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ENDANGERED SPECIES ACT: REVIEW OF THE CONSULTATION PROCESS REQUIRED BY SECTION 7

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES,
WILDLIFE, AND WATER

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

AN EXAMINATION OF THE CONSULTING PROCESS REQUIRED BY SECTION 7 OF THE ENDANGERED SPECIES ACT

JUNE 25, 2003

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C O N T E N T S

ENDANGERED SPECIES ACT: REVIEW OF THE CONSULTATION PROCESS REQUIRED BY SECTION 7

WEDNESDAY, JUNE 25, 2003

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER,
Washington, DC.

The committee met, pursuant to notice, at 9:33 a.m. in room 406, Senate Dirksen Building, the Hon. Michael D. Crapo [chairman of the subcommittee] presiding.

Present: Senators Crapo, Murkowski, and Inhofe [ex officio].

OPENING STATEMENT OF HON. MICHAEL D. CRAPO, U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. The hearing will come to order.

Good morning. Welcome. Today the Subcommittee on Fisheries, Wildlife, and Water will examine the process of Section 7 consultation under the Endangered Species Act. Senator Domenici has been kind enough to join us to discuss some rather serious problems with regard to Section 7 and the Endangered Species Act in New Mexico. Senator Domenici must chair a hearing at 10 o'clock a.m., so we are going to move quickly through our opening statements so that Senator Domenici can get to that hearing on time.

Section 7(a)(2) of the Endangered Species Act requires Federal agencies to consult with either the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species.

Since 1986, when the Fish and Wildlife Service and the National Marine Fisheries Service published their joint consultation regulations, the consultation process has mushroomed into a lengthy and expensive procedure that is increasingly burdening all the agencies required to participate in it.

To begin with, the size of the program has grown beyond what anyone ever imagined in 1986. More than 900 species have been added to the list since then. There is another very significant reason that consultation has become such a burdensome and costly proposition. Much of this boils down to two words: "may affect."

If a Federal action may affect a listed species, then the consultation process is triggered. The only way a consultation can be avoid-

ed is if the project will have no effect on the listed species. "May affect" is defined as a beneficial, benign, or adverse action.

Once it has been determined that an action may affect a listed species, consultations are divided up into those that are "not likely to adversely affect," and "likely to adversely affect." The former result in informal consultation, and the latter in formal consultation. In order for the Services to make a "not likely to adversely affect" determination, the effects of the action must be discountable, or insignificant, or completely beneficial.

Obviously these regulations were intended to protect the listed species that we are attempting to recover. Despite this, the Services are consulting on tens of thousands of actions each year with effects that are, in fact, discountable, insignificant, or completely beneficial.

For example, in 2001, Region 1, which is Idaho, Washington, Oregon, California, Nevada, and the Pacific Islands of the Fish and Wildlife Service, completed 14,004 Section 7 consultations. Of those, only 863 were formal consultations, which means that the other 13,141 were expected to have effects that were discountable, insignificant, or completely beneficial.

Precisely three of those consultations resulted in jeopardy opinions. As I said earlier, the focus and purpose of Section 7 is to ensure that Federal actions do not jeopardize the continued existence of listed species. In Region 1, only three Federal projects of the 14,004 were determined to be potentially jeopardizing to the continued existence of the species.

On the one hand, this is good news. The agencies are doing a good job of avoiding adverse effects. The problem is that the Services are expending colossal resources on a process that produces a lot of paperwork for Agency staff without a lot of positive impacts on recovery. No other agency in the Federal Government engages in such massive red tape to ensure compliance.

Congress has been concerned that these costs and delays that continue to increase funding levels for consultation staff. In a report published last year on salmon funding expenditures, the General Accounting Office reported that in the 5 years preceding 2002, the National Marine Fisheries Service's Northwest Region's consultation staff had grown from six to 120. Yet, I continue to hear problems, delays, and costs. I do not have a perception that additional funding is going to address these issues.

Let me close by reading from a memo sent to Forest Service Chief Dale Bosworth, by Regional Forester, Jack Blackwell, on April 30, 2001. He states:

"I cannot adequately convey the high levels of frustration, anxiety, and feelings of helplessness that are occurring both internally and externally as we attempt to manage the national forests, and deal with ESA Section 7, processes.

"We all care deeply about and want to conserve species. Like the majority of the American public, we strongly support the ESA and recognize it is probably not going to be amended anytime soon. But something significant must change in order to bring more effectiveness, efficiency, and common sense to the Section 7 consultation process.

"The time is right to initiate serious multi-agency reforms that do not require congressional action. The amount of effort required to get projects through consultation is increasing and appears to be the same investment in people regardless of the project's potential impact or risk to the listed species or its habitat.

"Once a project is more than a 'no affect' determination, the amount of documentation and analysis seems nearly identical. We are spending a disproportionate amount of time and effort on projects viewed by Forest Service biologists as low risk.

"I am gravely concerned that we continue to expand scarce resources on a process that does not appear to provide significant conservation or recovery benefits. I hope this will be the first of several discussions with how we might create a process that is less costly and laborious, and delivers meaningful conservation benefits to species on the ground."

With that, I will turn to our chairman of the full committee, Senator Inhofe.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF IDAHO

Senator INHOFE. Thank you, Mr. chairman.

Let me just tell me that my prepared statement is almost verbatim yours. I am going to be asked that it be put in the record.

Senator CRAPO. Without objection, so ordered.

[The prepared statement of Senator Inhofe follows:]

Senator INHOFE. We do have a problem here. I see that our friend from New Mexico has his silvery minnow problem. We have the Arkansas shiner. I probably would swap with you right now. There are serious problems there. Pat Horn, accompanied by Paul Renfrow, who have come up from Oklahoma, will be testifying in the third panel. I will be back for that.

Unfortunately, we have a Senate Armed Services Committee hearing two floors down at exactly the same time. Mr. Chairman, after we hear from Senator Domenici, I will go to that hearing and then come back for the third panel.

You know that there is a problem when even the Ninth Circuit Court of Appeals in San Francisco, which is about the most liberal court in the country, has overturned Fish and Wildlife consultation decisions on the grounds that they had no evidence to back them up. We will get to some of these.

Thank you, Mr. Chairman.

Senator CRAPO. Thank you very much, Mr. Chairman.

Without anything further, Senator Domenici, the floor is yours to present your testimony.

Welcome. Thank you for being with us today.

STATEMENT OF HON. PETE V. DOMENICI, A UNITED STATES SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you, Mr. Chairman, and Senator Inhofe.

I think in the final analysis there are very few Americans who would oppose a national law that said, "Let us try to protect endangered species."

However, what has happened to the Endangered Species Act is that it is being applied without any common sense.

The interpretation and the implementation of the Act have gone greatly awry. The process has become extremely combative. When the judicial combat occurs, it would appear that the participants' goal is to win no matter what.

In fact, the result is rather lacking in common sense. Clearly, if you submit this to a large cross-section of Americans and say, "Would you come up with this opinion to save this species?", you would find a minute number would agree with it.

Look at the case concerning Albuquerque, New Mexico. The City is up and down the Rio Grande River from just north of Santa Fe, all the way to just where the Rio goes into El Paso, Texas. We have a little minnow in the Rio Grande called the silvery minnow. The Rio Grande River is not a wet river like those in the East. As I grew up as a young man, for long periods of time during the year, big stretches of the Rio Grande were without water. It is actually a river that runs with water only when you have a lot of rain. In the last 50 years, the river has run only when you are letting out enough water to make it wet. Otherwise, it has deep sand pockets that suck up all the water you can put in it. It is very hard to make it run.

Nonetheless, there has been an ongoing battle that the habitat for this minnow, as far as a certain group of environmentalists are concerned, must run wet throughout a very lengthy area of the river. This calls for huge amounts of water. The only place we can get it is to start dumping our reservoirs.

What we have now is a Tenth Circuit Court opinion that places the needs of this small endangered fish over the needs of the people of our State. On June 12th, by a 2–1 decision, the Tenth Circuit ruled that the Federal Government can completely disregard its contractual commitments to provide much needed water to the cities, farms, Indian reservations, and instead take that water for the needs of the fish. The Court found that the Government can use water imported from another basin for the silvery minnow in violation of New Mexico State law.

Senators you know that the great Colorado River has been part of supplying water to all different States up and down its lengthy path, but it also supplied water to the State of New Mexico. The second-to-last agreement made by the Senate, when Senator Clinton Anderson was then the Senator from New Mexico, was to take some of that water, send it across the Rocky Mountains through a canal drilled through the mountain into this new environment for that water, the Rio Grade River.

Obviously, since the fish existed before that water came in, the environment of the river for the fish and its protection was the river without that water, not the river with that water.

Nonetheless, the closing remarks of the two judges seemed to me to almost be the writings of some young student, delighted with the idea that this river needed everybody and everything working and living together for it to be a livable river. As a consequence, it needed the water of that river to protect the fish.

Of course, that whole thought is an error. From its inception, that river and that fish did not have that imported water. One of

the very big mistakes made by the Court was to say that the imported water could, and must, in fact, be used as you put together the biological living conditions for the preservation of the fish.

That is one of the issues that seems rather simple for a committee like this to address. Across the land, with reverence to rivers, to protect endangered species within a river basin, should you give water that is brought in for another purpose under another contract, and paid for in another way? Could you make that imported water also a part of the water that is to be used for the preservation of the fish?

The Court said "yes." The minority judge said "no." The minority opinion is a very excellent opinion in this Senator's way of reading things. Maybe this dissenting judge is familiar with the Frankenstein monster. The dissenting judge equated the Endangered Species Act as it was applied in this Circuit to the Frankenstein monster that had gone wild, that just stomped around and took over things wherever it could lay it feet, taking all the contracts of the Bureau of Reclamation, regardless of their purpose, regardless of their tenure, and regardless of how long they existed. They said they are all subject to saving this fish.

How did we get there? The Court interpreted the ESA, as I said, as preempting 75 years of existing water law, existing contracts, and the needs of the burgeoning population of Albuquerque and the surrounding area. The silvery minnow case began with a Section 7 consultation under ESA. The consultation for the minnow was triggered by litigation. In 1999, a group demanded that the Court direct the Bureau to consult with the Fish and Wildlife Service over the Bureau of Water and River Operations in the middle Rio Grande.

Until that time the Federal agencies had not consulted the Bureau's operations. The middle Rio Grande, like most of the water in the West, is completed accounted for through water contracts, interstate compacts, and perfected water rights under State law.

I think all of you understand that the hallmark of water rights in the West is certainty. That is why we have water rights law. People have to have certainty of obligation and of ownership. That is why water basins in States like New Mexico, believe it or not, are adjudicated. Up and down the river you decide who owns what, effective as of what time in history. To have any property value, it must have certainty. The whole goal and objective of this river basin is to inject certainty, not uncertainty, into the water rights of that basin.

In my opinion, because the Bureau had no discretion to alter these water deliveries, a Section 7 consultation was not appropriate and should not have been ordered. Once the Fish and Wildlife Service produced a biological opinion in 2001, the litigation that began over Section 7 consultation was leveraged into a challenge to the biological opinion itself. Let me repeat that. The litigation began over a Section 7 consultation and was leveraged into a challenge to the biological opinion itself.

The environmentalists argued that the Bureau failed to consult on a full range of alleged discretionary authority, even though the Bureau believed it had no discretion to take contractually obligated water, or the water resulting from inter-basin transfers. The Bu-

reau had no discretion to do that. Indeed, the Bureau kept maintaining that, "Since we do not have any discretion, why do we have to have such broad consultation."

The Section 7 consultation was next transformed into a court fight over an injunction sought by environmental groups. The case resulted in the district judge determining that the Bureau has the discretion under the ESA to take New Mexico's water as I have described it. The Tenth Circuit, in the divided opinion, did what I have just said. It would behoove you and your staff to read the opinions. They are not long. In particular, the opinion of the dissenting judge seems to me to be on that makes eminent sense upon which you might consult in terms of making some rational change to the ESA.

I have been here long enough to have voted for the ESA. I came here in 1972. At tht time, I did not know very much about what I was voting on, but even I did, I probably would have voted for the ESA. It is a great sounding piece of legislation. Obviously, when you look at it, and look at the kind of people who were then sponsoring it, you would for vote it.

Back then, you had people like Scoop Jackson proposing the ESA and proposing other environmental laws of the days. You usually would vote for them. That is not to say that those same senators sitting here today would agree with the laws that they passed. Nonetheless, they were giants who were trying to make some sense out of what could end up being a very environmentally confused part of our country.

Did any of us who voted for the ESA intend for it to apply retroactively? I do not think so. Did any of us who voted for it intend that through the courts you could achieve super status to the point of abrogating pre-existing contracts as has happened here? I did not.

Just remember, the water that came to the basin across those mountains and through those tunnels was no gift. Nobody gave that to us. That was paid for over a 40-year period of time at 4 percent interest by the city of Albuquerque and a number of units of governments. I missed by 1 year being the one who signed that contract for the city. I came into the seat that signed the contract the year after it was signed. But it was being finished up while I was then Chairman–Mayor. It was a huge indebtedness to bring water in. It was very clear. It was new water for a purpose, that is, the long-term protection of water needs of that valley. That is the valley that this court said was subject to take for the fish under the ESA.

I am firmly convinced, as I have been in the past, that the law should be changed. But I am equally convinced that it is almost impossible to do that. Particularly in the West it seems to me that we must have laws that are prospective, not retroactive. We cannot particularly exist in a world where the statute is allowed to undermine water contracts, interstate compacts, water rights preferred under State law, and even treaties which have long governed river management.

Four years after the Section 7 consultation litigation was brought, millions of dollars have been spent. The court case drags on. We are still in the position where we must request a rehearing

in bank in the Tenth Circuit, and if necessary, ask the Supreme Court to consider it.

In addition to countering the potential devastating impact of the Tenth Circuit, in particular on the imported water, which is the future of that area, I would be held derelict if I were not working with members of our delegation, and hopefully with all of you, on legislation to provide a balanced approach for that river basin, one that addresses both the needs of the people of my State, and the needs of the silvery minnow.

I have that legislation written. It has been cleared by a number of lawyers. I will present it to you for your perusal. If you think it is correct, you can support us. We will attach it to some legislation here in the Senate. It is very simple. It merely says that the Endangered Species Act does not apply in the river basin. We describe it to the imported water which was brought there for other purposes.

It continues to say that a biological opinion, which has been developed, should be implemented. Environmentalists do not like it and to them, we say, "That shall be implemented." That biological opinion says that the river might run dry. It has to run dry because of the shortage of water, rather than to dump all the reservoirs to save the fish. The biological opinion is essentially the legislation that we will offer to one of the bills here on the floor.

I thank you for listening. I wish you good luck.

I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered.

Thank you very much, Senator Dominici. We realize you have a committee to be to in about 5 minutes.

The chairman wanted to make a quick statement.

Senator INHOFE. Thank you, Mr. Chairman. I have to go down to Armed Services. I just want to respond, Senator Dominici, that in hearing about your legislation, I really believe it needs to go a little broader. There are other problems out there. I will share some stories with you.

When I became chairman of this committee, I suggested something that was considered to be totally outrageous by some of the community out there, and that was that we base our decisions on sound science, that we have cost benefit analysis. Our chairman of the subcommittee, Senator Crapo, said in his opening remarks that he thinks we need to have common sense. I am sure they will consider that equally outrageous. We want to address these problems. We have a chairman of this subcommittee that is going to give the leadership necessary to make some changes.

Thank you very much, Mr. Chairman.

Senator CRAPO. Thank you.

Senator Dominici, thank you for spending your time with us today and in testifying to us.

Senator DOMENICI. It was my pleasure.

Thank you, Senator Murkowski.

Senator CRAPO. Senator Murkowski, would you like to make an opening statement?

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. I appreciate that, Mr. Chairman. Thank you.

Mr. Chairman, it was interesting to hear the good Senator from New Mexico and his comments. I would concur with him that as we look to Section 7 and the consultation process, I would certainly concur that it needs work, and perhaps as much as major surgery.

Typically when we hear those who will speak to the pros and cons of Section 7 and the consultation process, the focus is on experience with fresh water or terrestrial species, as Senator Dominici has indicated. But those are not the only areas where Section 7 comes into play.

Alaska's fishing industry has recently had a very instructive encounter with the consultation process. I would like to summarize that for the record. Stellar sea lions are managed by the National Marine Fisheries Service. In 1975, the population in Alaska of the Stellar sea lions was estimated at more than 100,000 animals. By 1989, it had fallen to about 25,000. In 1990, Stellars were listed as threatened. In 1993, critical habitat was designated. In 1997, the Western population in the Aleutian Islands was declared to be endangered.

Under the Act, the status of the sea lion population triggered a Section 7 consultation to consider the effects of the fisheries. Since the fisheries are also managed by the National Marine Fisheries Service, this created the odd situation where the Agency responsible for the fisheries was consulting with itself over its responsibility for the marine mammals.

From 1979 to 1998, NMFS repeated found that the fisheries did not adversely affect the sea lions. But that was not satisfactory to Greenpeace and other interests which then filed a lawsuit. After the lawsuit was filed, the Agency suddenly reversed its course and in late 1998, it issued a new biological opinion under Section 7 which, for the first time, found jeopardy for the Alaska pollock fishery.

The finding was based on an untested theory, popular among the Agency's marine mammal scientists, which supposed that fishing could cause localized depletion of pollock or disturb the sea lion feeding pattern. Unfortunately it ignored most of the available science including evidence that largely exonerated fishing from blame for the sea lion decline, and demonstrated that sea lion stocks were healthiest when fishing activity was the heaviest.

Despite that, it became the guiding principle for the Agency, and 5 years of court battles, to adopt reasonable and prudent alternatives which devastated whole communities depending on fishing, and spawning two more biological opinions in an attempt to get the issue back on a reasonably even scientific keel.

What makes this case notable is not the outcome, but how badly the process itself was allowed to spin out of control, even though the National Marine Fisheries Service was the Agency conducting the action. Evidence that indicated fisheries were unlikely to harm sea lions was largely ignored. In 1989, in 1994, and yet again in 1996, research by scientists looking for a link between the pollock

fishing and the sea lion decline had failed to yield the expected results.

Although the declines were found in some areas of heavy fishing, there were also sharp declines in areas with little or no fishing. Other scientists, publishing in 1991 and 1992, questioned the supposed link more directly. A 1991 paper by two of NMFS' top fisheries scientists actually seemed to indicate that there is an inverse relationship between pollock and sea lions. In fact, more recent work may even suggest that attempting to ensure less fishing and more pollock may have been the worst thing to do because a pollock diet is less nutritious than one that includes fish of other species.

The failure of process in this case is that such a deeply questionable document as the 1998 biological was accepted as gospel. Those responsible for overseeing the work failed to ensure that it was either justified or complete before it was accepted. Those who attempted to provide prospective on it were shut out of the process. Worst of all, once such an error has been made, it may take many years and many dollars before it can be overturned.

Mr. Chairman, natural resource managers sometimes use the term "precautionary principle" to describe a better safe than sorry approach to management. It should describe a reasonable effort to ensure that all information is considered and reasonable precautions are taken where there is uncertainty. It should not be an excuse for catering to the preconceived notion of one interest over another. The Section 7 process should be emblematic of the precautionary principle at its best, not at its worst.

Finally, let me note that the National Marine Fisheries Service, since the events I have described about the Stellar sea lions, has made a significant effort to improve its practices and prevent such abuses. That is laudable. However, these efforts have been voluntary. The fact is that the potential for abuse remains inherent in the statute as it is currently written.

Conservation of species demands sound, objective science that examines all sides of an issue, not a subjective approach that caters to preconceived notions. To the extent that the law allows the latter to occur, it is at fault, and change is needed.

Mr. Chairman, I would ask that a paper written by Dr. Dayton L. Alberson on the Stellar sea lion and pollock basically outlining the science behind it, be included in the record for others to review.

Senator CRAPO. Without objection, so ordered.

Senator MURKOWSKI. I thank the chairman for bringing this to the attention of the subcommittee, and for your work on this very important issue.

Senator CRAPO. Thank you. We appreciate your attention and concern about this issue as well.

We will now proceed to the second panel. Mr. Barry Hill, Director, natural Resources and Environment, U.S. General Accounting Office. I understand, Mr. Hill, that you are accompanied Ms. McClure.

You may proceed.

STATEMENT OF BARRY HILL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GENERAL ACCOUNTING OFFICE ACCOMPANIED BY: TRISH MC CLURE, DEPUTY DIRECTOR, OFFICE OF NATURAL RESOURCES AND ENVIRONMENT, U.S. GENERAL ACCOUNTING OFFICE

Mr. HILL. Thank you, Mr. Chairman, and members of the subcommittee.

Before I begin, let me explain that Trish McClure, who is with me today, was responsible for basically leading and managing the work that we will be presenting today in our testimony. I will briefly summarize my prepared statement.

We are pleased to be here today to discuss the preliminary results of our ongoing review of the consultation process required by the Endangered Species Act. As you requested, we focused on the processes that applied in the Pacific Northwest.

Under the Endangered Species Act, before Federal agencies may conduct, permit, or fund activities of the areas where threatened or endangered species may be present, the agencies must consult with the Fish and Wildlife Service or the National Marine Fisheries Service. The consultation is intended to ensure that Federal agency activities will not jeopardize the continued existence of any listed species or destroy or adversely modify habitat designated as critical for those species.

In the Pacific Northwest, the types of activities agencies may need to consult on include maintaining wilderness trails in national forests, dredging navigational channels, and operating hydroelectric dams. The Federal agencies responsible for consulting on such activities are called "action agencies." The four action agencies included in our review were the Army Corps of Engineers, the Bureau of Land Management, the Bureau of Reclamation, and the Forest Service.

Action agencies must also consult on various activities for which they issue permits, licenses, or Federal funds to non–Federal parties. These activities include livestock raising, timber harvesting, and mining on Federal lands, and building structures such as piers and docks on private property.

The consultation process can be short or long, as illustrated by the graphic that we have displayed here to my left on the presentation board. If an action agency determines that a proposed activity may affect a listed species, the Agency may initiate either an informal or a formal consultation with one or more, or both of the services. An informal consultation, which could be as simple as a brief telephone call, the Service and action agencies agree that the activity is unlikely to harm the species, and that formal consultation is not necessary.

On the other hand, if the Agency or the Service believes that the activity may be harmful, the action agency initiates a formal consultation by submitting a biological assessment of the activity and its potential effects. If harm appears likely and formal consultation is required, the Service has 135 days, by regulation, to formally consult and document, in a biological opinion, whether the activity could jeopardize the species' continued existence.

It is important to keep in mind that even under normal workload conditions, the consultation process can be difficult. In part, this is

because decisions about how species will be protected must often be based on uncertain scientific information and on professional judgment. It is also because Federal agencies and the Services must strive to reach a balance between ensuring that action agencies are able to fulfill their missions while protecting threatened and endangered species.

My testimony today will present the preliminary results of two topics. First, key efforts to improve the consultation process in the three States we reviewed, and second, key concerns with the consultation process as identified by the Services, other Federal agencies, and non–Federal parties.

We anticipate issuing our final report in late August, and in that report we will be presenting additional information on concerns about and improvements to the consultation process, Service and Agency officials perspectives on the effectiveness of the improvements, and information on the adequacy of agency data bases that contain key information on individual consultations.

Let me turn to the first issue of my testimony on efforts to improve the consultation process. In response to concerns that largely stem from several fish listings in the late 1990's, the Services in the Pacific Northwest have taken a number of steps to improve the consultation process. For example, both Services have increased their staff levels in certain offices to help address workload backlogs. The National Marine Fisheries Service established new offices to facilitate consultations at remote locations.

Also, to improve efficiency, the Services have increased their use of consultations that address multiple activities. These consultations are often referred to as programmatics, and minimize the need to consult on individual activities. For example, one consultation in Western Oregon covers ten types of routine activities in two national forests and two BLM districts.

Another efficiency improvement, called streamlining, uses interagency teams made up of Service and action agency personnel that work together on multiple projects. The intent is that by working collaboratively these teams will more quickly reach agreement on the potential effects of a project, and will resolve problems that arise.

Finally, the Services and the action agencies have worked both individually and together to develop and refine guidance and training for staff conducting consultations. Interagency efforts include refresher training on the streamlining process, and development of websites that provide staff with preparation instructions for, and examples of, biological assessments and other key consultation documents.

Despite these and other improvement efforts, officials at the Services and action agencies, as well as non–Federal parties, continue to have concerns about the consultation process. A key problem that lengthens the process is that the Services and action agencies do not have a shared understanding of what constitutes a complete biological assessment. This leads to repeated requests by the Services for additional information from the action agencies until the Services are satisfied that the assessment adequately addresses the effects of the proposed action on the species.

If you will refer to the presentation board, you will see in the middle of the board the dotted line that represents this cycle of information request by the Services. You will also notice that this cycle occurs before the official consultation time clock begins, either 30 days for an informal consultation or 135 days for a formal one.

By this time, however, related activities, such as requesting and providing additional information may have been ongoing for quite a while. Repeated requests for information can also be caused by Service biologists being unfamiliar with action agency programs. High turnover among Service biologists is one factor that contributes to this problem.

In addition, the fear of litigation can also impact the length of the process; that is, action agencies and Service officials said they sometimes try to bulletproof biological assessments, or make them so comprehensive that they will be immune from legal challenge. This adds to the time and cost of consultation.

Action agency officials also expressed concern that Service and action agency roles are not clearly defined. Some action agency officials told us that Service biologists sometime recommend changes to Agency's proposed activities beyond what action agencies think is necessary to minimize the negative effects on species.

In response, Service officials say that the purpose of the consultation process is to discuss the potential effects of proposed actions early in the planning process and to explore options that will avoid jeopardy.

Service and action agency officials also identified a lack of sufficient resources, particularly at the Services, as a key concern. They said that the staff level increases have not kept pace with their growing work loads.

Among the non–Federal parties, permanent applications express concerns about the time and expense required for the consultation process. For example, the average permit processing time for 19 permits issued in 2002 for building private docks, or for similar activities on Lake Washington near Seattle, was more than 2 years, and added about $10,000 to applicants' costs.

Finally, environmental advocacy groups expressed concern that the consultation process, like other land management decisionmaking processes, is closed to them until decisions are final. Accordingly, they feel that their only avenues for voicing their concerns are through administrative appeals and lawsuits.

In conclusion, Mr. Chairman, may I say that everyone involved in this process is supportive of the goals and the intent of the Endangered Species Act. All would agree that consultations are a key component of this process. Continued efforts must be made by the Services and the action agencies to find more and better process, effectiveness, and efficiency improvements for consultations that help achieve the proper balance between action agencies being able to fulfill their missions, while protecting threatened and endangered species.

Mr. Chairman, that concludes my statement. We would be happy to answer any questions that you or any other members may have. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered.

Thank you very much, Mr. Hill.

The first question I have relates to the time lines that you show at the top of your chart. Could you go over again with me just what the language is in the statute or the regulations that establishes these time lines?

Ms. MCCLURE. The only statutory timeframe is for formal consultation. That is 135 days for the entire process. The Service policy to deal with informal consultations is 30 days. But both of those clocks start ticking once the Services decide that they have enough information from the action agency to determine whether the activity will have an effect on species or its habitat.

Senator CRAPO. It is that point that I wanted to go into. The Service gets to decide when the clock starts going. Is that something that is in regulation or in statute, or is that just a procedure that the Services has adopted?

Ms. MCCLURE. It is a procedure that the Services have adopted to implement the statute.

Senator CRAPO. The statute contains the time deadlines that we talked about. The reason I go into that is because I certainly cannot say what was in the mind of those who wrote and voted for the statute, but it would seem to me that they had an idea in mind that there would be a deadline. If the timing of the deadline does not begin until the Agency performing the consultation decides that it will begin, then it appears to me that we have a problem from the git-go with regard to establishing some kind of a timeframe within which we must operate.

Would you like to comment on that?

Mr. HILL. Well, I think what you are saying is true. But just to provide some balance to this, I believe the controversy is occurring over whether or not the biological assessment is complete. That is a key point. That clock cannot start ticking until that assessment, in the eyes of the Service agencies, is complete. I think you have to be careful here in terms if you expedite that process, already there are concerns about the lack of scientific data and information that is being used to come up with these biological assessments.

There has to be a balance here to make sure that the action agencies are doing a good job on those biological assessments in using the best available data that they have and doing that in a way that can be done a little quicker and more streamline. In that way, you can get to the point where you have a biological assessment that is ready to go into this formal or informal process.

Senator CRAPO. This is not a new problem. It comes up in other contexts. I first ran across this before I became a Member of Congress when I was working on permitting processes and the like. There were time lines for applicants for environmental permits, but the time lines never start running until something is decided by an Agency. That something is never decided by the Agency, or decided months, if not years, after the process is begun.

When I evaluated it at that time, it became evident that if you were to put an actual firm deadline on the Agency, then what they would simply do would be just to deny the permit and say. "We do not have enough information; so we cannot approve it. You can make your application again. We will deny it again. You can make

it again and we will deny it again until we feel like we are ready to grant it."

The argument being made was, and always is, that we do not have enough information to adequately evaluate the permit. It is a serious problem. You raise a valid point.

The question I have is this. This is a creative thinking question. How can we address this problem? If we want to find some way to put some time parameters on the actions that we require of our agencies—not just in the environmental arena, but in any arena—how can we approach it? Have you given that any thought?

Mr. HILL. We are auditors by nature. We look for data. We look for evaluations. That is what is lacking here. No one really has any good information as to how long this entire process actually takes, or why it is taking so long. There is not a lot of data out there that really indicates when the initial contact is made to the Service agencies in terms of an action agency coming in and saying, "I have a project. I want to talk with you about it and enter into these informal consultations."

There is not a lot of data out there that really indicates just how long that process takes. You hear the horror tales now and then, but we do not know how prevalent that is. More importantly, without that kind of data and without that kind of evaluative information, you really do not know what is broken in that front end. That is where I think there could be some gains made in terms of shortening that front-end process, that once the clock starts ticking, that is a pretty set timeframe.

Senator CRAPO. We hear the horror stories, but that we really do not know how prevalent that is. In terms of the analysis that you made in focusing on the Northwest, do we get a feel there out of the data that we studied there as to how prevalent these long delays and problems are?

Ms. MCCLURE. We have some data on that which we are still analyzing. The problem is that some of the data bases that the Services maintain do not capture key points in time that you would need to evaluate how long the process is. We did gather data from service and action agency officials that can speak to the process of how it has changed over time.

In terms of consultations in the 1998 and 1999 timeframe, we have heard a lot of concerns through 2002, where they have had the benefit of some of these improvement efforts, like programmatics and streamlining. Folks do indicate that the timeliness has improved as a result of some of the improvement efforts. We will get into that in more detail in our full report.

Senator CRAPO. You heard my opening statement in which I referred to a memo that was sent by the then regional forester, Jack Blackwell, where he indicated that he could not adequately convey the level of frustration, anxiety, and feelings of helplessness that were occurring within the Forest Service at that point, in terms of trying to work through the consultation process.

In a follow up memo, he was reporting back to the Chief on some of the information that they were trying to glean as they tried to implement these streamlining processes that you have talked about. From the tenure of that memo, I get the feeling that, at

least in this context, it was not felt that there had been a lot of success.

One of his examples was that he reports what some of his people are reporting to him. He says in other forest reports that "The streamlined consultation is an oxymoron. This forester says the terms implies a fast, or at least a faster approach to what existed previously. They say the current process was developed because we had reached gridlock in consultation."

I guess if we have improvement over gridlock, that is good. What I am getting at and what I am hearing you say is that we do not have enough data to answer the question. How broad based is this frustration? Are the streamlining processes working? Are we talking about a limited number of horror stories? Are we talking about a pervasive problem that is causing the agencies to approach gridlock?

Do you have any further response to that?

Ms. MCCLURE. In the three States that we looked at, as you know, the Forest Service and the BLM are the only action agencies that do streamlining. The vast majority of the individuals we spoke with in those Agencies, and the Services that service those agencies, felt that streamlining was working well and was improving how consultations were working.

There was one exception in Idaho were things were not working well. The individuals we spoke with seemed to think that the problem was personality driven, and that the process was not being implemented as it should be. There is a process of the ground level biologists who serve on what are called Level I teams. They are really the ones who do the grunt work and try to make the decisions and work through issues.

When they cannot resolve issues amongst themselves and they cannot proceed with projects, they are to elevate that to their managers, to what is called a Level II team. That was not happening. You did have projects that were gridlocked.

Senator CRAPO. That is exactly what is further referenced in this memo. When you said there was one problem in Idaho, was Idaho the problem or part of Idaho was the problem?

Ms. MCCLURE. A part of Idaho was the problem.

Senator CRAPO. OK. One of the things that was mentioned in this memo was the point you just raised, and that is that there was a reluctance or a failure to elevate this from Level I further up the chain, for various reasons. The speculation is that people did not want to admit that it was not working, or that there was a concern that there may be some retribution or something like that, if they were to elevate the decision.

Is it your understanding that this particular problem is not pervasive?

Ms. MCCLURE. There does not appear to be gridlocked consultations like there is in this one location in Idaho. We did hear from other individuals involved in the streamlining process, though, that there is some hesitancy to elevate issues to managers. There is that fear that, "This is not working and we failed." There is some level of concern in other offices, but it is not gridlocking the process.

Senator CRAPO. There is something about this consultation process that is out there that is causing an element of concern. This

is not the first time this committee has addressed this issue. I am told that in the past they were not able to get enough witnesses willing to come forward to talk about it so that they could hold a full hearing. In terms of getting this hearing put together today, there are a lot of people that did not want to talk.

I am assuming that this is in the public section. These are people who have a consultation on a project they are involved with and who do not want to be irritating anyone at the Agency who may be evaluating their projects by saying what their frustrations are with the project. I am assuming that is the kind of dynamic that we are dealing with.

I can tell you that we had to go through a tremendous amount of effort to get people who were willing to come forward and talk with us today. I am a little worried because of that, that perhaps we are not getting a full story about what is happening in terms of the implementation of this. I am assuming that you are continuing to evaluate this. I would encourage you to keep that in mind and perhaps be prepared to evaluate that aspect of this with us, if you can get a feel for it as you conduct your analysis.

Mr. Hill, aside from the significant increases in the number of listed species, which is obviously going to increase the number of consultations, are there other reasons why the consultations have increased over the past few years; do you know?

Mr. HILL. Well, the listing, particularly in the Pacific Northwest, is a major factor. You have a number of species listed in the late 1990's that have habitat areas that are so far reaching that just about any activity you are going to be doing there that is close to the rivers and steams, is going to be examined closely. That was a significant factor.

Another factor certainly is the fear of litigation. There is a lot of concern, quite frankly. There has been a lot of litigation and there has been a lot of court decisions. If you look back in time, I believe the action agencies in the past had more of an inclination to basically look at their proposed action and determine that t would not have a negative effect. They would then go ahead without even having a consultation.

Now, because of the litigation that is occurring, I think there is more of an inclination to play it safe. If they make that determination, there is no effect and it is later found out to have an effect, they are responsible. They are liable for that action.

Senator CRAPO. Are they personally liable for that; do you know?

Ms. MCCLURE. Personally, or as an Agency?

Senator CRAPO. Personally.

Ms. MCCLURE. I am not clear on that. We could check on that.

Senator CRAPO. If you would, I would appreciate that.

Without objection, so ordered.

Senator CRAPO. Go ahead.

Mr. HILL. In order to play it safe, I think right now what you have is, because of the fear of litigation, that they are going to go through this consultation process and consult with the Service agencies. At that point, the liability shifts from them to the Service agencies. So I think you are seeing more of an increase in consultations from that standpoint as well. It is also adding to the problem of the nature, size, and risk of the projects that are coming into the

system. There are many more "low risk" types of projects that are going through consultations than the major actions that I think you were seeing earlier on.

Senator CRAPO. Tell me a little bit about what qualifies as an action, or whatever the proper term is, that then has to be evaluated?

Ms. MCCLURE. Virtually anything. Any proposed action, even a beneficial action, the action agency has to decide whether it may harm, or jeopardize the continued existence, or adversely modify its critical habitat.

Senator CRAPO. I know that you used examples in your testimony of construction of docks on private property, or the like. In the materials I have here, I have things such as grazing, road or trail maintenance, fire suppression, recreation projects, and noxious weed treatment. They even have firewood and Christmas tree cutting.

When I look at the statistics of 14,004 consultations just in this one region, of which 13,141 were considered to be in the category of discountable, insignificant, or completely beneficial. Are we getting to the point where we are throwing the net too broadly, that we are creating too broad a focus and diverting resources away from what could be a more beneficial use of these dollars and personnel in terms of species protection?

Mr. HILL. That is a hard question to answer. Here again, there is not a lot of good data and information to base that on. There is not a lot of information in terms of the benefits of this consultation process. The purpose of the process is to sit down early and discuss the particular project, to explore options or whatever, and to basically avoid the jeopardy, the negative effects. To the extent that that is occurring, because of the consultations, we really do not have a good handle to what extent that is happening.

Senator CRAPO. That really is the core question.

Mr. HILL. Right. That is the kind of information that I think needs to be collected. Where do you have instances where the consultation had a happy ending, a positive effect here, and that we were able to avoid some type of negative action because we had an early consultation and we were able to work it out before this project got too far?

Senator CRAPO. Are you evaluating that question as you continue your study?

Mr. HILL. Here again, there is really no data to go out there. I do not believe that we are going to be able to capture that in the work that we are doing.

Ms. MCCLURE. We can capture the amount of information that is out there and what is being done, but we will not be speaking to the benefits of the process.

Senator CRAPO. As you are aware, I am sure, this committee is also looking at the problems that we face in designating critical habitat. It was the Fish and Wildlife Service that said that they were out of money and that they do not do the critical habitat designations anymore. I see a statistic here that the number of personnel doing consultations in the NMFS in the Northwest Region, went from six to 120.

I am thinking about where we are putting our resources in endangered species protection. I am wondering if there any way for

us to construct a study that would enable us to answer this core question. If the consultation process, as voluminous as it is, is making us much better at avoiding harmful impacts to species, then there is a benefit there.

If instead it is causing us to spend significant resources evaluating whether a dock can be built on private property, or whether a Christmas tree can be cut, after it has been evaluated by the personnel managing it, then I have a hard time justifying that kind of extensive utilization of resource, when we could be utilizing resources in other parts of the Agency.

I think you have answered this, but I want to ask this again. Is there a way that we could construct a study to get at that question?

Ms. MCCLURE. You would have to look at the benefits. You would have to get into the benefits. I think you would also need to address the legal vulnerabilities, or the legal authorities and requirements under the Act. I think the Senator raised the issue this morning that we did not know it would go this far and wide when we signed the Act back in 1973.

I think there are several different pieces of analysis that need to be done that could certainly get us closer to where we are right now in answering that question.

Senator CRAPO. Thank you very much.

In Idaho, I am told that we are now facing a situation where just the time line that we are talking about here, is getting drawn out for all the reasons you talked about. We hear about the litigation aspect of it a lot. That time line is interfering with projects that are going to have a very beneficial impact if we can just proceed with them; for example, reconnecting stream channels that have become disconnected and impeding fish passage and migration and rewatering streams that have become dewatered.

One of the concerns that I have is that we are losing opportunities to put our resources where they count and to engage in activities that will enable us to improve circumstances for species.

That is not really a question. It is just a commentary of the frustration that we are facing here as we look at some of these statistics.

Mr. HILL. If I could interject, we did some work last year on the Columbia River Basin salmon and steelhead. We ran into that situation with regard to some of the projects that the Forest Service was trying to do, particularly culvert replacement. Some of this work is very seasonal. It can only be done during certain times of the year because of the weather or because of the spawning habits of the fish.

They raised that as a problem in terms of their inability to get these culvert projects approved within a timely way. They were delayed to the point where they missed their window of opportunity to do the work. Here again, it was a beneficial project. They are trying to open up the fish passages, basically, by replacing these culverts. They missed their window of opportunity. The project basically slid for a year, and in some cases it was 1-year money. They lost the money, and in essence, they had to go back to the drawing board.

It can have some significant effects if this thing is not done in a timely way for some projects.

Senator CRAPO. I appreciate your making that point. Again, we run into this constantly. It happens whether it is in terms of forest management, water management, fish issues, forestry issues, or the like. Often in the Northwest we have a very limited timeframe within which we can operate, as you indicated. A couple of months of delay can result in a year's lost time. That is one of the reasons that we are talking about this.

Let me ask one other question and then I will turn to our chairman for his questions.

Have you looked at the question of whether we are requiring the same amount of documentation and consultation for small projects, or projects that are considered not to have significant impacts, as we are for larger projects and those which have significant potential impacts? In other words, are we requiring the full load for every kind of project?

Ms. MCCLURE. I do not know if it is a equal load, but certainly we heard concerns, again going back to the fear of litigation, that even for simple projects the amount of documentation required on the part of the action agency is increasing and can be fairly significant.

But most officials we talked with said it went back to this fear of litigation, that even on the part of the action agencies, that they feel compelled to bulletproof, or feel ensured that they have covered all of their bases, that they would be immune from a legal attack.

Senator CRAPO. In this memo, I want to find out how broadly the facts in this memo apply, but one of the points that was made in here is that as a result of what you have just described in that effort to try to bulletproof things, and protect against liability or responsibility for any problems, that our personnel are now spending more time in the office than they are in the field.

Again, it gets back to the point that I have made several times and that is, are our resources being applied as effectively as they should be in terms of the management of our resources and the protection of species.

Mr. Chairman, do you have questions?

Senator INHOFE. Mr. Chairman, I do not. While I was attending the Armed Services Committee hearing, I am sure that anything I would ask would be redundant of what you have already asked. I notice that we have a sizable third panel.

I have no questions.

Senator CRAPO. All right. Thank you very much.

In light of the time constraints under which we are operating, I am going to excuse you. Again, I am hopeful that we will be able to continue this discussion, as you continue your evaluation. Ultimately, I hope you come back with an answer to that $64,000 question that we identified together here, and that we can find a way to evaluate whether this is actually doing its job and being worthwhile, or whether we are diverting resources in a very significant way away from species protection. Thank you very much.

I would like to call our third panel now. Please come forward as I am introducing you. Our first panelist is Alan Glen, Counsel, Smith Robertson, Elliott, and Glen; John Kostyack, Senior Counsel;

National Wildlife Federation; Patricia Horn, Vice President and General Counsel, OGE Enogex Incorporated; Jim Chilton, Arizona rancher, on behalf of the Public Lands Council and the National Cattlemen's Beef Association; and William Snape, Vice President and Chief Counsel, Defenders of Wildlife.

We have had some of you with us before. We appreciate your coming back again. For those who are here for your first time, we appreciate your being here.

Let me lay down the one big ground rule. That is, follow the clock. We do have your written testimony. We have reviewed your written testimony. It will be a part of the record. We do ask you to summarize what you have to say in the 5 minutes which will be allocated to each of you so that we will have time to engage with you in dialog and some questions.

I always remind the witnesses of this. I am confident that when your 5 minutes is up, you will not be done saying what you want to say. I would ask you to wrap it up at 5 minutes. If you tend to go a little longer, I will rap the gavel here just to remind you.

You will have an opportunity in the questions and answers to get a part of the rest of what you want to say. We will give you an opportunity to supplement the record if you feel you really did not get to say everything.

With that, let us proceed.

Mr. Glen, you are first.

STATEMENT OF ALAN M. GLEN, COUNSEL, SMITH, ROBERTSON, ELLIOTT, AND GLEN

Mr. GLEN. Thank you, Mr. Chairman, and Senator Inhofe.

My name is Alan Glen. I am a private lawyer from Austin, Texas. Much of my work is in the Endangered Species Act field, and a much of my time is spent representing clients through the consultation process. Most of my clients are in industry. I also represent a number of local governments, including cities, counties, and school districts.

Mr. Chairman, I am going to echo some of the concerns that you raised in your opening remarks in three areas of the consultation process. I will mention that I do think the consultation process can be efficient and can be beneficial, although it often is not.

Since my testimony focuses on problems, I will mention briefly two laudatory examples that I have been involved with. One was for Williamson County, Texas, where a very efficient consultation process resulted in the approval of a road program. The other was for a school district where a desperately needed high school got through the consultation process in record time and was able to go forward.

Unfortunately, problems do remain. I will touch on three specific areas.

First, there seems to be a trend toward the lowering of the threshold for consultation, in other words, the trigger point that leads to consultation. This trend is occurring not only on a case-by-case basis, but by broad actions by the agencies that tend to pull numerous projects and activities into consultation that in my view should not otherwise be there.

I provide in my testimony two examples of that. The most notable and current is the cactus ferruginous pygmy owl guidelines that are applicable in Southern Arizona. These were consultation guidelines adopted as a result of litigation by the Corps and the Fish and Wildlife Service. They have the effect of lowering to an infinitesimal small level the threshold for consultation. This means that we are going to get exactly what you talked about in your opening remarks—the thousands of consultations on projects that will cause a lot of time, a lot of money, and with very, very little conservation benefit for that consultation.

There were a similar set of guidelines adopted in Austin relative to the Edwards A Aquifer and the Barton Springs salamander. We have litigated those on behalf of the National Homebuilders Association, and reached a settlement by which they were withdrawn.

Next, I will mention the issue of delay. I will observe that there are good Federal regulations under the Fish and Wildlife Service relative to what the information standards are to trigger consultation. In my experience, though, those regulations are often not followed. By the way, the cite, I believe, is 50 C.F.R. 402.14(c), which lays out what is required to initiate consultation.

In my experience, the lengthy delays are oftentimes associated with the Agency wanting much more information than is achievable or obtainable during the 135 day consultation time clock. Unfortunately, the regulations specifically disallow the Agency to require surveys beyond the timeframe allowed.

What tends to happen in practice, though, is that the Agency starts to sell time. There are quite explicit trades where we will let you out of this process in 30 days if you add to your project these things. The Agency in some instances has called this an alternative process by which you pay mitigation in order to get a quicker turnaway. This mitigation, in my view, is often at the end of the day not justified under the law or the applicable science. It sets up a mechanism by which the Agency is extracting merely for the speed of processing.

Last, I will mention the utilization of draft jeopardy opinions. The statistics are good. There are thousands of consultations and very few jeopardy opinions. In my personal experience I have seen a number of actual draft jeopardy opinions. I cover two of those in my written testimony. I have been threatened to receive many of those.

The impact of that and other things that happen earlier in the consultation process, cannot be reflected in the statistics, but it is very significant. There are projects that make enormous concessions along the way and spend an enormous amount of time and money doing the scientific research, and then ultimately receive non-jeopardy opinions. The statistics of what that cost and what that involved is not reflected in the statistics that can be gathered by the GAO.

With that, I will conclude my remarks. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered. Thank you very much, Mr. Glen. Mr. Kostyack?

STATEMENT OF JOHN KOSTYACK, SENIOR COUNSEL, NATIONAL WILDLIFE FEDERATION

Mr. KOSTYACK. Good morning, Senator Crapo and Senator Inhofe.

Thank you for the opportunity to testify.

I would like to make three observations based upon our 30 years of experience with Section 7 of the ESA, and my 10 years of experience working with this provision. I would like to also provide three recommendations for the future.

First, the big picture question: Is it worth all the trouble? There has been a lot of discussion that there is a lot of time and delay associated with Section 7, and unclear benefits. My organization's experience, and the commonly held view of people I work with in the conservation community and the scientific world is that there are immense benefits.

Section 7 provides a crucial opportunity for the Government to look before it leaps into potentially harmful activities. It accomplishes a great deal for species conservation, despite a modest investment in resources. We would say that any reduction in conservation activities would be at the expense of listed species.

I can give you a long list of examples and places around the country today where Section 7 is the key driver behind long overdue conservation actions, from the Klamath Basin, to the Missouri, and to the Rio Grande. There are many ecosystems where fish, wildlife, and plant species are at the brink of extension.

Without the Endangered Species Act, Section 7 provisions, the species there such as the coho salmon of the Klamath, and the pallid sturgeon and piping plover on the Missouri, and the silvery minnow on the Rio Grande would have no hope.

The second observation I would like to make is that we get these benefits from Section 7 regardless of whether jeopardy or adverse modification is found. In fact, the vast percentage of consultations go forward with the Agencies sitting down, working collaboratively.

We want to avoid, if possible, jeopardy and adverse modification findings. That means that the process has broken down. The general story and the history of the Endangered Species Act is that these solutions are worked out in a collaborative sense, win-win solutions result, and projects move forward after adjustments are made to avoid unnecessary harm to fish, wildlife, and plant species.

This should not be characterized as a failure of the Act. You can go across the country for examples of these win-win solutions. I have listed a number of them in my testimony. I will give one right now.

If you go down Alligator Alley in Southern Florida, you can see the wildlife underpasses beneath I–75. That was the result of a Section 7 consultation concerning the endangered Florida panther. As a result, we have avoided unnecessary vehicle collisions with the panther, the No. 1 cause of panther mortality. That project went forward fairly smoothly, while having this immense benefit for a critically endangered species.

The third observation I would like to make is that the vast majority of ESA consultations are streamlined. There have been many suggestions that people are being burdened with extensive delays and paperwork. But if you look at the record, roughly 97 percent

of Fish and Wildlife Service consultations between 1996 and 2002, were resolved informally.

An informal consultation, as a general proposition, means a single phone call or a single letter. I have seen many of these concurrence letters written by the Agencies. They are essentially one paragraph long. They do not entail many resources at all.

Yet, we can receive significant conservation benefits from these informal consultations when both the wildlife agency and the action agency agree to make project modifications to reach this "no adverse effect" finding.

Let me turn to my three recommendations very quickly. First, we really truly need a formalized program for tracking the Section 7 process. The only way to systematically evaluate the performance of Section 7, and to ensure that this key part of the law works as effectively as possible, is to have a rigorous monitoring program.

Right now there is little systematic collection of data. Virtually all the information we have heard is anecdotal, or we gather statistics that are not necessarily very meaningful, such as how many no-jeopardy or jeopardy determinations have been made. That really does not tell the story of what kind of conservation outcomes we are receiving.

Looking simply at the pieces of paper that result from consultation alone will not be enough either. You need to follow through on the outcomes of these consultations to see whether these conservation measures are truly being implemented, and what have been the barriers to implementation. All of this data should be collected in a systematic fashion and it should be posted on the internet for public review, debate, and discussion.

The second recommendation is that we really and truly need to provide better funding to enable these wildlife agencies to respond to their ever-increasing workload. We have heard a lot about delays which is a legitimate concern. We really need to get to the heart of the problem, and that is inadequate staffing and funding of the Agencies. In addition to reducing delay, this also ensures that the Agencies have better ability to marshall the best available science.

There have been ESA funding increases in recent years and they have been significant in terms of percentages. But if you look at the rate of increase in the work load versus the rate of increase in funding increases, they do not compare.

There is one example that I was able to pull out in a quick analysis. In the past 7 years, the number of formal consultations that were handled annually by the Fish and Wildlife Service has grown fivefold in the past 7 years, while the consultation budget has only grown threefold.

The third recommendation is perhaps the most important thing I can say today. Congress really needs to reject the new initiatives we are seeing from the Administration to essentially weaken the consultation process. The two most significant examples I can give you are:

One, in January of this year, the Administration proposed a rulemaking for EPA that would allow that Agency to make its own "no adverse effect" determinations with regard to pesticide registrations.

Similarly, just a week or two ago, the Administration proposed to allow the Forest Service and three other land management agencies to make its "no adverse effect" determinations with respect to logging under the National Fire Plan.

With respect to both of these kinds of movements and changes in the ESA policy, the result is that the Fish and Wildlife Service and NOAA Fisheries have reduced ability to protect listed species from threats that are well known. They have reduced the ability to insert their expertise into the process.

I thank you for the opportunity to testify. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered. Thank you, Mr. Kostyack.

Ms. Horn?

STATEMENT OF PATRICIA HORN, VICE PRESIDENT AND GENERAL COUNSEL, OGE ENOGEX INCORPORATED

Ms. HORN. Thank you, Chairman Crapo.

I appreciate the opportunity to be here in front of this committee. I appreciate your leadership on this subcommittee and the committee. I especially appreciate Senator Inhofe on his work and commitment to Oklahoma.

I am Vice President of Enogex, a pipeline company in Oklahoma. We are a natural gas pipeline and energy company. We do most of our work in Oklahoma and Arkansas. We are the tenth largest pipeline in the United States, so we do have a significant presence in those two States.

The Company takes great pride and responsibility regarding environmental performance, accountability, and stewardship. Let me say we seek to achieve a balance between our dual responsibility to protect the environment and deliver reliable, safe, and reasonably priced services to our customers.

My testimony today will cover some of the experiences that the company has experienced in the consulting process, both on a historical basis and a current basis. Basically let me tell you two background points.

The company is a natural gas pipeline company and it connects natural gas wells that are completed and are capable of producing in commercial quantities. The owners of the gas are trying to get it to the market place—a time-sensitive interest by the owners in getting natural gas to the community.

The issue that has come up is an endangered species called the American Burying Beetle. I would like to talk a little bit about that species. It was listed as endangered in 1989. At that time it was only found in two States—Oklahoma and Rhode Island. In 2002, a snapshot was taken, and it is located in seven States.

It is in 17 Oklahoma counties, in the Eastern part of the State, and four counties in Arkansas. It is a large beetle. It is distinctive. It is a habitat generalist. It feeds on carrion. It operates in two different seasons of the year which gets to be critical with our construction practices. It is active during May through September, and inactive from October through April 1st. An interesting fact is that it can travel two miles per night. It is a quite mobile little beetle.

I would like to talk about our historical clearance process. Informal consultation has actually been very favorable. Since 1989, continuing up to 2002, our consultations with the Fish and Wildlife Service have resulted in favorable clearances, either no presence of the beetle in the counties that I talked about, or no impact to the beetle by our proposed construction.

Again, the timing that we are involved to do business is as follows. We go out and negotiate with producers who do not know when they drill a well whether it is going to be commercial or not. Once it is determined it is going to be producible in commercial quantities, we have to get out there quickly, construct the pipeline, and get that gas to market.

The history that I discussed with you has been important that we knew predictability. We knew by going to the Agency we would get a result. Some of the results came in as few as three or 4 days, and we would get clearances. Other times it was up to 30 days.

So again, the history has been favorable. We were surprised in 2002 when there was a real change to the procedure that we were required to go through, without a change in science, without a change in any of the data that we could find, that would really justify the change that we were required to go through.

In July 2002, we were told by the Agency, "OK, if it is an inactive season, get out there, do your construction. There is no problem. If it is during the active season when we were going to be out, then you could gate off the right-of-way." Again, not a problem.

A complete reversal of that happened in October. In October we went in with two clearances with two big producer wells, Chesapeake Energy and BP Amoco. We were trying to connect those two wells. When we sought our clearances, the Agency determined, "We do not have enough information. You are not going to be able to connect this well until you go out and do a survey of whether the beetle is present or not."

October is the inactive season. We could not do a survey until May. We were stuck with having a well that needed to get gas to market, but we could not connect until we did a survey that the beetle would not be active. We began a very aggressive communication with the EPA, which was the permitting agency here, and with the Fish and Wildlife Service. A stormwater permit was what we were required to get.

We were trying to negotiate with them to enable us to do the work for our customers and move forward. A lot of information was requested. This was a daily process that we were involved in. We were able to get the information in. We requested this in September 2002. We received a final biological opinion at the end of January 2003.

We were held up in that process. By that time we got a biological opinion—I am not going into all the problems of whether the biological opinion was justified or warranted; I am trying to set out the timing for this committee to understand. Again, this biological opinion is probably not warranted or justified, but we moved forward with trying to do that in this instance to try to connect the wells and get the process done. We do not want to be bound by that, when there is not the science, when there is not the balance being looked at, before going forward.

I want to talk with you just a little bit about the effects of these two wells. One well we lost to competition. We were not able to connect that well. We lost a million dollars in revenues over the life of the well. The producer lost $2 million by not being able to timely connect the well. As you know, gas prices are volatile and based upon not being able to connect that well during the time when prices were rising, resulted in that loss.

We were able to construct and connect the other well. Again, $2.5 million was lost in this delay and $150,000 to Enogex. Overall, we are looking at $5 million as the economic ramifications of that one instance that I wanted to point out for this committee.

You raised an interesting point. Are you worried about testifying here, Ms. Horn, because of ramifications to you? I will tell you that is one of the things that I have questioned. I want to have a good relationship, and the company wants to have a good relationship with these Agencies. I am here only to present the problem and to get resolution. I am not here for any other purpose.

When we look at this and try to determine how we are going to move forward, we think the Fish and Wildlife Service is casting the net too widely. It is not based on sound science. There is no evidence at all that prior construction activity, 75 years of oil and gas operations in this area of the State, has caused any detrimental effect to this species.

Until we have that information, and until we determine why these species deteriorated, and why now it seems to be building back, we cannot go in and make any justifiable decisions about what should be done when the real intent here is to protect that endangered species.

Again, we are looking for reasonable and predictable procedures. We are looking for sound science. We are looking to strike a balance between preservation and business timing ramifications that we have encountered here.

Senators we request your consideration in helping to resolve this issue. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered. Thank you, Ms. Horn.

Mr. Chilton?

STATEMENT OF JIM CHILTON, ARIZONA RANCHER, ON BEHALF OF THE PUBLIC LANDS COUNCIL AND THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION

Mr. CHILTON. Good morning, Chairman Crapo, and Senator Inhofe.

My name is Jim Chilton. I am a rancher from Arivaca, Arizona. My family started ranching in Arizona in 1888. My family first started ranching in the Arivaca area in 1987. Arivaca, however, goes back much further than that. Father Keno put the town on the map in 1695 when it was the center for cattle grazing he brought with him from Mexico.

My father, brother, and I run approximately 1,250 head of cattle on 85,000 acres of very good land for a semiarid area: 48,000 acres are Arizona school trust land, 35,000 acres are forest land, and 2,000 acres are private. We are among the 23,000 permittees who

manage livestock to harvest annually, renewed grass resource grown on Federal lands.

I appreciate the opportunity to be here today on behalf of sheep and cattle ranchers, and members of the Public Lands Council and the National Cattlemen's Beef Association. Every day is earth day for the men and women of the cattle industry.

My story involves this. Federal land management agencies seriously misapplied the Endangered Species Act to the land and my Federal allotments. This struck me as deeply unfair. I was not willing to accept the judgment of their actions without a fight.

I have spent countless hours and about $375,000 on lawyers, respected range scientists, bringing in soil experts, and assembled the best site-specific data to correct faults and misleading information stuffed into my file by the Forest Service and put in my record. After those expenditures, the record shows that my grazing allotment is in good to excellent condition, and is in an upward trend.

In 1997, the Forest Service removed 20 acres from my Montana allotment. It is an Arizona allotment. It just happens to be called Montana. They removed 20 acres from California Gulch. That is a dry gulch that runs into Mexico. Our range is right on the Mexico border. This was over a Mexican minnow, the Sonora chub.

In 1998, a Forest Service fish biologist asserted that grazing on my Forest Service allotment was likely to adversely affect the minnow. The adverse call was astonishing, since there was no water in the gulch nine to 10 months out of every year.

The June 1990 issue of the Southwest Naturalist described the Sonora chub as abundant in Mexico where the chub dominates its 5,000 square-mile watershed. The fish was listed only because its range barely extended into the United States and one canyon east of my ranch. Any minnows that swim up across the international border onto my ranch are truly wetbacks. They die when it dries up.

In a similar vein, the Forest Service botanist concluded in 1998 that cattle grazing on the allotment was likely to adversely affect the lesser long-nosed bat, a listed species, even though the bat had never been on the allotment. Relying on his biologists, the Forest Service supervisor signed a biological assessment in November 1998 asserting that grazing would harm the minnow and the bat.

Once the consultation process commenced, the Forest Service refused to allow me or my representatives to participate in the process. We were excluded even though we had applicant status. The final biological opinion of the U.S. Fish and Wildlife Service in April 1999 ignored my comments to the draft biological opinion.

The final biological opinion included an incidental take statement with owners' terms and conditions which regulated my grazing allotment. As a practical matter, the Fish and Wildlife Service and the Forest Service added an estimated $25,000 to managing my allotment.

Fortunately, a Federal District judge in a court decision struck down the biological opinion in 2000 as arbitrary, capricious, and unlawful. The District Court concluded that the species had to be present before the Fish and Wildlife Service could issue an incidental take statement and promulgate land use control and terms.

The Forest Service and the Fish and Wildlife Service cannot regulate grazing based on potential or suitable habitat.

Senator CRAPO. Mr. Chilton, we just had three stacked votes called, which means we are going to be interrupted for a significant amount of time. Senator Inhofe and I have just discussed this. We are going to have to ask you to wrap your testimony quickly, and have Mr. Snape wrap up his testimony as quickly as he can.

We are going to stay here for another 15 minutes. We are going to have to wrap up the hearing. We apologize for that.

If you would not mind, Mr. Chilton, could you wrap up your testimony?

Mr. CHILTON. I traveled 3,000 miles to be here.

Senator CRAPO. We hear you. We will seriously consider your testimony. I have read your written testimony as well.

Mr. CHILTON. The bottom line is this. Not only did the Federal judge declare the biological opinion arbitrary, capricious, and unlawful, but the Forest Service decided to redo the consultation process. The word went around. "Well, that was just one Federal judge's decision."

We appealed it to the Ninth Circuit Court of Appeals. The Arizona Cattlegrowers v. the United States Fish and Wildlife Service and the Center for Biological Diversity. We won.

The Federal court said that the biological opinion was unlawful, arbitrary, capricious, and the Fish and Wildlife Service lacks the authority to impose terms, conditions, and land use regulations on listed species on the land where the species are not found. In other words, the species has to be there before the Fish and Wildlife Service has the jurisdiction.

Affirming the lower court's ruling, the Court determined that the Federal agencies had the burden of proof to determine if the species existed on a grazing allotment.

Furthermore, the Court ruled that even if cattle grazing occurred in the area where the listed species exist, the U.S. Fish and Wildlife Service must prove that cattle grazing will actually kill or injure the species.

I will conclude by saying that we need sound science. We need good science. Science starts with disinterested evaluation of species listing proposals by objective scientists using peer reviewed science. We would like to see the ESA be amended to require the National Academy of Sciences or some other reputable third party to delist species or list species, and to review biological opinions and designated critical habitat. If we had had proper science, the Sonora chub and the lesser long-nosed bat would never have been listed.

Thank you. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered. Thank you, Mr. Chilton.

Mr. Snape, I apologize to you. I would ask you to be as brief as you can. I promise you that we will thoroughly evaluate your testimony.

STATEMENT OF WILLIAM SNAPE, VICE PRESIDENT AND CHIEF COUNSEL, DEFENDERS OF WILDLIFE

Mr. SNAPE. Thank you, Mr. Chairman, and Chairman Inhofe.

Thank you for allowing me to testify. I am testifying not only on behalf of the Defenders of Wildlife, but also on behalf of the Endangered Species Coalition.

I am going to focus on the three points that I identified on the cover page of my testimony. I flushed it out throughout the rest of my written testimony, but in the interest of time I will just emphasize those three points. I will take them in turn.

The first conclusion that I made is that too frequently the focus of consultation is on mere short-term survival of the species and not recovery. Of course, recovery of the species is what I think we all agree upon under the Endangered Species Act. We may agree to disagree on many things. I imagine that we will. But we should all agree that the point of the Endangered Species Act is to recover these species and get them off the list. It is our opinion that frequently species are managed to hang on for survival, near the brink of extinction, but long-term recovery measures are not taken. The woodland caribou is an example of this.

Frequently, for many species, these consultations are not aimed at recovery. I think that is a conflict that is frequently not resolved. I think that results in litigation by both sides, or all sides, as the case may be. That is point No. 1.

Point No. 2 is that species with critical habitats tend to fare much better in consultation than species without such designations. I note here in my testimony the example of the pygmy owl and the silvery minnow. Mr. Glen and I have butted heads in Federal court over the pygmy owl. I agree with a lot of what he said, but certainly not all of it.

I will point out that the pygmy owl that a species that was listed precisely because of habitat loss and habitat degradation. Therefore, I do not think it is too much to ask for Federal agencies like the Army Corps to take every acre of its important habitat into account when they are permitting under provisions such as the Clean Water Act. I do not think that is unreasonable.

With all due respect to Senator Dominici, I disagree a little bit on that recent silvery minnow decision, I will point out only that he must be a speed reader. It is not a short opinion. It is 57 pages in the majority opinion, a 7-page concurrence, and a 35-page dissent. It is very complicated stuff.

But my bottom line with the case, and I have to be a little careful here because we are one of the litigants in that litigation, is that the case is not about taking water out of people's mouths, or out of farmer's fields, for the silvery minnow. That is not what the case said and that is not what the case held. That may be in the big picture of what he thinks is happening.

All that case said was that when the Federal Government is going to renew and implement a Federal contract with irrigation districts and with the city of Albuquerque that it must simply take endangered species into account. All the Court was saying here was that it was not convinced that the Bureau of Reclamation had no discretion or that the Bureau of Reclamation could not do anything to find any water to help the silvery minnow. The Court was asking the Bureau of Reclamation to ask these questions meaningfully.

So I disagree with the concept that critical habitat or consultation has created this crisis. This is a crisis in New Mexico that they

have known was coming down the pike and one that I think that the Bureau of Reclamation purposely stuck its head in the sand upon.

Last, the consultation process is of value not only to wildlife but frequently to human beings. As John Kostyack said, it is a provision that asks Federal agencies only to look before they leap. Frequently, as Ms. Horn talked about, in the informal consultation process, good mutually advantageous changes can occur. I do not know much about the American burying beetle, so I cannot help elucidate that particular conflict.

But frequently during the informal consultation process, negotiations and discussions occur where win-win solutions really are hammered out. The same is true for formal consultation. There are reasonable and prudent alternatives. The terms and conditions that are frequently in biological opinions almost always seek to avoid jeopardy and to find a way of moving forward.

In fact, I am going to end by picking up with the theme that Mr. Chilton left upon—and again we may have to agree to disagree on our ultimate conclusions—but we want the best science as well. I think that sometimes there is conflict between the best available science, which is the standard in the act, and peer reviewed National Academy-type science, which leads to the very delays that permittees sometimes are complaining about. That is where the conflict is frequently occurring.

As you look to ask the GAO to find more facts out about the consultation process, I would urge this subcommittee to look at the case law that has occurred over the last decade with Section 7 consultation. I think you will find lawsuits by environmentalists and industry. I think you will see environmentalists losing as much as they are winning. You also will see industry losing as much as it is winning.

I think what you are seeing is the type of common sense application of Section 7 that I think this subcommittee is searching for. It is not always as efficient as someone like Mr. Chilton would like. But I believe that it is a process that is working and one that we need to get more information on to actually fine tune.

Thank you, Mr. Chairman. I would ask that my complete testimony be included in the record in its entirety.

Senator CRAPO. Without objection, so ordered. Thank you very much, Mr. Snape.

I am going to give the rest of the time that we have for questioning to Senator Inhofe. I have a lot of questions. What I am going to do is engage my questions in writing to this panel. I would ask that you to respond in writing so that we can continue the dialog.

Without objection, so ordered.

Senator CRAPO. I apologize, but this series of votes which we could not predict is going to take us for the rest of the morning. When Senator Inhofe is done, we will conclude this hearing.

Senator CRAPO. Thank you, Mr. Chairman.

Mr. Chilton, I know when you commented that you came 3,000 miles to get here, I always feel badly. I happen to be a Republican, and I thought that when the Republicans took over we would not

have this problem, but we do. When there are votes, there are votes and we cannot help that.

Mr. Kostyack, you said that the consultation process has been streamlined. What period of time are you talking about that streamlining taking place?

Mr. KOSTYACK. Actually, I was not specifically referring to the new measures that have happened in the past four or 5 years. As Mr. Hill testified, on behalf of the GAO, there have been a number of very specific policy initiatives taken by the two wildlife agencies to streamline the process.

My point about streamlining was simply that when you have 97 percent of the overall consultations concluding informally without a biological opinion, and without the formal consultation procedures, it is a streamlined process. If you look at the regulations governing informal consultation, there is nothing in there that imposes any procedures on the Agencies, or that imposes any paperwork requirements.

My experience has been that these are very frequently resolved with a single phone call and a single page letter confirming the outcome.

Senator INHOFE. I was reading the quote that our chairman made.

Who were you quoting at that time?

Senator CRAPO. The regional forester.

Senator INHOFE. OK. There is very little difference between informal and formal consultations. Is that essentially what it said?

Senator CRAPO. I think what he was saying was that the amount of paperwork they were requiring was about equal.

Senator INHOFE. I see that during 2001, there were 46,227 informal consultation and 1,143 formal consultations. I would not want that to be construed to take only the formal consultations as evidence that this streamlining has taken place. That is not your intention; is it?

Mr. KOSTYACK. No, not at all. My point is that obviously we need follow up investigation. A large percentage of these informal consultations, from my experience, do not involve extensive paperwork.

There is a timeframe where neither Agency knows whether they are truly going to go to formal consultation. When they are in the information gathering mode, it may end up with an informal consultation required, and it may not. That point is the exact reason why we object to the Administration's new proposals for allowing the action agencies to completely take over this process and cut the wildlife agencies out.

That point is when you really need to get your arms around the data, whatever data is available. There ought to be free sharing among the key agencies.

Senator INHOFE. I would like to just ask very briefly, Mr. Glen, Ms. Horn, and Mr. Chilton, do you agree that there has been an improvement in this process? Are the trends going in the right direction or the wrong direction?

Mr. GLEN. To be honest, Senator, I think they are going in both directions. I have seen very significant improvements in some

areas, but there are recent examples that trouble me as going in the wrong direction.

An example in the wrong direction is the owl guidance I mentioned. I take issue with what Mr. Kostyack is saying about what happens in informal consultation. I mentioned in my testimony the Barton Springs salamander guidelines. Those were all resolved in informal consultation. The deal was you could get out an informal consultation if you agreed to develop no more than 15 percent of your property and you had no other real available process for a bunch of bureaucratic reasons to get out of that box. That is why those were actually litigated and have been withdrawn.

Senator INHOFE. That is very interesting.

Mr. Chilton, do you have any comments to make as far as the trends go?

Mr. CHILTON. The trends are to list more and more species using inadequate scientific information. If peer reviewed science were used, these species would not be listed. It is very important that the listing process be emphasized and that peer reviewed science be used, and that the Forest Service not make adverse calls when species are not present. They create work for the U.S. Fish and Wildlife Service. It is very inefficient. Yet, they tend to want to always want to make an adverse call.

Senator INHOFE. Ms. Horn, do you have any comments to make?

Ms. HORN. Senator, we have seen a trend starting toward this. We are seeing additional species being considered and critical habitat, and Western Oklahoma being considered for prairie chickens. We are seeing a trend for this increasing.

Senator INHOFE. In your testimony, you talk about the various requirements that the Fish and Wildlife imposed on your company to avoid jeopardizing the beetle. Can you describe some of those requirements just so we can have them in the record.

Ms. HORN. Yes, they are very much changing our construction practices. The costs are very prohibitive. One of the things that we now have to do is to employ a biologist to go out to every project that we have and do an assessment for the presence or absence of the beetle if it is in one of these counties.

We also have a lot of procedures about baiting any beetle that could possibly be there again off the right-of-way. The construction practices that we are having to follow cause more resource time and energy delay. We are having to narrow the right-of-way that we can use. We are having to stop using pesticides and different practices that are not required environmentally, but are required for the endangered species, to make sure that we are trying to mitigate any possible potential impact to the beetle that may be there.

Senator INHOFE. When you talk about biologists, are you talking about your staff people or using outside biologists?

Ms. HORN. We are having to use an outside biologist because it has to be someone who knows the history of the beetle, and also someone who has a Section 10 permit.

Senator INHOFE. I have a number of questions that I am going to submit for the record. I need to get very specific on the model that you are using for this particular beetle. There is not time to do it now.

Without objection, so ordered.

Senator INHOFE. Mr. Chilton, Ms. Horn, and Mr. Glen, we need for you to submit for the record also constructive suggestions on things that you could come up with that you think would help in this situation.

As I think Mr. Kostyack and Mr. Snape both know, I had some experience in the private sector for some 30 years and had some similar problems. I am very sensitive to some of the things that come to this committee. But I also think it is a good idea to come up with constructive suggestions for improvements.

With that, I am going to go ahead and ask you to do that for the record.

Without objection, so ordered.

Senator INHOFE. I am going to have to conclude this and adjourn this meeting. I thank you very much for coming, and particularly, Mr. Chilton, for coming as far as you did. I know there are some very serious problems out in Arizona that I am sure are affecting you right now. I appreciate your presence here.

We are adjourned.

[Whereupon, at 11:19 a.m., the subcommittee was adjourned, to reconvene at the call of the chair.]

[Additional material submitted for the record follows:]

STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you Mr. Chairman for calling this hearing today on the Section 7 consulting process under the Endangered Species Act. I am very interested in this issue, as this process has a particularly significant impact on the ground in my State of Montana, just as I know it does in yours, Mr. Chairman.

I was particularly interested in the preliminary report prepared by the General Accounting Office, I believe at your request Mr. Chairman. I was struck by the many similarities between what I have heard from my constituents and the findings in that report.

For example, the GAO points out: "Even under normal workload conditions, the consultation process can be difficult, in part because decisions about how species will be protected must often be based on uncertain scientific information and on professional judgment."

"Decisions resulting from consultations are sometimes challenged in lawsuits and responding to the lawsuits can increase workload and delay activities. These problems were magnified in the late 1990's after several fish species in the Pacific Northwest were listed as threatened or endangered."

"The new listings increased the Service's consultation workload significantly in Idaho, Washington and Oregon, and the Services were unable to respond quickly."

The Service's issues are no less compelling and complex in Montana, and Montana has a fraction of the U.S. Fish and Wildlife staff that Idaho, Washington and Oregon have to deal with its consultation workload. Montana has only 18 permanent and 5 1-year term Fish and Wildlife Service ecological services employees. These employees are responsible for millions of acres of Forest Service, Bureau of Land Management and other Federal lands, and countless activities that occur across the State on private and State lands in Montana.

Activities in Montana that could potentially or actually impact endangered, threatened or other sensitive species include: timber harvests and hazardous fuels reduction projects, irrigation development, coal mine development and expansion, new or expanded coal and gas fired power plants, new hydroelectric generating facilities, highway projects, airport facilities, sewage treatment plants and cellular tower placements. Many if not all of these activities could require some level of consultation with the Fish and Wildlife Service, to address or reduce impacts to fish and wildlife. Lack of funds and staff for Montana hamstrings every other Federal agency that depends upon opinions from the Fish and Wildlife Service.

There's only so much that 18 full-time, permanent employees can do, in a State the size of Montana, with as many endangered, threatened and other sensitive species that we have, including grizzly bears, wolves, lynx, bull trout, sage grouse, prai-

rie dogs, Yellowstone cutthroat trout, fluvial arctic grayling, sturgeon, and the list goes on.

I've been told that good projects often never see the light of day in Montana, because the Fish and Wildlife Service just can't get to them they're struggling just to keep up with a crippling backlog. That backlog is hurting the economy of my State and rural, timber-dependent communities like Eureka, Thompson Falls, Columbia Falls, Seeley Lake and dozens and dozens more because every Forest Service timber sale requires some level of consultation with the Fish and Wildlife Service. County Commissioners bend my ear about this problem every time I'm back in the State.

Not only can the Service do very little proactive work in Montana to work with communities and landowners to recover species and prevent species from being listed the staff is struggling to chip away at their crippling backlog of consultation and other work.

Mr. Chairman, Montana is a growing State, and we're trying hard to continue to grow our economy, to provide more and better paying jobs for the citizens of our State. That means more projects, more improvements, more activity, and more potential for conflicts with fish and wildlife recovery goals.

As Montanans, we prize our first-class landscapes, our pristine rivers and streams. We're proud of our outdoor heritage and our abundant fish and wildlife. We don't believe that economic growth and protecting fish and wildlife and their habitat are mutually exclusive goals.

But, a lack of resources has made it very hard for the Fish and Wildlife Service to respond in a proactive way to Montanans' needs or the needs of our fish and wildlife populations. That's just not right.

I would like to ask the Chairman if he would include Montana in the ongoing study on the consulting process required by Section 7 of the ESA. I believe Montana merits this consideration, and if necessary I will request a separate study from GAO of the situation in Montana. We're getting close to a crisis here, and from what I understand, it's been hard on the staff on the ground they've been working long hours, weekends, just to keep from getting buried. I've asked the leadership at the Fish and Wildlife Service and the Department of Interior multiple times to address this situation, and have received no response.

I'm sorry to sound like a broken record on this issue, Mr. Chairman, but I believe very strongly that ensuring adequate resources for the Fish and Wildlife Service would mean important Federal, State and private sector projects more forward more quickly, more efficiently, and that potential problems are addressed up front. More people and more resources means the Service can work more pro-actively with the State and local land-owners on species conservation efforts, to avoid the need to list a particular species, or to help landowners cope with the presence of an endangered or threatened species on their property. For instance, as I've mentioned before, a few Service employees did great things to improve habitat for bull trout by taking the time to get to know local ranchers and citizens along the Blackfoot River in Montana.

There may be other means to improve the section 7 consultation process, and I know that's why the Chairman called this hearing today. I too am interested about any way we can make this process work more smoothly.

Mr. Chairman, I have worked hard in the past to propose common sense reforms to the ESA, in order to help the Fish and Wildlife Service and other agencies implement the Act more effectively, and with greater sensitivity to the needs of private landowners and States. I was proud of these efforts and the efforts of many of my colleagues on this Committee. I know you are interested in pursuing similar common-sense reforms. But, no matter what may or may not happen with ESA reform this Congress or in any other Congress, we have to adequately fund the Fish and Wildlife Service, and we have to put adequate staff where it's needed the most. I can't say this enough.

The investment would be small compared with the benefits to species and to the citizens of my State we'd see healthier forests, improved species habitat, reduced conflicts, continued economic growth, and fewer lawsuits.

Thank you again, Mr. Chairman for calling this important hearing and I look forward to working with you in the future on this and other issues important to my constituents and the country.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Good morning. Thank you for inviting me to testify before the Subcommittee on Fisheries, Wildlife and Water on Section 7 consultations required by the Endan-

gered Species Act. I appreciate the opportunity to provide comments on an issue with which I have become all too familiar.

Today, I would like to discuss a recent Tenth Circuit Court of Appeals decision by a three judge panel that essentially places the needs of a small endangered fish called the silvery minnow over the needs of the people of my State. On June 12, in a 2-to–1 decision, the Tenth Circuit ruled that the Federal Government can completely disregard its contractual commitments to provide much needed water to the cities, farms, and Indian reservations in New Mexico and instead take that water for the needs of the fish. The Court even found that the government can order the importation of water from another basin for the silvery minnow in violation of New Mexico State law that allows such transfers for municipal uses only.

This judicial decision means that local governments, farming communities, and Indian tribes cannot reasonably expect a permanent water supply despite their long-held water contracts. If allowed to stand, this far-reaching interpretation of the Endangered Species Act will have a devastating impact in my State, which is already suffering from years of drought. If the decision is used in future litigation-driven efforts to expand the reach of the Act via the Courts—which seems likely—the impacts of the Tenth Circuit's decision will register throughout the west and even the Nation.

How did we get here? How can a Court interpret the ESA as preempting 75 years of existing water law, all existing contracts, and the needs of a burgeoning western population?

In the case of the silvery minnow, it began with the ESA's section 7 consultation process. As with many actions under the Act, the section 7 consultation process for the minnow was triggered by litigation. In 1999, a group of environmentalists demanded that the courts direct the Bureau of Reclamation to consult with the Fish and Wildlife Service over the Bureau's water and river operations on the Middle Rio Grande.

Until that time, the Federal agencies had not consulted on the Bureau's operations because the Bureau was obligated to make water deliveries. The water in the Middle Rio Grande, like most of the water in the west, is completely accounted for pursuant to water contracts, interstate compacts, and perfected water rights under State law. As the Subcommittee is aware, one of the key issues with section 7 consultations is whether or not the agency has discretion or control over the action at issue. In my opinion, because the Bureau had no discretion to alter these water deliveries, a section 7 consultation was not appropriate and should not have been ordered.

Mr. Chairman, once the Fish and Wildlife Service produced a Biological Opinion in 2001, the litigation that began over a section 7 consultation was leveraged into a legal challenge to the Biological Opinion. The environmentalists argued that the Bureau failed to consult on the full range of its alleged discretionary authority—even though the Bureau believed it had no discretion to take contractually obligated water or the water resulting from interbasin transfers. The section 7 consultation litigation was next transformed into a court fight over an injunction sought by the environmental groups. The case resulted in the district judge's determination that the Bureau has the discretion, under the ESA, to take New Mexico's water.

The Tenth Circuit, in a divided opinion, upheld the district court's determination of the Bureau's broad discretion. The dissent, however, rightly characterized the ESA as a Frankenstein. Despite good intentions, this law has become a monster. As a Senator who voted to enact the ESA in 1973, I certainly do not recognize the statute after thirty years of expansive interpretation by the courts. Did any of us who voted for the ESA intend for it to apply retroactively? I did not. Did any of us believe the Act would, through the courts, achieve super-status to the point of abrogating pre-existing contracts? I did not. It was never my intention, when I voted for the ESA, that the statute would violate previous Federal commitments over these water resources.

The ESA must be applied prospectively. We cannot—particularly in the west—exist in a world where the statute is allowed to undermine the water contracts, interstate compacts, water rights perfected under State law, and even treaties which have long governed a river's management.

Now, 4 years after the section 7 consultation litigation was brought, millions of dollars have been spent and the court case drags on. New Mexico is now in the position where it must request a rehearing en banc to the Tenth Circuit and, if necessary, take the fight all the way to the Supreme Court. In order to counter the potential devastating impact of the Tenth Circuit's decision, I am currently working with other members in the New Mexico delegation on legislation to provide a balanced approach—one that addresses both the needs of the people of my State and the needs of the silvery minnow.

Mr. Chairman, the ESA, long-driven by litigation, is in dire need of reform. The section 7 consultation process, as examined by the Subcommittee today, seems to me a good place to start. Above all, certainty must be imposed on the process. Not only is certainty the bedrock of western water law, it is also critical for listed species. I believe we can amend the law to protect struggling species while, at the same time, allowing people access to the vital resources they need. I stand ready to assist the Subcommittee in any attempt to achieve comprehensive reform of the Act.

Again, thank you for having me here today. I appreciate the opportunity to testify on this important matter.

STATEMENT OF BARRY T. HILL, DIRECTOR NATURAL RESOURCES AND ENVIRONMENT, GENERAL ACCOUNTING OFFICE

ENDANGERED SPECIES: DESPITE CONSULTATION IMPROVEMENT EFFORTS IN THE PACIFIC

Northwest, Concerns Persist about the Process

Why GAO Did This Study

The Endangered Species Act requires all Federal agencies to consult with the Fish and Wildlife Service or the National Marine Fisheries Service (the Services) to determine the effect that the activities they conduct, permit, or fund may have on threatened or endangered species. In particular, Federal agencies (action agencies) must ensure that their activities do not jeopardize the continued existence of any listed species or adversely modify critical habitat. After several fish species in the Pacific Northwest were listed in the late 1990's, the Services' consultation workload increased significantly in Idaho, Oregon, and Washington, and the Services were unable to keep up with requests for consultation. As a result, many proposed activities were delayed for months or years. Even under normal workload conditions, the consultation process can be difficult, in part because decisions about how species will be protected must often be made with uncertain scientific information using professional judgment.

This testimony is based on ongoing work requested by the Chairman of the Senate Subcommittee on Fisheries, Wildlife, and Water. It addresses (1) efforts to improve the consultation process, by the Services and by four action agencies in Idaho, Oregon, and Washington; and (2) concerns with the process expressed by officials at the Services and action agencies, and by nonFederal parties. www.gao.gov/cgi-bin/getrpt?GAO–03–949T.

What GAO Found

The Services and four action agencies in the Pacific Northwest have taken a number of actions to improve the efficiency of the consultation process. For example, the Services have increased their staff levels in some offices, and the National Marine Fisheries Service has opened additional offices to facilitate consultations at remote locations. The Services have also increased their use of consultations that cover multiple activities that are similar in nature, thus minimizing the need to consult on individual activities. Another improvement, called streamlining, uses interagency teams that work together on multiple activities; these teams work to improve communication, reach agreement on the potential effects of activities early in the process, and resolve problems that arise to ensure that proposed activities will not negatively affect listed species. In addition, the Services and the action agencies have worked, both individually and together, to develop and refine additional guidance and training for staff conducting consultations.

Despite the improvement efforts, Service and action-agency officials, as well as nonFederal parties, continue to have concerns with the consultation process. A key problem that lengthens the consultation process is the lack of a shared understanding between the Services and action agencies on what constitutes a complete biological assessment. According to Service and action-agency officials, this can lead the Services to make multiple requests for information from the action agencies about an activity until the Services are confident that a biological assessment adequately addresses the effects of the proposed activity on the species. Multiple requests for information are also sometimes due to Service biologists' being unfamiliar with Action–Agency programs, partly owing to high staff turnover. In addition, Action–Agency officials noted that the Services and the action agencies attempt to ensure that biological assessments are "bullet proof" by making them so comprehensive that they will be immune to any legal challenges. Action–Agency officials also expressed a concern that Service and action-agency roles are not clearly defined. For example, according to action-agency officials, Service officials sometimes make judgments about whether an activity should occur or how it should occur, rather than

just judging its potential effects on species. In response, Service officials commented that the purpose of the consultation process is to discuss the potential effects of proposed actions early in the planning process and to explore options that will avoid jeopardy. Service and action-agency officials also identified a lack of sufficient resources-particularly at the Services-as a key concern, stating that staff-level increases have not kept pace with their growing workloads. Among the nonFederal parties, permit applicants expressed concerns about the time and expense required for the consultation process. Environmental groups said land management decisionmaking processes, such as consultation, are often closed to them until after final decisions are made, and that the only way they can make their voices heard is through administrative appeals and lawsuits.

United States General Accounting Office

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss preliminary results from our ongoing review of the consultation process required by the Federal Endangered Species Act, particularly as applied in the Pacific Northwest. Under the act, before Federal agencies may conduct, permit, or fund activities in areas where species listed as threatened or endangered may be present, the agencies must consult with the Department of the Interior's Fish and Wildlife Service or the Department of Commerce's National Marine Fisheries Service (the Services). Such consultation is intended to allow Federal agencies to ensure that the activities are not likely to jeopardize the species' continued existence or adversely modify their critical habitat. Consultation has particularly significant effects in the Pacific Northwest because numerous species there are threatened with extinction, including the Northern spotted owl, various salmon species, and the bull trout.

Federal activities that agencies may need to consult about in the Pacific Northwest range from operating hydroelectric dams on the Columbia River-which provide about 60 percent of the Federal electricitygenerating capacity in the region-to harvesting timber, to dredging navigation channels. Responsible agencies-or "action agencies"-include the Department of the Interior's Bureaus of Land Management and Reclamation, the Department of Agriculture's Forest Service, and the Army Corps of Engineers, to name a few. Typical nonFederal activities that these agencies permit, which may also require consultation, include grazing, timber harvesting, and mining on Federal lands, and building structures such as piers and docks on private property. NonFederal parties, such as private landowners, developers, or local governments, typically conduct these permitted activities.

If an action agency determines that an activity may affect a listed species, the agency may initiate either an informal or a formal consultation with the appropriate Service. In an informal consultation-which could be as simple as a brief telephone call-the Service and action agency may agree that the activity is unlikely to negatively affect the species and that formal consultation is not necessary. On the other hand, if the Service or agency initially believes or finds after informal consultation that the activity may have negative effects, the action agency initiates formal consultation by submitting a biological assessment of the activity and its potential effects. If negative effects appear likely and formal consultation is required, the Service has 135 days to formally consult and document, in a biological opinion, whether the activity could jeopardize the species' continued existence and what actions, if any, are required to mitigate those effects. Avoiding jeopardy caused by federally conducted or approved activities is important to achieving the overall purpose of the Endangered Species Act, which is to conserve species that are at risk of extinction.

Even under normal workload conditions, the consultation process can be difficult, in part because decisions about how species will be protected must often be based on uncertain scientific information and on professional judgment. Decisions resulting from consultations are sometimes challenged in lawsuits, and responding to the lawsuits can increase workload and delay activities. These problems were magnified in the late 1990's, after several fish species in the Pacific Northwest were listed as threatened or endangered. The new listings increased the Services' consultation workload significantly in Idaho, Washington, and Oregon, and the Services were unable to respond quickly. As a result, many activities that Federal agencies proposed were delayed for months or years. Action agencies and others criticized the consultations as unduly burdensome.

Our testimony, which is based on ongoing work that you requested, addresses (1) key efforts to improve the consultation process in the Pacific Northwest and (2) concerns about the consultation process identified by officials from the Services and other Federal agencies, and by nonFederal parties, including environmental advocacy groups. To gather their views on consultations, we administered a structured questionnaire to 61 officials with the Services and the Army Corps of Engineers, the Bureaus of Land Management and Reclamation, and the Forest Service in Idaho,

Oregon, and Washington. We conducted 133 additional interviews with agency officials in headquarters and field offices and with nonFederal parties; we also visited various locations in the three States. Prior to issuing this testimony, we shared a preliminary draft with the agencies we reviewed and incorporated their comments as appropriate. We conducted our work in accordance with generally accepted government auditing standards. Our final report, which we anticipate issuing in late August 2003, will present additional information about the adequacy of agency data bases that are used to maintain key information on individual consultations. Our report will also provide Service and action-agency perspectives on improvements made to the consultation process.

SUMMARY

Efforts by the Services and action agencies to improve the consultation process have focused on increasing the number of staff that conduct consultations, improving the efficiency of the process, and providing additional training and guidance for consultation staff and nonFederal parties. For example, both of the Services have increased their staff levels in certain offices, and the National Marine Fisheries Service has established new offices, among other things, to facilitate consultations at remote locations. To improve efficiency, the Services have increased their use of consultations that address multiple activities, minimizing the need to consult on individual ones. For example, one consultation in western Oregon covers ten types of routine activities in three national forests and two Bureau of Land Management districts. Another improvement, called streamlining, uses interagency teams for consultations to improve communications among the Services and action agencies on multiple activities, get agreement on the potential effects of an activity faster, and help resolve problems that arise. Finally, the Services and the action agencies have worked, both individually and together, to develop and refine additional guidance and training for staff conducting consultations. Interagency efforts include refresher training on the streamlining process and development of Web sites that provide staff with preparation instructions for, and examples of, biological assessments and other key consultation documents.

Despite the improvement efforts, Service and action-agency officials, as well as nonFederal parties, continue to have concerns with the consultation process. A key problem that lengthens the consultation process is that the Services and action agencies do not always share an understanding of what constitutes a complete biological assessment. According to Service and action-agency officials, this can lead to multiple requests by the Services for information from the action agencies about an activity until the Service is satisfied that a biological assessment adequately assesses the effects of a proposed activity on listed species. Multiple requests for information also sometimes stem from Service biologists' unfamiliarity with action-agency programs, partly owing to high staff turnover. In addition, action-agency officials noted that the Services and the action agencies attempt to ensure that biological assessments are "bullet proof" by making them so comprehensive that they will be immune to any legal challenges. Action-agency officials also expressed a concern that Service and action-agency roles are not clearly defined. For example, according to action-agency officials, Service officials sometimes make judgments about whether an activity should occur or how it should occur, rather than simply judging its potential effects on species. In response, Service officials commented that the purpose of the consultation process is to discuss the potential effects of proposed actions early in the planning process and to explore options that will avoid jeopardy. Service and action-agency officials also identified a lack of sufficient resources-particularly at the Services-as a key concern, stating that staffing increases have not kept pace with their growing workloads. Among the nonFederal parties, permit applicants expressed concerns about the time and expense required for the consultation process. For example, the average permit processing time for 19 permits issued in 2002 for building private docks or for similar activities on Lake Washington (near Seattle) was about 2 years and added about $10,000 to applicants' costs. Environmental groups said land management decisionmaking processes, such as consultation, are often closed to them until after final decisions are made, and that the only way to make their voices heard is through administrative appeals and lawsuits.

Background

The Endangered Species Act prohibits the "taking" of any threatened or endangered species of animal and defines "take" as to harass, harm, pursue, shoot, wound, kill, trap, hunt, capture, or collect, or to attempt to engage in any such conduct. Federal agencies must comply with prohibitions against taking species listed as threatened or endangered and must consult with the Services to determine the effect, if any, that their activities may have on listed species. In particular, Federal agencies

must ensure that their activities do not jeopardize the continued existence of any listed species, or destroy or adversely modify habitat designated as critical for those species. If any proposed activities will jeopardize a species or adversely modify its critical habitat, the Services will identify alternatives to those activities.

The Fish and Wildlife Service and the National Marine Fisheries Service together have responsibility for implementing the Endangered Species Act. The Fish and Wildlife Service is responsible for the protection of terrestrial, or land-dwelling, and freshwater animal and plant species. Endangered or threatened terrestrial animals in the Pacific Northwest include the Northern spotted owl, the grizzly bear, and the Canada lynx. The Service also manages land in national wildlife refuges and, like other land-managing agencies, must consult with its own biologists in determining the effect of its activities on listed species. The National Marine Fisheries Service is responsible for the protection of oceandwelling species and anadromous species, such as salmon.[1]

Several Federal agencies manage land in the Pacific Northwest or conduct activities there, many of which require consultation under the Endangered Species Act.

- The Army Corps of Engineers (Corps) supports navigation of the nation's waterways by maintaining and improving channels. In Idaho, Oregon, and Washington, the Corps also operates 12 dams and reservoirs that provide flood control, generate hydroelectric power, protect fish and wildlife, and support recreation and other activities. In addition, the Corps issues permits to parties who wish to conduct activities in lakes, streams, and wetlands; these activities include dredging or filling waterways, and building structures ranging from docks and driveways to housing developments.
- The Bureau of Land Management manages about 28 million acres of Federal land in Idaho, Oregon, and Washington. The agency issues permits for and manages such activities as livestock grazing, recreation, mining, and timber harvests; many of these activities require consultation.
- The Bureau of Reclamation's core mission is to deliver water and hydroelectric power throughout 17 western States. In the Pacific Northwest, it operates and maintains 28 dams and administers 54 reservoirs. Its primary activities that require consultation are dam construction, operation, and maintenance.
- The Forest Service manages about 45 million acres of national forest in Idaho, Oregon, and Washington. The agency issues permits for, manages, and must consult on activities such as timber harvesting; recreation; livestock grazing; mining; environmental restoration; and rights of way for road construction, ski areas, and access to private land.

Improvement Efforts Have Focused on Staffing Resources, Efficiency, Guidance, and Training

The Services and action agencies have increased the number of staff that conduct consultations. Specifically, the Fish and Wildlife Service increased the number of biologists in some of its offices in order to address their growing consultation workload. The National Marine Fisheries Service also increased staff levels at several offices, and opened several new field offices in 2001 to facilitate consultations at remote locations. Previously, the geographic distance between the locations made consultations difficult. In addition, some action agencies have found it useful to provide funding for one or more Service biologist positions to specifically work on, or give priority to, that action agency's consultations. For example, the Corps' Seattle district provides funding for a Fish and Wildlife Service biologist position. The district gives the Service a list of upcoming activities, and the Corps-funded Service biologist works on consultations for those activities.

To improve the efficiency of the consultation process, the Services have increased their use of consultations that address multiple activities, minimizing the need to consult on individual activities. These multipleactivity consultations, often referred to as programmatics, sometimes allow action agencies to approve activities that meet predetermined criteria without additional consultation. Programmatics may cover repetitive activities with similar effects, such as road and recreation trail maintenance, or a variety of activities affecting a particular area or group of species, such as forest fuels treatment, grazing, and watershed restoration projects conducted in bull trout habitat. Multiple-activity consultations may also cover these types of activities in a specific region, as in three western Oregon national forests and two Bureau of Land Management districts, where one consultation covers ten categories of routine activities.

Another improvement effort, streamlining, is intended to reduce the time spent on consultations by facilitating early planning, up-front coordination, and commu-

[1] Anadromous species live part of their lives in fresh water and part in saltwater.

nication between the Services and action agencies. Under the streamlined process, officials work on interagency teams that meet regularly to discuss upcoming action-agency activities and review draft biological assessments. The belief is that with improved communication, more trust will develop between the Services and action agencies, and problems will be easier to resolve when they arise. Accordingly, for formal consultations that go through streamlining, the Services, the Bureau of Land Management, and the Forest Service set a goal of reducing the time allotted from the current legal requirement of 135 days to 60 days. Streamlining is currently used for most Bureau of Land Management and Forest Service activities in the Pacific Northwest. In addition, the Bureau of Land Management and the Forest Service are involved in a pilot process in some locations in Idaho and Oregon. In this process, the action agencies have been delegated the authority to certify that certain activities meeting pre-established criteria are unlikely to adversely affect listed species and can therefore proceed.

Both the Services and the action agencies have provided additional training and guidance to improve understanding of the consultation process and one another's roles and authority, including the following.

The Services have developed refresher training on the consultation process, have prepared guidance on how to prepare a high-quality biological assessment, and provide continuing professional education on evaluating the biological effects of proposed activities.

- The Services, the Bureau of Land Management, and the Forest Service have developed an interagency Web site with links to the Endangered Species Act and its regulations and to guidance on streamlined consultation procedures. They plan to add examples of biological assessments and other documents as guidance for teams using streamlined procedures.
- The National Marine Fisheries Service currently provides links on its Web site to biological opinions and to a tracking system that shows the status of consultations. The Service also plans to launch a separate Web site this year to provide guidance to action-agency biologists and others on preparing biological assessments.
- The Army Corps of Engineers has developed Web sites to inform citizens about the permitting and consultation processes. These Web sites include instructions on applying for permits for activities such as pier and dock construction.

Several action-agency officials told us that they also sometimes use site visits to educate stakeholders (e.g., the Services, the action agency, and interested non-Federal parties) about a proposed activity. An Army Corps official, for example, said the Corps has taken Service biologists out on dredges to increase the biologists' understanding of dredging operations and their likely effect on species. In another example, a Forest Service biologist convened onsite meetings of all the stakeholders in a consultation about the proposed development plan for a ski area in Washington. These stakeholders (representatives of the Forest Service, the Fish and Wildlife Service, the ski area, the State, and a local hunting group) walked through the proposed development areas and discussed ways to prevent the development from adversely affecting the species involved. This onsite collaboration, according to the Forest Service biologist, gained agreement by all stakeholders on how the development could avoid adversely affecting listed species. It also may have forestalled litigation by the State and the local hunting group, which had previously opposed the proposed development plan.

Despite Improvement Efforts, Concerns Remain about Consultations

Despite ongoing efforts to improve consultations, Service and Action–Agency officials continue to have concerns about the consultation process. The absence of shared criteria for complete biological assessments, Service biologists' lack of knowledge about action-agency programs, and fear of litigation were frequently mentioned by Service and action-agency officials as significant concerns. In addition, according to some Action–Agency officials, Service and action-agency roles are not clearly defined, which leads to Service officials sometimes recommending changes to agencies' proposed activities beyond what action agencies think is necessary to minimize the negative effect on species. In response, Service officials commented that the purpose of the consultation process is to discuss the potential effects of proposed actions early in the planning process and to explore options that will avoid jeopardy. Service and action-agency officials were also concerned about a lack of sufficient resources, particularly at the Services. Among nonFederal parties, concerns were expressed about the time and cost required for consultations and about a perceived lack of openness and effectiveness in the consultation process.

Officials Do Not Have a Common Understanding of the Information Needed in Biological Assessments

A key problem that lengthens the consultation process is that the Services and action agencies do not always have an understanding of what constitutes a complete biological assessment-that is, one that provides sufficient scientific information to determine an activity's effect on a species. Because of this lack of common criteria, and because complete scientific information is rarely available for listed species, officials often rely on their judgment and experience to determine the likely effect of activities on species. Some Service officials we interviewed said that they often do not receive sufficiently detailed information from the agencies in a biological assessment about the activity so that they can independently assess its likely effects on the species. They therefore request additional information and do so until they are satisfied that the assessment adequately addresses the effects of the proposed activity on the species. On the other hand, some action-agency officials said they believe that the Services require much more detailed information than is necessary to determine whether they agree with the action agency's assessment of the activity's effects. Many Service and action-agency officials said that these requests for additional information and associated discussions can delay the consultation process and cause frustration.

Disagreements over the detail needed in biological assessments are exacerbated because many officials perceive the consultation process as personality-driven. Specifically, Service and action-agency officials said that sometimes officials on both sides of the issue take unyielding positions on consultations, either on behalf of the activity or the listed species, and they waste time arguing. In these instances, the process takes much longer to complete than when participants are able to compromise. In addition, action-agency officials said some Service biologists-particularly new ones-can be overly zealous in their efforts to protect species and may be unlikely to compromise; at the same time, action agencies do not always involve the Services early enough in consultation, making the process difficult. In other cases, officials told us that some individuals that are key to the consultation process lack the interpersonal or negotiation skills necessary to resolve conflicts that arise in the process. One action-agency official noted, "there is no room in the process for zealots-on either side."

National Marine Fisheries Service officials recognize the need for better guidance regarding the level of detail required in biological assessments and are developing training for their biologists, along with a Web-based template and checklist for action agencies. Service officials told us that they believe deadlocked disagreements over biological assessments are less common than they used to be, and when they do occur it is sometimes because issues are not elevated to management for resolution when they should be. Furthermore, they believe that increased staff, planning, and field offices have helped alleviate these issues.

Service Biologists Are Unfamiliar with Action–Agency Programs

Service and action-agency officials agreed that Service biologists are sometimes unfamiliar with action-agency programs and activities and that the time required for Service biologists to learn about activities and how they may negatively affect species can lengthen the consultation process. High turnover among Service biologists is one factor that contributes to their lack of familiarity with action-agency activities. In one example, Service biologists did not understand the process of mining for gold in streams until they were given a field demonstration. Allowing the Service biologists to see the mining equipment in operation helped facilitate the consultation process because the biologists did not have to ask numerous clarifying questions to understand the activity's potential impact. Although site visits can help familiarize biologists with action-agency activities, because of resource limitations, Service and action-agency officials said they are unable to make site visits a routine part of consultation.

Service and Action–Agency Officials Are Concerned about Litigation

Service and action-agency officials alike cited the fear of litigation as a significant concern that lengthens the consultation process. Since 1999, the Services have been affected by at least 19 lawsuits involving consultations in courts with jurisdiction in Idaho, Oregon, and Washington. For example, according to a Forest Service official in Oregon, at least two dozen timber projects have awaited consultation for 2 years because a court ruled that the National Marine Fisheries Service used insufficient scientific data to support a determination that natural vegetation growth

would adequately mitigate the effects of logging.[2] This decision invalidated more than 20 existing biological opinions for timber harvests, which will await formal consultation until the National Marine Fisheries Service implements a strategy for addressing the court's concerns. In addition, both Services must respond to notices of lawsuits and agreements that settle lawsuits.

According to action-agency officials, such court rulings have led Service officials to apply the same level of scrutiny to all activities, regardless of the level of risk they pose to listed species. Action-agency officials believe that the Services attempt to ensure that all biological assessments are "bullet proof"-or so comprehensive that they are impervious to legal challenge-and this adds to the time and cost of consultation. As a result, Service officials apply similar scrutiny to activities that are less likely to have long-term negative impacts, such as trail maintenance or habitat restoration, as they do to activities with much higher potential for long-term negative effects, such as mining. Some action-agency officials recognized that this fear of litigation similarly causes them to put more details in their biological assessments than they otherwise would. Furthermore, Interior officials expressed concerns that existing litigation, and the risk of future litigation, may be interfering with the consultation process and diverting to litigation a disproportionate amount of the funds intended for Endangered Species Act implementation.

Service and Action–Agency Roles in Consultations Are Not Clearly Defined

According to action-agency officials, Service and action-agency roles are not clearly defined. Some action-agency officials expressed concern that Service biologists sometimes make judgments about whether an activity should occur, rather than just its potential effects on species. Action–Agency officials told us they believe decisions about activities' design should be left to the action agencies. The Department of the Interior's Assistant Secretary for Water and Science recently discussed this concern in an address to Bureau of Reclamation employees. The Assistant Secretary asserted that it is the Bureau's responsibility to determine how its proposed activities should be designed and the Services' responsibility to issue biological opinions on those activities' potential impact on species. He emphasized that the Bureau should not include components in its proposed activities that it believes are not necessary for avoiding negative effects to listed species, simply because the Services want those components included. The Bureau's Commissioner also issued a policy statement reiterating the Assistant Secretary's position that it is the Bureau's responsibility-not that of the Services-to define its proposed activities and to provide a biological assessment that is based on the best available science. The policy states that the Bureau should rely on the Services to respond with a scientifically sound biological opinion-which may include a determination that an activity will adversely affect a listed species. In that event, Bureau and Service officials would work together to develop acceptable measures for mitigating the activity's detrimental effects. In commenting on a draft of this statement, Service officials said that the purpose of the consultation process is to discuss the potential effects of proposed actions early in the planning process and to explore options that will avoid jeopardy.

Insufficient Staffing Resources Are a Key Concern

Service and action-agency officials identified a lack of sufficient resources-particularly at the Services-as a key concern that limits timely completion of consultations. Service and action-agency officials are concerned that although staff levels have increased in recent years, staffing has not kept pace with their growing workloads. For example, data from the Fish and Wildlife Service's office in Portland, Oregon, show that while the office's budget for consultations increased approximately 40 percent between fiscal years 1998 and 2002, the number of consultations for which each biologist was responsible increased about 90 percent. One consequence of this disparity between resources and workload is that the Services cannot always meet regulatory timeframes. Furthermore, officials said that there is an upward trend in the types of activities that require consultation. For example, as a result of a court ruling in the mid–1990's, the Bureau of Land Management and the Forest Service must consult with the Services on their land management plans. This ruling created a substantial new workload for the agencies and the Services, and they are still working to complete the consultations in some areas.

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[2] Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service, 265 F.3d 1028 (9th Cir. 2001).

Some NonFederal Parties Are Concerned about the Length and Cost of the Permitting Process

NonFederal parties wishing to conduct activities requiring consultation because they involve Federal permits or licenses also expressed concerns about the time and cost required for the process. When nonFederal parties apply to an action agency for a permit or license, they must go through reviews required by the action agency for approval. These reviews can include consultation. Action agencies either prepare (sometimes at the applicant's expense), or ensure that applicants have arranged for the preparation of, a biological assessment; the agency then reviews the biological assessment and requests additional information as needed. According to a Service official, economic impacts and the scope of the proposed activity are considered during consultation, in addition to whether or not the activity will jeopardize listed species or adversely modify critical habitat.

In one example, a private landowner waited about 3 years-including time for Forest Service permit review and consultation-related activities-for a permit that would allow him to cross Forest Service land to harvest his privately owned timber stand. To cross the Forest Service land, the landowner had to improve an old logging road and construct about half a mile of new road, which he did himself, work valued at about $9,000; he also reimbursed the Forest Service about $6,800 for the costs to prepare a biological assessment for the consultation. Further, according to the landowner, when he was finally able to harvest the timber its market value had dropped by one-third to one-half from its anticipated value. The Forest Service biologist who worked on this consultation noted that it was affected by numerous complicating factors, including a court decision barring the Fish and Wildlife Service from issuing biological opinions on activities affecting spotted owls and a new policy for dealing with private landowners.

In another example, the average time for the Corps to process 19 permits issued in 2002 for building private docks or for similar activities on Lake Washington (near Seattle) was about 2 years. This time included the consultation time spent by each Service, as well as the time spent by the action agency to help the permit applicant complete a biological assessment and meet other Corps requirements for the permit. For these permits, consultation added about $10,000 to nonFederal parties' costs. Officials from the Services noted that these types of delays were not uncommon when bull trout and salmon were first listed because so many activities, many of them in urban areas, were affected. A National Marine Fisheries Service official stated that these listings created an "automatic backlog" of consultations that overwhelmed them. A Fish and Wildlife Service official also noted that the delays were at least partly due to their unfamiliarity with the effects that building docks could have on bull trout. The bull trout was the first aquatic species that they had to deal with in the Pacific Northwest.

Environmental Groups Are Concerned that Consultations Lack Openness and Effectiveness

Environmental advocacy groups also expressed concerns with the consultation process. Representatives of two environmental advocacy groups said land management decisionmaking processes, such as consultation, are often closed to them until after final decisions are made, and that the only way they can make their voices heard is through administrative appeals and lawsuits. One representative expressed concern that the streamlining process lacks transparency and compromises the Services' role of scrutinizing action-agency activities. Service officials noted that the Endangered Species Act does not require public participation or public comment in the consultation process. One environmental group's representative expressed concern that the Services do not have a comprehensive view of a species' status across its range and therefore are limited in their ability to determine the potential effects of proposed activities. For example, the bull trout may or may not be significantly affected by an activity in one stream, but unless the Services know the trout's status across its range, they cannot make informed decisions about how an activity will affect the species as a whole.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions that you or Members of the Subcommittee may have.

STATEMENT OF ALAN GLEN, AUSTIN, TX

Good morning Mr. Chairman and Members. My name is Alan Glen, and I am a lawyer from Austin, Texas. I am particularly interested in the topic of interagency consultations under the Endangered Species Act ("ESA") and am hopeful that the

interest and efforts of this Subcommittee will help to enhance the consultation process and make it a more efficient tool for species conservation.

I. Introduction

My testifying for increased efficiency in the ESA consultation program is a little bit like a tax lawyer testifying for streamlining the tax code. A significant proportion of my work involves assisting clients in navigating the complex and acronym-rich ESA consultation process. Our firm represents clients, ranging from developers, to utility companies and State and local governments, across the Nation in ESA matters. My experience with consultations under the ESA is firsthand, having handled dozens of consultations involving a wide variety of activities and species. Through this experience, I have seen significant conservation and economic benefits derived from resolution of endangered species conflicts through the consultation process. Unfortunately, I have also recognized maddening inefficiencies and uncertainties, many created by the very agency they afflict. I do see the Fish and Wildlife Service ("Service") making positive strides to improve the efficiency and effectiveness of the consultation process, but some problems remain.

Statistics regarding the ESA consultation process are often cited in an effort to demonstrate that the program is working, and with little impact on government and economic activity. We are told that thousands of consultations are processed each year, with only a handful resulting in a "jeopardy" conclusion. These statistics, however, do not reveal the enormous cost in terms of time, money, project changes, and mitigation property or payments associated with completing these thousands of consultations. Perhaps the pending GAO report will shed some light into the trenches of the process, where most of my labor is performed.

Today, I will focus briefly on some of what I refer to as the self-inflicted wounds of ESA consultations: areas in which the Service may be making life harder on itself than necessary or appropriate. First, I will mention the trend toward lowering the thresholds or "triggers" of the consultation process, resulting in many more consultations with perhaps little conservation benefit. Next, I will discuss the use of delay beyond the legally required timeframe for the completion of consultations, and how illegal delays are sometimes used as a tool for extracting concessions that are not otherwise required by law. Last, I will mention the use and impact of "draft" jeopardy conclusions which can be a tool to extract costly mitigation far beyond what the law requires. The Service has been making progress in addressing some of these concerns on a policy level. In practice, though, they still arise with some degree of frequency.

II. Lowering Consultation Thresholds

The Service conducts thousands of ESA consultations every year. Many of these, however, involve activities with little, or purely speculative, biological impacts. Because the thresholds required for a consultation to actually modify a project or activity (the project must be found to jeopardize or at least "take" a listed species), are so much higher than the threshold required to merely initiate consultation (that a species might be affected, even if purely beneficially), these marginal to no impact consultations end up amounting to delay and cost for little conservation benefit. Moreover, the trend toward lowering the thresholds to initiate consultation is severely impacting the ability of other Federal agencies, perhaps most notably the Corps of Engineers and the EPA, to have efficient general or nationwide permitting programs. The lower thresholds mean that many projects with little or no impact, that might otherwise have only the briefest of interchanges with the Federal Government, are instead kicked into an ESA consultation that can cause delays of over a year.

A very recent example of this trend toward lowering of consultation thresholds are the cactus ferruginous pygmy owl consultation guidelines (Attachment "A") worked out between the Corps and the Service for the Corps' nationwide permitting program in southern Arizona. These guidelines define a development project's potential impacts on the owl so broadly that consultation would be required on dozens, if not hundreds, of projects not located in critical habitat for the species and in fact miles and miles from any known owls. Moreover, because the guidelines state that, where consultation is triggered, the Corps will require applicants to obtain an individual permit from the Corps, a time-consuming and expensive process, even though the project would otherwise qualify for a much more efficient nationwide permit authorization. These guidelines have the effect, therefore, of increasing the work load of two Federal agencies and increasing the time and cost associated with projects' Federal environmental approvals, all in exchange for little if any real species conservation. To its credit, the Service is beginning to recognize the inefficiencies of these

guidelines and has expressed an interest in working with appropriate stakeholders to improve the process.

A similar example of lowering the consultation threshold occurred with the Service's Edwards Aquifer Water Quality Recommendations (Attachment "B") in central Texas These guidelines have since been withdrawn as a result of a settlement in a lawsuit we filed on behalf of the National Association of Homebuilders. However, prior to the withdrawal of these guidelines, they operated in a manner very similar to the cactus owl guidelines. Under the aquifer guidelines, the position of the Service was that every development project in a 350-square-mile area should consult with the Service regarding potential impacts on the endangered Barton Springs salamander, a small amphibian that lives in the Barton Springs swimming pool in Austin's Zilker Park. The Federal trigger for these consultations was the otherwise very efficient EPA general permit for construction-related stormwater discharges applicable to every development project over five acres. The Service's position requiring consultation was contrary to its often-stated view that no single project would result in harm to the salamander. In this case, the lowered consultation threshold resulted in more than mere delay for a number of projects. Applicants were entitled under the EPA general permit to conduct "informal" consultations with the Service, but if differences could not be resolved in informal consultation, the general permit did not authorize resolution through formal consultation. In other words, applicants were stuck in a Catch–22; they were required to initiate informal consultation with the Service, but could not require the Service to finally "put it in writing" in formal consultation. The Service was overtly telling developers, "if you agree to these project modifications, we will let you out of the consultation; if not, you're stuck." With no practical way for applicants ultimately to hold the Service accountable for its extractions, most applicants simply gave up and made concessions that in most instances could not have been required of them if consultation were properly concluded.

III. Delay as a Tool of Extraction

One of the frequently cited benefits of the ESA Section 7 consultation process is that, unlike the process for approving habitat conservation plans under Section 10(a), it is subject to specific and generally reasonable statutory timeframes. For example, formal consultation is required to be concluded within 135 days. Unfortunately, at least in my experience, these timeframes are observed much more often in the breaches than in compliance. While this fact may largely be due to the heavy workload and limited budget of the Service, it can and does give rise to an implicit trading of processing time for conservation benefits that would not otherwise be the obligation of the applicant to provide. For the private sector, particularly on larger activities or projects such as pipelines and large-scale developments, time is very, very expensive, and the time it takes to process environmental approvals may directly affect a project's competitive position. The Service sometimes takes advantage of this fact by, either implicitly or expressly, offering an applicant a quicker turnaround if they make concessions. This practice would not be particularly disturbing if the concessions were those that could lawfully be required by the Service at the end of a normal process. But, it has been the case repeatedly in my experience that the concessions are purely a trade for quicker processing.

A good example of this circumstance is the so-called "alternative consultation process" informally adopted by the Service for the Navasota ladies tresses ("NLT") (a species of orchid). (See Attachment "C," correspondence and draft Notice of Intent to Sue). Under this alternative process, projects, principally pipelines and some real estate developments, which may affect NLTs or their habitat, can simply offer to pay a per-acre conservation fee and receive an expedited approval through consultation. Because the fee, even at tens of thousands of dollars, often pales in comparison to the project cost of unspecified delay, many applicants happily pay it. Indeed, this would be a beneficial arrangement for all involved, if at the end of the day the fee was legal. However, because plants are not protected under the ESA Section 9 "take" prohibition, there is no lawful basis for this fee. The Service is simply selling time.

Another problem that arises with respect to consultation timeframes is the Service's understandable, though not lawful, desire to delay the initiation of consultation or extend the period of consultation beyond the statutorily required timeframe in order to allow the applicant to gather more data concerning the species in question. Many species can be observed only seasonally and for short durations. In these circumstances, the Service is too often tempted to seek to require delays in order to allow for more complete survey data. The Service's own regulations and the courts, however, reject that approach. Information is never perfect, and the Service is required to make its judgments based on the data available within the statutorily pre-

scribed timeframe. Recently, I was involved in a large, regionally important infrastructure project which, although it had received all of its major Federal environmental approvals, faced the potential of significant delay to allow time to perform some additional surveys for a plant.

IV. Draft Jeopardy Opinions

With the much-publicized statistic of how few final jeopardy opinions the Service renders per year in ESA consultations, it is surprising that I have personally been involved in at least four written draft jeopardy opinions and several more specifically promised if my client refused to relent. Again, this is an area in which the Service is making progress, but, at least up until the recent past, in my experience the Service's issuance, or overt threat of issuance, of draft jeopardy opinions, can be another unwarranted tool of extraction. Attachment "D" includes two attorney letters responding to draft jeopardy opinions issued on projects in Pima County, Arizona. In both instances, the draft opinions were based on clearly erroneous understandings of the applicable regulations and facts. Also, in both instances, the draft opinions were accompanied by demands for the applicant's provision of costly mitigation which, at least in my view, far exceeded the Service's authority to require. In the instance involving the Pima pineapple cactus, the mitigation was ultimately reduced from an initial demand that the applicant purchase and permanently protect 400 acres of cactus habitat, to a payment of less than $20,000 to a research program. In the instance involving the cactus owl, due to severe economic pressure to avoid further delay, the applicant largely relented to the mitigation demand, even though there were no owls on the project site and the applicant proposed of its own accord to leave approximately half of the property in its natural condition.

V. Conclusion

Recently, I have observed the Service making significant strides to improve the ESA consultation process. Difficulties nonetheless remain, and I consider it appropriate and beneficial that this Subcommittee is directing its attention to these issues.

EXHIBIT
A

Guidelines to ensure the Nationwide Permit program will not adversely affect the cactus ferruginous pygmy-owl

February 24, 2003

Staff from the U.S. Fish and Wildlife Service (FWS) Arizona field office and the Army Corps of Engineers (COE) has jointly developed the following guidelines. We believe adoption of these procedural guidelines by the Regulatory Branch of the COE in Arizona would ensure the NWP program does not adversely affect the cactus ferruginous pygmy-owl (pygmy-owl). These procedures will become effective on the date the FWS concurs on the COE's "may affect, not likely to adversely affect" determination for purposes of this informal, programmatic consultation on effects of the NWP program on the pygmy owl.

1) For proposed NWP notification[1] projects located in south, central, and northeastern Maricopa; southeastern Gila where contiguous with Pinal; southwestern Graham; northwestern Cochise; and all of Pinal, Pima, and Santa Cruz Counties, the COE will review current pygmy-owl location information, provided by FWS, and the criteria in 5A before making an effect determination. If the proposed discharge of dredged or fill material meets the criteria in 5A for a no effect determination, the COE will proceed with NWP processing. However, the COE will provide the applicant's project information, as described in #2, to the FWS at the time a "no effect" determination is made and prior to permit verification. Provision of this information does not require a concurrence or response. If the COE concludes the proposed project may affect but is not likely to adversely affect the pygmy-owl, the COE will proceed with condition 2 below.

2) For all proposed NWP notification[1] projects which meet the "may affect not likely to adversely affect" criteria in condition 5B below, the COE will initiate informal consultation and provide all available information to allow FWS to adequately review the proposed project. This will include project location, project type, discharge amount, overall project size, vegetation community type, and any relevant analysis of direct, indirect, and cumulative effects, as required by general condition 13 of the NWP program. To the extent FWS needs additional information, the COE will either provide the information or have the applicant provide it directly to the FWS. The FWS will provide a letter of concurrence (or non-concurrence) with a written explanation within 30 days of receipt of the initial COE letter or receipt of additional available information, if requested.

3) The COE has determined it will assert discretionary authority and will require submittal of an individual permit application and initiate formal consultation for any proposed NWP project which the COE has determined does not meet the criteria under condition 5 or for which the FWS has provided a non-concurrence in writing on a "may affect not likely to adversely affect" determination unless the applicant chooses to revise the project to meet the criteria under 5. The FWS will conclude formal consultation within 135 days of receipt of any required and available information.

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1 The term "notification" refers to those NWP's in which the applicant is required to notify the COE pursuant to the terms of the specific NWP and/or General Condition 11.

4) The Section 7 scope of analysis for individual NWPs shall include an evaluation of the effects of the action and cumulative effects on pygmy-owl and/or critical habitat as defined in the Regulations for Interagency Cooperation (50 CFR Part 402). "Effects of the action" include the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interdependent or interrelated with the action. "Indirect effects" are those that are caused by the proposed action and are later in time, but still reasonably certain to occur. "Interrelated actions" are those that are part of a larger action and depend on the larger action for their justification. "Interdependent actions" are those that have no independent utility apart from the action under consideration.

5) Specific criteria for determining effects to pygmy-owls are detailed below.

A) No Effect - either:

1) The project:
   a. occurs outside of pygmy-owl survey zones 1, 2 and 3[2] and
   b. the project occurs outside of the maximum dispersal distance (21 miles[3]) of a known pygmy-owl site[4]

Or

2) The project occurs above 4,000 ft elevation.

Or

3) The project occurs inside of survey zones 1, 2 or 3, or critical habitat (except for special management areas, as defined in the Draft Pygmy-owl Recovery Plan), but no habitat components (as defined under B(1)(b) below) are present on or within 400 meters of project boundaries (the distance from which noise and human activity may disturb a pygmy-owl site).

Or

4) The project is located within one of the areas defined as the Urban Exclusion Zone for the pygmy-owl.

Or

5) The project site:
   a. occurs inside of survey zones 1, 2, or 3,
   b. has been surveyed for pygmy-owls using the approved survey protocol and no pygmy-owls were detected,
   c. contains suitable habitat but the project will not disturb habitat components consisting of multiple layers or large trees (>2 m in

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[2] For purposes of this document, proposed critical habitat and draft recovery areas are contained within zones 1, 2, and 3 and are, therefore, not referenced separately.

[3] The maximum dispersal distance is based on Arizona Game and Fish Department telemetry data for dispersing juvenile cactus ferruginous pygmy-owls.

[4] A pygmy-owl site consists of the nest or activity center (center of locations used by a non-breeding individual) of a resident owl (documented since 1993), which has been in the area for more than 2 weeks.

height) and saguaros and will not preclude movement of pygmy-owl by creating an inadequate configuration of habitat or appreciably increasing human activity levels, and

d. is outside of the maximum dispersal distance (21 miles) of a known pygmy owl site.

B) May Affect, Not Likely to Adversely Affect - The project is wholly beneficial to the pygmy-owl; or effects are insignificant, discountable and short in duration; either:

1) The project:

a. has been surveyed for pygmy-owls using the approved survey protocol and no pygmy-owls were detected, or FWS has determined that surveys are not necessary,
b. will not appreciably alter habitat components consisting of multiple layers or large trees (> 2 m in height) and saguaros,
c. will not preclude movement of pygmy-owl by creating an inadequate configuration of habitat or appreciably increasing human activity levels,
d. will not be located <400 m from a known pygmy-owl site, and
e. will be of short duration (14 days from March 20 to May 31; otherwise 90 days).

Or

2) Heavy construction activity occurs outside of the pygmy-owl breeding season (February 1-July 31) and no habitat components, as defined above, will be removed.

Or

3) The project proponent works with FWS to design the project so that effects are insignificant or discountable.

6) COE may call FWS with specific project information for survey recommendations and habitat suitability guidance.

7) The FWS will evaluate information submitted under #1 to ensure this programmatic consultation for the NWP program is adequate in addressing the effects to the pygmy-owl. In addition, FWS and COE will meet on an annual basis, or as needed, to evaluate and discuss the continued effectiveness of these guidelines for protecting Arizona's population of pygmy-owls and to update maps, if necessary. At these meetings, the COE will provide a table identifying the following in regard to pygmy-owls: file number, NWP number, location coordinates, ESA effect determination made, permittee, waterway, county, acreage of impact to waters of the U.S., and status of construction (not constructed, under construction, or completed). If adaptive measures to this agreement are necessary, they will be explored at that time.

EXHIBIT
B

U.S. Fish and Wildlife Service
Recommendations for Protection of
Water Quality of the Edwards Aquifer

September 1, 2000

These recommendations were produced with the intent of identifying measures that would achieve an objective of "non-degradation" of water quality for projects within the Edwards Aquifer. While true "non-degradation" is not technically possible today, these recommendations strive to maintain current water quality. Anyone implementing projects following these recommendations is encouraged to go beyond water quality maintenance and demonstrate ways that the project can achieve improved water quality.

These recommendations to protect water quality are current as of the date listed above and will change as new information becomes available. They are not rules, regulations, laws or requirements. These recommendations were formulated by reviewing existing scientific information, existing rules and regulations, and by working closely with water quality engineers and biologists. These recommendations pertain to the protection of water quality for Federally listed endangered and threatened species. These measures do not address other possible impacts to Federally listed endangered or threatened species.

It is recognized that strict adherence to any general set of development recommendations may be problematic at the project level. Problems that arise are usually very site-specific and should be dealt with on a case-by-case basis. Variations from these recommendations could be used and still achieve the "non-degradation" objective. In cases where flexibility is appropriate, variations should be designed to achieve the "non-degradation" objective.

1. **Buffer Zones.**

Buffer zones (undisturbed natural areas) should be established for the stream drainage system and for sensitive environmental features within the Edwards Aquifer watersheds.

A. Buffer zones should remain free of construction, development, or other alterations. The number of roadways crossing through the buffer zones should be minimized and constructed only when necessary to safely access property that cannot otherwise be accessed. Other alterations within buffer zones could include utility crossings, but only when necessary, fences, low impact parks, and open space. Low impact park development within the buffer zone should be limited to trails, picnic facilities, and similar construction that does not significantly alter the existing vegetation. Parking lots and roads are not considered low impact. Neither golf course development nor wastewater effluent irrigation should take place in the buffer zone. Stormwater from development should be dispersed into overland flow patterns before reaching the buffer zones.

B. Each stream should have an undisturbed native vegetation buffer on each side as follows:

Streams draining 640 acres (one square mile) or greater should have a minimum buffer of 300 feet from the centerline on each side of the stream.

Streams draining less than 640 acres but 320 or more acres should have a minimum buffer of 200 feet from the centerline on each side of the stream.

Streams draining less than 320 acres but 128 or more acres should have a minimum buffer of 100 feet from the centerline on each side of the stream.

Streams or swales draining less than 128 acres but 40 or more acres should have a minimum buffer of 50 feet from the centerline on each side of the drainage.

Streams or swales draining less than 40 acres but 5 or more acres should have a minimum buffer of 25 feet from the centerline on each side of the drainage.

C. Sensitive environmental features should have a minimum buffer of 150 feet around the feature (radius). If the drainage to a feature is greater than 150 feet in length, then the minimum buffer should be expanded to a minimum of 300 feet for the area draining into the feature. Sensitive environmental features include: caves, sinkholes, faults with solution-enlarged openings, fracture zones with solution-enlarged openings, springs, seeps, or any area that holds water or supports mesic vegetation for sustained periods. Possible sensitive features and sensitive features as defined by the "Instructions to Geologists for Geologic Assessments on the Edwards Aquifer Recharge/Transition Zones", TNRCC document 0586 (Rev. 6/1/99) should have these buffers established.

2. **Low-impact development designs.**

Low-impact development design is defined not only by impervious cover, but also by a philosophy of development planning, engineering design and construction, and tenant occupation that reduces the impact upon the surrounding environment. The goal of low-impact development design is to produce a product with the least effect upon the natural biota and the hydrologic regime of the site. A source of guidance for such design may be obtained from Low-Impact Development Design Manual (hereafter LIDDM), Department of Environmental Resources, Prince George's County, Maryland, November 1997. Site specifics will affect the applicability of the measures to the Central Texas area.

Recharge zone development should be limited to no more than 15% impervious cover in the uplands zone. Contributing zone development should be limited to no more than 20% impervious cover in the uplands zone. The uplands zone includes all land not within a buffer

zone and not within golf course turf areas subject to fertilizer, pesticide and herbicide applications. Buffer zones and golf course turf areas should not to be included in impervious cover calculations.

Preservation of large, undisturbed upland areas through the use of innovative site design techniques that, for example, cluster development is encouraged. Cluster development should also incorporate design principles that: reduce roadway widths; reduce residential street lengths using alternate street layouts that increase the number of homes per unit length; reduce residential street right-of-way widths; minimize the use of residential street cul-de-sacs using alternative turnaround designs; use vegetated channels instead of curb and gutters; and use subdivision designs that incorporate, where appropriate, narrower lot frontages. Additional recommendations for low impact designs include the use of non-toxic building materials, water conservation, rainwater harvesting, wastewater recycling, and xeriscaping.

3. Provisions for increased development intensity.

Onsite development intensity may be increased if additional land, conservation easement, or development rights are acquired offsite. Offsite land should be located in the same watershed and aquifer zone as the development. Offsite land being used to offset higher development on a project should not include areas that would be part of a buffer system under these recommendations.

In the recharge zone, development should not exceed a maximum of 30% on-site impervious cover of the upland zone (developed site) when sufficient offsite land is provided. Such offsite land should be maintained in an undeveloped condition (25 acre tracts or larger) in perpetuity such that the effective impervious cover (developed land plus offsite land) does not exceed 10% impervious cover. In the contributing zone, development should not exceed 35% on-site impervious cover of the upland zone when sufficient offsite land is provided. Such offsite land should be maintained in an undeveloped condition in perpetuity such that the effective impervious cover of the combined tracts does not exceed 15%. Golf course areas receiving fertilizer, pesticide, and herbicide applications should be excluded from the uplands area calculation and should not be use to calculate allowable impervious cover. The offsite acreage may be reduced when more sensitive land can be preserved; however, this consideration should be made on a case-by-case basis.

Offsite land should be in a low impervious cover condition (2 percent or less) in perpetuity. Conservation easements or deed restrictions should be used to ensure permanent protection. Offsite lands should also have provisions made for appropriate long term management, which could include a property owner, home-owners association, river authority, municipality, county or land trust. Offsite land should be in large contiguous areas and used to augment existing conservation efforts, to the greatest extent practical.

4. **Stormwater quality treatment.**

The stormwater management goal should be to prevent degradation of the aquifer and surface water by meeting specific non-degradation performance objectives. Satisfying the non-degradation goal should be demonstrated by meeting the following two objectives:

The development should not result in an increase in annual average stormwater pollutant loads over pre-development conditions for discharges from the site.

The development should preserve the current form and function of the drainage network/stream system. This may be achieved by either non-structural or structural means, depending upon the nature of the development.

The use of vegetative practices is encouraged to meet the goals of non-degradation and erosion control. Key to the success of vegetative practices is providing a low impact development design incorporating elements that more closely mimic the existing hydrologic setting. Developments or portions of developments at 10% impervious cover or lower should be able to achieve such designs. Non-structural approaches are encouraged whenever feasible in order to avoid concentrating runoff patterns. Relying primarily on vegetative and other non-structural approaches increases the likelihood of long-term water quality protection as well as minimizing future maintenance responsibilities. Developments or portions of a development with impervious cover greater than 10% are encouraged to rely on such practices to achieve non-degradation, though it is understood that permanent, structural best management practices should be employed in many instances. When non-structural controls are used to achieve non-degradation, then it should be demonstrated for streambank erosion that the pre-development levels of stream flow are maintained for streams draining at least 40 acres. If the site to be developed lies within a contributing area of less than 40 acres, or if there is no defined channel at the outlet, then pre-development levels of flow should be maintained for the point(s) of the greatest drainage area within the development. When structural controls are used, capturing the runoff from the 1-year, 3-hour storm event, and releasing it over a 24-hour or greater period should accomplish stream channel erosion protection.

5. **Construction-related erosion and sedimentation controls.**

Development should incorporate an erosion control plan in accordance with the temporary best management practices of the Nonpoint Source Pollution Control Technical Manual and/or the Technical Guidance Manual on Best Management Practices (June 1999, TNRCC, RG-348). Temporary erosion and sedimentation control plans should also be applied to individual lots as they are developed through appropriate mechanisms.

6. **Maintenance plans.**

Plans for maintenance of structural water quality and erosion controls should be prepared and implemented in accordance with the Nonpoint Source Pollution Control Technical Manual and/or the Technical Guidance Manual on Best Management Practices (June 1999, TNRCC, RG-348). Documentation should be provided that ensures that sufficient annual funding exists to properly maintain stormwater treatment facilities.

7. **Environmental education.**

An educational program should be implemented to inform the public about the sensitivity of the aquifer and their potential impacts on water quality. The developer or owner of the project should include within the development plans an environmental educational program for residential, industrial, and/or commercial developments. Topics may include information about endangered aquatic species, karst geology, best management practices, buffer zone maintenance, fertilizer application, pesticide use, organic gardening, and disposal of hazardous household chemicals. Materials used should be obtained from the Fish and Wildlife Service, TNRCC, American Water Works Association, National Ground Water Association, Water Environment Federation, or from another appropriate sources. Development of kiosks, displays, video, and/or other media to present material covering a variety of non-point source pollution control topics should be encouraged. Alternative educational efforts, such as site-specific recharge feature displays and educational nature trails should also be encouraged. Similarly, all developments should include an integrated pest management plan to minimize exposure of stormwater runoff to chemicals (fertilizers, herbicides and pesticides).

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EXHIBIT
C

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December 19, 2000

VIA FACSIMILE: (512) 490-0974

Ms. Dawn Whitehead
U.S. Fish and Wildlife Service
10711 Burnet Rd., Suite 200
Austin, Texas 78758

Re: Miramont Consultation 2-15-00-F-1068

Dear Ms. Whitehead:

I am transmitting with this letter a form of notice of intent to sue. Our client, TAC Realty, Inc., has instructed us to file a notice of intent to sue in substantially this form unless this consultation can promptly be resolved to the mutual satisfaction of the parties. Please note that the attached form of notice of intent to sue addresses not only the Miramont Consultation, but also the Service's "alternative process" to performing Section 7 consultations.

I ask that you contact me at your earliest convenience so that we can determine whether further conflict on this matter can be averted.

As always, I appreciate your consideration.

Very truly yours,

Alan M. Glen

Enclosures
AMG/emh

cc w/encl.: Mr. Stan Walker (Corps)
Mr. Presley Hatcher (Corps)
Mr. Paul Darmitzel
Mr. David Elmendorf
Mr. Paul Sunby
JB Ruhl (Firm)

DRAFT

December __, 20000

The Honorable Bruce Babbitt
Secretary of the Interior
1849 C Street, N.W., MIB6650
Washington, D. C. 20240

Ms. Jamie Clark
Director
United States Fish & Wildlife Service
1849 C Street, N.W., MS-3012
Washington, D. C. 20242

Re: Notice of Intent to Sue in Connection with Miramont Project, Brazos County, Texas

Dear Secretary Babbitt and Ms. Clark:

On behalf of our client, TAC Realty, Inc. ("TAC"), and pursuant to the provisions of Section 11(g) of the Endangered Species Act ("ESA"),[1] we respectfully submit this notice of our client's intent to sue in connection with the U.S. Fish & Wildlife Service's ("USFWS") handling of a consultation pursuant to the provisions of Section 7(a)(2) of the ESA[2] regarding TAC's proposed "Miramont" development in Brazos County, Texas. Specifically, our client believes that with respect to the Miramont project USFWS has abused its discretion and acted arbitrarily, capriciously, and against law in contravention of the ESA and the Administrative Procedure Act ("APA").[3]

This matter involves an attempt by USFWS to overcome the limits of its authority under the ESA with respect to listed species of plants. Aware of the fact that the ESA Section 9 "take" prohibition does not extend to plants, USFWS has nevertheless, through what it calls an "alternative" consultation process not authorized in the ESA, sought to obtain from permit applicants compensatory mitigation for impacts to "potential" plant habitat. The tool used by USFWS to obtain this compensatory mitigation is the threat, overt or otherwise, of bureaucratic delay beyond the timeframes clearly established by law. Whatever one believes about the merits of the degree of protection afforded plants under the ESA, the "alternative process" created by USFWS, as well as the actions and omissions of USFWS with respect to the Miramont project, exceed and contravene USFWS's authority under the ESA and are arbitrary and capricious.

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[1] 16 U.S.C.§1540(g).

[2] 16 U.S.C.§1536(a)(2).

[3] 5 U.S.C. §§551-559

Background

TAC proposes to construct residential, golf course, and commercial development on the approximately 525-acre Miramont Property in Brazos County, Texas. The Miramont property is located in central Brazos County approximately 2.0 miles east of the City of Bryan. Development of the property will require utilization of a nationwide permit issued by the U.S. Army Corps of Engineers ("Corps"), as provided for under Section 404 of the Clean Water Act, to authorize the discharge of dredged or fill material into waters of the U.S. In order to authorize these activities, the Corps must determine if the proposed activities may affect species listed as threatened or endangered under the ESA. If such a determination is made, the Corps is required by Section 7(a)(2) of the ESA to consult with USFWS regarding the scope and magnitude of the effects.

Navasota ladies'-tresses (*Spiranthes parksii*) ("NLT") is a listed endangered species of orchid and the only threatened or endangered species known to occur regularly in Brazos County. On February 7 and 8, 2000, SWCA, Inc. Environmental Consultants ("SWCA") delineated waters of the U.S. on the Miramont property and conducted on-site surveys for potential habitat for NLT. On February 14, 2000, SWCA, acting on behalf of TAC, submitted to the Corps a preconstruction notification ("PCN") regarding TAC's intended utilization of a Corps Nationwide Permit ("NWP") 26 for development of the property. This package included reports summarizing the delineation of jurisdictional waters of the U.S. and a summary of the results from the NLT habitat assessment.

On April 17, 2000, the Corps requested additional information on the proposed development including a more detailed report of potential habitat for NLT. In response, SWCA prepared a report dated May 30, 2000.

By letter dated July 10, 2000, the Corps initiated formal consultation with the USFWS under Section 7 of the ESA. In that letter, the Corps determined that: 1) the proposed project may affect NLT within the permit area; 2) the proposed project was not a major construction activity within the meaning of the National Environmental Policy Act and therefore a Biological Assessment would not be required; and, 3) the best scientific and commercial data available for determining potential impacts to NLT was contained in the May 30, 2000 SWCA report, which the Corps included with their letter to the USFWS.

SWCA and TAC representatives met with a USFWS consultation biologist on July 25, 2000 to review the project. On August 3, 2000, SWCA biologists met again with USFWS biologists to discuss the location of potential habitat for NLT on the property and possible project-related impacts to potential habitat.

On August 7, 2000, USFWS indicated to SWCA that a Biological Assessment would be required for the agency to be able to determine the biological impacts of completion of the proposed

Miramont development, despite the Corps' determination that the proposed development was not a major activity requiring preparation of such a document. USFWS subsequently withdrew its request for a Biological Assessment, but on August 17, 2000, sent a letter to the Corps and SWCA stating that USFWS did not possess sufficient information to enable it to initiate formal consultation and requested a more detailed analysis of the impacts to NLT habitat of the proposed project.

On September 8, 2000, SWCA responded to the August 17 USFWS letter on behalf of TAC by submission to USFWS of a letter and Biological Evaluation. The Biological Evaluation concluded in relevant parts:

> The status of NLT on the Miramont property is unknown. Since the development project entered the planning phase in 1998, USFWS has determined that drought conditions made it unsuitable for conducting surveys for the species both in the autumn of 1998 and autumn of 1999. Further, Ms. Kathryn Kennedy, a botanist with USFWS, has indicated that autumn of 2000 will also be unsuitable for surveys. Therefore, no systematic survey of the property has been possible for NLT over the past three years.
>
> ...
>
> The Miramont property has been heavily grazed for an extended period of time as evidenced by the species composition of vegetation in pasture lands, and has been grazed continuously for more than 90 years. This suggests to us that NLT is unlikely to be common or widespread in the Miramont property in those open areas within woodlands. Review of Fig. 4 further suggests NLT is unlikely to be common or widespread in the Miramont property. Not only was an unsuccessful survey for NLT conducted on a portion of the Marimont property, but 30 other surveys were also unsuccessful in locating NLT in a broad section of central Brazos and Grimes counties between areas known to support NLT in southern Brazos and Grimes counties and in northern Brazos county. While failure to detect NLT in central Brazos and Grimes counties could be an artifact of sampling effort, it must be assumed that, since the purpose of the surveys was to find plants, surveys were not conducted randomly and surveyors targeted areas that appeared to provide suitable habitat. Thus, failure of the surveys to detect NLT on the Miramont property and elsewhere in central Brazos County and in central Grimes County could be the result of an actual gap in distribution of the species due to some physiographic and/or historic land use factors.
>
> In summary, SWCA believes it is very likely that, if NLT does occur on the Miramont property, it occurs in very low densities and low numbers. Based on the

> field investigations of Dr. Smeins and Ms. Avilvsgi and estimation of the amount of lightfall gap area within woodlands, SWCA believes the area potentially occupied by NLT is 20 acres or less. Further, an unsuccessful survey was conducted in the early to mid 1980s and the property was subjected to prolonged and heavy use for cattle grazing.

On October 4, 2000, TAC representatives met yet again with USFWS. At this meeting, USFWS unequivocally stated that as of September 8, 2000, USFWS had received information sufficient to conduct formal consultation and that formal consultation would be deemed to have been initiated as of that date. In addition, on November 27, 2000, the Corps sent a letter to USFWS stating that "[w]e believe the additional information coordinated with you and supplied by the applicant is sufficient to consider formal consultation to have been initiated on September 8, 2000."

On December 15, 2000, however, USFWS wrote the Corps seeking to establish November 27, 2000, as the initiation of consultation and requesting a delay until June 8, 2000, for writing its biological opinion. That letter includes the following remarkable passage:

> The Service has learned that the applicant no longer wants to participate in the *alternative process* and that *we are now examining the preparation of a standard biological opinion*. It is also our understanding that the applicant is not able to provide any additional information (e.g. analysis of the surface and underlying soil layers that may affect the hydrology of the project area). Because we are lacking a competent survey of the proposed project area and *no off-setting habitat conservation is being proposed, the Service will need to evaluate the significance of the total loss of this area of potential habitat to the species*. (emphasis added)

Claims

1. The "Alternative Process" is Arbitrary, Capricious, and Against Law.

Without statutory authorization or regulatory action, USFWS has created with respect to actions that may affect the NLT and other species[4] an "alternative process" (the "Alternative Process") for conducting interagency consultations under Section 7(a)(2) of the ESA. This Alternative Process involves the applicant agreeing to provide an arbitrarily determined level of compensatory mitigation, in the form of a cash payment to USFWS's designee (the National Fish and Wildlife Foundation), in exchange for which USFWS issues a biological opinion without delay or requests for additional information. In a biological opinion issued by USFWS to the Corps on April 29, 1999, USFWS described the "Alternative Process" as follows:

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[4] Other species to which USFWS has applied the Alternative Process include the Houston toad.

> Occasionally, project implementation cannot feasibly be delayed to conduct surveys during the limited time frames when some species are active and can be positively identified, or drought conditions make it impossible to conduct reliable surveys. Under these circumstances applicants may, at their request, provide for potential endangered species concerns using an *alternative process* developed by the Corps and the Service to provide for these special situations. Under this process the applicant agrees to provide avoidance, minimization, *and conservation compensation measures* for project impact to potential species habitat without detailed surveys. *This process is used in lieu of the standard practice of conducting comprehensive surveys that identify occupied habitat and include detailed qualitative analysis of effects on individuals and populations and the habitat directly supporting them.* The Service prepares a Biological Opinion based on potential habitat rather than population measures, using the assumption that potential habitat is occupied and outlining acceptable provisions that adequately address endangered species concerns, *so that consulting agencies' permitting processes may proceed.* (emphasis added)

In essence, what USFWS is saying is that if an applicant provides compensatory mitigation (i.e. a payment to the National Fish and Wildlife Foundation) for impacts to potential, but undocumented, habitat, then USFWS will allow the project to go forward without requests for further information, studies, or delay. If, on the other hand, an applicant such as TAC refuses to pay compensatory mitigation, then the process is delayed and more information is required to make the analysis. Nowhere, however, does applicable law or regulation create or allow two consultation processes, one for those who pay and one for those who do not.

The inequity and illegality of USFWS's bifurcation of the consultation process is highlighted by two facts: (i) USFWS does not have the discretion to delay consultation for the purposes of receiving the data that is apparently "missing" when an applicant "requests" the Alternative Process; and (ii) in consultations concerning areas not shown to be inhabited by NLTs, there is no legal basis for USFWS to require compensatory mitigation. So, in essence, USFWS, through the Alternative Process, is exacting mitigation payments it could not otherwise require by threatening delay it can not legally impose. The message to project applicants is clear: "play ball with us and we will promptly approve your project, but if you don't want to play ball, we are a very busy agency and we may need more time and data to process your consultation." Needless to say, this approach to consultation under Section 7(a)(2) of the ESA is overreaching and illegal.

The statement that in circumstances such as the Miramont Consultation USFWS can not require compensatory mitigation merits further explanation. First, no provision of ESA Section 7 or applicable regulations authorizes USFWS to require compensatory mitigation. Indeed, it is difficult to find a reference to compensatory mitigation in USFWS's own Section 7 Manual. Rather, if an action is determined to "jeopardize the continued existence" of a species, USFWS must specify

"reasonable and prudent alternatives" to the action that would not jeopardize the species. Applicable regulations define "jeopardize the continued existence of" as follows:

> Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild.[5]

A "reasonable and prudent alternative" to a "jeopardy" action is that which "can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [and] is economically and technologically feasible."[6] Similarly, where a non-jeopardy action is determined to "take" a listed species of fish or wildlife in contravention of the ESA Section 9 prohibition against take, ESA Section 7(b)(4) requires USFWS to authorize such take subject only to "reasonable and prudent measures" necessary to minimize such impacts. Plants such as the NLT, however, are not subject to the ESA Section 9 take prohibition.

Therefore, suggestion of "reasonable and prudent alternatives" to an action determined to jeopardize the existence of the NLT is the only potential legal mechanism through which USFWS could even raise the topic of compensatory mitigation for potential impacts to the NLT. But to get to that point in consultations in which the Alternative Process is available (i.e. where, as in the Miramont Consultation, the presence or absence of NLTs can not be conclusively determined during the consultation timeframe), USFWS must first conclude that impacting an area not shown to be inhabited by NLTs would somehow jeopardize the species. In the case of Miramont, any such conclusion would be clearly arbitrary and capricious. Moreover, even if USFWS could conclude that a proposed action affecting "potential" as opposed to known habitat would jeopardize the species' continued existence, there is no reason to believe that compensatory mitigation would be within the above-specified limitations on "reasonable and prudent alternatives," (i.e. within the authority and jurisdiction of the action agency, consistent with the action, and economically feasible).

In the context of consultations under Section 7(a)(2) of the ESA, it is simply impermissible, arbitrary, and capricious for USFWS to base substantive requirements on a presumption of species presence where that presence has not been proven. This fact was emphasized by the federal district court in the recent case of *Arizona Cattle Growers vs. U.S. Fish and Wildlife Service*, in which the court held that USFWS's basing of consultation terms and conditions on the assumption that species were present in the grazing allotments in question was arbitrary and capricious.

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[5] 50 CFR 402.02

[6] *Id.*

In the Miramont Consultation, USFWS has consistently sought to drive TAC towards the Alternative Process. Once TAC advised USFWS that it was disinclined to provide compensatory mitigation for a plant not shown to be present on its property, however, USFWS shifted towards requesting delay, information, and study that it has not requested when applicants have "consented" to the "Alternative Process."

2. Failure Properly and Timely to Initiate, Conduct, and Conclude Consultation.

USFWS has failed properly and timely to acknowledge the initiation of, conduct, and conclude the Miramont Consultation in accordance with ESA Section 7[7] and applicable USFWS regulations.[8] Following is a brief summary of actions or omissions of USFWS in connection with the Miramont Consultation which constitute violations of non-discretionary duties under the ESA and are arbitrary, capricious, or against law within the meaning of the APA:[9]

a. Failure to Acknowledge Initiation of Consultation.

USFWS regulations[10] provide that formal consultation pursuant to ESA Section 7(a)(2) is initiated upon submission by the action agency of a written request including:

> "1) a description of the action to be considered; 2) a description of the specific area that may be affected by the action; 3) a description of any listed species or critical habitat that may be affected by the action; 4) a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects; 5) relevant reports, including any environmental assessment, or biological assessment prepared; and 6) any other relevant available information on the action, the affected listed species, or critical habitat."

The date of initiation of consultation is critical because ESA Section 7(b)(1)(A)[11] provides that consultation under ESA Section 7(a)(2) "shall be concluded within the 90-day period beginning on the date on which it is initiated." This period may be extended only with the consent of the action agency and can not be extended beyond an aggregate of 150 days without the consent of the

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[7] 16 U.S.C. §1586

[8] 50 CFR Part 402

[9] _____.

[10] 50 CFR §402.14

[11] 16 U.S.C. §1536(b)(1)(A)

applicant. As of the writing of this letter, neither the Corps nor TAC have consented to any extension of the mandatory period.

The record in the Miramont Consultation will demonstrate that consultation was initiated no later than July 25, 2000. Nevertheless, beyond that date TAC and the Corps strove to continue to provide information requested by USFWS. There can be no doubt, however, that at the latest consultation was initiated by September 8, 2000, upon which date TAC submitted to USFWS a document entitled "Biological Evaluation of the Proposed Miramont Development, City of Bryan, Brazos County, Texas." Indeed, in a meeting between TAC and representatives of USFWS on October 4, 2000, the USFWS representatives unequivocally agreed that sufficient information had been provided and consultation initiated as of September 8, 2000. Moreover, on November 27, 2000, the Corps wrote to USFWS confirming its belief that all requirements had been satisfied and consultation initiated as of September 8, 2000.

In contradiction of the position of the Corps, TAC, and USFWS itself (as stated in the meeting of October 4, 2000), USFWS inexplicably now takes the position that consultation was not initiated until November 27, 2000. This is in plain contradiction to the unequivocal provisions of the ESA and applicable regulations. There was no additional information provided to USFWS from September 8, 2000, until November 27, 2000, and therefore, no reason initiation should have been delayed. Initiation begins when USFWS receives a request and the required information. There can be no argument that as of September 8, 2000, USFWS had both a request (the Corps' original request) and all required information. The failure of USFWS to accept the lawful and timely initiation of the Miramont Consultation by the Corps is arbitrary, capricious, and against law.

b. Failure Properly to Conduct Consultation.

USFWS has apparently decided that there are two formal consultation procedures for determining potential effects to NLTs. Under the Alternative Process, in which the applicant agrees to pay an arbitrarily determined level of compensatory mitigation, additional information or time is not needed. Where an applicant does not agree to pay, however, USFWS needs more information and more time in order to conclude consultation. In the Miramont Consultation USFWS's various and changing demands for additional or reformatted information or documentation fall outside of legal bounds. Specifically, applicable regulations provide in pertinent parts, as follows:

> The Director [of USFWS]...may recommend *discretionary* studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys *is not* to be construed as the Service's opinion that the Federal [action] agency has failed to satisfy the information standard of

Section 7(a)(2) of the [ESA].[12] (emphasis added)

The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of Section 7(a)(2) of the [ESA]. *If no extension of formal consultation is agreed to, the Director [of USFWS] will issue a biological opinion using the best scientific and commercial information available.*[13] (emphasis added).

c. Failure Timely to Conclude Consultation.

At the latest, the Miramont Consultation was initiated on September 8, 2000. Accordingly, pursuant to ESA Section 7(b)(1)(A), the Miramont Consultation should have concluded on December 8, 2000. USFWS has breeched its non-discretionary duty to conclude the Miramont Consultation.

Conclusion

For the reasons stated in this letter, TAC respectfully notifies you of its intent to file suit if the matters complained of are not promptly rectified. We and TAC would welcome the opportunity to meet with USFWS personnel in an effort to reach a resolution of these matters short of litigation.

Very truly yours,

Alan M. Glen

cc: **[to be provided]**

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[12] 50 CFR §402.12(d)

[13] 50 CFR §402.14(f)

EXHIBIT D1

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July 24, 2000

Mr. Terry Oda
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Re: Draft Biological Opinion dated May 11, 2000 (the "Draft BO") on the Effects of the Proposed Hartman Vistas in Marana, Arizona (the "Project"); Consultation #2-21-99-F-364

Dear Mr. Oda:

This firm has been retained as litigation counsel for New World Homes in connection with the above-referenced U.S. Fish and Wildlife Service (USFWS) consultation regarding the impacts of the Project on the Arizona population of the cactus ferruginous pygmy-owl (CFPO). The purpose of this letter is to provide the applicant's comments on the Draft BO. In preparation of these comments, we have been assisted by relevant experts, including the applicant, its economic/value expert, Baker Peterson & Baker, its biological consultant, Westland Resources, and environmental counsel, Alan Glen. Mr. Glen has spoken with you frequently about this project, and his comments are incorporated into this letter. The reports of the economic/value expert and the biological consultant are attached hereto. We request that these comments and all attachments be made a part of the administrative record of the consultation.

Based on the Draft BO, our client and we are profoundly concerned that the disagreements between our client and USFWS will not be resolved short of litigation. We have carefully reviewed the relevant regulations, agency guidance, precedents, and available scientific evidence and have concluded that the Draft BO, if put in final form, would not withstand judicial challenge. Indeed, the Draft BO is fraught with misinterpretation of USFWS's authority, unsupported assumptions and speculation, and lack of scientific rigor. The conclusion of the Draft BO ultimately is based on the speculation that a yet to be born bird will fly to the Project site, where no CFPO has ever been documented before, and will be so affected as to jeopardize the entire Arizona population of the CFPO. There is no scientific basis for this conclusion. Instead, the conclusion appears to be based upon an overall landscape disturbance objective contained in the draft recovery plan for the CFPO without regard to the particular circumstances of this site or proposed project. In order to justify this, USFWS has arbitrarily inflated the "action area," discounted the baseline, and assumed effects on unborn animals even though the

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Project is not occupied by CFPOs. The analysis totally ignores the very small role this site actually plays in the CFPO habitat. The Project site amounts to less than 15 Ten Thousandths of CFPO critical habitat. Yet, the opinion concludes that the proposed project contained on this very small site will jeopardize the continued existence of the CFPO. No scientific evidence is offered to explain how a project on such a small part of the habitat can have such far-reaching effects. The biological opinion plainly departs from the legal requirement that evidence support a conclusion that the predicted effects are "likely" and instead substitutes a standard of whether the predicted effects could conceivably happen under any circumstances. The two standards are greatly different and compel radically different results. Although the text used in the draft BO refers to the appropriate standard, the actual explanation set forth in the text makes it clear that a "might conceivably happen" standard is in fact used.

In addition, the draft BO is flawed by other analytical errors including the use of an action area defined by a 19 mile radius from the project site. This means that the author of the draft BO concluded that this project, which is only 157 acres, has an effect on 1,133 square miles, including the entire area of the incorporated City of Tucson, the Town of Marana, and Oro Valley, and still extends into the next county.

Moreover, as demonstrated through expert analysis described below, the Draft BO offers no economically feasible alternative to the applicant, which would otherwise have a legitimate, investment-backed expectation of proceeding with its proposed project. In fact, it does not appear that economic feasibility has even been evaluated. No evidence can be found in the draft BO to support a conclusion that the reasonable and prudent alternatives suggested are economically feasible. Instead, it appears to be assumed that the suggested reasonable and prudent alternatives are economical feasible without any supporting analysis or data. This assumption is worse than arbitrary because it defies the realities of market place economics. The applicant does not believe the suggested reasonable and prudent alternatives are economically feasible, and supports its view with the report of an economic valuation expert. In assessing the economic feasibility of the reasonable and prudent alternatives, the expert evaluated the particular features of the project and the land, and concluded that the reasonable and prudent alternatives are not economically feasible. In fact, implementation of the project with the reasonable and prudent alternatives would result in a negative value. Thus, if the reasonable and prudent alternatives suggested in the draft BO are the only alternative uses of the property, then the land is effectively turned into a private park with no commercial utility. This does not meet the requirement that the service provide a reasonable and prudent alternative that is economically feasible.

Perhaps reasonable and prudent alternatives along the lines suggested might work for other land under other circumstances, especially if an applicant has access to off-site mitigation

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at a reasonable cost. We cannot address the economic feasibility of a project under different circumstances. But, there is no evidence in the draft BO that off-site mitigation land is available to this particular applicant at a reasonable price, or that the costs for development of this particular piece of property can be so drastically reduced that the reasonable and prudent alternatives suggested can be made economically feasible.

Summary of Factual and Legal Context

USFWS presents absolutely no credible evidence that the Project Site provides any value to the CFPO. It is now and always has been unoccupied habitat. All of the USFWS's rationales for finding that the Project will take CFPOs, jeopardize the continued existence of the CFPO as a species, and adversely modify CFPO critical habitat are based on speculation about either (1) the potential of the Project Site in the future to serve as some form of habitat for as yet unborn CFPOs, or (2) the potential of the Project construction and its final uses to harm as yet unborn CFPOs that the USFWS speculates may move to the vicinity of the Project. Neither hypothesized potential satisfies the legal requirement that the USFWS base its take, jeopardy, and adverse modification decisions on the best available scientific information. USFWS acts in complete dereliction of that duty and binding court precedent as it fabricates a wish list of what it believes the Project Site might become in the future and a parade of horribles in its description of the Project's impacts. For the reasons summarized here and described in more detailed analysis later in this letter, and in the attachments, each of the three findings, take, jeopardy, and adverse modification, is fundamentally unsupported by credible, reliable, verifiable scientific evidence and is at odds with the rudimentary legal requirements of the ESA.

Essential Project Facts

We do not think there is any dispute that the following statements set forth the best available scientific evidence regarding the project site and the CFPO:

- Despite repeated survey efforts and AGFD telemetry studies, no CFPO has ever been detected on or within .5 miles of the Project. The closest known CFPO nest is approximately 2 miles distant and is separated from the Project by extensive, dense development, although there are unconfirmed reports of a site .8 miles northeast of the project. *See* Westland Resources letter attached as Exhibit 1, page 15.

- The Project as proposed calls for the preservation of substantial open space corridors with appropriate restrictive covenants. These corridors are more than adequate for potential, theoretical CFPO movement. *See* Westland Resources letter attached as Exhibit 1.

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- According to USFWS's own calculations, the areas to be cleared within the Project amount to approximately 15 TEN THOUSANDTHS (.00015) of the total area within CFPO critical habitat boundaries and 13 THOUSANDTHS (.0013) of the area within critical habitat Unit 4.

- The Project is fully entitled for the proposed development, while the vast majority of land in critical habitat Unit 4 is entitled only for very low density residential development.

Applicable Legal Standards

The foregoing *facts* leave the Service little room for defending its extreme conclusions that the Project will take CFPOs, jeopardize the continued existence of the CFPO as a species, and adversely modify CFPO critical habitat. When the legal standards associated with each of those decisions is applied properly to *the facts*, the conclusion of the Draft BO is revealed as unsupported by the best available scientific evidence.

Take: The Service presents no credible evidence that the Project will take identifiable CFPOs. Given that no CFPOs have been recorded within 0.5 miles of the Project Site, there is no basis for suggesting that the Project construction or final use will cause direct physical contact with and injury to a CFPO. To establish a finding of take in this case the Service thus must demonstrate that the Project will somehow indirectly injure a CFPO. Presumably the Service has in mind some form of *harm* through habitat modification or *harass* through indirect annoyance of CFPOs. As those components of take are defined in the Service's rules, however, each requires a finding of actual injury as a result of disruption of behavioral patterns such as breeding, feeding, or sheltering. *See* 50 CFR §17.3. Moreover, the Supreme Court has made clear what is implicit in the Service's rules, that the injury must be to an identifiable individual of the species and the foreseeable and proximate result of the action in issue. *See* Babbit v. Sweet Home Chapter of Communities for a Greater Oregon, 515 US 687 (1985).

There is no evidence that a CFPO has ever used the Project Site or its immediate vicinity for breeding, feeding, sheltering, or, for that matter, *any* behavior. It must follow that whatever habitat modification the Project may involve cannot disrupt CFPO behavior. To overcome that straightforward factual analysis, the Service simply pretends that CFPOs do utilize the Project Site because, under a hypothesized set of conditions, they could. The Service advances this fiction by (1) postulating that the habitat on the Site is suitable for CFPOs even though no CFPO has ever agreed with that characterization, and (2) adopting the maximum dispersal range of CFPOs so as to place the Project Site within the range of documented CFPOs. This speculation

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falls far short of meeting the applicable standard that the predicted effect is "likely" to occur. The standard used in place of "likely" to occur is that the predicted effect might conceivably occur.

Perhaps in anticipation of these difficulties, the Service advances a second front for its take analysis through hypothesized effects of the Project construction, which the Service associates with noise and dust, and the Project's final uses, which the Service associates with cats and pesticides. The Service's noise and dust case suffers from the same problem as its habitat modification case; there are no CFPOs on site. No CFPO, anywhere, has been documented within 0.5 miles of the Project Site. The Service presents no evidence that any CFPO has ever suffered injury from noise and dust emanating from a Project at that distance. As for cats and pesticides, the Service puts itself in a conundrum. First, there is no evidence of effects that cats and pesticides associated with residential uses affect CFPOs at distances greater than 0.5 miles. Courts have routinely rejected this kind of tenuous causal analysis as sufficient grounds for finding take. Indeed, if the Service is serious that the Project's potential to introduce cats and pesticides is sufficient to trigger the take prohibition for the Project, then the Service will have to treat all existing cat owners and pesticide users in the CFPO critical habitat range as acting in violation of the ESA, a position the Service has not publicly taken and which we strongly doubt it intends to advance. Yet in concocting its theories of take to reach the Project, the Service cannot apply lesser standards to the rest of the world. The constitutional doctrine of equal protection requires the service to treat the applicant as well as it treats others within the critical habitat.

Jeopardy: The basis for finding that the Project jeopardizes the continued existence of the CFPO is also unsupported by the evidence. To reach a jeopardy finding, the Service must demonstrate that the Project, reasonably would be expected, directly or indirectly, to reduce *appreciably* the likelihood of both the *survival and recovery* of the CFPO in the wild *by reducing* the reproduction, numbers, or distribution of that species. 50 CFR §402.02 (emphasis added). Significantly, the Service presents no evidence that the Project will *reduce* the reproduction, numbers, or distribution of the CFPO. Obviously the Project will do none of these, as no CFPO has ever used the Project Site for reproduction, no CFPOs are on the Project Site, and none have ever distributed there. The CFPO's own behavior demonstrates that its survival does not depend on the Project Site.

To make a case that the Project Site is important to the recovery of the CFPO, the Service hypothesizes that the Project reduces *the potential* for CFPOs to use the Project Site and thereby jeopardizes the continued existence of the CFPO as a species. The Service's definition of jeopardy, however, does not reach actions that reduce future potential reproduction, numbers, or distribution of a species, and it explicitly requires that an action reduce both the chances of

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survival *and* (not *or*) recovery. *All* property in the Tucson area has *the potential* to provide habitat for the CFPO, even a parking lot, or a farm, or a residential subdivision could be converted to CFPO habitat and thus further the *recovery* of the species. The jeopardy prohibition, however, does not require property owners to preserve or enhance the *potential* recovery values of their property for the benefit of protected species. In any event, there is no evidence that the Project Site, if preserved in its baseline conditions, would even contribute to the recovery of the CFPO. Here again the Service's case depends entirely on speculated contingencies. In short, the CFPO has never demonstrated that its reproduction, numbers, or distribution, either present or potential, depend on the Project Site remaining in its current condition, hence it cannot be the case that conversion of the Project Site to any other use will jeopardize the continued existence of the CFPO as a species.

Adverse Modification. To establish that the Project results in adverse modification of critical habitat, the Service must demonstrate that the Project involves a direct or indirect alteration that *appreciably* diminishes the value of critical habitat for *both the survival and recovery* of a listed species. 50 CFR §402.02. Once again the Service confronts the problem that the Project Site has never played a role in the survival of the CFPO. There is no evidence that the CFPO has considered the Project Site any more valuable to its survival than a paved parking lot. As for recovery of the CFPO, the Project Site represents 15 Ten Thousandths of the total CFPO critical habitat. The value of the Project Site, for both the survival and recovery, of the CFPO is thus below any threshold that could reasonably be associated with appreciable within the meaning of the Service's regulations.

Specific Deficiencies of the Draft BO

Following is a more detailed discussion of some of the deficiencies of the Draft BO:

1. USFWS's "Action Area" is Grossly Overbroad. On pages 2 and 3 of the Draft BO, USFWS defines the "action area" for the purposes of the consultation as follows:

> The Service has determined the action area to include the project site and areas within 31 KM (19 miles) of the project site. The Service bases this determination on the dispersal distance of juvenile CFPOs in Texas and Arizona...

USFWS's determination of the action area plainly makes no sense. Applicable regulations define the "action area" as all *areas to be affected directly or indirectly by the Federal action* and not merely the immediate area involved in the action. 50 CFR §402.02 (emphasis added). In the Draft BO USFWS stretches this definition beyond reason. To be part of the action area, an area has to be *affected by the action*. In determining a proposed action area, therefore, the applicant

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used USFWS's own protocol for CFPO surveys, which suggests surveying 1,500 feet around a project site for the presence of CFPOs that might be affected by an action. USFWS on the other hand, by tying the definition of the action area to hypothetical juvenile CFPOs dispersing to the site from distant locations even though no such dispersal has previously been documented, has turned the analysis on its head. In light of the fact that the Project site has never been documented to be used by a CFPO for any purpose whatsoever, including dispersal, and that USFWS itself has pointed out that AGFD telemetry studies show that dispersing CFPOs elect to move northwest to more open areas rather than the Project (Draft BO at 18), presuming effects up to 31 KM (19 miles) distant is unreasonable and speculative in the extreme.[1] Indeed, an area more than 1,500 feet from the Project site could not, by virtue of the Project, be made any more or less suitable for a CFPO dispersing from some other location. The logic used in the draft BO could easily support a conclusion that the action area includes the entire range of the CFPO, based on speculation that any CFPO might someday find its way to this site. The flaw in the logic, however, is that the CFPO is not "affected" until it arrives at or near the site. So long as the CFPO resides away from the site, the development of this site cannot either directly or indirectly affect the CFPO.

USFWS can demonstrate no potential project effects on areas more than a short distance from the actual Project site. Nor can USFWS demonstrate any likelihood that a dispersing CFPO would actually utilize the Project or its immediate vicinity for any extended period even if left in the baseline condition. In fact, USFWS itself points out on page 18 of the Draft BO that telemetry studies have shown that dispersing CFPOs move to less developed areas to the north rather than to the project vicinity. Yet, the conclusions of the Draft BO are based entirely on the speculation that the Project site and its immediate surroundings would be used for the establishment of a CFPO territory even though none has been established before and that the effects to such a CFPO would rise to the level of jeopardy. The dispersing CFPOs are avoiding this site. The 1,500 foot distance from the site proposed by the applicant and adopted by the EPA is actually conservative, as it describes the largest zone of potential effects that would emanate from the project *if a CFPO ever established a territory in the area.*

The applicant has asked its consultant to review all available evidence and literature to determine if there is any evidence to support a conclusion that a project of less than one-quarter

[1] Using a dispersal distance from other locations does not seem an appropriate way to measure the effects of the Project on other areas, particularly in light of the fact that a CFPO has never been documented to disperse to or over the Project. Moreover, even if one accepted dispersal distance as an appropriate method of determining the action area, it is worth noting that USFWS did not use a minimum or even average dispersal distance. *Rather, USFWS used the maximum CFPO dispersal distance ever observed*, a distance that is reflected in only unpublished data. This is a result-oriented analysis.

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square mile is likely to affect 1,100 square miles. That is, can a project actually effect an area that is approximately 4,500 times its own size. The answer we have received is that there is no evidence to support this conclusion. In fact, we are informed by our consultant that USFWS has taken radically different and inconsistent views regarding this subject. During informal conversations as recently as 9 months ago, the service advised applicants to use an action area of 600 meters. *See* Westland Report attached hereto as Ex.1, page 6-7.

2. The Review of the Status of the Species is Deficient. The report of Westland Resources, Ex. 1, comments on the status of the species. Importantly, the draft BO fails to give fair consideration to evidence that the CFPO can and does successfully utilize habitats at the suburban interface. This is critically important data regarding the status of the species because it undermines the notion that there is a direct linkage between housing construction and harm to the CFPO.

3. Environmental Baseline is Deficient and Establishes a Double Standard. The environmental baseline discussion in the Draft BO fails to consider the impact of existing development and other factors on the suitability of the Project as CFPO habitat. Throughout the Draft BO, USFWS has set up the inconsistency of asserting that areas adjacent to dense development are not suitable for the CFPO, while at the same time asserting that all of the Project, much of which is adjacent to existing development, the already approved Countryside Vista Blocks 5 and 6, and roads, is not only suitable, but essential, for the CFPO. The USFWS rules provide that the "environmental baseline" "includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process." 50 CFR §402.02. Impacts that are a part of the baseline are not considered effects of the action for the purpose of determining whether an action will jeopardize a species or result in adverse modification of critical habitat. 50 CFR §402.02. Accordingly, where, as in this case, an action area has already been subjected to various significant impacts as a result of prior actions considered part of the baseline, the likelihood of significant additional effects emanating from the action is greatly reduced.

In this circumstance, for example, the project site and its immediate vicinity have been significantly affected by existing dense development to the east, existing low density development to the north, existing roadways on east and north sides of the Project, I-10 to the west of the Project, the approved Countryside Vista Blocks 5 and 6, and various other human activities, including without limitation, off-road vehicle use, trash dumping, and removal of vegetation. Figure 14 to Exhibit 1 is a picture depicting existing disturbances within 600 meters of the Project site. Indeed, in the Draft BO, USFWS itself emphasizes the existing development

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in the Project vicinity. (*See, e.g.*, Draft BO at 15). Separately in the Draft BO, USFWS emphasizes the sensitivity of the CFPO to various disturbances, including dense development, roadways, noise, human activity, household cats, etc. The connection which USFWS fails, but is required, to make is that according to its own view of the needs of and threats to the CFPO, the Project site and its immediate vicinity have already been rendered essentially unsuitable for nesting by the CFPO, even though the vegetation may in isolated areas still retain a composition and density similar to that utilized by CFPOs in other locations. Indeed, based on the negative effects the Service contends existing development and human activity have on CFPOs, one would think USFWS would not want the Project site, even in its current condition, to attract a CFPO for nesting. USFWS can't have it both ways, either the CFPO is sensitive to disturbances such as those existing in the Project area, in which case there is little if any biological value remaining in the Project, or it is not so sensitive to these types of disturbances, in which case this Project will not jeopardize the species or result in adverse modification of critical habitat.

Westland Resources has provided its comments regarding the environmental baseline. Based upon a fair evaluation of the data, there is no evidence to conclude that habitat modification is not tolerated by the CFPO. To the contrary, so long as basic habitats are met, the CFPO appears to be quite tolerant of human activities. *See* Section 3 of Westland Resources Report.

4. The Effects of the Action are Speculative in the Extreme. The effects of the action identified in the Draft BO are based entirely on the unsupported speculation that a CFPO will seek to establish a breeding territory in the immediate vicinity of the Project. In fact, such speculation is plainly contrary to the best available scientific information. It is not permissible for USFWS to base a Biological Opinion on the speculative value of the Project site as nesting habitat for unknown, unborn dispersing CFPOs. As documented in the Draft BO, telemetry studies by AGFD have indicated that dispersing CFPOs have avoided the site and instead moved north to less developed locations. Moreover, the Draft BO does not only speculate on the potential presence of a CFPO in the Project vicinity, but on the nature and degree of impact such a CFPO would suffer.

5. Cumulative Effects Analysis Defective. The cumulative effect analysis includes reference to a single well to be developed by the applicant to supply water to the proposed project. It is suggested in the draft BO that this well will permit other non-federal projects that will reduce the amount of owl nesting, foraging and sheltering habitat in the area and adversely effect CFPO travel corridors. This is a remarkable conclusion to be drawn from the existence of a single well. The future use of this well is entirely speculative, and may be limited to the project, and other existing facilities. In the event service is provided to future projects within critical habitat, the service will at that time have the opportunity to express an

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opinion upon the effect on the CFPO. It is difficult to imagine any activity that might occur as a result of the well within critical habitat that will not be subject to the consultation process.

6. Jeopardy and Adverse Modification Conclusions are Arbitrary, Capricious, and Against Law. 50 CFR §402.02 describes the jeopardy standard as follows:

> *Jeopardize the continued existence of* means to engage in an action that *reasonably* would be expected, directly or indirectly, *to reduce appreciably the likelihood of both survival and recovery* of a listed species in the wild *by reducing the reproduction, numbers, or distribution of that species.* (emphasis added).

As stated in USFWS Section 7 Consultation handbook:

> The determination of **jeopardy** or **adverse modification** is based on the effects of the action on the continued existence of the **entire** population of the listed species or on a listed population, and/or the effect on critical habitat as designated in a final rulemaking. When multiple units of critical habitat are designated for particular purposes, these units may serve as the basis of the analysis if protection of different facets of the species life cycle or its distribution is essential to both its survival and recovery. *Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do no result in **jeopardy** or **adverse modification** determinations unless that loss, when added to the environmental baseline, is likely to result on significant adverse effects throughout the species range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.* (Handbook at 4-34; bold in original, italics reflects emphasis added).

USFWS's jeopardy conclusion in the Draft BO plainly fails to meet this standard. There are no CFPOs on or in proximity to the Project site. How can the Project then appreciably reduce the likelihood of survival and recovery of the CFPO by reducing the reproduction, numbers, or distribution of the species? Even if a CFPO did venture into the Project vicinity, there is no credible evidence to suggest that temporal effects on that CFPO would appreciably diminish the likelihood of the survival and recovery of the species. The biological consultant, Westland Resources, has advised the applicant that there is no credible scientific evidence to support the conclusion reached by the draft BO. The jeopardy conclusion is plainly arbitrary, capricious, and against law.

7. The Reasonable and Prudent Alternatives are Fatally Defective. 50 CFR §402.03 provides that [r]easonable and prudent alternatives:

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> refer to alternative actions identified during formal consultation that can be implemented in a manner [1] *consistent with the intended purpose of the action,* [2] that can be implemented *consistent with the scope of the Federal agency's legal authority and jurisdiction,* [3] *that is economically and technologically feasible*...(emphasis added).

In the Draft BO, USFWS proposes just two reasonable and prudent alternatives to the Project:

1. Reduce on-site ground disturbance to no more than 25% of the parcel; or

2. Provide off-site mitigation land, with perpetual management, within critical habitat unit 4 south of Tangerine Road and east of I-10 in an amount adequate to achieve 25% aggregate ground disturbance. Draft BO at 26.

Both of these alternatives fail to satisfy each of the three mandatory criteria quoted above. Indeed, in proposing these alternatives, USFWS has blatantly failed to follow its own guidance:

> The action agency and *the applicant* (if any) *should be given every opportunity to assist in developing reasonable and prudent alternatives.* Often, they are *the only ones who can determine* if an alternative is within their legal authority and jurisdiction, and *if it is economically and technologically feasible.* ESA Section 7 Consultation Manual at 4-41 (emphasis added).

Despite this unequivocal guidance, and despite the applicant's numerous efforts to indicate to USFWS that these RPA's would not satisfy the mandatory criteria, USFWS has failed to provide RPA's that meet regulatory requirements. In particular, the RPA's are not economically feasible, are not consistent with the intended purpose of the action, and cannot be implemented consistent with the authority and jurisdiction of the EPA under the NPDES stormwater program.

A. The RPA's are Not Economically Feasible. Neither of the RPA's proposed in the Draft BO are economically feasible. The first RPA, which calls for reduction in disturbance on-site to no more than 25% would amount to approximately 75% reduction in the size of the Project. The cost of Project development and utility infrastructure must be recoverable from the sales price of the units.

The second RPA is equally unfeasible, because it does not take into account the difficulty of acquiring land for the purpose of off-site mitigation. The requirement imposed by the second

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RPA is that the land be south of Tangerine, thus eliminating land which might be acquired elsewhere within critical habitat at an acceptable cost.

The economic feasibility issue is of tremendous importance to the applicant. The requirement that reasonable and prudent alternatives be given to applicants illustrates that the EPA was never intended to be applied in such a way as to preclude reasonable use of private property. If an economic feasibility analysis had been performed, it would have become readily apparent that the applicant is not being given an alternative that permits reasonable use of the property. Instead, basic market forces render the alternatives suggested as unreasonable and imprudent. The applicant's economic valuation expert has carefully evaluated this issue and provide a report, a copy of which is attached as Exhibit 2. The qualifications of this expert are beyond reproach. Indeed, this expert has been employed by the federal government, as well as most other local governmental agencies to provide appraisal opinions. The opinion reached is unqualified. The reasonable and prudent alternatives suggested by the draft BO are neither reasonable nor prudent, because they are not economically feasible. The value of the site for the intended purpose with either the first or second suggested RPA is a negative. In effect, compliance with the RPA eliminates the intended use of the property. *See* Baker Peterson & Baker report attached as Exhibit 2.

B. The RPA's are Not Consistent With the Intended Purpose of the Action. The proposed action is the construction of a residential community with approximately 367units with open space and other amenities in a price range for which there is an identifiable market. A vast reduction in the number of units, as would be required under the first RPA, cannot be implemented consistent with the action. Even if the Project would be feasibly pursued under the first RPA, it would entirely change in character from a well-designed and balanced community of clustered housing to either low density, ranchette housing, or a tiny cluster island surrounded by greenspace, neither of which is consistent with what the applicant has proposed.

C. The RPA's Can Not be Implemented Consistent With the Authority and Jurisdiction of the EPA Under the NPDES Stormwater Program. It must be borne in mind that the federal action in question is the applicants utilization of the EPA's NPDES general permit for construction-related stormwater discharges (the CGP). Accordingly, the RPA's must be something that the EPA has the legal authority and jurisdiction to impose as a conditions to CGP, or perhaps, individual stormwater permit authorization. Under the federal Clean Water Act the EPA does have broad authority to condition permits for the protection of water quality. In this instance, however, the RPA's sought by USFWS have nothing whatsoever to do with water quality and in fact are directed at a terrestrial species. Nowhere under the permitting program in question does the EPA have the jurisdiction or authority to require an applicant who is otherwise protecting water quality from stormwater discharges to eliminate approximately 75% of their

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project or provide 3 to 1 off-site mitigation with perpetual management. Indeed, with respect to the second RPA (off-site mitigation), USFWS has itself acknowledged that it is not permissible to include in an RPA actions on lands over which the action agency has no jurisdiction or no residential authority to enforce compliance. ESA Section 7 Manual at 4-42.

Conclusion

The concerns expressed in this letter and the attachments are not exhaustive. There are, however, sufficient to support the applicant's firm conviction that the draft BO must be withdrawn and substantial changes must be made to comply with applicable regulations and to permit an economically feasible use of the land. The applicant would welcome the opportunity to further discuss these issues with the service.

Sincerely,

GABROY, ROLLMAN & BOSSÉ, P.C.

/s/
Richard M. Rollman

RMR/mg
Attachments
cc: Terry Klinger
Alan Glen
Jim Tress
Greg Anderson
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EXHIBIT
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May 6, 1997

Mr. Robert Dummer
U.S. Corps of Engineers
Regulatory Branch
3636 North Central Avenue, Suite 760
Phoenix, Arizona 85012

Re: **Your Project No. 2-21-96-F-134: Applicant's Comments on the Draft Biological Opinion for the Las Campanas Project in Green Valley, Pima County, Arizona by WLC Green Valley Ltd.**

Dear Mr. Dummer:

We have been retained by WLC Green Valley Ltd. (the Applicant) in connection with the above-referenced matter. The purpose of this letter is to provide the Applicant's comments on the draft biological opinion prepared by the U.S. Fish and Wildlife Service (Service) for the above-referenced project. For the reasons described below, we believe that the draft biological opinion contains significant inadvertent errors regarding the status of the species, resulting in dramatic overstatements regarding the effects of the action, considers factors not legally relevant to the consultation process, and as a result, incorrectly concludes that the agency action in question is likely to jeopardize the continued existence of the Pima pineapple cactus (PPC). We also believe that the draft opinion fails to identify reasonable and prudent alternatives within the meaning of the Endangered Species Act (ESA) or the Service's regulations.

In view of the significant inadvertent errors in the draft biological opinion, we do believe that this matter can be amicably resolved, and you will see that we close this letter with a request for a meeting to begin seeking such a resolution. We and our client look forward to working with the Corps and the Service to bring this matter to acceptable resolution.

I. Overview of Applicant's Position

The Applicant's project is comprised of 358 acres of potential development plus 84 acres of open space. The Applicant contemplates that fill will be placed for road

crossings over unnamed washes on the property. The total area covered by the Corps permit will comprise 6.6 acres. The relative impact of the Las Campanas Project is significantly overstated in the biological opinion as a result of an error. In calculating the total available habitat for the PPC, the Service apparently counted townships as if they were sections of land. This inadvertent error resulted in an underestimate of the amount of the available habitat by 1/36th. Thus, the 32,000 acres of available habitat identified in the draft biological opinion should actually be **1,152,000 acres**. Though it is not clear how the Service arrived at an extrapolated number of 11,920 individual PPC plants based on the 32,000 acres of available habitat, this number increases to **429,120** individual plants based upon 1,152,000 acres of available habitat.

This error has resulted in the Service dramatically overestimating the impact on the PPC of both this project and other activities occurring in the species' range. In reality, the area of habitat proposed to be disturbed by the Las Campanas Project will comprise only about **.031** percent of the estimated total available habitat. In addition, only about **.01** percent of the Service's extrapolated number of total existing individual plants will be disturbed by the project, and these will be transplanted locally to permanent open spaces on the development property in accordance with Service-approved protocols. Moreover, the project is surrounded on all sides either by existing development or mine tailings, and therefore is not part of any larger habitat block. It is difficult to see how this relatively modest project is likely to jeopardize the continued existence or recovery of the species.

As we explain in more detail below, we believe that the jeopardy conclusion in the draft biological opinion results both from the calculation errors and from consideration of inappropriate and irrelevant factors in evaluating the proposed action. First, we believe that the draft opinion incorrectly expands the proposed action area from the 6.6-acre federal agency action at issue (the Corps' authorization of the fill areas under section 404 of the Clean Water Act), to encompass the Applicant's entire private project, and from there implicitly and without justification expands the action area to include the entire Green Valley and Sahuarita range of the PPC. Second, the opinion overstates the impacts to the species both as a result of the calculation errors and by inappropriately considering speculative future effects in evaluating the status of the species and the environmental baseline, both of which are properly limited to past, present, and current effects and activities. This error is compounded in the opinion by inappropriately considering these same speculative future effects in evaluating the cumulative effects of other state and private projects. Few if any of these unrelated future projects are "reasonably certain to occur" within the meaning of the ESA regulations and all would occur, if at all, outside any action area properly considered in the draft opinion. Third, even accepting all of that, the draft opinion seriously overstates, from a biological perspective, the effects of both the proposed action and the cumulative effects in reaching the conclusion that the Corps' authorization of the project's fill areas can be reasonably expected to appreciably reduce the likelihood of survival or recovery of the species.

The draft opinion identifies several measures for consideration by the Corps as "reasonable and prudent alternatives" to the proposed action, including: (1) that the Applicant establish an intensive monitoring program on experimental safe zones on the property; (2) that the Applicant acquire and maintain 411 acres in replacement habitat with an average density of 1 PPC per acre (a 10 to 1 mitigation ratio assuming 100% transplant failure); and (3) that the Applicant contribute $31,000 to a management fund for the Service's use in conservation projects. These alternatives cannot be implemented consistent with the Corps' legal authority and jurisdiction, are not economically feasible, and are not necessary to avoid jeopardy to the species. As discussed in greater detail below, the project alternatives identified in the opinion therefore cannot be considered "reasonable and prudent alternatives" under any proper interpretation of that phrase.

Before discussing the Applicant's specific objections to the draft biological opinion, we would offer the following description of the statutory and regulatory framework under which the project is being reviewed.

II. Legal Background

As you know, section 7 of the ESA requires federal agencies, such as the Corps, to ensure that any federal agency action "is not likely to jeopardize the continued existence of any endangered species or result in the destruction or modification of" critical habitat. 16 U.S.C. § 1536(a)(2). The Service has listed the PPC as an endangered species, but has declined to designate any of the PPC's habitat as critical habitat. *See* 58 Fed. Reg. 49875, 49878 (1993). An agency action that would destroy or modify PPC habitat is not, therefore, prohibited by the ESA, provided the action is not likely to jeopardize the continued existence of the PPC. The term "jeopardize the continued existence of the species" is defined by the regulations implementing the ESA to mean:

> [T]o engage in a action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.02.

The jeopardy evaluation is to be made by the federal agency in consultation with the Service, for which purpose the Service prepares a biological opinion on whether the agency action is expected to appreciably reduce the likelihood of survival and recovery of the species. *See id.* §§ 1536(a)(2), (b). The agency and the Service are required to utilize the best scientific and commercial data available in evaluating whether the agency action is likely to cause jeopardy. If the biological opinion concludes that the agency action is reasonably expected to appreciably reduce the likelihood of survival and recovery of the species ((*i.e.*, a "jeopardy opinion"), the Service is required either to identify in its biological opinion reasonable and prudent

alternatives to the action that would not violate the ESA, or to issue a biological opinion without reasonable and prudent alternatives. A jeopardy opinion issued without reasonable and prudent alternatives is in essence an opinion by the Service that the property in question cannot be developed without violating the ESA.

The regulations implementing the ESA set out the procedure and substance of Section 7 consultations. The Service will evaluate the "effects of the action" as well as the "cumulative effects" of unrelated future state or private actions *within the action area*. These effects will be added to the "environmental baseline" *within the action area* to determine whether, in light of the current rangewide status of the species, the Corps' authorization of the fill areas would reasonably be expected to appreciably reduce the likelihood of survival or recovery of the PPC in the wild.

The environmental baseline is defined by the regulations to include the impact of past, present, and contemporaneous activities *within the action area*. *See id.* § 402.02. The environmental baseline is essentially a statement of the current environmental conditions relevant to the species within the action area. *See* Draft Handbook at 4-23. To this baseline, the Service adds the "effects of the action," including both direct and indirect effects caused by the agency action and the direct and indirect effects of actions that are interrelated or interdependent with the agency action. *See* 51 Fed. Reg. 19932 (1986). The "action area" is defined by the effects of the action. *See* 50 C.F.R. § 402.02.

Cumulative effects are not effects of the action. Cumulative effects are the effects of future state and private activities that are *reasonably certain to occur within the action area*. *See id.* The phrase "reasonably certain to occur" is not defined in the regulations. It has, however, been the subject of guidance by the Service and the Service's legal counsel. This guidance is discussed in more detail later in this letter. Suffice it to say here that speculative future projects that are not reasonably certain to occur, as evidenced by objective indicators of commitment to the project, should not be included in the Service's evaluation of cumulative effects. *See* 51 Fed. Reg. 19928, 19932 (1986); Solicitor's Opinion on Cumulative Impacts Under Section 7 of the Endangered Species Act, 88 I.D. 903, 908 (1981) (available at 1981 I.D. LEXIS 123) [hereinafter "Solicitor's Opinion"]; Draft Handbook at 4-29. Nor should future activities outside the action area.

III. Applicant's Objections to the Draft Opinion

We turn now to the Applicant's specific objections to the draft opinion. As we discuss in more detail below, we believe that the draft opinion inappropriately expands the action area; that it considers speculative, future projects not legally relevant to the jeopardy analysis; and that it seriously overstates the effects of the proposed action.

A. The Opinion Underestimates Species Range and Overestimates Impact

As a result of a calculation error, the opinion seriously underestimates the status of the species and overestimates the impacts of the action. The opinion estimates the range of the PPC at 32,000 acres, with an extrapolated population of 11,920 individuals. Opinion at 8. In fact, based on the information used by the Service the range of the species is approximately 1,152,000 acres, with an extrapolated population of 429,120 individuals. With the correct baseline, the impacts of the action are negligible, affecting .031% of the range and .01 percent of the individuals. Likewise, the cumulative effects are vastly overstated. In short, once the calculation errors are corrected, there is little question that the opinion shifts to "no-jeopardy." Out of an abundance of caution, and to aid the Service's preparation of further opinions on the PPC, however, we also detail a variety of other objections to the opinion.

B. The Draft Opinion Inappropriately Expands the Action Area

The draft opinion inappropriately expands the action area from the 6.6-acre fill area involved in the federal agency action at issue; both explicitly, to include the Applicant's entire private project, and implicitly, to include the entire Green Valley and Sahuarita range of the PPC.

1. Expansion to Include Entire Project

The draft opinion incorrectly describes the proposed action to include in the action area the entire 358-acre development area plus 84 acres of permanent experimental safe area in the development footprint. The only federal agency action at issue is a Corps' permit for 6.6 acres of fill. Although in many cases, the action area may be larger than the area actually involved in the federal agency action at issue, a larger action area is not justified here. Specifically, there are insufficient indirect, interrelated, and interdependent effects associated with the fill areas to justify federalization of the Applicant's entire project. Indirect effects (including the effects of interrelated and interdependent actions) are defined as effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." *See id.* The discharge of fill into the unnamed washes on the property will cause few, if any later effects. Moreover, the potential remaining development and open spaces are not actions interrelated with the Corps permit, in that they are not "part of a larger [federal agency] action" and do not "rely on the larger [federal agency] action for their justification." *See id.* (defining the terms "action" and "effects of the action," including interrelated actions). Nor are the potential remaining development and open spaces interdependent actions, because these private actions clearly have utility independent and apart from the Corps' authorization of the fill areas. *See id.*

To interpret the terms interrelated and interdependent more broadly would expand the scope analysis under the ESA to equal or exceed that of review under the National Environmental Policy Act (NEPA). The Service has recognized that the scope of ESA review should be narrower than the scope of NEPA review. *See* 51 Fed. Reg.

According to both ESA regulations and the Service's own guidance, the environmental baseline should be limited to consideration of environmental conditions within the action area. *See* 50 C.F.R. § 402.02 (defining "action area" and "effects of the action"); *see also* Draft Handbook at 4-23 (recognizing this limitation). The draft opinion's implicit expansion of the action area to include the entire region is demonstrated by its consideration of areas well outside the development footprint of the Applicant's project. For example:

> The primary threat to the continued existence of the Pima pineapple cactus involves the rate at which habitat is being lost, fragment or altered, *primarily in the Green Valley and Sahuarita regions* of the plant's range.

Draft Opinion 9. The following statement is even more telling:

> Both informal and formal consultations and other forms of documentation have determined that habitat loss, fragmentation and alteration *within the action area* is ongoing at present.

Id. These statements demonstrate that the Service has implicitly treated the action area for the Applicant's project as the entire range of the species in the Green Valley and Sahuarita regions. This expansion is not consistent with the ESA regulations or guidance.

b. Cumulative Effects

The draft opinion compounds this error by again considering, this time in its evaluation of cumulative effects, possible actions outside any appropriate action area for the project. The ESA and implementing regulations require, however, that consideration of cumulative effects is limited to such effects occurring "within the action area."

Cumulative effects are not effects of the action, and the cumulative effects of other, unrelated state or private projects cannot be used to expand the action area for a project. The term "cumulative effects" is defined to include "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur *within the action area* of the Federal action subject to the consultation." *See id.* § 402.02. The term "action area" is defined to include only the area affected by the action, including its direct, indirect, interrelated, and interdependent effects. *See* 50 C.F.R. § 402.02; *see also* Draft Handbook at 4-29 (emphasizing the phrase "action area" in the explanation of "cumulative effects"). This interpretation of the regulations is compelled by the statutory requirement that there be a causal connection between the agency action (in this case, the Corps' authorization of the fill areas) and the likelihood of jeopardy (*i.e.*, the reasonable expectation that survival or recovery of the species will be appreciably reduced by that action). *See* 16 U.S.C. § 1536(a)(2) (establishing the consultation requirement).

No activities other than actions related to the Applicant's use of the property are expected to occur in the action area for the proposed action. The draft opinion's analysis of cumulative effects, however, is based entirely on actions that would occur, if at all, outside the action area:

> The primary factor contributing to extirpation of the individuals and large scale habitat loss is residential development. However, mine expansions are likely to cause the alteration and loss of more habitat than residential development in the near future. As discussed in the BA, this project is surrounded by residential and commercial developments on three out of four boundaries, and the fourth is within one mile of mine tailings. Private or State lands within a reasonable distance that would allow for cross-pollination and dispersal areas are almost certain to be developed for mining or residential purposes.
>
> . . . [T]he [area adjacent to the] western boundary . . . seems likely to be developed also. . . .
>
> Private land within this important region of the range of the Pima Pineapple cactus (which is 90% state or privately owned) is relatively certain to be developed for urbanization or mining based on the current rate of development in the Green Valley and Sahuarita areas and certain mine expansion proposals.

Draft Opinion 11-12.

In summary, in evaluating the environmental baseline for the project and the cumulative effects from future unrelated projects, the draft opinion relies heavily on actions that would occur, if at all, outside the action area. By doing so, the draft opinion implicitly expands the action area to include the entire range of the species, without possible justification under the ESA or its implementing regulations. The result of this expansion is that the opinion gives undue weight in the jeopardy analysis to activities occurring outside the action area. The draft opinion acknowledges that the likelihood that the PPC would be jeopardized by the proposed action "is appreciably increased by the cumulative effects that are reasonably certain to occur in the Green Valley and Sahuarita area such as those from urbanization and mining." *See* Draft Opinion 12. In the absence of this inappropriate expansion of authority, the Service's conclusion that the species is likely to be jeopardized by the Corps' authorization of the fill areas for the project is not supportable.

C. The Draft Opinion Considers Speculative, Future Actions

The effect of inappropriate expansion of the action area is compounded by the consideration of merely speculative future projects in that expanded area. Future projects should not be considered in evaluating the current status of the species or the

environmental baseline. Future actions within the action area should be considered in evaluating cumulative effects, but should be limited to actions that are *reasonably certain to occur* within the action area.

1. Current Status of Species and Environmental Baseline

The draft biological opinion inappropriately considers *future* activities and effects in evaluating the rangewide *current* status of the PPC and the environmental baseline for the project. *See* Draft Opinion 6, 9 (discussing various future development trends in the region). The environmental baseline for the project is essentially a subset within the action area of the rangewide status of the species. *See* Draft Handbook at 4-23. The ESA regulations and Service guidance call for the environmental baseline to include past, present, and contemporaneous projects, but not future activities, as follows:

> The environmental baseline includes the past and present impacts of all Federal, State or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

50 C.F.R. § 402.02. This definition of "environmental baseline" anticipates that only the effects of past and existing actions as well as actions being taken at the same time as the proposed action should be considered in the environmental baseline. Draft Handbook at 4-23.

The consideration of speculative, future activities is not appropriate either in establishing the environmental baseline within the action area or in evaluating the current status of the species throughout its range. To the contrary, the ESA regulations and Draft Handbook consistently direct consideration of future effects to the cumulative effects analysis at the end of the evaluation process. *See* 60 C.F.R. § 402.02 (defining the term "environmental baseline"); *id.* (defining the term "cumulative effects"); Draft Handbook at 4-22 (explaining that the analysis for the status of the species "documents the effects of all *past* human and natural activities or events that have led to the *current* status of the species"); Draft Handbook at 4-29 (describing the cumulative effects analysis).

The draft opinion improperly considers future projects at length in evaluating the rangewide current status of the species as well as the environmental baseline, as follows:

> Residential development within and surrounding Green Valley is expected to increase in the future. In fact, it is expected that habitat losses will likely double within the next three years based

> on recent documentation between 1993 and 1995 . . . and proposed development.
>
> Urbanization and mining are the primary threats to the continued existence of Pima pineapple cactus. The above data was derived from land areas specifically threatened with urbanization. Possible mine expansions through portions of the northern section of the range would also increase habitat losses. . . .
>
> Even with data on historical change, which is not available, we cannot reliably predict cause and effect scenarios for the future due to compounding factors such as climate change, urbanization, legal and political complexities . . . . Draft Biological Opinion 6 (Status of the Species).
>
> The primary threat to the continued existence of the Pima pineapple cactus involves the rate at which habitat is being lost, fragmented or altered, primarily in the Green Valley and Sahuarita regions of the plant's range. Draft Biological Opinion at 9 (Environmental Baseline).

By inappropriately considering future projects (and by its calculation errors) in its analysis of the current status of the species, the draft opinion understates the current vitality of the species, both in establishing the environmental baseline within the action area and in evaluating the current status of the species throughout its range. The draft opinion then compounds this error by inappropriately considering these same speculative future actions in evaluating cumulative effects.

2. Cumulative Effects Should be Reasonably Certain to Occur

The cumulative effects evaluated in a biological opinion must be based on future state and private actions that are "reasonably certain to occur." The draft opinion, however, bases its cumulative effects analysis largely on an extrapolation of historical growth patterns, general impression, and similar non-project-specific anecdotal information, while admitting to have "no knowledge" of good commercial information on private actions. *See* Draft Biological Opinion 6 ("Lost acreage on private lands of which we have no knowledge would likely mean even greater impacts occurring to the cactus than we have documented."). This level of information on the cumulative effects cannot be characterized as the "best commercial information available," nor does it support the contention—frequently recited but not well documented in the draft opinion—that these actions are "reasonably certain to occur in the future." *See id.* at 11-12.

The Service has long recognized the importance of avoiding consideration of speculative projects in evaluating cumulative effects in a biological opinion. The Service has therefore required that the cumulative effects analysis be based on state and private

D. The Draft Opinion Overstates the Effects of the Action

Based on a corrected estimate, there are currently about 1,152,000 acres of habitat, none of which has been listed as critical habitat by the Service. Of this available habitat, 6.6 acres will be directly impacted by the proposed action requiring federal authorization (.0006 percent of the available habitat), 358 acres will be directly impacted by the residential development (about .031 percent of the available habitat), and an additional 84 acres will be set aside within the development footprint as permanent open spaces. Of the extrapolated 429,120 (after error correction) individual PPC plants, 45 individuals (.01 percent of the estimated total population) will be transplanted from their existing location to the permanent open spaces on the property.

There is limited data on the success of transplantation of the PPC, but transplantation has according to the draft opinion been "hypothesized" to be limited by drought-related predation or spatial distribution, or both. The draft opinion therefore assumes that all 45 (100 percent) of the transplanted plants will die. *See* Draft Biological Opinion 10 ("[T]he experimental transplantation into safe zones may result in the direct mortality of 45 individuals.") This assumption is based on the personal comments of Margaret Livingston, who estimated that 70 percent of the plants would die from predation occurring during drought conditions. *See id.* Ms. Livingston is not otherwise identified in the draft opinion, nor are her qualifications described or the basis for her anecdotal information. Such undocumented mortality rates would not appear to qualify as the "best science available" within the meaning of the ESA. We believe the Draft Opinion significantly misrepresents the probability of successful transplantation of PPC. The experience of our client's expert consultant is that transplantation of PPC, like most cacti, can be done with an extremely high success rate if done properly. The Service appears to agree that salvage and replanting are successful as stated on page 8 of the Opinion:

> Research has determined successful methods for conducting the first two phases involving salvage and replanting of individuals...

However, the Opinion goes on to state:

> However, the third phase involving habitat selection has been unsuccessful and further study is needed if transplantation is ever considered a viable option for plants impacted by land development.

No documentation for this statement is provided on page 9 of the Opinion, but on page 10 the Opinion states:

> However, in the second year under drought conditions, an estimated 70% mortality with anecdotal observations of predation occurred (Margaret Livingston pers. comm.). Therefore the experimental transplantation into safe zones may result in the direct mortality of 45 individuals.

Though not stated in the Opinion, we assume that predation is a reference to plants being dug up by animals. Potential predation of the cacti by mammals was considered in the biological assessment and protection of transplanted cacti with wire screens has been proposed to the Service. It is our understanding that no such protection was provided in the study referenced by the Service. The Service's conclusion regarding mortality is also suspect because no controls were provided (what percent of non-transplanted cacti were dug up by predators during the drought?) and because of the obvious extrapolation of 70% mortality to 100%. It appears that transplantation of cacti is very likely to be a significant part of the management of this cactus in the future and it seems the Service would be much more interested in determining how better to do it successfully rather than emphasizing results of one study, where potential predation was apparently not anticipated. One almost gets the impression that the Service does not want transplantation to be successful.

The Service's concern regarding suitable habitat has also been addressed in the biological assessment. Areas proposed for transplantation are similar topographically and support similar vegetation as areas where cacti currently occur. Two PPC are known to occur within proposed "safe zones" and several more are within a few feet of them.

We are also concerned that the Service is overstating potential problems relating to cross-pollination. The Service appears to be confusing cross-pollination with potential effects of small population size caused by habitat fragmentation. Cross-pollination requires the presence of only two cacti; 45 cacti are more than adequate. Average distance between plants following relocation will be less than currently occurs on the property, making it easier for pollinators to visit plants, not harder. The plants on the property will not be significantly farther from plants off the property following development than they are now. Observations of pollinators and plants with fruits and high seed-sets in areas where PPC occurs at much lower densities strongly suggest that pollination is not a significant problem.

If the Service believes that habitat fragmentation is a problem as suggested in RPA B of the Opinion, which indicates that replacement habitat must be at least 411 acres in size and not surrounded by fragmented habitat or developed land, does it not follow that the Las Campanas land is of extremely limited value for PPC? If so, how can the Service conclude that the proposed project results in jeopardy, since it does not come close to meeting the Service's criteria for replacement habitat?

For the foregoing reasons, it is clear that, even in light of the draft opinion's grossly expanded basis for its jeopardy analysis, the proposed action would not reasonably be expected to appreciably reduce the likelihood of survival or recovery of the species. Even as written, therefore, the draft opinion's conclusion that the proposed action is likely to jeopardize the continued existence of the species is not supported by adequate scientific and commercial information.

IV. Applicant's Objections to Identified Alternatives

In light of the draft opinion's conclusion that the proposed action would jeopardize the continued existence of the species, the service is required by the ESA to identify reasonable and prudent alternatives to the project, if any exist. 16 U.S.C. § 1536(b)(4). A jeopardy opinion with no identified reasonable and prudent alternatives is in essence a determination by the Service that the property cannot be put to productive use without violating the ESA. The term "reasonable and prudent alternative" is defined by the regulations implementing the ESA as alternatives:

> that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02.

The draft opinion identifies several measures for consideration by the Corps as "reasonable and prudent alternatives" to the proposed action, including: (1) that the Applicant establish an intensive monitoring program in experimental safe zones on the property; (2) that the Applicant acquire and maintain 411 acres in replacement habitat with average density of 1 plant to the acre (roughly a 10 to 1 mitigation ratio); and (3) that the Applicant contribute $31,000 to a management fund for the Service's use in conservation projects. For the reasons discussed below, we believe that it is clear that these alternatives cannot be implemented consistent with the Corps' legal authority and jurisdiction, are not economically feasible, and are not necessary to avoid jeopardy to the species. The project alternatives identified in the opinion therefore cannot be considered "reasonable and prudent alternatives" under any responsible interpretation of that phrase.

A. PPC Conservation Area

The draft opinion identifies the acquisition and maintenance by the Applicant or others on behalf of the Applicant of 411 acres of replacement habitat with an average density of one plant to the acre. The habitat must be all in one place and must meet the criteria set out in the opinion for suitability and be approved by the Service. The draft opinion identifies only two suitable land areas for the replacement habitat, both of which are on state lands. The acquisition of these state lands or other replacement habitat is not necessary to avoid jeopardy to the species, is not within the scope of the Corps' legal authority and jurisdiction to require, and is not economically feasible for the Applicant.

The draft opinion's belief that the acquisition of 411 acres of replacement habitat is necessary to avoid jeopardy to the PPC is not reasonable. As discussed at length above, this jeopardy conclusion is not rationally based on factors within the scope of the Corps' or Service's authority to consider. Moreover, the draft opinion even as expanded beyond the legal limits does not support the conclusion that the proposed action will jeopardize the species, particularly in light of the isolated nature of the property involved in the Applicant's project. Thus, it is not reasonable to conclude that 411 acres of replacement habitat (more than the 358 acres to be directly affected by the Applicant's project) is necessary to avoid jeopardy to the species.

In addition, the Corps has no jurisdiction to require the acquisition of replacement habitat. Although the federal register guidance suggests that this limitation on project alternatives envisions that the federal agency involved will utilize "the full range of discretionary authority held by the agency," the Corps would have no discretionary authority over the lands in question.

Finally, the acquisition of 411 acres of replacement habitat is not economically feasible. The draft opinion identifies only two suitable land areas for replacement properties, both situated on state land. The limited availability of suitable replacement habitat as well as the relative bargaining power of the state in any transaction will make purchase of replacement habitat prohibitively expensive. The cost of acquiring and maintaining replacement habitat, will likely make development of the property by the Applicant or anyone else economically infeasible, thereby rendering the property of little or no value for any future development.

B. PPC Management Fund

This fund would provide money for conservation activities by the Service that improve the status of the PPC and "offset project-related impacts that cannot be feasibly removed." The draft opinion does not specifically identify the projects that the fund would be used for, nor does it finally determine how much the Applicant would be required to pay into this fund. It is the Applicant's understanding, however, that its contribution would be limited to approximately $31,000. This money might be used, for example, for "fencing for 3 miles to enclose conservation area," which apparently refers to the replacement habitat (although this reference is not clear), and for a "monitoring program" for "Lehman lovegrass plots" and "Pima pineapple cactus [i]nventory in conservation areas."

As discussed above, the Applicant's relatively modest and isolated project would not be likely to jeopardize the continued existence of the PPC. If, however, the project did so, the draft opinion does not adequately define the amount of Applicant's contribution or explain how that contribution is essential to avoid jeopardy to the species. In particular, since the Applicant's contribution would apparently be used for Service activities on replacement habitat, and the acquisition of replacement habitat is not necessary, economically feasible, or within the Corps' authority to require, we do

not see how contribution to a management fund can be considered a reasonable and prudent alternative to the proposed action.

V. Summary and Conclusion

In summary, the draft opinion contains significant calculation errors and inappropriately expands the action area of the proposed action (the Corps' authorization of the fill areas), explicitly to include the Applicant's entire project and implicitly to include the entire Green Valley and Sahuarita regions. In evaluating the extent of jeopardy to the species, the draft opinion then considers the effect of speculative, future actions that are not reasonably certain to occur. The draft opinion then seriously overstates the effects of the proposed action, even as expanded, and as a result, incorrectly concludes that the action is likely to jeopardize the continued existence of the Pima pineapple cactus (PPC). Moreover, the alternatives proposed in the draft opinion are not reasonable or prudent within the meaning of the Endangered Species Act (ESA) or the Service's regulations.

In light of the concerns raised in this letter, the Applicant proposes a meeting of the Applicant, its biological consultant, and the undersigned with representatives of the Corps and the Service within the next 30 days to discuss the draft opinion as well as the conservation measures proposed by the Applicant as part of the action. We would be happy to attend a meeting in Phoenix or Albuquerque as the Corps and the Service may designate. We believe that this matter can be resolved to everyone's satisfaction, and we look forward to working with you and the Service to that end. Please contact me soon regarding a convenient time and place for this meeting. Meanwhile, please do not hesitate to contact me if you would like to discuss this letter or if I can otherwise be of further assistance in this matter.

Very truly yours,

Alan M. Glen

JLM/skj

cc: Mr. Michael Bowman, WLC Green Valley Ltd.
Ms. Angela Brooks, Ecological Services Field Office, Phoenix, AZ
Mr. Steve Chambers, USFW Region 2 (ES-SE)
Mr. Tom Gatz, Ecological Services Field Office, Phoenix, AZ
Ms. Nancy Kaufman, Regional Director, USFW Region 2
Mr. Ron McClendon, USFW Region 2 (ES-SE)
Ms. Susan McMullin, Chief, Ecological Services, USFW Region 2
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G. Scott Mills, Ph.D., SWCA, Tucson, AZ
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Mr. Sam F. Spiller, Field Supervisor, Phoenix, AZ
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STATEMENT OF JOHN F. KOSTYACK, SENIOR COUNSEL, NATIONAL WILDLIFE FEDERATION

Good morning, Senator Crapo and members of the Subcommittee. I am here to testify on behalf of the National Wildlife Federation, the nation's largest conservation education and advocacy organization. I appreciate the opportunity to come here today to talk about the consultation process under Section 7 of the Endangered Species Act (ESA). I would like to make three observations about our 30 years of experience with this key feature of our nation's most important wildlife law, and provide three policy recommendations for the future.

LESSONS FROM 30 YEARS OF IMPLEMENTING SECTION 7

1. Section 7 is Fundamentally Sound

A key focus of today's hearing is the Subcommittee's March 22, 2002 request to the General Accounting Office (GAO) for a study of the Section 7 consultation process. Although the request letter is 15 months old and the Subcommittee's views on Section 7 may since have evolved, it is nonetheless important that its assertions not be left unrebutted.

The Subcommittee's effort to gather statistical information about how Section 7 operates makes sense. However, the request letter to the GAO is harshly and unfairly critical of the consultation process. Contrary to the arguments in the letter, Section 7 consultations have not consumed inordinate time and money. In fact, this key provision of the ESA has accomplished a great deal of conservation with a relatively small investment of Federal resources. As with any statutory provision, improvements could be made with implementation of Section 7; but the basic structure of the consultation process is a good one and should be left undisturbed.

Section 7 contains several crucial tools for conserving the nation's threatened and endangered species and the ecosystems on which they depend. Particularly important is Section 7(a)(2), which requires all Federal agencies that carry out, fund or permit actions affecting listed species to consult with the U.S. Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration (NOAA) on avoiding jeopardy and critical habitat modification in connection with those actions. This consultation provides a crucial opportunity for the Federal Government to "look before it leaps" into potentially harmful activities. As a result of the thousands of Section 7(a)(2) consultations that take place every year, Federal agencies now routinely adjust their actions to protect imperiled species while carrying out or facilitating economic activities.

Another key tool, although given far less attention than Section 7(a)(2), is the Section 7(a)(1) conservation provision. Section 7(a)(1) requires all Federal agencies to develop and implement a program to conserve listed species, and to do so in consultation with FWS or NOAA. In enacting Section 7(a)(1), Congress wisely put the burden on all Federal agencies engaged in activities affecting listed species to help promote the ESA's goal of species recovery, and to consult with the expert wildlife agencies in devising their strategies for fulfilling this conservation duty.

2. Section 7 Consultations Provide Important Benefits to Listed Species Even in Cases When Neither Jeopardy Nor Adverse Modification of Critical Habitat is Found

At the heart of the Subcommittee's March 2002 letter is the concern that only 0.3 percent of projects reviewed under Section 7 between 1996 and 2002 were found to jeopardize a protected species or to adversely modify critical habitat. The Subcommittee infers from this statistic that "only one out of every 300 consultations involved a project with a potential to violate the ESA," and that resources are therefore being wasted on "elaborate consultations on projects that pose no significant threat to species."

This is simply not an accurate depiction of reality on the ground. The fact that no jeopardy and no-adverse-modification conclusions have been the outcomes of most consultations is not evidence that the projects under review had no potential to violate the ESA, or that they posed no significant threat to the species. In fact, the thousands of consultations with no jeopardy and no-adverse-modification outcomes mostly represent species conservation success stories. Rather than responding to evidence of potential ESA violations with enforcement actions, Federal wildlife agencies have worked collaboratively with action agencies and others to negotiate "win-win" solutions solutions where projects move forward after adjustments are made to avoid unnecessary damage to fish, wildlife and plant species and their habitats.

Examples of these "win-win" outcomes can be found across the country. For example, in Florida, when you drive across the portion of Interstate 75 known as Alligator Alley, you can see the results of a consultation between FWS and the Federal Highway Administration concerning the impact of I–75 improvements on the endangered Florida panther. Tucked under the highway are several wildlife crossings that allow the panther to roam across its range while avoiding vehicle collisions. These crossing now serve as models for other wildlife passages planned elsewhere in the country.

In Nebraska, the Whooping Crane Critical Habitat Maintenance Trust is using income from a $7.5 million endowment, created as the result of a Section 7 consultation, to finance habitat protection, land acquisition, and other programs to conserve the critically endangered whooping crane and other species threatened by dambuilding along the Platte River. On the Upper Colorado River basin, as a result of

a cooperative program stimulated in part by Section 7, the Bureau of Reclamation is altering the timing and magnitude of releases from a series of dams to help address habitat requirements of the endangered fishes downstream.

Progress has been slower on the Klamath, Missouri, Rio Grande and other river ecosystems where fish, wildlife and plant species hover on the brink of extinction, but thanks to Section 7, these species are finally receiving some attention. In the absence of Section 7, there would be little hope for the coho salmon of the Klamath Basin, the pallid sturgeon and piping plover on the Missouri, the silvery minnow on the Rio Grande, or the natural systems for which these species serve as indicators. Section 7 represents our best hope for achieve a balance among development and conservation goals in our river basins and other ecosystems, so that both people and wildlife can thrive. 3. The Vast Majority of ESA Consultations are Streamlined

The Subcommittee's letter asserts that "each of these [ESA Section 7] consultations requires extensive studies and reports by the Federal action agency and one or both of the Services, and extends for months or years before ending with the inevitable no-jeopardy finding that is so often obvious from the start." In fact, the vast majority of consultations are informal ones involving minimal time or paperwork. FWS statistics show that roughly 97 percent of its consultations from 1996 through 2002 were resolved informally. NOAA Fisheries' statistics for 2001 also show that the vast majority of its consultations are resolved this way.

Informal consultations are, by definition, those that are resolved with "no adverse effect" findings by FWS or NOAA Fisheries. Under Section 7 regulations, such a finding does not have any paperwork requirements, and there is no need for a formal consultation or a biological opinion. Often, ESA compliance issues are resolved in a single phone call, memorialized with a one paragraph letter.

Despite the streamlined nature of the informal consultation process, significant conservation benefits are realized. In an informal consultation, FWS or NOAA will often recommend modifications to project proposals that, if adopted, will lead to a no-adverse-effect conclusion. Harm to the species is avoided, and the project goes forward without significant disruption.

RECOMMENDATIONS FOR THE FUTURE OF THE SECTION 7

CONSULTATION PROGRAM

Set forth below are NWF's policy recommendations for the procedural aspects of the Section 7 program. NWF's recommendations regarding Section 7's critical habitat protection were provided in my testimony before the Subcommittee 3 months ago. If requested, I would be pleased to provide additional recommendations on how to make the remaining substantive protections of Section 7 work more effectively.

1. Greater Transparency into Consultation Outcomes Is Needed to Systematically Evaluate the Performance of the Section 7 Program

In its March 2002 letter, the Subcommittee requests that the GAO investigate the disposition of consultations by obtaining statistics on the following outcomes: withdrawal by requesting agency; modification of proposed agency action; issuance of biological opinion; issuance of letter of concurrence that formal consultation is not required due to "not likely to adversely affect" finding. Unfortunately, nowhere in the March 2002 letter is there a request for information concerning what conservation measures were put in place, and what actions harmful to listed species were avoided, as a result of Section 7 consultation. In the absence of such information, it is extremely difficult to evaluate the relative costs and benefits of the Section 7 process.

To ensure that Section 7 works as effectively as possible, Congress should fund a comprehensive program for tracking the results of consultations and monitoring the performance of resulting conservation measures and programs. The data should be made available on the Internet for public inspection. If such steps were taken, Congress, the Administration and the public would be in the position to discuss and debate species conservation strategies based on a comprehensive look at past implementation of Section 7 on the ground.

Interestingly, the habitat conservation planning (HCP) program under Section 10 of the ESA, which governs non–Federal activities, has already achieved far greater transparency than the Section 7 program governing Federal activities. All permits and corresponding HCPs are currently listed on the FWS website, and the various documents reflecting the terms of each of the permits and HCPs are available for public review in a centralized library. Moreover, as a condition of receiving a permit under Section 10, applicants must agree to submit annual reports with data concerning permit implementation.

At a minimum, the level of transparency in the Section 7 program should be brought up to the level of the Section 10 program. Considering that Section 7 is ap-

plied in so many more circumstances than Section 10 (roughly 77,000 Section 7 consultations were completed in fiscal year 2002 versus less than fifty Section 10 permits issued), the need for a systematic evaluation of the Section 7 program is arguably greater than with the Section 10 program.

2. Provide Funding to Enable the Wildlife Agencies to Respond to their Ever Increasing Workload

In its March 2002 letter to GAO, the Subcommittee requests that GAO investigate several possible inefficiencies, such as duplication of work by FWS and NOAA, that might be causing delays in the consultation process. Eliminating inefficiencies is a worthwhile objective, one that the wildlife agencies themselves have been working to achieve for several years now with, for example, the increased use of programmatic consultations and multi-stakeholder consultations. However, eliminating inefficiencies alone will not solve the delay problem. Inadequate funding of the wildlife agencies is the single biggest obstacle to the timely completion of consultations.

So long as species continue to be placed at risk of extinction by human activity, more species listings are inevitable. Each increase in the number of listings inexorably leads to more Section 7 consultations, as Federal agencies proposing projects encounter greater numbers of listed species on the landscape. Continued growth in human populations and in the size of the economy means that there are ever-increasing numbers of Federal projects being proposed that require Section 7 review. Also, the expansion of the HCP program begun in the 1990's means that there are also increasing numbers of non–Federal projects requiring review by FWS and NOAA biologists.

Congress should acknowledge these trends and provide the funding needed by wildlife agencies to implement Section 7 successfully. Although ESA funding has increased in recent years, funding levels remain ridiculously low considering the enormity and complexity of the challenges facing the agencies. Moreover, the rate of funding increases has not kept up with the rate of increase in the workload. For example, in the past 7 years, the number of formal consultations handled annually by FWS has grown fivefold while the consultation budget has only grown three-fold.

To ensure that Section 7 continues to protect listed species without inordinate project delays, the budgets of FWS and NOAA Fisheries must be increased to reflect the added responsibilities.

3. Reject "Self–Consultation" Initiatives Currently Being Proposed by the Administration

Finally, it is essential that Congress reject the Administration's current proposals to expedite project approvals by rolling back Section 7 safeguards. Rather than provide the obviously needed funding increases to enable Federal wildlife agencies to fulfill their mandate to conserve listed species, the Administration would remove crucial regulatory tools that the wildlife agencies need to be effective.

For example, on January 24, 2003, the Administration issued an Advanced Notice of Proposed Rulemaking calling for the EPA, not FWS or NOAA, to make no-adverse-effect determinations concerning proposed pesticide registrations. By eliminating EPA's duty to engage in informal consultations and to obtain FWS's and NOAA's concurrence in no-adverse-effect findings, the Administration would remove the wildlife experts from the picture, leaving listed species and their habitats increasingly vulnerable to pesticide contamination. EPA, which has long simply refused to uphold its ESA consultation obligations with respect to pesticides, would be rewarded for its obstinacy. EPA alone would decide which chemicals would be subject to FWS and NOAA's scrutiny and which would be shielded from ESA review.

Similarly, the Administration has issued a series of proposals that would greatly reduce the ability of FWS and NOAA to protect listed species from the impact of logging operations. On June 5, 2003, for example, the Administration proposed to allow the Forest Service, the Bureau of Land Management (BLM) and other land management agencies to make their own no-adverse-effect determinations with respect to logging activities under the National Fire Plan. As with pesticides, FWS's and NOAA's ability to protect listed species from threats posed by logging would be severely curtailed.

In its June 5, 2003, proposal, the Administration attempts to justify the rollback of protection of species on Federal lands by arguing that the land management agencies have sufficient expertise to make their own judgments about ESA compliance. However, the Forest Service, BLM and other agencies have frequently demonstrated a bias toward resource extraction and resource extraction industries. In many ESA consultations, wildlife conservation measures were put in place only after Federal wildlife agencies negotiated extensively with the land management to secure them.

For thirty years, the Federal wildlife agencies have played a crucial role in protecting threatened and endangered species from harmful Federal projects. Unlike the land management agencies, which have a narrow focus on their particular landholdings, the wildlife agencies continually monitor what is happening across the species' range and maintain familiarity with the latest science on species conservation. Unlike many action agencies, which are charged with carrying out or approving economic development projects, Federal wildlife agencies have no conflict of interest. Their sole mission is to conserve fish, wildlife and plants and the ecosystems on which they depend.

Congress should reject any and all efforts to weaken the ability of FWS and NOAA to utilize the Endangered Species Act to conserve our nation's imperiled wildlife.

CONCLUSION

Thank you again for the opportunity to testify. I welcome the opportunity to answer any questions that the Subcommittee may have.

STATEMENT OF PATRICIA D. HORN, VICE PRESIDENT, ENOGEX INC.

Chairman Crapo and other members of the Fisheries, Wildlife and Water Subcommittee, I am pleased to share with you the experiences of Enogex Inc. ("Enogex") concerning the consulting process pursuant to Section 7 of the Endangered Species Act ("ESA").

My name is Patricia Horn and I am Vice President of Enogex.[1] Our company takes great pride in our environmental performance. We know that environmental responsibility is important to the quality of life of our customers, the communities we serve and our own employees and their families. It is also critical to our success.

We are a company committed to complying with and, when possible, exceeding government-established environmental standards. We seek to continually monitor, assess and improve our environmental performance. We also seek to foster strong working relationships with the local, State and Federal agencies that monitor our environmental stewardship.

Finally, we believe we have a dual responsibility to protect our natural resources and to provide safe, reliable and reasonably priced power and gas transportation services. The company will, therefore, bring to any emerging environmental policy discussion the need for a sensible balance between environmental gain and its resulting costs and resources.

The purpose of this testimony is to outline the historical interpretation and the more recent philosophy and change of the U.S. Fish and Wildlife Service ("USFWS") in its informal and formal consultations relating to protection of an endangered species believed to exist in areas where Enogex conducts pipeline construction activities in Oklahoma and Arkansas.

Background

Enogex and the oil and gas industry conduct a wide variety of operations from construction of well pads and access roads to laying gathering and transmission pipeline systems for the delivery of natural gas to intra and inter-state markets. Enogex conducts its activities in the majority of counties in Oklahoma and in numerous counties in Arkansas.

In order to proceed with oil and gas construction activities, Enogex requests applicable environmental clearances or informal consultations relating to any endangered species that may be present in the areas of the planned construction. Enogex requests these clearances from the USFWS. An endangered species, the American Burying Beetle (Nicrophorus americanus) ("ABB") has been identified as existing in Oklahoma and Arkansas.

The ABB was listed as endangered in 1989. At the time of listing it was believed that there were only populations in Rhode Island and Oklahoma. As of 2002, populations are now known from Rhode Island, Oklahoma, Nebraska, South Dakota,

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[1] Enogex is a natural gas pipeline and energy company that operates the nation's 10th largest natural gas pipeline system with more than 10,000 miles of pipe, 13 processing plants and 23 billion cubic feet of gas storage, principally in Oklahoma and Arkansas. Oklahoma City-based OGE Energy Corp. (NYSE: OGE) is the parent company of Enogex and Oklahoma Gas and Electric Company (OG&E). OGE Energy and its subsidiaries have about 3,000 employees.

OG&E, a regulated electric utility, serves approximately 720,000 retail customers in a service territory spanning 30,000 square miles in Oklahoma and western Arkansas, and wholesale customers throughout the mid-continent region. OG&E has eight power generating facilities with combined capacity of approximately 5,700 megawatts.

Kansas, Massachusetts and Arkansas. The beetle is listed as existing in 17 Oklahoma Counties and 4 Arkansas Counties. It is suspected in other counties in these two States. (These known and suspected counties will be referred to as "the ABB Counties")

The ABB is a large beetle that ranges from 1 to 1.5 inches in length, has four red-orange spots on its wing covers, and is distinguished by its larger size and its orange-red pronotum. The beetles are habitat generalists, occurring in many different habitats. They feed on carrion and lay their eggs in or adjacent to a buried vertebrate carcass. It is suspected that carrion availability in a given area is more important than the vegetation or soil structure. The beetle is typically active in Oklahoma and Arkansas from mid–May to mid–September. Adults are presumed to be an annual species, fully nocturnal and are usually active only when nighttime temperatures exceed 60 F (15C). The remainder of the year it hibernates. The ABB has been recorded traveling as much as 2 miles per night.

Historical Treatment

Historically, Enogex has requested environmental clearances relating to any endangered species in the ABB Counties from the USFWS in Tulsa, Oklahoma and Conway, Arkansas. Informal consultations relating to projects being initiated in the ABB Counties have always resulted in a "no adverse impact" finding by the USFWS. Such clearances from the USFWS were typically determined within a few days to a little more than a month with the responses generally provided within 30 days. Accordingly, projects received clearances and were allowed to proceed without delay.

Enogex's main construction activities relate to laying gathering or transmission pipeline to connect producing natural gas wells to its pipeline system to allow the produced natural gas to be marketed. To be competitive and allow Enogex the ability to provide these services, wells must be connected efficiently and without delay. It is not feasible to begin the construction of the connecting pipeline until it is determined that a well being drilled will produce in commercial quantities. Upon this determination, Enogex customers expect and demand that the pipeline be constructed and placed in service without delay to transport the natural gas produced to the market place. If Enogex is unable to predict and understand the timing required to timely complete its construction, it cannot be competitive and meet the expectations of the well operators, working interest owners or royalty owners in the producing well.

Prior to late 2002, Enogex submitted environmental clearance requests or informal consultations to the USFWS for the ABB Counties and received clearances that either no endangered species were present or, if present, the proposed project would have no adverse effect on the ABB. During years 2000 through 2002, Enogex submitted 54 informal consultations to the Tulsa, Oklahoma USFWS and 46 to the Conway, Arkansas USFWS and each time received the clearances to proceed with the planned pipeline construction. A change in these clearances being granted without comment began in July, 2002.

Initial Change in Consultation Process

By letters dated July 16 and 18, 2002, Enogex was advised by the USFWS that two proposed pipeline projects in Latimer County, Oklahoma were in the vicinity of where the ABB may occur. The USFWS, at this time, recommended that the pipeline projects be implemented outside the ABB's active period (early October through April) and thereby avoid impacts on the species. If this recommendation was not feasible, the agency recommended continuously baiting beetles away from the project area using chicken parts or mice to ensure that beetles would not be adversely impacted by the proposed projects. The USFWS advised that if the proposed projects could be implemented outside of the beetle's active period or if the recommended baiting protocol was followed, then the ABB would not likely be adversely impacted by the projects. Therefore, no further Section 7 consultation would be needed.

Drastic Change in Consultation Process

In October, 2002, in response to requested informal consultations relating to pipeline construction projects to connect two recently completed natural gas wells in Latimer County, Oklahoma, Enogex was advised by USFWS of a drastic change in treatment relating to the USFWS's informal consultation policy relating to the ABB. The USFWS advised that sufficient site-specific information on the occurrence of beetles within the project areas was not available and that therefore the USFWS could not provide an accurate assessment of the impacts of the projects on the species. The USFWS recommended that Enogex conduct a survey for the presence of the ABB in the project areas. The USFWS advised that the survey should be con-

ducted by a biologist with knowledge of the life history of the ABB and who has a Section 10 permit from the USFWS to conduct such surveys. Due to the beetle being active only during the warm summer months, the USFWS advised that the survey could only be conducted between late April and early September. If beetles were observed, further Section 7 consultation would be required.

If Enogex could not proceed until after a survey in the summer, the connection of these newly completed wells by Enogex would be delayed by at least 8 months. Enogex responded quickly to understand the request and data that would be required to properly initiate a formal consultation immediately. Enogex retained a biologist to conduct field surveys. It consulted with the EPA to determine what further information needed to be provided to EPA so that a formal consultation could be requested. Enogex provided detailed project information, construction protocol, operations and maintenance protocol, geological survey maps, survey plats, storm water pollution prevention plans and recently completed habitat surveys to the USFWS and EPA. The EPA formal consultation letter was sent to USFWS on November 27, 2002. The final Biological Opinion ("BO") from the USFWS was received on January 23, 2003.

The BO issued by the USFWS determined that after reviewing the current status of the ABB, the environmental baseline for the action area, and the cumulative effects of the proposed action, the projects were not likely to jeopardize the continued existence of the ABB across its entire range. No critical habitat has been designated for this species, therefore none was affected. The BO provided numerous restrictions, implementation of required terms and conditions relating to construction practices and established a permitted take.

Immediate Effects of Change to Pending Commercial Well Connects

As noted, these most recent requests for consultations to the USFWS related to two recently completed natural gas wells ready to produce natural gas to the market place. One of the wells was not connected to Enogex and the connection was awarded to a competitor. This resulted in significant revenue loss to Enogex exceeding $1,000,000 over the life of the well. Additionally, because the delay prevented the natural gas in the well from reaching the market, the well producer lost approximately $2,000,000. After receipt of the BO by Enogex and extensive education and training to its operators and contractors, the second well was connected to Enogex. The delay in the treatment of the ABB consultation resulted in a loss to Enogex exceeding $150,000. Additionally, the delay caused the well producer to lose approximately $2,500,000 because the natural gas in the well could not get to the market.

Future Implications

This recent change in treatment and approach of the ABB by the USFWS is not based on any new data or science about the ABB. Instead, it is our understanding that this change is based upon new interpretation of existing data differently from previous reviews. Currently, the USFWS is responding with a very aggressive approach for the purpose of preservation of the ABB. Enogex has been informed that all proposed construction projects located within the ABB Counties will be exhaustively scrutinized and formal consultation initiated.

If a pipeline, oil and gas operator or other construction company wishes to construct during the ABB hibernating season (late September to late April) and the project triggers a Federal nexus, the company will be required to enter into formal consultation with the USFWS. The result will be the issuance of a Biological Opinion that will State restrictions, construction practices and permitted take of the species. Such consultation, if not delayed, is required to be completed within 135 days after the Formal Consultation is officially requested. A Federal nexus trigger includes projects that exceed 5 acres of soil disturbance, cross jurisdictional waters or involve mechanized clearing of forested wetlands, and include all FERC regulated projects.

The USFWS has noted construction activities presented to it for consultation in the ABB Counties in 2002 included pipelines, roads, cell towers, residential developments, bridges, mining, petroleum production, sewer lagoons, commercial developments, recreational developments, fiber optics, cable and electrical lines and water treatment facilities. Clearly, the implications of this new procedure and expansive interpretation of the ABB data will have far reaching effects to any construction activity in these ABB Counties.

As noted, Enogex's experience in the past is that it took approximately 30 days to receive clearances to proceed with pipeline construction. Under the new interpretation, the USFWS has 135 days to complete the formal consultation. The most recent construction projects for which formal consultations were entered into by

Enogex took approximately 4 months to receive what the USFWS called "expedited" clearance.

In addition, Enogex has been required to hire a third party biologist to survey the proposed project area for the presence of the beetle. These surveys are time consuming and expensive to complete. Enogex estimates an average of $5,000 is incurred for each project in order to provide data relating to the specific area and the presence or absence of the ABB.

Enogex (and all effected parties) will be required to expend enormous resources of time, energy and money to establish construction programs, training, third party experts and to implement the expansive conditions and requirements to meet the conditions now being imposed by the USFWS in these areas. Such additional costs and burdens must be questioned when it has not been established that necessary preservation or recovery of the ABB will result.

It is also believed that this new, expansive approach in the preservation philosophy by the USFWS in one district will be implemented in other areas. Enogex has recently been advised that this same process will be implemented in Arkansas.

Conclusion

Along with numerous oil and gas industry trade associations such as Mid–Continent Oil and Gas Association, Oklahoma Independent Petroleum Association, Gas Processors Association and Oklahoma Farm Bureau, Enogex is seeking to address the USFWS's procedural changes in the protection of the American Burying Beetle. Enogex believes that the first step needs to focus on whether the facts present relating to the ABB merit this comprehensive and far reaching change in consultations and clearances being granted. After accurate and complete data is established then the measures necessary to properly preserve this endangered species can be implemented. Until this step is undertaken and accomplished, actions—such as the recent actions taken by the USFWS—only tend to create unnecessary hardship on the agency and unnecessary hardship on the public attempting to do business in these areas, and they result in no true protection to the ABB. Enogex is hopeful that this issue can be resolved without affected parties having to resort to a costly and time-consuming litigation process.

Mr. Chairman and members of this Committee, Enogex appreciates and seeks any assistance that this Committee can provide to address this critical issue.

STATEMENT OF JIM CHILTON, ARIVACA, AZ ON BEHALF OF THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION AND THE PUBLIC LANDS COUNCIL ON THE ENDANGERED SPECIES ACT

Introduction

Good morning, Chairman Crapo and Distinguished Members of this subcommittee, my name is Jim Chilton and I am a rancher from Arivaca, Arizona. My family first started ranching in Arizona in 1888. Arivaca, however, goes back much further than that. Father Keno first founded the town in 1690 when it became a center for grazing cattle he brought with him from Mexico. Today, the town has a population of 1500 people. The largest employer in the town and surrounding area is ranching. My father, brother, and I run approximately 1,250 cattle on 85,000 acres: 48,000 acres of Arizona school trust lands; 35,000 acres of Forest Service land, and 2,000 private deeded acres. I appreciate the opportunity to be here today to provide my story on section 7 consultation of 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 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 infra-

structure 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

Federal land management agencies so seriously misapplied the Endangered Species Act (ESA) to the land in my Federal allotments that I unfortunately was forced to conclude that the Forest Service and the Fish and Wildlife Service (FWS) were using the Act to force me out of the business of ranching on historic grazing lands. The agencies took these actions even though thirty years of data in the Coronado National Forest files, detailed production and utilization studies by nationally recognized range management scientists, and reports by numerous other researchers showed my allotments to be currently in good condition and are on an upward trend in which an exceptional number of high value native climax species have been preserved. This struck me as deeply unfair, and I was not willing to accept the judgment of their actions without a fight.

I have spent hundreds of thousands of dollars on lawyers and litigation and tens of thousands more to have respected range scientists and specialists assemble the best site-specific data possible. We spent countless hours of work with top-ranking consultants, days and weeks of lost time in meetings and legal wrangling, and months assembling a mountain of scientific evidence to show that cattle grazing does not adversely impact the Sonora chub or the lesser long-nosed bat. Even though many other permittees may face similar challenges from the land managing agencies, not all grazing permittees facing similar Federal actions are able to mount this kind of elaborate defense which ultimately proved successful.

Section 7 Consultation: What Went Wrong

In 1998, a Forest Service biologist asserted that grazing on my allotment ("the Montana" allotment) was likely to adversely affect the Sonora chub, a listed species. The adverse call was astonishing. In 1997, the Forest Service removed 20 acres from the Montana allotment along the "California Dry Gulch" adjoining the border to protect the chub. The excluded area had lush riparian growth and had been part of a successful experiment-in-progress to demonstrate that rest-rotation grazing could enhance riparian condition. In Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service, 273 F.3d 1229 (9th Cir. 2001), the court considered the very actions addressed today and found, among other things, that the chub "are essentially confined to the California Gulch, an area from which livestock are excluded." The Southwestern Naturalist, June 1990, describes the Sonora chub as abundant in Mexico where the chub dominates its 5,000 square mile watershed and constitutes 99.97 percent of the total number of fish and 96.9 percent of the biomass of the species.

In a similar vein, a Forest Service botanist concluded in 1998 that cattle grazing on the Montana allotment were likely to adversely affect the lesser long-nosed bat, a listed species, even though the bat had never been found on the allotment. One dead bat was found 10 miles east of the allotment in 1959, but that is the extent to which the migratory bat has ever had contact with the Montana allotment. Research has shown that these bats are not food-limited even on the ranches where they have roost caves. No roost sites occur on our allotment.

Relying on his scientists, the Forest Supervisor signed a biological assessment for the Montana allotment in November 1998, asserting that grazing could harm the minnow and bat. Once the consultation process commenced, the Forest Service and FWS refused to allow me or my representatives to participate in meetings or other discussions prior to the issuance of the draft FWS Biological Opinion. We were excluded even though we had applicant status for the consultation. The FWS similarly excluded ranchers from the consultation process in the Sierra Nevada consultation process. Of course, the draft Biological Opinion represents a largely settled judgment by the agency, which may be further adjusted in response to public comments but is rarely ever reversed.

Nevertheless, I had my team of lawyers, range, riparian, soils, and fish experts submit comments on the draft Opinion. The final Biological Opinion issued by the FWS in April 1999 largely ignored my submitted comments in the sense that they did not respond substantively to the points. The conditions included by the FWS in the Opinion to benefit the chub and bat added an estimated $25,000 of expenses annually in managing the allotments. The Forest Service issued a Montana Allotment Management Plan in September 1999 that was based on the Biological Opinion. The plan allowed for my cattle to use 45 percent of the forage and leave 55 percent for wildlife and esthetics. The plan also replaced the fixed permit number of 500 cows with a "range" of 400 to 500 cows per year (subject to annual determina-

tion). These restrictions decreased the market value of the allotment by approximately $150,000.

A Federal district court decision struck down the Biological Opinion in December 2000. Nevertheless, the FWS and Forest Service reinitiated consultation on the chub and bat. A new draft Biological Opinion was issued by the FWS in March 2001 eliminated grazing on 1,200 acres along the California Dry Gulch to protect the chub. I persuaded the FWS Field Supervisor through discussions and the presentation of exhaustive documentation that the Dry Gulch is an intermittent and ephemeral stream, not the perennial stream repeatedly referred to in the draft Biological Opinion. The Supervisor ultimately restored the 1,200 acres that had been withdrawn from grazing. The Ninth Circuit issued the Arizona Cattle Growers' opinion in 2001 holding that the FWS lacks authority to impose conditions in permits for listed species on land where the species had not been found.

SECTION 7 CONSULTATION: 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, when they embarked on consultation for the Sonora chub and the lesser longnosed bat. These species were never found on my allotments, yet the government was prepared to impose onerous restrictions on my livelihood to help them.

Sound science starts with disinterested evaluation of species listing and delisting proposals by objective scientists utilizing peer review of their work. FWS 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 FWS 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 Forest Service 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 Forest Service and the Fish and Wildlife Service as they made decisions concerning the future of my livelihood on the allotment. I would have wanted the agencies to listen to presentations by my experts, and then take the testimony of those experts into consideration. I would have appreciated some responsiveness from the agencies. Instead, we were kept out of the discussion completely during the first consultation. Agency decisionmaking 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 Forest Service 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 Forest Service 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 section 7 consultation under 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.

STATEMENT OF WILLIAM J. SNAPE, III, VICE PRESIDENT AND CHIEF COUNSEL, DEFENDERS OF WILDLIFE

Introduction

Thank you, Mr. Chairman and Ranking Member of the Subcommittee on Fisheries, Wildlife and Water. On behalf of Defenders of Wildlife (Defenders), where I am vice-president and chief counsel, as well as our approximately one million members & supporters, I appreciate the opportunity to address the value of inter-agency consultation under the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. Sections 1531 et seq., pursuant to Section 7 of the Act. 16 U.S.C. §1536. I am also chairman of the board for the Endangered Species Coalition, which represents approximately 400 citizen groups, scientific entities and small businesses on behalf of a strong and vibrant Act. See generally www. stopextinction.org. My biography was circulated to this Committee earlier this year in connection with testimony on ESA critical habitat.

By definition, my written testimony can merely touch upon the many varied consultations now going on across the country. I would be happy to answer any questions regarding the policy themes I raise herein. Familiarity with Section 7 of the ESA is presumed in this testimony. For excellent background information, see, e.g., American Bar Association, Endangered Species Act: Law, Policy and Perspectives (2002); Stanford Environmental Law Society, The Endangered Species Act (2002) at 78–103; and Daniel Rohlf, Jeopardy Under the ESA: Playing a Game Protected Species Can't Win, 41 Washburn Law Journal 114 (2001). Also relied upon was Senator Crapo's March 22, 2002 letter to the General Accounting Office (GAO).

I wish to make three basic points this morning about the ESA consultation process:

1) Too frequently, the focus of consultation is mere short-term survival of the species, not recovery, which is (and should be) the true goal of the Act;
2) Species with critical habitat designations tend to fare much better in consultation than species without such designations; and
3) The consultation process itself is of value to wildlife and humans alike.

SURVIVAL VS. RECOVERY

Case Studies: Woodland caribou and grizzly bear

In our estimation, the current problem over standards in the consultation process derive from several questionable changes contained in the 1986 Section 7 regulations. One change pertains to the definition of "jeopardize", which now means, as a result of the 1986 rules purportedly still in effect, "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild . . ." 50 C.F.R. §402.02 (emphasis added). At least one Federal court has found the Section 7 regulatory standards to be illegal because they conflate the notions of "survival" and "recovery" contrary to Congress' intent. Sierra Club v. U.S. Fish and Wildlife Service (FWS), 245 F.3d 434 (5th Cir. 2001).

Nowhere is this legal problem more evident than in northern Idaho, eastern Washington, and western Montana, where the highly endangered woodland caribou hangs by a tether. With only 30–40 individual adults left in the U.S. wild, by all scientific accounts this species needs all the old growth forest habitat it can get for breeding, feeding and sheltering. U.S. FWS, Southern Selkirk Mountain Woodland Caribou Recovery Plan (1994). In this same area, a remnant population of grizzly bears, numbering no more than a dozen or so in the U.S., is also jeopardized by Federal agency actions. U.S. FWS, Grizzly Bear Recovery Plan (draft revised, 1993).

Yet, in example after example, the Forest Service which administers most of the woodland caribou's remaining habitat allows actions on Federal public lands that harm the species and prevents its conservation, almost as if it is managing the species for fingernail survival. For instance, the Colville National Forest recently approved a request from the Stimson Lumber Company to build a road and secure industry access in unroaded forest recovery areas for the woodland caribou and grizzly bear; this project will definitely adversely affect both species. U.S. FWS, Biological

Opinion on the Stimson ANILCA Access Easement Project at 58–68. In another instance of woodland caribou habitat degradation, the Idaho Panhandle National Forest recently announced a doubling of the Chips Ahoy timber sale. 68 Fed. Reg. 33906 (2003). Other so-called "salvage" timber sales in prime woodland caribou recovery habitat are still pending. See, e.g., 65 Fed. Reg. 34654 (2000). Expanded snowmobiling use and trails, some of it illegal, is also harming woodland caribou on Forest Service lands. See, e.g., Trevor McKinley, Snowmobile Mountain Caribou Interactions, (May 9, 2003 draft). The grizzly bear is now threatened by a number of increased uses on Federal public lands, including the exponential increase in oil and gas permits being issued by the Department of the Interior and related agencies.

THE IMPORTANCE OF CRITICAL HABITAT

Case Studies: Pygmy Owl and Silvery Minnow

One need read no further than the plain language of the ESA Section 7(a)(2) to understand the importance of critical habitat during the consultation process: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of (critical) habitat . . ." (emphasis added). As the FWS has stated in the context of the northern spotted owl critical habitat designation, "the adverse modification standard may be reached closer to the recovery end of the survival continuum, whereas the jeopardy standard traditionally has been applied nearer the extinction end of the continuum." 57 Fed. Reg. 1822 (1992).

Two species in the Southwest the Rio Grande silvery minnow and the cactus ferruginous pygmy owl both vividly demonstrate the importance of critical habitat for most species during Section 7 consultation. With regard to the pygmy owl, the Army Corps of Engineers ended consultation on several important estate development projects that would negatively impact identified pygmy owl recovery habitat immediately after a Federal court vacated the pygmy owl critical habitat designation. National Association of Home Builders v. Norton, slip op. (D. Arizona Sept. 19, 2001). With just approximately 18 adult pygmy owls identified in the United States, and habitat loss and destruction being the key factors in the species' decline, this imperilled bird (like the woodland caribou and grizzly bear) needs all the prime desert habitat it can get. See, e.g., 62 Fed. Reg. 10730 (1997)(final listing rule for pygmy owl, emphasizing the central importance of habitat protection for the species).

With regard to the silvery minnow a recent U.S. Court of Appeals decision reinforces how critical habitat helps not only individual species, but also entire ecosystems. Rio Grande Silvery Minnow et al. v. Keys, slip op. (10th Cir. June 12, 2003). It should also be noted here that, despite the rhetoric by some to the contrary, this decision is balanced and requires only that the Bureau of Reclamation consider wildlife imperilled with extinction when dealing with water shortages under Federal water contracts. Id.

Thus, we are extremely concerned by the Bush Administration's announcement last month that it will seek to delay once again its work on the critical habitat designation for over thirty threatened and endangered species. Having successfully engineered its own budget crisis, the Administration now seeks to deny affirmative habitat protection for those species that most need it, including the pygmy owl, including many species that contribute to California's biological diversity, and including the bull trout that is negatively impacted by U.S. and Canadian forestry actions alike.

MANY BENEFITS OF THE CONSULTATION PROCESS

Case Studies: Sonoran pronghorn, Lynx, Migratory Birds

With all due respect, we disagree that: 1) most "no jeopardy" findings under the Section 7 process are "inevitable" or that 2) "more and more of these unneeded consultations" provide "no benefit" imperilled wildlife species. Crapo Letter to GAO at 1.

First, the high incidence of "no jeopardy" opinions has as much to do with the political and economic pressure that project applicants apply upon the action agency as it does with the biological integrity of the agency actions in question. See Oliver Houck, The Endangered Species Act and Its Implementation by the U.S. Departments of the Interior and Commerce, 64 University of Colorado Law Review 277, 326 (1993)("Taken together, Interior's regulations present a composite picture of an agency doing everything possible within law, and beyond, to limit the effect of protection under Section 7(a)(2)."). Second, even when a no jeopardy opinion is validly

written, the statutory language (and practice) of the ESA is that "reasonable and prudent alternatives," "reasonable and prudent measures," and "terms and conditions" by FWS or the National Marine Fisheries Service (NMFS) can all positively impact the final agency action going through consultation. See, e.g., ESA, 16 U.S.C. §1536(b)(4). Avoidance, minimization and mitigation are important concepts in the Section 7 and 10 processes. See generally Michael Bean and Melanie Rowland, The Evolution of National Wildlife Law (1997).[1]

A case in point is the highly endangered Sonoran pronghorn, of which as few as 20 individual adults now inhabit the United States. Listed since 1967 when the original voluntary endangered species law was passed by Congress, this desert species has declined due to a number of individual agency actions that have degraded its habitat, most of which is on Federal land (e.g., DOD, FWS, BLM, NPS, Border Patrol). A Federal court has ruled, consequently, that the Federal family must do a much better job cumulatively assessing and acting upon threats to the Sonoran pronghorn. Defenders of Wildlife v. Babbitt, 130 F.Supp. 2d 121 (D.D.C. 2001). If anything, the subsequent consultations pursuant to this judicial decision have usefully identified threats and actions impacting the pronghorn. The problem has been getting the action agencies to do the right thing. As one of several examples, despite recognition that hot desert cattle grazing in the Sonoran Desert is adversely impacting the Sonoran pronghorn (an earlier GAO study already has concluded that hot desert grazing is an economic disaster for the Federal Government), the Bureau of Land Management in its "no jeopardy" opinion has essentially allowed "business as usual." U.S. FWS, Biological Opinion for Five Livestock Grazing Allotments in the Vicinity of Ajo, Arizona (2002).

Another example of proper consultations leading to wiser governmental decisions pertains to the lynx and northern national forest management. Under court order to designate critical habitat for this species, we believe the FWS (and the Forest Service, which tends to be the action agency with regard to this species) would help both the lynx and the national forest program by rigorously analyzing the impact of certain projects upon meso-carnivore protection. See generally Leonard Ruggiero et al., Ecology and Conservation of Lynx in the United States (1999). However, the recent proposal by the Bush Administration to allow the Forest Service to make its own consultation decisions on actions "likely to adversely affect" listed species turns the notion of independent wildlife analysis on its head, and is illegal. 68 Fed. Reg. 33806 (2003).

Similarly, it is blatantly illegal for the Services to allow the Environmental Protection Agency (EPA) to opt out of consultations altogether with regard to its pesticide approval program. 68 Fed. Reg. 3786 (2003). As Defenders has noted in detailed comments to the EPA and the Services, our Federal Government's top biologists cannot be written out of the process to evaluate the safety of new chemicals that come on line almost every day. This is an issue not only for many wildlife species, and particularly the migratory birds discussed by Rachel Carson almost forty years ago, but also for human health.

CONCLUSION

We believe Section 7 of the ESA is fundamentally sound. With adequate financial resources, we believe the FWS and NMFS possess the ability to streamline consultations (and related environmental reviews) when necessary to do so. Long opposed by many industry applicants, we believe the time has come to add sunshine to the relatively closed Section 7 process in order to better understand the process and to potentially fine tune it. Self-consultation by action agencies is not the way to go. Holding action agency expenditures accountable to good fiscal and ecological oversight is where we should be heading.

Thank you for your time and attention. I would be happy to answer questions or respond to comments.

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[1] See also David Malin Roodman, Paying the Piper: Subsidies, Politics and the Environment (1996); Elizabeth Losos et al., Taxpayers' Double Burden: Federal Resource Subsidies and Endangered Species (1993); Thomas Power, Not All That Glitters: An Evaluation of the Impact of Reform of the 1872 Mining Law on the Economy of the American West (1993)(all three reports highlight examples of Federal agency expenditures that are economic and ecological losers).

STATEMENT OF RICHARD DIEKER, PRESIDENT OF THE YAKIMA BASIN JOINT BOARD

ESA SECTION 7 CONSULTATIONS

CHAIRMAN CRAPO AND MEMBERS OF THE SUBCOMMITTEE: I am here testifying today on behalf of the Yakima Basin Joint Board, an association of major irrigation districts in the Yakima River Basin, Washington. The Board has been attempting to work with the National Marine Fisheries Service (now "NOAA Fisheries") and the U.S. Fish & Wildlife Service on Section 7 Endangered Species Act issues for nearly 5 years.

As a result of the Services' actions, or more accurately lack of actions, the Board has experienced significant hardship, expense, and delay which has hindered the legitimate and valuable operation of the Yakima Reclamation Project.

Our experience has led us to conclude the Section 7 consultation process is seriously flawed because of the arbitrary, dilatory, and negative administration of the process by NMFS and USFWS.

Both services have often even refused to include the Board in many Section 7 consultation discussions, even though the Board has requested to be treated as, and has been advised that we are being treated as, an "applicant" in the Section 7 consultation.

The Yakima Reclamation Project was begun in 1905, and has been the backbone of the irrigated economy in the Yakima River Basin since construction was largely completed in 1917. The Project includes 6 dams in the Cascade Mountains that store winter and spring runoff for use in the hot and dry summers. The Project has been completed and operating since 1917, except for the Kennewick division which was completed in the 1950's. It has been a very successful Reclamation project. More information on the history of irrigation in the Yakima River Basin is included in Appendix A–1.

Under Section 7 of the ESA, the Bureau of Reclamation has consulted with NMFS and USFWS regarding the operation of the project, to the extent the Bureau has discretion in its operations. The Bureau also consulted with NMFS and USFWS regarding repair or reconstruction of one of the Project dams,

Keechelus dam, under the Safety of Dams Act. That Keechelus dam consultation is the subject of litigation which is still on appeal to the U.S. Ninth Circuit Court of Appeals.

The following issues and relevant information describes the Board's consultation experience. More detail about each subject is presented in the Appendicessome appendices, which are identified with the same letter as in the titles.

A. SPECIFIC ESA SECTION 7 PROBLEMS EXPERIENCED BY THE BOARD

(1) Consultation Has Cost Board, its Members and their waterusers over $1.7 Million; YBJB scientific expertise

The Board and its members have incurred and paid more than $1,000,000 to its fish biologists, more than $239,902.00 to attorneys, and more than $530,000 for dedicated staff time and other costs responding to the ESA Section 7 consultations on the operations of the Yakima Reclamation Project, on the Keechelus dam repair consultation, and for other ESA compliance issues.

Section 7 consultation costs have been a severe financial burden to YBJB landowner/waterusers whose irrigated crop income and production have been adversely impacted in the past five (5) years by drought and depressed prices of major Project asparagus, fresh fruit (apples, etc.), hops, mint and other irrigated crops.

Attached Appendix "A–2" contains more details about YBJB's consultation related costs.

Most of these costs and expenses were required to provide the best available science to the U.S. Bureau of Reclamation for its use in the Section 7 consultations on the operations of the Yakima Reclamation Project and its ESA Section 7 consultation.

The Board has, since 1992, retained experienced, independent and professionally qualified fish biology advisors and consultants: (1) who are familiar with, and knowledgeable about, fish, habitat, State and Federal laws and regulations and other activities and conditions in the Yakima River Basin, the Western United States, Alaska and Canada, and (2) who have contributed to the preparation of this testimony and statement. Since the listings of the Bull Trout and Steelhead, the overwhelming majority of their time has been spent on ESA issues or performing research that is directly relevant to and has been used in the Section 7 consultation.

Appendix "A–3" contains brief statements describing the qualifications of the Board's fish biologists.

(2) Delays in Resolution of the Consultation; Bureau of

Reclamation consultation chronology

For nearly 5 years, Tthe Board has been actively involved in ESA Section 7 consultation and has helped the Bureau of Reclamation respond to issues raised by NMFS and USFWS (the "Services") in the Project operations consultationproblems for nearly 5 years. The Section 7 consultation on Project operations is still not complete.

The Board's Section 7 consultation expenses started in August, 1998 when a Bureau representative formally notified the Board's president that the Bureau was required to consult with NMFS. Previously, the Board's biologists had reviewed and commented on the proposed listings of the fish. After the consul-tation started, the Board's biologists provided input and assistance to the Bureau while the Bureau was developing its "Biological Assessment." The Biological Assessment is the first step of a formal Section 7 ESA consultation. In 1999, The Bureau presented a draft "Biological Assessment" to the Services for their review and comment. The Bureau submitted a Final Biological Assessment to the Services in August, 2000. Under Section 7 and its implementing regulations, the Services are supposed to conclude the consultation by issuing a "Biological Opinion." Section 7 of the ESA requires consultations to be completed within 90 days, subject to extension only to 150 days unless the applicant consents to a longer period. It has been almost 3 years, over 1000 days, and no Biological Opinion has been issued.

To the Board's knowledge, there has still not yet been no resolution of the original basic issues such as the scope of the consultation, new issues have surfaced, problems, new problems keep surfacing, and there is no realistic timeframe for completion. The Services that would allow the Yakima system to function. The twohave hired large numbers of staff to deal with new endangered species listings, largely designated by themselves, to assist with their workload. The effect of agency expansion, however, has only served to allow the Services to attempt to ir expanded their authority over Yakima Reclamation Project operational and maintenance issues, and the extension of consultation far into the future.

Appendix A–4 is a chronology of consultation activities prepared by the Bureau of Reclamation's Yakima Office which shows the Bureau's efforts to conclude the consultation.

(3) Consultation requires education and Expense

The new hires by the Services have often been inexperienced junior-level biologists who must negotiate complex and contentious technical issues. The results of their questionable decisions has required the Board to retain recognized experts in fisheries science to more correctly examine the issues raised, provide accurate analyses, and educate the new hires in the science they are supposed to administer.

Appendix A–5 contains more detail on this subject.

(4) ESA administrative rules are vague

The classification of hatchery fish by NMFS under the ESA, and the subsequent judicial review of that classification, is a good example of the Services' arbitrary interpretation of the ESA. Judge Hogan found that NMFS wrongly excluded hatchery fish from the population under consideration for listing and sent the issue back to NMFS for reconsideration. (See, infra, p. 31) There are many other examples of vague administrative rules that wrongly interpret the ESA, including the appropriate definition of an ESA "species", what is meant by "evolutionarily significant", who determines "evolutionarily significance", and differences in interpretation of responsibility by NMFS and USFWS.

Another classic example of NMFS arbitrariness is the listing of Steelhead trout as threatened. It is known beyond dispute that Steelhead are genetically identical to rainbow trout and in fact interbreed with rainbow trout. Rainbow trout are plentiful in the Yakima River, which supports a trophy fishery for them. Yet, Steelhead were listed as threatened, and NMFS has refused to delist them.

Appendix A–6 contains more detail on these issues.

(5) Impartial analyst or biased advocate?

The legal structure of the ESA is contrary to the precept of keeping scientific data and analysis independent of the influence of political objectives. The service which is expected in the ESA Section 7 consultation process to act as a "neutral analyst" while determining deciding whether or not to list a species is the same service charged with regulating activities which might affect the species of concern. The potential for the service to act in its own self-interest and expand it's own administrative power and budget is obvious. Congress and the executive branch should amend the ESA and/or require by regulation an independent review of the species' "status"

to avoid the services' "conflict of interest" when the same service is responsible for both analysis and advocacy.

B. ADMINISTRATIVE ERRORS AND ESA MISINTERPRETATION

During the past decade, NMFS has greatly expanded the ESA list of Pacific salmon it considers "threatened" or "endangered". species. The pace and scope of these listings is indicative of obvious, substantial flaws with the Services' interpretation and administration of the Act. These expensive, time-consuming listing problems can be traced back to NMFS policies which redefine the intent and purpose of the Act to: (1) conserve genetic diversity rather than protect actual species, sub-species, or distinct population segments, (2) redefine the unit at risk to be an "Evolutionary Significant Unit" or "ESU", a concept introduced to satisfy the genetic conserva-tion goals only incorrectly assumed by NMFS, and (3) further subdivide the units at risk. An example of this last problem is the implementation of policies to exclude fish of hatchery-origin from listed populations of the same population segment, regardless of their relationship to naturally spawning fish which was considered and rejected by Judge Hogan, noted above and infra, p. 25.

More detail on this subject is contained in Appendix B.

C. IMPROPER LISTING OF SPECIES; COLUMBIA RIVER SALMON, STEELHEAD TROUT AND BULL TROUT ARE NOT THREATENED WITH EXTINCTION

Salmon and steelhead in the Columbia Basin have experienced declines in abundance since the end of the 19th century[BJI1]. Decreased abundance was, howeverin large part, a result of overfishing and of an intentional Federal Government decision to develop the Columbia River water resources for greater economic benefit. As a result, only about 20 percent of the historical habitat remains available to spring chinook and steelhead.

When the Federal Government made the decision to developthose the Columbia River's water resources, it also decided to establish hatcheries to produce salmon and steelhead to maintain the fisheries, and later to supplement natural spawning populations. Those efforts were largely successful, in conjunction with the changing ocean environment. Numbers of chinook salmon and steelhead returning to the Columbia in the last 4 years have been higher than any comparable period since the 1930's. Steelhead are not at risk of extinction, yet there is no serious discussion of delisting, and the power of the Services power keeps expanding.

Similarly, there is no evidence that bull trout are at risk of extinction. Bull trout status now in relationship to their historical abundance in the basin is poorly known, mostly because of a lack of information on historical abundance. Bull trout were listed because of this lack of information, without any actual knowledge or evidence that they were at risk of extinction, or even declining in numbers. Natural production continues throughout the system and abundance seems to be increasing mostly because of a restriction on fishing. Bull trout have much lower population densities than steelhead and salmon because, as a predator species, lower abundance is a strategy that favors survival in headwater reaches and smaller streams. Bull trout are obviously not at risk of extinction in the Yakima Basin. Their numbers are stable or increasing.

More detail on this subject is available in Appendix C.

D. THE UNITED STATES HAS NO LEGAL AUTHORITY TO CHANGE THE USE OR REALLOCATE YAKIMA RECLAMATION PROJECT SURFACE IRRIGATION WATER WHICH IS OWNED BY YAKIMA RECLAMATION PROJECT LANDOWNER/WATERUSERS; THE U.S. IS A "TRUSTEE" FOR THE BENEFIT OF PROJECT IRRIGATOR LANDOWNER/ WATERUSERS.

Yakima Reclamation Project landowners and waterusers have, according to the United States Supreme Court, a constitutionally protected, vested Washington State approved and certificated ownership ofrights to Yakima Reclamation Project surface water. and water rights pursuant under Federal and Washington State water rights law. The Bureau of Reclamation is obligated by law and contract to annually deliver to Board members their full annual entitle-ments. The Washington State Supreme Court has confirmed that the irrigator's Project water rights are only subject only to a substantially diminished Treaty fish water rightto protection of fish for substantially limited because the Yakama Nation filed a claim in the Federal Indian Claims Commission against the U.S., negotiated a settlement and was, in 1968, paid $2.1 million by the U.S. as part of the final settlement of three (3) land claims plus the Nation's fishing diminution claim all of which were dismissed with prejudice. Nonetheless, yet both NMFS and USFWS have been attempting through their actions to modify or restrict the use of established irrigator water rights. The Services continue to attempt to use the consultation process to modify these vested water

rights despite their own regulations which recognize that consultation is required only for the Bureau's discretionary acts. The Board does not believe the Bureau has legal discretion to take any part of these vested irrigation water rights and reallocate them for ESA or any other purpose including fish.

Appendix D provides additional background on the legal rights of Yakima Reclamation Project irrigator landowner/waterusers.

E. CONCLUSION

The Endangered Species Act is important national legislation. The Board supports the ESA, but only as it was originally passed by Congress. The Board Yakima Basin Joint Board, a group of public water suppliers who deliver water supplied by the United States Bureau of Reclamation Yakima Project in central Washington State, considers the problems it has encountered with the ESA, and particularly in the Section 7 Consultation process, to have reached crisis proportions. The serious and disabling problems created are the result of erroneous administration and administrative interpretation of the Act by the NMFS and USFWS, and weakness in the Act itself that permit service errors. problems. Testimony on the controversial concepts and abuses in administration of the Act has been identified in this presentation.

Bull trout and steelhead trout are listed as a threatened species under the Endangered Species Act throughout the Columbia Basin, including the Yakima River when in fact neither species is at risk of extinction. Consequently, the Board has had to expend considerable time and over one million dollars on legal and scientific advice to maintain their constitutionally protected water rights and provide the best available science to the Bureau of ReclamationUSBR, NMFS, and the USFWS for use in the Section 7 consultation occurring on the operations of the Yakima Reclamation Project.

This ESA burden exists because both bull trout and steelhead were listed by services that NMFS and USFWS have misinterpreted the ESA to protect genetic diversity, rather than subspecies or distinct population segments as defined by the ESAAct. Pacific salmon, steelhead, and bull trout in the Columbia Basin are not at risk of extinction, but the misinterpretation of the ESA Act has allowed the widespread listings of these species through arbitrary internal agency policy decisions. These decisions have been upheld by the courts because of the great deference the courts show to the services which administer the ESA.

Congress must clarify the ESA to prevent the misinterpretations that have resulted in the listing of species that are at no risk of extinction. Congress must remove the Services discretion to list "ESUs" rather than subspecies or distinct population segments. Congress must take action to correct the flaws in the administration of the ESA that have resulted in grievous hardships to water users and private land owners, and to prohibit the very controversial genetic diversity concepts originating from the services' policy memoranda rather than from the congressional legislation. It will be necessary that Congress must precisely define its goals, objectives and expected actionsbe precisely redefined to , and leave no uncertainty about the purpose of the Act and the extent of its authority. Congress must provide , as well as providing clear guidelines on agency actions, administration of those actions, and the consultation process, and put teeth in the provisions, routinely ignored, that consultations proceed on time.

Congress will, by positive action, remove the discretion that has caused the Ninth Circuit and other Circuits of the Federal Court of Appeals to defer to the services' misinterpretation of the ESA and the resulting seizure of power.

APPENDICES

APPENDIX A–1

Yakima River Basin, Irrigation in the Yakima River Basin

and the Yakima Reclamation Project

The Yakima River Basin ("Basin") in south-central Washington State is the approximate 6,155 square mile, 4 million acre (an area larger than the State of Connecticut) surface water drainage of the 214+ mile Yakima River and its tributaries.

The Basin is bordered on the west by the Cascade Mountains with desert/steppe rangeland on the east, north and south. The Yakima River's headwaters are on the eastern slopes of the Cascades and flows generally from northwest to southeast until it empties into the Columbia River between Kennewick and Richland, Washington.

Annual Basin precipitation (mostly snow) on the eastern slopes of the Cascades during late fall, winter and early spring may exceed 120 inches but both snow and

rain in the irrigated farming areas of Benton, Kittitas and Yakima Counties annually average only between eight (8) and ten (10) inches.

Irrigated agriculture, the main economic activity in the Yakima River Basin, uses approximately 1,000 square miles of the Basin's area.

(1) Pre–1905 Irrigation

By 1902, there were an estimated 121,000 acres under irrigation in the Yakima Basin, representing about 25 percent of the present irrigable development. This acreage was served by natural flows in the river and tributaries, with none of the present large storage dams and reservoirs in existence. The natural runoff was inadequate to insure a dependable water supply for the development even at the turn of the century.

Because of early over appropriation of available water supply, no additional irrigation development for many fertile acres in the Valley was feasible unless two things were accomplished: First, existing claimants had to agree to restrict their water usage to beneficial use and equitable distribution, particularly in the low late summer period; and second, water storage was necessary to salvage the early season runoff for supplying irrigation needs for new land development." [Lentz, *Review of the Yakima Project and Other Data*, (1974), pp. 1–2]

(2) Post–1905 Irrigation; the Yakima Reclamation Project

The U.S., between 1913 and 1933, developed the Yakima Reclamation Project by constructing six (6) irrigation water storage reservoirs (Bumping, Clear Creek, Cle Elum, Keechelus, Kachess and Rimrock) with total active capacity of 1,070,700 acre-feet ("a/f"), as well as diversion and conveyance facilities between 1906 and 1958 for the five (5) major Yakima Reclamation Project divisions (Kennewick, Kittitas, Roza, Sunnyside and Yakima-Tieton) plus the Wapato Irrigation Project ("WIP").

The water storage reservoirs are operated to conserve winter and spring water ("runoff") for release during the low water summer irrigation season.

The Yakima Reclamation Project's 465,000 acres of irrigable land annually requires approximately 2,500,000 acre-feet of water to successfully grow marketable crops.

An "acre-foot" of water is the amount of water needed to cover an acre of land to a depth of one (1) foot of water.

Yakima Reclamation Project landowner/waterusers have repaid, and continue to annually pay, the U.S. for all Yakima Reclamation Project construction, annual maintenance, operation and repair of the storage reservoirs allocable to irrigation.

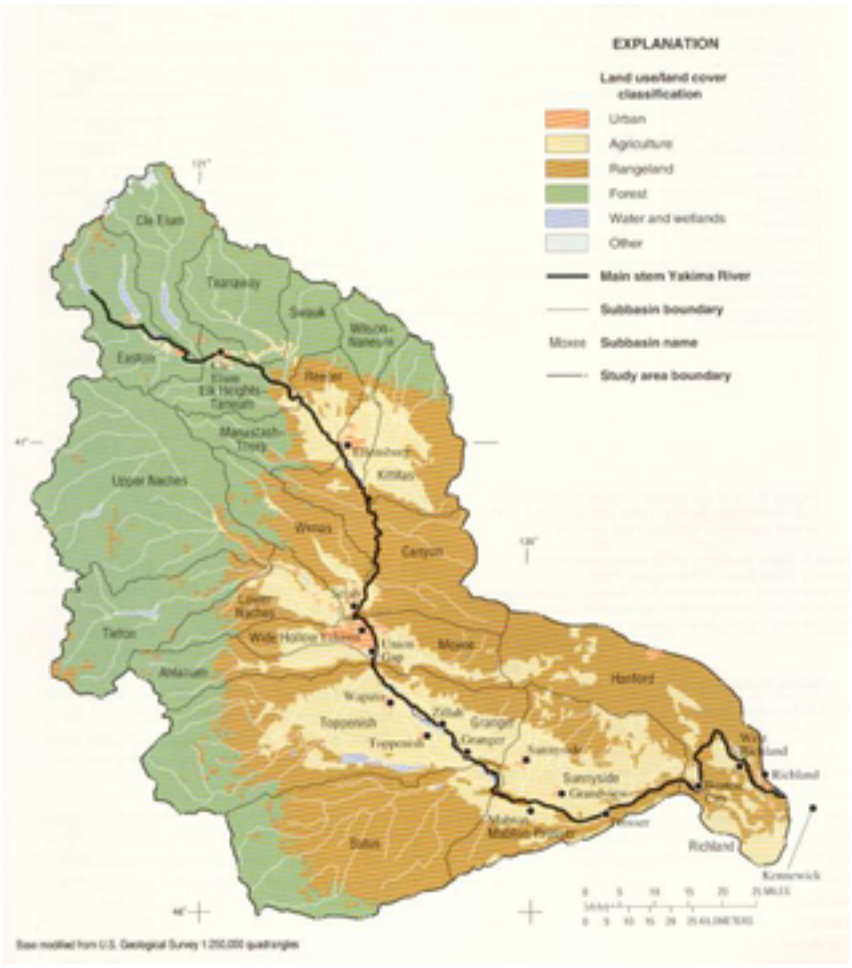

Figure 1. The western portions of the Yakima Basin are forested mountains of the Cascade Range, while the eastern, low elevation portions of the Basin are arid agricultural and range land. Over 465,000 acres of agricultural land is served by the Yakima Reclamation Project.

APPENDIX A–2

Consultation has cost the Board, its members and their waterusers over $1.7 million

(1) Joint Board Biologist Fees: $1,060,943.00

Since 1998, the Board has spent $1,060,943.00on biologists. The work done by those biologists since that time has either been directly related to the Section 7 consultation or has been research that is relevant to and useful in the Section 7 consultation.

(2) ESA-related Attorneys Fees and Cost Estimates:

$239,902.00

Joint Board members estimate they have spent at least the following amounts on attorneys fees and costs on matters directly related to ESA matters. Because of divisions of labor among the members' attorneys, the Kennewick Irrigation District's attorneys and the Yakima Tieton Irrigation Districts attorneys have spent the most time and effort on ESA matters.

a. Kennewick Irrigation District

	$
1998	12,170
1999	18,387
2000	5,312
2001	6,634
2002	16,159
2003 to date	12,501
	$71,163

b. Roza Irrigation District

Roza Irrigation District estimates that its share of ESA-related attorney's fees are approximately $50,000.

c. Sunnyside Division

	$
8/98 to 12/98	2,125
1999	7,750
2000	5,923
2001	9,116
2002	3,825
1/03 to 7/03	5,000
	$33,739

d. Yakima Tieton Irrigation District

YTID estimates that its share of ESA-related attorney's fees are approximately $50,000. This does not reflect all ESA-related work done for YTID's benefit because YTID's attorneys were splitting the bill for their Yakima River ESA-related work between YTID and other clients.

e. Kittitas Reclamation District

Kittitas Reclamation District estimates its ESA-related attorneys fees have been $35,000.

TOTAL ATTORNEYS FEES AND COSTS: $239,902.00

(3) ESA-related Staff Cost and Other Cost Estimates: $534,786.00

a. Kennewick Irrigation District

Kennewick's Secretary/Manager estimates that he spends a minimum of 2 days per month on ESA matters. Prorating his annual salary for the period since June, 1998 results in a staff time loss of: $63,440.

b. Roza Irrigation District

Roza estimates that its Secretary/Manager (now retired and part time spends approximately 10–15 percent of his time on ESA related matters)

c. Sunnyside Division

SVID estimated costs related to ESA: $113,652

Average Monthly meetings w/ some relation to ESA since Jan 1998:

At least 7 meetings per month with multiple staff members concerning YBJB, WSWRA, AFW, Tri-County, and YRBWEP

d. Yakima Tieton Irrigation District

Did not provide estimate

e. Kittitas Reclamation District

i. KRD Manager: $29,040

Average Monthly meetings w/ some relation to ESA since Jan 1998: 5.5 yrs x 12 months x 5 meetings x 4 hrs per meeting x $22 payscale = $29,040

Meetings include YBJB, KCWP, KRD Board, Manastash Creek, Tucker Creek, Taneum Creek, YRBWEP, Tri-County, WSWRA, AFW)

ii. KRD GIS Staff: $12,562

iii. KCWP staff: $5000 per yr over 4 yrs: $20,000

iv. NRCS/KCCD: $7,500 per yr over 4 yrs: $30,000

v. KCWP/KCCD related activities: $15,000 per yr over 2 yrs: $30,000

vi. Additional District related Costs: $236,092

YRBWEP: KRD Comp plan and addendum: $130,000

Taneum Creek Gage Stations and related hardware: $50,000 ($10,000 per station x 5 stations [Confluence of Yakima, Bruton Ditch, Taneum Ditch, Taneum Ck above chute, Mann Ditch]. Taneum Creek Gage Stations / operations and related staff time: 5.5 yrs x ave yr $5266 = $28,962. Taneum fish passage contract (weir pools at Mann Ditch): $27,130.44.

Total: $236,092

TOTAL KRD ESA STAFF TIME AND OTHER ESA EXPENDITURES: $357,694

TOTAL BIOLOGISTS, ATTORNEYS, STAFF AND OTHER COSTS ATTRIBUTABLE TO ESA: $534,786

APPENDIX A–3

YBJB Scientific Expertise

(1) Ernest L. Brannon, Ph.D. is a Professor emeritus at the University of Idaho who has specialized in salmonid life history, ESA listed salmonid species, engineered habitat, aquaculture and is a Distinguished Research Professor in fisheries.

(2) Steven P. Cramer has been a fisheries consultant to private firms, State and Federal agencies, and Indian tribes since 1987, after serving 13 years with the Oregon Department of Fish and Wildlife (ODFW), where he directed major research programs. Mr. Cramer has participated on the Technical Advisory Team set up by NMFS for the ESA reviews of both Coho and steelhead on the West Coast. He has worked closely with the key NMFS biologists responsible for completing the ESA status reviews for anadromous salmonids. He has been the lead author on six major reports supplied to NMFS for ESA status reviews of Coho and steelhead populations. Three times, Steve Cramer has been contracted to guide ESA status reviews for fish populations in an entire State, including Coho in Oregon, steelhead in Oregon, and steelhead in California. He was selected by Bonneville Power Administration to organize and lead a team of Northwest consultants to prepare a series of 11 reports on recovery issues of threatened and endangered Snake River salmon.

(3) D. Brent Lister. Mr. Lister is a fishery biologist with 25 years of experience as a consultant in salmon enhancement and fish habitat impact analysis, and 15 years experience as biologist and senior program manager with the Canada Department of Fisheries and Oceans on both the Pacific and Atlantic coasts. His key expertise is in stream habitat utilization and population dynamics of salmon and steelhead. Since 1990, Mr. Lister has been retained as a consultant to the Yakima Basin Joint Board on ESA consultations and status reviews relating to steelhead and bull trout, and on a variety of issues concerning river flow regime effects on salmon spawning, and the rearing and seaward migration of juvenile salmonids.

(4) Patrick A. Monk, consulting fish biologist for the Yakima Basin Joint Board, an association of major irrigation districts and municipalities in the Yakima River. Mr. Monk's has worked on a wide variety of fisheries management projects, including Endangered Species Act analysis and consultation and designing and conducting field studies of fish and their habitats. Mr. Monk holds a Master of Science degree in Fishery Resources, University of Idaho (2002), and a Bachelor of Science in Zoology, University of Wisconsin-Madison (1989).

(5) Thomas R. Payne, Certified Fisheries Scientist, is Principal Associate of Thomas R. Payne & Associates, Fisheries Consultants, located in Arcata, California. He is a specialist in the application of the Instream Flow Incremental Methodology (IFIM) to determine the impacts of flow alteration on aquatic ecosystems. In the past 15 years, he has conducted or reviewed over two hundred instream flow studies on proposed and existing hydroelectric and irrigation projects. Projects have been located in areas ranging from mountain streams in Hawaii to major rivers on the East Coast, with an emphasis on high gradient streams in the Pacific Northwest. Work associated with IFIM and directed by Mr. Payne includes fish population sampling, habitat mapping and typing, hydraulic measurements, habitat use determinations, computer simulations, license application preparation, agency negotiations, post-project analysis, and expert witness testimony.

(6) Kenneth L. Witty, senior fisheries consultant, started his career in fisheries a district biologist for the Oregon Department of Fish and Wildlife (ODFW) in 1963. The focus of his work with ODFW was inventory and management of fish resources and inventory and protection of their habitats. He administered the Lower Snake River Fish and Wildlife Compensation Plan in Oregon. Since retiring from ODFW,

Mr. Witty has worked with S.P. Cramer and Associates, Inc., focusing on the preparation of (1) reports assessing fish populations, trends and risk assessments, genetics, competition/predation, and re-introductions, (2) biological assessments for the ESA, 404 permits including Section 10 authorization to sample listed fish, and gravel fill/removal permits, (3) habitat surveys, restoration, and carrying capacity estimates, (4) hatchery siting, design, and brood stock collection, and (5) passage evaluation at main-stem dams.

APPENDIX A–4

Bureau of Reclamation Consultation Chronology

YFO O&M consultation timeline

6/24/98	*COM001*Request for species list from FWS to initiate consultation on YFO operations
7/23/98	ESA Mtg with FWS. Discussion covered how to approach compliance. OK'd with a BO for interim period until IOP complete. FWS approved outlined process for proceeding with BA. Reservoir operations (bull trout access, fluctuations and productivity, a minimum for Rimrock pool 10,000AF), activities below the reservoirs (hydro graphs, passage at storage dams, show all diversions, identify screens and ladders, Clear Cr Ladder), operations post flip-flop
7/28/98	Memo from BR to FWS concerning relationship of IOP to consultation suggesting a meeting
8/10/98	NMFS/BOR discussed biological issues including, describing the fish protective facilities, facility maintenance, instream flows. NMFS suggests getting data from YN
12/2/98	e-mail from FWS to BR concerning draft sections of the BA supplied to FWS
12/4/98	Mtg with FWS @ Moses Lake. FWS comments on Reclamation data development and biological assessment outline. Outline included w/ agenda.
9/1/1999 ...	Transmit draft BA to FWS and NMFS and request comments. Hand delivered to NMFS and made PowerPoint presentation
10/14/1999	Memo from FWS to BR transmitting comments on draft BA
11/30/1999	Met with NMFS to discuss Salmon Creek and spoke with Fransen about comments on the draft YFO ops BA
12/1/1999	Meeting with FWS to discuss comments on draft BA
5/25/00	Met with NMFS to discuss BR consultations including YFO ops and Keechelus. NMFS raised issue of ''jeopardy'' at Keechelus if passage not included. ''No train wrecks''
8/7/2000 ...	Sent final BA to FWS and NMFS. Offered to meet and discuss BA.
9/22/2000	Memo from FWS to BR indicating that BA was adequate to initiate consultation which began on August 8, 2000 and was to be completed on or before December 20, 2000.
12/20/2000	135 day consultation period ends on YFO Ops
1/19/2001	Memo from FWS notifying us and irrigation districts that FWS was going to use 60 extension provided to coordinate more with NMFS and BR.
2/19/2001	First 60 extension for FWS ends for YFO ops BO
3/12/2001	2001 Drought Operations Mtg. @ BOR. Discussion included Rimrock Lake, Easton Ladder, flushing flows, etc.
3/27/2001	Memo from FWS to BR requesting 60 day extension to provide for additional coordination with BR.
3/30/2001	FWS/BOR Yakima Field Office Section 7 Consultation Mtg. @ BOR. Discussion included Legal and Contractual Considerations, 2001 Operations, Brief overview of BA
4/13/2001	FWS/NMFS/BOR Section 7 Consultation Meeting @ Kittitas Reclamation Office. Discussion included FWS/NMFS comments on Yakima Project Operations BA, and presentation of FWS Recommendations on Drought Operations. 4/6/01 comments by USFW on the Yakima Operations Biological Assessment FWS and NMFS commit to draft BO's in Aug/September timeframe.
4/30/2001	Letter Received from USFW to the BOR: Request for Extension on Section 7 Consultation on the Yakima Project Operations and Maintenance. Committed to formulate BO by July 18 and transmit draft BO by September 1, 2001
5/11/2001	Meeting with NMFS and FWS to discuss BA. Discussed 4/30 letter from FWS to BOR. Handout prepared by Steven P. Cramer and Ray Beamesderfer entitled Simulation of Bull Trout Impacts at Rimrock Reservoir Resulting form Entrainment at Drawdown as well as graphs with fish counts and size
6/7/2001 ...	Two field trips hosted by ID's to look at irrigation systems
7/18/2001	Per 4/307/2001 request, FWS to have formulated BO on YFO ops
9/1/2001 ...	Per 4/30/2001 request, FWS to deliver draft BO on YFO ops
9/17/2001	Meeting with FWS to discuss YFO ops and Keechelus consultation.
9/21/2001	Meeting with NMFS and WA State to discuss Keechelus and O&M consultation. NMFS commits to assign staff to work on both and commits to a White Paper on the O&M consultation
3/15/2002	Conference call with NMFS and FWS. Both agencies commit to White Papers outlining there assessment of affects of the proposed action on listed species and a jeopardy/no jeopardy analysis.
6/27/2002	Meeting with NMFS and FWS. NMFS provides an incomplete internal review draft of their White Paper dated 6/26/2002. FWS indicates their White Paper is still under development.

Bureau of Reclamation Consultation Chronology—Continued

YFO O&M consultation timeline

7/11/2002	Meeting with NMFS and FWS. NMFS provides completed internal review draft of their White Paper. BOR commits to provide comments by 1 Aug. FWS commits to providing their White Paper by ''mid-August'' (Aug 16). Agencies lay out tentative schedule to complete consultation by Oct. 2003. Includes a peer review process for baseline and project affects analysis.
8/2/2002 ...	BR sends comments to NMFS on draft White Paper
8/19/2002	Conference call to discuss joint agency letter outlining process and schedule for completing O&M consultation. On advice of consul letter it is decided to delay sending letter due to Keechelus lawsuit.
11/20/2002	Meeting with NMFS and FWS to discuss baseline and proposed action. FWS provides draft version of White Paper
12/04/2002	Meeting with NMFS and FWS to continue discussion about baseline and proposed action. Comments on FWS White Paper discussed. FWS agreed to lead peer review process. Parties agree to develop affects matrices.
12/09/2002	Conference call with NMFS and FWS to discuss baseline issue relative to the presence of the dams. Parties eventually agree that dams are in the baseline.
12/19/2002	E-mail from FWS indicating that 8/2000 BA is inadequate for consultation purposes and indicates that consultation should be put on hold until it is revised.
12/31/2002	Phone call to FWS to discuss 12/19 e-mail. General agreement that consultation can proceed with a target date for completion of October 2003 and BR would provide additional information as requested and if available to further consultation process.
1/06/2003	Meeting with FWS and NMFS. Agree to schedule to complete consultation in October 2003. Interim dates for peer review process included. Worked on affects matrix. Discussed dam/baseline issue again.
1/08/2003	Met with ID's to bring them up to speed on meetings with NMFS and FWS since 11/2002.
1/22/2003	Meeting with FWS and NMFS. Peer review process discussed. Meeting focused on affects matrix for two example reaches—Cle Elum Reservoir and Granger-Prosser.
1/30/2003	Meeting with FWS, NMFS and ID's. FWS reports on peer review process being developed. More discussion about dams/baseline, FWS indicates the issue needs to be elevated and BR agrees. Work on matrix—outline data sources and analysis techniques for Cle Elum as an example for other reaches.
1/31/2003	Phone call with FWS to discuss dams/baseline issue. Agreed issues needed to be elevated
2/13/2003	Meeting with FWS, NMFS and ID's to discuss Yakima Project maintenance details. FWS reports on peer review process. Parties agree to have matrices available by March 3.
2/19/2003	Phone call to FWS on dams/baseline issue. FWS indicated they did not believe now was the time to elevate issue but rather wait until draft BO was done.
2/20/2003	BR memo to FWS in reply to 12/19/2002 email agreeing to time extension till end of October 2003 to complete consultation
2/28/2003	Meeting with FWS and NMFS to discuss consultation and peer review. FWS proposes very abbreviated peer review process which NMFS doesn't like and then entire process is dropped. Agree on interim dates to complete consultation—affects analysis by mid-May, BR review by 6/1, release draft BO by 7/15, take comments and re-release late September with final the end f October. Also agreed to develop joint briefing paper on dams/baseline issue.
3/7/2003 ...	Met with FWS to develop joint briefing paper on dams/baseline issue
3/19/2003	Met with FWS to review joint briefing paper on dams/baseline issue. Discussed need to elevate issue quickly, FWS was to explore and get back to BR.
3/26/2003	3/27/2003E-mail exchange with FWS concerning elevation of dams/baseline issue
4/10/2003	Meeting with FWS to discuss dams/baseline issue. BR feels dams are in the baseline and FWS believes affects of the presence of the dams are an affect of the proposed action.
4/11/2003	E-mail from FWS on dams/baseline issue and jeopardy analysis. FWS believes dams and their impacts could be part of the baseline, proposed action or both and for purposes of jeopardy analysis it make little difference.
4/23/2003	BR transmits draft effects analysis to FWS and NMFS
5/2/2003 ...	Phone call to FWS to arrange meeting to discuss draft affects analysis and potential misunderstandings. FWS doesn't commit.
5/6/2003 ...	E-mail to FWS in response to 4/11 e-mail
5/7/2003 ...	Phone call to FWS to arrange meeting to discuss draft affects analysis and potential misunderstandings. FWS indicated they had an internal discussion schedule for 5/9 and would then get back about arranging a meeting.
5/14/2003	Phone call to FWS to arrange meeting to discuss draft affects analysis and potential misunderstandings. FWS 5/9 discussion did not occur so meeting can't be scheduled.
6/18/2003	E-mail from FWS concerning baseline issue. Frames issue as BR's reluctance to treat future affects of proposed action as effect of the action.

APPENDIX A–5

Consultation Requires Education

NOAA and the U.S. Fish and Wildlife Service should insure biologists conducting ESA consultations are fully qualified because of the high stakes involved for both the species of concern and local and regional economies.

ESA consultations can result in significant, negative, destructive consequences on local and regional economies. After NMFS (now NOAA Fisheries) listed Pacific salmonids over most of the West Coast, NMFS was ill-equipped to handle the large volume of consultations required by the listings. NMFS hired additional staff to cope with the work load, but in our experience NMFS staff in the field consulting on ESA issues are often junior-level biologists with limited knowledge of the species and the factors affecting them.

Consequently, the decisions of ESA administrative personnel are often contrary to good science and to common sense, and many entities and individuals required to consult before obtaining government permits hire biologists from consulting firms with generally high levels of expertise and experience to resolve the problems created by services personnel. Thus, ESA consultations frequently consist of novices from the services consulting with experts from the scientific arena, who must first educate the services novices before proceeding with the consultation process. Services biologists should be able to understand both technical and policy issues before they are responsible for complex and contentious ESA consultations, but often are not.

APPENDIX A–6

ESA Administrative rules are vague

ESA rules are often vague, increasing the potential for litigation, and leaving too much discretion to the individual agency biologists involved directly in ESA consultations.

(1) Hatchery fish not counted.

The treatment of hatchery fish, and the decision from Judge Hogan (*Alsea Valley Alliance vs. Evans, infra*, p. 31) in September, 2001, is just one example of arbitrary and vague decisions made by The National Marine Fisheries Service (NOAA Fisheries). In the *Alsea Valley Alliance* case, Judge Hogan held that NMFS had arbitrarily decided that hatchery fish were not to be included in the status of a population or species under consideration for listing.

Although hatchery fish from the same parental source as wild fish cannot be differentiated from those wild fish, and their progeny will revert to wild fish when spawned in the wild, NMFS decided that only the wild component of the population should be included in the numerical status of the population when deciding whether the "species" was at risk, and in essence was subdivided the population into what NMFS thought was suitable and unsuitable members. The only difference between the hatchery and wild fish are the identifying marks applied in the hatchery. Genetically, physically, and reproductively they were the same fish.

(2) Proposed Bull Trout critical habitat.

Recently, USFWS proposed critical habitat rules for bull trout. A review of the proposed critical habitat rules revealed the following weaknesses:

The designation of the appropriate "environmental baseline" conditions forms the basis for evaluating actions which may affect listed species, but the application of the concept is inconsistent between the action agencies (NOAA/USFWS).

The USFWS may exclude areas from critical habitat designation if the benefits of excluding areas outweigh the benefits of inclusion. However, the proposal does not define benefits, or establish any verifiable criteria for including or excluding habitat.

Critical habitat should, to comply with ESA, include only the specific areas within the geographic area occupied by the species at the time it is listed, and which contain the physical and biological features essential to conservation of the species. Critical habitat must be limited geographically to what is *essential* to conservation of the species although more extensive habitat may be required to maintain the species over the long term, *critical* habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention. These provisions of the ESA are violated by USFWS' proposed bull trout critical habitat. For example, USFWS proposes to include two (2) streams in the Yakima Basin, Taneum Creek and the Teanaway River, as critical habitat, even though these streams do not currently support bull trout. There has been no discussion with stakeholders (YBJB and others) about whether or not these streams

should be included in critical habitat to avoid short-term jeopardy. No economic impact analysis has been performed on this designation of critical habitat.

Definitions of important biological concepts are often lacking when new rules are proposed under the ESA. For example, the term "population" is an important biological concept. The ESA rules are, however, so vague that on one hand the entire Columbia River basin population of bull trout is considered a "distinct population segment" for the purposes of listing the fish, while designation of critical habitat and for a finding of one or two redds in a stream reach is considered a population for the purposes of recovery planning.

APPENDIX B

Administrive errors and ESA misinterpretation

Serious and unnecessary negative impacts on Pacific Northwest economy and way-of-life have resulted from the misapplication of the Endangered Species Act (ESA). These impacts have occurred because of the policy of the National Marine Fisheries Service (NOAA, formerly National Marine Fisheries Services or NMFS) as the administering agency of the ESA for anadromous Pacific salmon.

It is necessary to recall that the purpose of the Endangered Species Act (ESA) of 1973, including amendments through 1996, is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species," [ESA, Sec 2(b)].

It is also necessary to recall what the Statute means by the term species. The term "includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature" [ESA, Sec 3(16)]. Therefore, conservation is to include the species at risk and the ecosystems they depend on, and the term "species" refers not only to the traditional (taxonomic) species such as the condor, grizzly bear, or northern spotted owl, but also to any distinct population segment (DPS) of a species which interbreeds when mature.

NOAA has redefined the "purpose" of the ESA, the unit at risk, and what constitutes members of the unit, all of which are contrary to the wording of the Act.

(1) Purpose of the ESA expanded

The first unauthorized NOAA decision under the Act was declaring that conserving the genetic diversity of the species was the major goal of the Act. It was stated by Waples (NOAA Tech. Memo. 194, 1991) that such a framework accomplished the major goal of the Act, which was " to conserve the genetic diversity of species (taxonomic) and the ecosystems they inhabit". The genetic characteristics that were uniquely associated with the population unit would have to contribute to the overall genetic diversity of the taxonomic species. Therefore, NOAA decided that, rather than limiting the ESA to conserving species, subspecies, or DPSs, NOAA's administration of the Act would be to preserve genetic diversity. Preserving the genetic diversity of a species, however, requires very different and much broader protections than what is required for conserving species at risk of extinction. NOAA's decision was flawed

because it created a purpose for the ESA different from and substantially more burdensome than, the purpose stipulated by Congress—to conserve ecosystems and species at risk.

(2) Unit at Risk

A second, but related, unauthorized NOAA decision was to overlook the statutory definition of the unit at risk, i.e. "species," "subspecies," and "DPS," and to adopt the framework that stated a population or a group of populations would be considered distinct under the Act "if it represents an Evolutionary Significant Unit (ESU) of the biological species" (NOAA Tech. Memo. NOAA F/NWC–194NOAA, Waples 1991).

NOAA then concluded that to qualify as an ESU the population or group of populations must be (a) reproductively isolated from other conspecific population units, and (b) represent an important component in the evolutionary legacy of the species. NOAA concluded that isolation need not be absolute, but sufficient to allow evolutionary differences to accrue that would define the unit as genetically distinct. These were subjective criteria and open to the interpretation of the administering action agency.

NOAA established a unit different than species, subspecies, or distinct population segments around which to administer the Act. An ESU is not a unit defined by Congress as deserving protection under the ESA, nor does it fit the definition of a DPS, for which it was meant to substitute.

Congress intended that a DPS was an interbreeding unit, and that meaning was clearly stated by Congress in the wording of the Statute. But NOAA clearly states that ESUs are not limited to interbreeding units. In fact, Utter et al. (American Fisheries Symposium 17:149–165,1985) confirms the point that ESUs are not to be considered panmictic (i.e. interbreeding), because NOAA there states the "definition of an ESU by no means implies a single panmictic unit".

The issue is that NOAA decided to substitute multiple, non-interbreeding populations as a unit at risk, and therefore entitled to protection in place of the DPS defined by Congress as the interbreeding population unit. The substitution of ESU for DPS was a flawed NOAA decision because it created a different category with different criteria to classify population units than what was stipulated by Congress.

NOAA's creation of ESUs as a category at risk combined with NOAA's purpose to preserve genetic diversity, allowed NOAA to include, for example, all Chinook salmon in NOAA's classification of ESUs. Several populations can be lumped together based on genetic similarity and listed within a single ESU, whether or not each population warrants such treatment. Every population of Chinook salmon from the US/Canada border to southern California is a member of an ESU and nearly a hundred separate populations have been included in the listings. These listings are contrary to congressional instructions, "to use the ability to list sparingly and only when the biological evidence warranted such action" (96th Congress, 1st Session, 1979 Senate Report 151). NOAA did not use the ability to list "sparingly".

Moreover, even listings were contrary to the instructions to list only when the biological evidence warranted such action. For example, hundreds of thousands of Chinook salmon were returning each year over that geographical area, and recently near record numbers in the Columbia River have returned over the last 3 years, yet several ESUs in the Columbia Basin are listed at risk of extinction.

However, regardless of the demonstrated strength of Chinook salmon and steelhead trout returns to the Columbia over the last 4 years, water users are still subjected to restrictive regulations on the use of water and adjoining land, justified under the pretense that Chinook and steelhead trout are at risk. NMFS has adopted a "no net loss" policy that prevents any new water use out of the entire mainstem Columbia River. The incongruity of these policies is underscored by the fact that commercial and sport fisheries are still allowed to harvest the reputed endangered species, with well over 400,000 Chinook harvested annually off the coasts of Washington, Oregon, and California.

(3) Subdividing the Unit at Risk—exclusion of hatchery fish.

The third major flaw in NOAA's policy decisions was its subdivision of the unit at risk. The ESA is "to provide the means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" [ESA 1973, Sec 2(b)]. Under such mission-oriented legislation *all fish within the identified unit at risk* should be included in the census that determines their status, and in any plan to protect them.

NOAA, however, made another unauthorized decision which allowed NOAA to establish categories of the same fish and treat them differently. NOAA decided that hatchery fish were excluded from the numerical assessment of populations reviewed for listing, unless they were considered essential to the recovery of those populations. This unauthorized policy resulted in a U.S. District Court ruling against NOAA in *Alsea Valley Alliance v. Evans*.[1]

This third flaw, therefore, was subdividing the unit at risk. Myers et al. (NOAA Tech. Memo. NOAA-NWFSC–35, 1998) stated in the Chinook salmon status review that "attention should focus on natural fish which are defined as the progeny of naturally spawning fish". This was reiterated by Waples (NOAA Tech. Memo. NOAA F/NWC–194NOAA, 1991) in the discussion on what constituted a "species," and also where it was indicated that NOAA will determine "the role (if any) of artificial propagation in development of recovery plans for listed species". The NOAA policy on artificial propagation under the ESA (Hard et al. NOAA Tech. Memo. NOAA-NWFSC–2, 1992), again reconfirmed that in the view of NOAA "the primary objective of the ESA is the conservation of species in their natural ecosystems".

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[1]In the Alsea Valley Alliance v. Evans, 161 F. Supp. 1154 (D. Or. 2001), Judge Michael Hogan of the United States District Court for the District of Oregon ruled that NOAA was "arbitrary and capricious" in its decision to list the Oregon Coast Coho salmon distinct population segment (DPS) (or "Evolutionarily Significant Unit" (ESU)) under the ESA. According to Judge Hogan, NOAA cannot list naturally spawning fish separate and apart from hatchery fish in the same DPS (or ESU). "The central problem with the NOAA listing decision of August 10, 1998, is that it makes improper distinctions below that of a DPS, by excluding hatchery populations from listing protection even though they are determined to be part of the same DPS as natural Coho populations." 161 F. Supp at 1162.

The wording in the ESA reads "to provide the means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" [ESA 1973, Sec 2(b)]. The term "conserved" is defined in the language of the ESA to include propagation. In the case of salmon, propagation means hatchery production. The ESA does not state or imply that we should discriminate against hatchery fish when making biological assessments or recovery plans, but rather indicates that hatchery propagation is a legitimate technology to sustain the species under the ESA. Hatchery produced salmon came from wild populations and are part of the legacy of those wild fish. They represent the same discrete and distinguish-able elements of the wild population, as demonstrated in genetic analyses, including Myers et al., NOAA Tech. Memo. NOAA-NWFSC–35 (1998). *The final irony is that the progeny of hatchery fish spawning naturally are considered "wild" fish by NOAA.*

The ESA does not provide for or allow NOAA to distinguish between life history forms of the same species by listing one and excluding the other. A prime example is the listing of steelhead trout, and the exclusion of rainbow trout from the listing. Rainbow trout and steelhead trout interchange life history forms, are indistinguishable genetically, and represent an "ecosystem" that has existed for thousands of years, yet steelhead trout are listed in four separate ESUs and rainbow trout are excluded. Part of the problem is the limited biological perspective of the Services in making the listing decision, but the fact remains that if rainbow trout were included in the ESUs there would have been no possible justification to list steelhead trout because rainbow trout are numerous throughout the Columbia River Basin. The Yakima River has a renowned trophy rainbow trout fishery which are genetically indistinguishable from Yakima River steelhead trout, and in fact interbreed with Yakima River steelhead trout.

The three problems identified, i.e. (1) preserving genetic diversity, (2) creation of the ESU classification, and (3) subdividing the unit at risk, have created unnecessary and costly administrative burdens on the public, the State, and the Federal Governments. NOAA Fisheries' arbitrary and erroneous policy decisions have no justification, are clearly inconsistent with the wording of the Statute, and should be considered a serious breach of confidence in NOAA's administration of the law.

APPENDIX C

Improper listing of species: Columbia River Salmon, Steelhead Trout and Bull Trout are not threatened with extinction

The National Marine Fisheries Service (NMFS) made the determination that the Upper Columbia River Spring Chinook, Lower Columbia River Chinook, and Upper Snake River Spring/Summer Chinook, Snake River Fall Chinook, Upper Columbia River Steelhead Trout, Lower Columbia River Steelhead Trout, and Snake River Basin Steelhead Trout were in danger of extinction or likely to become endangered in the foreseeable future, and listed them respectively under the Endangered Species Act (ESA).

Similarly, bull trout in the Columbia River Basin have also been listed by United States Fish and Wildlife Service (USFWS), involving Lower, Mid-, and Upper Columbia and Snake River populations. Contrary to the impressions given by such listings, Chinook salmon, steelhead trout, and bull trout species are, however, not at risk of extinction in the Columbia Basin. This represents a serious incongruity between the rationale for having listed these species at risk and the actual status of Chinook, steelhead trout and bull trout in the Columbia River system.

In essence, this incongruity is at the foundation of the problems associated with the ESA, and originates with the administration of the Statute emanating from the policies developed by NMFS and USFWS, and not from the Act itself.

As described in Appendix B, the error in listings of Chinook and steelhead were from policy memoranda and represented major departures from the precepts of the ESA. Listing of bull trout followed similar errors of ESA interpretation.

With regard to the Columbia River Basin, the status of wild salmon, steelhead trout and trout was very much influenced by Federal development programs in the west, with efforts concentrated largely around the extensive water resources of the Columbia. Of the 673,400 square kilometers of Basin (Mullan et al. 1992), 191,660 square kilometers were made inaccessible to anadromous fish species with the construction of Grand Coulee Dam on the mainstem Columbia River (Fish and Hanavan 1948), and 189,070 square kilometers were blocked by Hells Canyon Dam on the Snake River, reducing access to only 40 percent of the original stream area available to anadromous salmonids (Netboy 1980).

Sixty-four percent (64 percent) of the remaining mainstem fish habitat on the Columbia and Snake Rivers has been changed from flowing stream to reservoir environ-ments (ODFW & WDFW 2000). Furthermore, extensive introductions of exotic

fish species have been made by USFWS and State agencies. Bass, crappie, perch, walleye, shad, carp and brook trout were introduced in the Columbia River and in many cases exotic species out-number native fish.

The point often ignored by, or unknown to, anyone attempting to expand production of wild salmonids in the Columbia River system is that the reductions of populations experienced by these species and the introductions of exotic fish were intentional changes which resulted from planned development of the river.

Federal irrigation and hydroelectric projects greatly enhanced the economic base of agriculture in Idaho, Oregon, and Washington, and expanded urbanization in otherwise arid land east of the Cascade Mountains. The cost of economically developing the Pacific Northwest was loss of fish habitat and wild fish. Congress established, however, fish hatcheries as the surrogate for wild Chinook and steelhead trout in the Columbia River Basin, and maintained anadromous fish runs through such measures. Congress assured sustained salmon and steelhead trout production in the Grand Coulee Maintenance Project, the Magnuson-Stevens Act, the Mitchell Act, and other compensation programs, as Federal law and they have successfully achieved that objective. Consequently, hatchery fish have been contributing to, and are thus part of, naturally spawning wild populations for over 90 years in the Basin.

Therefore, the suggestion that Chinook salmon and steelhead trout are at risk in the Columbia is not supported by the data (Brannon 2000, Brannon et al, 2002). As shown in Table 1, Chinook salmon adult returns passing Bonneville Dam have averaged over 600,000 fish in the last 4 years, three times the average returns when these fish were listed in the early 90's. Similarly, in the last 3 years, steelhead trout have increased well over twice their previous average return, with both steelhead trout and Chinook demonstrating returns greater than experienced since before the 1930's, and wild fish are well represented among returning populations.

In a like manner, bull trout are well represented throughout the Columbia River Basin, although they are reported in low numbers. They are present in all of the twenty-five separate regions identified in the Columbia system, which demon-strates that bull trout, as a species, are not at risk of extinction. The fact remains that until recently bull trout were given no attention and very little is known about their historical numbers in any of these regions. As a "predator species" that routinely undergoes extensive distribution throughout the system, bull trout's evolutionary strategy would be to avoid concentrating in large numbers, especially where food resources are limited as is often the case in the upper, more mountainous reaches of the watersheds. The bull trout's recently discovered wide ranging distribution within the Columbia River Basin indicates that bull trout are effectively self-sustaining, *and their relatively low population density is not a matter of a threat of extinction, but rather the consequence of life history evolution which offers favorable survival opportunities in the type of habitat bull trout seek.*

In each case where salmon, steelhead trout, or bull trout have been listed, the listing decision has been largely the result of limited knowledge about the biology of the species, as well as the tendency for NMFS and USFWS biologists to adopt general conservation measures rather than limiting themselves to the objective of the ESA.

Chinook salmon, steelhead trout, and bull trout are not at risk of extinction so the general conservation programs for these species are the responsibility of State agencies, not the ESA or the services.

Table 1. Adult wild and hatchery Chinook and steelhead trout passage at Bonneville Dam on the Columbia River over the last three 4 year spawning cycles (total Chinook includes jacks, total steelhead is wild plus hatchery).

Chinook, Steelhead Trout

Year	Spring	Summer	Fall	Total	Wild	Total
2002	268,813	127,436	474,554	925,452	143,045	481,203
2001	391,347	76,156	400,410	971,331	149,582	633,464
2000	178,302	30,616	192,815	491,928	76,220	275,273
1999	38,669	26,169	242,143	343,276	55,064	206,448
1998	38,342	21,433	189,085	280,944	35,701	185,094
1997	114,000	27.939	218,734	387,088	33,580	258,385
1996	51,493	16,034	205,358	296,635	17,375	205,213
1995	10,192	15,030	164,197	240,050	—	202,448
1994	20,169	17,631	170,397	243,450	39,174	161,978
1993	10,820	22,045	126,472	277,657	—	188,386
1992	88,425	15,063	116,200	256,299	—	314,973

Chinook, Steelhead Trout—Continued

Year	Spring	Summer	Fall	Total	Wild	Total
1991	57,346	18,897	150,190	274,644	—	274,535

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APPENDIX D A

The United States has no legal authority to change the use or reallocate Yakima Reclamation Project surface irrigation water which is owned by Yakima Reclamation Project landowner/waterusers; the U.S. is a "trustee" for the benefit of Project irrigator landowner/ waterusers

The 1902 Reclamation Act, Section 8 (43 USC 383) provides:

"§ 383. Vested rights and State laws unaffected

"Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, *and nothing herein shall in any way affect any right* of any State or of the Federal Government or *of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.* (June 17, 1902, ch. 1093, § 8 in part, 32 Stat. 390.)" (Emphasis added)

The Yakima Reclamation Project water rights are, pursuant to 43 USC 383 abovequoted, as well as unambiguous Federal and Washington State water law, the vested property of the YBJB landowner/waterusers whose predecessors-in-interest appropriated, beneficially used Yakima Reclamation Project water on their land and perfected their Yakima Reclamation Project water rights [See, Lawrence vs. Southard, 192 Wash. 287, 73 P.2d 722 (1937).]

The U.S. Supreme Court in Ickes vs. Fox, 300 U.S. 82, 95–96 (1937), which involved YBJB landowner/waterusers in the Sunnyside Division of the Yakima Reclamation Project, analyzed the 1902 Reclamation Act, Federal and Washington State water law, the Yakima Reclamation Project's surface water rights including ownership of them, the U.S.'s perpetual water delivery contracts with, and obligations to, YBJB landowner/waterusers, and unambiguously held:

" . . . . *Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of landowners; and by the terms of the law and of the contract already referred to, the water rights became property of the landowners, wholly distinct from the property right of the government in the irrigation works.* Compare Murphy vs. Kerr, 296 Fed. 536, 544, 545. *The government was and remained simply a carrier and distributor of the water (Id.),* with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands and

the water rights appurtenant thereto—a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner.

" . . . . And in those States, generally, *including the State of Washington, it has long been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by State law and hereby express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied*." (Emphasis added)

The United States has no legal authority, discretion, or surface water right approved or certificated by Washington State to consumptively or non-consumptively "re-allocate" or use YBJB landowner/waterusers' Yakima Reclamation Project surface irrigation water for any purpose other than for the irrigation of YBJB landowner/waterusers' land except for the substantially diminished treat fishery water right affirmed by the Washington State Supreme Court in *DOE vs. Yakima Reservation Irrigation District, et al.*, 121 Wn.2d 257, 850 P.2d 1306 (1993).

The U.S. is, in addition, obligated by its "perpetual" contracts executed with YBJB members for the benefit of YBJB landowner/waterusers *and* also, *as their trustee*, to annually store and deliver the entire Yakima Reclamation Project's total water supply available ("TWSA") as defined in *KRD, et al. vs. SVID, et al.*, U.S. District Court (E.D. Wash. 1945) (less the substantially diminished treaty fishery water) for each landowner/wateruser's annual use and reuse as irrigation water to the full extent of each YBJB landowner/wateruser's Yakima Reclamation Project water and water right entitlement.

The U.S. Supreme Court in *Nevada vs. United States*, 463 U.S. 110,m 122–123, 127–128, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), quoting from 43 USC 383, *California vs. U.S.*, 438 U.S. 645, 664 (1978), *Fox vs. Ickes, supra*, and *Nebraska vs. Wyoming*, 325 U.S. 589, 613–614 (1945), unambiguously concluded and held:

"In *California vs. United States*, 438 U.S. 645 (1978), we described in greater detail the history and structure of the Reclamation Act of 1902, and stated:

"The projects would be built on Federal land and the actual construction and operation of the projects would be in the hands of the Secretary of the Interior. *But the Act clearly provided that State water law would control in the appropriation and later distribution of the water*." Id. at 664 (emphasis added).

"In the light of these cases, *we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold or shifted about as the Government might see fit*. Once these lands were acquired by settlers in the Project, *the Government's 'ownership' of the water rights was at most nominal*; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes vs. Fox* and *Nebraska vs. Wyoming*, *the law of the relevant State and the contracts entered into by the landowners and the United States make this point very clear*. (Footnote omitted)

"The Government's brief is replete with references to a fiduciary obligation to the Pyramid Lake Paiute Tribe of Indians, as it properly should be. But the Government seems to wholly ignore in the same brief *the obligations that necessarily devolve upon it from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere*." (Emphasis added)

YBJB member entities, also acting as "trustees" for the benefit of their landowner/ waterusers, have executed "perpetual" contracts with the United States, obligating the U.S. to annually deliver to YBJB member entities their landowner/ waterusers' full, annual Yakima Reclamation Project irrigation water and water right entitlements.

Four (4) of the YBJB member entities (Kittitas, Roza, Sunnyside and Yakima-Tieton) landowner/waterusers' annual irrigation water and water right entitlements were unconditionally confirmed in the 1/31/45 "Judgment" in *KRD, et al. vs. SVID, et al.*, U.S. District Court (E.D. Wash. 1945).

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