

# HEARING ON IMPLEMENTATION OF THE ENDANGERED SPECIES ACT IN THE SOUTHWEST

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## HEARING BEFORE THE COMMITTEE ON RESOURCES HOUSE OF REPRESENTATIVES

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## HEARING ON IMPLEMENTATION OF THE EN- DANGERED SPECIES ACT IN THE SOUTH- WEST

WEDNESDAY, JULY 15, 1998

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

The Committee met, pursuant to notice, at 2:07 p.m., in room 1324 Longworth House Office Building, Hon. Richard W. Pombo [acting chairman of the Committee] presiding.

Mr. POMBO. [presiding] We're going to call the hearing to order.

I ask unanimous consent to allow members that are not on the full Committee—Mr. Skeen, Mr. Hayworth, and others had requested permission to participate in the hearing—I ask unanimous consent that they be allowed to sit on the dais without objection. I also ask unanimous consent that all members' opening statements being included in the record. The record will remain open to allow members who are not here at the beginning to enter their opening statements in the record in the correct proportion.

### STATEMENT OF HON. RICHARD W. POMBO, A REPRESENTA- TIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. The House Committee on Resources is holding this hearing today on the implementation of the Endangered Species Act in the southwestern United States. The avalanche of litigation in the region has created a great deal of confusion and hardship.

I want to thank my colleagues from the States of New Mexico and Arizona for bringing this situation to the attention of the Committee. In enacting the Endangered Species Act, Congress sought to protect declining species from extinction. We believe that listing species would stop the intentional harming of those species by over-hunting or intentionally destroying necessary and critical habitat. However, I believe that those who were serving in Congress when the ESA was enacted never foresaw the use of the ESA by radicals who use the ESA lawsuits to shut down entire communities and industries in the West.

The ESA lawsuit process has been described as a blunt instrument that allows a very small group of people to impose their will on the majority whether they are right or wrong. The ESA lawsuit gives extraordinary power to a very small number of people. Those most personally affected by these lawsuits have been systematically deprived of their right to defend their livelihoods and property.

Prior to the recent Supreme Court decision in *Bennett v. Spear*, only environmentalists could sue if they disagreed with a decision of the Federal agency under the ESA. The Justice Department and the Interior Department fought to keep private citizens out of the courthouse. The only reason that the Supreme Court finally resolved the standing issue in *Bennett v. Spear* was that private citizens were willing to fight all the way to the Supreme Court. And guess what? The Supreme Court agreed with Mr. Bennett and not the Justice Department that all our citizens have the right to protect their civil and economic rights in court.

Now citizens who are personally affected by the extremists' lawsuits want to participate in these lawsuits as intervenors. It seems to me that allowing the most affected to intervene would ensure that the court has all the necessary facts to make a better and more accurate decision. The purpose of a trial is to get the truth. Excluding private citizens in State and local governments from ESA lawsuits deprives the court and the public of the truth. It results in one-sided lawsuits and may result in a severe injustice to thousand of affected people and their families.

Settling these suits without the agreement of the intervenors deprives them of their right to a fair trial. It's time to ensure that the public has the opportunity for self-government through a full and fair involvement in lawsuits, including the right to a fair trial. Anything less is not democracy.

Mr. Farr, did you have an opening statement at this time?

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

Mr. FARR. Thank you, Mr. Chairman.

I would appreciate in this hearing discovering the real problems that exist regarding the ESA consultation process required in every change of ownership of land, or reuse of land, that is owned by the Federal Government. With all the military-base closures in the United States, we've had to go through that process repeatedly. I represent the largest base that has been closed, about 28,000 acres, and we went through the consultation process very effectively.

It has also been used in fisheries area such as the northeast where they actually had to create some no-take zones because they overfished certain areas and they needed to allow them to regenerate.

As members of this Committee and the Congress, we represent people. But we also represent all the other living things on the planet, particularly those living things in America. And we have a responsibility to maintain a balance between people and nature.

My sense is that often times regulators don't realize that there has to be a solution to a problem. There has to be an end, and I hope that we and the regulators can keep that in focus. On the other hand, those who are affected by regulations have to realize that the end product usually is trying to enhance the environmental management of property, to make it better than it has been historically. And I think that if we can find that consensus, we can, as Members of Congress, make good law and support a good process.

I'm very supportive of the Endangered Species Act. I think it is good law. I think in carrying it out, people sometimes err on the

side of caution, so we need to make sure that there's a sense of process here.

So, Mr. Chairman, I appreciate your having the hearing. I look forward to the testimony.

Mr. POMBO. Thank you.

Are there any other opening statements at this time? Mr. Hansen.

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

Mr. HANSEN. Thank you, Mr. Chairman.

I hope people realize the significance of this Act which passed in 1973. If you go back and you read what was said in the House and the Senate, it was a lot different as it was portrayed at that time than it has turned out to be.

As you read about what was said, a lot of people said we're going to protect the grizzly bear, the bald eagle, things such as that, but I think it was never envisioned to go to the extent that it has. Just like the Wilderness Act, and Hubert Humphrey statement "they'll probably be no more than 30 million acres will ever go into wilderness." We're through 100 million and going up.

And so, this Act, in and of itself, does not have a cost-benefit analysis to it. As you look at areas like Washington County in Utah, they've been expending a lot of money for HCP's for the desert tortoise. We can't come close to even coming up with the money to pay the people off—who we agreed to pay off, who have found the desert tortoise on their land. It has got to the point that it's almost ridiculous that we have police down there to make sure that they cross the road. I don't know what GS ratings these guys get, but they are there to make sure that happens. But then we find out from the best biologists around that the endangered species in Washington County is not really endangered, but it is endangered in California. And so, where it has respiratory diseases in California, it's very healthy in Utah, but we work on it. I have never seen anything as more of a subsidy with no end in sight. Somewhere there should be a cost-benefit analysis of what we get out of this thing.

Take the squaw fish in the Colorado River. They're trying to now, both the State of Arizona and the State of Utah, now they want us to come up \$120 million to make fish ladders for the squaw fish. Yet its cousin is in the Columbia River and in the Columbia River it is a predator. In the Colorado River, it's an endangered species. I mean isn't there some sense to this thing.

It's much like the hearing that the chairman and I were at out in Reno, Nevada on Monday where the wild-and-free running horse is there. And instead of this beautiful thunderhead, and Flicka, and all that wonderful stuff you see in movies, they're dying of starvation. Now the people who run cows out in that area, if they go over one AUM, they're kicked off the ground. If they don't get off the ground when they're supposed to, there's a penalty on them. Yet they're well over the amount of wild horses that run. And so, they're starving to death. So a few people who have the emotion and not the science can feel that they're doing the right thing. That worries me a little bit.

If I've seen a subsidy, it's the subsidy we're doing on the Endangered Species Act, and the subsidy we're doing on Wild Horse and Burro Act. And not to get off on that, but I would hope that we could attack this a piece at a time and bring this thing to some presence of reality. I guess in 1973 if I had been here, I would have probably voted for the Act.

But let me end on this: One of our Speakers that I knew very well by the name of Thomas Foley, who is now the Ambassador to Japan, made a statement to me because I was working with him on another issue, he said "I wished to hell I had never voted for the Endangered Species Act."

Thank you, Mr. Speaker.

Mr. POMBO. Thank you.

Any other opening statements?

I'd like to call up the first panel, Mr. Jimmy Bason, Mr. Howard Hutchinson, Mr. Robert Wiygul, Mr. Michael Anable, and Dr. Robert Ohmart.

I'd like to thank you for joining us today. Just to familiarize yourself, we limit the oral testimony to 5 minutes. You have a set of lights that are in front of you. Works similar to traffic lights; green means go; yellow means hurry up; and red means stop. Your entire written testimony will be included in the record, but if you could try to conclude your oral testimony in 5 minutes, the Committee would appreciate it.

Mr. Bason, if you're prepared, you may begin.

**STATEMENT OF JIMMY BASON, NEW MEXICO  
CATTLEGROWERS ASSOCIATION, ALBUQUERQUE, NEW MEXICO**

Mr. BASON. Mr. Chairman, members of the Committee, my name is Jimmy R. Bason and I live seven miles out in the suburbs of the little town of Hillsboro, New Mexico, which has a population of approximately 200 people. It is typical of the small, rural communities throughout the United States that you, the Federal Government, apparently are determined to eliminate.

I'm here representing the New Mexico Cattlegrowers and personally own a Federal Government grazing permit allotment on the Gila National Forest next to my son's adjoining permit which have been in the family about 35 years.

The Federal Government through its agent, Region 3, Southwest Region, and the news media, but not face-to-face has insinuated that ranchers don't want to change their ways and further insinuated that we're just one step above dinosaurs. I fully realize some of those representatives are in this same room.

This is to use an old, unchanged word from these hallowed halls, complete "balderdash." We are really on the cutting edge of change. We're constantly trying to improve ourselves and the resources that we live on. There's no reason for us to destroy that, but we're not on the cutting edge of unproven, and untested change that's based on theoretical changes designed to achieve some fanciful political goal.

We stay current with the latest scientific methods through constant schools, lectures, quarterly meetings, and all the disciplines at every one of our meetings—extension courses, short courses, et



cetera, et cetera. When the adversaries—and I use that word—determine they cannot win in actual facts, they completely change the rules on us. I compare this to challenging Michael Jordan, and I didn't say Michael Jackson—Michael Jordan, not Michael Jackson—and the Chicago Bulls to a basketball game with a pickup team, and just as the tip-off ball is about to be thrown in front, I announce to Michael we've just changed the rules. And I'm going to be changing them as the game goes along. This is exactly what's happening to us in New Mexico, and I suspect the rest of the Nation.

Every one in this room must understand that every Federal Government permittee and lessee sets down once a year, every year, and in conjunction with, and under the direction of the Federal Government, agrees to an annual operating plan which the Federal Government signs off on. There's no surprises under this.

We are here today to discuss the citizens' suit provision of the Endangered Species Act and, specifically, the two joined suits, numbers 666 and 2562, which were scheduled in Federal court in Tucson, Arizona in April 1998, in which I attended for the New Mexico Cattlegrowers and the Gila Permittees Association. The adversaries have alleged again in the media that the ranchers were given all the chances to sign off on the agreement that the Federal Government and the two zealous environmental groups agreed to. This slick distortion of facts is very similar to my alluding to the Potomac out here as being similar to the Rio Grande. They're both rivers. There is a world of difference in knowing of a possible tentative agreement 5 days before court and actually having any input into that agreement. Not much need to have prisoner sign off on his own death sentence when his head is already on the chopping block and his hands are tied behind his back.

Of course, we refused to join into the agreement. The judge himself saw the unjustness of this and refused to stipulate it in his court. Once again, the Citizen Group had sued and just before the actual science and facts could come up in court, the Federal Government rolled over and offered up their own operating plans; their own best practices; and their own trusting permittees on the altar of expediency.

I want to enter an article out of the Albuquerque Journal on the third of August, 1997 into my testimony where it brags that lawyers fees are nothing because the Federal Government pays it. Mr. Chairman, please recognize that we're talking about individual families and communities that are being ruined forever. They are the direct result of the Federal Government's policies that you and your predecessors established right here in Washington, from the time that we were encouraged to settle these sparsely occupied lands to keep foreign governments at bay—such as France, Russia, Spain, England, and so on—right through building of our infrastructure, the roads, the towns so that all 270 million citizens can come enjoy what they see today.

The Federal Government as a landlord must recognize that these aren't weekly renters out here or motel overnighers. They are the builders and the stayers of these rural areas. You can see their loyalty to the Federal Government in their improvements, and their flags, and all of their infrastructure, and their service to the coun-

try. And in no place more graphically illustrated than the noisy schools, or the new, and the silent cemeteries with generations of names for those passed on.

In closing, I want to please remind you that you are the Federal Government and please accept that responsibility that you worked so hard to get elected to. I'm tired of people saying it was those guys. On my ranch for 40 years, there's been an individual named "not me." I've never been able to find him, but he's constantly referred to whenever I ask "who messed this up? Who tore this up?" The answer is always "not me." I've never found him. I'm overjoyed to finally be in here in front of "they" as in "they said," "they told us to do it." You are "they."

Thank you, Mr. Chairman.

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

Mr. POMBO. They're not here.

[Laughter.]

Mr. BASON. Yes, they are.

[Laughter.]

They serve on all the committees around here beside just this one.

Mr. POMBO. Mr. Hutchinson.

**STATEMENT OF HOWARD HUTCHINSON, COALITION OF  
ARIZONA/NEW MEXICO COUNTIES, GLENWOOD, NEW MEXICO**

Mr. HUTCHINSON. Thank you, Mr. Chairman, and members of the Committee.

The legal strategies being employed by the environmental litigants have evolved over two decades. The examples being focused on by this hearing, CV 97666 and CV 972562, are only two cases in a succession of suits. The strategy focuses on land planning processes contained in the National Forest Management Act and the Federal Lands Management Policy Act.

The assertion is that the land and resource management plans are action-forcing, therefore, subject to Section 7 formal consultations under the Endangered Species Act. The Supreme Court addressed this issue on May 18 of this year. Their ruling was that forest plans are programmatic and not action forcing.

The cases prior to 666/2562 were concluded with stipulated settlements. Attempts at intervention by other affected interests were opposed by both the Justice Department and the plaintiffs. Settlements were granted by the Federal judges before the issue of intervention status was determined on appeal.

The results of these questionable settlements has been the slow but steady elimination of management activities on the National Forest and BLM lands. At the same time, when according to Dr. Garrett's report, cited in my written statement, these lands are in desperate need of restoration.

The April 27, 1998 issue of High Country News reported on Chief Mike Dombeck's agenda, "Aide Cris Wood says the fate of the schools would be better served separating their support from the rate at which trees are falling." By slowing decoupling communities from the 25 percent fund, we would like to see them less subject to the whims, and ups and downs of the Forest Service's timber

management program. "Over the short term," Wood says, "we're trying to provide a measure of stability and predictability they haven't had through much of this decade."

Are we now to have a decoupling of communities from their ranching as well? The instability of the last decade referred to Mr. Wood was the direct result of ESA citizens' suit and stipulated settlements. The agenda of the executive branch seems to run parallel with that of the environmental litigants.

The settlements have the appearance of friendly suit agreements. The question begs to be asked, "is the administration's Justice Department providing a suitable defense for the land management agencies or facilitating implementation of a special interest's goals who share complementary or parallel agendas?"

A great injustice is being inflicted on the rural residents of the southwest region. After nearly a century of livestock numbers' reductions, many on a voluntary basis, ecological conditions continue to decline. It should have become obvious to someone long ago that merely cutting numbers was not the solution.

In the current round of environmental assessments for implementing the agreement reached in 666/2562, the records of decision issued following the disclosures will not lend to the Congressional purpose in the NEPA of "encouraging productive and enjoyable harmony between man and his environment." The opposite will instead prevail.

The livelihoods of the rural populations in the southwest region are being sacrificed on the altar of biocentricism with little assurance of created benefits for the environment or the biosphere.

Congress should insist that the land management agencies adhere to their missions, and governing statutes, and quit making scapegoats of the commodity and amenity users for their mismanagement. Congress should also insist on the disclosure of impacts from settlements and insure that affected interests are assured standing in litigation. Further, Congress needs to investigate the implementation of the convention on biodiversity without Senate ratification and the Wildlands Project.

Thank you, Mr. Chairman.

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

Mr. POMBO. Thank you.

Mr. Wiygul.

**STATEMENT OF ROBERT WIYGUL, EARTH JUSTICE LEGAL  
DEFENSE FUND, DENVER, COLORADO**

Mr. WIYGUL. Representatives, thank you very much for having me here today.

My name is Robert Wiygul. I'm an attorney with the Earth Justice Legal Defense Fund in Denver. I'm very familiar with the lawsuit that is one of the subjects of this hearing. It's called the Forest Guardians' lawsuit. I was the chief trial attorney in that lawsuit. I was also the chief negotiator on the settlement agreement that's been spoken about in the lawsuit.

I'd like to give you my perspective on both that lawsuit and the settlement agreement that ended it. I think you may find that a

significantly different perspective from what you've heard here today.

First, let me say that that lawsuit primarily focused on what are called riparian areas; streams and stream corridors in the southwestern United States. The reason it focused primarily on those areas is because that 1 percent of the land base in the southwestern United States supports a huge assemblage of species that live in that area. Some estimates are as much as 85 percent of the species that live in the southwestern United States are dependent upon those riparian areas, stream corridors, for their survival of the species.

Now this particular lawsuit looked at those areas first and foremost. It focused on three species that use those areas and that depend on those areas for their survival. The southwestern willow flycatcher, which is a bird species, and two fish, the spinedace and the loach minnow. All of those creatures are dependent on healthy, riparian forests and streams for their survival. They are all protected under the Endangered Species Act, and by law they must be taken care of when Federal land management agencies are doing their planning.

As we reviewed the situation in the desert southwest with respect to the Forest Service's grazing law, a couple of things became very clear. One is that in that region, the Forest Service had good aspirations to protection of riparian areas in their regional guidance; in their forest plans; in many of their operating agreements. They had standards in there which, if followed, it helped protect those areas; help protect their value as habitat for endangered and other species. It also became clear that in many cases those standards were not being met on the ground and that actions were not being taken to make those standards be met on the ground. That is the reason that this lawsuit was filed. It followed a significant number of discussions with the Forest Service about that situation.

Now, when we went to Tucson, we prepared to try this case. We went with the intention of trying that case. As is very often the situation, for those of you who are trial lawyers or have been, the pendency of a hearing gives added currency to settlement discussions. That was the case there. Those discussions—let me be very clear about that—were not a rollover. Those discussions and that lawsuit were hard-fought, hard-nosed, and the Justice Department, who I consider to be colleagues in the bar, are worthy adversaries. They are not on the same side of the fence. They were not on the same side of the fence in that lawsuit when that agreement was negotiated. They were representing clients and they were fulfilling their obligations in that area. Other actions may well have to be taken to prevent further degradation of species' habitat in those areas.

Now, it is also a fact that the intervenors in that lawsuit chose not to participate in the settlement discussions of that lawsuit. That is not a fact that I can change. It was a choice that they made. They also attempted to challenge the settlement agreement itself in its implementation in court, and that attempt was turned down by the judge in Tucson.

I'd be happy to answer any further questions about this. I see I have a yellow light on, but that is the perspective that we have on

this lawsuit. It was an arms-length settlement agreement which the intervenors did have the opportunity to participate in represented a settlement of claims that, obviously in our view, the Forest Service would have lost had we gone through with the hearing.

Again, thank you very much for the opportunity to be here. I look forward to answering your questions after the other panelists have finished.

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

Mr. POMBO. Thank you.

Mr. Anable.

**STATEMENT OF MICHAEL ANABLE, DEPUTY STATE LAND COMMISSIONER, ARIZONA LAND DEPARTMENT, PHOENIX, ARIZONA**

Mr. ANABLE. Thank you, Mr. Chairman, members of the Committee.

My name is Michael Anable, the Deputy State Land Commissioner for the State of Arizona.

I'd like to give a little different perspective on third-party intervenor involvement in the citizens' suit. It's often where the Land Department finds itself.

We've run across three different kinds of suits: suits where the third-party or the citizen is trying to force a deadline at his critical habitat; suits where they're trying to force consultation; or suits which allege harm. The department has tried to intervene in a great number of those cases, just like the cattlegrowers from New Mexico did in the case that was just discussed, and we found it to be very difficult to intervene. And I believe your opening comments, Mr. Chairman, were along the lines of where I want to come from which is we need to provide more ability for intervenors to have a say at the table.

There's a great number of cases, which I cited in my written testimony, where I illustrate our struggles trying to intervene and the types of settlements that have happened before we can even get to the table and how egregious that's been. I think similar to the arguments you heard from Mr. Bason.

The points that I really want to make are the recommendations for change in the future I think Congress and this Committee should consider. I think you might want to consider giving third parties a right of intervention stronger than they have now. Make it clear that if you are a party with a significant interest in land, such as the State Land Department, that you have a right to intervene and have your voice heard, and you have a right to participate, to the extent you can, in settlement.

I think that a very practical problem with the current system is the sixty-day notice of intent to sue are only given to the agency that's being sued. Third parties must struggle to find out if there has been a suit filed that could affect their land. And, you know, an agency such as mine which is not large does have some attorneys that can go through the court records and try to keep up abreast of those, but as you know in the Ninth Circuit, it's just a playground for lawsuits and it's very difficult to keep track of that.

I think that it would be fairly simple for Congress to require Federal agencies to post a summary—to file a summary in the Federal Register of sixty-day notices they receive. Every third party, such as us, and cattlegrowers, and others would know where they can go look to find suits that are challenging them.

I think that Congress should take a look at allowing certain types of activities to go forward during the consultation period. Our experience has been that almost every project is on hold during the pendency of consultation. And there is a great many projects that every one knows will have no affect, and yet they get stalled. And I think that there needs to some ability for common sense to be put forward.

I think Congress might want to consider putting thresholds on the type of injunctive relief that can be given. There's many instances where broad injunctive relief is sought in these third-party—in these citizen lawsuits—that affect habitat that is, at most, marginally important to species. For example, in the Southwest Center versus the Forest Service lawsuit that we heard about, a great amount of that habitat was not occupied habitat; not suitable habitat, but potentially suitable habitat, but they still had to remove livestock from. And I think that the court needs to have the ability to weigh the relative importance of that habitat to the species versus the harm—the impact that it has on the landowner or the permittee in that case. Right now, there is only a presumption that the court act to err on the side of the species, and there's really no wane of that. I'm not arguing that we should allow activities in suitable habitat, or habitat where the animal exists. I'm saying that there needs to be some level of wane when its potential habitat. Stuff that may be useful if you change it.

And the last thing I would argue for is that we might want to consider limiting the awards on attorney's fees. I know that seems laughable, but in essence in the Ninth Circuit in Arizona, I think the current situation has led to a cottage industry for filing lawsuits. These lawsuits are starting to look like Xeroxed copies that just have the species named in them, and they're all the same. There's one after another, and I don't think that's what Congress intended when they dreamed up the Endangered Species Act.

That's all the comments I have. I thank you for the time.

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

Mr. POMBO. Thank you.

Mr. Ohmart.

**STATEMENT OF DR. ROBERT D. OHMART, CENTER FOR ENVIRONMENTAL STUDIES, ARIZONA STATE UNIVERSITY, TEMPE, ARIZONA**

Dr. OHMART. Good afternoon, ladies and gentlemen of the House Resources Committee. Thank you, Mr. Chairman, for inviting me to testify today. I want to acknowledge my Representative Shadegg, who serves on this Committee. I also see Mr. Hayworth is here.

Even though I've been employed by Arizona State University for the past 28 years, my comments today are my own based on my

education and experiences. They in no way represent those of the university.

I've been working in riparian habitats throughout the southwest for the past 25 years. In 1993, the Governor of Arizona appointed about 35 scientists throughout Arizona and from all of the state agencies and private entities as well to examine and rank ecosystems in Arizona at a level of risk. EPA provided the funding and we on the Technical Committee worked 2 years examining and ranking the risk level for all ecosystems within our state.

We found that ecosystems at greatest risk in Arizona are wetlands, springs, and streams. Domestic livestock grazing being ubiquitous in the state of Arizona is one of the top three human stressors to these ecosystems.

I would like to bring your attention to these photographs as these are repeat photographs.

[Photographs.]

The one on the right with all the cattle in the San Pedro River was taken June 1985 when this area was still in private ownership and being grazed by domestic livestock. Notice the width of the streams, the shallowness of the stream. Then in June 1995, 10 years later, but eight and a half years after domestic livestock were excluded from the San Pedro River, you can see the dramatic response of the riparian system, the value of wildlife habitat on the left eight and a half years after domestic livestock exclusion. I have many more of these types of repeat photographs as well.

Many people ask me, why worry about riparian habitats? What is their importance to society, to us in the southwest? If southwestern civilization is to sustain itself, it must have clean, reliable sources of water. Our riparian systems are vital to our survival in the southwest. Without them, we simply cannot survive. When healthy, they help dissipate floods, clean our water supplies, and provide the greatest water yield through time. Healthy riparian areas also provide the highest water quality.

These systems are also vital to the lion's share of wildlife in the southwest. For example, 75 to 85 percent of the wildlife in the southwest are obligate users to riparian systems. By this, I mean they have to have them to be able to survive. Another 15 to 20 percent of the wildlife use these habitats at some time or another throughout the annual cycle.

How much riparian habitat is there? To give you some idea, I'll use the data from Arizona since they are the most accurate as far as I know for New Mexico and the southwest. There are 73 million acres total acreage in the state of Arizona. There are 260,000 acres of riparian habitat or floodplain habitat, about .4, four-tenths of 1 percent. They are minuscule, yet they are vital habitat to the greatest percentage of wildlife that live or exist in Arizona. They are vital to us as humans to survive in Arizona. So, though small in acreage, they're extremely important to our wildlife, and as a consequence as they degrade, more and more species are going to continue to go on the endangered species' list. More and more pressures are going to be imposed by the citizens of the west and the southwest.

The most important ecological component for wildlife in these riparian systems is the cottonwood willow habitat that you see in this photograph on your left.

[Photograph.]

It is considered by the Nature Conservancy as the rarest, forest type in North America. With the above background information in front of us, I think we can now easily answer Chairman Young's question as to why has the U.S. Forest Service imposed new regulations on grazing on Federal lands in the area. U.S. Forest Service has not imposed any new regulations on Federal grazing permittees. It is only obeying the laws passed by Congress and beginning to better protect natural resources on public lands.

Mr. Chairman, we have in the past borrowed and destroyed abundant riparian resources from future generations. Unless we start making management changes today, there will not be any riparian resources for future generations except for saltcedar. Starlings, english sparrows will be our most abundant wildlife.

Thank you for allowing me to testify.

[The prepared statement of Dr. Ohmart may be found at end of hearing.]

Mr. POMBO. Thank you.

Mr. Anable, you made the statement about potential habitat in your oral testimony. Could you expand upon that somewhat for the Committee what is meant by potential habitat?

Mr. ANABLE. Mr. Chairman, members of the Committee, I believe in the general sense it's habitat that, given some future change in either management or growth of plant material, or some change, it will become, or has the potential to become, habitat for the species of concern. But it doesn't currently have all the attributes that it would need to provide that kind of habitat.

Mr. POMBO. Are you saying that land is regulated because of its potential habitat for endangered species, not because there's endangered species there?

Mr. ANABLE. Mr. Chairman, yes, definitely. That's quite common. There's three general categories. There's occupied habitat; suitable, but unoccupied; and then potential habitat. And in many instances, at least in my limited experience, the latter two categories are the lion's share of the type of land that we are placing restrictions on.

Mr. POMBO. You're saying that the lion's share of the land that they are putting restrictions on is potential habitat?

Mr. ANABLE. In the cases that I've been involved with, and I'll give you an example; the mexican spotted owl in northern Arizona. There was quite a bit of litigation involved with that. There was about a little over 3,000 acres of state land that was identified as suitable habitat—critical habitat until that got invalidated for the owl, but it was at best marginal habitat. It was Ponderosa Pine Forest which latter when the Fish Wildlife Service came out with their biological opinion, pretty much made it clear that, you know, had they done some science outside of the courtroom, they had probably never would have designated that as critical habitat. It at best was foraging habitat, you know, outside of for-nesting habitat. I say that in kind of a general sense. We do have some amount of suitable habitat for the owl, but by in-large it was potential unoccupied habitat, at best.



Mr. POMBO. In order for it to qualify for as potential habitat, it historically would have been habitat at some point in the past? Did they have to show that, at some point, that it had been habitat?

Mr. ANABLE. Mr. Chairman, I don't know. I think that is the intent that it was historically habitat that has been altered and with some change in management, it will come back. I don't know if there are examples where they purposely would want to manipulate habitat to recreate habitat that has been lost. You know, I guess there may be instances where they could do that, but I think there should be some historical reason to believe it used to be habitat.

Mr. POMBO. Mr. Bason, in your testimony, you said that in regards to this specific lawsuit that you found out about it a few days before it was settled. Is that accurate?

Mr. BASON. Yes, sir. We have a different take on it than Mr. Wiygul, and I'm going by our attorney, who is Karen Budd. She was notified. I think the hearing was scheduled on Tuesday, and she was notified about 6 days before there was a potential settlement agreement. She lives up in Wyoming. We live in New Mexico. Our individual permittees don't all live right next to a fax machine. We're scattered out. She tried to keep the cattlegrowers informed, our organization twice and the way that she had explained to us just on the phone, it was nothing that we could live with. So the fact that we had any input into that agreement is certainly not—that was a done deal when we were told sign off or that's it. We went to the same hearing that Mr. Wiygul went, and we spent 3 days just trying to get a temporary restraining order—not as he presents it to you—to keep them from implementing that agreement until we had time to have input in it. And the court ruled against us on that because it was not in front of the court. They had already settled outside of the court.

They had a stipulated agreement, which he helped draw up dated the 14th of April. I have a copy of it here. The judge refused to stipulate or to sign it. So they did another one on the 16th of April, which is a lot more restrictive to the permittees. And by "they," I mean the Federal Government and the two environmental groups.

And that's our take on the thing. And also, our take from a couple of weeks before, talking to the Justice Department, which he says are his colleagues, they told us they thought they could win this suit. The Forest Service and the Justice Department thought they could win this suit. That's what they told us. We came prepared to help them do that and found out that we were out of the deal.

Mr. POMBO. But before the 6-day time period, was there a request made to have you participate in a potential settlement?

Mr. BASON. Not that I know of. If they asked our attorney before that time, she didn't have any knowledge of any specifics, because she called us at the time that she actually knew that there was a settlement agreement being proposed.

I also might expand a little. The Forest Service was going to a lot of these affected permittees a month or two before and telling them that they might have to fence these riparian areas. So a lot of this was being talked about without us as an organization or an

industry knowing about, although we were getting rumors from individual permittees.

If an individual permittee would sign off and agree to that, either under coercion or what he thinks best or whatever, then he went out of the potential harm of the suit. That's what they did a lot of in Arizona. And a lot of the people affected thought that's the best way to do, and individually they got out of it.

Mr. POMBO. My time has expired, but on the second round I would like to get back to this. Mr. Farr.

Mr. FARR. Thank you, Mr. Chairman.

We are talking only about public lands here, are we not? Not private lands?

Mr. BASON. Are you addressing me, sir?

Mr. FARR. It wasn't clear from your testimony. Is it just public lands?

Mr. WIYGUL. That's correct. This lawsuit just involved public lands on Forest Service managed areas.

Mr. FARR. On the Forest Service managed areas, how much of the riparian corridor is grazed and would be subject to these consultations? What percentage of the lands available for grazing are actually being placed on restriction?

Mr. WIYGUL. The exact percentage I don't know, but it is on the order of the overall representation of riparian habitat in the land base, which is something around 1 percent, or in some cases, less than 1 percent.

Mr. FARR. So it is riparian habitat or the grazing riparian habitat?

Mr. WIYGUL. Well, the riparian habitat on these leases or on these allotments—

Mr. FARR. Is 1 percent.

Mr. WIYGUL. [continuing] rather would be roughly in the same proportion it is overall, that's correct.

Mr. FARR. Well, I really appreciate your testimony, Mr. Bason. It was very eloquent. But it is still difficult for me to understand the issue. You have a lease on these lands that have the riparian habitat on it, and because of the restrictions, you cannot graze in that riparian habitat, and that is the problem?

Mr. BASON. That is addressed to me, sir?

Mr. FARR. Yes, sir.

Mr. BASON. Yes, sir. In New Mexico and Arizona, the water is the key. The water is the key. You have to have water for your livestock. So 1 percent—and I won't challenge his figures, I don't know—but that small percent controls all of the allotment. So that's a favorite Forest Service tactic to tell you you can still graze, but you just can't graze where there is water, which controls the whole thing.

Mr. FARR. No, I understand that where the water is, is where everything is.

Mr. BASON. Yes, sir. And I'd like to make the point that there is only land there that homesteaders didn't take years ago. It's the land left over. And that's why the riparian areas are becoming so critical, because most of the good riparian areas have already been homesteaded by four generations before. They took the good stuff.

Mr. FARR. Well, this is the problem. You have public land and there is a lot of pressure on it for competing interests, and the question is how do you balance that out. And the consultation process is usually the way you balance it out.

I recognize there is a problem, because this is an area that government really hasn't dealt with before. It's relatively new, as Mr. Hansen pointed out, new law. On the other hand, the question I am asking is are there any State regulators involved in this, or is this just Federal regulators, Federal land?

Mr. BASON. On the forest permits that we are talking about, this is just Federal land through the Forest Service, although water quality and things like that are controlled through State regulation.

Mr. FARR. What is it specifically that is regulated that you don't like? Do you agree that the riparian corridor needs to be protected?

Mr. BASON. I personally don't have a riparian. That is the other thing that is hard to say here, because these suits are so intermingled. We personally don't have endangered riparian area, although I represented our members in that case in Tucson, went to do that, but didn't get to.

Mr. FARR. Well, I'm not so interested in the history of the case. I'm interested in trying to figure out what is the process here that is causing so much problem. Because if it's a management issue, that is, cattle needing water, you're grazing on public lands, and you're going to have to be subject to public protocols on use of that land just like you can put restrictions on your private land when you want somebody to lease on that land.

Is there a way of working these things out so that there is a balance here? I think that's what it's all about. It's a balance. You know, in my area, I have some very limited cattle grazing. Most of it is working out wetlands issues on private lands. And what my landowners say is we recognize that these things need to be protected. We just want to talk with one regulator who will speak for everybody, because our problem is that there are too many overlapping regulators and you can't get a straight answer.

Mr. BASON. Now you just put your finger exactly on our problem out there, too.

Mr. FARR. Well, is that the problem? I mean, you may not like the answer because you may end up getting all the regulators to agree that this is what is the best management practice, and that may step on what you think. It's not private property. This is public property that you are leasing.

Mr. BASON. Well, it affects our private property, too, because we are intermingled all throughout it. If you take away the grazing leases, then the private property becomes valuable only for subdivision, and our country is going to turn into a house trailer under every tree. That's what is happening.

I have one allotment that is 88 square miles. I get to run 150 cows year round. Everybody that knows the cattle business—like Congressman Skeen is going to laugh at how stupid I am—got 40 acres of deeded land in there. But that's what holds it by government policy for the commensurate property. Does that mean I quit, too?

But what we say, if we have always cooperated with the Federal Government through the Forest Service, we have always cooperated. All of a sudden, in the last 2 or 3 years, they've become our adversaries. They are rolling over, and I still use that word, so that they can say we have done a great thing for this Endangered Species Act, and we can't cooperate with them when they don't say—they don't want our input, they just say here is the way it is, take it or leave it.

But what you said about the different regulators, it does become a problem, because the Fish and Wildlife Service, Department of Interior, is really running the Forest Service Department of Ag.

Mr. FARR. I think there is a solution here, but I am the last to suggest that the solution is getting more people into the courtroom.

Mr. BASON. Yes, sir. Thank you.

Mr. POMBO. Mr. Skeen.

Mr. SKEEN. Thank you, Mr. Chairman. I apologize for having to leave. We're appropriating today, as you know, and trying to get those bills out over there, so I had to go. I'm sorry I missed some of the hearings.

I'd like to pose a question to Mr. Wiygul. I'm sorry I didn't hear his testimony. But the Southwest Center for Biodiversity and the Forest Guardians say that it was their lawsuit and the subsequent settlement agreement that forced the cattle off these allotments for the first time in years.

Is that a correct statement?

Mr. WIYGUL. It is correct. The Forest Service had standards that they were not applying on these allotments to protect riparian areas, and as a result of that settlement of the lawsuit, those standards were applied, and in many cases those cattle got out of the riparian areas.

Mr. SKEEN. Were these standards prevalent when the original questions were answered between the grazers and the Forest Service, or is this something new?

Mr. WIYGUL. If I understand your question correctly, Representative, some of these standards have been in place since 1984 in the Regional Guidance for the Southwest Region of the Forest Service.

Mr. SKEEN. Why weren't they complied with before the recent—

Mr. WIYGUL. I believe that is a question that is going to have to go to the subsequent panel.

Mr. SKEEN. Well, that's a question I'd like to have answered. I am not looking for—the Justice and the Forest Service representatives say they are going to do this anyway, so the agreement was really not a big deal, not even a small deal, is that correct?

Mr. WIYGUL. Not to second guess my colleagues' characterization of the agreement, I think it was certainly an important step forward in protecting those riparian areas and in making sure that those standards, guidelines, and regulations that were on the books were actually enforced.

And in that sense, I think it was a very important step forward in the protection of those areas.

Mr. SKEEN. Well, you've got two approaches inherent in the questions that I asked you. Which of the two statements are correct, and you can't have it both ways. When you were talking about

doing this adjustment on riparian rights, was there ever any talk about alternative or diversification of water supply or water assets in this thing, like drilling a well, like putting a pipeline in, or putting a trough in someplace?

Mr. WIYGUL. Yes, it's my understanding that in many of these cases, they are looking at developing water in places away from riparian areas.

Mr. SKEEN. Then what's the big deal on riparian rights?

Mr. WIYGUL. I'm sorry, sir?

Mr. SKEEN. Then what's the big deal on riparian rights?

Mr. WIYGUL. Well, the big deal there was that you had cattle degrading these areas.

Mr. SKEEN. Well, when they don't have a water tub to drink out of, they'll go drink out of the river. If you pump it out of the—

Mr. WIYGUL. That is indisputably the nature of cattle.

Mr. SKEEN. Yes, it certainly is. And human beings and everybody else. I just wonder why all of a sudden we've got riparian rights, when for several decades or more, that was no big deal? And all of a sudden, we're going to espouse riparian rights and that means take the cattle off.

Mr. WIYGUL. I would say that for a couple of decades it was a big deal; it was just ignored.

Mr. SKEEN. Well, that's very interesting. I will save the questions for further down the line, Mr. Chairman.

Mr. POMBO. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. In going through some of the testimony—and certainly I wanted to thank the members of the panel for their testimony before the Committee this afternoon. I think taking as a followup on what the gentleman from New Mexico was trying to get from you gentleman is the fact that obviously just under provisions of the Endangered Species Act, just out of the 9th Circuit alone, some 262 cases have been filed.

Is this a reflection because the law is bad, or is it because of some policies considered here that we haven't done on our part in the Congress to establish the kind of law that we don't end up in court? Anybody that would like to answer.

Mr. WIYGUL. I'm sorry, go ahead, Howard.

Mr. HUTCHINSON. Mr. Chairman and Representative, I think that the number of cases actually does stem from mismanagement, and many of the land users there are in concurrence with the environmental proponents that this has been occurring. And there have been suggestions of alternative methods for addressing these problems.

However, the quagmire that we are in right now does not allow for anything but the court adjudicated settlements being the management prescribed. So we get this essentially one-size-fits-all solution that is then generically assigned to everywhere. We are not allowed to adapt our managements and go forward.

There are a number of ranchers and other land users who are approaching riparian use and it is really a matter of timing and intensity, versus total removal, if you are going to keep livestock on the range.

Mr. FALEOMAVAEGA. Mr. Wiygul.

Mr. WIYGUL. Well, I think Mr. Hutchinson and I did find something that we could agree on there. I think the number of Endangered Species Act actions you've seen in this region of the country is a reflection of some specific factor, including, unfortunately, a long history of not addressing Endangered Species Act issues or complying with the Act itself.

Where I come from, they say you fish where the fish are. I think in this case, the Southwest region, unfortunately was one of the places in which the Endangered Species Act has not been honored, or had been honored more in the breach than the observance.

Mr. FALEOMAVAEGA. You don't consider the Federal agencies responsible for enforcement of the Act to the extent that they are doing their job according to the provisions of the ESA? Here's my problem. You've got a spotted owl. How many spotted owls do we have in the Northwest region, and how many acres does it take for a spotted owl to survive?

Mr. WIYGUL. I'm sorry, you're asking me that question? You don't have very many spotted owls left.

Mr. FALEOMAVAEGA. Well, maybe the Mexican spotted owl or the pygmy owl. I think I just wanted to relate to what Mr. Bason is trying to say here. The gentleman has got heads of cattle; he is given the right to graze. But to protect the minnow, those little fish—and I am not very familiar with the minnows that exist in the rivers. Is this more important than that a gentleman like Mr. Bason has been given a right to graze his cattle?

Mr. WIYGUL. Yes, I think there are two separate questions that are raised there, Representative. First is that yes, in the judgment of the people of the United States who strongly support and continue to support the Endangered Species Act, protection of species, including minnows, protection of that whole complex of biological diversity that is represented by endangered species, is critically important.

Now, nobody wants to put anybody out of business, knock anybody out of a living or anything like that. But where those things run into irreversible conflict, yes, you do have to act to protect those species that are part of the public trust, that belong to the citizens of the United States.

My second point is that grazing on public lands is a privilege which is subject to regulation by the landowner, which is the Federal Government, which acts on behalf of the people of the United States, and regulation to protect other resources is appropriate in that situation.

Mr. FALEOMAVAEGA. Well, I think the problem that we have here, we have NEPA, we have FLPMA, we have EPA, we have ESA, we have Clean Water Act, Clean Air Act, I think with all good and sincere intentions. But now we end up with 232 lawsuits. To me, that gives me a clear indication that something is wrong here, either the agencies responsible for the enforcement of the law, or maybe we here in the Congress have not done our part in specifying or providing for the appropriate language so that the law could be properly administered or enforced.

And I just wanted to share that concern with you gentlemen. Hopefully, I suppose we are all looking for the balance. How can we strike a balance between the minnows and Mr. Bason and his

grazing cattle and among others who sincerely are trying to make a living providing for the consumption demands of the American public?

I don't know if we consume minnows, but I just wanted to see what are we going to do in trying to strike a balance in this. I just wanted to share that concern with you gentlemen.

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

Mr. POMBO. Mr. Hayworth.

Mr. HAYWORTH. Thank you, Mr. Chairman. I'd like to thank members of the panel, especially my friends and fellow Arizonans who are here today.

Mr. Bason, I am with you. I don't like to hear about that fellow named "Not Me." Mr. Hutchinson, I appreciate your comments. I think, based on my own personal observation, I think I would cease characterizing some of these groups as "environmental." I think, sadly, what we have seen now is the rise of a form of legal action that really comes under the heading, the new prohibitionists.

Contrary to the protestations we have just heard from Mr. Wiygul, the perception of many ranchers in Arizona and really throughout the Southwest is that people are bound and determined to put them out of business. And, in fact, we have now the rise of the new prohibitionists, made manifest here by some of the comments and the delving into "legal mechanics" about lawsuits and the micromanagement of what transpires in court and legal tactics.

Mr. Wiygul, how many lawsuits have been filed by you personally or by the organizations you represent?

Mr. WIYGUL. Are you talking about—

Mr. HAYWORTH. I am asking how many lawsuits like these, dealing with endangered species and dealing with riparian areas. How many lawsuits have you filed in this area, sir?

Mr. WIYGUL. In the desert Southwest?

Mr. HAYWORTH. Yes, sir.

Mr. WIYGUL. One.

Mr. HAYWORTH. OK. How many lawsuits in general dealing with the ESA and cattle ranching have been filed?

Mr. WIYGUL. My estimate in the desert Southwest would be, I'm sure, 50 to 100.

Mr. HAYWORTH. Who pays the legal bills of your organization?

Mr. WIYGUL. In the case of the Earth Justice Legal Defense Fund, the folks that I represent, about roughly 80 percent of that is paid by donations from individuals. I would say down to 12 percent from foundations, I think about 2 percent from court-awarded attorneys' fees, and the rest from miscellaneous sources.

Mr. HAYWORTH. Does the Federal Government pay any part of that?

Mr. WIYGUL. To the extent that any attorneys' fees or costs are awarded under the Endangered Species Act, those come from the Federal Treasury, yes.

Mr. HAYWORTH. I've heard a lot of people talk about balance in this room, and I think that a lot of people would like to see some balance.

Let me turn to Dr. Ohmart. Thank you for coming, sir. Let me turn to your photographic evidence you offer here. Could you offer

a little more detail on these two pictures. Are they from the exact same location years later, or are they downstream?

Dr. OHMART. The photograph taken on the right was taken by an employee of Arizona Game and Fish Department on the San Pedro River. The photograph taken on the left, the one with green trees in it, was taken June 1995 by an employee of mine who I requested to go out to take the photograph on the right to try to find that same spot with a picture of domestic livestock, if possible. This is eight and a half years after.

But our data on the Colorado River show a mean growth rate of cottonwoods of ten vertical feet a year. If you assume the San Pedro is colder, the growing season is shorter, so if we say, OK, let's assume six vertical feet a year, 8 years of exclusion, you've 48 feet.

Mr. HAYWORTH. But to your best knowledge, that was taken from the exact same vantage point from the bridge?

Dr. OHMART. It's the exact same vantage point. I have been there myself two or three times.

Mr. HAYWORTH. I think a subsequent panel will show some interesting photographic evidence as well. Dr. Ohmart, compared to the late 1800's, early 1900's, roughly a century ago, how many cattle do you now believe are grazing in the Southwest, specifically Arizona and New Mexico?

Dr. OHMART. I don't have the exact numbers. If one goes back to the historical literature, they estimated in the 1890's, that there was as high as a million to 1.5 million head of domestic livestock grazing in Arizona. Of course, in the drought of 1893, it was reported that 30 to 70 percent of those animals died. Today, I am sure there is a lot less than that, but I don't have the exact number.

Mr. HAYWORTH. According to the figures that I have, you had about 1.5 million head in Arizona 100 years ago, about 2 million head in New Mexico. So 3.5 million head of cattle. Now there is about 15 percent of that, according to my math, about 415,000 total.

If that's the case, why do we pin all the destruction on the cattle? If the numbers are decreasing, why would we say there is such subsequent destruction of riparian areas, if there are fewer head of cattle?

Dr. OHMART. I think if one looks at the data sets that we looked at going through the Governor's technical committee, there are many stressors to riparian habitats. The three to stressors in the State of Arizona are—one of them is domestic livestock grazing, because it is ubiquitous. Another is water management activities, dams, reservoirs, riprapping, this type of thing. A third one is ground water pumping.

Now, domestic livestock, I think when their numbers were really high in the late 1800's, had a tremendous impact on riparian habitats. Their numbers died off because of drought. Then we had very wet years there. In fact, in 1905, the Salton Sink became the Salton Sea because of flooding in the Colorado River. We had very wet years. We had good productivity. Cattle numbers came back, maybe in fewer numbers than what they were prior to the heavy grazing in the late 1800's.



But one of the problems is that once you put cattle out there in an allotment and you don't have any kind of management plan or any way to regulate or move those animals, they all go to the riparian areas. Their ancestral stock was old-world riparian livestock. So the minute we brought them here to the West, they went to the riparian areas.

And you'd have to be a fool out there in Arizona, as you and I know very well, when it gets 110 to 115 degrees, if I'm out there in an allotment, I'm going to be in the riparian area. That's where the food is, that's where the water is, that's where the shade is.

So they concentrate there throughout the growing season. The riparian areas never have an opportunity to store energy, grow, set seed, and do their thing. So we have this basic problem of the animals staying concentrated there and not getting out unless someone takes and moves them out by horseback or whatever.

Mr. HAYWORTH. I see my time is up. I thank you, Mr. Chairman.

Mr. POMBO. Mr. Underwood.

Mr. UNDERWOOD. Thank you, Mr. Chairman.

Given the inordinate number of lawsuits that all this contentiousness has generated, ultimately, I think, for most of us here, the members of the Resources Committee, we are really trying to find lessons in terms of suggestions for legislation. And it is very easy, in the course of these hearings, to, in a sense, almost have stereotypic views of what's going on.

You have people who are utilizing public lands and who are sometimes characterized as exploiters of the public trust, people who are not mindful of the value of the public lands for the public in general. You have strong environmentalists, activism. I have had some personal experience with that, which I think people come in and are very active and file lawsuits and absolutely do not consult anybody in the local community. They may have one or two people active in the local community and the community in general may feel one way, but the activism goes on regardless.

And we also have the issue of how this is being dealt with by the Federal agencies and perhaps there is some defect in the legislation itself. I think I would go back to my friend from American Samoa's comment in trying to figure out if there's some kind of lesson that we can learn from this. Is it inevitable that we will continue to attempt to resolve these issues through the courts?

I know that we will not get anyone to acknowledge that the environmentalists have gone haywire and will file any kind of lawsuit at the drop of the hat to foist their nefarious agenda at every turn. I don't think we'll get them to acknowledge that, and we're certainly not going to get the people who graze cattle to acknowledge that they are somehow rapacious in their attitudes toward the public lands which, in fact, sustain their livelihood.

So, given that, are we left to blame mismanagers, mismanagement in the Federal agencies. Had they conducted their business in some other way or had the law been more specific in the manner in which they conduct their business, that much of this contentiousness could be avoided? Could some of this be mitigated or is there just something that—I guess the characterization I get from the cattle grazers is that everything was moving along relatively well until the Federal agencies all of a sudden became very

difficult to deal with for some unknown reason. And then the unknown reason, I guess, is spurred to action by court action by environmentalist groups.

So what I would like to hear is, is there any element along this process, is there anything that can be done for improving or re-vamping the legislation or the consultation process, or moving the process a little bit downward in terms of local decisionmaking, so that this kind of—well, maybe the intent of the Endangered Species Act is to keep attorneys like Mr. Wiygul employed forever, I don't know.

But is there some way that some suggestion can be made regarding a kind of a summative view of this? I would be happy to hear from Mr. Bason and Mr. Hutchinson and Mr. Wiygul on this.

Mr. BASON. Well, I'll respond at first. The Endangered Species Act is fatally flawed. This is from the bar at Hillsboro. We are experts there at everything. If you want to know about Iran or whatever, we know everything in Hillsboro. It is fatally flawed because only the human species has the gall to think that we can freeze time. We all think in our lifespan we are going to freeze time. This species, it is going to be there, it is going to get more.

The way I was taught in school, all species run their course and new ones come on. If we are going to freeze time for every one of these species we have out here, including putting the grizzly back in New Mexico—we're going to do that too—what about the new species that are trying to come along that have adapted to 270 million people. I use as an example the peregrine falcon in New York that is eating the pigeons and living a great life; it has adapted.

Under the way this law is set up, we are going to freeze time. We are smart enough in this room to say we are going to freeze everything where it is. And we can't do it. The way I was raised and the way I work, if you get stuck in the mud, you get out. If the roof leaks, you fix it. You cannot freeze time. But we all want to under this Endangered Species Act.

There is nobody loves animals and insects and birds more than the people out on the land. We can tell you all about them and have names for them. But until we actually go back and touch the Endangered Species Act and make it more practical, you are going to have this constant fight where you are expecting the individual landowners—and you can talk about public lands all you want, but the individual landowner out there is who's keeping the waters up, who's keeping the salt and the minerals and everything out for all these endangered species—you are going to force him out of business.

And what is going to happen? Somebody needs to take a long look at this. You cannot freeze time. As we sit here right now, people are making babies in the United States. We have to acknowledge the facts. So I feel strongly that you have to go back to the Endangered Species Act and make it into a practical, working law. And that's my—

Mr. UNDERWOOD. I'll ask you your comments on Iran later.

Mr. BASON. OK.

[Laughter.]

Mr. UNDERWOOD. Mr. Hutchinson.

Mr. HUTCHINSON. Mr. Chairman and Representative Underwood, I think there are some solutions, and I think the construction of the Act just as it is right now provides many of those solutions. Unfortunately, people are not given the opportunity or access to those resolutions.

Under section 7 of the Endangered Species Act, when an agency does go to that formal consultation level, a permittee is given access to that description of an alternative for a prudent measure to take care of that species. Now, that's supposed to take place.

And as an applicant—and that's the language in the Act—as an applicant, he is supposed to be at the table during that section 7 consultation taking a look at the biological information about the species, its habitat, and its needs; and then being able to say, well, gee, we can take care of that, we can do this in our management scheme, and coming up with alternatives.

However, that does not lend to a one-size-fits-all decision that comes out of a Federal court. And the judge is not going to spend the time to individually go through every single allotment alleged to be out of compliance and do that type of consultation process. And it certainly can't be expected of the Federal courts that are already overburdened with that.

But what I am saying is the processes are out there. The Federal agencies are not allowing those to take place, and certainly, the litigation is an obstacle for implementation of those processes.

Mr. UNDERWOOD. If the chairman will allow.

Mr. POMBO. Go ahead.

Mr. WIYGUL. I'll try to be as brief as I can, although, Representative, let me say initially that if I had counted on the Endangered Species Act to keep employed, I'd be a lot skinnier than I am right now.

I think that there are two really important points to get across here. One is that I think the best way to prevent litigation under the Endangered Species Act to prevent what have been called train wrecks in some other context is to make sure that that Act is complied with on the front end of the Federal lands management process and not on the back end.

The reason we found ourselves in a lawsuit like the Forest Guardians lawsuit that's been talked about here was because we had biological proof which was very sound and which I felt very comfortable going into court with that continued grazing in those species' habitats and in riparian areas was going to push them toward the brink of extinction.

If that had been addressed earlier, I don't think we would have found ourselves in that situation.

Now, I was taught that the best way to be respectful to folks is to tell them what you think is the truth. So I am going to air a perhaps unpopular opinion in this room, which is that I think the Endangered Species Act works well now and has flexibility built into it right now. That has been my experience as an attorney and as a litigator. There is a great deal of agency discretion in the administration that is built into it, and I do not believe that weakening any of the protections of the Act is called for, for any reason. The best way to deal with the litigation under the Endangered Species Act is to enforce it up front.

Mr. UNDERWOOD. Thank you very much for those responses. If I will, Mr. Chairman, my only experience with the Endangered Species Act and its application has been an unhappy one. To some extent, your comments regarding the fact that it should be enforced up front, and going back to Mr. Hutchinson's comments about the consultative end of it, in our particular experience, we felt very strongly that a course of action had been decided in advance and then consultation then occurs. And that somehow or other, we were always missing the timelines and that there was something procedurally that always seemed to be amiss. And it seemed like, you know, some people were in the know; and the rest, who were directly affected, were not in the know.

And that may call for some legislative fix, but certainly it is not meant—none of these comments that I personally make are to be described as out of sync with the intent of the Endangered Species Act, but certainly the way in which it has been applied and the lack of consultation. It is abominable. In almost every instance that I have had to deal with, with the application of this law, it seemed like we were always out of sync with the processes and that a decision, in fact, had been made prior to consultation, and consultation was simply a pro forma process to prove that they had obeyed it. Thank you.

Mr. POMBO. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. I do have some questions.

I wanted to ask Dr. Ohmart, the pictures that you show here are very interesting. Once again for the record, are they taken from exactly the same place because the angles are different, I know that. But are they taken from exactly the same place?

Dr. OHMART. Yes, ma'am. They are taken exactly from the same place. I didn't take either photo, but I have been there, I have checked it out and they are definitely repeat photographs 10 years apart, but only eight and a half years of exclusion.

Mrs. CHENOWETH. It appears, Doctor, that the photo that was taken eight and a half years later was taken in the springtime judging from—

Dr. OHMART. They were both taken in June, one in June 1985, this one in June 1995.

Mrs. CHENOWETH. OK. The reason I question is that there are power lines going through the photo eight and a half years later.

Dr. OHMART. Right. Two things have changed in the photograph on the left. One is a new power line went in, two is over the past 20 years, the mean base flow of the San Pedro River has declined because of ground water pumping. So it's not the river it was 20 years ago as far as—

Mrs. CHENOWETH. Declined because of ground water—

Dr. OHMART. Ground water pumping.

Mrs. CHENOWETH. [continuing] for the metropolitan areas.

Dr. OHMART. For Ft. Huachuca and for Sierra Vista in southern Arizona.

Mrs. CHENOWETH. I see. OK, Doctor, thank you.

Mr. Wiygul, I wanted to try to understand this whole thing a little bit better with the stipulated lawsuit, because part of the rea-

son for this hearing is the implementation of the Endangered Species Act.

Let me get this straight. In 1997, two lawsuits were filed by citizen groups because they said there was a failure on the part of the Forest Service to employ proper consultation, that is, site-specific consultation. And then the lawsuits were joined, right?

Mr. WIYGUL. Yes, ma'am, the lawsuits were joined. There were more claims than the consultation claim.

Mrs. CHENOWETH. Now, it was recognized by everyone—the court, you, everyone—that the site-specific consultation would be finished by July 1998, right?

Mr. WIYGUL. There are two points there. At the time those lawsuits were filed, actually, a broader consultation on the entire region had never been completed, completed after the suits were filed.

Mrs. CHENOWETH. But it was——

Mr. WIYGUL. The Forest Service was—I'm sorry.

Mrs. CHENOWETH. The fact was made known to all of the litigants that site-specific consultations were going on at the time that the suits were joined and that they would be completed by July 1998.

Mr. WIYGUL. At the time those suits were filed, no, I don't believe that was available. That happened after the suits were filed and after regional consultation.

Mrs. CHENOWETH. So there was a hearing in April 1998 requesting a preliminary injunction.

Mr. WIYGUL. Yes, ma'am.

Mrs. CHENOWETH. So, in April you requested the preliminary injunction enjoining grazing on the affected allotment, and that was 2 months before.

Mr. WIYGUL. In riparian areas, yes.

Mrs. CHENOWETH. OK, 2 months before.

Mr. WIYGUL. I think it's important to remember, Representative Chenoweth, that the goal of finishing site-specific consultations on these allotments on the part of the Forest Service and the Fish and Wildlife Service was explicitly phrased in hortatory and aspirational terms. And if they had not made that date, there was no reason they couldn't continue consulting as long as they wanted.

Mrs. CHENOWETH. Of course, they didn't have a chance to make the date, did they, because you entered into a stipulated agreement without the cattlemen and the judge would not agree, correct? Because the cattlemen were not part of the stipulated agreement. And then you entered into a settlement agreement which doesn't take the court's agreement.

So then the judge went on to say that the fact that the agreement actually—I mean, the judge actually said that the agreement exceeded the requirements of the ESA, but he had to decide that that didn't violate the ESA.

Mr. WIYGUL. With due respect, ma'am, I'd have to say that the judge did not say that it exceeded the requirements of the Endangered Species Act. He said even if it did, that's not necessarily against the law. And he said that in the context of rejecting a request to block the implementation of that settlement agreement.

The intervenors, the folks in the Cattle Growers Association, had the opportunity to go ahead and ask for an injunction or appeal that order, and they chose not to take that opportunity.

Mrs. CHENOWETH. And this was a hearing on the settlement and the judge—we are both talking about the hearing on the settlement.

Mr. WIYGUL. Yes, ma'am.

Mrs. CHENOWETH. And the settlement agreement. And the judge wrote, and I quote, the fact that the agreement may exceed the requirements of the ESA does not mean it violates the ESA, end quote. That is correct, right?

Mr. WIYGUL. Right. He said it may exceed the requirements.

Mrs. CHENOWETH. OK. There was a question asked earlier about attorneys' fees. And isn't it true that there has been 101 cases filed under the ESA in the last 10 years, and that the attorneys' fees that have been awarded range all the way from \$1,000 to \$3,500,000?

Mr. WIYGUL. I don't know if the number—I assume there have been at least that many cases, and the range of attorneys' fees sounds about correct. I think it's important to put that number in context. That \$3.5 million is about what, say, three partners at Skadden, Arps, Slate, Meagher and Flom made in the course of the past year.

The amount that is awarded in attorneys' fees under the Endangered Species Act is not anywhere close to what the private bar gets for doing cases of similar complexity.

Mrs. CHENOWETH. Well, \$3.5 million for one of the cases is pretty good fees.

Mr. WIYGUL. It's a lot for three folks in a private law firm to make, too.

Mrs. CHENOWETH. Thank you very much.

Mr. WIYGUL. Thank you.

Mr. POMBO. Mr. Shadegg.

Mr. SHADEGG. Thank you, Mr. Chairman.

Mr. Wiygul, let me just go back, because I want to clarify this and I am a little confused. My understanding is that in 1996 and 1997, the Forest Service did engage in consultation on the region-wide plan, that is, the overall plan. That's correct, is it not?

Mr. WIYGUL. That is, I believe, correct, yes.

Mr. SHADEGG. And then the issue was that there had not been consultation on each of the individual allotments, is that right?

Mr. WIYGUL. That was one of the issues in the lawsuit. At the time the lawsuit was filed, the regional consultation had not been completed. It was right about that same time, if I'm not mistaken.

Mr. SHADEGG. Well, on that point, both the Justice Department and the Forest Service contradict you. Both of them in written testimony, written statements submitted to us, say that the region-wide consultation had been completed.

Mr. WIYGUL. As of what date?

Mr. SHADEGG. As of December 1997.

Mr. WIYGUL. Right. I think the suit was filed, maybe a week or something before that.

Mr. SHADEGG. OK.

Mr. WIYGUL. I'm not sure that the discrepancy in dates here is significant.

Mr. SHADEGG. OK. So you are saying for 1996 and 1997, the regionwide consultation had been going on, there had been an overall discussion. Just before the end of that, you file your lawsuit, and at that time allege that there had not been the site-specific consultation.

Mr. WIYGUL. Right. We didn't know it was just before the end of that process, which had been going on for something approaching—

Mr. SHADEGG. Two years.

Mr. WIYGUL. I guess, 18 months, 2 years at that point. The other point that I think is worth making is that the other claims in that lawsuit were not only did consultation not take place, but that the practices of continuing to graze in many of these riparian areas were resulting in substantive, if you will, violations of the Endangered Species Act by pushing these species toward extinction.

Mr. SHADEGG. Yes, and that's fair. Let me just go back for a minute. This is technical, and I want to just stay on it for a minute and then get onto some broader issues. But isn't there a problem with the Endangered Species Act in that the minute a species is listed, there can not have been consultation unless you knew it ahead of time, and yet there can be an injunction immediately. You can stop the use of the land and there is no waiting period, no time period during which, once a species is listed, you can continue to use the land while you conduct the consultation. And isn't that an inherent problem raised by your lawsuit with the Act that ought to be fixed?

Mr. WIYGUL. I don't think that's raised by this lawsuit, because these species have been listed for some time now. I think the point that an injunction would automatically be issued on that, I think you'd still have to prove the things one would ordinarily have to prove in that context to make that happen. So I think that, in my view, there is enough discretion in the courts there to prevent any kind of—

Mr. SHADEGG. You are not confident you'd get the injunction the day the species was listed, that's all you're saying?

Mr. WIYGUL. I'm not very confident about that, Representative.

Mr. SHADEGG. OK. Let me turn to a broader scope of issues, and let me begin by thanking all the members of the panel, and again, as my colleague, Mr. Hayworth did, thanking particularly the Arizonans for coming. I appreciate your being here.

I want to ask particularly Mr. Wiygul and Dr. Ohmart if you think that the proper goal should be to ban all grazing in the southwestern United States because of the nature of the southwestern United States and the nature of grazing. My time is short, if you could answer that fairly quickly.

Mr. WIYGUL. Sure. I will answer briefly and let Dr. Ohmart say that. I don't speak for any organization on this. To the extent that livestock grazing can take place in a manner that's compatible with protection of other resources in the law, than it's something that could be considered as a use of public lands.

Mr. SHADEGG. So you are not generically against all grazing. If it can be done in a way that protects species, that's OK with you.

Mr. WIYGUL. I keep an open mind on things.

Mr. SHADEGG. Dr. Ohmart, where are you?

Dr. OHMART. I have always maintained that domestic livestock grazing should occur on public lands as long as it is not creating resource damage or, for example, in these particular streams, we've got species of fish and species of birds that are in dire trouble. And there, I think the only way we are going to help them is by total exclusion.

Mr. SHADEGG. Mr. Hutchinson said that it was a question of timing and intensity, rather than total removal. Do you agree with that?

Dr. OHMART. I have looked at this issue a number of times and have data from the field on it. And we took a stream, Date Creek, near Wickenburg, and we grazed it only in the non-growing season for 20-some odd years, 24 or 25 years. I could have accomplished exactly the same thing that we have accomplished there in 24 or 25 years in about 7 or 8 years. So you increase the healing period by four to five times, depending upon how early you begin to graze it in the fall and how late you graze it in the spring.

So, unfortunately, we should have started 20, 25 years ago to start better management on riparian areas, but the Forest Service was slow to enforce regulations, BLM has been slow to enforce regulations. You know, we have a number of neotropical migrant birds that are in dire trouble.

Mr. SHADEGG. Unfortunately, I am going to run out of time. I do want to say, Mr. Bason, that I agree with you. I think we have a serious problem here, both in that the Act attempts to freeze time or pretend that man can control the entire environment and restore habitats or species that have long since disappeared. But even worse than that, my constituents believe the Endangered Species Act was designed to protect species which are in danger of becoming extinct on the Earth, gone.

And yet, the language of the Act actually says that it protects them wherever they once appeared, no matter how briefly or for what reason. And we have, I think, several species of fish that are creating problems in southern Arizona where those species came forward for a brief period of time into that area, we can identify they were there for a brief period of time, but now we are going to protect for them. And where those same species of fish, you will go south of the border in Mexico and there are a plentitude. We have the pygmy owl, a similar circumstance. And I am a little bit worried about that.

I guess I have a lot more questions, but we have run out of time, and hopefully will get a second round either with this panel or the next.

Mr. POMBO. Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. I want to say first of all that I apologize that I had other meetings that prevented me from hearing the testimony of the witnesses. I apologize if I cover something or ask about something that's already been covered.

But I have a 1996 report that is 2 years old that says since 1973 only 27 species have been removed from the Endangered Species lists and seven of those were delisted because they went extinct. Nine of them, according to the Fish and Wildlife Service, were data



errors, which means they never should have been listed in the first place. The FWS claims to have recovered the remaining 11 species, but not one of them was saved by the ESA. And it goes on to explain that.

Is that true? Are we doing better now, or are we basically in the same position as this report from 2 years ago?

Mr. HUTCHINSON. Mr. Chairman and Representative Duncan, I have contended the same thing about the Mexican Spotted Owl, that it has been listed in error. And you weren't here maybe for my oral testimony at the beginning, but the Supreme Court took a look at the issue of land and resource management plans as being action forcing or not. The Supreme Court said no, they are not action forcing.

The reason I am getting to this is a lot of these suits have been brought, and a lot of listings have been created, due to Forest plans in and of themselves. The primary reason that the Mexican Spotted Owl was listed was because the Forest plans said that the forest would be harvested in a shelterwood manner.

Well, what was stated in the Forest plans and what was taking place on the ground were two different things. In fact, the Forest Service had taken this sensitive species, which had become sensitive because it had been portrayed in the press in the Northwest, is the reason it became sensitive. Not biologically sensitive; it had become politically sensitive.

So the Forest planning, in and of itself, became the issue. And so we are back to this situation of whether or not species are getting listed because they are actually in danger or not. I sit on the Mexican Spotted Owl Upper Gila Working Group for the recovery planning. It is a very difficult position for me because I look at the biology of the owl, and I look at the situation and I say we are losing more habitat for the Mexican Spotted Owl due to catastrophic wildfire. We have lost more nesting and roosting sites in the last 10 years to catastrophic wildfire than in the entire history of logging in the Southwest.

Mr. DUNCAN. Well, many people have said for a long time that this Act has been driven far more by politics and emotion than it has been by science or biology. But let me read another statement. This is from The Washington Times quoting a report that they wrote about in an editorial about 3 years ago.

It says "The government has no idea of the true cost of the Endangered Species program. Thought unmeasured, the costs of implementing the Act as currently written are in the multibillions. Yet in over 20 years, not a single endangered species has legitimately been recovered and delisted as a result of the Endangered Species Act."

Does anybody on this panel have an idea of how much we've spent or how much the Endangered Species Act has cost us? Is this a wild estimate that they have here that says it has cost us in the multibillions? Is that true?

Mr. HUTCHINSON. I'd say it's underestimated.

Mr. DUNCAN. Underestimated. I see that my time is about to expire. Let me just go to Mr. Bason. I read in your testimony, you say, "the radical environmentalists have no regard for the families or rural economies, which they will kill if their suits are successful

and their agenda has nothing to do with the protection of any endangered species or the environment.”

What, Mr. Bason, do you feel is their agenda? What many people around the country have started to notice is that the environmental movement has gone so far to the left and it is being dominated by very wealthy people who can insulate themselves from the harm that they do, because it doesn't really matter to them if they kill jobs or drive prices up. Yet there are many poor and working people who are being harmed greatly by this movement now.

And what I am wondering about is what do you mean—or if you say their agenda has nothing to do with the protection of any endangered species, what do you think their agenda is at this point?

Mr. BASON. I felt till lately that their agenda was to drive all livestock off the land permanently in Arizona and New Mexico. But I've changed my mind. They want at least one or two cows out there, so they can blame every one of these things on it.

In our case of this lawsuit that we are talking about, if they completely exclude the livestock off of the 60-something allotments that have finally trimmed down to 23 allotments, no one is addressing the elk. If there wasn't a cow out there, when you have 1500 elk come by, they are going to pound on those little minnows just like a cow does. It is completely out of line.

Any thinking person that's got common sense and knows whether to pick up a screwdriver or pick up a hammer, knows that you cannot do what they are trying to do here. You cannot do this. You have to have some other agenda there.

So I always felt it was to get the livestock off of our land completely. But now I know they've got to have one or two cows out there, because they've got to have somebody to blame all this on. From global warming right on down, you've got to have a cow to blame it on.

I'd like to yield to my colleague who is not here, Sam Donaldson, who has ranches in New Mexico, and you know his political bent. On *Sixty Minutes*, his own program, they asked him what would you do if an endangered wolf got there with your sheep, and he told them what he would do.

Why in the world does any person in here, any person think that if you were at your house and it's five o'clock at night and there's no one around and you lift up this little board and there's a little six-legged creature that says please don't kill me because I'm the last in the world. Let the government come control your land free, which is what the Endangered Species does, and you have an axe in your hand and you're looking at your grandson over there, what are you going to do?

You are going to do exactly what Sam Donaldson said he would do. I know that; I have fought it. I have had the Forest Guardians have a meeting of 4 days right in the middle of my allotment, so they could walk out and make comments in June after a 5-day drought, I mean a 5-year drought. I know. I am there on the battle lines. I know what I'm talking about.

I don't know what the final agenda is, but it has nothing to do with those endangered species, because when I went to school, there were 200 or 300 endangered species that got out every day in

the world, every day. Some of the new have to have room to come in.

I wanted to come up here and file suit on those little frogs that had six legs over here in Minnesota and claim that they are a new endangered species and everybody has to get out of Minnesota. It's gone crazy. And that's what I mean by the fact that you've got to come to a balance in this.

Don't ask me another question.

Mr. DUNCAN. Well, all I can say is these rich people who grew up in the cities and who come out once every couple of months into the woods and think of themselves as great outdoorsmen, look at things totally different from people like you who have lived on the land and on the farms all your lives. I appreciate what you have done for this country over the years, you and people like you, because you built this nation.

And if we do away with private property and if we do away with ranching and farming in this country, then we're going to live to regret it one day, I can tell you that.

Mr. BASON. I appreciate that comment and the time. I want to tell everyone that I am so grateful that Jurassic Park is not true, because if they can clone a dinosaur, this whole country is potentially habitat.

Mr. POMBO. Mr. Farr, do you have additional questions?

Mr. FARR. Just a quick one. Thank you, Mr. Chairman.

You know, I think this is all about value. You are interested in bottom line for ranching. A week ago today, I was sitting on the hillside, private land, in Big Sur and I was looking at a California condor that had been reintroduced. It was pretty exciting. I had never seen one before and I had grown up in that area.

When I walked off the hill I went down to a restaurant and in the restaurant everybody was talking about the condors, seeing the condors. And the owner of the restaurant came up and said thank you for helping preserve the condors and improving my business.

So why do you want to protect habitat? You were talking about the fact that the species may come back. Well, in Big Sur, the habitat has been protected—this is on the coast of California. There are five reintroduced condors and hopefully they are going to make it. And you know what? When they make it, business is going to increase. The hotels and the restaurants are going to have more people in them.

So I think that is creating value and I believe that there is balance here. Unfortunately what happens in a lot of these hearings is we invite you to give us a message, and then we kill the messenger, rather than trying to get to the real issue.

Dr. Ohmart, I am really impressed with the way you approached this. If you want to use Mr. Hayworth's analogy about cattle, how many cattle are there today versus historically? We could take historical Southern California and compare the cattle herds in Southern California today. The only difference is a place called Los Angeles. It developed around what limited water there was and there was no room for cattle.

Is there a way to have both cattle grazing and protection of the riparian areas? Can this balance be established and has it been es-

established anywhere in Arizona? Do cattlemen work with you and the University in trying to establish these things?

Dr. OHMART. I must confess I don't have very many permittees that work with me. I work with about three permittees. Because generally, my first advice to a permittee is let's get the cows off the riparian area, let's get it rehealed, give it a jump start if we need to with plantings of willows or whatever we need to do to get the woody rooted element in there, and then we'll bring the cattle back slowly.

Mr. FARR. And that hasn't been done yet?

Dr. OHMART. Well, I am working on one Forest Service allotment on the Prescott National Forest and the permittee removed his cows from three and a half miles of the Verde River near Perkinsville. Immediately, the Forest Service came in and said that's great, we're going to keep the cows off, and when our team is ready, we'll bring the cows back on. So I don't know if we'll ever get cows back on there, but I think if I'd have had 5 to 7 years, we could have started grazing that riparian area.

Mr. FARR. Professionally, do you believe that that's possible, to bring the riparian areas back and then allow for grazing, through management, as Mr. Skeen talked about, where you provide some offsite watering holes and things like that?

Dr. OHMART. I firmly believe that. And he had a grant from our state land and water group for \$75,000 for us to build off-stream waters. He has the water right and everything. The Forest Service never—

Mr. FARR. You mentioned the State. Let me ask a question here, because Mr. Bason talked about the fact that—

Mr. SHADEGG. Mr. Farr, let him finish his sentence. He said, "the Forest Service never," and I would like to hear the end of the sentence.

Dr. OHMART. The Forest Service never finished the planning process, so the gentleman lost that money and the opportunity to develop upland waters for his upland habitats. As a consequence of this, we are kind of stuck, if you would, between, I think, good common sense and Forest Service policy.

Mr. FARR. Well, I appreciate your approach to it. I hope the Committee will call upon your good common sense way of looking at it.

Mr. Bason said that the private lands that have water on them are being developed. And so what happens is that the public lands that have riparian areas and water on them are pressured. And the question is, is the State of Arizona doing proper land management so that the private lands will be responsible for the riparian corridors and not just leave that responsibility up to the Federal Government in federally owned lands?

Dr. OHMART. Our State really does very little to control development in riparian areas on private lands, even our State trust land. In 1991, EPA published that riparian habitats in the West were in the poorest ecological shape they have ever been in in the history of this country. I would say that State trust lands and riparian habitats even exceed that degradation level. There has not been a law passed to protect State trust lands in the State of Arizona since we became a State.

Mr. FARR. Well, I'd be interested in asking the Cattlemen's Association in the next panel if they've lobbied the legislature to try to get that. Because here you are coming to the Congress and beating up on Federal lands because we have the responsibility for maintaining riparian habitat, whereas other governments have that same responsibility but are not carrying out that responsibility.

Dr. OHMART. Well, they don't have that responsibility, sir, because we don't have the laws, unfortunately, in our State trust lands. There are no laws of conservation other than just graze them and try to maximize the buck.

Mr. FARR. Well, California has them.

Mr. POMBO. Before I go to Mr. Shadegg, Mr. Anable, would you like to respond to that?

Mr. ANABLE. Yes, thank you, Mr. Chairman. I have heard that kind of statement made many times before, and I have always asked, where is your data to show me how that is true. It really defies logic.

I submitted a map with my written testimony that depicts the State lands scattered throughout the State. The vast majority of our livestock allotments are intermingled with State, private, and Federal land, either BLM or used in conjunction with Forest Service.

So I never have understood just how the cows that are on these intermingled ranches know how to beat up State land worse than Federal land that is not fenced separately. Granted, I am not going to say every piece of riparian area we have is in excellent condition. We have our problem areas. But I think on an average, it defies logic to say that State trust riparian areas are worse than the BLM or worse than private.

I probably would hedge and say that there are probably better Forest Service riparian areas than the other three put together, just because of longer term concern and management.

Mr. POMBO. Thank you. As is the case with California in looking at your map, the largest landowner in Arizona is the Federal Government. So it is fairly understandable why you come here.

Mr. Shadegg.

Mr. SHADEGG. Thank you, Mr. Chairman, and I will be brief. Not only is the Federal Government the largest landowner in the State of Arizona, government is the largest landowner in the State of Arizona. I believe it is 86 percent of all land in the State of Arizona is owned by some level of government or another, Federal, State or local. That leaves very little private land.

I will be brief, Mr. Chairman; I know you want to move on to the next panel. I simply want to go back quickly to Mr. Bason's point. I am gravely concerned that if—well, let me state it differently. I believe we can, and I am pleased to hear that both Mr. Wiygul and Dr. Ohmart believe we can properly manage lands to allow the presence of cattle for grazing, doing it with some common sense and not over-grazing, because if we, in fact, drive all grazing off of these lands, I think Mr. Bason's point is well taken. And that is that someone will then search for some value to that land. The logical value will be development and we are going to have, as Mr. Bason put so eloquently, a mobile home under every tree. And I think a mobile home under every tree is not a particularly attrac-

tive way to develop the rural areas of Arizona or the unpopulated areas of Arizona.

So I think there is a challenge before us to try to work on this law to try to improve it. If, in fact, those are both taken from the same spot, they tell a very significant picture. I hope we can reach a balance.

In that regard, one of my constituents is Joan Murphy, who lives in my district. She is part of an old-time Arizona family. She is a self-described environmentalist, rancher, and volunteer. She serves on the National Affairs and Legislative Committee of the Garden Clubs of America. And we asked her to prepare testimony. It is, I think, rather compelling testimony talking about this very issue: how do we strike a balance, how do we not ban all grazing and yet properly graze so that the lands are properly managed. I think it is good testimony, Mr. Chairman, and I would like to submit it for the record if I could.

Mr. POMBO. Without objection.

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

Mr. SHADEGG. I guess I would like to conclude by simply saying that I think she has performed a great service in that through the Garden Clubs of America, she has brought to Arizona various groups and taken them out and shown them three different conditions of land: land where no grazing is allowed, land which is being improperly managed—overgrazed, in most instances—and then land which is properly grazed.

And in doing so, demonstrated that you can make a very strong case that land which is not grazed at all does not stay in as good condition as land which is properly grazed. And it is obvious that land which is overgrazed is damaged in the long run, and that's isn't good.

So I think there is a challenge before us. I guess I would also want to put into the record an editorial by the Arizona Republic in which they caution, their words, "in-your-face environmentalists," to be careful about what they ask for. If they push to eliminate all cattle from public lands and succeed, condos might replace cows as private ranch land is sold.

I agree with the Arizona Republic. I don't want to see condos replacing cows, and Mr. Bason, I share your sympathies. I am glad to see there is some consensus here, I think, on where we ought to be going in terms of goals. There may be differences in tactics.

I do have to say I think the purpose—and I want to commend the chairman for this Committee hearing—we have got to, I believe, create a better law than we currently have, because I counted the number of lawsuits in Arizona, and I believe it is 23 or 24, the vast majority of which filed either by Southwest Center for Biological Diversity, Forest Guardians, or Dr. Robin Silver.

And I think it is incumbent upon us as a Congress to create a system where not all decisions are made by Federal judges. Mr. Wiygul, I was a practicing attorney before I came here, and I know that litigation is a lot of fun and a good way to make a living and I wish you well in collecting attorneys' fees when you do right under the law.

But Chip Cartwright, who used to be the forest manager in that region, and I had a number of conversations. And I came to under-

stand that his job was impossible because no matter which way he went on any given decision, he was going to get sued. And what we then do is turn the management of all these lands, whether it's a Forest Service decision or a BLM decision or whatever, over to some Federal judge.

And I simply don't think that Federal judges have all the knowledge in the world and I think we have to find a more efficient system than the litigation system for resolving these issues. Because we create a structure where every time a Federal agency makes a decision, they get sued for it, whether it was to allow grazing or not allow grazing, allow trees to be cut or not allow trees to be cut.

If we wind up with a lawsuit over that, that is an incredibly costly and incredibly inefficient system, making a Federal judge decide the issue, whereas I would rather see some people with the technical expertise that is present on this panel making those decisions.

Thank you very much, Mr. Chairman.

Mr. POMBO. Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Mr. Chairman, I do have a couple more questions, if it is all right. Thank you.

I have a listing here of some 237 cases that have been filed with the Fish and Wildlife, again on the questions of environment and ESA and others. I would like to ask Mr. Wiygul—and please don't think I am beating on you or the others—I just wanted to get some information here.

I recall you had responded saying that you have filed somewhere between 50 to 100 cases on behalf of your clients, especially on environmental issues with the courts. I just want to get a more specific number from you on this.

Mr. WIYGUL. Right. I think that the question from, I believe, Representative Hayworth, was how many Endangered Species Act suits had been filed in the Southwest Region, and my guess was, I don't know, 50 or 100. I personally have, over the course of 7 or 8 years, probably filed 30 or 40.

Mr. FALEOMAVAEGA. OK, so I just wanted to get out of that, Mr. Wiygul, what percentage have been cases that you file against Federal agencies for their lack of implementation of the provisions of the law?

Mr. WIYGUL. Probably 40 percent, 30 percent, 40 percent.

Mr. FALEOMAVAEGA. The reason for my raising this is that I get a strong impression that, at least from the comments made earlier, there is nothing wrong with the law. It is just a lack of enforcement of the law that we find ourselves in court. Am I correct on this or am I getting the wrong impression from you gentlemen?

Mr. WIYGUL. I think in the case of the Endangered Species Act, I believe, particularly in some regions of the country, the problem is lack of application and enforcement of that statute of the front end of the Federal land management planning for other Federal action processes.

I think it's important to remember in the Southwest that the vast majority of those cases that have been filed there have been won by the plaintiffs, and the forum in which we play there is that of the Federal courts. And the Federal courts are a forum in which

accountability is demanded of attorneys such as myself and people who bring those suits.

I do not think that the judges that we appear in front of there can fairly be characterized as radical environmentalists, yet they have ruled in favor of the plaintiffs in most of those cases.

Mr. FALCOMA. Well, I think in most instances judges just don't want cases to come into their courts anyway. It's just a problem that they are being forced into a situation where they have to be the arbiters and they have to make a decision when issues such as this come before them.

But I just wanted to get an idea from you gentlemen, all of you, is it really because of the problems that we have with the Federal agencies and their enforcement process? Is it the lack of promulgation of proper regulations based on the statute, or is it just a problem of the law itself? This is what I am trying to get to the bottom of.

Mr. WIYGUL. Right. I do not believe that there is a basic problem with the law itself, with the exception of the fact that it needs to be strengthened to make sure that we protect a lot more habitat.

Mr. FALCOMA. Again, hearing from my colleagues, and I respect them in terms of how they feel about endangered species, we just had a hearing last week in Reno, Nevada on how we came about protecting wild horses and burros.

This wasn't because the legislators or our leaders here in Washington wanted to protect wild horses and burros. It was because of the requests of hundreds and thousands of children from all over the country. Wild Horse Annie from Reno, Nevada, who is the lady who initiated the whole concept, and the fact that if there was indiscriminate slaughtering of horses that ended up in meat houses for pet food, the kind of thing that goes totally against the mentality of the American people, Hopalong Cassidy, Gene Autrey, and Roy Rogers, bless his heart.

You know, we live these kinds of experiences, and I see the merit that there should be some kind of protection given to these species of animals and plants, and I think it is part of our heritage. So I do see that there is merit to the legislation, but at the same time, if we are not doing the extremes, just as the gentleman from Guam stated earlier.

And I think there is where we are having to find ourselves on how can we strike that balance for the endangered species, for the needs of Mr. Bason and what they are advocating, and for our friends who represent the environmental community.

That is all I wanted to share with you gentlemen. Thank you again, Mr. Chairman.

Mr. POMBO. Mr. Wiygul, I just wanted to give you an opportunity to correct the record. You said that in the vast majority of the cases, you had won. I have a list of the cases in front of me. I believe there is a couple, two, three here, that were actually won. Most of these were settlements similar to what happened in this particular lawsuit.

My understanding of this is that you didn't have a judge or a jury find in your favor, you had a settlement and that is where we end up with the so-called friendly lawsuits.



Mr. WIYGUL. I don't have the list that you have in front of you there, but I don't doubt that a lot of those were through settlements. However, I think they were through settlements that gave the plaintiffs what they wanted, which plainly, I think, is a victory.

Mr. POMBO. Which brings us back to the reason that we are holding a hearing like this where you get accused of friendly lawsuits between an environmental group and a willing Federal Government that settles a case, and the cattlemen are sitting out on the side and they are not part of the settlement.

Mr. WIYGUL. I think that my experience with litigating Endangered Species Act cases and other sorts of cases with the Department of Justice and the Federal agencies has been that the agencies are not willing parties, and that those settlements come about because the agency makes a correct risk termination that they are going to lose the lawsuit and that they need to cut their losses and try to do the best they can and get out of that situation.

With respect to the allegation that cattlemen, the Cattlegrowers Associations, were cut out of those discussions, I was specifically told by the attorney for the Arizona Cattlegrowers Association that he believed that settlement discussions or any sort of settlement there would violate a number of Federal statutes and they were not going to take part in those discussions.

I regret that they made that decision. Apparently, they did, and they did not take part in those discussions.

Mr. POMBO. We are going to give the cattlemen an opportunity to respond to that in writing, because I do believe that that is an important point. There is obviously a difference of opinion in front of the Committee today about whether or not they voluntarily decided to stay out or whether they were told they had to stay out.

I would like to ask you another question. In terms of filing this number of lawsuits, I have got a list here of about 320 lawsuits that have been filed by the organization that you represent. Over the past several years, the vast majority of those are in the West. Why do you think all of these lawsuits are filed in the West and the Southwest?

Mr. WIYGUL. I think in response to an earlier question here, the reason is a very simple, straightforward, and intuitive one. First, the Southwest is an area which, because of its ecosystem and the complexity of it, has a lot of endangered species. That's one very good reason that that is the case.

The other is that, unfortunately, in a lot of cases, the Endangered Species Act has not been complied with there.

Mr. POMBO. Do you feel that the Endangered Species Act is being complied with much more in the Northeast?

Mr. WIYGUL. I think you have a couple of factors at work there. I suspect that if you looked at the relative numbers, you would find that you didn't have as many assemblages, if you will, of endangered species in small areas that concentrate the effects of management actions as what you have in the Southwest.

Mr. POMBO. Do you think if you took the 300-some odd Fish and Wildlife Service employees that are in charge of listings in California and put them in Michigan for a couple of years, that they could find more endangered species?

Mr. WIYGUL. I don't know the answer to that question, Mr. Chairman.

Mr. POMBO. And at the same time, take your organization and move you to Michigan, do you think there would be more lawsuits filed up there?

Mr. WIYGUL. You know, I think I do know the answer to that question. It would probably be no, because I have practiced in other parts of the country where the Endangered Species Act was not used as much, and the reason for that was there just weren't as many endangered species or Federal activities of the type that affected them.

Mr. POMBO. Final question to followup on what you just said. All of these lawsuits, or the vast majority of these lawsuits are because of habitat and habitat destruction. You know, the picture of the habitat that's up there, that's what we always talk about as habitat destruction.

This photo we have of the land use pattern in Nevada would be very similar in California, Arizona, and New Mexico. There is obviously a lot less habitat destruction in those States than there is in the Northeastern States, the Mid-Atlantic States where they have much heavier development. The farming is much more intensive over the years in those states.

And yet, the habitat destruction that has occurred in those States doesn't seem to interest you or the Fish and Wildlife Service. It is the habitat destruction that occurs out West because of cattle or other things that gain your attention.

Mr. WIYGUL. I'd have to respectfully disagree with you about that, Mr. Chairman. I think there are an awful lot of folks up in the Northeast and on the East Coast who are very concerned about those issues.

Mr. POMBO. Oh, they're very concerned about Arizona and California and other places. They are not quite as concerned about what's happening in their area, because we don't have the lawsuits being filed that demand that they list endangered species there the way that you do out in Arizona.

I am going to dismiss this panel. I do not want to cut you off, but unfortunately, we have 5 minutes left in the vote and we are going to have to go vote. I am going to dismiss this panel. I will tell you that there are going to be further questions that I have of each of you that will be submitted to you in writing. I would request that you answer those in a timely fashion so that they can be included in the Committee hearing record.

Unfortunately, we are out of time, though, and we have to go vote. But I am going to dismiss this panel and the hearing will be temporarily recessed.

[Recess.]

Mr. POMBO. We're going to call the hearing back to order. I'd like to call up our second panel.

As you're taking your seats, I apologize to the second panel for the delay. Sometimes we can't control the floor votes, but thank you for being here to testify today.

Mr. Menges, if you are ready, you can begin.

**STATEMENT OF JEFF MENGES, SECOND VICE PRESIDENT,  
ARIZONA CATTLEMEN'S ASSOCIATION, PHOENIX, ARIZONA**

Mr. MENGES. Thank you, Mr. Chairman. My name is Jeff Menges. I'm a fourth generation rancher from Southeast Arizona, and currently serving as Second Vice President of the Arizona Cattle Growers and present this testimony on behalf of its more than 2,000 members.

I'd like to thank the Committee and the chairman for having this hearing and inviting me to testify on behalf of the Arizona Cattle Growers with regards to the suits that were addressed in Tucson and also with regards to some of my own personal experiences on BLM lands and the Endangered Species Act.

In the cases in Tucson, cattle growers were brought into the process at the request of the Forest Service and then sold out by the same agency. The Arizona Cattlemen's Association had witnesses prepared to testify as to the benefits that can result from grazing in riparian areas, that it is not necessary to exclude grazing to ensure the continued existence of the species in question, and that excluding grazing could be potentially harmful to some of the endangered species. Unfortunately, these witnesses were never heard because the agreement that was reached between the government and the environmental groups quickly brought an end to the hearing.

First, I want to point out that the ability to continue to utilize Federal lands is crucial to the future of the ranching industry, particularly in Arizona where the Federal Government owns more than 73 percent of the land. These lands are intermingled with State and privately owned lands making nearly every ranching operation dependent to some degree on the ability to utilize the Federal lands for grazing.

This attack by the environmentalist groups on Federal lands grazing is having the effect of destroying Arizona's ranching industry which provides beef for approximately seven million people. This overzealous use of the ESA suits is forcing hard working ranch families into removing their cattle from the very allotments they have spent their lives stewarding—allotments which are in better condition today than at any time in history.

For most ranchers, it is a lifetime goal to pass the family ranch to the next generation as their parents and grandparents have done. Good stewardship of the lands is in the best interest of every ranching family. Nevertheless, there are a number of interest groups that make no secret of the fact that they intend to remove all cattle from the Federal lands in the Southwest, and they are utilizing the ESA to do just that.

A typical scenario of what happens is the groups find an area where they want to stop a use. They find a species, petition to have it listed, file suit against the agency, asserting that they haven't entered into consultation and that they are taking endangered species, then they request a preliminary injunction, asking to stop the activity, usually grazing, then they settle out of court and, more times than not, they're awarded attorneys' fees. Assuming this trend continues, most ranchers will turn to their last option which is to subdivide and sell their private land.

I was called as an expert witness to the U.S. District Court in Tucson, Arizona where the Forest Guardians were seeking a preliminary injunction to stop the grazing on more than 100 forest allotments. The Forest Service had requested that the Arizona Cattle Growers intervene in the process. The ACGA then intervened, along with the New Mexico Cattle Growers' Association, at a cost to us of approximately \$100,000 only to have the Forest Service settle with the environmentalists, behind closed doors, resulting in the removal of cattle from these riparian areas.

And I see my yellow light's come on, so I'd like to get into my own case on the BLM lands. As you can see, my pictures, like Dr. Ohmart's pictures, are before and after pictures, but the difference is this area has been grazed—winter grazing. We started in March 1990. That picture was taken the day we put the cattle out of the area. We completed fencing. We completed waters. We entered into a written, cooperative agreement saying that we were going to graze the area in the winter during the dormant season. We grazed it each winter. That's what it looked like last week—the bottom picture and then, in 1995, I received an award for the efforts. The BLM monitored it in 1995 and it was the only area in 29 miles that was in proper functioning condition, including a number of areas that had cattle totally excluded. And then as a result of one of these ESA lawsuits filed by the Southwest Center for Biological Diversity, earlier this year I was sent a full force and effect decision saying that I would have to permanently remove my livestock from that area.

So, in conclusion, until recently I've always been a strong supporter of the BLM and its grazing program. It distresses me to be in confrontations with BLM officials that I considered friends, but I have an obligation to my family to stand for what is right and protect my family's future. I've always believed that by caring for the land as my parents, grandparents and great grandparents did I was preserving an opportunity for my own children to engage in this lifestyle if they should so choose. But I am now convinced that if this runaway train called the Endangered Species Act is not stopped, my children will not have that opportunity.

Thank you.

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

Mr. POMBO. Thank you.

Mr. Lohoefer.

**STATEMENT OF RENNE LOHOEFENER, ASSISTANT REGIONAL DIRECTOR, FISH & WILDLIFE SERVICE, U.S. DEPARTMENT OF INTERIOR**

Mr. LOHOEFENER. Mr. Chairman, members of the Committee, thank you for the opportunity to discuss the Endangered Species Act, specifically issues related to conservation of natural resources and grazing in the Southwestern United States.

The Fish and Wildlife Service has experienced an abundance in the dangerous species related litigation in the last few years, especially in the Southwest. However, the Service strongly supports the citizen suit provision of the Endangered Species Act. This provision plays an important role in ensuring the States, counties, the indus-

try, environmental organizations, and private citizens have a say in the protection of species and habitat, and provide the means for these parties to ask the courts—the judge—whether agencies are appropriately implementing the Endangered Species Act.

Natural resource conservation in the Southwest is extremely challenging, not as a result of the citizen suit provision and Endangered Species Act, but because there are so many competing demands for the Southwest natural resources. The Southwest is a biologically rich area with many diverse and fragile ecosystems, large expanses of public lands, fast growing metropolitan centers, and scarce water resources. This situation has been further complicated by past problems in communication among Federal agencies and with the public. In addition, the Service and other agencies in the Southwest have an extremely heavy and ever-increasing workload.

The complex social, ecological, and economic patterns in the Southwest are not going to change. However, a change that is already underway is how Federal agencies are communicating with each other and with the public, and how we are working together to ensure compliance with the Endangered Species Act. We are working closely with other agencies to streamline the consultation process and to make it as efficient and effective as possible. The Service has made and will continue to make every effort to ensure that our decisions are scientifically valid and our priorities are driven by the needs of species.

The Endangered Species Act requires the Service to make listing decisions based solely on the best scientific and commercial data available. It cannot be and is not influenced by pending or threatening litigation.

In the Southwest, the Service and other Federal agencies have made a commitment to collaborate among agencies, with the public, and with tribal, State and local governments. This effort is known as the Southwest Strategy. By improving communications with all interested parties, including open dialogue early in the decision-making process, we hope to decrease the amount of litigation and use the resources that are currently applied to litigation to increasingly work with our partners to conserve natural resources in the Southwest.

For example, to bring all agencies into compliance with the Endangered Species Act section 7 consultation requirements, a Southwest Strategy work group has just completed the streamlining process to address the near-term section 7 workload. In addition, public involvement is being undertaken and agencies involved in the Southwest Strategy have recently been in contact with and sought feedback from various State and tribal governments and non-government parties.

Recently, the collaborative process developed through the Southwest Strategy helped avoid an injunction on cattle grazing on 160 Forest Service allotments in Arizona and New Mexico. The Forest Service and the Fish and Wildlife Service had committed to find new ways of doing business in the Southwest and a grazing work group was under formation as part of the Southwest Strategy enabling us to come together quickly to consult on allotments identified in litigation by environmental organizations.

This interagency group was not only able to expedite consultation on the 160 allotments that were the subject of the lawsuit, but they also reviewed and consult on a total of nearly 750 allotments. During the review of these allotments, the Forest Service's commitment to protecting species and ecosystems was evident as very few modifications were needed to ensure that listed species were not adversely affected by cattle grazing.

In order to ensure that the Service is able to help conserve natural resources while remaining responsive to the needs of other Federal agencies and the public, the administration has requested a \$2 million increase in the Fiscal Year 1999 budget for the Southwest region. This increase in funding will allow us to increasingly work with partners to reduce the need to list species, increasingly work to recover species so that they may be removed from the list of protected species, continue to address the listing backlog and respond to the hundreds of consultations requested by our Federal agencies—other Federal agencies.

The Service and numerous other Federal agencies have put a great deal of effort in getting the Southwest Strategy underway and are hoping to use it as an example of how we can do business in a more efficient and effective manner. We want to ensure that those individuals that make a living off the land can continue to do so while also ensuring that native species and their habitat are protected on Federal lands, that our natural heritage is conserved, and that future listings are avoided.

I am happy to report that we are currently headed in this direction. I hope I can report back to you in the near future that our efforts have been successful and litigation in the Southwest has been reduced.

Mr. Chairman, members of the Committee, thank you again for the opportunity to testify on this issue. I'd be happy later, of course, to answer any questions you may have.

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

Mr. POMBO. Thank you.

Mr. Coppelman.

**STATEMENT OF PETER COPPELMAN, DEPUTY ASSISTANT ATTORNEY GENERAL FOR THE ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE**

Mr. COPPELMAN. Mr. Chairman and members of the Committee, I'm pleased to testify today regarding citizen suits brought by environmental plaintiffs under the Endangered Species Act and other natural resource statutes in the Southwestern United States. The Committee has asked that I focus on two particular cases: Southwest Center for Biological Diversity and the Forest Guardians' case and, particularly, on the stipulations that were entered in settlement of plaintiff's motion for preliminary injunction, and I'm happy to do so.

Decisions of Federal agencies in this case have avoided the kind of broad injunctions that have been entered in a number of cases around the country. Unlike those situations, there is no region-wide shutdown imposed by a Federal court in this case. Grazing in

the Southwest has continued despite all the litigation that we've heard about.

In my written testimony, I described three situations where litigation was pursued rather than settlement and we found the courts to be quite unsympathetic in the face of agency noncompliance with various environmental requirements including the Endangered Species Act. Those are first, in Texas—on the Texas National Forests litigation involving the Red-Cockaded Woodpecker that began in 1985 has resulted in injunctions that were entered in 1988 and, despite two trips to the Court of Appeals, remain in effect today.

In the Pacific Northwest, as the Committee is aware, injunctions entered by Federal courts in 1989 to 1992 shut down all timber harvesting on 24 million acres of old growth forest until the agencies produced the President's forest plan in 1994. And closer to home, in the Southwest, Federal courts enjoined all timber harvesting in the region for over 16 months until December 1996 finding violation of consultation requirements of the Endangered Species Act with regard to the Mexican Spotted Owl.

Let me now turn to the Southwest Center litigation. In the Southwest there are over a thousand grazing allotments in 12 national forests of which upwards of 700 contain species that are listed under the Endangered Species Act. The Act requires the Forest Service to consult with the Fish and Wildlife Service on activities that the Forest Service authorizes or permits, like grazing, that may affect listed species. So, in 1996 and 1997, the Forest Service consulted with the Fish and Wildlife Service on the effects of grazing on a region-wide basis, but this region-wide consultation, which concluded in December 1997, did not include an analysis of the effects of grazing on individual allotments. In the absence of these site-specific consultations, the Forest Service was arguably out of compliance with the Endangered Species Act.

The Southwest Center lawsuit was filed in October 1997, and it was consolidated with a lawsuit that was filed by Forest Guardians in December 1997. These two lawsuits, collectively, named over 150 allotments for which consultation was lacking, and the complaints in both cases asked that all grazing on all these allotments be stopped pending completion of the consultation.

Shortly after these lawsuits were filed both the Arizona Cattle Growers' Association and the New Mexico Cattle Growers' Association moved to intervene, and they were granted intervenor status.

In early March 1998, the Forest Service and the Fish and Wildlife Service and the Department of Justice convened a conference call among all the parties, including the intervenors, to explain the proposed process for completing consultation. Soon after this discussion, the plaintiffs—the environmental plaintiffs—moved for a preliminary injunction against grazing on all the allotments that were identified in their two complaints. We filed a response in which we pointed out that most of the riparian habitat of species identified had already been excluded from grazing, and for the remainder, grazing in riparian areas would be excluded in the near future. So it became apparent to everybody that the Forest Service was already excluding grazing in most of these riparian areas on

the majority of the allotments so that settlement would be a good idea to discuss.

A few days prior to the preliminary injunction hearing, all of the parties—all of the parties, including the intervenors, began discussions—this was about 5 or 6 days as you’ve heard, before the hearing—to determine whether we could avoid the need for a hearing. And, initially, counsel for the intervenors participated. They voluntarily withdrew from those discussions. We didn’t kick them out.

Shortly after the first stipulation was signed, and they didn’t like it, they went to court and asked for a temporary restraining order against enforcement of the stipulation. That’s their perfect right to do so. They argued that the Forest Service couldn’t legally make the management changes that were in the agreement, and that if the agreement was implemented it would cause them economic hardship.

After the hearing, the district court or the magistrate recommended that their motion be denied. The magistrate found that the Forest Service had the authority to make the changes necessary to affect the management direction and that the permittees would have the ability to participate in the changes and they would retain their right to contest them. The courts said specifically, “if the Forest Service does not follow through on its plans to exclude grazing on a shortened timeline in order protect the listed species, and a violation of the ESA results, the harm could be truly irreparable.”

The district court judge accepted the magistrate’s recommendation. The consultation has been progressing on schedule. A draft biological opinion was issued and it’s now projected that the final opinion will be issued in the middle or end of August. The delay is caused by the request of the Cattle Growers for more time to comment.

I would be happy to answer any questions the Committee might have.

Thank you.

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

Mr. POMBO. Thank you.

Ms. Towns.

**STATEMENT OF ELEANOR TOWNS, REGIONAL FORESTER FOR  
THE SOUTHWESTERN REGION, U.S. FOREST SERVICE AND  
DAVE STEWART, ACTING DIRECTOR OF RANGE MANAGE-  
MENT**

Ms. TOWNS. Thanks for the chance to discuss the Endangered Species Act and grazing in the Southwest. I’m accompanied by Dave Stewart, the Region’s Acting Director for Range Management.

Folks, this is not a new controversy. Over a hundred years ago, Gifford Pinchot, the first chief, argued that grazing should be permitted and regulated, but not prohibited. The Congress apparently agreed. Over the years, and in many laws, you told us to regulate use and occupancy, but preserve the forest, and later you told us to permit grazing and to protect the public’s natural resources. And so we walk that tight rope, seldom pleasing ranchers or environmentalists, each absolutely convinced that we are in the pocket of



the other. I'm not complaining. I love my job. I'm even going to love it at the end of today.

I went to the Southwest to find middle ground between laws that require protection of the resources and laws that authorize grazing, and I think that's what you want, as well. So let's talk about this Southwestern region. We are 12 national forests, and more than 20 million acres of Federal land in Arizona, New Mexico, Oklahoma, and Texas. It's a large and diverse area with ecosystems such as the Colorado Plateau in Arizona and New Mexico, the Chihuahuan semi-desert in New Mexico, the Sonoran Desert in Arizona, and grasslands in Oklahoma and Texas.

Our range management program is extensive and it's important to this agency. We have over 1300 grazing allotments and over 1600 permits regulating about two million animal months of grazing by cattle, horses, sheep, and goats. That's about 18 percent of the permits and 16 percent of the animal months of grazing on national forest systems lands service-wide.

In 1995, we faced the grim reality that over one-third of our grazing permits would expire by the end of 1996. We are scheduled to complete analyses on about 600 of some 1400 permits by the end of this year. Priority was given to allotments with habitat or species, clean water, or riparian issues.

Well, shortly after we started environmental analysis of those allotments, and that's one process, we began forest plan level—not site-specific—forest plan level consultation on ESA. We knew it'd be a while before site-specific analysis would be done and so we established region-wide management requirements to avoid jeopardizing those species or destroying habitat until we could do site-specific analyses. We even put those management requirements into the 1998 annual operating plans for each grazing allotment.

But, nonetheless, in 1997, we were sued twice for allowing grazing on 160 allotments before required site-specific consultation was completed. So, in February, we initiated site-specific consultation on those allotments and, while we were at it, on another 600 with habitat for listed species.

And, by the way, I'll take a moment to say that your government worked in that instance and we worked hard on behalf of the resources and the permittees. Two agencies mobilized forces and consulted on 750 allotments in record time. The majority, around 600 of them, were determined not to have affected species or their habitat. Over 100 were found not to have adversely affected listed species. And, so it came down to this: of 750 allotments, 21 were found to have adversely affected species or their habitat and even though the livestock were moved around, seasons were changed, none—zero cows, were removed from those allotments as a result of those stipulations. To the good, I'm told, that some ranchers elected to remove cows in response to consultation on their allotments.

And, so, here we are: 21 allotments, zero cows removed as a result of these stipulations, and two approximately month-long stipulations. But back to my story. We started NEPA, and we started forest plan consultation, not site-specific. Then we were sued for not doing site-specific consultations. We started that and then the plaintiffs moved to take livestock off until site-specific consultation

was done. And to avoid the risk of having the livestock taken off, in June, we signed stipulations with each plaintiff.

A couple of points about those stipulations: they were short-term, stop-gap agreements that would have ended today had we not honored the ranchers' request for more time to study the draft biological opinion. Now, some of the ranchers, and some of you believe that in negotiating the stipulations, we cut deals imposing new and dire conditions. The truth is that, for the most part, the stipulations formalize management practices that already were being implemented or planned to be implemented. And I thought I heard Mr. Bason refer to that.

In our judgment, signing the stipulations protected the resources and kept the livestock on the land and that was our choice of evils. The consultation will soon be completed. Additional management requirements may very well be necessary. I'm almost through, Mr. Chairman. We will continue to make progress on NEPA analyses and new allotment management plans. All of this takes time and, no doubt, the uncertainty is unsettling to some. Resolving this grazing situation in the Southwest is a priority for this administration. To that end, the President has asked for a \$20 million increase in service-wide range management dollars for 1999; a \$3 million increase for habitat management for listed species.

To those who might think that denying these increases will restore the status quo, I say that we need the money to comply with law. Failure to do so puts grazing and resources in the hands of litigants and the courts. And second, as has been referred by Mr. Lohoefer, at the insistence of two secretaries, agencies in the Southwest came together around this issue. We are committed to improving collaboration among the users, Federal agencies, States, local governments, tribes, and the public; and it's working. I met with the Natural Resources Conservation Service officials to discuss range improvement budgets for the affected allotments, and it's our hope that in the future the improved collaboration among the parties will enhance sustainable resource management, reduce the polarization litigation that currently are occurring in the region.

Thank you.

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

Mr. POMBO. Thank you.

Mr. Coppelman, you said in your testimony that, shortly before the settlement, that all of the groups were called together and given the opportunity to negotiate and that the cattlemen were part of the process. Is that the 6 days that we heard testified to earlier?

Mr. COPPELMAN. Right. Nothing—there were no negotiations before the 6 days.

Mr. POMBO. There were no negotiations?

Mr. COPPELMAN. Well.

Mr. POMBO. Your testimony is considered under oath and I didn't swear anybody in, but, if you need to confer with someone else, please do.

Mr. COPPELMAN. No, my understanding is that the negotiations, you know, were spurred by the scheduling of the preliminary in-

junction and—so that the negotiations essentially started 6 days before the hearing. That's my understanding. I was not involved in the negotiating.

Mr. POMBO. The Committee has received statements from others that would indicate that the negotiations between Justice Department Forestry were—in the environmental groups were happening before the 6 days; that they were discussing a possible settlement and possible provisions that would be acceptable to both of you and that it was only up to the 6 days that the cattlemen were called in.

Mr. MENGES. Are you talking to me?

Mr. POMBO. I'm going to give him an opportunity to answer.

Mr. MENGES. I thought you were looking at me so—

Mr. POMBO. No.

Mr. COPPELMAN. Well, there could have been talks before that, but there was—

Mr. POMBO. Talks are what I'm talking about. Yes.

Mr. COPPELMAN. The 6 days—there was a specific proposal, a—

Mr. POMBO. You had a proposal that you put on the desk and said this is what we're going to talk about at the 6 days?

Mr. COPPELMAN. We didn't draft the proposal. I think the proposal was drafted by the environmentalists and it was circulated among all the parties.

Mr. WIYGUL. I believe that's correct.

Mr. POMBO. I want you to be very careful about how you answer this because I don't want this to go anywhere beyond this hearing. The draft proposal that was put together, was the Justice Department and the Forest Department part of that draft proposal in negotiating what was in and what was—what way possible settlement could look like?

Mr. COPPELMAN. Yes. Our attorneys were involved in—

Mr. POMBO. Before the 6 days.

Mr. COPPELMAN. Mr. Chairman, the trial attorney who was involved in discussion isn't here, and I don't know the specific answer. I'll have to get back to you on that then.

Mr. POMBO. Ms. Towns, were you part of the discussions?

Ms. TOWNS. No, sir. I have been regional forester for a grand total of 3 months now.

Mr. POMBO. Mr. Stewart, that is with you, was he part of the discussions?

Mr. STEWART. No discussion with our plaintiffs. All of our discussions were with our Department of Justice attorneys, in terms of articulating to them what the status of these various allotments were with respect to various actions that we were taking to protect riparian areas. But no discussions with plaintiffs.

Mr. POMBO. You had no discussions with the plaintiffs?

Mr. STEWART. I had no discussions with plaintiffs. To my knowledge, the agency did not. The only discussions that were taking place is that as we continued to administer grazing permits in the field, on our forest and on our ranger district, there were discussions between those people, not directly involved with litigation, that are responsible to work with the permittees to try and work out resource issues.

Mr. POMBO. If we have one of the employees of the Forest Service who steps forward and says that he was told that the settlement would include fencing off the riparian areas several weeks before the 6-day period—he was told by his superiors that—how would he come up with that information if you were not discussing this settlement with someone?

Ms. TOWNS. I have no idea, sir.

Mr. COPPELMAN. Well, let me say, Mr. Chairman, that there were many discussions right from the get-go, when these lawsuits were filed, about how to respond and what we were going to do—what the government was going to do in response to the lawsuits. There were many conversations among the agencies and, in fact, on February 6, 1998, well before this hearing, the Fish and Wildlife Service and the Forest Service entered a grazing consultation agreement where they set forth how they were going to carry out these—the consultation requirements on the specific allotments, and there were probably discussions about what kinds of things might be required as a result of this consultation. I mean, I can provide that for the record, if you don't already have it.

Mr. POMBO. Please do. Would it be fair to say that there were informal conversations with the plaintiffs about what could possibly be in the settlement agreement before they drafted the agreement—six days prior to the settlement?

Mr. COPPELMAN. Mr. Chairman, I really, without having a trial attorney here would—I don't want to guess, as you might imagine. I mean, and I will definitely get an answer to you.

Mr. POMBO. Well, the request was that the trial attorney also appear at the hearing and I'm a little bit perplexed that we go through the trouble of trying to bring people here for a hearing and we don't have people who can answer questions. And this is not a slam on you or your ability. I'm sure you do your job very well, but the purpose of the hearing was to try to find out what happened and to try to answer some of the questions that the members have, and for the administration to provide us with people who are not in position to answer questions is very difficult for us.

I would appreciate it if you would provide that for the record. Let me ask you: Were the Cattlemen's Association intervenors included as well in any informal or formal conversations that occurred before the 6 days?

Mr. COPPELMAN. Prior to the 6 days? That will have to be included in the answer that I provide to you.

Mr. POMBO. Can I ask the Forest Service? Were you discussing with the Cattlemen's Association and the other intervenors what a possible settlement could look like? Mr. Stewart, I know Ms. Towns wasn't there. Mr. Stewart, can you answer that?

Mr. STEWART. Yes. The answer is no. But I would like to say—make some remarks about that. Well over a year ago, before either of these lawsuits were filed, the Forest Service directed our district rangers to look very closely at allotments that had already been mentioned in notices of intent to sue. We had several 50-day notices of intent to sue. We had the allotments, they were actually mentioned. They were written out for us to look at and we knew that these were potential allotments that could be under litigation. And, so we directed our forest supervisors and district rangers to

look very closely, in the Summer of 1997, what changes would need to be made in annual operating plans for 1998 grazing season, irrespective of any of this litigation. So——

Mr. POMBO. So you discussed it with the cattlemen before?

Mr. STEWART. We discussed it individually with grazing permittees, not necessarily the cattlemen's organization in the context of settlement.

Mr. POMBO. Mr. Menges——

Mr. STEWART. But there we no lawsuits filed at that point in time.

Mr. POMBO. Mr. Menges, is—are you aware of these conversations taking place about the riparian areas a year before?

Mr. MENGES. The Forest Service, I know, out on the ground on an individual basis talked with certain permittees. It's an indication of how intimidated that the agencies have become by these lawsuits because nearly a year before this thing ever went to court, they were out there managing as if they were managing for endangered species before the consultation was ever complete, just at the threat of a lawsuit. They were starting to ask these ranchers to get their cattle out of there and amend their annual operating plans to do that. So, yes, I think that they did talk to them. We've seen the same situation in other areas of the State with the goshawk. That species has never been listed. The Forest Services has adopted guidelines for management of goshawks. Might as well be listed.

Mr. POMBO. Mr. Lohofener——

Ms. TOWNS. Mr. Chairman, if I may address that. Please.

Mr. POMBO. Yes. Go ahead.

Ms. TOWNS. We were out on the ground talking with permittees. We—you know there's been some question about enforcement over time. We've been out on the ground over a number of years discussing range management issues and doing that which we're supposed to do in terms of stewardship. I think it's a presumption to presume that prior to the lawsuit that we were out there to discuss this in relation to endangered species. As a matter of fact, I believe I've testified that as to those stipulations. What they did was essentially carry over, memorialized, formalized that which had already been discussed and negotiated on the annual operating plans, which is part of our responsibility as regulators.

Mr. POMBO. Well, I would hope that over the course of time that you would discuss this with the permittees. I don't believe that is in question. I don't think anybody questions that; that over the normal course of business, you would discuss management issues with the permittees.

Mr. LOHOEFENER, during the period of time before the 6 days before the settlement, did you or anyone in your agency have informal or formal conversations with the plaintiffs to discuss what a possible settlement would look like?

Mr. LOHOEFENER. No, I did not, Mr. Chairman, and to the best of my knowledge no one in the Service did.

Mr. POMBO. So, what I'm to understand from the testimony, the Fish and Wildlife Forest Service, and the Justice Department is that the plaintiffs came in with a draft settlement that you did not—had not seen before the 6 days prior to the settlement, and you sat down with them to negotiate that at that point. You're tes-

tifying here, before Congress today that, to the best of your knowledge, you had not seen or discussed the draft settlement before that 6 days before the settlement occurred?

Mr. LOHOEFENER. Yes, I am, Mr. Chairman.

Mr. COPPELMAN. I'm going to check, Mr. Chairman.

Mr. POMBO. Ms. Towns?

Ms. TOWNS. We've testified that we have not—we didn't participate in those discussions with plaintiffs.

Mr. POMBO. Mr. Hayworth.

Mr. HAYWORTH. Thank you, Mr. Chairman, and I thank the Subcommittee's indulgence in allowing us to come in today, and my colleague from Arizona and I, and I appreciate by time on the full Committee in the 104th Congress. And, I'm listening with great interest to some of these comments. Again, as I'm more than eager to point out, JD does not stand for Juris Doctor. I'm not a lawyer, never played one on TV, and, yet, we hear from one of my Arizona friends what, in essence, can be called a "chilling effect." That the mere threat of litigation leads to actions presumptive in nature as to exclude cattle from certain areas because of the threat that something someday might happen.

So, in essence, I believe, Mr. Menges, is it safe to say that it's your notion that a "chilling effect" has come about?

Mr. MENGES. Absolutely.

Mr. HAYWORTH. Mr. Coppelman, what is the name of the trial attorney who should be here today? I think of Mr. Bason's remark about that fellow, not me, earlier this afternoon. You know, it's not me. We're not involved in this. I didn't have personal involvement. Who is the trial attorney who should be here today?

Mr. COPPELMAN. The trial attorney who was on the case is Chrissy Perry.

Mr. HAYWORTH. I'm sorry?

Mr. COPPELMAN. Chrissy Perry.

Mr. HAYWORTH. Chrissy Perry. Again, I guess that was not your call as to who was here, but, and I don't want to suggest to the chairman how to run the Subcommittee, but it might be good to try and get Ms. Perry into some of these discussions because, although we've heard, well, we're not certain about formal negotiations, I think it's safe to infer that, through the parsing of statements, there are probably some working documents and some ideas, whether drawn up on the back side of napkins or legal pads, somewhere—probably, some sort of working documents or drafts were circulated. But, again, I understand you can't answer because you weren't the trial attorney involved, and we probably need Chrissy Perry here.

Mr. Menges, let me go to your stewardship of the land because—and I do wish that Dr. Ohmart, our fellow Arizonian, were here. I saw him earlier. I'm not sure if he's still here with us in the gallery—in the audience today. But, it's very interesting to look at your photographic evidence that seems to show us good stewardship of the land including areas where cattle have grazed. Could you go into more detail on what you're able to do and why you're able to win an award and why on earth, now, they'd tell you to get out?

Mr. MENGES. Well, they told me to get out because it's potential habitat for one fish species and one bird species—a cactus ferrigimous, pygmy owls, and razorback suckers.

Mr. HAYWORTH. So, just a second. It is potential—

Mr. MENGES. Right. Neither of the species exist there. But the biological opinion that came out as a result of the lawsuit by the Southwest Center stated that if cattle were grazing in a riparian area that they were taking these species. Therefore, the BLM said that they had no alternative but to implement the terms and conditions of the biological opinion. I was sent a full force and effect decision in which I have appealed; although, by it being full force and effect, it remains in effect for the duration of the appeal. And we have appeals in Arizona that have been before the interior board of land appeals for—since 1991, and haven't been heard.

Mr. HAYWORTH. So appeals that have been in the hopper since—for 7 years now?

Mr. MENGES. Right.

Mr. HAYWORTH. Most times when they're criminal cases, the statute of limitations would expire, I believe, sir.

Mr. MENGES. With regards to the stewardship question, I believe we've done some things with grazing that you couldn't do without grazing the areas. After a flood event you'll find vertical cuts in the banks. We put cattle in there and rounded those cuts off so that vegetation could grow on them. They can't grow when it's vertical. We reduced some fireloads in there. The annual vegetation is very thick back under the mesquite bosque so you can reduce the danger of fire which would—could be devastating to habitat.

We've had some success at reducing salt cedar invasion, by grazing in the winter; not putting salt out for the cattle. We have been able to get them to eat the salt cedar. It tastes salty to them. And, so that's a non-native species that the agencies are very concerned about invading.

I think of a riparian area like any other area. The fundamental principles of range management apply and you can use livestock as a management tool to achieve your objectives. They can work in the seeds. Think of a person's yard, for example. You mow your grass, you prune your trees, you fertilize, then you do it all over again, and cattle can be used as a livestock management tool to do those things, and, I think we've seen the results here because this area on my allotment was one that was brought into proper functioning condition, as I mentioned. And some of the areas that had had livestock completely eliminated were not in PFC the first time the BLM monitored this 29 mile stretch of river.

Mr. HAYWORTH. Just one final note, and I appreciate the indulgence of the chair. How much work is involved in trying to be a good citizen and do the right thing? I mean, the photographic evidence here is compelling. Do you feel you've gone the extra mile to be a good citizen? Are you, basically, being slapped in the face by these presumptive regulations?

Mr. MENGES. This is an area—I live close to town. There is private lands above my allotment. There is private land below my allotment that belongs to other ranchers. We have to maintain those fences across those—the river between the private land and the public land. Every time the river rises, we have to go back and do

that, and put the cattle out. There is a lot of recreational activity in this area—leaving the gates open—cattle getting in, so it is a lot of work to keep cattle out of these areas.

I've always had the incentive to do that because I would be rewarded by being able to graze this area in the winter. But now, there's really not any incentive. We just have the heavy-handed approach—the Federal Government—saying that if you don't keep all the cattle out of there, if you don't maintain the fences, then you risk losing your permit.

Mr. POMBO. Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. Menges, did I understand you to say that the Forest Service asked you to intervene in the grazing litigation?

Mr. MENGES. Yes. We received—Doc Lane of the Arizona Cattle Growers' Association received a phone call from Region 3—I do not know the individual. I could find out the name. Mr. Lane then called the officers, and I'm one of the officers of the Association, and said, the Forest Service has been in touch with us. They say that they think we may be in some trouble on this preliminary injunction, that we need to get intervenor status in both suits. I think we may have had it in one suit at the time. We went out and got the intervenor status. And make no mistake, the information that you received earlier was correct. The Cattlemen's Associations were contacted before the court hearing about an agreement that had already basically been, I suppose, drafted. I don't think we saw it, but our attorneys told them if that's what it said, certainly we would not sign on to it. Then, at the hearing, when the court rejected that as a stipulation, the Cattle Growers' Association—well, that was basically the end of the hearing and the Forest Guardians and the Forest Service went into a room right there in the court house. They did not ask the Cattle Growers' Associations to participate. They cut the agreement in that room. That is now the agreement that the Forest Service is using as a basis for altering the annual operating plans on the permit—for the permittees and excluding the grazing off of these allotments.

Ms. TOWNS. Mrs. Chenoweth, Congressman?

Mrs. CHENOWETH. Yes.

Ms. TOWNS. I was just wondering if I might respond to that?

Mrs. CHENOWETH. Yes.

Ms. TOWNS. The stipulations—and this may be about the third time that I've said this, but it seems to be important to repeat. The stipulations memorialized what was in annual operating plans that had been worked out since, in 1995, when we began to look and see that a number of those permits were going to expire in 1996 and we were instructed by the Burns amendment to do NEPA compliance on our entire workload.

The stipulations—I asked that question specifically before we came here—memorialized that which had already been worked out. There were no deals cut. I think—

Mr. POMBO. Would the gentlelady yield for just a minute? If the stipulations were annual operating procedures, why was the lawsuit filed?

Ms. TOWNS. There are a number of technical reasons why others might choose to file a lawsuit. As I mentioned before, there were several layers of planning. We had embarked upon two of them and



the final one when we were in the programmatic—the fourth plan level of planning—when we were into that process with Fish and Wildlife Service, the lawsuits were filed saying that we had not done site-specific environmental analyses in compliance with the ESA. We were on a track doing planning at one of two—at two levels.

Mrs. CHENOWETH. There's a difference, though, between the stipulated agreement and the settlement agreement. Yes. There definitely is. So, Judge Reduttle rejected the stipulated agreements.

Ms. TOWNS. There is no settlement. The lawsuit is still in effect.

Mrs. CHENOWETH. There was a settlement agreement that the—

Mr. COPPELMAN. Can I just say that the chronology is that the judge—there's a Federal district judge and a magistrate. The hearings were held in front of the magistrate at the direction of the Federal district judge. The magistrate was holding a hearing. During that hearing word came back from the judge that he was not going to sign the stipulation because the Cattle Growers were not on it. OK? So, then, the plaintiffs and the Forest Service and Department of Justice reached an agreement without—that would not have to be approved by the court. Then what happened was the Cattle Growers filed a temporary restraining order, that evening, to try to stop that stipulation from being enforced, and a hearing was held on that. The magistrate rendered a written—a fairly comprehensive—written decision denying—recommending that the TRO be denied.

The same judge, who rejected the earlier stipulation, after the hearing, after the recommendation of the magistrate, approved the recommendation of the magistrate denying the temporary restraining order. That's what happened.

Mrs. CHENOWETH. Mr. Menges, do you believe that the settlement agreement simply memorialized practices, policies, and procedures already in place?

Mr. MENGES. I can think of three permittees that had their altered annual operating plans amended, right off the top of my head; just some of my friends, and the forest—the local forest rangers called a meeting and I attended that meeting at the Clifton Ranger district, and they talked about the changes, and people had changes to their annual operating plans right there that day that were the result of this agreement. And, they talked about how they were going to enforce it and they were going to hire somebody to ride and take pictures and see if they can find somebody that had let cows come into the river.

Mrs. CHENOWETH. And the parties that were affected with the changes—

Mr. MENGES. Yes.

Mrs. CHENOWETH. [continuing] were not a party to the agreement at all—this settlement agreement?

Mr. MENGES. Oh, no. These—

Mrs. CHENOWETH. Now did the Forest Service offer to pay your legal fees? I understand your legal fees were about \$100,000.

Mr. MENGES. Between the two associations, no. We have to get that out of our members.

Mrs. CHENOWETH. Well, if you had agreed to the settlement would they have paid your legal fees?

Mr. MENGES. I don't know. I doubt it—

Mrs. CHENOWETH. Mr. Coppelman.

Mr. MENGES. This case—

Mr. COPPELMAN. They were intervenors.

Mrs. CHENOWETH. So the Forest Service asked you to intervene?

Mr. COPPELMAN. You get attorneys' fees if you beat us basically. And this case isn't over. And this case is only—all that's happened is that they—you know, were at the preliminary injunction stage. Nobody is entitled to attorneys' fees, nobody's applied for attorneys' fees. So I can't answer the question of who, ultimately, may get attorneys' fees in this case.

Mrs. CHENOWETH. So, how much will the plaintiff in these two cases—the Forest Guardians and FWCBD receive in attorneys' fees?

Mr. COPPELMAN. I don't know whether they will and, if they do, I have no idea how much that will be at this point. I mean, it's based upon records that they submit to us—timesheets and all that kind of stuff—if they're entitled to attorneys' fees.

Mrs. CHENOWETH. So, in your opinion, they're entitled to attorneys' fees if they present proper records and costs?

Mr. COPPELMAN. No. I said that they—if they are the prevailing party, as determined under the law, then they would be entitled to attorneys' fees, just like industry attorneys would be entitled to attorneys' fees. And we've paid plenty of money to industry counsel, as well.

Mrs. CHENOWETH. Will the intervenors—the cattlemen—receive any reimbursement of their attorneys' fees and court costs from the government at all?

Mr. COPPELMAN. I can't—that's way in the future and we'll just have to see how this case resolves itself and who submits—you know, makes a motion for attorneys' fees. I wish I could be more helpful, but I just can't right now.

Mrs. CHENOWETH. I have a lot of other questions, Mr. Chairman, but I will yield back my time that is up.

Thank you.

Mr. POMBO. If the gentlelady has other questions that she would like to ask at this time, we're nearly concluded with the hearing so you may go.

Mrs. CHENOWETH. Thank you.

Mr. POMBO. I ask that she be given an additional 5 minutes.

Mrs. CHENOWETH. If the Cattlemen's Association sues to challenge a settlement in a separate suit, as the judge in this case has seemed to indicate that he would be suggesting that they can, will they ever get an opportunity to present their side of the case and their witnesses in court?

Mr. COPPELMAN. Well—

Mrs. CHENOWETH. I mean are we going to be facing endless, out-of-court settlements—

Mr. COPPELMAN. Where we are is the intervenors moved for a temporary restraining order. The temporary restraining order was denied. Now, they could have moved for—then for preliminary injunc-

tion. They could appeal. They haven't chosen to—they haven't tried to anything more.

Mrs. CHENOWETH. Do you feel harm has been rendered by this decision based on Mr. Menges' testimony?

Mr. COPPELMAN. Do I feel—

Mrs. CHENOWETH. Has there already been damage caused as a result of the decision and Mr. Menges' testimony that certain individuals are losing their privileges?

Mr. COPPELMAN. I'm not in a position to judge that—what's happened to individuals. I mean, that—if Mr. Menges feels he's been harmed, I mean, clearly, in enforcing the Endangered Species Act, some cattle have been removed from Federal lands. Yes.

Mrs. CHENOWETH. Mr. Coppelman, did the court ever issue any order or decree that mandates the implementation of this settlement agreement?

Mr. COPPELMAN. No. That's not the way it was presented procedurally. Procedurally, it was presented to the magistrate and the Federal district court judge on a motion—a temporary restraining order to prevent implementation of the stipulation.

Mrs. CHENOWETH. So there's never been an order or decree that mandates the implementation of this settlement agreement, then?

Mr. COPPELMAN. A judicial order, no.

Mrs. CHENOWETH. Thank you. I have other questions I'd like to submit in writing.

Mr. POMBO. Mr. Hayworth.

Mr. HAYWORTH. Mr. Chairman, I just am cognizant of the fact that one of the key players, if you will, or participants, the trial attorney, was, for whatever reason, not here with us today. Might I suggest, commensurate with Congressional protocol and your discretion as the Subcommittee chairman, that we request of the trial attorney, and, indeed, our friends from the Department of Justice and the others involved in this to submit all written correspondence, and for that matter, informal correspondence, which may exist prior to the settlement of this case, involving the litigants, which may indicate whether or not there was some sort of pre-settlement established—or settlement established before the 6-day period that you've talked about. And, I would just—I would make that recommendation to you, and, of course, would be happy for you to formalize that in some way and I know that, I'm sure that our friends in the Justice Department would be happy to comply with such a request.

Mr. POMBO. In conferring with counsel and the full Committee chairman, that will be taken under advisement.

Mr. HAYWORTH. I thank you very much, Mr. Chairman. I'd like to thank those witnesses, especially my constituent from Arizona, for being here today.

Mr. POMBO. We do have further questions that we will be submitting to you in writing—to all of you. I have a number of questions that I don't feel were answered here today and I have other questions that will be submitted to you. If you could answer those in writing in a timely fashion for the hearing, it would be of great help to the Committee and would avoid future hearings, at least on this.

I thank you for coming in and testifying. Your testimony was very valuable to the Committee. I, again, apologize for the length of the hearing—the delay in the hearing, but we don't control the floor schedule. So. But, thank you all very much for being here.

Mr. HAYWORTH. Thank you, Mr. Chairman.

[Whereupon, at 5:44 p.m., the Subcommittee adjourned subject to the call of the Chair.]

[Additional material submitted for the record follows.]

## STATEMENT OF JIMMY R. BASON

Let me start by thanking you Chairman Young and members of the Committee for the opportunity to speak to you today, although I would rather have my fingernails pulled out with pliers. But, you and your fellow Congressmen need to know what is happening to American citizens, American taxpayers who are working hard to raise their families. Unfortunately, my family and I are in the sorry position to be able to illustrate that story.

I have owned a ranch in Southwestern New Mexico for 36 years. Unlike many of my counterparts, I did not inherit the ranch. I grew up working on other people's ranches. I was able to put together my own operation after serving my country in the Air Force for five years. I had planned to pass the ranch, comprised of Federal, state and private land to my son, Brent, and his young family. We have begun that process and Brent placed himself heavily in debt last year with federally guaranteed loans to begin buying me out of the operation.

Brent is 29 years old. He is the father of a three-year-old Typhen, who I call "Jefe" because he thinks he runs the outfit, and my newest pride and joy, one-month-old Cord. Brent's wife Stephanie worked on the ranch right up until delivering Cord last month. Immediately following the birth, she was up fighting with the Bureau of Land Management to allow our local 4-H group to use a building the agency had promised to let the kids use for summer projects.

Our ranch is largely comprised of two (2) large forest allotments on the Gila Forest, which brings us to the topic of today's hearing, citizen lawsuits as provided for in the Endangered Species Act (ESA), the Clean Water Act (CWA) and the Clean Air Act. The Southwestern Region of the U.S. Forest Service, which includes 11 forests in Arizona and New Mexico, has become the hotbed of environmental litigation. Both the Forest Guardians and the Southwest Center for Biological Diversity have filed suits against the U.S. Forest Service under the ESA. Their initial attempt was to remove livestock from some 160 grazing allotments in New Mexico and Arizona.

Please keep in mind that all FEDERAL GOVERNMENT permittees operate under the direction of and with the cooperation of THE FEDERAL GOVERNMENT on a yearly basis. Each year the permittee manages his allotment pursuant to an annually updated and signed agreement with THE FEDERAL GOVERNMENT.

Instead of working with and defending us as well as themselves, we read in the newspapers that THE FEDERAL GOVERNMENT says cowboys haven't changed in 20, 50 or even 80 years. If there is a problem on Federal lands, it is THE FEDERAL GOVERNMENT who has created it by not pursuing proper management and not allowing permittees to do what they know to be best.

The radical environmentalists have no regard for the families or rural economies, which they will kill if their suits are successful. And, their agenda has nothing to do with the protection of any endangered specie or the environment. Cattle don't eat fish or birds and proper grazing management practices will allow for fish, birds and cattle. The radicals want to control the land and they are using citizen lawsuits to do it.

At the present time our allotments are not a part of ANY of the ongoing citizen suits filed by radical environmentalists. However, that has not stopped the impact of citizen suits on us or many of our neighbors. My son and his young family are literally facing bankruptcy at the hands of THE FEDERAL GOVERNMENT who guaranteed the loan them the money to go into business. I know they are not alone in this crisis.

We are part of the first 33 allotments in the Gila National Forest, one of the 11 forests in the Southwestern Region, to undergo environmental analysis as part of the National Environmental Policy Act (NEPA) process. The U.S. Forest Service (USFS) began the analysis with an initial scoping document in early March 1998. Given what I have learned since then, I have come to refer to this Federal agency, as well as all others as THE FEDERAL GOVERNMENT.

Between the two allotments, we are authorized to run 450 head of cattle year-round. Due to the drought that we have experienced over the past several years, we have voluntarily been running only 300 head, taking non-use on the balance. Brent and Stephanie were working with THE FEDERAL GOVERNMENT and all seemed well. We have documented monitoring for our operation for some 50 years and NEPA analysis was done about nine years ago. That all changed near the end of April.

As part of NEPA our Sierra County Commission got involved in the process on behalf of affected permittees in the County. In mid April Brent told the Commission, in a public meeting attended by FEDERAL GOVERNMENT employees, that unless things changed, there would be no need for the Commission to go to the trouble.

This was publicly confirmed by the FEDERAL GOVERNMENT employees in attendance.

A mere nine days later that all changed. Brent was called in by what I now refer to as the "bully squad." Brent was confronted by some seven different FEDERAL GOVERNMENT employees who told him that because of a court order resulting from a citizen suit filed by the Forest Guardians against the USFS, his permit would be cut to 92 head.

First Brent informed the FEDERAL GOVERNMENT that there was no court order, rather there was a settlement agreement between the Forest Guardians and the USFS, which had no force of the court or the law. When they argued with him, he pulled out a copy of the settlement agreement, which I had obtained when I attended the hearing on the issue. That did not deter them.

Brent then pointed out that the operation would not be economically viable at that number. He stated that he would need at least 200 calves to service the debt he had undertaken to buy the permit to marginally service the debt under THE FEDERAL GOVERNMENT's lending agency's guidelines previously agreed to. The "good cop" in the squad, then began negotiating on Brent's behalf. Pretty soon they had worked back up to 192 head. The good cop suggested that THE GOVERNMENT just go up the eight additional head to arrive at the number Brent needed, The "bad cop" absolutely refused. He said THE FEDERAL GOVERNMENT had been pushed around enough in the Northwest they weren't going to take any more. They had to do something dramatic and this was it.

Brent left the meeting with no resolution. Among the reasons THE FEDERAL GOVERNMENT mentioned to justify their drastic cut was a computer model being used to assess carrying capacity. It appears that all the monitoring we have done over the past five decades has little or no value. This computer model, which THE FEDERAL GOVERNMENT now wants to call a calculator, has built-in assumptions such as the idea that cattle will not graze on a slope of over 40 percent. I don't know how many of you are familiar with the terrain in New Mexico, but no one has told our cattle they won't eat from a slope of more than 40 percent. They have been doing it for years.

Additionally, many of the management practices livestock producers have employed over the years like placing mineral or supplemental feed in strategic locations are designed to ensure that the animals will utilize grazing throughout the allotment and maintaining equitable distribution of grazing. These management practices were not taken into consideration by the computer calculator.

Another assumption is that cattle will not graze beyond two miles from any watering facility. That's something else nobody has told our cattle. Whole breeds of cattle are promoted for their ability to travel miles from water. Additionally, THE FEDERAL GOVERNMENT didn't even have correct information about where there were watering facilities on the operation. Some of that has since been corrected in THE FEDERAL GOVERNMENT's files, but incorrect information has already been provided to literally hundreds of people, many of whom are dedicated to removing livestock from the land.

There is also the arbitrary decision by THE FEDERAL GOVERNMENT that only 35 percent of the forage can be utilized. AND, the computer calculator did not take into account all the kinds of forage available. No forage value was given for the browse, which the main forage source on these allotments.

Brent was allowed to drive to Silver City to look at the model. Having learned his lesson about the "bully squad," he took our range consultant, a former USFS employee, as well as a range specialist from the New Mexico Department of Agriculture (NMDA) with him. None of the three saw anything to support what THE FEDERAL GOVERNMENT was proposing to do with our allotment.

As part of the NEPA process, we were told that each permittee had the opportunity to provide an "alternative" to be included in the second scoping document. The time line in which that alternative was to be produced was extremely short, especially when you consider that THE FEDERAL GOVERNMENT chose to undertake this assessment at the busiest time of year for livestock producers. We were able to secure a one-week extension through our livestock association and their attorney and presented our alternative. That alternative was printed in the scoping material published, but with the notation that it was not considered viable and would not be studied.

THE FEDERAL GOVERNMENT has since decided that they would further study our alternative, but like the misinformation on the water, the seed has been planted and the trap has been laid for those who would do away with us.

On June 9, 1998, THE FEDERAL GOVERNMENT mailed out over 600 copies of their scoping alternatives to "interested parties." Their aim was to make sure that all alternatives and issues relative to the 33 allotments were listed and they gener-

ously provided a 20-day comment period. When asked for a 30 extension on the comment period for all permittees by New Mexico Lt. Governor Walter Bradley, THE FEDERAL GOVERNMENT granted an extension ... but only for the Lt. Governor.

THE FEDERAL GOVERNMENT still plans to issue 23 draft EAs to cover the 33 allotments on August 1, 1998. Lt. Governor Bradley has until July 30 to comment. I guess that tell us all how much THE FEDERAL GOVERNMENT values the participation of state government.

THE FEDERAL GOVERNMENT says it cannot grant an extension to all permittees because their analysis must be completed by the end of the fiscal year. If the money for the analysis must be spent within the fiscal year, why did they wait until March to begin the process?

Adding insult to injury, the Forest Guardians chose to hold their annual gathering on our allotment in mid June, after we have suffered through five years of drought. That Federal land is multiple use land and the Forest Guardians have every right to use it. However, now I am told that our allotments have some 60 comments, while the other 31 have only 15 combined.

As I said, the draft EAs are to be mailed out by August 1, with a 30-day comment period for recipients to "vote" on which alternative should be utilized. Brent has no illusions about which alternative will win the vote on our allotments. It will be alternative A, which allows for no grazing, but keeps all watering facilities and improvements in place. It does not, however, make clear who will pay to keep those improvements in place. Brent and Stephanie will certainly not have the money to do. In the end, it will be the American taxpayer, your constituents, who will pay the bill, just as they are paying the bills for these citizen suits.

Between 1993 and 1998, some 75 suits have been filed in Arizona, primarily by radical environmental groups. Every time THE FEDERAL GOVERNMENT settles one of these suits, they turn around and pay the radicals for their court costs and attorney fees. There have been hundreds of thousands of dollars paid out by THE FEDERAL GOVERNMENT. During the Forest Guardians meeting in Kingston on our operation, their attorney quipped that he did not charge his clients fees, THE FEDERAL GOVERNMENT paid his bills. And we call these citizen suits?

If THE FEDERAL GOVERNMENT doesn't pay, so-called charity groups do. According to an article from the Albuquerque Journal in August 1997, which I would like to request be made part of the record, the Philadelphia based PEW Foundation pumped nearly \$700,000 into the Southwest for litigation between 1995 and 1997. And, they are just one of the contributors. So much for citizen law suits.

An additional problem with the citizen suit provisions is the way THE GOVERNMENT has reacted to them. As part of their latest litigation, the Forest Guardians filed for a preliminary injunction to remove livestock immediately from more than 100 allotments in New Mexico and Arizona. At the request of the FEDERAL GOVERNMENT and after great expense and effort, the New Mexico Cattle Growers Association and the Arizona Cattle Growers Association gained intervenor status in the case to protect the interests of the livestock producers. Although THE FEDERAL GOVERNMENT assured our organizations that they were in a good position to defend the case, immediately prior to the hearing they negotiated a stipulated agreement with the radicals that would have been extremely harmful to the livestock industry.

Because we as intervenors would not sign off on the stipulation, the presiding Federal district judge denied the stipulation. So, the Forest Guardians and THE FEDERAL GOVERNMENT simply and literally went into a back room and came out with a settlement agreement. This agreement is a piece of paper with no more value than a contract between two parties.

THE FEDERAL GOVERNMENT, however, has told the press and the public and tried to tell permittees that they have a court order to destroy our lives, our families, our culture and our country.

Based on the ESA, the agreement itself appears to be illegal. It covers potential critical habitat, potentially listed species, suitable habitat and suitable but unoccupied habitat. The ESA provides no authority for any of these. The potential critical habitat is especially frightening. Potential critical habitat is defined as anywhere a species might want to live in the next ten years. Suppose some bird or fish or bug decides it wants to live where your chair is sitting. Will you just step aside and find a new place for your office and for our government to hold hearings?

The Forest Guardians are feeling pretty sly right now. At their Kingston meeting on our allotment, they announced that they would be flying over the fences THE FEDERAL GOVERNMENT agreed to build, taking photographs. They will then bring their volunteer troops in on foot to document that fences are down. Because THE FEDERAL GOVERNMENT will be violating their settlement agreement, the Forest Guardians will then file a new suit based on that violation and demand that

cattle be removed, not because of the ESA, but because of a violation of a settlement agreement. Given the way THE FEDERAL GOVERNMENT has handled the situation to this point, there is little doubt in my mind what happens next.

There was no way THE FEDERAL GOVERNMENT could hold up their end of that settlement agreement even in the beginning. There are so many elk in the Gila Forest that there is no way to keep them from tearing down fences. If anyone were interested in the truth, the truth is that the elk are doing tremendous resource damage. Even when all the cows are gone, there will be no improvement in the environment because of the elk.

Additionally, the Forest Guardians made statements at their meeting about how “boy scouts” might cut fences or leave gates open. Any guesses as to the size and age of these “boy scouts?”

At the conclusion of the Forest Guardians three-day meeting in Kingston, gates were left open in every one of our eight pastures allowing livestock to roam over more than 100 square miles. Coincidence?

I have been told that folks are walking our pastures that are being rested trying to find proof that cattle are in them out of the rotation prescribed by our grazing permit, even though our allotments are not the subject of current litigation. It doesn't take a rocket scientist to figure who will be among the targets of the next suits.

If I sound bitter, it is because I am. I have told you a very personal story, but my story is no different than that of my fellow cattle producers throughout the West. THE FEDERAL GOVERNMENT tells us that they are not trying to put us out of business. I would ask, if you decided to cut their wages by 78 percent, would they still think they were employed? Would they be able to pay their bills and feed their families?

I taught my son not to be afraid of anything. But I am afraid and now I can't seem to make him afraid of what THE FEDERAL GOVERNMENT, our government, the government is doing to us.

Nobody among us wants to harm the environment. Who could be against protecting animals? We have cared for the land and its creatures so that we could pass it on to future generations.

We are here to beg for your help to stop what is happening to us.

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STATEMENT OF ROBERT WIYGUL, MANAGING ATTORNEY, EARTH JUSTICE LEGAL  
DEFENSE FUND, ROCKY MOUNTAIN OFFICE

Good afternoon. My name is Robert Wiygul, and I am the managing attorney of the Earth Justice Legal Defense Fund's Rocky Mountain Office, which is located in Denver, Colorado. I am also the attorney for Forest Guardians in the case in the Arizona district court which is the subject of this hearing. I appreciate the opportunity to be here and to give you my perspective on this case, and the settlement agreement which resulted from it.

I'd like to address three basic points about this lawsuit and the settlement agreement. The first is that removal of cattle from river and stream corridors was and is absolutely necessary to address the damage that livestock grazing causes to endangered species and water quality on Forest Service lands in Arizona and New Mexico. Had the Forest Service not agreed to the measures in the settlement agreement, there is little question that the Court would have issued an injunction with much harsher terms. The second is that the settlement agreement was the bare minimum necessary to, in the short term, protect stream corridors and the species that depend on them for their survival. Over the longer term, there will need to be additional reform of grazing practices to protect these watersheds. Third, I would like to address the charges that the livestock industry was excluded from the negotiations over this settlement agreement. Those charges are simply not borne out by the facts.

**The Forest Guardians lawsuit was a necessary response to what amounted to a crisis situation on Forest Service lands in the Desert Southwest.**

Stream corridors constitute the richest, most diverse and productive ecosystems in the southwestern United States, serving as home to hundreds of species, including migratory neotropical song birds and native fish. Although historically constituting just 1 percent of land in the Southwest, the habitats within these corridors—referred to as riparian areas—support an estimated 85 percent of desert Southwest species at some point in their development. During the course of the last century, however, 95 percent of these riparian systems have been degraded and destroyed.



Unmanaged domestic livestock grazing has been one of the single most important factors in the precipitous decline of these ecosystems.

For more than 20 years, the Forest Service has regarded riparian health as a top management priority on the 21 million acres it manages in Arizona and New Mexico; for more than 15 years, the Forest Service has had standards and guidelines in effect to restore these degraded ecosystems; yet today, the vast majority of riparian areas on Forest Service lands remain in unsatisfactory condition. During that same period, the United States Fish and Wildlife Service ("FWS") has listed one riparian-dependent species after another as threatened or endangered. To date, more than 20 southwestern species that are dependent on healthy riparian and aquatic ecosystems have been listed as either threatened or endangered, or are proposed for listing.

The Forest Guardians lawsuit, *Forest Guardians v. U.S. Forest Service, et al* (Civ. No. 97-2562 PHX-SMM), focused on three species that are dependent on healthy streams and riparian areas: the southwestern willow flycatcher, the spikedace, and the loach minnow. There is no serious question that uncontrolled cattle grazing has decimated the riparian habitat critical to these species. The scientific literature and documentation from the U.S. Fish and Wildlife Service and the Forest Service all establish that grazing has altered the hydrology and vegetation of these species' habitat so severely as to drive them to the brink of extinction.

The only means of recovering these areas to a fully functioning status is to remove cattle from them altogether.

Despite this fact, the Forest Service's actions to remove cattle from this critical riparian habitat has been painfully slow and halting. In one case, for example, our research showed that fences which were to have been constructed as much as three years ago to protect riparian areas from cattle had simply never been built. In other cases, cattle were placed in riparian pastures after other pastures had been exhausted. In still other cases, cattle were present in areas from which the Forest Service claimed that they had been excluded. This failure to protect critical riparian habitat violated not just the Endangered Species Act, but also the National Forest Management Act. Just as significantly, the Forest Service had very clearly failed to comply with the consultation requirements of the Endangered Species Act with respect to grazing on these allotments.

**The settlement agreement was the bare minimum necessary to, in the short term, protect stream corridors and the species that depend on them for their survival.**

The fact of the matter is that the Forest Service had simply not moved to carry out its obligations under the Endangered Species Act, and as a result it stood a good chance of losing in court. If the agency lost, the result would very likely have been a broad injunction against any continued grazing pending compliance with the Endangered Species Act.

The settlement agreement that was ultimately reached in the case was a compromise, as are all settlement agreements. In essence it required the Forest Service to remove cattle from a number of stream corridors, perform habitat reviews in other stream corridors, and insure that trespass cattle were promptly removed from places they weren't supposed to be.

These measures are not by any means overly protective. In fact, they constitute a bare minimum of safeguards for these endangered fish and birds. For the short term, they will help protect critical riparian habitat from further degradation. For the longer term, other measures will clearly be necessary. In the arid climate of the desert southwest, cattle grazing leads to erosion, changes in plant communities, and environmental degradation. Over time cattle numbers on Forest Service lands must be drastically reduced, and in some cases grazing must be eliminated altogether.

This is not a pleasant prospect for the Forest Service, it is not a pleasant prospect for the ranching community, and although you may not credit it, it is not a pleasant prospect for me. But it is an inescapable fact that decades of abuse is catching up with the public lands of the desert southwest, and the law and the public demand that those abuses be reversed.

*The livestock industry was invited to join in the negotiations over this settlement agreement.*

Finally, let me address the charge that the settlement agreement in the Forest Guardians suit was cooked up in secret, and somehow lacks legitimacy. The fact of the matter is that the New Mexico and Arizona Cattle Grower's Associations intervened in the lawsuit, and were invited to join in settlement discussions. They even participated in early settlement talks. Apparently on the advice of their attorneys, they pulled out of those talks. Had they chosen to participate, they would have been

at the table. They did not, and their complaints of exclusion cannot lie comfortably in their mouths now.

In addition, it is worth noting that the Cattle Growers' Associations requested that the Federal district court block implementation of the settlement agreement, and that court reused the request in very strong terms. The Cattle Growers could have appealed that decision or sought further relief, but chose not to. If they believed this settlement agreement was secret or illegal, their recourse was through the courts. The fact that they chose not to take that recourse says volumes.

In sum, the Forest Guardians lawsuit was a necessary response to years of abuse of the riparian areas of the southwestern National Forests. The settlement agreement that was reached in that case provides a bare minimum of protection for these areas, and its terms were negotiated in broad daylight.

Thank you for inviting me to testify here today. I welcome your questions.

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STATEMENT OF DR. ROBERT D. OHMART, ARIZONA STATE UNIVERSITY

Good afternoon ladies and gentlemen of the House Resources Committee. Thank you, Mr. Chairman, for inviting me to testify today.

Even though I am and have been employed by Arizona State University for the past 28 years, my comments today are my own based on my education and experiences. They in no way represent those of the University.

I would like to begin with a brief background to give you some feel for the basis and foundation of my testimony. I was born in eastern New Mexico where my folks worked at dry-land farming, raising some cattle, and running some sheep. A large portion of my relatives pursued these vocations in the general area as well. Dry land farming was erratic at best and if the boll weevils didn't get the cotton the hail storms usually did. Ranching was similar and my father moved to Carlsbad, New Mexico to work in the potash mines shortly before I entered school.

I received all of my primary and secondary education in Carlsbad. After graduation in 1955 I attended New Mexico State University thinking I was mature enough for a college education. Unfortunately that was not the case.

I left college and worked for two years in the oil fields of west Texas. I worked on drilling rigs and ultimately became a pulling unit operator where we replaced joints of tubing or pumps on oil wells that needed refurbishing. After two years I returned to New Mexico State University where I began working on a BS degree in Wildlife Management. To broaden my training and to insure employment after graduation I took many courses in range grasses, range management and animal sciences. I graduated in 1961 and elected to continue my education at NMSU but now in the Biology Department. I completed my Master's Degree in 1963. Though my interests were primarily in wildlife (birds) I continued taking botanical courses such as range botany and plant ecology.

I give you this background because most people on the street think college professors live and exist in ivory towers and have little or no connection with the real world. In many of my colleagues that is true, but my roots come from poor dirt farmers with little more than a fourth or fifth grade education. I have watched many a sunrise on my knees with a 12-foot cotton sack strapped to my shoulder or standing on a pulling unit starting out of the hole with an 8,000-foot string of 2-inch pipe. I feel very connected to the real world and part of my heritage is a few cows, goats and chickens in my back yard in Chandler, Arizona.

After my Master's degree I attended the University of Arizona, worked at the University of California in Davis, and eventually accepted a faculty position to develop a wildlife program at Arizona State University in 1970.

Since then, my research has taken me over much of Arizona, California, New Mexico and west and south Texas. I have worked with virtually every Federal and state agency in the Southwest.

In 1993 the Governor of Arizona appointed about 35 scientists throughout Arizona and from all state and private entities to examine and rank ecosystems in Arizona at a level of risk. EPA provided the funding and we on the Technical Committee worked two years examining and ranking the risk level for all ecosystems in Arizona.

We found that ecosystems at greatest risk in Arizona are wetlands, springs and streams. **Domestic livestock grazing is one of the top three human stressors to these ecosystems.** (The other two are water management (dams, channelization, riprapping, etc.), and groundwater pumping.)

About ten to twelve years ago I became interested in small streams and their behavior since virtually all of the large streams in the Southwest have been so intensively managed for water yield. As I began to examine small streams it became in-

stantly obvious the impacts that grazing livestock where having on these stream systems. I immediately began reading and studying the scientific literature to determine what other workers had observed and documented relative to livestock use and their impacts.

I then began to look for bench mark areas or streams that had no or very limited domestic livestock use. Not to my surprise there are few streams that had escaped heavy livestock use over the past 125 years that cattle have used the arid west. I began walking streams seeing what others had reported in the scientific literature and noting other types of ecological degradation as the result of heavy livestock use. Bench mark streams and streams where cattle have been excluded in the recent past helped me to reconstruct what the appearance of healthy streams should be.

The photographs I show you today provide vivid evidence of the damage uncontrolled livestock have on riparian habitat. These are two photos on the San Pedro River taken from the Herford Bridge. The one with the cattle in it was taken by a AZ Game and Fish employee in June 1985 (Pat O'Brien). Cattle were removed from the river on 1 January 1987. So the second photo was taken 8.5 years after cattle exclusion from the same spot and in the same month (June 1995). You can see that recovering a riparian stream is possible, but it takes time and it takes will.

*Why worry about riparian habitats? What is their importance to society?*

If southwestern civilization is to sustain itself it must have clean, reliable sources of water. Our riparian systems are vital to our survival in the southwest. When healthy they help dissipate floods, clean our water supplies and provide the greatest water yield through time. Healthy riparian areas also provide the highest water quality.

These systems also are vital to the lion's share of wildlife in the Southwest. For example, 75 to 85 percent of the wildlife in the Southwest are obligate users of riparian systems. By that I mean that this wildlife would no longer exist in the Southwest if these habitats were obliterated. Another 15 to 20 percent of the wildlife use these habitats at some time or another throughout the annual cycle. **So about 95 percent of the wildlife in the Southwest use the riparian habitats.**

*How much riparian habitat is there?*

The most accurate data come from Arizona, but I strongly suspect that is very representative for the Southwest. There are 73 million acres in Arizona. There are 5,000 miles of perennial rivers in the State. There are 260,000 acres of floodplains along the above rivers or this acreage is capable of supporting riparian floodplain habitat. **Thus, less than 1 percent of Arizona is riparian habitat yet it is vital to more than three quarters of the total wildlife in the State.** There have been a few streams excluded from livestock but their numbers are insignificant compared to the whole.

*What condition of health are these habitats in?*

In 1991 EPA reported that riparian habitats were in the poorest ecological health ever in the history of this country. In general, their ecological health has only worsened over the past 7 years.

*What is the most important ecological component for wildlife in riparian systems?*

The cottonwood/willow habitat is by far the richest wildlife habitat in the coterminous United States. This forest community is considered the rarest forest type by the Nature Conservancy.

With the above background information in front of us I think I can now easily answer Chairman Young's question as to "Why has the USFS imposed new regulations on grazing on Federal lands in the area."

The USFS has not imposed any new regulations on Federal grazing permittees, it is only obeying the laws passed by Congress and beginning to better protect natural resources on public lands.

I went to Tucson with the intent of testifying as an expert witness for the Conservation Groups and on my arrival I was informed that the USFS had stipulated to all the concerns of the Conservation Groups. Being a personal and professional colleague with many of the USFS personnel over the past 30 years, I asked many of them why they had conceded to these groups. The answer was a simple "All of these demands are in our planning and management proposals so the intent of the Conservation Groups was no different than what our intentions were. This action today only expedited our management intentions."

Mr. Chairman, we have in the past borrowed and destroyed abundant riparian resources from future generations. Unless we start making management changes today there will not be any riparian resources for future generations except for salt cedar. Wildlife will mainly be starlings, English sparrows, and pigeons. As a young-

ster I was taught that when you borrowed something to ALWAYS return it in better condition than when you borrowed it—sharpen it or whatever.

We are not doing that, Mr. Chairman, and if we are concerned about the condition of this earth for our future generations these types of management changes are imperative!

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STATEMENT OF JEFF MENGES, SECOND VICE PRESIDENT, ARIZONA CATTLE GROWERS' ASSOCIATION

### **Introduction**

Mr. Chairman, my name is Jeff Menges. I am a fourth generation rancher from southeastern Arizona and I am currently serving as second vice-president of the Arizona Cattle Growers' Association (ACGA).

I want to thank Chairman Young and the House Committee on Resources for holding this oversight hearing and for inviting me to testify on behalf of over 2,000 Arizona Cattle Growers regarding the use of the citizen suit provision of the Endangered Species Act to terminate grazing in the southwestern part of the United States. 16 U.S.C. 1540(g). I will utilize my time today by recounting for the Committee my own personal experiences with lawsuits filed by the Southwest Center for Biological Diversity and the Forest Guardians on BLM allotments that my family has been utilizing for nearly twenty years.

This process is fundamentally wrong and has left ranchers disillusioned and has increased distrust of the agency personnel we must work with on our allotments. In the case I just mentioned the cattlegrowers were brought into the process by the agency and then we sold out by the same agency that enlisted our assistance. The Arizona Cattlemen's associations had expert witnesses prepared to testify as to the benefits that can result from grazing in riparian areas, that it is not always necessary to exclude grazing to ensure the continued existence of the species in question, and that excluding grazing could be potentially harmful to some of the endangered species. Unfortunately, these witnesses were never heard because the agreement that was reached between the government and the environmental groups quickly brought an end to the "hearing."

### **Utilizing Federal Lands is Crucial to the Ranching Industry in Arizona**

First, I want to point out that the ability to continue utilizing Federal lands is crucial to the future of the ranching industry, particularly in Arizona. In our state, more than the Federal Government owns 73 percent of the land and the Indian tribes and these Federal lands are intermingled with state and privately owned lands. This intermingled land ownership pattern makes nearly every viable ranching operation dependent to some degree on the ability to utilize the Federal lands for grazing. This attack by the environmentalist groups on the practice of Federal lands grazing is having the effect of destroying the entire ranching industry in Arizona, an industry that currently provides beef for approximately seven million people. This ongoing and overzealous use of the citizen suit provision of the ESA is forcing hard working ranch families into removing their cattle from the very allotments they have spent their lives stewarding—allotments which are in better condition today than at any other time in history.

For most ranchers, it is a lifetime goal to pass the family ranch to the next generation as our parents and grandparents have done for the past one hundred years. Good stewardship of the lands from which we make our living and which makes this possible is in the best interest of every ranching family. Nevertheless, there are a number of interest groups that make no secret of the fact that they intend to remove all cattle from the Federal lands in the southwestern part of the United States and they have found a method of utilizing the ESA to do just that.

### **Environmental Groups are Systematically Removing Cattle from the Southwest**

The following is a typical scenario of how the groups proceed under the ESA: First, the group determines the area in which it wants to see the cattle removed. Next, the group finds a species that occupies or could potentially occupy the area and petitions to get the species listed as "endangered" pursuant to the ESA. Then, the group files suit against the action agency, either the Forest Service (FS) or the Bureau of Land Management (BLM) under the citizen's suit provision of the ESA which provides: "... any citizen may request to enjoin any person 'alleged' to be in violation of the Act ..." 16 U.S.C. 1540 (g)(1)(A). Typically, the group bases its suit on the allegation that the land management agency has not entered Section 7 Consultation as required for protection of the species and asserting that grazing con-

stitutes a “taking” pursuant to Section 9 of the ESA. Next, the group will ask the court to grant a preliminary injunction to prohibit any grazing activity until a decision on the merits can be made. The next step is for the environmentalist group and the land management agency to settle, out-of-court, whereby the FS or the BLM agrees to remove the cattle from the area and the environmentalist group agrees to drop the suit. More often than not, the environmentalists will obtain an award for costs and fees based upon a section within the ESA that provides authority for the ruling court to grant such awards whenever it sees fit. *Id.* at 1540 (g)(3)(B)(4). The group uses the fee award to finance filing its next lawsuit. This process repeated over and over again across the entire southwestern part of this country is effectively eliminating the entire ranching industry. In my own case, with more than 90 percent of my operation existing on Federal lands, assuming this trend continues, my only option is to take the remaining private land I have left, subdivide and sell it for real estate development.

#### **The Land Management Agencies Fail to Defend Their Own Federal Lands Grazing Programs**

Recently, I was called as an expert witness in the U.S. District Court in Tucson, Arizona where the Southwest Center for Biological Diversity and the Forest Guardians were seeking a preliminary injunction precluding continuation of grazing on over one hundred Forest Service allotments in Arizona and New Mexico. The Forest Service requested that the Arizona Cattle Growers intervene in the process. Believing the Forest Service intended on defending its grazing program, and realizing that the injunction had the potential of putting our ranchers out of business, the ACG had no alternative but to request intervenor status. Therefore, the ACGA intervened in the lawsuit at a cost to us and the New Mexico Cattle Growers of approximately \$100,000 only to have the FS settle with the environmentalists “behind closed doors” resulting in removal of cattle from all riparian areas. In this case, the cattlegrowers were neither privy to nor included in the negotiation process yet, the U.S. Department of Justice attorneys attempted to get the court to sign the negotiated settlement agreement. The court refused to sign the order but nevertheless, the FS is currently implementing the terms of the settlement agreement by modifying annual operating plans on Forest Service allotments. Something is drastically wrong with this process whereby standing to sue is as easy as alleging a violation of the ESA and where settlement agreements can be arranged without involving the affected parties in the process. A grazing permit represents a contract between the individual rancher and the government. I know of no other arena, which provides a mechanism whereby an outside interest, is allowed to alter or terminate a contract without consulting the affected parties. It is fundamentally wrong for the land management agencies to negotiate altering our grazing permits without including us in the process.

#### **Litigation is Driving Public Lands Management Decisions**

A second suit that I want to address with the Committee was filed by the Southwest Center for Biological Diversity was the result of a Biological Opinion (BO) released by the U.S. Fish and Wildlife Service regarding the BLM allotments utilized by my operation and affecting approximately 1.6 million acres and 288 BLM allotments. In this case, the environmentalists alleged that the BLM failed to consult with the Fish and Wildlife Service as required under the ESA. However, the released findings stated in the Biological Opinion established that cattle grazing was not adverse to any listed or potentially listed species and that cattle grazing would not adversely affect any potential habitat, thereby precluding the Consultation requirement. Nevertheless, the environmentalists alleged that grazing in these riparian areas constitutes a “taking” of the pygmy owl and the razorback sucker both listed as endangered pursuant to the ESA. As a result, the BLM entered into a similar process I described above resulting in an agreement that forces me to terminate grazing on approximately nine miles of riparian area within my allotments despite the fact that there is no indication that either of these species occupy these particular riparian areas, nor have these areas been designated as critical habitat. Furthermore, the BLM admits that the riparian areas within our allotments exhibit an upward trend.

In fact, I entered into a cooperative agreement with the BLM allowing me to implement a winter grazing program on these allotments due to the fact that the riparian area was in such good condition. The availability of this annual spring forage is invaluable to my ranching operation. I have been grazing this particular area under the agreement since 1990 and as recent as 1995 this was the only segment within the 29 miles of riparian area monitored by the BLM that was determined to meet the criteria for “proper functioning condition” (PFC).

I have provided pictures, which illustrate the positive vegetative response in this riparian area. Clearly, these pictures show and the BLM cannot deny that we have effectively accomplished every environmental goal established by the BLM at the onset of the grazing program. Furthermore, in 1995, I received a "grazing excellence" award from the Society for Range Management for our efforts. Yet, despite the success of my efforts, earlier this year I received a Full Force and Effect Decision by the BLM ordering me to remove all livestock from these riparian areas for the next ten years (and presumably permanently). I filed appealing the decision, but pursuant to regulations governing such appeals, the order to remove my cattle remains in full force and effect pending decision on the appeal. 43 C.F.R. 4.477. Furthermore, the burden of proving that our livestock should remain on the allotment according to the terms of our cooperative agreement lies with the rancher. Assuming I have the resources to defend an agreement on one allotment, it's unlikely that I can continue to defend myself when the next challenge arises. It becomes obvious that the administrative appeals afford little relief to the average operator.

#### **Ranchers are disillusioned by the Appearance of Impropriety Surrounding these Settlement Agreements**

This process of filing lawsuits only to romance the agency into backroom agreements with the environmental community has left ranchers disillusioned and created increased level of distrust of the agency personnel we have worked with for several years. Time and time again, the cattlegrowers have been invited to join in the litigation process by the agency only to be sold out by the same folks that asked for our help. We are astounded by the apparent willingness of the land management agencies, an arm of our Federal Government, to succumb to the demands of these opposition groups. To illustrate my point, I want to provide you with an example of how blatant this can be.

On the morning following the hearing in Tucson in which I was called as an expert witness and which I referred to earlier in my testimony, I was sitting in a room at the hotel where all parties to the litigation were gathered for a continental breakfast. A local news program announced that "one of the largest cattle removals in the history of the public lands would be occurring in New Mexico and Arizona." A large group consisting of Forest Service employees, Southwest Center for Biological Diversity and Forest Guardian members and their attorneys cheered and clapped the announcement of the previous day's settlement agreement between the groups. It was apparent to me on whose team those Federal officials were playing.

The Forest Service and BLM remain under a legal mandate to maintain grazing programs, but it is apparent by the actions of the agency that there are many of these Federal land managers that give only lip service to such programs and would much prefer to see livestock eliminated from the Southwest. What has become even more painfully obvious to the ranching community is that more and more the land management agencies we have worked with in the past are aligning themselves ideologically with the extreme environmentalist groups that make no secret of the fact that it is their goal to remove all livestock from the entire southwest. Even more disheartening for us is the fact that without the ESA citizen suit provision and provisions for reimbursement of litigation costs much of this opposition activity would not be possible. Many of us have our life savings invested in our Federal lands grazing permits and now we are forced to defend them against parties who invest little to none of their own resources.

#### **Conclusion**

The process is broken. Litigation is currently driving land management decision making and the ESA citizen suit provision is fueling the ongoing litigation efforts. The ESA is being used to zone for owls, suckers and a number of other species that absolutely do not exist and may not even historically existed in the area. Federal lands ranchers need relief from misuse of this process—these types of frivolous activities is not what Congress intended. The citizen suit provision of the ESA and the appeal process must be overhauled with consideration of the foregoing misuses in mind.

Until recently, I had been a strong supporter of the BLM and its grazing and it distresses me to be in confrontation with BLM officials that I considered as friends but I have an obligation to my family to stand for what is right and to protect my family's future. I always believed that by caring for the land like my parents, grandparents and great grandparents did I was preserving an opportunity for my own

children to engage in this ranching lifestyle should they choose. But I am now convinced that if this “runaway train,” the ESA is not stopped, my children will not have that opportunity to earn their living by ranching.

Thank you for this opportunity and, if you have any questions, I will glad to answer them.



GILA RIVER NEAR OLD SAFFORD BRIDGE,  
SMUGGLER PEAK ALLOTMENT, MARCH 1990



GILA RIVER NEAR OLD SAFFORD BRIDGE,  
SMUGGLER PEAK ALLOTMENT, JULY 1998



STATEMENT OF RENNE LOHOEFENER, ASSISTANT REGIONAL DIRECTOR, ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE, REGION 2

Mr. Chairman, thank you for the opportunity to discuss the Endangered Species Act, specifically the citizen suit provision of the ESA as it relates to grazing in the Southwest. I am accompanied by Tim Vollman, Regional Solicitor, Department of the Interior, for our Southwest Region.

In spite of the abundance of litigation that the U.S. Fish and Wildlife Service (FWS) has faced in recent years, particularly in the southwestern portion of the U.S., the FWS remains a strong proponent of the citizen suit provision of the ESA. This provision plays an important role in ensuring that non-Federal entities—including states, counties, industry associations, environmental organizations and private citizens—have a say in the protection of species and their habitat, and provides a mechanism whereby citizens can ask the courts to examine whether agencies are appropriately implementing the ESA. However, it is unlikely that the citizen suit provision invites litigation against the Federal Government, as these suits could usually be brought under other laws were this provision absent in the ESA. In fact, the ESA citizen suit provision actually assists the government to avoid some lawsuits, since it requires plaintiffs to notify the Federal agency 60 days prior to bringing a lawsuit. The Notice of Intent to Sue (NOI) provision has enabled the government to avoid some lawsuits by responding during the 60-day period to the claims made in the NOI and to work with potential plaintiffs in other instances to address issues raised in NOIs.

The situation in the Southwest is extremely challenging, not as a result of the citizens suit provision of the ESA, but due to the need to manage natural resources for which there are many competing demands in an area with extremely diverse and fragile ecosystems, large expanses of public lands, fast growing metropolitan centers, and scarce water resources. This situation has been further complicated by past problems in communication among Federal agencies and with the public, and by the extremely heavy and ever-increasing workload of the FWS and other agencies in this region.

The complexity of the social, ecological and economic situation in the Southwest is not going to change. However, Federal agencies are already changing how they communicate with each other and the public, and how they work together to ensure compliance with the ESA. We are also working closely with other agencies to streamline the consultation process and to make it as efficient and effective as possible. As for our ever increasing workload, the President's FY 1999 budget requested an increase for FWS in Endangered Species funding of \$2 million to support the additional staffing needed to ensure timely and efficient consultations, listing decisions, and recovery efforts in the Southwest.

The FWS has made and will continue to make every effort to ensure that our decisions are scientifically based, that our priorities are driven by the needs of species, and that neither are driven by litigation. The ESA requires the FWS to make listing decisions solely on the basis of the best scientific and commercial data available. It cannot be, and is not, influenced by pending or threatened litigation. At the center of much of the litigation surrounding the listing program in the Southwest has been the FWS's listing priority system. The FWS is not challenged as much on decisions of whether to list as on decisions of when to list. A large backlog of listing actions resulting from the listing moratorium and funding rescissions several years ago required the FWS to prioritize its listing actions based on critical need, biology and the relative conservation benefit provided by each type of listing activity. To assist in assigning relative priorities to listing actions, each year since the listing moratorium the FWS has issued a Listing Priority Guidance (61 FR 64475) to prioritize types of listing actions such as emergency listings, final listing decisions, candidate status, petition findings, delistings and critical habitat designations. This prioritization has necessarily resulted in many cases where the FWS postponed listing certain species in order to pursue listing other species in greater need of ESA protection. The FWS has stood behind its listing priority system, which has withstood several court challenges, because it is based on sound science and conservation need. Operating without this priority system or failing to defend this system would likely result in more, not fewer, lawsuits.

To ensure that litigation does not consume our resources and to be more responsive to other Federal agencies and the public, the FWS has instituted broad reforms in the last few years. These reforms have, in many respects, revolutionized species conservation in the United States and made implementation of the ESA more effective and efficient while providing greater flexibility and certainty to businesses and private landowners. The FWS has begun streamlining the consultation and permitting processes of the Endangered Species Program; strengthening our historical

commitment to basing species conservation decisions on sound science through an improved peer review process; increasing the use of Candidate Conservation Agreements to remove threats and prevent species from needing to be listed as endangered or threatened; providing regulatory assurances to private landowners through Habitat Conservation Plans (HCPs) with the "No Surprises" rule and the use of new tools such as "Safe Harbor" agreements; improving monitoring programs under sections 7 and 10 of the ESA; and increasing Federal agency, Tribal, State, and private sector involvement in species conservation.

Specifically in the Southwest, the FWS and other Federal natural resource-related agencies have made a commitment to collaborate with each other, the public and Tribal, State and local governments under the umbrella of the Southwest Strategy. We are working diligently to improve communications with organizations that have typically brought litigation against us. By maintaining good communications with all interested parties, including open dialogue early in the decision-making processes, we hope to decrease the amount of future litigation and to use the energy and resources of all parties that is currently applied to litigation to work creatively and proactively to enhance natural resources in the region. For example, towards the end of bringing all agencies into compliance on consultation requirements under the ESA, a Southwest Strategy Work Group has just completed streamlining processes for the Federal agencies to address the near-term section 7 workload. In addition, public involvement is being undertaken, and agencies involved in the Southwest Strategy have recently been in contact with and sought feedback from various State and Tribal government and non-governmental entities. A tribal summit was also held in New Mexico to engage tribal members and governments in dialogue about natural resources and one is being planned in Arizona also as part of the Southwest Strategy.

It is in part due to the groundwork laid by the Southwest Strategy that a possible injunction on cattle grazing was avoided on approximately 160 Forest Service allotments in Arizona and New Mexico. The Forest Service and FWS had committed to finding a new way of doing business in the Southwest and a Grazing Work Group was under formation as part of the Federal aspect of the Southwest Strategy, enabling us to come together quickly to consult on allotments identified in litigation by the Forest Guardians and the Southwest Center for Biological Diversity. This inter-agency group was not only able to expedite consultation on approximately 160 allotments that were the subject of the suit, but they were able to review and are near completion of consultation for 749 other allotments. Of those 749 allotments, only 21 required formal consultation because they fell into the category of "Likely to Adversely Affect" a listed species.

In this consultation, no effects were found on listed species for more than 600 of the 749 allotments, and a determination of unlikely to adversely affect listed species was made for another approximately 110 allotments. The Forest Service's commitment to protecting species and ecosystems is evident in riparian areas, where grazing was not likely to adversely affect any southwestern willow flycatchers or their habitat. Furthermore, management changes called for on these and future allotments would be required of the Forest Service under section 7 consultation irrespective of this or any other litigation.

As previously stated, in order to ensure that the FWS remains responsive to the needs of other Federal agencies and the public, and of the species, and to address our expanding workload, the Administration has requested a \$2 million increase in our FY 1999 budget for the Southwest. This increase in funding will allow us to proactively work with partners to reduce the need to list species, continue to address the listing backlog, respond to hundreds of consultations for other Federal agencies, and work to recover species so that they do not need the protections of the ESA.

The Service and numerous other Federal agencies have put a great deal of effort into getting the Southwest Strategy underway and are hoping to use it as an example of how we can do business in a more efficient and effective manner. We want to ensure that those individuals that make their living off the land can continue to do so, while also ensuring that native species and their habitat are protected on Federal lands, that our natural heritage is conserved, and that future listings are avoided. I am happy to report that we are currently headed in this direction. I hope I can report back to you in the near future that our efforts have been successful, and litigation in the Southwest has been reduced.

Mr. Chairman, thank you again for the opportunity to testify on this issue. I would be happy to answer any questions.

STATEMENT OF ELEANOR S. TOWNS, REGIONAL FORESTER, SOUTHWESTERN REGION,  
USDA FOREST SERVICE

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Committee today to discuss the implementation of the Endangered Species Act on grazing programs of the southwestern Region. I am accompanied by Dave Stewart, Acting Director of Range Management, Southwestern Region.

Today, I will be giving a brief overview of grazing on National Forest System lands in general and the Southwestern Region in particular.

#### **Overview**

The Forest Service has been managing rangelands for nearly 100 years, and has a long history of partnership with livestock producers who rely upon National Forest System lands. In fact, grazing on Federal lands was one of the earliest resource issues to be debated in the United States. When the debate raged over whether livestock grazing would be banned from the Forest Reserves, Gifford Pinchot, the first Chief of the Forest Service, argued that grazing be controlled rather than prohibited.

Then, as now, livestock grazing on National Forest System lands was based on scientific range research, first begun in 1897 by the Department of Agriculture in the Cascade Mountains of Oregon. The Forest Service began to implement the concept of a "special tract permit system" (as it was then known) and began to collect fees in 1906 that were intended to pay for administration of the permit system. By developing concepts such as carrying capacity and grazing systems involving deferral and rotation, these early range scientists and managers laid the foundation for sustainable resource use.

Today livestock grazing on National Forests reserved from the public domain is administered under a number of statutes, including the Granger-Thye Act of 1950, the Multiple-Use Sustained-Yield Act of 1960, the Forest and Rangeland Renewable Resources Planning Act of 1974, the Federal Land Policy and Management Act of 1976, and the Public Rangelands Improvement Act of 1978, among others. These laws augment the authority in the Organic Act of 1897 which established the Forest Service and directed the agency to regulate the use and occupancy of the forests to preserve them from destruction.

#### **The Range Management Program in the Southwestern Region**

The Southwestern Region of the Forest Service, which consists of twelve National Forests and more than twenty million acres of Federal land in Arizona, New Mexico, Oklahoma, and Texas, is a large and diverse area with ecosystems such as the Colorado Plateau in Arizona and New Mexico, the Chihuahuan semi-desert in New Mexico, the Sonoran Desert in Arizona, and grasslands in Oklahoma and Texas.

The range management program in the Southwestern Region is extensive. There are 1396 grazing allotments and 1658 permits which provide for about 2.1 million head months of grazing by cattle, horses, sheep, and goats. This represents about 18-percent of the permits and 16 percent of the head months of grazing on National Forest System lands nationwide.

Grazing in the Southwestern Region and elsewhere on National Forest System lands is authorized by a grazing permit, which is typically issued for a term of ten years. The permit specifies the number of cattle authorized to graze, the allotments where the grazing is to occur, and the season or time of use. The authorization regarding numbers and season of use do not obligate or guarantee that those numbers or seasons will be met each year. Through annual operating plans, grazing seasons and numbers may be adjusted for resource protection.

The permit also sets forth the terms and conditions which a permittee must comply with when grazing livestock on National Forest System lands. For almost a century, courts have held that grazing on Federal lands is a privilege, not a right, and statutes governing this activity expressly state that issuance of a grazing permit does not limit or restrict any right, title, or interest of the United States in any federally owned land or resources.

Decisions to issue grazing permits must be made in compliance with applicable laws. In addition to the laws previously noted, grazing on National Forest System lands is also subject to the requirements of the Endangered Species Act, the National Environmental Policy Act (NEPA), the National Historic Preservation Act, the Wilderness Act, the Clean Water Act, and other environmental laws. Decisions to issue grazing permits must also be consistent with the applicable direction contained in the land and resource management plan (forest plan) for the National Forest on which the grazing occurs.

Evaluating the legal requirements applicable to grazing and the resource condition of lands where grazing is proposed are crucial to meeting our responsibilities as resource managers. The evaluation typically occurs as part of the environmental analysis required pursuant to NEPA and is required when a grazing permit expires at the end of its ten year term or when a permit is waived to the Forest Service as part of the sale of a ranching operation.

In 1995, the Southwestern Region was faced with the expiration of 501 permits—covering 36 percent of its 1396 grazing allotments—by the end of 1996. Under Section 504 of the FY 1995 Supplemental Appropriations Bill (Public Law 104-19), Congress directed the Forest Service to develop a schedule for the orderly completion of the environmental analysis required by NEPA. In the meantime and pending the completion of the requisite analysis, Congress directed the Forest Service to issue new grazing permits on the same terms and conditions as the expiring grazing permits if the only reason not to issue a new permit was that the NEPA analysis had not been completed. Once the NEPA analysis had been completed, the Forest Service could make the adjustments to the permit terms and conditions warranted by the environmental analysis.

The Southwestern Region developed a schedule to complete the NEPA analysis by 2001 on the 501 allotments as well as all allotments where there were apparent resource concerns associated with endangered species and the protection of clean water and riparian areas. The Region has made tremendous progress in completing the allotment analysis since the enactment of the FY 1995 Supplemental Appropriations Bill. Through 1997, decisions authorizing grazing pursuant to the NEPA analysis have been made on 294 grazing allotments. We project that we will complete decisions for another 287 allotments in 1998.

Changes in allotment management may be needed over time as new information becomes available; such has been the case with respect to species listed as threatened or endangered under the Endangered Species Act.

In May 1996, the Forest Service initiated programmatic consultation on all the forest plans in the Southwestern Region regarding effects to federally listed threatened and endangered species. In June 1997, during this consultation, the Region issued special management requirements for seven of the listed species (loach minnow, spinedace, spikedace, razorback sucker, pygmy owl, southwest willow flycatcher, and Sonoran chub). The Region determined the management requirements were necessary to avoid jeopardizing these species or destroying critical habitat; these requirements were considered in the development of the Biological Opinion for the forest plans issued by Fish and Wildlife Service in December 1997. The 1998 annual operating plans which are appended to and incorporated as a term and condition of grazing permits throughout the Southwestern Region reflect the June 1997, special management requirements.

In late 1997, the Forest Guardians and Southwest Center for Biological Diversity, filed separate lawsuits against the Forest Service, alleging the agency had violated the Endangered Species Act by allowing grazing to continue before site-specific consultation with the Fish and Wildlife Service required under the Endangered Species Act had been completed. Approximately 160 individual grazing allotments on forests throughout the Southwestern Region were specifically identified in the two lawsuits.

As part of an important agreement with our colleagues at the Fish and Wildlife Service, the Forest Service initiated site-specific consultation with the Fish and Wildlife Service in February 1998, for grazing on the 160 allotments listed in the two lawsuits and approximately 600 more allotments with habitat for threatened or endangered species. The consultation was scheduled to be completed by July 15, 1998. The completion date for consultation has been extended until next month to give permittees more time to comment on the draft biological opinion. This consultation is an unprecedented accomplishment and shows a high level of coordination and cooperation between the Fish and Wildlife Service and the Forest Service. We think this accomplishment is very important in that it provides for conservation and recovery of federally listed species while allowing some grazing (albeit at reduced levels) during the course of the consultation. The Forest Service has used its best efforts to involve ranchers whose permitted allotments were among the 160 named in the lawsuits in the consultation process to the extent such involvement was authorized under the Endangered Species Act.

On March 3, 1998, Forest Guardians filed a motion for a preliminary injunction to halt grazing on most of the named allotments in their lawsuit pending completion of the site-specific consultation. Subsequently, the Southwest Center for Biological Diversity also filed a motion for a similar preliminary injunction. In order to avoid injunctions of livestock grazing, the Department of Justice negotiated stipulations with both Forest Guardians and the Southwest Center for Biological Diversity to ensure that protection of habitat for threatened and endangered species would con-

tinue at least until the completion of the consultation on the allotments. The stipulations formalize management practices that were already being implemented. As part of the stipulations, the Forest Guardians and the Southwest Center for Biological Diversity agreed to withdraw their respective motions for preliminary injunction, which, if granted, could have forced the removal of livestock from the allotments entirely. We were aware of concerns expressed by the livestock industry which had intervened in these lawsuits and regret that they declined to sign the agreement. It was our view, a view shared by the Department of Justice, that the benefits of entering into these stipulations—including avoiding a possible court ordered injunction—outweigh any disadvantage.

The consultation will soon be completed. We will continue to make progress on NEPA analysis and new allotment management plans. All of this takes time. Resolving the grazing situation in the Southwest is a priority of this Administration; in the President's FY 1999 budget for Forest Service range management, the President asked for \$65.6 million, an increase of \$20 million over FY 1998. Part of the requested increase would be allocated to the Southwestern Region to address livestock grazing. The President's FY 1999 budget for the Forest Service includes \$28.7 million for habitat management for threatened, endangered, and sensitive species, an increase of \$3 million over FY 1998. A portion of these funds would be allocated to the Southwestern Region for use to restore habitat. Habitat restoration for these species in combination with improvements in livestock management help make it possible to recover endangered species so that they may be removed from the list of threatened and endangered species.

We are committed to improving collaboration among the Federal agencies, states, local governments, tribes, and the public. It is our hope that in the future, improved collaboration among all parties will enhance sustainable resource management and reduce the polarization and litigation that currently is occurring in the Region.

### **Conclusion**

In summary, the Forest Service has been managing rangelands for nearly 100 years, and has a long history with livestock producers who rely upon National Forest System lands. The Southwestern Region manages a diverse and unique range of ecosystems and has an extensive range program. The Region is moving quickly to complete NEPA analysis, including consultation with the Fish and Wildlife Service for federally listed threatened and endangered species. Resolving the challenges in the Southwestern Region is a high priority for the Administration. We will continue to work closely with the Fish and Wildlife Service and the public to meet these challenges. Thank you for the opportunity to discuss these complex matters. This concludes my prepared remarks. I would be happy to answer questions.



## U.S. Department of Justice

Office of Legislative Affairs

*Office of the Assistant Attorney General**Washington, D.C. 20530*

The Honorable Don Young  
Chairman  
Committee on Resources  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman Young:

This is in response to your request of June 1, 1998, requesting certain statistics on cases handled by this Department's Environment and Natural Resources Division. Enclosed please find the following case lists:

Tab A: Cases filed since June 15, 1997, against the United States which have claims under the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the National Forest Management Act, and/or the Federal Land Policy Management Act, with information on court, plaintiff, date filed, and "nickname" (including, in most cases, the species name where a listed species is at issue).

Tab B: Cases filed against the United States which have claims under the ESA, NEPA, the National Forest Management Act, and/or the Federal Land Policy Management Act, in which attorneys fees or costs have been imposed by the court since June 15, 1997, with information on court, plaintiff, date filed, "nickname" and amount awarded. This list includes both judicial decisions and court-approved settlements.

Tab C: Notices of intent to sue filed under the ESA since June 15, 1997. Please note that the ESA does not require service of these notices on the Department of Justice, and therefore we do not receive all notices.

Please also note that these lists do not include cases exclusively handled by United States Attorneys' Offices.

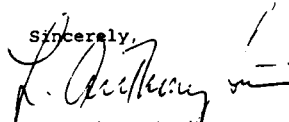
With respect to your request for information regarding the appropriations to the Department for litigation of these cases, we do not have the information in the specific form you request, but I can provide the following information.

The Environment and Natural Resource Division's annual appropriation is part of the General Legal Activities (GLA) account of the Department of Justice's annual appropriation. The GLA appropriation provides funding for five national litigating divisions, Interpol, the Solicitor General and the Office of Legal Counsel. In FY 1997, P.L. 104-208 provided \$420,793,000 for GLA; the amount apportioned to ENRD as a whole was \$58,049,000. In FY 1998, P.L. 105-119 provided \$444,200,000 for GLA, of which \$60,107,000 was apportioned for ENRD. Note that ENRD's budget is used for a range of activities and issues, including litigation related to natural resources, pollution control, Indian affairs, and land acquisition.

The statutes listed in your letter are litigated primarily by two sections of ENRD, the Wildlife and Marine Resources Section and the General Litigation Section, which also litigate a range of other statutes and issues. Funding for these sections and for the statutes you list is not specifically identified in any appropriation bills or committee reports. Further, ENRD's internal accounting system does not contain specific budget information on the statutes you have identified.

Thank you for writing to the Department.

Sincerely,



L. Anthony Sutin  
Acting Assistant Attorney General

Enclosures

cc: The Honorable George Miller  
Ranking Minority Member

UNITED STATES DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
All Cases Filed Since June 15, 1997 Under the following Statutes:  
ESA, NEPA, NFMA, AND FLPMA

06/12/98		Page 1 of 18	
Case Title	Nickname	Court Number	District
ANAK NATIVE COMMUNITY, ET AL VS UNITED STATES POSTAL SERVICE	CENALUBIT COASTAL MGMT PLAN	97-304	Alaska
ALAN HAMILTON, ET AL VS CITY OF AUSTIN, ET AL	BARTON SPRINGS POOL	98-317	Texas, West
ALASKA LEGISLATIVE COUNCIL, ET AL VS BRUCE BABBITT, SECY OF INTERIOR, ET AL		1-88-00089	District of Columbia
American Rivers, et al v. Federal Energy Regulatory Commission	Hells Canyon (Snake River)	98-70347	Ninth Cir.
AMERICAN WILDLANDS & PACIFIC RIVERS COUNCIL VS CHARLES C WILDES	COOL BEAR TIMBER SALE	98-051	Montana
AMERICAN WILDLANDS, ET AL VS DAVID GABER SUPRV/GALLATIN NATL FOREST, ET AL	GRIZZLY BEAR	97-71	Montana
AMERICAN WILDLANDS, ET AL VS US FOREST SERVICE, ET AL	ELKHORN MOUNTAINS	97-160	Montana
AMERICAN WILDLANDS, ET AL VS US FOREST SERVICE, ET AL	TOBACCO ROOT MOUNTAIN RANGE	98-4	Montana
ANCHORAGE WATERWAYS COUNCIL VS U.S. ARMY CORPS OF ENGINEERS	FORT RICHARDSON	97-300	Alaska
ANIMAL LEGAL DEFENSE FUND, ET AL V. BABBITT	RIVER OTTERS	97-2743	District of Columbia
			11/19/97



## 77

Case Title	Nickname	Court Number	District	Date Filed
06/12/98	WHITE-TAILED DEER	97-02983	District of Columbia	10/30/97
ANIMAL PROTECTION INSTITUTE, ET AL VS. ROBERT STANTON, DIR NAT'L PARK SERVICE, ET AL				
ARIZONA CATTLE GROWERS ASSOCIATION ET AL VS. US FISH & WILDLIFE SERVICE AND BLM	SOUTHWESTERN WILLOW FLYCATCHER	97-241	Arizona	11/24/97
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SOUTH DELTA WATER AGENCY, ET AL VS. UNITED STATES OF AMERICA, DEPT OF INTERIOR, BUREAU OF RECLAM., ET AL	STANISLAUS AND MERCED RIVER	97-1590	California, East	08/27/97		
SOUTH TRENTON RESIDENTS AGAINST 26, ET AL VS. FED HWY ADMIN.; JANE GARVEY; RUSSEL ECKLOFF; ET AL	VOLATILE, ORGANIC COMPOUNDS	3-97-3786	New Jersey	07/31/97		
SOUTHEAST ALASKA CONSERVATION COUNCIL VS. HADLEY POWELL, FOREST SUPRV/KETCHIKAN AREA, ET AL	LAB BAY TIMBER SALE	97-032	Alaska	10/02/97		
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	CACTUS FERRUGINOUS PYGMAY OWL	97-704	Arizona	11/03/97		

UNITED STATES DEPARTMENT OF JUSTICE  
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Case Title	Nickname	Court Number	District
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	CHIRICAHUA DOCK	97-2041	Arizona
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	FORTY FOUR SPECIES	99-0180	California, South
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	SAN XAVIER TALUSSNAIL	99-12	Arizona
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	WINKLER CACTUS	99-59	Colorado
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. ROGERS	SPIKEDACE AND LOACH MINNOW	97-519	Arizona
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. UNITED STATES FOREST SERVICE	MULTIPLE USFS GRAZING PERMITS	97-566	Arizona
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL VS. CHARLES W CARTWRIGHT, REG. FORESTER, ET AL	PONDEROSA PINE TREES	97-1529	Arizona
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL VS. COLONEL DOROTHY KLASSE, ARMY, ET AL	SOUTHWESTERN WILLOW FLYCATCHER	97-1969	California, East
SOUTHWEST CENTER FOR BIOLOGICAL, ET AL VS. UNITED STATES FOREST SERVICE	GRAZING PERMITS-MULTIPLE USFS	97-566	Arizona
SOUTHWEST WILLIAMSON COUNTY COMMUNITY ASSOCIATION INC VS. ROONEY E. SLATER	INTERSTATE 840 SOUTH	3-97-0734	Tennessee, Middle
STATE OF UTAH VS. UNITED STATES	UTAH TRUST LANDS ADMIN.	2-97-589	Utah
			10/22/97

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06/12/98		Page 17 of 18		
Case Title	Nickname	Court Number	District	Date Filed
STATE OF UTAH; ET AL VS. UNITED STATES OF AMERICA; ET AL	JUNE SUCKER FISH	2-97-627	Utah	12/03/97
SURFRIDERS FOUNDATION VS. JOHN DALTON SECY OF NAVY CHARLES C KRULAK COMMANDANT US MARINE CORPS; ET AL	SAN MATEO POINT FAMILY HOUSING	97-1364	California, South	07/24/97
SUSAN CURRY, ET AL VS. US FOREST SERVICE	BALD EAGLE, NO GOSHAWK, OSPREY	97-1081	Pennsylvania, West	06/16/97
TEJON RANCH CO., ET AL V. UNITED STATES FISH AND WILDLIFE SERVICE	CALIFORNIA CONDORS	97-6261	California, East	12/30/97
THE WILDERNESS SOCIETY, ET AL V. BOSWORTH	CLEARWATER NATIONAL FOREST	97-208	Montana	12/15/97
TINOQUI-CHALOLA COUNCIL OF KITANEHIK, ET AL VS. THE UNITED STATES DEPT OF ENERGY	NAVAL PETROLEUM RESERVE #1	98-5100	California, East	01/29/98
TULARE LAKE BASIN WATER STORAGE DISTRICT, ET AL VS UNITED STATES	STATE WATER PROJECT	98-101	District of Columbia	02/06/98
UNITED STATES V. TOMMY AND DAVID SRNSKY	RUNNING BUFFALO CLOVER	97-70	West Virginia, North	08/14/97
UTAH ASSOCIATION OF COUNTIES VS. WILLIAM J. CLINTON, PRESIDENT OF U.S. ET AL	ESCALANTE NATIONAL MONUMENT	2-97-478	Utah	06/23/97



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06/12/98		Page 18 of 18		
Case Title	Nickname	Court Number	District	Date Filed
UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMIN. VS. WILLIAM J. CLINTON, PRESIDENT, ET AL	GRAND STAIRCASE ESCALANTE NATL	2 97-492	Utah	06/25/97
VIEQUES CONSERVATION & HISTORICAL TRUST VS. DEPARTMENT OF INTERIOR, ET AL	ROAD PROJECT	97-2905	District of Columbia	12/24/97
W.A. MONCRIEF, JR, MAC'EL * GLUSSMAN PERMAN, ET AL VS. UNITED STATES OF AMERICA	DARK CANYON EIS STUDY AREA	97-565	New Mexico	08/12/97
WEST OAKLAND NEIGHBORS, ET AL VS. US DEPT OF TRANSPORTATION, ET AL	NAVY FLEET & SUPPLY CENTER	97-03927	California, North	10/09/97
WILD ALABAMA VS. JAMES RAMEY, DIST. RANGER, ET AL	RED-COCKADED WOODPECKER	97-1277	Alabama, Middle	06/25/97
WILDERNESS SOCIETY, ET AL VS. DALE BOSWORTH	CLEARWATER NATIONAL FOREST	97-0208	Montana	12/15/97
WILDERNESS WATCH FRIENDS OF BITTERROOT, ET AL VS. STEPHEN K. KELLY, US FOREST SERVICE US AGRI	SELWAY-BITTERROOT WILDERNESS	97-164	Montana	10/02/97
WILLIAM MICHAEL JONES VS. MIKE THORN, ET AL	RIVERGATE PENINSULA	97-1674	Oregon	11/26/97

TOTAL: 184

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CASE TITLE	NICKNAME	DISTRICT	AMOUNT	DEBT DATE
ANACOSTIA WATERSHED SOCIETY, ET AL. V. RODNEY E. SLATER, SECY OF TRANSPORTATION, ET AL.	BARNEY CIRCLE	DISTRICT OF COLUMBIA	\$214,350.00	12/09/98
ARIZONA CATTLE GROWERS' ASSOCIATION V. MIKE DOMBECK, GRAZING LIVESTOCK CHIEF US FOREST SERVICE	ARIZONA	ARIZONA	\$ 7,517.55	10/17/97
BIODIVERSITY LEGAL FOUNDATION V. BARBITT	PREELE'S MEADOW JUMPING MOUSE	COLORADO	\$ 15,000.00	08/14/97
BLUE MOUNTAIN ENVIRONMENTAL COUNCIL, ET AL V. US FOREST SERVICE	GREEN TREE REPLACEMENT	OREGON	\$ 9,000.00	06/15/97
BOB HOUSE, ET AL V. US FOREST SERVICE, ET AL	LEATHERWOOD FORK TIMBER SALE	KENTUCKY EAST	\$ 36,572.47	12/23/97
COALITION OF ARIZONA AND NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH, ET AL V. US FISH AND	SPOTTED OWL, MEXICAN	NEW MEXICO	\$ 45,000.00	06/19/97
CONSERVATION LAW FOUNDATION INC., ET AL V. US AIR FORCE, DONALD B. RICE, SECT OF USAF, ET AL	FEASE, AIR FORCE BASE	NEW HAMPSHIRE	\$100,000.00	10/30/97
DEFENDERS OF WILDLIFE, ET AL V. ROGERS	FLAT-TAILED HORN LIZARD	ARIZONA	\$ 27,567.34	07/11/98
DEFENDERS OF WILDLIFE V. BARBITT	CANADA LYNX	DISTRICT OF COLUMBIA	\$ 13,000.00	03/16/98

CASE TITLE	NICKNAME	DISTRICT	AMOUNT	DEBT DATE
DEFENDERS OF WILDLIFE, ET AL V. SHEILA E. WIDNALL, SECRETARY OF THE AIR FORCE	SONGBAN PRONGHORN	DISTRICT OF COLUMBIA	\$ 32,000.00	07/02/97
ENVIRONMENTAL DEFENSE CENTER V. BARBITT	CALIFORNIA TIGER SALAMANDER	CALIFORNIA, CENTRAL	\$ 2,500.00	12/18/97
FUND FOR ANIMALS, ET AL V. BRUCE BARBITT, SECY OF INTERIOR, ET AL	GRIZZLY BEAR AND GRAY WOLF	DISTRICT OF COLUMBIA	\$ 11,000.00	10/29/97
MINNESOTA HUMANE SOCIETY, ET AL V. JOHN ROGERS, ACTING DIR. US FISH & WILDLIFE SERVICE, DOI	URBAN GOOSE MGMT PROGRAM	MINNESOTA	\$ 60,000.00	12/12/97
NATURAL RESOURCES DEFENSE COUNCIL INC. V. ROBERT F. BURFORD, ET AL	COAL REGULATION	DISTRICT OF COLUMBIA	\$ 27,000.00	07/16/97
NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL V. UNITED STATES DEPARTMENT OF INTERIOR	CALIFORNIA GRAYCATCHER	CALIFORNIA, CENTRAL	\$260,000.00	07/16/97
NORTHWEST ECOSYSTEM ALLIANCE AND PILCHUCK AUDUBON SOCIETY V. DENNIS E. BSCHOR, SUPVR. NAT'L FOREST	CANYON SALVAGE SALE	WASHINGTON, WEST	\$ 8,500.00	07/10/97
OREGON COUNCIL OF THE FEDERATION OF FLY FISHERS, ET AL V. DALEY	UMPUQUA RIVER CUTTHROAT	WASHINGTON, WEST	\$ 9,542.64	09/15/97
ORLEANS AUDUBON SOCIETY V. BARBITT	GULF STURGEON	LOUISIANA, EAST	\$ 48,000.00	01/29/98
PACIFIC RIVERS COUNCIL, ET AL V. THOMAS (USFWS)	PAC NW SALMON	IDAHO	\$129,000.00	12/11/97
PUEBLO OF ISLETA, ET AL V. US DEPARTMENT OF ENERGY	SANDIA NATIONAL LABORATORY	NEW MEXICO	\$ 60,927.50	12/08/97

CASE TITLE	RECORDING	DISTRICT	AMOUNT	DEBT DATE
SAFARI CLUB INTERNATIONAL V. LUJAN	AFRICAN ELEPHANTS	DISTRICT OF COLUMBIA	\$340,725.58	06/24/97
SAVE OUR SPRINGS ALLIANCE, ET AL V. BABBITT	FOIA REQUEST, SALAMANDER	TEXAS, WEST	\$ 2,000.00	01/12/98
SAVE OUR SPRINGS ALLIANCE, INC., ET AL V. BABBITT	BARTON SPRINGS SALAMANDER	TEXAS, WEST	\$107,500.00	11/21/97
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	JAGUAR LISTING/PYGHY OWL	ARIZONA	\$ 23,500.00	11/21/97
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	NORTHERN GOSHAWK	ARIZONA	\$ 31,800.00	03/23/98
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	SOUTHWESTERN WILLOW FLYCATCHER	ARIZONA	\$ 17,851.49	11/14/97
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BUREAU OF LAND MANAGEMENT	SAFFORD DISTRICT GRAZING	ARIZONA	\$ 44,000.00	03/03/98
THE FUND FOR ANIMALS V. BABBITT	GRIZZLY BEARS	DISTRICT OF COLUMBIA	\$230,000.00	06/24/97
WILD ALABAMA V. JAMES RAMEY, DIST. RANGER, ET AL	RED-COCKADED WOODPECKER	ALABAMA, MIDDLE	\$ 1,952.46	01/09/98

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Case Title	Nickname	Date of Notice
06/12/98 American Canoe Association, Inc.		03/16/98
BENUEWAH COUNTY-ST. MARIES LEVEE RESTORATION, IDAHO	BALD EAGLES.	10/30/97
BIODIVERSITY LEGAL FOUNDATION	TOPEKA SHINER	04/03/98
BIODIVERSITY LEGAL FOUNDATION	SPALDING'S CATFISH	03/27/98
BIODIVERSITY LEGAL FOUNDATION	NEOSHO MADTOM	10/06/97
BIODIVERSITY LEGAL FOUNDATION	DESERT YELLOWHEAD	02/26/98
BIODIVERSITY LEGAL FOUNDATION	PRIEBLE'S MEADOW JUMPING MOUSE	03/29/98
BIODIVERSITY LEGAL FOUNDATION	LESSER PRAIRIE CHICKEN	07/11/97
BIODIVERSITY LEGAL FOUNDATION	CAPE SABLE SEASIDE SPARROW	04/07/98
BIODIVERSITY LEGAL FOUNDATION	HARLEQUIN DUCK-12 MONTH FINDIN	08/15/97
BIODIVERSITY LEGAL FOUNDATION	MOUNTAIN PLOVER	10/13/97
BIODIVERSITY LEGAL FOUNDATION	FLATWOODS SALAMANDER	11/28/97
BLUE STONE INDUSTRIES		06/20/97
CALIFORNIA NATIVE PLANT SOCIETY	OTAY TARPLANT	10/09/97
CENTER FOR MARINE CONSERVATION	SEA TURTLES	09/13/97
CONSERVATION LAW PROJECT	CALIFORNIA RED LEGGED FRON	12/11/97
COUNTY OF SAN BERNARDINO	SAN BERNARDINO KANGAROO BAT	05/04/98
DEFENDERS OF WILDLIFE	SONORAN PRONGHORN	05/15/98
DEFENDERS OF WILDLIFE	LOWER COLORADO RIVER	07/16/97
DEFENDERS OF WILDLIFE	CACTUS PYGMY OWL	10/07/97
DEFENDERS OF WILDLIFE	PRONGHORN (WATTS)	11/03/97
DEFENDERS OF WILDLIFE	PYGMY OWL	12/05/97
DEFENDERS OF WILDLIFE BARRY M. GOLDWATER RANGE	SONORAN PRONGHORN	10/16/97

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Case Title	Nickname	Date of Notice
06/12/98 DEFENDERS OF WILDLIFE YUMA TRAINING COMPLEX	SOMORAN PRONGHORN	10/1/97
EARTHLAW	PREBLE'S JUMPING MOUSE	05/13/98
FOREST GUARDIANS	RIO GRANDE SILVERY MINNOW	03/25/98
FOREST GUARDIANS	RIO GRANDE SILVERY MINNOW	02/27/98
FOREST GUARDIANS	PEREGRINE FALCON	06/06/98
FRIENDS OF ANIMALS	MINNESOTA WOLVES	12/25/97
FRIENDS OF ANIMALS, INC.	GRAY WOLVES	07/17/97
FRIENDS OF THE WILD SWAN	GRIZZLY BEARS	09/02/97
GREEN WORLD INC	NORTHERN RIGHT WHALE	07/25/97
GREEN WORLD INC.	TAKE REDUCTION PLAN	07/25/97
HEARTWOOD	INDIANA BATS	04/09/98
HEARTWOOD, OZARK WATCH LEAGUE, DEVIN SCHERUBEL, CHARLES PHILLIPS AND JIM BENSMAN	INDIANA BAT	02/06/98
IDAHO SPORTING CONGRESS	STEELHEAD TROUT	10/17/97
IDAHO SPORTING CONGRESS	SALMON	12/12/97
J AND L PROPERTIES	SILVER SPRINGS PROJECT	12/23/97
J. R. MILLER	SOUTHWEST WILLOW FLYCATCHER	09/15/97
JERRY D. POWERS	SOUTHWEST WILLOW FLYCATCHER	08/19/97
KLAMATH SISKIYOU WILDLANDS CENTER	NORTHERN SPOTTED OYSTER MARBLED MURRELET	04/25/98
MARK TWAIN NATIONAL FOREST (HEARTWOOD)	INDIANA BATS	06/29/97
MERIDIAN GOLD COMPANY	SNAKE RIVER SPRINGS SUMMER CHINOOK	05/27/98
Miccosukee Tribe of Indians	Wood Stork	03/16/98
NATIVE ECOSYSTEMS COUNCIL	GRAY WOLF	01/21/98

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06/12/98		Page 3 of 5
Case Title	Microname	Date of Notice
NATURAL RESOURCES DEFENSE COUNCIL	CAUFED HCP	10/30/97
NATURAL RESOURCES DEFENSE COUNCIL	NWP PROGRAM	11/21/97
NATURAL RESOURCES DEFENSE COUNCIL	CAPE SABLE SEASIDE SPARROW	02/13/98
NED MIDD	CANADA SHINER	11/21/97
NEW MEXICO CATTLE GROWERS ASSOCIATION	MEXICAN GRAY WOLF	03/24/98
NEW MEXICO CATTLE GROWERS ASSOCIATION	SOUTHWEST WILLOW FLYCATCHER	08/22/97
NEW MEXICO CATTLE GROWERS ASSOCIATION	MEXICAN WOLVES	05/08/98
NEW MEXICO CATTLE GROWERS GRAZING BO	SOUTHWEST WILLOW FLYCATCHER	08/14/97
NEW MEXICO CATTLE GROWERS-BOR	SOUTHWEST WILLOW FLYCATCHER	08/14/97
NEW MEXICO PUBLIC LANDS	SOUTHWESTERN WILLOW FLYCATCHER	08/21/97
NEW MEXICO PUBLIC LANDS COUNCIL (BUREAU OF RECLAMATION)	NMPLCBOR	08/21/97
NEW MEXICO PUBLIC LANDS COUNCIL (UNITED STATES FOREST SERVICE)	NMPLCBORFS	08/21/97
OREGON NATURAL DESERT ASSOCIATION	REDBAND TROUT	12/18/97
PACIFIC ENVIRONMENTAL ADVOCACY CENTER	NPR	11/26/97
PACIFIC LUMBER COMPANY "A"	NO SURPRISES	08/23/97
PACIFIC PROJECT	OHAI ELEPHANT	08/08/98
PACIFIC RIVERS COUNCIL	SALMON	08/21/97
QUEEN ANNE'S CONSERVATION ASSOCIATION	DELMARVA FOX SQUIRREL	11/26/97
RESTORE THE NORTH WOODS	ATLANTIC SALMON	10/08/97

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06/12/98	Case Title	Notice	Date of Notice
	ROSTARD MAX STRAUSS	RIGHT WHALE '97 STRIKE	03/19/98
	ROBERT C. EAST	ACELOT	04/23/98
	ROBERT W. BARNHART AND ALAN L. HAMILTON	BARTON SPRINGS SALAMANDER	01/20/98
	RONALD L. MERRITT	SOUTHWEST WILLOW FLYCATCHER	07/21/97
	SAN BRUNO MOUNTAIN WATCH	CALLIPPE SILVERSPOT BUTTERFLY	03/05/99
	SIERRA CLUB (LONE STAR CHAPTER)	HOUSTON TOADS	01/23/98
	SIERRA CLUB LEGAL DEFENSE FUND	SPKEDACE	10/22/97
	SIERRA CLUB LEGAL DEFENSE FUND, INC.	ALABAMA BEACH MOUSE	01/12/98
	SOCIETY FOR ENVIRONMENTAL TRUTH	PYGMY OWL	11/18/97
	Southwest Center for Biological Diversity	Southwest Willow Flycatcher	02/13/98
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	ANGELES NATIONAL FOREST - LIPS	03/18/98
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	DIXIE AND MANTI LA SAL NATIONAL FORESTIONS	03/18/98
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	LOWER COLORADO RIVER	07/05/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	FAIRY SHRIMP	08/15/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	QUEEN CHARLOTTE GOSHAWK	08/28/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	DOD-LOW MILITARY FLIGHTS	09/07/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	USAF OPERATIONS HOLLOWMAN AFB	09/08/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SOUTHWESTERN WILLOW FLYCATCHER	10/01/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	CHIRICAHUA DOCK	09/28/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	MULTIPLE USFS GRAZING PERMITS	11/14/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SOUTHWESTERN WILLOW FLYCATCHER	11/17/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SAN DIEGO AMBROSIA	11/21/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SANTA ANA RIVER WOOLY STAR	11/21/97
	SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	MEXICAN SPOTTED OWL	01/21/98



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Case Title	Nickname	Date of Notice
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	KANGAROO RATS	11/29/97
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SOUTHWESTERN WILLOW FLYCATCHER	02/12/98
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY	SOUTHWESTERN WILLOW FLYCATCHER	02/12/98
SOUTHWEST ENVIRONMENTAL CENTER	SOUTHWESTERN WILLOW FLYCATCHER	05/08/98
Split of the Sage Council	Coastal California Gnatcatcher	01/29/98
TANGLE CROSS TRUST	SOUTHWESTERN WILLOW FLYCATCHER	07/25/97 -
THE CENTER FOR MARINE CONSERVATION	HARBOR PORPOISE	02/23/98
THE CONCERNED CITIZENS OF RUTHERFORD COUNTY		08/13/97
THE HUMANE SOCIETY	KEMPS RIDLEY SEA TURTLE	07/15/97
TULALUP TRIBES OF WASHINGTON	HABITAT CONSERVATION PLAN	07/11/97
VPW HEARTWOOD	NORTHERN FLYING SQUIRREL	06/22/97
VEQUES CONSERVATION AND HISTORICAL TRUST	THE ROAD PROJECT	08/15/97
VEQUES CONSERVATION AND HISTORICAL TRUST	THE SPORTS COMPLEX	08/15/97
VEQUES CONSERVATION AND HISTORICAL TRUST	THE SPORTS COMPLEX	11/07/97
VIRGIN ISLANDS TREE BOA	TREE BOAS	10/17/97
WETLANDS ACTION NETWORK	BALLONA WETLANDS	08/20/97
TOTAL: 104		



U.S. Department of Justice  
Office of Legislative Affairs

Deputy Assistant Attorney General

Washington, D.C. 20530

July 13, 1998

The Honorable Don Young  
Chairman  
Committee on Resources  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to the information requested in your invitation to the Department to testify at the July 15, 1998, House Resources Committee Oversight Hearing on Endangered Species Act Implementation.

You requested that the Department provide "any and all agreements or settlements in [the Southwest Center] litigation between the Forest Service and any party to the litigation." In response, we have enclosed two stipulations entered into between the U.S. Forest Service and the plaintiffs, Southwest Center for Biological Diversity and the Forest Guardians. We are sending these materials in response to your requests to this Department and to the Forest Service.

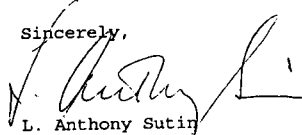
You also requested a list of pending and resolved cases involving each of five individual or organizational plaintiffs, along with certain other information about those cases. The case tracking system used by the Environment and Natural Resources Division (ENRD) is able to identify and retrieve cases by the name of the lead plaintiff, but is not able to identify cases by the name of parties who are not the lead plaintiff, or who have intervened in a case. Accordingly, the attached list contains cases in which one of the parties identified in your letter is a lead plaintiff. In addition, to the extent we could easily identify other cases in which one of the parties was either a non-lead plaintiff or an intervenor, we have included those cases on this list. This list does not include cases handled by United

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States Attorneys Offices. It contains cases brought under a variety of statutes, including the Endangered Species Act, the National Forest Management Act and the National Environmental Policy Act.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Anthony Sutin", is written over the typed name.

L. Anthony Sutin  
Acting Assistant Attorney General

Enclosures

cc: The Honorable George Miller  
Ranking Minority Member

Case Title	Case Number	State	Settlement	Settlement Date	Settlement Reason	Settlement Amount
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. PERRY	94-914	Arizona	On Appeal			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ROBIN SILVER VS CLYDE THOMPSON	93-085	Arizona	Closed	06/19/94	Voluntary Dismissal	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. UNITED STATES FISH AND WILDLIFE SERVICE	94-098	Arizona	Closed	02/06/95	Settlement/Decree	\$1,065.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL V. UNITED STATES FISH AND WILDLIFE SERVICE	94-079	Arizona	Closed	04/11/94	Settlement/Decree	\$1,000.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	94-104	Arizona	Closed	06/06/95	Settlement/Decree	\$5,145.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY; ET AL VS. WILLIAM J. PERRY	94-518	Arizona	Filed	07/26/94		
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	94-1945	Arizona	Closed	08/21/94	Settlement/Decree	\$1,971.91
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	94-1969	Arizona	Closed	11/13/97	Settlement/Decree	\$15,693.11
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	94-2039	Arizona	Closed	09/01/98	Settlement/Decree	\$31,800.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY; ET AL VS. UNITED STATES	95-1827	Arizona	Closed	07/22/97	DOJ Review	\$40,000.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	95-4071	California, East	Closed	01/03/98	Settlement/Decree	\$13,371.87
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	95-3489	California, South	Filed	11/07/95		
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	95-2138	District of Columbia	Filed	11/17/95		\$71,891.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY VS. UNITED STATES BUREAU OF RECLAMATION	95-2333	Arizona	Filed	12/18/95		
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. U.S. FOREST SERVICE	95-379	Arizona	Closed	12/02/99	Court Judgment/Pro Govt	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. ROBIN SILVER	95-2033	Arizona	Closed	07/02/97	Court Judgment/Pro Govt	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BUREAU OF LAND MANAGEMENT	96-11	Arizona	Closed	06/25/96	Settlement/Decree	\$44,000.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. JOHN Q. ROGERS, JR., DIR. (USFWS)	96-18	Arizona	Closed	03/19/97	Dismissed	

Case Title	Notations	District	Court Number	Date Filed	Stage	Date Closed	Reason	Attorney Fee Amount
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. FERG		Arizona	98-543	04/09/98	Closed	01/29/98	Court Judgment-Pro Govt	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Arizona	98-529	05/15/98	Closed	11/25/97	Court Judgment-Pro Govt	\$17,851.48
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY VS. BRUCE BABBITT, SECY OF INTERIOR, ET AL		Arizona	97-18078	05/15/98	On Appeal			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY VS. FEDERAL HIGHWAY ADMINISTRATION & ROBERT HOLLS		Arizona	98-543	05/20/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY		Arizona	98-548	05/22/98	Closed	07/23/97	Court Judgment-Pro Govt	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		California, South	98-1170	06/27/98	Closed	04/28/97	Settlement/Choice	\$17,000.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Arizona	98-498	08/08/98	Closed	03/27/98	Court Judgment-Pro Govt	\$25,800.00
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Arizona	97-5474	03/07/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL V. BABBITT		Divided of Columbia	97-595	03/28/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY VS. UNITED STATES BUREAU OF RECLAMATION		Arizona	97-18788	04/19/97	On Appeal			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY VS. THE US FOREST SERVICE, ET AL		New Mexico	97-5762	05/21/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL VS. CHARLES W. CARTWRIGHT, REG. FORESTER, ET AL		Arizona	97-1529	07/22/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. ROBERTS		Arizona	97-519	08/14/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Arizona	97-2041	10/02/97	Closed		Dismissed	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL VS. MARGARET L. JENSEN		Arizona	97-523	10/09/97	Closed	12/03/97	DOJ Review	
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. KLASSE		California, East	97-1988	10/20/97	On Appeal			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. UNITED STATES FOREST SERVICE		Arizona	97-898	10/23/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Arizona	97-794	11/03/97	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT		Colorado	98-39	01/13/98	Filed			

Case Title	Nicknames	District	Court Number	Date Filed	Stage	Date Entered	Reason	Attorney's Amount
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	SAN XAVIER TALUSSNAIL	Arizona	98-12	01/13/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	FORTY FOUR SPECIES	California, South	98-2180	02/02/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. BABBITT	ARKANSAS RIVER SHINER	New Mexico	98-322	03/18/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL V. BABBITT, ET AL	QUEEN CHARLOTTE GOSHAWK	District of Columbia	98-304	04/13/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, ET AL V. BRUCE BABBITT	SACRAMENTO SPUTTAL	California, South	98-1009	05/28/98	Filed			
SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY V. G. LYNN SPRAGUE	FOUR FOREST PLANS-LUMPS	California, North	98-2434	06/18/98	Filed			

Case Title	Midstate	District	Court Number	Date Filed	Stage	Date Closed	Reason	Amount For Award
FOREST GUARDIANS V. EPA	New Mexico	New Mexico	97-00991		Original			
FOREST GUARDIANS, LUTHERAN V. U.S. GORDON YUTTER, SECY. OF AGRICULTURE ET AL	Arizona	ARIZONA NATIONAL FOREST	98-1387	08/08/99	Closed	08/77/98	Court Judgment-Pro Govt	
WILDERNESS SOCIETY, FOREST GUARDIANS, ET AL V. US FOREST SERVICE, ET AL	Arizona	GOSHAWK HABITAT	97-1303	08/08/97	Closed	08/15/93	Court Judgment-Pro Govt	
FOREST GUARDIANS, ET AL V. RICHARD DYALE, BARFORD DISTANGER, CONROD MAT, FOREST, US FOREST SERV	Arizona	THYLIGHT CAMPGROUND	94-411	08/07/94	Closed	07/28/98	Court Judgment-Amt Govt	\$15,074.83
								\$15,307.72
								\$11,941.87
FOREST CONSERVATION COUNCIL AND FOREST GUARDIANS VS. JOHN PETUSON	New Mexico	SANTE FE NATIONAL FOREST	98-473	04/08/98	Closed	07/22/97	DOJ Review	
FOREST GUARDIANS V. WILLIAM CALONS, N.M. STATE DIRECTOR, BLM	New Mexico	SOUTHWEST WILLOW FLYCATCH	98-0803	02/22/98	Filed			
FOREST GUARDIANS V. BROWNER	New Mexico		98-528	08/13/98	Concluded		Settlement/Dispute	\$44,860.22
FOREST GUARDIANS VS. DAN GLICKMAN, SECY OF AGRIC, ET AL	New Mexico	ARIZONA WILLOW	98-1128	08/18/98	Filed			
FOREST GUARDIANS, ET AL VS. JACK WARD THOMAS, IN OFFICIAL CAPACITY AS CHIEF, US FOREST SERVICE	Arizona	SPOTTED OWL, MEXICAN S OOS	97-18448	10/1/98	On Appeal			
FOREST GUARDIANS, ET AL V. THOMAS	Arizona	MAPA BUTT	98-2258	10/01/98	Filed			
JIM POWERS AND FOREST GUARDIANS V. KING	Arizona	SPRINEDACE	97-310	03/13/97	Filed			\$18,062.09
FOREST GUARDIANS, ET AL V. BASBITT	New Mexico	RIO GRANDE SILVERY MINNOW	97-433	04/04/97	Filed			
FOREST GUARDIANS V. UNITED STATES FISH AND WILDLIFE SERVICE	New Mexico	SILVERY MINNOWS	97-481	07/11/97	Closed	08/24/97	Dismissed	
FOREST GUARDIANS V. UNITED STATES FOREST SERVICE	Arizona	SOUTHWESTERN WILLOW FLYC	97-3882	12/13/97	Filed			

Case Title	Midname	District	Court Number	Date Filed	Stage	Date Closed	Reason	Amount Fee
FOREST GUARDIAN V. BROWNER		New Mexico	99-0085	06/06/96	Filed			



Case Title	Midstate	District	Court Number	Date Filed	Stage	Date Closed	Reason	Attorney Fee Amount
ROBIN SILVER V. CHARLES A. BOYSEHER	RED SQUIRREL/GAO	Arizona	91-0387	03/08/91	Closed	06/29/92	Dismissed w/Prejudice	
DR. ROBIN SILVER, ET AL. V. BABBITT	MEXICAN SPOTTED OWL	Arizona	94-0337	02/13/94	Ongoing	07/17/97	Court Judgment-Avll Govt	\$4,000.00
MOUNT GRAHAM COALITION V. UNITED STATES FOREST SERVICE	RED SQUIRREL/SILVER, ROBIN	District of Columbia	94-437	05/25/94	Closed	07/07/97	Court Judgment-Pro Govt	\$102,418.00
EDWARD M. OBER AND ROBIN D. SILVER V. CAROL M. BROWNER		Arizona	2-94-01318/022894		Filed			
DR. ROBIN SILVER V. THOMAS (J.L. FISH AND WILDLIFE)	MEXICAN SPOTTED OWL	Arizona	94-1810	08/18/94	Closed		Court Judgment-Avll Govt	\$2,364.00
								\$8,176.00
								\$11,174.00
								\$218,823.35
COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH	MEXICAN SPOTTED OWL/SILVE	New Mexico	94-1059	09/19/94	Filed			
COALITION OF ARIZONA AND NEW MEXICO COUNTIES V. USFWS	MEXICAN SPOTTED OWL/SILVE	New Mexico	95-1385	10/27/95	Closed	07/07/97	Court Judgment-Avll Govt	
STATE OF ARIZONA EX REL. M. JEAN HASSELL V. BABBITT	MEXICAN SPOTTED OWL/SILVE	Arizona	96-3893	12/21/96	Closed	11/18/97	Dismissed	

Cause Title	Case Name	District	Case Number	Date Filed	Stage	Date Closed	Reason	Advisory Fee Amount
UNIVERSITY LEGAL FOUNDATION ET AL VS BRUCE BARRETT, SECY OF INTERIOR ET AL	CANADA LYON & ATLANTIC BAL	District of Columbia	98-0841	04/01/98	Filed			\$3,000.00
New Mexico Cattle Growers Association, et al. v. United States	Southwest Willow Flycatcher	New Mexico	98-282	3-9-98	Filed			\$7,000.00

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

SOUTHWEST CENTER FOR  
BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

U.S. FOREST SERVICE, et. al.,

Defendants.

CV-97-666-TUC-JMR

FOREST GUARDIANS,

Plaintiff,

v.

U. S. FOREST SERVICE, et. al.

Defendants.

Civil No. 97-2562 PHX-SMM

ARIZONA CATTLE GROWERS'  
ASSOCIATION,

and

NEW MEXICO CATTLE GROWERS'  
ASSOCIATION,

Intervenors.

CV- 97-2562 PHX-SMM  
CV-97-666-TUC-JMR

## STIPULATION

Plaintiffs Forest Guardians and the Southwest Center for Biological Diversity, et. al., and defendant United States Forest Service agree to the following terms in settlement of the Plaintiffs' Motion for Preliminary Injunction.

1. On the allotments listed in Forest Service Table A, the Forest Service represents that livestock have been excluded from at least 99% of occupied, suitable but unoccupied, and potential habitat of the species identified in Forest Guardians' Motion for Preliminary Injunction and that the Forest Service is not currently allowing the excluded habitat to be grazed. The Forest Service further represents that the excluded habitat will be monitored at least once every two weeks for maintenance of fences and to determine whether any livestock are present. The Forest Service will monitor the excluded habitat in the San Francisco River riparian corridor in the Luna and Pleasant Valley allotments weekly to determine whether any livestock are present. If livestock are present the Forest Service will immediately and aggressively initiate the process for removal. Forest officers will make every reasonable effort to remedy situations of livestock encroachment into excluded areas at the time of discovery. In the event the situation cannot be remedied at the time of discovery, forest officers will make every effort to verbally notify owners (within 24 hours) to remove livestock. Owners of livestock to be removed will be given a specific time frame in which to remove their livestock (normally between 5-10 days). Verbal notification will be followed by a certified letter to the owner.

In the event livestock are not removed as requested, one of two courses of action will aggressively be pursued by the forest officer.

(a) If the owner of the livestock is a national forest permit holder, action will be taken under the provisions of 36 CFR 222.4(a), and procedures outlined in FSM 2231.62 for suspension or cancellation of grazing permits. The permit holder will be sent

a certified letter within two (2) days notifying him of the violation and allowing him 5-10 days to show cause why his permit should not be suspended or canceled, and notifying him again to remove cattle from the area in question. If livestock are not removed, and the permit holder does not provide sufficient evidence why action against his permit should not be taken, suspension or cancellation action will be taken by the forest officer within five days of the time frame given to show cause.

(b) If the owner of the livestock is not a national forest permit holder, one of two or combination of two courses of action could be taken:

1) The owner will be cited under 36 CFR 261.7(a), (b), or (c). At the time of citation, the owner will be given another specified time frame to remove livestock (normally 5-10 days). If livestock are not removed, the forest officer will initiate impoundment action as specified in 2 below or the government will file a complaint in trespass against the owner, normally within a 3 week period.

2) Initiate the impoundment of livestock per the provision of 36 CFR 262.10. According to these regulations, when the owner of the livestock is known, such livestock may be impounded by the Forest Service five days after written notice of intent to impound and such notice is mailed by certified or registered mail or personally delivered to the owner. In any event, the Forest Service would normally initiate impoundment action within a 10 day period if this process is initiated.

When livestock ownership is not known, such livestock can be impounded any time 15 days after the date a notice of intent to impound livestock is first published in a local newspaper and posted at the county courthouse and in one or more local post offices. In any event, the Forest Service would normally initiate impoundment action within a 20 day period if this process is initiated.

2. On the allotments listed in Forest Service Table B, the Forest Service represents

that livestock will be excluded from at least 99% of occupied, suitable but unoccupied, and potential habitat of the species in Forest Guardians' Motion for Preliminary Injunction prior to August 15, 1998, according to the schedule set forth in Forest Service Table B. The Forest Service further represents that once exclusion is accomplished, the Forest Service will not allow these areas to be grazed and the excluded habitat will be monitored at least once every two weeks for maintenance of fences and to determine whether any livestock are present. If livestock are present, the process for removal, outlined above, will begin immediately.

3. The Forest Service will fence the perennial portion of Dry Blue Creek on the Luna allotment (approximately 50 yards) by August 15, 1998.

4. Within ten (10) days of the date of this Agreement, a U. S. Forest Service journey-level fish biologist and/or a U.S. Forest Service fisheries scientist will evaluate the suitability of East Eagle Creek for loach minnow habitat and for the presence of the species. One or two biologists designated by the plaintiffs will accompany the U.S. Forest Service to provide technical input for this determination. The permittee also will be allowed to accompany the U.S. Forest Service, or send a designated representative to accompany the U.S. Forest Service, to provide input for this determination. If the U.S. Forest Service determines that suitable loach minnow habitat exists in East Eagle drainage, the permittee will be requested to voluntarily remove livestock from the allotment until NEPA on the permit and consultation with the U.S. Fish and Wildlife is completed. If the permittee does not voluntarily comply with this request, he will be directed to remove the livestock from the allotment. The removal will be directed through modification of the Annual Operating Plan.

5. The Forest Service will continue with the cowbird trapping on the allotments identified on Forest Service Table C. On the allotments on Table C, where cowbird trapping is not scheduled for this season, the Forest Service will conduct monitoring to determine where trapping is needed. Trapping will be initiated if appropriate. It is

understood that trapping and monitoring occur both on and off national forest system lands and are conducted by various cooperating entities.

6. Whenever the Forest Service receives a report from the parties of the presence of livestock in excluded habitat, the Forest Service agrees to verify the presence or absence of livestock no later than the next working day and, if present, to initiate the livestock removal process outlined above. To the extent practicable, any report of livestock in excluded habitat should provide the name of the reporter, the date and time of the discovery, the location of the livestock, and the number of livestock present in the excluded habitat.

7. On April 14, 1998, Forest Guardians and Southwest Center for Biological Diversity will provide the Forest Service with a list of allotments where livestock have been observed in excluded habitat within the last seven (7) days. With respect to those allotments, the Forest Service agrees to initiate the livestock removal process outlined above upon verification that livestock are in the excluded habitat. To the extent practicable, any report of livestock in excluded habitat should provide the name of the reporter, the date and time of the discovery, the location of the livestock, and the number of livestock present in the excluded habitat.

8. Upon request by Forest Guardians or Southwest Center for Biological Diversity, the Forest Service will provide all data or other documents in its possession generated as a result of its bi-weekly inspection of excluded habitat (referenced above), its cowbird trapping program (referenced in Table C), and its willow flycatcher monitoring program (referenced in paragraph 5).

9. With respect to the Dillman Creek, Trout Creek, Spur Lake and Underwood Lake allotments, the Forest Service will conduct a field review by June 1, 1998 to determine whether suitable or potential flycatcher habitat occurs on these allotments. A representative of Forest Guardians and Southwest Center for Biological Diversity will be

invited to accompany the Forest Service on these field reviews. The permittees also will be invited to accompany the U.S. Forest Service, or send a designated representative to accompany the U.S. Forest Service, to provide input for this determination.

10. With regard to the Luna allotment the Forest Service will conduct a field review to determine whether suitable or potential habitat southwest willowflycatcher or loach minnow habitat occurs on the San Francisco River and Stone Creek as it flows through the allotment. A representative of Forest Guardians and Southwest Center for Biological Diversity will be invited to accompany the Forest Service on these field reviews. The permittees also will be invited to accompany the U.S. Forest Service, or send a designated representative to accompany the U.S. Forest Service, to provide input for this determination.

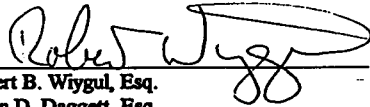
11. By May 15, 1998, the Forest Service will provide to Plaintiffs a map or maps indicating the location of the existing and planned areas of exclusions.

12. Forest Guardians and the Southwest Center for Biological Diversity agree that they will not seek preliminary injunctive relief with respect to the allotments identified in Forest Guardians' Motion so long as the Forest Service complies with the terms of this stipulation for the duration of the ongoing grazing consultation.

13. The parties agree that the terms of this stipulation are enforceable. This agreement does not constitute an admission by any of the parties of any claim or defense in the lawsuit or of any issue involved in the ongoing consultation.

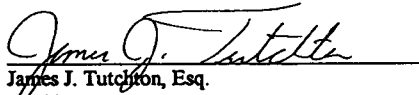
Dated this 16th day of April, 1998.





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Attorney for Federal Defendants

Forest Service Table A. Allotments with at least 99% of the habitat excluded.

Forest	Allotment
<b>APACHE-SITGREAVES</b>	<del>Grass</del>
	Black River
	Bobcat-Johnson
	Dark Canyon
	Double Circles
	East Eagle
	Fish Hook
	Hickey
	Lower Campbell Blue
	Mud Springs
	Pigeon
	Pleasant Valley
	Raspberry
	Steeple Mesa
	Tule springs
	Turkey Creek
	Wildbunch
<b>CARSON</b>	
	Miranda
	Olla-Ranchos
	Rio Pueblo
<b>CIBOLA</b>	
	Brennan
<b>GILA</b>	
	Alexander
	Alma
	Apache Canyon
	Cedar Breaks
	Corner Mountain
	Deep Canyon
	Devils Park
	Dry Creek
	Eagle Peak
	East Apache
	Govina
	Harden Cienega
	Jordan Mesa
	Kelly
	Little Rough
	Lower Plaza
	<del>Luna</del>
	Mangas Valley
	Pleasanton/Lightning Mesa

Forest Service Table A. Con't.

Forest	Allotment
<b>GILA</b>	
	Potholes
	Sapillo
	West Apache
	Whiterocks
<b>PRESCOTT</b>	
	Antelope Hills
	China Dam
	Copper Canyon
	Jerome
	Perkinsville
	Sand Flat

Forest Service Table B. Allotments with at least 99% of the habitat planned for exclusion.

Forest	Allotment Name	Planned Ex. Date
Apache/Sitgreaves		
	Cow Flat	5/1/98
	Red Hill	6/1/98
Gila		
	Black Bob	4/15/98
	Devils Park	8/15/98
	Frisco Plaza	8/1/98
	Gila River	4/15/98
	Harve Gulch/R.Park	5/15/98
	McCarty	8/15/98
	Taylor Creek	5/15/98

**Forest Service Table 4-6**  
**Allocations Based on Penalties Table 2**

	Occupied SWP Site is Within 6 miles of Grazing During the Breeding Season	Covered by Cowbird Trapping
<b>APACHE-SITGREAVES</b>		
ALPINE	YES	YES
BEEHIVE	YES	YES
BURRO CREEK	YES	YES
COYOTE-WHITMER	YES	YES
CROSS BAR	YES	YES
ELC	YES	YES
ESCUJILLA	YES	YES
GREER	YES	YES
L. CAMPBELL BLUE	YES	YES
NUTRIOSO SUMMER	YES	YES
POOL CORRAL	YES	YES
RUDD KNOLL	YES	YES
SHEEP SPRINGS	YES	YES
STONE CREEK	YES	YES
TENNEY	YES	YES
TURKEY CREEK	YES	YES
U.CAMPBELL BLUE	YES	YES
VOIGT	YES	YES
WILLIAMS VALLEY	YES	YES
<b>CARSON NF</b>		
CAPULIN	N	NA
MIRANDA	YES	YES
OLLA-RANCHOS	No Grazing Permitted	YES
RIO PUEBLO	YES	YES
TCLP	YES	N
<b>CIBOLA NF</b>		
AGUA FRIA	N	NA
BLUEWATER	N	NA
BRENNAN	N	NA
COTTONWOOD/TUCES	N	NA
DAN VALLEY/DENT	N	NA
MT SEDGEWICK	N	NA
RAMAH	N	NA
STINKING SPRINGS	N	NA
WINGATE	N	NA
<b>GILA NF</b>		
LUNA	YES	YES
ROUGH CANYON	YES	RESEARCH
SPAR CANYON	YES	RESEARCH
<b>PRESCOTT NF</b>		
ANTELOPE HILLS	YES	N
BALD HILL	YES	YES
CIENEGA	YES	YES
COPPER CANYON	YES	YES
JEROME	N	NA
VERDE	YES	YES
YOUNG	YES	YES
<b>SANTA FE NF</b>		
EROSION	N	NA

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

SOUTHWEST CENTER FOR	)	Civil No. 97-666-TUC-JMR
BIOLOGICAL DIVERSITY, et al.,	)	(Consolidated)
Plaintiffs,	)	
v.	)	
U.S. FOREST SERVICE, et al.,	)	
Defendants.	)	
FOREST GUARDIANS,	)	Civil No. 97-2562-PHX-SMM
Plaintiff,	)	
v.	)	STIPULATION IN SETTLEMENT OF
UNITED STATES FOREST SERVICE &	)	SOUTHWEST CENTER'S MOTION
DANIEL GLICKMAN, et al.,	)	FOR A PRELIMINARY INJUNCTION
Defendants.	)	

WHEREAS, plaintiffs Southwest Center for Biological Diversity, Southwest Trout and Sky Island Watch (collectively "Southwest Center") filed this action on October 23, 1997, alleging that the Forest Service (USFS) was in violation of Sections 7 and 9 of the Endangered Species Act, 16 U.S.C. § 1531 et seq. (ESA) by failing to enter into consultation with the United States Fish and Wildlife Service (FWS) on the effects of livestock grazing within certain allotments on species listed as threatened and endangered under the ESA and their habitat;

WHEREAS, on February 9, 1998, the USFS and the FWS entered into a Grazing Consultation Agreement (GCA) establishing a process for consulting under Section 7 of the ESA on the effects to listed species of grazing on the allotments named in this litigation;

WHEREAS, pursuant to the terms of the GCA, the USFS and the FWS have committed to completing the above-referenced consultation by July 15, 1998, on those allotments where ongoing grazing is determined to have an effect on listed species;

WHEREAS, on April 7, 1998, Southwest Center moved for a preliminary injunction pending completion of consultation to enjoin grazing on the allotments named in the Southwest Center complaint;

WHEREAS, on April 16, 1998, Southwest Center and the federal



defendants reached a stipulation regarding a number of the allotments named in the Southwest Center complaint;

WHEREAS, with regard to the remaining allotments, the Southwest Center and the federal defendants believe the Southwest Center's motion for a preliminary injunction can be settled without further litigation, the parties hereby agree as follows:

1. With regard to the Bullard Peak, Canyon del Buey, Centerfire, Citizen, East Sand Flat, Pueblo allotments, the Forest Service has determined that ongoing grazing is having no effect on the species at issue and that therefore consultation is not necessary; with regard to the Dagger allotment, consultation has already been completed and a biological opinion has been issued. Therefore, injunctive relief pending completion of consultation is neither necessary nor appropriate. However, plaintiffs reserve the right to challenge the substance of the above determinations in a subsequent action.

2. With regard to the Redstone allotment, there are currently no known permitted livestock on this allotment. Although there are feral cattle of unknown origin that currently exist on the allotment, they are difficult to gather and must be identified prior to disposition. The Forest Service has suspended the permit for this allotment, has issued a notice of impoundment for trespass livestock, and intends during June 1998

to contract for removal of those livestock within sixty days.

3. With regard to the Limestone, Picnic and Watson Mountain allotments, there are no livestock currently present on the allotments, nor are livestock scheduled to come onto these allotments until after consultation is complete. An injunction prohibiting grazing pending completion of consultation on the allotments is neither necessary nor appropriate. However, if consultation has not been completed when livestock come onto the allotments Southwest Center reserves the right to seek injunctive relief on these allotments.

4. On the allotments listed in Forest Service Table A, the Forest Service represents that livestock have been excluded from at least 99% of occupied, suitable but unoccupied, and potential habitat of the species identified and that livestock are currently excluded from the habitat in these allotments. The Forest Service further represents that the excluded habitat will be monitored at least once every two weeks for maintenance of fences and to determine whether any livestock are present. If livestock are present the Forest Service will immediately and aggressively initiate the process for removal. Forest officers will make every reasonable effort to remedy situations of livestock encroachment into excluded areas at the time of discovery. In the event the situation cannot be remedied at the

time of discovery, forest officers will make every effort to verbally notify owners (within 24 hours) to remove livestock. Owners of livestock to be removed will be given a specific time frame in which to remove their livestock (normally between 5-10 days). Verbal notification will be followed by a certified letter to the owner if necessary.

In the event livestock are not removed as requested, one of three courses of action will aggressively be pursued by the forest officer.

(A) If the owner of the livestock is a national forest permit holder, action will be taken under the provisions of 36 C.F.R. 222.4(a), and procedures outlined in FSM 2231.62 for suspension or cancellation of grazing permits. The permit holder will be sent a certified letter within two (2) days notifying the permit holder of the violation and allowing him 5-10 days to show cause why the permit should not be suspended or canceled, and notifying him again to remove cattle from the area in question. If livestock are not removed, and the permit holder does not provide sufficient evidence why action against the permit should not be taken, suspension or cancellation action will be taken by the forest officer within five days after the time frame given to show cause.

(B) If the owner of the livestock is not a national forest

permit holder, one of two or combination of two courses of action could be taken:

1) The owner will be cited under 36 C.F.R. 261.7(a), (b) or (c). At the time of citation, the owner will be given another specified time frame to remove livestock (normally 5-10 days). If livestock are not removed, the forest officer will initiate impoundment action as specified in 2 below or the government will file a complaint in trespass against the owner, normally within a 3 week period.

2) Initiate the impoundment of livestock per the provision of 36 C.F.R. 262.10. According to these regulations, when the owner of the livestock is known, such livestock may be impounded by the Forest Service five days after written notice of intent to impound and such notice is mailed by certified or registered mail or personally delivered to the owner. In any event, the Forest Service would normally initiate impoundment action within a 10 day period if this process is initiated.

(C) When livestock ownership is not known, such livestock can be impounded any time 15 days after the date a notice of intent to impound livestock is first published in a local newspaper and posted at the county courthouse and in one or more local post offices. In any event, the Forest Service would normally initiate impoundment action within a 20 day period if

his process is initiated.

5. Whenever the Forest Service receives a report from Southwest Center of the presence of livestock in excluded habitat, the Forest Service agrees to verify the presence of livestock no later than the next working day, and if livestock are present, to initiate the livestock removal process outlined above. To the extent practicable, any report of livestock in excluded habitat should provide the name of the reporter, the date and time of the discovery, the location of the livestock, and the number of livestock present in the excluded habitat.

6. Upon request by Southwest Center, the Forest Service will provide all data or other documents in its possession generated as a result of its bi-weekly inspection of excluded habitat (referenced above).

7. By July 6, 1998, the Forest Service will provide to Southwest Center a map or maps indicating the location of the existing areas of exclusions.

8. Southwest Center agrees that it will not seek preliminary injunctive relief with respect to the allotments identified in Southwest Center's motion so long as the Forest Service complies with the terms of the stipulation for the duration of the ongoing consultation.

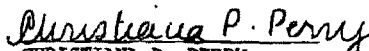
9. Southwest Center and the federal defendants agree that

the terms of this stipulation are enforceable. The Forest Service represents that it intends to make every effort to comply with its terms in good faith. If, however, through unforeseen circumstances, events should change after the agreement is executed, the Forest Service will notify the Southwest Center as soon as reasonably possible of the change and the reason therefor. The parties agree to attempt to work reasonably toward a mutually acceptable solution. If the parties are unable to agree, Southwest Center reserves the right to renew its motion for preliminary injunctive relief with regard to the allotment(s) in question. This agreement does not constitute an admission by any of the parties of any claim or defense in the lawsuit or of any issue involved in the ongoing consultation.

Dated this 16<sup>th</sup> day of June, 1998.

  
 JAY TITCHTON  
 Attorney for Plaintiffs

Date: 6-17-98

  
 CHRISTIANA P. PERRY  
 Attorney for Federal  
 Defendants

Date: 6-16-98

**TABLE A**  
(Allotments with 99% of the Habitat Excluded From Grazing)

FOREST	ALLOTMENT	SPECIES
Apache-Sitgreaves	Bush Creek Foote Creek	Loach Minnow, SWWF Apache Trout, SWWF, Loach Minnow
Coconino	Bar T Bar Beaver Creek  Buckhorn  Fossil Creek  Hackberry/Pivot  Sedona  Thirteen Mile Rock  Buck Springs	Spinedace Spikedace, SWWF, Razorback Sucker Spikedace, SWWF, Razorback Sucker Spikedace, SWWF, Razorback Sucker Spinedace, SWWF, Razorback Sucker Spikedace, SWWF, Razorback Sucker Spikedace, SWWF, Razorback Sucker Spinedace
Coronado	Bear Valley Montana	Sonora Chub Sonora Chub
Prescott	Squaw Peak	Gila Topminnow, Razorback Sucker
Tonto	Chrysotile Haystack Butte Hicks/Pikes Peak Red Creek  Sears Club/Chalk Mtn  Sedow	Razorback Sucker Razorback Sucker Razorback Sucker Razorback Sucker, SWWF Razorback Sucker, SWWF Razorback Sucker

## STATEMENT OF SANDY AND MARVALENE SANBORN

The following is a brief synopsis of the tangle of agency actions which threaten to put the Sanborn Land and Cattle Company ("Sanborn LCC"), an Arizona livestock company, out of business. In July 1997, the Forest Service told us that we could no longer graze the Salt River/Roosevelt Lake Pasture which is included in our allotment because grazing would harm the Southwest Willow Flycatcher ("SWWF"). For the past three years, we had removed our livestock during the nesting season but had been allowed to return in late summer. By closing the pasture, the Forest Service denied us access to our water rights in the Salt River. Due to the Forest Service's antiquated and unwritten policy of not allowing any range improvements until there is a final allotment management plan ("AMP"), we were prohibited from installing substitute water, and lost several head due to dehydration.

For the last year, we have been shut out of this critical pasture, even more critical water—all due to a selectively applied Endangered Species Act ("ESA") policy. The District Ranger's decision is on appeal but we as an elderly couple, simply could not do the physical labor to ride the cattle to keep them out of the pasture (with no fences to speak of) and deliver water as well.

We acquired the grazing permit when we purchased the ranch in 1994. We are an older couple and our health has been directly harmed by the Forest Service's action, their treatment of us, and the stress of trying to understand and comply with regulatory decisions which make no sense. Sandy Sanborn underwent heart surgery shortly after the Forest Service closed the Salt River pasture in the fall of 1997 and postponed the surgery in order to try to deal with the Forest Service. The threat of losing the huge investment represented by the ranch and the home is too much to face alone and without help. We tell you the following experiences to show how the Forest Service's implementation of the ESA, is causing havoc, bears little or no relation to the resources or the species to be protected and requires congressional intervention.

*The Grazing Permit*

Our ranch, like many in the western livestock industry, is our primary asset. We own, as Sanborn LCC, Grazing Permit Number 12-795 for the Sierra Ancha and the Poison Springs allotments located on the Tonto National Forest, east of Phoenix. Sanborn LCC is authorized to graze approximately 950 cattle on two grazing allotments. However, we never have grazed the full permit numbers due to the last several years of drought. In 1997, we brought off an additional 50 head and in 1998 agreed to reduce our numbers to 370 head plus yearlings.

The Poison Springs allotment was originally divided into 25 pastures, including three located on the Salt River which the Forest Service now collectively calls the "Salt River/Roosevelt Lake" pasture. We were originally told that the pasture would be closed to grazing during the spring (April 15 through July 31) in order to protect the SWWF, now listed as an endangered species. We complied with this direction and removed all of the livestock for the nesting season.

*SWWF Habitat To Be Flooded*

When we bought the ranch, we also understood that the Bureau of Reclamation ("BOR") proposed to expand water storage for the East Roosevelt Dam and Lake, and it would inundate part of the Salt River pasture for a few months every few years. The BOR proposal to increase water storage for the Phoenix metro-area is also being litigated but has been upheld.

The partial allotment closure is contradicted by the fact that this pasture will be regularly under water by the BOR's expansion of the Roosevelt Dam to hold an additional 30,000 acre feet of water. This will increase the surface area of the lake by more than 2,000 acres. While the pasture can be grazed when not under water, Forest Service, BOR and USFWS all acknowledge that the area will lose the trees which create the SWWF nesting habitat.

We believe that due to the planned flooding of this pasture, the land along the Salt River was never designated critical habitat for the SWWF. Certainly, the USFWS reviewed and approved the flooding of this area and the loss of the suitable nesting habitat.<sup>1</sup> The USFWS issued a non-jeopardy opinion approving the Bureau's projection of a total loss of this area as habitat for the SWWF.

*The Forest Service Decision*

<sup>1</sup> The USFWS also designated more than 300 river miles in Arizona as "critical habitat" for the SWWF—none of which are in or near the Sierra Ancha or Poison Springs allotments of the Tonto National Forest. 62 Fed. Reg. 39129 (July 22, 1997); 62 Fed. Reg. 44228 (August 20, 1997) (correction).



In May 1997, the Regional office of the Forest Service issued Interim Direction to protect the SWWF ("SWWF Direction"). This direction was prepared and implemented without any public comment or notice and without amending the respective forest plans. In preparing this direction, the Forest Service relied on unpublished and now unavailable biologists' opinions, as opposed to hard scientific evidence, that there is a direct link between cattle grazing and parasitism of SWWF nest sites by cow birds. The same team ignored other scientific work calling into question the validity of this assumption. This direction called for the removal of all activities on the National Forests, including livestock grazing, recreation, and other human activity.

In the summer of 1997, the Regional Forester directed the forests to immediately implement the SWWF direction. The District Ranger of the Tonto National Forest, based entirely on this direction, closed the Salt River pasture to all livestock grazing for the foreseeable future on July 22, 1997. To our knowledge, the District Ranger did not close any other pasture on the Tonto National Forest.

When we first bought the ranch and the National Forest grazing permit, the Forest Service was in the process of developing an AMP for an entire drainage on the Tonto National Forest. Today, the Sanborn LLC AMP is still not final, even though the Forest Service completed a final environmental assessment, which was challenged for not being an environmental impact statement ("EIS"), and then published a final EIS in October, 1997.

Based on the alleged threat of livestock to the SWWF, in July, 1997, the Forest Service closed pastures of the permit (renamed the Salt River pasture). This is very same area which will be inundated by the expansion of the East Roosevelt Dam. The irony is that even though USFWS declared the flooding of the SWWF habitat to be okay, the Forest Service used the SWWF as the reason to deny us both our grazing access and access to critical water rights by permanently closing the area to all livestock grazing. This decision completely disrupted our operation because it is located along the river and without access we cannot use the water we own.

The District Ranger's decision to close the Salt River pasture occurred immediately after a "tiger team" from the regional office met with the District Ranger and her staff to demand immediate action. The team members castigated and threatened District Ranger staff members who objected to the direction due to lack of due process and questions about the biology.

The Salt River pasture provides the primary source of water for the entire allotment and with the closure of the pasture, we have had to haul water on an almost daily basis. The Forest Service has adhered to a policy of not approving additional range improvements, such as water development or fences, until the AMP was done. This process was started in 1992, long before we purchased the ranch, and is still not complete. The Forest Service approved the AMPs for the other allotments included in the same final EIS in October of 1997. However, the Forest Service excluded our allotment shortly after their appeal of the decision to close the Salt River pasture. Thus, the Forest Service has put us in a lose-lose situation, with no access to water, during a drought, and no opportunity or ability to pursue other solutions.

Despite our cooperation and efforts to work with the Forest Service, the Forest Service will not authorize any fences or water projects that will provide water to pastures where there is no natural water. The Forest Service's only reason is that the AMP is not yet final but that the same time, the Forest Service itself has delayed issuing the Sanborn LCC AMP, although it approved the AMPs for all of the other ranches covered by the EIS.

Not until this year, after entering into an agreement with the Forest Guardians, did the Forest Service act to close other grazing allotments to grazing based on the SWWF direction. Now, we understand that several hundred permittees are also being forced to remove their livestock from riparian areas and related pastures, with little or no notice. The direction is not applied to other uses, such as recreation use, even though all uses were identified as harmful.

We requested a stay of the District Ranger's decision, based upon the significant economic harm and the serious questions about the alleged connection between SWWF and livestock grazing. This request for a stay was denied, based on erroneous accusations leveled by the Supervisor's office that we had grazed the full permit numbers and refused to remove livestock during the drought. A few months later, the Forest Service decided to stay the entire appeal, an action for which they had no legal authority, on the basis that the USFWS would revisit its biological opinion. Sanborn LCC objected to this stalling tactic in a letter to the District Ranger and never received the courtesy of a response. The USFWS did revisit the biological opinion but did not change the prescription for the SWWF, which is closure of the pasture for the nesting season.

The Forest Service claimed that it has delayed its decision on the Sanborn's AMP due to new information concerning the SWWF. This new information is not the U Bar Ranch data, which the Forest Service has discounted as not applicable. The 1998 revised USFWS biological opinion only requires removal of livestock grazing during the nesting season, not year round. Thus, the USFWS biological opinion does not support the Forest Service's decision to close this pasture to grazing permanently.

The Forest Service's actions cannot be supported on procedural grounds or scientific grounds. The SWWF direction was adopted secretly, despite express requirements in the law and regulations that such direction have public notice and comment. By comparison when the Forest Service tried to adopt direction regarding the red cockaded woodpecker or the northern goshawk, the Sierra Club prevailed in appeal on the basis that any such direction had to be adopted as part of a public process.

*Assumption of Harm to the SWWF Contradicted*

The Forest Service has continued to discount the results of a five year study on the U Bar Ranch, which shows that grazing does not lead to greater parasitism and that SWWF is not harmed by livestock grazing. This year Forest Service biologists are reconsidering the presumed link between loss of nest sites and livestock grazing. Nevertheless, due to a combination of hostility to grazing program within the Forest Service and the threat of ESA litigation, Forest Service officials continue to remove livestock grazing on the basis of the ESA.

The latest scientific evidence shows that the presumed connection between the decline of the SWWF and livestock grazing cannot be supported. The work done on the U Bar Ranch is the only study seeking to measure the relationship between grazing and the SWWF. It is debunking most of the assumptions now being employed by the Forest Service. Despite this credible new information, the Forest Service is ignoring the results of the U Bar study, on the assumption that the habitat is different, the Forest Service assumes that all cattle are harming the SWWF, without addressing the specific facts of the particular allotment.

We pointed out that the allotment has dense stands of tamarisk where the SWWF nests and roosts and the cattle do not stand in the nest habitat, because they cannot trail through the trees and brush. The Forest Service's claim that the removal of livestock grazing is due to the USFWS direction and possible jeopardy opinion makes no sense, if USFWS has already approved inundation of this habitat. Moreover, it makes no sense to deny us the right to graze livestock when this area is not critical habitat and the Forest Service has failed to consider reliable scientific evidence that livestock grazing is not the cause of cow birds taking over SWWF nests.

The Sanborn LCC situation was only exacerbated by the fact that the Forest Service states that it relied on reports from its biologists but those reports are not included as part of the appeal record, and the Supervisor declined to provide a copy of the report, although originally he agreed to do so.

For the last year, we have suffered serious losses as a direct result of the Forest Service's mechanical application of the SWWF Direction—which itself was (a) admittedly based on incomplete information, (b) adopted in secret, without the procedural protections guaranteed by the National Forest Management Act, Federal Land Policy and Management Act, and the National Environmental Policy Act; and (c) apparently so weak and biased that the Forest Service will not release the actual data allegedly supporting the closure of the pasture.

We have completed the administrative appeal process and are awaiting a decision. However, given the Forest Service's denial of the stay request a year ago and its recent refusal to even disclose the biological report which was the basis for the decision to close the pasture, we are not optimistic. The Forest Service treatment of Sanborn LCC reflects an institutional hostility to livestock grazing and a willingness to sacrifice this industry.

It is long past time for someone to bring common sense and fairness to the management of the National Forests. Many other livestock grazing permittees, like Sanborn LCC, face ever-growing limits on their grazing permits which are adopted without any sound basis in science, fact, or common sense. Recent litigation and the mere threat of litigation appears to persuade the Forest Service to simply turn on the livestock industry and become a willing partner in the environmental groups' efforts to end all livestock grazing on the National Forests.

We urge this Committee to begin drafting legislation to prevent the Forest Service from disrupting the legal rights of grazing permittees, without following fair and open procedures in the development of ESA management guidelines, and evaluation of which guidelines can be supported by science as opposed to emotion and political

posturing. Unless Congress acts, the Forest Service will continue to sacrifice the multiple-use interests to the demands of a few who oppose “impure” uses of the Federal lands. Only seven years ago, the attacks were on the logging industry, which has largely disappeared from the Arizona National Forests. This year is livestock grazing. In the next few years, recreation use will be the target. We also urge the Congress to revise the Endangered Species Act so that it cannot be used as a tool by agencies to ignore the legal rights of long-standing permittees and land uses in favor of politically motivated litigants.

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STATEMENT OF BRIAN AND DEB JENNINGS, LAZY H CROSS RANCH, C/O IRVING POWER PLANT, CAMP VERDE, ARIZONA

July 28, 1998

Dear Representative Don Young,

We would like to submit this letter as written testimony for record on the ERA hearing on 7/13/98.

My wife and I have owned the Skeleton Ridge Allotment grazing rights on the Tonto National Forest for 23 years. We’ve operated on a rest rotation management plan for 18 years. Included with that is 18 years of trend monitoring, as well, that show our range conditions to be in an upward to stable trend in all aspects.

In 1994 we decided to sell our ranch. In March of 1995, we asked the Forest Service to update our NEPA plan to cover the latest endangered species requirements, which would be required either to transfer or reissue our permit. It took two and a half years for Forest Service and Fish & Wildlife Service to go through the motions and come up with an opinion. The “on the ground” forest service people couldn’t see or find any adverse effects from our current grazing plan or numbers. However, the Fish & Wildlife Service came back with an opinion of “may effect but no adverse effect” with real strict usage guidelines. They had NO sound science to back up their decision, which will greatly restrict the current grazing plan.

In the last three and a half years, due to lawsuits and deal making between the Forest Service and numerous environmental groups to prevent lawsuits, new stricter use guidelines, deals to completely remove livestock grazing from designated occupied, unoccupied or potential habitat and all the unrest among the agencies, we have lost 5 or 6 (at least) potential buyers. When they talk to the Forest Service, they aren’t given any answers as to whether or not grazing will be allowed and if so, whether it’ll be at current numbers or reduced numbers. This push for proposed changes in Forest Service guidelines will force us or anybody who buys this ranch to likely lose a third or more of the grazing capacity and/or build at least 30 miles of fence which will have to be constantly maintained, rain or shine, in very rough country. This will cost more than the current value of the permit. We sure can’t blame anyone for not wanting to invest in all these unanswered questions.

#### *Case II*

My family and I also own Red Creek Allotment grazing rights adjacent to Skeleton Ridge. This ranch has been on the same type management plan, same monitoring system showing the same results and has the same endangered species. We also asked for the updated NEPA on this ranch in March of ‘95. As of to date we have no answer on this ranch either. One of the reasons we don’t is the agency people are unable to come to the same decisions. Some say it should be a “may effect with no adverse effects” and the others just seem to want the livestock removed altogether from the Verde River. The only difference between Skeleton Ridge Allotment and Red Creek Allotment is a barbwire fence! Needless to say, we’ve lost numerous potential buyers on this ranch, also.

In 1985 the forest supervisor, the regional director of Fish & Wildlife Service and the director of AZ Game & Fish signed an MOU to plant the Gila Top Minnow in some 60 sites in AZ in an experimentally nonessential capacity with the biological opinion of “may effect but no change in activity.” A few years after they were planted the Forest Service began to fence livestock away from springs and other sources of minnow habitat. This year after 13 years of saying nothing, we are told that we have to fence off the remaining unfenced springs and/or streams before we can use the surrounding pastures. It has been seven months since we were informed of the decision to exclude livestock from these sites. To date none of the paper work is done to start any construction of alternative, dependable water (which we were promised) or fencing, and we are due to move into these pastures in a couple of weeks at the latest. This is going to cause us to have to stress (by overuse) the pastures we are currently in or remove numbers to avoid a take. This because no one is responsible for their decisions or their lack of actions.

The AZ Game & Fish surveyed these sites and found NO Gila Top Minnows on Red Creek Allotment since 1987. However Fish & Wildlife and Forest Service will not give on their decision until more studies are done. Consequently, we're stuck in between with no answers. Very possibly, we will lose every thing in the end.

### Case III

My in-laws, Herschel and Ramona Downs, own the KP & Raspberry Allotments grazing rights in the Apache-Sitgreaves National Forest. They have been on this place for 45 years. The current management plan has been used for 13 years. Along with this they have also monitored, showing an upward trend for the same period of time. In 1995, their 10-year permit came up for renewal. The Forest Service proceeded to go through the motions of the NEPA process. But, with the big push to get so many permits renewed before they expired, the Forest Service came up with a computer model, from somewhere unknown to us, to set carrying capacity by. This model eliminated so much area as unsuitable, estimated carrying capacity so low, and restricted vast areas for occupied, unoccupied, and potential habitat for several endangered species, that it showed an 84 percent reduction in livestock numbers. All this was done from the office with no ground truthing what so ever. The trend monitoring, which had been done with Forest Service range staff, U of A range specialists, and the permittee was totally ignored. This reduction in numbers is from 225 head to 46 head. The EIS said there would be no adverse economic impact. But in reality this has destroyed Herschel and Ramona's life, financially and emotionally. Herschel is 85 years old and can't start over, has no income and nothing to sell except their home which was for retirement. They have nothing to pass on to their daughters and granddaughter. That is two families that have lost everything (their daughter and son-in-law ran the ranch for them). A way of life and a way to earn a living.

They are going to sell their cattle and turn the permit back to the Forest Service because 46 head only earns approximately \$10-\$12 thousand annual income, at best. Two families can't run a ranch and live on that amount. *One can't!*

If they take non-use to save a chance of getting it back after the court cases are settled, they still have to maintain all improvements (this entails some 200 miles of fence). Thus they would be liable for any unwanted livestock straying onto their permit and all restricted areas within. We understand harm to an endangered species to be a felony if prosecuted. Can you see an 85 year old man in prison because an elk tore the fence down or some jerk left a gate open and a cow got through to where she wasn't supposed to be?!

If the Fish & Wildlife Service, Forest Service, and environmental groups aren't using the ESA to justify removing livestock, they should be willing to remove ALL threats to listed species, such as recreation, reintroduced predators or over populations of certain species. However, this is not happening.

As you can see from these three cases, the ESA needs changed if we are to maintain life as or near to what it is now, economically and socially.

We feel that many changes are called for in the ESA. Here are three good examples:

- 1—All decisions concerning listings should be based on sound science.
- 2—Removal of one species should be followed by removal of any and all other species that can and will do the same harm or damage.
- 3—Introduction of a species should only be done when it won't endanger the survival of another species.

We appreciate your efforts to help. Thank you for giving us this opportunity to testify.

Sincerely,

Brian & Deb Jennings

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

Mr. Chairman, here we go again. Same hearing, different month, as we hear one more time about how the west is being persecuted under the Endangered Species Act. This time, it's the environmental community using the citizen suit provisions of the ESA to kick cattle ranchers off Federal lands with the cooperation of the Federal agencies. Moreover, the environmental groups are getting rich doing it.

The facts do not seem to support those claims, however. The fact is, the Endangered Species Act requires all Federal agencies to consult with the Fish and Wildlife Service to insure that any action carried out by an agency, including the issuance of grazing permits, is not likely to jeopardize the continued existence of any endan-

gered or threatened species. Moreover, the Act imposes a substantive duty on the agencies to insure that any action authorized by the agency is not likely to reduce appreciably the likelihood of both the survival and recovery of the species.

The fact is, cattle grazing, be it on public or private lands, can be extremely damaging to riparian habitat and, in many cases, the habitat that is needed for several endangered and threatened species to survive. In the case we will hear about today, the Forest Service has admitted that it had not conducted consultations on the permits allowing this grazing, and that this was a violation of the law. This suit was settled with an agreement that embodied the activities that the Forest Service had already planned to undertake to ensure compliance with the ESA. Moreover, as the Justice Department will point out, the situation was resolved without the burden of court ordered shut downs that have been common in the past. Instead, grazing is continuing to occur on the vast majority of Forest Service allotments.

The fact is, if there are more lawsuits being filed in the west to enforce the ESA, it is not because the burden of the ESA has increased, or is being unfairly imposed on the west and not the east. It is because species diversity and richness in the west and south is far greater than it is in the north and the east. It is because the population growth in the south and west is booming—all of the nations fastest growing regions are found in the south and west—placing more demands on scarce resources. It is because the demand for the use of Federal lands continues to increase, as private lands continue to be sold to developers to accommodate this growth. And it is because local governments, developers, and the users of taxpayer-owned lands are constantly applying pressure on the Federal agencies to refrain from implementing the ESA. In fact, an ESA bill in the Senate is stalled because the Republican leadership is insisting that all language obligating Federal agencies to help recover species be deleted from the bill . . . a demand which will, without a doubt, encourage more lawsuits.

The fact is, as the growth in the Southwest continues to place more demands on public lands in this incredibly biologically diverse region, ESA related issues will increase as well. The rate at which the Forest Service and the Fish and Wildlife Service will be able to conduct consultations, make listing decisions, and carry out their responsibilities under the law will not increase, however, without an increase in financial resources to address this growing workload. In turn, the environmentalists will continue to win their lawsuits. Not because the courts are more sympathetic, but because the letter of the law is clear and the courts are finding that it is not being applied, in large part due to this lack of resources.

Ironically, this week we will be asked to vote on an Interior appropriations bill that does nothing to improve that financial situation for the Service and provide more expedient consultations for ranchers and others who wish to use public lands. According to an OMB letter, "Under-funding the ESA as the Interior Appropriations bill does, will harm our ability to get species back on the road to recovery and off the ESA list. It will also result in an increase in litigation due to an inability to complete consultations, listings, and de-listings in a timely manner."

If we want to do something to really solve ESA conflicts, we need to stop pointing to the Act as the cause of all of our problems and instead provide the agencies with the resources they need to do their job in a timely fashion. The majority of Americans support the protection of endangered species, and this law is not going away. Let's stop trotting out the same old rhetoric to make the situation worse and work together on getting the facts so we can do what the public elected us to do; reauthorize this law in a way that makes it better for both the species and the people.

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STATEMENT OF LEON FAGER, USFS RETIRED, RIO RANCHO, NEW MEXICO

Dear Congressman Miller:

Please enter the following letter into the record of the upcoming hearing in July sponsored by Rep. Joe Skeen of New Mexico concerning the Southwestern Region of the Forest Service agreements to remove livestock from riparian areas.

I recently retired, November 30, 1997, after 31 years in the Forest Service. My Forest Service career included assignments as a wildlife biologist on the Apache Sitgreaves and Black Hills National Forests, Regional Fisheries Biologist in Region 2, and the Southwestern Regional Threatened, Endangered and Sensitive Species Program Manager from 1992 until I retired. Over the past 31 years, I have seen many changes in the Forest Service concerning our customers and the resources that we were charged to manage. My concerns and frustrations with the Forest Service in the Southwestern Region prompted me to take an early retirement and leave an organization that I once loved. I would like to share with you some of my experiences in R3 hopefully to give you some insight into why the Region is subject

to an overwhelming amount of litigation, angry public and degrading natural resources.

The Southwestern Region, over the years, has nurtured a strong and politically effective relationship with the timber and livestock industries. Budgets and targets, of course, help drive Forest Service programs and entrenched the Regional belief that timber and range were the two primary products from National Forest System lands and in fact are the Regions' core values. Other programs such as wildlife, fish, rare species, botany and water are considered secondary products and are generally seen as constraints on the timber and range programs. The publics that support wildlife, fish and rare plant programs are considered "the enemy" by many of those in leadership positions, including the current Director of Wildlife, Fish and Rare Plants.

The role of the biologists in the Region is support for the timber and range programs with little opportunity to design and implement projects specifically to recover listed and sensitive species. These species are not valued by the Region's leadership and the only reason that so much energy and money is being spent on them now is that the Region has been sued numerous times with more litigation on the way, because of the Southwestern Region's apparent failure to follow the law and adequately protect rare species.

Furthermore, the Southwestern Region's leadership see the lawsuits as an attack on the programs they value. The Southwestern Region's leadership and is spending millions of taxpayer dollars to defend a livestock grazing (range) program that has outlived its value and needs to be phased out as an inappropriate use of National Forests in the 21st century.

The impact, past and present, of livestock grazing on Southwestern National Forests is the major reason that ecosystems are deteriorating, species are near extinction and watersheds are losing much of their ability to yield high quality and quantities of water. The damage done by livestock is especially apparent in the Region's riparian ecosystems. Riparian areas make up less than 1 percent of the National Forests vegetation types yet support the majority of the Regions' rare animal, fish and plant species as well as providing water and recreation.

Biologists, over the years, have voiced their concerns over the impacts that livestock were having on riparian systems in the southwest. Their concerns have been generally ignored by Regional line officers. This comes as no surprise because of the history of most of the folks in leadership positions who grew up with the traditional timber and range emphasis and they still maintain that same mentality today. Many feel that the current leadership in the Region is incapable of making hard decisions to meet the publics' demand for water, wildlife, fish, rare plants and recreation in the upcoming century. There are three rapidly growing metropolitan areas in the Region with most new residents relocating from the eastern U.S. The demands from resources from National Forests will be less timber and livestock production and greater demands for values other than livestock. As the publics in the Southwest become increasingly aware of the values of fish, wildlife, rare species and water they are demanding protection, recovery and restoration of rare species and their habitats on National Forest lands.

These demands, often in the form of lawsuits, are seen by the Regions leadership as meaningless complaints from a minority of "radical environs," and after years of ignoring their own biologists, state wildlife agencies and the public, we taxpayers paying the cost to defend livestock grazing in the Region. The ineptness of the Regions leadership is also reflected in the reprisals to anyone perceived as challenging traditional management of the agency's core values.

The Regional Leadership Team is incapable of being responsible and accountable for the conservation of the publics resources, including taxpayers dollars. They are out of touch with the public and do not have passion for restoration of degraded ecosystems. They threatened employees who speak out in favor of resources and they destroy their credibility. I know of many biologists and one deputy forest supervisor who were forced to leave the Forest Service, transfer or resign because they spoke out on resource and leadership issues in the Region. I know of a Fisheries Biologist who is barred from working on some Forests and Regional Task Groups because he criticized the Regions leadership in regards to riparian habitat management. I will be glad to furnish their names if you would like. The problems in the Southwestern Region relate back to the leadership.

I would like to offer some suggestions that I think would help make positive changes in the Region:

- (1) Remove those line officers that demonstrate lack of leadership or will to manage the resources on National Forests as NATIONAL resources for the good of the public.

(2) Carefully replace inept line officers with leaders that are sensitive to ALL the publics. This means meeting with “the enemy” environmental groups, finding common ground and working together to restore ecosystems, watersheds and recover rare species.

(3) We can prevent much costly litigation if we had leaders that follow the law and listen to the public.

(4) Think about doing away with the “line and staff” organization. Explore the use of successful organizations from the private sector such as Saturn Motors. The Kaibab NF is studying a new and more effective organization which they discussed with the Gore Company, makers of Gore-Tex. They were told that no matter what kind of organization they develop will not work as long as the Forest Service is out of touch with their markets and the public. In fact, the Gore-Tex folks said that if their company was out of touch with their customers as the Forest Service is they’d be out of business. The decentralized line and staff organization allow for many little fiefdoms bossed by many inept leaders.

(5) Acquire leaders who will regain our lost relationships with state wildlife agencies and environmental groups. Get rid of those now in leadership positions who foster hostility between the Forest Service and these groups.

(6) Develop active partnerships between the Forest Service and environmental groups such as the Southwest Center For Biological Diversity, Forest Guardians, National Audubon Society, etc.

(7) Consider working with Congress to modify the Multiple-Use Act to that of an Appropriate-Use Act. The Multiple-Use Act as applied in this Region means ALL uses coming from the same acre. This is why we’re in trouble on our riparian areas.

(8) Rather than just mitigating the losses of rare species from grazing and timber management activities begin restoring habitats to recover and delist species. This is what our Forest Service Manual directs us to do.

(9) Require that biologists become certified using The Wildlife Society’s certification process. The Forest Service requires silviculturist to become certified before writing timber prescriptions, biologists need to be certified before authorized to sign Biological Assessments. This would reduce the opportunity for foresters to have range conservationists and non-qualified biologists giving favorable findings under Section 7 of the ESA to support range and timber.

(10) Develop a program area of ecosystem restoration. This should be the core program area of the Forest Service and should drive all other programs.

(11) Since our public lands are indeed important to the public interest and are highly valued as a source of water, recreation, wildlife and the protection and recovery of rare genetic material needed by future generations, we should consider the designation of a national commission similar to the Federal Reserve appointed by the administration who makes policy on public lands. This commission would be independent of congressional and agency influence and would set policy based upon the needs and desires of the public of the use of public lands.

(12) The Congress and the Forest Service must come to grips with destructive livestock grazing, not only on riparian areas but also on the adjacent upland watersheds. The damage caused by livestock has resulted in untold costs both to the health of these ecosystem but also to the economic health of communities large and small which depend on water and recreation from National Forests in the southwest. There are a number of alternatives that could be implemented to lessen the impact of livestock on southwestern national forests: (A) Do not restock livestock on allotments that have been vacated and the permit waived back to the Forest Service—retire these allotments from grazing; (B) Design a “buyout program” possibly using grazing fees and Federal Land and Conservation Funds to use as a pool to compensate willing grazing permittees to waive their permit back to the government and the allotment will be retired from grazing; and (C) Designate an area of each National Forest where livestock could be grazed under feedlot conditions. This would reduce the damage to a small (less than one section), allow the Forest Service to graze cows, thereby satisfying one of their core values and provide a place for permittees to put their cows. The taxpayer is paying for this but the taxpayer is already footing the bill for uneconomical grazing; this would at least reduce the cost.

(13) Focus on watershed health, not just riparian. Costly riparian fencing should only be used as a short-term emergency measure.

(14) No more Ecosystem Management (EM) lip service. Prove commitment to EM through on-the-ground action.

(15) Abandon management strategies that call for maximum resource production.

(16) Make Land and Resource Management Plans realistic in terms of resource limitations and budgets. Integrate separate resource proposals i.e. wild-life, water, recreation. Disclose contingency plans for different budget levels.

(17) Learn to just say “no” to demands on National Forests which violate the law or detract from sustainability.

(18) Set priorities when resource uses conflict, i.e. recreation vrs wildlife habitat.

(19) Monitor Forest Service actions and learn from mistakes.

(20) Reward Forest Service employees for entrepreneurship and risk taking. A study of the Forest Service reward system found that the Service did not highly value these attributes but rather rewarded employees for loyalty.

(21) Tie Forest Service performance standards to measures of ecosystem sustainability.

(22) Do not accept the Forest Service excuse that elk and not livestock are causing damage to riparian areas. Where there is elk damage, it is very localized and due to the deteriorated condition of the surrounding uplands, due to overgrazing by livestock which force elk into riparian areas.

(23) Require that a cost:benefit analysis be done on each allotment and disclose to the public. The taxpayers are getting ripped off, not only in environmental damage, but in our pocketbooks too! An analysis of 3 allotments on the Apache-Sitgreaves show as total taxpayer cost for range improvements to be \$323,690 with an annual return from grazing permits of \$2168. At this rate it, without adding interest to the debt as a private borrower would normally have to do, it would take 150 years to pay the taxpayer back for this debt.

(24) Don't buy into the myth of “folk economics” that a reduction in livestock grazing will cause small towns to disappear, quite the contrary is true. It is well documented by Dr. Tom Powers, economist, University of Montana, that when small towns rely only on one or two industries such as livestock and timber, their long term sustainability is highly threatened. Many case studies reveal that when the mills closed or livestock were eliminated as an industry, there was a very short time period (18 days for Arizona and 25 for New Mexico) for the growth of normal income to replace all jobs lost to Federal grazing. In fact short term unemployment is considered healthy to the overall economic health of communities because new and diversified industry take the place of the traditional ways of life. The Forest Service and politicians are actually doing a disservice to these small communities and only perpetuate this kind of “folk economics” to protect the status quo and generally a few ranchers who want their way of life continued and subsidized by our tax dollars.

(25) Lastly and most importantly, decision-makers should use their power to sway the Forest Service to use the best science in making decisions for the long term sustainability of our public lands. We hold these lands in stewardship for the long term needs of future generations. Public lands need to be restored for the benefit of endangered species, wildlife, fish, recreation and clean water for our economic future.

With an increasing population, the importance of our public lands for clean water, recovery of rare species, wildlife, fish, recreation, wilderness and scenic beauty is more important to our society everyday. Traditional extraction uses have to give way to nonextractive uses if our public lands are to support sustainable ecosystems. Old ways of thinking and managing these lands need to give way to using best science in the gentle stewardship of these national treasures. I think the American taxpayer is going to demand healthy ecosystems and a positive return on his dollar. Both are now absent on our public lands





*"Working together for responsible management."*

Coalition Of Arizona/  
New Mexico Counties  
For Stable Economic  
Growth

July 15, 1998

**WRITTEN STATEMENT OF HOWARD HUTCHINSON, EXECUTIVE DIRECTOR  
FOR THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES**

**USE OF THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT  
TO TERMINATE GRAZING ON FEDERAL FOREST AND BLM LANDS IN THE  
SOUTHWEST**

**BACKGROUND**

**Litigate, Legislate, Agitate**

"SKEEN TO CONVENE CONGRESSIONAL PANEL ON 'UNRANCHING ACTIVITIES' - PROPOSES ANOTHER \$400,000 RANCHING SUBSIDY. In a 6-25-98 press release, Representative Joe Skeen (R-NM) announced that a July 15, 1998 congressional hearing 'to discuss secret agreements between the Forest Service and the Southwest Center for Biological Diversity has been tentatively approved.' Both he and Pete Domenici (R-NM) are concerned about recent settlements between the Southwest Center, Forest Guardians and the Forest Service, temporarily removing cattle from National Forest stream sides. Rather than admit they don't like the results, they claim to be concerned about the process. They have inserted language into the Interior Appropriations Bill stating:

'The Committee expresses strong reservations over the process used to obtain a stipulated agreement entered into between the Southwest Center for Biological Diversity and the Forest Service regarding endangered species management issues in the Southwest Region.'

This is ironic since both Domenici and Skeen have fought hard to keep the public out of decisions to graze cattle on public lands. Both want to hand the NM ranching industry a \$400,000 subsidy to build fences and upland waters to implement our agreements. Remember the argument that public lands ranching fees are cheap because the ranchers pay for all the infrastructure costs?"<sup>1</sup>

With the bravado of a school yard bully, Kieran Suckling published the above statement in the Southwest Center for Biological Diversity (SCBD) electronic newsletter (<http://www.sw-center.org>) on June 29, 1998. SCBD, through litigation and threats of litigation, have terminated wood product extraction from the National Forests in the Southwest Region, delayed the filling of the Roosevelt Lake impoundment on the Salt River and garnered the concession to purchase mitigation lands for potential impacts to Southwestern willow flycatcher habitat inundated by the increased elevation of the lake to increase storage capacity. Like a bull in a china closet, SCBD and like organizations are reshaping Arizona's and New Mexico's social, cultural, economic, physical and biological environments.

Apparently feeling the sting of public reaction to impacts on Northern New Mexico Hispanic communities, Forest Guardians (FG) has ventured south and west to conduct the same type of guerrilla warfare litigation. At the June 12 through 14 conference of FG, Jon Tate, an ally of FG, opined that "consensus sucks." His message was "litigate, legislate, agitate."

SCBD and FG are self proclaimed proponents of the Wildlands Project (WP). Their philosophy is biocentrism and all activities are directed at achieving the goal of preserving large geographic core areas with interconnecting corridors each with defined buffer zones. Within the cores and connecting corridors, little to no human activities are tolerated. In the buffer zones human activities must be compatible with

<sup>1</sup> SOUTHWEST BIODIVERSITY ALERT #138, 6-29-98, SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY

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achieving the biocentric objectives of the cores and corridors.<sup>2</sup>

This is but one battle in a war with many fronts. What is being observed in the usage of the citizen suit provision of the ESA by these groups is the defining of the "umbrella" species.<sup>3</sup> In other areas of public policy, law and regulation, growth management, land zoning, species reintroduction, multiple species habitat planning and the purchasing of private property for "conservation and open space" is proceeding at the direction of other organizations and individuals with cross ties with Ski Island Alliance (SIA), FG, Southwest Forest Alliance (SFA), SCBD, 1,000 Friends of New Mexico and other "mainstream moderate" environmental organizations.

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**National Forest and BLM Public Lands Planning Procedure Disruptions**


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The legal strategies being employed have evolved over two decades. The examples being focused on by this hearing, CV 97 666 and CV 97 2562, are only two cases in a succession of suits. The strategy focuses on the land planning processes contained in the National Forest Management Act (NFMA) and the Federal Lands Management Policy Act (FLPMA). The assertion is that the land and resource management plans (RMPs) created are action-forcing and therefore subject to Section 7 formal consultations under the Endangered Species Act (ESA).

This previous series of cases were concluded with stipulated settlements. Attempts at intervention by other affected interests were opposed by both the Justice Department on behalf of the Forest Service and the plaintiffs. The settlements were granted and signed by the federal Judges before the issue of intervention status was determined on appeal.

Pursuant to the decisions upheld by the 9th Circuit Court of Appeals and under legal and regulatory interpretation by the U.S. Fish and Wildlife Service (FWS), the land management agencies' argument that the RMPs are merely programmatic and not action-forcing have failed. In a decision handed down by the U.S. Supreme Court on May 18, 1998, forest plans were held to be programmatic and not action-forcing<sup>4</sup>.

The Court's decision was unanimous. The following quote describes the reasoning.

"Held: This dispute is not justiciable, because it is not ripe for court review.

(a) In deciding whether an agency decision is ripe, this Court has examined the fitness of the particular issues for judicial decision and the hardship to the parties of withholding review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149. Such an examination in this case reveals that the relevant factors, taken together, foreclose court review. First, withholding review will not cause the plaintiffs significant "hardship." *Ibid*. The challenged Plan provisions do not create adverse effects of a strictly legal kind; for example, they do not establish a legal right to cut trees or abolish any legal authority to object to trees being cut. Cf. *United States v. Los Angeles & Salt Lake R. Co.* 273 U.S. 299, 309-310. Nor would delaying review cause the Sierra Club significant practical harm. Given the procedural requirements the Service must observe before it can permit logging, the Sierra Club need not bring its challenge now, but may await a later time when harm is more imminent and certain. Cf. *Abbott Laboratories*, 387 U.S., at 152-154. Nor has the Club pointed to any other way in which the Plan could now force it to modify its behavior to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. Cf., e.g., *id.*, at 152-153. Second, court review now could interfere with the system that Congress specified for the Forest Service to reach logging decisions. From that agency's perspective, immediate review could hinder its efforts to refine its policies through revision of the Plan or application of the Plan in practice. Cf., e.g., *id.*, at 149. Here, the possibility that further consideration will actually occur before the Plan is implemented is real, not theoretical."<sup>5</sup> (Emphasis added.)

While the Justice Department argued this point at trial and prevailed at the District Court and made the same point on appeal to the 6th Circuit, they did not pursue the appeal to the Supreme Court. Instead, it was the intervenor, Ohio Forestry Association that petitioned for Certiorari. In the Southwest Region cases focused on by this hearing, the federal government did not present the above argument. In the previous

<sup>2</sup> Appendix 1, Ski Island Web site information, Ski Island description Par. 2

<sup>3</sup> *Ibid*, September 1997 Newsletter, Par. 1

<sup>4</sup> *OHIO FORESTRY ASSOCIATION, INC. v. SIERRA CLUB ET AL.*

<sup>5</sup> *Ibid*, Pp. 5-12

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cases, they presented the argument in brief but agreed to the stipulated settlement contrary to their argument.

The results in 666 and 2562 deviated from the standard settlement procedure in the previous cases due to the presence of interveners New Mexico and Arizona Cattlegrowers organizations. When the interveners refused the stipulations, the District Judge refused to sanction the settlement. The plaintiffs, FG and SCBD and the Forest Service entered into a negotiated agreement. FG and SCBD declared victory and dropped their pursuit of an injunction to remove the livestock, leaving the interveners with an agreement that called for pursuit of immediate amendments of their annual operating plans (AOPs) and amendments to the Region's forest RMPs.

In effect, the agreement has become a defacto significant amendment to the forest plans. Failure to incorporate the provisions of the agreement into the RMPs will bring the plaintiffs back into court for further litigation and time line delays. The result is an effective bar of State, Tribal and local government and public meaningful participation in the RMP amendment process in that there is essentially, through intimidation, a predetermined decision. This is contrary to the provisions of the NFMA and its implementing regulations.

In example of FWS interpretation, the Mexican spotted owl was listed based on the threat created by the language in the Southwest Region's RMPs describing the use of sheltered harvesting techniques, allowance for steep slope harvesting and harvesting entry into areas meeting the "definition of old growth forests." The listing proceeded forward under the prodding of other suits that were concluded by stipulated settlements. The listing occurred despite comments presented by the Forest Service that what was described in the RMPs did not drive site specific actions taking place on-the-ground.

The disclosure of planning to the public and Congress that RMPs are supposed to create, along with some degree of predictability for revenue flows and infrastructure needs to State, Tribal and local governments and industry, is the primary purpose of the NFMA. Coupled with the ESA and other federal environmental laws, the NFMA has brought Forest Service activity to a near halt, crippled the Southwestern economy, devastated small rural communities and created a volatile atmosphere ripe for violence against all parties. The same scenario has been played out on the BLM lands as well, defeating the purposes of the FLPMA.

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**National Environmental Policy Act Procedure Disruptions**

There is the pretext of going through the National Environmental Policy Act (NEPA) process to meet the provisions of the 666/2562 agreement. Again, failure to implement the agreement would land the Forest Service before a federal District Judge. The disruption to the NEPA process is even more egregious than the disruption of the NFMA process. Meaningful participation by the public and non-federal governments in the development of alternatives and disclosure of impacts has been tainted by the threat of further litigation.

The record of decision issued following the disclosure will not lend to the Congressional purpose of "encouraging productive and enjoyable harmony between man and his environment." The opposite will instead prevail. The livelihoods of the rural populations in the Southwest Region are being sacrificed on the altar of biocentrism with little assurance of created benefits for the "environment or biosphere."

The process of negotiating an agreement (decision) outside of the disclosures required by the NEPA by employees of an administration that in its deeds and by its own words are in concert with the purposes of the above plaintiffs defeats the Congressional intent and is an abomination to the Constitution.

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**Perversion of the ESA Intent Through Litigation**

The implementation of the Wildlands Project (WP) has not gone through a rigorous analysis and the impacts have not been disclosed to the public or Congress. The Global Biological Assessment, the implementing document for the Convention on Biodiversity (Agenda 21) holds the WP up as an example of the desired outcome. The President has signed the Convention and systematically promoted its implementation through the administrative agencies. All without the ratification of the Senate.

The ESA has been used as a vehicle to list species through stipulated settlements to fabricate the

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### **Coalition Of Counties**

"'umbrella' species" necessary to force implementation of the WP in the Southwest and elsewhere. The question begs to be asked: Is the administration's Justice Department providing a suitable defense for its own land management agencies or facilitating implementation of special interest's goals who share complementary or parallel agendas?

The citizen suit provision of the ESA provides for the payment of litigation costs if the plaintiff prevails. The above referenced stipulated settlements contain monetary awards. The attorneys for the plaintiffs serve pro bono during the trial and settlement procedures. Upon settlement they petition for and receive payment for those pro bono services. The FG and SCBD receive funding through private and government grants.

The affected interests and their representative organizations must raise their own legal funds while trying to stay in business. While all this is going on they are demonized in the press and vilified in the plaintiff's propaganda. Should the elected federal, state or local officials who represent these constituencies attempt to intervene on their behalf, they too have the label of anti-environmentalist, or worse, hung on them.

While the concept of the ESA is noble, it has failed to recover species and crippled the morale of the land management agencies, damaged industry and private property interests, the Southwestern economy and, worse, the citizens' confidence in government. The people of the region are only asking for fairness, due process and justice.

### **Associated Problems**

A number of federal employees are members, supporters or sympathizers of the organizations litigating biocentrism into being. Other employees are members of the less radical groups. On one hand there is a conflict of interest concern that arises and on another is the prohibition of lobbying. These employees are prohibited from lobbying directly, but by joining an organization, escape detection.

One of the major problems facing the livestock permittees from the settlement agreement is the misrepresentation of the settlement itself. There is a vast difference between a stipulated settlement and a mere agreement. The stipulated settlement should have a basis in law and is court enforceable. The agreement reached in 666/2562 has no basis in law and is not court enforceable. The FG, SCBD, and the Forest Service have represented to the press, permittees and public that this is a stipulated settlement and that they have no choice but to implement it.

### **Conclusion and Suggested Remedies**

A great injustice is being inflicted on the rural residents of the Southwest Region. After nearly a century of livestock numbers reductions, many on a voluntary basis, ecological conditions continue to decline. It should have become obvious to someone long ago that merely cutting numbers was not the solution.

Dr. Dave Garrett, former Dean of Northern Arizona University School of Forestry has concluded in a recent study that fire suppression is the primary cause for the decline in the grasslands, rangelands, woodlands and conifer zones. According to his report we could expect to see a 400 percent increase in forage production with the proper treatments. These treatments would have the benefits of increasing water yields an average of 30% and improve water quality.

The current buzz words are "riparian restoration." The primary element of riparian environments is water. With an increase in water delivery and dispersal of livestock, vegetation would increase and grazing pressure would decrease. However, I was told by a Forest Service employee in a public meeting that, since they did not have the funds to properly treat the watersheds, their only alternative was to reduce livestock numbers.

Congress should insist that the land management agencies adhere to their missions and governing statutes and quit making scapegoats of the commodity and amenity users for their management failures. Congress should also insist on the disclosure of impacts from settlements and insure that affected interests are assured standing in litigation. Congress needs to also investigate the implementation of the Convention on Biodiversity without Senate ratification and the Wildlands Project.

**Coalition Of Counties****Appendix I**  
**Ski Island Alliance Web Site Information**

<http://www.lobo.net/~skisland/>

**Sky Island Alliance**

Isolated mountain ranges surrounded by lowland deserts make up the unique "Sky Islands" ecosystem of southeastern Arizona, southwestern New Mexico, and Northern Mexico. This is one of the most biologically diverse areas in the nation - increasingly threatened by tourism, water development, mining, logging, overgrazing and urban sprawl. The entire project area includes the Sky Islands, and Gila and Mogollon Highlands to the north and the Sierra Madre to the south. The system has three components: cores, buffers, and habitat corridors.

Cores include designated Wilderness, roadless areas, and National Parks where extractive uses are prohibited and ecological and evolutionary processes maintained. Buffer areas that permit sustainable extractive uses surround and enlarge the cores. Corridors connect the cores, allowing for genetic exchange to occur among wide ranging animals and plants while maintaining migratory pathways in times of environmental change. Recovery areas are the fourth element not yet identified within the draft map of the region where closing roads, replanting streams and other methods are employed to restore native biodiversity.

**September 1997 Newsletter****Sky Island / Greater Gila Reserve Design Update**

The Sky Island Alliance reserve design is going along at full-speed as we gear up for two scientific peer reviews this fall and winter. We have recently contracted a biologist from the University of New Mexico to collect data on the focal species of our region, which will be a crucial component of our overall reserve design. We are utilizing a core group of wide-ranging, distinctive species of the region to design a network of cores, corridors, and buffer areas. With this approach we hope to provide protection and connectivity for the majority of the remaining endemic plant and animal species of the region without spending the amount of money and time it would take to study the entire region's plant and animal communities before releasing a draft reserve management plan. The "umbrella" species approach is at the core of the conservation biology theory that, if we design a network based upon the needs of 10-15 species which need the highest quality, variety, and acreage of habitat, most other plant and animal communities will benefit from the effort.

In addition to preparing our reserve design plan for peer review, we are writing proposals for next year's budget fulfillment. Since 1998 will be the year of outreach and education for Sky Island Alliance, we will review the peer review comments and prepare our proposal for release to the public. With that in mind, we are asking funders to support our outreach efforts while we continue the process of collecting and organizing field research data in a Geographic Information System (GIS). We are also designing a brochure with the help of Patagonia's art department starting early next year. The brochure will be designed as a general information and education piece for the public.

While our funders have been extremely supportive of us, we need to boost individual membership in order to: 1) balance the different kinds of revenue we receive in support of the project and 2) to build a greater constituency for our project as the political aspect of the proposal comes into play. If you have not sent in your yearly membership dues, please take a minute to do so now (\$15.00). In addition to your membership, we need volunteers to conduct field research, road surveys, and road-kill data collection. Introduce Sky Island Alliance work to as many friends and colleagues as you can, and ask them for support. We will need all the help we can get, especially when the political machinery begins to wrangle over our proposal for the region.

If you haven't visited our web page yet, check it out! There are many resources available to give you an idea of what a reserve design is and the principles behind conservation biology (address on letterhead above). If you'd like to volunteer for field work anywhere in the region, please call Jack Humphrey at (505) 243-5319. Hiking is more fun when you combine it with work that will inevitably benefit the area you care most about!

**Reserve Design Progressing**

At our last workshop, held in late April in Kingston, NM, we made major progress toward the completion of our reserve map. Dick Cameron of Forest Guardians has developed a map that includes: land ownership, GAP vegetation analysis, roads and trails, perennial streams, Mexican Spotted Owl and Goshawk territories and old growth forest on National Forest land, protected land, grazing allotments for National Forests. We also chose a number of distinctive, wide-ranging species as indicator or umbrella

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**Coalition Of Counties**

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species. Among them are the Mexican wolf, aplomado falcon, mountain lion, jaguar, black bear, river otter, pronghorn antelope, prairie dog, golden eagle, bison, Bighorn sheep and grizzly bear (yes!). The purpose of conducting a reserve design with a list like this is to make reserve design a practical, a manageable process for a group with very limited funding and volunteer time. We hope that by protecting these species, we will protect the majority of habitat for all remaining plant and animal species in the region. This is obviously a hypothesis that will have to be tested and species may be added or taken off the list as we find out how well the design works.

Our project coordinator, Jack Humphrey, is organizing summer field work to help fill in information we lack for various parts of the reserve. He has developed a detailed field guide with instructions for documenting the information we need. If you'd like to volunteer for summer field work in either AZ or NM, please contact Jack at our e-mail address, [skisland@swcp.com](mailto:skisland@swcp.com), or at 1315 Coal Ave. S.E., Albuquerque, NM 87106.

**Written Testimony Before U.S. House of Representatives Committee on Resources**  
**Effects of Citizen Suits Under the Endangered Species Act Upon Non-Federal Landowners**

Michael Anable  
 Deputy State Land Commissioner  
 Arizona State Land Department

***The Arizona State Land Department***

The Arizona State Land Department is an agency of the State of Arizona that manages approximately 9.4 million acres of land which the State holds in trust for the benefit of Arizona's common schools and certain other public institutions. These lands ("State Trust Lands") comprise approximately 12.9% of the total land ownership in Arizona, and are distributed throughout those portions of the State that lie outside the boundaries of federal parks, forests and reservations (42.1% of the total) and Indian reservations (27.4% of the total). [See map attached] The State of Arizona has a fiduciary responsibility to manage the State Trust Lands for the best interests of the trust, and to produce appropriate revenues over the long term to financially support the trust beneficiaries. Although it is a department of state government, with respect to issues arising under the Endangered Species Act, the State Land Department has the same general interests and concerns as a private landowner. Federal actions that directly or indirectly limit or burden the use and development of State Trust Lands, or facilities needed for the profitable use and development of State Trust Lands, may sharply reduce the value of those lands.

***Examples That Illustrate How Citizen Suits Can Affect State Trust Land***

Although most citizen suits filed to enforce provisions of the Endangered Species act are brought against federal officers or agencies, such suits can have significant effects upon non-federal landowners. Suits that seek to enforce "mandatory deadlines" under the Endangered Species Act, which limit the time allowed for the Fish and Wildlife Service to perform the duty at issue, not only truncate the opportunity for public comment and consideration of public comment, they may result in a substantively flawed decision because the time and resources available to the agency simply do not permit fuller analysis. In such cases the agency invariably errs on the side of the listed species, resulting in more limitations on the activities of agencies and landowners. *Silver v. Babbitt*, described below, is but one example of this type of action.

Suits to enforce other duties under the Endangered Species Act generally seek broad, dramatic injunctive relief prohibiting or limiting activities alleged to actually or potentially "harm" species. The language of Section 7(d) of the Act, which prohibits "any irreversible or irretrievable commitment of resources with respect to any agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. . ." after consultation is initiated, affords litigants a strong statutory basis for injunctive relief. Because consultation must be re-initiated after any species is listed, the Ninth Circuit has

recognized a duty to consult at the program level as well as the project level, and agency resources are limited, suits to compel consultation are used as a vehicle to stop on-the-ground activities across the landscape. *Silver v. Thomas*, described below, is an example of this type of action.

Suits alleging that land management decisions or activities may cause “harm” and therefore result in take of listed species may also seek broad injunctive relief. Plaintiffs in such suits are aided significantly by the judicial gloss on the Endangered Species Act, such as the statements in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which found that Congress intended to reverse the trend toward species extinction whatever the cost, and therefore tend to err on the side of presuming harm to listed species. *Southwest Center for Biological Diversity v. U.S. Bureau of Land Management*, and *Forest Guardians v. U.S. Forest Service*, described below, are examples of this type of litigation.

Typically neither the plaintiffs who file citizens suits nor the affected federal agencies give notice of the action to third parties who might be affected. Also, the federal defendants frequently stipulate to judgment as to all or part of a case, and plaintiffs often seek injunctive relief or summary judgment shortly after the answer is filed. Consequently, unless a party has the resources to continually monitor the court files, or happens to receive information about a lawsuit, it may not learn of the pending action and intervene in time to participate effectively. *Southwest Center for Biological Diversity v. Babbitt*, described below, is an example of such a situation.

Although the federal defendants generally do not oppose “permissive intervention,” the Justice Department typically does oppose intervention as of right, and plaintiffs usually oppose intervention, on the ground that the matter at issue is whether the federal agency has violated some mandatory duty, and the federal defendants adequately represent the interests of all affected parties. In fact, the federal defendants may settle claims through agreements that are ultimately harmful to third parties. *Silver v. Thomas* and *Forest Guardians v. U.S. Forest Service*, described below, are examples of such settlement.

The Department questions whether Congress intended federal priorities in the realm of species protection to be directed by civil suits and federal courts, rather than the federal agencies responsible for such activities. To the extent that scarce resources available to the federal agencies are devoted to the defense of litigation, they diminish the resources available to conduct consultations, develop recovery plans, and review or develop habitat conservation plans and other conservation measures.

The following specific examples may be helpful to illustrate how citizens suits, or the threat of citizens suits, may affect State Trust Lands, or impair the Department’s opportunity to participate in or otherwise affect decisions that may affect State Trust Lands.



**1. The Mexican spotted owl**

***Deadline for Designation of Critical Habitat: Silver v. Babbitt***

On March 16, 1993 the Fish and Wildlife Service published a final rule listing the Mexican spotted owl ("MSO") as a threatened species.<sup>1</sup> The Service did not publish a proposed rule to designate critical habitat for the MSO within the time specified by law. In 1994, Robin Silver brought suit in the United States District Court for the District of Arizona to compel the Service to designate critical habitat for the species.<sup>2</sup> The State Land Department moved to intervene in that lawsuit, asserting its interest in assuring that there would be adequate opportunity for notice of and public comment on the proposed designation, and that the process would result in a rule that was both substantively and procedurally sound. The motion to intervene was denied, on the ground that the suit would merely establish a deadline for action by the Service, and would not determine the substance of the final rule.

As the State Land Department had feared, the Court set an unrealistically short deadline for action by the Service, the public had no meaningful opportunity to comment upon the economic and other impacts of the designation, and the final rule did not adequately address the concerns articulated by the Department and others. The District Court ordered that the proposed rule be published by December 1, 1994, and that the final rule be published by May 27, 1995. The Service's analysis of economic and other impacts did not begin until after the proposed rule was published, and the draft economic analysis was not available to the public until March of 1995. Although the Service had estimated that its own internal review of the draft economic analysis would require five months, members of the public had only 60 days or less to obtain, review and comment upon the Draft Economic Analysis, and the Service had only twenty days to analyze and respond to public comment. The Service made no significant changes to the designation of critical habitat as a result of its consideration of economic and other impacts, or its consideration of public comments.

Shortly after the final rule designating critical habitat was published, the Service published its Draft Recovery Plan for the MSO. Whereas the critical habitat rule designated approximately 4.7 million acres of forested land as "critical habitat" for the MSO, much of that land was characterized by ponderosa pine and other forest types that were not identified in the Recovery Plan as habitat needed by the MSO.<sup>3</sup> The Recovery Plan made it apparent that the final rule designating critical habitat was grossly over inclusive.

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<sup>1</sup>58 Fed. Reg. 14248.

<sup>2</sup>*Silver v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 94-337 PHX CAM.

<sup>3</sup>USDI Fish and Wildlife Service, *Recovery Plan for the Mexican Spotted Owl: Vol. I* (Albuquerque, New Mexico, December, 1995) at pp. 82-96.

Ultimately the Department brought an action to challenge the final rule designating critical habitat, in which it asserted numerous violations of the Administrative Procedures Act, the Endangered Species Act, and the National Environmental Policy Act.<sup>4</sup> In a parallel case, the New Mexico district court determined that the rule was invalid because the Service had failed to comply with NEPA.<sup>5</sup> On March 25, 1998 the Service published a notice in the Federal Register to acknowledge the court-ordered invalidation of the critical habitat designation for the MSO and to remove it from the Code of Federal Regulations.<sup>6</sup> On May 29, 1998 Robin Silver filed a motion to reopen *Silver v. Babbitt*, ostensibly seeking to “enforce” the 1994 judgment by compelling the Service to readopt the flawed critical habitat rule. That motion is now pending.

***“Programmatic Consultation”: Silver v. Thomas***

Also in 1994 Robin Silver and the Southwest Center for Biological Diversity brought suit in the District of Arizona against Jack Ward Thomas, then chief of the U.S. Forest Service, seeking to enjoin all timber harvesting, range, oil and gas, mining and road projects and other “ground disturbing activities” throughout Region 3 national forests and on Navajo tribal forest lands (over 21 million acres of land) on the ground that the Forest Service had failed to initiate “programmatic consultation” with the Fish and Wildlife Service, and that such activities were therefore prohibited by Endangered Species Act section 7.<sup>7</sup> The State Land Department moved to intervene in the action, asserting financial and other interests in continued timber harvest activity, and grave concern about the effects of the injunction upon forest health and the increased likelihood of wildfires. The district court denied the motion in a one line minute entry order that referred back to its earlier order denying the State’s motion to intervene in *Silver v. Babbitt*.

In September of 1994 the district judge issued an injunction that prohibited timber harvesting activities not specifically approved by the plaintiffs in millions of acres of land in Arizona and New Mexico. Although the decision to enjoin timber harvesting activities was made by the district judge, the federal defendants eventually stipulated to a somewhat narrower injunction that would remain in effect pending the conclusion of the Section 7 consultation process, and waived the right to appeal. When the biological opinion was issued in the late spring of 1995, the plaintiffs took the position that it did not satisfy the requirements of Section 7, and brought proceedings to continue the injunction in effect until a legally sufficient biological opinion was issued. The injunction was not terminated until November of 1996, and caused or

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<sup>4</sup>*Hassell v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 95-2893-PHX PGR.

<sup>5</sup>*Coalition of Arizona and New Mexico Counties for Stable Economic Growth v. Fish and Wildlife Service*, United States District Court for the District of New Mexico, Case No. CIV 95-01285M.

<sup>6</sup>63 Fed. Reg. 14378 (Mar. 25, 1998).

<sup>7</sup>*Silver v. Thomas*, United States District Court for the District of Arizona, Case No. CIV 94-1610 PHX CAM.

contributed to the closure of several of the few remaining timber mills in Arizona.

## 2. *The cactus ferruginous pygmy owl*

The cactus ferruginous pygmy owl is a small bird that has a historic range extending from central and southern Arizona south through western Mexico, and from southern Texas through northeastern Mexico, that was listed as endangered in Arizona.<sup>8</sup> It is estimated that there are over 500,000 acres of "suitable habitat" for the owl in Pima County, and as much as 1.5 million acres of such habitat throughout the State of Arizona. A great deal of that land is State Trust Land, including both urban and non-urban lands north of Tucson. There are approximately 31 known pygmy owls in the State, however very little land has been surveyed for owls.

During the fall of 1997, after the cactus ferruginous pygmy owl was listed as endangered in Arizona, the Southwest Center for Biological Diversity brought suit to compel the Fish and Wildlife Service to designate critical habitat, for the bird.<sup>9</sup> That suit is still pending. If the Service is compelled to designate critical habitat the State Land Trust Land may ultimately be affected by the designation. If unreasonable deadlines for adoption of a rule designating critical habitat are established, the State Land Department and others may be deprived of the opportunity to provide meaningful comment, as was the case with the MSO.

The Southwest Center for Biological Diversity and others also threatened to sue the Amphitheater School District if the district proceeded to build a high school on a 73 acre site that it had purchased for that purpose, based upon their contention that one or more pygmy owls had been sighted on neighboring lands. Shortly thereafter the Arizona Ecological Services Office sent notices to Pima County, a political subdivision of the State of Arizona, and certain municipalities that regulate land uses, in effect stating that although the Service could not force those entities to revise their land use ordinances and procedures, it could and would prosecute responsible officials who issued building permits, grading permits, or permitted rezoning that would allow private landowners to remove vegetation from lands that provide "suitable habitat" for the cactus ferruginous pygmy owl, and who thereby caused "harm" to the owl. This led to the development of requirements that landowners whose property fits the very broad profile of "suitable habitat" for the pygmy owl must survey for owls over a two year period before they may develop their property, whether or not owls have ever been sighted near the property.

The BLM has also taken steps to exclude or limit cattle on grazing allotments that fit the profile of "suitable habitat," without regard to whether those lands are now or ever have been occupied by pygmy owls. This affects the management of State Trust Lands, because in many cases State Trust Lands are included with private and federal lands within various ranches and ranch units. For example, if ranchers are required to construct fencing to exclude livestock from

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<sup>8</sup>U.S. Fish and Wildlife Service, Final Rule, Determination of Endangered Status for the Cactus Ferruginous Pygmy-Owl in Arizona, 62 Fed. Reg. No. 46 10730 (March 10, 1997).

<sup>9</sup>*Southwest Center for Biological Diversity v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 97-704-TUC-ACM (filed October 31, 1997).

portions of a ranch, the cost may be quite high, and it may become infeasible for the rancher to continue using the allotment. Both the cost of fencing and forced exclusion of cattle from allotments may impair the financial viability of the entire ranch. Ranchers may shift livestock from federal lands to State Trust Lands, which are then in danger of being overgrazed, or they may be forced out of business entirely, perhaps depriving the State Trust Lands of an otherwise responsible lessee and land manager.

### **3. Multiple Species: The BLM Safford District Grazing Program.**

In 1996 the Southwest Center for Biological Diversity brought a lawsuit against the U.S. Bureau of Land Management seeking to compel the initiation of "programmatic consultation" pursuant to Section 7 of the Endangered Species Act and seeking to enjoin all livestock grazing on lands managed by the BLM throughout its Safford District pending the conclusion of consultation on the ground that livestock grazing was causing incidental take of 23 listed species.<sup>10</sup> The State Land Department and certain Arizona counties moved to intervene; the Department asserted that the federal lands at issue are commingled with State Trust Lands and private lands, and that they form an essential component of most working ranches. The Court could not enjoin livestock grazing on BLM lands within the Safford District without also affecting the State Trust Lands. In this case, the motion to intervene was granted.

The federal defendants stipulated to some of the relief sought (initiation of consultation) before the State Land Department intervened. The Intervenor proposed that the Center defer the litigation of its "take" claims until the consultation was completed, but the Center refused to do so. Instead, it filed a motion for summary judgment. In its motion, the Center did not identify particular species or members of a species alleged to have been "taken" by specific actions or habitat modifications occurring at a particular time and place on one or more of the 288 individual grazing allotments on BLM administered lands within the Safford District. Instead, it argued that illegal take must be occurring because livestock grazing *may* cause adverse impacts to various protected species or their "habitats" which *may* be present *somewhere* within the Safford District--more than 1.6 million acres (approximately 2,500 square miles) of public lands scattered over a vast area that extends from the New Mexico border as far west as Picacho and Eloy, and from the international border with Mexico as far north as Safford and Morenci. On that basis, the Center argued that all livestock grazing within the BLM's Safford District should be enjoined to prevent "unlawful take" of listed species.

The Intervenor expended considerable time, effort and funds to employ attorneys and experts to oppose the motion for summary judgment and to prepare a cross-motion for summary judgment. After those papers were filed, and shortly before the federal defendants' responsive papers were due to be filed, the federal defendants and the Center stipulated to stay all proceedings in the case pending the conclusion of the consultation process. Had the Intervenor not been involved, it is certainly possible that the federal defendants would have stipulated to an

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<sup>10</sup>*Southwest Center for Biological Diversity v. U.S. Bureau of Land Management*, Case No. CIV 96-011-TUC-RLT.

injunction or other relief that would adversely affect the ranchers managing 288 allotments and leases, comprising 1,588,258 acres and averaging 145,537 annual animal unit months of use, as well as the State Land Department.

**4. Five "Cienega Species: Southwest Center for Biological Diversity v. Babbitt**

In 1996 the Southwest Center for Biological Diversity brought an action against the Fish and Wildlife Service seeking to compel the listing of the jaguar and the designation of critical habitat for the cactus ferruginous pygmy owl, the Huachuca water umbel, the Canelo Hills ladies tresses, and the tiger salamander.<sup>11</sup> Because State Trust Lands provide suitable habitats for these species and could be affected by the designation of critical habitat, State Land Department filed a motion to intervene. The district judge never ruled on the motion to intervene. Instead, the court granted a motion for summary judgment and issued an order compelling the Service to adopt final rules listing the jaguar and designating critical habitat for the other species.

Because the court's order appeared to direct the agency in the exercise of its discretion, the federal defendants filed a motion for clarification of the order; when it was not timely clarified, the federal defendants filed an appeal. Thereafter the district court clarified its order, and the appeal was dismissed.

**5. Multiple Species: Southwest Center for Biological Diversity v. U.S. Forest Service and Forest Guardians v. U.S. Forest Service**

In late 1997, environmental activists filed two parallel lawsuits that would potentially affect the management of livestock grazing on 21 million acres of national forest lands in Arizona and New Mexico.<sup>12</sup> These suits alleged that by allowing livestock grazing on forest allotments in six national forests in Arizona and New Mexico, the Forest Service had violated Sections 4, 7, and 9 of the Endangered Species Act, its duties to promote diversity of species pursuant to the National Forest Management Act, and its duties under Section 401 of the Clean Water Act, to obtain state certification before authorizing activities that may prevent waters from meeting federal water quality standards. The Coalition of Arizona and New Mexico Counties, and the Arizona and New Mexico Cattle Growers Associations moved to intervene.

The two suits were consolidated on February 17, 1998, and on March 3, 1998 Forest Guardians filed a motion for a preliminary injunction, to prevent livestock grazing in riparian areas on specified allotments pending the conclusion of the litigation. The federal defendants and Forest Guardians sought to resolve the injunction issue by stipulating to certain modifications to grazing allotments. When the district judge declined to accept the stipulation,

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<sup>11</sup> *Southwest Center for Biological Diversity v. Babbitt*, United States District Court for the District of Arizona, Case No. CV 96-2317-PHX-RGS.

<sup>12</sup> *Forest Guardians v. U.S. Forest Service*, United States District Court for the District of Arizona, Case No. CIV 97-2562-PHX-SMM and *Southwest Center for Biological Diversity v. U.S. Forest Service*, United States District Court for the District of Arizona, Case No. CIV 97-666-TUC-JMR.

because it did not include the Intervenor, the federal defendants and Forest Guardians reached settlement agreement as between themselves, and the hearing on the request for injunction was vacated. Although the Department was not directly involved in this litigation, we understand that the effect of the settlement agreement, at least with respect to some allottees, was to unilaterally change certain allotments by amending annual operating plans to require the allottee to exclude cattle from portions of those allotments at the allottee's expense.

The settlement agreements, in paragraph 2, require the Forest Service to exclude livestock from "at least 99% of the occupied, suitable but unoccupied, *and potential* habitat" for several species, including the Southwestern willow flycatcher, the loach minnow, the spikedelta and the MSO. They provide in various paragraphs that the Forest Service will direct allottees to remove livestock from an allotment that is found to contain occupied, suitable, or potential habitat for these species, through modification of the Annual Operating Plan. The effect of the settlement agreements is to direct federal actions that affect allottees, without giving the allottees any opportunity to contest the action. If the matter were litigated, the allottee might reasonably be expected to prevail if he challenged the unproved assumption that livestock grazing in potential habitat for the MSO causes harm to that species. Because the settlement agreement concedes that issue, the allottee will have no opportunity to challenge it.

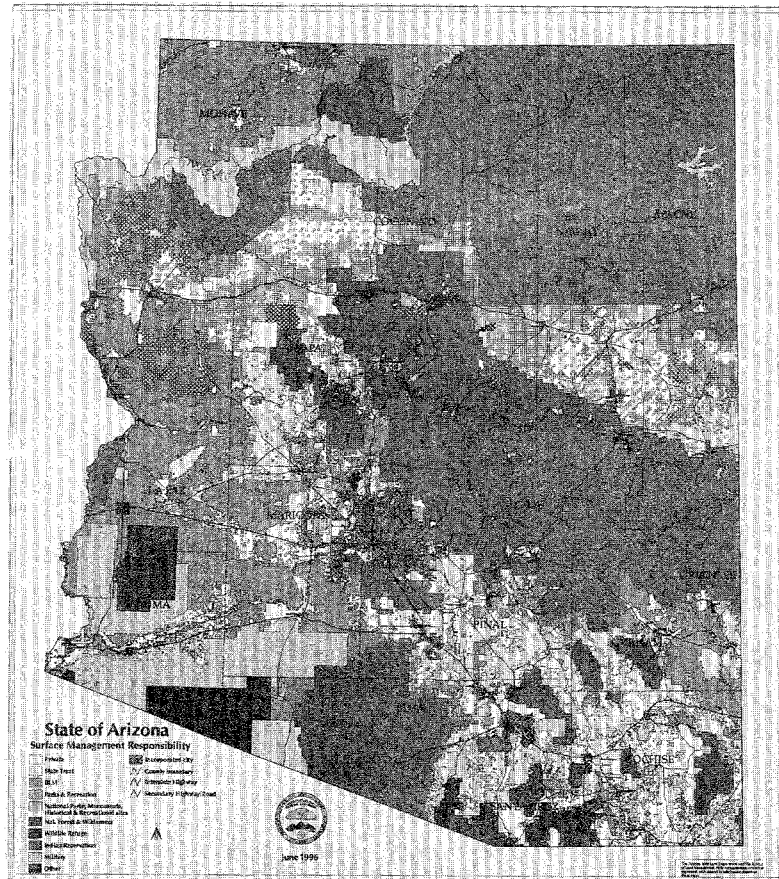
#### ***Suggestions for Reform***

Congress should consider amending the Endangered Species Act to redress the concerns identified in this testimony. To lower some of the barriers to participation by interested and affected parties, Congress could provide a right of intervention for persons who may be significantly affected by the relief sought in a citizen's suit. Congress could also require that each sixty day notice of intent to sue be accompanied by a one-paragraph summary of the claim that could be published in the Federal Register, and then require the relevant federal agencies to publish the summaries and to publish notice of each citizen suit that is filed when the complaint is served on the agency.

To reduce the likelihood that federal agencies will stipulate to relief that will adversely affect third parties, Congress could provide statutory guidance to courts by establishing thresholds for injunctive relief that would moderate the current presumption of harm to listed species.

Congress should consider amending Section 7(d) of the Endangered Species Act to strengthen the ability of the federal action agency to determine which activities may proceed pending the conclusion of consultation. The possibility that a federal action may alter unoccupied, *potential* habitat for a listed species should not be a justification for broad injunctive relief. It should also consider adopting provisions that provide greater opportunities for participation in the process by those who will be affected by the federal actions, and some provision that would allow the federal agencies and the courts that review their actions to take into account the relative costs and benefits of a proposed decision. The presumption that any harm to listed species, no matter how small (e.g., alteration of potential habitat) outweighs any harm to affected third parties, no matter how great, should be modified.

Congress should not allow federal conservation policies to be dictated by private litigants. Assuming that species protection is not the only federal priority, and that the federal agencies responsible for conservation will be operating within some budget that reflects the relative priority of their activities, those agencies should be allowed to establish budget priorities within the parameters fixed by Congress. Congress should reconsider the wisdom of providing for unlimited awards of attorney's fees to those who bring citizen's suits against federal agencies to enforce provisions of the Endangered Species Act. Such awards, particularly when coupled with "mandatory deadlines" established by the statute, provide financial incentives for plaintiffs to bring lawsuits to compel agencies to take actions, and thereby direct agency priorities and activities.





## Worse than cows

A friendly word of caution to in-your-face environmentalists:

Be careful what you ask for.

The relentless push to eliminate cattle from the public land could succeed. If it does, condos might replace cows as private ranch land is sold.

The resulting fragmentation of public lands might be uglier than a cow with a face full of cholla cactus.

Think about it.

Think about the power of cooperation — and the possibility vinegar is the wrong ingredient for today.

The job of cutting-edge environmental movements has long been to push against the comfort zone. Challenge the status quo.

Groups like the Tucson-based Southwest Center for Biological Diversity are good at pushing the envelope. Along with other environmental groups, they have been sounding the alarm about public land ranching.

As a consequence, the public has been sensitized to low grazing rates, the potential destructive effect cattle have on streams, and the use of federal money to control predators for the sake of businessmen (ranchers).

That heightened awareness got results. The term "welfare ranching" is part of the national debate. Cattle interests lost the public relations battle to prevent the reintroduction of wolves in Arizona. The Forest Service has reached an agreement with the Southwest Center to move cattle away from streams in six national forests in Arizona and New Mexico.

That was a significant victory for the center, which has made the removal of cattle from all rivers and streams in

Arizona a priority.

But it might be time to reassess the enemy. A continued assault on ranchers "would put people out of business," says Terry Wheeler, a Globe-area rancher.

And that isn't necessarily good news for the Birkenstock-clad crowd.

Bankrupting ranchers could be counterproductive to those who want to preserve land for the species that need it and the people who enjoy it. If ranchers can't make a living, the wide, open spaces could wind up sold and subdivided.

It's "imminent, it's immediate, it's happening," says Bill McDonald, a Douglas-area rancher who won a \$285,000 "genius grant" from the John D. and Catherine T. MacArthur Foundation for his efforts to bring warring sides together.

McDonald helped found the non-profit Malpai Borderlands Group to preserve the open spaces ranches represent. The group works with representatives from environmental groups, the scientific and government communities.

McDonald "really stepped forward and tried to come up with a different way of moving through these polarized issues," says John Cook, who is co-director of the Malpai Group as well as being national vice president for the Nature Conservancy.

"Building the radical center," is what McDonald calls it.

It's a honey-laced strategy with a greater potential for success than the confrontational approach.

By working together, ranchers and environmentalists can find solutions that preserve Arizona's open space without sacrificing its heritage or habitat.

## Without cheers . . . or tears

Gather round ye children of the Massachusetts Youth Soccer Association and we shall tell you an Aesop's Fable, *The Hare and the Tortoise*.

We will tell you the way the story should be told, the way your soccer officials would have it told.

Their "non-result-oriented soccer competition," requires that no score be kept. There are no winners. There are no losers. There are no tears. But there are no cheers.

"We're trying to take away that you've-gotta-win-the-trophy feeling," explains Cathy Cresta, the soccer association registrar, noting that her organization is even considering expanding the no-winner guidelines to include 12-year-olds.

"These children don't need that kind of pressure."

But young people understand pressure, and it is silly to think that they can be shielded from life's agonizing challenges when learning how to face those challenges is precisely what growing up is all about.

So, gather round ye children of the Massachusetts Youth Soccer Association and listen to the updated, Massachusetts version, of *The Hare and the Tortoise*, the

way some parents think it should be told:

The Hare was once boasting of his speed before the other animals. "I have never yet been beaten," said he, "when I put forth my full speed. I challenge anyone here to race with me."

The Tortoise said quietly, "I accept your challenge."

"That is a good joke," said the Hare. "I could dance round you all the way."

"Keep your boasting till you've beaten," answered the Tortoise. "Shall we race?"

So a course was fixed and a start was made. The Hare darted almost out of sight at once, but soon stopped and, to show his contempt for the Tortoise, lay down to have a nap.

The Tortoise plodded on and plodded on, and when the Hare awoke from his nap, he saw the Tortoise just near the winning-post and ran in time to . . . tie.

Then said the Tortoise: "Plodding won't win the race, but it won't lose it, either."

So, ye children, now you know the Massachusetts version of this old Aesop tale. Now stick around while we tell you the story of David and Goliath.

They fought to a draw.

**Testimony of Joan B. Murphy**  
**7273 N. Central Avenue, Phoenix, Arizona 85020**

**Before the House Subcommittee on Natural Resources**  
**July, 1998**

My name is Joan Murphy and I live in Arizona. I am an environmentalist, a rancher, and a volunteer. I serve on the National Affairs and Legislation Committee of the Garden Club of America covering environmental issues in the 12 western states. My role is to educate the committee about these issues, give the western perspective, and explain the reasons for the various viewpoints found in the West. In Arizona, I work with the Arizona Cattle Growers Association as the chairman of the Cattlemen's College at their annual convention, arranging classes and encouraging cattlemen to improve their lands. Wearing two hats, I am aware of the different views, the complexity of the problems, and the effects of the current deluge of lawsuits - on the environment, and on the people of the Southwest.

#### **Goals for the land**

My principle concern in all of these issues is the health of the land. Having a diverse, sustainable ecosystem is the goal of all people - environmentalists, governmental agencies, and those who derive their livelihood from the use of our natural resources. *We all* have the same goals, so why are there so many problems! We are often only immersed in the negative aspects. There exists the potential of utilizing the expertise of people already on the public lands to accomplish everyone's environmental goals. It is the *method* proposed by different groups to achieve these goals that causes the problems. Wonderful creative approaches already exist. Groups like the Malpais Borderlands Group in southeast Arizona, the Diablo Trust in northern Arizona, and the Quivira Coalition in New Mexico, use communication and cooperation as their approach. They bring in individuals with varying viewpoints to help find common sense solutions to improving both their private and public lands, while ensuring an economic return for themselves and their communities.

Groups like the Southwest Center for Biological Diversity and Forest Guardians, however, have a different agenda. The Washington Post on February 1, 1998, quoted one of their leaders as saying, as they discussed their lawsuits to eliminate grazing, "We know we are killing an industry that has been there for 100 years. Good riddance." Their agenda promotes conflict, not solutions, and it is profitable! Through scare tactics they generate hysteria and contributions. With lawsuits and court decisions they receive attorney's fees and costs. With the Endangered Species Act as their vehicle, they have managed to terrorize the livestock industry, hamstringing the work of the public land agencies, and have an agenda, which many feel could have *disastrous long term effects* on the health of western public lands, if successful.

### **History of Western Environmental Decisions**

Before we look at the current situation, let's look at the history of environmental policy in the West. Although everyone had the best intentions, decisions were made that, with the benefit of hindsight, did not result in the desired results. Let's look at some examples.

- \* Fires were suppressed in Sequoia National Park for 70 years, the government not realizing that Sequoia seeds need fire to germinate.
- \* Fires have also been suppressed throughout the Southwest. According to forestry experts, this has resulted in the current risk of catastrophic fires due to a fuel buildup of 10 times the number of trees seen in a healthy forest.
- \* In the Kaibab National Forest north of the Grand Canyon the goal was to protect the deer, so all the predators were eradicated. Without any natural enemies, the deer population exploded, there wasn't enough food, and most died from disease and starvation. The present situation in Yellowstone National Park concerning bison is a parallel problem.
- \* In Arizona in the 1950's, many of the cottonwood trees that lined our rivers were removed to conserve water. That destroyed a streamside ecosystem essential to birds and other creatures and led to the scouring of the riverbeds.
- \* In the 1800's the goal was to encourage settlement of the West. The Homestead Act gave land to anyone willing to travel to the frontier. They discovered many lands were not suitable for farming, but very good for raising cattle. The vast grasslands seemed inexhaustible. Government policy of sharing lands "in common" eliminated the incentives to care for land, and resulted in serious destructive grazing practices, the legacy of which still remains.

### **Effects of the Endangered Species Act**

What about our current policies and their effects? The law that is driving much of the controversy in the West at this time is the Endangered Species Act (ESA). It seeks to protect those plant and animal species that are felt to be in danger of extinction. Most intelligent people feel that protecting the diversity of all life on the planet is important. However, the act is responsible for far reaching consequences that were never intended when it was written. The ramifications of this law are changing the West.

The ESA focuses on a single species and dictates the manipulation of habitat for that species, whether or not other potentially threatened plants and animals, or whole

ecosystems, suffer as a result. People all over the country are terrified by this law. We all want to save species, but because of the threat of huge fines and jail time for harming a species or its habitat, even *accidentally*, some landowners in the southeast have chopped down all their trees to avoid the risk of attracting a Red Cockaded Woodpecker.

We want landowners to improve habitat for species, but if they do, and an endangered species should find that habitat, the use of it will probably be taken away. A rancher in southern Arizona has greatly improved his riparian area. The Sonoran Chub, a fish very plentiful in Mexico swam upstream to this area and settled in. The fish has now been declared endangered in the United States by the U.S. Fish & Wildlife Service, and this rancher has lost the use of that portion of the stream he did such a good job restoring. The Forest Service now has ruled that grazing on 15,000 acres of adjacent forest land *might* affect the stream, so he may also lose the use of that portion of his grazing lease as well. That is one quarter of his ranch, and he could be forced out of business. His options? To sell his private land to the developers that have been lusting over that beautiful valley.

Shouldn't there be *incentives* for ranchers to accomplish the land improvements we all want? Various federal and state agencies have programs to help facilitate positive changes, and many people on the land *want* to improve their holdings, but the current policies encourage the reverse. One rancher was told by a member of the Forest Service, "We don't *need* incentives anymore. We have laws to *make* you do things". As an environmentalist, I find that attitude appalling, as a rancher who is trying to make a difference, devastating. That attitude goes against common sense, against our belief in the importance of healthy land, and against our desire to work with others to find solutions to problems. It is extremely distressing that, although my principal goal is to improve the environment, I find that in good conscience I can no longer encourage ranchers to do so, as their success may result in the loss of their land.

The Endangered Species Act is encouraging destruction of land. Another rancher in the state was touring his permit area with the land agency personnel to evaluate the "potential" for Cactus Pigmy Owl habitat. One area looked particularly lush and healthy, so he was told he could no longer use that area for cattle. Another area had very little forage, so that one was deemed suitable for grazing. He said, in words to this effect, "you mean, if I overgraze, and don't take care of the land, I can use it? But, if I do take good care of it, and it's healthy, I can't? That was correct. Is that what Congress really wants to accomplish?

How is the Endangered Species Act affecting our forests? We have already talked about the critical condition the forests in the Southwest, and past management practices. Now we have another problem. The timber industry provided the infrastructure that made management of the forests possible. All the experts agree that to bring back the forests to a healthy condition, thinning *must* be done of the smaller trees to prevent disease and the laddering of fires. Control burns must be utilized to knock back the dangerous fuel load. The Southwest Center of Biological Diversity's lawsuits sought to protect the endangered Mexican Spotted Owl, and they accomplished that. It also accomplished another of their

goals - to drive the timber industry out of the Southwest. It is gone, except for a couple of small pulp mills. Now the Forest Service has no way to manage the forests, and the danger continues to grow. Were there not ways of solving perceived problems without killing an industry and putting the forest and the state in such jeopardy? A fire now will take the whole forest and all the owl nests with it. Is that what we want?

#### **Cattle as a Management Tool**

Various elements of the environmental community are now promoting removal of all cattle from public lands. But, let's look at our goals again. What is best for the land? All elements of the scientific community define this goal as a sustainable base of native perennial and annual shrubs and grasses. It is recognized that *improper* grazing can be detrimental. The simplistic solution is to remove cattle. However, a study of the science of producing and maintaining healthy grasslands has clearly shown that *proper* grazing practises are highly beneficial, and in many cases *essential* to sustaining the health and biodiversity of these lands. This has been recognized by some knowledgeable environmental groups like The Nature Conservancy, which is working to save ranches and the open spaces they represent.

The Environmental Protection Agency and some scientists have been quoted as saying, "we have learned more about range management in the last 10 years than the 100 prior years". That is exciting! We need to take advantage of this new information. I have read a lot of materials from a variety of sources: conservation groups, cattlemen's publications, and scientific literature from universities and federal agencies. I have also had long conversations with Terry Wheeler who is revegetating mine tailings using cattle, and have made on-site inspections of his projects. I have met with Eric Schwennesen, a consultant on grass management with the World Bank, who has been accomplishing some amazing things in Africa and Pakistan. He is utilizing cattle to stop the advance of desertification in those arid and abused areas. Almost all of the studies *demonstrate* that *properly grazed* grasses are healthier, but, it is equally important that they not be *overgrazed*.

In the arid climate of the Southwest, ungrazed forage may look healthy from a distance, but upon closer inspection, the stalks of grass may be dead. In areas where there is snow, these stalks are broken off the snow's weight, and the plants throw out new green stalks in the spring. In the Southwest, those stalks are left standing and shade out the center of the plant so new shoots do not emerge. Cattle, as they graze, trample the dead stalks, bite off the grass, thus stimulating it like the cutting of your lawn. Their hooves also break up the crust of the soil, allowing seeds to be planted and leaving slight depressions which will catch and hold the moisture. Many experts say that ungulates (elk and cows) have the perfect symbiotic relationship with grass.

Overgrazing? Some people say the answer is simple - remove cattle! It's definitely not that simple. Cows should be thought of as *tools* for managing the range. One bite is good, but repeated grazing of the same plant is bad. Cattle left in an area too long may

continue to graze the fresh regrowth. This can diminish the size of the plant, as well as its root structure, and may eventually cause it to die. Or, if cattle are turned out for long periods in one area with lots of plant choices, they may not graze some plants at all, but will tend to return to the most palatable ones. If not properly managed, they *overgraze* some plants and *undergraze* the others, so none are healthy.

What about removing cattle altogether? Initially, or the first few years, the land looks better because the grass hasn't been eaten. But, remember those uneaten gray stalks? Without a substantial number of new shoots emerging, the plant gradually dies. Without hooves breaking up the soil, a crust forms on the surface, water sheets off, encouraging erosion and resulting in less water penetrating the soil. It encourages what is called desertification, or "going to a desert like condition", with more and more bare ground, where only the most drought tolerant plants survive, like Creosote and Greasewood do in some parts of Arizona. I have seen a photograph of an area in another state where the range had the most marvelous stand of Black Grama grass. It was so good they decided to preserve this wonderful example, so future generations could see it. They eliminated all grazing 50 years ago. Today it is just eroded sand. There are many other examples of non-use resulting in grass eradication.

What about cows in riparian areas? Riparian areas are the streamside ecosystems that are so critical to wildlife in arid climates. Cows definitely can cause damage. They like to stay close to the water, may overgraze that grass, may break down the banks, and widen the streambed. Less vegetation can contribute to more damage from floods with loss of soil. They will eat green cottonwood shoots, if allowed access in the growing season. But, with proper management, they also can *increase* the diversity and amount of vegetation. Total removal of cattle can also cause problems. No control of the amount of vegetation can result in a greater risk of fires. The Nature Conservancy's Sonoita-Patagonia Preserve had a fire that burned several acres of magnificent cottonwoods. The Conservancy is now using cattle as a tool to solve this problem.

Many ranchers have made wonderful progress with their riparian areas, and the Arizona Cattlemen's Association and the Bureau of Land Management (BLM) are promoting programs that teach riparian restoration. On our ranch, we are trying all kinds of techniques, using both cattle and beaver, and are monitoring the results. In one area we have fenced both sides of the stream, keeping cattle out except in the non-growing season. The transplanted beaver are making a huge difference by slowing the water and raising the water table. The floods, that periodically occur, have resulted in large numbers of cottonwood trees and willow shoots germinating, creating an incredibly lush habitat for birds and wildlife.

However, environmental extremists are now putting together agreements with the Forest Service and the BLM to totally eliminate cattle from riparian areas. Whether cows should be allowed in riparian areas or not, should these groups have the power to dictate all management? Do the agencies perceive this as necessary to avoid litigation? In any case, the rancher on the land - the one who can make the difference - and the one who pays for

the grazing lease, has been shut out of the process. One such agreement affects 90 grazing allotments.

Why this short course on riparian and grass management? Each area is different. It is impossible to judge land as one drives by, or from an office in Phoenix or Washington. Some land is not well managed, no-one denies that, and some changes are appropriate, but snap decisions cannot be made. My husband had a friend tell him about "the sorry condition of a grazed area". He asked her some questions including: When was it last grazed? How many cattle had been there, and for how long? How long had it been rested? When did it last rain? She didn't know the answers to any of these questions - only that the grass looked heavily grazed. That land might have just been intensively grazed for only 2 days and was scheduled to rest for a year or more. It could have been the healthiest land in the state! Are we making judgments about the condition of the environment without enough knowledge?

#### Effects of the Elimination of the Livestock Industry

A few radical environmental groups want to eliminate all grazing from the Southwest. We already know that even the best intentions can result in undesirable results. Let's speculate about just a few of the results that might result from that action.

The state is very concerned because it would affect the tourist industry. Our cultural heritage is one of the reasons many tourists flock to the Southwest. They love the cowboy. I had a friend from England visiting recently. One of her biggest thrills was driving over a hill and seeing a cowboy on horseback. With the cattle industry gone, that would change, along with the economies of rural areas, many of which would suffer.

How would it affect the federal government? There is already alarm as to who will manage the public lands for us all, if ranchers are gone? The agencies have neither the manpower, the expertise, nor the money to do so. Some agency personnel are extremely concerned as to how they could manage the vast areas that are their responsibility, without ranchers. One individual at the BLM spoke about ranchers alerting them to vandals, cactus thieves, illegal off road vehicles, torn up roads, and garbage dumping. He said that a rancher is the only one that is always there, is aware of any activities, and alerts the agency. He felt they were a critical ingredient in the agency's ability to manage the land.

What about the wildlife? Ranchers maintain watering facilities throughout their range, which are invaluable to wildlife as well as cattle. There has been a tremendous increase in wildlife over the last 60 or 70 years, some species by 800%. If ranchers are gone, no-one will be fixing windmills and cleaning ponds. Many water sources will disappear. How would these changes affect desert animals adapted to current conditions?

What about the condition of the land? It is always my first concern. It would prosper in the short run, particularly if it had been poorly managed previously, but we know

about the effect of grazing on grasses, we know what the lack of grazing will do. Is desertification the landscape of the future?

And, what about us? We all love the open spaces. But, what keeps them there? They are there because they are utilized as ranches. Of the land in Arizona, 87% is government land - state, federal or tribal, but that is broken up by small parcels of private land - sometimes in a checkerboard pattern in 640 acre sections. Private lands are usually the best lands, as those were the pieces the original settlers chose. Most ranch units utilize private lands as well as lands owned by perhaps several different public entities. Very few ranches would be viable economic units without the ability to use these public lands. If that ability is eliminated and the rancher can no longer make a living, he would have no other choice but to sell his private holdings - most often to developers. This results in loss of open space, loss of wildlife corridors, and the aesthetics of the vast vistas that so many of us cherish.

Is there an answer?

These effects are rapidly changing the face of Arizona. Environmental extremists are dictating the management of our lands. Ranchers have the desire and expertise to do the job. We must not allow a small group of radicals to eliminate an industry that has the potential to accomplish society's environmental goals. As Larry Allen, a career Forest Service employee working with the Malpais group said, "Ranchers are not the problem, they are the solution! These decisions are too important to let others make them.

What changes could make a difference? I see the following as needed to stabilize the management of land in the Southwest.

- \* Reform of the Endangered Species Act to eliminate the threat of penalties for improving the environment.
- \* A change in the ESA procedures that currently allow radical groups to create gridlock.
- \* Incentives for good stewardship.
- \* A commitment by governmental agencies to use collaboration rather than regulation to accomplish goals.
- \* Government programs to encourage and educate those ranchers that need to improve management skills, including financial and technical assistance.
- \* Flexibility that will enable people to craft common sense solutions.

Thank you for the opportunity to express my thoughts.





## Department of Justice

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STATEMENT

OF

PETER COPPELMAN  
DEPUTY ASSISTANT ATTORNEY GENERAL  
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

IMPLEMENTATION OF THE ENDANGERED SPECIES ACT

PRESENTED ON

JULY 15, 1998

Mr. Chairman, I am pleased to testify today regarding citizen suits brought under the Endangered Species Act and other natural resources statutes, particularly in the Southwestern United States. As I will discuss, the federal agencies' actions in Southwest Center for Biological Diversity v. United States Forest Service avoided the kinds of broad injunctions that had previously been entered in a number of cases around the country. Unlike those situations, which I will also describe briefly, there has been no regionwide shutdown: grazing on federal lands in the Southwest has continued despite litigation against the Forest Service and the Bureau of Land Management.

My testimony will also discuss other citizen litigation in the Southwest and elsewhere, in which we have had a number of significant legal victories.

Let me note at the outset that the specific cases you have asked me to discuss today are pending in federal court, and therefore the Department's pending matter policy applies to discussion of them. Pursuant to that policy, I will be happy to discuss matters that are in the public record.

#### **The Southwest Center litigation**

I would first like to turn to a discussion of the recent grazing cases about which you have inquired. According to the Forest Service, there are over 1,000 grazing allotments in the twelve National Forests in the Southwest Region, of which upwards

of 700 contain species that are listed under the Endangered Species Act (ESA). The ESA requires that the Forest Service consult with the Fish and Wildlife Service on the effects of activities that the Forest Service authorizes (such as grazing) that may affect listed species. The ESA also prohibits, pending completion of consultation, any irreversible or irretrievable commitment of resources by the Forest Service, or by any permit holder that would foreclose the formulation of reasonable and prudent alternatives to jeopardy to listed species.

In 1996 and 1997, the Forest Service consulted with the Fish and Wildlife Service on the effects of grazing in the Southwest as authorized in its forest plans. But this regionwide consultation, which concluded in December 1997, did not include an analysis of the effects of grazing on individual allotments within each forest. At the time the Southwest Center suit was filed in October 1997, therefore, the Forest Service had not specifically consulted with the Fish and Wildlife Service on the vast majority of these 700 grazing allotments. For this reason, the Forest Service was arguably out of compliance with its obligations under the ESA.

The Southwest Center lawsuit was consolidated with a related suit filed by Forest Guardians in December 1997. These actions were filed under the citizen suit provision of the ESA and together named over 150 individual grazing allotments for which consultation was lacking. The complaints in both cases sought,

among other things, a declaration that the Forest Service was in violation of the ESA and an injunction against grazing on all of these allotments pending completion of consultation.

In recognition of the need for compliance with the ESA's consultation requirements and in order to avoid any injunctions that would prohibit grazing in the interim, in February 1998 the Forest Service and the Fish and Wildlife Service entered into an agreement that set an ambitious but feasible timeframe for completing consultation on all these allotments, as well as any others that the agencies were capable of including in the process. The deadline set was July 15, 1998. The agencies determined that grazing permittees on allotments where grazing was deemed likely to adversely affect listed species would be provided an opportunity to participate in the consultation through submission of comments on the Fish and Wildlife Service's draft biological opinion. The July 15 date has since been extended until late August at the request of permittees.

The agencies also determined that, during the consultation period, currently permitted grazing would continue, and would be administered through permit provisions and annual operating plans, taking into consideration resource protection needs. They anticipated that the annual operating plans would continue to be prepared with permittee participation and that the need might arise to amend the plans during the course of the consultation as new information on the effects on listed species became

available.

Shortly after both suits were filed, both the Arizona Cattlegrowers' Association and the New Mexico Cattlegrowers' Association moved to intervene and were granted status as intervenor-defendants in the two cases. In early March 1998, the Forest Service and the Fish and Wildlife Service, as well as Department of Justice representatives, convened a conference call among all the parties to the suit to explain the consultation agreement and the process for getting the consultation completed. I should point out that among those participating on this informational conference call were representatives of both the Arizona Cattlegrowers Association and the New Mexico Cattlegrowers Association.

Soon after this discussion, the Forest Guardians and the Southwest Center each moved the court for a preliminary injunction against grazing. Each group requested a broad injunction against grazing on all the allotments identified in the two complaints, and Forest Guardians also requested a more specific injunction against grazing in riparian areas on the allotments identified in the Forest Guardians' complaint, pending completion of consultation. The groups argued that, as a matter of law, grazing in riparian areas during the pendency of consultation constituted an irreversible and irretrievable commitment of resources that had to be enjoined entirely pending completion of consultation. They further argued that, as a

factual matter, the Forest Service was in violation of its own management direction on these allotments (and therefore also was violating the ESA) because the agency had failed to implement resource protection measures that had been adopted in the earlier consultation on the regionwide, plan-level biological opinion.

The Department defended the agencies against the request for an injunction, arguing that the groups were not entitled to an injunction as a matter of law. We also argued that the Forest Service was in compliance with its own management direction - direction that had been in place for months before the suits had been filed and that, as implemented, ensured against any irreversible or irretrievable commitment of resources at the allotment level caused by grazing during the remainder of the consultation process. In particular, the Forest Service pointed out that, for the vast majority of the allotments identified in the Forest Guardians' motion, over 99% of the riparian habitat of the species identified had already been excluded from grazing and that, for the remainder, grazing in riparian areas would be excluded in the near future. These changes had been and were being made as a result of the Forest Service's implementation of its own management direction.

It then became apparent to all of the parties that the Forest Service was already excluding grazing in riparian areas on the majority of the allotments. A few days prior to the scheduled preliminary injunction hearing, all of the parties,

including the intervenors, began discussions to determine whether the need for the hearing could be obviated. Initially, counsel for the Cattlegrowers participated in these discussions. Before discussions were concluded, however, the Cattlegrowers' representatives voluntarily withdrew from participation.

Ultimately, the plaintiffs and federal defendants agreed to and signed a stipulation under which the Forest Service agreed to maintain the status quo pending completion of the consultation.<sup>1</sup> The stipulation included a description of the administrative process that the Forest Service would follow when livestock were found in areas from which they were supposed to be excluded. This process tracks the administrative process contained in the Forest Service grazing regulations, and includes timeframes that are consistent with those set out in the regulations and could reasonably be implemented by the Forest Service with adequate notice and participation by the permittees. In exchange, plaintiffs withdrew their motions requesting a broad injunction against all grazing on a larger number of allotments. Later, the Forest Service entered a similar stipulation with the Southwest Center only, and addressed allotments not addressed in the first stipulation.

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<sup>1</sup> Initially, the plaintiffs and federal defendants had submitted the stipulation to the court for its approval. During the course of the preliminary injunction hearing, the court indicated it would not sign the stipulation if the Cattlegrowers had not also signed off.

I want to emphasize that the stipulations in effect memorialized the management practices that were already being implemented by the Forest Service. By entering into the stipulations, however, the Forest Service and the Fish and Wildlife Service were able to proceed, undistracted by continuing active litigation, towards timely completion of the ongoing consultation. At the same time, the threat of a sweeping preliminary injunction against all grazing had been eliminated.

Shortly after the first stipulation was signed, the Cattlegrowers, as was their right, tried to block its implementation by filing their own motion. The Cattlegrowers argued that the Forest Service could not legally make the management changes embodied in the agreement, and if implemented, such changes would cause economic hardship. The district court, after a hearing on the Cattlegrowers' motion, denied the Cattlegrowers' motion to block the agreement. The court found that the Forest Service had the authority to make the changes necessary to effect its management direction, and that the permittees would have the ability to participate in these changes and had retained their right to contest them. The court further found that the economic hardship suffered by the Cattlegrowers as a result of the implementation of these changes did not outweigh the potentially irreparable harm to threatened and endangered species if the Forest Service did not carry through with its direction.



In practice, the stipulation has proven successful. The Forest Service has received excellent cooperation to date from the permittees in keeping livestock on these allotments, but out of the areas where they could cause harm. Furthermore, the consultation has been progressing on schedule, and a draft biological opinion was issued last month. The final biological opinion was due to be issued today, but the Forest Service granted a request by several permittees to extend the comment period on the draft. A final biological opinion is now anticipated in late August, and with this opinion, consultation will be concluded, and the terms of the stipulation will automatically expire.

It is worth noting that, by virtue of the stipulation and the fact that the agencies were not otherwise consumed by defense of this litigation over the last few months, the agencies have been able to include all 700 grazing allotments with threatened and endangered species in their consultation.

#### **Other Experiences**

Our response to the grazing lawsuits was controlled and considered, and allowed the agencies to avoid a broad injunction while proceeding with their work. I would now like to describe some of our experiences in similar cases where we have pursued litigation rather than settlement, and found courts to be quite

unsympathetic in the face of agency non-compliance with various environmental requirements, including those imposed by the ESA. In some of these cases courts have imposed severe restrictions on land management, with mandatory injunctions that remain in place for many years; in some cases the courts have continued to act in an oversight capacity regarding much of the particular agency's activities on the federal lands, requiring frequent reports and appearances by the federal agency involved, and limiting the agency's discretion. Let me give you a few specific examples.

1. Texas National Forests

Litigation that began in 1985 over Forest Service management of the Texas National Forests has resulted in an injunction that was entered in 1988 and has remained in effect until the present day. Plaintiffs in this case sought to stop all even-age harvesting, in particular clear-cutting, on the grounds that it harmed the endangered Red-Cockaded Woodpecker. We defended against this broad injunction request even though there was clear evidence that the woodpecker was in decline in these forests, at least in part because the Forest Service was unable to carry through on promised activities to improve the bird's habitat. We contended that the court should not enjoin timber harvesting in light of the Forest Service's aggressive efforts to correct the situation.

The court rejected these arguments and enjoined clear cutting and other even-aged timber management practices in the

forests, and has continued its jurisdiction over much of the forest's everyday management. Today these forests continue under injunction. When new management protections for these species complete the administrative amendment process we will return yet again, ten years later, to ask the court to lift the injunction and return the forests to Forest Service control.

## 2. The Pacific Northwest

Broad injunctions were also issued by courts in Washington and Oregon in 1989-1992 as a result of challenges by environmental organizations to management of Forest Service and Bureau of Land Management land in the Pacific Northwest for the habitat needs of the northern spotted owl. The claims arose under the National Forest Management Act, the National Environmental Policy Act and the ESA. While the federal government vigorously defended all of these cases, our defenses were unsuccessful. The resulting injunctions essentially shut down all harvesting on Forest Service and BLM lands in the Pacific Northwest for four years until the agencies produced the Northwest Forest Plan, which was also attacked by environmental groups and timber industry organizations and which we vigorously, and successfully, defended. The defense of this litigation through the years from 1989-1994 was extremely time and resource consuming, both for the Justice Department and for the land management agencies.

### 3. Southwest Forests

My final example brings us back to the Southwest, where we have experienced the same kind of broad judicial response to a situation where the district court found that the Forest Service had not fully complied with all ESA requirements. In various proceedings commenced in 1994, a coalition of environmental organizations and individuals sued the Forest Service and the Bureau of Indian Affairs, charging various violations of the consultation and take prohibitions of the ESA. We proceeded to litigate the case despite negative precedent in the Ninth Circuit. The court granted plaintiffs' request for injunctive relief, and enjoined all timber harvest until consultations on amended Land and Resource Management Plans (LRMPs) were completed. While the Forest Service immediately initiated informal consultation, sought clarification of certain aspects of the order, and provided to the Court a list of "no effect" activities, the process of obtaining court approval of particular activities was time consuming and cumbersome. In fact, the Court responded by ordering the parties to agree to a list of activities that could continue pending consultation.

Consultations on the LRMPs were not concluded until July of 1996, at which time the plaintiffs filed a motion for an order finding that consultation on the existing forest plans was not complete. Litigation over the adequacy of the consultations continued, as did the injunction, until December 6, 1996, for a

total of sixteen months.

We believe these results -- lengthy litigation, diversion of agency resources, and broad, long-term injunctions -- are to be avoided. So far they have been avoided with respect to grazing in the Southwest.

#### **Citizen Suits in the Southwest**

Finally, I would like to respond to your request for information about other suits brought by selected plaintiffs in the Southwest. As you can see from the information we provided, a number of cases, including ESA actions and Administrative Procedure Act challenges under other statutes, have been brought by the organizations and individuals identified in your letter. Other actions, including many involving grazing matters, have been brought by ranchers and others whose activities are regulated by federal law. In Endangered Species Act citizen suits in which the plaintiff, whether a conservation organization or a member of a regulated community, prevails, the law generally requires the government to pay attorneys fees and costs; a similar standard applies to cases brought under the National Environmental Policy Act, the National Forest Management Act, and other natural resource statutes.

As with any actions filed against our client agencies, in determining the best way to resolve litigation, we evaluate each

case on its individual merits. The facts and law associated with each case are unique. The Department of Justice, in close consultation with the agencies that it is defending, takes into account a variety of factual and legal considerations including litigation risk, and ultimately we take positions in litigation that we believe best serve the interests of the United States. Very often, we vigorously defend actions brought against us, and we have been largely successful in these cases.

1. Lake Mead Litigation

In May 1998, the Ninth Circuit Court of Appeals upheld a 1997 biological opinion challenged by the Southwest Center for Biological Diversity. At issue was the water level in Lake Mead and the possible lowering of the water level, a matter of much concern to a number of states. During a series of dry water years in the late 1980s and early 1990s, the water level of the lake had fallen and a community of willow trees had grown on 1400 acres comprising the Lake Mead delta below the Grand Canyon National Park. With the return of normal water regimes in the mid- 1990s, the water level of the lake had risen to cover the roots of these willow trees and the trees were dying. Nevertheless, in 1996, several nests of an endangered bird, the southwestern willow flycatcher, were observed in the willow trees on the delta.

The biological opinion, issued by the Fish and Wildlife Service, found that the operations of the Bureau of Reclamation

on the Lower Colorado River were likely to jeopardize the continued existence of the southwestern willow flycatcher; however, the Fish and Wildlife Service set forth a Reasonable and Prudent Alternative (RPA) to avoid jeopardy. The RPA did not require Reclamation to alter the level of Lake Mead to save the delta habitat. The federal government worked closely with the states to successfully defend this litigation in the district court and court of appeals.

## 2. Other Cases

There have been a large number of cases in the Southwest challenging alleged failures by the Fish and Wildlife Service to meet mandatory statutory deadlines set out in Section 4 of the Endangered Species Act, including decisions whether to list a species as threatened or endangered or whether to designate critical habitat for such species. Given a lack of financial resources to carry out all of its Section 4 responsibilities, the Fish and Wildlife Service has not in fact been able to meet all of its statutory obligations. Nevertheless, we have staunchly defended on legal and equitable grounds the agency's decisions as to which duties to address in which order, given the limited resources available to it. Our efforts, though not universally successful, have for the most part preserved the operation of the agency's Listing Priority Guidance. Just two weeks ago, on June 29, 1998, the Tenth Circuit Court of Appeals upheld the Fish and Wildlife Service's implementation of the Listing Priority

Guidance in a case in which the Biodiversity Legal Foundation had challenged the Service's failure to make a 90-day finding on a petition to list the sharp-tail grouse.

#### **Conclusion**

While we have had these recent litigation victories in the Southwest, we have lost some cases, and settled a number of others. We have participated with the other agencies in a collaborative process to address natural resource issues in the Southwest, a process that we believe is contributing in a positive way to avoiding litigation in the region. This concludes my testimony. I would be pleased to answer any questions the Committee may have.



**PHILLIP K. KNIGHT**

**DATE CREEK RANCH, BOX 1525  
WICKENBURG, ARIZONA 85358**

Rep. Don Young  
Chairman House Committee on Resources  
1324 Longworth HOB  
Washington, DC 20515

July 25, 1998

Re: Hearing on Implementation of ESA

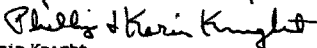
Dear Mr. Young,

We are writing because we are affected by the - as we believe unfair - implementation of the ESA and this is causing severe economic hardships for us. In this year's Annual Operating Plan for our allotment (the Buck Springs Allotment) in the Coconino Forest, the number of cattle we could graze, the pastures we could use and the number of days we could graze were substantially reduced. We were not informed about the reductions in a timely manner, we were not consulted and we had already made substantial investments based on prior years' operating plans.

I am known to be a progressive and environmentally engaged rancher who is experienced in the restoration of riparian areas. However, it seems to me that no matter what we suggest, the hands of the Forests Service are tied. They are unable to get their opinion across in their consultations with the Fish and Wildlife Service, who seem to dictate the actions in an area with which only the local foresters and the ranchers are intimately familiar. We were informed that during the consultations for our permit's 1998 Annual Operating Plan the facts, findings and suggestions of the local Fish and Wildlife representative (who was not invited to the consultation) as well as the district's range con and biologist, were totally ignored. (We were not invited either!) The scientific facts did not seem to be important at that decision making meeting, but only the political agenda. How else could we be threatened to have to move all our cattle off our allotment, if any should drift into and graze at Leonard Canyon or any adjoining riparian areas, when at the same time substantial numbers of elk are continuously grazing those areas without any possibility to control them.

We hope the above, as well as the attached letter dated 5/31/98, will give you some insight into what is going on here in the Southwest. I will be happy to furnish any details you may be interested in. Unfortunately we do not have a phone at our ranch, but if you leave a message on our answering machine (520-776 8877), we will call back as soon as possible. You may also be able to reach Karin Knight at work (Monday - Thursday) at (520) 684-7844 or (602) 546-7727.

Thank you very much for your support in this matter.

Kind regards,   
Phillip and Karin Knight

Attachment

PHILLIP K. KNIGHT

DATE CREEK RANCH, BOX 1525  
WICKENBURG, ARIZONA 85358

USDA - Forest Service  
Blue Ridge Ranger District  
Attn: Acting District Ranger  
HC 31, Box 300  
Happy Jack, AZ 86024

May 31, 1998

Dear Ms. Connelly:

This letter confirms a meeting between Forest Service representatives (Steve Calish, Cathy Taylor, Jerry Gonzales, Liz Blake) and us on May 8, 1998. The intent of the meeting was to find a way to use the Buck Springs allotment permit in 1998 despite of all the reductions and stipulations set forth in the Annual Operating Plan ("AOP") for 1998.

Since it was recognized that using the permit under that AOP would result in a substantial loss to us (at least approx. \$13,000), we presented a plan to reduce the loss to approximately \$4,500 by basically only using one of the eight pastures of the allotment and only running about 215 calves this season instead of 1350 calves we were able to run in 1997 and expected to run in 1998. It was made clear by us that not using the permit at all would also result in a loss of at least \$13,000 in interest and payments that we will have to make even if we do not use the allotment.

By using basically only one pasture, we expect to eliminate all labor and labor-related cost. We will not hire any help and do all work ourselves without pay.

The Forest Service agreed to this plan but contended that we may have to use one additional large pasture, if forage conditions required a move. In order to be able to move the cattle to Buck Springs by May 30th, we were pressed for time to get the billing and payment process under way immediately and therefore signed a revised "Application for Term Permit". The revised "Bill for Collection" we received as a consequence thereof incorrectly states that the changes in numbers are due to "grazing law suit". That is not the case. We herewith state that we voluntarily agreed to the reduction in numbers for the 1998 season for the reasons outlined above. This year's AOP is in no way meant to set a precedent and has nothing to do with the various pending law suits. We only made this hard decision for this year with

PHILLIP K. KNIGHT

DATE CREEK RANCH, BOX 1523  
WICKENBURG, ARIZONA 85358

- 2 -

our back against the wall, to get this season's activities under way and to get an early start on resolving the overwhelming problems for the 1999 grazing season. We cannot tolerate a repetition of this year's disaster. It is unacceptable to confront a permittee with reduced numbers at a time, when most of his decisions and monetary outlays for the season have already been made. We were orally informed about possible changes to the 1998 AOP in April 1998. However, based on last year's numbers, we already had purchased the majority of steers for the Buck Springs allotment in November of 1997, an investment which we now have to reverse unexpectedly and possibly to our disadvantage.

In order to plan for 1999, we need to obtain from you a time table for the production of the AMP for the Buck Springs allotment. In case the AMP cannot be finished in time for the 1999 grazing season (October/November 1998) we must have the AOP for 1999 in place at that time.

As you stated in your letter dated May 1, 1998, (AOP for 1998) the AUMs in 1998 were approximately 50% of those on the permit. For 1999 we need to come up with substantially higher numbers than those for 1998, at least equal to those for 1997, or the permit is worthless, since we will not be able to break even, i.e. cover all cost incurred in the operation, without profit or salaries to ourselves.

We hope you understand the problems we are facing, and we are ready to start the planning process immediately. We appreciate your continued support in this matter.

Thank you and kind regards,

*Phil & Karin Knight*

Phillip and Karin Knight



**U.S. Department of Justice  
Office of Legislative Affairs**

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 1998

The Honorable Don Young  
Chairman  
Committee on Resources  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to an outstanding question from the July 15 hearing on citizen suits under the Endangered Species Act. The question pertained to settlement discussions prior to April 7, 1998 in two cases, Southwest Center for Biological Diversity v. U.S. Forest Service and Forest Guardians v. U.S. Forest Service. Our response to your question is necessarily limited by the fact that both of these cases remain pending.

As is typical of any litigation, there were conversations between Department attorneys and counsel for both the plaintiffs and the intervenors after the suits were filed. During some of these conversations, the possibility of settlement was mentioned and, following one conversation in the context of a court-ordered status conference, a draft settlement agreement was circulated among all the parties, although it was never pursued.

The Department did not participate in any significant settlement discussions until April 7, when we were contacted by counsel for the Arizona Cattlegrowers Association regarding the Forest Guardians' motion for a preliminary injunction (PI). Having received the government's declaration (in response to the PI motion) asserting that most of the riparian habitat on most allotments was already excluded from livestock grazing, Arizona Cattlegrowers' counsel suggested attempting to reach a stipulation to avoid the PI hearing. The Department of Justice attorney then contacted counsel for the Forest Guardians. The next day, April 8, Forest Guardians faxed a draft stipulation to the Department. It is our understanding that the draft stipulation was faxed by the Forest Guardians to counsel for the Arizona and New Mexico Cattlegrowers Associations on that same date. Since we prefer in this type of case to reach agreement with all the parties whenever possible, the detailed settlement

negotiations that followed were conducted in conference calls among counsel for all the parties. Counsel for the Cattlegrowers Associations ultimately advised the other parties that they would oppose the stipulation. The government and the plaintiffs subsequently signed stipulations regarding this matter.

Finally, the Committee requested a copy of a Memorandum of Agreement (MOA) between the Fish and Wildlife Service and the Forest Service regarding the process for conducting site-specific ESA consultations on the allotments at issue and others. In accordance with the usual third-agency practice, we have consulted with the Departments of Agriculture and Interior about disclosure of the MOA to the Committee and it is enclosed.

I hope that this information is helpful. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

L. Anthony Sutin  
Acting Assistant Attorney General

Enclosure

cc: The Honorable George Miller  
Ranking Minority Member

USDA Forest Service & USDI Fish & Wildlife Service  
GRAZING CONSULTATION AGREEMENT

February 6, 1998

A. Purpose

The purpose of this agreement is to establish an effective and cooperative process for the specific consultation required under section 7 of the Endangered Species Act (ESA) as described below. The scope of the consultation is the effects to listed species and their habitats of the activities in site specific grazing allotments in the Southwestern Region. These allotments are administered under the Forest Plans, grazing permits, allotment management plans, and annual operating plans.

This agreement addresses consultation and conferencing on all species listed as threatened, endangered, or proposed (TEP) for listing, and designated or proposed critical habitat occurring on the Forests of the Southwestern Region. This agreement defines the process, products, actions, timeframe and expectations of the FS and FWS for this consultation and will serve as a guiding document for both agencies throughout the consultation process.

The federal agencies will convene an interagency team of federal employees to conduct this consultation.

B. Consultation Background

Forest Land and Resource Management Plans (Forest Plans) provide guidance and direction for managing National Forests and Grasslands for a 10-15 year period. The plans establish goals, objectives, standards and guidelines for multiple-use and sustained-yield management of renewable resources without impairment of the productivity of the land. Standards and guidelines for the management and conservation of threatened, endangered and proposed species, including proposed or designated critical habitat, are included in Forest Plans. Forest Plans provide direction for the protection and enhancement of all threatened, endangered, and proposed species' populations and habitat proposed or designated as critical, site-specific evaluation of all projects and activities, and initiation of consultation with FWS as appropriate.

The goal of the Southwestern Region of the Forest Service is to develop site specific Allotment Management Plans (AMPs) authorizing grazing in compliance with applicable environmental statutes (e.g. National Forest Management Act (NFMA), Clean Water Act (CWA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA)). Allotments with listed or proposed species or designated or proposed critical habitat are scheduled to be completed by the end of fiscal year 2000. If new concerns are raised during this ongoing grazing consultation as a result of the teams work, there will be adjustments to the schedule for NEPA compliance for revising AMP's.

#### C. Consultation Action

The action that is the subject of this consultation agreement is ongoing grazing activities in the Southwestern Region as currently authorized through existing term grazing permits.

This consultation will focus on ongoing grazing on allotments identified in current litigation (Southwest Center For Biological Diversity -v- Forest Service and Forest Guardians -v- Forest Service) as first priority. Other allotments will be addressed if time and resources permit providing that it does not compromise the time line and quality of this consultation.

#### D. Operations

##### The Forest Service Agrees to:

Develop and submit to the FWS, a site specific Biological Assessment (BA) analyzing the effects of ongoing grazing activities. The BA will be based on both individual allotment evaluations and on the summation of broad evaluations for each TEP species. Formal consultation will be initiated with the submittal of a written request by the Regional Forester.

To initiate consultation the FS will provide a biological assessment by February 13, 1998, that includes:

1. A description of the action to be considered.
2. A description of the specific area that may be affected by the action. (The FS will provide an initial set of Forest maps showing the allotment boundaries containing TEP species.)

3. An initial set of any listed species or critical habitat that may be affected by the action. (A table will be provided that identifies the TEP species affected and on which individual allotments they occur.)
4. All available summary data sheets for individual allotments that provide information about:
  - a. Forest, District, Permittee Name, allotment number, allotment name.
  - b. A list of all TEP species or habitat on the allotment.
  - c. Consultation status by species.
  - d. A description of the actions taken to preserve/protect & conserve TEP species and habitat.
  - e. A description of the manner in which the action may affect TEP species or habitat.
5. A description of the thresholds that will be used to make "may affect" determinations.

During Consultation the FS will provide:

1. Members to the federal interagency assessment team(s) who will participate in assessing effects and supplementing the BA.
2. An allotment-by-allotment assessment of the effects on TEP species and habitat.
3. A final cumulative description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects.
4. All reports, including any environmental impact statement, environmental assessment, or biological assessment prepared previously that are relevant to this consultation.
5. Any other relevant available information on the action, the affected listed species, or critical habitat.
6. The Forest Service will provide the supplemental information for the BA by May 1, 1998.
7. The Forest Service will provide review and comments on the Draft BO to the FWS by July 1,



1998, or within 15 days of receipt of the draft BO.

8. The Forest Service will provide notification to all affected permittees regarding their opportunity to participate in this process as applicants. Individual permittees will be encouraged to participate through their state livestock organizations. Participation by applicants will be governed by 50 CFR Part 402. The Forest Service will describe the applicant's role to the permittees.

The Fish and Wildlife Service agrees to:

1. Provide members to the assessment teams who will participate in assessing effects and developing the BA.
2. Provide the Forest Service a draft biological opinion by June 15, 1998 or within 45 days of receipt of the supplemental BA.
3. Prepare a final Biological Opinion, after delivery of all agreed upon consultation information, by July 15, 1998, or within 15 days of receiving the FS comments on the draft BO. Prepare any necessary formal Conference Reports on effects to proposed species and proposed critical habitat. The Fish and Wildlife Service will make every effort to provide the consultation products prior to the deadline.

The Forest Service and Fish and Wildlife Service mutually agree to:

1. Cooperate as partners in the commitments each agency has made to the process and deadlines as outlined.
2. Develop a strategy to expedite consultation through screening and batching ongoing grazing activities.
3. Cooperate in developing and completing the consultation. This includes, but is not limited to, informal and open exchanges of information and data needs, and expeditious response to requests for information or clarification.
4. Cooperate in developing the biological assessment thresholds for species "may effect" criteria that can be applied to allotments.

5. This Consultation Agreement can be amended by mutual agreement of both parties.
6. This agreement is intended only to improve the internal management of the Forest Service and Fish and Wildlife Service and is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.
7. Timeline:
  - a. May 1, 1998--FS submits BA to FWS.
  - b. June 15, 1998--FWS submits draft BO to FS.
  - c. July 1, 1998--FS returns comments on BO to FWS.
  - d. July 15, 1998--FWS transmits final BO to FS.

  
 JOHN E. KNEAFACK  
 Regional Forester  
 USDA, Forest Service

2/9/98

Date

  
 Henry M. Kaufman  
 Regional Director  
 USDI, Fish and Wildlife Service

2/9/98  
 Date



**U.S. Department of Justice  
Office of Legislative Affairs**

Office of the Assistant Attorney General

Washington, D.C. 20530

August 26, 1998

The Honorable Don Young  
Chairman  
Committee on Resources  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter of July 28, 1998, asking a number of questions in follow-up to the July 15, 1998 hearing on Endangered Species Act implementation in the Southwest. Below are the Department's responses to the questions in your letter as well as those questions contained in the attachment to your letter.

1. Please provide the names of each attorney employed by the Department of Justice representing or supervising those representing the United States in the litigation which was the subject of the hearing. Southwest Center for Biological Diversity v. U.S. Forest Service, Docket number CV 97 666 TUC JMR and CV 97 2562 PHX SMM. In addition please provide a brief, but full curriculum vitae for each person listed. (Please understand that private witnesses are required to submit this information under the rules of the House of Representatives.)

Department of Justice attorneys who represented or supervised those representing the United States in this litigation are:

Christiana Perry  
Jean Williams  
Eileen Soback  
Peter Coppelman  
Lois Schiffer  
Michael A. Johns

Andrew Smith  
Ellen Athas  
Charles Findlay  
Karen Egbert  
Stephen Samuels  
Monte C. Clausen

Curricula vitae for each of these individuals are attached at Tab A.

2. In keeping with the request made by the members for additional documents, please provide to the committee any and all documents related to the case Southwest Center for Biological Diversity v. U.S. Forest Service, Docket number CV 97 666 TUC JMR and CV 97 2562 PHX SMM either prepared by or submitted to the Department of Justice which were either proposals for a settlement, a draft settlement agreement, a draft or proposed stipulation, a draft or proposed stipulated agreement, or letter offering settlement terms or conditions, or any document prepared or presented to the Department of Justice which would have resulted in the settlement or dismissal of this case prior to a trial.

We have already provided to the Committee the two stipulations that were signed by the parties and remain in effect.

The Southwest Center litigation remains pending and therefore is subject to the Department's pending matter policy, which constrains our ability to share non-public information. We have substantial confidentiality interests in the draft documents, particularly in connection with pending litigation. Many of these documents include attorney-client and work product privileged material that would not be available by law to a party in litigation with the United States. They also include settlement-related documents that were created with the understanding that they would not be shared with anyone other than the parties in the litigation. This common understanding of confidentiality is a necessary premise to settlement discussions in any case. We have serious concerns that disclosing these documents would chill attorney-client communications and the deliberative process within the Department; and would also harm our relationships with present and future litigation counsel, who rely on the Department's good faith commitments that we will maintain the confidentiality of settlement documents.

As is typical of any litigation, there were conversations between Department attorneys and counsel for both the plaintiffs and the intervenors after the suits were filed. During some of these conversations, the possibility of settlement was mentioned and, following one conversation in the context of a court-ordered status conference, a draft settlement agreement was circulated among all the parties, although it was never pursued.

The Department did not participate in any significant settlement discussions until April 7, when we were contacted by counsel for the Arizona Cattlegrowers Association regarding the Forest Guardians' motion for a preliminary injunction (PI). Having received the government's declaration (in response to the PI motion) asserting that most of the riparian habitat on most allotments was already excluded from livestock grazing, Arizona Cattlegrowers' counsel suggested attempting to reach a stipulation to avoid the PI hearing. The Department of Justice

attorney then contacted counsel for the Forest Guardians. The next day, April 8, Forest Guardians' counsel faxed a draft stipulation to the Department. It is our understanding that the draft stipulation was faxed by the Forest Guardians to counsel for the Arizona and New Mexico Cattlegrowers Associations on that same date. Since we prefer in this type of case to reach agreement with all the parties, the detailed settlement negotiations that followed were conducted in conference calls among counsel for all the parties, and at least one draft of additional language was circulated among all the parties. Counsel for the Cattlegrowers Associations ultimately advised the other parties that they would oppose the stipulation. The government and the plaintiffs subsequently signed stipulations regarding this matter.

3. How much will the plaintiffs in these two cases (Forest Guardians and SWCBD) receive in attorneys fees, expert witness fees, court costs, and any other costs requested by the plaintiff as a result of this settlement? If that information is not currently available, please provide it to the Committee on Resources within 10 days of the date on which the amount becomes known to the Department of Justice, including copies of all pertinent documents submitted by the plaintiffs in support of their motion for attorneys fees, expert witness fees, and costs and a copy of any order or judgment of the court awarding such fees.

As an initial matter, we note that the award of attorneys fees requires a final order, and there has been no such order in these cases. Rather, the stipulations merely resolved motions for preliminary injunction, the litigation is still pending, and nothing in the stipulation addresses entitlement to attorneys fees.

As you know, the issue of whether or not the government is required to pay attorneys fees to an opposing party - whether environmental groups or local land owners - is governed by law. With respect to claims brought under the Endangered Species Act (ESA), the ESA specifically provides that reasonable attorneys fees may be awarded to any party whenever the court determines that such award is appropriate. The courts have held that under the ESA, fees should be paid to prevailing parties, and that the award of attorneys fees may be appropriate even in cases in which there has been no judicial determination on the merits, e.g. cases which have been settled or mooted, if the plaintiff's lawsuit was a catalyst to the results of the case.

Additionally, with regard to claims made in these cases under the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA), which were not at issue in the motion for preliminary injunction, attorneys fees could be available under the Equal Access to Justice Act (EAJA), 28 U.S.C.

2412. However, the EAJA standard differs somewhat from the ESA standard. EAJA also provides for awards to prevailing small businesses and other specified prevailing parties, but only in cases where the federal defendant's position was not substantially justified. Thus, the question of whether the government's position was substantially justified is another factor in its decision as to whether to contest or pay fees.

4. Will the intervenors receive any reimbursement of their attorneys fees and court costs from the government? Would they have received reimbursement if they had agreed to the settlement?

As outlined above, under the ESA and EAJA, attorneys fees are available to a party that prevails against the government. With respect to those claims on which the intervenors entered on the side of the government in the suits brought by Forest Guardians and Southwest Center for Biodiversity, they will not be entitled to attorneys fees. This would be the case regardless of whether or not they signed the stipulation. However, the intervenors have also filed cross-claims against the government. Should they prevail on those claims, they may be entitled to attorneys fees.

5. Prior to the Supreme Court's decision in Bennett versus Spear, the Department of Interior, through the Justice Department, routinely opposed standing for ranchers and other resources users attempting to use the citizen suit provision of the ESA using the zone of interest test. Has the Justice Department continued to oppose standing for groups who assert an economic harm basis for using the citizens suit provision of ESA?

The Department of Justice makes decisions as to whether to challenge standing of a party or potential intervenors consistent with the relevant case law, including Bennett v. Spear, and the facts of the specific case.

The government did not oppose the entry of the intervenors into the two cases under discussion here. In cases such as these, involving consultation under Section 7 of the ESA, which recognizes that permit or license holders may have an interest in the outcome of the consultation, we generally do not oppose intervention of those interested parties whose interests would not otherwise be represented.

6. Does Department of Justice have a formal policy with regard to intervention by groups such as ranchers, loggers, county or state governments who assert that they will be personally harmed by the outcome of ESA citizen suits seeking judicial review under the Administrative Procedure Act?

No. Decisions as to whether to challenge a potential intervenor are made on a case-by-case basis.

7. Did the court in the case ever issue any order or decree that mandates the implementation of this settlement agreement? If so, please attach a copy.

No. The Court was not required to issue such an order because the stipulation was entered into by the United States and the plaintiffs in exchange for the plaintiffs' withdrawal of their motion for preliminary injunction, which sought a broad injunction against grazing. The Court did issue an order, adopting the Report and Recommendation of the Magistrate, rejecting the Cattlegrowers' challenge to the implementation of the agreement and holding that the Forest Service had the authority to make the changes necessary to effect its management direction. Copies of the Report and Recommendation and the Order are attached at Tab B.

8. You state in your testimony in page 3 that ranchers will be given an opportunity to comment on the biological opinion until August. Considering the binding nature of the agreement will the Forest Service be allowed to make any changes to their policy, procedures, forest management plans, rules or regulations pertaining to management of grazing lands, including riparian areas?

By their terms, the stipulations entered into between the United States, Forest Guardians, and Southwest Center expire upon completion of consultation and will then have no effect, as it was the purpose of the stipulations to maintain the status quo and not to dictate management for the future. However, because the stipulations memorialized existing or planned management practices, those practices will continue unless, at the discretion of the Forest Service, change is warranted consistent with applicable law.

9. Under the 9<sup>th</sup> Circuit's ruling in the Pacific Rivers case and later in *Silver v. Babbitt*, on-going activities must be enjoined prior to consultation. This appears to mean that the moment a species is listed the federal land management agencies are in violation of the ESA and an injunction must be issued, even though the species itself may have been considered in previous consultation or in the plans developed for the Forest in question. Doesn't this mean the agencies can never get ahead of the consultation process

because of new listings? Hasn't consultation become a moving target that is almost impossible to achieve in compliance with law? Does the ESA give the government any amount of time to complete consultation before injunctions may be issued to halt on-going activities?

It is possible for agencies to get ahead of the listing process. Under Section 7(a)(4) of the ESA, federal agencies are to "confer" with FWS on species proposed for listing, but there is no prohibition on commitment of resources under Section 7(d) during this time as there is for species that are already listed. Regulations issued under the ESA provide that in many circumstances, if such a conference is conducted in accordance with the procedures for formal consultation, an opinion issued at the conclusion of the conference may be adopted as the biological opinion at the time the species is listed. We believe that the ESA, its implementing regulations, and the practices of the agencies allow the statute compliance in most instances. Further, even when consultation is required for species that are already listed, initiation of consultation does not necessarily mean all ongoing activities must be suspended.



1. Mr. Coppelman, how does the Justice Department insure that conflicts of interest do not arise in cases such as those that were involved in the Tucson hearing?
2. Does the Justice Department or the federal government have any regulations regarding conflicts of interests in this matter?
3. Did any of the individuals involved in this case have any conflicts of interest regarding this case or were any removed from the case because of potential conflicts of interests?
4. Did any of the individuals involved in the case, on behalf of the federal government, ever belong to the New Mexico Cattle Growers, the New Mexico Farm and Livestock Bureau or the New Mexico Wood Growers?
5. Were any of those federal employees, involved in the case, ever a member of the Southwest Center for Biological Diversity or Forest Guardians?
6. Have any of these employees, involved in the case, ever given money to any of these organizations?
7. If this information is not available, would you agree that serious conflicts of interests could arise if any of these individuals were found to have contributed to or been a member of any, of these groups?

The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), 5 C.F.R. 2635, apply to all Executive Branch agencies. Because each federal agency is required to ensure that its own employees follow the applicable conflict of interest regulations, my answers to questions 1-8 relate only to Justice Department attorneys and policy.

The Justice Department has several mechanisms in place to educate employees about their obligations with respect to compliance with the government's conflict of interest rules. All employees are apprised of, and expected to follow, the Standards of Conduct. The Standards of Conduct include regulations on both conflicting financial interests, 5 C.F.R. 2635.401 et seq., and the need to exercise impartiality in performing official duties, 5 C.F.R. 2635.501 et seq. These regulations define, and require employees of the Executive Branch to avoid, conflicts of interest. Justice Department employees are also told about the restrictions contained in 18 U.S.C. 208(a) on participating in matters in which they have a financial interest. In addition, the rules of professional conduct for attorneys generally prohibit an attorney

from representing a client where the representation would result in a conflict of interest. See Rule 1.7, ABA Model Rules of Professional Conduct.

Environment and Natural Resource Division attorneys receive annual ethics training which includes, among other things, training on the need to avoid conflicts of interest. At the time an attorney gets involved in a particular case, he or she has the obligation to ensure that his or her involvement in the case does not create a conflict of interest. To help resolve specific questions, both the Environment Division and the Department have experts on government ethics who are available at any time to respond to individual attorneys. Political appointees have extensive entrance interviews to discuss the conflict of interest rules, as well as annual ethics training.

The Justice Department does not maintain records on individual employees' charitable contributions or memberships in clubs or other organizations. The Standards of Conduct provide that an employee may not work on a specific matter involving particular parties in which a covered person is or represents a party, if it is determined that a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter. 5 C.F.R. §2635.502(a). This requirement may be waived by an appropriate authority. In the development of the notion of a "covered person" a careful balance was struck between defining and preventing true conflicts of interest, and infringing on the employee's first amendment right to freedom of association.

For purposes of 5 C.F.R. §2635.502(a), a covered party includes an organization in which the employee is an "active participant." Active participants include serving as an officer of an organization or as a committee or subcommittee chair or otherwise participating in directing the activities of the organization. While an organization may be a covered person with respect to an employee who devotes significant time to a specific program of the organization, the fact that an employee is a member of, or contributes to, the organization does not make the organization a covered person.

We do not believe that any conflict of interest arose in the cases at issue here.

**8. Please list all Justice Department personnel involved in these cases that have previously been employed by environmental organizations.**

Peter Coppelman - The Wilderness Society, 1981-90  
Eileen Soback - One year fellowship, Los Angeles Center for Law in the Public Interest, 1979

**9. Name the individual who approved the settlement.**

The April 16, 1998, Stipulation was approved by Eileen Sobeck, Chief of the Wildlife and Marine Resources Section.

**10. Please provide the names and titles of those individuals who signed off on this settlement agreement, including Justice and Department of Agriculture employees.**

Within the Department of Justice, the April 16, 1998, Stipulation was recommended by Christiana Perry, Jean Williams, and Andrew Smith, and approved by Eileen Sobeck. Peter Coppelman, Principal Deputy Assistant Attorney General for the Environment and Natural Resources Division, and Lois Schiffer, Assistant Attorney General for the Environment and Natural Resources Division were apprised of the status of the Stipulation and the action the trial attorneys intended to take, but their approval was not required because the Stipulation was not a final settlement on the merits of the case. With respect to Department of Agriculture review, we refer you to that agency for a response.

**11. Did the Justice Department contact the Council on Environmental Quality on this case and related issues?**

In May 1997, there was an interagency meeting held at the Council on Environmental Quality on Southwest natural resources issues generally. The purpose of the meeting was to identify and prioritize potential issues. The two cases at issue here were not discussed since they had not been filed, although some of the issues that arose in the cases were identified at this meeting. The Department did not otherwise contact CEQ regarding these two cases.

**12. Please provide the names of any individuals outside of the Justice Department and the Department of Agriculture who were contacted regarding this case and related issues.**

For a description of the Department's contacts with the parties and their counsel in these cases, please refer to our answers to Question 2 of the letter, and to Question 24 of the attachment. We also had contact with our client agencies, the Departments of Agriculture and the Interior. Otherwise, we are not aware of other contacts regarding these cases.

**13. Please provide any briefing materials, correspondence or copies of documents that were given to any of these individuals.**

As we noted in our answer to Question 12, we have not contacted individuals other than the parties and their counsel, and our client agencies. Therefore, we do not have materials responsive to this questions.

14. Please provide the names of the individuals within the Department of Justice who had contact with these people outside of the Department of Agriculture.

As we noted in our answer to Question 12, the Department has not contacted individuals other than the parties and their counsel, and our client agencies.

15. Did Department of Justice personnel take part in Department of Agriculture briefings of the Council on Environmental Quality?

Over the years, there have been innumerable meetings at which the Department of Agriculture has briefed CEQ, and the Department of Justice has taken part in many of these meetings. Except as noted in our answer to question 11, the Department of Justice has not participated in any briefings with CEQ on these cases.

16. Did the Justice Department notify the individual ranchers impacted by the court cases regarding the stipulated agreement before it was signed?

The individual ranchers impacted by the court cases were not parties to those court cases and therefore were not notified regarding the stipulation. As previously explained, the Arizona and New Mexico Cattlegrowers' Associations, which were parties, were involved in the development of the stipulation until two days before the stipulation was initially presented to the court, when they withdrew from participation. We understand the ranchers were notified about changes to the Annual Operating Plan, pursuant to the Department of Agriculture's procedures. We refer you to the Department of Agriculture regarding those procedures.

17. Were all of these ranchers represented by the New Mexico Cattle Grower's attorney?

The New Mexico Cattlegrowers Association intervened on behalf of its members; however, the Association's court-filed papers do not list its members. Thus, the Department of Justice is not in a position to know which ranchers are represented.

18. As intervenors, can the ranchers receive legal fees if they prevailed?

Please see our response to question 4 of Chairman Young's letter. Since the ranchers' representatives, the Cattlegrowers Associations, intervened on the same side of the litigation as the government in the two cases at issue, they will not be able

to obtain fees against the government in this case. If the Cattlegrowers prevail against the government on the cross claims they have raised, they may be entitled to fees.

**19. Was not the stipulated settlement nothing more than a contract between two parties?**

The Stipulation of April 16, 1998, is an agreement between the plaintiff and the federal defendants to resolve plaintiff's motion for a preliminary injunction. Pursuant to its terms, the Forest Service agreed to take certain steps and plaintiff agreed to withdraw its broad request for a preliminary injunction to halt grazing.

**20. If that is the case, how could the ranchers challenge it or gain standing to challenge it?**

The Arizona and the New Mexico Cattlegrowers Associations did challenge the stipulation in their motion for temporary restraining order filed April 16, 1998, seeking to enjoin the Forest Service's implementation of the stipulation. The government has not challenged the standing of the ranchers to make these claims, and the Cattlegrowers' motion to enjoin implementation of the stipulation was heard immediately by the Court. Their request for an injunction was ultimately denied.

**21. Why has the Justice Department opposed intervenor status by the ranching community?**

The government has not opposed intervenor status by the ranching community in either the Southwest Center or the Forest Guardians case. As stated above, the position taken by the Department of Justice regarding proposed intervention by affected individuals or state or local governments in ESA citizen suits is made on a case by case basis. We evaluate these situations in light of the provisions of Federal Rule of Civil Procedure 24, which governs intervention. Factors that influence the government's position include whether other parties already participating in the litigation adequately represent the proposed intervenors, at what point in the case a motion to intervene is filed, and the views of the client federal agencies. In the majority of instances, the federal government neither supports nor opposes intervention.

**22. Why did the Justice Department testimony ignore the fact that ranchers have filed administrative appeals on the amendments to their operating plans that the Forest Service instituted to implement the settlement agreement?**

The Justice Department was asked to testify before the Committee about litigation in federal court under the citizen suit provisions of the ESA, with an emphasis on the Southwest Center

and Forest Guardians litigation. While the Department represents the Forest Service in court, we do not participate in administrative proceedings.

23. I have been told that later this year, the environmentalists, using low flying aircraft, will monitor allotments to see if all aspects of the agreements are being fulfilled. They will follow-up with on the ground verification of violations. Following the discovery of violations, they will then return to court asking for further actions and remedies. The presence of a large elk population; the nature of the terrain; and factors such as fencing being destroyed, cut, or washed out as well as gates being left open intentionally, may well result in isolated cases of cattle returning to some of the riparian areas. Under this scenario, which means that settlement was intended to fail, would the government's position be defensible in court?

We do not agree that the stipulation was intended to fail. Indeed, in conducting the consultation and crafting the stipulation, the federal defendants have taken into account that accidents, and natural events such as those described in this question, may occur; such events should not provide a basis for plaintiffs to prevail should they reinstate their motion. The Department has no knowledge of any plans to fly aircraft to monitor allotments. We would note again that, by its terms, the stipulation will expire when the consultation is complete.

24. Identify all of the participants in the meetings that led to the stipulated settlement in Tucson.

There were several conference calls in the week prior to the hearing set on Forest Guardians' motion for preliminary injunction regarding the proposed stipulation. All parties were represented through one or several counsel on these calls up to and including the call on April 12, 1998. Included in these calls were Christiana Perry and Jean Williams (counsel for Federal Defendants), Robert Wiygul (counsel for Forest Guardians), Jay Tutchton (counsel for the Southwest Center), Jay Shapiro (counsel for Arizona Cattlegrowers Association), and Karen Budd-Falen (counsel for New Mexico Cattlegrowers Association). On April 12, the Cattlegrowers' attorneys indicated that they would withdraw their support of the stipulation. After that time, on April 13-14, 1998, there were several meetings between Ms. Perry and various representatives of the federal defendants, and plaintiffs' counsel and various representatives of plaintiffs to negotiate the stipulation. On April 13, Ms. Perry advised counsel for Arizona Cattlegrowers of the continuing negotiations with plaintiffs.

**25. Identify all of the participants in the second stipulated settlement.**

The second stipulation was negotiated between and executed by Ms. Perry and Mr. Tutchton. The parties to the stipulation were the U.S. Forest Service and the Southwest Center for Biodiversity.

**26. Were ranchers impacted by the second settlement invited to take part? If not, why not?**

The individual ranchers impacted by the second stipulation were not parties to the litigation and therefore were not participants in the negotiation of the stipulation. The Arizona and New Mexico Cattlegrowers Associations, which were parties, would have been invited to take part, had they not previously withdrawn from similar negotiations and opposed the first stipulation. We understood that they would also refuse to support a second stipulation and so did not include them in the discussions regarding the second stipulation.

**27. Were they notified a second settlement was being considered?**

The Cattlegrowers Associations, through their counsel, were aware of the possibility of a second stipulation. In a pleading filed in early May 1998 (the Federal Defendants' Supplemental Response to Southwest Center's motion for preliminary injunction), we stated that "it is federal defendants' belief that it may be possible with additional information to resolve Southwest Center's motion through a stipulation similar to that used in the Forest Guardians case; federal defendants are currently in the process of attempting to confirm this through discussions with Southwest Center." Counsel for the Cattlegrowers' Associations, including Jay Shapiro and Karen Budd-Falen, were served with this pleading on May 1, 1998.

**28. Was the press, the Congress, or anyone else besides the environmental groups informed beforehand of the second settlement negotiations? If not, why not?**

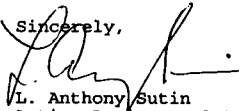
The Forest Service informs us that prior to signing the second stipulation, representatives of the Forest Service met with representatives of the New Mexico and Arizona Cattlegrowers' Associations to advise them of the intention of the federal defendants to enter into the second stipulation and to review its contents. The Forest Service informs us that, prior to signing, Forest Service representatives also met with congressional delegations from both New Mexico and Arizona regarding the second stipulation. We provided the New Mexico Cattlegrowers' Association's attorney, upon request, with a copy of the draft stipulation before it was signed.

29. If no one was aware of the second settlement talks, outside of the participants, would not reasonable people come to the conclusion that this process was being held secretly?

Based on the facts set out in our answer to questions 27 and 28 above, it is evident that the process of entering into the second stipulation was carried out with the knowledge of the Cattlegrowers. In any event, there is no requirement that all aspects of litigation to which the federal government is a party be conducted in public. Meetings, discussions and settlement talks between some or all parties often take place without notice to the public, the court or other parties to the litigation. Moreover, to promote the public policy favoring settlements, Rule 408 of the Federal Rules of Evidence provides that evidence of conduct or statements made in settlement negotiations is not admissible to prove liability for or invalidity of the claim or its amount.

I hope that this information is helpful. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,



L. Anthony Sutin  
Acting Assistant Attorney General

Enclosure

cc: The Honorable George Miller  
Ranking Minority Member



**Environment and Natural Resources Division**

Peter Coppelman, Principal Deputy Assistant Attorney General, Environment and Natural Resource Division. B.A., Harvard College, 1964; Fulbright Scholarship to India, 1964-65; J.D., Cornell Law School, 1968. Fellow, California Rural Legal Assistance, 1968-70; Directing Attorney, California Rural Legal Assistance Office of the National Senior Citizens Law Center, 1970-1974; Managing Partner, Coppelman & Hiestand, 1974-77; Trial Attorney, ENRD, 1978-81; Director of Forest Wilderness Programs, The Wilderness Society, 1981-84; Senior Counsel for Resource Planning and Economics, The Wilderness Society, 1984-87; Vice President, The Wilderness Society, 1987-90; Counsel for Federal Legal Affairs, Greenfield Environmental, 1990-1994; Principal Deputy AAG, ENRD, 1994 to present.

Karen Egbert, Senior Attorney, Environmental Defense Section. B.A., Heidelberg College, 1971; M.A., George Washington University, 1973; J.D., Catholic University of America, 1980. Staff Assistant, Robert F. Kennedy Memorial, August 1974 - August 1975; Legislative Assistant, Congressman Ronald Sarasin, 1975-1977; Legislative Assistant, Congressman Joshua Eilberg, 1977-1978; Staff Attorney, Federal Trade Commission, 1981-1987; Staff Attorney, EDS, 1987 to present.

Charles Findlay, Assistant Chief, General Litigation Section. B.A., 1968, Kenyon College; J.D., Case Western Reserve University, 1971. Attorney-Advisor, Office of Legislative Counsel, Department of the Interior, 1971-73; Attorney-Advisor, Office of the Solicitor, Department of the Interior, 1974-78. Staff Attorney, GLS, 1978 - 1997; Assistant Chief, GLS, 1998 to present.

Christiana Perry, Trial Attorney, Wildlife and Marine Resources Section. B.A., Duke University, 1987; J.D., Georgetown University, 1991. Staff Attorney, WMRS, 1991 to present.

Stephen Samuels, Assistant Chief, Environmental Defense Section. B.A., 1974, Tulane University; J.D., 1977, Stanford Law School. Attorney, Department of Energy, 1977-1980. Associate, Breed, Abbott & Morgan, 1980-1985. Trial Attorney, EDS, 1985-1989. Assistant Chief, EDS, 1989-present.

Lois Schiffer, Assistant Attorney General, ENRD. B.A., Radcliffe College, 1966; J.D., Harvard Law School, 1969. Attorney, Boston Legal Assistance Project, 1969-70; Law Clerk, U.S. Court of Appeals, D.C. Circuit, 1970-71; Associate, Leva, Hawes, Symington, Martin and Oppenheimer, 1971-74; Attorney, Center for Law and Social Policy, 1974-78; Chief, General Litigation Section, and Special Litigation Counsel, ENRD, 1978-84; General

Counsel, National Public Radio, 1984-89; Partner, Nussbaum & Wald, 1989-94; Adjunct Professor, Georgetown Law School, 1986-present. Assistant Attorney General, ENRD, 1994 to present.

Andrew Smith, Trial Attorney, General Litigation Section. B.S., UCLA, 1986; M.S., University of Arizona, 1992; J.D., University of New Mexico, 1995. Veterinarian Assistant, 1987-1988; Magazine Editor, 1988-1989; Law Clerk, 10<sup>th</sup> Circuit Court of Appeals, Santa Fe, 1995-1996; Law Clerk, District of New Mexico, Santa Fe, 1996-1997; Trial Attorney, GLS, 1997 to present.

Eileen Soback, Chief, Wildlife and Marine Resources Section. B.A., Stanford University, 1975; J.D., Stanford Law School, 1978. Fellow, Los Angeles Center for Law in the Public Interest, 1979; Staff Attorney, NOAA Office of General Counsel, 1979-1984; Trial Attorney, WMRS, 1984-1990; Assistant Chief, WMRS, 1990-1995; Chief, WMRS, 1995 to present.

Jean Williams, Assistant Chief, Wildlife and Marine Resources. B.A., Goucher College, 1975; J.D., Tulane University, 1979. Staff Attorney, Fawer and Greenbaum, New Orleans, LA, 1979-1980; Staff Attorney, Perito, Duerk and Pinco, Washington, D.C., 1981-83; Trial Attorney, WMRS, 1983-1995; Senior Trial Attorney, WMRS, 1995-1996; Assistant Chief, WMRS, 1996-present.

#### **Assistant United States Attorneys**

Monte C. Clausen, Assistant U.S. Attorney, Tucson. B.A. University of Arizona, 1964; J.D., University of Arizona, 1969. Attorney, Leshner, Kimble, Rucker & Lindamood (later called Leshner, Kimble, Clausen & Gothreau), 1969-84; Partner, Murphy, Clausen & Goering, 1984-88. Assistant United States Attorney, Civil Division, U.S. Attorneys Office, Tucson, 1989 to present.

Michael A. Johns, First Assistant U.S. Attorney, Phoenix, AZ. B.S., University of Arizona, 1971; J.D., Arizona State University College of Law, 1974. Crew Foreman, Payson Ranger District, Tonto National Forest, 1969-72; Law Clerk, U.S. Attorney's Office, Phoenix, 1972-73; Assistant U.S. Attorney, 1974-90, Deputy Civil Chief, 1990-94, Civil Chief, 1994-96, Chief AUSA and Civil Chief, 1996-97, First AUSA and Civil Chief, July to November 1997, Interim U.S. Attorney, First AUSA, and Civil Chief, November 1997 to May 1998; and First AUSA, May 1998 to present, U.S. Attorneys Office, Phoenix.

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

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APR 17 1998	
CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
BY _____	DEPUTY

SOUTHWEST CENTER FOR BIOLOGICAL  
DIVERSITY, et al.

Plaintiffs,

vs.

U.S. FOREST SERVICE, et al.

Defendants.

No. CV 97-666 TUC JMR

FOREST GUARDIANS,

Plaintiff,

and SOUTHWEST CENTER FOR  
BIOLOGICAL DIVERSITY, et al.

Plaintiff-Intervenors,

vs.

UNITED STATES FOREST SERVICE,  
et al.,

Defendants.

No. CV 97-2562 PHX SMM

ORDER

ARIZONA CATTLE GROWERS' ASSOC.,

and

NEW MEXICO CATTLE GROWERS'  
ASSOC.,

Intervenors.

No. CV 97-666 TUC JMR  
No. CV 97-2562 PHX SMM

On April 16, 1998, Intervenors Arizona Cattle Growers' Association and New Mexico Cattle Growers' Association filed a Motion for Temporary Restraining Order Against United States Forest Service. Because a motion for preliminary injunction was pending

*JMR, Jackson, Bergoffen, Clausen, Sobek, Perry, J. [unclear],  
James, Budd-Jalen, Van Zandt, Katz, Wiyqui, Decker, John*

in this matter, and the hearing regarding such was being conducted by Magistrate Judge Terlizzi, this matter was also referred to Magistrate Judge Terlizzi for Report and Recommendation.

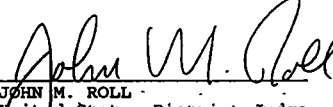
On April 17, 1998, Judge Terlizzi filed a Report and Recommendation. Due to the nature of the proceedings, and pursuant to prior Order of this Court, this Court is reviewing the Report and Recommendation prior to the time provided the parties for objecting to the Report.

Following independent review of the Report and Recommendation, the Motion for Temporary Restraining Order, and the materials filed regarding the motion for preliminary injunction,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation filed April 17, 1998 is ADOPTED.

IT IS FURTHER ORDERED that the Intervenor's Motion for Temporary Restraining Order is DENIED.

DATED this 17 day of April, 1998.

  
JOHN M. ROLL  
United States District Judge

*Perry*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA APR 17 A 11:19

SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY, et al.,	)	
Plaintiffs,	)	CV 97 666 TUC JMR
v.	)	REPORT AND RECOMMENDATION
UNITED STATES FOREST SERVICE, et al.,	)	
Defendants.	)	
<hr/>		
FOREST GUARDIANS,	)	
Plaintiff,	)	CV 97-2562 PHX SMM
and SOUTHWEST CENTER for BIOLOGICAL DIVERSITY, et al.,	)	
Plaintiff-Interveners,	)	
v.	)	
UNITED STATES FOREST SERVICE, et al.,	)	
Defendants.	)	
<hr/>		
ARIZONA CATTLE GROWERS' ASSOC.	)	CV 97 666 TUC RTT
and	)	CV 97 2562 PHX SMM
NEW MEXICO CATTLE GROWERS' ASSOC.,	)	
Interveners.	)	
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REC'D APR 22 1998

*RTT, Jme, Tuchten, Bergoffen, Clausen, Sobek, Perry, Juen  
James, Budd-Jalen Van Zandt, Kate Whinnell, Doreen Tuck*

These consolidated cases involve allegations of violations of the Endangered Species Act ("ESA"), 16 U.S.C. § 1601 *et seq.*, and other federal and state laws by the United States Forest Service (USFS) on national forest lands. Plaintiffs filed a Motion for Preliminary Injunction to enjoin USFS from permitting any domestic livestock (cattle) grazing on specifically identified allotments of national forest lands until certain substantive and procedural requirements of the ESA were fulfilled. Evidentiary hearings on Plaintiffs' Motion, which pertains to case number 97 CV 666 TUC JMR, were held April 14, 15 and 16, 1998, before the Magistrate Judge. During those hearings, Plaintiffs and USFS submitted a stipulation agreement for District Judge John Rolls' approval. Judge Roll declined to accept the stipulation because Arizona and New Mexico Cattle Growers' Associations ("Intervenors") did not join in the agreement. On April 16, Plaintiffs and USFS amended the agreement and filed it as a Settlement Agreement, which does not require the Court's acceptance to take effect, and Plaintiffs withdrew the Motion for Preliminary Injunction. Shortly thereafter, Intervenors filed a Motion for Temporary Restraining Order ("TRO"), pursuant to Rule 65(b), Fed.R.Civ.P., seeking a Court Order to prohibit the implementation of the Settlement Agreement, at least until Intervenors' forthcoming Motion for Preliminary Injunction is filed, fully briefed by all parties, orally argued and decided. For the reasons stated below, the Magistrate Judge recommends that the Motion be denied.

#### THE STANDARD FOR GRANTING A TRO

The Ninth Circuit employs alternative standards in deciding whether to grant interim injunctive relief. The first standard requires the Court to weigh: 1) whether the moving party will suffer irreparable injury if the relief is denied; 2) whether the moving party will probably prevail on the merits; 3) whether the balance of potential harm favors the moving party; and 4) whether public

interest favors granting relief. *Davison v. City of Tucson*, 924 F.Supp. 989, 991-92 (D.Ariz. 1996).

Using the alternative test, a movant must show either: 1) a combination of probable success on the merits and the possibility of irreparable harm, or 2) the existence of serious questions going to the merits and the balance of hardships tips sharply in favor of the moving party. *Id.*; *International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). In essence, the Court must balance the equities in the exercise of its discretion. *Id.*

#### BACKGROUND

To properly evaluate the Motion for TRO, it is necessary to understand the withdrawn Motion for Preliminary Injunction, which resulted in the Settlement Agreement, prompting the Motion for TRO. Because the other parties were not given an opportunity to file briefs opposing the Motion for TRO, the Court utilized all of the pleadings associated with the Motion for Preliminary Injunction and testimony presented at the associated hearings, in addition to the Motion for TRO and the brief arguments heard regarding it, to inform this Report and Recommendation.

A. The Endangered Species Act ("ESA"): ESA was enacted by Congress in 1973 in response to increasing concern that various "species of fish, wildlife and plants have been so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). One of its purposes was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To those ends, Congress established a variety of statutory requirements, both procedural and substantive, that, together, are designed to protect and recover threatened and endangered species.

Species are designated as "threatened" ("likely to become an endangered species within the foreseeable future") or "endangered" ("in danger of extinction"), 16 U.S.C. § 1532 (20) and (16). Based

on factors including: the present or threatened destruction, modification or curtailment of the species' habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(1). The Secretary of the Interior publishes in the Federal Register a list of those species determined to be threatened or endangered. 16 U.S.C. § 1533(c)(1). Concurrent with listing the species, the Secretary designates which habitat of such species is "critical habitat." 16 U.S.C. § 1533(a)(3)(A).

Critical habitat is defined as "(i) the specific areas within a geographical area occupied by the species ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection, and (ii) specific areas outside the geographical area occupied by the species ... upon a determination by the Secretary that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A). Critical habitat does not necessarily include the entire geographical area which can be occupied by the listed species; it must be an area essential to the species' conservation. 16 U.S.C. § 1532(5)(C). ESA imposes a substantive obligation on all federal agencies to utilize their authorities to conserve listed species. 16 U.S.C. § 1536(a).

The ESA requires that "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 such species' critical habitat. 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the U.S. Fish and Wildlife Service ("FWS") has promulgated regulations that govern the consultation process. Under these regulations, the USFS must determine whether a listed



species or critical habitat "may be present" in an area in which agency action is proposed. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.14(a). For projects where protected species may be present, the USFS must develop a Biological Assessment to determine whether or not the proposed action is "likely to affect" the protected species; if so, the USFS must engage in "formal consultation" with FWS. 50 C.F.R. § 402.14(a), resulting in a written Biological Opinion by the FWS.

The Biological Opinion includes a summary of the information on which the opinion is based, a detailed discussion of the effects of the action on listed species or critical habitat, and gives the opinion that the action is likely to jeopardize the continued existence of a listed species or is likely to result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"), or that the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy biological opinion"). 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If a proposed action receives a "jeopardy biological opinion," the action may not go forward unless the FWS can suggest reasonable and prudent alternatives to the proposed action, that avoid such jeopardization, destruction or adverse modification. 16 U.S.C. § 1536(b)(3)(A). Formal consultation is concluded with the issuance of the Biological Opinion. 50 C.F.R. § 402.14(i) [small L](1). After consultation has begun but before it has been completed, the federal agency cannot make any "irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d).

B. USFS: Planning for the use of National Forest System lands for livestock grazing (or any other) purposes is governed by the National Forest Management Act ("NFMA") of 1976 and associated regulations. 16 U.S.C. § 1600 et seq.; 36 C.F.R. § 219 et seq. NFMA establishes a

framework for the USFS to use in developing Land and Resource Management Plans ("LRMPs" or "forest plans"). Pursuant to NFMA, forest management planning and decision-making operates on several levels. 16 U.S.C. § 1604. Broad planning and policy-making operates at the regional level. The National Forest System is divided into nine geographic regions in the United States. National forests in Arizona and New Mexico are located in the Southwest Region, which consists of 11 forests, each with its own "forest plan." Each forest within a region must comply with a "regional guide" that includes standards and guidelines which, by virtue of their scope and/or nature, make sense to address on a broad, regional level. See 36 C.F.R. § 219.8-219.9.

A more detailed level of decision-making is that of specific projects, such as authorizing domestic livestock grazing on certain allotments in the national forests. (Declaration of John R. Kirkpatrick ("Kirkpatrick Declaration"), Acting Regional Forester for USFS, Southwest Region, attached as Exhibit 1 to USFS' Memorandum in Opposition to Motion for Preliminary Injunction at ¶ 4). Grazing permits are typically issued for a maximum of 10 years and are governed by Allotment Management Plans ("AMPs"), which prescribe the manner in which livestock operations will be conducted. In addition, USFS issues instructions called Annual Operating Plans ("AOPs") to its permittees annually which contain specific management direction for the upcoming grazing season that might be necessary for resource protection in a particular allotment. (Kirkpatrick Declaration at ¶ 5.)

C. **Factual Background:** As a starting point, the importance of riverbed areas to wildlife in the desert southwest cannot be overstated. Riparian areas serve as critical habitat for numerous threatened and endangered species. It is undisputed that livestock grazing does occur in some riparian areas involved in this lawsuit. The ESA flatly requires that the USFS ensure that its

programs and permits do not jeopardize the survival or critical habitat of any listed species and, to that end, requires the USFS to consult with FWS whenever its actions may affect such species.

In its Motion for Preliminary Injunction, Plaintiffs claimed that the USFS failed to consult with FWS prior to approving livestock grazing in riparian areas, which will adversely affect three listed species, the Spikedace, the Loach Minnow and the Southwestern Willow Flycatcher, in violation of the ESA; that the USFS also failed to consult with respect to grazing within five miles of occupied Flycatcher habitat during the breeding season; that the USFS actions in authorizing grazing in critical riparian areas will result in jeopardy to the survival of the three listed species; and that the USFS' authorization of grazing during the breeding season within five miles of Flycatcher habitat will jeopardize the survival of the Flycatcher.

Formal consultation on the broad level of the Southwest Region's forest plans, which encompass the allotments identified in this action, has already been conducted and completed, resulting in a "no jeopardy" Biological Opinion from the FWS regarding the three species involved in the Motion for Preliminary Injunction. (Plaintiffs' Exhibit 9, attached to Motion for Preliminary Injunction.) During consultation, the USFS issued a "Seven Species Biological Assessment" which specifically dealt with seven listed species of concern, including the Spikedace, Loach Minnow and Southwestern Willow Flycatcher. (Plaintiffs' Exhibit 3, attached to Motion for Preliminary Injunction.) In the Biological Opinion, FWS outlined specific management directives for the protection of the three species. Plaintiffs' charge of failure to consult referred to consulting on a project, or site-specific, level. Plaintiff sought to enjoin all livestock grazing until consultation is completed for each individual grazing allotment. This site-specific consultation is scheduled to be completed on July 15, 1998.

#### DISCUSSION

The Settlement Agreement entered into by Plaintiffs and USFS accomplished several objectives: USFS agreed to monitor more closely, on either a weekly or bi-weekly basis, several allotments on which grazing is already supposed to be excluded and in which the listed species may be present; USFS agreed to exclude grazing on several other allotments by, at the latest, August 15, 1998; general removal procedures for trespassing cattle are outlined; general communicative and disciplinary procedures regarding permittees whose cattle trespass into excluded areas are outlined; and further cooperative biological field research is directed, providing for input by permittees and Plaintiffs.

In their Motion for TRO ("Motion"), Interveners argue that the agreement violates the NFMA and its associated regulations by directing the construction of fences or otherwise excluding cattle from individual permittees' allotments without first making final decisions which can be appealed or giving concrete notice to the affected permittees. (Motion at 6.) While the USFS ultimately has the right to modify the Annual Operating Plans associated with the permits, as testified by Pat Morrison of the USFS, Interveners claim that required procedures will be violated if the agreement takes effect immediately. (*Id.*) Additionally, the construction and/or cost of some of the fencing will be borne by permittees without their input, which Interveners argue is required. (*Id.* at 6. fn 2.) Interveners assert that permittees will suffer immediate irreparable injuries: forcing livestock away from water sources, restricting some permittees' independent water rights, eliminating the use of some private lands, forcing the sale or destruction of some cattle, eliminating the use of certain pastures which will render entire grazing systems inoperable, causing economic loss for additional feed and fencing, and causing the possible loss of livestock to predators. (Motion at 5.) Additionally,

Interveners argue that the exclosure of cattle from areas containing "potential" or "suitable but unoccupied" habitat for listed species violates the ESA because it goes beyond what the ESA requires. (Motion at 7.)

Interveners claim that the balance of hardships tips sharply in their favor because, while the permittees will suffer immediate irreparable injury if the relief they seek is not granted, the listed species and their habitats will not be harmed if the TRO is granted and grazing is allowed to continue pending completion of the formal consultation process. (Motion at 8, citing the Kirkpatrick Declaration.) Interveners also claim the TRO will "preserve the status quo" and allow them time to amend their cross-complaint in the original action to include additional claims, to join affected individual permittees, and to file a Motion for Preliminary and Permanent Injunction against enforcement of the Settlement Agreement. (Motion at 8.)

Counsel for USFS argues that the Settlement Agreement memorializes practices, policies and procedures which are already in place or were scheduled to occur in the near future as part of a comprehensive plan for protection of listed species. She argues that granting the TRO would enjoin the USFS from performing actions which it feels are required under the ESA, effectively causing the USFS to violate the ESA. Thus, the USFS argues that actions spelled out in the Settlement Agreement actually represent the status quo, and the TRO would change the situation, rather than the reverse. Plaintiffs agree, arguing that the Agreement serves as an official commitment by the USFS to better monitor and enforce the exclosure of cattle grazing that is already supposed to be in effect, as well as setting a schedule for getting the remaining allotments in compliance with the ESA.

Using the Ninth Circuit's alternative test, on the first prong, Interveners must demonstrate a combination of a likelihood of success on the merits and irreparable injury if this short-term,

immediate relief is not granted. According to the USFS, in the 49 allotments listed in Table A to the agreement, grazing is already excluded. If there are cattle in those areas, they are not there pursuant to an existing permit, so to order fences erected or cattle removed with appropriate notice should not cause legal injury. While some permittees in those allotments and the nine allotments scheduled for enclosure between now and August 15, 1998, will obviously be impacted, perhaps significantly, there are certain remedies in place, either through the administrative appeals process, which the USFS stated it anticipates, or through other civil contract actions. The permittees do not appear to have a legal property right in their permits so much as a procedural right to receive notice when the terms and conditions are modified.

Pursuant to 36 C.F.R. §222.4, grazing permits are revocable privileges that may be canceled, modified or suspended in certain situations. For example, the USFS is authorized to modify the terms and conditions of a permit to conform to revision of an allotment plan or "other management needs." 36 C.F.R. §222.4(a)(7). It can then cancel the permit in the event the permittee refuses to accept the modification of the terms and conditions of the existing permit. 36 C.F.R. §222.4(a)(2)(i). Ninth Circuit case law reiterates the agency's authority to require that permittees remove cattle, with or without an injunction in place:

"The non-Indian permittees assert that their grazing permits are property rights which the government may not revoke or modify without compensation. We reject this assertion. The license to graze on public lands has always been a revocable privilege."

*Swim v. Bergland*, 696 F.2d 712, 719 (9th Circ. 1983).

While the agency's actions regarding modifications in grazing permits can eventually

receive judicial review, those decisions are subject to the agency's discretion. In *Perkins v. Bergland*, 608 F.2d 803, 807 (9th Cir. 1979), the Secretary of Agriculture reduced the authorized number of cattle grazing in forest lands because the land had been damaged by overgrazing. The Court concluded that only very narrow judicial review was appropriate: "[t]he District Court should ascertain whether the agency's factual findings as to range conditions and carrying capacity are arbitrary and capricious." *Id.*

The USFS has not released final decisions or plans detailing the exact areas of each allotment that will be affected, whether fencing must go up, who will be responsible for fence construction and/or its costs, etc., but USFS management personnel testified that the exclosures in all of the allotments have either been in effect for some time or have been planned. (Testimony of David Stewart, Acting Director of Rangeland Management for the Southwest Region.) Stewart affirmed that the regulations allow modifications of terms and conditions of permits without consulting the permittees in order to protect or meet the basic needs of the resources, but that the permittees should be advised "as soon as humanly possible." As part of the Settlement Agreement, detailed maps of all current or planned exclosures are being provided to Plaintiffs by May 15, 1998; these will presumably be provided to Interveners as well. Additionally, the fact that the agreement may exceed the requirements of the ESA does not mean it violates the ESA. In total, the likelihood of Interveners' successfully preventing the implementation of the Settlement Agreement was not sufficiently demonstrated by Interveners.

Using the second prong of the alternative test, there are serious questions going to the merits, but the Court must find that the balance of hardships tips sharply in Interveners' favor. If the agreement goes forward, the harm caused by exclosure in the various allotments may be

compensable through monetary damages, if the affected permittees can prove legal property rights or procedural rights have been violated. The USFS may be forced to absorb the cost of much of the fence construction. The Court acknowledges that some permittees will suffer significant economic hardship (Declarations supplementing the Motion for TRO), but those hardships do not outweigh the sweeping, definitive scope of the ESA. Additionally, if the USFS does not follow through on its plans to exclude grazing on a shortened time line in order to protect the listed species, and a violation of the ESA results, the harm could truly be irremediable.

#### CONCLUSION

Based on the foregoing, **THE MAGISTRATE JUDGE RECOMMENDS** that Interveners' Motion for Temporary Restraining Order be **DENIED**.

Pursuant to 28 U.S.C. § 636(b), any party may serve and file written objections with the District Court within ten days of being served with a copy of this Report and Recommendation. If the objections are not timely filed they may be deemed waived.

DATED this 17th day of April, 1998.

  
RAYMOND T. TERLIZZI  
United States Magistrate Judge



**WRITTEN TESTIMONY OF JAMES K. CHILTON, JR  
CHILTON RANCH & CATTLE COMPANY**

**HOUSE COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES  
JULY 26, 1998**

**CHILTON RANCH & CATTLE COMPANY**

17500 West Chilton Ranch Road  
 Arivaca, Arizona 85601  
 520-398-9194

**WRITTEN TESTIMONY OF JAMES K. CHILTON, JR.**

July 26, 1998

**Mr. Chairman, and Members of the House Committee on Resources of the U.S. House of Representatives:**

My name is James K. Chilton, Jr. I am a fifth generation Arizona cattle rancher. Our ancestors arrived in Virginia about 1650, served in the House of Burgesses, fought in the Revolutionary War and served as both soldiers and citizen-pioneers at times of crisis and challenge throughout the history of this Nation.

Today we believe the Constitutional rights our ancestors fought for are being violated by nature-activist government officials and by radical environmentalists under the cloak of the Endangered Species Act. Certain government officials, not all, in the U.S. Forest Service and the U.S. Fish & Wildlife Service ("USFWS") are enthusiastically attempting to use the Sonora Chub (*Gila Ditaenia*) and the Lesser long-nosed bat (*Leptonycteris curasoae*), both allegedly threatened species, as surrogates to take our property, to deny us our water rights and to render valueless a portion of our preferential grazing rights.

**Historical Background**

My family, which includes my father and mother, my brother's family and my wife and two sons operate and own a 50,000-acre ranch south of Arivaca, Arizona which consists of about 2,000 acres of fee simple deeded land, the Montana and Jarillas Grazing Allotments located in the Coronado National Forest, leases on State of Arizona School Trust lands and on some Bureau of Land Management land. The Forest Service grazing allotments are utilized for livestock production under a claim of historic use as evidenced by preference grazing permits issued by the Forest Service continuously since the establishment of the Forest Reserves at the turn of the century. These reserves were created under Congressional authority for the purpose of providing continuing resource production to the Nation. The 2,000 acres of deeded land we own generally represent 160-acre pioneer homesteads scattered throughout the 50,000 acres of grazing land.

We are most concerned about the federal actions being taken regarding the 13,760-acre California Gulch watershed portion of the ranch which is adjacent to and drains into Mexico. The California Gulch watershed is an infinitesimally small 4/100 of 1% of the Mexican 6,270-square mile Rio de la Concepcion watershed. For the last 300 years cattle have put to beneficial use the forage and water in both the California Gulch and the Rio de la Concepcion watersheds.

In 1986 the USFWS declared the Sonora chub, a small minnow, to be a threatened species because there was only one tiny location where it was found in the United States: Sycamore

Canyon. Sycamore Canyon is a parallel wash east of California Gulch located in our neighbor's Bear Valley Grazing Allotment. The Sonora chub was listed by the USFWS in spite of the fact that it is abundant in Mexico and not biologically endangered. *The Southwestern Naturalist*, June 1990, describes the Sonora chub as abundant in Mexico. In fact the Sonora chub totally dominates the number of fish in the 6,270 square mile watershed (99.7% of the total number of fish and 96.9% of the biomass).

In 1995 the Sonora chub expanded its range onto our ranch by swimming up from Mexico into a 1/4-mile-long riparian area in California Gulch immediately adjacent to the international border. Most years the Gulch dries up during June and early July resulting in the death of the immigrant chubs. Since the chub is a listed species, the entire 13,760-acre watershed has now become the welcomed target for USFWS and Forest Service government activists seeking to use the Endangered Species Act to realize their personal agendas to eliminate cattle grazing when and where possible. At the same time radical nature activists at the Southwest Center for Biological Diversity in Tucson, Arizona have seized upon the fact that genuine "wetbacks" (minnows) from Mexico have swum upstream to file a lawsuit. The October 23, 1997 lawsuit against the Forest Service argues that the Forest Service had not properly consulted with the USFWS regarding the chub (and other fish species on other ranches) as required by the Endangered Species Act. One of the remedies sought in the suit was to eliminate grazing on the entire Montana Grazing Allotment. Recently the Forest Service settled with the Southwest Center for Biological Diversity out of court. We were totally excluded from participation in the settlement in spite of being the financially affected parties, and in spite of having hired experts to prepare accurate data on the fish habitat, and in spite of having hired lawyers and having formally petitioned both the Forest Service and the Court to be recognized as intervenors in the lawsuit. The Forest Service went into private meetings with the radicals and agreed to fence and exclude our cattle from an important water source on our Montana Allotment. Although we tried to intervene in the October 23, 1997 lawsuit to protect our interests, the Federal Court would not allow us intervenor status. To add insult to injury, the Forest Service did not even consult with us formally or informally, nor with any other rancher, when they hastily settled out of court with the Southwest Center, thus preventing the Court from even hearing the testimony of scientists and other witnesses present and ready to testify to the inaccuracy of the Southwest Center contentions that all riparian areas are adversely impacted by livestock grazing.

It is impossible for anyone to ever understand how we felt when we realized that the remedy in the lawsuit was to eliminate us for what the Forest Service may or may not have done. It is grossly unfair since we had no power nor responsibility to ensure that Forest Service personnel complied with any requirement to consult or not consult with the USFWS. We are being unfairly penalized for a presumed bureaucratic failure.

The Forest Service reacted to the lawsuit by telling us that there was no need for us to worry about our Montana Grazing Allotment since they would defend us. Then the Forest Service, over our strong objection, fenced off the 1/4 mile stretch of the Gulch adjacent to the international border. At about the same time, Tucson-based Forest Service staff started stuffing the files with memoranda that provide baseless, paper justification of a pre-determined conclusion by activists that cattle grazing on the Montana Grazing Allotment would likely adversely affect both the

Sonora chub and the Lesser long-nosed bat. Through Freedom of Information Act requests, we discovered the false and misleading documents, we retained outstanding objective scientists to carefully evaluate the memoranda and we asked the scientists to make independent reports regarding their findings and observations. On April 27, 1998 the reports were delivered to Mr. Stuart Leon of the USFWS who is head of a joint Forest Service and USFWS Regional Range Consultation Team. All aforementioned reports are available upon request.

On June 22, 1998 the USFWS promulgated a draft Biological Opinion which demands that about four miles of California Gulch wash be fenced resulting in eliminating our rightful forage use within the wash and excluding us from the beneficial use of the water to which we have valid water rights under Arizona law. We have now filed documents with both the Forest Service and the USFWS objecting to their decision to force us out of the ever-expanding area in California Gulch which is coveted by anti-cattle activists. Worse yet, the USFWS recommended the Forest Service consider elimination of all grazing in Schumacher Pasture, which constitutes nearly fifty percent of our summer range, to "protect" the chub and the bat.

**Neither the Sonora chub nor the Lesser long-nosed bat is in fact biologically endangered and both have been incorrectly listed by the USFWS.**

#### Sonora chub

The Sonora chub is abundant in Mexico in the 6,270 square mile Rio de la Concepcion watershed south of the Montana and Bear Valley grazing allotments. The *Southwestern Naturalist*, June 1990 describes the Sonora chub as abundant and concludes there is no evidence of a decline in the species (99.7% of the total number of fish and 96.9% of the biomass are Sonora chubs). There are perhaps billions of Sonora chub just south of the border.

Exactly why is the Sonora chub expanding its range rapidly into our allotment, all since 1995, if it can't flourish with the present grazing regime? No one is contending that this minnow is decreasing in numbers on our ranch. The fact of its voluntary expansion into our grazed ranch with its beautifully restored riparian area gives the lie to the pretext used by the Forest Service and USFWS for fencing us out of what we have carefully nurtured. The modified rest-rotation system, begun in 1990, providing 20-month re-growth periods after 4-month harvesting periods is an experiment in progress which should be allowed to continue while evaluation of its highly promising, already apparent results can be carried out. We believe that it is the intention of certain individuals to prevent this on-going scientific experiment from reaching the point of publication in scientific journals since the results are not supporting their belief that cattle grazing in riparian areas is bad.

#### Lesser long-nosed bat

Professors E. Lendell Cockrum and Yar Petryszyn, two of the nation's foremost experts on the Lesser long-nosed bat have carefully researched the listing of the Lesser long-nosed bat and thoroughly debunked the sloppy science on which the listing was based (*The Long-Nosed-Bat, Leptonycteris: an Endangered species in the Southwest?, Occasional Papers, the Museum of Texas Tech University, Number 142, July 19, 1991*). Professors Cockrum and Petryszyn state "It

appears that limited parts of the available data were used when the Fish and Wildlife Service ruled that the long-nosed bat, *Leptonycteris curasoae yerbabuenae*, was endangered. The data used appear to be a combination of over-optimistic estimates of past population sizes and overly pessimistic estimates of current numbers, both poorly documented." In fact, Professors Cockrum and Petryszyn suggest "bat populations have increased in the past century because of more suitable roosts being available as the result of mining activity in the area."

With respect to our Montana Grazing Allotment, Dr. Kenneth Kingsley states, "there are no known records of lesser long-nosed bats from any of the quads involved in the allotment, except Pajarito Peak (which is several miles east of the Montana Allotment), where there is one record of a single female collected in June 1959. Further, the nearest known active roosts to the allotment are located well beyond the nightly flight ranges of this species. (Range is the maximum distance from a roost, while flight distances are total mileage flown within the range while foraging among food plants). The Forest Service author of "Status of the Species" in her portion of the Biological Assessment has confused range with total distance to conclude erroneously that the Montana Allotment is within the range of the known maternity roosts. Further, according to the Dr. Kingsley report, there is no evidence that Lesser long-nosed bats are food-limited. In fact, he points out that, "There is abundant food for them throughout and beyond their known range."

**The Forest Service has used the Sonora Chub and the Lesser long-nosed bat as surrogates to fence off valuable forage and water and has attempted to justify their actions by stuffing their files with error-ridden claims and misleading memoranda.**

It is a given that if you begin any type of analysis with false, misleading or misrepresentative data, questionable assumptions and theories, then you will have false, biased and inaccurate conclusions. In the case of the USFWS biological conclusions regarding the status of the species "garbage in" clearly resulted in garbage conclusions. Unfortunately, it is evident from the language used in the draft biological opinion, that the USFWS has received false and misleading information from some Forest Service personnel and/or has ignored the accurate scientific information we have provided. The following paragraphs identify inaccurate information being used to bolster the political conclusion that cattle grazing as currently occurring on the Montana Allotment adversely impacts the Sonora chub and the Lesser long-nosed bat.

#### Soil condition and accelerated erosion

Mr. Francisco J. Escobedo's March 9, 1998 memorandum on soil conditions was either incompetently prepared, prepared at the direction of others to deliberately misrepresent the truth or in fact may not even have been prepared by Mr. Escobedo, but by some other anti-cattle agenda-driven person. Mr. Escobedo's memorandum was based on "field notes" written on the back of an envelope during a two or three hour windshield "inspection" through a minimal, road-accessible part of the Montana Allotment. We encountered Mr. Escobedo during his brief visit and invited him to accompany us into the extensive and more representative areas of the pastures to which we were headed. He responded that he didn't have time to go any further and then turned his truck around and headed back to town before reaching the portion of the pasture which

he later characterized as in impaired soil condition. The memorandum bearing his name erroneously describes observed plant pedestaling, soils with low infiltration rates, low vegetative ground cover, erosion pavement being visible, rills on deeper soils, impaired soils due to an impaired ability to resist erosion and soils with an unsatisfactory ability to infiltrate water, platy surface structures and accelerated erosion. We have requested that these adverse soil conditions be shown to us and neither Mr. Escobedo nor any other Forest personnel can take us to any locations where these allegations can be observed to be true.

More specifically, at C2 monitoring cluster north of Japanese Tank stockpond, Mr. Escobedo concluded that *"The C2 cluster transect was rated as impaired due to its impaired ability to resist erosion and unsatisfactory in its ability to infiltrate water. Surface structure was platy, which can indicate a degree of compaction, and the soils were shallow and skeletal. Vegetative ground cover was low and consisted of shallow rooted annuals and woody, tap-rooted plants."* Every aspect of the Escobedo conclusion regarding C2 cluster is in fact false. There is no observable accelerated erosion and vegetative ground cover is composed primarily of valuable native perennials. On June 3, 1998 Forest Service soils specialist Mr. Wayne Robbie from Albuquerque dug an 18-inch hole at the cluster and demonstrated to the large contingent of Forest Service personnel present that the C2 cluster soil had satisfactory ability to infiltrate water, the surface structure was not platy and significant litter and decomposing plant material were incorporated in the soil. It was also observed that rooted perennial grasses formed a protective cover and were clearly less than 7 inches apart, the standard for indicating low erosion hazard on the type of slope and soil in C2 according to NRCS criteria. In addition, monitoring completed by the Forest Service indicates that this transect, in spite of being located in the approximately 7% of the pasture which receives the heaviest use, is in good condition and showing an upward trend. Dr. Dee Galt, veteran soils scientist with over 30 years' experience could not find any aspect of Mr. Escobedo's C2 cluster analysis to have any validity.

Compounding the problem, Mr. Robert Lefevre, Watershed Program Manager, in his Tucson office, reviewed dated 1990 information and General Ecosystem Survey data, presumably relied on Escobedo observations and concluded that 44% of the Montana Allotment has impaired soil condition and 11% has unsatisfactory soil conditions.

In total contrast, renowned range management expert Dr. Jerry Holechek, respected soils scientist Dr. Dee Galt, internationally recognized fish biologist Dr. Homer Buck, fish biologist and attorney Mary Darling, biologist Dennis Parker and retired USFS officer George R. Proctor (whose duties formerly included Chief of the Range Management Section, as well as Assistant Regional Forester in charge of State and Private Forestry and Watershed Management over the entire Southwestern Region of the Forest Service) spent dozens of hours in extensive, on-the-ground, detailed observation and *relied on no one else's assertions* to prepare their reports. Not a single one of these experts agreed that any of the adverse soil conditions described by Mr.

Escobedo and Mr. Lefevre were accurate descriptions of the Montana Allotment range. The following are some of the conclusions relating to erosion and soils conditions objective scientists have reached:

1. Soils in Schumacher, Ruby, and Warsaw Pastures are stable with no signs of accelerated erosion attributable to grazing.(Galt & Holecek);
2. Water quality is excellent in all pastures . . .all streams and tanks had clear water with no signs of siltation (Galt & Holecek);
3. Even though there had been abundant rainfall in recent days, and the creeks and rivulets were running higher than he personally had ever seen them on previous visits, Dr. Homer Buck saw no evidence of excessive runoff, erosion, or siltation (Dr. Homer Buck);
4. It is my opinion that the claims I have read blaming grazing by cattle for "excessive runoff", "degraded watershed", "excessive siltation", "destruction of riparian growth" etc., cannot be supported by sound biological evidence (Dr. Homer Buck);
5. No evidence of erosion attributable to livestock was detected by Mr. Proctor, myself or Mr. Chilton and all water was observed to be flowing clear in all of the large number of ephemeral drainages running as a result of the recent storm, as well as in the main channels of California Gulch and Schumacher Canyon.. (Dennis Parker); and,
6. No evidence of unsatisfactory soil conditions was observed during a horseback check of uplands and drainage courses in Schumacher Pasture in the California Gulch watershed.(George Proctor, March 1998).

#### Riparian conditions in California Gulch, Schumacher Pasture

Forest Service personnel Mr. Lefevre and Mr. Stefferud contend that 30% of the riparian area is in satisfactory condition while 70% is in unsatisfactory condition. The facts are that the actual riparian areas include only two stream reaches with sufficient water during enough of any normal rainfall year to maintain "riparian" growth. These areas are the reach above and below the private mining land known as "Dos Amigos"(California Mine and California Spring) and the ¼-mile Mexican border riparian area now excluded from grazing. A very thorough riparian species survey was undertaken by Dennis Parker and the Chiltons in 1996 which documented the species variety and number, the impressive riparian recruitment, the tree trunk diameter classes and core-determined tree ages, riparian grass species and density, and observed fauna. The two riparian areas are both in exemplary condition.

Mr. Lefevre and Mr. Stefferud are reaching their "70% unsatisfactory" figure by looking for riparian vegetation in the ephemeral or solid rock banked sections of the California Gulch Wash. There is no grazing management strategy that can convert dry sand washes or rock outcrops into verdant creeks. The presence of highly desirable dense and flourishing riparian plants in the two actual riparian reaches which have been managed in exactly the same manner as the dry stretches indicates that water flow and geology, not cattle presence, are the relevant variables.

Objective scientists, after actual on-site investigation, have concluded that **the Sonora chub is not adversely affected by the current Montana Allotment grazing program**. The following are **supportable conclusions** which directly contradict the ill-founded statements of Mr. Lefevre and Mr. Stefferud:

1. The uplands and riparian habitat are in excellent condition. Riparian habitat contains large, well-established cottonwoods and willows, as well as an abundance of younger trees and shrubs of a variety of age classes. (Mary Darling);
2. Notwithstanding these facts, the scientific data and the clearly visible evidence of riparian regeneration that exists to the contrary, the Forest fish biologist (Jerry Stefferud) concluded that livestock grazing as practiced on the Montana Allotment has a deleterious overall impact on habitat conditions for the chub. Such an opinion is insupportable and has no place in this Species Effects Assessment. (Dennis Parker);
3. All of the extensive areas of riparian plant/ stream channel / aquatic habitats he (George Proctor) saw during an all day horseback examination of the Montana Allotment in late March, 1998, were in satisfactory condition with a strong upward trend. This finding contradicts the forest fish biologist's claim that these habitats are degraded and are continuing to degrade on the Montana allotment. (George Proctor); and,
4. Schumacher Pasture is in good ecological condition and in a strong upward trend. (Galt and Holechek, April 1998)

**U.S. Fish & Wildlife Service has knowingly or unknowingly used false and misleading reports prepared by the Forest Service to justify outrageous mitigation measures which are significantly more onerous than the Forest Service fencing of 1/4 mile of California Gulch.**

The Forest Service and the USFWS have totally ignored our repeated attempts to provide objective science to counter either incompetent, inaccurate or biased work generated by government employees who, under time pressure or in pursuit of personal agendas, performed perfunctory, superficial, pick-up window "observations", quoted and cited each other and produced "reports" designed to back up their pre-formed conclusions: that riparian regeneration cannot occur with cattle grazing and that the Sonora chub and cattle are incompatible.

Every case is different and the specifics of a successful ranch management plan merit sincere consideration not doctrinaire dismissal. "There won't be any cottonwood or willow recruitment" is an article of faith adhered to by the activist anti-grazing elements represented on this occasion by Forest Service employees Jerry Stefferud, Mima Falk and Robert Lefevre and not borne out in reality on the Montana Allotment. Dozens of visitors including Congressional staff, scientists, agency personnel and environmentally concerned citizens have verified excellent riparian conditions by going to visit the site where the chub swam up from Mexico and was first discovered in California Gulch in 1995. This riparian site was described in 1996 by the Arizona Game and Fish chub researcher as having "riparian growth in good vigor and profusion" with the grazing program instituted in 1990.



**Repeated attempts to provide accurate, site-specific, current and comprehensive scientific information to the USFWS and Forest Service Regional Range Consultation Team have been ignored.**

We first learned of the misleading, incorrect and unjustified Forest Service Effects Assessment conclusions prepared by Jerry Stefferud and Mima Falk which stated that grazing of the California Gulch watershed was "likely to adversely affect" the Sonora chub and the Lesser long-nosed bat on March 25, 1998. Since both Biological Assessment Effects Assessment statements were clearly based on false and misleading information, we promptly asked Dr. Jerry Holechek and Dr. Dee Galt, Dennis Parker, Dr. Homer Buck, Mary Darling and Dr. Kenneth Kingsley to prepare reports regarding the California Gulch watershed that were objective and scientifically supportable. The reports that were prepared were hand delivered to Mr. Stuart Leon, USFWS & Forest Service, Regional Range Consultation Team on April 27, 1998. In addition, we delivered three copies of the same reports to the Nogales Ranger District immediately thereafter and two reports to David Stuart, Range Management, Forest Service Albuquerque on May 27, 1998. Unfortunately, all attempts to provided site-specific information appear to have been ignored in the preparation of the June 22, 1998 Draft Biological Opinion.

In addition, we have consistently requested the right to have direct input into any process where our grazing allotment would be affected. In fact, we requested applicant status in our July 11, 1996 letter, our March 13, 1998 letter and at our March 25, 1998 meeting at the Nogales Ranger District so that we could participate in any matters relating to listed species. The requests to participate included any Endangered Species Act consultation, where we are the real parties of interest, the Range Management Plan, where we are the affected parties, and the NEPA process, where we are most impacted by any mitigations. We also requested that prior to any decision by the USFWS & Forest Service Regional Range Consultation Team, the Team visit the Montana Allotment site to review the site, data and information we had prepared. Furthermore, on our behalf, U.S. Senators McCain and Kyl together with Congressmen Salmon, Shadegg and Stump requested that the USFWS & Forest Service Regional Range Consultation Team visit the site to compare the agency staff contentions with the obviously contradictory reality. Unfortunately, the USFWS & Forest Service Regional Range Consultation Team refused, or was directed not to visit the Montana Allotment.

When it was learned that a site visit would not be granted, we requested that the USFWS & Forest Service Regional Range Consultation Team allow ourselves together with our experts to travel to and meet with the Team in Tucson, Phoenix, Albuquerque or any other site convenient to the Team in accordance with existing laws, rules, and ethical standards. Once again we were denied the opportunity to meet with the USFWS & Forest Service Regional Range Consultation Team, a right any citizen should have. In summation, we believe we have been brushed aside by government officials and that there may be or have been a conspiracy to deprive us of our constitutional rights and due process of law.

**Draft Biological Opinion Reasonable and Prudent Measures section and Terms and Conditions section need to be changed to reflect actual on-site data.**

The assumptions upon which the recommendations in the draft biological opinion are based are generalizations from non-site-specific data or inaccurate interpretations of monitoring data. Most importantly, we believe the mitigations recommended in the USFWS Draft Biological Opinion are particularly offensive because they are clearly completely unjustified and unrelated to the needs of any listed species based on the considerable expert opinion and data we have provided to the Forest Service and USFWS. The following citations from site-specific, carefully prepared expert reports contradict the politicized language and error-ridden calculations that served as the basis for the draft form of the biological opinion:

1. Objective scientific evidence clearly demonstrates Schumacher, Ruby and Warsaw Pastures were found to be in good (late seral) or better ecological condition and to be in a strong upward trend in ecological condition based on Forest Service transect data collected in 1984 and 1996 (Galt & Holechek) (These two range scientists established additional monitoring transects, including a riparian transect, collected their own data and analyzed it and reran the Forest Service's own field data to come to the independent conclusion that mathematical errors, false assumptions and miscalculations of the raw Forest Service data had led to the erroneous characterization of Schumacher Pasture as being in "fair condition with a downward trend.");
2. Grazing in the California Gulch watershed cannot be characterized as "chronic." This term is value-laden and pejorative as well as inappropriate in every way. Harvesting a renewable natural resource is not to be equated with a disease. Grazing on this ranch is carefully managed under a rest-rotation plan designed by Forest Service range experts and the allotment owners and insures that no two pastures in the watershed are grazed simultaneously and that sufficient rest is allowed to ensure riparian health. (Mary Darling);
3. Grazing as presently practiced is having no negative impacts on the Sonora chub and *may be positively impacting vegetation* on the Montana Allotment (Galt & Holechek);
4. In fact, livestock grazing is not adversely affecting potential or existing Sonora chub habitat on the Montana Allotment (Mary Darling);
5. Galt and Holechek found riparian vegetation in California Gulch to be improving in vigor and composition with dense stands of deergrass present in even marginally riparian drainages;
6. Dennis Parker, George Proctor and Mary Darling all independently found that riparian vegetation, observed during their on-foot and horse-back inspections of the site, shows excellent recruitment of new trees. They noted the presence of all tree age classes including large well-established trees in the riparian sections of the Gulch, and reported that streambank vegetation is healthy and diverse and that riparian habitat in Schumacher Pasture is not being adversely impacted by livestock grazing;
7. Dr. Dee Galt, Dr. Holechek, Dr. Homer Buck, Mary Darling and Dennis Parker saw no accelerated erosion, gullying, or pedestaling due to livestock grazing in California Gulch or in Ruby, Schumacher or Warsaw pastures. Dr. Galt and Dr.

Holechek specifically looked for evidence of accelerated erosion beyond the expected background geological erosion and reported no sign of rills, pedestaled plants or impaired soils from hoof action, lack of live plant cover, lack of mulch, impaired soil or platy soil surface structures cited by individuals who prepared agency reports reflecting primarily familiarity with the writings of anti-grazing activists rather than familiarity with the conditions actually existing on the Montana Allotment; and,

8. It is highly likely that the fact that the Sonora chub has recently swum up from Mexico to colonize a 1/4 -mile riparian area just north of the international border below Schumacher Pasture is due to our careful and faithful implementation of the grazing program Duane Thwaits of the Forest Service designed for the Montana Allotment during the late 1980's.

**USFWS needs to amend the Draft Biological Opinion to reflect site specific scientific information presented by objective experts.**

Based on the above, the USFWS needs to recognize that all currently occupied Sonora chub habitat is currently fenced so that livestock is excluded. **There is no reason to fence any additional portions of California Gulch since current grazing practices in the Sonora chub riparian areas and the uplands do not adversely affect the chub.** Monitoring of range utilization has been and will continue to be done. However, the newly recommended monitoring is extraordinary, envisions the participation of persons with anti-grazing agendas and no range management training, is inordinately expensive and difficult to coordinate. It would be helpful if the line between legitimate, knowledge-based monitoring and de facto harassment can be defined. We are not criminals under house arrest on our range; we are well-trained stewards of a grass ranch which has been producing a sustainable human food harvest every year for over 300 years.

As of this point in time, we believe we have been damaged by arbitrary and capricious actions of the Forest Service and the USFWS. Furthermore, we believe that certain Forest Service & USFWS personnel may have unlawfully conspired with individuals at the Southwest Center for Biological Diversity and the Forest Guardians in order to advance their personal anti-grazing agendas. In addition, we believe that the long-term result of this Forest Service and USFWS action is to devalue or take our water rights and grazing rights without just compensation. It is especially outrageous when it is realized that a few people in the USFWS and Forest Service merely want to use the Sonora chub and the Lesser long-nosed bat as surrogates to attempt to take our property, to destroy our livelihood, to systematically deny us our rights and to threaten the historic ranches and rural culture of the West. These may seem like grandiose allegations in the face of ostensibly minor federal actions, but the steps presently being taken, combined with the ceaseless harassment of the last six years, are designed to hasten the end of ranching in the West. We will not tolerate such interference with our rights and we will seek the full redress the law allows. The well-documented truth is that our current grazing program does not adversely affect the Sonora chub or the Lesser long-nosed bat.

**Congress needs to amend the Endangered Species Act to cause species to be listed utilizing better scientific information and peer review, to quantify the cost of each listing, to evaluate the cost versus the benefits of USFWS actions and forbid the USFWS to list a species whose biological range is predominantly on the other side of an international boundary.**

As is the case with the Sonora chub and the Lesser long-nosed bat, too many species have been incorrectly listed based on flawed data and lack of scientific peer review. Once listed, these species often become surrogates for individuals within and outside of government to achieve their personal agendas to stop rural economies and take private property in the name of the species. Species should only be listed after careful scientific analysis and genuine scientific peer review. The current standard of using the "best scientific and commercial data available" has been proven to be flawed. Real science together with the funding of additional research to study whether a species should or should not be listed is necessary to avoid costly incorrect listings such as the Sonora chub and Lesser long-nosed bat. Citizens are being forced to accept the onerous restrictions imposed in the name of dubiously listed endangered species or hire experts and conduct privately financed research to disprove the contentions of well-financed activists. Resources which could be applied to the recovery of genuinely endangered species are being diverted.

It is our understanding that the Endangered Species Act does not specifically give the USFWS the authority to list as threatened or endangered a species like the Sonora chub which is abundant in a neighboring country but few in numbers on the United States' side of the international border. However, the USFWS has expanded its power by writing rules and regulations allowing such listings of species whose presence in this country is at the marginal extremes of its range. Congress should make law, not the USFWS.

An amended Endangered Species Act should require the USFWS to determine if a species is endangered by focusing on its core habitat and not its fringe occurrences at the marginal extremes of its range. Endangered core habitats may deserve protection, but splinter groups do not need to receive special attention. In our immediate area, not only is the Sonora chub incorrectly listed, but the Cactus Ferruginous Pygmy-owl is also listed and causing economic and social havoc even though it is abundant in its core habitat which ranges from Argentina through Mexico.

The Constitution forbids the military to require a citizen to provide food or shelter for military personnel, yet the Endangered Species Act requires private citizens to provide food and shelter for threatened or endangered species at unevenly shared sacrifice and expense. If the public determines that there is a need for an individual citizen to sacrifice on behalf of the public to provide habitat for a listed species, then the USFWS should request from Congress an amount of money sufficient to pay the citizen for the cost incurred in providing a public benefit. The Act must be amended to make the USFWS financially responsible for taking of private property as the fifth amendment to the Constitution states "*...nor shall private property be taken for public use without just compensation.*" Private property is not just land. It includes the goods, services, water rights, forage rights and rights purchased by any citizen. The cost of the taking of any form of property must be covered by the USFWS budget. The USFWS and Congress need to quantify, understand and approve the direct and indirect costs. It is irresponsible management to lay

USFWS-mandated costs off on other federal agencies, other governmental units, on private parties and the hidden costs on the local, state and national economies.

It is a fundamental truth that unless those individuals who are responsible for managing the Endangered Species Act are also responsible for paying the costs resulting from their actions and decisions, there will continue to be grave abuses of power and intolerable injustices. These abuses have largely gone unheralded since the perpetrators are primarily targeting rural communities and rural producers. It is very easy for some purist biologist to sit at his or her government word processor in some urban center to promulgate a biological opinion requiring great sacrifice in time and expense from private individuals and/or other government agencies if the technocrat has no responsibility for the cost of his or her prescriptions. Congress has been and will continue to be ultimately responsible for such serious abuses unless Congress amends the Act to require the USFWS to be financially responsible for its decisions.

An amended Endangered Species Act needs to require a cost-benefit analysis prior to enforcing USFWS dictates and mitigations upon society, on other federal agencies, on other state and local governmental units or on private parties. The cost of saving a species should not be greater than Congress and society rationally decide to bear. It not rational to list a species and then spend billions either directly or indirectly to save it unless the benefit of saving the species justifies the non-funding of alternative public needs. Recently, a USFWS purist technocrat suggested that the Interstate Freeway 10 near the City of San Bernardino, California be closed two months of each year so that a listed fly might safely cross the Freeway during its mating period. A rational society can not tolerate the concept that it should spend whatever it requires to maintain or save a particular species with total disregard for all other public needs. All evidence proves that some species naturally become extinct over time; political diversion of funds to a hopeless effort to save such species is a failure to recognize the difference between God and man.

The USFWS has nearly absolute power over other federal, state and local agencies as well as over property owners since the Endangered Species Act, as currently written, is administered and is generally interpreted by the courts as an "absolute" law which is supreme. The USFWS essentially becomes the land use czar over all other governmental units and over all private property owners. In fact, the USFWS has become the supreme land use control agency elbowing out local land use planning and zoning when a listed species exists near or could potentially exist in an area. Specifically, in the case of the Montana Grazing Allotment, the USFWS in its Draft Biological Opinion dictates both to the Forest Service and to ourselves the absolute future management of our grazing allotment. Their orders have been drafted by individuals with no site-specific knowledge, no long-term experience on the land and no responsibility for either the cost or impracticality of their commands. To make things even worse, it is nearly impossible to talk with, consult with or reason with these secretive unknown bureaucrats. A private citizen's only redress to arbitrary and capricious bureaucratic decisions is a lawsuit (if and only if he or she can demonstrate standing in court and only after years of wasted time and presently estimated costs of \$250,000).

Respectfully,



THE FOLLOWING LETTERS, REPORTS & DOCUMENTS  
ARE AVAILABLE UPON REQUEST

1. Letter from Michael J. Van Zandt, McQuaid, Metzler, McCormick & Van Zandt, Attorneys for Jim and Sue Chilton
2. Letter from Michael F. McNulty, Brown & Bain, P.A., Water Attorney for Jim & Sue Chilton
3. Letter from Dr. Dee Galt, Soils Scientist and Dr. Jerry Holechek, Range Consultant
4. June 11, 1998 Survey of Vegetation and Soils Conditions on the Montana Allotment by Dr. Jerry Holechek and Dr. Dee Galt
5. June 1998 California Gulch, Montana Allotment Fisheries Assessment for the Sonora chub prepared on behalf of the Chilton Ranch & Cattle Company by Darling Environmental & Surveying, LTD
6. April 26, 1998 Report Sent to Mr. Stuart Leon, Range Consultation Team and to Candace Allen, District Ranger
  - A. Letter to Stuart Leon from Dennis Parker, Biologist
  - B. April 26, 1998 Report Executive Summary
  - C. April 21, 1998 Survey of vegetation and soil conditions on Schumacher, Ruby and Warsaw Pastures by Drs. Jerry Holechek & Dee Galt
  - D. April 23, 1998 Assessment of Riparian and Range Conditions on the Montana Allotment and Comments on the Species Effects Assessment for the Sonora Chub by Dennis Parker, Biological Consultant
  - E. Inventory of Bottom Associated Tree Species and an Assessment of Overall Condition Found Along California Gulch, by Dennis Parker
  - D. October 16, 1995 Natural Resources Conservation Service Analysis of Cluster C2, by Kristen Egen, Range Management Specialist
  - E. April 1998 California Gulch Fisheries Habitat Assessment for the Sonora Chub by Darling Environmental & Surveying, LTD.
  - F. April 23, 1998 California Gulch Fisheries Habitat letter from Dr. Homer Buck
  - G. April 23, 1998 Lesser Long-nosed Bat Study by Dr. Kenneth J. Kingsley, SWCA Inc., Environmental Consultants
  - H. April 24, 1998 Letter and Paper by Professors Cochrum and Petryszyn on the Lesser Long-nosed Bat
  - I. Vitas/Resumes

**Prepared Statement  
of the  
Johnson Cattle Company, an Arizona General Partnership  
1132 West McLellan  
Mesa, Arizona - 85201**

**Submitted by:**

**Earl C. and Clifford K. Johnson, Partners**

**to**

**The United States House of Representatives  
Committee on Resources,  
Oversight Hearing on  
The Endangered Species Act**

**July 15, 1996**

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**I. Introduction**

Mr. Chairman and members of the Committee, we are pleased to have this opportunity to present the following testimony documenting our experience concerning the important topic of the impact of the Endangered Species Act upon livestock grazing on the National Forests managed by the United States Forest Service, Southwestern Region.

Our testimony will summarize the cattle grazing history of the Cartwright Ranch in Arizona and it will discuss what we believe to be the unfair, overreaching and detrimental application of the Endangered Species Act by the Forest Service and the U. S. Fish and Wildlife Service in the administration of grazing on the Tonto National Forest lands that comprise the vast majority of our ranch.

**II. History**

The CC Ranch, or simply the "Cartwright", as its known locally, was founded by Reddick "Red" Cartwright and his son, Jackson Manford Cartwright in 1887 after Red had traded a small parcel of land in the Phoenix area for 150 head of Texas Longhorn range cattle. Together with a small herd of cattle the family had maintained at their farm on the outskirts of Phoenix, sixteen-year-old Manford took charge of the combined herd and started grazing the grasslands of this ranch that is now legendary throughout the Southwest. The CC brand is the only brand that has ever been used on this historic ranch.

After establishing a home for their cattle herd the Cartwrights settled upon, and eventually homesteaded, a 56 acre parcel of land just downstream from the confluence of Seven Springs Canyon and Cave Creek. Manford believed, contrary to the opinions of much older and more experienced neighboring ranchers, that he could construct a ditch from Seven Springs to his homestead and irrigate enough land to sustain him and his family. Through the use of cowboy engineering, picks, shovels, some rough lumber and considerable time, he managed to bring an abundance of gravity-flow spring water to his headquarters. The result is a thriving oasis complete with an irrigated meadow and four fresh water fish ponds that also provide water for area fire protection and the stockwater needs of our ranch headquarters. Each Fall, we still harvest a few pears from the aged orchard Manford nurtured from seedlings to maturity. Just to prove it wasn't an accident that he could efficiently transport water across rough terrain, Manford filed a water right on Meshakatee Spring primarily for use as a domestic water source. Because of this abundance of sweet spring water bubbling from the canyon wall above the ranch headquarters, the two story home the Cartwrights had constructed, and which is still habitable, was the first in the area to have indoor plumbing.

Manford and his direct descendants continued to operate this bountiful ranch and to supply beef cattle to the growing population of central Arizona for the next 93 years. In 1980 the last Cartwright family member to demonstrate an interest in the ranching business had reached retirement age and our family partnership purchased the ranch.

Ours is also a pioneering Arizona family since our ancestors first settled in the state in 1870's. Thus, the historical significance of The Cartwright figured very heavily into our decision to buy this ranch as opposed to a number of others available to us. We determined at the outset of our ownership that the ranch would continue to be a working beef-cattle ranch and that we too would pass it along through succeeding generations of our sizable family. We were well aware that the ranch had not been well managed in recent years, primarily due to the ill health of Jack Cartwright, the last family member to operate the business. It was therefore necessary to join the Forest Service in an intensive "house cleaning" before we could begin to restore the ranch to a viable and productive operation.

Our first official act was to hire a crew of the roughest, toughest and most experienced cowboys we could find and begin rounding up what turned out to be more than 800 head of wild cattle, in addition to the permitted herd of another 800. Even the expertise of our crew was challenged to the point we had to use helicopters to gather part of the wild herd and some had to be slaughtered on the spot so that their carcasses could be removed from near-vertical terrain by pack animal or helicopter.

### III. Corrective Measures

The District Ranger of the Cave Creek Ranger District of the Tonto National Forest conceded at the time we purchased the ranch, and the record reflects, that he and his staff had been frustrated for many years in their attempts to have the previous owner remove



these unmanageable animals from the range. If the removal task we undertook had been left to the Forest Service, which it very well could have been if we had not purchased the ranch, the effort would undoubtedly have been extremely expensive, the score tragically comic and the probable result a disastrous failure. Each of the District Rangers we have dealt with has noted in meetings with us and in letters to us and to governmental agencies that if it had not been for our dedication and disregard for the expense involved, the condition of the ranch would have continued to deteriorate and at an accelerating pace. In fact the commendations we've received from the Forest Service for our cooperation and attention to range improvement and environmental protection has been continuous since 1980. Therein lies the reason, Mr. Chairman and members of the Committee, that we are mystified, puzzled and thoroughly frustrated over the restraints and demands recently imposed upon us by the Forest Service.

As we've mentioned above, we have worked very closely with each Cave Creek District Ranger and his staff in restoring the range beyond the degree it had been damaged by the existence of wild cattle and inattention. In fact, we have followed to the letter, each and every improvement recommended to us by the Forest Service in terms of herd management, pasture rest rotation and range improvements. At considerable expense, our company purchased the heavy equipment necessary to clean and reconstruct stock tanks and to repair erosion damage. We cleaned and repiped spring flow and either constructed or repaired watering troughs. In each of these improvements particular care was taken to provide for wildlife use of these facilities as well as for cattle. We built pasture fences to Forest Service specifications and on the precise alignments mutually agreed upon by our partnership and the District Ranger.

#### IV. Gila Topminnow Introduction

At one point the Forest Service informed us that they, in cooperation with the U.S. Fish and Wildlife Service, were going to attempt to reintroduce the Gila Topminnow, a threatened and endangered species, in several locations on the ranch, even though they had no conclusive evidence the species had ever inhabited these riparian areas. They said they and the Fish and Wildlife Service had executed a Memorandum of Understanding stipulating that whatever the result of the planting experiment, our grazing lease and the permitted numbers of cattle would not be affected. A fully executed copy of the MOU is in our grazing file at the Cave Creek Ranger District. The topminnow was planted in 9 locations on the ranch. Subsequently, it was determined by the Forest Service and Fish and Wildlife that the topminnow could not be found in any of the planted waters. Several years later, a population of topminnow appeared in the lower reaches of Lime Creek. One of the original nine planting experiments was upstream at Lime Spring. It was thus concluded by the two agencies that a seasonal flood had washed the topminnow population downstream and they were now inhabiting Lime Creek. After several years during which we were hearing a lot of concerned pronouncements from the Forest Service on the future of the topminnow, we received a notice saying that we would have to discontinue use of the Lime Creek Pasture. We were also ordered to reduce grazing by 80% in any other pasture on the ranch which contained one or more of the original nine

riparian areas where the topminnow had been reintroduced, despite the fact no one has been able to locate a topminnow in *any* of these areas. This action is clearly contrary to the provisions of the Memorandum of Understanding. Additionally, it is a thinly veiled attempt to use the Endangered Species Act as the instrument of destruction of our ranching business.

Traditionally, the District Ranger has invited us or our ranch manager to accompany his staff during field studies of range conditions. However, in recent months numerous studies of conditions in riparian areas have been conducted by the staff of the Tonto National Forest Supervisor without our knowledge, or for that matter, we are told, without the knowledge of the District Ranger's staff range conservationist. In fact, we doubt that we would have learned about the conduct of these studies if it had not surfaced when we filed a Freedom of Information Act request with the Forest Service. As recent as last month, and over the years that we've owned the Cartwright, we have periodically retained the services of independent experts to monitor our operations. When we learned of the recent concentrated studies of conditions *only* in riparian areas, we hired a qualified range management consultant to accompany Forest Service personnel on these field study outings. Our consultant reported that he felt the forage use measurements were skewed. The following is quoted from his report: "Bias in recording by Forest Service Technician in Charge was noted. Recording technicians from ASU (Arizona State University) were doing their best to objectively assess animal impact on the riparian transects. The Tech in Charge said that he was not hearing enough current year recording and instructed them to influence the transect by recording more current year bites." We interpret this to mean there is little evidence of grazing in the area so the Technician in Charge needed to doctor the report. Our consultant's report adds that he agrees with the Forest Service that our range has and is continuing to improve. That full report is available for review upon request.

Mr. Chairman, we believe that you and the members of the Committee will agree with us that:

- There is ample reason to doubt that the Gila Topminnow ever inhabited the riparian areas of the Cartwright Ranch since there is no biological or other scientific evidence to suggest that it did.
- The nine probable habitats for the topminnow on our ranch, according to the Forest Service and the Fish and Wildlife Service, were obviously incompatible to the species since there is no evidence any of the relocated minnows survived.
- When the floods moved some of these minuscule fish downstream, they managed to survive in the streambed of Lime Creek which has been grazed on a regular schedule according to our Allotment Management Plan.

**The preceding three points-of-fact make a very strong case that, contrary to the findings of the governmental agencies, cattle and topminnows are indeed**

**quite compatible in a shared habitat.**

For reasons with which the Forest Service fully concurs, we operate the ranch in a way that makes the Cartwright closely resemble two separate ranches. That is, we keep a permanent herd of 100 head of adult cattle on the Lime Creek end of the ranch and rotate them between Lime Creek Pasture, Long Creek Pasture and Professor Pasture. The other herd, (490 head), occupy the remainder of the ranch and are rotated through six pastures. Unless some very unusual or catastrophic event should occur, that smaller herd would never see the rest of the ranch. Therefore, it was readily apparent to us and surely to the District Ranger, that his ordered abandonment of grazing in the Lime Creek Pasture would effectively eliminate the habitat for 100 head of adult cattle. Likewise his reduction of the use of each of our remaining pastures containing the locations referenced in the Memorandum of Understanding by 80% would have the net effect of putting us out of the cattle business. When the Memorandum of Understanding was brought to the attention of the District Ranger, he simply passed it off and said the Forest Service had no choice in the matter; that they were ordered to take the reduction action by the Fish and Wildlife Service. When it was pointed out to the District Ranger and his Range Conservationist that the Fish and Wildlife Service lacked statutory authority to issue such an order, they responded that they did it anyway and speculated that the authority to issue the order was political as opposed to statutory. We fail to track the logic in that statement and are stunned by the fact it was even uttered.

At that point, we retained the services of an attorney and filed an appeal under the provisions of 36 CFR Section 251.82. The Deciding Officer (District Ranger) requested, and was granted, by the Reviewing Officer (the Forest Supervisor), three (3) extensions of time to respond to our appeal. During that critical time we continued to operate the ranch, including the grazing of the Lime Creek Pasture, as we were permitted to do under the Forest Service approved Cartwright Allotment Management Plan. When the District Ranger became aware of this he issued an order to remove the cattle and said we were in violation of his earlier letter and threatened to cancel our grazing permit. Our attorney filed for a Stay of that order with the Forest Supervisor. In the interim the cattle were removed from the Lime Creek Pasture as provided in the above referenced Allotment Management Plan. Subsequently, the Forest Supervisor denied the Stay. Before the long-delayed Appeal decision was received from the Forest Supervisor, the District Ranger presented us with a letter saying that based upon the results of the latest Production and Utilization Studies, our permitted number of adult cattle would have to be reduced to an, as yet undetermined number, between 250 and 300 head.

Mr. Chairman, this is only a fractional representation of the pattern of insupportable decisions we have received from the Forest Service over the 18 years we have owned this ranch. As we stated earlier in this testimony the record is replete with compliments to us and to our employees for the improvements we have made to the range, and with accounts of how poorly the ranch was managed prior to our ownership. Despite the Forest Service description of how poorly the ranch was managed by the previous owner, that owner was never granted a permit to graze fewer than 700 head of adult cattle. As you've seen

above, the actual number of cattle on the ranch at the time we purchased it was roughly double the permitted number, or about 1,600 head. An interesting aside to this situation is that the ranch actually supported that large number of cattle fairly well considering that pastures were not properly rotated. Now we are being told that despite our superb job of caring for the ranch, and despite the extensive improvements we have made to the range, the Forest Service has concluded that the entire ranch will now support no more than 300 head of cattle. It is hardly a stretch of the imagination, nor is it overtly cynical to conclude that the better you treat the range, the stiffer the penalty.

To summarize:

- Within the past three years, the record will show that the Forest Service has never met a deadline established by them, or requested by us, concerning the Cartwright Ranch.
- In the same period we have never failed to meet a deadline.
- In the 18 years we have owned the ranch, we have, by Forest Service account, improved the condition of the ranch, have been completely cooperative, and have lived with our word.
- During the same period of time the Forest Service has lived with the terms of an agreement for only as long as it suits their agenda and have then either modified it or rejected it forthwith, as they now have with the above referenced Memorandum of Understanding.
- We have taken temporary voluntary cuts in cattle numbers to the extent of more than three hundred head. The termination, and thus the restoration, of the latest cut was to expire at the end of 1997.
- Just as that agreement expired, the Forest Service concluded the ranch could safely carry no more than 250 head.

#### V. Conclusion

Mr. Chairman, the above summary of detrimental Forest Service action and, in many cases, equally damaging inaction and contradiction is the basis for our appeal to your committee. It has finally become necessary for us to seek legislative intervention and relief from the continuous governmental agency harassment and frustration, in the name of the Endangered Species Act, being inflicted upon our sincere efforts to operate and improve our ranch without causing harm to any species of native plant or animal life. We are prepared to prove to anyone with a genuine interest in the matter that we have indeed been protective of our environment. We have no less concern for the preservation of our environment than the most avid environmentalist and our heritage is as strongly bonded to the land as that of anyone.

To emphasize the point of our frustration, we present you the following series of correspondence from the District Ranger. Unfortunately, it is not an isolated example:

- On January 7, 1998, and again on the 26th day of the same month, the District Ranger issued us a decision letter ordering that we discontinue grazing in the Lime Creek Pasture in the interest of preventing riparian area damage.
- On February 21, *less than a month later*, the same District Ranger wrote us a very complimentary letter regarding the successful development work we had voluntarily completed that resulted in minimal grazing activity in the riparian areas. He said in part; "I am very pleased to see this very positive indication of improved conditions on the Cartwright Allotment". The "positive indication" he was referring to is a result of water development work we had completed long before either of these letters were written.

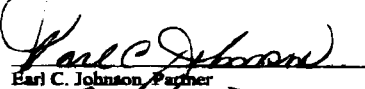
Whoever says you can't have it both ways has never been exposed to that unique brand of reasoning that seems to be an accepted standard in the Forest Service.

We have no quarrel with the principals of sound range management or with the protection of any species; threatened and endangered or not. We submit that our track record as documented by the Forest Service and independent professional consultants clearly supports that statement.

We very definitely *do take issue* with the inappropriate and unintended application of the Endangered Species Act as an instrument for the destruction of our business.

Mr. Chairman and members of the House Committee on Resources, we thank you for your indulgence and for the opportunity of submitting this Prepared Statement.

JOHNSON CATTLE COMPANY,  
an Arizona General Partnership

  
Earl C. Johnson, Partner

  
Clifford Johnson, Partner

(For further information contact Edward Childers, P.O. Box 16044 Phoenix, AZ - 85011)

**PERKINS RANCH, INC.**



P.O. Box 403 • 3955 (3 1/2 miles) E. Perkinsville Rd • Chino Valley, AZ 86323  
Phone (520) 636-2543 OR (520) 636-4114

July 28, 1998

Natural Resource Committee  
Representative Don Young

Dear Sir:

This is the disastrous effect that the endangered species act has had on us.

The usual date of our grazing season on our forest permit, Perkinsville Allotment, is on or about Nov. 15, 1997 to June 15, of the following year. The Forest Service called us on Aug. 15, 1997 and sent us a letter also on Aug. 26, 1997, to tell us we would not be able to graze our cattle in the coming season because their range analysis showed them there was very little production. Since we received our first rains on Aug. 15, 1997 and the growing season just started then, it is certainly not surprising that the production wasn't there on Aug. 15.

We asked for and received a mutual range inspection on Oct. 16 and 17. We showed the Forest Service we had adequate vegetation by then for our livestock.

Now they came back at us with another reason for not being allowed on our permit. By Nov. 14, 1997, we started getting hit with the threatened and endangered species, notice of river crossing restrictions so we would not be able to cross our cattle from the south side of our permit to the north side of our permit.

On Nov. 26, 1997, we received a letter from the Chino Valley ranger that they received a notice of intent by Earthjustice, Forest Guardians, and the Rio Grande Chapter of the Sierra Club on the threatened and endangered species, specifically the spikedace minnow, on the Perkinsville Allotment and also other species.

Dec. 5, 1997 (still unable to move our cattle on to our permit) the Forest Service tells us they have new information on the T & E species as to what they can accept on AOPs. This is a paragraph from their letter:

"Finally, there is a related, but separate matter in dealing with the threatened and endangered (T & E) species. To protect T & E species on your private land on the Verde River, the USDA Forest Service is required by the U.S. Department of Interior Fish and Wildlife Service (FWS) to provide information under a separate cover letter.

Three FWS papers describe habitat conservation plans (HCP). A HCP should help you meet your legal obligations under the endangered species act for actions on your private land."

(2)

Finally by Dec. 13, 1997, nearly a month late, we were allowed to start using our permit. However, they would only allow us on the south side of the Verde River which is about one-third of our permit. The reason for this was the following restrictions of the ESA.

1- "To protect American peregrine falcon eyries (nests)"

Now two of these areas were potential sites and the other one was not on our permit and our cattle could not even get close to it, but they insisted we could still affect it.

2- "To avoid direct effect on T & E fish in the Verde River avoid any use of Verde River by livestock, including crossing on private land." We've been crossing this river for 98 years and all fish still flourish.

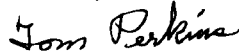
3- "To avoid affecting bald eagle potential nest sites." The bald eagles also do a good job of co-existing with the cattle.

It wasn't until Jan. 25, 1998 that we were allowed to cross the Verde River with our cattle on our private land. We still were not allowed to cross on forest service land to use the larger portion of our rangeland. We were finally allowed to graze our cattle on our Perkinsville Allotment until June 15, 1998 only after we appealed the Chino Valley Ranger's decision to not let us graze or partially graze them.

What a terrible way to have to live in this great country of ours- such insecurity. Had we not been allowed to use our forest permit because of the endangered species act, we would have had to go out of business. This is a business the Perkins family has enjoyed working for 98 years. We are in the fifth generation. We have been good keepers of the land and we have never endangered any species, but we have helped them survive, too.

Thank you for taking the time to listen to our concerns.

Sincerely,



Tom Perkins  
Perkins Ranch, Inc.

**PERKINS RANCH, INC.**  
P.O. Box 403  
Chino Valley, AZ 86323  
636-2543

July 16, 1998

Mr. Mike King  
Forest Supervisor  
344 S. Cortez St. Prescott AZ 86303

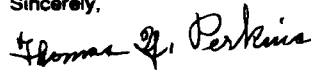
Dear Mr. King:

In an effort to increase the level of communication between the Forest Service and our ranch, we are requesting formal applicant status for all ongoing and future consultations with the Fish and Wildlife Service and others for listed and sensitive species and their habitat that affect our grazing permit.

We would appreciate being kept up to date on the above activities on a regular basis and be notified of the results of consultation activities in a complete and timely manner as they occur.

Thank you for your help in improving cooperation, coordination, and consultation in this important area.

Sincerely,

A handwritten signature in cursive script that reads "Thomas Y. Perkins".

Thomas Y. Perkins, President  
Perkins Ranch, Inc.



**PERKINS RANCH, INC.**  
P.O. Box 403  
Chino Valley, AZ 86323  
636-2543

July 16, 1998

Honorable Jon L. Kyl  
2200 E. Camelback Road, Suite 120  
Phoenix, Az 85016

Dear Senator Kyl:

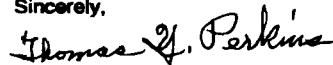
Thank you for your recent letter and the note from E.J. Jamsgard regarding the action that you have taken to help us deal with the continuing problems with the Forest Service over our livestock permit on the Prescott National Forest.

We were really surprised to read in Mr. King's letter of June 25, 1998 that we were free to choose to cross the Verde River on Forest Service land when we removed livestock from the north side of the river. Our recollections are entirely different. As late as May 7, 1998 (see attached letter from Ranger Johnson) we were told that the Forest Service was still "working toward clearing a river crossing acceptable to the spikedace" and that "we may or may not be completed with our crossing analysis" by June 1, 1998. We also contacted Dwayne Warrick and he has no recollection of being notified that a river crossing on Forest Service land was approved prior to June 1, 1998. In fact, we are still waiting for any formal or informal notification that the problem of the river crossings on Forest Service land has been solved and a process is in place to prevent the endless delays we experienced last year over the river crossings.

Because of this problem and many other examples of the Forest Service's lack of performance in following through with adequate communication regarding consultation activities that affect our grazing permit, we have requested formal applicant status for all consultations with the Fish and Wildlife Service and others for listed and sensitive species and their habitat that affect our grazing permit. We seek your support in making this happen so that the Forest Service will disclose all consultation activities and the results of those activities in a complete and timely manner.

Thanks again for your help in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Thomas Y. Perkins".

Thomas Y. Perkins, President  
Perkins Ranch, Inc.



## CALIFORNIA CHAMBER of COMMERCE

Comments  
House Resources Committee Hearing July 15, 1998  
Endangered Species Act  
Timothy J. Lindgren, Chairman  
Natural Resources Committee  
California Chamber of Commerce

The intended role of the federal government under the Endangered Species Act (ESA) is a regulatory one primarily allowing it to regulate those activities of landowners that could lead to the "taking" of a species listed pursuant to the ESA. This falls considerably short, however, of exercising such regulatory powers to coerce private landowners into a position to "recover a species" or "restoring its habitats".

These comments briefly summarize what is commonly perceived by timber companies, ranchers, farmers and related agricultural interests as the distortion of the intent of ESA by the National Marine Fisheries Service (NMFS) and its extraordinarily broad interpretation of its regulatory role.

Until NMFS listed coho salmon as a threatened species under the ESA, private landowners had never been required to provide for the recovery of a listed species or to restore its habitat as a condition of obtaining an Incidental Take Permit (ITP) or other federal approval. While the ESA does charge the federal government with the responsibility for engaging in acts leading to the recovery of listed species, the obligations of private landowners are limited to compensating for any impacts upon listed species that might be caused if a permit was issued under Section 10 of the Act.

NMFS has initiated a policy of requiring "properly functioning habitat" for coho in its permit applications for private landowners on the West Coast (Washington, Oregon, and California). This properly functioning habitat mandate is the regulatory equivalent of requiring landowners to provide for the recovery of salmon because it requires the enhancement of habitat conditions to a far greater extent than what would be necessary to mitigate the impacts of the landowners current operations. In this context, NMFS has held that regardless of the extent or type of impacts that would actually be caused by the landowner and his operations, the landowner must demonstrate that properly functioning habitat conditions will be achieved during the term of the incidental take permit. Additionally the landowner must rectify any pre-existing negative habitat conditions on the landowner's property whether or not the landowner caused them. NMFS is applying this standard in judging the adequacy of incidental take permits and Habitat Conservation Plans (HCP's) under the ESA. NMFS indicated in correspondence with timberland owners that incidental take permits under Section 10 will not be approved unless there is a demonstration that properly functioning habitat conditions will be achieved during the term of the permit.

House Resources Committee/ESA  
 Page 2  
 July 14, 1998

This has been the stumbling block for West Coast forest landowners submitting applications under Section 10 to the United States Fish and Wildlife Service (USFWS). Multi-species Habitat Conservation Plans have been submitted that comply with the issuance criteria for a Section 10 permit: 1) to minimize and mitigate the impacts of the proposed incidental taking, and 2) that the proposed take itself will not cause jeopardy. NMFS, however, using its recovery standard has stopped the progress of all these HCP's and the implementation of their protection measures for other species. NMFS has even been able to stop HCPs that do not include salmon through the use of the Section 7 consultation process of the ESA.

Under Section 7 NMFS is required to consult on any federal agency action (including issuance of a permit to private landowner by a federal agency) that could adversely affect a listed species. NMFS is required to analyze the effects of the action to determine whether or not they will cause jeopardy to any listed species under its jurisdiction. In NMFS' view a failure to provide for achievement of properly functioning habitat conditions would cause jeopardy to salmon.

In the case of one West Coast forest landowner who submitted a Section 10 application and an HCP for the northern spotted owl, NMFS effectively held up the approval of that permit through the Section 7 process for over a year. Further NMFS has used its leverage under Section 7 to try to force concessions from the landowner (e.g. 300-foot buffers on both sides of streams) even though there are no coho salmon in the HCP area. During one field trip NMFS biologists claimed that "there was nothing the landowner could do that would not take fish." In other words, just owning property and using it would result in a jeopardy call and denial of the HCP. During the course of negotiations, NMFS offered the "if the landowner wanted an ITP for spotted owls, he/she just has to agree to FEMAT buffers." FEMAT buffers are what is described in the Administration's Plan for management of the national forest system and include 300 foot no cut buffers along all streams. This constitutes almost 40% of the ownership (in this case) that would be set aside and harvesting or other management activities not allowed.

The Endangered Species Act specifies that concurrent with a listing decision the Secretary will designate any habitat of such species which is then considered to be critical. However, there are some guidelines on what gets designated. For example, such habitat shall not include the entire geographic area that can be occupied by the species; when considering designation the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species; and each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area.

In the current proposed designation NMFS decided to designate ALL accessible areas in the ESU (the region where the coho has been listed). They further define accessible reaches as those within the historical range of the ESU that can still be occupied by any life stage of coho salmon. This is really a broad interpretation of critical habitat especially when they identify only those reaches above specified dams on rivers as inaccessible.

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In addition to the designation of all these streams below these dams NMFS has designated their adjacent riparian zones as critical habitat. These zones would be areas within a horizontal distance of 300 feet from the high water mark. NMFS has not identified any physical or biological feature within this 300 feet that is essential to the species biological needs or conservation that would require special protection. It is absurd to list 300 feet of dry land on both sides of a creek as habitat critical to the survival of a species that requires primarily water to survive.

NMFS tells property owners that this designation has no effect unless one has to get a permit from a federal agency. This is absolutely true. The problem arises when you do have to get a permit. Section 7 (discussed above) of the ESA requires that a landowner must consult (get a biological opinion) with NFGS before a permit can be issued that may jeopardize a listed species or modify its critical habitat. The agency cannot issue a permit that modifies critical habitat - period. There is no allowance for mitigation through improvements or alternatives to any disturbance or impact you may have, as there is in all other permits. YOU CANNOT MODIFY OR IMPACT CRITICAL HABITAT. Since you cannot have an impact (that is the same as doing nothing in terms of ground disturbance or altering hydrology), therefore the result is the same as a "no touch" buffer although NMFS will not admit to this. NMFS continues to insist that all the critical habitat designation means is that you must come in and talk (consult) with them before you do any activity and that this is not a no touch buffer.

Further, NMFS has also indicated an intent to impose its interpretations of its regulatory authority upon the California Department of Forestry - a state agency which arguably enforces the most stringent forestry regulations in the world - yet, regulations which NMFS deems wanting.

While the California Chamber of Commerce is aware of similar problems in Washington and Oregon, the brief comments above are limited to the experience of timber companies in California. Most private landowners are operating under timber harvest plans approved earlier and are in the unenviable position of having presently proposed plans totally stalled with the accompanying potential for their harvesting activities coming to a complete stand still in the very near future.

With this understanding of regulatory burdens now imposed on private owners of timber lands, we ask the Committee to undertake legislative action to clarify and better define the scope of authority given to government agencies under provisions of the Endangered Species Act. By such clarification, we believe the Committee can restore balance to the responsibilities and opportunities inherent in resource stewardship and private property ownership as originally intended in the passage of the Endangered Species Act.

We do not believe that Congress intended to give government agencies like NMFS the authority to impose a recovery standard on HCP proponents. We suggest for the Committee's consideration language based upon the Supreme Court's Dolan decision and on legislation recently adopted in California to amend its state Endangered Species Act. That clarifying language would be added as a separate subsection to Section 10 of the Endangered Species Act as follows:

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(n) **ROUGHLY PROPORTIONAL MITIGATION** - Any actions or measures required of an applicant as a condition of a permit authorized pursuant to subsection (a)(1)(B) or subsection (a)(3) or an agreement authorized by subsection (k) or subsection (l) shall be -

(1) necessary to satisfy a specific requirement of this section applicable to such permit or agreement; and  
(2) roughly proportional in extent to the impact that would be caused by the applicant and is authorized by the permit or agreement -

- (a) of any incidental take of a listed species under the permit or agreement;
- (b) on any species that is proposed for listing, a candidate for listing, or not listed and is addressed in a permit or agreement pursuant to subsection (a)(3) or subsection (k).

We appreciate the Committee's consideration of these matters as you undertake the difficult task of reforming the Endangered Species Act to restore equity in its execution while providing essential protection for our fellow species.

**Response to U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON RESOURCES**  
**9/17/98**

1) Please provide the names of each person employed by the Forest Service or the Department of Agriculture, involved in, representing or supervising those representing the United States in the litigation which was the subject of the hearing, Southwest Center for Biological Diversity v. U.S. Forest Service Docket number CV 97 666 TUC JRM and CV 97 PHX SMM. In addition, please provide a brief, but full curriculum vitae for each person listed. (Please understand that private witnesses are required to submit this information under the Rules of the House of Representatives.)

Eleanor S. Towns	Regional Forester, Southwestern Region	B.A. Communications, University of Illinois M.A. Guidance & Counseling, Univ of New Mexico J.D. Univ of Denver	26
John R. Kirkpatrick	Deputy Regional Forester, Resources Southwestern Region	B.S. Forestry, Northern AZ University	33
Robert C Joslin	Deputy Chief, National Forest System, USDA FS, Washington Office	B.S. Forest Management, Northern AZ University	33
Nancy Green	Assistant Director, Wildlife Fish & Rare Plants, USDA FS, Washington Office	B.A. Psychology, Humboldt State University, Arcata, CA - post graduate studies (Wildlife & Wildlife Ecology towards M.S. & Ph.D.)	15
Berwyn Brown	Range Administration Specialist, USDA FS, Washington Office	B.S. Forest & Range Mgt, Colorado State University M.A. Public Administration, University of New Mexico	35
David M Stewart	Acting Director, Rangeland Mgt, Southwestern Region	B.S. Watershed, Forestry, & Range, University of Arizona	30
Patrick L Jackson	Appeals & Litigation Coordinator, Southwestern Region	B.S. Forestry & Range, Colorado State University --- M.S. Hydrology, University of Arizona	26
James R Lloyd	Director, Wildlife Fish & Rare Plants, Southwestern Region	B.S. Fisheries Mgt, Humboldt State Univ -- M.S. Nat. Res, Humboldt State University	23
Sandy Boyce	Regional T&E Species Manager, SW Region	B.A. Biology, Sonoma State Univ M.S. Natural Res, Humboldt State Ph.D. Zoology & Wildlife, BYU	11

George C Martinez	LMP Coordination & Monitoring, Range-land Mgt, SW Region	B.S. Range Science, New Mexico State University	28
Christina Gonzalez	Appeals & Litigation Assistant, SW Region	N/A	24
John C Bedell	Forest Supervisor Apache-Sitgreaves NF	B.S. Forestry & Watershed Mgt, University of Arizona	34
Michael A Rising	Supvy Rangeland Mgt Specialist, A/S NF	B.S. Range Science, New Mexico State University	26
Terry L Myers	T&E Species Coord. A/S NF	Ph.D. Wildlife Science, University of Arizona	10
Abel M Camarena	Forest Supervisor Gila NF	B.S. Wildlife Mgt, California State at Humboldt	24
Steve Libby	Range/Wildlife/WS Staff Officer, Gila NF	B.S. Forest Management, Colorado State University	28
Charles N Sundt	Range Specialist Gila NF	B.S. & M.S. Animal Science New Mexico State University	29
Paul F Boucher	Forest Biologist, Gila NF	B.S. Botany, M.S. Biology Northern AZ University	25
Pat Morrison	Wildlife & Range Staff, Gila NF	B.S. 1974, Wildlife Biology, Colorado State University	22
Ben Kuykendall	Range & Wildlife Staff, Carson NF, Camino Real RD	B.S. Fisheries Biology, NM State University	24
Larry Cosper	Range, Wildlife, WS Staff, Cibola NF	B.S. Wildlife Mgt, NM State U M.S. Wildlife Science, NMSU	10
Greg Goodwin	Range, Wildlife, WS Staff, Coconino NF	B.S. Wildlife Mgt, Univ of WY M.S. Zoology, Univ of WY	26
Cecilia Overby	Wildlife Biologist, Coconino NF	B.S. Biology, William & Mary M.S. Forestry, NAU	10
Randall Smith	Resource Mgt Staff, Coronado NF	B.S. Wildlife Science, Kansas State University M.S. Wildlife Science, NMSU	19
Carol Boyd	Rangeland Mgt Spec Coronado NF	B.S. Wildland Rec Mgt., Univ of Idaho B.S. Range Mgt, Univ of Idaho M.S. Range Mgt, Univ of Idaho	10
Mike Leonard	Forest Wildlife Biologist, Prescott NF	B.S. Wildlife/Range Mgt, Texas Tech University M.S. Park Admn/WL Mgt, Texas Tech University Ph.D. Interdisciplinary Land Use Planning & Mgt & Design, Texas Tech University	22
Jerry Elson	Range Wildlife Staff, Santa Fe NF	B.S. Forest & Range Mgt, Colorado State University	35

Eddie Alford	Biological Res. Group Leader, Tonto NF	B.S. Range Science, NM State University — M.S. Range Science, Colorado State	22
Mary Ann Joca	Assistant Regional Attorney, OGC- Albuquerque	B.S. Agri (Soils), University of Florida — J.D. Univ of New Mexico	20
Eric Olson	Attorney Advisor/ General, OGC - D.C.	B.S. Biology, Duke University— J.D. University of Virginia	8
Vicki A Breman	Attorney Advisor/ General, Office of the General Counsel-DC	B.S. International Studies, Webster University, —J.D. Univ. of Georgia	11

2) *Will there be an opportunity for public comment on the stipulated agreement or any of the subsequent changes to policy, procedure, management plans, terms and conditions of permits, or the other actions that will be taken by the Forest Service as a result of the stipulated agreement?*

Stipulated agreements reached in the context of litigation are never subject to public comment and this situation is no exception. Changes in management plans, permits, and other actions will continue to occur under existing procedures.

Relative to your questions on policy, procedure, management plans, and terms and conditions of permits, on March 4, 1998, the Forest Service and Department of Justice hosted a conference call with representatives of the plaintiffs, intervenors (New Mexico and Arizona Cattle Growers' Associations), and respective attorneys for all clients. The purpose of this call was to share information about the process the Forest Service would use to address Endangered Species Act (ESA) consultation requirements for ongoing grazing activities and for administration of grazing pending completion of consultation. During this conference call the following points were emphasized:

- Currently permitted grazing would continue to be administered through existing permit provisions and the annual operating plans (AOPs) with consideration of resource protection needs identified in Forest Plans and the Fish and Wildlife Service Biological Opinion of December 19, 1997, for Forest Plans.
- AOPs would continue to be prepared with permittee participation, and with the understanding that some AOPs might be amended during the course of the site-specific ongoing grazing consultation process as new information became available. The timing of amendments would depend on when new information became available.
- Site-specific NEPA compliance for allotments would continue as scheduled per Section 504(a) of the 1995 Rescissions Act, for decisions to continue authorization of grazing and the preparation of allotment management plans (AMPs). In conducting NEPA analysis and making decisions for the issuance of new term grazing permits or permit modifications and preparing AMPs, each allotment is studied and evaluated in compliance with NEPA and other environmental laws including site specific consultation under the ESA.

The Forest Service has procedures in place to ensure permittee participation in various aspects of the planning and decisionmaking processes as follows :



- Local Forest Service offices publish quarterly lists of all upcoming projects which will undergo NEPA analysis. These are made available to permittees and the public;
- Affected permittees have had the opportunity to be involved throughout the process of completing NEPA decisions in the Southwestern Region, including the 287 NEPA decisions that are currently projected for completion in 1998. Permittees are given the opportunity to comment on all proposed actions before a final decision is made;
- After a decision is made permittees may appeal the decision under the Agency's administrative appeal regulations at either 36 CFR 215 or 36 CFR 251 Subpart C;
- Permittees may appeal AOPs for their individual allotments under 36 CFR 251 Subpart C;
- Permittees are notified of their right of applicant status under the provisions of Section 7 of the Endangered Species Act when the Forest Service consults formally with the Fish and Wildlife Service on threatened or endangered species on their individual grazing allotments. This allows the permittees who are granted applicant status to submit comments on draft biological opinions, prior to issuance of a final biological opinion by the Fish and Wildlife Service.

3) *Who will pay for the installation and maintenance of these fences on Forest Service lands? Who must make and pay for repairs?*

Fences are constructed for proper livestock grazing management to protect specific riparian resources, including habitats for federally listed species. Fences provide permittees the means of excluding their permitted livestock from key habitats to ensure proper resource protection. The Forest Service is not requiring permittees to bear the cost and labor of the needed fencing. Fence construction is accomplished through the following options:

- The Forest Service covers 100 percent of the fence construction costs.
- The Forest Service furnishes the materials and the permittee furnishes the labor for fence construction;
- A permittee may elect to pay for materials and construct fences to separate cattle from Threatened and Endangered habitat in order to avoid having to keep cattle off larger areas of upland range until such times as the Forest Service has funds available to construct the fences;

Also, a permittee may take voluntary non-use or avoid having livestock in an area excluded from livestock grazing by using salting and/or by using riders until the Forest Service or the Forest Service and permittee can cooperatively construct necessary fences;

Regardless of the method of construction, fences are constructed to control livestock use and protect resources. These fences normally are assigned to the grazing permittee for maintenance. In some situations, where unusually costly maintenance may become necessary, (e.g. due to an unusual weather event, human vandalism, or damage due to wildlife use) the Forest Service may assist the permittee with maintenance or reconstruction.

- 4) *What will the Forest Service do to keep other animals such as elk out of riparian areas and from knocking down the fences to get to the water?*
- 5) *Will other wildlife such as elk be able to get water and will this settlement harm the wildlife?*

Because questions 4 and 5 are interrelated, we have combined the answers for them.

Consistent with our multiple use mandate and agreements with State wildlife agencies, elk and other wildlife generally are not excluded from riparian areas. Elk and other wildlife are able to get to water because the height of fences and spacing between wires are designed to allow passage of wildlife and at the same time restrict access to certain riparian areas by domestic livestock. In situations where there is damage to a fence by wildlife, forest officers can consider assisting permittees with maintenance or reconstruction of the fence. We do not anticipate any harm to wildlife from the actions we are taking.

- 6) *Will there be any compliance with NEPA prior to implementation of this settlement? Will there be an EIS completed to determine the environmental impact of fencing riparian areas?*

The response to question 2, above, partially answers this question, including a description of the NEPA process the Forest Service is following for new grazing authorizations and AMPs. To the extent that exclusion of livestock requires construction of fences, appropriate NEPA compliance is being conducted.

Fencing projects are addressed through the NEPA process in several ways, depending on site specific circumstances. Some of the fencing projects are in compliance with NEPA as a result of the process of preparing new grazing authorizations and preparation of AMPs in accordance with the schedule developed under Section 504(a) of the 1995 Rescissions Act. In other situations, NEPA analyses for individual fences has been conducted and determinations made that due to a lack of environmental impact the action can be categorically excluded from documentation in an environmental assessment (EA). In still other situations, environmental assessments have been prepared for individual fence projects where extraordinary circumstances preclude a categorical exclusion. In all instances the NEPA process has been followed and a determination has been made that either a categorical exclusion is appropriate or that the effects can be addressed through an environmental assessment. The purpose of an EA is to determine whether an environmental impact statement (EIS) is necessary, and in no instance was it found that an EIS was necessary because of current actions to exclude livestock from specific riparian areas.

- 7) *Will the requirements of the settlement go through a rulemaking process pursuant to the Administrative Procedure Act?*

The stipulations are not "rules" under the Administrative Procedures Act. Therefore, they are not subject to rule making processes pursuant to the Administrative Procedures Act. The stipulations document measures being taken to provide immediate protection for federally listed species and associated riparian habitats as determined through ESA Section 7 consultation. The stipulations will terminate when site-specific consultation is complete.

8) *Explain why the plaintiffs were seeking site specific consultation when the Forest Service had already completed consultation on the entire plan? Were all affected endangered, threatened, and proposed species taken into consideration during that consultation? Was there any determination that the species would be harmed by the Forest Plan or any activity undertaken pursuant to the plan?*

The Forest Service completed programmatic consultation in December 1997 on the effect of all amended Forest Plans in the Southwestern Region on species listed as threatened or endangered under the Endangered Species Act. The Biological Opinion issued by Fish and Wildlife Service on the amended Forest Plans found that implementation of the plans would not jeopardize the continued existence of any of the listed species. However, this programmatic level consultation was very general in nature. The Forest Service had not completed consultation as required under Section 7(a)(2) of the Endangered Species Act to ensure that any action taken by the agency (in this case, management of individual grazing allotments) does not jeopardize a species or result in destruction or adverse modification of designated critical habitat. We surmise that the plaintiffs' suit sought compliance with this requirement to ensure Section 7 compliance for each allotment.

9) *Have you heard of a plan by the Forest Guardians or any other group to act this summer as "Cow Cops" to enforce the settlement? Can private groups use vigilante tactics to enforce this agreement? What will be your response to "cow cops"?*

We do not know of any plan by any group to act as "cow cops". The following information may be helpful. The March 31, 1998, declaration by Acting Regional Forester John R. Kirkpatrick (Attachment 1) stated with respect to the individual allotments identified in the motion for injunction filed by Forest Guardians, the Forest Service would commit sufficient resources to enhance compliance with provisions of grazing permits and AOPs, to monitor unauthorized livestock use, and that it would be a high priority to take appropriate actions to ensure protection of habitats within the allotments pending completion of consultation. As part of the two stipulations the Forest Service agreed to a schedule for monitoring exclusions within specific riparian areas and to require removal of any livestock in a timely manner. Upon notification of livestock being in excluded areas, the Forest Service is, and will, take timely action to require removal of livestock and protect riparian habitats. Any member of the public can notify the Forest Service that livestock are in excluded areas. Traditionally the public has provided such information and we do not consider public participation of this type to pose a problem.

10) *The Regional Forester stated several times during the course of the July 15th hearing that the settlement agreement between the U.S. Forest Service and the Plaintiffs memorialized allotment annual plans that had been previously agreed to. Please provide written documentation of this statement.*

11) *Provide documentation pertaining to each provision in the stipulated agreement showing where it was located in the annual operating plans prior to the settlement agreement of April 16, 1998. Please explain why the annual operating plans had to be amended following the date of the settlement. Does that amendment process contradict the statement that the settlement memorialized items that were already taking place and agreed upon?*

Because questions 10 and 11 are interrelated, we have combined the answers for them.

Because of the ongoing grazing consultation, completion of AOPs for many allotments with late spring and early summer turn on dates was intentionally delayed. This was done to avoid situations where

AOPs would be issued only to be revised a few weeks or months later based on information emerging from the site-specific consultation process, specifically the information for the supplemental biological assessment (BA). (See consultation agreement, Attachment 2)

As part of the process of preparing the information to supplement the BA, an interagency consultation team worked with staff on each forest during February, March, and early April to assess the effects of ongoing management of individual allotments on threatened or endangered species. During this assessment process on each allotment, Forest Supervisors identified changes needed in annual operating plans to address threatened or endangered species, including, in some instances, the need to exclude livestock from some specific riparian areas. However, in many cases the Forests had not yet had time to go through the process of working with individual permittees to make changes in the AOPs prior to the hearing in Tucson.

Part of the confusion surrounding the origin of the AOP modifications (excluding livestock from certain riparian habitats) stems from the fact that when AOPs were issued after the hearing, some correspondence from District rangers to permittees inappropriately linked the AOP changes directly to the stipulation agreements, without acknowledging that the original determination of the need for the exclusions was made prior to the hearing and the stipulations. This correspondence should have referred to the consultation process (and in some cases even earlier processes) as the basis for the changes. The vast majority of these AOP changes were either complete, ongoing, or had been identified as being needed, as documented in John Kirkpatrick's March 31, 1998, declaration.

An example of (a) an AOP on a seasonal allotment (one of the allotments identified in the motion for preliminary injunction) which was prepared for the 1998 grazing season and (b) that AOP later amended prior to the Tucson hearing is included, Attachment 3 (a-b).

AOPs for yearlong allotments were prepared prior to the hearing and amended as necessary as the consultation process proceeded. Two examples of 1998 AOPs for yearlong allotments which were already implementing specific riparian exclusions prior to the Tucson hearing but remained unchanged through the consultation process are attached, Attachment 4. Refer to Attachment 5(a-b) for an example of a yearlong AOP which was prepared for the 1998 grazing season and (b) that same AOP as amended through the consultation process.

The exclusion of livestock from riparian habitats could have originated from several reasons. These are: (1) previous agreements with permittees, documented in AOPs, to exclude livestock from riparian habitats for all or a portion of the grazing season as a matter of good resource management; (2) information from site specific consultation under Section 7 of the Endangered Species Act in conjunction with NEPA analysis scheduled under Section 504 of the Rescissions Act; (3) regionwide management requirements which the Region began including in AOPs in 1997 to avoid jeopardizing the continued existence of certain listed species pending completion of site-specific analyses for all allotments; and (4) information from the ongoing allotment specific consultations initiated in February of 1998. Determinations to exclude livestock resulted from one of the four reasons listed and not through negotiation with the plaintiffs as part of the stipulated agreements. Again, the main focus of the stipulations was the Forest Service commitment to a schedule for monitoring excluded areas and to use existing procedures to ensure timely removal of any livestock found in excluded areas.

Upon receipt of John Kirkpatrick's declaration dated March 31, 1998 (attachment 1), plaintiffs and intervenors became aware of the management actions the Forest Service had either already taken, or soon would take to exclude livestock from specific riparian habitat as a result of the aforementioned four reasons. The April 16, 1998, stipulation memorialized and documented the changes in allotment management that the Forest Service had taken, or anticipated to take, to exclude livestock from specific

riparian habitats, Attachment 6. The Kirkpatrick declaration covers all of the allotments listed by plaintiffs' (Forest Guardians) motion for preliminary injunction as having listed species or habitat. Twenty-six of these allotments were described collectively, but not individually named in the declaration. These 26 allotments (page 12, Kirkpatrick Declaration) were either not stocked with livestock this year, not scheduled to for livestock grazing in specific riparian habitats, or already had excluded livestock grazing from specific riparian habitats.

Similarly, the June 16, 1998, stipulation memorialized and documented exclusion of livestock from specific riparian habitats on approximately 19 additional allotments that had occurred prior to June 16. See Attachment 7.

**12) *How does the U. S. Forest Service prevent conflicts of interests involving their employees from arising in their decision making process?***

The standards of Ethical Conduct for Employees of the Executive Branch, found at 5 CFR 2635 apply to all Executive Branch agencies. As with other Executive Departments, the Department of Agriculture has its own regulations at 7 CFR Part O Subpart B (Conduct and Responsibilities of Employees) which apply to the Forest Service. Among other provisions, §0.735-11 (Prohibited Conduct - general) includes the requirement that employees avoid actions that might result in or create the appearance of losing impartiality and §0.735-11 (Conflict of Interest) addresses the prohibitions on conflicting financial interests.

The Forest Service provides Ethics and Conduct training to its employees. The training is designed to prevent conflicts of interest and increase awareness so that even appearances of conflicts of interest are avoided.

**13) *Is the Forest Service aware of whether any of their employees are members of any organizations that are involved in these cases or contribute money to any of the organizations involved in these cases, including but not limited to the Forest Guardians, Southwest Center for Biological Diversity, the Sierra Club, the Wilderness Society or any local affiliated organization?***

The Forest Service does not track the membership of employees in organizations, and in fact 5 USC 552a(e)(7) of the Privacy Act prohibits the Agency from maintaining records of such First Amendment information. The Forest Service encourages its employees to participate in professional organizations and in their communities.

**14) *Who in the Forest Service approved the settlement agreement? Additionally what officials in the Forest Service and the Department of Agriculture had to sign off on the decision?***

The April 16, 1998, stipulation agreement was approved by Acting Regional Forester John Kirkpatrick. Regional Forester Eleanor Towns approved the June 16, 1998, stipulation. Deputy Chief Robert Joslin verbally concurred with both stipulations. No one in the Department of Agriculture had to sign off on the decisions.

*15) The Forest Service has previously stated that the President's Council on Environmental Quality had been briefed on the lawsuits and the Endangered species issues in the southwest. Please provide all briefing papers, documents, letters and any other correspondence regarding contact between the Department of Agriculture and Council on Environmental Quality.*

*16) Please provide the names and position of the individuals who were briefed and who participated in the briefings. Also provide the names of any other persons contacted in any manner regarding these two court cases and related issues. Please provide the names and positions of all Forest Service and Department of Agriculture employees who had any contact with the Council of Environmental Quality on the cases and related issues.*

Because questions 15 and 16 are interrelated, we have combined the answers for them.

The Department of Agriculture did not brief the President's Council on Environmental Quality (CEQ) on these lawsuits and did not send CEQ any briefing papers, documents, letters or other correspondence regarding them. Department and Forest Service personnel did meet with CEQ on related issues, by which we assume you mean general discussions of natural resource issues in the southwest, including endangered species issues. Such discussions have occurred at interagency meetings involving CEQ on three occasions over the past 16 months. Two of these meetings predated the filing of the lawsuits by the Southwest Center for Biological Diversity and Forest Guardians late in 1997. The third meeting, held in March 1998, was to discuss the Southwest Strategy and did not include a discussion of any pending litigation in the region. (See testimony of the Fish and Wildlife Service testimony at the July 15 hearing for a description of the Southwest Strategy.)

In December 1997, a field trip to Region 3 was hosted by Acting Regional Forester John Kirkpatrick for representatives of the CEQ and the Department of Agriculture to better acquaint them with a variety of resource issues and land stewardship initiatives in Arizona and New Mexico including the Malpai Borderlands Group. The Malpai Borderlands Group is a grassroots landowner-driven 501(c)(3) non-profit organization, attempting to implement ecosystem management on a large geographic area on the border of Arizona, New Mexico, and Mexico. During the field trip, there was broad discussion of numerous lawsuits pending at the time, including the two cases involving Forest Guardians and the Southwest Center for Biological Diversity. There was nothing specific to discuss regarding the Forest Guardians and Southwest Center suits since they had only recently been filed.

*17) Did any Forest Service, or any Department of Agriculture employees have any contact with the Forest Guardians or Southwest Center for Biological Diversity prior to the six days before the start of the Tucson hearing in April? If so, please identify the personnel and the nature of the contact.*

Because the question relates to the Tucson hearing we assume that what is being asked is whether there was contact regarding the motion for preliminary injunction that was the subject of the hearing. Soon after the filing of the motion for preliminary injunction by Forest Guardians on March 3, 1998, some telephone calls were initiated by the plaintiffs to some of the Forest Service field offices inquiring about exclusion of livestock from riparian areas. District and Forest personnel were immediately instructed to refer the plaintiffs to the Department of Justice. To our knowledge Forest Service and Department personnel did not have any other contact with Forest Guardians or Southwest Center regarding the motions for preliminary injunction prior to the 6 day period before the start of the Tucson hearing. Prior

to the hearing, all communication between these plaintiffs and the United States regarding these motions occurred between Department of Justice and Plaintiffs' attorneys.

**18) Identify all Forest Service or Department of Agriculture personnel that were involved in this case.**

Refer to the answer for question number 1.

**19) Were any other agencies, Departments or federal officials briefed by the Forest Service on these cases or related issues? If so, please identify those receiving such briefings.**

Because the cases involved consultation with the Fish and Wildlife Service (FWS), and because FWS was a defendant in one of the lawsuits, the Regional Director of the FWS was briefed by Regional Forest Service personnel and staff of the two agencies met as needed to address the consultation process. Also, shortly after the first of the year, the Forest Service, Fish and Wildlife Service, attorneys for the Department of Agriculture and Department of Interior, and the Department of Justice met in Albuquerque to discuss how to address the ESA consultation related to the allotments identified in the lawsuits, as well as other allotments in the region. The outcome of these discussions was the consultation agreement, Attachment 2. The Bureau of Land Management (BLM) also was represented at the meeting due to ongoing and future consultations by the BLM involving livestock grazing and the overlap of species, habitats, and need for coordinated approaches to management. At various times BLM staff have been briefed on the status of the effort. In addition, the lawsuits and the signed stipulations were described in general terms at meetings involving the various agencies participating in the Southwest Strategy.

We interpret your question about briefings on related issues to apply to discussions concerning the Southwest Strategy, in which federal agencies in Arizona and New Mexico are committed to working with the public and each other in a collaborative effort to maintain and restore the cultural, economic, and environmental quality of life in Arizona and New Mexico. The strategy was described as part of the Fish and Wildlife Service testimony at the July 15 hearing. Federal agencies participating in the Southwest Strategy include the Bureau of Land Management, Geological Survey, Fish and Wildlife Service, Bureau of Indian Affairs, National Park Service, Bureau of Reclamation, Natural Resources Conservation Service, Forest Service, Environmental Protection Agency, and the Department of Defense.