

**H.R. 1142, TO ENSURE THAT LANDOWNERS RE-  
CEIVE TREATMENT EQUAL TO THAT PROVIDED  
TO THE FEDERAL GOVERNMENT WHEN PROP-  
ERTY MUST BE USED**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON RESOURCES**  
**HOUSE OF REPRESENTATIVES**

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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**HEARING ON H.R. 1142, TO ENSURE THAT  
LANDOWNERS RECEIVE TREATMENT EQUAL  
TO THAT PROVIDED TO THE FEDERAL GOV-  
ERNMENT WHEN PROPERTY MUST BE USED**

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**WEDNESDAY, APRIL 14, 1999**

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON RESOURCES,  
*Washington, DC.*

The Committee met, pursuant to notice, at 11:01 a.m., in Room 1324, Longworth House Office Building, Hon. Don Young [chairman of the Committee] presiding.

**STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF ALASKA**

Mr. YOUNG. The Committee will come to order.

We are going to go ahead with the process. The original intent, for the members that were told there was going to be a disputed subpoena issued, that is no longer the case. Secretary Babbitt has agreed to appear before Mr. Doolittle, and I think that is the right step forward, and I want to compliment him, the Department of Interior.

So this is really the first hearing by the Committee on Resources on H.R. 1142, the Landowners Equal Treatment Act of 1999. I introduced this bill because I believe the Supreme Court was right when it said in the Dolan case that it is wrong to force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. This is the primary purpose of the 5th Amendment takings clause.

I think this bill is especially appropriate today, on April the 14th, the eve on the day on which Americans have to turn over increasing amounts of their hard-earned income to the Federal Government. Private property owners pay more in taxes than any other group in this country. Property taxes are paid over and above the income taxes levied by the Federal and State governments and the various sales and use taxes paid. And by the way, may I suggest that the Federal Government owns over 835 million acres and doesn't pay a nickel in taxes.

Property taxes pay for our local schools, and the government does not do that. Property taxes pay for our roads, our police, the fire protection, and many other vital services that are provided for all of our citizens, not only to property owners, but to every citizen—even those who do not pay property tax receive the benefits of property tax. Our private property owners are the backbone of our

society. They pay the bills. We ought to afford them some respect and gratitude. And may I suggest any other society that does not have privately-held property, their governments have failed miserably. Private property is the soul of our conscious, the soul of our Constitution.

I support the purposes of the Endangered Species Act. However, when I voted for ESA—and one of the few remaining Members that did vote for ESA—in 1973, Congress was not told that this law would be used to force private property owners to set aside land for habitat, for species, against their will and without being compensated for the loss of their property. For the good of all, these private property people are suffering the burden of the ESA Act. If they aren't willing to set aside their land, the Federal Government threatens to put them—and, in fact, has put them in jail.

The Landowners Equal Treatment Act amends the Endangered Species Act to require, first, that the Federal Government avoid using the ESA to take away private property owners' right to use their own land. May I suggest that if there is endangered species on that private land, that person must have been doing something right, or the species wouldn't be there. But under the present law we punish; we do not reward.

Then, if the land is so important as habitat for endangered or threatened species, the use of the land cannot be avoided. The bill requires the government to minimize the impacts on landowners' right. If that is not possible, it simply requires the government to mitigate for the impacts by compensating the owner of the land for using it.

This is a very simple concept and almost identical to the process used by the Fish and Wildlife Service for its own compensation when their land is used by other Federal agencies. If the noise from an airport is a "use" of Federal lands, then certainly forcing landowners to provide habitat for federally-protected species is an even more intrusive "use" of private lands by the public.

The Fish and Wildlife Service is being compensated in the amount of \$26 million simply because they say that noise from overflights is a "use" of their refuge property. According to the 5th Amendment, private property owners have a right to be compensated when their property is used by the Federal Government for Federal public benefit.

Federal agencies do not have the right; yet, they have the power and clout to force other agencies and private landowners to pay them millions of dollars. What's good for the Federal Government is even better for the private citizen. Under H.R. 1142, we will ensure that landowners receive the fair and equal treatments they deserve.

I would suggest that, if everybody will listen to this bill and get out of the political rhetoric, that this is a solution to a very serious problem, and that is a problem that the ESA is failing. It has not been successful, and it has made the enemy of the government for the private property owners.

So this is the beginning of a series of a hearings. Mr. Pombo will be chairing it a little later on and as we go forth.

[The prepared statement of Mr. Young follows:]

## STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Good morning. Today the Committee on Resources will hear testimony on H.R. 1142, the Landowners Equal Treatment Act of 1999.

I introduced this bill because I believe that the Supreme Court was right when it said in the Dolan case that—it is wrong to force some people alone to bear public burdens which—in all fairness and justice—should be borne by the public as a whole. This is the primary purpose of the 5th Amendment takings clause.

I think this bill is especially appropriate today—**April 14**—the Eve of the day on which Americans have to turn over increasing amounts of their hard earned income to the Federal Government.

Private property owners pay more in taxes than any other group in this country.

Property taxes are paid over and above the income taxes levied by both the Federal and state governments and the various sales and use taxes paid.

Property taxes pay for our local schools, roads, police and fire protection, and many other vital services provided, not only to property owners, but to every citizen—even those who do not pay property taxes. Our private property owners are the backbone of our society. They pay the bills. We ought to afford them our respect and gratitude.

I support the purposes of the Endangered Species Act. However, when I voted for the ESA in 1973, Congress was not told that this law would be used to force private property owners to set aside land for habitat for species against their will and without being compensated for the loss of their property.

And if they aren't willing to set aside their land, the Federal Government can put them jail.

The Landowners Equal Treatment Act amends the Endangered Species Act to require first that the Federal Government avoid using the ESA to take away private property owners right to use their own land. Then, if the land is so important as habitat for endangered or threatened species that the use of the land cannot be avoided, the bill requires the government to minimize the impacts on the landowner's rights. If that is not possible, it simply requires the government to mitigate for the impacts by compensating the owner of the land for using it.

This is a very simple concept that is almost identical to the process used by the Fish and Wildlife Service for its own compensation when their land is used by other Federal agencies. If noise from an airport is a "use" of Federal lands, then certainly forcing landowners to provide habitat for federally protected species is an even more intrusive "use" of private lands by the public.

The Fish and Wildlife Service is being compensated in the amount of \$26,000,000 simply because they say that noise from overflights is a "use" of their refuge property. According to the 5th Amendment, private property owners have a right to be compensated when their property is used by the Federal Government for a public benefit.

Federal agencies do not have that right, yet they have the power and the clout to force other agencies and private landowners to pay them millions of dollars. What's good for the Federal Government, is even better for private citizens. H.R. 1142 will insure that landowners receive the fair and equal treatment that they deserve.

106TH CONGRESS  
1ST SESSION

# H. R. 1142

To ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1999

Mr. YOUNG of Alaska (for himself, Mr. TAUZIN, Mr. POMBO, Mr. PETERSON of Pennsylvania, Mr. DOOLITTLE, Mrs. CHENOWETH, Mr. RADANOVICH, Mr. CANNON, Mr. SHADEGG, Mr. SCHAFFER, Mr. WALDEN of Oregon, Mr. HASTINGS of Washington, Mr. SIMPSON, Mr. HANSEN, Mr. MCKEON, Mr. HERGER, Mr. HILL of Montana, Mr. GALLEGLY, Mr. DELAY, Mr. THOMAS, Mr. BAKER, Mr. SKEEN, Mr. THORNBERRY, Mrs. CUBIN, Mr. CALVERT, and Mr. BONILLA) introduced the following bill; which was referred to the Committee on Resources

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## A BILL

To ensure that landowners receive treatment equal to that provided to the Federal Government when property must be used.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Landowners Equal  
5 Treatment Act of 1999".

1 **SEC. 2. FINDINGS AND PURPOSE.**

2 (a) FINDINGS.—The Congress finds and declares the  
3 following:

4 (1) The Secretary of the Interior, through the  
5 United States Fish and Wildlife Service, recently de-  
6 manded and received compensation for the loss of  
7 use of federally owned property resulting from con-  
8 structive use of the property for other public pur-  
9 poses, in an amount of approximately \$26,000,000.

10 (2) The Secretary of Transportation has pro-  
11 mulgated a regulation allowing for compensation of  
12 Federal agencies for the lost use of agency property  
13 for public purposes, through a definition of the term  
14 “constructive use” that includes off-site impacts of  
15 Federal agency actions on federally owned property.

16 (3) The Federal Government enjoys no right  
17 under the Constitution to compensation for use of  
18 Federal agency property for other public purposes,  
19 while the rights of private persons to be com-  
20 pensated for the taking of their property by the Gov-  
21 ernment for a public purpose is a fundamental right  
22 protected by the Fifth and Fourteenth Amendments  
23 to the Constitution.

24 (4) Private property owners should be com-  
25 pensated in a manner that is at least as equitable  
26 as the compensation afforded to Federal agencies

1 when their property is used or constructively used  
2 for other public purposes.

3 (5) Fair and equitable treatment of private  
4 property owners will increase the willingness of pri-  
5 vate property owners to provide habitat for wildlife  
6 and plants protected under the Endangered Species  
7 Act of 1973 (16 U.S.C. 1531 et seq.).

8 (b) PURPOSE.—The purpose of this Act is to increase  
9 the efforts of private property owners to protect and re-  
10 store habitat for wildlife, by ensuring that their constitu-  
11 tional and legal property rights will be honored, respected,  
12 and protected in the implementation of the Endangered  
13 Species Act of 1973.

14 **SEC. 3. MINIMIZING IMPACTS ON PRIVATE PROPERTY.**

15 The Endangered Species Act of 1973 (16 U.S.C.  
16 1531 et seq.) is amended by adding at the end the fol-  
17 lowing new section:

18 “MINIMIZING IMPACTS ON PRIVATE PROPERTY

19 “SEC. 19. (a) IN GENERAL.—In implementing this  
20 Act, the head of an agency shall make every possible effort  
21 to avoid, minimize, or mitigate impacts on non-Federal  
22 property that result in Federal use of the property as a  
23 direct result of the action of the agency head under this  
24 Act or in furtherance of the purposes of this Act. An agen-  
25 cy shall not take action that results in a Federal use of  
26 non-Federal property under this Act unless the agency—

1           “(1) obtains the written permission of its  
2 owner;

3           “(2) negotiates a voluntary agreement author-  
4 izing that use; or

5           “(3) pays compensation in accordance with this  
6 section.

7           “(b) COMPENSATION FOR FEDERAL USE OF NON-  
8 FEDERAL PROPERTY.—An agency that takes action under  
9 this Act or in furtherance of the purposes of this Act that  
10 results in a Federal use of non-Federal property or any  
11 portion of non-Federal property without the written con-  
12 sent of the owner of the property shall compensate the  
13 owner for the fair market value of the Federal use of the  
14 property or portion. Compensation paid shall reflect the  
15 duration of the Federal use as necessary to achieve the  
16 purposes of this Act.

17           “(c) REQUEST OF OWNER.—An owner of non-Fed-  
18 eral property seeking compensation under this section  
19 shall make a written request for compensation to the agen-  
20 cy implementing the agency action resulting in the Federal  
21 use of property. The request shall, at a minimum, identify  
22 the affected portion of the property, the nature of the Fed-  
23 eral use of non-Federal property for which the compensa-  
24 tion is sought, and the amount of compensation sought.

1       “(d) NEGOTIATIONS.—The agency may negotiate  
2 with the owner to reach agreement on the amount of the  
3 compensation under this section, the terms of any agree-  
4 ment for payment, and the terms of any Federal use of  
5 non-Federal property for which compensation is paid. If  
6 such an agreement is reached, the agency shall within 6  
7 months pay the owner the amount agreed upon. An agree-  
8 ment under this section may include a transfer of title or  
9 an agreement to limit the period of time of the Federal  
10 use of non-Federal property.

11       “(e) CHOICE OF REMEDIES.—If, not later than 180  
12 days after the written request is made, the parties have  
13 not reached an agreement on compensation, the owner of  
14 the property may elect binding arbitration or seek com-  
15 pensation due under this section in a civil action.

16       “(f) ARBITRATION.—The procedures that govern the  
17 arbitration shall, as nearly as practicable, be those estab-  
18 lished under title 9, United States Code, for arbitration  
19 proceedings to which that title applies. An award made  
20 in such arbitration shall include a reasonable attorney’s  
21 fee and other arbitration costs, including appraisal fees.  
22 The agency shall promptly pay any award made to the  
23 owner.

24       “(g) CIVIL ACTIONS.—A civil action to enforce this  
25 section may be filed under section 11(g). An owner who

1 prevails in a civil action against the agency pursuant to  
2 this section shall be entitled to, and the agency shall be  
3 liable for, the amount of compensation awarded plus rea-  
4 sonable attorney's fees and other litigation costs, including  
5 appraisal fees. The court shall award interest on the  
6 amount of any compensation from the time of the Federal  
7 use of non-Federal property.

8       “(h) SOURCE OF PAYMENTS.—Any payment made  
9 under this section to an owner of property and any judg-  
10 ment obtained by an owner of property in a civil action  
11 under this section shall, notwithstanding any other provi-  
12 sion of law, be made from the annual appropriation of the  
13 agency that took the agency action giving rise to the pay-  
14 ment or civil action. If the agency action resulted from  
15 a requirement imposed by another agency, then the agency  
16 making the payment or satisfying the judgment may seek  
17 partial or complete reimbursement from the appropriated  
18 funds of the other agency. For this purpose, the head of  
19 the agency concerned may transfer or reprogram any ap-  
20 propriated funds available to the agency. If insufficient  
21 funds exist for the payment or to satisfy the judgment,  
22 it shall be the duty of the head of the agency to seek the  
23 appropriation of such funds for the next fiscal year.

24       “(i) AVAILABILITY OF APPROPRIATIONS.—Notwith-  
25 standing any other provision of law, any obligation of the

1 United States to make any payment under this section  
2 shall be subject to the availability of appropriations.

3 “(j) DUTY OF NOTICE TO OWNERS.—An agency may  
4 not take any action that is a Federal use of non-Federal  
5 property unless the agency has given 30 days notice to  
6 each owner of the property directly affected explaining  
7 their rights under this section and either obtaining their  
8 permission for the Federal use or providing the procedures  
9 for obtaining any compensation that may be available  
10 under this section.

11 “(k) RULES OF CONSTRUCTION.—The following rules  
12 of construction shall apply to this Act:

13 “(1) OTHER RIGHTS PRESERVED.—Nothing in  
14 this Act shall be construed to limit any right to com-  
15 pensation that exists under the Constitution or  
16 under other laws.

17 “(2) EXTENT OF FEDERAL AUTHORITY.—Pay-  
18 ment of compensation under this section (other than  
19 when property is bought by the Federal Government  
20 at the option of the owner) shall not confer any  
21 rights on the Federal Government other than the  
22 Federal use of non-Federal property agreed to so  
23 that the agency action may achieve the species con-  
24 servation purposes of this Act.

25 “(l) DEFINITIONS.—For the purposes of this section:

1           “(1) AGENCY.—The term ‘agency’ has the  
2 meaning given that term in section 551 of title 5,  
3 United States Code.

4           “(2) FEDERAL USE.—(A) The term ‘Federal  
5 use’ means—

6                   “(i) any action under this Act to—

7                           “(I) permanently incorporate non-  
8 Federal property into a Federal facility;

9                           “(II) place non-Federal property  
10 under the control of the Secretary; or

11                           “(III) temporarily occupy non-Federal  
12 property in a manner that is adverse to the  
13 constitutional right of the owner of the  
14 property against taking of the property by  
15 the Federal Government; and

16                   “(ii) any constructive use of non-Federal  
17 property.

18           “(B) In this paragraph the term ‘constructive  
19 use’ means any action described in subparagraph  
20 (C) taken under this Act that results in—

21                   “(i) substantial diminution in the normal  
22 or reasonably expected uses of non-Federal  
23 property;

1           “(ii) a reduction in the fair market value  
2           of non-Federal property of 25 percent or more;  
3           or

4           “(iii) in the case of the right to receive  
5           water, any diminution in the quantity of water  
6           received or available for use.

7           “(C) The actions referred to in subparagraph  
8           (B) are the following:

9           “(i) The imposition or enforcement of a  
10           prohibition of use of non-Federal property the  
11           purpose of which is to provide or retain habitat  
12           for any species of wildlife or plant determined  
13           to be an endangered species or threatened spe-  
14           cies.

15           “(ii) A designation of non-Federal property  
16           as critical habitat under this Act.

17           “(iii) The denial of a permit under section  
18           10 that results in the loss of the ability to use  
19           non-Federal property in order to provide habi-  
20           tat for wildlife or plants.

21           “(iv) An agency action pursuant to a rea-  
22           sonable and prudent alternative suggested by  
23           the Secretary under section 7, that would cause  
24           an agency to restrict the use of non-Federal  
25           property.

1           “(v) The imposition by any governmental  
2           entity of a limitation or restriction on an other-  
3           wise permissible use of non-Federal property by  
4           the owner of the property, as a condition of a  
5           Federal agency providing any land, money, per-  
6           mit, or other benefit to the governmental entity,  
7           if imposition of the limitation or restriction by  
8           the agency directly would constitute a Federal  
9           use of non-Federal property under the other  
10          provisions of this paragraph, unless the govern-  
11          mental entity has some other legal basis for im-  
12          posing the limitation or restriction.

13          “(3) FAIR MARKET VALUE.—The term ‘fair  
14          market value’ means the most probable price at  
15          which property or a right to use property would  
16          change hands, in a competitive and open market  
17          under all conditions requisite to fair sale, between a  
18          willing buyer and willing seller, neither being under  
19          any compulsion to buy or sell and both having rea-  
20          sonable knowledge of relevant facts, and without re-  
21          gard to the presence of any species protected under  
22          this Act. With respect to a right to use property,  
23          fair market value shall be determined on or imme-  
24          diately before the exercise of the right.

1           “(4) LAW OF THE STATE.—The term ‘law of  
2           the State’ includes the law of a political subdivision  
3           of a State.

4           “(5) NON-FEDERAL PROPERTY.—The term  
5           ‘non-Federal property’ means property which is  
6           owned by a person other than any Federal entity of  
7           government.

8           “(6) PROPERTY.—The term ‘property’ means  
9           land, an interest in land, the right to use or receive  
10          water, and any personal property, as defined under  
11          the law of the State.”.

○

Mr. YOUNG. Are there any other opening statements by anybody on the Committee?

[No response.]

If not, at this time I do welcome my good friend, the Honorable Bill Thomas, a Republican from California, for being the first panel up. You are up, Mr. Thomas. Congratulations for appearing before the Committee.

**STATEMENT OF HON. WILLIAM M. THOMAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. THOMAS. Thank you very much, Mr. Chairman. I would ask unanimous consent that my written statement be made a part of the record.

Mr. YOUNG. Without objection, so ordered.

Mr. THOMAS. And I do want to go on record indicating that I strongly support the chairman's bill, H.R. 1142, and every time we have a hearing I can present you with additional stories which reinforce our concern.

But let me say at the outset, in examining this issue, I have, notwithstanding the full support of the chairman's bill, decided to introduce three separate bills in an attempt to break the logjam which appears present if we deal with an omnibus bill. I just want to briefly mention H.R. 494, which deals with the process, trying to create a transparency and openness and the requirement that good science be used to list and delist. Then H.R. 495, which deals with land management, and a point that the chairman made, in terms of the societal desire, but the private property-holder having to pay society's desire should be just compensation. And then, finally, H.R. 496, which deals with the accidental taking and the habitat maintenance, which now appears to be totally criminal every time you take an action.

Let me say they are going to have testimony later about, if in fact we require compensation, that there are going to be people playing games and trying to beat the system. It cannot be worse than the current situation.

I brought just one picture to show you what occurred as the snowmelt from the very heavy snows in the Sierra began coming down. We have, as you know, a great depression in the Central Valley called the Tulare Lake Basin, and if the various rivers did what they wanted to do, they would refill that every year. So we have dams along these streams, Lake Success being one of them.

The problem is we have never been able to get Lake Success and the Corps of Engineers to build the height of the dam high enough so that in heavy runoff years we can sustain it. We have to sandbag it as a temporary dam.

In trying to sandbag it, of course, you back the water up behind it. What was discovered was these elderberry bushes which supposedly were the habitat for the elderberry longhorn beetle. We examined the plants. There was no evidence. Bore holes and the rest can be done by the biologists. However, our friends at Fish and Wildlife said, notwithstanding that, if the water raises, there could potentially be beetles. Having looked and decided there were none, nevertheless, the private owners who didn't want that land flooded out in the basin, agricultural land, had to pay \$130,000 to sandbag

these bushes when the lake backed up. And, of course, upon further examination, there were no beetles.

In another instance a fellow wanted to run a landfill. You have to realize that for over a decade I represented a county that was 93 percent government land, and it happens to be the second largest geographic county in the United States. Notwithstanding totally surrounded by Federal land, every time somebody wants to start a private property project, they have to mitigate acres. In this instance it was an attempt to create a landfill, a 20-acre landfill plot, and the initial mitigation was 3 acres for 1, or 60 acres. By the time they finished the negotiation, he was going to have to put up 380 acres to mitigate the 20 acres, at about \$1,000 to \$1,500 an acre. So he simply decided that the project could not go forward—not because there isn't a whole lot of Federal land, but because of this extortion requirement in terms of meeting exorbitant private property contributions to be able to conduct private property activities.

Mr. Chairman, it is long overdue that, if society truly wants to preserve truly endangered species, then the society ought to pay for it. Right now it is being sustained on the back of private industry, not that private industry shouldn't pay its fair share, but 3-to-1 acres, 6-to-1 acres, 10-to-1 acres, when, in fact, most of the area is already owned by the Federal Government, is simply wrong.

I want to congratulate the chairman on his attempt to break logjam. As I indicated, if we can't break it by dynamiting it, perhaps we can operate in several different areas, and move bills that address particular areas, and find commonality among those who would like to make some changes, but an omnibus bill won't approach it.

With that, I want to thank the chairman for the opportunity to testify.

[The prepared statement of Mr. Thomas follows:]

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

Mr. Chairman, thank you for the opportunity to give this statement to the Committee and to discuss the concerns of my Kern and Tulare County constituents from California's 21st District. I strongly support the letter and spirit of the Chairman's bill, H.R. 1142. It is an important step in making the Federal Government accountable for its actions and ultimately in building a real and effective species conservation system.

I have two goals today. First, I want to add to the record a few new "horror" stories to those which I have related in the past. Those stories reveal more ongoing, arbitrary and wasteful decisions by Federal authorities. Second, I want to suggest some ideas that are introduced in my three reform bills that may help the Committee build a broader coalition to create a fairer and more effective law to conserve endangered species.

#### **New Tales from the 21st District**

My District has been deeply affected by 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.

During the heavy flooding of last May in Tulare County, visitors to Success Lake would have been struck by a remarkable sight—workers diligently placing sandbags around Elderberry Trees that line the edge of the Lake. Why? Because despite entire communities being underwater, U.S. Fish and Wildlife Service was more concerned about the *possible* existence and protection of Elderberry Longhorn Beetles,

which might be injured by local efforts to raise the level of the Lake to hold back more flood water. The fact that local biologists informed the Service that no beetles were present did not dissuade the Fish and Wildlife Service. So, private landowners spent \$130,000 to sandbag 140 Elderberry Trees and are buying mitigation land and replanting new trees in order to satisfy the bureaucracy. What alternative did these landowners have? None, but to pay the extortion money so they can go about the emergency sandbagging activity and save their farms.

That is how the Fish and Wildlife Service acts during emergencies. This is how it acts day-to-day. One of my constituents was starting a recycling business on a 20-acre plot of land in McKittrick, California. He obtained a permit from U.S. Fish and Wildlife Service with the proviso that he mitigate for the presence of endangered species by providing three acres for every one acre used. No sooner did he do so, then the Service increased the mitigation requirement from 60 acres to 380, each acre costing \$1,000 in the area. How does a family afford to buy and run a wildlife refuge for the satisfaction of government bureaucrats? This is simply extortion, plain and simple.

#### **We Need Real Conservation**

To rural landowners, our government is no longer a protector of rights and freedom. It has become a garbled operation that collects illegitimate “protection” money for its pet projects, money that can’t be collected by legitimate means, i.e., the appropriations process. It is evidence that the current system of endangered species protection simply is not working. Why should rural landowners pay if so-called wildlife conservationists living in the city aren’t paying to protect species? So, to my colleagues who have resisted reform of the Endangered Species Act, I issue this challenge: give landowner incentives a chance. Chairman Young’s bill is an excellent and fair method of accomplishing this.

#### **Other Needed Reforms of the Endangered Species Act**

I want to leave with you with some general comments on other reforms that are needed. As you know, I have introduced three Endangered Species Act reform bills, H.R. 494—The ESA Fair Process Reform bill, H.R. 495—Fair Land Management Reform bill, and H.R. 496—The Liability Reform bill.

The **Fair Process Reform bill** will ensure open and equal access to information relied upon by Federal agencies when making decisions on endangered species. Perhaps the single worst complaint I have heard about the current Federal system is that the people who are directly affected by government decisions and bear the burden and cost of compliance are left out of the decision process. In their view, it is “taxation without representation.” Landowners are now stuck with paying the cost of preserving species; yet, they do not have access to the same information held by the Federal Government and their input is ignored.

My bill includes provisions for an open access to the public for scientific studies and underlying study data. It also replaces the secret listing process with an open hearing so landowners can participate in the decision making process, and landowner representatives can cross-examine agency personnel and experts. My bill also includes provisions to improve the scientific basis of government decisions such as minimal information requirements for petitioners, peer review of multiple scientific studies used to support listing or government action, and economic impact analysis of its actions required for listings.

The **Fair Land Management Reform bill** will ensure that the government pays for obligations it imposes on landowners. This bill includes a provision to compensate landowners for significant government takings. Similar in spirit to Chairman Young’s bill, H.R. 1142, I also include a provision that limits the mitigation requirements that can be imposed by government. As described in my example above, a hapless landowner must sometimes buy nineteen acres in order to use one of his own and then manage this new “biology project” for the government by putting up fences and hiring biologists for years to look after the habitat. My bill would limit how much mitigation the government can require.

The **Liability Reform bill** will stop unfair government penalties against landowners. Rural landowners are frustrated enough at having their lands confiscated for government use. It adds insult to injury when no species are even on the land, yet the government continues to impose these onerous burdens and even the threat of penalties on landowners. Criminal and civil penalties should be limited to actual and intentional takings of an endangered species, not accidental or hypothetical ones. My bill also includes “Safe harbor” and “No surprises” provisions to end the string of broken promises and added obligations put on landowners by the government such as those mentioned in my example above. It is sad that we need a law to ensure government honesty, but apparently that is needed.

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. Chairman Young's bill, H.R. 1142, will begin to address the fundamental unfairness in the current system. Rural landowners must now bear the whole weight of protecting endangered species. H.R. 1142 will restore the balance and spread that responsibility to all Americans, who benefit from conserving our precious wildlife.

Mr. YOUNG. Thank you, Mr. Thomas. If I am correct now, the sandbags cost the private property owners \$150,000?

Mr. THOMAS. Well, what happened was that they weren't going to sandbag the lake unless the private property owners were willing to foot the bill of sandbagging the bushes. So you were faced with either letting the government flood you or to pay for the sandbagging, which would then allow them to sandbag the dam to hold back the water, so that these bushes wouldn't be damaged.

It was the regional office that said they had to do it. The people on the ground said there are not beetles in these bushes. They are probably hosts, but they were not actual hosts. So the agreement was sandbag bushes, so we can sandbag the dam, so that we are not flooded.

Mr. YOUNG. But there was no science saying there were bugs? There was no longhorn elderberry beetle?

Mr. THOMAS. That is correct. They are a host bush, but there was no evidence of beetles being there.

Mr. YOUNG. And what did the Fish and Wildlife say about that?

Mr. THOMAS. That they are potential; therefore, you sandbag them or we won't allow the dam to be sandbagged. So you are in the position of having your land flooded or putting up \$130,000 to sandbag the bushes so you can sandbag the dam. If it weren't government doing it, this would be called blackmail.

Mr. YOUNG. The gentleman from Utah.

Mr. HANSEN. Thank you, Mr. Chairman. I just want to thank you for bringing this up. If there has ever been a bill that is past overdue, it is this one.

Let me just say in the State of Utah, in an area called Washington County, we have the desert tortoise. Just north of that we have the prairie dog. We have thousands of acres of ground that is now being used for retirement homes. I happened to be in a place with the Secretary of Interior when he offered these people, ground that goes normally for \$22,000 an acre, \$600 an acre because the desert tortoise was on it or the prairie dog.

Most of us here come out of local government. I remember as a city councilman when I had to practice eminent domain; didn't like to do it, but you had to do it to put in a water system. We paid the person for the property or we went to court and adjudicated the matter.

When I was in the State legislature and speaker of the Utah House, we had to take big chunks of ground for the State of Utah. We paid the person or, if we didn't do that, we adjudicated it through the court. One way or another, it had a land trade.

Now we find these things, and people have had ground for years after years after years, and what do they find? They find something on it, and we have found instances in Washington County where Fish and Wildlife has actually picked up a desert tortoise and carried it to the ground that someone had. And they have confused to that. We have got that down in statement form, and it really dis-

turbs me that they have done that. Therefore, the ground becomes almost useless at that point, and they say, "Oh, hey, this ground that is now worth \$20,000, \$30,000 an acre for one of the best retirement areas in America, we will give you \$600."

So what can you do with your ground? Yes, I'll tell you, folks; you can do one thing. You pay taxes on it. You can keep paying those taxes. If you don't, the county is going to take that ground back.

And we find ourselves in a situation all over America—now, Mr. Chairman, I know this piece that you are doing is very good. Personally, I feel the listing, delisting, peer review, and a number of other things—but this is a good stroke into it. And I just want to compliment you because, as I read the 5th Amendment, I don't know it reads any other way when it says, "nor shall private property be taken for public use without just compensation." If this isn't a taking, I don't know what is, and it is about time Congress acted on it.

And thank you for letting me have that outburst.

[Laughter.]

Mr. YOUNG. That was on Bill Thomas' time.

[Laughter.]

Mr. THOMAS. Yes, since my light is still green—in your opening statement you talked about people who preserve the land, and then being punished for preserving it. Just in the break while we were home, the court ruled that Lake Isabella, which is another dam and a lake behind it on the Kern River, will not be allowed to fill to its height. Last season, again, during this enormous runoff, it was more than 500,000 acre feet behind Isabella Dam. The court has said that it can raise no higher than 350,000 feet. Why? Because up one fork of the Kern River is the southwest willow flycatcher. There are only about two places left in the United States—one outside Phoenix in Arizona, up in the mountains, and in this area.

For more than 100 years, the southwest willow flycatcher, a very small bird, has been compatibly mingling with the cattle grazing in the area, but once it was discovered that this was one of that last few habitats, government moved in. The Corps has not purchased land to mitigate, and folks have gone to court and gotten a restraining order. We are now in danger of flooding if the runoff is greater than 350,00 acre feet. We have been told by court order we can't let the reservoir fill to its natural height when for over 100 years this little bird has gotten along just fine with the people who were there, private property, and the way in which the property has been used. But now, because someone discovered it and government stepped in, we may, in fact, flood areas, which of course we will be here asking for taxpayers' help for flooded areas.

Mr. YOUNG. The gentleman from Virginia, Mr. Pickett.

Mr. PICKETT. I don't have any questions at this time, Mr. Chairman. I want to compliment you for introducing this bill, and I hope you will get the support you need to make sure it gets passed. Thank you.

Mr. YOUNG. The gentleman from Colorado.

Mr. HEFLEY. I don't have any questions, either, but, you know, I remain dumbfounded, Bill, when I hear stories like you have described to us this morning. It makes me ashamed of our govern-

ment that we do not exercise both science and common sense. I think everybody in this room would say the Endangered Species Act has done a lot of good things. When I was out in Colorado and see the bald eagles feeding on the Arkansas River again, I say it has done a lot of good things. But it is carried by extremists to such ridiculous extents that it just makes me ashamed of the government, and I appreciate you bringing this to us.

Mr. THOMAS. In California it is not just the Federal Government; the State has learned the game as well. And it is, in fact, extortion of the rankest kind in requiring people to put up private acres for the private acres that they want to use, especially when you have got those Federal and State lands reserved right next to it.

Mr. YOUNG. Mr. Abercrombie, do you have any questions?

Mr. ABERCROMBIE. I am here to learn, Mr. Chairman.

Mr. YOUNG. Very good. Mr. Smith, no questions? The gentleman from Maryland.

Mr. GILCHREST. Thank you, Mr. Chairman.

Real quickly, Bill, a quick question and a quick comment. The elderberry trees, which is what I guess are in the picture——

Mr. THOMAS. Yes.

Mr. GILCHREST. [continuing] elderberry bush——

Mr. THOMAS. Bushes, yes. And those pass for trees, too, though.

Mr. GILCHREST. Okay. Now those are the trees that had to be protected?

Mr. THOMAS. Right.

Mr. GILCHREST. Did they grow up from seed?

Mr. THOMAS. There are a lot of elderberry bushes in the area. In fact, they were willing to plant a lot of additional elderberry trees higher up, above the normal waterline, but that was not sufficient. What they had to do was protect those that were down in the flood plain that, if they held back the water, would have, in fact, been flooded, notwithstanding the fact that there was no evidence of the presence of beetles. And we have a lot of elderberry trees that grow wild in that area.

Mr. GILCHREST. The way you present the story really shows a significant disconnect between people and the ability to exchange information and come to a reasonable conclusion. I would agree with Mr. Hefley from Colorado that the Endangered Species Act has really some significant, positive things, one of which Joel says there are bald eagles now in certain areas of his district. I have a bald eagle's nest about a half a mile from my house that wasn't there even 10 years ago, and there are more bald eagles coming through. There are even some golden eagles coming through. So something is beginning to happen. But we can't break the cycle of a positive, reasonable, respectable exchange of information between people, the public sector and the private sector, to fix this problem.

So, Bill, I appreciate your testimony.

Mr. YOUNG. I tell the gentleman from Maryland that all of us are in support of reasonable and rational conservation, and that where there is clear evidence, backed by good science, we have no problem. But what has happened under this is that, frankly, there is a degree of arrogance. When you have local biologists on the ground identifying the fact that there are no beetles present, but 300 miles away the bureaucrat in Fish and Wildlife says, "We want

these trees sandbagged or you are not going to get the sandbagging of the dam." Notwithstanding what I think would pass for anybody's examination of good science, they simply made that kind of a decision. It is a degree of arrogance on their part that we find most difficult to deal with.

If, in fact, it is a societal desire to preserve, it ought to be a societal requirement to pay. If there is mitigation involved, it ought to be not just private sector mitigation. There ought to be some way that society and the private sector can work together. But what we have got in the current law, as the chairman indicated, is an almost impossible working relationship. To say to someone that you want to use 20 acres for a landfill and you have got to go buy us, the public, out of your private dollars, 380 acres, notwithstanding the fact that they looked at the 20 acres and there were no endangered species on it—but it has the potential—that is just wrong.

Of course, the gentleman from Hawaii I think has every right to be concerned because, I mean, they are first in terms of endangered species. California is second. As you move east, there are fewer, since most of those have been killed or eaten, and all, virtually all of the mitigation concerns are in the West.

Mr. ABERCROMBIE. Mr. Chairman, I am sure Mr. Thomas knows that, in terms of endangered species in Hawaii, we go alphabetically.

Mr. THOMAS. Exactly.

Mr. YOUNG. I would like to make one comment before we get too far away, and I hate to do this because it is going to stir somebody up. The eagle was never saved by the Endangered Species Act. Mr. Gilcrest and Mr. Hefley, the eagle was never saved by the Endangered Species Act. The eagle was saved by the lack of use of DDT and pesticides.

Mr. THOMAS. Exactly.

Mr. YOUNG. But there has never, ever been a shortage of eagles, but they were dying because of the use of those two pesticides, or the DDT, but even the scientists will tell you that the eagle was not saved because of the Endangered Species Act. And it is always thrown up in my face, "Look what they have done with the Endangered Species Act."

Secondly, I can't understand how Fish and Wildlife can say that flooding an elderberry tree is going to hurt the beetles. When I was a young man, most of California was flooded most of the time, and those elderberry bushes thrived beautifully, and the beetle, by the way, thrived beautifully, too. I mean, I can't figure where the science comes in. That is my big argument, not in my bill, that there is no applicable good science. So you use the best science available, which is none, and then they make the private property owner bear the burden of mitigating and trying to make up for the expenditure or loss.

I know we get in arguments on the eagles, but check your scientists and they will tell, it was not the Endangered Species Act.

The lady from California.

Mrs. NAPOLITANO. Thank you, Mr. Chair. I am very interested in the bill because it does have some great parameters—not from my area because I don't have a lot of those endangered species in my area that need saving. But I am concerned about the cost to the

agency; the Endangered Species Act would have to pay the landowners fair value for the property. What will that do to the funding mechanisms, and how would the agency be able to perform their normal course of duties for other areas that need to be addressed? That kind of leads me to believe that somewhere along the line we are addressing a part of the issue. And I agree, there is a big issue, but what about the funding mechanisms to be able to carry this forth? And given that we have to be fair to the landowner, how do we address that, sir?

Mr. THOMAS. I would tell the gentlewoman that there is a very wide continuum in which this discussion can take place, since the position now is that you get nothing, and in fact you have to pay something as a private individual. The gentleman from Utah indicated that a lot of local governments—and I know you are familiar with the activities that go on in terms of eminent domain. There are a number of us who would be willing to say we would even let government determine the fair value of the land, rather than the private person, if, in fact, that is what is needed to move it off the dime. But even if you do that, there will be a cost involved.

But one of the difficulties with this legislation having been passed in the 1970's with a goal of where you wanted to go without a clear idea is that, basically, where we are today is that there are people who want to use this statute to deny people legitimate use of private property. If society wants it, they ought to provide the minimum compensation, and then however much that is, we ought to have the guts to fund it. So that you have an orderly process. If society thinks this is important enough to preserve, and it belongs to someone, and has value, whatever that minimal value is ought to be compensated.

It is the idea that right now there are people who want to run this public project with not just pure private funds, but extorted private funds beyond what is reasonable, because they are funding additional programs out of the requirement that people pay them. That is the problem with the law today.

Mrs. NAPOLITANO. Right, but does this actually address a mechanism where it can happen?

Mr. THOMAS. You will have to ask the chairman in terms of his particular bill. What I have done is break it down into three different segments and address the cost of reimbursement in a separate bill, and I give a number of options in which we deal with it.

I would tell the gentlewoman that, if that is of interest to her, I am quite sure we can create a dialogue to come up with an appropriate way in which we not only determine the amount that is necessary, but that we create a funding stream as well.

Mrs. NAPOLITANO. Yes, I am interested, and the unfortunate part is that I don't know as much as I should on the rest of California's need for something of this nature.

Mr. THOMAS. I will tell the gentlewoman, if she sits on this Committee for any length of time, she will know more than she wants to about it.

[Laughter.]

Mrs. NAPOLITANO. I am learning.

Mr. YOUNG. The gentleman from California.

Mr. POMBO. Thank you, Mr. Chairman. I don't have any questions for Mr. Thomas. Just I think in answer to my colleague's question, the example that Mr. Thomas brought out I think is an example of what happens when there is no cost to the agency. A lot of times that is the problem that we run into. If there is extorted funds out of the private sector in order to pay for their regulation, then there is nothing stopping them from requiring whatever they can dream up. This just happens to be one example of something that the scientists would tell you makes no sense, and your own common sense would tell you it doesn't make any sense. But when there is no cost to the agency to require it, they can do whatever they want.

We found with our landowners in the Central Valley, particularly, that if they have the ability to extort the cost of their regulation from the individual private property owner, there is just nothing to stop them from doing that. I think that with me one of my greatest objections to the way the Act is being implemented today is that there is no cost to the public for the public's demands on individual property owners.

In our Constitution, the Bill of Rights of our Constitution was designed to protect the individual's rights from the will of the majority and from the government. And the 5th Amendment—"nor shall private property be taken for public use without just compensation"—is completely ignored under the current application of the Act because we can just require whatever we want of an individual property owner. I think that is why a lot of these debates are stirring in Congress and throughout the country right now.

But thank you, Mr. Chairman.

Mr. YOUNG. Who is up next on that side of the aisle? Go ahead.

Mr. KIND. Thank you, Mr. Chairman. I just had a couple of questions for Mr. Thomas, just to clarify the story that he painted for us today.

First of all, was there any finding that there were elderberry beetles anywhere in this proximity, perhaps not on this property itself, but in the near vicinity?

Mr. THOMAS. I am told that, as you follow the stream—and I know it is difficult to believe that would create flooding at this time, but when the snows melt and the rains come, they do fill up—that a significant distance upstream there were some elderberry trees, but they were way above the flooding line of the lake.

Mr. KIND. That contained some beetles?

Mr. THOMAS. That did contain beetles and bore holes.

Mr. KIND. Okay. The other question is, was your office informed in regards to what Fish and Wildlife was considering before they issued their final decision requiring the sandbags and—

Mr. THOMAS. Actually, we intervened in an attempt to try to get a dialogue going between the Corps of Engineers that have control over Success Dam and Fish and Wildlife, so that we could mitigate the battle between the two agencies to get the dammed sandbags up, and that we tried to get Fish and Wildlife down there on the ground, and that we had local biologists make the decision to try to speed up the process, and that they simply refused to go along and said, "We are not going to sandbag the dam unless you protect the trees." So 140 trees were sandbagged.

Mr. KIND. Well, how far away was Fish and Wildlife's office?

Mr. THOMAS. I think they are in Sacramento? Yes, Sacramento. That is 200 miles.

Mr. KIND. Two hundred miles? Okay, thanks for that clarification.

Mr. THOMAS. Yes. Part of the difficulty is that, even when we get them on the scene, they really are simply there in a passive way. You can't engage them in a dialogue and quiz them about why they did this or what they want to do or why they want to do it. They are simply there to listen, and it is very frustrating for the locals because it is a one-way comment structure. And that is one thing, I think, that has to change; that these people are unwilling to explain why they believe certain things need to be done. It is very frustrating for people when a decision comes down like this.

But in the timeframe, I mean, the landowners had nothing to do. They said, do it, because we need the dam sandbagged.

Mr. YOUNG. Jim—

Mr. THOMAS. Excuse me, Mr. Chairman. The long-term solution, of course, is to raise the height of the Success Dam by 20 feet, and we have had this bill in asking the Corps of Engineers to raise the height of the dam. The gentleman from California, Mr. Radanovich and I share the area. And if we could raise the dam height by 20 feet, we wouldn't have to make these kinds of decisions, but that has not been possible in the recent days, given the money concerns.

Mr. YOUNG. The gentlelady from Idaho, Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. This is a phenomenal story, Congressman Thomas.

So the Corps of Engineers was in charge of the reservoir pool level?

Mr. THOMAS. Yes.

Mrs. CHENOWETH. Well, was there any evidence that you know of that the Fish and Wildlife Service and the Corps consulted with one another, or did anyone do a NEPA or an EA with regard to the impact?

Mr. THOMAS. We made sure they communicated with each other because our timeline was so short; we kind of used our offices to facilitate the communication between the Corps and Fish and Wildlife to try to resolve this, as the waters continued to rise. So there was communication; there was consultation, and the answer was Fish and Wildlife was not going to let the Corps sandbag the dam unless something was done about these bushes, notwithstanding the local biologists saying that the bushes that were threatened to be flooded, and in fact would have been flooded, they had no evidence that they contained a beetle.

Mrs. CHENOWETH. That is phenomenal. Thank you. Thank you, Mr. Chairman.

Mr. YOUNG. Mark Udall, any questions?

Mr. UDALL OF COLORADO. Mr. Chairman, I have no questions at this time. Thank you.

Mr. YOUNG. Okay. The gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thanks. I have nothing to add other than my support for the bill, and this is but a number of stories that seem to happen to us in California. Thank you.

Mr. YOUNG. Okay, Tom Udall.

Mr. UDALL OF NEW MEXICO. Mr. Chairman, I don't have any questions at this time, either.

Mr. YOUNG. Mr. Thornberry?

Mr. THORNBERRY. No.

Mr. YOUNG. Mr. Underwood?

Mr. UNDERWOOD. No.

Mr. YOUNG. Mr. Simpson?

Mr. SIMPSON. No.

Mr. YOUNG. Mr. Inslee?

Mr. INSLEE. No.

Mr. YOUNG. Mr. Sherwood?

Mr. SHERWOOD. No, thank you, Mr. Chairman.

Mr. YOUNG. Mr. Souder?

Mr. SOUDER. Did you mean Noah when you said California was flooded?

Mr. YOUNG. Pardon?

Mr. SOUDER. You said that back when you were young and California was all under water—

Mr. YOUNG. The valley was flooded. A slip of the tongue maybe, but Mr. Thomas to get the "dammed bags built." Now I don't know whether he meant—which way he meant that—[Laughter]—but I caught—

Mr. THOMAS. I will provide a written statement.

Mr. YOUNG. People don't know the history of the California valley; it used to be flooded actually up until in the 1930's. Now it, of course, no longer occurs unless they have a dam that breaks or something else happens.

But the elderberry bushes, which I am well acquainted with because I have them on my ranch there, we used to get flooded all the time, and they grew beautifully. We didn't know anything about beetles. We used the elderberries to make wine out of it. It made good wine, by the way. I don't know whether you know that. I don't know whether that is invading the thing or not.

But if there are no others, I would thank Mr. Thomas and hope we will continue to have your support as we go through this process. I know the administration is not happy with this bill, but we have to get this to the forefront, to the people, what is really happening with this act with the Fish and Wildlife.

This is one vote on the rule on the budget. I would suggest everybody who can be back here no later than 12 o'clock. It shouldn't take you that long. By 12 o'clock, we will reconvene. Thank you.

Mr. THOMAS. Mr. Chairman, thank you very much for the opportunity, and thank you for the bill.

Mr. YOUNG. Thank you, Mr. Thomas.

[Recess.]

Mr. YOUNG. The Committee will come to order.

We have panel two: Mr. Carl B. Loop; Mr. Robert Gordon; the Honorable Jamie Clark; Mr. Steven Shimberg; Mr. Bruce Smith. If you would take your seats—I would respectfully request that.

I hope we will get other members here very soon. If not, we will still continue and proceed.

All right, Mr. Loop, you are vice president of the American Farm Bureau Federation. Welcome to the Committee, and we look for-

ward to your testimony. We will hear testimony from all the witnesses. Then we will have a series of questions. Thank you, Mr. Loop.

**STATEMENT OF CARL B. LOOP, JR., VICE PRESIDENT,  
AMERICAN FARM BUREAU FEDERATION, WASHINGTON, DC**

Mr. LOOP. Good afternoon, Mr. Chairman and members of the Committee. My name is Carl Loop. I am president of Loop's Nursery and Greenhouses, Incorporated. It is a wholesale plant operation in Jacksonville, Florida. I am also president of the Florida Farm Bureau and vice president of the American Farm Bureau.

We are pleased to offer our support for H.R. 1142, the Landowners Equal Treatment Act of 1999. This Nation's farmers and ranchers feed the country and much of the rest of the world. They also provide food and shelter for most of our Nation's threatened and endangered species. More than 78 percent of listed species are found on privately-owned lands, with more than 34 percent being on privately-owned lands exclusively.

The thrust of the Endangered Species, ES, and its current administration is that private landowners, through onerous land and use regulations and broad, far-reaching statutory prohibitions, are made to bear the entire cost of protecting listed species that occur on their property. Farmers and ranchers and small landowners across the country are restricted from using their property in ways that they have traditionally used it because of alleged presence of listed species or because it might someday be habitat for listed species.

We are told that there is a public interest in protecting these species and that their survival will benefit all of us, and we agree with that. Farmers and ranchers understand and appreciate the need of biodiversity and the protection of plants and animal species. Farmers and ranchers are willing to further the public interest, so long as the public pays its fair share. Payment of just compensation for decrease in property values and restriction on land use caused by ESA action is a method prescribed in the U.S. Constitution. The 5th Amendment requires that when private property is taken for public purpose the cost must be borne by the public through just compensation to the private landowner. Yet, in many cases private landowners are told to bear the entire cost of species preservation through land use restrictions and prohibitions.

The Farm Bureau has led the fight in Congress and the courts to have the government recognize its responsibilities to provide just compensation for property values lost as a result of protecting listed species on private property. Government agencies such as the Fish and Wildlife Service have steadfastly refused to recognize this responsibility and have fought every effort along the way.

You know, we were shocked and amazed to learn that the Fish and Wildlife Service had demanded, and will receive, more than \$20 million in compensation just because planes will fly 500 feet lower over a wildlife refuge due to the renovation at the Minneapolis airport. The payments will be made by air passengers traveling through Minneapolis.

There is no conceptual difference in what the agency demanded than in what farmers and ranchers have been asking for for years.

If anything, the claims of private landowners are much stronger because they are constitutional. The 5th Amendment specifically addresses a landowner's claims, giving them constitutionally-protected private property rights. The only real difference between the two situations is that the agency received compensation without having to fight a lengthy and costly court action. This is in marked contrast to what the agency forces small, private landowners to do, if they want to protect their rights.

That is why the enactment of H.R. 1142 is important and why the American Farm Bureau Federation supports it. It reinforces a constitutional guarantee to just compensation, and it also provides a private landowner should at least be treated no differently than Federal agencies that receive compensation when constructive use of the property they manage is adversely affected.

The bill also sets forth a fair and uncomplicated procedure that allows private landowner claims for compensation to be as easily processed as was the demand from the Fish and Wildlife Service. Procedural equity is as important as recognition of equal rights. Having equal rights means little if small, individual private property owners with limited resources cannot afford to enforce those rights, either financially or in length of time it takes to receive satisfaction.

H.R. 1142 does not add any new rights not already provided by the Constitution. Further, it does not do for private landowners anything that the Federal Government is not already doing for itself. It merely puts all parties on equal footing with respect to compensation for regulatory takings.

Mr. Chairman, I have got examples in my written report. In Florida, as was noted earlier, we are just behind California and Hawaii in the number of endangered species and have examples of where the authority of ESA has been abused and has really been harmful to some of our private landowners.

[The prepared statement of Mr. Loop follows:]

STATEMENT OF CARL LOOP, VICE PRESIDENT, AMERICAN FARM BUREAU FEDERATION,  
PRESIDENT, FLORIDA FARM BUREAU FEDERATION

Mr. Chairman and members of the Committee: Good morning. My name is Carl Loop, Jr. I am president of Loop's Nursery and Greenhouses, Inc., a wholesale plant nursery operation in Jacksonville, Florida. I am President of the Florida Farm Bureau Federation, and also serve as Vice President of the American Farm Bureau Federation.

We are pleased to offer our support for H.R. 1142, the Landowners Equal Treatment Act of 1999. This nation's farmers and ranchers feed the country and much of the world. They also provide food and shelter for most of our nation's threatened and endangered species. More than 78 percent of listed species are found on privately owned land, with more than 34 percent being on privately owned land exclusively. The vast majority of open, private land is owned by farmers and ranchers.

The thrust of the Endangered Species Act (ESA) and its current administration is that private landowners, through onerous land use regulations and broad, far-reaching statutory prohibitions, are made to bear the entire cost for protecting listed species that occur on their property. Farmers, ranchers and small landowners across the country are restricted from using their property in ways that it has traditionally been used because of the alleged presence of a listed species or because it might someday be habitat for a listed species that is not presently there.

We are told that there is a "public interest" in protecting these species, and that their survival will benefit all of us. As stewards of the land, farmers and ranchers understand and appreciate the need for biodiversity and the protection of plant and animal species. Farmers and ranchers are more than willing to further the public interest, so long as the public pays its fair share.

Payment of just compensation for diminution in property values and restrictions on land use caused by ESA actions is the method prescribed in the United States Constitution for achieving this. The Fifth Amendment to the Constitution requires that when private property is taken for public purposes, the costs must be borne by the public through just compensation to the private landowner. Yet in many cases private landowners are told to bear the entire costs of species preservation through land use restrictions and prohibitions.

A number of examples of the types of restrictions can be found in my home state of Florida, which has the second largest number of listed species within the continental United States. A couple of years ago, more than a hundred landowners received letters from the U.S. Fish & Wildlife Service advising them that their private property had habitat that could house the Florida scrub jay, a listed species. Landowners were also advised that any activity that might alter the scrub habitat on their property could be a violation of the Endangered Species Act, subjecting the owner to steep fines or even prison. A few years earlier, owners of five acre lots near Cross Creek were advised that they could not use the majority of their property because of the presence of a bald eagle's nest. In both cases, little or no regard was given by the Fish & Wildlife Service to the loss of use or value of the property.

Farm Bureau has for many years led the fight in Congress and the courts to have the government recognize its responsibilities under the Fifth Amendment to provide just compensation for property values lost as a result of protecting listed species on private property. Government agencies such as the Fish & Wildlife Service have steadfastly refused to recognize this responsibility and have fought this effort every step of the way.

We were therefore both shocked and amazed to learn that the Fish & Wildlife Service itself demanded and will receive more than \$20 million in compensation just because planes will fly 500 feet lower over a wildlife refuge due to renovations at the Minneapolis airport. The payments will be made by air passengers traveling through the Minneapolis airport. We are not sure whether to be pleased that the agency has finally seen the error of its past position and recognized the just compensation requirement of the Fifth Amendment, or to be outraged that the very same agency that has for years refused to recognize compensation for lost private property uses now suddenly turns the table completely when the property it manages is impacted. The agency seems to be telling farmers and ranchers, "Do as I say, not as I do."

If actions speak louder than words, as they invariably do, the Fish & Wildlife Service can no longer argue with any credibility that compensation should not be paid to private landowners when ESA actions adversely impact the value or use of their property. Any claims to the contrary are belied by the agency's behavior in similar circumstances.

There is no conceptual difference in what the agency demanded than in what farmers and ranchers have been asking for years. If anything, the claims of private landowners are much stronger than the claims of the agency, because the Fifth Amendment to the Constitution specifically addresses the landowners' claims, giving them a Constitutionally protected property right. There is, however, no Constitutional right for compensation to Federal agencies in cases when one public use has been substituted for another as it was in the Minneapolis case. The actions of the Fish & Wildlife Service can only be construed as accepting and reinforcing the argument that we have been making for years that the Fifth Amendment requires just compensation in cases where Federal regulations result in lost property value.

The only real difference between the two situations is that the agency received compensation without having to fight a lengthy and costly court action. This is in marked contrast to what the agencies force small private landowners to do if they want to protect their rights.

Should government be able to demand and receive compensation for its lost property values, and deny it in cases when it causes the loss in value?

Should government, whose duty it is to uphold the rights of its citizens, be allowed to ignore those rights, yet also be allowed to assert similar rights when it is affected?

The answer is no. What is good for one should be good for all.

That is why the enactment of H.R. 1142 is so important, and why the American Farm Bureau Federation wholeheartedly supports it. Not only does it reinforce the Constitutional guarantees to just compensation, but it also provides that private landowners should at least be treated no differently than Federal agencies that receive compensation when constructive use of the property they manage is adversely affected.

The bill also sets forth a fair and uncomplicated procedure that allows private landowner claims for compensation to be as easily processed as was the demand

from the Fish & Wildlife Service. Procedural equity is as important as recognition of equal rights. Having equal rights means little if small, individual private property owners with limited resources cannot afford to enforce those rights, either financially or in the length of time it takes to receive satisfaction.

H.R. 1142 does not add any new rights not already provided by the Constitution. Further, it does not do for private landowners anything that the Federal Government is not already doing for itself. It merely puts all parties on equal footing with respect to compensation for regulatory takings.

Mr. YOUNG. Thank you, Mr. Loop.  
Mr. Gordon.

**STATEMENT OF ROBERT E. GORDON, JR., NATIONAL WILDERNESS INSTITUTE AND GRASSROOTS ESA COALITION, WASHINGTON, DC**

Mr. GORDON. Thank you, Mr. Chairman. On behalf of the Grassroots ESA Coalition and the National Wilderness Institute, I am Rob Gordon. I am executive director of the National Wilderness Institute, a private conservation organization, and a member of the Grassroots ESA Coalition.

The Grassroots ESA Coalition is a diverse and large coalition of organizations representing everybody from environmental groups and property owners to ranchers, loggers, miners, and outdoor recreationists. The coalition is dedicated to changing the current approach for recovery of endangered species from the adversarial command-and-control process under today's ESA to an incentive-based program that encourages private landowners and citizens to provide habitat for wildlife and fosters a cooperative relationship between regulators and the regulated, resulting in long-term benefits to wildlife and society.

The Grassroots ESA Coalition strongly supports H.R. 1142 and commends you for addressing one of the fundamental flaws of the current ESA. Today counterproductive Federal regulations have created disincentives for conservation by preventing private property owners from using all or portions of their land if it is considered habitat for a federally-listed species. The ESA makes wildlife habitat a liability.

Without property rights protection, disincentives are created for both the property owner and the regulator. The property owner has a disincentive to maintain and create wildlife habitat, while the regulator that is not required to compensate the landowner will take the property owner's land because it is cost-free, rather than engage in the active management that is essential for the recovery of endangered wildlife.

Ultimately, what is lost is more than the trust and respect for Federal agencies and the loss of personal property. It is the loss of habitat and a year-round source of food and water for wildlife and endangered species. Landowners are rewarded if they manage their land in a way that does not attract endangered species and are punished for providing endangered species habitat.

In 1997, NWI completed a peer-reviewed study that measured the degree to which implementation of the ESA has conserved federally-endangered and threatened species. This study, which was based entirely on U.S. FWS data and National Marine Fisheries Service data, concluded that regulatory mechanisms of the ESA have entirely failed to recover endangered and threatened species.

We have created a law which pits rare plants and animals against property owners. As a result, both lose. The taking of private property for some environmental public benefit, likewise, adversely affects the behavior of land managers. The owner is forced to bear the price of some public good or benefit, such as preservation of a governmentally-defined wetland, or even retaining theoretical endangered species habitat. Because of the perverse incentive structure created by such regulations, there are often less desirable management decisions than would otherwise be made.

As a result, the unintended consequence of a policy to provide some public benefit at a property owner's expense, or that the resource, and—because it is the sum of cumulative good deeds—conservation as a whole suffer. At NWI we believe protecting property rights is the single most important step we could now take to improve our Nation's conservation efforts.

Current programs create perverse disincentives that devalue land if it contains rare wildlife or habitat—the last thing you should do, if you want to make something more plentiful. It is no accident, I think, that our wildlife and habitat management successes—and there are many—are the result of voluntary efforts, not governmental regulation of private property.

Successful wildlife programs almost invariably occur where private incentives are allowed to work or, as in our sportfish and game programs, where consumption or harvesting is used either as a management tool or as a way to make a government program pay its own way.

Government environmental regulations which take private property hurt conservation. If private property were better protected, each resource manager would be encouraged by enlightened self-interest to ensure that his resource is not only valuable today, but in the future as well. As a result, the individual closest to the resource would have an incentive to actively engage in determining what are the best practices for his particular site and situation, as no government regulator will ever be able to do.

Successful conservation is dependent upon protected private property. The Grassroots ESA Coalition supports the passage of this bill, and it would correct one of the fundamental flaws in the current law that prevents us from having a successful endangered species conservation effort. In fact, the Grassroots ESA Coalition favors a complete rewrite of the Endangered Species Act and anticipates the introduction of an incentive-based conservation bill for endangered species that benefits wildlife and people later this year.

We would like to thank you again and submit the mission and principles of the Grassroots ESA Coalition for the record.

[The prepared statement of Mr. Gordon follows:]

BOB GORDON, EXECUTIVE DIRECTOR, NATIONAL WILDERNESS INSTITUTE

On behalf of the Grassroots ESA Coalition I would like to thank you, Mr. Chairman, for this opportunity to appear before the Committee on Resources to testify on H.R. 1142, The Landowners Equal Treatment Act of 1999.

My name is Rob Gordon. I am the Executive Director of the National Wilderness Institute, a private conservation organization and member of the Grassroots ESA Coalition.

The Grassroots ESA Coalition is a diverse and large coalition of organizations representing everyone from environmental groups and property owners to ranchers, loggers, miners and outdoor recreationists.

The Coalition is dedicated to changing the current approach for recovery of endangered species from the adversarial command and control process under today's ESA to an incentive based program that encourages private landowners and citizens to provide habitat for wildlife, and fosters a cooperative relationship between regulators and the regulated resulting in long term benefits for wildlife and society.

#### **H.R. 1142 The Landowners Equal Protection Act of 1999**

The Grassroots ESA Coalition strongly supports H.R. 1142 and commends the Chairman for addressing one of the fundamental flaws of the current ESA. Today counterproductive Federal regulations have created disincentives to conservation. By preventing private property owners from using all or portions of their land if it is considered habitat for a federally listed species, ESA makes wildlife habitat a liability.

Without property rights protection, disincentives are created for both the property owner and the regulator. The property owner has a disincentive to maintain and create wildlife habitat while the regulator that is not required to compensate the land owner will take the property owners land because it is cost free rather than engage in the active management that is essential for the recovery of endangered wildlife.

Ultimately what is lost is more than the trust and respect for Federal agencies and the loss of personal property, it is the loss of habitat, and a year round source of food and water for wildlife and the endangered species. Landowners are rewarded if they manage their land in a way that does not attract endangered species and are punished for providing endangered species habitat. A well known example is Ben Cone, a North Carolina timber land owner, who testified before this Committee a few years ago.

Mr. Cone had always tried to harvest trees in a way that provided habitat for wildlife. Campers, hunters and fishermen used his land because he believes wildlife, tree farming and outdoor recreation are compatible. But when the endangered red-cockaded woodpecker arrived on his property, the Endangered Species Act put 1,000 acres of his property off limits to him. He spent \$8,000 on biologists to make sure he was following the stringent rules, and figures he lost \$1.8 million dollars in timber that was tied up in the area he could not harvest. He was prohibited from harvesting these trees because they had reached an age at which they attracted red-cockaded woodpeckers. As these trees become older the inner wood often becomes softer and thereby good insect hunting ground for woodpeckers.

Because of the perverse incentives of environmental regulation, Mr. Cone was forced to ensure that no more of his property was taken because his trees had become old enough to attract woodpeckers. To protect himself, Mr. Cone harvested his remaining trees at an earlier age. The end result was that all parties lost. Mr. Cone had lost part of his property and reduced management options on the remainder. The red-cockaded woodpecker lost because once the trees now off limits to Mr. Cone are gone there will be no more habitat generated on Mr. Cone's property because he could not afford to allow his trees to get too old. And, the taxpayer lost because dollars spent on regulators ended up harming the very bird they were spent to protect.

Mr. Cone was one of the fortunate land owners that had the resources to take legal action against the agency administering the ESA. Eventually a settlement was reached between the two parties.

#### **Awakening to the Adverse Conservation Impact of the Act**

Not only are those who have long been critics of the Act pressing this point but also some who have, until recently, argued that the law functioned the way it should. Michael Bean of the Environmental Defense Fund, for example, told a U.S. Fish and Wildlife Service employee training session:

There is, however, increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems. The problems they are trying to avoid are the problems stemming from the Act's prohibition against people taking endangered species by adverse modification of habitat. And they're trying to avoid those problems by trying to avoid having endangered species on their property. . . . Now it's important to recognize that all of these actions that landowners are either taking or threatening to take are not the result of malice towards the red-cockaded woodpecker, not the result of malice towards the environment. Rather, they're fairly rational decisions motivated by a desire to avoid potentially significant economic constraints. In short, they are really nothing more than a predictable response to the perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others. So that's point one, that the

strategies that have been used to date to conserve this species, the red-cockaded woodpecker, on private lands have probably contributed to the loss of the ecosystem upon which that bird depends.

Similarly, Larry McKinney of Texas Parks and Wildlife Department recently stated:

I am convinced that more habitat for the black-capped vireo and especially the golden-cheeked warbler has been lost in those areas of Texas since the listing of those birds than would have been lost without the Endangered Species Act at all.

Clearly there is increased recognition that the Act is not only failing in some incentives but resulting in the opposite of what was intended.

#### **Conservation Under the Endangered Species Act**

In 1997 NWI completed a peer reviewed study that measured the degree to which implementation of the ESA has conserved or is demonstrably leading to the conservation of federally endangered and threatened species.

This study, that was based entirely on USFWS and National Marine Fisheries Service (NMFS) data, concluded that:

The ESA's process for determining whether a species is endangered or threatened is subjective and often leads to incorrect determinations. Over 60 percent of listed species are considered declining or are of unknown status. The regulatory mechanisms of the ESA have entirely failed to lead to the recovery of endangered or threatened species. Only two species, the Aleutian Canada goose and the Virginia round-leaf birch can be considered as having been reclassified from endangered to threatened primarily because of the ESA. Although, in both instances, the beneficial management practices could have been conducted under other existing authorities. More than half of the species which are considered to have reached 75 percent or more of their recovery objectives have reached that point for reasons other than the successful implementation of the ESA. Vertebrate species clearly receive a disproportionate share of funding. Expenditure reports reveal that expenditures by governmental agencies other than the primary implementing agencies, the USFWS and the NMFS, account for the majority of Federal expenditures.

Given the inconsistency and inaccuracy of the USFWS reports, the agency's ability to conduct meaningful analysis of this program is questionable. Inaccurate reporting and inconsistent methodology complicates and decreases the potential for analysis of the program. The USFWS's lack of collection and reporting of quantitative data on species over time substantially frustrates an important means of measurement. The Department of Interior's inability to collect, maintain, and make available reliable data for the near 1,000 domestic listed species casts profound doubt on the notion that the same Department could reasonably manage a "national biological survey" (Fretwell 1997) of all flora and fauna as has been recently instituted.

The problems within the ESA are profound and require drastic revisions or wholesale replacement to create an endangered species program that will result in real conservation achievements.

#### **We Can Conserve Species In Peril**

The poor record of the current Endangered Species Act does not mean that we cannot conserve endangered wildlife. Compare the results of the ESA's regulatory and punitive approach with the record of voluntary, incentive based efforts which benefit greatly from private property. Wood ducks and bluebirds came back from very depressed numbers because thousands of people built artificial nesting boxes that were placed on private property.

Wood duck boxes built by duck hunters and placed in swamps are actually better than hollow trees at keeping out predators such as snakes and raccoons, and as a result of these boxes there are now over three million wood ducks in America—enough to support an annual harvest of over eight hundred thousand ducks.

When bluebird fanciers discovered that their favorite bird was declining primarily because the English starling, an aggressive, introduced species, was taking too many of the bluebird's nesting cavities, they designed bird houses with openings too small for starlings. In the last 15 years, over one hundred thousand bluebird houses have been built and bluebirds are on the rebound.

Wild turkeys have been restored from severely depleted numbers to their original range and beyond at the impetus of turkey hunters. Today, wild turkeys are found in every state except Alaska. The turkey population is at an all time peak and growing. And the hunters who organized the restoration effort are now able to harvest five hundred thousand birds annually.

Why are these private efforts so much more successful than the Endangered Species Act? Consider the difference between incentives and regulation. Suppose the Endangered Species Act had been adopted early in this century—wood ducks, bluebirds and wild turkeys would have been added to the Federal list and regulated under this law.

How could one convince a landowner to give permission to put a nesting box on his property?

How many landowners could afford to let the Wild Turkey Federation release birds on their land if the presence of an endangered species meant they could no longer use their land?

### Conclusions

We have created a law which pits rare plants and animals against property owners. As a result, they both lose.

Of particular interest to the Grassroots ESA Coalition and NWI is the relationship between private ownership of land and conservation. Private land is actually more important to the conservation of rare wildlife than government land. Although the Federal Government owns vast amounts of land, private land is often richer in wildlife, plants and water. When I speak of private conservation I do not refer only to not-for-profit environmental organizations but also commercial activities—ranching, farming, forestry, recreation industries and others—that make tremendous contributions to conservation as a byproduct of business activity. The North Maine Woods land, for example, is a vast area—over two million seven thousand acres—of privately owned commercial forest land that provides not only extensive wildlife habitat and public recreation opportunities, but contributes to our economy. Much of this land is still owned by the many descendants of the original landowners who got the land when Maine became a state in 1820.

In some cases, conservation is directly related to a business enterprise. Sea Lion Caves, a for-profit organization, protects the only mainland rookery of the Steller sea lion. It is a major tourist attraction on the Oregon coast and receives over 200,000 visitors annually. Had not the area been privately owned, developed and protected, especially when the State of Oregon paid a bounty for slaughtered sea lions, the sea lions caves area would undoubtedly be void of sea lions and other marine life and this natural wonder would probably not exist today.

The opportunities to improve the quality of our environment by creating incentives for property owners are not limited to the case of Sea Lion Caves but are vast. In Utah, Desert Livestock's land produce elk that have a higher calving ratio, preferable bull to cow ratio and a higher average weight than on adjoining public land. In Texas private ranchers are providing habitat and thereby maintaining a total number of a rare African antelope that is greater than in Africa itself. In these cases not only are the landowners and the species benefiting from private conservation activities but also the public. If any of these activities made the property owner vulnerable to taking of his property, they would surely be reduced in size and scope and might not occur at all.

Unfortunately, in some environmental circles it is assumed that the best thing we can do for the environment is to set aside the maximum amount of land and lock it up from any human influence, preserving resources from people rather than for them. It is assumed that governments make good land use decisions and private landowners make bad land use decisions. But these assumptions are not based on sound, objective science, and are not verified by human experience.

Many years ago biologist by the name of Garret Harden described a flaw in the foundation of the thinking of many influential environmental circles. Hardin argued that when something is owned communally, each possible user will try to maximize to his benefit to the detriment of the resource rather than working to make sure the resource would be increased in value as is the case with private property. Hardin termed this phenomenon "the Tragedy of the Commons."

The taking of private property for some environmental "public benefit" likewise adversely affects the behavior of land managers. The owner is forced to bear the price of some "public good or benefit" such as preservation of a governmentally defined wetland or even retaining theoretical endangered species habitat. Because of the perverse incentive structure created by such regulations there are often less desirable management decisions than would otherwise be made. As a result, the unintended consequences of a policy to provide some "public benefit" at a property owner's expense are that the resource and, because it is the sum of cumulative good deeds, conservation as whole, suffer. At NWI we believe protecting property rights is the single most important step we could now take to improve our nation's conservation efforts. Current programs create perverse disincentives that devalue land

if it contains rare wildlife or habitat the last thing you should do to make some more plentiful.

It is no accident, I think, that our wildlife and habitat management successes—and there are many—are the result of voluntary efforts, not governmental regulation of private property.

Successful wildlife programs almost invariably occur where private incentives are allowed to work—or as in our sport fish and game programs—where consumption or harvesting is used either as a management tool or as a way to make a government program pay its way.

Government environmental regulations which take private property hurt conservation. If private property were better protected, each resource manager would be encouraged by enlightened self interest to ensure that his resource is not only valuable today but in the future as well. As a result, the individual closest to the resource would have an incentive to actively engage in determining what are the best practices for his particular site and situation as no government regulator will ever be able to do. Successful conservation is dependent upon protected private property.

The Grassroots ESA Coalition supports the passage of H.R. 1142. It would correct one of the fundamental flaws in the current law that prevents us from having a successful endangered species conservation effort. In fact, the Grassroots ESA Coalition favors a complete rewrite of the endangered species Act and anticipates the introduction of an incentive based conservation bill for endangered species that benefits wildlife and people later this year.

[The information follows:]

#### GRASSROOTS ESA COALITION

##### **Mission**

A diverse and large coalition of organizations representing everyone from environmental groups and property owners to ranchers, miners, loggers and outdoor recreationists has publicly unveiled principles for establishing a new way to conserve our nation's endangered species.

The Grassroots, ESA Coalition organizations united to promote these principles so that the old Endangered Species Act could be reformed in a way that benefits both wildlife and people, something the old law has failed to do.

The old law has been a failure for endangered species and for people. It has not led to the legitimate recovery of a single endangered species while costing billions of dollars and tremendous harm. The old way destroyed trust between people and our wildlife officials. We need to reestablish trust so we can conserve wildlife—no program will succeed without the support of our farmers, our ranchers, our citizens.

The old law failed because it is based on flawed ideas. It is founded on regulation and punishment. If you look at the actual law by section you see it is all about bureaucracy—consultation, permits, law enforcement there isn't even a section of the law called "conservation," "saving" or "recovery."

It is a bureaucratic machine and its fruits are paperwork and court cases and fines—not conserved and recovered endangered species. What the Grassroots ESA Coalition and all Americans want to see is a law that works for wildlife, not one that works against people.

The future of conservation lies in establishing an entirely new foundation for the conservation of endangered species—one based on the truism that if you want more of something you reward people for it, not punish them. The debate that will unfold before the public is one between methods of conservation.

The old way is shackled to the idea that Washington bureaucrats can come up with a government solution through national land use control. Its supporters do not want to acknowledge that the law has failed because doing so would mean an end to the influence and power they have under the old system.

The Coalition sees a new way that can actually help endangered species because it stops punishing people for providing habitat and encourages them to do so. It creates an opportunity for our officials—for government—to reestablish trust and work with and earn the support of citizens. The Grassroots ESA Coalition is working to promote this new way.

If you think that government bureaucracy works, that welfare stops poverty and does not need reform or that the DMV and Post Office operate the way they should, then the old endangered species program is for you. If you do not, and you want to conserve endangered species without wasting money, intruding on people's lives and causing more pain and problems, then the Grassroots ESA Coalition is for you.

**Statement of Principles Regarding Endangered Species**

The Endangered Species Act has:

- failed to conserve endangered and threatened animals and plants;
- discouraged, hindered, and prohibited effective conservation and habitat stewardship;
- created perverse incentives, thus promoting the destruction of privately owned endangered species habitat; and wasted scarce conservation resources.

The Endangered Species Act has failed in large part because it has engendered a regulatory regime that has:

- violated the rights of individuals, particularly property rights;
- destroyed jobs, devalued property, and depressed human enterprise on private and public lands;
- hidden the full cost of conserving endangered species by foisting those costs on private individuals; and
- imposed significant burdens on State, county, and local governments.

We therefore support replacing current law with an Endangered Species Act based upon these principles:

Animals and plants should be responsibly conserved for the benefit and enjoyment of mankind.

The primary responsibility for conservation of animals and plants shall be reserved to the States.

Federal conservation efforts shall rely entirely on voluntary, incentive-based programs to enlist the cooperation of America's landowners and invigorate their conservation ethic. Federal conservation efforts shall encourage conservation through commerce, including the private propagation of animals and plants.

Specific safeguards shall ensure that this Act cannot be used to prevent the wise use of the vast Federal estate.

Federal conservation decisions shall incur the lowest cost possible to citizens and taxpayers.

Federal conservation efforts shall be based on sound science and give priority to more taxonomically unique and genetically complex and more economically and ecologically valuable animals and plants.

Federal conservation prohibitions should be limited to forbidding actions intended to kill or physically injure a listed vertebrate species with exception of uses that create incentives and funding for an animal's conservation.

Mr. YOUNG. Thank you, Mr. Gordon.

Before I go to Ms. Clark, for those of you in the room, if you have a mobile phone, shut it off or put it on a shaking mode, because it is not allowed in this room. It is very impolite for a person giving testimony to have the shrill ring of a phone that comes into this room. So keep that in mind, because you are my guests; I expect you to respect that.

Jamie.

**STATEMENT OF JAMIE RAPPAPORT CLARK, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Ms. CLARK. Good afternoon, Mr. Chairman. I appreciate this opportunity to discuss H.R. 1142, the Landowners Equal Treatment Act.

The administration is strongly opposed to enactment of H.R. 1142. This legislation will seriously and needlessly undermine endangered species conservation under the guise of protecting private property rights. The Secretary of the Interior will recommend a veto of H.R. 1142, if it is presented to the President.

Mr. Chairman, since I am not an attorney, I will focus my testimony on our highly successful efforts to make the Endangered Species Act more friendly to landowners, and how H.R. 1142 will compromise those efforts.

Before I begin, though, there has been a lot of discussion about Minnesota Valley National Wildlife Refuge, and I would like to briefly address the situation at the refuge, upon which H.R. 1142 appears, in part, to have been based.

Section 4(f) of the Transportation Act provides that park and wildlife areas, whether they are Federal, State, or local, may be utilized for transportation projects only when there is no viable alternative, and that the project engage in all possible planning to minimize and mitigate impacts if such an area should be used or must be used.

When Congress enacted this provision, they intended to discourage the use of our refuges and parks for transportation projects and, thankfully, they succeeded. Unlike private property, public lands have no constitutional protections. Although section 4(f) does not require payment as if the lands were private lands taken for governmental purposes, it does require the action agency to consider all feasible alternatives, and in the event there are none, to minimize and mitigate those effects. The mitigation requirement could generally be met in many ways that don't necessarily involve cash payments, such by altering designs, changing timing or location of activities, or other similar measures.

There is no relationship between a statute that appropriately limits the use of public park, recreation, and wildlife areas for transportation projects and the provisions of H.R. 1142, which requires the Service to compensate landowners from its budget for its statutorily-required efforts to protect endangered species.

This administration has gone to great lengths to harmonize endangered species conservation with the protection of private property rights. We have instituted bold reforms that have provided greater flexibility and certainty to businesses and private landowners. We streamlined the consultation and permitting components of the Endangered Species Act. We are proud that our efforts have accelerated species conservation and recovery, while promoting cooperation rather than confrontation. Key landowner-oriented reforms are discussed in some detail in my formal statement and in previous testimony before this Committee.

Increased funding support is essential to continue our successful record of reform. The President's Fiscal Year 2000 budget request for endangered species is an extremely important step in providing adequate funding to allow the Service to provide technical and financial assistance to landowners, to support candidate conservation agreements, to speed up the consultation program that assists other Federal agencies, and to increase and accelerate recovery actions.

The administration has taken great efforts to ensure that our implementation of the Endangered Species Act is both scientifically sound and consistently enforced throughout the country. We believe that, with full implementation of our reforms and provision of adequate provisions, the Endangered Species Act will, indeed, protect the biological resources of our Nation and the constitutional rights of American citizens.

H.R. 1142, if enacted, would likely have drastic consequences for the public as well as for the Fish and Wildlife Service. Many agen-

cy actions which have not considered takings by the courts in the past would appear to be statutorily defined as such by H.R. 1142.

The bill's provision that the funding for the required compensation program for these new takings is to come from the annual appropriation of the Fish and Wildlife Service could well result in a diversion of most, if not all, of the funds appropriated for the endangered species program into compensation for landowners. We would have little control over this result because most of the agency actions that would trigger the compensation are not discretionary under the Endangered Species Act. The section 7 consultation and the section 10 incidental take requirements are law. They don't become inoperable or suspended because the Service has insufficient funds to conduct the consultation or evaluate the HCP.

The work of the Service would grind to a halt. Developers or landowners whose project might affect a listed species would have the unhappy choice of postponing their project or attempting to proceed without the Service's involvement, a violation of the law subject to suit and injunction by any interested party and prosecution by the Department of Justice. Similarly, other Federal agencies would be unable to proceed with their own projects which might affect listed species or grant permits of permission to private developers for such projects.

As a result of the administrative reforms to craft a new Endangered Species Act, the ESA now produces cooperation instead of confrontation, and conservation rather than chaos. Enactment of H.R. 1142 would reverse this situation, to no one's benefit.

Mr. Chairman, this concludes my testimony, and I would be happy to answer any questions.

[The prepared statement of Ms. Clark follows:]

STATEMENT OF JAMIE RAPPAPORT CLARK, DIRECTOR, FISH AND WILDLIFE SERVICE,  
DEPARTMENT OF THE INTERIOR

Mr. Chairman, I appreciate this opportunity to discuss H.R. 1142, the Landowners Equal Treatment Act.

The Administration is strongly opposed to enactment of H.R. 1142. This legislation will seriously and needlessly undermine endangered species conservation under the guise of protecting private property rights. The Secretary of the Interior will recommend a veto of H.R. 1142 if it is presented to the President.

I have a letter from the Department of Justice, which I understand has also been provided to the Committee, addressing the aspects of the bill relating to "takings," and the operation of the section 4(f) programs of the Department of Transportation. I will accordingly focus my testimony on our highly successful efforts to make the Endangered Species Act (ESA) more friendly to landowners, and how H.R. 1142 will compromise those efforts.

Before I begin, though, I would like to briefly address the situation at the Minnesota Valley National Wildlife Refuge, upon which H.R. 1142 appears, in part, to have been based. The Committee held a hearing on this issue February 3, at which both the Service and the FAA testified. It is essential to note that there was no requirement that the Metropolitan Airport Authority in Minneapolis compensate us for the impacts their airport expansion. Section 4(f) of the Transportation Act provides that park and wildlife areas—whether Federal, State or local—may be utilized for transportation projects only when there is no viable alternative, and that the project "engage in all possible planning" to minimize and mitigate impacts if such an area must be used.

There is no requirement in this statute that compensation be paid when conservation lands must be utilized for a transportation project. Government lands have no constitutional protection against being taken for use by other governmental projects, and section 4(f) does not require payment as if the lands were private lands taken for governmental purposes. The requirement to minimize and mitigate impacts

could generally be met in many ways not involving cash payments, such as by altering designs, changing timing or location of activities, or similar measures.

In this particular case, the Department of Transportation was in a position to fulfill its statutory obligation under Section 4(f) to avoid harm to public park land by accepting the local airport authority's decision to replace the refuge recreational and environmental education facilities which would no longer be useable by the public after the airport was expanded. This was presumably due to the popularity of the refuge public use and environmental education programs with the local residents, to whom the airport authority is responsible.

Similarly, there was no connection between the decision to replace the facilities and the Endangered Species Act, for the simple reason that there are no listed species impacted by the new runway. The Service had concurred in a "no effect" determination under Section 7 of the ESA long before any decisions were made on replacement of the refuge public use facilities.

We cannot see any relationship between a statute that limits the use of park, recreation and wildlife areas for transportation projects and the provisions of H.R. 1142, which requires the Service to compensate landowners, from its budget, for its statutorily-required efforts to protect endangered species which are already present on their property.

This Administration has gone to great lengths to minimize the impacts of the ESA on landowners. We have instituted bold reforms that have provided greater flexibility and certainty to businesses and private landowners. We have streamlined the consultation and permitting components of the Federal Endangered Species Program. We are proud that our efforts have produced better species conservation and recovery, while promoting cooperation rather than confrontation.

Key landowner-oriented reforms include streamlining processes for Habitat Conservation Plans, the use of new tools like "No Surprises" assurances and "Safe Harbor" agreements, and greater use of Candidate Conservation Agreements and special rules under section 4(d) of the ESA.

#### **Habitat Conservation Plans**

Section 10 of the ESA accommodates landowners by authorizing the government to permit "taking" of individual endangered or threatened species by a landowner or local government incidental to otherwise lawful activities, when the effects of the taking are mitigated and minimized by conservation measures. The statutory requirements are interpreted and detailed in the Service's implementing regulations, administrative guidelines in the Services' Habitat Conservation Planning Handbook, and the final "No Surprises" rule. For those who are not familiar with it, a copy of that Handbook is Appendix I to my statement. The statutory requirements include provisions requiring 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.

In order to encourage HCP development, the Service has streamlined the development and application process and produced the previously-mentioned HCP Handbook as a guide. The handbook makes a number of improvements over the prior process. First, it 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.

In addition, the Service has proposed a Draft Addendum (otherwise known as the 5-point policy guidance) to the HCP Handbook, so that the HCP process can even better conserve wildlife while ensuring certainty for landowners and other applicants. The proposal would improve the way HCPs are developed and administered in five areas: establishment of measurable biological goals and objectives, use of adaptive management, monitoring, public participation and determination of the duration of the incidental take permits. Explicit goals and objectives will provide clear guidance for both the applicant and the Service regarding the purpose and direction of the HCP's operating conservation program. Incorporating adaptive management into an HCP gives applicants certainty about what we will require them to do under changing circumstances and allows the applicant to better assess the potential economic impacts of such adjustments before agreeing to the HCP; all parties are assured of a suitable outcome and the HCP process is not needlessly delayed. Provid-

ing opportunities for education and input in the development of HCPs will lead to plans having stronger public support.

### **Regulatory Certainty**

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. The Service has now implemented more than 240 HCP's with landowners and is developing about 200 more. For example, International Paper, a privately owned forest products company, recently completed an HCP for the red-cockaded woodpecker that will allow the company to continue its timber harvest operations by voluntarily expanding and enhancing the woodpeckers' habitat on the company's own property. HCP's are proving to be a popular voluntary conservation tool for both the private property owner and the Service.

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. It 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 Service's 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.

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 to 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 (this is Appendix 2 to my statement).

The Safe Harbor Policy will soon be finalized and will create an incentive for non-Federal landowners willing to proactively conserve listed species by providing them with regulatory certainty. Landowners who restore, enhance or maintain habitats for listed species will receive assurances that the conservation work they undertake will not result in additional regulatory restrictions on the use of their land. Landowners are currently implementing almost 40 Safe Harbor agreements encompassing over 1 million acres for such species as the red-cockaded woodpecker in the Southeast, the Attwater's greater prairie-chicken in Texas, and the Aplomado falcon, also in Texas. The Service believes that this policy will provide substantial benefits for both endangered species and landowners.

The Service is emphasizing the use of Candidate Conservation Agreements (CCA's), to conserve declining species before they have to be listed. Early conservation preserves management options, minimizes the cost of recovery, and reduces the potential for restrictive land use policies in the future. Addressing the needs of species before the regulatory restrictions associated with listed species come into play often allows greater management flexibility to stabilize or restore these species and their habitats. For example, two CCA's with Federal and State agencies and coal companies allowed the Service to withdraw the proposal to list the southern population of the copperbelly water snake.

For species which do need to be listed, the Service is expanding its use of Special 4(d) Rules to minimize the regulatory impact on landowners of listing species as threatened while providing the protection necessary for the species' conservation. Section 4(d) of the ESA authorizes the Secretary to issue such regulations as he deems necessary and advisable for the conservation of threatened species, which

need not include all of the protections the ESA provides for species listed as endangered. As an example, the Service is pursuing a Special 4(d) Rule for the Preble's meadow jumping mouse in Colorado and Wyoming to allow continuation of certain on-going activities (such as agriculture) and a level of new development in the mouse's habitat consistent with the species' conservation needs. The flexibility to accommodate landowners provided by this section was rarely used by prior Administrations.

Through its Pilot ESA Private Landowner Incentives Program, the Service is encouraging the conservation of listed and non-listed species on private lands. This \$5 million program provides incentives for private landowners to enter into Safe Harbor Agreements and Candidate Conservation Agreements with Assurances (CCAA).

A significant number of private landowners have expressed an interest in receiving assurances and in helping to implement conservation and recovery activities for listed and nonlisted species. The Safe Harbor and CCAA program will respond to the needs of private landowners who are interested in managing their lands in an environmentally-friendly manner and are concerned about the potential of future land- or resource-use restrictions that may result because of their proactive initiatives. We expect that during FY 1999, the majority of the funds and efforts will go to Safe Harbor programs since many are already underway, but we also will strongly encourage more active use of CCAA and the expansion of the Safe Harbor program to new parts of the Nation.

#### **Critical Funding Needs**

The Administration recognizes that increased funding support is essential to continue our successful record of reform. Last year we requested significant funding increases to carry out these reforms, to provide greater technical assistance to private landowners and to greatly expedite recovery of species and their eventual delisting.

The President's FY 2000 Budget Request for Endangered species is another 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 complete budget justification for the Endangered Species program is Appendix 3 to my statement.

The Administration has 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 our reforms and provision of adequate appropriations, the Endangered Species Act will protect the biological resources of the Nation without imposing undue burdens on individual citizens.

#### **Effect of H.R. 1142**

Unfortunately, H.R. 1142 does not contribute to these objectives. It instead undercuts the entire Act. It goes far beyond the Constitutional standards for takings, instead reviving the more expansive concepts brought forth in the 104th Congress. The Administration has testified before this Committee and other committees of the Congress repeatedly in opposition to these concepts, and I will not repeat those arguments here.

I would point out that the bill, if enacted, would likely have drastic consequences for the public as well as the Service. Many agency actions which have not been considered "takings" by the courts would nonetheless require payment of compensation under H.R. 1142. The bill's provision that the funding for this compensation program comes from the annual appropriation of the agency could well result in a diversion of most, if not all, of the funds appropriated for operation of the endangered species program into compensation for landowners.

We would have little control over this result because most of the agency actions which would trigger the compensation are not discretionary under the ESA; we have no choice but to list, to deny permits, or to suggest reasonable and prudent but alternatives to development projects needing Federal permits if that is where the facts take us. If we were to not take these actions when they were warranted out of concern for budgetary impacts, we would be in violation of the law, and could be subject to citizen suit and court orders compelling us to take the action in question. The adoption of requirements for compensation does not alter our responsibilities under the ESA.

Taxpayer money spent on compensation for legally required agency actions is money not spent protecting and recovering the species needing the protections of the ESA. But the impacts of this legislation would go far beyond this. While the operation of H.R. 1142 might well result in no new listings, section 7 consultations or

HCP approvals, the net result would be chaos and paralysis in significant elements of the development community.

The ESA section 7 requirement that Federal agencies consult with us before issuing permits for or funding projects which may affect listed species, and the section 10 requirement for an incidental take permit for non-Federal actions which might take listed species, are permanent law. They do not become inoperable because the Service does not have sufficient funds to conduct the consultation or evaluate the HCP. Any developer or landowner with a project which might affect a listed species would have the unhappy choice of postponing their project or attempting to proceed without the Service's involvement, a violation of the law subject to suit and injunction by any interested party and prosecution by the Department of Justice. Similarly, other Federal agencies would be unable to proceed with their own projects which might affect listed species, or grant permits or permissions to private developers for such projects.

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." 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. Enactment of H.R. 1142 would reverse this situation, to no one's benefit.

Mr. Chairman this concludes my prepared testimony. I would be pleased to respond to any questions you might have.

Mr. YOUNG. I certainly wasn't surprised, Jamie, what you were going to say.

The next witness is Mr. Shimberg.

**STATEMENT OF STEVEN J. SHIMBERG, VICE PRESIDENT FOR  
PUBLIC AND INTERNATIONAL AFFAIRS, NATIONAL WILD-  
LIFE FEDERATION, WASHINGTON, DC**

Mr. SHIMBERG. Thank you, Mr. Chairman and Members of the Committee. Thank you for this opportunity to testify here today.

My name is Steven Shimberg. I am here on behalf of the National Wildlife Federation, the Nation's largest member-supported conservation advocacy and education organization. My written prepared statement details some of the threats to private property, people, public resources, and endangered species that are posed by this bill, H.R. 1142, and I ask that my full statement and the attachments to it be included in the Record.

Mr. YOUNG. Without objection.

Mr. SHIMBERG. So that there is no misunderstanding about our position, the National Wildlife Federation—I am sure it is no surprise to the Chairman and the Members here—is opposed to this bill. Instead of proposing meaningful improvements to the Nation's landmark 25-year-old safety net for its species, this bill would effectively repeal the Endangered Species Act's application to private property.

When introducing this bill, the Chairman said, "The most effective way to protect endangered species is through the cooperative and voluntary efforts of private property owners." Mr. Chairman, we agree with that statement 100 percent.

The National Wildlife Federation has repeatedly advocated that the Endangered Species Act can and should be improved with targeted, common-sense amendments to make the Act work better for both private landowners and wildlife. Many of these changes are included in H.R. 960, the Endangered Species Recovery Act, which

was introduced by the Ranking Member of this Committee, Rep. Miller, and 67 original co-sponsors on March 3 of this year.

These needed amendments include building in real financial incentives to private landowners to go beyond the Act's bare minimum requirement and to take affirmative actions for the benefit of imperiled species. This can be done through relatively inexpensive tax law changes and funding initiatives targeted toward habitat restoration and active management of habitat.

In addition, as Mark Van Putten, the President and CEO of the National Wildlife Federation, testified before this Committee on March 10, we strongly support another alternative to this bill. I am referring to H.R. 701, the "Conservation and Reinvestment Act of 1999," and H.R. 798, the "Permanent Protection for America's Resources 2000 Act"—proposals by the Chairman and Rep. Miller that have the potential to establish a permanent dedicated funding source for early intervention measures that will prevent the decline of "nongame" species and, in turn, minimize the need for costly endangered species recovery actions. Nongame species, as you know, Mr. Chairman, are the roughly 90 percent of species that are not hunted or fished, nor classified as threatened or endangered. Although we do have some concerns with some of the details of those two bills, we are confident we can work out those differences, and we look forward to working with you, Mr. Chairman, and the others on this Committee to pass a bill this year.

In short, H.R. 1142 is not necessary. The Endangered Species Act already has numerous provisions to ensure that agencies have the flexibility they need to give due respect to private property interests. Agencies routinely allow economic activities in and around endangered species habitats to go forward. They use tools such as "4(d) rules" for threatened species, reasonable and prudent measures, reasonable and prudent alternatives, and incidental take permits, along with Habitat Conservation Plans, HCPs.

In over 25 years since enactment of the Endangered Species Act, courts have decided only four Endangered Species Act "takings" cases on the merits, and all of those have found that the Act did not take private property. In the unlikely event that private property rights are infringed, despite the availability of the flexible tools in the Act, the courts provide adequate remedies for property owners to enforce the Constitution's 5th Amendment "takings" clause.

We strongly support the 5th Amendment's balanced protection of private property. If a court determines that a government limit on the use and value of private property goes so far to be a taking of private property for public use, just compensation must be paid.

The National Wildlife Federation strongly opposes H.R. 1142 and other "takings" bills because they threaten a wide range of protections of private property, people, and public resources—protections which do not take private property rights.

As explained in detail in my prepared statement and the attachments, this bill should be rejected for a number of reasons. I will recite quickly six of those reasons:

One, it would create radical, sweeping, *new* rights—new rights to extinguish species by giving private property owners the right to wipe out every acre of a species' habitat. Under

this bill, unless we pay companies to obey the Endangered Species Act, they will be free to exterminate endangered species by destroying the habitat those species need.

Two, this bill would impose unworkable notification requirements that would needlessly block and delay a wide variety of emergency actions to save species.

Three, this bill would require windfall payments to corporations, developers, and other individuals under a standard that, according to every member of the Supreme Court, does not warrant compensation.

Four, these windfall payments would bust the budget. You will hear more about that from another witness on the second panel.

Five, this bill unjustifiably singles out the Endangered Species Act.

And six, as Director Clark has mentioned, this bill would chill enforcement of the Act by requiring that windfall payments be made from agencies' annual appropriations.

Mr. Chairman, I will conclude with that. My statement lays out the extent of opposition to compensation bills that this Congress has seen on a number of occasions—State and municipal governments, a wide range of interests. We look forward to working with you on realistic alternatives to this bill—both amendments to the Endangered Species Act and the conservation funding bill that you have proposed.

Thank you.

[The prepared statement of Mr. Shimberg follows:]

STATEMENT OF STEVEN J. SHIMBERG, VICE PRESIDENT, OFFICE OF FEDERAL AND INTERNATIONAL AFFAIRS, NATIONAL WILDLIFE FEDERATION

Mr. Chairman, and Members of the Resources Committee, thank you for this opportunity to testify before you. My name is Steven J. Shimberg; I am here on behalf of the National Wildlife Federation (NWF), the Nation's largest conservation advocacy and education organization, with over 4 million members and supporters, 46 state affiliates and 10 field offices.

My testimony outlines some of the threats to private property, people, public resources, and endangered species posed by this Endangered Species Act (ESA) "takings" bill, H.R. 1142, the "Landowners Equal Treatment Act of 1999." Unfortunately, instead of proposing meaningful improvements in the Nation's landmark 25 year old safety net for species, this bill essentially would result in a back-door, indirect repeal of the ESA's application to private property.

The American people have made it clear, over and over again, that they support the ESA. The ESA plays a unique, invaluable role in preserving our biological heritage for our children and grandchildren to enjoy. It also protects the biological storehouse that provides current and potential cures for cancer, benefits to crops, scientific, aesthetic, and other values.

As NWF has repeatedly advocated, the ESA can and should be improved with the targeted, common sense amendments discussed below to make the Act more effective at working with private landowners. This bill, however, is a shotgun blast that would cripple the ESA and the irreplaceable fish, wildlife and plant species that depend upon it.

NWF strongly supports the Fifth Amendment's balanced protection of private property. If a court determines that a government limit on the use and value of private property goes so far as to be a taking of private property for public use, just compensation must be paid.

In over 25 years, however, courts have only decided four ESA "takings" cases on the merits, all of which have found that the ESA did *not* take private property.

NWF strongly opposes H.R. 1142 and other "takings" bills because they threaten a wide range of protections of private property, people, and public resources which do *not* take private property rights. As discussed below, this and other takings bills

would delay, block, or be so prohibitively expensive as to force the government to stop implementing (in effect, repealing) these protections. A comprehensive discussion of the major points raised in this testimony regarding takings bills is contained in the article by NWF Senior Counsel Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 **Fordham Envtl. L.J.** 521 (1997-98), a copy of which is submitted as an attachment for the Committee's record.

Since 1990, NWF and our state affiliates have been in the forefront of the broad coalition to protect the property rights of all people by opposing state and Federal takings bills that elevate the interests of a few over the rights of all. NWF and others who oppose takings bills and support the Constitution's balanced approach are the genuine private property protection movement.

As explained in detail below, this bill should be rejected because:

- it would create radical, sweeping, new rights to extinguish species by giving private property owners the right to wipe out every acre of a species' habitat;
- it would result in the extermination of species by imposing unworkable notification requirements that would needlessly block and delay a wide variety of emergency and other actions that are essential to save species;
- it would require windfall payments from taxpayers to corporations, developers and individuals whose property has not been taken, according to every member of the Supreme Court;
- these windfall payments would create a precedent that would bust the budget and would create perverse incentives by rewarding proposals to apply for unrealistic development permits in especially sensitive habitat in order to receive payments;
- it unjustifiably singles out the ESA—in over 25 years, courts have only decided four ESA “takings” cases on the merits, all of which have found that the ESA did not take private property—this reflects the ESA's flexibility, which routinely allows economic activities in and around endangered species habitats to go forward;
- it would chill enforcement of the ESA by requiring that windfall payments be made from the annual appropriation of the agency that took mandatory or discretionary action to save a species. This would unjustifiably pressure agency employees to protect their jobs and programs by always erring on the side of not protecting endangered species;
- the only times that the issue has been presented directly to voters in statewide referenda or initiatives, voters have overwhelmingly rejected takings bills;
- widespread opposition to takings bills includes the National Governors Association, National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors, and other state and local government organizations that have approved resolutions opposing takings payment bills; and a wide range of national religious denominations, labor, taxpayer, conservation and other organizations; and
- there is a better way—common sense amendments to make the ESA work better for landowners and wildlife and funding to prevent species from becoming endangered.

#### **CREATING NEW RIGHTS TO EXTINGUISH SPECIES**

*Under H.R. 1142, unless we pay companies to obey the ESA, they would be free to exterminate sea turtles, salmon, grizzlies, manatees, whooping cranes, and other endangered species.*

The bill's alleged purpose is incorrect, it does not “ensur[e] that” private property owners’ “constitutional and legal property rights will be honored . . .”

H.R. 1142 would create radical, sweeping, new rights to extinguish species by giving private property owners the right to wipe out every acre of a species' habitat. Developers could bulldoze sea turtle and shorebird nesting beaches, and companies could chop down eagle nesting trees—unless we pay them not to do something they never had the right to do in the first place.

The unprecedented new rights under this bill would be created at the expense of public property rights. The laws of each of the 50 states recognize that wildlife within the state's borders represents property owned by the state for and on behalf of the people of each state. This public property right has always been understood to limit the rights of people and companies to use their property at the expense of wildlife—from hunting season and bag limit restrictions on landowners' ability to hunt for game on their land to rules designed to safeguard endangered species. This bill appears to be based on the mistaken idea that public rights in wildlife should be completely disregarded.

### STRANGLING SPECIES WITH RED TAPE

H.R. 1142 would also create a separate, sweeping immunity from enforcement of ESA safeguards for species unless and until Federal agencies have somehow “given 30 days notice to each owner of the property directly affected.” Specifically, the bill provides that: “An agency may not take any action that is a Federal use of non-Federal property unless the agency has given 30 days notice to each owner of the property directly affected.” The term “Federal use of non-Federal property” is very broadly defined.

This limitation on ESA implementation is absolute and without exception. Failure to identify, locate, and notify *each* of many partial owners of property could permanently bar needed actions to save species. Apparently, it would not matter if the majority of owners requested the agency action, or if the one owner who did not receive notice would have consented, or if the agency was ready and able to provide the windfall payments required by the other provisions of this bill.

Even emergency actions would be subjected to this 30 day notice straightjacket. Agencies would have to stand by helplessly while the last of a salmon run, for example, is exterminated. This absolute requirement appears to allow a property owner to take advantage of the 30 day delay to take actions that would wipe out a species. Conversely, it would seem to apply where an agency action would enhance the property value while incidentally resulting in, for example, “any diminution in the quantity of water received or available for use.”

If this bill had been law, it would have blocked the emergency action to save the desert tortoise when it was suffering a lethal respiratory disease several years ago. Today, the community of Clark County, Nevada is working to implement a conservation plan to save this ancient reptile—an opportunity that arguably would have been denied if emergency action to list had not been taken.

Ironically, to fulfill the notification requirement, the bill could require the Federal Government to inventory every acre of private land for potential habitat. This draconian notification mandate apparently requires an unworkable, unjustifiable, gigantic bureaucratic burden to compile a comprehensive, nationwide Federal database of all owners of all potentially affected property. Notifying current owners would require continually updated access to the ever-changing mix of corporate, partner, and individual owners.

H.R. 1142 would result in the extermination of species by needlessly blocking and delaying a wide variety of actions that are essential to save species. Extreme bureaucratic burdens and red tape would even apply to actions that do not diminish property value (or even increase the value), if they result in a “substantial diminution in” uses of property that are either “normal or reasonably expected.” Agencies would have to “make every possible effort to avoid, minimize, or mitigate” even extremely minor impacts on property value or use.

### WINDFALL PAYMENTS

*Essentially every payment from taxpayers under H.R. 1142 to corporations, developers and individuals would be a windfall*—because the payments would be required in situations that would not constitute a taking under the Fifth Amendment as that provision has been read by every member of the Supreme Court. The Court has repeatedly and unanimously rejected the purported takings test that is contained in H.R. 1142 as contrary to the balanced Fifth Amendment approach, holding that a law does not “take” private property solely because it diminishes the property’s value, and that takings analysis must look at an overall parcel of property, not just the affected portion.

In contrast, H.R. 1142 would pay companies when there is a 25 percent reduction in the value of a “portion” of property. *This would require payments where there is almost no effect on the overall property value.* For example, allowing condominiums or a strip mine on 99.9 percent of a 1,000 acre tract would not be enough, payments would be required for the one acre wetland buffer zone next to a salmon stream.

As more than 370 law professors wrote Congress regarding the similar test in the 1995-96 House and Senate takings bills: “Not only has the Court never adopted that radical view of the Fifth Amendment; no single past or present Justice on the Court has.” (Copy submitted for the Committee’s record). In 1993, the Supreme Court’s *Concrete Pipe* ruling (508 U.S. at 642-45) relied upon landmark zoning and land use cases in unanimously reaffirming the Court’s long-standing rejection of three premises and standards that lie at the heart of those bills and of H.R. 1142. The Court ruled that because regulatory takings decisions must consider many factors, including impacts on neighboring homeowners and the public, “our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” Second, the Court reaffirmed that takings analysis must focus on the overall property, not just the affected portion. Third, the Court reiter-

ated the importance of looking at specific facts, including what the property owner reasonably expected.

In contrast, H.R. 1142 requires payments when there is: a specific diminution in the value of any affected portion of property, regardless of reasonable expectations or other factors. This radical redefinition of takings fails to consider impacts on other people and property.

Corporations would be paid under the bill even if:

- they paid little, or nothing, for the property;
- the prohibited uses would harm neighboring property and the public health (as in ESA protections for wetland habitat that prevents downstream flooding or an aquifer habitat that serves as a drinking water supply);
- they never had a reasonable expectation that they could violate the ESA; and
- they can still make a massive profit on permissible uses of the property.

H.R. 1142's definition of property extends to impacts of a broad sweep of Federal actions on "land, an interest in land, the right to use or receive water, and any personal property . . ." The bill applies to actions that limit the uses of any of these types of property either to protect habitat on private or public land or as a condition of a Federal permit. So-called "personal property" is owned by corporations and individuals and essentially means tangible property that is not real estate. Thus, the bill would cover, for example, Federal permits that limit use of offshore oil drilling equipment to protect whales. While a Federal grazing permit has always been held to be a privilege, not a right, this bill could be read as granting permittees new rights to be free from limits on their personal property (livestock) to protect streamside overgrazing on public lands.

Senator Russ Feingold (D-WI) detailed how similar water language in the 1995-96 Senate takings bill "could expand the rights of agricultural water users at considerable cost to the taxpayer." "Fair market value payments of \$100 to \$250 per acre foot could be required if Federal reclamation projects reduced the subsidized water for which users pay from \$3.50 to \$7.50 per acre foot. (S. Rep. 104-239, at 82 (additional views of Sen. Feingold)).

Enactment of this bill would cause a flood of costly litigation. Looking at only the "affected portion" would trigger a flood of claims. For example, claims could be filed whenever erosion or flooding threatens to endangered species (and downstream homes) require one acre of streamside or floodplain buffer out of a 10,000 acre development. As Joseph L. Sax, then-Counselor to the Interior Secretary, testified during the Senate Judiciary Committee hearings on the 1995-96 takings bills: "[A]nybody who thinks when you pass a law that says you can be compensated by the Federal taxpayers when . . . any affected portion of your property, is reduced by 33 percent, thinks that isn't going to create a great burgeoning of lawsuits must be smoking something pretty strong." (S. Hrg. 104-535, at 226).

While H.R. 1142 focuses on the ESA, the history of the 1995-96 takings bills demonstrates the immediate, powerful pressure to expand such bills to cover all Federal laws. While the House passed bill was limited to the ESA, wetland protections and certain irrigation and water laws, Senate proponents immediately extended their bills to cover all laws (S. 605) or nearly all (S. 1954). The absurd and draconian payments to polluters and others that would have resulted clearly revealed that the purported property rights principles they embodied are contrary to the Constitution's balanced approach and to the views of the American public.

#### **TAKINGS BILLS ARE BUDGET BUSTERS AND CREATE PERVERSE INCENTIVES**

Like prior takings bills, H.R. 1142 would force repeal, or block implementation, of basic protections for people, property, and natural resources by making them too expensive to enforce.

Then-Office of Management and Budget (OMB) Director Alice M. Rivlin testified that the OMB estimated that direct spending costs of the 1995 House-passed ESA and wetlands takings bill would be \$28 billion over seven years, with the broader Senate bill costing several times that amount: "I want to emphasize that these are not estimates of Fifth Amendment 'takings' due to Federal activities, but instead reflect the costs of implementing a radical, harmful, and expensive compensation scheme that would likely encourage unmerited claims." (S. Hrg. 104-299, at 142).

Director Rivlin's estimate was highly conservative. She testified, for example, that while OMB recognized that the bills would encourage people to "game the system, potentially resulting in an enormous number of claims," OMB's estimate "did not include an estimate of the number of land owners that, for example, would want to get under the regulation so that they could make a claim." (Id. at 145). The late, former Senator Paul Tsongas, a strong advocate of a balanced budget, testified on this precise issue: "I can tell you as a former real estate developer who lost money,

this is a bonanza because all I would have to do now is figure out where wetlands are before they are designated, buy it, submit an application for a shopping center, after it gets denied, I submit a bill to you and it doesn't cost me anything." (Id. at 147).

Under H.R. 1142, claims would be even easier. For example, speculators could buy land for \$50 an acre, a price that fully and openly reflects the applicability of the ESA. A week later, they could then demand payment because the land was "only" worth \$75 an acre. Under H.R. 1142, a 50 percent real world gain would appear to be a 25 percent "reduction in fair market value," because the artificial "fair market value" of \$100 an acre would be calculated "without regard to the presence of any species protected under" the ESA.

H.R. 1142 would distort the economy and investment. Professor Richard J. Lazarus' testimony regarding the 1995-96 takings bills logically applies to this bill as well: "Perverse incentives will abound. Property owners will propose activities not because of any real interest in their undertaking, but rather simply so that the holder of the property right can be denied permission and thus be entitled to compensation. The law would create an economic incentive for land owners to engage in the most environmentally destructive activities possible, short of a classic common law nuisance, in order to force the land owner not to do so." (S. Hrg. 104-299, at 220).

Similarly, then-EPA Deputy General Counsel Gary S. Guzy repeatedly testified that takings bills would "create perverse incentives that discourage cooperation between property owners and regulators to find ways of allowing development while protecting the environment. . . . Even more perversely, the bill rewards proposals that are not realistic or feasible." (Id. at 200).

Thus, for example, developers would apply for permits to fill in especially sensitive habitat in order to collect payments when the permits are denied. H.R. 1142 would strongly encourage these applications to be filed even where the alleged development plan would not make economic sense, as in cases where the overall profit from the tract would be enhanced by retaining a lake and marketing luxury upland lakefront acreage.

The Congressional Budget Office (CBO) estimated only the costs of administering the 1995-96 House and Senate takings bills, stating that: "CBO has no basis for estimating the additional amount of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court. . . . CBO expects that the majority of the new suits would involve relatively large claims against agencies that regulate the use of land or water, particularly the U.S. Army Corps of Engineers and the Department of the Interior (DOI)." (S. Rep. No. 104-239, at 40, 43).

Taxpayers for Common Sense, a budget watchdog group, issued a May, 1996 report stating that the cost of S. 605 could be \$100 billion over seven years, or, more likely, a virtual blank check. A study by the University of Washington Institute for Public Policy Management revealed that Washington State's defeated takings legislation (Referendum 48) could have cost local governments up to \$1 billion annually for takings studies alone and exposed them to payments of as much as \$11 billion.

If H.R. 1142 were to pass, the vast majority of payments would be to large corporations and developers who are the subject of most of the regulations and who have the lawyers, appraisers and experts necessary to demonstrate a "right" to payment under the bill's vague standards. The ingenuity and greed of some giant corporations that oppose limits on their ability to profit at the expense of others was dramatically illustrated by a May 1996 Exxon subsidiary's lawsuit claiming that the \$125 million Exxon Valdez tanker had been taken.<sup>1</sup> The claim challenged a provision of the Oil Pollution Act of 1990, which was passed after the Exxon Valdez had spilled 10.6 million gallons of crude oil, that allowed the ship to operate anywhere in the world except Prince William Sound, where the spill had occurred. A separate March 11, 1999 Court of Federal Claims decision deferred ruling on the merits of a Maritrans, Inc. takings claim for more than \$200 million to cover the loss of 37 single-hull tank barges that would be phased out of service in 2003 by the double-hull requirements of the same Act. (Docket No. 96-483 C).

Professor C. Ford Runge's testimony about the 1995-96 takings bills demonstrated how payments regarding land would reflect the highly concentrated nature of land ownership: "[I]f one combines the land holdings of the large farm operators and timber operators, 2.1 million land owners own 1,035 million acres of land. That means that 2.65 percent of all private land owners own 78 percent of all private land. Their size also implies a likely sophistication in dealing with government programs." In contrast, the roughly sixty million owners of residential property own 3 percent of

<sup>1</sup> See David Whitney, *Exxon Wants Notorious Tanker Back on Duty in Alaska Waters*, Anchorage Daily News, Apr. 5, 1996, at A-1.

all private land. (S. Hrg. 104-299, at 205). Takings bills would benefit the former, large landowner group to the general detriment of homeowners who depend upon clean air, safe drinking water, zoning and other laws.

As a practical matter, H.R. 1142 would create an unlimited budget-busting entitlement; the bill's "subject to the availability of appropriations" language would be overwhelmed by pressure to pay all those who meet the bill's radical new payment standard. Surely, those who support this bill would favor paying everyone who they encouraged to file claims. The alternative would be a cruel hoax. After encouraging those who have not lost any property rights to spend the time and expense to hire a lawyer and an appraiser to file and prove a claim under H.R. 1142, not paying would place them in a worse position than they are now. Paying only the first claims would ensure that the biggest companies with the fastest and most expensive lawyers would drain all available funds.

As a result, H.R. 1142 would compel avoidance of these costs through repeal or non-enforcement of ESA protections that benefit people, neighboring property, and public resources. The cost of takings analysis and notifications mandated by H.R. 1142 would have a similar effect.

#### **"TROJAN HORSE" ATTACK ON THE ESA**

This bill unjustifiably singles out the ESA. In over 25 years, courts have only decided four ESA "takings" cases on the merits, all of which have found that the ESA did not take private property. (A copy of NWF Senior Counsel Glenn Sugameli's legal analysis of the ESA and takings claims is submitted for the Committee record). This paucity of cases reflects the fact that the ESA's safeguards that affect land use are in fact very flexible (indeed, only one of these four cases involved limitations on the use of land). Congressional Budget Office and Congressional Research Service reviews of takings claims against the Federal Government have consistently found that the vast majority of pending and recently decided cases have nothing to do with environmental protection laws.

The potential value of property is affected by the enactment, amendment and enforcement of every kind of Federal, state and local law: from Antitrust, Bankruptcy, Copyright, Drug, Energy, Food safety, through the alphabet all the way to Zoning. As Justice Holmes' opinion for the Court in the first "regulatory taking" decision warned, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). In deciding what is a taking, the Supreme Court has consistently used a balanced approach that reflects this warning.

Harvard Law Professor Frank I. Michelman explained that there is no "remotely principled basis" for the approach of limiting the scope of the 1995 House bill [or the current H.R. 1142] to "land value losses stemming from agency actions under two or three selected laws." (6 *Fordham Envtl. L.J.* at 416-17). Prominent ideological supporters of Federal takings bills agreed with this analysis. For example, Jonathan H. Adler of the Competitive Enterprise Institute testified that: "Any bill that seeks to protect the property rights of Americans must cover all Federal laws that deprive land owners of the reasonable use of their land. There is no principled basis upon which to pick and choose which laws, environmental or otherwise, should be covered." (S. Hrg. 104-299, at 222). He repeated this passage in subsequent testimony, but italicized "all" to emphasize the point. (S. Hrg. 104-535, at 205). See also *id.* at 82 ("There are a huge number of Federal regulations which have the effect of taking private property . . .") (statement of Nancie G. Marzulla, President of Defenders of Property Rights).

Narrowing takings bills like H.R. 1142, without any principled basis, to certain laws reveals that the issue is not property rights, but a Trojan Horse attack on laws that supporters of the bill do not like and that are too popular to repeal directly. Under the guise of protecting property rights, H.R. 1142 would make the ESA too expensive to enforce.

H.R. 1142 is not necessary. The ESA has numerous provisions to ensure that the Federal wildlife agencies have the necessary flexibility to give due respect to private property interests. Agencies routinely allow economic activities in and around endangered species habitats to go forward, using tools such as separate "4(d) rules" for threatened species, reasonable and prudent measures, reasonable and prudent alternatives, and incidental take permits and Habitat Conservation Plans. In the unlikely event that private property rights are infringed despite the availability of these flexible tools, the courts provide adequate remedies for property owners to enforce the Constitution's Fifth Amendment clause "nor shall private property be taken for public use, without just compensation."

### CHILLING ENFORCEMENT OF THE LAW

H.R. 1142 would chill enforcement of the ESA and harm a wide range of agency programs by requiring that payments “shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency that took the agency action giving rise to the payment . . .” This would apply to mandatory agency actions where the agency has no legal choice except to follow the Congressional mandate. Especially where there is any question whether a necessary action to save a species could lawfully be delayed, H.R. 1142 would impose a Hobson’s choice upon agency officials. Implementing the ESA in one case could result in windfall payments that would divert scarce agency resources, forcing massive layoffs and cutting off funds needed to enforce the ESA and other laws. Protection of National Wildlife Refuges, Army Corps of Engineers flood control activities and Environmental Protection Agency enforcement of air and water pollution laws could all suffer.

H.R. 1142 would unjustifiably pressure agency employees to protect their jobs and programs by always erring on the side of not protecting endangered species. These species often have no room for delay or error. Extinction is forever. It neither waits for delays nor forgives errors.

### VOTER REJECTION OF TAKINGS BILLS

In statewide referenda, voters have overwhelmingly rejected legislatively approved takings bills. By the same 60-40 percent margin, voters repealed a Washington State takings payment bill in November, 1995, and an Arizona takings impact assessment bill in November, 1994. (In each state, takings bill supporters outspent opponents by 2-to-1).

Supporters of takings recognize that the American people oppose these bills: the Seattle Times reported that “R.J. Smith of the conservative Competitive Enterprise Institute, a Washington, D.C. think tank, said the defeats in Washington and Arizona may have taught another lesson—that property rights leaders shouldn’t take the issue directly to voters through initiative or referendum.”<sup>2</sup> Indeed, there have been no more statewide “takings” initiatives or referenda.

Grassroots opposition to takings bills reflects the fact that these bills would force taxpayers either to give up needed protections or to pay billions of dollars to maintain health, safety and other measures that do not take any property.

### WIDESPREAD OPPOSITION TO TAKINGS BILLS

The radical nature of the similar, failed 1995-96 Contract with America ESA and wetlands takings bill generated bi-partisan opposition, a Presidential veto threat and strong opposition from a wide range of national religious, labor, taxpayer, conservation and other groups.

The National Governors Association, National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors, National Institute of Municipal Law Officers (now the International Municipal Lawyers Association), National Black Caucus of State Legislators, International Association of Fish and Wildlife Agencies, and Western State Land Commissioners Association all have approved resolutions opposing takings payment bills.<sup>3</sup>

A distinguished Member of this Committee, Rep. Tom Udall (D-NM), was Attorney General of New Mexico when he submitted testimony to the House Committee on the Judiciary opposing takings bills. He attached a letter to Congress from Republican and Democratic Attorneys General representing thirty-three states and territories describing how takings bills: “purport to implement constitutional property rights protections, but in fact they promote a radical new takings theory that would severely constrain the government’s ability to protect the environment and public health and safety.” (Reproduced in House Rep. 104-46, at 64-68).

Takings bills have ignited broad opposition on all levels of government, across political parties, and among a broad range of groups. Opponents of takings bills include citizens and groups representing civic associations, labor, taxpayer, planning, historic preservation, public health, hunting, conservation, and fishing industry organizations; state and local government officials; and child welfare, civil rights, religious and senior citizen groups. (S. Rep. No. 104-239, at 68). These opponents, who are working to protect people, property and natural resources, range from the

<sup>2</sup> Eric Pryne & David Postman, *Ref 48 Defeat Has Louder Echoes: A Property Rights Stall in Congress, Too?*, Seattle Times, Nov. 9, 1995, at A1.

<sup>3</sup> NGA 1995 Annual Meeting Resolution 18; NCSL policy resolution passed July 28, 1994; NLC Resolution #1 adopted Dec. 4, 1994; USCM Resolution Adopted Jun. 1995; NIMLO Resolution adopted Apr. 8, 1995; NBCSL Resolution adopted Dec. 1995; IAFWA Resolution adopted Mar. 1996; WSLCA Resolution adopted Jan. 12, 1995. The NLC, NCSL and WSLCA Resolutions are reproduced in House Rep. 104-46, at 69-72.

League of Women Voters to the United Steelworkers of America, to the American Public Health Association. (S. Rep. No. 104-239, at 68).

A broad range of religious denominations have opposed takings bills from a moral and theological perspective. These include detailed written testimony submitted by the United States Catholic Conference; (S. Hrg. 104-535, at 154-158) statements submitted by the National Council of Churches of Christ in the USA, and by numerous Christian denominations, including the Evangelical Lutheran Church in America, United Methodist Church, Presbyterian Church USA, Mennonite Central Committee U.S., and United Church of Christ; (Protecting Private Property Rights, H. Jud. Comm. Hrg. 104th Cong. at 41-42, 128-33).

President Clinton promised to veto the 1995-96 House, Senate or any similar takings compensation bills. The description in the President's December 13, 1995 letter to the Senate Judiciary Committee applies equally to this takings compensation bill: "S. 605 does not protect legitimate private property rights. The bill instead creates a system of rewards for the least responsible and potentially most dangerous uses of property. It would effectively block implementation and enforcement of existing laws protecting public health, safety, and the environment." (See S. Rep. 104-239, at 55). Strong bipartisan opposition repeatedly blocked Senate consideration of takings legislation in 1996.

#### **A BETTER WAY—COMMON-SENSE ESA REFORMS AND ENACTMENT OF NEW WILDLIFE FUNDING LEGISLATION**

NWF fully supports reauthorizing the Endangered Species Act to incorporate what we have learned since the last reauthorization in 1988. Four changes should be made to make the ESA work better for both landowners and wildlife. These changes are included in H.R. 960, the Endangered Species Recovery Act, which was introduced by the distinguished ranking Member of this Committee, Rep. George Miller (D-CA), with 67 original cosponsors on March 3, 1999.

First, Congress should build in real financial incentives for private landowners to go beyond the Act's bare minimum requirements and to take affirmative actions for the benefit of imperiled species. This can be done through relatively inexpensive tax law changes and funding initiatives targeted toward habitat restoration and active management of habitats.

Second, Congress should update the Act's habitat conservation planning (HCP) provisions, so that HCPs work for private landowners and species. The Clinton Administration has launched a revolutionary change in the ESA through its use of HCPs—locking in long-term land use plans for over 7 million acres in just 5 short years. According to several recent scientific studies, these plans may be undermining the ESA's recovery goal. Congress will need to clarify that HCPs may not undermine recovery, and that they must be sufficiently adaptive so that we can take effective action when they fail to achieve their promised conservation objectives.

Third, Congress should enhance Federal agencies' accountability for achieving recovery. Too many species are not making sufficient progress toward recovery, and agencies have become focused on avoiding jeopardy rather than fulfilling their statutory obligations to promote recovery. Agencies with activities affecting imperiled species must make specific and enforceable commitments to help implement recovery plans.

Finally, Congress should increase citizen participation in key decisionmaking processes. NWF recently sponsored a study of HCPs by the University of Michigan, which demonstrated conclusively that plans with major implications for our biological heritage are being designed behind closed doors, without input from conservationists, neighboring landowners, expert scientists and other concerned citizens. Congress should identify ways for these stakeholders to provide their ideas and input early in the process, rather than merely inviting comment after the deal has been struck and after it is too late for any significant changes to be made.

In addition, NWF strongly supports establishing a permanent, dedicated funding source for "nongame" species (the roughly 90 percent of species that are neither hunted nor classified as threatened or endangered). Several bills pending before Congress, including H.R. 701, the "Conservation and Reinvestment Act of 1999," and H.R. 798, the "Permanent Protection for America's Resources 2000 Act," have the potential for establishing such a permanent funding source. Although NWF has concerns about certain features of these bills, both could provide funding for early intervention measures that prevent nongame species' decline and avoid more costly recovery measures that are frequently incurred once a species has been listed. We look forward to working with the sponsors of those bills to ensure the two proposals are merged in a way that brings out the best in both of them and allows the broad support necessary for passage.

**CONCLUSION**

H.R. 1142 would harm the property and other rights of average Americans because it would impose standards that are contrary to the Fifth Amendment's balanced protection of private property. The result would be massive costs to taxpayers, a litigation explosion, more bureaucracy and inability to enforce the ESA's protections that benefit people, private property and public resources. We strongly urge that H.R. 1142 be set aside in favor of common sense ESA amendments and separate legislation to provide a permanent, dedicated funding source to prevent species from becoming endangered, both of which can make the Act work even better for both landowners and wildlife.

Mr. VENTO. Mr. Chairman, I would ask unanimous consent to place Mr. Miller's statement in the record.

Mr. YOUNG. Without objection, so ordered.

[The prepared statement of Mr. Miller follows:]

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

Mr. Chairman, I think it is unfortunate that the Committee will spend time today debating legislation that even its proponents have acknowledged is not going to become law. We could be making much better use of the Committee's time by discussing substantive issues related to the reauthorization of the Endangered Species Act, instead of once again trying to gut the law under the guise of protecting private property.

Congress has debated the private property rights and takings issues repeatedly over the past several years, and the outcome is always the same. We hear the horror stories about the impacts of the Endangered Species Act and other environmental laws. We research these horror stories and find that the law is usually not to blame, and these bills go nowhere. Why are we debating this issue yet again?

The bottom line is this; the Courts have repeatedly found that the implementation and enforcement of environmental laws to protect the public good do not constitute a taking of private property and do not warrant compensation under the 5th Amendment of the Constitution.

As such, H.R. 1142 and bills like it are not, as they are characterized, a mere protection of private property rights under the Constitution. Instead, they establish a new statutory threshold for compensation that is independent of the Constitution and will, in effect, pay people to comply with the laws that require the protection of species and the environment. In this particular case, H.R. 1142 creates a new taxpayer-funded entitlement for property owners that is not available under other environmental laws. Moreover, by requiring that compensation be paid from appropriated funds, it ensures that the agencies responsible for implementing the ESA will have little money left to perform their statutory duties to recover species.

The overwhelming majority of Americans support recovering endangered species, just as they support laws that ensure we have clean water and clean air. The Resources Committee should stop wasting time and money on endless debate on these peripheral issues which more often than not involve mis-characterization of the law, and instead do its job and write legislation to reauthorize the Endangered Species Act that will ensure that we recover species and get them off the list. That is the real way to reduce the restrictions on landowners as you seek to do with this legislation.

I have introduced H.R. 960 which has over 70 co-sponsors to date; a similar version in the last Congress had over 100 co-sponsors. And yet we have never even held a hearing on that legislation. We should move beyond the anecdotal stories and concentrate on the more difficult but also more important work of improving the ESA.

Mr. YOUNG. Mr. Smith.

**STATEMENT OF BRUCE SMITH, VICE PRESIDENT, NATIONAL  
ASSOCIATION OF HOME BUILDERS, WASHINGTON, DC**

Mr. BRUCE SMITH. Good morning, Mr. Chairman. My name is Bruce Smith, and I am a custom builder from Walnut Creek, California. I am also the National Association of Home Builders' 1999 vice president and treasurer. Formerly, I served as chairman of the Na-

tional Association of Home Builders' Endangered Species Subcommittee.

I appreciate the opportunity to testify before you today on H.R. 1142, the Landowners Equal Treatment Act of 1999. H.R. 1142 goes to the heart of three issues that the National Association of Homebuilders has long advocated: better communication between Federal agencies and landowners; timely negotiations between the two parties, and compensation for an agency taking under the Endangered Species Act.

The National Association of Home Builders' and its 197,000 member firms support this important legislation. We believe H.R. 1142 is a reasonable and fair bill that offers room for the agency and the landowner to negotiate an agreement on the use of private land. We are pleased that the bill sets out timelines for compensation payment and ending negotiations, and timely notice to a property owner affected by an agency's action.

NAHB strongly believes that the restoration of public confidence on wildlife conservation laws requires assuring individual private property owners that their rights will be respected and protected in the process of attaining the goals of the Endangered Species Act. Further, we believe it is only fair that private landowners be given the same consideration and treatment that the Federal Government agencies are given when their land is being used for public purposes. It is time the Congress insists that private landowners receive compensation as mandated in the 5th Amendment to the Constitution. H.R. 1142 is the right thing to do for this country.

Property loss is particularly difficult in our industry for the small-volume homebuilders. Nearly 60 percent of our members build fewer than 10 homes a year. These small businesses can rarely afford the economic impact of losing most, or even part, of the use of the property they own, and even fewer can afford the expenses associated with a long court battle to try to preserve their rights under the 5th Amendment. And none of them can afford excessive mitigation requirements. In California we have seen up to 160-to-1 ratio being used against these small-volume builders in America.

Further, while NAHB appreciates the opportunity to address these problems in the context of the Endangered Species Act, we also advocate that similar compensation provisions should be extended to takings under any Federal environmental statute, including the Clean Water Act, various national heritage acts, or any other Federal attempt to regulate land use.

H.R. 1142 is just a first step, but it is a very, very good step. However, there are other important ESA reform items that need to be addressed by this Congress. As many members of this Committee remember in the 104th Congress, H.R. 2275 was reported by this Committee and addressed many of the reforms that NAHB continues to seek. These reforms are long overdue and need to be addressed again and again, until they are passed by Congress.

To ensure that ESA works at its best, Congress must address peer review, better availability of scientific data to the public, the mandating of critical habitat of a species to be identified at the time a listing decision is made, better public notice, and codifying the administration's policies such as no surprises.

ESA needs to be a proactive, rather than reactive, Act. Citizens and landowners need to be a part of the process, not punished. This is the only way ESA will be successful and the only way we can protect and recover important species. These reforms, including H.R. 1142 here today, are a start to bringing the American citizen in the process of saving our species.

Thank you for this opportunity.

[The prepared statement of Mr. Bruce Smith follows:]

STATEMENT OF BRUCE SMITH, NATIONAL ASSOCIATION OF HOME BUILDERS

Good Morning Mr. Chairman and members of the House Resources Committee, my name is Bruce Smith. I am the 1999 Vice President and Treasurer of the National Association of Home Builders (NAHB), and formally served as Chairman of NAHB's Endangered Species Subcommittee. I am a custom builder in Walnut Creek, California. I appreciate the opportunity to testify before you today on behalf of NAHB's 197,000 members, regarding H.R. 1142, the "Landowners Equal Treatment Act of 1999."

**Bill Overview**

First, let me address H.R. 1142. This is a reasonable, fair bill that offers room for the agency and landowner to negotiate an agreement on the use of private land. We are pleased that the bill sets out time lines for compensation payment—within 6 months after an agreement is reached between the landowner and agency—and time lines ending negotiations if no agreement is reached. Further, we are pleased that the legislation requires the Federal Government to give 30 days notice to a property owner affected by an agency's action, and provides the owner with the proper information to be compensated. NAHB has long advocated better public notice to property owners from Federal agencies regarding the impact of environmental regulations. These proposed amendments fairly address such concerns and enhance the certainty in the regulatory process that our members deserve.

We would suggest two improvements to the bill. The bill defines "constructive use" to include "the imposition or enforcement of a **prohibition of use** of non-Federal property, the purpose of which is to provide or retain habitat for any species of wildlife or plant." The Federal Government may not enforce the ESA in a manner that renders an entire plot unusable; nonetheless, substantial portions of property can be deprived economically viable uses and rise to the level of a taking. This question is sometimes referred to as the "denominator problem."<sup>1</sup> The Supreme Court has never fully addressed this question, although lower courts have held that the portions of the property to be considered are those for which certain uses have been denied.<sup>2</sup> We would thus suggest adding language defining "constructive use" to encompass "the prohibition of use of non-Federal property **or any portion thereof.**"

Along the same lines, the bill defines "constructive use" as "the denial of a permit under section 10 that results in the **loss of the ability to use** non-Federal property in order to provide habitat for wildlife or plants." Our builders have found that the Federal Government often grants permits with conditions. These conditions may diminish the market value of the land by 25 percent or more and should also be defined as "constructive use." We would urge language be added defining "constructive use" to include permits that are granted with conditions that trigger the need for compensation.

NAHB appreciates that the Committee is addressing these problems in the context of the Endangered Species Act. However, we would also advocate that similar compensation provisions should be extended to takings under any Federal environmental statute, including the Clean Water Act, various national heritage acts, or any other Federal attempt to regulate land use. It has been our experience that once Federal agencies got into the business of regulating land, they have rarely paused to consider what impact its regulations have on private landowners and small businesses.

NAHB is pleased to see the introduction of this legislation. H.R. 1142 is the right thing to do for this country. NAHB believes strongly that restoration of public confidence in wildlife conservation laws requires assuring individual private property

<sup>1</sup> See *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967).

<sup>2</sup> *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

owners that their rights will be respected and protected in the process of attaining the goals of the Endangered Species Act. Further, we believe it is only fair that private landowners be given the same consideration and treatment that the Federal Government agencies are given when their land is being used for public purposes.

### **ESA Reform Overview**

H.R. 1142 is a first step and a good step. However, there are other important ESA reform items that need to be addressed this Congress. Compensation is a major element in any reform; however, there several other reforms we would like to see addressed by this Committee and Congress. The ESA imposes some of the most stringent restrictions on the use of private property of any Federal statute. The Act's provisions are mandatory, inflexible, and absolute. Indeed, unlike most legislative schemes, the statute's requirements are not moderated by "where practicable" or "where the benefits exceed the costs." There are many reforms that can be addressed to rectify these inadequacies. Reforms are long over due and deserve to be addressed by this Committee.

The following reforms of the Endangered Species Act are important to NAHB:

- Require a stricter scientific basis for listing species and peer review of the science.
- Mandate that critical habitat of a species should be identified at the time the listing decision is made.
- Allow for private citizens to play a greater role in the decision making process and allow for better public notice of listed species.
- Codify the Administration's policy on "no surprises," "safe harbor" and "candidate conservation agreements."
- Requiring recovery plans to be finalized under strict deadlines for each listed species.

NAHB supported S. 1180, the Endangered Species Recovery Act of 1997, introduced by Senators Dirk Kempthorne (R-ID), John Chafee (R-RI), Max Baucus (D-MT) and Harry Reid (D-NV) in the 105th Congress. The bill addressed many of the reforms NAHB seeks this Congress. S. 1180 would have provided reasonable balanced reform of the ESA. As a result it enjoyed support of the Administration, some environmental organizations, and many industry groups. NAHB was disheartened to see the bill fail. S. 1180 contained several important ESA reforms that would have promoted both economic development and species conservation. NAHB believes this Committee should promote many of the provisions in the bill again in the 106th Congress.

I would like to discuss in further detail the reforms NAHB believes should also be addressed in legislation this Congress.

### **Scientific Data**

Currently, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Services (NMFS) base their listing decisions upon "best scientific or commercial data available." This is vague language prescribed by the Act but not defined anywhere by law or regulation. Congress must ensure that FWS extends the Act's protections only to those species that are truly threatened or endangered, based upon all appropriate documentation and research. The listing process, therefore, should be reformed to require a stricter scientific basis for listing species. NAHB believes that Congress should define "best available science" to include the minimum viable population of species, the minimum habitat necessary for the species survival, the species geographic distribution, population, and percentage decline, and the actual threats to the species. NAHB also believes that an ideal formal, systematic peer review process would require evaluation of the methodologies used in the collection of the data. This would assure that researchers follow appropriate methodologies for gathering and analyzing data. All data should be field-tested, verifiable, and peer reviewed. Listing of species affects communities and landowners across our country every day. It is imperative that listings be made from sound science.

Data should also be made available to the public. It is important that a landowner be able to obtain information on a species that may be on their property.

### **Critical Habitat**

FWS routinely fails to designate critical habitat for listed species. Congress mandated that the critical habitat of a species should be identified at the time the listing decision is made "to the maximum extent prudent and determinable." Only those areas essential to the protection and recovery of the focal species are considered its critical habitat. The agency's failure to designate critical habitat creates severe and unnecessary problems for private landowners. As a result of FWS' failure to designate critical habitat, FWS regulates development on all potential habitat.

Congress needs to make a collection of sufficient and appropriate data for critical habitat designation a requirement and a priority. NAHB also believes that the Federal Government must weigh the socioeconomic consequences before critical habitat designations are proposed. It is only fair to the species and affected communities that critical habitat be identified.

#### **Public Notice/Involvement**

Current law has no public notice requirement outside of a Federal Register notice of proposed listing, and the requirement that a hearing be held in each affected state if requested within 45 days of final notice. NAHB believes a system must be established whereby the FWS would maintain a mailing list of interested parties who would receive notification of any and all petitions to list, proposed listings and draft recovery plans. Currently, the Army Corps of Engineers maintains such a list for proposed actions under the Section 404 program. In this way, landowners, environmental organizations, and other interested parties would have sufficient opportunity to comment on these proposed agency actions. Most individuals, including NAHB members, do not have the resources to follow every listing that appears in the Federal Register.

Further, private citizens and communities—especially those directly affected by conservation decisions—should have a greater stake and a more prominent role during the ESA decision making processes. Congress should provide for earlier and more meaningful opportunities for citizens to participate, more citizen involvement in recovery plans, and a more prominent role in the consultation process for applicants for Federal licenses and permits. NAHB has repeatedly suggested that FWS and NMFS notify private landowners when critical habitat is proposed on their property. Stakeholder participation in the process is critical whenever agencies propose to implement significant changes to existing regulatory processes.

#### **No Surprises/Candidate Conservation Agreements**

NAHB believes it is important for Congress to codify three important administration policies: “no surprises,” “candidate conservation agreements,” and “safe harbor.” These policies provide much needed assurances that when a deal is struck between landowners and their local, state or Federal governments that provide for both species conservation and the ability of the landowner to use his or her property, the government cannot come back with new information that requires further mitigation. This is a critical component in getting the landowner to the table and providing him or her with much needed incentive to preserve species. Codifying these policies as law will neutralize the negative affects of third party lawsuits that challenge the reasonable efforts of participants and government officials to cooperate in protecting species.

#### **Recovery Planning**

Congress should fortify the recovery planning process envisioned in the Act by requiring the preparation and use of timely, comprehensive, effective and cost-effective recovery plans. Presently, many species are without a viable financially feasible recovery plan. A recovery plan should be required and finalized under strict deadlines for each listed species. We also would advocate that the requirement for peer review of the biological goals within a recovery plan be as least as stringent as that for listing and delisting decisions. Further, FWS should adopt a “least-cost” alternative in recovery plans, and be prohibited from adopting a plan until all financial expenditures are identified. The overall goal is to save species. It is important that an emphasis is put on recovery.

#### **ESA/CWA Memorandum of Agreement**

NAHB submitted comments to the Environmental Protection Agency for the proposed memorandum of agreement (MOA) with the Fish and Wild Service and the National Marine Fisheries Service. The intent of the MOA as stated in the proposed rule is to streamline agency efforts during ESA Section 7 Consultation. NAHB supports efforts to streamline the process but opposes the attempt to expand agency authorities under the Clean Water Act (CWA) and ESA. The Water Quality Standards (WQS), National Pollutant Discharge Elimination System (NPDES) program, and the ESA Section 7 Consultation process have existing standards that should not be complicated. The MOA as proposed establishes too many levels of involvement and subsequently complicates the WQS, NPDES, and ESA consultation programs. NAHB’s comments focus on recommendations that adhere to the congressional intent of both the CWA and ESA. Congress should make clear that ESA considerations should not over ride the CWA programs.

### Fifth Amendment Rights Overview

Finally, let me take a moment to focus on the issue of property rights. One of NAHB's long-standing policies is to ensure that landowners are paid just compensation when government takes private property through onerous and excessive land use regulation. The right of private property owners to use their land is one of the most valued tenets of the U.S. Constitution and a bulwark of our democracy. Supreme Court rulings since the 1980s have reaffirmed the basic principle that the property rights safeguarded by the Fifth Amendment must be vigilantly protected and are as important as the speech and privacy rights protected by the First and Fourth Amendments. None deserve any less protection compared to the others.

Federal and state governments continue to take private property for a variety of reasons, thus triggering the requirement that just compensation be paid to the affected landowner. The Endangered Species Act (ESA), in particular, continues to be enforced in such a way as to cross that line drawn by Justice Oliver Wendell Holmes nearly seventy years ago. "If regulation goes too far," he wrote, "it will be recognized as a taking."<sup>3</sup> Often, enforcement of the ESA by the U.S. Fish and Wildlife Service (FWS) does, indeed, "go too far" and deprives property owners of all or a substantial portion of the use of their property.

This loss is particularly difficult for the small volume homebuilder. Over 60 percent of NAHB's membership build fewer than ten homes per year. These people can rarely afford the economic impact of losing most of the value of a property they own, and even fewer can afford the expenses associated with a protracted court battle.

I am not here to argue against the position that the preservation of endangered species is of national importance. It is of national importance; however, individual property owners should not bare the burden of species preservation for the whole nation. As Justice Black wrote in *Armstrong v. United States*, "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>4</sup>

NAHB is pleased that Chairman Young and other members of the Committee have addressed this issue in terms of the Endangered Species Act in H.R. 1142. Unfortunately, as mentioned earlier, this represents only part of a larger problem. Many other Federal statutes that regulate land use, such as the Clean Water Act or Superfund, also raise the specter of taking private property. These statutes should be similarly assessed to ensure that property owners who suffer unconstitutional takings are fairly compensated. We hope that Congress will look at other aspects of our struggle to realize our members' Fifth Amendment rights, particularly the need for procedural reforms in order to guarantee fair access to property owners to the Federal courts, so their Fifth Amendment takings claims can be resolved on the merits.

Expedition access to the Federal Courts remains a priority for the building industry. Private property owners still lack the ability to have the merits of a Fifth Amendment claim heard before a Federal court in a timely manner. NAHB strongly believes that along with compensation we need to address judicial reforms for private property rights cases. Last year, NAHB and many members of this Committee supported a bill, H.R. 1534, the Property Owners Access to Justice Act, which passed the House of Representatives in October of 1997. The bill was designed to clear many of the judicial and administrative hurdles property owners currently face when trying to bring their takings claim to court. The legislation gave a property owner access to Federal court without having to spend years in an endless cycle of administrative appeals with government agencies.

The requirement that property owners should exhaust "all administrative remedies" with an agency before getting their day in court often results in endless rounds of appeals with the relevant agency. Property owners have a legitimate expectation to know with some degree of certainty what rights they have on their own property. H.R. 1534 required the property owner to make at least two applications for a permit at the local level before going to court, but offered a clear ending to the process. It is important that a "final agency" action is defined in terms of a private property rights case, otherwise the process becomes endless for the property owner. Many times the property owner simply gets out of the process either because it is too expensive or time consuming to pursue, and hence loses the use of their property. This is wrong. Private property owners deserve to be heard in court on takings cases.

<sup>3</sup> PENNSYLVANIA COAL CO. v. MAHON, 260 U.S. 393 (1922)

<sup>4</sup> ARMSTRONG v. UNITED STATES, 364 U.S. 40 (1960)

The key elements of NAHB's property rights policy include the following:

- Federal legislation and regulation should fully compensate landowners in an expeditious manner for the value of their property that is taken or deemed unusable.
- Legislation should initiate and/or support appropriate litigation in Federal and state courts involving takings issues and other protections of private property rights.
- Legislation should adopt a clear statutory definition of a taking to include not only physical occupation or use, but regulated uses and/or diminished value.
- Federal legislation and regulation should ensure private property owners the right to exclude people from their property, including those who wish to enter onto property to gather data on environmental issues.
- Federal legislation should allow property owners more expeditious access to Federal District Court review of takings cases.

### Conclusion

There needs to be new, proactive approaches developed to protect endangered species habitat on non-Federal lands in order to achieve the ESA's goals. There needs to be adequate incentives for non-Federal landowners to factor endangered species conservation into their day-to-day land management activities. In fact, recent studies show that, for species found entirely on private property only 3 percent are improving, and the ratio of declining species to improving species is 9 to 1. The current ESA is reactive rather than proactive regarding private land conservation. That is why it is important to reform the ESA and offer landowner incentives to conserve. In order for the ESA to be successful the private landowner needs to be vested in the conservation not punished for owning good species habitat.

NAHB commends Chairman Young and other members of this Committee for addressing the important issue of compensation for private property takings. NAHB will continue to fight for landowners' Fifth Amendment rights under the United States Constitution, and will continue to advocate further ESA reforms.

Mr. YOUNG. I want to thank the panel for the excellent testimony and taking the time.

It interesting, I actually have two private people sectors and one quasi-private, Mr. Gordon, and two, they are basically government officials. If this Act is working so well, why would the private sector say it is not working so well, Jamie? Jamie? And Mr. Thomas certainly doesn't think it is working well. I mean, where is this cooperating attitude? Does it exist at all?

Ms. CLARK. Well, Mr. Chairman, I am certainly—and you and I have had many discussions about this—well aware that there are instances that need attention, but the administration has worked very hard over the last few years to provide incentives into the current Endangered Species Act, to solicit and advocate appropriations that allow us to respond more efficiently and more effectively, to address the technical assistance responsibilities that we have to implement the Endangered Species Act.

I get positive feedback all the time from——

Mr. YOUNG. From whom?

Ms. CLARK. From private landowners, from States, from other organizations that are really working with us to protect our biological heritage.

I am sure that there are instances where it is not working well, and we have all heard horror stories, many of which the Fish and Wildlife Service spends a great deal of time refuting. I am not here to contest or to debate the stories that we are hearing today or in previous hearings, but I am convinced that we have worked very hard, in many reauthorization attempts and certainly administrative, to address the needs of private landowners.

Mr. YOUNG. Again, my problem is I am not hearing that same story, and I am concerned that we have a case in Alaska now

where your Department turned down the Corps of Engineers' recommendation and raised it to another level, which cost not only a considerable amount of money; it cost my people money. The end results may be the same thing, but it is a year's delay. I don't see any working relationship there at all, and that disturbs me.

In your testimony, Jamie, you say that the Service has gone to great lengths to minimize impacts of ESA on private property. If that is true, would you object to language that requires the Service to avoid and minimize impacts, similar to the 4(f) Transportation Act language in the starting point?

Ms. CLARK. Well, from my perspective, the 4(f) language, the Transportation Act, is not a compensation language. The 4(f), the Transportation Act, was, indeed, to protect parks and refuge lands for the public benefit. The Minnesota Valley—

Mr. YOUNG. But you didn't answer the question. Would you object to that language if it applied to the private property owner?

Ms. CLARK. The current Endangered Species Act in areas has us minimize and mitigate. We—

Mr. YOUNG. Not on private property, you don't. You require that private property owner to mitigate by putting property into your hands, at a tremendous amount of disproportion acreage. That is what you do with the private property owner.

Again, I go back, do you object to rewarding a private property owner for having endangered species on his property? That is the thing that you—

Ms. CLARK. Absolutely not. That is the theme behind—

Mr. YOUNG. Then why don't we do it?

Ms. CLARK. [continuing] safe harbor; that is the theme behind a lot of the incentives programs that we have been developing. We just funded a whole host of projects nationwide to acknowledge landowners and to provide incentives to conserve endangered species on their land. We can cite many examples—I would be happy to do that for the record—where it has been very positive in the relationship between the Federal protective requirements of the Endangered Species Act and private landowners stepping forward to conserve species on their land.

Mr. YOUNG. But to yield back to me, how does requiring mitigation reward the owner? If he has an endangered species on his or her property, and he has been doing an activity and that species is live and well, and you find the species. In order to continue to let him continue to do what he has been doing, you require mitigation, additional acreage. Now how does that reward? How does that relate to working with one another? That is big government beating up on the private property owner.

Ms. CLARK. Well, the Endangered Species Act does, in fact, require anyone, whether it is a private landowner or a Federal agency, to address the taking of endangered species and to address and to overcome the notion of take of an endangered species.

Mr. YOUNG. But if I have—

Ms. CLARK. You can call it mitigation or call it whatever you like, but the fact of the matter is, I am kind of mandated in my position to prevent the extinction of species. We work with the landowners; we work with Federal agencies; we work with whoever to ensure that species don't go extinct. And if that involves affirmatively obli-

gations on behalf of the private sector or the Federal sector, we try to be as judicious and as realistic as—

Mr. YOUNG. You and I have had this discussion before. I just don't like your Service, very frankly. I don't like the way they conduct themselves and the attitude, "We're the Government, and you're the private property owner. We can do to you whatever we wish to do, and you can't do much about it." Now that is what has happened in many cases. You may call them horror stories and everything else, but that is not the attitude any agency should have within our democracy and under our Constitution.

And I have talked to you about this before, and you are not the only one, but this has gotten progressively worse in the last six years, where there is, I think, a lack of respect for the private property owner and his problems or her problems. When he has a species on that property, there is not much to give him credit for or reward him to keep the species. I think Mr. Gordon said it correctly; I think Mr. Loop said it correctly. I just really think you are leading this country down to a revolt against you, against the Federal Government.

There is nobody happy with the Federal Government today. I mean, that is the sad part about it, and that weakens our democracy and it strengthens this democracy. There is nobody—I can guarantee, if you walk down the street any other place than Washington, DC, and ask anybody, "What do you think about the Federal Government?", and there will be a negative response. That is not healthy.

My time is up. Mr. Vento.

Mr. VENTO. Thanks, Mr. Chairman.

Director Clark, does the Fish and Wildlife Service compensate public agencies for actions that they take to respond to the Endangered Species Act.

Ms. CLARK. No, Congressman, we don't.

Mr. VENTO. You have never done that. Do you know what the scope of the existing Endangered Species Act is as to the amount of land that might be covered, private land that might be covered by the Endangered Species Act today?

Ms. CLARK. Well, I would agree with one of the statistics that I heard in earlier testimony that we say that up to 70 percent of endangered species depend on private land for their existence, but regarding the amount of acreage that endangered species occupy that is non-Federal, I don't have a good number. I could check our records, but I don't believe we have a specific acreage number.

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

Mr. VENTO. And it is my understanding that the Airports Commission payment in Minnesota, my State, was made on the basis of the recreation and education activities, not on the basis—and, of course, this overflight issue that takes place—not on the basis of any type of impact on species, endangered or otherwise.

Ms. CLARK. The 4(f) requirement was made, or the 4(f) mitigation package was made in response to the Secretary of Transportation's obligation to minimize and mitigate adverse effects to public parks and refuges.

Mr. VENTO. I mean, the fact is that, in this case, the visitor center and the recreation activities, interpretative activities that were

going on outside, were rendered—would be completely adversely affected or completely eliminated practically on the basis of these overflights. That is my understanding.

Ms. CLARK. Right. It was the effect on the public's land. It was an effect on the public's enjoyment of Minnesota Valley—

Mr. VENTO. Now does the agency have any constitutional right or any other right to remedy this sort of situation with the Department of Transportation or with the Metropolitan Airports Commission? Do they have any other rights?

Ms. CLARK. Not to my knowledge. It is all statutorily mandated in the Transportation Act.

Mr. VENTO. So that is it? They can't go to the 5th Amendment? They can't go to the—

Ms. CLARK. No, they cannot.

Mr. VENTO. [continuing] 14th Amendment? This is the only right they have?

Ms. CLARK. To my knowledge, that is the right, which is why that was incorporated in the Transportation Act. Public lands and Federal agencies don't have the 5th Amendment right under the Constitution, but, of course, I am not an attorney. So I would—

Mr. VENTO. No, I know, but that is my understanding.

Ms. CLARK. Right.

Mr. VENTO. If somebody wants to contest it, they may. But, I mean, that is the purpose. That is the only remedy that is available, and it is a pretty weak one at that.

Ms. CLARK. That is correct.

Mr. VENTO. It has been weakened by the law, the 1997 law that was passed, which, in fact, had prevented the Fish and Wildlife Service from, in fact, having any control over any type of overflight. Is that correct?

Ms. CLARK. I believe you are referring to the Refuge Improvement Act of 1997—

Mr. VENTO. Yes, sponsored by our chairman and Ranking Member.

Ms. CLARK. Correct. It enjoyed wide support in the Congress, and it does not address the overflight issue.

Mr. VENTO. It does not address it, but the law actually precludes the ability of the Forest Service and that law from, in fact, taking any action for overflights, does it not?

Ms. CLARK. Right. Yes, sir.

Mr. VENTO. It does? I mean, so it is actually—it isn't a matter it isn't addressed. It affirmatively states that you cannot—

Ms. CLARK. That is correct.

Mr. VENTO. Well, why was that inserted in the bill? Was that inserted at the request of the administration?

Ms. CLARK. I actually don't know what the genesis of that is. I would be happy to get back to you for the record.

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

Mr. VENTO. I can tell you, there is a big problem with aircraft overflights over a lot of public lands that Members of Congress are concerned about, the least of which are not just by the Metropolitan Airports Commission, but by the military, and the increasing amount of airspace that they occupy.

If this bill, in fact, were stating that it was trying to provide a right along those lines, I think probably constitutionally, I guess, you haven't been able to demonstrate that in terms of private property, but it would be at least something, I think, to begin to look at. But I don't know where the relationship is here with this. I mean, I think that it is your testimony, Director Clark, that this would, in fact, render the Endangered Species Act null and void; that, in fact, if you had to pay this type of compensation, that there would be vast amounts of money. Any action you took under the Endangered Species Act would surely come across this 25 percent threshold, especially given the definitions that are in this bill. So this is just another way to, in fact, repeal the Endangered Species Act. Maybe that is not the intention, but that is what the effect is.

Ms. CLARK. It certainly would be the effect. It would not only cripple our ability to implement the Endangered Species Act and promote species conservation, but it would be a huge drain on our budget—in fact, probably, categorically, eat up our entire budget, paralyzing our ability to implement the other provisions.

Mr. VENTO. So if this is a solution, it is an unusual one in terms of the fact that it completely undercuts the entire thrust of the Endangered Species Act of law?

Ms. CLARK. I would agree with that.

Mr. HANSEN. [presiding] The gentleman from Nevada, Mr. Gibbons.

Mr. GIBBONS. Thank you very much, Mr. Chairman. I appreciate the opportunity.

To our panel, welcome here today.

Ms. Clark, let me ask a question with regard to the bull trout listing in the State of Nevada. According to the State of Nevada's biologists, who have every bit as much experience, every bit as much knowledge, every bit as much background and credibility on the bull trout, it was not an endangered species. Yet, at the insistence of, I believe, the National Wildlife Foundation, a couple of fishing groups that also wanted to preserve the area, the Fish and Wildlife Service went ahead and listed that species to protect the area—at great harm to some of the people who needed a road to access areas in that area.

That being said, you go to great lengths in your testimony to say that you enforce the endangered species law. Yet, what do you do about this designation of critical habitat?

Ms. CLARK. Well, I am not sure I followed the question, but let me try to answer. First, we added the bull trout to the Federal list of endangered species to protect the bull trout, after extended public comment and the evaluation of the science that we had before us. So, certainly, that was a decision made for the species.

Mr. GIBBONS. Well, the Fish and Wildlife Service for the State of Nevada disagreed with the idea that it was not an endangered species.

Ms. CLARK. Fair enough. I am sure there are debates on a number of species.

Mr. GIBBONS. So the science is questionable with regard to what you were doing, but, nonetheless, you used the bull trout as an excuse to close the road.

But, let's move on, because what we want to talk about is critical habitat, not endangered species here, that is the question. Do you use critical habitat, and designate critical habitat, rather than automatically finding an endangered species?

Ms. CLARK. I am still having a hard time answering your question because let me explain—

Mr. GIBBONS. Well, let me make it a little clearer.

Ms. CLARK. Let me see if I can—

Mr. GIBBONS. Do you designate critical habitat?

Ms. CLARK. We are obligated by the law to designate critical habitat when we list a species, if it is prudent and it is determinable. Oftentimes, we don't know the entire extent of the critical habitat, which is defined as habitat essential to the recovery of the species at the time we list it. So we say it is not determinable. That doesn't, though, prohibit us from protecting the habitat of the species through the consultation provision, through the incidental take permit provisions, or through the identification or articulation of habitat or recovery planning.

Mr. GIBBONS. So you are saying here, the testimony before this Committee is that the Fish and Wildlife Service does designate, as a matter of law, critical habitat?

Ms. CLARK. The Fish and Wildlife Service is obligated by the Endangered Species Act to designate critical habitat where it is prudent and determinable.

Mr. GIBBONS. Yes, I understand what the law states. I want you to state for this Committee that Fish and Wildlife Service does designate critical habitat.

Ms. CLARK. Yes, we do. We have done not it on the bull trout.

Mr. GIBBONS. Well, Mr. Shimberg, you mentioned in your testimony about four cases that—well, first of all, you are a lawyer, are you not?

Mr. SHIMBERG. Yes, I am.

Mr. GIBBONS. You mentioned four cases that were on point that have gone to the Supreme Court with regard to endangered species.

Mr. SHIMBERG. No, sir, I didn't suggest they went to the Supreme Court.

Mr. GIBBONS. They did not?

Mr. SHIMBERG. No. It was a Federal Claims court, the Sixth Circuit court, the district court in Colorado, and the Ninth Circuit.

Mr. GIBBONS. Are there any court cases that have gone to the Supreme Court with regard to endangered species?

Mr. SHIMBERG. Yes, but not with regard to takings issues.

Mr. GIBBONS. Okay. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. The gentleman from Colorado, Mr. Mark Udall.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman.

I want to welcome the panel here today, and thank you for taking time to appear before us.

I had a couple of questions for Director Clark, but I wanted to also, as I start, refer back to Chairman Young's comments about providing incentives for landowners. I am curious what sorts of things are going on to do that. If I could, I might mention what has been happening in Colorado.

I think you are aware of the Platte River and some of the recovery plans that have been put in place there with the State and the Fish and Wildlife Service and some of the water districts all coming together. I think it is a pretty creative and a nice model.

So if you would talk about some of the things you are doing to provide those kinds of incentives, I think the Committee would appreciate it.

Ms. CLARK. Sure. The Platte River Recovery Program is, indeed, we believe, a success. It is, I would submit, a great demonstration of a collaboration among the parties interested in preserving the integrity and long-term sustainability of the Platte River.

We have other kinds of situations like the Platte River that are underway in the Lower Colorado, the Bay Delta, southern California, and other parts of the country, where we have multiple constituents, multiple stakeholders working together to achieve the common ground of economic viability and species conservation. So those are kind of positive recovery programs.

We have some other programs that we have instituted administratively, like safe harbor. Safe harbor is a program where we provide assurances to landowners or we acknowledge—provide incentives for landowners to allow species or to support species conservation on their lands. It is for private landowners only, in that it, in essence, rewards their good deeds for endangered species, once we determine a baseline. Once the baseline is determined, and more of that species occupies that land, the assurance is given that the landowner can return the status of that land back to the baseline without fear of future regulation. So it provides certainty for landowners that are, in essence, growing endangered species on their lands.

That received tremendous visibility and acknowledgment through the Southeast with species like the red cockaded woodpecker, the State of Texas with species like the apalomado falcon, and is gaining wider support across the country.

Other kinds of incentives in the habitat conservation planning program, the incidental take permit program for non-Federal lands—a little over a year ago, we published a regulation involving no surprises: that once a deal was made, a deal was a deal, and that we wouldn't ask for additional land or water compensation or monetary compensation beyond the terms of the deal that we made at the time the HCP was signed. So that provides, kind of alleviates the fear of future regulation, once a deal has been made with the Federal Government concerning the management of those lands.

We have recovery incentives programs that we are trying to lay out through our budget process. It provides incentives and grants for private landowner and States to do good things for species' conservation. In fact, it is happening across the country. There is a lot of tremendous activity being conducted by non-Federal folks that are really accelerating species recovery.

Candidate conservation agreements is another one. You know, we don't need to wait until we need the safety net of the Endangered Species Act. We are working a lot with the non-Federal community to address species' needs while we have much more flexibility, either through habitat protections or actual species-specific pro-

tection mechanisms. In laying out that deal, the candidate conservation agreements, we provide the protection that, in the event the species ultimately has to be listed anyway, because that one private landowner can't take care of the entire species' needs on their lands, the private landowner who has a candidate conservation agreement won't be asked to do more.

Mr. UDALL OF COLORADO. Okay.

Ms. CLARK. So those are some examples, and I would be glad to get you more for the record.

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

Mr. UDALL OF COLORADO. Well, I would urge you to continue to working in that way. I believe in Colorado there is a lot of support for the Endangered Species Act, particularly if there is more flexibility applied.

Ms. CLARK. Right.

Mr. UDALL OF COLORADO. I endorse that approach, and I want to ask you one last question. As I look over the bill, I note there seem to be a lot of value judgments in the bill, if I could quote a couple of places for you.

It refers to "substantial diminution in the normal or reasonably expected uses of property" in one part of the bill. Then, in another section, it talks about any action to temporarily occupy property, quote, "in a manner that is adverse to the constitutional right of the owner" under the 5th Amendment.

Now it seems to me, given those kinds of value judgments, you potentially get a lot of litigation out of this piece of legislation, and then we end up spending our resources there in court, rather than doing the kinds of things you are doing. Would you comment on that?

Ms. CLARK. I would certainly comment, and then I would agree with it. I think there is a lot of subjective interpretation in this bill that would lend itself to varied interpretation. It is certainly something that I think the courts have struggled with for 200 years, and it kind of makes me glad I am a biologist, not a lawyer.

But I would say that I believe this is clearly the wrong direction to achieve fairness, flexibility, and species conservation, because it leaves way too much open to interpretation. It is something the courts have been grappling with for many years and haven't achieved.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman.

Mr. HANSEN. The gentelady from Idaho, Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Chairman Young expressed a frustration that the people feel toward Fish and Wildlife Service, and I think the testimony that we have heard today clearly indicates why the people are frustrated. Out West, because there is a conflict between wildlife and people, the people have to move.

We heard testimony today from Mr. Shimberg that we shouldn't even try giving people a chance to work with the agencies—also, from you, Ms. Clark—in opposing the bill; we shouldn't even try to give people a chance under the law to see if this would work. We just should go ahead with force.

Let me tell you another reason why people are utterly frustrated. Mr. Shimberg, who is an attorney, should have recalled this when

Mr. Jim Gibbons asked him about cases that were successful in the Supreme Court. Because in the Bennett v. Plennart case, later known as the Bennett v. Spear case, which was decided unanimously by the Supreme Court, the Fish and Wildlife Service argued that humans are not within the zone of interest in the Endangered Species Act. The Fish and Wildlife Service lost. The Supreme Court ruled with us.

Taking these cases by other agencies, such as the Dolan case, takings of private property, the Lucas case, were successful in the Supreme Court. So I just want to say that, when one comes before this Committee, they should be accurate in the information that they give the Committee.

I want to ask, Ms. Clark, why did you remove the Tidal Basin beaver from its natural habitat? What was your reason?

Ms. CLARK. This is actually one thing I can't be blamed for. Fish and Wildlife Service actually was not engaged in the moving of the beaver. It was actually another agency. Actually, I heard this morning, those beaver were successfully transplanted to a better home, I suppose, so they wouldn't eat the cherry trees. But that was not a Fish and Wildlife Service initiative.

Mrs. CHENOWETH. Which other agency did the moving?

Ms. CLARK. National Park Service.

Mrs. CHENOWETH. Did you issue a take permit to the National Park Service?

Ms. CLARK. The beaver are not listed under the Endangered Species Act. It is really governed by the District of Columbia and the States—

Mrs. CHENOWETH. No, no, no, no, no, that makes no difference. You have the law to follow; you have your own regulations to follow.

Did you issue a take permit to the—

Ms. CLARK. We would only issue a take permit if it was an endangered species. It is not.

Mrs. CHENOWETH. Okay.

Ms. CLARK. A take permit was not required.

Mrs. CHENOWETH. I see what your answer is. I want to let you know that I am going to be petitioning the Fish and Wildlife Service to list the Tidal Basin beaver for this reason, and then you can justify to me and the rest of the public why this little critter is not threatened or endangered, because he is. He is indigenous to this area. This was his natural habitat. And certainly by virtue of the fact that this little unit, this little family unit, reestablished itself in the Potomac, in the Tidal Basin, is an indication of not only its persistence and perseverance and pioneering spirit, but the fact that, by nature alone, these species can recover.

I find it absolutely amazing that the agencies, because this is Federal property, would act according to desires of the Federal Government on Federal property to protect the Federal property, to protect tourism, which I think is just fine. But I would like to see the same kind of consideration given when a species appears like the slick shot peppergrass, which isn't even listed as endangered or threatened, but is stopping the development of a military training range in Idaho, and yet, the Fish and Wildlife Service and the

BLM, and various other agencies, are stopping progress—under the same set of circumstances as we found with the Tidal Basin beaver.

I think that your actions, the actions of the Park Service, in the case of the Tidal Basin beaver, is clearly indicative of the absolutely incongruity of the way this whole Act has been applied by individuals. I think that, frankly, this administration is more interested in carrying out an agenda than it is in protecting wildlife and endangered and threatened species.

The Fish and Wildlife Service, by the way, in your testimony, you indicated that, in response to the overwhelming local input, this is one of the reasons why the refuge was established at the Minnesota airport. I find that amazing, because there was overwhelming reaction in Idaho against your trying to transplant grizzly bears into our State. The whole State rose up in arms. The whole legislature, all the county commissioners, said no. And, yet, unlike what you did in Minnesota, you didn't respond to the public input in Idaho. You are still attempting to impose grizzly bears on our State.

Our State is poor. We cannot afford to pay you \$26 million to pay you off. We would expect that you would go under the law and treat people equally, whether they are rich or whether they are poor.

It is this kind of inconsistency that is causing people to be angry and causing people to feel like you aren't at all interested in having the Federal Government do anything but create chaos. I would like to see more cooperation and far less chaos.

Thank you, Mr. Chairman.

Mr. HANSEN. Thank you. The gentleman from New Mexico, Mr. Tom Udall.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman. I am not so sure, if I was a beaver, I would want to locate in Washington, DC in the Tidal Basin, I will tell you.

Mrs. CHENOWETH. Would the gentleman yield?

Mr. UDALL OF NEW MEXICO. Yes.

Mrs. CHENOWETH. Thank you for yielding. I just want to say, though, that this is its natural habitat, and that little beaver is indigenous to this area, and that is the criteria that should be considered. Thank you.

Mr. UDALL OF NEW MEXICO. Thank you.

Thank you very much for coming, members of the panel. We really appreciate you being here. We appreciate the expertise that you bring to this issue.

I have a question or two here for Director Clark. Looking at your biography, it is apparent that you have served in the field, and I know you have many other people that serve with you in the field. When they come in contact with a landowner, and you have discovered that there is an endangered species located on an individual landowner's land, have they generally, for the most, in your experience, been cooperative with you in terms of trying to work with your agency in terms of the endangered species?

Ms. CLARK. Yes, they have. I mean, we can cite example after example of very successful interactions and very positive interactions between or among private landowners and Fish and Wildlife Service employees. We have spent a pretty significant investment in

evolving our agency into one of technical assistance and one of collaboration and one of more effective communication. And I won't certainly sit here and say that there aren't some examples to the contrary, but we enjoy a very significantly positive relationship with many landowners across the country.

Mr. UDALL OF NEW MEXICO. And part of that process, after you work with them in terms of recovery plans and safe harbor, and all of that, that requires personnel and funding? I mean, is your agency adequately funded, do you think, to carry out these kinds of programs?

Ms. CLARK. No, it isn't. In fact, that is why the President's Fiscal Year 2000 budget request, as its focus for the Fish and Wildlife Service and our endangered species part of the budget, highlights the need in the consultation arena, which is where we conduct the interagency collaboration/coordination efforts. We have requested a fairly significant increase to address the demands and the needs for technical assistance.

What we find more and more is that landowners, whether they are Federal landowners or non-Federal landowners, need to understand, and want to understand, what their responsibilities are, and they want to look for opportunities to, all of us, do the right thing, and they want incentives. So our budget has highlighted areas that show budget increases for technical assistance, budget increases to fund some of these incentives programs, and budget increases to acknowledge and reward landowners that want to do the right thing.

Mr. UDALL OF NEW MEXICO. And it sounds like to me, if you receive that kind of funding, you could make more of these situations into win-win situations, rather than—

Ms. CLARK. Absolutely.

Mr. UDALL OF NEW MEXICO. [continuing] having confrontation?

Ms. CLARK. I am sure of that, absolutely.

Mr. UDALL OF NEW MEXICO. Can you elaborate on the practical effects of this legislation and what it will have on property owners who are seeking section 10 permits or consultations under section 7 of the Act?

Ms. CLARK. Well, I can venture to guess what will happen. If, in fact, this kind of compensation language goes through and the compensation, however it is subjectively determined by this legislation, is arrived at with the new definitions of what compensation is occurs, I would imagine it would eat up our entire budget, our entire appropriation, which is not suggesting that the rest of the terms and conditions and responsibilities of the Endangered Species Act evaporate or go away or are suspended. So what we would have is gridlock in the Endangered Species Act—with people without permits, agency actions that are not allowed to go forward, recovery that is not occurring, and suspending and paralyzing implementation of the Endangered Species Act.

All of that results in probably cratering endangered species recovery efforts nationwide, because while all of our money will be diverted to litigation and compensation, as defined in this statute, it will allow us little, if any, money to fund our own technical assistance role or our own responsibilities to streamline compliance.

Mr. UDALL OF NEW MEXICO. Thank you, Mr. Chairman.

Mr. HANSEN. Thank you, Mr. Udall. The gentleman from Pennsylvania, Mr. Sherwood, is recognized for five minutes.

Mr. SHERWOOD. Did you say "50," Mr. Chairman? Thank you, Mr. Chairman.

And it has been with quite some interest that I have listened to the testimony today, and I think that this is the right thing to do when you have organizations like the American Farm Bureau and the Wilderness Institute and Fish and Wildlife, and we are all here together talking about it. I think we need to somehow find some common ground, and I don't think we are doing that real well.

Landowners, public citizens, Fish and Wildlife, Democrats and Republicans, we would all like to protect our environment, and we would all like to protect endangered species, but some of us are having a real hard time coming to grip with the incongruity of how private landowners do not deserve just compensation when we take away their property rights, but the public sector, who has the power to issue permits, does deserve to get compensation, for instance, for an airline overflight. I am not a partisan on either side of this issue, but I think my point of view is one that we are going to have to explain to the public in general.

Nobody has helped me today understand why those two issues are different. I understand, if we would pass this bill and go this way, that it would impact on Fish and Wildlife revenues. I can understand where, if they don't have the revenues, they won't be able to do a lot of the good work that we know that they do. But, still, nobody has helped me understand the basic inequality.

I guess I will direct it to you, Director Clark. Can you help me with this?

Ms. CLARK. I can try, and remember, again, I am not an attorney, but I will try it from the biologist's point of view. First of all, in the airport example that people are using, that was not compensation. It clearly was not compensation, and it certainly wasn't compensation to the Fish and Wildlife Service. Those monies were to protect the public's interest in a public refuge, and it is specifically dictated and laid out in section 4(f) of the Transportation Act. Those monies will never be seen by the Fish and Wildlife Service. They were a conduit to kind of replace the—to acknowledge and to address the adverse effects on the airport, and so it will replace the public's refuge with other public refuge lands. So it is not a compensation to the Fish and Wildlife Service.

The compensation issue, as I understand it, is one that is, especially under the statutes, environmental statutes like the Endangered Species Act, is one that is debated in the courts, and is, apparently, routinely debated in the courts. And it is one that the courts and the Supreme Court have grappled with for 200 years: What's fair; what's just, and what's compensatable? And certainly, if, in fact, the courts determine that a takings has occurred on a case-by-case basis, as determined by the courts, then compensation is legitimate and rightful, and we would agree with that.

But the confusion that keeps occurring, or the kind of intermingling that keeps occurring, between what happened at Minnesota Valley National Wildlife Refuge and the Minneapolis airport, and the redefinition of takings under this bill, should not be mixed because they are apples and oranges. I just want to be clear

that what happened for Minnesota Valley was not a compensation issue; it was a statutory mandate of the Secretary of Transportation to not negatively affect or negatively impact the public's refuges and parks, whether they are State, Federal, or local, for transportation projects, and to minimize and mitigate those effects, if, in fact, they could not be avoided.

I don't know if that helped, but that is how I separate it.

Mr. SHERWOOD. Well, an attorney I am not, but it would seem to me that an equal argument could be made for one of Mr. Loop's members who was unable to use their ground because they were told it would impact on habitat or a species, that they would have—any good attorney could make a case that they need to mitigate their loss. And if we can mitigate the loss for a public agency, it would seem that we need to mitigate the loss of private property.

And I am not trying to shut the Fish and Wildlife Service down. They just redid a creek in my area; it is a wonderful job. We had a few problems, but we got a wonderful job.

So those are the things we have to work out. But I think if you don't address this in the general public's mind, it will be at the peril of the whole program. Thank you.

Mr. HANSEN. The gentleman from California, Mr. Pombo.

Mr. POMBO. Thank you, Mr. Chairman.

Ms. Clark, just to clarify what you were just saying, you said that the Fish and Wildlife didn't get the money; they were just a conduit for the money?

Ms. CLARK. Well, the notion of compensation, as I understand it, is that it would, quote, "come to the landowner," for instance. And this issue with the Minnesota Valley National Wildlife Refuge, the dollars that were arrived at, or the mitigation scheme that was arrived at, was to address the adverse effects, as determined under the—

Mr. POMBO. To mitigate their impact—

Ms. CLARK. Right.

Mr. POMBO. [continuing] on the refuge?

Ms. CLARK. Right, and it will replace—and it will be used for additional land acquisition and facilities to support the public's interest in Minnesota Valley National Wildlife Refuge. It is not bumping up the refuge budget, but it does come through the Fish and Wildlife Service.

Mr. POMBO. Who is going to administer those new lands?

Ms. CLARK. The Minnesota Valley Refuge is administered by the Fish and Wildlife Service.

Mr. POMBO. And who is going to occupy the new buildings?

Ms. CLARK. The Fish and Wildlife Service.

Mr. POMBO. So it does go to the Fish and Wildlife Service?

Ms. CLARK. As a conduit for the public—I don't consider our 500-plus national wildlife refuges to be the Fish and Wildlife Service's refuges. They are America's national wildlife refuges. They are the public's refuges. And we happen to be the manager of those refuges, but we don't own them.

Mr. POMBO. All the government belongs to the people.

Ms. CLARK. Right.

Mr. POMBO. We don't have a debate over that.

Ms. CLARK. That is exactly what I am saying.

Mr. POMBO. But the money is going to the Fish and Wildlife Service to mitigate the impact that the expansion of the airport had on one of the lands that you manage?

Ms. CLARK. The money is going through to the Minnesota Valley National Wildlife Refuge; you are correct.

Mr. POMBO. So it does go in there? I think that the argument that you are missing in all of this is that, if there is an impact on the lands that Fish and Wildlife manages, they want to be mitigated for that. They want there to be mitigation payments to them, so that they are held whole.

On the other side of this debate is the private property owner who is impacted by actions of the Fish and Wildlife Service, who wants you to mitigate your impact on them, and you don't think that is fair, or you don't think it is within the law. And that is why so many of us say, you know, it should only be right that—any impact on the government has to be mitigated—so any impact on a private property owner should be mitigated. There is nothing in the Constitution saying that you have to be held harmless; that you have to be held whole. There is something in the Constitution that says private property owners have to be.

Ms. CLARK. I agree. I mean, I have never disagreed with the notion of, if a court found that the Endangered Species Act constituted or resulted in a takings, that the private property owners should be compensated. I don't think you have ever heard a debate out of the administration on that.

On the 4(f) issue, the Transportation Act issue, that is not what I want or not what the Fish and Wildlife Service wants. It is what Congress wrote into law, and obligates the Secretary of Transportation, and conditions the Secretary of Transportation to do when building a transportation system nationwide.

Mr. POMBO. Fish and Wildlife makes the decision there, and Fish and Wildlife makes the decision as to what the impact is, if any, on that particular refuge. As a condition that was in held in the law, they call in Fish and Wildlife Service to negotiate whether or not there is an impact or to discuss whether or not there is an impact, and to negotiate mitigation costs.

Ms. CLARK. The Secretary of Transportation makes the decision on what the ultimate mitigation is. In this particular case, it was done in collaboration—the Secretary of Transportation, the airport authority, and the Fish and Wildlife Service worked to determine the appropriate level of mitigation, but Fish and Wildlife Service does not call the shots. The Secretary of Transportation has the ultimate decision authority.

Mr. POMBO. Well, but that is not exactly accurate in terms of who actually calls the shots. Because we have seen other cases in other airports where Fish and Wildlife has denied use or denied activities because of the presence of endangered species in those areas. In this particular area, because there was a sizable amount of money, it was worked out that there could be—the extension of the runway could happen; the extension of the airport could happen, and the money would come. In other cases there hasn't been that low impact or negative impact that you found in this particular case. Fish and Wildlife is the one that makes the decision. It

is your biologists; it is your agency who makes the decision as to what the impact is, not the Secretary of Transportation.

Ms. CLARK. The Minnesota Valley Refuge issue had nothing to do with the Endangered Species Act. There was no endangered species. There was, in fact, a null effect call made.

Mr. POMBO. See, that is where you are not being real accurate, because there are endangered species. In your report you identify bald eagles; you identify endangered species in the area, and you say there is no impact on those. In other cases, where there is a nesting bald eagle near a site, you have denied the ability for a developer, the private property owner, to proceed in those cases.

Ms. CLARK. I understand that, and what I was referring to—and every case is reviewed individually, and certainly we debate and negotiate and get refuted all the time. All I was suggesting is that in the Minnesota Valley/the Minneapolis airport case, what governed the outcome of that deal was the Transportation Act, not the Endangered Species Act.

Mr. POMBO. That was your hook to get the money.

Mr. HANSEN. The time of the gentleman has expired.

Let me just say this: As you hear those bells go off and see those lights on the back, we have a vote on the budget resolution, and in just a moment we will recess, and then assemble back, and we will start with the last panel, if that is all right with everybody.

Director Clark, I know you have been very patient. Can I just ask you some questions, maybe with a five-second response—

Ms. CLARK. Certainly, I will try.

Mr. HANSEN. [continuing] if we could? And then I will get out of here.

I was intrigued by the statement that you made to Mr. Vento when he said that passage of this bill was tantamount to killing the Endangered Species Act. I can't really understand that, except that is kind of an admission that you have got an awful lot of private land that you are using for habitat. By any chance, do you know how much private land you now have habitat? Can you give us a figure on that?

Ms. CLARK. I can't give you a specific figure. I would be happy to see if we have that in our records. I do know that over 70 percent of our listed species today depend on private land.

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

Mr. HANSEN. What percent was that?

Ms. CLARK. Over 70 percent of listed species today depend on private lands for some part of their life cycle, but I don't know the amount of acreage.

Mr. HANSEN. So if you extrapolated that, you could almost say 70 percent of it was on private ground? I mean, 70 percent would be private ground.

Ms. CLARK. Well, it would be a tough extrapolation because you don't know whether—

Mr. HANSEN. I know it wouldn't be an accurate extrapolation, but it—

Ms. CLARK. It is fair to say that there is a significant amount of private lands that are probably occupied by endangered species.

Mr. HANSEN. Also, in the letter from the Justice Department to Don Young, from the—I don't remember the attorney's name on

this, Mr. Dennis K. Burke, Acting Assistant Attorney General—in the first paragraph, he says, “This bill would create a statutory right to compensation to the context of the Endangered Species Act regulation. That departs radically from the standard for just compensation under the 5th Amendment.” Could you explain that? I can’t see where it would depart at all.

Ms. CLARK. Unfortunately, this is where my not being an attorney is probably a good thing—or a bad thing.

Mr. HANSEN. Attorneys are the most overrated profession in America. So take a stab at it.

[Laughter.]

Ms. CLARK. I am beginning to believe that myself.

But I would certainly be happy to refer to Justice for further explanation.

Mr. HANSEN. Go down to the third paragraph. “Consistent with that position, ESA”—now here is the part I want to ask—“It has been the policy of this administration to minimize impacts on private property.” I just have a hard time buying into that, considering the amount of private property that I have seen impacted in the State that I represent. If anything, these people feel that they have ruined something that they have inherited, or they have purchased, and taken it almost with not any regard and in a callousful manner. Am I just an exception to the rule? Or is there usually a great working relationship with private property?

When the Secretary of Interior goes down to Iron County, Utah, and Washington County, Utah, and this ground now, which is probably the highest density for retirement that I know of, and this property is going for \$50,000 an acre, which is unbelievable to me, but it is, and offers them \$600 an acre because there is a slimy slug on it or a desert tortoise, or whatever it may be, I just stand amazed. If that is administration to minimize impacts on private property, I would surely like to see an example of that.

Ms. CLARK. I would be happy to provide you numerous examples of success. Minimizing the impacts on private property has really been aimed—we have tried to get there through a lot of the administrative reforms that I talked about earlier, like safe harbor and candidate conservation agreements, no surprises. But we have some tremendous success stories nationwide that I will be happy to provide for the record.

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

Mr. HANSEN. You have talked a lot about mitigation. I don’t see the term “mitigation” in the bill. I see—in transportation, but I don’t see it in the EPA bill, but I haven’t got time to get into that because we are going to miss a vote, if we don’t leave.

So let me thank the panel, and I appreciate your patience and being with us. Director Clark, thank you.

If you could be patient, we will be back in just a few moments. We stand in recess.

[Recess.]

Mr. POMBO. [presiding] The Committee will come back to order.

I know you are all familiar with the timekeeping. Your entire statements will be included in the record. If you can hold your oral testimony to five minutes, it would be appreciated.

Mr. Whitman, if you are prepared, you may begin.

**STATEMENT OF RICHARD M. WHITMAN, ATTORNEY-IN-CHARGE, NATURAL RESOURCES SECTION, OREGON DEPARTMENT OF JUSTICE, SALEM, OREGON**

Mr. WHITMAN. Thank you, Mr. Chairman. My name is Richard Whitman. I am the attorney-in-charge of the Natural Resources Section of the Oregon Department of Justice, and I am here today testifying on behalf of Oregon Attorney General Hardy Myers and the Oregon Department of Justice.

The State of Oregon has had significant experience, both with the effects of listings under the Endangered Species Act and with takings litigation resulting from efforts to protect at-risk species. Most of the State of Oregon is now affected to one degree or another by listings of threatened or endangered species.

Oregon, for quite some time, has had a wide range of State and local laws to protect species and their habitat. Many of those laws predate the Federal Endangered Species Act. As an example, the Oregon Forest Practice Act requires the state to inventory significant habitat for threatened and endangered species, and to then balance protection of that habitat with economic uses of the property.

Oregon, through such processes, has developed more specific protections for at-risk species and their habitat, largely through consensus-based processes that involve both affected property owners and also involve independent scientific review.

A fundamental premise of Oregon's approach to species protection, extending over several administrations, has been that regulatory restrictions on private use of property should be used as a minimum or baseline, and beyond that, the State should look to voluntary action and to incentives in order to achieve public purposes, including the protection of endangered species.

We are currently active in providing such programs, and one of the major ones is the Conservation Reserve Program, administered through the U.S. Department of Agriculture, through which the State has received significant funding for farmers to set aside, for a period of 30 years, areas along streams to protect fish habitat. I think that is an example of the sort of success story that you were looking for earlier today.

Attorney General Myers is concerned that H.R. 1142 would undercut some of these success stories and the State's ability to continue this type of consensus-based combination of minimum regulatory requirements, voluntary actions, and incentives. We believe H.R. 1142 would effectively remove Federal agencies from any significant role in protecting at-risk species on private lands. It would do so by requiring compensation for many Federal agency actions on land-based activities and essentially all Federal agency actions affecting the use of water.

Faced with this prospect, we believe that the result would be that the services would move away from trying to implement the ESA on private lands, and we believe that that is not in the best interest of anyone, for several reasons.

First of all, the loss of Federal rules and guidance, interpreting the section 9 take prohibition of the Endangered Species Act, would create a loss of Federal uniformity and would essentially leave it up to the courts to decide on a district-by-district basis what is a

take of an endangered species under the ESA. So we would have a loss of uniformity, a loss of predictability for the land-owning community, and we would create a significant burden for the land-owning community in making long-term investment decisions.

The withdrawal of the services from implementing the ESA on private lands would also be a problem for the States. It would thrust the States, even more than they are already, into the middle between trying to work with Federal agencies to implement protections for Fish and Wildlife, and at the same time trying to create consensus among property owners for what is reasonable to expect of them.

We have already seen two court decisions at the U.S. Court of Appeals level, one in Massachusetts and one in Florida, where the courts have essentially required State agencies to use their regulatory authorities in ways that avoid the taking of a species. Well, if we have court decisions forcing States to do that, on the one hand, on the other hand, we are going to have litigation from the private land-owning community against States for taking of their property. It is not a good role for the States to be in.

In sum, we believe that H.R. 1142 would not ease the regulatory burden on private property rights. It would simply shift more regulation to the State level, without providing the resources necessary to make that burden more tenable for private property owners, and at the same time disrupting the complex, but relatively stable, regulatory climate necessary for private investment.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Whitman follows:]

STATEMENT OF RICHARD M. WHITMAN, ATTORNEY-IN-CHARGE, NATURAL RESOURCES SECTION, DEPARTMENT OF JUSTICE, SALEM, OREGON

Hon. Don Young, Chairman, and Members of the Committee:

Thank you for the opportunity to testify today concerning H.R. 1142. My name is Richard M. Whitman, and I am the Attorney-in Charge of the Natural Resources Section of the Oregon Department of Justice. I am testifying on behalf of Oregon Attorney General Hardy Myers and the Oregon Department of Justice.

H.R. 1142 attempts to eliminate the economic burdens that may result from the application of the Federal Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) on private lands. The State of Oregon has had significant experience in this arena, particularly since the listing of the Northern spotted owl as a threatened species in 1990, with the listing of the marbled murrelet in 1992, and most recently with the multiple listings of Pacific salmon and steelhead. Most areas of the state are now affected to at least some degree by listings under the Federal ESA.

Well before Federal ESA listings began to occur in Oregon, the State was active in efforts to protect habitat for at-risk species. Beginning in the late 1970s, Oregon law required cities and counties to inventory of significant fish and wildlife habitat on all non-Federal lands, and to adopt programs to protect such areas while also balancing those protections with urban, forest and agricultural uses. In the mid-1980s these laws were expanded into Oregon's Forest Practices Act, again requiring the protection of significant habitat, while also maintaining productive forest uses to the extent possible. In 1995, the Oregon Legislature directed the Oregon Department of Agriculture to develop proscriptions for agricultural practices necessary to achieve state water quality standards and (among other things) protect fish life. Most recently, in the Portland metropolitan area, the state's regional government (Metro) adopted rules regulating urban development along most streams. As with agricultural practice proscriptions, these regulations are designed to help achieve state water quality standards as well as to protect the habitat necessary for fisheries.

One important purpose of these laws is the desire to provide private landowners with as much long-term certainty as is possible regarding what uses will and won't be allowed on private property. Another source of these laws is the State's tradi-

tional ownership and management of fish and wildlife resources.<sup>1</sup> As in other states across the country, the Oregon courts have repeatedly affirmed that wildlife is the property of the of the state, held by the state in its sovereign capacity to be conserved and protected for the benefit of and in trust for its citizens.

Oregon's active role in regulating activities on non-Federal lands as they affect fish and wildlife also arises from the firm belief that the tensions between species' protection and economic uses of private property are best resolved at the local, state and regional levels, where there is the best chance of obtaining some degree of consensus. Only if protective measures have a broad base of support at the state and local levels are those measures likely to be sustained over the long-term.

As the extent of regulatory restrictions to protect fish and wildlife and other public values and resources grows, Oregon like many other states is becoming more sensitive to the economic burden such restrictions place on private property. In developing new programs to respond to continuing declines in the populations of various species, Oregon attempts to create a broad consensus for regulatory protections that function as a minimum threshold or baseline. These regulatory restrictions set requirements that are intended to be a reasonable incident of property ownership that do not require (as a State or Federal constitutional matter) that property owners be compensated.<sup>2</sup> This baseline of regulations is supplemented with incentives and voluntary measures that provide additional protections for fish and wildlife species, while avoiding additional economic burden to property owners. The Federal Government has been an important source of assistance to the State in helping to fund such incentive programs.

The Governor and the Attorney General of the State of Oregon support the notion that the economic burden of protecting threatened and endangered fish and wildlife is a legitimate matter for political (and at some point, legal) debate. However, they also are concerned that H.R. 1142 is likely to have certain unintended consequences that would undermine the purpose of the legislation, as well as the states' efforts to manage and protect their fish and wildlife resources.

The first of these unintended consequences stems from Section 3 of H.R. 1142, which requires Federal agencies to compensate property owners for "constructive use" of private property. The term "constructive use" is broadly defined to include (among other things) "the imposition or enforcement of a prohibition of use of non-Federal property the purpose of which is to provide or retain habitat for any species of wildlife or plant determined to be an endangered species or threatened species." Section 9 of the ESA already prohibits "take" of listed species. Under the requirement to compensate for "constructive use," Federal agencies are highly unlikely to adopt rules that directly prohibit particular uses of property. Instead, they will (at most) continue to do what they have done to date: rely on relatively ambiguous rules interpreting the take prohibition in section 9 of the ESA, and avoid definitive proclamations concerning what specific actions they believe violate the statutory prohibition.

There are several problems with this outcome. First, the uncertainty and ambiguity of the section 9 take prohibition has already been a major source of concern in the forest industry in the Pacific Northwest, as well as among water users. Indeed, a large part of the reason for the State of Oregon's forest practice regulations defining minimum requirements for the protection of significant habitat for threatened and endangered species was the desire of the landowning community to have a level of long-term certainty so that they could continue to make the forty to sixty-year investment decisions that are a necessary aspect of forestry. While the State's regulations may not have been as protective as some would have liked to see, they do provide some level of assurance that forest practices that comply with the State requirements do not result in "actual injury or death" of listed species (e.g. a prohibited "take" under section 9 of the ESA).

If Federal agencies back away from their statutory role of helping to define the requirements of the ESA, that void will almost certainly be filled by an increase in litigation brought under the citizen suit provisions of the ESA. Such an outcome is not in anyone's interest, and could well upset the limited degree of predictability that the landowning community and the State have achieved over the past eight years. In at least the short to moderate term, such litigation also is likely to lead to disparate standards between different circuit and district courts, as the judiciary

<sup>1</sup> The Oregon Supreme Court held early on that private uses of property that destroy habitat essential for the survival of fish and wildlife constitute a public nuisance. See, e.g. *Columbia River Fisherman's Protective Union v. City of St. Helen's*, 160 Or 654, 87 P2d 195 (1939).

<sup>2</sup> As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922): "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."

is increasingly required to provide its own interpretation of the "take" prohibition in section 9 of the ESA in the absence of the Federal agencies.

Of even more direct concern to the State is the possibility that some of this litigation will be directed at State regulatory programs. In several recent court decisions, Courts of Appeal have held that day-to-day licensing and other regulatory approvals by state and local governmental may enjoined as a violation of section 9. *Loggerhead Turtle v. Volusia County*, 48 F.3d 1231 (11th Cir., 1998); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir., 1997). Under the ESA, Congress has provided citizens with the right to sue for violations of the ESA, including the section 9 prohibition on "taking" or causing a "take" of a threatened or endangered species. First in Massachusetts (*Strahan*), and most recently in Florida (*Volusia County*), courts have held that state and local governments can be required to exercise their authorities to regulate private activities in a manner that avoids actual injury or death of protected species.

If Federal agencies are required to move away from actively implementing the ESA, the states and the courts will effectively be the only game in town. States will continue to be sued to force use of their legislative and sovereign authorities to fill the void created by the departure of the Federal agencies. They will then be sued by property owners alleging that they have "taken" private property without compensation. The regulatory burden on private property owners will not necessarily be eased, and the degree of uncertainty over what uses of private property are allowed will almost certainly rise.

These consequences are not idle speculation. When the U.S. Fish & Wildlife Service listed the Northern spotted owl, the agency initially tried to clarify how the listing affected logging operations on private lands through the publication of guidelines. Since the time these guidelines were invalidated (for procedural reasons) the Service has generally avoided taking a definitive position concerning how the ESA take prohibition applies to activities on private lands (except in the most egregious cases). In part to provide some degree of certainty to forest land owners in the face of threatened citizen suits, the State adopted its own forest practice regulations designed to avoid clear instances of "take," while also minimizing burdens to private landowners. Now the State is being sued in a number of cases, not for "take" of species but for "taking" private property without compensation by denying certain harvest plans in close proximity to owl and eagle nests.<sup>3</sup>

H.R. 1142, by requiring Federal agencies to compensate property owners for a very broad range of actions that may limit the use of private property, is likely to lead to the same dynamic the State of Oregon has experienced with the Northern spotted owl. States that are more active in working in tandem with the goals of the Federal ESA will bear the brunt of litigation alleging that compensation is required. Other states will face litigation attempting to force them to exercise their licensing and other regulatory authorities to avoid take of listed species. The only immediate result for private property owners will be a higher level of uncertainty.

The Oregon Department of Justice is also concerned with at least one other specific provisions of H.R. 1142. Section 3(b) of the bill requires compensation for Federal agency action that result in "a Federal use of \* \* \* any portion of non-Federal property \* \* \* ." This language appears to upset the long-established requirement under the Federal and Oregon constitutions that an ownership be considered as a whole when determining if all or substantially all economic use has been taken by regulation. Oregon, as many other states, has long regulated the extent to which property owners may divide their real property. Oregon's subdivision control laws are a fundamental component of the State's zoning laws. By preventing the division and sale of real property in a manner that will lead to violations of state and local development controls, these laws ensure that property owners' reasonable expectations align with zoning laws. Section 3(b) appears to thwart the traditional rule that State law controls what property interests are constitutionally protected. We already have property owners asserting that regulations that restrict a particular use (the harvest of a relatively small number of trees) is a taking. By giving property owners apparent free reign to segment their property in any manner they choose, H.R. 1142 requires compensation for virtually all Federal actions and undermines the role of State law in determining what the pertinent property interest is in inverse condemnation actions.

The Federal Government has certain responsibilities regarding wildlife and fisheries under its legislative enactments and treaty obligations. Similarly, the states as sovereign governments owning wildlife as trustees for their citizens, are the traditional managers of wildlife protection measures and associated land use controls.

<sup>3</sup> These suits are being brought even though the State's regulations affect only a small portion of the ownerships involved. None of the cases have been litigated to a final conclusion.

Both governments, as a legal and political matter, must balance these responsibilities with private property rights.

A blanket Federal requirement that Federal agencies compensate property owners is not helpful in this context. It is likely simply to shift more of the burden of species protection to the states, without increasing the resources available to make that burden tenable for private property owners at the same time it disrupts the complex but relatively stable regulatory climate necessary for private investment.

Simply put, we believe that a far more constructive approach to meeting the dual goals of increasing the level of protection of threatened and endangered species, and reducing the regulatory burden on private property owners is to provide affirmative incentives to property owners when they go beyond some minimum regulatory threshold that is reasonable to expect of all citizens. We respectfully submit that H.R. 1142 is unlikely to provide any significant relief to private property owners, that it is likely to shift even more of the burden of implementing the ESA to the states, and that there are other more constructive means to achieve the dual goals of species protection and relief to private property owners.

Compensation for governmental restrictions on the use of private property to protect threatened and endangered fish and wildlife is not required as a matter of State or Federal constitutional law in most circumstances. By legislatively mandating compensation in a broad range of cases, H.R. 1142 would upset the balance between State and Federal roles in this complex arena. For these reasons, the Oregon Attorney General opposes H.R. 1142.

Mr. POMBO. Ms. Marzulla.

**STATEMENT OF NANCIE G. MARZULLA, DEFENDERS OF  
PROPERTY RIGHTS, WASHINGTON, DC**

Ms. MARZULLA. Thank you, Mr. Chairman, for the opportunity to comment on H.R. 1142. I am here on behalf of Defenders of Property Rights. Defenders is the only national public interest legal foundation dedicated exclusively to protecting private property rights.

Based upon our review of the proposed bill and our extensive experience in representing individual landowners whose land or water rights have been destroyed by the application of the Endangered Species Act, we conclude that H.R. 1142 will go a long way toward protecting the constitutional rights of property owners and toward protecting endangered species.

There are two points I would like to emphasize in my oral remarks. First, the Endangered Species Act affects the reasonable and beneficial use of millions of acres of private land. And the second point is that there is often no remedy under current law for the wholesale destruction of private property rights.

With respect to the first point, once land has been identified as habitat or even potential habitat for an endangered or threatened species, the owner can do nothing with his land that the U.S. Fish and Wildlife Service does not like.

So, for example, in the case of Mr. John Taylor, an elderly man who owns a building lot in Fairfax County, Virginia, Mr. Taylor cannot build even a modest modular home on his land because it might disturb the nesting habitat of the threatened bald eagle, which has been known to nest on land across from Mr. Taylor's building lot.

Or in the case of the Srnsky brothers, who own a home on land located within the national forest near Elkins, West Virginia, the Forest Service has not only barred them access to their home, but has endangered the lives of Tom and David Srnsky by digging 6-foot-deep tank traps. The Forest Service told a Federal judge that they believed the tank traps were necessary to protect the running

buffalo clover. Apparently, Forest Service officials are willing to risk even human safety in order to protect a plant.

Local farmers in California have had their water taken, causing their crops to dry up because the water was needed as habitat for two species of threatened fish. These are not isolated examples of the harsh impacts of the Endangered Species Act. In fact, the majority, as we know, the majority of the habitat designated for endangered species is on privately-owned land. Once property is identified as habitat or land necessary for protecting an endangered or threatened species, there are not simple solutions for the property owners, even those who lose their constitutional rights as a result.

Filing a lawsuit for just compensation is hardly an easy answer, even though private property rights is one of our fundamental civil rights. Takings litigation today is expensive, arduous, and lengthy. A Justice Department attorney told one of my clients a couple of weeks ago that his case that had been filed over a year and a half ago was in its infancy. The government attorney told him that takings cases often take 10 years in order to reach resolution. In other words, it will take at least a decade in order to win vindication for his constitutional rights.

Few people have the financial means or staying power to endure a decade of litigation against the Federal Government. Indeed, in the case of elderly litigants, such as John Taylor, who knows if they can survive long enough to see their rights vindicated by a court? H.R. 1142 is clearly needed and long overdue.

And then one final point I wanted to address that was raised in some earlier discussions by the earlier panel concerns the issue of whether H.R. 1142 comports with current case law construing the 5th Amendment. I would suggest that such case law, while it be interesting and should provide guidance, is not controlling. Because, as I understand it, H.R. 1142 is creating a new statutory cause of action.

Thank you. I would be happy to answer further questions you may have.

[The prepared statement of Ms. Marzulla follows:]

STATEMENT OF NANCIE G. MARZULLA, DEFENDERS OF PROPERTY RIGHTS,  
WASHINGTON, DC

I am pleased to be here today on behalf of Defenders of Property Rights, the only national public interest legal foundation devoted exclusively to protecting private property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Fifth Amendment of the U.S. Constitution, that private property shall not be "taken for public use, without just compensation." Defenders, which is based in Washington, D.C., has a large national membership which is comprised of property owners, users and beneficiaries of the rights protected by the Constitution and traditional property law. Defenders participates in litigation when it is in the public interest and when the property rights of its members are affected, and has also devoted significant resources to analyzing legislative proposals concerning property rights at both the state and Federal level.

Today, I am here to comment on H.R. 1142, the Landowners Equal Treatment Act of 1999. By amending the Endangered Species Act to make the Federal Government pay for any unconstitutional actions it takes under the auspices of that Act, this bill seeks to prevent the taking of private property for public use without just compensation, as required by the Fifth Amendment to the United States Constitution.

#### **INTRODUCTION**

Despite the fact that the United States Constitution imposes a duty on the Federal Government to protect private property rights, in reality, they are often trampled by regulatory actions, such as those taken by the Federal Government under

the Endangered Species Act, 16 U.S.C. § 1531. All too often, environmental regulations such as the Endangered Species Act destroy property rights on an unprecedented scale, leaving many owners stripped of all but bare title to their property. In recent years, courts have done much to restore vigor to the Fifth Amendment in cases such as *Nollan v. California Coastal Commission*, *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, and *Suitian v. Tahoe Regional Planning Agency*. Nevertheless, cases in which landowners possess the resources and perseverance to prevail in court against a taking of the property due to a government action are few and far between.

As a result, landowners are increasingly being deprived of most, if not all, economically beneficial uses of their land by government action and regulation without payment of just compensation. The Founding Fathers' intent for private property to be protected was clear. They could never have envisioned, however, the enactment of such harsh regulatory schemes as the Endangered Species Act. If the Fifth Amendment is going to be worth more than the paper it is written on, private property rights must be vigorously protected. Therefore, we at Defenders of Property Rights welcome legislative efforts such as H.R. 1142 which are consistent with the constitutional mandate of protecting private property rights.

**I. THE CONSTITUTION IMPOSES A DUTY ON GOVERNMENT TO PROTECT PRIVATE PROPERTY RIGHTS BECAUSE PROPERTY RIGHTS ARE AN ESSENTIAL ELEMENT OF A FREE SOCIETY.**

As reflected in various provisions in the Constitution, the Founding Fathers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights and economic liberty. Property rights is the "line drawn in the sand" protecting against tyranny of the majority over the rights of the minority.

To the framers of the Constitution, the protection of individual liberty was essential. The fundamental liberties guaranteed by the Bill of Rights include freedom of speech and religion; freedom of press and assembly; the right to bear arms; the right to trial by jury and cross examination of accusing witnesses; and freedom from cruel or unusual punishment. Recognizing that a government could easily abuse these civil rights if a citizen's property and livelihood were not guaranteed, the United States Constitution also imposes a duty on government to protect private property rights.

Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects. . . ." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." In addition to the Bill of Rights provisions, the Fourteenth Amendment echoes the Due Process Clause of the Fifth Amendment, stating that no "State shall deprive any person of life, liberty or property without due process of law. . . ." Indirectly the Contracts Clause of the Constitution also protects property by forbidding any state from passing any "law impairing the Obligation of Contracts." U.S. CONST. art. 1, § 10.

The Constitution places such strong emphasis on protecting private property rights because the right to own and use property was historically understood to be critical to the maintenance of a free society. The ability to use, enjoy and exclusively possess the fruits of one's own labor is the basis for a society in which individuals are free from oppression. Indeed, some have argued that there can be no true freedom for anyone if people are dependent upon the state for food, shelter, and other basic needs. Understandably, where the fruits of citizen's labor are owned by the state and not individuals, nothing is safe from being taken by a majority or a tyrant. Ultimately, as government dependants, these individuals are powerless to oppose any infringement on their rights due to absolute government control over the fruits of their labor.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle—that the government must lawfully acquire private land rather than merely seize it—is predicated upon fundamental notions of fairness. As the Supreme Court stated in *Armstrong v. United States*, "[t]he Fifth Amendment . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

The Founding Fathers understood the vital relationship between private property rights, individual rights, and economic liberty. However, they could never have envisioned the growth of government that has occurred of late years. Never before have

government regulations threatened to destroy private property rights on so large a scale and in so many different contexts as they do today. In just two short decades, the United States has developed from scratch the most extensive governmental regulatory programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use, yet very few recognize the fundamental importance of property rights to our Constitution and our system of government under law.

**II. PROPERTY RIGHTS TODAY ARE UNDER SIEGE FROM ENDANGERED SPECIES ACT REGULATIONS THAT HAVE BEEN AND CONTINUE TO BE IMPLEMENTED WITHOUT RESPECT FOR OR CONSIDERATION OF PROPERTY RIGHTS.**

The 1973 Endangered Species Act ("ESA") is today regarded as one of the most important and powerful environmental laws in the country. In 1978, the Supreme Court characterized it as the "most comprehensive legislation for the preservation of endangered species ever enacted by a nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978). A large component of the ESA is achieved by prohibitions on certain actions by private individuals on privately owned land under section 9 of the Act. Moreover, fifty percent of the endangered species in this country live on privately owned land and endangered species habitat is located almost exclusively on private land. Therefore, it is not surprising that the government's implementation of the ESA has slowed economic growth, taken private land without just compensation, and imposed pervasive and extreme burdens on local communities throughout the nation. Threats of criminal and civil prosecution, vaguely worded legal standards, and repeated agency failures to define the geographical scope of ESA restrictions have severely depressed property values and caused widespread confusion and economic losses.

The regulatory definition of "harm" under regulations promulgated pursuant to the "take" provision in Section 9 of the ESA is particularly problematic to landowners. Under current regulations, "harm" is defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (1994). Despite the fact that this definition can be read as being limited to the actual "taking" of an individual endangered species, in reality this regulation has been used by the U.S. Fish and Wildlife Service ("FWS") to foreclose any use of land that it deems harmful to the species as a whole. The current regulatory definition as applied allows the Federal Government to prevent use of land without regard to the actual presence of an endangered species, and without regard to any actual physical injury to any member of the species resulting from use of land.

In this way, FWS has used the ESA's prohibition against "taking" an endangered species or its habitat to assert control over a wide range of private activity on private lands. Landowners and businesses have been threatened with criminal or civil prosecution for clearing a fence of brush, cutting trees, using pesticides, or allowing livestock to graze. Although there is a permit process which allows activities to proceed even if they might "take" a species, these permits are time-consuming and expensive to obtain and require the negotiation and funding of "habitat conservation plans." A measure of how pervasive and oppressive these restrictions are is that even though listed species can be conserved through the purchase of habitat with government funding, as well as through the efforts of numerous environmental groups, the primary way species are conserved is through the regulation of private activity on private lands.

More landowners are also denied the reasonable use of their private property as FWS continues to list more and more species for protection and summarily prohibits any use of property which may affect those species or modify their habitat in any way. Faced with the grim prospect of the permit process, criminal prosecution, or large fines, the average landowner affected by these regulations cannot afford to challenge the government's actions. Even the most well-financed and dedicated property owners find themselves in a steep uphill battle just to get a court to hear their case, not to mention getting the government to actually pay just compensation if a court orders it. A few examples of reported and pending cases demonstrate the struggle faced by property owners when the Federal Government's actions under the authority of the ESA threaten to destroy all productive use of their land:

• Taylor v. United States

John Taylor, an elderly, retired builder, recently filed a lawsuit against the Federal Government because for two years, the U.S. Fish and Wildlife Service ("FWS") has refused to grant him permission to build a modular home on his small lot in Fairfax County, Virginia, unless he agrees to numerous unreasonable conditions to protect an eagle nest located in a tree on a neighbor's property. For example, Mr. Taylor's property remains undeveloped even though he

has agreed to refrain from building during the nesting period when the eagles inhabit the nest. FWS insists that he agree to contribute to some of their eagle-related projects, such as new nesting platforms at an Army research facility nearby or a fish restoration project in the upper Potomac, and contribute money to a salmon restoration project (because eagles like to eat salmon).

• U.S. Forest Service v. Smsky

On the flimsy excuse that it wanted to protect running buffalo clover, a listed species of plant, the U.S. Forest Service undertook a campaign that placed the safety—and even the lives—of two young West Virginians in danger. Living on a mountaintop, David and Tommy Smsky must traverse a road through Monongahela National Forest to enter and leave their home. The Forest Service dug six foot deep “tank traps” in this road at strategic places, trapping these young men atop the mountain for several days. They were also placed under surveillance by armed Federal agents, arrested for alleged trespassing, and scandalously defamed by Federal agents who told neighbors they were “Skinheads” and neo-Nazis. The government does not deny this behavior; rather, it defends the behavior in the name of protecting the endangered clover plants through which the Smsky’s road runs.

• Sierra Club v. Lujan

The Edwards Aquifer is a 175-mile long underground conduit which discharges naturally at springs which are the sole known habitat for the San Marcos fountain darter, Comal Springs salamander, San Marcos salamander, and Texas wild rice. In 1991, several environmental groups sought an injunction to require San Antonio, the ninth largest city in the country, to obtain its drinking water elsewhere, and to compel the State of Texas to limit other withdrawals from the Edwards Aquifer. In 1993, a Federal judge issued the injunction and encouraged the city to build a reservoir system at costs estimated in the billions of dollars. Although the injunction was subsequently modified, it seems clear that San Antonio—despite its undoubted right to extract water under state law—will be required to abandon, at least, a substantial portion of its water rights in order to comply with the ESA.

**III. COURTS ALONE CANNOT ADEQUATELY PROTECT PROPERTY RIGHTS BECAUSE LITIGATION TO VINDICATE FIFTH AMENDMENT RIGHTS IS A LONG, EXPENSIVE, AND ARDUOUS PROCESS.**

To add insult to constitutional injury, the judicial relief for the unconstitutional taking of private property is woefully inadequate. It is not a sufficient answer to the constitutional concerns raised above to suggest that property owners may simply file “regulatory takings” suits against the Federal Government to recover the value of the land so taken.

The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens. Not only are the laws drafted to ease the litigation burden of the government, but the costs of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the average citizen to bear. Consequently, many citizens faced with a property rights claim cannot pursue a legal remedy under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least, in comparison to the individual property owner), and can often pursue a vigorous defense of the case without constraint. Adding to the hardship for the individual, procedural hurdles often bar litigation on the merits of a property rights claim for anywhere from five to ten years, or longer. More specifically, the split of jurisdiction between the claims court and the district court, and the unyielding litigation posture of the Federal Government deny not only speedy justice, but in many instances, all justice to those whose property rights have been violated.

Property owners who believe their property has been taken without compensation in violation of the Fifth Amendment immediately have a very difficult choice to make. Both the U.S. Court of Federal Claims and the Federal district courts have potential jurisdiction over takings claims. If a property owner seeks injunctive relief, or a court order declaring the government’s action invalid, he must file suit in the U.S. District Court for his geographic area. If the property owner merely seeks compensation as guaranteed by the Fifth Amendment, he must file in the U.S. Court of Federal Claims, located in Washington, D.C. If the property owner would be equally happy with either relief, he would have to file two separate lawsuits in two separate courts, being careful to avoid the pitfalls of a Federal statute which prevents the property owner from pursuing both suits at the same time. Regardless of which claim a property owner pursues, and no matter which court he pursues that claim in, the government will defend itself by arguing that the petitioner should in-

stead be in a different court. If the case is dismissed and re-filed in any other court, the government's first defense will be the same—that the original court has the proper jurisdiction.

It is also important to remember that the current state of affairs, the maze-like procedures and hurdles a property owner must overcome before having his day in court, imposes a heavy burden on those constitutional rights. Indeed, Justice Brennan observed that the procedural difficulty in vindicating constitutional rights “exacts a severe penalty from citizens for their attempt to exercise rights of access to the Federal courts granted them by Congress to deny them ‘that promptness of decision’ which in all judicial actions is one of the elements of justice.” *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

In comparison, nothing like this procedural nightmare exists for claimants seeking to enforce any other constitutional rights. If a citizen's suit to defend his right to freedom of speech was dismissed because he had filed in the wrong court, or if a victim of racial discrimination had lost his case because he asked the court for the wrong type of relief—imagine how outraged we would be.

Thus far, the courts, in addition to Congress and the agencies, have failed to provide private property rights with the diligent protection that the Founding Fathers contemplated. In 1922, Justice Oliver Wendell Holmes declared that a regulation that went “too far” would be recognized as an unconstitutional taking of private property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Since that time, courts have struggled with the question of when a regulation does in fact go too far. There has been no clear articulation of when the exercise of regulatory authority will violate the Just Compensation Clause.

The Court has identified at least three areas which constitute per se violations of the Fifth Amendment. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Court held that destruction of the right to devise private property violates the Fifth Amendment. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court determined that a property regulation which does not substantially advance its avowed governmental purpose also constitutes a taking. And, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that destruction of all productive and beneficial uses of private property violated the Fifth Amendment. Despite these efforts to flesh out Fifth Amendment guarantees, there are still many open questions in takings jurisprudence.

As Chief Judge Loren Smith of the Court of Federal Claims has pointed out, under our constitutional system it is the function of the legislative, not the judicial, branch to balance competing social and economic concerns so as to arrive at a definition of “taking” which need not be re-created in an *ad hoc*, case-by-case manner each time the court is presented with the issue:

This case presents in sharp relief the difficulty that current takings law forces upon both the Federal Government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. They can only interpret the rather precise language of the Fifth Amendment to our constitution in very specific factual circumstances. To the extent that the constitutional protections of the Fifth Amendment are a bulwark of liberty, they should also be understood to be a social mechanism of last, not first, resort. Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system. At best, courts sketch the outlines of individual rights, they cannot hope to fill in the portrait of wise and just societal and economic policy.

*Bowles v. United States*, 31 Fed.Cl. 37 (1994). Justices Brennan, Scalia, Stevens, and Rehnquist have all remarked in their opinions on the inability of the Supreme Court, quite simply, to arrive at any set formula for defining when a taking has occurred. The judicial branch has, appropriately, deferred to the legislative branch to perform the function which the founding fathers envisioned for it under the Constitution—to pass legislation which will provide fair and prompt remedy when Federal regulation results in a taking of private property without just compensation.

Thus, Congress must revisit the treatment of property rights in environmental statutes and regulations and make it clear that property rights are to be considered in both the drafting of regulations and the implementing of programs. Federal environmental regulatory and enforcement agencies must give property rights the respect and deference that the Constitution requires.

**CONCLUSION**

The complex web of the Endangered Species Act, ripeness requirements, and inadequate property rights jurisprudence is jeopardizing both the government's ability to foster a free and prosperous society and to protect the environment. Effective and efficient environmental protection can be consistent with recognizing and securing peoples' property rights. The purpose of the Just Compensation Clause is not to stop government from acting, but rather, to make government realize that when it acts to achieve social good, it may also be singling out individual property owners to bear the associated costs. If government recognizes and considers these disproportionate burdens on property owners, it will be able to both protect the environment and respect property rights. The proposed bill, H.R. 1142, requires that private property rights are properly protected when the Federal Government takes action under the authority of the ESA by mandating that agencies "make every possible effort to avoid, minimize, or mitigate impacts on non-Federal property that result in Federal use of the property" and prevents agencies from acting until they have obtained written permission of the private property owner or paid compensation to the owner.

I would be pleased to answer any questions you may have concerning my testimony.

**Testimony Before the U.S. House of Representatives Committee on Resources  
April 14, 1999, 11:00 a.m., 1324 Longworth HOB**

by  
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Mr. POMBO. Thank you.  
Mr. Heissenbittel. Is that close?

**STATEMENT OF JOHN HEISSEN BUTTEL, VICE PRESIDENT,  
FORESTRY AND WOOD PRODUCTS, AMERICAN FOREST AND  
PAPER ASSOCIATION, WASHINGTON, DC**

Mr. HEISSEN BUTTEL. Pretty close.

Mr. Chairman, thank you for the opportunity to testify today in support of H.R. 1142. My name is John Heissenbittel, vice president of forestry and wood products for the American Forest and Paper Association.

Congress enacted the ESA to protect threatened and endangered species. That is a goal that our association supports very strongly. However, support of that goal does not mean that the resulting is perfect and immune from review.

The ESA, in fact, has been updated periodically since it was put into place in 1973, most recently in 1988. What AFPA seeks is balance and common sense in endangered species protection. Our members are united in the belief that the national interest is best served by policies that protect wildlife along with jobs and the economy.

As such, we urge reauthorization and updating of the ESA based on the valuable lessons we have gained in the 26 years of experience with the Act. Six ideas for updating the ESA:

First, ensure that the best science is used, including thorough peer review and quality control processes. Second, consultation on Federal actions must be prompt and accurate. Third, private landowners must be given reasonable compliance and relief procedures that do not impose an unfair burden for protection of a public resource. Fourth, the recovery plan must be the focus of all management and regulatory efforts on behalf of the species. Fifth, prohibited activities must be defined in a way that avoids speculative enforcement. And, finally, private landowners must be provided incentives to work cooperatively with the government to protect listed species.

In our view, H.R. 1142 recognizes the inherent inequity of the practice of making private landowners solely responsible for the costs of protecting endangered species. A statutory compensation requirement gives landowners the knowledge that, if all else fails, the government will be responsible for the public purpose of species protection.

The mechanism created by H.R. 1142 is essential for other incentive measures to work. The bill would allow those who believe that they have a stewardship responsibility, as our industry does, to work with the law as much as possible, at the same time it recognizes that when the demands of the Endangered Species Act exceed the ability of the landowner to economically cooperate—in fact, the bill establishes public responsibility to carry out public goals.

Now the Committee has chosen to focus on this one update to the Endangered Species Act, and we support that effort. However, as the chairman well knows, there are other issues that need to be updated in the ESA. I would urge the Committee to consider updates to the ESA which would complement H.R. 1142.

For example—and this has been mentioned in previous testimony—in section 10, an incidental take permit process requires the landowner to prepare a habitat conservation plan, or HCP, focusing on mitigation of take to be caused on the listed species by the applicant's activities. While Secretary Babbitt has instituted various policies which improve the HCP process, legislative changes are necessary to guarantee those improvements. We have heard of the no surprises policy—very helpful in the HCP process. But the fact is that policy is now being challenged in the Federal court system by our friends in the environmental community. Unless and until these policies are put in the force of law, we have no guarantee, as private landowners, that these helpful policies will be able to be carried out.

Again, we support the chairman's continued commitment to updating the ESA and protecting the private property rights of landowners, wherever and whenever possible. On behalf of AFPA, we appreciate the opportunity to testify in support of the chairman's bill today. Thank you.

[The prepared statement of Mr. Heissenbuttel follows:]

STATEMENT OF JOHN HEISSEN BUTTEL, VICE PRESIDENT, FORESTRY AND WOOD PRODUCTS, AMERICAN FOREST & PAPER ASSOCIATION ON BEHALF OF AMERICAN FOREST & PAPER ASSOCIATION

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today in support of H.R. 1142, the "Landowners Equal Treatment Act of 1999."

I am John Heissenbuttel, Vice President, Forestry and Wood Products, American Forest & Paper Association (AF&PA). AF&PA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. We represent more than 200 member companies which grow, harvest and process wood and wood fiber, manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The association is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies. AF&PA represents an industry which accounts for more than eight percent of total U.S. manufacturing output. It directly employs about 1.5 million people and ranks among the top 10 manufacturing employers in 46 states. AF&PA member companies, as a condition of membership, must also commit to conduct their business in accordance with the principles and objectives of the *Sustainable Forestry Initiative (SFI)*sm program.

The SFIsm program is a comprehensive system of principles, objectives and performance measures that integrates the perpetual growing and harvesting of trees with the protection of wildlife, plants, soil and water quality. It is based on the premise that responsible environmental practices and sound business practices can be integrated to the benefit of landowners, shareholders, customers and the people they serve. Professional foresters, conservationists and scientists developed the SFI program. These men and women were inspired by the concept of sustainability that evolved from the 1987 report of the World Commission on Environment and Development, and was subsequently adopted by the 1992 Earth Summit in Rio de Janeiro. The SFI program participants support sustainable forestry practices on the lands they manage and actively promote such practices on other forestlands. This commitment to sustainable forestry stems from the participants' convictions that forest landowners have a critical stewardship responsibility to current and future generations of Americans.

Nationwide, there are more than 9 million non-industrial private landowners who own 59 percent or approximately 288 million acres of the total productive private timberland. Most of these landowners have holdings of less than 100 acres. Property rights "takings" often hurt these smaller landowners who are least able to afford financial loss and own the majority of the country's timberland. In comparison, forest products companies own only 14 percent of the nation's timberland, but they rely heavily on the fiber supply provided by these small landowners.

Congress enacted the Endangered Species Act (ESA) to protect endangered and threatened species, a goal which we support. We believe the principles behind the

ESA represent those qualities which make our society the finest in the world. However, support of that goal does not mean that the resulting law is perfect and immune from review. The ESA has been updated periodically since its enactment in 1973, most recently in 1988. Under Congress' own schedule, the law was due for review and updating in 1992. That date has long since past and the need for action grows each year.

As its operating premise, the Endangered Species Act mandates certain protections of listed species to the point of their recovery, without regard to the interaction of these protections with the rest of society. Humans are part of the diversity of nature and are one of the natural elements that is capable of causing change, sometimes dramatic change, in the environment. Humans have modified the natural environment in North America for hundreds, if not thousands, of years. A recent example is the virtual elimination of fire from the environment in the Southeast. A number of species, some of which are now listed under the Endangered Species Act, were dependant on those fires for their existence. It would be sheer folly to require by law that these species be recovered because that would mean the return of the widespread fires upon which the species thrive. Yet, that is the literal mandate of the Endangered Species Act.

AF&PA seeks balance and common sense in endangered species protection. Our members are united in their belief that the national interest is best served by policies that protect wildlife along with jobs and the economy. SFIsm Objective 4 requires AF&PA members to: "Enhance the quality of wildlife habitat by developing and implementing measures that promote habitat diversity and the conservation of plant and animal populations found in forest communities."

The Endangered Species Act, often called the "pit bull" of environmental laws, grants sweeping powers and authority to Federal agencies for endangered species protection. It is weighted heavily in favor of species protection at the expense of all other considerations. AF&PA's goal is to make the ESA work for species *and* people. AF&PA urges reauthorization of the ESA based on the valuable lessons gained from 26 years of experience with the Act.

Congress should update the Endangered Species Act in six key areas:

- ensure that the best science is used, including peer review and quality control processes;
- consultation on Federal actions must be prompt and accurate and, when conducted over a Federal permit required for a private activity, must have a limited scope;
- private landowners must be given reasonable compliance and relief procedures that do not impose an unfair burden for protection of a public resource;
- the recovery plan must be the focus of all management and regulatory efforts on behalf of a species, including consideration of social and economic impacts, relative risks, costs and alternative recovery strategies;
- prohibited activities must be defined in a way that avoids speculative enforcement;
- private landowners must be provided incentives to work cooperatively with the government to protect listed species.

The Fifth Amendment provides that the government must pay citizens just compensation if the government takes their property for a public purpose. In 1973, Congress declared protection of endangered species to be a proper public purpose. Unlike other environmental laws which merely regulate how activities are conducted on private lands, the presence of listed species on your land often means that you are unable to conduct any activity. It is unfair—it is un-American—to impose the cost of carrying a public purpose on a few unlucky citizens. Recognizing the importance of protecting wildlife habitat and of working cooperatively with the government for the benefit of listed species does not abrogate the property rights guaranteed to all Americans by the Fifth Amendment to the Constitution of the United States.

H.R. 1142 recognizes the inherent inequity of this practice and resolves the unconstitutional burden by requiring Federal agencies to obtain written permission from, or provide compensation to, landowners when the agency takes an action under the ESA or in furtherance of the ESA that results in use of the landowner's property. A statutory compensation requirement gives landowners the knowledge that if all else fails, the government will be responsible for the public purpose of species protection.

The mechanism created by H.R. 1142 is essential for other incentive measures to work. The bill would allow those who believe that they have a stewardship responsibility, as our industry does, to work with the law as much as possible. At the same time, it recognizes that the demands of the Endangered Species Act exceed the abil-

ity of the landowner to economically cooperate. The bill establishes public responsibility to carry out public goals.

We all understand the importance of our local and national transportation systems. At the same time, we also understand that the burden caused by the construction of these systems should not be borne solely by the few property owners in the path of the road or under the flight path. It is the Constitutional obligation of us all, through the government, to compensate the few who bear the burden of these public benefits. Just as the Federal Government receives compensation for the burden on a Fish and Wildlife Service facility caused by airplanes landing and taking off at a Minnesota airport, so should landowners receive compensation if providing habitat for the benefit of listed species becomes burdensome.

We urge the Committee to consider carefully the particulars in H.R. 1142. An administrative compensation system, including an arbitration mechanism, is not helpful if it merely creates an extensive bureaucratic process. We strongly recommend that the Committee consult experts on arbitration before giving the bill its final approval.

The Committee has chosen to focus on this one update to the Endangered Species Act, and we support that effort. However, as the Chairman well knows, there are other issues that need to be updated in the ESA. With AF&PA members' emphasis on stewardship through the SFISM program, I would urge the Committee to consider updates to the ESA which would complement H.R. 1142 by addressing stewardship issues as well.

For example, the Endangered Species Act regulates activities of private parties and states which do not require a Federal permit or funding by prohibiting any action which would "take" listed species. The law provides, in section 10, an incidental take permit process which requires the landowner to prepare a habitat conservation plan (HCP) focusing on mitigation of the take to be caused to the listed species by the applicant's activities.

Unfortunately, the HCP process generally is expensive, lengthy, and complex. Many land owners simply cannot afford to pursue it. For example, the government considers an HCP to be subject to consultation as a proposed Federal action under ESA section 7, a process which is redundant and which creates several difficulties for the landowner, such as ongoing second-guessing by the agency. Also, the authority to require mitigation in the HCP and permit is relatively unqualified and has resulted in requirements which exceed by several degrees the effect of the activity which would be allowed under the permit.

Given the expense and commitment inherent in an HCP, landowners understandably are often willing to address more species than merely those listed. The government must recognize the benefit of addressing a number of species when the landowner chooses to do so. Current policies tend to create impediments to multi-species HCPs. Moreover, the two agencies responsible for ESA implementation, the Fish and Wildlife Service and the National Marine Fisheries Service, have not applied HCP policies in a consistent manner, causing considerable delay and frustration among HCP applicants.

While Secretary of the Interior Bruce Babbitt has instituted various policies which improve the HCP process, legislative changes are necessary to guarantee those improvements. For example, Babbitt has issued a "No Surprises" regulation which provides landowners, particularly those who depend on continuing access to natural resources on their land, certainty when agreeing to conditions in an HCP. However, this policy is now subject to a challenge in Federal court. We, therefore, also suggest the Committee consider amendments to the Endangered Species Act in the following areas:

- provide statutory authority for the "No Surprises" policy;
- authorize the Secretary to issue rules providing incidental take relief for categories of actions which would have little effect on listed species;
- recognize that since an HCP provides analyses equivalent to a biological opinion and the agency is consulting with itself, consultation on an HCP is redundant and unnecessary;
- require that mitigation in an HCP be proportionate to the effect on the species of the take authorized by the HCP and permit;
- authorize recognition that the HCP will provide benefits for unlisted species and provide assurance that the permit will cover those species in the event they are later listed without additional mitigation, without the imposition of excessive assessment procedures on the applicant;
- authority should be consolidated in the Secretary of the Interior, at least with respect to implementation of the ESA in non-ocean areas, regardless of the species involved.

Again, we support the Chairman's continued commitment to updating the ESA and protecting property rights of landowners whenever and wherever possible. On behalf of the American Forest & Paper Association, I appreciate the opportunity to offer our views on H.R. 1142, the "Landowners Equal Treatment Act of 1999." I would be happy to answer any questions you may have.

Mr. POMBO. Thank you.

Mr. DeGennaro.

**STATEMENT OF RALPH DEGENNARO, EXECUTIVE DIRECTOR,  
TAXPAYERS FOR COMMON SENSE, WASHINGTON, DC**

Mr. DEGENNARO. Mr. Chairman, thank you for the opportunity to testify before this Committee today. My name is Ralph DeGennaro. I am executive director of Taxpayers for Common Sense. We are a nationwide budget watchdog organization dedicated to cutting wasteful government spending and subsidy programs and promoting a balanced budget. We are politically independent, nonpartisan, seek to reach out to taxpayers of all political persuasions to work toward a government that costs less, makes more sense, and inspires more trust. We receive no government grants or contracts. We have never engaged in any litigation, except for rare friend-of-the-court briefs.

Taxpayers for Common Sense respectfully opposes H.R. 1142. We believe this proposal would establish a new entitlement program that would only increase the burden upon taxpayers. Rather than creating this complex, new Federal spending direct, it is TCS's belief that there are simpler and more effective ways of dealing with the problems addressed by this proposal.

For example, if advocates of this proposal want to repeal or modify the Endangered Species Act, then they should move to do so directly, as it is under the jurisdiction of this Committee, instead of imposing a takings spending program on the taxpayers. In short, if the Endangered Species Act is broken, then fix it or repeal it; do not enact H.R. 1142, which we believe would endanger the taxpayers.

I note that one of the folks from the National Wilderness Institute, who testified on one of the earlier panels, basically, said that their report showed that the Endangered Species Act had completely and utterly failed. If that is true, then the Committee should repeal it, not impose a cost on the taxpayers.

Taxpayers for Common Sense believes in property rights and the payment of just compensation under the 5th Amendment. However, there is already a venue in which to pursue these claims: the judicial system. Again, if the courts are broken, then fix the courts, a matter under the jurisdiction of the Judiciary Committee.

Passage of H.R. 1142, or similar legislation, would circumvent the judicial system and allow compensation to be awarded to individuals and others that have thus far had no justifiable takings claim. It would go significantly beyond the scope of traditional court decisions. As Justice Holmes notes in 1922, quote, "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."

Let's look at the budget implications. Nobody should vote for this bill under the illusion that it would be no big deal in the Federal budget. It is true that compensation payments under H.R. 1142

would be from appropriations, but enactment of this bill would create a legitimate expectation of compensation. Indeed, the only thing worse than enacting this bill would be for Congress to enact it with the intention of somehow avoiding paying every penny of every claim qualified under its terms.

Because Congress would, of course, want to keep its promise, want to pay those claims, this would, in essence, create an entitlement program. Indeed, the cost of this new spending program would be almost impossible to control or predict, but would surely reach billions of dollars. How would this be handled? Probably through more supplemental appropriations bills, which are already among the most abused parts of our budget process.

H.R. 1142 would establish broader criteria for filing takings claims. Historically, the courts have based compensation for claims on the value of the entire property. By allowing compensation for impacts on only a small fraction of the property, it would provide an ill-defined nature that would undoubtedly result in unwarranted compensation, and possibly overcompensation. Let's look at three possibilities.

First, speculation on fair market value. Property owners would be compensated for the fair market value of their property without regard to the presence of any species protected under this Act. Accordingly, speculators could buy land for a price already reduced with good knowledge that Endangered Species Act regulations applied to that land. The speculator could then demand compensation for full market value. That is an abuse.

Secondly, claims for compensation could be filed for development that never would have occurred. The bill would allow property owners to file claims to want to develop an affected parcel in order to receive compensation, even if that person never had had the intention or resources of developing the land.

Finally, third—and I think this is the most outrageous section of the bill—it would allow property owners to be compensated for the right to use or receive water, and for compensation for any diminution of water. The bill would mandate compensation of property owners for the fair market value of water that they receive at subsidized rates from the taxpayers.

For example, in the California Central Valley, a couple of years ago, contract rates for water ranged from \$3.50 to \$7.50 per acre foot, but the fair market value of that same water ranges from \$100 to \$250 per acre foot. Taxpayers for Common Sense would argue that, if this bill is enacted, it ought to have an amendment on there that says that those who are currently receiving water at less than the fair market value should be paying that price for the water.

Finally, and most broadly, this bill would set a precedent and open a slippery slope. Why is the Endangered Species Act special? It really isn't. Is it any worse than wetlands laws? Is it any worse than the Clean Air Act? Is it any worse than the airline safety laws? Does it impose any more burdens on private parties than Federal deposit insurance laws? No. I think, in fairness, if we are going to compensate those who feel they have takings under the Endangered Species Act, then Congress ought to be enacting broader legislation that compensates everybody who feels like they have

any diminution of value from any Federal law. That would be hundreds and hundreds of billions of dollars.

Thank you.

[The prepared statement of Mr. DeGennaro follows:]

STATEMENT OF RALPH DEGENNARO, EXECUTIVE DIRECTOR, TAXPAYERS FOR COMMON SENSE

Good afternoon. Mister Chairman thank you for the opportunity to testify before this Committee. My name is Ralph DeGennaro and I am the Executive Director of Taxpayers for Common Sense (TCS).

TCS is dedicated to cutting wasteful government spending and subsidies and keeping the budget balanced through research and citizen education. We are a politically independent organization that seeks to reach out to taxpayers of all political beliefs in working towards a government that costs less, makes more sense and inspires more trust. Taxpayers for Common Sense receives no government grants or contracts. TCS has never engaged in litigation, except for "friend of the court" briefs on rare occasions.

TCS opposes H.R. 1142, the Landowners Equal Treatment Act of 1999. TCS believes that this proposal would establish a new entitlement program that would only increase the burden upon taxpayers. Rather than creating a complex new Federal spending program, it is TCS' belief that there are simpler and more effective ways of dealing with the issues raised by this proposal. For instance, if advocates of this proposal want to repeal or modify the Endangered Species Act, then they should move to do so directly, instead of imposing a takings spending program on the taxpayers.

Taxpayers for Common Sense believes in property rights and the payment of just compensation under the Fifth Amendment of the Constitution. However, there is already a venue in which to pursue these claims: the judicial system.

The passage of H.R. 1142 or similar legislation would circumvent the judicial system and allow compensation to be awarded to individuals and corporations that, thus far, have had no justifiable "takings" claim. This legislation goes beyond the scope of traditional court decisions, in that the courts have generally not allowed a takings claim simply for diminution in value of the property. In the 1922 Supreme Court case that created the notion of a "regulatory taking", *Pennsylvania Coal Co. v. Mahon*, Justice Holmes noted that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>1</sup> This principle was recently reaffirmed in the *Concrete Pipe* case in 1993, when the Supreme Court unanimously ruled that diminution in value by itself is insufficient to demonstrate a taking.<sup>2</sup>

Indeed, as former Office of Management and Budget Director Alice Rivlin testified in 1995, bills similar to H.R. 1142 "go far beyond longstanding constitutional tradition . . . and . . . seek to pay people to obey the law."<sup>3</sup>

**H.R. 1142 Would Create New Uncontrollable, Unpredictable Entitlement Program**

Nobody should vote for this bill under the illusion that it will be no big deal in the Federal budget. It is true that compensation payments pursuant to H.R. 1142 would be technically "subject to the availability of appropriations." But enactment of H.R. 1142 would create a legitimate expectation of compensation. The only thing worse than enacting H.R. 1142 would be for Congress to enact it with the intention of somehow avoiding paying every penny of every claim qualified under the terms of H.R. 1142. Because Congress would of course want to keep any promise implied in H.R. 1142, enactment of the bill would in essence create an entitlement program.

The cost ceiling of this new spending program would be almost impossible to control or predict. Federal agencies would be overwhelmed by claims. The Budget and Appropriations Committees would ultimately be responsible for writing and approving funding bills that somehow both allocated money to ongoing activities and paid compensation claims. Doing this within any set budget caps would be almost impossible.

Furthermore, this payment scheme would have significant unintended consequences and likely lead to more supplemental appropriations bills to pay unex-

<sup>1</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,413 (1922).

<sup>2</sup> *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

<sup>3</sup> Alice M. Rivlin, Prepared testimony before the Senate Environment and Public Works Committee, July 12, 1995, p. 1.

pectedly large claims. Supplemental appropriations bills are already among the most abused aspect of the budget process, and H.R. 1142 would likely make it much worse.

#### **H.R. 1142 Would Leave the Government Liable for Hundreds of Millions, if Not Billions**

TCS believes that the true cost scenario could conceivably have no limit. In 1995, the Congressional Budget Office stated that for S. 605, the Omnibus Private Property Rights Act of 1995, CBO had “no basis for estimating the additional amount of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court.”<sup>4</sup> Although this statement was in reference to legislation that applied to a greater number of programs, it is still applicable to a bill that targets only the Endangered Species Act, due to the broad criteria for compensation established in H.R. 1142.

#### **H.R. 1142 Would Establish Broader Criteria for Filing “Takings” Claims**

Historically, the judicial branch has based compensation for claims on the value of the *entire* property. H.R. 1142 would require compensation for impacts on only *a small fraction of the property*. The bill would require the Federal Government to pay a property owner when Federal agency action *reduces the value of the affected portion of the property by 25 percent or more*. For example, if a coal mine is allowed to mine 99 percent of its area and is required to stop mining in 1 percent of its area due to ESA regulations, then the company could still sue if that 1 percent met the standards of diminishment. Using this calculation would almost always result in a taking, even if the value of the property as a whole had stayed the same or risen. This loose standard would invite manipulation of the system at taxpayer expense.

The ill-defined nature of H.R. 1142 would undoubtedly result in unwarranted compensation, and possibly overcompensation in certain cases. Let’s look at three possibilities:

#### **Speculation on “Fair Market Value”**

Property owners could be compensated for the “fair market value” of the property “without regard to the presence of any species protected under this Act.” Accordingly, speculators could buy land for a price already reduced by good knowledge that Endangered Species Act regulations applied to certain sections of the land. The speculator could then demand compensation for “full market value” of the land because the agency would not be allowed to take the ESA regulations into consideration.

Furthermore, the Federal regulatory programs that are often alleged to infringe on property rights, such as ESA, were initiated over 25 years ago. In a December 1998 report, the CBO stated that “arguably, anyone who bought property since then . . . should have known, to varying extents, that the property was or might be subject to regulation.” Many of those owners may have bought their property at a discount that reflected the incidence or risk of Federal regulation.<sup>5</sup>

#### **Claims for Development That May Never Have Occurred**

Takings legislation could also allow property owners to file claims for development that might never have occurred. Under H.R. 1142 and similar bills, a property owner would only have to claim to want to develop affected parcels in order to receive compensation. For example, it is probably true that many landowners do not want to harvest timber on their land. However, H.R. 1142 would allow all landowners to claim they want to harvest timber on their land and they should be compensated because they cannot do so.

#### **Water Claims**

Perhaps the most outrageous section of H.R. 1142 allows property owners to be compensated for the “right to use or receive water.” This section would extend additional protections to recipients of federally subsidized water at significant expense to the taxpayer. Thus far, takings claims in regard to the right to receive water have been relatively unsuccessful. H.R. 1142, like previously proposed takings bills, would mandate compensation for ANY diminution of water. This kind of claim has already been rejected by the court system, specifically by the Ninth Circuit Court of Appeals in the 1995 Westlands Water District case.

<sup>4</sup> U.S. Congressional Budget Office, “Cost Estimate for S. 605, Omnibus Property Rights Act of 1995.”

<sup>5</sup> U.S. Congressional Budget Office, “Regulatory Takings and Proposals for Change,” prepared December 1998, p. xiii.

The provisions governing water rights as property in H.R. 1142 would allow for further subsidization of agricultural water users. The bill would mandate compensation of property owners for the "fair market value" of water that they receive at subsidized rates. As there is a significant difference between what water users pay for the water at subsidized rates and "potential compensation awards," this provision of H.R. 1142 could represent enormous costs to taxpayers. For example, as Senator Feingold cited in his 1996 dissenting views, in California's Central Valley, the contract price for water ranged from \$3.50 to \$7.50 per acre foot. However, the fair market value of that same water ranged from \$100 to \$250 per acre foot (Sen. Rpt. 104-239). This difference could hold the government and taxpayers liable for millions. TCS would argue that if this bill were to become law, all water users should be required to pay fair market value for the water they receive before there is any "taking."

#### **H.R. 1142 Sets A Precedent**

H.R. 1142 would set a precedent that could lead to enactment of broader takings legislation that would target any number of Federal statutes. In fact, history has shown this to be true. In the 104th Congress, the House passed a similar bill that targeted the Endangered Species Act, the Clean Water Act, and certain irrigation laws. After that bill's passage in the House, the Senate introduced and passed out of the Judiciary Committee S. 605, the Omnibus Private Property Rights Act of 1995, which set virtually no limits on takings claims.

Mr. POMBO. Thank you. Mr. DeGennaro, I will just start with you.

I agree with you on your last point, that Congress ought to pass broader legislation to compensate owners for all laws and their takings. In fact, the House did pass such legislation a few years ago with a two-thirds majority vote out of the House, and the bill was never taken up in the Senate. But at this time, under the Endangered Species Act, this is legislation that this Committee has jurisdiction over. But I do agree with you that it should be broader in terms of compensation.

Mr. DEGENNARO. Mr. Chairman, of course, my point was that we shouldn't start on that slippery slope at all, pursuing—

Mr. POMBO. I know what your point was. I know what your point was, but I think the slippery slope was started when our Founding Fathers signed their name onto the Constitution and put the Bill of Rights, the first 10 amendments to it. I know that there are people that feel that this is a slippery slope, but I hold it in much higher regard than that.

In terms of your three examples citing abuses of this, I don't know how familiar you are with appraisals and fair market value of property. The speculative value on a piece of property is not the fair market value of that property. You can buy one of Mr. Heissenbuttel's member's land in the middle of a forest in California and say that you want to build a 100-story highrise on it and that is your intention, and you go in and get a fair market value of that property. No appraiser in the country is going to value it as if you could have put a 100-story highrise building on it. All it is is what it is, and that is the fair market value of it.

It is kind of a strawman to put up—to say that people will say that they are going to develop something and want the develop value of that property, when there is no chance that that property would have ever been developed. Coming from a State like California, I am somewhat familiar with the challenges in developing land, and the appraised value of those properties is dependent upon the ability to do that.

In terms of water, many States include water as a property right. In this country, water is governed by the States; at least in the West it is governed by the States, not by the Federal Government, and many States consider it a property right. If you are taking water away from a piece of property, especially in the West, you are devaluing that piece of property, and taking value away from that. Most of these people that have bought that have bought with it that water right attached, and if you take that water right away, you are taking away part of their bundle of property rights away from them. That is why many people are so concerned about that.

I would like to ask you a question, and I have read a lot of stuff that your organization has put out. But one thing I haven't seen was that it is very difficult for Fish and Wildlife, or anyone else, to bring forward successes of the Endangered Species Act. It is very difficult, very tortured for them to say, this is what we have gotten for our money.

They spend somewhere in the neighborhood of between \$500 and \$800 million a year. Have you come out, has your organization come out, in favor on behalf of the taxpayers of repealing or reforming the Endangered Species Act because of the waste of money that is currently under that system?

Mr. DEGENNARO. No, we have taken no position on that question. I would be glad to look at that and try to get back to you about that.

Mr. POMBO. Well, I would appreciate that. It seems there are a lot of wastes of government money that are out there.

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

Mr. DEGENNARO. Mr. Chairman, about your earlier point, you note that States govern the water, and I am sure that is true in large part. It is fair to say that Federal taxpayers do subsidize water. I think with respect to the taxpayers who pay those costs, that is something that should be considered in the mix.

Mr. POMBO. It absolutely should be considered, and I will agree with you on that point, that it should be considered. I know if you were aware—you bring up the Central Valley Project, and I am not sure if you are aware that many of those property owners had prior water right that was given to the Federal Government in exchange for a water contract of water that was going to be delivered by the Central Valley Project. So they gave up their water right in exchange for a water contract. That water contract is pertinent to the land that comes with it. So if it costs the Federal Government a substantial amount of money—and it did cost hundreds of millions of dollars to develop that project—they got the water. The Federal Government had no water. They got their water by taking water right away from individual property owners in exchange for water contracts. That is where the water came from.

Now there has been a substantial amount of money that has been spent by the taxpayer, and I do concede to you that that is legitimate point, but when you go out and buy land in the Central Valley of California, you are buying land with water or you are buying land without water. If you are buying it with water, you are paying two or three times as much, and sometimes considerably more than that, because you are buying that water right or that water contract that is pertinent to it.

If the Federal Government steps in and says, "We changed the rules. We are taking the water away from you," you have taken something away from that individual property owner, who happens to be a taxpayer as well.

Mr. DEGENNARO. Yes, we would be delighted to receive market value for water provided by Federal projects.

Mr. POMBO. Well, that is a considerable amount of money. And if that is what we could get for it, we would gladly take it, I can guarantee you.

Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

I have a quote here from a former fish and wildlife administrator for the State of Texas, who said that, quote, "The incentives are wrong. If I had a rare metal on my property, its value goes up, but if a rare bird occupies the land, its value disappears." We have got to turn it around to make the landowner want to have the bird on his property.

Do any of you have any comments about that? Is there a way to provide incentives for people to do good things with their land without just the government coming in and taking things, at great expense to the taxpayers?

Mr. HEISSEN BUTTEL. Just a couple of ideas: I mentioned the no surprises policy that Secretary Babbitt has developed, a good idea. It would be better if it was based on law rather than regulation. That has helped make habitat conservation plans more affordable for both large and small landowners, and it takes away the terror of investing in a habitat conservation plan, only to find that another species shows up down the road. So there are opportunities to take away the terror of finding a listed species on your property.

Mr. DUNCAN. We were talking a few minutes ago, and I was discussing the fact that today over 30 percent of the land in this country is owned by the Federal Government, and another little over 20 percent is owned by State and local governments and quasi-governmental units. That amount has been growing in a very rapid way in the last 20 or 30 or 40 years. We don't seem to have gotten the message out that a very important part of our prosperity has been based on private property, and that is one of the things that has differentiated our economy from that of places like the former Soviet Union, for example.

Mr. DeGennaro, I can tell you, there are very few Members of Congress who have voted against more Federal spending than I have. That has put me on the same side with your group on many occasions.

The reason I do that is not out of any selfishness or anything, but, you know, we forget up here, because we read about the salaries of these athletes, and this is a very upper-income area up in this area, but we forget that the average person in this country is making less than \$25,000 a year, and I am not talking about in poverty areas. The typical family is a husband and wife both working, grossing \$45,000 or \$50,000 a year—maybe. After taxes and so forth, that doesn't leave them a lot of extra money.

So what I see happening, though, is these environmental extremists, who almost always come from very wealthy families or very wealthy backgrounds, seem to want government units, whether

Federal, State, or local, to take over more and more and more property. So I can you tell you, I wish that we didn't have to have a bill like this. What I wish is that I wish the government at all levels would stop taking so much property in the first place. The fact is the Grace Commission, several years ago, recommended that the Federal Government sell off much of its land. Yet, you can't get these extremists to agree for the Federal Government to sell hardly anything. I mean, they shout in horror.

But since your group calls itself a taxpayers' group, would you be in favor of the Federal Government selling off some of this land, so we could get some money back for the taxpayers?

Mr. DEGENNARO. We would be willing to look at proposals to do that. I would say, we do recognize—I don't think you disagree with this, and I appreciate your leadership on many taxpayer issues—we do recognize that some of these lands are taxpayer assets that we hold in common. So I don't think we are opposed in principle to the idea that the taxpayers together, as a community, as a country, own things.

Now if there are specific proposals to sell specific things for specific reasons, I think we would be very glad to look at that.

Mr. DUNCAN. Well, I just think we are getting to a dangerous point here. I mentioned State and local governments, but there are these quasi-governmental units. In my area that is a big thing, and that doesn't count as Federal, State, or local land, but it is the same as public ownership. If you keep doing away with more and more and more private property, you are going to slowly destroy a big part of the American dream. People aren't going to be able to buy homes except on cookie cutter lots. You are going to force more and more people into smaller and smaller areas. That is going to create pollution problems and traffic problems and crime problems.

I mean, we really hope, Ms. Marzulla, that your organization is starting to call attention to the fact, because this is a message that I think we really need to get out to the American people—that we are really doing away with private property in this country in a fairly rapid way. Are you concerned about that?

Ms. MARZULLA. Very much so. In fact, I would add one additional thought, in addition to our basis of economic prosperity. Private property is really our basis of freedom—

Mr. DUNCAN. That is right.

Ms. MARZULLA. [continuing] particularly, when you look at the division of ownership of Federal and State land. Justice O'Connor, in one of her decisions that she authored for the Supreme Court about 10 years ago, made it very clear that the State and local ownership of land versus even Federal ownership of land helps protect individual liberties. So the ownership of private land, and even local ownership of land, all devolves to the protection of the individual. So it is a very important point.

Mr. DUNCAN. Well, and I will tell you another thing that we need to emphasize, also, is that the worse polluters in the world have been the socialist and communist countries. It is just a natural human tendency that people take better care of land that is in private ownership than they do land that is in public ownership, and, boy, you can see example after example of that. I mean, these housing projects that we had to blast down after 20 years in existence,

even though they had been put up at huge expense, private property is good for the environment, but we don't seem to have gotten that message out, either, or we have trouble getting it out.

Thank you. Thank you very much.

Mr. POMBO. Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. DeGennaro, is your office here in Washington?

Mr. DEGENNARO. Yes.

Mrs. CHENOWETH. Do you spend most of your time in Washington?

Mr. DEGENNARO. Yes.

Mrs. CHENOWETH. Do you get out to the Northwest very often, to our western country?

Mr. DEGENNARO. Not very often; certainly, not as much as you.

Mrs. CHENOWETH. You have quite an interesting background: budget analyst for Friends of the Earth, and now you published the Green Scissors report.

Mr. DEGENNARO. We are the lead co-author; the lead author of that report is Friends of the Earth.

Mrs. CHENOWETH. And didn't you just recently publish a new Green Scissors report advocating tearing out the dams on the Columbia and Snake River?

Mr. DEGENNARO. Yes. No, I am not trying to distance myself from the Green Scissors report. I am just trying to give credit to the lead organization on the report. But we stand behind that report, and we agree with its recommendations. Yes, we did.

Mrs. CHENOWETH. I find your questions about water and the value of water, which is pertinent to the land, interesting, because there is an economic dynamic I don't think you have considered at all. The fact is that most of those retaining facilities, those dams, have been paid off a long time ago by ratepayers or irrigators in the Northwest. Now, unlike the California Valley Project, as it has been altered by CVPIA, the ratepayers and the irrigators in the Northwest have paid off the facilities to the Corps of Engineers and to the Bureau of Reclamation. To advocate tearing out facilities that are still very, very good, and still supply low-cost hydropower and irrigation to the Northwest, at great cost to the ratepayers, to the irrigators, to the entire Northwest, seems ludicrous to what your organization stands and in a juxtaposition to what your organization stands for.

So I appreciate Mr. Pombo's response to you about water, because I clearly don't believe that this decision and recommendation by Green Scissors was very thoughtful in terms of its economic impact.

Mr. DEGENNARO. Right. I would be very glad to elaborate on the taxpayer rationale for removing the four Lower Snake River dams.

First—

Mrs. CHENOWETH. Well, I don't want to—

Mr. DEGENNARO. Okay.

Mrs. CHENOWETH. [continuing] get into that right now. I have some other questions that I would like to ask you, but I would love to discuss that with you very seriously, because I think there are some economic impacts you haven't considered.

Mr. DEGENNARO. One thing there, I think, just to highlight, that may be of special interest to you, is that, under some of the current projections, more and more water would need to be taken out of the Snake River to augment the flows, or something like that, and that could be a significant impact on southern Idaho. I think removing the dams would actually protect the water in southern Idaho.

Mrs. CHENOWETH. Actually, the dams are almost a whole State away from southern Idaho. I live out there, and I would love to be able to discuss it with you.

Your testimony states that the bill would expose the government to billions of dollars of liability. Are you telling this Committee that there are billion of dollars of privately-owned property that the government is using as habitat for wildlife against the wishes of the owners, and without compensating these owners for public use? And do you think that is right? Do you think that is fair?

Mr. DEGENNARO. No, what I would say, that the provisions of the bill are so loosely drawn, and I stated that there are three, at least three, examples here where we believe there would be significant overcompensation. In other words, people would be compensated in cases where they should not be. That is what gives you a price tag into the billions.

Mrs. CHENOWETH. Well, actually, I don't think that you really understand what this bill is doing, because this bill isn't based on the concept of taking or of diminished value of property. It is really based on the concept that, if the government uses privately-owned property for the benefit of the general public, and for a very laudable goal, delineated any public purpose, it should compensate the owner for the use of their property.

Now would it be your position that, when the Federal Government chooses to use private property for any public purpose, the owners are not entitled to be compensated? For example, if the government needs a place to house refugees from Kosovo in the near future, can they bring them into this country and allow them to use your home, your personal home, and your property as a place to stay, without your permission and without compensating you? Is that your position?

Mr. DEGENNARO. Of course not.

Mrs. CHENOWETH. Thank you.

I have a question for Nancie Marzulla.

Mr. POMBO. I ask unanimous consent the lady be given an additional two minutes.

Mrs. CHENOWETH. Thank you.

Mrs. Marzulla, what is the average time that it takes for a person who files a taking suit in Federal claims court, under the current law, to receive a final determination regarding that claim?

Ms. MARZULLA. Well, according to the Justice Department, at least in informal discussions that I have with them, it is at least a decade. If you look at some of the more well-known takings cases, it can go up toward two decades. Looking at Florida Rock or Love Lady's Harbor or Presault, a case where we represent Mr. Presault, his case has been in litigation for almost two decades now. So it is an extraordinary amount of time.

Mrs. CHENOWETH. What types of costs are involved in filing a claim for a takings into the claims court?

Ms. MARZULLA. Well, Defenders represents clients on a pro bono basis, but for private litigants it is enormously expensive, because there are filing costs, and of course all the attorneys' fees that continue to rack up through the years, as the case goes through the litigation process. So it can be hundreds of thousands of dollars.

Mrs. CHENOWETH. In your opinion, does Congress have the power to enact legislation protecting private property owners' rights and provide relief that may go beyond that provided by the courts under the existing 5th Amendment judicial precedence?

Ms. MARZULLA. Absolutely. In fact, I would go so far as to say they have the duty, because the 5th Amendment mandates or requires that government pay just compensation when private property is taken for a public use. But the way I view this bill is that it really is a way to implement the government's authority or to further proscribe the government's authority when it takes actions under the Endangered Species Act. I don't view it as a definition or attempt to define the scope of the 5th Amendment just compensation clause, but rather to describe or delineate how the government is to act toward private property owners in the course of regulating land under the Endangered Species Act.

Mrs. CHENOWETH. Mrs. Marzulla, in Mr. Shimberg's testimony, he indicates that his organization opposes legislation that elevates the rights of the minority over the majority. Now doesn't the Bill of Rights, including the 5th Amendment, provide for the protection of the rights of the majority, too?

Ms. MARZULLA. I think that is the very purpose of the Bill of Rights. It is to ensure that the individual or the minority—in this case the property owner who has been singled out to bear the burden of achieving a public good—to ensure that those rights are protected. That is the very purpose, the constitutional heart, so to speak, of the 5th Amendment.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Mr. POMBO. Mr. Whitman, I wanted to ask you a couple of questions about your testimony. I felt it was somewhat curious, a couple of the statements that you made, and I just wanted to clarify.

You are opposed to this legislation because of the compensation provisions that are in there, the very purpose of the bill; that you don't feel that it would work or it is justified to have the compensation provisions for a government taking private property for habitat like that. Is that somewhat accurate as to what your position is?

Mr. WHITMAN. Our position is that we believe that, in fact, under this bill, notwithstanding the provisions in the legislation that appear to require compensation, the effect of it, since there was not actually—or may not be—an appropriation to fund the fund the bill, that the services would back away from implementing the ESA on private land.

Mr. POMBO. Yet, when you used an example of a successful program, you used the conservation reserve program, which is compensation to property owners for using their property. And you say that is a success, and yet, you oppose compensating other property owners, if we are going to use their property for habitat.

Mr. WHITMAN. Mr. Chairman, if I might try to clarify that for you, the conservation reserve program is, I think, a very good example of the Federal Government providing incentives for private

property owners to do the right thing. It requires private property owners to go above and beyond what is required by regulation. Also, under State law, there is a State match to that program, and that State match, again, extends even further in contribution of private owners to habitat protection, by extending the time period under that program.

Mr. POMBO. It just seems to me like you would be in favor of this legislation, maybe with some amendments or some change, in order to expand what you hold up as an example of a success.

Mr. WHITMAN. I think it is fair to say that, if Congress could come up with a rational way of providing incentives for private property owners to go above and beyond what is required by regulation, that the Oregon attorney general would support it with that, yes.

Mr. POMBO. Well, I think we are attempting to do that. I am very much in favor of doing that. I have introduced any number of pieces of legislation that would do exactly, I think, what you are talking about. But you have to be able to get there from here. And, unfortunately, what is happening under the current implementation of the Act is that they don't have to pay for it, so they don't. They just take it. And that is the problem. There is no way, other than legislation like this, to make the Federal Government sit down and say, "We want to use this land as habitat," or "This land is habitat, and we want to protect that habitat, and we want to work out some kind of a cooperative agreement, so that it is better habitat than it is now, or that you continue to use it as habitat."

You have to be able to get there from here. If we continue doing what we are doing right now, the person that is paying the bill on this is the private property owner. I brought up a few minutes ago that it was between \$500 and \$800 million a year to implement the Endangered Species Act. As close as we can tell—we have had hearings on this, and that is about as close as we can tell, but the amount of money that is being paid by private property owners is many, many billions of dollars. It is mandated by a bureaucratic decision of an interpretation of the law on each individual property owner, and they are the ones that are really paying the bill on this for what we perceive as a benefit to society as a whole, because we made that decision, that we did not want these species to become extinct.

Ms. Marzulla, I wanted to ask you, on the takings cases that you are familiar with—and I know you are a land use attorney, and have been involved with this for a long time—the takings cases that you are familiar with take many years and hundreds of thousands of dollars to work their way from initially filing a claim and take it all the way to what ultimately will be a Supreme Court challenge.

With the example that you brought up, Mr. John Taylor, can you give me a ballpark idea as to what the property value is of the lot that we are talking about? Can you give me some idea of what that lot is worth?

Ms. MARZULLA. I don't know exactly, but I would guess it is maybe \$25,000 to \$40,000 at most.

Mr. POMBO. So, in your opinion, it would not go over \$100,000 in value—

Ms. MARZULLA. No.

Mr. POMBO. [continuing] for that particular lot? If this gentleman were paying attorneys' fees—and I understand he is an elderly gentleman—and if he were fortunate enough to live the 10 years to take this case all the way through, and you sat down with him and you were honest with him, and you told him it is going to take \$200,000 or \$500,000, or whatever the figure may be, to take this all the way through, and he has a piece of property that is worth less than \$100,000, what are his choices at that point?

Ms. MARZULLA. Well, under that scenario, I don't feel as if I could ethically recommend to him that he pursue litigation, if his property was worth what it is.

Mr. POMBO. Okay. So he is sitting there with a piece of property that he can't use, and the government has effectively taken away the value of his property because they have told him he can't use it. He can't build a house on it. There is no value left in that piece of property. And, yet, it is not worth enough to justify taking it and filing a claim. So what does he do with the property?

Ms. MARZULLA. Well, the U.S. Fish and Wildlife Service has suggested that he can donate it to the Nature Conservancy.

Mr. POMBO. And that would take care of his problem?

Ms. MARZULLA. I guess that would be one option.

Mr. POMBO. And he would donate that, and there would be some, if he had an income, there would be some tax advantage to donating that?

Ms. MARZULLA. Of course, that has been his response to the Fish and Wildlife Service, which is, he doesn't have a sufficient income to where he would benefit from the tax writeoff that he might get from donating the property.

Mr. POMBO. So even that, they have just basically taken away all value of his property, and he has no benefit, because of a lack of income, to donating it to a nonprofit?

Ms. MARZULLA. That is correct.

Mr. POMBO. So if this legislation were enacted, would he have another avenue that he could pursue that would somehow compensate him for his loss?

Ms. MARZULLA. Absolutely, and I think the additional benefit that it would provide is the arbitration provision, whereby he could enter into binding arbitration, and possibly get a speedier resolution of the case, rather than pursuing a lengthy, as he has, pursuing lengthy litigation. We filed our complaint on March 15. The government has 60 days to respond, and then from there, it goes on with discovery and various motions. It may be years before we get any kind of resolution of this case.

Mr. POMBO. Let me ask you this: Let's say, instead of one lot, he owned a thousand lots. Under your understanding of the current implementation of the law, he would be able to mitigate his impact on that one site, and be able to develop the rest of the lots, and have some income off of that. So this legislation is more designed to help a small, individual property owner, who has nowhere else to go, than it is a major property owner who happens to own a thousand lots or 100,000 acres?

Ms. MARZULLA. Absolutely. The person who doesn't have any land to trade off or the ability to use his land or have the resources

to make cash mitigation payments, or in the case of Mr. Taylor, donate money to salmon restoration plans or eagle educational facilities in national parks or forests. Those people have other avenues of buying their way out of the harshness of the Endangered Species Act. But people like Mr. Taylor, who really don't have any resources or additional land to negotiate with, they are really stuck.

Mr. POMBO. A final question: In your professional opinion, is it legislation like this that the small property owners need in order to be able to deal with the Federal bureaucracy?

Ms. MARZULLA. Absolutely. The way the system works now, it is not a level playing field. The property owner has really nothing at his disposal to demand respect for his constitutional rights or demand fair treatment. And this sort of legislation would help level the playing field.

Mr. POMBO. Thank you very much. I thank the panel for your testimony. There may be further questions that will be presented to you in writing. If you could answer those in writing for the Committee, they will be included in the Committee hearing.

I would like to apologize to the panel for the delay with us having to run over for votes and everything. I appreciate your patience. Thank you very much.

And the hearing is adjourned.

[Whereupon, at 2:36 p.m., the Committee was adjourned.]

