ENDANGERED FARMERS AND RANCHERS: THE UNINTENDED CONSEQUENCES OF THE ENDANGERED SPECIES ACT

HEARING

BEFORE THE

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THURSDAY, JULY 17, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON RURAL ENTERPRISES, AGRICULTURE, AND TECHNOLOGY,
COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The Subcommittee met, pursuant to call, at 1:00 p.m., in Room 1100, Longworth House Office Building, Hon. Sam Graves [chairman of the Subcommittee] presiding.

Present: Representatives Graves, Shuster, Ballance, and Udall.

Mr. GRAVES. We will call this hearing to order. I want to thank everybody and welcome you all to the Rural Enterprise Agriculture and Technology Subcommittee.

Today our main purpose is to examine the overregulation and unworkable environment the Endangered Species Act has placed on farmers and ranchers. The Endangered Species Act, or ESA, was intended to protect species on the brink of extinction. Instead, ESA has been turned on its head, and it places undue hardships on small businesses, farmers, and ranchers. It is now our agriculture base that is in danger of becoming extinct.

In 1973, 109 species were listed as endangered. Today, there are over 1,200 species listed as endangered, and 250 more considered candidates for ESA listing. Another 4,000 species are designated as species of concern. Of these thousands of individual species, only 15 have been recovered. That is less than 1 percent. And this number can't completely be proven. We are spending millions of dollars protecting the rice rat, the Key Largo cotton mouse, the oval pigtoe, and dozen of ferns.

As stated, the numerous ESA mandates have done little to save species. The number listed far outweighs the number the ESA can handle and successfully nurse back to survival. However, America's farmers and ranchers and small businesses seem to be the hardest hit by attempts to save species. Property has essentially been taken away from landowners due to the restrictions that are placed on practices, and the value of private property has plummeted. Farmers and ranchers face fines and imprisonment for the most basic of farm practices if Federal regulators believe it would disturb or endanger species or critical habitat.

The Endangered Species Act has done more to damage the welfare of America's hardworking farmers than it has done to save en-

dangered species. The Department of Interior, the Fish and Wildlife Service itself stated—and I am going to quote here—itself stated in the Register, the Federal Register notice regarding the Preble's jumping mouse—and I hope I got that termed right—And I am going to quote here: "In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to the most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology. It limits our ability to fully evaluate the science involved, and consumes enormous agency resources at huge social and economic cost.".

The Interior Department further states—and, again, this is a quote: This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent conservation needs.

Additionally, there has been very little study of the impact the ESA has had on agriculture communities and small businesses. Small business representatives have repeatedly stated that the Fish and Wildlife Service has in many cases proceed without the benefit of informed comments, specifically those from small business interests. Additionally, the SBA's Office of Advocacy has weighed in on ESA issues and concerns that the Fish and Wildlife Services failed to properly analyze the economic impact associated with the designation of critical habitat. Simply put, small businesses, farmers, and ranchers cannot survive under the constraints of the Endangered Species Act. The unworkable overregulation the ESA has placed on farmers does nothing to serve the function intended by this act.

I look forward to today's expert testimony. We have a lot of folks here today, and I hope we can work towards a common sense solution to the grave situation faced by agriculture and small business today.

[Mr. Graves' statement may be found in the appendix.]

Mr. GRAVES. And now I would like to recognize our Ranking Member, Mr. Ballance, for his opening remarks.

Mr. BALLANCE. Thank you, Mr. Chairman.

Our environment is a part of everything we do, from the food that we eat to the land that we occupy, and protecting it is an essential component of our national and global economic policies. The Endangered Species Act directly addresses the need for safeguarding our environment that was implemented to protect the survival of listed species while at the same time protecting and promoting the ecosystem in which they live. The Endangered Species Act understands the need for a balanced approach between environmental protection and meeting the needs of landowners. The Endangered Species Act recognizes the importance of these businesses in today's world.

Some claim that this act has a negative impact on their business by creating restrictions on small farmers and ranchers through land limitations. Debate will continue on whether or not the Endangered Species Act helps or hurts small businesses. But, in truth, depending on the industry, many small businesses do rely on this act for their prosperity.

Both the fishing and recreation industry counts on environmental protection for their economic survival. For example, the initial failure to protect salmon resources helped contribute to the loss of 47,000 jobs in the recreational and commercial salmon fishing industries. This job loss had a ripple effect, eventually making its way to other small businesses such as fishing supply stores, motels, and restaurants that form the infrastructure supporting these communities.

Failing to protect critical resources can devastate small businesses throughout an entire industry. The ESA plays a significant role in protecting many small business industries. Protections have been built into the Endangered Species Act to mitigate these effects in the form of conservation incentives. These incentives provide flexibility and choice for landowners trying to work within ESA provisions. These programs allow users to explore the best methods of compliance that also meet their economic needs.

Ironically, debate has taken place on the House floor today on legislation that slashes funding for Federal conservation programs, including initiatives that help small businesses comply with ESA. The Interior appropriations bill funds conservation programs at 991 million, 569 million below the amount authorized for 2004, and 200 million below last year's level.

The ESA and small businesses coexist today, and, with an adequate investment in effective conservation programs, will continue to do so. I hope that we can take a balanced approach and meet the needs of everyone involved to ensure the survival of both our environment and our Nation's economy.

Thank you. And I look forward to hearing the witnesses' testimony throughout this matter today.

Mr. GRAVES. Thank you, Mr. Ballance.

[Mr. Ballance's statement may be found in the appendix.]

Mr. GRAVES. We are going to have approximately six votes, which are going to happen at 1:30. So we will have an interruption, unfortunately, in the middle of the hearing, as things go. But there will be one 15-minute, and the rest are all 5 minutes. But when the bell rings, we will find a spot in there.

Again, I do want to thank all those for being here. And all statements of the members and witnesses will be placed in their entirety in the record.

Now, we are going to switch things around just a little bit for those of you who don't know, because Mr. Pombo, the Chairman of the Resources Committee, who is going to testify a little bit later, is on the floor right now working. So we are going to start out right now with our second panel.

Mr. GRAVES. And I would like to introduce the Honorable Craig Manson, who is the Assistant Secretary for Fish, Wildlife, and Parks at the Department of Interior. Judge, thank you for being here. I do appreciate it.

STATEMENT OF THE HONORABLE CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR

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

Mr. Chairman and Members of the Committee, I do indeed appreciate the opportunity to testify before you today regarding the Endangered Species Act. We at the Department of the Interior appreciate your interest in the impacts of the ESA, and its critical habitat component in particular, on agriculture and small businesses in general.

We have provided the Committee with briefing papers on the ESA and some of the major programs and issues, and I won't repeat that information now, but it is with my written testimony.

One of the most controversial aspects of the ESA is critical habitat. You were quoting from the Federal Register notice announcing the critical habitat designation for the Preble's meadow jumping mouse, and you described accurately what the content of that notice is—that we have found little additional protection to most listed species from the statutory designation of critical habitat, and that we are now faced with a flood of court orders requiring critical habitat designations. Compliance with those orders now consumes nearly the entire listing program budget, leaving the Fish and Wildlife Service little ability to prioritize its activities. It also compromises our ability to work with States, tribes, landowners, and others to recover species already listed under the Act.

The accelerated schedules of court-ordered designation have also left us with almost no ability to provide for additional public participation beyond the minimum required to comply with the Administrative Procedure Act, the ESA, or the Regulatory Flexibility Act. We are generally also not able to take additional time for review of comments and information to ensure the rule has addressed all of the pertinent issues before making decisions on listing and critical habitat proposals.

This is not a new problem. The previous administration testified before Congress that this situation is detrimental to species conservation and needs to be resolved. However, the increasing number of lawsuits has brought on a crisis where we are simply out of funds for this fiscal year. To cover this shortfall, the administration has requested authority from Congress to shift money from other endangered species programs, and the President's fiscal year 2004 budget request totals nearly $12.3 million for listing, nearly double the appropriation for fiscal 2000, and a 35 percent increase from last year. However, our long-term challenge is to find a way to use our limited resources to deal with the most urgent of species needs, and not on who can get to the courtroom first.

We recognize that critical habitat and other resource management decisions made by the Department can greatly impact local communities and the people who live and work in them. While countless species depend upon the land to sustain life, families, particularly farming and ranching families, depend on the same land for economic well-being. We know that we must work in partnership with people who live and work on the land.

This approach is also essential to the survival and recovery of many listed species. The majority of the Nation's threatened and endangered species habitat is on either State or private property. We strongly believe that a collaborative stewardship approach is the best way to achieve the ultimate goal of the Endangered Species Act, which is recovery of threatened and endangered species.

Under Secretary Norton of the Department has been implementing this partnering approach in our land management practices. Secretary Norton has often spoken of what she terms the four C's—communication, consultation, and cooperation, in the service of conservation. The focus of the four C's is the belief that enduring conservation springs from partnerships involving the people who live on, work on, and love the land.

At the same time, I must acknowledge that critical habitat is an extremely challenging program within which to apply collaborative approaches. We have, however, made some progress in this area. We have authority to exclude areas from critical habitat if the benefits of exclusion would exceed the benefits of inclusion, and we are making greater use of this authority.

For example, we excluded from recent critical habitat designations in Hawaii several ranches where landowners have committed to assist in the conservation and recovery of listed species on their land. We currently have many other conservation tools available to provide for close cooperation with private landowners, State, and local governments, and other non-federal partners. A detailed summary of those is in my formal written testimony.

Another aspect of conservation is to meet with and listen to landowners and others directly involved in or affected by our conservation decisions. I have made numerous visits to farming and ranching groups and other small businesses since taking office, and have met with many others here in Washington. For example, I met yesterday with members of the Nebraska Farm Bureau, and I particularly met with John Hays, one of the witnesses on the next panel, from Oregon. Mr. Hays is a genuine American conservationist, and I commend his story to you as a realistic example of the challenges both we and landowners face in dealing with the prescriptive provisions of the ESA.

The one common thread of all these meetings is the overwhelming desire of the farmers and ranchers to keep species on their land, and the overwhelming frustration at the way the ESA requires us to go about it. As I have stated on numerous occasions, the Department is committed to working with Congress to find a solution to these problems and other related issues. I want to reiterate that offer here today.

Mr. Chairman, that concludes my prepared testimony. And I am pleased to respond to any questions that the Subcommittee might have.

[Mr. Manson's statement may be found in the appendix.]

Mr. GRAVES. Thank you, Judge. I appreciate it. Would you rather be called Under Secretary or judge?

Mr. MANSON. Whatever you are comfortable with. It is Assistant Secretary. We decided that we don't have Under Secretaries at Interior anymore. That seemed a little too grim, you know.

Mr. GRAVES. Tom, if you don't mind, Representative Pombo is here, and I am just going to include him and incorporate him right into this panel, because I know he is busy. And I appreciate Mr. Pombo being here. He is somebody who is very interested in reforming the Endangered Species Act. He is Chairman of the Resources Committee, which is a very important Committee when it comes to dealing with this act.

And Representative Pombo, we were trying to come up with some props to kind of put a face on the endangered species that we are talking about here today, and we came across the fairy shrimp, which I have got a few of them in here. And I know these are near and dear to your heart. They look an awful lot like what I had at Ocean Air last night, but nevertheless I know they are near and dear to your heart.

STATEMENT OF THE HONORABLE RICHARD POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. Well, thank you, Mr. Chairman. I appreciate you holding this hearing. I know it is extremely important. And when you look at what the impact the Endangered Species Act has had on rural America and farmers and ranchers across the country, I think it is extremely important to look at the act itself and some of the shortfalls that we have had over the years in terms of recovery and being able to fully implement the act in a way that recovers those species.

In my district in California, there is no question that we have had a major impact on the farmers and ranchers because of the implementation of the act. You hold up the fairy shrimp. That is a species which was listed as an endangered species. Well, there were a couple of them that were listed as endangered and one that was listed as threatened. And that has had a major impact on the ability of farmers to farm in and around my district.

I recently had a farmer who was trying to plant vineyards on property that his family had farmed for generations, and he was given a cease-and-desist order and told he could not proceed with planting the vineyards because of the presence, or possible presence, of endangered species and the possibility that it was critical habitat for the fairy shrimp. That was a multi-million-dollar issue to that particular farmer because of the amount of money it cost to plant vineyards.

In my own case, I have a ranch in California; and when I went to build a home on my ranch, I was told that I couldn't build the home unless I paid into the habitat conservation plan. And it cost me $6,000 to gain permission from the Fish and Wildlife Service and Fish and Game in order to build a house on my ranch. That is the kind of impact that it is having on my district.

There are any number of anecdotal stories that people can tell, but I think what we all have to remember is that the problems that we are having with the Endangered Species Act aren't necessarily with the act itself, but it has a lot more to do with the implementation of that and what critical habitat designations mean and what recovery means and how we go about doing that. It is a matter of really rewriting the act, and trying to go after a law that does a better job of recovering species than what we currently have and has less of a direct impact on the private property owners, the farmers and ranchers, who have been good enough stewards of the land that they still have endangered species on that land. A lot of times people forget that they took care of that land good enough that they still have the species there. So maybe we ought to be changing the incentives, and encouraging them to become better

stewards and encourage them to do things on their farms and ranches that attract endangered species, instead of making it a negative as we have under the current implementation of the law.

So I appreciate greatly the opportunity to come in here and share a little bit with you, Mr. Chairman. And I am very, very appreciative that this Committee has decided to undertake this and hold a hearing.

Mr. GRAVES. In light of the fact that we are going to have votes here in a little bit, I am going to go ahead and open it up for questions for Representative Pombo real quick, because I know he is going to have to leave right after this. And I want to start out, and I encourage the members to keep their questions as short as possible.

But I read from—I quoted actually from the Federal Register. And we are finding out more and more, too, that critical habitat has been designated and species are being designated more through litigation than anything else. And why do groups continue—and I am just asking your opinion, I guess. Why do groups continue to use litigation when they know that also creates problems? Because it draws resources away from doing the job that the act was intended to do, it costs a tremendous amount of money, taxpayer dollars, to go through that. And yet it is proliferating.

Mr. POMBO. I think the judge can probably describe for you what the impact has been on Fish and Wildlife and the Department of Interior. But if the question is why do they continue to do this, I think a lot of it has to do with a different agenda that really doesn't have anything to do with recovering endangered species. I think it has a lot more to do with stopping growth around communities, it has a lot more to do with stopping timber harvest or mining or any kind of resource extraction from our public lands and private lands. I think it has a lot more to do with an outside agenda that has very little to do with what is the best thing possible for recovering species. Otherwise, we wouldn't be tying Fish and Wildlife and Interior up in terms of all of these lawsuits. I mean, you have a chance to visit with the folks down at the Department of Interior. They are spending most of their time defending themselves against lawsuits and not doing the things that they should be doing to recover endangered species.

Mr. GRAVES. If we condensed that list or reduced that list to a critical number, do you think that would have a huge effect on those lawsuits?

Mr. POMBO. I don't know. Unless we can change the law in terms of how these lawsuits are handled, I don't know what you do about that. Because everybody has the right to file a lawsuit and tie everybody up. The idea of creating a smaller number of severely endangered species and concentrating our resources on that is something that we have kicked around. And in a lot of cases, I think it would be better, because there are some severely endangered species that we should be concentrating on, because nobody wants to be responsible for a species becoming extinct. And because of that, I think that we could identify those species, and concentrate our energy and efforts and dollars on trying to recover those species.

Unfortunately, the way the law is written now or the way it is being interpreted right now, I don't believe that that is an option that Interior has.

Mr. GRAVES. Mr. Ballance.

Mr. BALLANCE. Thank you, Mr. Chairman.

Mr. Pombo, I am going to just thank you for your testimony. And I don't have any questions.

Mr. GRAVES. Bill.

Mr. SHUSTER. Thank you, Mr. Chairman.

I just want to thank Chairman Pombo. I think one of the things you said makes a lot of sense: Let us encourage landowners to manage these endangered species. I think they will do a good job of it and do it at a lot less cost, and I think in the end it will be a much better program.

But I appreciate your coming here, and I look forward to working with you to change this law so that we can make it more effective and more friendly to our farmers and our ranchers and developers. Because I believe that they do have a different agenda over at U.S. Fish and Wildlife. In Pennsylvania alone, there is a situation in eastern Pennsylvania that they found there was a turtle—I don't know the name of the turtle. It turns that they did DNA testing on the turtle, and the turtle wasn't from eastern Pennsylvania, it was from North or South Carolina. I didn't know that such a thing could be done, figuring it out with DNA, but it was. And it appears that somebody imported the turtle and put it in place so they could stop development in eastern Pennsylvania. So those type of shenanigans have to stop. And as I said, I look forward to working with you in changing this law. Thanks.

Mr. POMBO. If I may, Mr. Chairman. I would just add that the idea of changing the incentives and giving a positive incentive for those who are doing a good job of managing their land and recovering species is an idea that has grown quite a bit in recent years. And there are even a number of environmental groups that are beginning to see that as a solution to some of our problems.

Mr. SHUSTER. Sort of the carrot and the stick. People respond much better to the carrot. And I don't know anybody that wants to endanger or hurt the environment, but we certainly want to have economic development and do it in a reasonable way. So thank you.

Mr. POMBO. Thank you.

Mr. GRAVES. Mr. Udall.

Mr. UDALL. Thank you, Mr. Chairman. And thank you, Mr. Pombo, for your testimony. Mr. Pombo is the chairman of the Resources Committee on which I serve, and I am going to make sure I don't grill him here, because it might have some consequences in the Committee.

But I like your comment in terms of giving incentives, because I think you are right on. I think we need to try to—as many of us know, the endangered species are on private land, sometimes completely on private land. The only way we are going to fulfill the intent of the act is try to work with private landholders to make sure that happens.

As the Chairman knows, we have a big endangered species issue in the Rio Grande Basin. And I am hoping to get in some legisla-

tion that will talk about sustainable agriculture and sustainable use of water, and I look forward to having hearings on those issues and maybe even out in the State. I think requests have been put in for you to come out West and do some hearings out in New Mexico and some of the Rocky Mountain States. So, with that, thank you very much, and appreciate you being here.

Mr. POMBO. Thank you.

Mr. GRAVES. Thank you, Mr. Udall.

Thank you, Mr. Chairman. I appreciate you coming in. This is an issue that is very important to me, and we have—we get a lot of letters and a lot of correspondence from farmers and ranchers and many small businesses in many areas. Whether it is just trying to use their property and trying to farm, or even getting into the river, the Missouri River, which is—you know, we have a hotbed of endangered species issues going there, and the small businesses that are affected and the farmers that are affected based on some of the practices being changed. It is a huge issue, and I look forward to working with you and your Committee, too, on this particular issue and legislation.

Mr. POMBO. Well, I thank you, Mr. Chairman. And I do think it is important to point out that when we decrease the number of acres that we have the ability to farm and have that kind of an impact on rural America, it is not just the farmers and ranchers that get hurt, it is all of the small businesses and that entire community who provide services for those farmers and ranchers that suffer, too.

And as we have seen with the timber industry and other industries which have been, for all intents and purposes, been put out of business in this country, the impact on rural communities is devastating, and it is something that I believe the time has come for Congress to stand up and accept responsibility and move forward. So thank you very much.

Mr. GRAVES. These are truly mom-and-pop businesses, too. They aren't big, by any stretch. Thank you, Mr. Chairman. I appreciate it.

Mr. POMBO. Thank you.

Mr. GRAVES. Tom, we will go ahead and move right on to you. Our next person is Tom Sullivan, who is the Chief Counsel for the Small Business Administration's Office of Advocacy. Tom, I appreciate you being here.

STATEMENT OF THE HONORABLE THOMAS SULLIVAN, CHIEF COUNSEL, OFFICE OF ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. SULLIVAN. Thank you, Mr. Chairman, and members of the Subcommittee. Good afternoon, and thank you for the opportunity to appear before you today to describe the U.S. Fish and Wildlife Service's compliance with the Regulatory Flexibility Act and its designations of critical habitat for endangered species under the Endangered Species Act. My name is Tom Sullivan, I am the Chief Counsel for Advocacy at the United States Small Business Administration.

The Office of Advocacy is required by the Reg Flex Act and President Bush's Executive Order 13272 to monitor Federal agency compliance with the Reg Flex Act and report.

And I will give a brief overview of my office's responsibilities, but first would like to request that my complete written statement be included in the record.

As part of our mandate to monitor agency compliance with the Reg Flex Act, advocacy has reviewed recent rulemakings by the Service. My staff has had regular contacts with representatives from both the Department of Interior and the Service on critical habitat rulemakings. In fact, my deputy chief counsel and legal team are currently working with Assistant Secretary Manson's office to discuss ways to improve the Service's compliance with the Reg Flex Act while protecting both endangered species and small ranchers and farm builders.

Recently, small businesses have expressed concern to my office that the Service has provided economic analyses which do not accurately capture regulatory impacts. The Office of Advocacy has publicly commented three times this year that the Service's analyses appear insufficient to serve as the factual basis for their certification that the rules would not significantly impact a substantial number of small entities.

One example is the proposed designation of critical habitat for the pygmy owl published by the Service in November of last year. My office conducted outreach after the proposal, in part through our regional advocate in Arizona, Michael Hull, who met with affected small businesses directly and attended the Service's public hearing on the rule in Tucson.

From our outreach, we learned that the Service had not incorporated the concerns of many small ranchers, miners, home builders, and others in its threshold analysis as to whether the rule would affect small business.

And there is another concern I would like to express to the Subcommittee, and that is that the Service seems to have recently introduced critical habitat restrictions without affording notice and an opportunity to comment as required by the Administrative Procedure Act and the Reg Flex Act. I am concerned that the Service may exclude the public from its public policy process by foregoing rulemaking entirely, imposing survey and mitigation requirements on the public during consultations with other Federal agencies.

On the rule to designate critical habitat for the pygmy owl in Arizona, the Service acted to impose critical habitat restrictions during the public comment period on the rule. In March of this year, a Service biologist field supervisor issued a guidance memo to the Army Corps' nationwide permit program which imposed survey consultation and mitigation requirements for the land comprising most of Arizona from north of Phoenix down to the Mexican border. This would affect ranchers or farmers who use the nationwide permit program.

Small ranchers have also informed my office the Service may assert jurisdiction over unoccupied land in Arizona under the Endangered Species Act's section 7 consultation requirements, imposing survey consultation and mitigation burdens on small ranchers as

they attempt to secure grazing permits from the Forest Service and the Bureau of Land Management.

I believe that the Administrative Procedure Act and the Reg Flex Act do require the Fish and Wildlife Service to afford the public an opportunity to review potential regulatory actions and provide meaningful comment.

I look forward to working with Assistant Secretary Manson's office to ensure that affected small entities are given this chance.

It was the designated and designed purpose of the Reg Flex Act over 20 years ago, and my desire now, to help government base decisions on a full and open understanding of how regulations affect small business. My office stands ready to assist the Subcommittee and Judge Manson to achieve these goals.

Thank you for the opportunity to testify, and I am happy to answer any of the questions that this Subcommittee may have.

Mr. GRAVES. Thank you, Mr. Sullivan.

[Mr. Sullivan's statement may be found in the appendix.]

Mr. GRAVES. Judge, we will recess for a short time to go over and vote. Again, there is going to be one 15-minute and four or five 5-minute votes. So it will be a little bit, but we will come right back and then we will go into questions with you two, and then we will seat our third panel. So we will be right back. Thank you.

[Recess.]

Chairman GRAVES. Okay. We will go ahead and call the hearing back to order and we will open up with questions for the Judge and Mr. Sullivan, which I have one.

Mr. Manson, I would like to ask you the same question I asked Mr. Pombo about the excessive litigation, and it seems to be this act is being driven more by litigation now than sound science. Do you have any good idea why they continue to sue the Department when it continues to draw away resources, when it continues to pull down monies that should be going to be used to protect these species?

Mr. MANSON. Well, I think that is a real problem, particularly in this critical habitat area, and I do not purport to understand the motives of all of the individuals who and groups who are engaging in that litigation. I do think, however, that in this particular aspect I have testified before in other Committees that the Endangered Species Act is broken and we need a fix to this aspect of the Endangered Species Act, to take away the strict deadlines that provide the hooks for litigation and to make the designation of critical habitat an opportunity for real recovery and move it away from process. Whenever you have a process-driven aspect of the law, there are opportunities for litigation.

Chairman GRAVES. Do you think—and you mentioned recovery, which I think we should find those critical species and concentrate on recovery. But it seems like just keeping static—and, Mr. Sullivan, you might be able to answer this. Is the goal to stay static with some of these species or to actually recover? Recovery, there is only 1 percent that actually show recovery out of the ones listed.

Mr. MANSON. The goal of the act is to recover species and to the extent that we are not recovering species, then the purpose of the act is not being achieved.

Chairman GRAVES. Mr. Ballance?

Mr. BALLANCE. Thank you, Mr. Chairman. Mr. Secretary, you testified regarding large amounts and we just talked about litigation regarding this critical habitat designation and the drain it places on your Department and the limited resources. But is it not true that the overwhelming majority of this litigation is caused by the Department of Interior's failure to assign critical habitat designation in the first place? As required by this act?

Mr. MANSON. Well, the history is that for many years, the Fish and Wildlife Service found it, quote, not prudent, to designate critical habitat. That is a term that is used in the statute and it is a permissible finding under the statute. Beginning in the mid–1990s, starting primarily with a case involving the coastal California gnatcatcher, the courts began to find that the Fish and Wildlife Service's determination of what is not prudent was not in accordance with the Act. So, the answer to your question is all of the lawsuits on critical habitat are driven by the fact that there are 1,200 and more listed species, and less than a third of those have critical habitat designated as required by the Act.

Mr. BALLANCE. But are these lawsuits—and I haven't reviewed any of them—are they being brought against the Department, against Fish and Wildlife, trying to seek such designation?

Mr. MANSON. Yes.

Mr. BALLANCE. And of course your position is what?

Mr. MANSON. Well, my position is, as I have stated before, that the critical habitat designation, as it is presently set up in the statute, adds very little to the conservation of a species. That is why the Fish and Wildlife Service for many years, through administrations of both parties, found it not prudent to designate critical habitat.

Mr. BALLANCE. Well, Mr. Chairman, I do not want to run over my time. In North Carolina there are nine animals and seven plants known to be extinct that once lived in North Carolina and 13 animals and 48 plants that have vanished from the State, but can still be found in other areas. In an article in the Atlantic Journal and Constitution a U.S. Fish and Wildlife Service representative from the Asheville, North Carolina office stated that habitat loss is the single biggest factor in the loss of these species.

Given these facts one could argue that had environmental provisions such as critical habitat designation been in place to protect these habitats, 77 more species would be present in North Carolina today, further enriching the State's biodiversity. This is an example of how critical habitat can enhance one State. Imagine how many more species would be present today if we did a count in all 50 States. Given the fact that conservation of habitat could have prevented the extinction of a large number of species, how can you advocate eliminating critical habitat designations?

Mr. MANSON. Well, I agree that critical habitat loss is one of the, if not the critical factor, and that recovery of habitat is essential to the recovery of species. But, it is not so that the elimination of critical habitat under the statute would contribute to the further decline of species. In fact, the time, effort, and money that is spent on the statutory designation of critical habitat actually frustrates conservation efforts, and we find that there are superior ways to conserve habitat, both statutorily and on a voluntary basis, such as

is done in our Partners for Fish and Wildlife Program and our Landowner Incentive Program and Habitat Conservation Planning. And there is a difference between the designation of critical habitat under the statute, which turns out to be largely an administrative exercise, and the conservation of habitat on the ground. That is the brief answer to that.

Mr. BALLANCE. I have got a little bit more time, I think, Mr. Chairman. I am sympathetic with the small businesses and farmers and people who have these concerns. But is there a way or how can your Department—isn't there a plan or program in place, particularly the small farmers, that you can assist them with their limited financial resources in implementing conservation plans?

Mr. MANSON. Well, for example, the landowner incentive plan provides funds for landowners to do voluntary conservation measures that will benefit species. But nonetheless, we are still having to deal with the statutory structure of the ESA that requires the designation of critical habitat that has the other impacts that have been and will be discussed today.

Mr. BALLANCE. Thank you, Mr. Chairman.

Chairman GRAVES. Thank you, Mr. Ballance.

Mr. Sullivan, I am going to ask you a similar question. You guys have been pretty active in dealing with the regulatory mess. What would you suggest from a small business standpoint on making this work? Where we can find some common ground?

Mr. SULLIVAN. I think you are going to hear from a panel of professionals who have to deal with this every day in their business on what the Office of Advocacy believes is the solution. And that is prior to folks looking for litigation opportunities or prior to folks having to defend themselves in court, the folks from the Service have to ask the ranchers for solutions, and the Service has to ask the home builders for solutions. And I think that what Mr. Pombo said earlier is enlightening in that when it comes to conservationists and small business owners, they are not at odds with each other at all. They both want the same thing. And there is a tendency, the Judge and I were talking about during the break, is that this becomes a paper exercise. And instead of sitting down and consulting with the folks who would be affected by this, they file a claim with the Service. The Service has to file a claim by statutory deadline back and then they end up in court. And that is where the system is broken.

If we could make sure that that consultation happens between the conservationists between the farmers, between the ranchers, between the home builders earlier in the process without fear of litigation, then the system should work better.

Chairman GRAVES. Mr. Shuster.

Mr. SHUSTER. My experience has been that it is not necessarily the rancher, or look at developers, it is the environmental groups, people out there that want to throw up these hurdles.

How do we stop that? Can we at least limit? You are not going to stop people from suing people. I do not advocate that, but how do you limit it so that you do not have the endless continuing to file and file and file until the developer says forget it, I will just give up on it or it is costing him so much money that that becomes a problem?

Mr. SULLIVAN. Mr. Shuster, one of the things that we have recommended is that if you realize you are going to end up in court, why not make the decision to litigation proof it at the front end? One way that we believe that can happen is under the Administrative Procedure Act and under the Regulatory Flexibility Act the Service must flush out the economic impact on the home builders, on the ranchers and on the farmers, and once that is documented for the entire public to see then that will bolster their chances of winning in court at the end of the day. But I think it is unfortunate that we presuppose courtroom action to solve these problems, and I think that the judge has some innovative ideas on how the act can be changed to disincentivise folks from going to court all the time.

Mr. SHUSTER. Judge? Did you want to——.

Mr. MANSON. Well, we have talked, for example, about changing the structure of the Act, particularly in this critical habitat area, to remove the regulatory impacts of critical habitat and focus more on the conservation aspects of critical habitat. We have been talking to the Resources Committee and the relevant Committees in the Senate to see if we can't work cooperatively with Congress to develop specific legislative proposals along those lines.

Mr. SHUSTER. Something I guess may not pertain exactly to this act, but getting the different agencies to work together. And I want to thank you for your help. You were able to work together, at least close the time line for a development going on in my district, and you and the Corps worked together. Are there more ways that we can do that? Is there something that we need to put into law to bring all the stakeholders together at the beginning?

I know there is a project in northwestern Pennsylvania, they have been working on a road corridor, and they did just that. They haven't started construction, but brought all the stakeholders in at the beginning and said this is what we want to do. We are at a point where everybody has signed off on it. The biggest fight is where the corridor is going. Everybody wants the corridor because they have property near it. But you have the homeowners, you have the environmental people, the State, everybody sat at the table.

Is there something that we can do to encourage that?

Mr. MANSON. Well, I agree with processes like that. I think that is the only way you make progress on these issues, which have so many varied interests and are very contentious, and I agree completely with Mr. Sullivan when he talks about getting people together. That is the type of collaboration that we are trying to instill in our bureaus in the Department of Interior because we do not see that it works any other way.

Mr. SHUSTER. Another instance, back to the endangered species, the Indiana bat has been a problem on a highway corridor in Interstate 99 in my district. It has—I will step back a little bit. The project probably has been going on 30, 35 years now, and the road is still not completed, the last 9 miles, and it seems that the last hurdle is the Indiana bat. Somebody made a claim that they found droppings or something, and so it has held up the highway for a year. And this road started out in the mid–70s projected to cost $350 million. By the time they cut the ribbon and it is open, a 60-

mile road, $750 million. And a lot of that quite frankly is due to the environmental holdup, the Indiana bat holdup.

That is the kind of thing that we want to try to bring people together at the beginning, get them to sign off on it. So anything that we can do to help change the law to encourage that, we want to do.

And I want to thank both of you for being here, and Judge, your work for the people of the Ninth Congressional District in getting that process through, I thank you for that.

Chairman GRAVES. Thank you both very much. I appreciate it, and we will go ahead and seat the third panel now.

[Recess.]

Chairman GRAVES. Thank you all very much for being here. We will start out with Mr. Waters, who is from Missouri, Ray County, Missouri. He lives near Orrick and farms with his family there. You all farm about 3,500 acres of corn and soybeans and he has been very active in Missouri River issues and is a member of Missouri Farm Bureau and American Farm Bureau Federation. I appreciate you being here today.

STATEMENT OF TOM WATERS, MISSOURI FARM BUREAU, AMERICAN FARM BUREAU FEDERATION

Mr. WATERS. Thank you. You just took my whole introduction. Good afternoon. My name is Tom Waters, a seventh generation farmer from Ray County, Missouri. I operate our family farm in the Missouri River bottoms near Orrick, Missouri. I farm 3,500 acres of corn, soybeans and wheat and alfalfa. In addition, I oversee another 1,500 acres that is primarily in the Missouri River bottoms. I am a proud member of the Missouri Farm Bureau and the American Farm Bureau, the Nation's largest agricultural organization.

Mr. Chairman, and members of the Subcommittee, I thank you for this opportunity to provide testimony regarding the Endangered Species Act. The Farm Bureau especially appreciates your willingness to address the impacts of the Endangered Species Act on our Nation's farmers and ranchers. The Missouri Farm Bureau has submitted written testimony for today's hearing. The written testimony covers a wide range of issues and concern the Farm Bureau has with regard to the Endangered Species Act.

In addition to the written testimony, the Farm Bureau has asked me to share my story with you and describe how three threatened and endangered species have impacted my farming operation. The pallid sturgeon, piping plover and the interior least tern are stirring up much controversy along the Missouri River and causing me to pay close attention to the Endangered Species Act.

Regional representatives within the Fish and Wildlife Service and a few environmental groups are using the Endangered Species Act to increase spring flows and reduce summertime flows on the Missouri River. Under this scenario my farming operation would suffer great harm. High flows in the spring prevent bottom lands from draining and make it difficult to impossible to plant my crops, and the reduced summertime flows will force barges that are used to transport my crops off the river.

In 1999, for example, flows on the Missouri River were high. I had 970 acres I couldn't plant or that were drowned out by the high Missouri River.

That is about one-third of my total operation that was unavailable to me that year. The next year, the river was low, and I was able to plant that same 970 acres and I raised a good crop. So I know for a fact that the higher spring flows on the Missouri River greatly reduce my ability to produce agricultural products.

The Biological Opinion calls for a spring rise approximately every 3 years. That assumes certain levels of rainfall and amount of available water. The one thing we farmers know for certain, there is no certainty with the weather. It is likely that high rainfall years might require releases of water in an off scheduled year. That would mean that these lands could be flooded in 2 or 3 years in a row. This certainly makes it extremely difficult for me to plan my yearly operation and to obtain financing to grow my crops.

Even if I can't grow a crop because my land is flooded by the spring rise, I still have to pay property taxes and make mortgage payments on the unusable lands. I am making a portion of my farm available for the benefit of these species, while my inland neighbors a short distance away have no such restrictions.

The ESA is for the benefit of all people, yet I and others along the Missouri River are bearing the cost of preserving the habitat. What is so frustrating about the whole process is I have little to no say in the listing of the species, the process of designating critical habitat or the plan to recover the species. Yet I stand to lose several acres of highly productive farmland in an effort to save these fish and birds.

The Army Corps of Engineers and Fish and Wildlife Service engage in a consultation process to decide matters that affect my property, and yet I have no chance for any meaningful input into these decisions.

The Federal agencies who are deciding the fate of my land and up to one-third of my operation, I feel that I should be at table with them to tell them what is feasible for me to do and to generally have some input into what ought to be done. After all, it is my land that is being used for the benefit of the species. Even worse is the more I learn about the species, the more I understand the science being used may be misguided. There is a debate on what is best for the species and whether it is necessary for a spring rise in order to preserve them.

Courts can't even agree on what is best. Right now there are two conflicting court orders regarding the Missouri River with which the Corps cannot comply. Before lands are restricted and people's livelihoods are affected, decisions should at least be based on sound science so that it is proved that the action is necessary for the survival of the species.

The Endangered Species Act should at least have a threshold standard that the Fish and Wildlife Service is required to meet before it takes actions that affect people's lives. That information should be independently peer reviewed in order to ensure that it meets these threshold requirements and that the Service has a sound scientific basis for acting.

Given scientific uncertainty surrounding Missouri River issues, I feel like a pawn in a political chess game with my land and that of my river neighbors as the prize.

Landowner participation in conserving species is critical. Involving landowners more and providing incentives for them to become involved will not only create a more balanced and informative decision-making process but it will allow landowners to be excited once against about providing habitat for our Nation's treasures.

Again, I thank you for the opportunity to share my thoughts. I would be happy to answer any questions you have. Thanks.

Chairman GRAVES. Thank you, Mr. Waters.

[Mr. Waters' statement may be found in the appendix.]

Mr. GRAVES. We would now hear from John Hays. John is from Oregon, President of the Oregon Cattlemen's Association, and he is representing the National Cattlemen's Beef Association. We appreciate you being here and coming all across the country to be here in Washington. Go ahead.

STATEMENT OF JOHN V. HAYS, ROUSE BROS. RANCH, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PUBLIC LANDS COUNCIL

Mr. HAYS. Good afternoon, Chairman Graves and distinguished members of the Committee. My name is John B. Hays. I am a rancher and a former President of the Oregon Cattlemen's Association from Baker County, Oregon. My family has been ranching on the same land in Unity, Oregon since 1950. I appreciate the opportunity to be here today to provide my story on the Endangered Species Act to the Committee on behalf of the sheep and cattle rancher members of the Public Lands Council and the National Cattlemen's Beef Association, the largest cattlemen's organization in America.

I graze my cattle on private lands, about 15,000 acres, as well as on three Federal allotments, one approximately 20,000, a 45,000-acre and a 35,000-acre allotment. These allotments are integral to my ranching operations. AUMs, animal units, reductions on the Federal allotment directly impact the economic viability of my entire operation.

On May 24, 2001, I met several members of the United States Forest Service, my attorney, and two witnesses from the Oregon Cattlemen's Association to discuss the future of my grazing allotment. The meeting became necessary because I had been getting mixed communications concerning my Forest Service grazing allotment. I feared I was on the verge of having my animal units per month, AUMs, severely reduced due to an endangered species that was not present on my allotment.

The Forest Service personnel had been communicating to me that the animal units on my grazing allotment would likely be cut back or possibly eliminated due to the Canadian lynx. I did say "Canadian" lynx, not "United States" lynx. This baffled me as the lynx has never been found on my allotment. Indeed, no one had ever seen a lynx in our part of the State. In fact, there had only been 14 confirmed reports of lynx in Oregon since 1897.

Even more baffling was the Forest Service, working together with the United States Fish and Wildlife Service under a memorandum of understanding, were mapping critical lynx habitat on

my ranching operation. My attorney took detailed notes of our conservation on behalf of myself so I could be free to ask questions, respond to the Forest Service comments, and the following key points is what we discussed:

The Forest Service Resource Staff Advisor from Boise stated that parts of my allotment have been determined to be lynx habitat, even though the Forest Service "did not think there are any lynx in the area, but they are required to manage for lynx anyway".

It is unfortunate that Federal agencies are being forced to spend their money resources on something that no rancher, no trapper, recreationalist or Forest Service personnel has ever witnessed or found any scientific evidence that suggests the presence of a lynx.

The Forest Service said that the United States Fish and Wildlife Service required them to follow their conservation strategy that was in place even before the listing of the lynx took place, and then they could determine whether or not these actions are not likely to affect the habitat of the lynx. At that point they said they could issue a grazing permit for maybe 1 year without too much delay.

Mr. Chairman, it is impossible to gauge my operation on a year-to-year basis. Grazing permits or grazing rights are issued for 10 years. Once issued, I have to present this permit to my banker and receive operational financials for the year. Three years ago, when all of the talk of the severity of reducing animal units on my allotment was taking place, my banker was reluctant to finance my operation because this might exist. The Forest Service telling me that they would issue a permit without too much delay is far too vague an assurance for running a business which depends on grazing.

When I need to turn my cattle into grazing allotments, I have no other place to pasture them. A delay can cause overgrazing and resource denigration on my private pasture land and stunt the growth of my cattle.

I realize the Federal employees that are stuck in the bog of regulations and paperwork that delay the issuance of my permit still receive a Federal paycheck, but I do not. My livelihood is dependent on the timely and continual issuance of a grazing permit.

The Forest Service said so far they were not in compliance on the Canadian lynx issue because they had not yet consulted with the U.S. Fish and Wildlife Service on my grazing permit. They said they had been spending most of their time on the bull trout, another highly questionable endangered species. They said my allotment permit would be vulnerable until they had time to consult with the U.S. Fish and Wildlife Service. The science used to list the bull trout is now widely being questioned, and yet it seems to take precedence over the Canadian lynx.

Even though the Forest Service has reissued my permit with restrictions, unaffected by the lynx at this time, except they had three timber sales in my area this past month that were denied because of the lynx habitat. This experience has left a bad taste in my mouth. It has made my sons reluctant to take family business over. They do not care about ranching. And this is not just a problem I have had to deal with but many ranchers across the area have the same problem.

Perhaps the most obvious failure in the ordeal described above is when the agencies fail to use sound science which in this case

equates with common sense. The Canadian lynx was never found on my allotment, yet the government has proposed to impose onerous restrictions on my livelihood to help it.

Sound science starts with objective evaluations of species, listing and delisting proposals by qualified scientists, using peer review of their work. The U.S. Fish and Wildlife Service employees can have judgments obscured at times by their institutional interest in administering the ESA. Because of the tremendous impact the ESA can have on an economic community and local land use generally, we believe that additional procedures are in order to ensure that no interest is unfairly minimized or excluded prior to a decision.

Another general issue is that all members of the public who are potentially adversely affected by the results of a consultation under the ESA should be permitted as a matter of law to participate fully in the consultation.

And lastly the if Forest Service feels it is necessary to remove a permittee from the land pursuant to the terms of a biological opinion issued under the ESA, the agency should be required as a matter of law to consider alternatives to keep that rancher in business.

In conclusion, I want to thank you again for the opportunity to present this view of the cattle industry in respect to the AUM reductions due to the ESA. We look forward to working with you to craft legislation that will both respect and meet the protective species and be respectful for the ranchers and their families who have worked the western lands for so many generations.

Thank you.

Chairman GRAVES. Thank you, Mr. Hays. I appreciate it.

[Mr. Hays' statement may be found in the appendix.]

Mr. GRAVES. We will hear now from Robert Gordon, who is with the National Wilderness Institute. Mr. Gordon, I appreciate you being here. I think you have a video.

STATEMENT OF ROBERT GORDON, DIRECTOR, NATIONAL WILDERNESS INSTITUTE

Mr. GORDON. I do, and I will start it partway through my remarks. It is relevant to the half. But I want to thank you and Ranking Member Ballance for the opportunity to comment on the ESA.

The NWI is a private conservation organization dedicated to using sound, objective science for the wise management of natural resources, and we have done extensive work on endangered species and produced a number of studies on the effectiveness of our wildlife conservation programs.

Of particular interest to NWI is the relationship between private ownership of land and conservation. Private conservation is actually more important to wildlife than government efforts, in my opinion. Although the Federal Government owns vast amounts of land, private land is often richer in wildlife, plants and water. It is often said that about 70 percent of endangered species are found on private land. And when I speak of private conservation, I do not refer only to the work of those who are self-proclaimed environmental organizations, but also commercial activities, small businesses, ranching, farming, forestry, recreation industries, and oth-

ers that make tremendous contributions to conservation as a by-product of their businesses.

For example, in Texas there are private ranches with a greater number of certain species of rare antelope than are found in the wild in their native lands. In these cases not only the landowners and the species benefit from private conservation activities, but the public as well. If any of these private activities made the property owner vulnerable to taking of his property, they would surely be reduced in number and scope and might not occur at all.

Undoubtedly, the attribute of our society that makes the greatest contribution to the environment is the ever growing efficiency of American businesses. Our family farms that during the last 100 years have greatly increased food and fiber production while reducing the amount of land devoted to crops by 28 million acres serve as a prime example of such efficiency. That 28 million acres is now available for some other use.

In the 30 years that the Endangered Species Act has been on the books it has brought few, if any, species to the point where they can actually be classified as recovered and removed from the endangered species list. Although several species have been taken off the list and called recoveries, in few, if any cases was it brought about primarily or solely by the ESA. In many cases the claimed successes are really attributable to the species being underestimated when it was on the list or being mistakenly listed due to taxonomic errors.

When you consider all the money that went into the program, which is called the crown jewel of environmental legislation, its very poor record is quite amazing. There are a number of reasons this law has not been as successful as we would like our conservation laws to be. The act is 30 years old and some of the assumptions on which it is based have proven not to be sound principles. For a program to work well we have to get the incentives right. Unfortunately, the ESA has created a perverse incentive structure that actually compounds the difficulty of conserving rare species.

A well-known example of this has been the plight of the red-cockaded woodpecker, where it was determined years ago that the policy of protecting older stands of trees was basically encouraging those who were growing stands of trees that reached the age where they would be suitable habitat for red-cockaded woodpecker to cut them down so they would not be regulated. Basically, a very predictable reaction to the public policy. U.S. Fish and Wildlife Service Regional Director, Sam Hamilton, has recognized this when he stated years ago: The incentives are wrong here. If I have a rare metal on my property, its value goes up. If a rare bird occupies my land, the value disappears.

During the break I talked to fellow panelist, Mr. Bean, and we couldn't recollect exactly how many times we had been up here in the last decade and testified on the same panel. And I can recollect that the first time that I testified back in the early nineties, my point was that incentives needed to be incorporated in the law and that there was a very poor record of achieving the goal of recovery of endangered species and that the standards were very subjective. The problem of incentives I think is now starting to be well recognized. I have heard many Members mention it and many panelists

and I think people are trying to incorporate solutions to the problems of perverse incentives under the law. And I think the criticism of the poor recovery record is well-known and starting to be addressed.

And I also raised back then the first time I testified the standards of the law are very subjective, and one of my problems with that is that it allows very selective enforcement of the law. The subjectivity of the standards under which the current program operates allows the law to be enforced selectively and politically. Economic activity has been shut down in parts of the country, particularly the rural West to protect potential habitat of species, species whose endangerment is questionable. But in other areas developments never seem to be inconvenienced by the need to protect a species. Now conservation science and the politicizing of allocation of resources not only lead to unjustified or counterproductive restrictions, but also block protective action where it is truly needed.

A glaring example of this occurs right here in Washington, D.C., where thousands of tons, millions of pounds of sludge, toxic sludge are permitted to be discharged by the Corps of Engineers Washington Aqueduct through a national park and into the Potomac River, where it smothers the spawning beds of the endangered short-nose sturgeon. I brought a tape of that discharge. I hope it can come out a little bit clearer than that. But there might be other places that you would find that would dump as much sludge in a river, but you would have to go to a Third World country to do it. This sludge is so toxic that the acute toxicity of it is strong enough that it kills fish in 10 minutes. It is loaded with arsenic, lead, chromium, nickel, zinc, and yet it has been going on for years under the eye of the EPA and right into the area the National Marine Fishery Service has stated is a primary, if not only, spawning habitat of the endangered short-nose sturgeon.

If you wondered why there is so little conflict between the rare species and human activities in this area, you may be surprised to learn the ESA simply is not enforced here the way it is elsewhere. Here the benefit of the doubt is given to economic considerations, not endangered species.

In the big picture, I would just say that you need to compare the results of ESA's regulatory and punitive approach, which often takes private property with a record of voluntary and incentive-based efforts which greatly benefit from private property. Wood ducks, bluebirds came back from depressed numbers because thousands of people built artificial nesting boxes on their property. During the past 30 years, wild turkeys have been restored to their original range and beyond at the impetus of turkey hunters.

Why are these private efforts so much more successful than the ESA? Consider the difference between the incentives and the regulations. Suppose the Endangered Species Act had been adopted early this century and wood ducks and bluebirds and wild turkeys would have been added to the Federal list and regulated under this law. How would you possibly get a landowner 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 the endangered species meant they could no longer use the land?

Through the implementation of laws which take private property without compensation of the landowner we have created a climate which pits rare plants and animals against the property owner. As a result they both lose, as does society. Our current approach to endangered species is inadequate because it is based on flawed ideas.

Thank you very much.

Chairman GRAVES. Thank you Mr. Gordon. I appreciate that.

Now we will hear from Michael Bean. And Michael, you are with the Ecosystem Restoration Program and Chair of the Wildlife Program? Did I get that correct?

STATEMENT OF MICHAEL J. BEAN, CHAIR, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE

Mr. BEAN. Pretty close, Mr. Chairman. Thank you. Thank you very much for the opportunity to testify. I am with Environmental Defense, Chairman of its Wildlife Program and Co-Director of its Center for Conservation Incentives. I want to begin my remarks by recounting some work that I did in Mr. Ballance's home State of North Carolina, nearly 10 years ago.

We were concerned then about the conservation of the red-cockaded woodpecker, an endangered species. Mr. Gordon mentioned that species a moment ago. And we were concerned because many of the private landowners in the area around Fort Bragg were disinclined to do the sort of management of their land that would have created improved habitat for that species. And yet we saw that the cooperation of those landowners was essential to the conservation of that species. So we spent some time talking to those landowners, understanding their needs and their concerns. We put together an idea to address both their regulatory concerns and their economic needs to see if they might be willing to change the way they were managing their land so that the red-cockaded woodpecker could benefit.

And I am pleased to say that today that program in North Carolina, which was the first of its kind anywhere in the Nation, has been extraordinarily successful. Indeed, that program and others like it operate in Virginia, North Carolina, South Carolina and Georgia and will soon be operating in Florida. In the two Carolinas, there are roughly 140 landowners with 350,000 acres of land in their ownership and all of those landowners are actively managing their land in ways that lay out the red carpet for that endangered bird.

And there are in fact landowners who are willing to have endangered birds introduced onto their land. In Texas, there are landowners who together own 2 million acres of ranchland who are allowing the endangered northern aplomado falcon, the rarest falcon in North America, to be released on their lands in a thus far successful restoration program, and that is an outgrowth, Mr. Ballance, of the program that began in your State.

I believe based on the work that I have done with landowners in North Carolina, Texas, California and elsewhere that it is in fact possible to address their concerns and realign incentives within the existing framework of the Endangered Species Act so that they can be allies of conservation, not its adversaries.

There are two needs, however, that I think are quite important. Many of the examples that I have given in my prepared testimony of landowners who are doing positive things to help rare species on their land are landowners who are taking advantage of Fish and Wildlife Service policies called the safe harbor agreement policy or the candidate conservation agreement policy. For both of these types of agreements, I believe, landowners have a great deal of interest in many parts of the country in pursuing but, candidly, Fish and Wildlife Service's process for reviewing and approving these is slower and more complicated than it needs to be. So frankly the Fish and Wildlife Service needs to assume the responsibility for according higher priority to these agreements and ensuring that they can be expeditiously reviewed and approved so that landowners who are willing to do their part in helping endangered species, in fact, do so.

There is also a need for money, because the sort of management that is needed for any of these species always entails a cost and that is sometimes a rather significant cost. Judge Manson in his testimony referred to the LIP program, the Landowner Incentive Program. That was one of two new incentive programs that were announced by Secretary Norton in the fiscal year 2002 budget. Together those two programs would have provided $50 million of incentives to private landowners. Congress included that in the fiscal year 2002 budget. It is now mid-July in fiscal year 2003 and to this date not one cent of that $50 million has reached any landowner anywhere in the country. That is not because any environmentalist sued or created any obstacle; it is because the Fish and Wildlife Service and the Interior Department have been unable to organize those two programs in such a way that that money can get out the door and into the hands of landowners where it can be used to restore habitat for rare species. In fact, the first year's appropriation, because none of it was even obligated by the Fish and Wildlife Service, was rescinded last year by Congress so they have recently awarded grants to the States and announced grants under the private stewardship grants program, the smaller of the two programs to which I refer, but to this point has paid no money to any landowner under either of those programs.

So I firmly believe that incentives are critically needed in order for the Endangered Species Act to achieve its goals, but there is a serious need for the Fish and Wildlife Service, or others who are in the business of delivering those incentives, to have in place procedures and mechanisms whereby those incentives can be delivered expeditiously with a minimum of delay and burden and so forth. And if we can solve that problem, then frankly, I think the sorts of conflicts which I must admit will be to some extent unavoidable, can nevertheless be reduced in the future. And so I would hope that the Committee might focus its attention on that problem as well.

Thank you.

Chairman GRAVES. Thank you, Mr. Bean. I appreciate your testimony.

[Mr. Bean's statement may be found in the appendix.]

Mr. GRAVES. I also want to read the testimony of an individual who couldn't be here today, Rex Wood. I want to put it in the record. He is from Mehlville, Missouri.

Chairman Graves, Ranking Member Ballance and Members of the Subcommittee, thank you for holding this hearing to examine the problems farmers and ranchers face with the Endangered Species Act. I am Rex Wood, a farmer from Mehlville, Missouri. I have been directly affected by the Endangered Species List.

The floods of 1993 and 1995 caused a massive logjam in Locust Creek in Lynn County, Missouri. Approximately 1,200 feet of solid debris in the channel was bordered by private land and the remaining 5,000 feet was within the boundaries of Pershing State Park. The blockage was stopping water flow upstream, raising channel levels, and preventing fields from draining. Numerous efforts were made by approximately 40 farmers controlling 10,000 acres of affected farmland to get the logjam cleared. The 40 farmers donated over $18,000 for cleanup on the 1,200 feet of channel bordering private land, but the Fish and Wildlife Service halted our plans for over 2 years by claiming any clean-out would harm Indiana bat habitat.

No one has ever seen an Indiana bat in this area, but because loose-bark trees along streams were potential habitat, we could do nothing while watching productive fields lay idle because of standing water. Losses to affected farmers easily surpassed $3 million dollars for the 1995 through 1997 cropping years. Finally, in the fall of 1997, Fish and Wildlife agreed to clean out after marking every potential habitat tree along the channel. The clean-out equipment could not touch any one of these trees, resulting in higher costs involved in removing the debris.

Farmers try to be good stewards of the land and environment, but frustration results when common sense is absent and we become the endangered species. Thank you for allowing me to testify. Hopefully some resolutions could be made.

I do want to submit that for the record.

Chairman GRAVES. We will open it for questions from our panel, and I do want to start with Mr. Bean. What you said is actually encouraging with programs for private owners to participate, and obviously you have made it clear that there are individuals out there who are very interested in fostering endangered species.

What I am interested in is the individuals like these, for instance, that are not necessarily interested. They want to help the environment, they want to do what they can, but they also want to be able to use their land for whatever need they have, whether it is farming or whatever small business that is. And that I guess is what I am getting at. How do we help those individuals? Because this is what this is about and what the Endangered Species Act is doing to those farmers and small businesses. How can we help them out if they are not necessarily wanting to participate, as it is put?

Mr. BEAN. As you have noted earlier, the goal of this program is to recover endangered species and when endangered species do recover, then the restrictions that the act imposes are eliminated. So the faster we can accomplish the goal of recovery, the better. I recognize that not every landowner will be interested in using his

or her land to create or improve habitat for endangered species. But to the extent we can create significant incentive programs and deliver those to landowners in an efficient way, the goal of recovery can be achieved much more quickly and much more easily, thus lessening the conflicts between endangered species objectives and other objectives.

So I would think even those landowners who will not participate themselves in these incentive programs have an interest in there being incentive programs that their other neighbors can take advantage of, because to the extent their neighbors do then we can only make faster progress toward the goal that we all share.

Chairman GRAVES. Can we afford that? In this situation, or at least it would seem to me, if an individual is prevented from using their property for whatever business they are engaged in, say it be farming in this particular case, and we reimburse them for whatever losses were incurred as a result of that, can we afford that nationwide and all of those affected? We have approximately 1 percent I think we have shown to be recovered from all the species listed on the Endangered Species List. We could go generations in some cases trying to recover some of these.

Mr. BEAN. I think—I don't want to minimize the costs, but I do think the goal of recovery is achievable, it is within our means and a target that is an appropriate target to shoot at. I would note that the farm bill has in it some, I think, $17 billion for various conservation programs over the next 5 years. Part of the problem we face is just making sure that we spend those dollars in an effective way. Let me give an example from Oklahoma.

The Conservation Reserve Program in Oklahoma was used to encourage the planting of grasses, perennial grasses on potential habitat for a bird called the lesser prairie chicken. It is not yet an endangered species but it is heading in that direction. Grasses that were planted were nonnative grasses. The nonnative grasses provided no habitat value for the lesser prairie chicken. Had that same money from the Conservation Reserve Program been used to plant native grasses, the goals of the Conservation Reserve Program, which at that time were largely erosion control, would have been met and simultaneously habitat would have been created for the lesser prairie chicken. So without an additional penny being spent, it would have been possible to achieve both the sediment control or erosion control goals of that program and at the same time a goal which was not achieved, which was the goal of creating habitat for that species that is headed toward the endangered list.

And frankly in my experience around the country that is just the tip of the iceberg of how we are missing opportunities with existing programs to integrate endangered species conservation into those programs and get our goals working, if you will, in harmony with each other, not at cross purposes as they were in that Oklahoma example.

Chairman GRAVES. I have one final question. Is it—do you think that the needs of species on the Endangered Species List outweigh needs of the displaced families or whatever the case may be or the businesses?

Mr. BEAN. No, I do not, sir. I think the needs of human beings are uppermost. But I think the needs of human beings are served

by having a biologically diverse environment and doing everything within our means to avoid the loss of species whose loss we can avoid.

Chairman GRAVES. Mr. Gordon, why on the—which is outrageous to see that, why is it that a blind eye is being turned to that sludge being dumped—I mean I can just imagine—and I know what happens in the Midwest if there is any sort of runoff from the livestock operation or something like that, which is shut down immediately. But yet you see something like this and it is kind of appalling to see that. Why the disparity from what I know to be the case in the Midwest, where I am from, and this out here?

Mr. GORDON. I can't entirely answer that question. I would have to be inside the mind of the agencies, but I can tell you that the behavior has been atrocious. The Corps has actually argued, at one point sent a memo to the EPA arguing that those discharges might be good for fish because they would cause the fish to flee the area and thereby not be caught and eaten by fishermen.

The level of these pollutants exceed D.C. water quality standards by not a small percentage, but by orders of magnitude 10 times, 100 times. There is very strong indication that actually testing done to justify a new permit that will allow that to continue for at least another 6–1/2 years may have been rigged. There is—according to officials at EPA, they recently advised me that the application submitted for this discharge by the Corps was profoundly factually flawed. One of the discharges was recorded as being 110,000 gallons a year. They made a mistake. They meant 110,000 gallons a day. That is like a taxpayer reporting a $30,000 income when his annual income is $11 million. And the National Marine Fisheries Service originally argued in court that we do not know if this endangered fish nearby. We do not know if this sludge is bad, and when it came time to issue the permit gave the facility a permit that actually anticipates that the eggs and fry of this fish will be killed and makes the argument that, well, there is enough of them that it will not kill all of them.

So just a remarkable set of dual standards. My hunch is that it has a lot to do with the fact that the facility is here in Washington, D.C., and it is one Federal entity regulating another. It is in an affluent neighborhood that maybe does not want a sludge treatment facility built. The water treatment wholesale buyers, D.C., Arlington and Falls Church, do not want to pay the costs perhaps of complying with the law and the court has been successful in obscuring this discharge. Typically it is conducted at night so that people cannot see it.

Chairman GRAVES. Mr. Ballance.

Mr. BALLANCE. Thank you, Mr. Chairman. I have enjoyed listening to all the panelists and I don't know how much time we will have to explore this but it has been educational to me.

Mr. Bean, I want to thank you for your work in North Carolina.

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Mr. Gordon, you mentioned that ESA had not been effective in preserving listed species. My information is that 41 percent of listed species have improved or stabilized their population levels and other species. Red wolves and California condors would likely be extinct without ESA protection.

Mr. Bean, what is your thinking on ESA's success rate in general?

Mr. BEAN. Mr. Ballance, my thought on that is that the Endangered Species Act has done a reasonably good job of preventing extinction. It has not done as good of a job at achieving recovery as I would like it to, and I note that the Endangered Species Act is largely prohibitive in the sense that it prohibits harmful activities but it does not offer many incentives for rewarding or encouraging beneficial activities. So the work I have been doing since working in your State in North Carolina a decade ago has been focused on trying to create or find incentives, both financial and regulatory incentives to complement the necessary regulatory controls so that private landowners, since they do own much of the habitat where many of these species life or can live with appropriate management, incentives for those landowners to get engaged in conservation activities on behalf of these species. Only with those sorts of incentives and with that sort of participation can we improve the record so that it is not 41 percent that are improving or stable, but closer to 80 or 90 percent, which I think is an achievable goal in the future that you and I can foresee.

Mr. BALLANCE. And as a follow-up, I don't know if you or Mr. Gordon mentioned this, the Fish and Wildlife not putting these funds out, what happened there?

Mr. BEAN. I wish I knew all the details. It took a long time for the Fish and Wildlife Service to publish a notice of how it intended to operate these programs in the Federal Register. I am told that many months were consumed by some back and forth with OMB over the details of those notices.

But Secretary Norton properly, I think, has touted these programs as emblematic of this administration's commitment to promoting incentives and working with private landowners. So I don't think there is a very persuasive excuse or justification for the fact that a year and a half later not a dime has reached the ground yet.

Mr. BALLANCE. Mr. Waters, I am very sympathetic with your situation. I am a farmer, I started out my career on the farm. But I take it you recognize that there are some small business industries, maybe even in your general area, that would benefit based on how this flow would come out on the river.

Mr. WATERS. I don't think so in my area. Probably the upper basin, you know there are some small businesses pushing for these changes in the upper basin, the recreation industry. But in general in our area in the lower basin, you are looking at a barge industry that is just barely hanging on. The agricultural folks that are impacted by the river are certainly struggling, and the small businesses that provide goods and services to those agricultural producers are struggling because of it.

Mr. WATERS. And in addition, that you look at municipal water supplies and industrial water supply. Those folks are having to leap great hurdles as well because of the changes that they are proposing.

Mr. BEAN. May I comment on that, Mr. Ballance?

Mr. BALLANCE. Yes, sir.

Mr. BEAN. The Corps of Engineers has done a very extensive environmental impact statement on this issue of changing the flow

regime on the Missouri River, and the Corps of Engineers' conclusion is that the changes in flow necessary to achieve the suggestions of the Fish and Wildlife Service in its biological opinion would increase the economic benefits from the river by $9 million in a normal year and by $19 million in a dry year, a drought year. Those are Corps of Engineers figures. And while it is certainly true that navigation on the Missouri River would suffer a loss, which the Corps estimates at $2 million, the benefits for navigation on the Mississippi River, again, according to the Corps of Engineers, are $5 million. So if one is a fiscal conservative and interested in making sure that the expenditures of our tax dollars are maximizing economic return, in this case that happens when you operate the flow of that river so as to achieve the objectives of the Endangered Species Act.

Mr. BALLANCE. Thank you, Mr. Chairman. My time is up.

Mr. GRAVES. Mr. Shuster.

Mr. SHUSTER. I thank all of you for being here today. I am going to echo something the Chairman said; he is encouraged by what you said, Mr. Bean, some of the remarks that you had. And one thing that I was encouraged to hear is that you believe the U.S. Fish and Wildlife is slow, and their process doesn't work that well. Can you let me know what some recommendations or some things you see that can be changed there, because I feel the same way. And many people in my district have faced those problems with the U.S. Fish and Wildlife.

Mr. BEAN. Yes, sir, Mr. Shuster. I am in the process of preparing for the Fish and Wildlife Service a set of written recommendations that will expedite the approval of these voluntary landowner agreements that I have referred to. I expect to have that done shortly. And if that is acceptable to you, I will be happy to provide those to you and the rest of the Committee when those are done shortly.

Mr. SHUSTER. That would be great.

And the other question I have—and obviously you are not here to defend the entire environmental movement in this country, But it seems to me at times, and I have seen this first-hand, where they are not interested in—they are interested in stopping development at any cost. And that is why we get lawsuits, and they use what would appear to me to be not sound science, as I stated earlier, in the building of a highway through my district. It has taken 30 years, and every environmental challenge that can be thrown up has been done. And in the course of time, people are losing their lives, being killed on unsafe highway.

So how do you respond to that charge to the environmental movement in this country? And, again, I don't think that it is all of or every group in this country, but there is a significant amount of that going on.

Mr. BEAN. Well, I don't know any of the facts about the highway in your district, so I really can't comment on that. Nor is it possible for me to read people's minds to know exactly what their motives are.

I will say that a lot of lawsuits have been brought by environmental organizations where their motives were questioned, but the lawsuits were successful. And what that tells me is that judges, courts, including judges appointed by Republican as well as Demo-

cratic Presidents, agreed that there was a violation of law, and thus awarded judgment to environmental plaintiffs in those cases.

In all the discussion this morning about the many lawsuits that the Fish and Wildlife Service is on the receiving end of, there wasn't any acknowledgment of the fact that the Fish and Wildlife Services loses almost every one of those lawsuits. And it is not because the suits are frivolous, it is not because the judges are biased; it is because the Fish and Wildlife Service isn't doing what the law requires.

Mr. SHUSTER. Well, again, there are some the judges are finding in favor, but there are many that they aren't. And, again, that is the ones that I have to question. I certainly don't want to stop people from pursuing a lawsuit where they feel that something has been done, but in many cases they are losing because judges are throwing them out, or they are losing in court because they haven't used sound science, and they have just been hurdles to try to escalate the costs of projects. And those are the things that concern me.

I wonder, Mr. Gordon, if you would want to comment on that, what you see out there in parts of the environmental movements in this country.

Mr. GORDON. I think there are legitimate lawsuits and lawsuits that are frivolous. I think there are both. I think there are people that have stated motives and unstated motives. As Mr. Bean said, it is difficult to read people's minds.

You know, I have been working on endangered species issues for too long, about 14 years, and for the first 10 years of our organization's existence, we never engaged in lawsuits, and we are generally pretty critical of them. The first time we actually did was over this discharge, and, in my opinion, it is something that nobody from either side of the political spectrum could agree with, but—and we have stated, hey, we think this is also very much an example of selective enforcement, so that people see that as a very troubling aspect of, you know, we are suing to make Washington, D.C., abide by the same laws that you feel, I think, are overzealously enforced around the country.

I happen to generally share that opinion, that there is two sets of standards, and the laws can be overzealously enforced against a farmer or a rancher who doesn't have necessarily the resources, and the standards that may be required of the plaintiff in that case may not be as tough as they have been in our case. And there has been a term, the iron triangle, that has been thrown around for years describing the relationship between regulators and the people in the environmental community and others getting in basically cozy lawsuits, where the lawsuits are driven to drive—accepted and designed to drive the policy. I think that goes on. I think there are all different kinds of reasons for the lawsuits.

But I don't think that—I think that is the nature of ESA. That is the way it is set up. It is a litigious mechanism, and until there is some fundamental changes in the law that make it operate in a different way, that is the way it is going to be.

Mr. SHUSTER. Well, why have you shied away, your organization? You said you shied away from lawsuits.

Mr. GORDON. Well, we just weren't litigious in nature. I mean, our goal or the way we were dealing with our educational mission

was conducting studies and surveys and producing peer-reviewed papers and entering into philosophical debate. And, in fact, the way we got into this lawsuit is we had hired three biologists to come and look at some Federal projects and say, hey, are the same standards that are applied to farmers and ranchers around the country being applied to these Federal projects here in Washington, D.C.? And they came back to us and they said, you wouldn't believe what is going on in these things. And when we looked at it, we found that it was so egregious that we decided we would enter into litigation for the first time.

Mr. SHUSTER. It seems that Mr. Hays was at the lengths of an example of what you hear about around this country, where small business people, you were held up as they were looking, and then it turned out they didn't find.

Mr. HAYS. Yeah. I feel like that coming from a very remote part of the State—don't forget, Oregon, we have been literally demolished by the Endangered Species Act. Our timber industry, by a bogus spotted owl, by a salmon recovery, which we already have and have recovered, has literally ripped us apart. I have seen families and towns diminished down to something—the guys that you are talking about about these conservative programs, I do this every day in my ranch, and so does everybody else in that area. We don't need to have something that is not there, like don't use that door because God is going to use it in 50 years. Stay off of that. No, that is not the way this works. We have things that are—I run probably two, 3,000 head of elk and deer on my place, flocks of geese. I mean, we are conservationists. But we come in with some bogus thing like the spotted owl turned our State, which was one of the most prosperous; now we are the highest unemployment State in the world. I have seen families that have lost their pride and everything they have got. They are going down to drugs now and anything else they can do to sell to make a living. Our little schools and everything.

These recovery programs are great somewhere, but they are not doing it in the West. We are hurt. We are darn near to the point where we are broke and ready to close the doors on everything. And you just cannot believe how this thing has hurt us. I mean, it needs change. It needs change from day one. But you can't—just like my little deal here where this endangered species took me out of the banking industry. I borrowed $3 million as of yesterday. I paid 10 points up front for it and 10 percent interest just to stay, in interest, because I believe in it.

My family came out on the Oregon Trail, and my grandmother and my great-grandmother and her sister were widowed 5 days out, brought 11 children out. I'm not the one that is going to turn this thing around and quit, but I am going to tell you these things are—it hits me right here when we talk about some of this thing that is going on.

But Oregon was the classic example where it all started, and they have demolished our State. And I am sorry.

Mr. SHUSTER. No, that is quite all right. I understand. Being a former small business owner, I know that, you know, government regulation——.

Mr. HAYS. I don't—I want your regulation, but I don't want your handouts. I just want to make a living and grow food for America.

Mr. SHUSTER. Absolutely. And some of these government regulations are just—you know, some of them are 30, 40, 50 years old people are still dealing with. They need to be changed, and that is our responsibility here to see that that is changed, so that you can rebuild a timber industry in Oregon. And it is encouraging to me that Chairman Pombo is here today, and I know I spoke to him later, he is going to try to go through and revamp this law so that we do see the U.S. Fish and Wildlife doing things differently. They need an overhaul, and I don't think they need just tweaked, I think it needs a vast overhaul so that—we want to protect the environment. We have to make sure that families like yours and millions of other families are able to earn a living and not be destroyed by bogus claims, as you said. And I think there are more out there than should be.

So, thank you all for being here today. And thank you, Mr. Chairman.

Mr. GRAVES. I do have one more question that was mentioned for Mr. Waters and Mr. Hays. Both of you mentioned being shut out of the process when it comes to involvement in addressing critical habitat. You might address that just a little bit more. I mean, is this just being implemented without any consultation whatsoever?

Mr. WATERS. Well, there is consultation in the Missouri River case between the Corps of Engineers and the Fish and Wildlife Service. They go into formal consultation, but the problem is, when they go into formal consultation, it is between those two agencies basically behind a closed door, and we are shut out of that process. So it would be nice if the landowners and the folks affected had some input into that formal consultation process. But right now, as the act is written, we don't have any input into that formal consultation process. That is correct.

Mr. HAYS. He is very right, none at all, because I have a biologist that is on my ranch, works every day, and I have to do that to keep operating. And he is a retired BLM man. They don't even list him. He can't get on that. He said, you aren't a government employee, you can't get on our I.D. teams. I said, well, how about my county agent? He works for USDA. I said, how about Oregon State University? They eliminate us from the process of it, and the science that we put into them never hits the turnpike. We never get to use it.

And that is—and what it does is it comes to the point where I did talk to Mr. Manson the other day, yesterday, and they are changing their U.S. Fish and Wildlife in the Northwest, in Portland, and they have got some direction to get this thing straightened out. But, no. We are—and, you know, when you are out of the system, and you are the guy that has historical—all your life you lived there, your family. My mother just died, who was 91 a couple months ago. And people like that, you know, we know the history of the thing and what has made it work, but we are cut completely out because it is government deals, and it is not a fair system.

Mr. GRAVES. I appreciate you all being here. We have a joint session of Congress at 4:00. I thank you for your testimony.

Mr. BALLANCE. Mr. Chairman, may I?

Mr. GRAVES. Yes, Mr. Ballance.

Mr. BALLANCE. I listened to—pretty carefully to all the testimony. I am not sure I heard the need for a complete overhaul of this act. And I am——.

Mr. HAYS. Yes, sir, we do.

Mr. BALLANCE. Well, let me ask Mr. Bean. Do you see that—and maybe just a brief answer—that we actually need a complete overhaul, or we need—maybe some people are not doing their jobs.

Mr. BEAN. I don't think there is a clear consensus on this panel in response to your question. My own view is a complete overhaul, no, I don't think that is in the cards. I don't think it is likely to happen. I do think there may be some fine-tuning adjustments that would be helpful. But I do think there is a very urgent need and a very practical benefit from addressing the manner in which the Fish and Wildlife Service administers and implements some of these new incentive programs. They hold the potential, I believe, to make a lot of these problems that now afflict a number of landowners more manageable and shorter-term if they are effectively administered. At least that is my view. And, to date, the service has not effectively administered these new programs. So that is a critical need, in my view.

Mr. BALLANCE. Thank you, Mr. Chairman.

Mr. GRAVES. I want to thank you all.

Mr. GORDON. I just wanted to say, I would agree that the program—or an overhaul of the bill, the law, is probably not politically in the cards at this moment, but I don't think that that means it is not necessary. I don't think the law has a very good record at conservation. And, clearly, it is causing tremendous social and economic disruption, and you are not achieving the goal, and you are doing damage. And if that is not something that cries out for correction, I don't know what is. And the only people who can do that correction are you.

Mr. HAYS. Just one comment. When I got out of the football world and come back to the ranch in 1986, we had 3 percent were growing agriculture in America. And you look right now, with all the species and all this, we have less than 1 percent raising agriculture right today. I don't want to buy food from a foreign country.

Mr. GRAVES. Again, I appreciate all of you being here today. We have identified it—in my research in this and through the testimony today, we have identified some immediate problems. Obviously, landowner involvement in this process is part of it. The excessive litigation and using litigation to address critical habitat issues is a problem, but, to me, of an even greater issue is how the Endangered Species Act is implemented when it comes to private property. And there is one key there, private property. And I want to do everything I can to make sure that the needs of animals or whatever, or plants, species, do not come ahead of the needs of people. That is far greater.

I think there are people out there, Mr. Hays, Mr. Waters are good examples, producers out there that will do everything they can to make sure that habitat is there. They believe in habitat and conservation, but they also believe in providing for their families and food and fiber for this country and think that that is very noble, and we need to work with them. We can find some common ground here. It doesn't have to be all or nothing. And right now,

when you shut down an individual's use of the property because of the Endangered Species Act, that goes way too far.

Thank you all for being here today. I appreciate the time you spent coming in for this testimony. We are adjourned.

[Whereupon, at 3:49 p.m., the Subcommittee was adjourned.]

Opening Statement

Good afternoon and welcome to the rural enterprise, agriculture, and technology subcommittee of the house committee on small business. Our purpose today is to examine the over-regulation and unworkable environment the endangered species act places on America's farmers and ranchers. The endangered species act or ESA was intended to protect species on the brink of extinction. Instead, ESA has been turned on its head and it places undue hardships on farmers and ranchers. It is now our agricultural base that is in danger of becoming extinct.

In 1973, 109 species were listed as "endangered." Today there are over 1200 species listed as endangered and 25o more considered "candidates" for ESA listing. Another 4000 species are designated as "species of concern". Of these thousands of species, only 15 species have been "recovered." That is less than one percent. And this number cannot completely be proven. We are spending millions of dollars protecting the rice rat, key largo, cotton mouse, oval pigtoe, and thousands of ferns. Honestly, what are we doing? Is this the reason for the establishment of the ESA?

As stated, the numerous ESA mandates have done little to save species. The number listed far out weighs the number the ESA can handle and

successfully nurse back to survival. However, America's farmers and ranchers seem to be hardest hit by attempts to save species. Property has essentially been taken away from landowners due to the restrictions that are placed on their practices, and the value of private property has plummeted. Farmers and ranchers face fines and imprisonment for the most basic of farm practices if federal regulators believe it would disturb an endangered species or its habitat. The endangered species act has done more to damage the welfare of America's hardworking farmers than it has to save endangered species.

The department of interior fish and wildlife service itself stated in the federal register notice regarding the Prebles Jumping Mouse that, "in 30 years of implementing the ESA, the service has found that the designation of statutory critical habitat provides little additional protection to most listed species while consuming significant amounts of conservation resources. The service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources and huge social and economic costs." Interior further states that, "this leaves the service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs."

Additionally, there has been very little study of the impact the ESA has on agricultural communities and small businesses. Small business representatives have repeatedly stated that the fish and wildlife service has, in many cases, proceeded without the benefit of informed comments, specifically those from small business interests. Additionally, the SBA's office of advocacy has weighed in on ESA issues and concurs that the fish and wildlife service has failed to properly analyze the economic impact associated with the designation of critical habitat.

Simply put, farmers and ranchers cannot survive under the constraints of the endangered species act. The unworkable over regulation the ESA has placed on farmers does nothing to serve the function intended by this act. I look forward to today's expert testimony and hope that we can work towards a common-sense solution to the grave situation faced by America's agricultural base. I now would like to recognize the ranking member of the subcommittee, Mr Ballance, for his opening remarks.

STATEMENT
of the
Honorable Frank Ballance, Ranking Democratic Member
Subcommittee on Rural Enterprises, Agriculture and Technology
House Committee on Small Business
Hearing "Endangered Farmers and Ranchers:
the Unintended Consequences of the Endangered Species Act"
July 17, 2003

Thank you, Mr. Chairman.

Our environment is part of everything we do – from the food that we eat, to the land that we occupy and protecting it is an essential component our national and global economic policies.

The Endangered Species Act directly addresses the need for safeguarding our environment. It was implemented to protect the survival of listed species, while at the same time protecting and promoting the ecosystems in which they live.

The Endangered Species Act understands the need for a balanced approach between environmental protection and meeting the needs of landowners. The Endangered Species Act recognizes the importance of these businesses in today's world.

Some claim that this act has a negative impact on their business by creating restrictions on small farmers and ranchers through land limitation.

Debate will continue on whether or not the Endangered Species Act helps or hurts small business. But in truth, depending on the industry, many small businesses do rely on this act for their prosperity.

Both the fishing and recreation industry count on environmental protections for their economic survival. For example, the initial failure to protect salmon resources helped contribute to a loss of 47,000 jobs in the recreational and commercial salmon fishing industries.

This job loss has a ripple effect – eventually making its way to other small businesses such as fishing supply stores, motels, and restaurants that form the infrastructure supporting these communities. Failing to protect critical resources can devastate small businesses throughout an entire industry. The ESA plays a significant role in protecting many small business industries.

Protections have been built into the Endangered Species Act to mitigate these effects in the form of conservation incentives. These incentives provide flexibility and choice for landowners trying to work within ESA provisions. These programs allow users to explore the best methods of compliance that also meet their economic needs.

Ironically, debate is taking place on the House floor today on legislation that slashes funding for federal conservation programs – including initiatives that help small businesses comply with ESA. The Interior Appropriations bill funds conservation programs at $991 million -- $569 million below the amount authorized for 2004, and $200 million below last year's level.

The ESA and small businesses co-exist today, and with an adequate investment in effective conservation programs, will continue to do so. I hope that we can take a balanced approach and meet the needs of everyone involved to ensure the survival of both our environment and our nation's economy.

Thank you and I look forward to hearing the witness' testimony and thoughts on this matter today.

STATEMENT OF CRAIG MANSON, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON RURAL ENTERPRISE, AGRICULTURE AND TECHNOLOGY POLICY OF THE COMMITTEE ON SMALL BUSINESS, U.S. HOUSE OF REPRESENTATIVES, REGARDING THE ENDANGERED SPECIES ACT

July 17, 2003

Mr. Chairman and Members of the Committee, I am Craig Manson, Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior (Department). Thank you for the opportunity to testify before you today regarding the Endangered Species Act (ESA).

The Department appreciates the Committee's interest in the impacts of the ESA on agricultural communities. As you may know, the Department of the Interior, along with the Department of Commerce for some fish and other marine species, is charged with administering the Act. I will discuss the how the Administration is working to make the implementation of ESA more efficient and effective, and identify areas of specific concern to the Department.

The ESA was passed in 1973 to conserve vulnerable plant and animal species that, despite other conservation laws, were in danger of extinction. The purpose of the ESA is to conserve and recover listed species. At the Department of the Interior, the ESA is administered by the U.S. Fish and Wildlife Service (Service).

Under the law, species may be listed as "endangered" or "threatened." All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. Once

listed, the species is afforded the full range of protections available under the ESA. These protections include prohibitions on killing, harming or otherwise taking a species.

We recognize that the resource management decisions made by the Department can greatly impact local communities and the people who live and work in them. While countless species depend on the land to sustain life, families – particularly farming and ranching families – depend on the same land for community and economic well-being. As a result, we know that we must work in partnership with the people who live and work on private and public lands.

The Department has been implementing this "partnering" approach in our land management practices. In this regard, Secretary Norton has often spoken of what she has termed the "4 C's" — Communication, Consultation, and Cooperation, all in the service of Conservation. The focus of the Four C's is the belief that enduring conservation springs from partnerships involving the people who live on, work on, and love the land. Some examples of our commitment to this process are outlined later in my statement.

At the same time, I must acknowledge that critical habitat is an extremely challenging program within which to apply cooperative approaches.

Many of our current concerns are focused on the flood of court orders requiring critical habitat designations. These court orders are undermining endangered species conservation by compromising the Service's ability to protect new species and to work with states, Tribes, landowners, and others, to recover species already listed under the ESA.

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the ESA, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources. The Service's present system for designating critical habitat is driven by litigation rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Currently, only 306 species or 25% of the 1,211 listed species in the United States under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,211 listed species through conservation mechanisms such as listing, Section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the states, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits regarding critical habitat designation, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and

court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits and to comply with the growing number of adverse court orders. As a result, the Service's own proposals to undertake conservation actions based on biological priorities are significantly delayed. The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for additional public participation beyond those minimally required by the Administrative Procedure Act, the ESA, the Regulatory Flexibility Act, and the Service implementing regulations; to take additional time for review of comments and information to ensure the rule has addressed all the pertinent issues; and to conduct outreach to affected entities, including small business, before making decisions on listing and critical habitat proposals. These limitations are due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who will suffer adverse impacts from these decisions challenge them. The cycle of litigation appears endless, is very expensive, and in the final analysis provides little additional protection to listed species.

This is not a new problem. The previous administration also testified before Congress that this situation is detrimental to species conservation and needs to be resolved. However, the ever-increasing number of lawsuits has now brought this problem to a crisis where we are simply

out of funds for this year. To cover this shortfall, the administration has requested authority from Congress to shift money from other endangered species programs. The President's FY 2004 Budget Request for listing totals nearly $12.3 million, an amount that, if approved by Congress, is almost double the $6.2 million appropriated in FY 2000 and a 35 percent increase of FY 2003. This will allow us to complete the court mandated designations for this year and next. However, our long term challenge is to find a way to make better use of our limited resources, based upon the most urgent needs of the species, rather than litigation-driven priorities.

Cooperative Approaches to Habitat Protection and Critical Habitat Designation

It has been our view that areas not in need of special management considerations or protections are outside the definition of critical habitat. For that reason, we exclude from critical habitat areas covered by plans that adequately manage for the species concerned. In recent rules, exclusions have included lands covered by the Department of Defense's Integrated Natural Resource Management Plans, areas with active Habitat Conservation Plans approved by the Service or by the National Marine Fisheries Service, and those with other management plans, including private landowners.

We are continually working to find new and better ways to encourage voluntary conservation initiatives. Cooperative conservation of fish and wildlife resources is critical to maintaining our Nation's biodiversity. A proactive, preventative approach based on incentives could harness the voluntary spirit of the public to help stem the tide of species extinction.

The Service currently has many conservation tools available which provide for close cooperation with private landowners, state and local governments, and other non-federal partners and that are particularly important in our implementation of the ESA. For example, through the Candidate Conservation program, the Service can work with the states, landowners, and others to voluntarily conserve candidate and other declining species. It is with these species that we have the greatest flexibility in supporting our mutual partners on proactive conservation actions. Thus, a collaborative approach to conservation might result in removing the threats that necessitate listing. Similar to preventative medicine that hopes to save patients from the need for expensive procedures, hospitalization, or even a trip to the emergency room, species can be protected by interested partners working with the Service before they need the protections of the ESA.

Conservation efforts on non-federal property are also essential to the survival and recovery of many listed endangered and threatened species. The majority of the Nation's current and potential threatened and endangered species habitat is on property owned by non-federal entities. The Service strongly believes that collaborative stewardship involving the proactive management of listed species is the best way to achieve the ultimate goal of the ESA – that is, recovery of threatened and endangered species. The recovery of certain species can benefit from short-term and mid-term enhancement, restoration, and/or maintenance of terrestrial and aquatic habitats on non-federal property.

For example, Safe Harbor Agreements (SHA) provide a means to garner non-federal property owners' support for species conservation on their lands. They allow for flexible

management by providing assurances to private landowners who implement conservation measures for listed species that their actions will not lead to additional ESA restrictions. SHA's have contributed significantly to the conservation of the red-cockaded woodpecker in the southeast as well as other species inhabiting private lands.

The Habitat Conservation Planning Program provides a flexible process for permitting the incidental take of threatened and endangered species during the course of implementing otherwise-lawful activities. The program encourages applicants to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs. Perhaps the program's greatest strength is that it encourages locally developed solutions to listed species conservation while providing certainty to permit holders.

Grants

The Service has several grant programs that directly address ESA issues. Recently, through the Cooperative Endangered Species Conservation Fund authorized by Section 6 of the ESA, more than $70 million in grants to 29 states to support conservation planning and acquisition of vital habitat for threatened and endangered fish, wildlife, and plant species. The grants will benefit species ranging from the endangered red-cockaded woodpecker in the Southeast to the threatened spectacled eider in Alaska.

Under the new Private Stewardship Grant program, envisioned by President Bush when he was still Texas governor, earlier this year we made 113 grants, totaling more than $9.4

million, to individuals and groups to undertake conservation projects on private lands in 43 states for endangered, threatened and other at-risk species.

Another conservation grant program that assists states, Tribes, conservation organizations, and private landowners in conservation projects and programs is the Landowner Incentive Program. As part of the Administration's overall Cooperative Conservation Initiative, and funded through the Land and Water Conservation Fund, this program provides cost-share grants on a competitive basis to states and territories to establish or supplement existing landowner incentive programs that provide technical and financial assistance, including habitat protection and restoration, to private landowners for the management of habitat to benefit federally listed and other at-risk species on private lands. This year, $34.8 million in grants were awarded under the Landowner Incentive Program.

These grants are yet another way the Department seeks to promote cooperative action for species conservation.

Conservation Banking Guidance

Conservation banks are lands acquired by third parties, managed for specific endangered species and protected permanently by conservation easements. They may also help avoid the need for designation of critical habitat. Banks may sell a fixed number of mitigation credits to developers to offset adverse effects on a species elsewhere.

On May 8, 2003, the Service announced a new conservation banking guidance to help reduce piecemeal approaches to conservation by establishing larger reserves and enhancing habitat connectivity, while saving time and money for landowners. This guidance details how, when, and where the Service will use this collaborative, incentive-based approach to species conservation.

Code of Scientific Conduct

Secretary Norton recently announced the development of a code of scientific conduct for the Department – independently reviewed and approved by a panel of leading scientists and ethicists – to help ensure the integrity of all scientific work done by its employees and contractors.

The Department developed the code in accordance with the federal policy on conduct of science published on December 6, 2000, by the White House Office of Science and Technology Policy. In addition, the Department's Office of Inspector General recommended that the Department develop a scientific code of conduct in its report on its investigation of the submission of unauthorized samples to a laboratory during population surveys for the Canada lynx in 1999 and 2000.

The code is being developed through a unique process involving both peer review by an independent panel and employee involvement. The code will be a new addition to the Departmental Manual, and this will be the first time employees have had a chance to comment on a change to the manual. In addition to the employee comment process, there will also be an

opportunity for public comment on a similar code being prepared for consultants and contractors to the Department. Their code will go through the ordinary administrative rulemaking process.

As I have stated on numerous occasions, the Department is committed to working with the Congress to find a solution to the problems associated with critical habitat and other related issues. I want to reiterate that offer here today.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to respond to any questions you and other members of the Subcommittee might have.

U.S. Fish & Wildlife Service

Endangered Species Recovery Program

Frequently Asked Questions

The ultimate goal of the Endangered Species Act (ESA) is the recovery (and subsequent preservation) of endangered and threatened species and the ecosystems on which they depend. A variety of methods and procedures are used to recover listed species, such as protective measures to prevent extinction or further decline, consultation to avoid adverse impacts of Federal activities, habitat acquisition and restoration, and other on-the-ground activities for managing and monitoring endangered and threatened species. The collaborative efforts of the U.S. Fish and Wildlife Service and its many partners (Federal, State, and local agencies, Tribal governments, conservation organizations, the business community, landowners, and other concerned citizens) are critical to the recovery of listed species. As a result of these efforts, the ESA has been credited with saving many species from extinction, including the California condor, black-footed ferret, peregrine falcon, and our Nation's symbol, the bald eagle.

The California Condor Recovery Program is built upon a foundation of private and public partnerships. The focus of the condor recovery effort is the release of captive reared condors to the wild to ultimately establish self-sustaining populations.
USFWS photo by Scott Frier

What exactly do we mean by recovery?
Recovery is the process by which the decline of an endangered or threatened species is arrested or reversed, and threats removed or reduced so that the species' survival in the wild can be ensured. The goal of the ESA is the recovery of listed species to levels where protection under the ESA is no longer necessary.

How does the recovery program work?
The Service's Recovery Program staff works with Federal, State, Tribal, non-governmental entities, and private landowners to take necessary measures to prevent extinction of species; prepare recovery plans to ensure coordinated, effective recovery actions; and implement actions to reverse the decline of listed species and expedite full recovery. Recovery plans, documents prepared for listed species that detail the specific tasks needed for recovery, provide a blueprint for private, Federal and State cooperation in the conservation of threatened and endangered species and their ecosystems. The plan may cover one species or several species.

Achieving species recovery on the ground
To stabilize and ultimately delist endangered and threatened species, the Service engages and encourages the participation of multiple stakeholders; the Recovery Program requires the participation of all landowners who do or could provide key habitat for an endangered or threatened species. We work closely with other Federal agencies to ensure that their activities do not adversely impact a listed species and, whenever possible, aid a species' recovery. The recovery of many listed species cannot be accomplished solely on our National Wildlife Refuges, National Forests, National Parks, and other Federal lands; many species occur primarily or solely on private lands. Achieving recovery for most threatened and endangered species therefore requires cooperative conservation efforts on private lands.

Flexible management of threatened species
Section 4(d) of the ESA allows us to establish special regulations for threatened (not endangered) species. These "4(d)" or "special rules" allow us to customize the protections of the ESA to match the needs of the species and people. The Service develops 4(d) rules for threatened species whenever these rules provide effective conservation results. For example, a special rule was developed to benefit the Apache trout. Apache trout may be caught by anglers who attempt to catch other fish species. To accommodate this accidental capture, the rule allows Apache trout to be caught so long as they are returned to the water. The revenues generated from fishing in the waters inhabited by the Apache trout helps promote conservation of the habitat.

Safe Harbor Agreements for private landowners
The Service is committed to enhancing opportunities for private (non-Federal) landowners to participate in the conservation of listed and imperiled species. One example is the "Safe Harbor" program, which provides regulatory assurances to non-Federal landowners who voluntarily implement measures that contribute to the conservation of listed species on their lands. These Safe Harbor Agreements eliminate landowners' concern that restoring habitat and allowing the return of listed species to their property might result in future land use restrictions under the ESA.

Grants to States, Territories and private landowners
The Service also offer grants for endangered species conservation and recovery. Working with our State partners, the Service will award approximately $106 million in Federal funding in Fiscal Year 2002 (October 2001 - September 2002) under five types of endangered species grants.

Reintroducing species back into their historic range
Re-establishing a threatened or endangered species in areas of its former range is often necessary so that there are enough populations or individuals of the species to sustain recovery of the species. To lessen concerns against reintroductions because they may also bring restrictions on the use of private or public lands in the area, Congress added the provision for experimental populations under section 10(j) of the ESA. An experimental population is a geographically described group of reintroduced plants or animals that is isolated from other existing populations of the species. Species in experimental populations are considered to be threatened, regardless of the species' designation elsewhere in its range, allowing us to develop special rules under section 4(d) of the ESA. For example, the gray wolf population that was reintroduced into the northern Rockies has fewer take prohibitions than listed populations elsewhere. Flexible management of this experimental population allows landowners and livestock producers to harass wolves that threaten livestock, and in some cases also allows these wolves to be killed by appropriate authorities if they prey upon livestock. These prescribed actions have reduced potential economic threats to ranchers while benefiting the recovering wolf population.

Recovery efforts occur throughout the Service
Many programs in the Service are leading recovery efforts for species. Many of our National Fish Hatcheries are raising endangered or threatened species; many of our National Wildlife Refuges were established specifically to protect listed species and many other species. The Service's Partners for Fish and Wildlife program offers technical and financial assistance to private (non-Federal) landowners to voluntarily restore wetlands and other fish and wildlife habitats on their land. The program emphasizes the reestablishment of native vegetation and ecological communities for the benefit of fish and wildlife in concert with the needs and desires of private landowners. Our Law Enforcement program focuses on potentially devastating threats to wildlife by investigating wildlife crimes, regulating wildlife trade, helping us understand and obey wildlife protections laws, and working in partnership with international, State, and Tribal counterparts to conserve wildlife resources.

Who else helps to recover species?
The Service has cultivated many recovery partnerships with the conservation community. For example, the Service established a national partnership with the Center for Plant Conservation to utilize their expertise in plant conservation. Founded in 1984, the Center is supported by a consortium of 29 botanical gardens and arboreta throughout the United States. With approximately one out of every 10 plant species in the United States facing potential extinction, the Center is the only national organization dedicated exclusively to conserving rare U.S. plants.

Another important conservation partnership has been established with the American Zoo and Aquarium Association. Zoos and aquariums are important partners in the Service's propagation/reintroduction programs for many listed species, such as the Wyoming toad, Puerto Rican crested toad, Karner blue and Oregon silverspot butterflies, desert fishes, and American burying beetle. An added benefit of these recovery projects is the opportunity to educate millions of zoo and aquarium visitors about endangered species.

What are some examples of recovery efforts?
Delisted in 2001 due to recovery, the Aleutian Canada goose has benefited from both habitat restoration and reintroduction into formerly occupied habitat; translocation of young bald eagles into formerly occupied habitat is one factor contributing significantly to eagle recovery; captive propagation has increased the numbers of whooping cranes and red wolves; and land acquisition and cooperation among the Service and the States has protected important habitats for Houston toads and other amphibians, to cite a few examples.

Do recovery programs work?
Yes. But recovery is a challenge that takes time. We are attempting to halt or reverse declines that in some instances have been more than 200 years in the making. Even in the face of a substantial increase in the number of species listed over the past decade, the recovery efforts of the Service, other Federal agencies, States, Tribal governments, conservation organizations, businesses, and private landowners have successfully halted and reversed the decline of many listed species. Of all the species listed between 1968 and 2000, only 7 -- or less than 1 percent -- have been recognized as extinct, and subsequently removed from the list. The fact that almost 99 percent of listed species have not been lost speaks to the success of the ESA as a mechanism for conservation of species that are at risk of extinction.

U. S. Fish and Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
703/358 2061
http://endangered.fws.gov/recovery
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U.S. Fish & Wildlife Service

ESA Basics

Over 25 years of protecting endangered species

Introduction
When the Endangered Species Act (ESA) was passed in 1973, it represented America's concern about the decline of many wildlife species around the world. It is regarded as one of the most comprehensive wildlife conservation laws in the world.

The purpose of the ESA is to conserve "the ecosystems upon which endangered and threatened species depend" and to conserve and recover listed species. Under the law, species may be listed as either "endangered" or "threatened". Endangered means a species is in danger of extinction throughout all or a significant portion of its range. Threatened means a species is likely to become endangered within the foreseeable future. All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened.

As of August 31, 2002, 1,818 species are listed, of which 1,260 are U.S. species. The list covers mammals, birds, reptiles, amphibians, fishes, snails, clams/mussels, crustaceans, insects, arachnids, and plants. Groups with the most listed species are (in order) plants, mammals, birds, fishes, reptiles, and clams/mussels.

The law is administered by the Interior Department's U.S. Fish and Wildlife Service (FWS) and the Commerce Department's National Marine Fisheries Service. The FWS has primary responsibility for terrestrial and freshwater organisms, while the National Marine Fisheries Service's responsibilities are mainly for marine species such as salmon and whales.

Legislative History
The 1973 Endangered Species Act replaced earlier laws enacted in 1966 and 1969, which provided for a list of endangered species but gave them little meaningful protection. The 1973 law has been reauthorized seven times and amended on several occasions, most recently in 1988. The Endangered Species Act was due for reauthorization again in 1993, but legislation to reauthorize it has not yet been enacted. The Endangered Species program has continued to receive appropriations while Congress considers reauthorization, allowing conservation actions for threatened and endangered species to continue.

The ESA
The Endangered Species Act is a complex law with a great deal of built-in flexibility. Some basics of the law include:

Purpose
When Congress passed the Endangered Species Act in 1973, it recognized that many of our nation's native plants and animals were in danger of becoming extinct. They further expressed that our rich natural heritage was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." The purposes of the Act are to protect these endangered and threatened species and to provide a means to conserve their ecosystems.

Federal Agencies
All federal agencies are to protect species and preserve their habitats. Federal agencies must utilize their authorities to conserve listed species and make sure that their actions do not jeopardize the continued existence of listed species. The FWS and the National Marine Fisheries Service work with other agencies to plan or modify federal projects so that they will have minimal impact on listed species and their habitat.

Working with States —Section 6
The protection of species is also achieved through partnerships with the States. Section 6 of the law encourages each State to develop and maintain conservation programs for resident federally-listed threatened and endangered species. Federal financial assistance and a system of incentives are available to attract State participation. Some State laws and regulations are even more restrictive in granting exceptions or permits than the current ESA.

Bald eagle
Corel Corp. photo

Working with non-Federal landowners, the Service provides financial and technical assistance to landowners to implement management actions on their lands to benefit listed and nonlisted species.

Local Involvement
The protection of federally listed species on Federal lands is the first priority of the FWS, yet, many species occur partially, extensively or, in some cases, exclusively on private lands. Policies and incentives have been developed to protect private landowners' interests in their lands while encouraging them to manage their

lands in ways that benefit endangered species. Much of the progress in recovery of endangered species can be attributed to public support and involvement.

Listing —Section 4
Species are listed on the basis of "the best scientific and commercial data available." Listings are made solely on the basis of the species' biological status and threats to its existence. In some instances, a species which closely resembles an endangered or threatened species is listed due to similarity of appearance. The FWS decides all listings using sound science and peer review to ensure the accuracy of the best available data.

Candidate Species —Section 4
The FWS also maintains a list of "candidate" species. These are species for which the Service has enough information to warrant proposing them for listing as endangered or threatened, but these species have not yet been proposed for listing. The FWS works with States and private partners to carry out conservation actions for candidate species to prevent their further decline and possibly eliminate the need to list them as endangered or threatened.

Recovery —Section 4
The law's ultimate goal is to "recover" species so they no longer need protection under the Endangered Species Act. The law provides for recovery plans to be developed describing the steps needed to restore a species to health. Appropriate public and private agencies and institutions and other qualified persons assist in the development and implementation of recovery plans. Involvement of the public and interested "stakeholders" in development of recovery plans is encouraged. Recovery teams may be appointed to develop and implement recovery plans.

Consultation —Section 7
The law requires federal agencies to consult with the Fish and Wildlife Service to ensure that the actions they authorize, fund, or carry out will not jeopardize listed species. In the relatively few cases where the FWS determines the proposed action will jeopardize the species, they must issue a "biological opinion" offering "reasonable and prudent alternatives" about how the proposed action could be modified to avoid jeopardy to listed species. It is a very rare exception where projects are withdrawn or terminated because of jeopardy to a listed species.

Critical Habitat —Section 4
The law provides for designation of "critical habitat" for listed species when judged to be "prudent and determinable". Critical habitat includes geographic areas "on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection." Critical habitat may include areas not occupied by the species at the time of listing but that are essential to the conservation of the species. Critical habitat designations affect only federal agency actions or federally funded or permitted activities.

International Species —Section 8
The Endangered Species Act is the law that implements U.S. participation in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a 130-nation agreement designed to prevent species from becoming endangered or extinct because of international trade. The law prohibits trade in listed species except under CITES permits.

Exemptions —Section 10
The law provides a process for exempting development projects from the restrictions of the Endangered Species Act. This process permits completion of projects that have been determined to jeopardize the survival of a listed species, if a Cabinet-level "Endangered Species Committee" decides the benefits of the project clearly outweigh the benefits of conserving a species. Since its creation in 1978, the Committee has only been convened three times to make this decision.

Habitat Conservation Plans —Section 10
This provision of the ESA is designed to relieve restrictions on private landowners who want to develop land inhabited by endangered species. Private landowners who develop and implement an approved "habitat conservation plan" providing for conservation of the species can receive an "incidental take permit" that allows their development project to go forward.

Definition of "Take" —Section 9
Section 9 of the Endangered Species Act makes it unlawful for a person to "take" a listed species. The Act says "The term take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." The Secretary of the Interior, through regulations, defined the term "harm" in this passage as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."

Compliance with Other Laws
The Endangered Species Act is not the only law to protect species of wild mammals, birds, reptiles, amphibians and fishes, clams, snails, insects, spiders, crustaceans, and plants. There are many other laws with enforcement provisions to protect declining populations of rare species and their habitat, such as the Marine Mammal Protection Act, the Migratory Bird Treaty Act, and the Anadromous Fish Conservation Act. The Lacey Act makes it a federal crime for any person to import, export, transport, sell, receive, acquire, possess, or purchase any fish, wildlife, or plant taken, possessed transported or sold in violation of any Federal, State, foreign or Indian tribal law, treaty, or regulation.

For More Information
For additional information about threatened and endangered species and current recovery efforts, contact the U.S. Fish and Wildlife Service at the address below. Additional materials and the current U.S. List of Endangered and Threatened Wildlife and Plants is also available over the Internet at *http://endangered.fws.gov*.

US. Fish & Wildlife Service
Endangered Species Program
4401 N. Fairfax Drive, Room 420
Arlington, VA 22203
703/358 2390
http://endangered.fws.gov
October 2002

A Voice for Small Business

Testimony of

The Honorable Thomas M. Sullivan
Chief Counsel for Advocacy
U.S. Small Business Administration

Before the

Subcommittee on Rural Enterprise, Agriculture, and Technology

of the

U.S. House of Representatives
Committee on Small Business

for

"Endangered Farmers and Ranchers: Unintended Consequences of the Endangered Species Act"

July 17, 2003
2:00 p.m.

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, D.C., support the Chief Counsel's efforts.

For more information on the Office of Advocacy, visit *http://www.sba.gov/advo*, or call (202) 205-6533. Receive email notices of new Office of Advocacy information by signing up on Advocacy's Listservs at *http://web.sba.gov/list*

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Chairman Graves and Members of the Subcommittee:

Good afternoon and thank you for the opportunity to appear before you today to describe the U.S. Fish and Wildlife Service's (the Service) recent compliance with the Regulatory Flexibility Act (RFA) in its designations of critical habitat for endangered species under the Endangered Species Act (ESA).

My name is Thomas Sullivan and I am Chief Counsel for Advocacy at the U.S. Small Business Administration. Pursuant to our statutory authority, the Office of Advocacy actively solicits input from small entities to assist our office in setting policy priorities and identifying rules that will affect them. The Office of Advocacy's comments on recent designations of critical habitat by the Service are the result of those outreach activities. Please note that my office's views expressed here independently represent the views of small business and do not necessarily reflect the views of the Administration or the U.S. Small Business Administration.

The Chief Counsel for Advocacy is required by the RFA and Executive Order (E.O.) 13272 to monitor Federal agency compliance with the RFA and report to Congress. I will give you a brief overview of my office's responsibilities under the RFA and E.O. 13272 as background to the Service's treatment of the RFA in its critical habitat designations.

In 1980, Congress enacted the RFA after finding that Federal regulations imposed disproportionate economic hardship on small entities. The RFA required agencies to consider ways to reduce regulatory burdens on small entities. This laudable goal was accomplished by requiring Federal agencies to consider the potential economic impact of federal regulations on small entities and to examine regulatory alternatives that achieve the agencies' public policy goals while minimizing small entity impacts.

The RFA was unenforceable, however, and many agencies were indifferent to the RFA, avoiding its purposes by improperly certifying rules as not requiring a regulatory flexibility analysis, claiming the rules did not have a significant economic impact on a substantial number of small entities. Then, in 1996, Congress amended the RFA with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Importantly, SBREFA established the right of small businesses to seek judicial review for Federal agencies' failure to comply with the RFA.

President Bush further committed the Federal government to compliance with the RFA with E.O. 13272 signed on August 13, 2002. E.O. 13272 requires agencies to implement policies protecting small entities when writing new rules and regulations. In addition, E.O. 13272 instructs agencies and Advocacy to work closely together as early as possible in the regulation writing process to address disproportionate impacts on small entities and reduce their regulatory burden. E.O. 13272 directs agencies to consider the Office of Advocacy's written comments on rules and compelling them to publish a response in the *Federal Register*.

Executive Order 13272 also requires the Office of Advocacy to provide training to agencies on compliance with the RFA. To accomplish that task, we have hired an outside contractor to assist us in developing a formal training program. A pilot program is currently being developed that will involve the U.S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration. These agencies will provide feedback to assist in the development of the government-wide training. The pilot training is scheduled for July 23 and 24, and will form the basis for Advocacy to provide training for all agencies.

As part of our mandate to monitor agency compliance with the RFA, Advocacy has reviewed recent rulemakings by the Service. My staff has had regular contacts with representatives from both the Department of Interior and the Service on critical habitat rulemakings. In fact, my deputy chief counsel and legal team are currently working with Assistant Secretary Manson's office to discuss ways to improve the Service's compliance

with the RFA, while protecting both endangered species and small ranchers and farmers. The Office of Advocacy looks forward to working closely with the Department of Interior in its efforts to train the Service's regulatory staff on the requirements of the RFA.

My testimony focuses on shortcomings in the Service's past RFA compliance, namely, (1) the Service's failure to conduct meaningful outreach to potentially affected small farmers and ranchers and incorporating this outreach into its actions prior to proposing rules, and (2) the Service's recent imposition of critical habitat requirements on small farmers and ranchers without affording them the right to participate in the rulemaking process as provided by law. I will use the example of the recent proposed rule designating critical habitat in Arizona for the pygmy owl which my office recently submitted comments on to illustrate these points.

I. Incorporating Small Business Concerns into Rulemaking

As I mentioned above, the RFA requires regulatory agencies to estimate the impacts of proposed rules on small entities. An agency must complete an Initial Regulatory Flexibility Analysis (IRFA) for a proposed rule and a Final Regulatory Flexibility Analysis (FRFA) for a final rule. However, the agency head may certify under the RFA's Section 605(b) and not publish an IRFA or FRFA if the rule would not have "a significant economic impact on a substantial number of small entities," and the agency publishes the factual basis for the decision to certify along with the certification in the *Federal Register*.

Performing an IRFA and FRFA requires the agency to consider whether regulation of small entities is needed to achieve the regulatory goals they have announced. Upon completion of a public comment period, and a public hearing in the case of critical habitat designations, the Fish and Wildlife Service must articulate clear legal, policy, and factual reasons for any decision to introduce regulatory burdens on small entities. Without conducting this analysis of regulatory burdens and less-burdensome alternatives, agencies

risk over-regulating small entities, when their regulatory goals can usually be achieved without imposing excessive burdens on small entities.

Recently, small businesses have expressed concerns to my office that the Service has provided economic analyses which do not accurately capture regulatory impacts. The Office of Advocacy has publicly commented three times this year that the Service's economic analyses appeared insufficient to serve as the factual basis for certifications of proposed rules.

One example is the proposed designation of critical habitat for the pygmy owl published by the Service on November 27, 2002. My office conducted outreach after the proposal, in part through our Regional Advocate in Arizona, Michael Hull, who met with affected small businesses directly and attended the Service's public hearing on the rule in Tucson. From our outreach, we learned that the Service had not incorporated the concerns of small ranchers, miners, home builders, and others into its threshold analysis as to whether the rule would affect small businesses. Small cattle ranchers expressed concern that the proposed critical habitat designation would restrict their ability to protect themselves against wildfire risks through prescribed burns, install necessary watering facilities for cattle in dry conditions, rotate grazing sections, and increase the size of their herds to normal levels once the current major drought has lifted. The Fish and Wildlife Service did not address these concerns in its proposed rule or supporting economic analysis.

My office informed the Service in January of 2003 that our preliminary discussions with various small business representatives indicated that the factual basis relied upon by the Service to certify under the RFA may have been inadequate, and an IRFA was likely required. At that time, we encouraged the Service to conduct small business outreach on the determination that the rule would not have a significant economic impact on a substantial number of small entities. On June 27 of this year, the Office of Advocacy submitted formal comments on the proposed rule. In our comments, we informed the Service that the Office of Advocacy believed the Service was required by the RFA to publish an IRFA for the proposed rule due to the insufficiency of the factual basis for

their certification. The Service has not published an IRFA to date, and I believe that, under the RFA, this rule does not comply with the RFA and cannot proceed to a final rule without the publication of an IRFA for public comment.

President Bush delivered on his commitment to small business when he signed his Executive Order requiring agencies to incorporate small business concerns into rules. Unfortunately, small businesses have expressed the concern that the extensive amount of litigation over critical habitat designations has discouraged the Service from conducting small business outreach. I welcome the opportunity to work with the Service to correct this situation.

As I mentioned above, I believe small entity outreach to be the necessary first step in compliance with the RFA. Through effective small business outreach, the Service has an opportunity to improve its consideration of impacts on small entities, and my office stands ready to assist it. Specifically, the Service should seek input from the small business community during initial policy discussions, just as other Federal agencies do. Most importantly, this input must be taken into account when the Service develops rules that impact small businesses.

II. Imposing Critical Habitat Without Rulemaking

A second major concern I would like to mention is that the Service has recently introduced critical habitat restrictions without affording small entities notice and an opportunity to comment as required by the Administrative Procedure Act (APA) and the RFA. I am concerned that the Service may exclude the public from its policy making process by foregoing rulemaking entirely, imposing survey and mitigation requirements on the public during consultations with other Federal agencies. The benefit of establishing critical habitat through rulemaking is that it provides affected small entities the opportunity to participate through comments on the proposal, and the rulemaking process ensures the thoughtful analysis of small business impacts provided by the RFA. Recent court cases have held that the Service must undertake informal rulemaking to

establish critical habitat before imposing survey and consultation requirements or use restrictions on land that is not occupied by endangered species.

For instance, on the rule to designate critical habitat for the pygmy owl in Arizona, the Service acted to impose critical habitat restrictions during the public comment period on the proposed rule. In March of this year, a local Fish and Wildlife Service biologist field supervisor, Steven Spangle, issued a "guidance" memorandum to the Army Corps of Engineers' Nationwide Permit program which imposed survey, consultation, and mitigation requirements for land comprising most of Arizona from north of Phoenix down to the Mexican border. This would affect ranchers or farmers who use the Nationwide Permit program. Small ranchers have also informed the Office of Advocacy that the Service may assert jurisdiction over unoccupied land in Arizona under the ESA's Section 7 consultation requirements, imposing survey, consultation, and mitigation burdens on small ranchers as ranchers attempt to secure grazing permits from the U.S. Forest Service and the Bureau of Land Management.

I believe that the APA and RFA require the Fish and Wildlife Service to afford the public an opportunity to review potential regulatory actions and provide meaningful comment. I look forward to working with Assistant Secretary Manson's office to ensure that affected small entities are given this chance.

In essence, the RFA asks agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities. The concept underlying this analytical requirement is that agencies will revise their decision-making processes to take account of small entity concerns in the same manner that agency decision-making processes were modified subsequent to the enactment of the National Environmental Policy Act (NEPA). The RFA then acts as a statutorily mandated analytical tool to further assist agencies in

meeting the rational rulemaking standard set forth in the APA through a regulatory flexibility analyses, just as NEPA was intended to rationalize decisions concerning major federal actions that would affect the environment through the required environmental impact statement.

It was the designed purpose of the RFA over twenty years ago, and my desire now, to help government base decisions on a full and open understanding of how regulations will affect small business. The Office of Advocacy stands ready to assist the Subcommittee and Assistant Secretary Manson to achieve these goals.

Thank you for the opportunity to testify today. I am happy to answer any questions you may have about my testimony.

Statement of the American Farm Bureau Federation

TO THE
RURAL ENTERPRISE, AGRICULTURE, AND TECHNOLOGY SUBCOMMITTEE
HOUSE SMALL BUSINESS COMMITTEE
REGARDING
THE ENDANGERED SPECIES ACT

July 17, 2003

Presented by:
Tom Waters

600 MARYLAND AVENUE SW • SUITE 800 • WASHINGTON, DC 20024 • (202) 484-3600 • FAX (202) 484-3604
225 TOUHY AVENUE • PARK RIDGE, IL 60068 • (847) 685-8600 • FAX (847) 685-8896
Internet: http://www.fb.com/

As the national voice of agriculture, AFBF's mission is to work cooperatively with the member state Farm Bureaus to promote the image, political influence, quality of life and profitability of the nation's farm and ranch families.

FARM BUREAU represents more than 4,800,000 member families in 50 states and Puerto Rico with organizations in approximately 2,800 counties.

FARM BUREAU is an independent, non-governmental, voluntary organization of families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being.

FARM BUREAU is local, county, state, national and international in its scope and influence and works with both major political parties to achieve the policy objectives outlined by its members.

FARM BUREAU is people in action. Its activities are based on policies decided by voting delegates at the county, state and national levels. The American Farm Bureau Federation policies are decided each year by voting delegates at an annual meeting in January.

STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
TO THE
RURAL ENTERPRISE, AGRICULTURE, AND TECHNOLOGY SUBCOMMITTEE
HOUSE SMALL BUSINESS COMMITTEE
REGARDING
THE ENDANGERED SPECIES ACT

July 17, 2003

Presented by:
Tom Waters

Good afternoon. My name is Tom Waters. I am a seventh generation farmer from Ray County, Missouri. My family and I own and operate a 3,500-acre farm near Orrick in the Missouri River floodplain. We raise corn, soybeans, wheat and alfalfa. We oversee an additional 1,500 acres of cropland, most of which is also in the Missouri River bottoms. I am a member of the Missouri Farm Bureau Federation and the American Farm Bureau Federation.

Mr. Chairman and subcommittee members, thank you for the opportunity to testify today in regard to the Endangered Species Act (ESA). Farm Bureau appreciates your attention to this important issue and your willingness to address the impacts it has on farmers and ranchers.

Farmers and ranchers have had an interest in the ESA for quite some time, as approximately 76 percent of all listed species occur to some extent on privately owned lands. Agricultural producers take pride in being good stewards of the land and strive to provide habitat for wildlife. But most farmers and ranchers are also small businessmen or businesswomen who can least afford any adverse impacts from endangered or threatened species on their lands. The ESA does not address the needs of small business.

To protect plants and animals listed as endangered or threatened, the ESA authorizes the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to place restrictions on how agricultural producers can utilize their private lands. This may include restrictions on activities that may affect a species only indirectly. The agencies' policies and procedures in implementing the Act often cause problems for farmers and ranchers. For example, if an agency believes a farmer's basic farming practices has disturbed an endangered or threatened species, he could face fines or imprisonment.

Missouri Farm Bureau policy states, "We support reform of the Endangered Species Act which will result in a more appropriate balance between the needs of plants and animals and the needs of people." American Farm Bureau policy further states, "The current federal ESA must be amended or updated to accommodate the needs of both endangered and threatened species and humans with complete respect for private property rights within the framework of the United Stated Constitution."

The following are some issues and concerns that Farm Bureau has with regard to the Endangered Species Act.

Land Use Restrictions and Penalties
Privately owned lands provide habitat for approximately 76 percent of all species listed under the Endangered Species Act. More than one-third of all listed species occur exclusively on privately-owned lands. Most of these privately-owned lands are farms or ranches. With its prohibitions against "taking" a species or disturbing habitat, the ESA often results in restrictions on what farmers and ranchers can do on their private lands.

When private lands are designated as critical habitat for a listed species, farmers and ranchers face additional restrictions. Anytime that the producer wants to do anything on the property that involves federal funding, permitting or technical assistance, he must get permission from the Fish & Wildlife Service through the section 7 consultation process. As private lands play a critical role in the survival and recovery of endangered and threatened species, the ESA should be made more compatible with landowners' needs. The Act must recognize that costs to recover species should not be borne by landowners, but by the public.

Habitat Conservation Plans Do Not Serve Most Farmers and Ranchers
The ESA allows landowners to mitigate the impacts of any disturbance to listed species on their property by entering into a Habitat Conservation Plan (HCP). An HCP allows a landowner the opportunity to go forward with a proposed project if the landowner provides mitigation for any impacts to a listed species. An HCP also provides for a level of "incidental take" that allows a landowner to accidentally "take" a limited number of the species without penalty.

Unfortunately, this process is primarily for larger landowners. Development of an HCP requires extensive scientific studies that are costly to complete. It also requires a great deal of time to complete and have approved. Service review of a proposed HCP can take months or years. Once the applicable Service has reviewed the HCP, it is submitted for public comment. HCP's require the identification of a source of funding to complete and a mitigation plan for the listed species, among other requirements.

These costly and time-consuming requirements for development of an HCP are outside the reach of most small businesses, such as farms and ranches. Farmers and ranchers can neither afford the time it takes to complete an HCP nor the money it takes for scientific studies or mitigation. As a result, they are unable to enjoy the advantages of a protected "incidental take" allowance and other benefits that accrue to landowners with an HCP.

We are convinced that voluntary incentive programs for landowners provide the greatest opportunity to make the Endangered Species Act work for both landowners and species. These programs encourage active participation among landowners through the use of voluntary incentives instead of negative enforcement. AFBF has been an ardent advocate for the development of ESA incentive programs that: are voluntary with the landowner; focus on active species or habitat management instead of the acquisition of lands or easements; incorporate a variety of options that include the removal of ESA disincentives such as land use restrictions; and are flexible with the landowner to allow landowners to develop plans that best achieve the

ESA goals sought to be gained within the context of existing individual agricultural operational needs. Voluntary incentive programs provide a "win-win" solution for both people and species.

However, these incentive programs should be available to big and small landowners alike. Smaller landowners, who might need HCP protections the most, should not be excluded by the high costs to develop them. The ESA should provide for equal treatment of big and small landowners alike, and provide an equivalent process to the HCP for small landowners.

Economic Impacts to Farmers and Ranchers
In the process of designating critical habitat for any species, economic considerations must be taken into account under section 4 of the ESA. This section requires the Secretary to determine critical habitat only after "taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." Areas may be excluded if "the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat."

It is extremely important that the full economic impact of a proposed designation on private lands be considered before the designation is made. Landowners and affected parties should have the opportunity to participate in the analysis by contributing input. If the cost to the landowner is greater than the benefits the species will receive from the designation of critical habitat, then the farm or ranch land should not be included.

While Congress only allowed economic impacts to be considered in two sections of the entire ESA, we believe the Act should be amended to require an economic impact study for actions taken to protect endangered and threatened species. Furthermore, we believe a cost/benefit analysis should be conducted prior to the listing of a species.

Verifiable Scientific Evidence and Independent Peer Review
In making any decisions under the Endangered Species Act - whether to list a species, designate critical habitat, or "consulting" on a proposed activity - it is very important that only sound science be used. It is especially important because any ESA decision might have an adverse impact on people's livelihoods. Currently, section 4 of the Act requires agencies to make "determinations" regarding listing and designation of critical habitat based on the "best scientific and commercial data available." Agencies are not required to prove the basis for their determinations, which puts the burden of proof on the public.

In several instances, incomplete or inadequate data has been used in making agency decisions. A preliminary report from the National Academy of Sciences recently concluded that the information used by the Department of Interior to shut off water to 1,400 producers in the Klamath Basin in Oregon and California was based on faulty information. As decisions made under the ESA affect many people, it is essential that verifiable scientific evidence be used. We believe an independent scientific peer review panel should be used to validate the conclusions of agency scientists. Specifically, the panel should decide if sufficient scientific evidence is present to verify an agency's determination to list a species or designate critical habitat. This will help restore the agency's responsibility to justify its decisions.

Landowner Participation in Recovery Efforts
Landowner participation in conserving species on private lands is crucial. The ESA requires that recovery plans be developed for most listed species, however most plans up to this point have been developed primarily by agency scientists. Yet most species occur on private lands. Recovery decisions affecting people's property are being made without input from the landowner who provides habitat for that species.

When recovery plans are developed for a species on private lands, a team should be appointed that combines scientific and stakeholder interests. By involving farmers and ranchers in the planning process, they will be more willing to take an active role in addressing the needs of species through their management practices. In addition, they can offer insight into economic and social factors that may not have been considered. Through such a process, both human needs and the needs of the species will be considered.

Landowner Participation in Section 7 Consultations
Section 7 of the ESA requires consultation between the FWS and federal agencies when an action "authorized, funded or carried out" by an agency may affect a listed species or critical habitat. While farmers and ranchers will be impacted by a decision made through the consultation process, they are not generally involved in the discussions. A prime example would be the denial of water from the Klamath Basin project in 2001. This decision was based on the results of a consultation between the Bureau of Reclamation, NMFS and the FWS. Farmers were not included in the consultation.

Farm Bureau supports the involvement of farmers and ranchers in the consultation process to create a more balanced and informed decision-making process. Private landowners having direct contact with the FWS can result in better understanding of the possible impacts to listed species. Direct contact can also give both parties greater understanding of what "reasonable and prudent alternative" might be feasible and fit within the scope of the proposed activity.

Farmers and ranchers play a key role in protecting our endangered and threatened species. As such, the ESA should create a better balance with the needs of plants and animals and the needs of people. It should not penalize small landowners who cannot afford to buy mitigation for planned projects.

We appreciate the opportunity to provide testimony, and we look forward to working with committee members and staff to address the issues that we have raised.

Tom Waters

Missouri Farm Bureau Federation

Biographical Information

Tom Waters is a seventh generation farmer from Ray County, Missouri. He and his family own and operate a farm near Orrick in the Missouri River floodplain. The Waters family farms 3,500 acres of corn, soybeans, wheat and alfalfa. They oversee an additional 1,500 acres of cropland, most of which is in the Missouri River bottoms.

Tom is a member of the Missouri Farm Bureau Federation and the American Farm Bureau Federation. He currently serves as chairman of the Missouri Levee and Drainage District Association and president of the Missouri-Arkansas River Basins Association. He is also the president of three local levee and drainage district boards, which combined represent over 21,000 acres of Missouri River bottomland.

Statement by the

NATIONAL CATTLEMEN'S BEEF ASSOCIATION

and the

PUBLIC LANDS COUNCIL

on the

Endangered Species Act

Submitted to the

Rural Enterprises, Agriculture and Technology Subcommittee

The Honorable Sam Graves, Chairman

of the

House Small Business Committee

The Honorable Donald A. Manzullo, Chairman

July 17, 2003

Good morning, Chairman Graves and Distinguished Members of this Subcommittee, my name is John V. Hays, and I am a rancher, and a former President of the Oregon Cattlemen's Association, from Baker County, Oregon. My family has been ranching on the same land in Unity, Oregon, since 1850. I appreciate the opportunity to be here today to provide my story on the Endangered Species Act (ESA) to the Committee on behalf of the sheep and cattle rancher members of the Public Lands Council and the National Cattlemen's Beef Association.

The Public Lands Council (PLC) represents sheep and cattle ranchers in 15 western states whose livelihood and families have depended on federal grazing permits dating back to the beginning of last century. The National Cattlemen's Beef Association (NCBA) is the trade association of America's cattle farmers and ranchers, and the marketing organization for the largest segment of the nation's food and fiber industry. Both PLC and the NCBA strive to create a stable regulatory environment in which our members can thrive.

Ranching out west has been part of the landscape, the economy, and the culture for approximately three centuries. About 214 of the 262 million acres managed by BLM are classified as "rangelands," as are 76 million of the 191 million acres managed by the Forest Service. More than 23,000 permittees, their families, and their employees manage livestock to harvest the annually renewed grass resource grown on this land. Western ranching operations provide important additional benefits to the Nation by helping to preserve open space and reliable waters for wildlife, by serving as recharge areas for groundwater, and by supporting the economic infrastructure for rural communities. Our policy is to support the multiple use and sustained yield of the resources and services from our public lands which we firmly believe brings the greatest benefit to the largest number of Americans.

My Story

On May 24, 2001, I met with several members of the United States Forest Service, my attorney, and two witnesses from the Oregon Cattlemen's Association to discuss the future of my grazing allotment. The meeting became necessary because I had been getting mixed communications concerning my Forest Service grazing allotment. I feared I was on the verge of having my animal unit months (AUMs) severely reduced due to an endangered species that was not present on my allotment.

I graze cattle on my own private land (about 15,000 acres), as well as on two federal allotments, one approximately 45,000 acres and the other 35,000 acres. These allotments are adjacent to my private land and are integral to my ranching operation. AUM reduction on the federal allotment directly impacts the economic viability of my entire operation.

The Forest Service personnel had been communicating to me that the AUMs on my grazing allotment would likely be cut back or possibly eliminated due the Canadian lynx.

This was baffling to me as a lynx has never been found on my allotment; indeed, no one had ever seen a lynx in my part of the state. In fact, there have been only 14 confirmed reports of lynx in Oregon since 1897. Even more baffling was that the Forest Service, working together with the United States Fish and Wildlife Service (USFWS) under a Memorandum of Understanding, were mapping critical lynx habitat on my ranching operation.

My attorney took detailed notes of our conversation on my behalf so I could be free to ask questions and respond to the Forest Service (FS) comments. The following are key points that came from this discussion:

- The FS Resource Staff Advisor stated that parts of my allotment had been determined to be lynx habitat, even though the FS "did not think there were any lynx in the area, but that they are required to manage for lynx anyway." It is unfortunate that federal agencies are being forced to spend their resources on something that no rancher, trapper, recreationalist, or FS personnel has ever witnessed or found any scientific evidence that suggests the presence of a lynx.

- The FS said the USFWS required them to follow their conservation strategy that was in place even before the listing of the lynx took place, and then they could determine whether or not their actions are "not likely to affect" the habitat of the lynx; at that point they said they could issue a grazing permit for perhaps one year without too much delay. Mr. Chairman, it is impossible to manage a ranching operation on a year-to-year basis. Grazing permits are issued for ten years. Once issued, I have to present this permit to my banker to receive operational financing for the year. Three years ago when all of this talk of severely reducing AUMs on my allotment was taking place, my banker was reluctant to finance a ranching operation that might not exist. The FS telling me they would issue a permit without too much delay is far too vague an assurance for running a business which depends on grazing. When I need to turn my cattle onto the grazing allotment, I have no other place to pasture them. A delay can cause overgrazing and resource degradation on my private pasturelands and stunt the growth of the calves. I realize the federal employees that are stuck in the bog of regulations and paperwork that delay the issuance of my permit still receive their federal pay check, but I don't. My livelihood is dependent on the timely and continual issuance of the grazing permit.

- The FS said so far they were not in compliance on the Canadian lynx issue because they had not yet consulted with the USFWS on my grazing permit. They said they had been spending most of their time on the bull trout - another endangered species. They said my allotment permit would be vulnerable until they had time to consult with the USFWS. The science used to list the bull trout is now widely being questioned—and yet, it seemed to take precedence over the Canadian lynx.

- Sharon Beck, past president of the Oregon Cattlemen's Association, asked the FS if they had any way to determine which endangered species get their attention first, and they said no. The FS expressed how frustrated they were with the many endangered species listings they have to deal with. Once again, they might be frustrated, and I believe that they have reason to be, but FS frustration doesn't equate to a rancher's livelihood.

- My concern about FS management of my allotment for the lynx was compounded by the controversy surrounding the existence of the lynx in a National Forest in Washington State based on the purported discovery lynx hair in the forest.

- The Oregon Department of Fish and Wildlife (ODFW) responded to documentation about the lynx to the FS on October 24, 2001. Here are four interesting notes from Larry Cooper, Staff Biologist ODFW: (1) "Lynx are easily trapped and treed by hunters using hounds, yet, only fourteen (14) confirmations of lynx exist in Oregon since 1897." (2) "...lynx are a casual visitor to Oregon and no reproduction has ever been found." (3) "It is apparent that the authors [of the documentation] have strong emotional beliefs that lynx populations existed..." (4) the documentation "was presented under the ruse of science."

The FS, along with the USFWS, could have severely damaged the economic viability of my cattle ranching operation by using the ESA to protect what had been referred to as the "casual visitor", the Canadian lynx. And all of this was further complicated by the inability to get the science completed because of the bull trout.

Even though the FS has reissued my permit, unaffected by the lynx at this time, this whole experience has really left a bad taste in my mouth. It has made my sons reluctant to take the family ranching business over. And this is not just a problem I have had to deal with; many ranchers across the West have to grapple with the ESA. Wildlife flourishes on my ranch: there are over 1500 deer, elk, antelope, fox, and geese, which many people come to enjoy every year. I make a dedicated effort to take care of the environment, and still I have to deal with potential onerous restrictions of the ESA.

Possible Solutions

1. Sound Science

Perhaps the most obvious failure in the ordeal described above is that the agencies failed to use sound science, which in this case really equates with common sense. The Canadian lynx was never found on my allotment, yet the government was prepared to impose onerous restrictions on my livelihood to help it.

Sound science starts with objective evaluation of species listing and delisting proposals by qualified scientists utilizing peer review of their work. USFWS employees can have their judgment obscured at times by their institutional interest in administering the ESA.

Because of the tremendous impact ESA can have on economics, communities, and local land use generally, we believe additional procedures are in order to ensure that no interest is unfairly minimized or excluded prior to a decision. In particular, we would like the ESA to be amended to require the National Academy of Science or some other reputable third party to concur in USFWS decisions to list or delist species or in the contents of Biological Opinions.

2. Applicant Status

Another major failure of the consultation process in my instance was the refusal on the parts of the agencies to allow myself, who was legally recognized as having applicant status in the consultation process under FWS regulations, or any members of my legal or scientific team to participate in any FS and/or FWS discussions, meetings, or deliberations prior to the issuance of the draft FWS opinion. Numerous times my lawyers asserted that under the law and under FWS regulations they had the right to participate in the process as applicants—and still we were denied access to the discussions about my allotment. By not allowing me to be there, I feel that decisions were not made based on fact, but instead were based on irrelevant factors.

I would have wanted my oral testimony to be heard and taken into account by agency officials in the FS and the USFWS as they made decisions concerning the future of my livelihood on the allotment. Agency decision making would have benefited tremendously by a more complete illumination of the facts and science affecting the species.

The general issue is that all members of the public who are potentially adversely affected by the results of a consultation under the ESA should be permitted, as a matter of law, to participate fully in the consultation.

3. Mitigating Alternatives

If the FS feels it necessary to remove a permittee from the land pursuant to the terms of a Biological Opinion issued under the ESA, the agency should be required, as a matter of law, to consider alternatives to keep that rancher in business. Public land grazing keeps many ranchers' operations viable, and to be forced off of the land without any rectification could be the kiss of death to many public land ranchers. The FS should have to consider if other, comparable range is available for the public land rancher to graze his cattle on. It is a principle of fairness—if land is to be taken away, the land should be replaced with equally economically viable land.

Conclusion

I want to thank you again for this opportunity to present the views of the cattle industry with respect to AUM reduction due to the ESA. We look forward to working with you to

craft legislation that will both respect the need to protect species and be respectful of the ranchers and their families who have worked western lands for so many generations.

Testimony of
Rob Gordon
Executive Director
National Wilderness Institute
Subcommittee on Rural Enterprises, Agriculture and Technology
July 17, 2003

Thank you for this opportunity to comment on the Endangered Species Act. NWI is a private conservation organization that is dedicated to using sound, objective science for the wise management of natural resources. We have done extensive research on Endangered Species and have produced a number of studies on the effectiveness of our wildlife conservation programs.

Of particular interest to NWI is the relationship between private ownership of land and conservation. Private conservation is actually more important to wildlife than government efforts. Although the federal government owns vast amounts of land, private land is often richer in wildlife, plants and water. 70% of the endangered species are found on private land. When I speak of private conservation, I do not refer only to the work of self-proclaimed environmental organizations but also commercial activities – small businesses, ranching, farming, forestry, recreation industries and others – that make tremendous contributions to conservation as a byproduct of their business. The North Maine Woods land, for example, is a vast area of more than two million acres of privately owned commercial forest land that not only contributes to our economic well-being, but provides wildlife habitat and public recreation opportunities as well. 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. For example, 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 more than 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, this area would

undoubtedly be void of sea lions and other marine life - this natural wonder would probably not exist today.

In Texas there are private ranches with a greater number of certain species of rare African antelope than are found in the wild in their native lands. In these cases, not only are the landowners and the species benefiting from private conservation activities but the public as well. If any of these activities made the property owner vulnerable to taking of his property, they would surely be reduced in number and scope and might not occur at all. Undoubtedly, the attribute of our society that makes the greatest contribution to the environment is the ever-growing efficiency of American businesses. Our family farms that during the last hundred years have greatly increased food and fiber production while reducing the amount of land devoted to crops by 28 million acres serve as the prime example of such effeciency.

In the 30 years the Endangered Species Act has been in on the books, it has almost never brought about the recovery and delisting of an endangered species. Although several species have been taken off the list and called recoveries, in no case was the recovery brought about by the ESA. In many of the claimed success the population of the species had been underestimated when it was added to the list. Other claimed recoveries, such as the peregrine falcon, gray whale, or brown pelican, improved in number from factors unrelated to the Endangered Species Act.

When you consider all the money and effort that went into this program which is called "the crown jewel of environmental legislation," it is really amazing that almost no species owes its recovery primarily to the ESA.

There are a number of reasons this law has not been as successful as we would like our conservation laws to be. The Act is 30 years old and some of the assumptions on which it is based have not proven to be sound principles. At that time there was a misplaced faith in the notion that the way to solve every problem was to set up a big federal program. We should have known better.

Many years ago biologist Garret Harden described a flaw in the thinking in many environmental circles. Hardin pointed out that when something is owned communally, each possible user will try to maximize his benefit to the detriment of the resource rather than working to increase the value of the

resource as is the case with private property. Hardin termed this phenomenon "the Tragedy of the Commons."

For a program to work well, we have to get the incentives right. Unfortunately, the ESA has created a perverse incentive structure that actually compounds the difficulty of conserving rare species.

Let me give you a concrete example of how his works in the field.

Ben Cone is a North Carolina timberland owner. Mr. Cone has always tried to harvest trees in a way that provided habitat for wildlife. Campers, hunters and fishermen have used his land because he believes wildlife, tree farming and outdoor recreation are all 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 has spent $8,000 on biologists to make sure he is following the stringent rules, and figures he has lost $1.8 million dollars in timber that is tied up in the area he cannot harvest. He is prohibited from harvesting these trees because they have reached an age at which they attract red-cockaded woodpeckers. As these trees become older the inner wood often becomes softer and thereby good insect hunting ground for woodpeckers.

Now, because of the perverse incentives of environmental regulation, Mr. Cone has been forced to ensure that no more of his property is taken because his trees become old enough to attract woodpeckers. To protect himself, Mr. Cone must harvest his remaining trees at an earlier age. The end result is that all lose. Mr. Cone has lost part of his property and has reduced management options on the remainder. The red-cockaded woodpecker has 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 cannot afford to allow his trees to get too old. And, the taxpayer loses because dollars spent on regulators ended up harming the very bird they were spent to protect.

Michael Bean of the Environmental Defense Fund recently described the problem in a talk to U. S. Fish and Wildlife Service employees when he said there is "increasing evidence that at least some private land owners are actively managing their land so as to avoid potential endangered species problems." He went on to say:

> 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 avoiding having endangered species on their property. Because the woodpecker primarily uses older trees for both nesting and foraging, some landowners are deliberately harvesting their trees before they reach sufficient age to attract woodpeckers, in their view, and in fact before they reach the optimum age from an economic point of view.
>
> In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs...

After many years of trying to make the Endangered Species law work as a conservation measure, US Fish and Wildlife Service Regional Director Sam Hamilton said, "The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears."

Other wildlife officials have pointed out how listing a species under the present law can further imperil its prospects. Larry McKinney, Director of the Resource Protection Division of the Texas Parks and Wildlife Department 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 these birds than would have been lost without the Endangered Species Act at all.

The law's weak scientific standards also contribute to the program's lack of success. Under the current law the standards for listing are, in a word, bad. I use the word bad because it is an apt acronym for "best available data", or, as it says in Sec. 4 "best scientific and commercial data available". The problem with best available data is that best is a comparative word. Thus the data need not be verified, reliable, conclusive, adequate, accurate or even good. The best available data standard hampers the effectiveness of the program. It is difficult to know just how many species have been listed on poor grounds but there is evidence to suggest that the number is significant. In a review we did a few years ago of 306 recovery plans we found there

was little hard information about the status of many listed species. Recovery plans regularly call for "searches for additional sites," "searches for additional populations" and "surveying suitable habitat for additional populations." Few recovery plans state that we reliably know how many of a particular federally regulated species exist.

The subjectivity of the standards under which the current program operates also allows the law to be enforced very selectively and very politically. Economic activity has been virtually shut down in parts of the country, particularly the rural west, to protect possible, potential habitat of species of highly questionable authenticity. But in other areas major developments never seem to be inconvenienced by a need to protect species. A few years ago a study by the Resources Committee found that 549 species were listed in the far West compared to only 39 in the Northeast. Critical habitat had been designated for only 9 species in the East compared to 96 in the West.

You may have heard about how the listing of fairy shrimp or the Dehli sand fly resulted extensive restrictions on land use in California. That doesn't happen here. I can tell you from first hand experience that when you give the Fish and Wildlife Service information about species on the brink of extinction in the Washington area, they act as though they never heard of the Endangered Species Act. For example, there are some highly endangered invertebrates, similar to the listed fairy shrimp but far rarer and far more endangered, that occur in a few springs in the Washington area. One of these small crustacean species is known from only one location, another from only two locations. Yet petitions to have them listed have been arbitrarily rejected.

Bad conservation science and politicized allocation of resources not only lead to unjustified or counterproductive restrictions, they also block protective action where it is truly needed. A glaring example of this occurs here in Washington where thousands of tons of harmful, foul-smelling, toxic sludge are permitted to be discharged by the Washington Aqueduct through a National Park and into the Potomac where it smothers the spawning beds of the endangered shortnose sturgeon. There might be other places that dump that much pollution in a river but you would have to go to a third world country to find it.

The National Wilderness Institute has gone to court to try to force a number of very reluctant federal agencies to end the political favoritism and special

treatment used to exempt this area from the Endangered Species Act and the Clean Water Act. The Parks Subcommittee and the full Resources Committees held hearings on this midnight dumping and Senator Allen and Congressman Radanovich have introduced legislation to protect the Potomac River and the Bay from these discharges.

If you have wondered why there is apparently so little conflict between rare species and human activities in this area, you may be surprised to learn that ESA is simply not enforced here the way it is elsewhere. Here, the benefit of the doubt is not given to the endangered species. Here, economic considerations outweigh species protection. Here, science, or what purports to be science, is employed to provide cover so that needed projects can proceed unimpeded by the ESA.

As a result of our lawsuit, the EPA has finally and very begrudgingly issued a new permit that purports to place restrictions on the discharges at some point in the future. We are continuing our legal action to ensure that their stated intention becomes a binding commitment.

Compare the results of the ESA's regulatory and punitive approach which often takes private property 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 on their 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 about thirty years ago 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 several years, over one hundreds thousand bluebird houses have been built and bluebirds are on the rebound.

During the past 30 years, wild turkeys have been restored 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 is 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 would you possibly get 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?

Through the implementation of laws which take private property without compensation to the landowner we have created a climate which pits rare plants and animals against property owners. As a result, they both loose, as does society.

Our current approach to endangered species is inadequate 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 and 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, court cases and fines – not conserved and recovered endangered species.

BEFORE THE
SUBCOMMITTEE ON RURAL ENTERPRISES, AGRICULTURE AND TECHNOLOGY
OF THE
SMALL BUSINESS COMMITTEE
OF THE
HOUSE OF REPRESENTATIVES

STATEMENT OF
MICHAEL J. BEAN,
CHAIR, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE
AND
CO-DIRECTOR, CENTER FOR CONSERVATION INCENTIVES

CONCERNING THE ENDANGERED SPECIES ACT
AND ITS IMPACT ON SMALL LANDOWNERS AND SMALL BUSINESSES

July 17, 2003

"I am a gun-toting, redneck, Texas Republican preacher." That is how Texas rancher Bob Long described himself last month in an article that appeared in the *Houston Chronicle*. Mr. Long is a good deal more than that. He has been the chairman of the Republican Party in Bastrop County, Texas, for the past two decades. He is also a rancher who is in the midst of restoring and enhancing habitat on his ranch for an endangered toad, the Houston toad, with help from my organization, Environmental Defense, and the Sand County Foundation, through our joint initiative called the Leopold Stewardship Fund. One of the ponds on Bob Long's ranch where this effort has been carried out was silent in past years, but this year was filled with a chorus of breeding toads.

Bob Long and landowners like him across the nation are essential partners in any serious effort to conserve the nation's imperiled wildlife and rare plants. They own much of the habitat where such species live. Indeed, for some species, they own all the habitat that remains. Further, the continued health and well-being of much of that habitat depends upon active management measures – to control invasive exotic species, to maintain desired vegetative characteristics, or to replicate natural disturbance regimes through prescribed burning or other measures – that can only be undertaken by, or with the cooperation of, landowners like Bob Long. In short, for many species, success in achieving the goal of recovery is not likely to be achieved without the active cooperation of private landowners.

A decade ago, Texas would have been a hard place to find many landowners willing to roll out the red carpet on their land for an endangered species. The prevailing

view then was that endangered species could only mean trouble – bureaucrats telling you all the things you couldn't do on your land. Today, Bob Long is not alone in inviting endangered species to share his land. A little to the west of Mr. Long's property in Bastrop County, we are working with more than forty Hill Country ranch owners to restore and enhance habitat for two endangered songbirds, the black-capped vireo and the golden-cheeked warbler. The Leopold Stewardship Fund, mentioned above, has contributed significantly to this effort as well. In far south Texas and far West Texas, owners of nearly two million acres of private ranchland have made their land available for reintroducing the endangered northern aplomado falcon, the rarest falcon in North America. Along the Texas coast, south of Houston, 13 landowners, including the chair of the Victoria County Soil and Water Conservation District, are restoring coastal prairie habitat on over 44,000 acres of land as part of a program intended to benefit the Attwater's prairie-chicken, one of the most imperiled bird species in the world. Further east, in the Piney Woods region of Texas, forest landowners are managing their land to help the endangered red-cockaded woodpecker.

It is not just Texas where this sort of thing is happening. In the Carolinas, over 140 landowners, who together own more than 350,000 acres, are carrying out management activities to improve conditions for the red-cockaded woodpecker. Some of the participating landowners own a few thousand acres; others own as little as two and a half acres. They include landowners like Dougald McCormick, whom I first encountered in 1992, when he drove a pickup truck with a license plate that read "IEATRCW." RCW, by the way, stands for red-cockaded woodpecker, and Mr. McCormick's license plate was emblematic of landowner attitudes in the North Carolina Sandhills then about endangered species. That was then. Times have changed. Not only was Mr. McCormick one of the first landowners to enroll his land in the program to help the RCW, but so was Jerry Holder, a former county Farm Bureau board member, past president of the North Carolina Pine Needle Producers Association, and 1997 North Carolina Forest Conservationist of the year. In Mississippi, former Mississippi Tree Farmer of the Year John Lambert is developing a similar agreement on his forest property for the endangered gopher tortoise and the RCW.

Similar programs for the RCW have been initiated more recently in Georgia and Virginia. In Oregon, Robert Russell is allowing a pond on his property to be used as a refugium for the endangered Oregon chub. In next door Idaho, the Soulen Livestock Company has tried to get out ahead of the curve with an agreement to help the southern Idaho ground squirrel on its land before that declining species finds its way onto the endangered species list.

These examples and many others like them illustrate that creative implementation of the Endangered Species Act can enlist the willing participation of many of the nation's farmers, ranchers, and forest landowners. I do not dispute that there have been and will continue to be situations where the requirements of the Endangered Species Act impose significant burdens on private landowners. Reversing the effects of decades of indifference to the plight of many imperiled plants and animals cannot be either easy or

painless. It cannot happen through business as usual. Business as usual is what made all these species endangered in the first place. Nevertheless, I do believe that much progress toward the goal of recovering rare species can be accomplished in creative ways that enlist the cooperation of farmers, ranchers, and forest landowners.

What are some of those creative ways and how might they be improved? Most of the examples above are of safe harbor agreements, a conservation tool developed during the Bruce Babbitt years at Interior, and embraced by his successor, Gale Norton. Safe harbor agreements allow landowners to enhance, restore, or create habitat for endangered species without incurring new or additional regulatory restrictions. We had a large hand in developing the first of these agreements in North Carolina, and are strong supporters of them. Nevertheless, having worked to develop these agreements for many different landowners in many different parts of the country, we strongly believe that the Fish and Wildlife Service needs to make it far easier for landowners to enter into these agreements. Fish and Wildlife Service Director Steve Williams has written that the Service intends to expand the use of these landowner-friendly and rare species-friendly agreements, and it should. But to accomplish that worthy goal, the Service has to commit itself to making these agreements simpler to understand and quicker to approve.

The same can be said for candidate conservation agreements with assurances. These are intended to encourage landowners to do things to help declining species before they need to be listed as endangered. The Soulen Livestock Company agreement in Idaho mentioned above is an example of such an agreement. In another of the initiatives of the Leopold Stewardship Fund, we are working to help expand the reach of that agreement to include some of the Soulen Livestock Company's neighbors.

Safe harbor agreements and candidate conservation agreements with assurances are effective at providing the regulatory assurances many landowners want before managing their land to attract endangered species. They don't necessarily address another important need, however. That is the expense of management. Virtually all of the management activities the landowners mentioned above are doing for endangered species entail expense, sometimes significant expense. If agreements of the sort discussed here are to realize their full potential, helping landowners meet these management expenses is vital. I have mentioned the Leopold Stewardship Fund that we and the Sand County Foundation have established as a private initiative to help landowners meet these expenses. But the resources available through that initiative are quite small in comparison to the need. The government itself has to step up to the plate. New programs like the Interior Department's Private Stewardship Grants Program and the Landowner Incentive Program are encouraging, though still small, initiatives. An expanded Partners for Fish and Wildlife Program could also greatly help. So too could better targeting of the considerable sums available through the Farm Bill's various conservation programs to projects that help imperiled species.

There are still other creative ideas by which endangered species can be turned into assets, rather than liabilities, for landowners. Take, for example, Hickory Pass Ranch

near Austin, Texas. Its owners, the Johnston family, recently agreed to establish a conservation bank on part of the ranch. In effect, for their commitment to manage the property in ways that will maintain high quality habitat for the golden-cheeked warbler, they can sell mitigation credits to developers in the region whose projects are turning other habitat into streets and subdivisions. Conservation banking is a mechanism that is enabling the owners of the Hickory Pass Ranch to help an imperiled species and to keep the ranch that they love from being turned into an ocean of condos. This same mechanism can create similar incentives for other private landowners to do well by doing good. The Fish and Wildlife Service recently published much-needed guidance on the development, operation, and use of conservation banks for endangered species. That guidance should encourage expanded use of this incentive-based conservation mechanism.

In summary, there are a great many ways in which private landowners can be and are constructively engaged in aiding the conservation of endangered species. Many of them are quite recent and have yet not gotten the attention that past conflicts have gotten. Clearly, there have been and will continue to be situations in which the needs of endangered species cannot be easily or painlessly reconciled with private objectives. I offer one further example that I think is instructive. Just over thirty years ago, the federal government cancelled the registration of nearly all products containing the pesticide DDT. There were howls of protest from those who argued that our agricultural economy would be destroyed, our small farmers put out of business, and the small businesses that serviced them shuttered. Thirty years later, we have nearly 40 million acres of former cropland idled, not because of the ban on DDT, but because of agricultural overproduction. None of the calamitous predictions of 30 years ago was well founded. Had our Congress then heeded the dire predictions of DDT's advocates, we would never have experienced the recovery of our national symbol, the bald eagle, or of the peregrine falcon or brown pelican. The ongoing recovery of the northern aplomado falcon in Texas pursuant to safe harbor agreements, would not have been thinkable . I offer this reminder for a simple reason. Though incentive-based approaches are a critically necessary part of any effective conservation program, we need the other parts too, including the judiciously applied regulatory requirements to address those problems that cannot be effectively solved in other ways.

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