problems such as poor shrimp retention or insufficient turtle exclusion. A panel of scientists, including representatives of the fishery and the environmental communities, also has been established to evaluate the status and trends of listed sea turtle populations. The implementation of TEDs, along with the protection of nesting beaches, has resulted in a significant increase in the Kemp's ridley population that provides grounds for cautious optimism that these measures are effective.

Regional scientists and managers also provide administrative and technical expertise for implementation of Public Law 101-162, Section 609. NMFS provides technical training in the use of TEDs to foreign nations to help them meet the requirements of this law which prohibits the importation of shrimp into the United States that was harvested in a manner harmful to sea turtles. NMFS also provides technical expertise in evaluating the enforcement of foreign TED programs necessary for the annual certification of countries to Congress each year. In 1996, a court order expanded the program worldwide, and NMFS' training activities have increased significantly.

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NMFS has proposed to designate critical habitat for green and hawksbill turtles in the waters around Culebra, Mona, and Monito Islands off of Puerto Rico. Comments heard during recent public hearings suggested that the proposal has been received favorably by local stakeholders. The Region also is working on the final determination on the Service's proposal to list Johnson's seagrass, which is found on the east coast of Florida.

Alaska Region

The Alaska Region's ESA program focuses on efforts to protect Pacific salmon and endangered or threatened marine mammals, notably steller sea lions and large whales.

The steller sea lion management and recovery program is a collaborative effort that includes research programs of the National Marine Mammal Laboratory, State of Alaska, and the University Marine Mammal Consortium and section 7 consultations with Federal agencies.

Efforts to protect the humpback whale include section 7 consultations and the collection of biological data from stranded animals. The program for bowhead whales involves coordination on oil and gas development activities statewide, Section 7 consultations for Federally permitted activities, whale research, and extensive coordination with the Alaska Eskimo Whaling Commission and the oil industry regarding oil and gas exploration.

For Pacific salmon, the Region prepares biological assessments and coordinates fisheries management actions relative to take of listed Pacific salmon by Federally authorized commercial fisheries.

Major accomplishments for the Alaska Region include a partnership with the Alaska Eskimo Whaling Commission and continued research by the National Marine Mammal

Laboratory showing that stocks of bowhead whales have increased at a rate of 3.1% from 1978 to 1993.

The Region expanded its efforts to address the human impact of the tourism industry on endangered humpback whales that feed in Alaskan waters in the summer months by developing guidelines for responsible viewing and by working closely with industry to ensure adherence to these guidelines.

Although Steller sea lions are continuing to decline in Alaska, the combined efforts under the Marine Mammal Protection Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the Endangered Species Act contribute to evaluating current protection measures and determining additional conservation measures to aid the recovery of this species.

Northwest Region

The Northwest Region's ESA program centers entirely on the task of conserving, protecting and recovering anadromous species of salmon and trout. When the first Northwest salmonid species were listed in the early 1990s (Snake River sockeye and two populations of Snake River chinook), the Region embarked on an extensive program to protect and recover these species. It required working with numerous layers of state agencies, inter-state commissions, industries, Federal agencies, Tribes and private landowners. The Region has based its numerous decisions and determinations on a science-based management program. With recent listings and proposed listings of salmonids, the Region's endangered species program will involve even more stakeholders.

The Region's current management activities include implementing the Northwest Forest

Plan, conducting section 7 consultations with Federal agencies (including extensive consultations over the Federal Columbia River Power System), consulting with the Federal Energy Regulatory Commission on relicensing of hydropower facilities, working with States and non-Federal landowners to develop conservation plans, and reviewing Clean Water Act programs and U.S. Army Corps of Engineers' permits.

The Region considers its major accomplishments to be a genuine collaboration on development, implementation and consultation on the Northwest Forest Plan; the Washington State Department of Natural Resources Habitat Conservation Plan which covers more than one million acres of state owned land; completion of three additional HCPs with private forest landowners which cover over two million acres; the Oregon Coastal Salmon Recovery Initiative (State conservation plan for coho salmon); streamlining section 7 consultations on timber sales; a negotiated section 7 consultation with Douglas County (Washington) for a new water storage dam and reservoir that will service the county and its municipalities; the Eastside section 7 consultation on PACFISH and consultation on eight U.S. Forest Service Land and Resource Management Plans that cover all of the Snake River Basin Federal Land. These plans comprise over 60 percent of freshwater habitat for listed Snake River chinook and sockeye salmon. The NWR Region is also continuing to collaborate on the development of the Interior Columbia Basin Ecosystem Management Program.

Southwest Region

The Southwest Region is responsible for protecting and recovering endangered and threatened marine mammals (whales and monk seals), sea turtles, and salmonids. Its territory covers California and the Western Pacific. In the Western Pacific, it evaluates the effects of

Federal actions such as commercial fishing on listed species of marine mammals, especially humpback whales and Hawaiian monk seals, and sea turtles. It is implementing an extensive recovery program for Hawaiian monk seals. Off the coast of California, the Region conducts surveys of gray whales in order to monitor the effects of delisting this species.

However, as you can see from last week's proposal by NMFS to add a dozen West Coast stocks of salmonids to the list of threatened and endangered species, the Southwest Region alone is now responsible for eleven populations of salmonids (both listed and proposed for listing). The first salmonid ever listed is the Sacramento River winter-run chinook salmon (1989). Because the habitat of winter-run chinook is primarily controlled by actions of Federal agencies, the conservation strategy for this species has required extensive section 7 consultations with the Bureau of Reclamation, the U.S. Army Corps of Engineers and with NMFS (commercial fishing). However, NMFS has brought successful legal action against private water diversion facilities that illegally took winter-run chinook salmon. The quality and quantity of water necessary to restore winter-run chinook salmon brought about one of the most ambitious Federal and state partnerships, the Bay Delta Accords which has been extended through 1998 in order for the group implementing the Accords to complete an environmental impact statement on the alternatives to restore the water quality of the Sacramento/San Joaquin Rivers and Delta and San Francisco Bay.

With the listing of coastal coho salmon and steelhead trout, the Region is turning its focus to forming more partnerships with state and private landowners, especially timber companies. An example is the agreement reached last Friday (February 27) between NMFS, FWS, the State of California and Pacific Lumber Company (Headwaters) on the principles related to the

company's submission of a Habitat Conservation Plan pursuant to an ESA section 10 incidental take permit.

CONCLUSION

The ESA is working for non-Federal landowners as well as Federal agencies. This Administration has taken unprecedented action in the past 5 years to use the flexibility that is inherent in the ESA to make it work for Federal agencies, states, Tribes and private landowners. We have worked with our partner the U.S. Fish and Wildlife Service to ensure that the agencies are consistent in their treatment of both Federal and non-Federal actions that may affect listed species. We have provided guidance to our Regions to ensure that they are fair and provide consistent advise to Federal and private, state, or Tribal landowners.

We know that we must have the support of private landowners including states to recover species. We have met that sector at least halfway by demonstrating through actions such as the No Surprises Assurances and State Conservation Agreements that we are willing to provide incentives to encourage this sector to be our equal partners to conserve species. Its through partnerships with private, state and Tribal landowners, that species will have the best chance for long-term survival and recovery.

Attachment 4

NATIONAL MARINE FISHERIES SERVICE – U.S. FISH AND WILDLIFE SERVICE
STATUS OF FORESTED, COASTAL and CENTRAL VALLEY[1] HABITAT CONSERVATION PLANS, NORTHERN CALIFORNIA

Update – February 20, 1998

Applicant / Project type	Location/Acres	Status[2]	Species Coverage/Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Arcata Redwood Company industrial timber management	Humboldt County 142,000 acres	HCP in negotiation. Coho, currently, not part of the HCP. ARCO desires the coho issue to be handled via section 7 for 2 years while Simpson develops an aquatic HCP.	MaMu only plan, at this time 15 year permit	FWS:**Ken Hoffman** Phil Detrich NMFS: **Sharon Kramer** Nan Reck	Draft HCP, IA, EA submitted to FWS 12/96 without field office certification-package not returned. Revised draft HCP, IA, EA not yet submitted to FWS. Outstanding issues are the resolution of ownership, short term mitigation, long term mitigation and coho adverse effects.

[1] The information presented for the four Central Valley HCPs, listed last on this table, does not include input from the U.S. Fish and Wildlife Service. Also, the information is only for HCPs in which NMFS is involved; other HCPs may be in development that may affect anadromous salmonids. For detailed information regarding the Central Valley HCP's and NMFS's involvement, contact Chris Mobley of the SWR, Santa Rosa Office.

[2] Increasing order of stages from beginning to end: introductory discussions → initial development → data development → negotiations of HCP → processing the permit application → nearing completion → permit issued or denied.

Applicant / Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Big Creek Timber Company industrial timber management	Santa Cruz and San Mateo Counties 12,657 acres	Data development	MaMu/aquatic/multi species plan Permit term yet to be decided	FWS: **Ann Chrisney** (Sacramento office) NMFS: **Kristi Young** Vicki Campbell	No movement in many months. Watershed analysis expected in March '98. Discussions to resume in April/May.
Coastal Forest Lands industrial timber management	Mendocino County 75,000 acres	Introductory discussions	NSO/MaMu/aquatic /multispecies plan Permit term yet to be decided	FWS: **Ken Hoffman** NMFS: **Kristi Young** Vicki Campbell	No movement or discussions in many months.
Fruit Growers Supply Co. industrial timber management	Siskyou County (205,273 acres) Trinity County (800 acres) Shasta County (927 acres) 207,000 acres total	NSO permit application is being processed. Coho, currently, not part of the HCP. The company desires the coho issue to be handled via section 7 for 2 years while they develop an aquatic HCP.	NSO only plan, at this time Permit term yet to be decided	FWS: **Amedee Brickey** Phil Detrich NMFS: **Nan Reck** Sharon Kramer & Vicki Campbell	First analysis draft review completed in Jan. 1997. NMFS is currently working with Fruit Growers to reach resolution on what constitutes a "not likely to adversely affect" for coho so the NSO permit can be issued without resulting in "adverse effects" for coho for 2 years while the aquatic HCP is in development. It remains unknown if a NLAA can technically be reached with the company.
Georgia Pacific industrial timber management	Fort Bragg Unit Mendocino County 192,925 acres	HCP in negotiation.	NSO/MaMu/aquatic/multi species plan 50-65 year permit	FWS: **Ken Hoffman** NMFS: **Kristi Young** Vicki Campbell	Nov '97 NEPA/CEQA scoping occurred for an EA. Significant progress is being made on the on aquatic issues. Assessment of NSO and MaMu ongoing.

Applicant / Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Gualala Redwood industrial timber management	Mendocino County 30,000 acres	Initial development	NSO/MaMu/aquatic/multi species plan 30-50 year permit	FWS: **Amedee Brickey** NMFS: **Kristi Young** Vicki Campbell	The company is working on a watershed analysis. No discussions in months.
Humboldt Municipal Water District municipal water withdrawal and delivery	Humboldt County	Initial development	Aquatic conservation plan Permit term yet to be decided	FWS: **Ken Hoffman** NMFS: **Sharon Kramer**	Diversion screened with early, outdated technology. Studies ongoing in cooperation with NMFS to assess levels of take due at surface water diversion. Instream flow to be negotiated.
Jackson Demonstration State Forest - California Department of Forestry and Fire Protection demonstration forestry public recreation activities forest product collection	Mendocino County 50,000 acres	HCP in negotiation.	NSO/MaMu/aquatic/multi-species plan 30-50 year permit	FWS: **Amedee Brickey** NMFS: **Kristi Young** Vicki Campbell	NEPA/CEQA public scoping for the EIS/EIR started in Oct '97. Terrestrial species strategy proposed in 10/97. Aquatic species strategy proposed in 12/97. Discussion progressing on both terrestrial and aquatic species.

Applicant / Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Louisiana Pacific Corporation industrial timber management 1 - HCP 2 - SYP's	Mendocino County (Coastal - 230,000 acres) Humboldt County (Coastal - 75,000 acres) 305,000 acres total	HCP in negotiation.	NSO/MaMu/aquatic/multi-species plan Permit term yet to be decided.	FWS: **Amedee Brickey** NMFS: **Sharon Kramer** Nan Reck	NEPA/CEQA public scoping started in Sept. '97. L-P announced in Oct '97 their intent to sell their entire forest land base in N. Calif. within a year. L-P wishes to proceed with the development of the HCP. Negotiations on species strategies began in mid Dec '97, with an aquatic conservation strategy presented in Feb. 98. Due to L-P's intent to sell their land base, NMFS does not consider this HCP a high priority for staff time.
Miller Rellim industrial timber management	Del Norte County 29,902 acres	HCP in negotiation.	NSO/MaMu/aquatic/multi-species plan 50 year permit	FWS: **Ken Hoffman** NMFS: **Nan Reck** Sharon Kramer	NEPA/CEQA public scoping started in Nov. '97. Agency review draft provided in Oct. '97. Ongoing discussions of terrestrial and aquatic baseline analysis and adequacy of prescriptions.

Applicant, Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Pacific Lumber Company industrial timber management	Humboldt County 207,000 acres Land exchange with Elk River Timber Co and federal/state purchase of a "Headwaters 7500 acres Reserve"	HCP in negotiation; DEIS/EIR in development for compliance with both NEPA and CEQA; California SYP in sufficiency review	NSO/MaMu/aquatic/multi-species plan 50 year permit	FWS: **Phil Detrich** Ken Hoffman NMFS: **Vicki Campbell** Sharon Kramer & Nan Reck	NEPA/CEQA scoping took place in Jan-Fed '97. Negotiations with Pacific Lumber and Maxxam has moved to the policy and legal arena with agency management and attorneys. Agreement is near.
Ribar Properties industrial timber management	Humboldt County 1373 acres	NSO permit application is being processed. Aqustic HCP is in negotiation.	NSO plan 30 year permit	FWS: **Ken Hoffman** NMFS: **Sharon Kramer** Nan Reck	NSO HCP submitted and NOA published in Fed Reg. 5/97 NSO HCP and NEPA completed in summer '97. Aqustic HCP/EA nearing completion; NEPA document must be amended and re-circulated- anticipated in spring '98.
Sierra Pacific Industries industrial timber management	Northern California numerous counties ~ 1.4million acres (~300,000 acres in anadromous coho and steelhead zone)	Data development	NSO/MaMu/aquatic/multi-species plan 25-50 year permit	**FWS: Ken Hoffman** Phil Detrich, Jason Davis NMFS: **Kristi Young** Vicki Campbell	No movement in numerous months. Land base containing anadromous salmonids may be removed from the permit. Company also considering dropping the HCP or hiring a consultant to negotiate.

Applicant / Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes
Simpson Timber Company industrial timber management	Humboldt County 380,000 acres	Data development	Aquatic/multi species plan 50 year permit	FWS: **Ken Hoffman** NMFS: **Sharon Kramer** Nan Reck	NSO permit issued in '92. Debate over the role of HCP's in the conservation of listed species. No agreement on goal of HCP. Negotiations ongoing.
Timber Products Company industrial timber management	Siskyou and Humboldt Counties 125,402 acres (80,513 acres in anadromous zone)	HCP in negotiation.	NSO/aquatics/multi species plan 10 (+) year permit	FWS: **Amedee Brickey** NMFS: **Nan Reck** Sharon Kramer	FWS and NMFS currently negotiating strategies for several species. An EA will be prepared.
California Department of Fish and Game -- Striped Bass Management Program	Sacramento River, Sacramento-San Joaquin Delta	HCP in negotiation, nearly complete.	multi-aquatic species 10 year permit for screen diversions	FWS: **Bob Pine** NMFS: **Lisa Holsinger**	Draft HCP, IA and EA to public in early spring '98. Anticipated permit issuance June '98.
CALFED Bay-Delta Program	Central Valley-wide	Initial development	multi-aquatic species programmatic HCP for implementation of the CALFED Program	FWS: **Dave Harlow** NMFS: **Gary Stern & Jim Lecky**	Draft EIS/EIR scheduled for release to the public in early '98.
Pacific, Gas & Electric Power Plants	Contra Costa County confluence of Sacramento and San Joaquin Rivers	Processing the permit application.	Manage take of anadromous fish/delta smelt into cooling water intakes.	FWS: **Mike Thabault & Matt Vandenberg** NMFS: **Penny Ruvelas**	Changes to HCP and IA being made prior to release of documents for public review with an EA. Expected permit issuance by Spring '98.
Reclamation District 108	Sacramento River, Mile 118	Initial development - MOA for process signed.	Screen largest diversion; address entrainment of four smaller diversions over longer term.	FWS: NMFS: **Chris Mobley**	Goal of completion by end of 1998.

Applicant / Project type	Location/ Acres	Status	Species Coverage / Permit Term	Leader and Back-up assignments	Expected dates/ Notes

Updated by: Vicki L. Campbell
National Marine Fisheries Service
Habitat Conservation Planning Team Leader
Santa Rosa, California
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Attachment A.

Permit *Issued (4)

Northwest Region, NOAA-Fisheries, Olympia Field Office
HABITAT CONSERVATION PLAN LOG - February 11, 1998

* These potential HCPs are listed for the first time.

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Champion Pacific Timberlands (eastside)	WA	Mid-development stage. Many riparian areas have varying levels of trees damaged by spruce budworm, which infects Doug-fir and grand fir, but not P-pine or red cedar or hardwoods.	Multi-species HCP on 30,000-acre in-holding on Yakama Indian Reservation. No known anadromous fish use, but resident salmonids are present in the few perennial streams. Most streams only flow seasonally.	Zisa/McCracken (FWS) Longenbaugh (NMFS)	Services met with applicant 1/31 and 2/9. Discussed riparian conservation measures and public review process. Applicant will hold public meeting in Hood River, OR, on 3/12/98. (Rev. 2/11/98)
Champion Pacific Timberlands (westside)	WA	Early development stage. A pending land exchange would place 7,200 ac of land that contains some older forests into Champion ownership.	Possible multi-species HCP on 170,000-acres mostly within Lewis and Pierce Counties	Vogel (FWS) Parton (NMFS)	Had initial meeting and site visit on 5/30/97. Further development is contingent on progress of eastside HCP. (Rev. 9/19/97)
City of Tacoma - Howard Hansen Dam	WA	Preliminary discussion stage.	Salmon HCP for hydro-reservoir operations.	Fransen (NMFS) Poon (NMFS) Grady ?(NMFS)	Initial meetings have been held with no schedule set. (Rev. 2/11/98)
Crown Pacific (including Arlecho Creek, formerly managed by Mutual of New York).	WA	Discussing revised conservation measures with applicant. C-P has invited technical staff from several local tribes to assist NMFS and FWS as we develop riparian and watershed conservation measures.	Multi-species ITP sought, with owl & murrelet issues driving HCP at present. DNR watershed analyses prescriptions will be implemented across the entire 101,500-acre Hamilton Tree Farm in Skagit, Whatcom , & Snohomish Counties.	Haas (FWS) Longenbaugh (NMFS) Bogaczyk (FWS) Michaels (FWS)	Next mtng with applicant on 3/4 to identify issues that need policy resolution. (Rev. 2/11/98)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
DNR West of the Cascades	WA	Monitoring Plan being developed; implementation initiated. Continuing discussions with DNR about land transfers and implementation. DNR is talking with tribal reps to avoid litigation.	Multi-species HCP with murrelet, owl & riparian strategies on 1.14 million acres. Owl strategy includes NRF & dispersal habitat. Hazard slopes protected. Total riparian acreage is 133,500 in western WA. TFW-style Watershed Analyses continuing but not scheduled.	Landino (NMFS) Vogel &Hansen (FWS) Longenbaugh (NMFS) Parton (NMFS)	ITP issued on Jan 30, 1997. Meeting monthly with applicant to discuss implementation issues. Meeting sometime to develop riparian prescriptions for maintaining and restoring riparian ecosystems, likely in conjunction with tribes. (Rev. 9/19/97)
DNR East of the Cascades	WA	Preliminary discussions about scope and species.	Aimed at conserving anadromous and resident salmonids.	Landino (NMFS)	Meetings are expected to begin soon. (Rev. 11/28/97)
Longview Fibre	WA	Final stage of HCP development. Applicant has chosen for now to not address salmonids, although they are addressing some amphibians.	Multi-species HCP with focus on owl NRF & dispersal habitat in 21,000-acre plan area. Steelhead in the plan area are proposed for listing as threatened.	Hansen (FWS) Landino (NMFS)	FWS has taken the lead, since there are no proposed measures to address anadromous salmonids at this time. (Rev. 7/2/97)
Mid-Columbia PUDs (Public Utility Districts)	WA	Anadromous fish settlement agreement being drafted. Negotiations on mainstem, hatchery, and habitat mitigation in late stages of development. Three PUDs, State, tribes, and Federal agencies are jointly involved in plan development.	Aquatic conservation plan for five hydro projects covering 105 river miles on the main stem of Mid-Columbia River. Highest fish passage survival sought through each project. For unavoidable losses, development of tributary & hatchery mitigation measures.	Landino (NMFS) Turner (NMFS) Bodurtha (FWS) Hevlin (NMFS) Carlon (NMFS) Cates (FWS) Young, J. (FWS) Smith (NMFS)	Final Draft Conservation Plan on PUDs schedule. General agreement on Draft Anadromous Fish Agreement and Conservation plan to be reached by end of Feb 1998. (Rev. 2/11/98)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Murray Pacific	WA	Post-issuance monitoring and implementation phase. Have reviewed monitoring results.	Multi-species HCP with 10% reserves primarily in riparian habitat throughout 49,000 acres of forested land. DNR watershed analyses to be all done by 2004.	Hansen (FWS) Parton (NMFS) Landino (NMFS) Longenbaugh (NMFS)	ITP issued 6/95. Field review of implementation by FWS on 9/3. (Rev. 9/19/97)
Oregon Dept. Forestry Elliot State Forest (Potential Amendment)	OR	On hold until larger State Forest Lands HCP is developed. ODF expects to defer work on this until large scale HCP is further along.	Original HCP did not include anadromous fish. 93,000 ac in coastal OR near Coos Bay contains some Umpqua Cutthroat streams, and coastal coho.	Landino (NMFS) (Note that someone from the FWS Portland Field Office is expected to become the point of contact)	On hold. Will schedule negotiations when ODF is ready. (Rev. 7/2/97)
Oregon Dept. Forestry - Northwest State Lands	OR	Mid-development stage. Have developed goals and objectives that address all the coho "factors for decline". NMFS and FWS are discussing specific measures for Aquatic& Riperian Habitats, and Water Quality & Quantity.	Multi-species HCP on 615,000 ac., in NW OR, including the Clatsop, Tillamook, and Santiam State Forests. ODF has added several hundred acres of state forest in SW coastal areas that include coastal and trans-boundary coho ESUs.	Maurice (FWS) Parton (NMFS) Longenbaugh (NMFS) Lockwood (NMFS) Zisa (FWS) Benitvoglio (FWS)	Discussions of riparian conservation measures will continue over the next few weeks along with continuing talks about erosion and landslides. (Rev. 2/11/98)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Plum Creek Timber-I 90 Cascades	WA	Post-issuance monitoring phase. Implementation issues will be addressed as the applicant is ready.	Multi-species HCP with owl NRF and dispersal habitat across the 170,000-acre plan area. Riparian protection & management in addition to DNR watershed analyses being done for entire area by 2001.	Vogel (FWS) Landino (NMFS) Parton (NMFS) Longenbaugh (NMFS)	ITP issued 6/27/96. Implementation in progress. Amendment in development to accommodate land exchange. (Rev. 9/19/97)
Port Blakely - Garrett Eddy Tree Farm	WA	Preliminary discussion stage. Pursuing State Landscape Planning Pilot project on WDFW/WDNR timeline, which has not yet been established. Unknown schedule for HCP.	6,600 acre second-growth block in foothills of North Cascades. Similar conservation to their other, approved HCP (R.B. Eddy Tree Farm).	Bogaczyk (FWS) Parton (NMFS) Thomas (FWS)	Initial meetings and site visit occurred in Jan and Feb. HCP proposal on hold pending development with WA State as Pilot Landscape project. (Rev. 11/25/97)
Port Blakely - Robert B. Eddy Tree Farm	WA	Post-issuance monitoring and implementation phase.	Multi-species HCP with owl as focus. All-species ITP issued. Riparian protection & hazard slope protection.	Bogaczyk (FWS) Longenbaugh (NMFS)	ITP issued 7/19/96. Services met with outgoing landowner lead biologist to discuss monitoring results on 2/4/98. (Rev. 2/11/98)
Potlatch Corporation	ID	Preliminary discussion stage.	Aquatic species HCP for anadromous fish and bull trout.. 670,000 acre in eastern ID.	Ries/Carter (NMFS)	FWS and NMFS policy and tech staff met with Potlatch on Jun 25. (Rev. 7/2/97)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Rayonier	WA	Early stage of development. Field trips conducted. Coordination with WDFW and Tribes ongoing. Nearly completed habitat definitions.	Multi-species on 93,500 acres in western Olympic Peninsula SOSEA (spotted owl area)	Hansen (FWS) Parton (NMFS) Grettenberger (FWS) Michaels (FWS)	HCP development proceeding according to applicant's 2-yr timeline. Tribes are giving input to riparian classification scheme. Filed trips planned to discuss habitat definitions. (Rev. 2/11/98)
Seattle Public Utility (formerly the Water Department)	WA	Agency policy leads have signed Agreement in Principle (3/14/97) for the HCP and two related agreements for instream flows and fisheries mitigation. Fisheries agencies and sport fishing groups agree with proposed hatchery for sockeye mitigation, which is considered controversial by envtl groups. Army Corps of Engineers is concerned about future ESA requirements from NMFS re the Ballard Locks. Seattle will pursue joint NEPA/SEPA via EA process.	Enhance second growth for owl & murrelet conservation. 64% of the 93,000-acre watershed will be in older forest reserves. Instream flows will maintain tribal and commercial salmon fisheries, and aid in recovery of depressed steelhead runs. Fish passage at Landsburg dam will be provided. This dam has blocked salmon since 1901. Watershed analysis like DNR has been completed. Riparian reserves will be similar to FEMAT recommendations. Bull trout in the upper basin are considered a healthy population.	Longenbaugh (NMFS) Poon (NMFS) Swenson (NMFS) Bogaczyk (FWS)	Seattle Public Utility has begun drafting an HCP and EA, based on the Agreement in Principle that was signed on 3/14/97. Agencies have been working on final language for the Instream Flow Agreement and the Fisheries Mitigation Agreement, and begin working on the IA for the HCP on 2/11/98. Next policy meeting will be on 3/3. (Rev. 2/11/98).

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Simpson Timber	WA	Late-development stage. Pursuing State Landscape Planning Pilot project. Also pursuing agreement with EPA to meet Clean Water Act.	Aquatic species HCP for anadromous fish. 200,000 acres in SW WA. Riparian management linked to geomorphic stream classification. Progressive approach to monitoring.	Saunders-Ogg (FWS) Parton (NMFS) Ralph (EPA)	Services have been working with applicant to incorporate review comments from the draft HCP rcvd 11/20/97. (Rev. 2/11/98)
Stinson HCP	WA	Applicant wants flexible approach that recognizes small size of ownership.	985 acres managed for multi-species. Short segment of fish-bearing stream (500 ft) and several other seasonally flowing streams would receive managed riparian buffers.	Vogel (FWS) Longenbaugh (NMFS)	Services met with applicant on 2/9. Latest riparian offer is favorable. (Rev. 2/11/98)
Union County	OR	Early development stage.	Will attempt to include both CWA (TMDLs) and ESA concerns. Area has Snake River chinook and steelhead in the Grande Ronde River.	Ries (NMFS)	Preliminary meetings are expected to begin soon. (Rev. 11/28/97)
Wallowa County/Nez Perce Tribe	OR	Early development stage.	County-wide effort, strong riparian emphasis, 2 million ac. Area has Snake River chinook and steelhead in the Grande Ronde River.	Ries (NMFS) Koch (FWS)	HCP on hold until further notice. (Rev. 7/8/97)
WA Dept Fish & Wildlife	WA	Initial discussions underway.	Statewide HCP and general permit for the state's Hydraulic Permit (HPA) program.	Zilliges (NMFS)	No dates yet. WDFW still has to assign staff lead. (Rev. 11/28/97)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Washington Farm Forestry Association	WA	Identification of pilot participants underway. Evaluation of "checklist" function under discussion.	Potentially 250,000 acres of small, non-industrial private timberland.	Thomas (FWS) Longenbaugh (NMFS)	Meetings are scheduled to discuss concept and application of "checklist." Otherwise on hold. (Rev. 7/8/97)
Weyerhaeuser SW WA	WA	HCP process will be reinitiated after 2-yr hiatus. The applicant delayed this project in order to focus on their HCP in OR (Weyerhaeuser Willamette).	Multi-species HCP with owl dispersal habitat in the 102,0000-acre plan area. DNR watershed analysis completed to establish riparian protection for the three sub-basins.	Bogaczyk (FWS) Longenbaugh (NMFS) Hirsh (FWS)	Have had regular meetings with Services, WDFW, and tribes to review riparian prescriptions from watershed analyses. On hold until applicant is ready. (Rev. 11/25/97)
Weyerhaeuser - Willamette Tree Farm	OR	HCP application filed 12/6/96. FR Notice for public review published Jan 23, 1997. Remaining issue is protection measures for non-fish bearing perennial streams.	Multi-species HCP on 400,000 ac., including an estimated 46,000 ac of Umpqua Cutthroat habitat. DNR-style watershed analysis being done on most of the plan area. Plan area has an estimated 72,000 acres of coastal coho habitat in the Umpqua and Siuslaw Rivers.	Hirsh (FWS) Longenbaugh (NMFS) Bogaczyk (FWS) Zisa (FWS) Day (NMFS)	Services have been meeting to attempt to resolve protection of perennial non-fish bearing streams. (Rev. 2/11/98)
*WA Wheat Growers Assoc.	WA	Preliminary discussion stage.	Salmon HCP covering 3 million ac in 13 counties, mostly in eastern WA, that may cover certain wildlife species.	Zillges (NMFS)	Several initial meetings have been held. No schedule yet. (Rev. 2/11/98)
Yakama Indian Nation	WA	Early development stage of Land Management Plan (LMP).	Multi-species LMP across 1 million acres of non-irrigated forest & range lands.	Vogel (FWS) Longenbaugh (NMFS)	Preliminary partial draft was rcvd 10/16/97. Preparation of entire draft is on applicant's schedule. (Rev. 11/25/97)

APPLICANT	STATE	STATUS	CONTRIBUTION	LEADER/STAFF ASSIGNMENTS	EXPECTED DATES
Yakima Irrigation Districts (Roza and Sunnyside Districts)	WA	Preliminary discussion stage.	Aquatic species HCP for anadromous fish.	Landino (NMFS)	Initial meetings have been held. On hold until further notice. (Rev. 7/8/97)
HCPs on the horizon					
Grants Pass Irrigation Dist.	OR				
King County	WA				
Okanogan Irrigation Dist.	WA				
Foster Creek Wsd Council	WA				

Low-Effect HCPs

Attachment B

R						
844	NWR	Incidental	Koch	Idaho Department of Fish and Game (IDFG) - sportfishing	salmon, chinook, spring/summer and fall	State Sport Fishing Program - Kokanee Fishing in Redfish Lake
899	NWR	Incidental	Koch	Oregon Department of Fish and Wildlife	salmon, sockeye and chinook - spring/summer and fall	Release of non-listed juvenile fish from state hatcheries (trout and salmon)
901	NWR	Incidental	Koch	Washington Department of Fish and Wildlife (WDFW)	salmon, sockeye and chinook - spring/summer and fall	Release of non-listed juvenile fish from state hatcheries (steelhead)
902	NWR	Incidental	Koch	Washington Department of Fish and Wildlife (WDFW)	salmon, sockeye and chinook - spring/summer and fall	Release of non-listed juvenile fish from state hatcheries (salmon)
903	NWR	Incidental	Koch	Idaho Department of Fish and Game (IDFG)	salmon, sockeye and chinook - spring/summer and fall	Release of juvenile fish from Idaho Power Company hatcheries (salmon)
908	NWR	Incidental	Koch	Idaho Department of Fish and Game (IDFG)	salmon, chinook, spring/summer and fall	Resident Fish Stocking Program - RBT in tribs and Redfish Lake
1008		Incidental		State of North Carolina Division of Marine Fisheries	Turtles	Final Due 1/15/2001; To allow shrimp trawling without TEDs in a restricted area in NC that has high concentrations of algae, replaces the
1017	NWR	Incidental	Koch	Oregon Department of Fish and Wildlife 8/6/96	Fish	Recreational and commercial fishing in the Umpqua River Basin
1096	NWR	Incidental	Koch	Weyerhauser Corp Northwest Region Incidental Take Permit with an HCP	Fish	

ATTACHMENT C

Issue 4: Funding of Programs, Allocation of Staff at the Regional Level for ESA Activities (Includes Marine Mammal Protection Act funds for listed marine mammals)

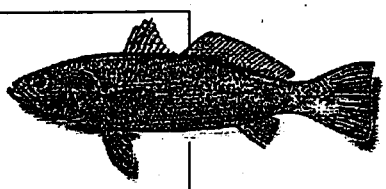
FY 98

Region	**Staff**	**Funds**
Alaska	11.5	$4.4 million
Northwest	146	$13.2 million
Southwest	49.3	$6.6 million
Southeast	26.5	$2.1 million
Northeast	13.5	$1.4 million

Attachment D

NMFS

National Marine Fisheries Service

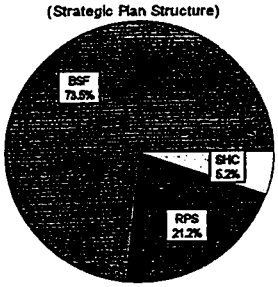


Total Request - ORF: $351,376,000

The National Marine Fisheries Service is responsible for the management, conservation, and protection of living marine resources within the United States Exclusive Economic Zone. The Agency also plays a support and advisory role in the management of living marine resources in coastal areas under state jurisdiction, provides scientific and policy leadership in the international arena, and implements internationally agreed-upon conservation and management measures. Through science-based conservation and management and promotion of the health of coastal and marine ecosystems, benefits to the Nation from the sustainable use of living marine resources are maximized. Authorities are derived primarily from the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the Sustainable Fisheries Act amendments to the MSFCMA, the Marine Mammal Protection Act (MMPA); the Endangered Species Act (ESA); and various other statutes that confer a mandate to reduce and mitigate degradation and loss of living marine resources habitat. Other legislative Acts provide authorities for enforcement, seafood safety, and cooperative efforts with states, interstate commissions, and other countries.

Goal Based

(Strategic Plan Structure)



The FY 1999 Budget request includes increases required to achieve NOAA's strategic plan goals to Build Sustainable Fisheries; Recover Protected Species; and Sustain Healthy Coasts. New mandates under the Sustainable Fisheries Act call for improved and expanded research to support fisheries management decisions and set new national standards which will entail significant costs for new management programs and additional data and analyses. Workloads associated with the management of West Coast salmon to meet the objectives of the Endangered Species Act continue to escalate.

Continued on third page following.

NATIONAL MARINE FISHERIES SERVICE
($ IN THOUSANDS)

Operations, Research and Facilities	FY 1998 ENACTED FTE	FY 1998 ENACTED AMT.	FY 1999 BASE FTE	FY 1999 BASE AMT.	FY 1999 PRES. REQUEST FTE	FY 1999 PRES. REQUEST AMT.	INC./DEC. (REQUEST - BASE) FTE	INC./DEC. (REQUEST - BASE) AMT.
Information Collection & Analyses								
Resource Information	934	99,300	885	93,814	895	92,714	10	-1,100
(BASE Resource Info)		[84,600]		[82,914]		[91,864]		[8,950]
(Dolphin Encirclement) 1/		[3,800]						
(MarMAP)		[850]		[850]		[850]		
(Gulf of Mexico Consortium)		[1,500]		[1,500]		[0]		[-1,500]
(Gulf and South Atlantic Foundation)		[1,250]		[1,250]		[0]		[-1,250]
(Gulf State Marine Fisheries Cmsn)		[750]		[750]		[0]		[-750]
(Chuckchi Sea Study)		[900]		[900]		[0]		[-900]
(Atlantic Herring and Mackerel)		[400]		[400]		[0]		[-400]
(Summer Flounder)		[250]		[250]		[0]		[-250]
(Aquatic Resources Initiative)		[5,000]		[5,000]		[0]		[-5,000]
Antarctic research		1,200		1,200		1,200		
Chesapeake Bay Studies		1,890		1,890		1,500		-390
Right whale research		400		400		200		-200
(Gear Modification Research)		[150]		[150]		[0]		[-150]
MARFIN		3,500		3,500		3,000		-500
(NE Activities)		[500]		[500]		[0]		[-500]
SEAMAP		1,200		1,200		1,200		
Alaskan groundfish surveys		950		950		661		-289
(Calibrations Studies)		[289]		[289]		[0]		[-289]
Bering Sea pollock research		945		945		945		
West Coast groundfish		780		780		780		
New England stock depletion		1,000		1,000		1,000		
Hawaii stock management plan		500		500		0		-500
Yukon River chinook salmon		700		700		700		
Atlantic salmon research		710		710		710		
Gulf of Maine groundfish survey		567		567		567		
Dolphin safe technologies		250		250		250		
Habitat research/evaluation		450						
Pacific salmon treaty program		5,587		5,587		5,587		
Hawaiian monk seals		550		550		500		-50
Steller sea lion recovery plan		2,770		2,770		1,440		-1,330
(Base program)		[590]		[590]		[590]		
(Alaska Sea Life Center - one time)		[1,000]		[1,000]		[0]		[-1,000]
(State of Alaska)		[850]		[850]		[850]		
(North Pacific Universities MM Consortium		[330]		[330]		[0]		[-330]
Hawaiian sea turtles		248		248		248		
Bluefish/striped bass		800		800		0		-800
Halibut/Sablefish		1,200		1,200		1,200		
Subtotal	934	125,497	885	119,561	895	114,402	10	-5,159
Fishery Industry Information								
Fish statistics	146	13,000	146	13,000	148	14,500	2	1,500
Alaska groundfish monitoring		5,500		5,500		5,200		-300
(Base program)		[3,200]		[3,200]		[3,200]		
(Crab Management)		[850]		[850]		[850]		
(Bering Sea Fishermen's Association		[300]		[300]		[0]		[-300]
(Rock Fish Research)		[800]		[800]		[800]		
(NMFS Rock Fish Research)		[350]		[350]		[350]		
PACFIN/catch effort data		4,700		4,700		3,000		-1,700
Rec. fishery harvest monitoring		3,900		3,900		3,100		-800
Subtotal	146	27,100	146	27,100	148	25,800	2	-1,300
Information Analyses & Dissemination	243	20,900	243	20,900	243	20,900		
Computer hardware and software		4,000		4,000		4,000		
Subtotal	243	24,900	243	24,900	243	24,900		
Total, Info., Collection, & Analyses	1,323	177,497	1,274	171,561	1,286	165,102	12	-6,459

NATIONAL MARINE FISHERIES SERVICE
($ IN THOUSANDS)

	FY 1998 ENACTED		FY 1999 BASE		FY 1999 PRES. REQUEST		INC./DEC. (REQUEST - BASE)	
	FTE	AMT.	FTE	AMT.	FTE	AMT.	FTE	AMT.
Conservation and Management Operations								
Fisheries Management Programs	207	27,250	209	27,250	214	34,400	5	7,150
(Base program)		[24,700]		[24,700]		[33,350]		[8,650]
(Alaska Harbor Seal Commission)		[100]		[100]		[100]		
(Rancho Nuevo Sea Turtles)		[350]		[350]		[350]		
(Atlantic Salmon Recovery Plan)		[450]		[450]		[450]		
(Chinook Salmon Management)		[1,500]		[1,500]		[0]		[-1,500]
(State of Maine Recovery Plan)		[150]		[150]		[150]		
Federal Ship Financing Fund Expenses		-1,700		-1,700		0		1,700
Columbia River hatcheries		12,055		12,055		10,300		-1,755
(Mass Marking)		[655]		[655]		[0]		[-655]
Columbia River end. species studies		288		288		288		
Regional councils		11,900		11,900		12,800		900
International fisheries commissions		400		400		400		
Management of George's Bank		478		478		478		
Beluga whale committee		200		200		200		
Pacific tuna management		2,300		2,300		1,250		-1,050
Subtotal	207	53,171	209	53,171	214	60,116	5	6,945
Protected Species Management	259	6,200	262	6,200	262	6,200		
(California Sea Lions)		[500]		[500]		[500]		
Driftnet Act Implementation		3,278		3,278		3,278		
Marine Mammal Protection Act		9,500		9,500		9,500		
Endangered Species Act recovery plan		20,200		20,200	14	30,450	14	10,250
Dolphin Encirclement 1/			9	3,800	9	3,300		-500
Fishery observer training		417		417		0		-417
East Coast observers		350		350		350		
Subtotal	259	39,945	271	43,745	285	53,078	14	9,333
Habitat Conservation	116	8,500	116	8,400	116	10,700		2,300
Enforcement & Surveillance	171	17,600	171	17,600	176	18,500	5	900
Total, Conservation and Mgmt. Opns	753	119,216	767	122,916	791	142,394	24	19,478
State and Industry Assistance Programs								
Grants to States								
Interjurisdictional fisheries grants		2,600		2,600		2,600		
Anadromous grants		2,100		2,100		2,100		
Anadromous fishery project						258		258
Interstate fish commissions		6,750		6,750		4,000		-2,750
(3 Commissions)		[750]		[750]		[750]		
(Atlantic Cooperative Management)		[6,000]		[6,000]		[3,250]		[-2,750]
Subtotal		11,450		11,450		8,958		-2,492
Fisheries Development Program								
Product quality and safety	93	10,524	93	10,524	86	9,824	-7	-700
Hawaiian Fisheries Development	0	750		750		0		-750
Subtotal	93	11,274	93	11,274	86	9,824	-7	-1,450
Total, State & Industry Assist. Progs.	93	22,724	93	22,724	86	18,782	-7	-3,942
Acquisition of Data	356	25,098	356	25,098	356	25,098		
TOTAL NMFS	2,535	344,535	2,500	342,299	2,529	351,376	29	9,077
Fisheries Fees (Proposed New Fees)						-19,781		-19,781

1/ Dolphin Encirclement was included in Resource Information in the FY 1998 Appropriation

NMFS

For FY 1999, the National Marine Fisheries Service requests $351.4 million. This is a net increase of $9.1million over the FY 1999 base and consists of $35.4 million in program increases directly related to mandated activities under the recent Sustainable Fisheries Act amendments to the Magnuson-Stevens Act, to the increased workload associated with protecting and restoring Pacific salmon, and habitat conservation. To offset these requested increases for mandated program activities, decreases of $26.3 million are proposed for lower priority items and for one-time funding needs.

The NMFS FY 1999 base reflects the proposed transfer of $2.2 million for Beaufort and Oxford Laboratories to NOS in FY 1998. The base also reflects the movement from the $3.8 million in the Resources Information line item in FY 1999 for Dolphin Encirclement Studies required by the International Dolphin Conservation Act to the Protected Species Management line item.

The FY 1999 proposed appropriation establishes authority to collect fees to begin to offset costs associated with providing fisheries management and enforcement. A proposal for the fees is being developed, and receipts will be collected from fees assessed on landings of commercial fishermen in the U.S. The $19.8 million in estimated fees will be used to offset the overall NOAA Budget Authority and Appropriation in FY 1999.

Detailed Program Changes

Information Collection and Analysis - The goal of this budget sub-activity is to provide accurate and timely analyses on the biological, ecological, economic, and social aspects of the Nation's use of its living marine resources in support of Administration goals to Build Sustainable Fisheries, Recover Protected Species, and Sustain Healthy Coasts. Also included are activities to determine the impacts of the incidental taking of marine mammals and endangered species; to develop forecast models for marine resource populations, ecosystems, and fishery systems; to improve the quality and timeliness of information on living marine resources, their habitats and their use; and to provide $1.9 million within the base program for information and services critical to the Administration's South Florida Ecosystem Restoration Initiative. In FY 1999, NMFS requests a net decrease of $6.5 million for this sub-activity which consists of $10.5 million increases and $16.9 million of program decreases for items not requested in FY 1998.

NOAA requests a net decrease of $5.2 million from the FY 1999 base for the Resource Information line item.

NMFS requests a net decrease of $1.1 million for the Resource Information base line item. This net change consists of $9.0 million in program increases and $10.1 million of program decreases. Of this $9.0 million increase, $5.9 million will be used to restore the FY 1997 level of base programs which was reduced in FY 1998 to cover the costs of report assignments, and to provide for the South Florida Ecosystem

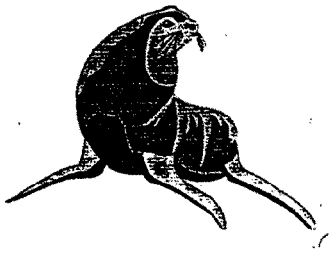
Restoration Initiative. Without the restoration of this funding, research activities at NMFS laboratories in FY 1999 will be below FY 1997 levels.

$3.1 million in increases is required to support the Administration's Council on Sustainable Development to replenish and protect fisheries. Section 203 (e) of the goals of Sustainable Fisheries Act amendments to the Magnuson-Stevens Act requires the Secretary of Commerce to undertake or expand efforts to achieve annual resource assessments in all regions by requiring that all stocks be assessed annually. Presently, some stocks are only assessed every three years, and some stocks are not assessed at all. NMFS will begin a multi-year effort to meet this requirement through the collection of additional fishery-dependent statistics, improved stock assessments, and increases in charter days-at-sea to complement the days-at-sea provided by NOAA vessels. The $10.1 million in decreases relate to appropriation report assignments for the Gulf of Mexico Consortium, Gulf and Atlantic States Fish Development Foundation, the Gulf States Marine Fisheries Commission, Chuckchi Sea study, Atlantic herring/mackerel, Summer flounder, and Aquatic Resources Initiative (see bracketed amounts in accompanying table).

In addition, eight decreases totaling $4.1 million are proposed for other lower priority programs in Resource Information: Chesapeake Bay Studies, Right Whale Research, MARFIN, Alaskan Groundfish Surveys, Hawaii Stock Management Plans, Hawaiian Monk Seals, Stellar Sea Lion Recovery Plan, and Bluefish/Striped Bass Research (see amounts in accompanying table).

NOAA requests a net decrease of $1.3 million for the Fishery Industry Information line item. An increase of $1.5 million is requested for the collection of fisheries statistics and performance of economic analyses required by the new National Standard 8 of the Sustainable Fisheries Act. This mandates that conservation and management measures consider the economic impacts on fishing communities.

The increase will initiate a comprehensive plan in all NMFS regions for fisheries data collection on the socioeconomic characteristics of commercial and recreational fishermen, economic values within fisheries, and vessel data within fisheries, all of which will improve the analytical capability to predict and monitor the economic and social consequences of management decisions. Three decreases totaling $2.8 million are requested for lower priority activities: Alaska groundfish monitoring, PACFIN, and recreational fishery harvest monitoring.



Conservation and Management Operations - This budget sub-activity provides for the development and implementation of Fishery Management Plans (FMPs) under the Magnuson-Stevens Act and the Sustainable Fisheries Act, and for the management of protected species under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA). It also provides for the enforcement of laws and regulations

NMFS

under these and other statutes as well as for the protection of habitats. Funding for the eight Regional Fishery Management Councils is included in this sub-activity, as is funding for Mitchell Act hatcheries along the Columbia River in the Pacific Northwest. A net increase of $19.5 million is requested for the sub-activity Conservation and Management Operations; this consists of $24.7 million of program increases, offset by $5.2 million of program decreases.

NOAA requests a net increase of $6.9 million for the Fisheries Management Programs line item. A net $9.6 million increase is requested to implement the Sustainable Fisheries Act and provide additional funding for the Regional Councils. These increases are offset by $4.3 million in decreases for items funded in FY 1998 above the President's FY 1998 request (one-time funding for repair of certain hatcheries and an increase for research and management of pelagics in the Pacific). An $8.7 million increase in the Fisheries Management Programs base line item is requested to initiate compliance with the SFA amendments to the Magnuson-Stevens Act which include implementation of new national standards, description and identification of Essential Fish Habitat (EFH), and incorporation of management measures to mitigate the adverse impacts of fishing on EFH. $0.9 million will be provided to the Regional Fishery Management Councils to support their review of existing fishery management plans and incorporation of Essential Fish Habitat in fishery management plans, per the new requirements of the Sustainable Fisheries Act. Also required are revised Fishery Management Plans to rebuild overfished fisheries. Other multi-year activities required to support the Council on Sustainable Development's goal to replenish and protect fisheries include development of programs related to management of fishing effort, e.g., a central registry system of limited access permit systems, a standardized vessel registration system, inventory and regulation of allowable gear by fishery, and special studies, reports, and advisory panels. A $1.7 million increase is requested for the Federal Ship Financing Fund (FSFF) administrative costs. These costs include managing the portfolio of loans that existed for the FSFF prior to FY 1992 plus all guaranteed and direct loans awarded since FY 1992. From FY 1996 through FY 1998, Congress reduced NOAA's ORF budget authority by $1.7 million and directed NOAA to use the FSFF to cover these expenses. The President's Budget requests the restoration of this $1.7 million to the Fisheries Management Program line item and does not propose the continuation of the financing adjustment in FY 1999 as there are no available balances for these costs in the FSFF.

NOAA requests a net increase of $9.3 million for Protected Species Management. A $10.3 million program increase is to establish core science and management competency and scientific research to support expert consultation and advice to public and private landowners and resource users to promote action that leads to the recovery of endangered and at-risk salmonids. NOAA has used the ESA's flexibility to work cooperatively with the States of Oregon and Maine to develop salmon conservation plans thereby preventing Federal listings of Atlantic and West coast salmon species. This increase also supports recovery actions for right whales, Hawaiian monk seals and Stellar sea lions. A $3.3 million program (a decrease of $0.5 million from the $3.8 million FY 1999 base) is requested to fund the second year

implementation of the International Dolphin Conservation Act. This will continue a four-year study on the effects of encirclement of dolphins as a method for harvesting tuna and development of a tracking and monitoring system for verification of "dolphin-safe" tuna imports. A decrease of $0.4 million is requested to end funding to the University of Alaska for fishery observer training program which is duplicative of other training available at the Alaska Fisheries Science Center in Seattle, Washington.

An increase of $2.3 million, including $1.5 million for DARP, is requested for the Habitat Conservation line item to provide operational and programmatic capability for the Restoration Center which serves as NOAA's focal point for habitat restoration, restoring fish habitat and other living and nonliving natural resources injured by human activities, and transferring restoration technology to the public and private sectors. In addition, the Center coordinates NMFS' participation in both the Coastal America Program and in projects conducted under the NOAA/Corps of Engineers Memorandum of Agreement for habitat creation within Corps public works program.

NOAA requests an increase of $0.9 million for Enforcement and Surveillance activities. This increase will advance critical enforcement and surveillance strategies through the Voluntary Compliance Programs, Vessel Monitoring Systems, and state performance contracts. All of these initiatives are essential to educate the public, deter potential offenders, and detect, apprehend, and prosecute willful violators of Federal statutes in support of the Nation's goal to replenish and protect fisheries.

State and Industry Assistance Programs - This budget sub-activity provides for product quality and safety research, grants to states under the Anadromous and Interjurisdictional Fisheries Acts, funding for the three Interstate Fisheries Commissions, and for the Atlantic Coastal Fisheries Act. NMFS requests a net decrease of $3.9 million for FY 1999.

NOAA requests an increase of $0.3 million for the Anadromous Fishery Project (Striped Bass) in the Northeast. A decrease of $2.7 million is requested for one-time activities funded by the Atlantic Coastal Fisheries Act and passed-through to the Atlantic States Marine Fisheries Commission. A decrease of $0.8 million is requested to terminate funding to the Oceanic Institute in Hawaii for fisheries development activities. A decrease of 7 FTE and $0.7 million is requested to transfer product quality and safety program activities to the Food and Drug Administration as part of the Seafood Inspection PBO.

February 26, 1998

JOHN A. KITZHABER, M.D.
GOVERNOR

The Honorable William Daley
Department of Commerce
15th & Constitution Ave NW
Washington DC 20230

Dear Secretary Daley:

Since we met in Washington D.C. last December, I have continued to work toward the successful implementation of the Oregon Plan for recovering coastal coho salmon. In addition, we have prepared a steelhead supplement to expand our efforts to include this species. This new approach to implementing the Endangered Species Act (ESA) holds great promise. Not only does it avoid the conflict and polarization which has often accompanied a listing, it has brought private landowners to the table in a positive way which has resulted in habitat improvements which go far beyond the "take avoidance" required under the law.

I am writing because of a growing concern that our work may be jeopardized by a lack of communication and cooperation between the National Marine Fisheries Service (NMFS), other federal agencies, and the State of Oregon.

As you no doubt are aware, NMFS has announced new listing proposals for chinook and steelhead that cover much of the west coast. If you want states to succeed in taking the lead on salmon recovery, the federal government needs to: 1) support the states' approaches for broad-based public involvement in species recovery; 2) apply internally consistent and well-defined standards in guiding state recovery efforts; and 3) provide substantial funding assistance. Let me elaborate on each of these points.

1) Supporting state approaches for broad-based public involvement in species recovery. Clearly the traditional approach to implementation of the ESA has not been highly successful. Federal recovery plans are only contemplated after a species is in danger of extinction, plans are costly and often take many years to develop, and there is insufficient authority for plan implementation – particularly on non-federal lands. The number and range of listed species is growing rapidly, and there are far too few examples of successful recovery.

Recognizing that states are often in a better position to develop and implement species recovery plans, the federal government has recently begun to encourage state involvement. I believe this opens the door to substantial progress. The Oregon Plan for restoring at-risk species and improving water quality under the ESA and the Clean Water Act is a case in point.

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As the federal government opens the door to state leadership in implementing the ESA, it is important for the federal government to allow the development of effective new approaches. If a state is committed to leading a recovery effort, the federal agencies can help by adapting as much as possible to the approach taken by the state. This is what I mean when I ask NMFS to join with us as a partner.

In Oregon, we use a team approach to developing environmental regulation. I firmly believe that a recovery strategy has the best chance of being implemented if it is developed collaboratively, with the involvement of the responsible regulators and affected constituencies. As you know, under the ESA, we can only ask landowners to avoid the "take" of a species; we cannot require them to actually promote recovery. Therefore, the approach that I have taken in Oregon is to use a solid regulatory approach to avoid "take," and to work cooperatively with landowners to achieve additional improvements that promote recovery.

Let me provide a recent example of the kind of approach that will not work in Oregon. Since the Memorandum of Agreement (MOA) with Oregon was signed in April of 1997, NMFS Northwest Region has been developing a proposal to improve forest practices in Oregon. We had requested that NMFS develop these recommendations in conjunction with an advisory group of the State Board of Forestry in order to give private landowners some ownership in the proposal. As you may recall, I brought this issue to your attention at our meeting in December. Instead of working within Oregon's process to develop the proposal, NMFS produced a document that is nearly 150 pages in length, with 12 pages of scientific references, and with no input from the advisory group or the State of Oregon. NMFS originally planned to have the three Regional Directors of the federal regulatory agencies (NMFS, Environmental Protection Agency, United States Fish and Wildlife Service) unveil this proposal at a meeting of an advisory group of the State Board of Forestry -- with the press in attendance -- and with no opportunity for advance review of the proposal. While ultimately a lower-profile presentation was arranged, this unwillingness to work with Oregon has threatened the very core of Oregon's collaborative plan.

In the future, I ask that NMFS work within the state's collaborative processes if they intend to propose a change to the Oregon Plan for Salmon and Watersheds. We need to bring the private landowners along with us, not simply try to run over them.

2) Applying internally consistent and well-defined standards in guiding state recovery efforts. While it is important to support a state's approach to public involvement, it is also important that the standards in implementing the ESA be internally consistent between NMFS regional offices. Again, let me offer an example. Once we had developed a plan to recover steelhead, I was very pleased that NMFS was willing to work with us on additional recovery measures that could preclude the need for a listing in the Klamath Mountain Province that is shared by both Oregon and California. But then a problem arose. As you may be aware, NMFS Southwest Region and NMFS Northwest Region have had different views on what was

necessary for California to recover steelhead and to retain candidate status in the Northern California Evolutionarily Significant Unit (ESU). As a direct or indirect result of mixed messages sent to the State of California, that state threatened to withdraw their commitment to measures in the Klamath Mountain Province. In turn, this threat caused a delay in Oregon steelhead listing decisions, and places a no-list decision in the Klamath Mountain Province in some jeopardy. We have worked hard to develop and to fund a solid recovery strategy for the Klamath, and I would be extremely unhappy if inadequate coordination at NMFS or between NMFS and California led to a decision to list in Oregon.

As a second example, I am enclosing a one-page agreement between NMFS, Interior, and Governor King of Maine that led to a deferral on the listing of Atlantic salmon. I have also noted that the NMFS decision withdrawing the proposed listing of Atlantic salmon in Maine was strongly supportive of that state's plan as a basis for avoiding a listing. In contrast, NMFS decision on Oregon coastal coho was equivocal in its treatment of the Oregon Plan. It is difficult to avoid the conclusion that Oregon is being held to a very different standard than is Maine. In addition to extensive measures to recover coho and steelhead (two plans of 3,000 pages each), extensive monitoring strategies, a commitment to adaptive management, and an annual audit by an Independent Science Team, I signed a long memoranda of agreement for coho that reflects a lack of trust that Oregon will follow through with our recovery plan commitments. I am now being asked to sign a similar agreement for steelhead. In addition to the Maine agreement, I am enclosing the two Oregon MOA's for your consideration. Most of the issues raised in these agreements are addressed in much more detail in our recovery plans.

As a third example, let me cite the NMFS Northwest Region's recent proposal on changes to the Oregon Forest Practice Act. The 150 page proposal mentioned above would result in a reduction of timber harvest on private forest lands in Western Oregon of between 40 and 80 percent, with many landowners being put out of business entirely. The standards being proposed for private forest lands in Oregon are higher than for any habitat conservation plan anywhere on the West Coast and, I would guess, anywhere in the country.

Mr. Secretary, I would remind you that these proposed standards go far beyond what NMFS could ever achieve under an actual listing. Clearly, our objective must be the recovery of species and not merely "take avoidance." To recover the species we will ultimately need the cooperation of private landowners. If NMFS alienates the forest industry, either through a lack of collaboration or by attempting to force restrictions of forest activities that result in a massive taking of private land unachievable even under an ESA listing, I fear we will have no support for our recovery effort.

Finally, I believe it is important for NMFS to make explicit the criteria for listing a species, and also for delisting. We need to remove the "black box" perception that shrouds the listing process. Listing criteria can help guide our recovery efforts, while delisting criteria will clarify our

objectives and provide additional motivation for recovery. To ensure we are working toward the same objectives, states and tribes should be involved in biological review teams and in recovery teams.

3) Provide substantial funding assistance. As we discussed in December, states that are taking the lead in recovery plan development and implementation need federal funding. It is a federal responsibility, under the ESA, to develop and implement recovery strategies. The State of Oregon appropriated $32 million in new money to implement the Oregon Plan for Salmon and Watersheds, and we are spending an additional $100 million this biennium to vigorously implement the environmental laws and regulations that support that plan.

I appreciate the fact that Terry Garcia participated in a meeting two weeks ago to discuss Oregon's funding needs for steelhead. I hope that you can help us this fiscal year, as well as in the 1999 budget.

Mr. Secretary, I appreciate your taking the time to read these thoughts. I am doing my utmost to recover salmonids in Oregon in a collaborative manner that is resulting in real, on-the-ground improvements, and in changes in attitude that are essential if we are to achieve long-term recovery. However, I do not believe that I should be treated differently from other governors in terms of trust by NMFS staff nor that Oregon should be held to a higher standard than other states.

I have no doubt that you understand the issues I have raised here. I believe the solutions will be found in better coordination and communication -- both vertical and horizontal -- within NMFS. I also believe we need a more trusting and transparent relationship between NMFS and the state, and a greater willingness to tailor sound, science-based recovery strategies to the politics and policies of the Northwest.

I look forward to working with you to achieve the kind of progress that results from a true partnership.

Sincerely,

John A. Kitzhaber, M.D.

JAK/NR/sm

Enclosures

c: Vice President Al Gore
Katie McGinty
Will Stelle

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

March 17, 1998

Honorable Rolland Schmitten
Director
National Marine Fisheries Service
1315 East West Highway
Silver Spring, Maryland 20910

Dear Director Schmitten:

Thank you for you assistance in the recent hearing held by the Committee on Resources regarding the Endangered Species Act. I would appreciate your cooperation in regard to providing the following information to the Committee on Resources.

First, please provide to the Committee a copy of the any and all agreements, conservation plans, or memoranda of understanding with the State of Maine that led to the decision not to list the Atlantic Salmon. Also provide to the Committee any and all agreements, conservation plans, or memoranda of understanding with the State of Oregon which led to the decision not to list various species of coho salmon.

Two, please provide a detailed written explanation of the manner in which the concept or application of the "evolutionarily significant unit" or ESU as been applied or used in defining or determining which species of Pacific salmon and which Atlantic salmon will or will not be determined to be an endangered or threatened species under the Endangered Species Act. What is the distinction between an ESU and a distinct population segment. Why wasn't the ESU concept applied with respect to the Atlantic Salmon.

Three, in the budget submission provided to the Committee by the National Marine Fisheries Service, you state that you intend to establish a "rapid response enforcement team" for sea turtle enforcement efforts in the Southeast Region. In light of the fact that the United States Coast Guard already provides for enforcement of the sea turtle protection regulations and does an outstanding job, why is the team needed, how much will it cost over the next five years, and what will be the specific duties assigned to the team. What geographic areas will be the focus of its enforcement effort? Is there any other comparable enforcement "team" anywhere else in the country under the jurisdiction of the National Marine Fisheries Service? How will the team be selected and trained?

Your response to this letter should be provided not later than 5:00 p.m. on April 3, 1998. All responses and documents should be sent to Elizabeth Megginson in 1320 Longworth HOB, Washington, D.C. 20515. Should you have any questions regarding this request you should contact Ms. Megginson at 202-225-7800.

Yours truly,

Don Young
Chairman

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

APR 29 1998

The Honorable Don Young
Chairman, Committee on Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter containing follow-up questions on the Oregon coho and Maine Atlantic salmon conservation plans, evolutionarily significant units (ESUs), and our "rapid response enforcement team." I have responded to the different topics under their appropriate headings.

Oregon coho and Maine Atlantic salmon conservation plans

Enclosed are copies of Maine's Atlantic Salmon Conservation Plan and agreements/memoranda of understanding that led to the decisions not to list Atlantic salmon and Oregon coho salmon. As previously discussed with your staff, Oregon's Coastal Salmon Restoration Initiative can be found on the World Wide Web at "http://www.das.state.or.us/salmon/Chap-0.html".

Evolutionarily significant units

The National Marine Fisheries Service (NMFS) has used its Policy on Applying the Definition of Species under the Endangered Species Act (ESA) to Pacific salmon since 1991 to delineate ESUs, or distinct population segments (DPSs), of Pacific salmon as authorized by the ESA. NMFS developed this policy in response to petitions to list salmon in the Snake River Basin, using the concept of ESUs, which had some currency in the scientific literature. Similarly, NMFS and the U.S. Fish and Wildlife Service (FWS) have used the Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the ESA since 1996 to delineate DPSs of Atlantic salmon and other vertebrate species. While the joint policy does not officially use the term ESU, there are strong conceptual similarities between the two

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approaches. The policies are consistent. The ESU policy provides more details specific to Pacific salmon life histories.

These policies provide guidance on how to interpret the distinct population segment language in the ESA. Both policies involve two steps in order to delineate a DPS: (1) the population must be substantially reproductively isolated, or discrete; and (2) the population must represent an important component of the evolutionary legacy of the species (i.e., must be significant). If these two criteria are met, then the population qualifies as a DPS (or ESU, in the case of Pacific salmon), and therefore, a species, under the ESA. Once a DPS or an ESU is delineated, its status and current threats, as well as ongoing conservation efforts, are evaluated to determine whether it warrants an ESA listing as threatened or endangered.

"Rapid response enforcement team"

NMFS' Office for Enforcement (OLE) developed and deployed a highly mobile, Protected Resources Enforcement Team in 1997/98 in direct response to increased strandings of marine turtles and as a Reasonable and Prudent Measure and Term and Condition of the 1996 Biological Opinion. This team of uniformed OLE officers, located along the Gulf of Mexico and Florida's Atlantic coast, was formed to respond in an immediate and timely manner to protected marine resource events which often occur in these areas. The primary focus is marine turtle protection, however, the team will also respond to events which involve other protected marine resources such as whales or dolphins. Nearshore shrimping activity is now thought to be the probable cause of continuing and significant levels of marine turtle mortality. This area is seldom covered by the larger U.S. Coast Guard (USCG) patrol vessels due to the shallowness of the waters (often 6 feet or less in depth). Also, the NMFS response team is focused on protected marine species and is not multi-tasked for drug interdiction, vessel safety, immigration, or search and rescue, nor is it limited by state boundaries as are state resource agencies. This team will have only positive impacts on the legitimate shrimp fishing industry, as the highly trained team will complete its mission very rapidly, with little or no inconvenience to the fishers, and the projected result will be reduced turtle mortality and a continuing and healthy shrimp industry.

The Protected Resources Enforcement Team of the southeast will have yearly projected operational costs of less than $250,000. A 5-year estimated cost for this team with a total of six personnel (operational and administrative costs included) is $3.15 million. The team members will be selected based on particular qualifications and skills. Training will be provided to team members as outlined in OLE's national training policies for Officers and Special Agents. Specialized training, if needed, will be provided to those individuals requiring such training to fulfill the rigors of their assignments.

I appreciate your interest in this matter. If you have any additional questions regarding the ESU concept, please call Marta Nammack at 301-713-1401. If you have any additional questions regarding the Protected Resources Enforcement Team, please call Bob Jones at 301-427-2300.

Sincerely,

David Evans

for Rolland A. Schmitten
Assistant Administrator
for Fisheries

Enclosures

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

APR 30 1998

The Honorable Don Young
House of Representatives
Washington, D.C. 20515

Dear Representative Young:

Thank you for your letter regarding additional questions you wanted answered following the March 5, 1998, oversight hearing on the Endangered Species Act (ESA).

Your questions are set out below in bold with the answers immediately following each question.

- **Why has NMFS headquarters failed to sign the 1997 Environmental Assessment (EA) for the Southeast Alaska chinook fishery after having the completed document for over eight months? Are there problems with this document or is this just a bureaucratic roadblock?**

The combined 1997/1998 EA was signed March 27, 1998.

- **With millions of dollars spent on Mitchell Act (NMFS) and Lower Snake Compensation Plan (USFWS) hatcheries, why aren't NMFS and USFWS using these hatcheries for supplementation and rebuilding of endangered and threatened salmon populations rather than producing fish in hatcheries that can't be utilized because of restrictions on wild fish harvests?**

In FY'98, NMFS anticipates spending about $12.0 million for operation of its 21 Mitchell Act hatcheries, while USFWS anticipates spending about $11.6 million for operation of its 12 Lower Snake River Compensation Plan (LSRCP) hatcheries.

Most of the fish production from these two programs is required by the Columbia River Fish Management Plan, as mandated by the Federal District Court as a result of a settlement in the United States v. Oregon litigation. The Management Plan provides hatchery specific salmon and steelhead production requirements necessary to help the Tribes achieve their treaty fishing rights. Approximately 50 percent of the Mitchell Act fish production is therefore released above Bonneville Dam to benefit tribal treaty fisheries. Of the remaining production released from hatcheries located below Bonneville Dam, about 19 percent is necessary to maintain

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broodstock for upriver treaty programs, while the remaining 31 percent of the Mitchell Act hatchery releases are made solely for supporting non-treaty sport and commercial fisheries.

All LSRCP hatchery production occurs in upriver locations. These fish all contribute to ongoing tribal treaty fisheries, although at greatly restricted levels due to needed protections for ESA-listed populations. This mitigation program is also expanding its actions to support naturally spawning populations of listed species through supplementation and now captive broodstock measures.

Hatcheries are being used in efforts to assist severely depressed populations of upriver salmon and steelhead. While supplementation has not yet been shown to be successful in producing self-sustaining natural populations, hatcheries can help slow down a population decline by producing more fish while factors for the decline are being addressed. As ESA-listed populations of naturally produced fish continue to decline, there has been greater use of artificial propagation to reduce the risk of extinction due to low population levels. This is most relevant to the LSRCP program which is located throughout the Snake River Basin. For the Mitchell Act, limited use of NMFS' funded facilities has been warranted given their downriver location. With the recent listings of lower river populations (and proposals for additional listings), NMFS expects greater use of Mitchell Act facilities in an attempt to help conserve depressed populations. At present, the Bonneville Fish Hatchery, a Mitchell Act facility, is being used to assist in captive broodstock programs for Redfish Lake sockeye salmon (Idaho) and Grande Ronde spring chinook (Oregon). Additionally, the Mitchell Act program currently provides 2 million coho salmon smolts annually to programs in the upper Columbia basin, Clearwater basin, Umatilla basin, and Yakima basin designed to restore extirpated populations of this species.

Salmon and steelhead are still being produced at Mitchell Act facilities that will continue to be available for harvest in spite of severe restrictions to historic mixed-stock fisheries. Two and one-half million steelhead smolts are released each year with external marks that allow sport fishers to continue selective, recreational fisheries for these fish, while releasing any wild, unmarked fish. A substantial program in mass marking of coho salmon (15.8 million smolts) was initiated at Mitchell Act hatcheries starting in 1996 to allow selective sport fisheries in ocean and inland waters while minimizing negative impacts on depressed wild populations. Additionally, upwards of several million Mitchell Act smolts are acclimated and released in lower Columbia River terminal fishery areas where known-stock sport and commercial fisheries can continue with insignificant effects on wild stocks migrating past.

- **Are there any peer-reviewed scientific studies proving fitness of a wild salmon population has been reduced genetically by the influence of a hatchery population?**

We are not aware of any studies that have been sufficiently detailed to allow an unequivocal determination of this issue. However, there is a great deal of evidence that shows, indirectly, that such a result can be expected. The attached studies, all published and all peer-reviewed, show that artificial propagation leads to genetic and/or phenotypic changes that are disadvantageous for survival in the wild. This being the case, population genetic theory indicates that genetic interactions with artificially propagated populations can in general be expected to reduce fitness of natural populations.

- **Given that the Upper Willamette River's naturally spawning population of chinook is most likely a mixture of hatchery strays, why did NMFS propose its protection as an "ESU" under the ESA? What scientific basis is there for this distinction?**

As explained in the NMFS policy on artificial propagation of Pacific salmon under the ESA (published in 1993), hatchery fish are not excluded from ESA consideration simply because they are (or were for part of their life cycle) in a fish hatchery. Two major points can be made here with respect to hatchery fish and the ESA: (1) artificial propagation may in some cases help assist recovery of natural populations, but maintaining fish in a hatchery is not a substitute under the ESA for conserving natural populations in their native ecosystems; (2) a key question in evaluating the relationship of hatchery fish to ESUs of Pacific salmon is whether genetic resources of the hatchery fish are similar enough to those of the natural populations in the ESU that the hatchery stock could be considered for use in recovery.

In the Willamette River basin, the majority of chinook salmon return to hatcheries, but there are still a substantial number that spawn naturally, and about half of these fish were naturally produced. Almost all the hatchery production in the basin has been derived from stocks native to the upper Willamette River. Both hatchery and wild chinook salmon from the Willamette River retain highly distinctive genetic and life history characteristics that distinguish them from all other chinook salmon coast wide. Historically, flow conditions over the Willamette Falls limited the time of year when fish could ascend the falls. As a result, spring run fish in the Willamette River have one of the earliest return timings in the Columbia River Basin. Differences in the time of emigration to the ocean, and even skeletal differences, exist between Upper Willamette spring-run fish and those from other ESUs. Furthermore, the ocean distribution of spring-run fish from the

Willamette River, based on Coded-Wire-Tag (CWT) recoveries, is distinct from that of populations from neighboring ESUs. Genetically, Willamette River spring chinook salmon are one of the most distinctive groups in the Columbia River basin. Therefore, it is clear that the Willamette River ESU remains largely intact, although at present it just as clearly is not meeting the goals of the ESA with respect to sustainability of the natural population.

- **How did NMFS make the determination to combine the Snake River and Deschutes River populations?**

The Deschutes River historically supported a population of fall chinook salmon, as evidenced by counts of fish at Sherars Falls in the 1940s. Genetic and life history data for the Deschutes River fall-run population indicate a closer affinity to fall chinook salmon in the Snake River than to those in the Columbia River. Similarities were observed in the distribution of CWT ocean recoveries for Snake River and Deschutes River fall-run chinook salmon; however, information on Deschutes River fish was based on a limited number of releases over a relatively short time frame. Following the public comment period, the Biological Review Team (BRT) will review all comments and new information before reaching a final conclusion about configuration of this ESU.

- **What effect, if any, will the redefined Snake River population have on Alaska fisheries?**

Based on marine recoveries of CWTs, the Deschutes River fall-run chinook salmon have a similar ocean distribution to that of the Snake River fall run. In fact, this similarity was one of the criteria used by the BRT to group the Deschutes River fish into the Snake River Fall Run ESU. A small proportion of the marine recoveries occurred in Alaskan waters.

- **Could the genetic similarities between Deschutes River chinook salmon and Snake River chinook salmon be a result of Snake River strays cross-breeding with Deschutes River chinook or were these populations historically similar?**

One hypothesis that was discussed by the BRT was that displacement of Snake River fish by construction of John Day Dam and/or the lower Snake River dams led to colonization of the Deschutes River by Snake River fish and interbreeding with, or replacement of, the native fish. There was a considerable increase in the run size of fall chinook salmon in the Deschutes River following the construction of John Day Dam, although it has been suggested that these fish may have been local mainstem spawners whose spawning areas were inundated. Coded-wire-tag data indicate that straying by non-native chinook salmon into the Deschutes River is very low

and does not appear to be disproportionately influenced by Snake River fall-run chinook salmon. Furthermore, there was some information which suggested that the Deschutes and Snake River populations were part of an ESU that, historically, also included ocean-type fish in the Umatilla, John Day, and Walla Walla Rivers. Populations in the latter three rivers are considered to be extinct.

- **If NMFS uses genetic analysis in the case of the Deschutes River and Snake River populations, why doesn't NMFS count hatchery fish that are genetically similar to the wild stock? For example, the Snake River Lyons Ferry hatchery is said to be genetically closer to the historic Snake River chinook salmon than the current "wild" stock.**

Hatchery populations are often considered part of the ESU, based on genetics, life history characteristics, history of stock transfers, etc. In this sense, hatchery fish "count" under the ESA and can be used as a tool to help aid recovery. In fact, hatchery fish are being used to assist recovery in almost every ESU of salmon and steelhead listed by NMFS. Where hatchery fish don't count is as a substitute for conserving natural populations in their native ecosystems. Therefore, in making listing and delisting determinations, NMFS focuses on the abundance and trends associated with natural production, not on the abundance of hatchery fish. Put another way, hatchery fish can be a means to accomplish an end under the ESA (restoration of natural populations), but do not represent an end in themselves.

I appreciate your continuing interest in the ESA and NMFS' implementation of it.

Sincerely,

Rolland A. Schmitten
Assistant Administrator
for Fisheries

Enclosure

ENCLOSURE

Fleming, I.A., Jonsson, B., Gross, M.R., and A. Lamberg. 1996. An experimental study of the reproductive behavior and success of farmed and wild Atlantic salmon. J. Applied Ecology 33: 893-905.

Describes experiments to measure reproductive success and behavior of fifth-generation farmed Atlantic salmon compared to newly captured wild salmon in artificial spawning channels. Farmed females exhibited poor breeding behavior, and had less than a third of the reproductive success of wild females. Farmed males exhibited very poor breeding behavior, and had one to three percent of the reproductive success of wild males.

Fleming, I.A. and M.R. Gross. 1989. Evolution of adult female life history and morphology in a Pacific salmon (coho: Oncorhynchus kisutch). Evolution 43:141- 157.

Studied body morphology, egg morphology and fecundity of female coho salmon from 13 wild and five hatchery populations and tested a number of a priori predictions relating morphology and fecundity to a number of environmental factors. Found that body and egg morphology differed significantly among populations in the manner predicted by the authors' adaptationist hypotheses. The sampled hatchery populations exhibited a reduction in characters associated with breeding competition and an increase in egg size compared to the sampled wild populations.

Fleming, I.A. and M.R. Gross. 1992. Reproductive behavior of hatchery and wild coho salmon (Oncorhynchus kisutch): does it differ? Aquaculture 103:101-121.

Fleming, I.A. and M.R. Gross. 1993. Breeding success of hatchery and wild coho salmon (Oncorhynchus kisutch) in competition. Ecological Applications 3:230- 245.

Fleming, I.A. and M.R. Gross. 1994. Breeding competition in a Pacific salmon (coho: Oncorhynchus kisutch): Measures of natural and sexual selection. Evolution 48:637-657.

In this series of papers the authors described the results of experiments that utilized an experimental spawning channel to study how the reproductive success and behavior of coho salmon is related to a number variables including morphology, density and origin (hatchery versus wild). The authors found evidence of strong selection at high densities for larger body size and against hatchery origin, and suggest that the behavior of the hatchery fish led to their poor reproductive success. Selection for all traits was stronger at high densities than at low densities, and at low densities hatchery fish performed about as well as wild fish. The hatchery stock had been founded from a local wild stock and had been in culture with no directed program of artificial selection for four generations (12 years).

Peterson, E., Jarvi, T, Steffner, N.G. and B. Ragnarsson. 1996. The effect of domestication selection on some life history traits of sea trout and Atlantic salmon. J. Fish Biol. 48:776-791.
Studied changes in morphology and life-history of hatchery reared Atlantic salmon over a twenty-three year period. Lacked a wild control, so effects may not be due to hatchery rearing.

McGinnity, P., Stone, C., Taggart, J.B., Cooke, D., Cotter, D., Hynes, R., McCamley, C., Cross, T. and A. Ferguson. 1997. Genetic impact of escaped farmed Atlantic salmon (Salmo salar L.) on native populations: use of DNA profiling to assess freshwater performance of wild, farmed and hybrid progeny in a natural river environment. J. Marine Sci. 54: in press.
Used DNA profiling to measure reproductive success of farmed and wild Atlantic salmon in the wild and found that fish-for-fish farmed salmon produced significantly fewer parr and smolts than wild fish. The farmed salmon stock had been in artificial culture for at least six generations.

Chilcote, M.W., Leider, S.A. and J.J. Loch. 1986. Differential reproductive success of hatchery and wild summer-run steelhead under natural conditions. Trans. Am. Fish. Soc. 115:726-735.

Leider, S.A., Hulett, P.A., Loch, J J. and M.W. Chilcote. 1990. Electrophoretic comparison of the reproductive success of naturally spawning transplanted and wild steelhead trout through the returning adult stage. Aquaculture 88:239-252.
Both papers describe the contribution of genetically 'marked' steelhead to natural production in the Kalama River and found that naturally spawning hatchery fish were only ~30 percent as successful as wild fish at producing smolts and ~10 percent as successful at producing returning adults. The hatchery stock used in the experiment was of mixed origin and not native to the Kalama River, and had been in artificial culture for four or five generations with some level of artificial selection occurring during part of that time.

Reisenbichler, R.R. and J.D. McIntyre. 1977. Genetic differences in growth and survival of juvenile hatchery and wild steelhead trout, Salmo gairdneri. J. Fish. Res. Board Can. 34:123 128.
Describes the results of a study in which the progeny of HxH, HxW, and WxW crosses were genetically marked and placed in artificial redds in several tributaries of the Deschutes River, OR. Survival and growth were measured from the eyed-egg to yearling stage, and the progeny of HxH crosses were found to have ~80 percent the survival of WxW crosses. The opposite pattern was seen in a control hatchery pond. The growth rates also differed significantly among the crosses in some streams, with HxW and HxH fish larger than WxW fish. The hatchery stock used had been founded two generations previously from the same wild stock that

was used in the experiment. All matings were performed in the hatchery, so differences in mating success between hatchery and wild fish were not measured. No information was provided on the degree to which the hatchery stock had been artificially selected.

Reisenbichler, R.R. 1997. Genetic factors contributing to declines of anadromous salmonids in the Pacific Northwest. pp. 223-244 in Pacific Salmon & Their Ecosystems: Status and Future Options, D.J. Stouder, P.A. Bisson, R.J. Naiman, Editors. Chapman & Hall, New York.

Provides a review of earlier studies and describes additional data on relative survivals of hatchery and natural steelhead in the Clearwater River, ID. Survival of hatchery fish in the wild to the sub-yearling stage was ~80 percent of wild survival and to the pre-smolt stage was ~60 percent of wild survival. The hatchery stock used had been in culture for five generations. No other details were provided.

Berejikian, B.A., Tezak, E.P., Schroder, S.L., Knudsen, C.M. and J.J. Hard. 1997. Reproductive behavioral interactions between wild and captively reared coho salmon (Oncorhynchus kisutch). J. Marine Sci. 54: in press.

Describes the results of a quantitative study of the reproductive behavior of wild and captively reared coho salmon in semi-natural stream setting. The captively reared fish were collected as naturally produced fry and reared to adulthood in captivity. The wild fish were collected as adults from a nearby stream. The captively reared fish did successfully spawn, but the wild spawners were competitively superior, with wild males dominant in 86 percent of the spawnings. Captively reared females produced on average 62.5 percent as many nests as wild females. Captively reared fish differed from wild fish in morphology and coloration. The differences between the captively reared and wild fish were probably predominately due to environmental effects, since the captively reared fish were in an artificial environment for less than one generation.

Swain, D.P. and B.E. Riddell. 1990. Variation in agonistic behavior between newly emerged juveniles from hatchery and wild populations of coho salmon, Oncorhynchus kisutch. Can J. Fish. Aquat. Sci. 47:566-571.

Quantitatively compared aggressive behavior between wild and hatchery juveniles that had been raised from eggs in a common environment. Hatchery juveniles displayed significantly greater levels of aggression than wild juveniles. The two hatchery stocks used in the study had each been in culture for five generations, and the wild fish were captured in streams near the site of the original hatchery broodstock collections. Because all groups of fish were reared in a common environment, the authors conclude that observed differences were genetically based, and because all the stocks came from the same or nearby populations, the authors

conclude that the differences were due to domestication selection in the hatchery. The authors hypothesize that relaxation of selection for predator avoidance in the hatchery was the selective agent.

Berejikian, B.A. 1995. The effects of hatchery and wild ancestry and experience on the relative ability of steelhead trout fry (Oncorhynchus mykiss) to avoid a benthic predator. Can. J. Fish. Aquat. Sci. 52:2476-2482.

This study describes experiments to quantitatively measure the predator avoidance abilities of wild and hatchery raised steelhead juveniles. Wild and hatchery steelhead native to the same watershed were spawned in a common environment, and the resulting progeny were used in the experiment. The hatchery fish used had been in culture for at least one and up to seven generations. Using three different types of experimental design, the author found that the hatchery juveniles were eaten by a native predator (Cottus asper) at significantly higher rates than the wild juveniles. Because both groups were spawned and raised under identical conditions, the author concluded that the observed differences were genetically based.

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

March 13, 1998

Mr. John Blankenship
Assistant Regional Director for Ecological Services
Region 3, U.S. Fish and Wildlife Service
Federal Building
Federal Drive
Fort Snelling, Minn. 55111

Dear Mr. Blankenship:

I wish to thank you for your participation in the hearing conducted by the Committee on Resources, on March 5, 1998 relative to the Endangered Species Act. The hearing raised a number of additional questions which you may be of assistance in answering. I would appreciate your providing written responses to the following questions:

1. How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?
2. How many members of your staff perform as their primary duty, the review of proposed listing rules and the finalization of proposed listing rules?
3. How many members of your staff perform as their primary duty, the review and issuance of Section10 incidental take permits?
4. With regard to the consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the committee with your policy regarding mitigation of impacts of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a section 7 consultation.

Please provide a copy of all documents requiring mitigation where a ratio of greater than 1:1 is required.

5. With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing

under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off site mitigation.

6. With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.

7. Please provide the Committee with a list of all incidental takes of endangered or threatened species in your region which have occurred in the last five years but for which no incidental take permit or incidental take statement was required.

Please provide the requested information to the Committee not later than 5:00 p.m. on Friday, April 3, 1998. All correspondence should be sent to the attention of Elizabeth Megginson at 1320 Longworth HOB, Washington, D.C. 20515. Your cooperation and assistance are greatly appreciated.

Yours truly,

Don Young
Chairman

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

March 13, 1998

Mr. Paul Nickerson
Endangered Species Coordinator
Region 5
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, Mass. 01035-9589

Dear Mr. Nickerson:

I wish to thank you for your participation in the hearing conducted by the Committee on Resources, on March 5, 1998 relative to the Endangered Species Act. The hearing raised a number of additional questions which you may be of assistance in answering. I would appreciate your providing written responses to the following questions:

1. How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?

2. How many members of your staff perform as their primary duty, the review of proposed listing rules and the finalization of proposed listing rules?

3. How many members of your staff perform as their primary duty, the review and issuance of Section10 incidental take permits?

4. With regard to the consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the committee with your policy regarding mitigation of impacts of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a section 7 consultation.

Please provide a copy of all documents requiring mitigation where a ratio of greater than 1:1 is required.

5. With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing

under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off site mitigation.

6. With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.

7. Please provide a copy of every environmental impact statement, all biological opinions, letters relative to the terms and conditions of an incidental take permit, every incidental take permit, and jeopardy opinions for a project to rebuild beaches on Long Island, New York, including a project to rebuild beaches on Fire Island, in New York State.

8. The attached article from the Portland Press Herald, dated July, 18, 1997, describes the destruction of nesting sites for the endangered least tern. Please provide the committee with all documents outlining requirements for federal, state, local or private organization actions to protect the least tern in Maine. Describe any action you took to respond to the destruction of least tern habitat as described in the attached article.

9. Please provide the Committee with a detailed explanation for the failure to adopt the definition of distinct population segment of Atlantic salmon to include each evolutionarily significant units (ESU's) as is used for Pacific salmonids.

10. Please provide the Committee with a copy of the conservation plan, memorandum of understanding, agreement, or other documents relating to the conservation of the Atlantic Salmon signed by the Secretary of the Department of the Interior and the state of Maine.

11. Provide the Committee with a description of the recovery program for the American burying beetle, including the costs of any reintroduction program and locations of any reintroduction.

12. Please provide the Committee with a list of all incidental takes of endangered or threatened species in your region which have occurred in the last five years but for which no incidental take permit or incidental take statement was required.

Please provide the requested information to the Committee not later than 5:00 p.m. on Friday, April 3, 1998. All correspondence should be sent to the attention of Elizabeth Megginson at 1320 Longworth HOB, Washington, D.C. 20515. Your cooperation and assistance are greatly appreciated.

Yours truly,

Don Young
Chairman

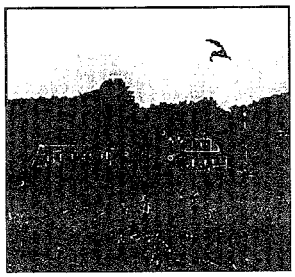
Portland Press Herald Maine Sunday Telegram

Friday, July 18, 1997

Higgins Beach partygoers wreck 10 nests of endangered seabirds

Least tern links

Staff photos by Gordon Chibroski



A least tern bearing a morsel of food for its young looks for its nest hidden in dune grass at the west end of Higgins Beach in Scarborough.

Maine Game Warden Nat Berry and Phil Bozenhard, a regional wildlife

By David Hench
Staff Writer
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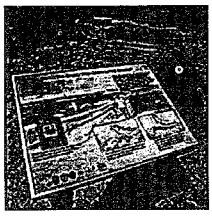
SCARBOROUGH - Beach parties on a secluded corner of Higgins Beach this week wiped out 10 nests of endangered least terns, and showed how difficult it is to protect the birds' dwindling breeding habitat.

Maine Audubon Society biologists found smashed eggs and dead chicks on Wednesday amid beer cans, pretzel bags and the remains of bonfires in a two-acre breeding area at the north end of the beach.

Biologists say the area is the ideal environment - removed from heavy beach traffic and free of natural predators - and potentially Maine's most productive breeding area for the birds.

But it is also a popular party spot for youths, partially hidden by dunes from the nearest cluster of beach houses and not visible from public roads.

biologist, repair a frail fence Thursday at Higgins Beach designed to protect nests of least terns from human traffic. The fence was knocked down, probably by the same partygoers who destroyed 10 nests at the east (Spurwink River) end of the beach.



This sign warns of the area that is protected to help save the Least Tern's nest from being destroyed by careless individuals on the western side of Higgins Beach in Scarborough.

"As long as people are going to use the beach there and the birds are there, you're always going to have conflicts. How to resolve that, I really don't know what the answer is," said Dick Stott, special agent for the U.S. Fish and Wildlife Service.

Stott said that killing the federally protected birds' chicks or eggs is an offense punishable by as much as six months in jail and a $5,000 fine. He and police are investigating the nest destruction. Stott encouraged anyone with information to contact him at 780-3235.

There are about 50 breeding pairs of least terns in Maine, and 20 of them had chosen Higgins Beach to lay this season's clutch of two eggs per pair. The loss of 10 nests at Higgins Beach is a major blow to the population, said Jody Jones, wildlife ecologist with the Maine Audubon Society.

"We were hopeful we would get some chicks out of this particular colony," she said, adding that the incident is among the worst since the society started managing nesting sites in 1989.

Biologists say police should do more to deter parties at the north end of the beach, but Scarborough police say they are doing more than most towns would do to protect the nesting sites.

"The town of Scarborough is supplying officers Friday and

Saturday nights at its own expense to protect 19 bird nests," said Lt. Marla St. Pierre. "Obviously the town understands the importance of it, or we wouldn't be doing it in the first place."

Police agreed this year to extend weekend patrols by a reserve officer through Labor Day, for a total cost of about $1,000, to help protect the terns.

But St. Pierre said that protecting the nests completely is beyond the department's resources. She said youths have congregated at the north end of Higgins Beach for the 20 years she's been with the department.

"Short of having somebody standing there in the dune grass from Memorial Day to Labor Day around the clock, I don't see how we can quell this problem," she said.

The destruction is frustrating though not surprising to Bob McCleery and Bryce Skolfield, biologists who roam from Ogunquit to Georgetown monitoring nesting sites for piping plovers and least terns.

Incursions into the protected area at Higgins have been happening weekly and even twice a week since April, Skolfield said, as he picked his way through the fine sand and sparse dune grass favored by least terns.

The intrusion into the area was clearly intentional. The debris included burnt stakes and signs that had been put up to warn people not to enter the nesting area, which is roped off with twine and metal stakes.

But the death of the birds and the destruction of the eggs was probably inadvertent, Skolfield said. The least terns' nests are just small depressions in the sand, and the eggs are hard to spot even in daylight. When threatened, young chicks crouch down and hide, motionless, in a sand depression.

McCleery gestured to footprints covering the sand and said the nests have little chance with that kind of traffic. "Our only major predator here at this beach would be humans."

McCleery conceded that the Audubon Society needs to work harder in the schools to educate young people about wildlife and the need to respect the breeding areas.

He knelt about 15 feet from the blackened circle of a bonfire and pointed to a dead tern chick, resembling a wad of cotton with a small beak and wiry legs. The men also found many of the small, sand-colored eggs abandoned or crushed, the remains still inside.

As McCleery neared the remaining nests, terns swarmed above him, their undersides brilliant white with dark accents on the wings and head. The birds flashed down toward him.

The fact that the birds didn't do that when the men arrived at the beach Wednesday gave them their first clue of the magnitude of the destruction.

"They weren't being territorial. Since they lost the nests, there was nothing to protect," Skolfield said.

This week's loss could be compounded if the terns no longer feel safe breeding at Higgins. There are only four breeding sites in Maine this year, and the birds may eventually not come back, Jones said.

So far, five new least terns have reached maturity and about six nests remain. Some of the birds whose nests were destroyed are trying to lay again.

They could succeed, but that's a long shot, Skolfield said. The eggs take 21 days to hatch and the chicks take another 21 days to grow enough to fly. By then it will be September, and time to start the migration south.

- A Louisiana nature park has a picture of a least tern incubating in a sand nest.
- An Arkansas site has a picture of hatchling least terns in their nest.
- The U.S. Fish & Wildlife Service has a least tern page as part of an endangered species site.
- This report by a UNH research team describes least tern habitats in Casco Bay.
- For more on Casco Bay's environment, see Casco Bay Online.

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In response reply to:
AEA/FWS

APR 10 1998

The Honorable Don Young
Chairman
House Resources Committee
Washington, D.C. 20515

Dear Mr. Chairman:

Attached are answers to questions 1-3 and 7 that you submitted to the Fish and Wildlife Service's Region 3 and answers to questions 1-3 and 7-12 directed to Region 5 as a follow-up to the March 5, 1998, oversight hearing on the Endangered Species Act. Responses to the remaining questions will be submitted to you by April 17, 1998, as we discussed with Elizabeth Megginson on your staff.

Thank you for the opportunity to answer these questions. Please contact me if you need additional information.

Sincerely,

DIRECTOR

Don Young question to Region 3

1. **Question: How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?**

Answer: Region 3 has nine biologists who perform this activity as a significant (but not necessarily "primary") component of their workload. Eight of these nine are located in field offices and one is located in the Regional Office in Minneapolis. The field office biologists also conduct other candidate determination, petition review, listing, consultation, and recovery activities. No single individual has candidate review or listing as a primary responsibility.

Don Young question to Region 3

2. **Question: How many members of your staff perform as their primary duty the review of proposed listing rules and the finalization of proposed listing rules?**

Answer: Region 3 has relatively few candidate species, which means that we prepare relatively few proposed listing rules. Nevertheless, the same individuals identified in Question 1 prepare and review any rules that Region 3 generates and also review rules prepared by other regions for species that also occur in Region 3. Each of our eight field office supervisors also devotes some time to the review of proposed listing rules, as does Regional management.

Don Young question to Region 3

3. **Question: How many members of your staff perform as their primary duty the review and issuance of Section 10 incidental take permits?**

Answer: To date, Region 3 has not issued any Section 10(a)(1)(B) permits. One Regional Office staff member has worked part-time on the development of a Section 10(a)(1)(B) permit for the State of Wisconsin's Karner blue butterfly HCP. This effort has also required considerable assistance from the endangered species specialist and the field office supervisor at the Green Bay Field Office.

Don Young question to Region 3

4. **Question: With regard to the consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the committee with your policy regarding mitigation of impacts of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a section 7 consultation.**

Answer: To be submitted by April 17, 1998

Don Young question to Region 3

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom the funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off-site mitigation.**

Answer: To be submitted by April 17, 1998.

Don Young question to Region 3

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On-site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: To be submitted by April 17, 1998.

Don Young question to Region 3

7. **Question: Please provide the Committee with a list of all incidental takes of endangered or threatened species in your region which have occurred in the last five years but for which no incidental take permit or incidental take statement was required.**

Answer: We are not aware of any situations that fit this question. During the past five years, Region 3 has not sought prosecution related to taking of endangered or threatened species that should have been covered by either an incidental take statement or a section 10(a)(1)(B) permit.

Don Young question to Region 5

1. **Question: How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?**

Answer: The Endangered species staff in Region 5 (Northeast Region) is distributed among the Regional office and ten Ecological Services field and sub-field offices. There are five biologists in the Regional office; and each of the ten field offices and sub-field offices has either one or two biologists who work full time on Endangered Species activities, and other biologists who work part-time on them. Due to the relatively small size of the endangered species program in Region 5, most biologists are engaged in all aspects of the program, including candidate determination; petition review; listing; consultation; and recovery. Our approach to candidate review has been to appoint ad hoc field teams to review the status of a particular species that might be in need of ESA oversight and make recommendations to the Regional Office as to the need for listing. No single individual has candidate review or listing as a primary responsibility, but they are a part of the duties of all the Region's endangered species biologists.

Don Young question to Region 5

2. **Question: How many members of your staff perform, as their primary duty, the review of proposed listing rules and finalization of proposed listing rules?**

Answer: Similar to the arrangement cited above, no single individual has review of proposed rules and finalization of said rules as primary responsibilities. Such documents are normally prepared in the field offices and submitted to the Regional Office for policy review and approval. Approved packages are then forwarded on to the Washington Office Division of Endangered Species. All rules are reviewed by both the Regional Endangered Species Coordinator and the Regional Assistant Coordinator for biological validity and policy compliance prior to being forwarded to Washington. The Regional Director is the last level of policy review within the Regional Office.

Don Young question to Region 5

3. **Question: How many members of your staff perform, as their primary duty, the review and issuance of Section 10 incidental take permits?**

Answer: Region 5 has issued only one Section 10 (a)(1)(B) incidental take permit in conjunction with a habitat conservation plan. During 1996, the State of Massachusetts was permitted additional beach use during the piping plover nesting season. Although staff time is devoted to these activities, the lead individual will vary depending on the species and geographic area.

Don Young question to Region 5

4. **Question: With regard to consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the Committee with your policy regarding mitigation of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a Section 7 consultation. Please provide a copy of all documents requiring mitigation where a ratio of greater than 1:1 is required.**

Answer: To be submitted by April 17, 1998.

Don Young question to Region 5

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off site mitigation.**

Answer: To be submitted by April 17, 1998.

Don Young question to Region 5

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: To be submitted by April 17, 1998.

Don Young question to Region 5

7. **Question: Please provide a copy of every environmental impact statement, all biological opinions, letters relative to the terms and conditions of an incidental take permit, every incidental take permit, and jeopardy opinion for a project to rebuild beaches on Long Island, New York, including a project to rebuild beaches on Fire Island, in New York State.**

Answer: We have asked the Army Corps of Engineers to send you the final Environmental Impact Statements for the first three projects listed below. See the attached letter to the New York District Office of the Corps (attachment 1). These are the only EISs we are aware of for Long Island. There have been no jeopardy opinions written, Section 10 incidental take permits issued or letters relative to the terms and conditions of an incidental take permit written that pertain to Long Island. Copies of the following four relevant, non-jeopardy opinions are attached (attachment 2) as requested.

A. Shinnecock Inlet Project - Reformulation Study, formal consultation letter (biological opinion) dated December 8, 1986.

B. Fire Island to Montauk Point, Moriches to Shinnecock Breach, Interim Plan for Storm Reduction, biological opinion dated December 20, 1994.

C. Fire Island to Montauk Point, Long Island, New York, Breach Contingency Plan, biological opinion dated July 14, 1995.

D. Shelter Island, New York, Erosion Control Project, revised biological opinion dated October 1, 1997.

Don Young question to Region 5

8. **Question: The attached article from the Portland Press Herald, dated July 18, 1997, describes the destruction of nesting sites for the endangered least tern. Please provide the committee with all documents outlining requirements for federal, state, local or private organization actions to protect the least tern in Maine. Describe any action you took to respond to the destruction of least tern habitat as described in the attached article.**

Answer: The least tern in the northeastern United States is not listed as either "endangered" or "threatened" under ESA, but it is protected as a migratory bird under the Migratory Bird Treaty Act (MBTA). The State of Maine has listed the bird as "endangered" pursuant to state law.

The Service does not have any statutory mandate to protect the least tern beyond the scope of the MBTA. The MBTA stipulates that it is unlawful to "...pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess...any bird, or any part, nest or egg thereof, included in the terms of the conventions." Therefore, anyone who destroyed these particular nests would be liable for Federal prosecution, with maximum penalties of six months in jail and/or a $5,000 fine.

Because this same beach is home to a piping plover colony, a species currently federally listed as "threatened," our Law Enforcement Division has conducted a number of random patrols to prevent destruction of plover nests. These patrols occurred during the time that the least terns were also nesting on the beach. In addition, local police officers conducted similar patrols during the nesting season.

As described in the Portland Press Herald article, several least tern nests were destroyed by senseless vandalism last summer. Consequently, the Service's Division of Law Enforcement conducted a thorough investigation under the Migratory Bird Treaty Act once the destroyed least tern nests were discovered. A number of people who were on the beach at the time of the incident were interviewed, and the investigation was referred to the local District Attorney's office for possible prosecution under state law. Prosecution was not pursued since no defendants were identified.

Don Young question to Region 5

9. **Question: Please provide the Committee with a detailed explanation for the failure to adopt the definition of distinct population segment of Atlantic salmon to include each evolutionarily significant units (ESUs) as is used for Pacific salmonids.**

Answer: The concept of an Evolutionarily Significant Unit (ESU) was developed by the National Marine Fisheries Service to deal solely with Pacific salmon. Subsequently, both NMFS and the Service developed and promulgated the policy outlining the parameters for delineating Distinct Population Segments (DPS) of vertebrate species. The proposed rule, issued September 29, 1995, describing a DPS of Atlantic salmon in seven Maine rivers as a listable entity under ESA was consistent with that policy. The withdrawal notice of December 18, 1997, included a broadened DPS to accommodate possible discovery of additional wild populations. Both rules are consistent with the joint DPS policy. Unlike the listings of the Pacific salmon for which NMFS has sole responsibility, jurisdiction for the Atlantic salmon is shared between FWS and NMFS. If further clarification of the ESU concept is desired, the NMFS should be contacted.

Don Young question to Region 5

10. **Question: Please provide the Committee with a copy of the conservation plan, memorandum of understanding, agreement, or other documents relating to the conservation of the Atlantic Salmon signed by the Secretary of the Department of the Interior and the State of Maine.**

Answer: We have enclosed a copy of the Maine Atlantic Salmon Conservation Plan; a statement of cooperation signed by Governor King; Secretary Babbitt and Assistant Secretary of Commerce Garcia; and, most importantly, an Executive Order signed by Governor King directing State agencies to implement the plan as attachment 3. Both Services are proud of the scope and details of the plan, and our role as catalyst in this action involving the state and numerous interested parties. We are now working closely with Maine to ensure effective implementation and to provide the necessary monitoring to measure and report progress. One of the pivotal elements of the plan is the commitment of the private sector to salmon recovery. Project SHARE (Salmon Habitat and River Enhancement) developed as a coalition within the private sector to help recognize and deal with salmon problems both in and adjacent to the rivers. A recent news article and a video about SHARE are enclosed for your information.

Don Young question to Region 5

11. Question: Provide the Committee with a description of the recovery program for the American burying beetle, including the costs of any reintroduction program and locations of any reintroduction.

Answer: A summary of the recovery effort for the burying beetle follows, along with the recovery plan, as attachment 4.

Summary of American Burying Beetle Recovery Work

Reintroductions were conducted on Penikese Island and Nantucket Island, Massachusetts. Penikese Island reintroduction pre-release surveys occurred in 1988 and 1989, and actual release of American burying beetles occurred in 1990-93. The Service and State of Massachusetts have been doing follow-up monitoring since 1994. Nantucket Island reintroduction occurred from 1994-1997 and is continuing. Pre-release surveys occurred in 1993 and 1994.

Since 1988, when the first pre-release surveys were done on Penikese Island, to the present (including Nantucket), we have granted a total of $7,000 in Section 6 funding to the State of Massachusetts. During this period, we have spent about an additional $10,000 for contract support of maintaining the captive beetle breeding colonies, for pre-release and follow-up surveys and for Service travel and per diem during the field work. Our total expenditure is, therefore, about $17,000 over the period of 1988 to 1997 for the two island reintroduction programs.

The Service in an effort to maximize the use of recovery dollars has worked with many partners to undertake these reintroduction efforts. Roger Williams Park Zoo has been critical to this effort by raising American burying beetles for reintroduction at no cost to the Service. On Penikese Island, free housing is provided for participating biologists by a local school. On Nantucket Island free housing is provided by the Marea Mitchell Natural History Museum Association. While equipment needs for these efforts are minimal, the University of Massachusetts field station assists by providing free logistical support. The State of Massachusetts is also a full partner in that they cover the cost of their personnel, equipment, travel, etc., and do not require reimbursement with section 6 funding.

When it comes to evaluating the outcome, it needs to be pointed out that these are not transplants. The American burying beetles for both Penikese and Nantucket islands are being captive bred for the Service, at first by Boston University, and now by the Roger Williams Park Zoo. A few beetles from a wild population on Block Island, Rhode Island, were translocated.

Success is determined by two methods: (1) pairs of beetles are set up on carrion so that they will reproduce; after 10-14 days, it is determined if breeding was successful, and any larvae present are counted; and (2) the following year, the same location will be surveyed by live trap to count

the number of surviving progeny.

While both populations are persisting in the short-term, it is certainly too early to declare either reintroduction effort a success or failure. We know our release methods are successful and that the pairs breed and produce good-sized broods (14-18 young) that allow for at least small numbers of beetles to survive and breed again the next year. These young are capable of finding, feeding, and breeding on naturally occurring carrion present on the islands. The long-term outcome of these efforts will not be known for some time.

Will reintroductions continue? Penikese Island is complete. We released 211 beetles over four years and estimate that nearly 1000 progeny have been raised. The island is only 74 acres in size, however, so no more releases are planned and only follow-up monitoring will continue. The Nantucket Island reintroduction will continue, since it is such a large island, about 33,000 acres, with about 12,000 acres in permanent conservation ownership.

Are additional reintroductions planned? The first mainland reintroduction of American burying beetles is planned for this summer in Athens County, Ohio. American burying beetles will be captured in Fort Chaffee, Arkansas and translocated and released in Ohio. The State of Ohio and Ohio State University are partners there.

Don Young question to Region 5

12. **Question: Please provide the Committee with a list of incidental takes of endangered or threatened species in your region which have occurred in the last five years but for which no incidental take permit or incidental take statement was required.**

Answer: We are not aware of any situations that fit this question. During the past five years, Region 5 has not sought prosecution related to taking of endangered or threatened species that should have been covered by either an incidental take statement or a section 10(a)(1)(B) permit.

Don Young question to Region 3

4. **Question: With regard to the consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the committee with your policy regarding mitigation of impacts of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a section 7 consultation.**

Answer: In its Mitigation Policy (46 FR 7656; January 23, 1981), the Service adopted the Council on Environmental Quality's definition of mitigation to include: a) avoiding the impact altogether by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and e) compensating for the impact by replacing or providing substitute resources or environments (see 40 CFR 1508.20). The Service's mitigation policy is expressly excluded from application to Endangered Species Act matters (see section III.B. of the policy).

The Service, however, routinely works with consulting agencies to identify measures to avoid and minimize impacts to listed species. Documentation where this has occurred would include an enormous number of concurrence letters related to informal consultations where the action agency agreed to either eliminate potentially adverse actions or to modify the timing or scope in such a way as to avoid the adverse effects. In all such cases, the net result was that the potential for "take" of listed species was determined to be so remote as to be either insignificant or discountable, and no "incidental take" authorization was provided.

In answering this question it is likewise important to clarify the differences between the reasonable and prudent alternatives developed to avoid jeopardy and reasonable and prudent measures and accompanying terms and conditions to avoid and minimize incidental take. By regulation, reasonable and prudent alternatives are alternatives the Service believes will avoid the likelihood of jeopardy or adverse modification; can be implemented in a manner consistent with the intended purpose of the action; can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; and are economically and technologically feasible. While the Service generally develops the alternatives to avoid jeopardy with input from the action agency, ultimately it is the action agency's decision whether to implement these measures. The action agency determines whether the reasonable and prudent alternative is within the agency's legal authority and is economically and technologically feasible. In attempting to develop alternatives, the Service considers a whole range of options including compensatory

"mitigation" both on-site and off-site in an effort to identify ways the proposed action can proceed while avoiding the likelihood of jeopardy. If compensatory mitigation is provided as a component of a reasonable and prudent alternative and the agency believes that it has the authority to implement it, the agency may require that mitigation be implemented. Once a jeopardy biological opinion with reasonable and prudent alternative is provided to the action agency, the Section 7 regulations stipulate that they must notify the Service of its final decision on the proposed action. In a biological opinion on the Mitchell's satyr butterfly (attachment 1) the Service included acquisition and/or conservation easement protection of occupied fen and adjacent upland habitat for the butterfly in a reasonable and prudent alternative to avoid jeopardizing the species. The RPA was worked out with the action agency, the Federal Highway Administration, in a series of meetings before finalization of the RPA and the biological opinion.

Incidental take includes the taking of an endangered species that is incidental to an otherwise legal action. When the Service anticipates that an action will result in the incidental taking of listed species it is required to identify those reasonable and prudent measures and their accompanying terms and conditions that are necessary and appropriate to minimize such impact. Measures are considered reasonable when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project, additionally, they must be within the legal authority and jurisdiction of the action agency or applicant to carry out.

While it has been the policy of the Service that it is not appropriate to require mitigation to offset incidental take, it was not explicitly stated in the 1994 Section 7 consultation handbook. Because the Service is aware that there occasionally has been an inconsistent application of this policy, it clarified the policy in its recently approved Endangered Species Consultation Handbook. The Service's new Handbook clearly states that it is not appropriate to require mitigation for the impacts of incidental take. Additionally, to ensure national consistency the Service is providing training to its personnel in the application of Section 7 consultation regulations through classes coordinated by the National Conservation Training Center. During consultation there are instances where action agencies or project developers have initiated and incorporated mitigation measures into the scope of their projects. In many cases, these measures are required as part of other Federal permitting (e.g., Section 404 permits). These measures are factored into the Service's analysis of the effects of the project and may be an important component in avoiding jeopardy. If the action agency chooses not to implement these measures, they would be altering the scope of the project for which consultation was conducted, thereby voiding the biological opinion; and any "incidental take" coverage would lapse. To emphasize the importance of these measures and that implementing them is non-discretionary, Region 3 routinely incorporates them as terms and conditions in "incidental take" statements; but they are not provided to offset any "incidental take" that is anticipated.

Don Young question to Region 3

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom the funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off-site mitigation.**

Answer: In 1994, Region 3 issued a jeopardy biological opinion for a highway project in Michigan that suggested the acquisition of off-site lands to permanently protect habitat for the Mitchell's satyr butterfly as a reasonable and prudent alternative. A copy of the biological opinion and "incidental take" statement are included (attachment 1) as well as a copy of the memorandum of agreement that implemented the purchase of the protected areas (attachment 2). We must emphasize that the acquisition of off-site lands was necessary to offset a potential jeopardy situation, not to compensate for "incidental take" associated with the project. It is also important to note that it was the action agency's decision to implement the alternative once it had determined that it had the authority and jurisdiction to do so.

Don Young question to Region 3

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On-site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: As described in our response to question 4, when the agency includes actions to avoid and minimize the impact of incidental take including "on-site" mitigation measures as part of the scope of work for which they are consulting, Region 3 has occasionally included them as terms and conditions of an "incidental take" statement. In one instance, some land was acquired by the City of Marion, Illinois. The restrictions were part of wetland mitigation required by a Corps of Engineers 404 permit. In a consultation on the project, Region 3 identified that in order to minimize the incidental take of Indiana bats residing in the wetland forest, deed restrictions designed to improve the quality habitat were included as terms and conditions of a reasonable and prudent measure. A copy of the biological opinion is provided as attachment 3.

Don Young question to Region 5

4. **Question: With regard to consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the Committee with your policy regarding mitigation of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a Section 7 consultation. Please provide a copy of all documents requiring mitigation where a ratio of greater than 1:1 is required.**

Answer: In its Mitigation Policy (46 FR 7656; January 23, 1981), the Service adopted the Council on Environmental Quality's definition of mitigation to include: a) avoiding the impact altogether by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and e) compensating for the impact by replacing or providing substitute resources or environments (see 40 CFR 1508.20). The Service's mitigation policy is expressly excluded from application to Endangered Species Act matters (see section III.B. of the policy).

The Service, however, routinely works with action agencies to identify measures to avoid and minimize impacts to listed species. Documentation where this has occurred would include an enormous number of concurrence letters related to informal consultations where the action agency agreed to either eliminate potentially adverse actions or to modify the timing or scope in such a way as to avoid the adverse effects. In all such cases, the net result was that the potential for "take" of listed species was determined to be so remote as to be either insignificant or discountable, and no "incidental take" authorization was provided.

In answering this question it is likewise important to clarify the differences between the reasonable and prudent alternatives developed to avoid jeopardy and reasonable and prudent measures and accompanying terms and conditions to avoid and minimize incidental take. Reasonable and prudent alternatives by regulation are alternatives the Service believes will avoid the likelihood of jeopardy or adverse modification; can be implemented in a manner consistent with the intended purpose of the action; can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; and are economically and technologically feasible. While the Service generally develops the alternatives to avoid jeopardy with input from the action agency, ultimately it is the action agency's decision whether to implement these measures. The action agency determines whether the reasonable and prudent alternative is within the agency's legal authority and is economically and technologically feasible. In

attempting to develop alternatives, the Service considers a whole range of options including compensatory "mitigation" both on-site and off-site in an effort to identify ways the proposed action can proceed while avoiding the likelihood of jeopardy. If compensatory mitigation is provided as a component of a reasonable and prudent alternative and the action agency believes that it has the authority to implement it, the agency may require that mitigation be implemented. Once a jeopardy biological opinion with a reasonable and prudent alternative is provided to the action agency, the Section 7 regulations stipulate that they must notify the Service of its final decision on the proposed action.

Incidental take includes the taking of an endangered species that is incidental to an otherwise legal action. When the Service anticipates that an action will result in the incidental taking of listed species it is required to identify those reasonable and prudent measures and their accompanying terms and conditions that are necessary and appropriate to minimize such impact. Measures are considered reasonable when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project; additionally, they must be within the legal authority and jurisdiction of the action agency or applicant to carry out.

While it has been the policy of the Service that it is not appropriate to require mitigation to offset incidental take, it was not explicitly stated in the 1994 Section 7 consultation handbook. Because the Service is aware that there occasionally has been an inconsistent application of this policy, it clarified the policy in its recently approved Endangered Species Consultation Handbook. The Service's new Handbook clearly states that it is not appropriate to require mitigation for the impacts of incidental take. Additionally, to ensure national consistency the Service is providing training to its personnel in the application of Section 7 consultation regulations through classes coordinated by the National Conservation Training Center. During consultation there are instances where action agencies or project developers have initiated and incorporated mitigation measures into the scope of their project. In many cases, these measures are required as part of other Federal permitting (e.g., Section 404 permits). These measures are factored into the Service's analysis of the effects of the project and may be an important component in avoiding jeopardy. If the action agency chooses not to implement these measures, they would be altering the scope of the project for which consultation was conducted, thereby voiding the biological opinion; and any "incidental take" coverage would lapse. To emphasize the importance of these measures and that implementing them is non-discretionary, Region 5 routinely incorporates them as terms and conditions in "incidental take" statements. Our records indicate that Region 5 has issued three no jeopardy biological opinions where the impacts of incidental take were minimized through mitigation. In one case, the project applicant offered the mitigation as a component of the project description and the Service incorporated it as a term and condition of the reasonable and prudent measures in an incidental take statement. Copies of these opinions are enclosed as attachment 4.

Don Young question to Region 5

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off site mitigation.**

Answer: We have required off-site mitigation as part of two of the three opinions referred to in question #4 because on-site options were non-existent. Both opinions dealt with activities affecting the dismal swamp least shrew, which required 404 permits from the Army Corps of Engineers. We have not required payment from or to anyone for mitigation.

Don Young question to Region 5

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: Region 5 has included on-site mitigation as part of one opinion referred to in question 4. Specifically, we allowed clearing of 19 acres of wooded habitat for the Delmarva fox squirrel in Maryland as part of golf course construction, with the provision that 177 acres be protected via a conservation easement. The reason was to ensure that a large block of habitat suitable for fox squirrels would remain. The project applicant included the mitigation in the project description and the Service incorporated it as a term and condition of the reasonable and prudent measures in the incidental take statement.

List of Attachments for Response to Congressman Don Young

Region 3
Attachment 1
Question 4&5: Mitchell's satyr butterfly..... biological opinion

Attachment 2
Question 5: Mitchell's satyr butterfly..... incidental take statement

Attachment 3
Question 6: Indiana Bat..... biological opinion

Region 5
Attachment 4
Question 4: Delmarva fox squirrel ..... biological opinions

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
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NOV 25 1997

David H. Dun, Esq.
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Eureka, California 95501

Re: Habitat Conservation Plans

Dear Mr. Dun:

This responds to your letter to me dated May 21, 1997, and also addresses concerns raised at the meeting here in Long Beach on July 9, as well as in the letter dated June 12, 1997, from Mr. James T. Brown, Vice President and General Manager of Simpson Timber Company; Mr. David S. Dealey, Vice President, Northern Operations, Fruit Growers Supply Company; and Mr. M. D. Emmerson, Vice President and Chief Financial Officer, Sierra Pacific Industries. I apologize for the delay in this response. Significant issues were raised in these letters and at the meeting regarding the authorities and responsibilities of NMFS in the development of long-term conservation plans (HCPs) to support issuance of incidental take permits under Section 10 of the Endangered Species Act. We welcome the opportunity to respond.

On May 6, 1997, NMFS listed as threatened the Southern Oregon/Northern California Coast Unit of coho salmon (the "Transboundary ESU"). This is the salmon species for which your clients seek an incidental take permit for certain of their timber operations. NMFS noted in the listing document that the coho populations in the Transboundary ESU are "very depressed," currently numbering fewer than 10,000 naturally-produced adults. According to the California Department of Fish and Game, populations in the California portion of the ESU could be less than 6 percent of their abundance during the 1940's. 62 Fed. Reg. at 24588. NMFS found that habitat degradation from activities such as logging and road construction, among others, has contributed to the decline of coastal coho salmon. 62 Fed. Reg. at 24592.

The coho salmon's status and prospects for long-term survival are tenuous at best. Habitat conservation plans now under development in California and Oregon will be particularly important to the species' survival as approximately 65 percent of the habitat in the range of the Transboundary and Oregon Coast ESUs is in non-federal ownership. 62 Fed. Reg. at 24602. Because many of these HCPs will cover large tracts of land and be in effect for many decades, the plans will, to a significant degree, determine the long-term viability of these ESUs. In NMFS' opinion, unless forest habitat conservation plans include those conservation measures necessary to provide essential habitat functions for the coho salmon, the likelihood of the species' survival and recovery could be appreciably reduced.

In general, the objective of NMFS is the same in each HCP: to achieve during the term of the plan the essential habitat functions required for long-term survival of listed species of anadromous fish, while allowing for incidental take. This objective requires that riparian measures in HCPs have a high probability of achieving habitat conditions that will support well-distributed, viable populations of the listed species. NMFS' objective fully comports with Section 10(a)(2)(B)(iv) of the Act, which requires the Secretary to find that a proposed permit will, at a minimum, "not appreciably reduce the likelihood of the survival and recovery of the species in the wild."

You have suggested that NMFS' insistence that forest HCPs provide essential habitat functions for coho salmon amounts to a requirement that permittees "recover" the species and exceeds the agency's authority under Section 10(a)(2)(B). This contention implies that scientists are able to draw a bright line between those riparian prescriptions necessary to provide for the survival of a species and those that would achieve recovery. For species such as the coho salmon, however, there is no such bright line.

In the joint ESA rules published by the U.S. Fish and Wildlife Service and NMFS (51 Fed. Reg. 19926 (1986); 50 C.F.R. Part 402), the Services explained their role in Section 7(a)(2) consultations and responded to comments that injury to recovery of an already depleted species would require issuance of a jeopardy opinion. In response, the Services noted that distinguishing between these standards could be difficult.

> The 'continued existence' of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.' However, significant impairment of recovery efforts or other adverse effects which rise to the level of 'jeopardizing' the 'continued existence' of a listed species can also be the basis for issuing a 'jeopardy' opinion. The Service acknowledges that, in many cases, the extreme threats faced by some listed species will make the difference between injury to 'survival' and to 'recovery' virtually zero.
> 51 Fed. Reg. at 19934.

The prevailing scientific view is that long-term survival of imperiled salmonid species requires protection and restoration of local populations and their habitat. As the National Research Council's recent report on salmonid conservation concluded:

> The long-term survival of salmon depends crucially on a diverse and rich store of genetic variation. Because of their homing behavior and the distribution of their populations and their riverine habitats, salmon populations are unusually susceptible to local extinctions and are dependent on diversity in their genetic makeup and population structure. Therefore, management must recognize and protect the genetic diversity within each salmon species, and it must recognize and work with local breeding populations and their habitats.

National Research Council, Committee on Protection and Management of Pacific Northwest Anadromous Salmonids, *Upstream* at 4 (1996). The prescriptions sought by NMFS are designed to provide habitat that will support a diversity of local breeding populations and are thus necessary for salmonid species' long-term survival.

The legislative history of the 1982 amendments to Section 10 of the ESA indicates that Congress viewed habitat improvement and species conservation as appropriate considerations in determining whether to issue long-term incidental take permits.

> The Secretary, in determining whether to issue a long-term permit to carry out a conservation plan should consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem.
> House Conf. Rep. No. 97-835. (emphasis added)

Forest HCPs often allow for significant timber harvest and consequent species impacts during the initial years. Thus, it may take decades before the riparian measures under the plan produce stream conditions that provide essential habitat functions for the listed species. In light of these facts, the legislative history of the Act supports the inclusion in Section 10 permits of measures which will provide for improved fish habitat over the life of the plan.

Requiring achievement of essential habitat functions necessary to support long-term survival of coho salmon is also supported by the "No Surprises" policy developed by the Fish and Wildlife Service and NMFS. Under that policy, which is currently the subject of rulemaking, once an HCP agreement has been executed, neither Service will seek additional financial compensation or land restrictions beyond those required under the terms of the HCP without the concurrence of the permittee. The policy provides significant long-term assurances to the Section 10 permittee that are not available to federal agencies or license or permit holders under Section 7. In order to be able to provide these assurances under the "No Surprises" policy, NMFS must ensure that conservation measures in the HCP provide a high probability that aquatic habitat functions essential to the species' long-term survival will be achieved and maintained during the term of the permit.

NMFS believes that measures to provide essential habitat function for coho are necessary for the species' long-term survival. NMFS' authority to require such measures is not limited to the authority provided in section 10(a)(2)(B)(iv). Section 10(a) confers broad authority to the Secretaries of Commerce and Interior in fashioning the terms and conditions of incidental take permits. For example, Section 10(a)(2) requires the permittee, through the habitat conservation plan, to minimize and mitigate the impacts of the taking "to the maximum extent practicable." That section also authorizes the Secretary to include in the permit additional measures "necessary or appropriate for purposes of the plan."

Throughout each HCP effort, NMFS has committed to ensuring that we employ the best available scientific information to determine the necessary terms and conditions, and to work in a collaborative effort with the applicant to ensure that the best information is brought to bear in the discussions. We remain committed to this process, and to a successful conclusion of each negotiation that will yield certainty and stability to the applicant and lasting benefits to fish and wildlife resources.

Once again, we thank you for your interest in this matter and look forward to working with you in the coming months.

Sincerely,

William T. Hogarth, Ph.D.
Acting Regional Administrator

cc:
James Brown, Simpson Timber Co.
David Dealey, Fruit Growers Supply Co.
M.D. Emmerson, Sierra Pacific Industries
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