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# LAND AND MONEY MITIGATION REQUIREMENTS IN ENDANGERED SPECIES ACT ENFORCEMENT

## OVERSIGHT HEARING

BEFORE THE

## COMMITTEE ON RESOURCES
## HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

MAY 26, 1999, WASHINGTON, DC

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# OVERSIGHT HEARING ON LAND AND MONEY MITIGATION REQUIREMENTS IN ENDANGERED SPECIES ACT ENFORCEMENT

**WEDNESDAY, MAY 26, 1999**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
*Washington, D.C.*

The Committee met, pursuant to notice, at 10:13 a.m., in Room 1324, Longworth House Office Building, Hon. Richard Pombo presiding.

## STATEMENT OF HON. RICHARD POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. [presiding] Good morning. I would like to welcome you all here today to this oversight hearing of the Committee on Resources on how mitigation is used in the enforcement of the Endangered Species Act. Chairman Don Young is not able to be here today and has asked that I Chair this hearing.

Today, we are going to hear testimony regarding the experience of a number of communities and private property owners regarding their efforts to work with the Fish and Wildlife Service and National Marine Fisheries Services to obtain permits and approvals to use either private property or provide public services at the local level.

The Endangered Species Act prohibits the take of threatened or endangered species and also prohibits the take of the land on which they live. This means that a property owner whose land is found by the government to be habitat for a listed species cannot use his or her land without the risk of criminal and civil prosecution under the Endangered Species Act. In 1982, Congress amended the ESA to allow these property owners to obtain what we call an "incidental take permit" so that they can use their property as long as their take of species or its habitat is only incidental to an otherwise legal use of the property. Within the last four years, the Fish and Wildlife Service and the National Marine Fisheries Service has issued over 250 incidental take permits.

In addition, if the use of private land depends on a Federal permit of any type, the Fish and Wildlife Service and National Marine Fisheries Service also require a section 7 consultation. This is particularly prevalent where there are wetlands and the Corps of Engineers must issue a wetlands permit.

Landowners who find themselves needing a permit are being asked to mitigate for the loss of species habitat on their land by

either setting aside a portion of the property they own or paying money for the purpose of buying land elsewhere. This is a growing industry, particularly in California where the great majority of mitigation is required.

The purpose of our hearing is to examine how this system is working. I am concerned about the potential for abuse of landowners who may not be in the position to bargain over the amount of mitigation being required. Do these demands for mitigation violate the Fifth Amendment of the Constitution? The Supreme Court has addressed this issue in the case of Florence Dolan v. City of Tigard and found that there are limits on the amount of mitigation or exactions that can be demanded from private property owners.

The Federal Government has required private property owners around the country to pay more than $62 million to various parties as a condition of obtaining section 10 permits. This does not include the value of the land they have required to be set aside and protected "in perpetuity." This Committee will examine how these funds are spent and whether they are being spent wisely.

Let me say to our witnesses that we appreciate your coming here today to testify regarding your experiences. I realize that there are many individuals who are truly afraid to make their concerns public or to share their experiences for fear of retribution and retaliation. Under the ESA, these Federal agencies exercise great power over the lives of the people who live in the areas where there are endangered species. They can literally destroy a small business just by refusing to process a permit or complete a consultation. So, I know the risks you are taking, and I want to thank you for living up to your responsibility as good citizens.

With that in mind, I ask Director Clark to listen closely to the testimony of the other witnesses. Director Clark and I have had several conversations about the future of the species protection and recovery in this country, and although we may not see eye to eye on the best way to improve our Federal laws on this issue, I respect and hold her views in high regard. Since she took the reign two years ago, I believe she has put forward a genuine effort to positively address concerns raised by this Committee. However, as today's testimony will echo, these exact concerns have been routinely disregarded by the Fish and Wildlife Service regional offices. Therefore, responsibility for failure to follow policy by agency staff and employees has to fall into the Director's lap.

[The prepared statement of Mr. Pombo follows:]

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

Good Morning. I would like to welcome all of you today to this oversight hearing of the Committee on Resources on how mitigation is used in the enforcement of the Endangered Species Act. Chairman Don Young is not able to be here today and has asked that I chair this hearing.

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The Endangered Species Act prohibits the take of threatened or endangered species and also prohibits the take of the land on which they live. This means that a property owner whose land is found by the government to be habitat for a listed species cannot use his or her land without the risk of criminal and civil prosecution

under the ESA. In 1982, Congress amended the ESA to allow these property owners to obtain what we call an "incidental take permit" so that they can use their property as long as their take of the species or its habitat is only incidental to an otherwise legal use of the property. Within the last four years the Fish and Wildlife Service and the National Marine Fisheries Service has issued over 250 incidental take permits.

In addition, if the use of private land depends on a Federal permit of any type, the Fish and Wildlife Service and NMFS also require a section 7 consultation. This is particularly prevalent where there are wetlands and the Corps of Engineers must issue a wetlands permit.

Landowners who find themselves needing a permit are being asked to mitigate for the loss of species habitat on their land by either setting aside a portion of the property they own or paying money for the purpose of buying land elsewhere. This is a growing industry, particularly in California where the great majority of mitigation is required.

The purpose of our hearing is to examine how this system is working. I am concerned about the potential for abuse of landowners who may not be in a position to bargain over the amount of mitigation being required. Do these demands for mitigation violate the 5th Amendment of the Constitution. The Supreme Court has addressed this issue in the case of Florence Dolan v. City of Tigard and found that there are limits on the amount of mitigation or exactions that can be demanded from private property owners.

The Federal Government has required private property owners around the country to pay more than $62,354,875 to various third parties as a condition of obtaining section 10 permits. This does not include the value of land they have required to be set aside and protected "in perpetuity." This Committee will examine how these funds are spent and whether they are being spent wisely.

Let me say to our witnesses that we appreciate your coming here today to testify regarding your experiences. I realize that there are many individuals who are truly afraid to make their concerns public or to share their experiences for fear of retribution or retaliation. Under the ESA, these Federal agencies exercise great power over the lives of the people who live in areas where there are endangered species. They can literally destroy a small business just by refusing to process a permit or complete a consultation. So I know the risk you are taking and I want to thank you for living up to your responsibility as good citizens.

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Before I introduce our witnesses, I would recognize our ranking minority member for his opening statement.

Mr. POMBO. Before I introduce our witnesses, I would recognize our Ranking Member for his opening statement. Mr. Miller.

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

Mr. MILLER. Thank you very much, Mr. Chairman, and I thank you for calling this hearing, and I welcome our witnesses today, and I look forward to their testimony on the ESA implementation.

We are all naturally concerned about ongoing ESA disputes that pit development against species and their habitat. I, for one, would welcome the opportunity to legislate in a responsible way on this issue, because I think that all parties deserve a better ESA management and enforcement program than exists today.

It is clear that the major objectives to this law is not being currently met. More than 1,800 species are already listed, and the number is going to continue to grow as more and more habitat is

lost. The United States has lost approximately 117 million acres of wetlands in the lower 48; 25 million acres of ancient forest in the Northwest; 22 million acres of native grasslands just in California. Our national forests contain nearly 360,000 miles of road, 8 times more than the interstate highway system. As States like California continue to grow, the conflicts will continue to mount. While some of the witnesses will tell us that the Fish and Wildlife Service has been making the law operate more effectively and fairly, others, I understand, will focus on the remaining delays and obstacles and question whether the costs of mitigation are authorized under law.

The Endangered Species Act requires the activities that will impact listed species must be minimized and mitigated. This is not new nor is it unique to the ESA. The Clean Water Act, the National Environmental Policy Act, and many other laws require that Federal agencies and private landowners mitigate their negative impacts on the environment just as many county and city planning commissions do in terms of the human environment. I hesitate to think of how unpleasant it would be if we lived in a U.S. where these laws did not exist and mitigation was not required.

We will also hear that the Fish and Wildlife Service is hopelessly slow in processing permits to allow development to move forward, particularly in the rapidly growing areas of the country, like California. These delays cost time and money, and, frankly, they concern me. The biggest cause of delays, some will tell us, is inadequate staffing yet, ironically, just a year ago, this Committee was holding hearings to criticize Fish and Wildlife Service for putting too many staff in Region 1 and neglecting other areas of the country. Well, you can't have it both ways. You can't criticize Fish and Wildlife for using its limited resources where the biggest demands are and then criticize them when they are not doing the job fast enough. If this Committee wants the Fish and Wildlife Service to be able to do its job in a timely manner, then we need to provide the financial and personnel resources that are required, and to stop wasting time with endless congressional inquiries and subpoenas for information that divert staff from the job the witnesses and the people here today want to see done.

The bottom line is that the overwhelming majority of Americans support the recovery the endangered species just as they support the laws that ensure that we have clean water and clean air. The leadership of the Resources Committee should demonstrate its willingness to write comprehensive reform legislation to reauthorize the Endangered Species Act that will ensure that we recover the species and get them off the list. This is the real way to reduce the restrictions on landowners. Thank you.

Mr. POMBO. Thank you. I ask unanimous consent that all other opening statements be included in the record.

I would also like to ask unanimous consent that Mr. Hastings from Washington be allowed to sit on the dais and participate in the hearing.

I would like to welcome our first panel. The Honorable Jamie Clark, Director, U.S. Fish and Wildlife Service, Ms. Penelope Dalton, Mr. William P. Workman, Mr. Robert M. Weygandt, Mr. Dave Schulz, and Dr. Vinton Charles Bruton, join us at the witness table, please.

Before you all sit down, I would like you to stand and raise your right hand to take the oath.

---

Oath: Do you solemnly swear or affirm under the penalty of perjury that the responses given and statements made will be the whole truth and nothing but the truth?

[Witnesses sworn.]

Let the record show they all answered in the affirmative. Thank you very much.

I would like to welcome you all here today, and, Ms. Clark, we will start with you.

**STATEMENT OF JAMIE CLARK, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, WASHINGTON, DC; ACCOMPANIED BY MIKE SPEAR, MANAGER, CALIFORNIA-NEVADA OPERATIONS OFFICE**

Ms. CLARK. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the Committee.

I really do appreciate this opportunity to discuss section 7 and section 10 implementation under the Endangered Species Act. I am accompanied by Mike Spear, the Manager of the California-Nevada Operations Office and other key folks in California.

The Fish and Wildlife Service is working with many partners to provide flexibility and certainty in the way we administer the Endangered Species Act. We have instituted many reforms during this administration to make the Act work better for both people and species, and our reforms are paying off. The United States economy has never been stronger; at the same time, more species are being protected and recovered than ever before. The American public has demonstrated that they want to preserve our national heritage while allowing economic development to continue. We are achieving that goal through the Endangered Species Act.

Consultation, habitat conservation planning, and recovery workloads have increased dramatically at the same time that the administration has been working to streamline implementation of the law. Fulfilling the President's Fiscal Year 2000 budget request for endangered species is essential to enable the Service to support the increasing technical assistance requests from private landowners and to expedite consultation and permitting actions throughout the Nation. I urge the Congress to adopt the President's budget request for the Endangered Species Program for Fiscal Year 2000.

I would like to explain to the Committee how the term "mitigation" is applied in the context of the Endangered Species Act since it is often misunderstood. Mitigation refers only to activities that may be done to offset or rectify the impact of an action. Avoiding or reducing the impact is referred to as minimization. Though the Service tries to distinguish among the many forms of the term "mitigation," applicants, action agencies, and, as you stated before, even we sometimes use the term broadly. This leads to confusion over the difference between minimization and mitigation under the Endangered Species Act.

Under section 10, the Service helps the applicant identify the minimization and mitigation actions required to reduce or offset potential adverse effects of a proposed activity on a species covered the Habitat Conservation Plan. The law requires that applicants

minimize and mitigate the effects of their actions to the maximum extent practicable.

Minimization and mitigation requirements can take many forms depending on the habitat needs and the individual status of the species and the size and scope of the project. Because applicants come to us with many types of projects that vary in size, scope, and impact, we try to be flexible in meeting the needs of the applicants. We don't use a cookie cutter approach in developing HCPs.

During the section 7 consultation process, the Federal action agency and the Service may work together to identify what measures may be incorporated into a proposed project to avoid jeopardy and to minimize the effects on listed species. Because they are incorporated into the project before the Service completes a biological opinion, it is not mitigation in the same way that it is used under section 10.

I am mindful, Mr. Chairman, that the Committee believes that the Fish and Wildlife Service required mitigation through reasonable and prudent measures on some occasions. I have received Chairman Young's letter earlier this month that raises this concern in detail. I take this issue very seriously and will look into it closely in concert with the regional directors who are responsible for implementing the consultation program in the regions. Specifically, I will review the projects that were raised in the letter to determine if the guidance concerning the scope of reasonable and prudent measures is being adhered to consistently across the country.

In closing, I would like to address the demands facing the Fish and Wildlife Service nationwide that challenge our ability on an ongoing basis to make the Endangered Species Act work. For example, California—your home State—is facing rapid population growth and urbanization and has more federally listed species today than any other State except for Hawaii. The challenges in California are especially difficult in offices like Carlsbad where we have many entities seeking immediate assistance in project planning related to listed species, wetlands, and other natural resource issues. I have seen a copy of the letter sent to this Committee by 26 California members that asked Chairman Young to enlist the General Accounting Office to review the work of our Carlsbad office. We welcome this opportunity to have an objective third party look at and explain to the public the demands and expectations put on our Carlsbad office, very much representative of what is happening nationwide.

I am proud of the hard work that our dedicated Fish and Wildlife Service employees do all over the country to further our mission, while addressing the needs of private landowners and species conservation.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Ms. Clark follows:]

DON YOUNG, CHAIRMAN

**U.S. House of Representatives**
**Committee on Resources**
**Washington, DC 20515**

March 4, 1999

Ms. Jamie R. Clark, Director
U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Ms. Clark:

I would like to thank you very much for your excellent presentation of the U.S. Fish and Wildlife Service's funding priorities for the upcoming fiscal year.

As a follow-up to our Subcommittee hearing, I would like to receive written responses to the attached questions. While the hearing record will close in 30 days, I would hope that you would make every effort to respond to the inquiries in an expedited manner.

Again, I look forward to your timely responses and would appreciate your immediate attention to these issues. Thank you.

Sincerely,

Jim Saxton
Chairman
Subcommittee on Fisheries Conservation,
Wildlife and Oceans

QUESTIONS

1. In the U.S. Fish and Wildlife Service's budget request for FY'2000, the Service has asked for $66 million for the Cooperative Endangered Species Fund. How will this money be spent and what is the justification for this huge increase?

2. The Department has proposed $5 million be appropriated in FY'2000 for an ESA Landowner Incentive Program. How is this program currently working?

3. During the last Congress, this Subcommittee conducted several oversight hearings on the operation and maintenance of our National Wildlife Refuge System. We discovered that the System was experiencing a huge maintenance backlog. In response, we convinced the appropriators to allocate $220 million for this account in FY'98 and an additional $18 million in FY'99. The Administration has now proposed a further increase of $27 million above what was appropriated in FY'99. How will this money be spent?

4. What are your priorities in terms of reducing the maintenance backlog facing the Refuge System?

5. In your budget, you propose to spend $2.7 million to acquire 6 acres for the Archie Carr National Wildlife Refuge. When was this area designated as a refuge, who owns the 6 acres the Service desires to acquire? What is so special about this 6 acres to justify paying $458,000 per acre?

6. What is the status of the Midway Atoll National Wildlife Refuge? How many visitors are expected to go there this year?

7. What is the rationale for the $5.1 million increase for Fish and Wildlife Management Assistance?

8. What is the reason that the Administration is projecting that $62.9 million more will be collected in excise taxes for the Sport Fish Restoration Program in FY'2000?

9. What is the justification for setting aside six percent of the Wallop-Breaux Fund for administrative costs? How is this money spent and what is wrong with reducing the administrative set-aside as Congress did in the African Elephant, Asian Elephant and Rhino and Tiger Conservation Funds?

10. On February 16th, the Fish and Wildlife Service issued two final rules on the harvesting of Mid-Continent light geese. Could you briefly describe the fundamental goal of this effort and the net effect of doing nothing about the population explosion of Mid-Continent light geese. Is this a first step or will these regulations solve the overabundance problem?

11. What are the goals of the Pacific Northwest Forest Plan in FY'2000 and, specifically, how will the Fish and Wildlife Service's request of $17.3 million be spent?

12. What is the budget justification for spending an additional $11 million on the Florida Everglades Watershed Restoration? How will this money be spent?

13. How much money does the Administration propose to spend on the Partnership for Wildlife Act in FY'2000?

14. When will the Department issue its new revised "baiting" regulations? Has the Department issued a directive to U.S. Fish and Wildlife law enforcement agents indicating that the "knows or reasonably should know" legal standard for baiting cases must now be used nationwide? Has there been any problem in implementation?

15. Please, briefly explain the Department's proposed Temporary Federal Duck Stamp Act?

16. What is the Department's role in the war on "Invasive Species"? How much money will be allocated to this battle in FY'2000 and what is the battle plan?

17. Your budget submission notes that you support 50 projects at 48 refuges to eradicate or control invasive species. While your budget does not identify those projects, Congress has authorized a pilot program to eliminate nutria at the Blackwater National Wildlife Refuge in Maryland. Is this effort included in your list of priority projects? If not, why?

18. One February 3rd, the President issued an Executive Order on Invasive Species. This order would establish an Invasive Species Council. What are the functions of this council, how will it be funded and what legal basis did the President use to create this entity?

19. The U.S. Fish and Wildlife Service has told the Eastern U.S. Freeflight conference that they can no longer use the Galesville airport to fly their model airplanes. Since this airport has supported this activity for many years, without any problems, what is the justification for this misguided decision?

20. This is a particularly strange decision in light of the Service's assessment that 5,620 new monthly overflights at below 2,000 feet at the Minneapolis-St. Paul Metropolitan Airport would not adversely affect wildlife at the Minnesota National Wildlife Refuge. Is it the Service's contention that jet aircraft are not detrimental to wildlife but model aircraft are?

21. In December of last year, the U.S. Fish and Wildlife Service sent, what can be described as a threatening, intimidating and extremely heavy handed questionnaire to 240 registered elk hunters in New Mexico? Who authorized the use of this questionnaire? Does the Department routinely use this approach when trying to obtain information from law

abiding citizens?

22. Has this type of questionnaire been used in the past? After reading Kevin Adams letter on this issue, I do not sense any remorse for using this highly intimidating letter. His comment that he regretted that the survey could be viewed as "accusatory and confrontational" is amazing. What other conclusions could a reasonable person reach?

23. How many National Fish Hatcheries will the Service operate in FY'2000? Have you now finished paying transitional funds to those states that acquired title to several hatcheries in FY'97 and FY'98?

24. Why has this administration never requested any funding for the Wild Bird Conservation Act of 1992?

25. How many conservation projects will be financed in FY'2000 from the Asian Elephant Conservation Fund?

26. What is the justification for having the Great Meadows National Wildlife Refuge listed first on your National Priority List? What are the unique features of this property?

27. What is the status of last year's number one priority, the Palmyra National Wildlife Refuge?

28. Please explain to the Subcommittee why the U.S. Fish and Wildlife Service lobbied so vigorously for a $30 million authorization for the North American Wetlands Conservation Fund, yet once again requested only $15 million for their account?

29. Please explain the stages the Service is undertaking to implement the National Wildlife Refuge System Improvement Act of 1997?

30. Why has there been such a significant increase in the amount of money collected under the Sport Fish Restoration Program?

31. How many new wildlife refuges will be created in 1999?

32. Last year, Congress enacted the Rhino and Tiger Product Labeling Act. The goal of this law is to stop the importation of products claiming to contain Rhino and Tiger parts. What has been the effect of this law?

33. Are you familiar with the questionnaire sent last July by the Public Employer for Environmental Responsibility (PEER) to 341 refuge management personnel on the director's new ecosystem management poling? What is your general reaction to the survey results?

34. How do you respond to the fact that 76 percent of those surveyed refuge managers indicated that they either disagree or strongly disagree with the director's decision? What does this say about the policy?

35. In your FY'2000 budget submission, there are significant increases requested for nearly every account under the jurisdiction of the USFWS. An obvious exception to that trend is your request for the refuge revenue sharing act. In this instance, you indicate that counties should receive $10 million or $779,000 less than they got in FY'99. Since our nation's counties are now receiving only 60 percent of what they are entitled to under the PILT Program, how can you justify this further reduction? What is disturbing is that these payments are declining, while the number of new refuges increases each year.

36. In FY'2000, the agency has requested $35 million for road construction within our refuge system. Has the service assessed the impact that improved roads and the corresponding increase in automobile traffic have on refuge wildlife resources? Is it your contention that this increased visitation does not have a significant impact on wildlife?

38. Furthermore, this growth in visitation has the effect of increasing noise and visual disturbances within our refuge system. Have you attempted to evaluate these impacts? What were your findings?

39. There is $2.362 million in the President's budget for the USFWS marine mammal line item. How are these funds dispersed between the Alaska Nanuuq Commission, the Eskimo Walrus Commission and the Alaska Sea Otter and Steller Sea Lion Commission for co-management activities? What other activities are funded under this line item?

40. There is a $300,000 increase under the marine mammal line item for determining subsistence harvests by Alaska natives of walrus and sea otters. What role does the service play in setting subsistence harvests? What is the status of the co-management agreements between the Alaska native groups and the USFWS for the marine mammal species under the jurisdiction of the USFWS?

41. Some Alaska native constituencies are concerned with the funding of the 'Watchers of the Sea Mammals' through the Eskimo Walrus Commission and the Alaska Sea Otter and Steller Sea Lion Commission. What is the role of this organization and how much funding do they receive from the USFWS through the Commissions?

42. The Secretary is authorized under section 104(5)(B) of the Marine Mammal Protection Act to establish and charge a reasonable fee for permits issued to hunters importing polar bear trophies from Canada. The current fee is $1,000. This money is then made available for the Secretary to use in developing and implementing cooperative research and management programs for the conservation of polar bears in Alaska and Russia pursuant to section 113(d). What is the status of these cooperative research and management programs? How

much money is currently in the fund supporting these activities?

43. The Yukon River Salmon Act authorized appropriations through Fiscal Year 1999. The appropriation for FY99 was $600,000, of which $200,000 went to cover the expenses of the U.S. Yukon River Salmon panel and survey, restoration and enhancement activities. The remaining $400,000 was to be contributed to the Yukon River Restoration and Enhancement Fund. What is the USFWS doing with these funds while the interim agreement is no longer in force?

44. Public Law 99-625 requires the Fish and Wildlife Service to contain and relocate sea otters which migrate south of Point Conception in California. These sea otters are now affecting a number of commercial fisheries. Does the Administration's FY 2000 budget request include funding for this containment and relocation? If not, why not? If the Service does not intend to honor the commitment of Public Law 99-625, does the Fish and Wildlife Service have any plans for compensating fishermen for the loss of income due to the Service's inability to contain these sea otters?

45. Last year, the 105th Congress passed the Great Lakes Fish and Wildlife Restoration Act of 1998 and was signed by the President of the United States. This Act authorized an amount of $3.5 million for U.S. Fish and Wildlife Service administration and another $4.5 million for on the ground fish and wildlife restoration projects. Why has the Service failed to include a funding initiative in the FY2000 budget for this important Act? Does the Service plan to include funding for this Act in future budget requests?

46. The President's FY2000 budget contains a Service initiative to address the Nation's tens of thousands fish passage impediments and blockages that affect fish and other aquatic species of commercial and recreational importance. With the $900,000 request for the Service's Fisheries Program, can the Service fully apply the capability and expertise of the program to this burgeoning problem?

47. The President's FY2000 budget contains a cross program Service initiative to address listed and declining species and reverse trends of habitat loss. Due to the size and breadth of the Mississippi River basin, and the importance the basin States place on North America's largest freshwater fishery, does the $275,000 request for the Service's Fisheries program, with its unique capability and expertise, fully reflect the value of the fisheries resources in the basin and restoration needs?

48. With respect to the 64 field offices within the Service's Fish and Wildlife Assistance program, what are the current equipment and maintenance needs?

49. In your FY 2000 budget justifications you discuss the Service's review of listed species to determine if they have met or are approaching their recovery goals necessary for delisting or reclassification. And that you anticipate publishing proposed rules to delist/downlist 10 species and to finalize rules delisting/downlisting 15 species.

    a. Can you please tell the committee which species you are looking at for delisting or reclassification?

    b. What is the justification for why they are being delisted? Such as extinction or technical errors.

    c. Is this an indication that the service has increased its resources to review all listed species and determine which ones no longer need to be on the list?

50. Under the National Wildlife Refuge Fund (PILT), the Service is providing our counties only 60% of their full entitlement.

    Can you explain why the Service has no intention of fully paying what you our counties?

51. I have noticed that the Service is seeking a funding increase for ESA listings. However, you have evidently placed the recovery of species at a lower priority than previous years by significantly cutting recovery funding by over $9 million.

    Why does the Service continue to increase its efforts to "list" species when your own budget outlays show you have very little interest in the actual "recovery" of those listed species? It is my view that this method of wildlife management does nothing for the future of our species, but only continues to add to their decline because of the ever expanding regulations you place on land use.

52. The Service is requesting $1.3 million for its share of the CALFED process.

    a. Is the Service specifying how the money is to be spent, beyond the vague classification "for technical assistance"? Specifically, does the Service have any plans to designate CALFED funding for the eradication of invasive species, or levee integrity?

    b. Since you have not, is the Service willing to agree to do so for this budget cycle?

53. The Service has requested $5.3 million for the International Wildlife Trade program. Particularly you mention that you plan on participating in the 11th Conference of the Parties for CITES to be held April 2000 in Nairobi, Kenya. I hope to attend this conference, as I did the 10th Conference.

A number of the issues, laid out in your budget brief, that you plan on addressing at the next CITES are of great interest to me. Therefore I would like to ask your assurance that I and other interested members on this committee be included in the development of the U.S. negotiating positions and draft resolutions.

54. In your letter to Chairman Young dated February 12, 1999, you state the reason you are spending substantially greater sums of money in the west, than in the north and are focusing your ESA enforcement efforts in the west is that there is more biological diversity in the west. According to your letter, the greater the biological diversity, the larger numbers of endangered or threatened species.

Doesn't this mean, that those areas with greater biological diversity start out with a strike against them under ESA, because this really translates to more "rare" species sharing less habitat areas?

55. How many biologists do you have in Region 3 and how many in Region 5 working on the ESA?

a. With so few biologists in those areas, are you certain that you have listed all the species in the north and midwest that merit listing under the ESA?

b. If so, then why do each of these northern and midwestern states have such long lists of state endangered species.

c. Are you examining those list to insure that those species do not warrant species?

56. I am concerned that many species may face extinction in states where the Fish and Wildlife Service has failed to invest funds necessary to identify and protect them. For example, a report recently released by the Massachusetts Natural Heritage and Endangered Species Program along with the Massachusetts Chapter of the Nature Conservancy, clearly indicates that in the State of Massachusetts species are declining and face extinction, yet little is being done to protect them. The report, **Our Irreplaceable Heritage** states "*Since European settlement, seven animal species have gone extinct, and many more are no longer found in the state. Currently, 424 species of plants and animals are protected under the Massachusetts Endangered Species Act because of their precarious status in the Commonwealth. Furthermore, many ecosystems and natural communities have been drastically altered or diminished in size. Unless we act now, some of these systems and communities and their constituent species could be lost from Massachusetts. The relatively large quantity of currently protected open space in the state is not*

*sufficient to conserve all biodiversity."* (P. 8-9)

This report also says that a major problem is the lack of information regarding the status of species. The report states *"A paucity of information and incomplete inventories of certain taxonomic groups – particularly invertebrates, non-vascular plants, and fungi –limit our ability to effectively assess their status.... the true status of most species is poorly known.... more complete species status evaluations are unlikely to occur, and some uncommon species may not receive the serious conservation attention they deserve."* (P. 12)

The report goes on to describe species and their habitats which are facing serious declines and possible extinction, yet many of the species identified in the report are not federally protected. With over 400 listed species, Massachusetts provides only $628,835 in state funds for species protection with an additional $123,000 in federal grants for species protection in the state.

**Have you looked at this report and provided any sort of response to these concerns?**

57. In contrast to Massachusetts, the state of California has 292 state listed species, while appropriating more than $11 million in state funds in 1998 for protection of endangered species. At the same time, the federal government is spending more than $37.9 million in Region 1 which consists of 5 states, with a substantial percentage being focused on California. Region 5 which includes Massachusetts received only $2.7 million divided among its 13 states.

    a. Don't you think that when a state spends such enormous amounts of money and has the most stringent state ESA in the country, that there should be less of a federal presence rather than more?

    b. Shouldn't you be spending federal funds in states that have poor state ESA's?

58. In March of 1998 a national policy entitled "Endangered Species Consultation Handbook" was released to staff members of the Fish and Wildlife Service. Has this policy streamlined the processing of Section 7 and Section 10A of the Act? I'm concerned that your Sacramento and Carlsbad offices are not following the Consultation Handbook. In fact, I'm not convinced that are even familiar with the Handbook.

59. It was my understanding that the Sacramento office was opened and staffed at the discretion of the Secretary of the Interior, Bruce Babbitt, in order to facilitate resolution of problems in California, mainly Southern California. My personal experience in contacting

the Sacramento office often results in being referred to the Portland office. I am unfamiliar with the chain of command. What is the purpose, responsibilities and goals of the Sacramento Office?

What is the national office doing to ensure that the Sacramento Office is fulfilling its mission?

60. The ESA, the code of federal regulations (5D, CFR §402), the ES Consultation Handbook and the 1994 national policy of the Department of the Interior and Commerce on information standards under the ESA set requirements for biological opinions and resulting actions by the service. With this in mind, have you or your staff revised any biological opinions through Section 7 issued by either the Carlsbad or Sacramento offices?

Have you compared the opinions issued by the Service with the request for a permit and supporting documentation provided by the permit applicant? In addition, please provide a list of all complaints submitted to you and alleged violations of the Act, all citations issued by the Service, and any court cases that have been filed by and against Fish and Wildlife and the decisions.

61. Are you aware that southern California has numerous Native American Indian tribes whose historical tribal lands are impacted by the Service's activities? Please provide confirmation that the Service is participating with listing packages and recovery plans and report back to me and this committee on how many Indian tribes have tribal lands situated within endangered species habitat. Please be specific on the species, tribes, and tribal contacts.

In addition, please confirm all federally owned lands are considered when identifying potential habitats for our ESA. Please provide samples.

Mr. POMBO. Thank you.

Next, we have Ms. Dalton who is the Assistant Administrator for Fisheries, National Marine Fisheries Service.

**STATEMENT OF PENELOPE DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, SILVER SPRING, MARYLAND; ACCOMPANIED BY JIM LECKIE, ASSISTANT REGIONAL ADMINISTRATOR FOR PROTECTED RESOURCES, SOUTHEAST REGION; TED EUTLER, ATTORNEY, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, OFFICE OF GENERAL COUNSEL**

Ms. DALTON. Mr. Chairman and members of the Committee, I am pleased to be here today on behalf of the National Marine Fisheries Service. Accompanying me is Mr. Jim Lecky, Assistant Regional Administrator for Protected Resources for NMFS' Southeast Region, and Mr. Ted Eutler, Attorney in NOAA's Office of General Counsel. NOAA is a partner with the Fish and Wildlife Service in administering the ESA and works with other Federal agencies, States, counties, tribes, and private landowners to carry out its requirements.

Mr. POMBO. Ms. Dalton, could I have you just pull the mike just a little——

Ms. DALTON. Sure.

Mr. POMBO. Thank you.

Ms. DALTON. Attached to my written testimony is a summary of all section 10 incidental take permits or Habitat Conservation Plans (HCPs) that currently are being monitored or negotiated by NMFS. To date, we have issued only one major permit and that was to PALCO this year in California. However, we are a party to four implementing agreements associated with section 10 permits issued by the Fish and Wildlife Service in the Pacific Northwest. In addition, we currently are negotiating about 35 additional HCPs. Most of these agreements involve management of large tracts of timber in the Pacific Northwest and northern California. None of the permits or agreements that we have issued to date require mitigation payments or mandatory set asides of property. While we have rarely used off-site mitigation, we believe it is appropriate where habitat losses are unavoidable, such as compensating for the mortality of juvenile salmon in the operation of specific hydro-electric dams.

One example which demonstrates our commitment to working with private landowners and carrying out our ESA responsibilities is the PALCO HCP. This plan is being implemented through a section 10 incidental take permit and consists of interrelated elements to minimize, mitigate, and monitor the effects of timber harvesting activities on aquatic species. Prescriptive measures for any permit activity can be modified based on watershed analysis, new scientific studies, and monitoring as long as the plan continues to meet the objective of maintaining or achieving necessary habitat functions for threatened or endangered aquatic species.

Although PALCO and other timber related permits require management of riparian buffers, this is not a permanent set aside of private land. At the end of the permit period or sooner, if new information indicates it is appropriate or the species recovers, these

areas could become available for timber activity. In addition, some riparian buffers are not off limits to harvest, and they even require cutting for effective management.

One important point is that in exchange for agreeing to carry out certain measures to minimize or mitigate effects of actions on listed species, the landowner receives an ESA exception. In addition, the landowner receives assurances that the government will not come back for the lifetime of the permit and ask for more land, water, or money that was not provided for in the permit or its implementing agreement. This assurance is a key element of the Administration's "No Surprises" policy which the Services put into place last year.

With respect to section 7, NMFS works with Federal agencies and applicants to minimize the impacts of taking listed species incidental to projects authorized, funded, or permitted by those agencies. NMFS does not require payments into any kind of fund or mitigation bank as a reasonable or prudent measure in an incidental take statement. Measures which we have proposed have ranged from habitat restoration, inner-bank stabilization projects, to permitting an activity at a time of year when it will have the least impact on a species. For example, time-of-year restrictions are used for such activities as fishing, dredging, and general construction.

NMFS has made significant progress over the past five years in making the ESA more workable for the American people. First, we partnered with the Fish and Wildlife Service to issue joint guidance on conducting section 7 consultations and developing HCPs. The HCP handbook includes guidance for evaluating whether plans will be effective and accomplish minimization and mitigation goals. The section 7 handbook is extremely useful to Federal agencies and their applicants, because it tells them what to expect when they enter into the consultation process.

Second, we have worked within NMFS to make sure that our regions receive the guidance needed to implement the ESA fairly and consistently. The policies and regulations that are now in place should provide economic assurances and greater certainties to landowners. In addition, they have strengthened cooperation among Federal, State, and local officials and non-governmental groups and private citizens.

In addition to its ESA program, NMFS has initiated habitat restoration projects in many parts of the country. These projects contribute to the recovery of listed species and encourage local community involvement. One example is the Haskell Slough in Washington State where NMFS supplied initial funding and worked with State and local partners to implement a plan for restoring habitat. Participants included Northwest Chinook Recovery, private landowners, Trout Unlimited, the Upper Skagit Indian Tribe, People for Salmon, Washington Department of Fish and Wildlife, and others. Volunteers dug ditches and moved earth to reconnect the Slough to the Skionmish River, providing salmon with 3.5 miles of critical habitat they need to spawn, feed, and grow. Adult salmon returned to these streams within 24 hours of its opening last November. This is habitat salmon once had access to and now have access to again.

Finally, the Administration has requested substantial increases in the Fiscal Year 2000 budget for recovery of protected species, conserving ocean biodiversity, and enforcement and monitoring. The salmon initiative is an ambitious approach that challenges State, local, and tribal authorities to take the lead in developing recovery plans with Federal guidance and assistance. The request will establish a Pacific Coastal Salmon Conservation Fund to be matched dollar for dollar with non-Federal contributions and made available for agreements with the Pacific States.

In summary, recovering threatened and endangered species is an enormous challenge with profound social, economic, and ecological implications. With budgetary investments and a commitment to making it work, we believe the ESA can be implemented without unnecessary economic burden on any sector of the economy.

Mr. Chairman, this concludes my testimony. I would be pleased to respond to any questions.

[The prepared statement of Ms. Dalton follows:]

**TESTIMONY OF**
**PENELOPE DALTON**
**ASSISTANT ADMINISTRATOR FOR FISHERIES**
**NATIONAL MARINE FISHERIES SERVICE**
**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**
**U.S. DEPARTMENT OF COMMERCE**

**ON IMPLEMENTATION OF THE ENDANGERED SPECIES ACT**

**BEFORE THE**
**COMMITTEE ON RESOURCES**
**U.S. HOUSE OF REPRESENTATIVES**

**MAY 26, 1999**

Mr. Chairman and members of the Committee, I am pleased to be here today on behalf of the National Marine Fisheries Service (NMFS). NMFS is a partner with the U.S. Fish and Wildlife Service in administering the Endangered Species Act and works with other Federal agencies, states, counties, Tribes, and private landowners to carry out the requirements of the Act.

I welcome the opportunity to discuss with you today the requirements of both section 7 and section 10 of the ESA, and how these requirements relate to private landowners. I will describe the requirements to mitigate and minimize the impact of incidental taking that is likely to result from the activity for which a section 10 incidental take permit has been requested. Also, I will discuss the requirements in incidental take

statements associated with section 7 biological opinions to minimize the take of listed species.

**Legal Basis for the Requirements**

Section 9 of the ESA prohibits takings of endangered and threatened fish and wildlife by any person that is subject to the jurisdiction of the United States. However, there are exceptions to that prohibition in both section 7 and section 10 of the Act. For example, section 7 provides an exception for Federal agencies or their applicants, including private landowners, who carry out actions that incidentally take listed fish and wildlife. Associated with the provision for incidental take is a requirement to minimize the impact of that take. Section 10 provides an exception for non-Federal landowners if the taking is incidental to an otherwise lawful activity. Associated with this exception is the requirement to minimize and mitigate the incidental take to the maximum extent practicable. Of course, this requirement should be reasonable, prudent, and based on the best available scientific information.

**Section 10 Incidental Take Permits Issued by NMFS**

Attached is a summary of all section 10 incidental take permits currently being monitored or negotiated by NMFS. We have issued only one major permit and that was to Pacific Lumber Company, Scotia Pacific Company, and Salmon Creek Corporation (PALCO) this year in California. However, we are a party to four Implementing Agreements associated with section 10 permits issued by the Fish and Wildlife Service in the Pacific Northwest. Most permits or agreements concern management of large tracts of timber in the Pacific Northwest and Northern California. In the coming years, we expect our focus to shift to issuing permits that cover water related activities such as hydropower, irrigation and water supply.

None of the permits or agreements that we have issued, or that we are negotiating, require mitigation payments or mandatory set asides of property. Also, NMFS has rarely used off-site mitigation to date, but we believe it is appropriate to use off-site mitigation where habitat losses are unavoidable, such as to compensate for the mortality of juvenile salmon associated with the operation of specific hydro-electric dams.

The PALCO habitat conservation plan, which is being implemented through a section 10 incidental take permit, consists of interrelated elements to minimize, mitigate, and monitor the effects of timber harvesting activities on aquatic species. The PALCO permit demonstrates the flexibility of the ESA as well as the flexibility that has become the hallmark of this Administration's efforts to provide incentives to private landowners. For example, the prescriptive measures for any covered activity can be modified based on the results of watershed analysis, new scientific studies, and monitoring, as long as the plan continues to meet the objective of maintaining or achieving the habitat conditions that we have found to be necessary for threatened or endangered aquatic species.

A lot has been said about "watershed analysis," which is required for all covered lands in the PALCO HCP. It is a process that analyzes the conservation strategies currently included in the plan and which are now being implemented on an interim basis. After the analysis is completed, NMFS, the U.S. Fish and Wildlife Service and the California Department of Fish and Game will establish site-specific prescriptions that will need to be implemented and may be different than the interim strategies now in place. However, the level of protection, after watershed analysis or other adaptive management strategies, must not impair

the plan's ability to maintain or achieve the necessary habitat conditions. Pacific Lumber may propose changes at any time. NMFS may approve changes if we find that the proposed changes will not impair the plan's ability to maintain or achieve, over time, the habitat conditions necessary for the species covered in the permit.

Although the PALCO permit and other timber-related permits under negotiation require management of riparian buffers, we do not consider this a permanent set aside of private land. At the end of the permit period, typically 50 to 100 years, or even sooner if the species recovers, these areas would not be off limits to timber activities. Also, through the use of adaptive management strategies, a landowner can demonstrate that the necessary mitigation has been achieved and, as a result, there may be fewer restrictions on the activities covered in the permit.

**Section 7 Biological Opinions and Incidental Take Statements**

To date, NMFS has not required payments into any kind of fund as a term and condition to fulfill the reasonable and prudent measures in an incidental take statement that is attached to a biological opinion. NMFS works with Federal agencies and applicants to minimize the impacts of taking listed species

incidental to projects authorized, funded or permitted by the agencies.

In biological opinions with incidental take statements, the requirements to minimize a take of a threatened or endangered species may range from restoring habitat to conducting an activity at a time of the year when it will have the least impact on the species. For example, time-of-year restrictions are used for such activities as fishing, dredging, and general construction.

**Summary**

We believe the most important point to take from this hearing today is that, in exchange for an agreement from a private landowner to carry out certain measures to minimize or mitigate the effects of landowner actions on threatened or endangered species, the landowner is receiving an exception to the ESA, which is exactly how the ESA is supposed to work. In addition, with a section 10 incidental take permit, the landowner is receiving assurances that the government will not come back for the lifetime of that permit (which can be up to 100 years) and ask for more land, water or money that was not provided for in the permit or its Implementing Agreement. This assurance is

the result of the Administration's "no surprises" policy which the Services recently implemented.

That concludes my testimony, Mr. Chairman. I would be happy to respond to any questions members of the Committee may have.

# NATIONAL MARINE FISHERIES SERVICE
# SOUTHWEST REGION
# HABITAT CONSERVATION PLANS
# CALIFORNIA

## Update -- January through May 1999

| **Applicant /** Project type | **Location/Acres** | **Status**[1] | **Species Coverage/Permit Term** | **Leader** and Back-up **assignments** | **Progress & Issues** |
|---|---|---|---|---|---|
| **Big Creek Timber Company** industrial timber management | Santa Cruz and San Mateo Counties 12,657 acres | HCP negotiations to begin late May '99. | Multi-species plan: salmon, amphibians and marbled murrelet<br><br>Permit term yet to be decided | NMFS: **Kristi Young** Vicki Campbell | Several phone conversations since 1/99. Big Creek worked on a draft HCP, independent of the agencies. The preliminary draft was submitted to NMFS in May '99. HCP negotiations will begin end of May '99. |
| **California Department of Fish and Game -- Striped Bass Management Program** striped bass supplementation | Sacramento River, Sacramento-San Joaquin Delta | HCP in negotiation, nearing the permit processing phase | multi-aquatic species<br><br>10 year permit | NMFS: **Penny Ruvelas** | The final draft CP and NEPA documents are being reviewed by the agencies. finishing agency review. Final issues currently being worked out . Public review drafts should be released early summer '99. |
| **Central Coast Water Authority** operation and maintenance of state water pipeline from Central Calif. to Lake Cachuma. | Kern County to Santa Barbara County | HCP in negotiation | Mutli-species: steelhead (Southern California ESU) and multiple FWS listed species<br><br>50 year permit? | NMFS: **Anthony Spina** Darren Brumback | NMFS reviewed draft HCPs, provided comments and recommendations for revision. Mitigation measures are currently being negotiated. |

[1]Increasing order of stages from beginning to end: introductory discussions →initial development →data collection and analysis →HCP in negotiation →processing the permit application →nearing completion →permit issued or denied.

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| **Cottonwood Creek Sand and Gravel, Inc's.**<br>sand and gravel operation | Tehama County, Cottonwood Creek near the confluence of the north and south forks (3,000 cubic yards per year)<br>Trinity County (800 acres)<br>Shasta County (927 acres)<br><br>207,000 acres total<br>Mendocino County 50,000 acres | Received initial draft of HCP dated 2/24/99. HCP in negotiation. | Multi-aquatic species: steelhead,<br>Chinook Salmon<br>fall-run<br>late fall-run<br>winter-run<br>spring-run | NMFS: **Steve Edmondson** | Numerous phone calls and e-mails attempting to expedite process. NMFS review ed the 2/24/99 Draft HCP and has identified significant technical deficiencies. |
| **Jackson Demonstration State Forest California Department of Forestry and Fire Protection**<br>demonstration forestry, industrial forestry, public recreation activities forest product collection | Mendocino County 50,000 acres | HCP in negotiation. | Multi-species: salmon, northern spotted owl, marbled murrelet, etc.<br><br>50 year permit | NMFS: **Kristi Young**<br>Vicki Campbell | Two meetings, multiple phone calls, and e-mail discussions since 1/99. CDF is proceeding on development of a draft HCP and environmental documents. Agency review drafts are expected in July. |

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| **Mendocino Redwood Company**<br>industrial timber management | Mendocino County<br>230,000 acres | HCP in negotiation. | Multi-species: salmon, northern spotted owl, marbled murrelet, etc.<br><br>Permit term yet to be decided. | NMFS: **Sam Flanagan**<br>Kristi Young | Five field visits, one meeting, multiple phone calls, and exchange of technical and policy documents since 1/99. MRC is still undecided on whether to obtain an HCP, but has begun negotiating a riparian strategy. Issues with MRC are the length and complexity of HCP, time lines for development, and restrictions on harvesting. |
| **Pacific Lumber Company**<br>industrial timber management | Humboldt County<br>211,700 acres | Permit issued on March 1, 1999 | Multi-species (17): salmon, northern spotted owls, marbled murrelet, etc.<br><br>50 year permit | NMFS: **Bill Condon**<br>(as of May 1999)<br><br>**Vicki Campbell**<br>(Oct 1996 - April 1999)<br><br>NMFS Implementors:<br>Steve Kramer<br>1 FTE yet to be hired | Implementation of the HCP has begun. The federal and state agencies have assigned multiple staff to assist. Progress is slow due to difficulties associated with previously approved harvest plans. |
| **Reclamation District No 108**<br>Sacramento River water diversions | Seven diversion structures located on the Sacramento River between river mile 43.1R and river mile 63.2 | Letter of intent between USBR, USFWS, NMFS and RD-108 signed 8/15. Draft EA/HCP dated 12/98 has been reviewed by NMFS staff and general council and comments provided to RD-108. | Multi-species:<br>chinook salmon<br>fall-run<br>late fall-run<br>winter-run<br>spring-run,<br>coho salmon,<br>steelhead,<br>Sacramento splittail,<br>Valley elderberry longhorn beetle,<br>giant garter snake | NMFS: **Steve Edmondson** | During recent conference call applicant was generally receptive to comments. Outstanding issues include uncertain enumeration of incidental take because take is density dependent (fish/unit volume of water) and how to handle whole issue of remaining unscreened diversions |

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| **Ribar Properties**<br>industrial timber management | Humboldt County<br>1373 acres | Salmon HCP nearing the permit processing phase. The northern spotted owl draft HCP has already gone through public review. | Multi-species: salmon and northern spotted owl<br><br>30 year permit | NMFS: **Sharon Kramer** | Four meetings and numerous phone calls since 1/99. NMFS and NOAA reviewed a draft HCP and provided comments. A revised draft is expected in May. Work on the NEPA document will begin in May. A public review draft is expected in mid summer. |
| **San LuisObispo, County Of**<br>operation of Lopez Dam | San Luis Obispo County<br>Lopez Dam and Arroyo Grande Creek | Initial development | Multi-species: salmonids and terrestrial species<br><br>Permit term yet to be decided. | NMFS: **Anthony Spina**<br>Darren Brumback/Korie Johnson | Consultant has been hired, the scope of work is being developed. The issues will be water use and downstream effects to Arroyo Grande Creek. |
| **Santa Cruz, County of**<br>public works, flood control management | Santa Cruz County<br>Monterey County<br><br>12 miles of Pajaro River<br>8 miles of Corralitas Creek<br>3 miles of Salsipuedes Creek | Initial development | Multi-species: steelhead, redlegged frog<br><br>Permit term yet to be decided. | NMFS: **Joyce Ambrosius** | The County has hired a consulting firm. A conference call to kick off the process is set for early June. |

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| **Sierra Pacific Industries**<br>industrial timber management | Northern California, numerous counties<br><br>~ 1.4million total acres<br>~300,000 acres in anadromous salmon zone | Reinitiating initial development after a ~2 year hiatus. Data collection and analysis have been ongoing. | Multi-species: salmon, northern spotted owl, etc.<br><br>25-50 year permit | NMFS: | One meeting and several phone conversations since 1/99. SPI remains uncertain about the benefits of an HCP. Work will proceed with NMFS and SPI on developing biological goals for a potential HCP in mid summer. SPI is concerned about restrictions on their timber harvesting |
| **Simpson Timber Company**<br>industrial timber management | Humboldt County 465,000 acres<br><br>(Acreage includes the Arcata Redwood Company property) | Aquatic HCP in initial negotiation. Data analysis is ongoing.<br><br>The northern spotted owl HCP was approved in '92. | Salmon and other aquatic species<br><br>50 year permit | NMFS: **Bill Condon**<br>Sharon Kramer | Six meetings, multiple phone conversations, two field visits, one comment letter, and exchange of technical and policy documents since 1/99. Substantive technical negotiations with Simpson are progressing slowly due to concerns over policy and regulation interpretation differences. Simpson has not expressed any desire to accelerate negotiations. Work will begin in May on identifying the exact species to be covered and biological goals. Regulatory and policy interpretations continue to cause Simpson concern. |

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| **Southern Electric**<br>power generation, 2 power plants | Contra Costa County<br>confluence of Sacramento and San Joaquin Rivers | Processing the permit application. | anadromous fishes/delta smelt<br><br>15 year permit term | NMFS: **Penny Ruvelas** | The drafts HCP and EA were released to the public. The documents are currently undergoing revision in response to public comment. Due to public comment on Delta smelt and conflicts with the goals of the CalFed program, the documents will be re-released to the public for a second round of commenting. |
| **Stimson Timber Company**<br>industrial timber management | Del Norte County<br><br>29,902 acres | HCP in negotiation. | Multi-species: salmon, northern spotted owls, marbled murrelet<br><br>50 year permit | NMFS: **Sharon Kramer**<br>Bill Condon | Multiple phone conversations, one meeting, and one monitoring/ adaptive management letter since 1/99. NMFS has also met with tribal representatives and brought forward issues. Negotiations have focused on monitoring and adaptive management, with the assistance of the Tiburon Fisheries Science Center. Stimson has slowed down negotiations and has stated a desire to proceed very slowly with HCP development. Stimson has issues with monitoring, adaptive monitoring, and cumulative effects assessments due to potential limitations on their timber harvesting. |

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| **The Timber Company**<br>industrial timber management | Fort Bragg Unit<br>Mendocino County<br>192,925 acres | HCP in negotiation. | Multi-species: salmon, northern spotted owl, marbled murrelet, etc.<br><br>50-65 year permit | NMFS: **Kristi Young**<br>Sam Flanagan | Five meetings, ~ bi-weekly technical phone calls, and ongoing exchange of technical documents since 1/99. Technical discussions on riparian management strategies are proceeding well. Technical discussions and negotiations are expected to continue at the current pace. TTC has concerns over reduced timber harvesting with a HCP. |
| **Ventura, County of**<br>**Ventura, City of**<br>**Casitas Municipal Water District**<br>water use, diversions, dams, flood control, utility line repair, and maintenance of the Ventura River watershed | Ventura County<br>Ventura River watershed | Introductory discussions | Multi-species: salmonids and terrestrial species<br><br>25-75 year permit | NMFS: **Eric Shot & Darren Brumback**<br>Anthony Spina/Korie Johnson | Consultant to be hired in late June '99. Some data collection and analysis has taken place. The main issues are dams, water use and loss of spawning habitat. |

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**Northwest Region, NOAA-Fisheries, Olympia Field Office**
**HABITAT CONSERVATION PLAN LOG - May 14, 1999**

* Potential HCPs listed for the first time.

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Champion Pacific Timberlands - Klickitat (eastside) | WA | Preparing draft EA and HCP for public review. Many riparian areas have varying levels of trees damaged by spruce budworm, which infects Doug-fir and grand fir, but not P-pine or red cedar or hardwoods. | Multi-species HCP on 30,000-acre in-holding on Yakama Indian Reservation.<br>No known anadromous fish use, but resident salmonids are present in the few perennial streams. Most streams only flow seasonally. | Zisa/McCracken (FWS)<br>Longenbaugh (NMFS) | Met with landowner on March 15 and discussed draft of HCP. Landowner is now working on revised draft and EA to be discussed with Services on May 19.<br>(Rev. 5/4/99) |
| Champion Pacific Timberlands - Rainier (westside) | WA | On hold pending outcome of WA-Forestry Module, in which Champion participated in developing proposed new rules. | Possible multi-species HCP on 170,000-acres mostly within Lewis and Pierce Counties | Vogel (FWS)<br>Parton (NMFS) | No recent talks with landowner.<br>(Rev. 5/4/99) |
| City of Tacoma - Howard Hansen Dam | WA | Late development stage. Preparing draft DEISm HCP, and IA. | Salmon HCP for reservoir operations. Flow and hatchery issues. | Fransen (NMFS)<br>Poon (NMFS)<br>Grady (NMFS) | Reviewing revised draft HCP. Aiming for public review in July '99.<br>(Rev. 5/10/99) |
| Crown Pacific (including Arlecho Creek, formerly managed by Mutual of New York). | WA | Final stage of developing draft HCP and Impl Agrmnt with applicant.<br>NEPA - EIS being prepared. | Multi-species ITP sought, with owl & murrelet issues driving HCP at present. DNR watershed analyses prescriptions will be implemented across the entire 85,000-acre Hamilton Tree Farm in Skagit, Whatcom , & Snohomish Counties. | Bogaczyk (FWS)<br>Longenbaugh (NMFS)<br>Michaels (FWS) | Recent meetings have been held to resolve remaining issues, including post-termination mitigation. Next mtng on 5/24 to resolve remaining IA issues.<br>(Rev. 5/10/99) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| DNR West of the Cascades | WA | Specific of Riparian, Road, and Monitoring Plan being developed; interim riparian implementation guidance initiated.<br>Continuing discussions with DNR about land transfers and implementation.<br><br>Permit holder and Services are working with several tribes to address tribal concerns for implementation. | Multi-species HCP with murrelet, owl & riparian strategies on 1.14 million acres. Owl strategy includes NRF & dispersal habitat. Hazard slopes protected.<br><br>Total riparian acreage is 133,500 in western WA.<br><br>TFW-style Watershed Analyses continuing but not scheduled. | Vogel (FWS)<br>Longenbaugh (NMFS)<br>Parton (NMFS)<br>Hansen (FWS) | ITP issued on Jan 30, 1997. Meeting monthly with DNR to discuss implementation issues.<br><br>Work group has developed final riparian prescriptions. Expect to be adopted soon after internal review by DNR mgmt.<br><br>NMFS working to add recently listed steelhead and salmon to ITP.<br>(Rev. 5/11/99) |
| DNR East of the Cascades | WA | Preliminary discussions about scope and species. | Aimed at conserving anadromous and resident salmonids. | Landino (NMFS) | Meetings are expected to begin sometime.<br>(Rev. 9/14/98) |
| * King County Wastewater | WA | Early development. | Anadromous fish coverage for most urban county in Puget Sound. Seek coverage for existing operations and expansion of facilities into northern Puget Sound. | Kirkpatrick (NMFS)<br>Donnelly (NMFS) | Held kickoff meeting on 4/23. Applicant has set target date of 1/1/01 to complete process for permit application.<br><br>(Rev. 5/14/99) |
| Longview Fibre | WA | Applicant has put HCP development on hold until WA-Forestry Module is completed. | Multi-species HCP with focus on owl NRF & dispersal habitat in 21,000-acre plan area.<br>Steelhead, chum, and chinook in the plan area are listed as threatened (Lower Columbia ESU). | Hansen (FWS)<br>Landino (NMFS) | Applicant is waiting outcome of changes in statewide timber harvest rules being negotiated in TFW.<br><br>(Rev. 5/11/99) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Mid-Columbia PUDs (Public Utility Districts) | WA | Anadromous fish settlement agreement was signed Negotiations completed on mainstem, hatchery, and habitat mitigation. Two PUDs, State, tribes, and Federal agencies are jointly involved in plan development. | Aquatic conservation plan for five hydro projects covering 105 river miles on the main stem of Mid-Columbia River. Highest fish passage survival sought through each project. For unavoidable losses, development of tributary & hatchery mitigation measures. | Brown (NMFS)<br>Turner (NMFS)<br>Hevlin (NMFS)<br>Dach (NMFS)<br>Cates (FWS)<br>Young, J. (FWS)<br>Smith (NMFS) | Scoping process completed. DEIS is under development.<br>(Rev. 5/14/99) |
| Murray Pacific Corp. | WA | Post-issuance monitoring and implementation phase. Have reviewed monitoring results. | Multi-species HCP with 10% reserves primarily in riparian habitat throughout 49,000 acres of forested land. DNR watershed analyses to be all done by 2004. | Hansen (FWS)<br>Parton (NMFS)<br>Longenbaugh (NMFS) | ITP issued 6/95.<br>(Rev. 6/1/98) |
| Oregon Dept. Forestry Elliot State Forest (Potential Amendment) | OR | On hold until larger State Forest Lands HCP is developed. ODF expects to defer work on this until large scale HCP is further along. | Original HCP did not include anadromous fish. 93,000 ac in coastal OR near Coos Bay contains some Umpqua Cutthroat streams, and coastal coho. | Yip (NMFS)<br>Parton (NMFS) | On hold. Will schedule negotiations when ODF is ready.<br>(Rev. 6/1/98) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Oregon Dept. Forestry - Northwest State Lands | OR | Late-development stage. Draft measures for riparian, roads, and watershed may be revised based on results of public input to review of early draft. | Multi-species HCP on 615,000 ac., in NW OR, including the Clatsop, Tillamook, and Santiam State Forests.<br><br>ODF has added several hundred acres of state forest in SW coastal areas that include coastal and trans-boundary coho ESUs. | Parton (NMFS)<br>Lockwood (NMFS)<br>Zisa (FWS)<br>Benitvoglio (FWS) | ODF is considering how to incorporate results of public review.<br><br>(Rev. 5/10/99) |
| Plum Creek Timber-I 90 Cascades | WA | Post-issuance monitoring phase. Implementation issues will be addressed as the applicant is ready.<br>Permit amendment in process to include steelhead and chinook.<br>Wrapping up NEPA on the land exchange with National Forests. | Multi-species HCP with owl NRF and dispersal habitat across the 170,000-acre plan area. Riparian protection & management in addition to DNR watershed analyses being done for entire area by 2001. | Vogel (FWS)<br>Parton (NMFS)<br>Longenbaugh (NMFS)<br>Carlson (NMFS) | ITP issued 6/27/96.<br>Implementation in progress.<br><br>Met with Muckleshoot Tribe 5/7 to hear their concerns about land exchange and adequacy of HCP protection in upper Green River.<br><br>(Rev. 5/10/99) |
| Port Blakely - Garrett Eddy Tree Farm | WA | Landowner withdrew this area as potential HCP, since statewide WA-Forestry Module will likely become new rules. | 6,600 acre second-growth block in foothills of North Cascades. Similar conservation to their other, approved HCP (R.B. Eddy Tree Farm). | Bogaczyk (FWS)<br>Parton (NMFS)<br>Thomas (FWS) | No further work expected.<br><br>(Rev. 5/10 /99) |
| Port Blakely - Robert B. Eddy Tree Farm | WA | Post-issuance monitoring and implementation phase. Mass-wasting prescriptions confirmed by consultant. | Multi-species HCP with owl as focus. All-species ITP issued. Riparian protection & hazard slope protection. 7,700 ac in SW WA Willapa Hills. | Bogaczyk (FWS)<br>Longenbaugh (NMFS) | ITP issued 7/19/96.<br>Reviewed monitoring results on 2/5/99.<br><br>(Rev. 5/10/99) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Potlatch Corporation | ID | Preliminary discussion stage for one species CCA. Applicant has concerns for HCP re onerous conservation and NEPA -EIS vs EA. | Aquatic species Candidate Consv Agrmnt for westaslope cutthroat for 670,000 acre in eastern ID. Services would like to include bull trout, steelhead & /chinook. | Ries (NMFS) | Ongoing discussions with landowner to agree on specific ESA process.<br><br>(Rev. 5/10/99) |
| Rayonier | WA | Landowner withdrew this area as potential HCP, since statewide WA-Forestry Module will likely become new rules. | Multi-species on 93,500 acres in western Olympic Peninsula SOSEA (spotted owl area) | Hansen (FWS)<br>Parton (NMFS)<br>Grettenberger (FWS)<br>Michaels (FWS) | No further work expected.<br><br>(Rev. 5/10 /99) |
| Seattle Public Utility (formerly the Water Department) | WA | Services and the applicant are reviewing and drafting responses to the 1100 public comments to the draft HCP and NEPA-SEPA documents.<br><br>Watershed analysis like DNR has been completed. Riparian reserves will be similar to FEMAT recommendations. | Enhance second growth for owl & murrelet conservation. At least 64% of the 93,000-acre watershed will be in older forest reserves.<br><br>Instream flows on the lower Cedar River will maintain tribal and commercial salmon fisheries, and aid in recovery of depressed salmon & steelhead runs.<br><br>Fish passage at Landsburg Dam will be provided. This dam has blocked salmon since 1901. | Longenbaugh (NMFS)<br>Poon (NMFS)<br>Swenson (NMFS)<br>Bogaczyk (FWS) | Seattle expects to issue a revised SEPA document on 5/26 that will include recommended changes to the HCP. This will be discussed by the City Council and during public hearings in June. The City Council is expected to decide at their 7/19 mtng on the details of the final HCP.<br><br>Based on the final HCP, the Services expect to need about 6 wks to prepare Findings and Biological Opinions.<br>(Rev. 5/10/99) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Simpson Timber | WA | Final-development stage. Working with EPA to meet Clean Water Act, thru separate TMDL. | Aquatic species HCP for anadromous fish. 215,000 acres in SW WA. Riparian management linked to geomorphic stream classification. Progressive approach to monitoring. | Parton (NMFS)<br>Saunders-Ogg (FWS)<br>Ralph (EPA) | Services have been working with applicant on final points of HCP and Impl Agrmnt. Expect application and draft HCP for public review in early summer.<br>(Rev. 5/10/99) |
| Stinson HCP | WA | Applicant wants flexible approach that recognizes small size of ownership and is template for other small tree farms. | 985 acres managed for multi-species. Short segment of fish-bearing stream (500 ft) and several other seasonally flowing streams would receive managed riparian buffers. | Vogel (FWS)<br>Longenbaugh (NMFS) | On landowner's schedule.<br>(Rev. 9/14/98) |
| Storedahl Gravel Pit | WA | Early development stage. | Applicant wants to continue developing 100 ac near E.Fork Lewis R floodplain as gravel pit to minimize take of salmonids. | Banyard (NMFS)<br>Landino (NMFS) | Reviewing receive first draft HCP.<br>(Rev. 5/10/99) |
| WA Dept Fish & Wildlife | WA | Early development stage. | Statewide HCP and general permit for the state's Hydraulic Permit (HPA) program. | Zillges (NMFS)<br>Romanski (FWS) | Applicant expects to complete within 2 yrs. Interim coverage through MOA. Kickoff meeting held on 4/17. Next mtng 5/25.<br>(Rev. 5/10/99) |
| Weyerhaeuser SW WA | WA | HCP process may be reinitiated after 2-yr hiatus, or may be dropped in lieu of the WA-Forestry Module. | Multi-species HCP with owl dispersal habitat in the 102,0000-acre plan area. DNR watershed analysis completed to establish riparian protection for the three sub-basins. | Bogaczyk (FWS)<br>Longenbaugh (NMFS) | On hold, pending outcome of WA-Forestry Module..<br>(Rev. 5/11/99) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| Weyerhaeuser - Willamette Tree Farm | OR | HCP application filed 12/6/96. FR Notice for public review published Jan 23, 1997.<br><br>Remaining issue is protection measures for outer riparian buffers along fish-bearing streams. Negotiations may resume soon. | Multi-species HCP on 400,000 ac., including an estimated 46,000 ac of Umpqua Cutthroat habitat. DNR-style watershed analysis being done on most of the plan area. Plan area has an estimated 72,000 acres of coastal coho habitat in the Umpqua and Siuslaw Rivers. | Longenbaugh (NMFS)<br>Bogaczyk (FWS)<br>Zisa (FWS)<br>Day (NMFS) | Applicant is assessing next approach to provide riparian function along outer buffers of fish-bearing streams.<br><br>(Rev. 5/11/99) |
| WA Wheat Growers Assoc. | WA | Preliminary discussion stage. | Salmon HCP covering 3 million ac in 13 counties, mostly in eastern WA, that may cover certain wildlife species. | Zillges (NMFS) | Several initial meetings have been held. No schedule yet.<br><br>(Rev. 2/11/98) |
| Yakama Indian Nation | WA | Mid - development stage of Land Management Plan (LMP). NEPA outline done. | Multi-species LMP across 1 million acres of forest & range lands. | Vogel (FWS)<br>Longenbaugh (NMFS) | Preparation of entire draft is on applicant's schedule. FWS next mtng with tribe on 6/22-23.<br><br>(Rev. 5/10/99) |
| Yakima Irrigation Districts (Rosa and Sunnyside Districts) | WA | Preliminary discussion stage. | Aquatic species HCP for anadromous fish. | Landino (NMFS) | Initial meetings have been held. On hold until further notice.<br><br>(Rev. 7/8/97) |

| Applicant | State | Status | Contribution | Leadership/Staff Assignments | Expected Dates |
|---|---|---|---|---|---|
| *HCPs on the horizon* | | | | | |
| Foster Creek Conservation District, & perhaps Douglas Co. Consv. Dist. | WA | Seeking funds from WA Salmon Recovery Team | | | |
| City of Bellingham Water Supply | WA | | | | |

Mr. POMBO. Thank you.

At this time, I would like to recognized Mr. Calvert.

Mr. CALVERT. Thank you, Mr. Chairman. I am happy to recognize my good friend and the city manager of the city of Corona, Bill Workman, who is with us today and his able assistant Laura Manchester who is in the audience. The city of Corona is a growing city right next to Orange County. It is right in the heart of southern California. It is probably, if not the fastest-growing city in the United States right now, it is probably in the top 10, and it is difficult to balance the needs of a city—crime, fire protection, parks, open space, water, a multitude of problems that face any community—and, certainly, we have our fair share of problems regarding ESA and mitigating for ESA, and I think Mr. Workman will point out that it is not mitigation that we are concerned about, it is reasonable mitigation, and I look forward to his testimony, and I appreciate you giving me the opportunity to introduce Bill Workman.

Mr. POMBO. Mr. Workman?

**STATEMENT OF WILLIAM P. WORKMAN, CITY MANAGER, CITY OF CORONA, CORONA, CALIFORNIA**

Mr. WORKMAN. Thank you, Mr. Chair and members of the Committee. As Mr. Calvert indicated, I am Bill Workman, the city manager of Corona, California, and I am appreciative of your invitation to speak today on the effectiveness of the Fish and Wildlife Service and its administration of its regulatory duties as well as improving its service to clients, such as the city of Corona. I have submitted a written statement which I will briefly summarize.

Let my message to you begin by saying that changes are needed in the operation of the Fish and Wildlife Service's Carlsbad office. Based on our experience in Corona, changes are specifically needed in two areas. First, the timely processing of environmental clearances under Federal regulations and, second, the acceptance of mitigation plans that reasonably compensate for justifiable environmental impacts. I speak to you on this subject from a base of 20 years experience serving communities both as an administrator and a planner. My experience includes resolving difficult environmental issues in communities located in Los Angeles, Orange, San Diego, and Riverside County. I am personally and professionally committed to ensuring that critical environmental habitat be protected in balance with the land use needs of our human population.

It is with this background that I will relate to you our frustrated efforts to reach closure on a project known as Corona's Operations and Maintenance Manual. This project is illustrative of the problems that need to be addressed in the Carlsbad office of the Fish and Wildlife Service. In short form, the city of Corona conducts municipal operations and maintenance activities for a variety of public facilities within the Prado Basin in southern California. These activities occur on land that is owned by the city as well as leased from the Army Corps of Engineers.

At the urging of the Army Corps of Engineers and the Fish and Wildlife Service, the city of Corona, five year ago, began development of a Prado Basin Operations and Maintenance Manual. The manual's intent is twofold: one, protect critical habitat, and, sec-

ondly, permit the city to conduct its routine maintenance and operations activities.

After hundreds of hours of work, hundreds of thousands of dollars of investment and multiple agency reviews, we submitted the Operations and Maintenance Manual through the Army Corps of Engineers to the Fish and Wildlife Service for a section 7 consultation on March 17, 1998. The Corps formally requested of Fish and Wildlife a section 7 consultation on May 20, 1998. More than a year later, I sit before you with the United States Fish and Wildlife Service refusing to initiate a formal section 7 consultation, a clear disregard for the processing deadlines detailed in Federal regulations. I sit before you with a crazy quilt of oral and written explanations why the Fish and Wildlife Service cannot do its prescribed duties.

Most distressing in this process was the outrageous demands for mitigation that are both physically and financially punitive. I direct your attention to the Fish and Wildlife Agency's letter of August 4, 1998. It is listed as exhibit 3 in our documents. Here is where in writing they seek 3 to 1 mitigation and also 10 to 1 mitigation—threaten 10 to 1 mitigation for routine city operations and maintenance. We are not talking about new construction but just the routine operations and maintenance. They have additionally told us that they have to have mitigation for maintenance activities that have occurred in past years but which has not been mitigated to their satisfaction. To translate that, what that means is that the Fish and Wildlife Service wants retroactive mitigation for the city's 30 years of doing day-to-day things, such as mowing the ballfields in our parks, and this mitigation is on top of mitigation the city has already provided in nine mitigation sites through the Prado Basin.

Let me say that I thank you for calling this hearing today. We believe that it is important to gain a better understanding of the procedures and mitigation requirements employed by the Fish and Wildlife Service, particularly in Carlsbad, in their implementation of the Endangered Species Act. We urge the Committee to seek timely section 7 consultations from the Carlsbad office as well as adhere to reasonable mitigations for maintenance of public facilities.

That concludes my remarks. Thank you.

[The prepared statement of Mr. Workman follows:]

OFFICE OF CITY MANAGER

William P. Workman
City Manager
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815 WEST SIXTH STREET (P.O. BOX 940), CORONA, CALIFORNIA 91718-0090

May 26,1999

Honorable Chairman and Members
Committee on Resources
U.S. House of Representatives
Committee on Resources
Washington, DC 20515

Re: United States Fish and Wildlife Service Mitigation Requirements

Dear Chairman Young and Members:

The City of Corona conducts operation and maintenance activities for several facilities located within the Prado Basin, in Southern California. Such activities include maintenance of channels and culverts, streets, parks, and clearance of the airport protection zone. These activities occur on land both owned by the City and leased to the City by the U.S. Army Corps of Engineers (Corps).

The City of Corona's proposed Operations and Maintenance Manual (O & M Project) was developed at the request of the Corps and United States Fish and Wildlife Service (USFWS) in an effort to identify cumulative impacts within the Prado Basin from ongoing operation and maintenance activities. The City has been coordinating with the Corps and USFWS for over five years regarding the O & M Project and submitted the required documentation to the Corps, including a draft Environmental Assessment and project descriptions, on March 17, 1998 (Exhibit 1). The Corps formally requested a Section 7 Consultation for the O & M Project on May 20, 1998 (Exhibit 2).

The USFWS provided a letter dated August 4, 1998 (Exhibit 3), indicating that they could not initiate consultation until the City provided additional information. A response letter from the City addressing these concerns, dated October 13, 1998, was sent to the Corps in October 1998 (Exhibit 4).

A meeting was held with the USFWS to discuss the O & M project in November 1998. At this November meeting, USFWS requested the City to divide the O& M project into three tiers: (1) public health and safety, (2) non-emergency, and (3) larger projects. This was completed (Exhibit 5). On January 19, 1999, USFWS Senior Biologist Loren Hays indicated that he had enough information to complete the Biological Opinion (Exhibit 6).

Yet, at the meeting with City staff on March 19, 1999, Loren Hays and Jon Avery of the USFWS asserted that they needed additional information. At the March 1999 meeting, it became apparent that the real reason for the denial in processing the Section 7 Consultation is USFWS's desire for an unjustifiable and overly burdensome amount of mitigation.

**PERMIT PROCESSING CONCERNS**

The City of Corona respectfully requests the Committee to consider the following Section 7 permit processing concerns:

**Denial to issue formal consultation was not timely.**

On page one of the USFWS's August 4, 1998, letter, USFWS states that it is unable to initiate consultation on the proposed project per 50 CFR § 404.02, until further information is provided regarding the effects of the proposed Project on the Least Bell's Vireo, Southwestern Willow Flycatcher, and critical habitat for both species. This section indicates the following:

*"A process between the Service and the Federal agency that commences with the Federal agency under section 7(a) (2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act."*

Additionally, 50 CFR § 402.14(e) indicates the following:

*"Formal consultation concludes 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth: (1) the reasons why a longer period is required, 2) the information that is required to complete the consultation; and 3) the estimated date on which the consultation will be completed. A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant."*

Finally, 50 CFR § 402.14 (f) indicates:

*"When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional*

*data to determine how or to what extent the action may affected listed species or critical habitat. If formal consultation is extended by mutual agreement according to section 402.14(e), the Federal agency shall obtain, to the extent practical, the data, which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available."*

The Corps initiated formal consultation on May 20, 1998. A copy of the letter from the Corps to USFWS is attached (Exhibit 2). It is also our understanding that the USFWS has not requested an extension for the consultation. Therefore, the consultation should have concluded by the statutory deadline of August 24, 1998. USFWS must be held to its own policies, procedures and timelines.

**Request for more information contradicts prior USFWS statements.**

USFWS state in their April 13, 1999 letter (attached to Exhibit 6), that they are still waiting for completed project descriptions to complete the Section 7 Consultation for the proposed project. As indicated in the City's May 10, 1999 to Congressman Calvert (Exhibit 6), it was our understanding as of January 1999 that USFWS staff had enough information to process the Section 7 Consultation.

**Request for additional information concerning the inter-related or inter-connected effects of the maintenance projects are unnecessary.**

The proposed O & M Project includes maintenance and operation of existing facilities located within the Prado Basin. Many of these facilities have been in operation for decades. The City is not proposing to create additional maintenance requirements in critical habitat, but merely to continue our maintenance of existing facilities. Since the facilities already exist, it is expected that little, or no, additional impacts will occur to vireos, flycatchers, and critical habitat. (See Exhibit 4 for a complete response to the USFWS's August 4, 1998 letter.)

A copy of the draft Environmental Assessment (EA) was submitted to the USFWS in May 1998. The draft EA describes each of the facilities proposed to maintained and operated as well as a discussion regarding the proposed impacts from each of the facilities. In addition, the USFWS has reviewed the following documents related to projects included in the O & M Project:

- *Environmental Assessment for the City of Corona Rincon Street Phase II Improvements, prepared by John M. Tettemer & Associates, Inc. (JMTA) dated August 1995.*

- *Corona Municipal Airport Flood Control Protection Plan Environmental Assessment prepared by JMTA dated February 1998.*

- *Final Addendum to the Environmental Impact Report and Supplemental Environmental Assessment – Wastewater Treatment Plant No. 1 Expansion Outfall Alignment, dated February 1997.*

- *Biological Assessment in Support of Section 7 Consultation – City of Corona Wastewater Treatment Plant No. 1 Pipeline Alignment and Outfall Structure Butterfield Drain, Prado Basin, CA, dated September 1996.*

In addition, the USFWS has issued the following biological opinions related to projects included in the O& M Project:

- *Biological Opinion of the Rincon Street Phase II at Temescal Wash Project in Prado Basin, Riverside County, California (I-6-95-F-37).*

- *Biological Opinion of the Corona Airport Wall Project, Prado Basin, Riverside County, California (1-6-98-F-17).*

- *Biological Opinion on the expansion of the City of Corona Wastewater Treatment Plant No. 1 and Outfall (1-6-97-F-7).*

The City of Corona has provided responsive and complete information to process the Section 7 Consultation.

**MITIGATION REQUIREMENTS**

While USFWS contends that they cannot initiate formal Section 7 Consultation without more information, we believe the real issue to be mitigation. The City of Corona respectfully requests the Committee to consider the following mitigation concerns:

**Mitigation requirements of the USFWS Carlsbad office are punitive.**

USFWS continues to maintain that mitigation for the O & M Project is on a 3:1 basis. In other words, for every one-acre of impacts, the City would be required to purchase, plant, and maintain three acres of new wetlands. Utilizing the 3:1 mitigation formula, USFWS has concluded that the City must purchase, plant and maintain 36 acres of

new wetlands for this maintenance project. If the City proceeds with any of the O & M Projects without USFWS's approval, mitigation is on a 10:1 basis.

Additionally, USFWS representatives indicated at the March 1999 meeting that they want mitigation for maintenance activities we have been performing over the years for which we have not mitigated. These include maintenance activities, which we began over 30 years ago as well as mowing the ball fields at Butterfield Park.

The City strongly maintains its position that mitigation requirements should only apply to new projects, and that such mitigation should be on a 1:1 basis. The City, its consultants, or legal counsel are unable to determine the legal authority for the USFWS 3:1 mitigation requirements for new projects, let alone for routine maintenance. Furthermore, we object to USFWS demands to require mitigation on a retroactive basis.

**Mitigation requirements of USFWS Carlsbad office are, in part, determined by the maintenance of existing mitigation sites.**

At our March 19, 1999 meeting, USFWS informed the City that mitigation for the O & M Project would exceed the 3:1 requirement previously referenced in USFWS's August 4, 1998, response letter to the Corps because the City's current mitigation sites are not being maintained properly. We strongly disagree with this assertion. As the evaluation of the mitigation status was conducted by a USFWS volunteer, we question the validity of the findings. Furthermore, we question the ability of USFWS to increase mitigation requirements on this basis.

**The City has already provided significant mitigation for Prado Basin facilities.**

The City currently maintains nine wetland mitigation sites within the Prado Basin. As part of the proposed O & M Project, the City has proposed removal of exotic plants, such as castor bean and arundo, in various projects of the O & M. The City has already provided cowbird funding as part of the Rincon Street Phase II Project. The purpose of this annuity is to assist with capturing cowbirds. Capturing cowbirds is one measure that could help the endangered vireo, one of the favorite targets of a cowbird. As discussed at the March 1999 meeting with the Corps and USFWS, the City is willing to work with the USFWS regarding appropriate mitigation measures for the clearing of the airport protection zone for the protection of airport users. However, the City maintains its position that we should not be mandated to mitigate for routine maintenance activities.

## OTHER RELATED ISSUES

**The City of Corona continues to receive conflicting direction from different regulatory agencies.**

The maintenance of the airport runway protection zone (APZ) is required by the Federal Aviation Administration. This maintenance requirement is a safety requirement for the Corona Municipal Airport. The City has been maintaining a portion of the Airport Protection Zone for the past four years. This work was reviewed and approved by the resource agencies including the USFWS. However, the City needs to clear the entire APZ in order to enhance pilot and general public safety at the airport. As previously noted, the City is willing to mitigate for this additional clearance.

The City has also had difficulty obtaining the necessary clearance from USFWS to repair aged sewer lines in the Prado Basin. Such repair work has been ordered by water regulatory agencies.

## CONCLUSION

The City has invested significant resources in the development and processing of the O & M Project and would like the process to be completed as soon as possible. It is inconceivable in light of the above facts that USFWS has not processed the Section 7 Consultation. Furthermore, it is our understanding that the Corps is ready to issue the Section 404 permit for the O & M Project once the Section 7 Consultation is completed. The Regional Water Quality Control Board has already issued a Waiver of Section 401 Water Quality Certification and the California Department of Fish and Game has issued a Section 1601 Streambed Alteration Agreement for the O & M Project. Therefore, all of the environmental clearances of the Project are almost completed except for the Section 7 Consultation.

We urge the Committee to evaluate the USFWS Carlsbad office's policies, procedures, and mitigation requirements for implementation of the Endangered Species Act. We believe this USFWS office's implementation of the ESA is unaccountable and punitive. Furthermore, we believe their mitigation requirements are beyond reasonable and punitive.

Thank you for this opportunity to share our concerns. Should you have any questions, please feel free to contact me or Laura Manchester, Assistant to the City Manager, at (909) 736-2372.

Sincerely,

William P. Workman

William P. Workman
City Manager

## SUMMARY OF EXHIBITS

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| Exhibit 1 | *Operation and Maintenance Projects Within a Portion of the Prado Basin Located on Land Leased From the U.S. Army Corps of Engineers. Draft Environmental Assessment, Prepared by: John M. Tettemer & Associates, March 1998.* |
| Exhibit 2 | *Letter from Mark Durham of Army Corps to Engineers to Loren Hays of USFWS requesting initiation of formal consultation for the O & M Project, May 20, 1998.* |
| Exhibit 3 | *Letter from Jim A. Bartel of USFWS to Colonel Robert L. Davis of Army Corps of Engineers responding to May 20, 1998 letter to initiate formal Section 7 Consultation for the O & M project, August 4, 1998.* |
| Exhibit 4 | *Letter from Elisha Back of John M. Tettemer to Robert R. Smith of Army Corps of Engineers responding to August 4, 1998 letter from USFWS, October 13, 1998.* |
| Exhibit 5 | *Letter from Elisha Back of John M. Tettemer to Robert R. Smith of Army Corps of Engineers responding to requests from USFWS to divide projects into three tiers, January 13, 1999.* |
| Exhibit 6 | *Letter from City of Corona to Congressman Calvert responding to USFWS letter of April 13, 1999 (attached) and chronology of project, May 10, 1999.* |

Mr. POMBO. Thank you.
Mr. Weygandt.

**STATEMENT OF ROBERT M. WEYGANDT, CHAIRMAN, BOARD OF SUPERVISORS, PLACER COUNTY, CALIFORNIA**

Mr. WEYGANDT. Thank you, Mr. Chair and members of the Committee. I appreciate the opportunity to speak before you today.

My name is Robert Weygandt. I am chairman of the Placer Country Board of Supervisors. I have submitted my written testimony, and, today, I would like to, I think, emphasize, summarize three key points.

First, we believe that the Endangered Species Act needs to be implemented in a way that preserves and emphasizes local land use planning controls. We think that this can actually be done in a very effective way that integrates the mission of Fish and Wildlife and other agencies.

Second, I would like to support a notion that a market-based approach to supporting these missions is probably the best way to bridge the challenges that face the Service as well as those of us at a local level and especially the private sector players.

Third, Fish and Wildlife recently, in our jurisdiction, have been dealing with what they refer to as service area impacts or, according to California Environmental Quality Act law, we refer to it as cumulative impacts on a project, and I would like to develop some discussion about that.

A little bit of background about Placer County. It starts at the Valley floor of Sacramento at an elevation that is almost zero and extends all the way up to Lake Tahoe. So, it includes a very diverse and complicated habitat; also provides for our residents a tremendous quality of life, but it reflects a complex set of circumstances by which to deal with these issues before us today. It also, in that it has that quality of life, has been one of the fastest growing counties in the State of California. Our population has grown from about 170,000 people to 220,000 people over the last 10 years; that is a growth rate of 30 percent. And by the year 2010, we are expected to house about 350,000 residents. That is a doubling of our population in 20 years, and it will require an additional 50,000 dwelling units.

With regards to preserving local control over the decision-making process, the county adopted its most recent general plan in 1994, and it includes, in that general plan, a huge set of items that are the concerns of the Federal regulatory agencies. In addition to that, recently, in April of 1998, the board of supervisors implemented what we call Placer Legacy Open Space Conservation Project. That is a huge undertaking that is an effort to essentially implement the open space policies of the 1994 general plan. A component of that we will hope will be the successful completion of Natural Communities Conservation Plan, or an NCCP. And, again, one of the key goals of doing that is to create a much more clear set of rules and regulations and permitting processes and emphasize that permitting down at the local level but in fact with compliance of the mission of especially Fish and Wildlife.

We believe that this is the most effective way to deal with these issues, because, in fact, we believe that at the local level our con-

stituents have a better voice in this effort, and, in fact, it is not in conflict with the mission of Fish and Wildlife or other Federal regulatory agencies but in fact is in concert with them. We think, in fact, that if you consider our review processes at the local level that in fact it would be simple for the Service to focus in and integrate their efforts with ours, and in fact the county—we have a culture of actually requesting that to happen up-front, and we have experienced good success on that basis.

With regards to the market-based approach to trying to achieve these goals, the county in its general plan does not focus on attempting to be confrontational with private property rights, market economics, or, in fact, individual freedoms, but, in fact, to embrace those. And we have some good examples that reflect the results of that in the county. We have a privately—perhaps the first permitted privately owned mitigation bank. It provides a streamlined process for developers to buy inexpensive credit. It has created some great habitat. We have some premium priced lots that are open space lots adjacent to nice habitat. The enforcement of the protection of those is done through the county's planning department as well as homeowners associations, so the cost is low, and our business community enjoys a much higher level of predictability as to their operations, because they are protected from incompatible uses by our general plan.

We also think, though, that in our recent experiences, the Service especially needs to focus on what they call service area impacts in their review. Recently, we have seen some letters and memorandums that basically reflect the notion that if you have, let us say, 5 projects that require disturbance of 2 acres each, that if you approve one of those, it has an impact of disturbing 2 acres, but taken all 5 together, it would have more than a cumulative impact of the 10 acres. We actually think that this concept has merit, but, in fact, according to CEQA and our planning review process, we already consider that, and the key problem we have had recently is that there have been recent public infrastructure projects that are required to support existing entitlements that in fact are basically having to go through that cumulative impact review process twice. So, we think that there is a great role there for review and streamlining and probably renovation of that policy.

In conclusion, our goal as a county is to up-front try to deal with these issues so that we are consistent with not only the goals of our constituents but the mission of protection of endangered species as well as "no net loss" policy, and in that effort we think there are great opportunities. Thank you.

[The prepared statement of Mr. Weygandt follows:]

STATEMENT OF ROBERT WEYGANDT, CHAIR, BOARD OF SUPERVISORS, PLACER COUNTY, CALIFORNIA

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to share with the Committee the experiences of Placer County in working with the U.S. Fish and Wildlife Service to satisfy the mandates of the Federal Endangered Species Act. As I will describe in more detail below, by seeking to anticipate and address endangered species issues rather than react to crises once they emerge, Placer County is looking to approach endangered species regulatory requirements in a way that harmonizes property rights with natural resources imperatives by relying on local land use planning.

## I. INTRODUCTION

Placer County rises from the expansive grasslands of the Sacramento Valley to the spectacular shores of Lake Tahoe high in the Sierra Nevada mountain range. This geologic and climatic diversity makes Placer County home to a rich variety of plant and animal species and contributes to the County's reputation as one of the scenic treasures of California.

Over the last 150 years, much of the County's once vast grasslands, woodlands, and riparian areas has been dedicated to urban, rural, suburban, industrial, and agricultural uses. Today, Placer County is one of the fastest growing counties in California. Since 1990, the County's population has grown from 170,000 to about 220,000, an increase of nearly 30 percent. By 2010, nearly 350,000 people are projected to live in the County, representing a doubling of the population in 20 years and requiring the addition of nearly 50,000 units to the present housing stock. Looking even further into the future, the California Department of Finance projects a population of 522,214 persons at the year 2040.

Residents and businesses continue to be attracted to Placer County by the opportunity to live, work and recreate in a place of such remarkable natural beauty. As more and more people are lured to Placer County, the region risks losing the natural and scenic qualities which distinguish it from other places in the country—unless it engages in thoughtful planning for its future.

**General Plan.** To begin to address this need, in August of 1994, Placer County adopted a new General Plan containing a number of goals and policies to ensure that there is a balance between growth, economic development and the health of the environment. For example, the General Plan provides that fish and wildlife habitat is to be protected, restored and enhanced to support fish and wildlife species so as to maintain populations at viable levels. It specifies that open space and natural areas are to be of sufficient size to protect biodiversity, to accommodate wildlife movement and to maintain self-sustaining ecosystems. It also prescribes that wetland impacts are to be reduced to a point of no net loss of habitat area, function and values. To implement these and other policies and goals, the General Plan requires the development of comprehensive implementation programs to preserve a sufficient quantity of Placer County's natural inheritance to maintain a high quality of life and an abundance of diverse natural communities, while supporting the economic viability of the County and enhancing property values.

**Placer Legacy Open Space Conservation Project.** To this end, in April, 1998 the Placer County Board of Supervisors authorized planning staff to proceed with the Placer Legacy Open Space Conservation Project to further the various open space and natural resource goals of the Placer County General Plan and associated General Plans of the six cities in Placer County. The Board, reflecting community consensus, has voted unanimously to proceed with this project on every policy issue. The Board directed staff to develop a program that will protect a wide range of open spaces in Placer County including:

- agricultural lands;
- natural features for outdoor recreation;
- scenic and historic areas;
- areas to ensure public safety;
- areas that create a separation of urban communities; and
- areas that provide for plant and animal diversity and the protection of special status species.

The last objective, in particular, is to be addressed through the preparation of a Natural Communities Conservation Plan (NCCP) for Placer County. A Natural Communities Conservation Plan is a regional habitat conservation plan that is based upon California State Fish and Game statutes. It can provide regulatory relief from California endangered species andrelated laws and it can satisfy the requirements of the Federal Endangered Species Act under Section 10 for a range of species. The County's NCCP will also be designed to obtain regulatory relief from Section 404 of the Federal Clean Water Act for wetland impacts. The County envisions this effort to be a unique collaboration between local, state and Federal agencies, private sector interests and other members of the community. We have already established a collaborative team of public and private sector interests who are working together on the sucessful implementation of this or some similar program that affords us the opportunity to achieve the aforementioned comprehensive and long range goals.

The County, in beginning to undertake regional conservation planning, has engaged in constructive discussions with the Fish & Wildlife Service. The County, because it has taken a leadership role in promoting responsible conservation and development through its General Plan, is developing a cooperative effort with the

Service to help it fulfill its statutory mandates in a manner sensitive to local land use decision making. We are very early in this process, but are encouraged about the prospects of collaborating with the Service on a multi-species conservation plan that will address species issues on a long-term basis, provided that adequate provisions are made for permitting key public infrastructure projects in ways that respect and retain local government land use decision making prerogatives.

## II. THE REASONS FOR THE PLACER COUNTY APPROACH

Conservation planning of the sort being pursued by the Placer Legacy Project promises benefits for the environment, the development community, and local governments.

**Conserving Resources for the Long-Term.** In authorizing habitat conservation plans, Congress anticipated that such plans would, at their best, be comprehensive in that they would address the conservation of not only listed, but also unlisted species and the ecosystems upon which they depend. Regional conservation planning is also comprehensive in another way. Because of the project-by-project nature of traditional Federal and state species permitting, conservation plans have often been developed in isolation, with judgments about the rules of development made in a piecemeal, ad hoc manner. As a result, mitigation requirements have sometimes lacked consistency from one project to another and mitigation areas have at times been unconnected and have failed to maximize conservation opportunities. Needed public infrastructure and other economic development projects have at times not been integrated by the Service into local land use decision making. Because of its broader scope, regional conservation planning enables habitat preservation areas to be designed in ways that maximize their capacity to maintain the workings of natural systems and sustain biodiversity across ecosystems. The conservation plan can focus on the long-term stability of natural communities and habitats, and not just on the unique habitat needs of a few sensitive species. With this in mind, we believe our opportunity is unique in that we are acting long before other jurisdictions that have undertaken similar efforts but did so in a more crisis situation.

**Respecting Private Property and Minimizing Economic Impacts.** Conservation planning is voluntary. Neither land owners nor jurisdictions are required to participate. And land for habitat conservation areas will only be acquired from willing sellers. Federal and state resource agencies do not have their jurisdiction or authority over private property augmented by conservation planning efforts. To the contrary, their roles in development permitting of specific projects are diminished by it, as is discussed below. In a word, conservation planning efforts can be structured to fully respect and maintain private property and local decision making.

While voluntary, conservation planning offers numerous benefits that encourage local governments and landowners to participate. Regional conservation planning moderates the impact of regulatory requirements on the economic concerns of an area, thereby reducing the potential for conflict between environmental and developmental interests. The broader scope of regional conservation planning provides greater opportunity for accommodation of interests and appropriate balancing of land uses. The comprehensive nature of regional conservation planning further provides land developers with the prospect of far greater certainty and predictability in their planning and land acquisition decisions. If species covered by a plan are later listed under Federal or state law, landowners are relieved of any additional conservation requirements and are assured the development plans can proceed unimpeded. This is the important "No Surprises" Policy, which says, "a deal is a deal."

Furthermore, regional conservation planning offers landowners the opportunity to resolve local, state, and Federal endangered species issues once and for all and, more generally, can streamline the array of local, state, and Federal regulatory processes by collapsing complicated layers of regulatory requirements and procedures into a single, unified process at the local government level. Appropriate mitigation for impacts on biological resources are established through a single plan, rather than through a series of disjointed processes independently derived by the different levels of government to achieve similar objectives.

**Strengthening Local Land Use Decision Making.** Through regional conservation planning, primary responsibility is placed in the hands of local governments to implement Federal and state wildlife, habitat, and wetlands conservation objectives, while the Federal and state governments play a role more limited to setting standards, monitoring performance, and providing technical and financial assistance. This approach recognizes that decisions about the use of the land are best left to local government, and that the tools of local land use planning, unavailable to the Federal and state governments, are ideally suited to protecting natural resources. In the process of integrating wildlife protection objectives into the regulatory processes

of local government, opportunities are enhanced for citizens to participate in the shaping of plans that will affect the long-term environmental and economic character of their communities.

The Placer Legacy Project is being developed to deliver all of these benefits. The conservation needs of all of the plants and animals which are currently, or may in the future, be protected by the state and Federal Endangered Species Acts will be addressed. Through the adoption of a NCCP which will satisfy the requirements of the Federal Endangered Species Act, the County will be in a position to provide immediate solutions and options to the development community related to compliance with state and Federal regulations. With such a program, the County can become the permit issuing authority for compliance with state and Federal rules, thus retaining maximum local control over land development activities. This will add certainty to the development process and will reduce the amount of time normally required to address these issues, while at the same time providing a state-of-the-art conservation plan with the greatest potential to maintain the function and values of preserved natural communities. It will help spread the costs of implementation more broadly and equitably to all beneficiaries, rather than imposing undue costs on one principal sector, such as new development. It is our hope that, the preparation of a NCCP may lead to the availability of substantial financial assistance for the acquisition and preservation of open space areas.

## III. NEED FOR POLICY GUIDANCE ON SERVICE AREA IMPACTS

While Placer County is excited about the regional conservation planning efforts underway, there is concern about the need for a more consistent and uniform treatment of mitigation for what the Service is calling "service area impacts," especially regarding public infrastructure projects and their potential impacts within the areas they are servicing. Broader conservation planning will not succeed if projects to service existing and anticipated development cannot be effectively integrated into the planning effort, and if the mitigation required for them, cannot be determined on the basis of clearly articulated policy delivered in a timely manner.

It must be remembered that habitat conservation planning programs are voluntary. Ideally, they involve the collaboration of local governments, land owners, and other community interests with Federal and state agencies. Removing impediments to local government participation in such efforts, therefore, is critical to the success of such programs.

Specifically, one impediment has been the lack of a clear Service policy with respect to mitigation associated with permitting public infrastructure projects. Currently, the Service requires mitigation for public infrastructure development based on service area-wide impacts, in addition to the direct on-site impacts caused by construction of the public facility itself. Thus, when a local government builds a road or a wastewater treatment plant to better service already existing development and anticipate realistic, future needs, the Service will require mitigation for both the direct impacts caused to endangered species by that particular development as well as for the impacts being caused by the activity it is servicing throughout the region. Sometimes the Service will require mitigation for so-called "indirect effects" that have tenuous connection to the infrastructure project. In such cases, it is unclear upon what basis the Service has determined that an infrastructure project is the direct cause of a future development impact.

The Service has some legitimate concerns on this issue, but it has failed to articulate criteria by which potential service area impacts can be identified and evaluated. How broad is the reasonable scope? Does it apply equally to both existing, entitled development and to anticipated future development?

To prevent any real or perceived unfair treatment of local governments, therefore, Placer County recommends consideration be given to a policy reflecting a thoughtful and restrained approach to mitigation required by the Service for public infrastructure projects—specifically, a policy that would clarify the scope of legitimate public infrastructure service area impacts and would exclude impacts for which mitigation has already been provided. It is essential that the Service remember the cumulative impacts of all major planning projects are already an integral part of our local planning efforts as dictated under the California Environmental Quality Act.

## IV. CONCLUSION

Placer County is committed to responsible development and conservation of the natural resources that make the County such a special place to live. The Legacy Project promises to achieve both. For the NCCP component of Legacy to fully fulfill the mission of both the Counties' General Plan and policies of the Service, several conditions must be met. The County can provide local planning, implementation, and enhanced enforcement of our mutual goals. The Service will need to honor the

"No Surprises" Policy, acknowledge local land use planning, and clarify or reform the "service area impact" issue especially on public infrastructure projects necessary to support existing entitlements. The result from both parties must be a more clearly defined and streamlined permitting process. Placer County looks forward to having the Fish and Wildlife Service as a constructive resource in protecting the County's natural inheritance while facilitating permitting for projects to meet the County's growing needs.

In conclusion, the County's policies are based on the notion that the most effective path to achieving environmental quality is not to compromise private property rights, market economics, or individual freedoms, but in fact to embrace them. Already we have witnessed several examples. We have a local privately owned mitigation bank that sells credits. The result is newly developed and spectacular habitat, less expensive and more timely creation of small acreage credits available to the development community, and profit opportunity for entrepreneurs. We have seen subdivision lots adjacent to protected open space sell for premium prices and their maintenance secured by partnerships between the County's code enforcement and homeowner's associations. Our local business community enjoys a more long term and predictable operating environment because strict zoning protects their facilities from the encroachment by incompatible uses and the quality of life of their employees.

Towards these multiple goals, there is a role for all the existing players; Federal, state, and local governments, property and business owners, and community interests. Certainly, there is room for reform that scrutinizes and thereby reorganizes the appropriate roles and relationships among these players. If our policies provide value to our constituents, adhere to private property rights, market economics, and good science, environmental enhancement will certainly be forthcoming.

Mr. POMBO. Thank you.

Mr. Schulz.

**STATEMENT OF DAVE SCHULZ, CHAIR, OKANOGAN COUNTY, OKANOGAN, WASHINGTON**

Mr. SCHULZ. Thank you, and good morning. For the record, my name is Dave Schulz, and I am chairman of the Okanogan County Commission, the general executive and legislative authority for the government of Okanogan County in the State of Washington. I appear on behalf of the Okanogan County to provide the Members of Congress with an example of the pitfalls of the implementation of the Endangered Species Act and to propose a more constructive approach to implementation that will promote the recovery of the protected species and broad scale compliance with ESA. It is our hope that the National Marine Fisheries Service and U.S. Fish and Wildlife, collectively called the Services, share our views on a preferable model for ESA implementation and that the Services will use practical, flexible, and incentive-based approaches that hold more promise for long-term species recovery while minimizing the disruption to the life and economy of communities affected by the ESA listings.

Ninety-one percent of the lands in the Methow are public lands owned by the United States Forest Service or by the State of Washington. The natural resources of timber, mineral waters, and agriculture are the economy. The exceptional scenic value of the Methow Valley has placed the County at the heart of several controversial issues concerning Federal and State natural resource policies, including a landmark decision by the U.S. Supreme Court on the procedural nature of NEPA. That designation ski resort was never built. The spotted owl, the grizzly bear recovery zones, and now in August 1997, we added steelhead as endangered; June 1998, bull trout were added, and on March 1 of this year, the chinook were added. The Methow Valley is intensely impacted because

of the extensive use of irrigational water diverted to more than 50 ditches serving hundreds of small farms and landowners. The ESA listing in Okanogan County places the exercise of private water rights by small farms and businesses on a potential collision course from the ESA.

Okanogan County, once again, is a test-case for Federal environmental policy, and the outcome is certain to be a setting precedent for the future implementation of ESA and other watersheds in Washington and throughout the West. Okanogan County, therefore, urges Congress and the Services to promote ESA implementation in a way that emphasizes creative and cooperative programmic compliance rather than a case-by-case enforcement and controversy.

Section 7 talks about special use permits issued by the United States Forest Service. In March 1998, the Forest Service prepared and submitted to the Services the biological assessment for the renewal or continued use of special use permits held by irrigation ditch companies in the Methow. Under the most generous interpretations of ESA, formal consultation on ditch permits should have been completed by the fall of 1998. As of this date of this hearing, however, consultation remains incomplete and effected irrigation ditches in the Methow are not permitted to divert water even though the irrigation season began back in April. I looked at a letter today from Mr. Stow and it says, "Staffing limitations have hampered our ability to process the workload." Simply, they need money and people to help in this process.

Under section 9, the county exercises no authority over the use of water rights, and the authority of the State is very limited in that regard. There simply is no authority by which the State or the county may immediately impose regulatory restrictions that curtail the use of private water rights, and there is certainly no appropriations to provide compensation that would necessarily accompany the regulatory taking of private property interests.

Under an agreement between the State and the county, a waterbank will be established in State rules and county ordinances. A waterbank, or HCP, is a programmic solution that minimizes legal conflict while providing the correct incentives to provide interest to take volunteer actions to efficiently use water, conserve, and restore ESA listed fish and comply with ESA.

What are the barriers and recommended solutions? In your packet, I have give you a number of those. There are four of them. I think it would be well worth the time to look at those. Most of the water that is required to satisfy NMFS fundamental condition is the property of numerous third parties. Neither the county nor the State can make the commitments required by National Marine Fisheries Service. The requested action that I am asking is a commitment for the Services to work cooperatively on a waterbank HCP with the county and the State of Washington. Mitigation credit for immediate action is there so the HCP development and approval through increments, and, thirdly, financial support, unfunded mandates. We simply need money as well as NMFS and others. Fourth, interim action and relief, and we have House bill 2514, 2496; we are trying to implement that.

Thank you for listening from our 38,400 residents from Okanogan County.

[The prepared statement of Mr. Schulz follows:]

STATEMENT OF DAVE SCHULZ, CHAIR, OKANOGAN COUNTY COMMISSION, OKANOGAN COUNTY, WASHINGTON

For the record, my name is Dave Schulz, and I am chairman of the Okanogan County Commission, the general executive and legislative authority for the government of Okanogan County, Washington. I appear on behalf of Okanogan County to provide Members of Congress with an example of the pitfalls for implementation of the Endangered Species Act ("ESA"), and to propose a more constructive approach to implementation that will promote the recovery of protected species and broad-scale compliance with the ESA. It is our hope that the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") (collectively the "Services") share our views on a preferable model for ESA implementation, and that the Services will use practical, flexible, and incentive-based approaches that hold more promise for long-term species recovery while minimizing disruption to the life and economy of communities affected by ESA listings.

**I. Okanogan County's Methow Valley:**
**A Report from the Frontline of ESA Implementation**

Washington State's Okanogan County is a vast county covering 5,268 square miles along the Canadian border and extending east from the crest of the Cascade Mountains to the Columbia River. *See* Attachment 1 (Maps of Okanogan County and Methow Valley). The Methow River flows southeast from its headwaters in the North Cascades National Park through the semi-arid and irrigated Methow Valley and into the mainstem Columbia River. Okanogan County and the Methow Valley are exceptionally scenic areas, generously endowed with natural resources and populated with communities who enjoy and depend on outdoor recreation and natural resources for their livelihoods.

The United States and the State of Washington own and manage a majority of the land in Okanogan County, and those public lands are the source of timber, mineral, water, and range resources upon which much of the regional economy is established. Like many rural and natural resource-dependent counties, Okanogan County has suffered a long-term decline in the vitality of its timber, mining, ranching, and agricultural sectors. Growth in rural tourism has been beneficial to the County, but is not expected to fully replace the employment and income lost through the decline of resource industries. The Okanogan County Commission does not seek to stop change or turn back the clock, but the Commissioners do feel that it is essential that Federal, state, and local governments assist private interests to make adjustments and transitions in the face of change, especially when change is wrought by policies and laws imposed by government.

Not surprisingly, Okanogan County's abundance of natural resources and the exceptional scenic value of the Methow Valley have placed the County at the heart of several controversies concerning Federal and state natural resource policy. In the 1980's, a destination ski resort proposed for the Methow Valley was the subject of special land exchange legislation enacted by Congress and litigation that led to a landmark decision by the U.S. Supreme Court on the procedural nature of the National Environmental Policy Act. The resort was never built. In 1982, the North Cascades Grizzly Bear Recovery Zone was established to promote land management for the conservation of grizzly bears listed as threatened under the ESA. The zone includes much of Okanogan County, including the Methow Valley and cities such as Twisp and Winthrop. In the 1990's the northern spotted owl was listed as a threatened species, and national forest lands in Okanogan County are now subject to added management restrictions under the Northwest Forest Plan Also in the 1990's, the State of Washington formulated a special management plan designed to conserve lynx habitat in the 130,000-acre Loomis State Forest. Lynx are now proposed for listing as a threatened species under the ESA. Ironically, completion of the Loomis plan spawned a citizen suit in 1997 alleging that the state management plan would take grizzly bears in violation of the ESA. In 1998, Omak Wood Products, one of the County's largest private employers and a major purchaser of timber from the Loomis Forest, declared bankruptcy and closed its doors. And, in 1999, after years of permit processing and environmental analysis, the Crown Jewel Mine proposed for Okanogan County was denied final approval in a Federal record of decision based on an unprecedented interpretation of Federal mining law with consequences for the mining industry nationwide.

Okanogan County clearly is no stranger to natural resource controversy, but now faces a new crisis in the implementation of the ESA that may affect the County more profoundly than all of the litany of natural resource controversies that have visited the County over the past three decades. Beginning in 1997, NMFS and FWS listed three fish species found in Okanogan County for protection under the ESA. In August of 1997, NMFS listed the Upper Columbia Steelhead Evolutionary Significant Unit ("ESU") as endangered under the ESA, and NMFS added the Upper Columbia Chinook ESU as an endangered species in March 1999. In June 1998, FWS listed Columbia Basin bull trout as a threatened species. Because the habitat of these fish depends on water quality, the use of water resources, the quality of riparian habitat,and land use in general, fish listings pose what is probably the greatest natural resource challenge to the economic and social stability and health of Okanogan County.

While there have been several ESA listings of anadromous fish throughout the Pacific Northwest, Okanogan County has been more immediately and severely impacted by ESA listings for salmonids because it is among the few places where the fish are classified as endangered. The Methow Valley is intensely impacted because of the extensive use of irrigation water diverted through more than 50 ditches serving hundreds of small farms and landowners. In short, the ESA listings in Okanogan County place the exercise of private water rights by small farms and businesses on a potential collision course with the mandates and prohibitions of the ESA.

Okanogan County is once again a test-case for Federal environmental policy, and the outcome is certain to be a precedent for future implementation of the ESA in other watersheds in Washington and throughout the West. Implementation of the ESA in the County provides an opportunity to build a model for ESA compliance and species recovery that can be used elsewhere, but it also presents a risk that adversarial implementation will work against the long-term prospects for species recovery and cooperative compliance by landowners and water users in Okanogan County and elsewhere. Okanogan County therefore urges the Congress and the Services to promote ESA implementation in a way that emphasizes creative and cooperative programmatic compliance rather than case-by-case enforcement and controversy.

**II. Case-by-Case Enforcement:**
**A Formula for Conflict and High Costs Without Recovery**

Okanogan County recognizes that the Services are required to implement and enforce the ESA, and must do so with limited resources. It is this combination of limited resources and a host of compliance requirements for innumerable Federal and nonfederal actions that begs for programmatic solutions that avoid individual review and enforcement for every single activity and litigation that will consume limited agency resources and provoke additional errors and delays. At this time, however, it appears that implementation of the ESA in the Methow Valley is at risk of slipping into a mode of adversarial enforcement that will do more to harm the objectives of the ESA than it will to recover salmon.

The risk of adversarial enforcement of the ESA is centered on two issues: (1) Section 7 consultation on special use permits issued by the United States Forest Service ("Forest Service") to ditch companies for the conveyance of water on rights-of-way across Federal land, and (2) threatened enforcement actions by the United States or citizens alleging violation of the ESA's "take" prohibition.

Under the ESA and both rules and guidelines implementing the ESA, Section consultation is subject to certain procedural requirements and time limitations. In March 1998, the Forest Service prepared and submitted to the Services the biological assessments for the renewal or continued use of special use permits held by irrigation ditch companies in the Methow. Under the most generous interpretation of the ESA, formal consultation on the ditch permits should have been completed by the Fall of 1998. As of the date of this hearing, however, consultation remains incomplete and affected irrigation ditches in the Methow Valley are not permitted to divert water even though the irrigation season began in April. *See* Attachment 2 (April 22, 1999 Letter from U.S. Forest Service to NMFS concerning consultation issues in Methow Valley). There is no apparent excuse for this delay, and the delay imposes a severe hardship on Methow Valley landowners. *Id.* The Services are now engaged in an effort to conclude consultation with haste, but consultation is not expected to be complete for another month or two, during which affected ditches are forbidden to divert water. The situation appears to be ripe for litigation that will drain the resources of the Services and will be destructive for the affected landowners and water users.

There is a substantial risk that the Services, in their recent haste to complete consultation, may render an ill-considered biological opinion that imposes unduly harsh targeted stream flow conditions through an incidental take statement. Under such a statement, affected ditches would be required to curtail diversions when affected stream reaches drop below a flow level set by the incidental take statement. Because watersheds are shared resources with multiple users, an incidental take statement with terms and conditions based on targeted stream flows threatens to impose on a single permittee an unfair condition that may be beyond the control of that permittee. Establishing terms and conditions for targeted flows is also a threat to water rights that are not subject to consultation because the terms and conditions may promote citizen suits to enforce the targeted flow as a standard for take. Water resource users who may be affected by such a precedent have no opportunity to evaluate and comment on the scientific basis or economic impact of target flows. The County and the State are currently engaged in an active public planning process to address instream flows as part of a comprehensive water resource planning effort for the Methow Valley, but that process requires time and scientific evidence. Okanogan County is concerned that flawed Federal biological opinions could become a stumbling block for long-term water resource planning, ESA compliance, and salmon recovery by establishing an unrealistic precedent for targeted stream flows deemed necessary to avoid jeopardy or prevent take of listed salmonids.

Coupled with the mired consultation process in the Methow Valley are threats of enforcement based on allegations of take prohibited by Section 9 of the ESA. In a recent letter, NMFS asserts that the County and the State of Washington should take emergency action under state law to restore instream flows or risk liability for take. *See* Attachment 3 (Undated Letter from NMFS to Tom Fitzsimmons, Director, Washington Department of Ecology). The interpretation of the ESA set forth in the NMFS letter is inconsistent with the legal obligations and authorities of both the County and the State. The County exercises no regulatory authority over the use of water rights, and the authority of the State is very limited in that regard. There simply is no authority by which the State or the County may immediately impose regulatory restrictions that curtail the use of existing private water rights, and there certainly is no appropriation to provide compensation that would necessarily accompany the regulatory taking of private property interests in water rights. At most, the State may adjust instream flows established by rule, but any adjustments will not and cannot curtail existing water rights to achieve those flows. Implementation of the ESA must be consistent with the authority and realistic resources of the State and County if it is to be successful. Threats of liability will not change the law or the resources under which the County and State must operate.

The Services should look to the County and State as cooperators who must work within their own constraints. Okanogan County appears before the Congress today to declare that it is prepared to cooperate with the Services in developing constructive long-term ESA compliance and conservation solutions that avoid the difficulties that currently afflict the Methow Valley. Toward that end, Okanogan County offers with this testimony its recommendations and requests for implementation of the ESA.

**III. Programmatic Compliance and Recovery:**
**Building Cooperative, Flexible, and Incentive-Based Habitat Conservation Plans**

In response to ESA listings for anadromous fish, the State of Washington has provided funding and authority for counties and other interested stakeholders to formulate and implement watershed-based plans for water resource management, protection of water quality, and conservation of protected species and their habitat. In 1998, Okanogan County was awarded a substantial grant to commence this planning process and the County also agreed to work with the Washington Department of Ecology to create a waterbank that will be used to implement water resource objectives.

Under an August 4, 1998 Memorandum of Agreement ("MOA") between Okanogan County and the State, a waterbank for the Methow Valley will be established in State rules and County ordinances. *See* Attachment 4 (MOA and Notice of Proposed Rulemaking). The MOA guiding the creation of the waterbank was concluded *before* the current controversy involving the Services and consultation on irrigation ditches in the Methow Valley. The waterbank will facilitate the transfers of water rights, changes in use or point of diversion of water resources, and use of water saved through efficiency, conservation, and reuse. As part of the process for conducting a transaction permitted by the waterbank, the holder of a water right will relinquish an established fraction of the water right for deposit in the State's instream flow trust account. In this way, the State and the County will provide incentives for hold-

ers of private water rights to rebuild instream flows through efficiencies and changes in use that are voluntarily implemented by private interests. This method of rebuilding instream flows serves the desired biological objective without regulatory "cat and mouse" or other means beyond the authority and financial resources of the State and County. The waterbank promises to deliver biological results more promptly and with less controversy and cost than general adjudication of water rights, enforcement actions, or regulatory mandates.

The County strongly believes that the waterbank jointly developed by the County and the State should serve as the basis for a Habitat Conservation Plan ("HCP") and programmatic incidental take permit issued by the Services under Section 10 of the ESA. In principle, when a holder of a private water right relinquishes part of that right to assist in the restoration of instream flows beneficial to ESA-listed salmon, he or she should receive the benefit of assurance that the exercise of the remaining water right is lawful under the ESA for the duration of the incidental take permit. By granting such an assurance, the United States is able to create a strong incentive to restore instream flows that does not require an appropriation of funds or compensation to the holder of the water right.

A waterbank HCP is a programmatic solution that minimizes litigation and legal conflict while providing the correct incentives for private interests to take voluntary action to efficiently use water, conserve and restore ESA-listed fish, and comply with the ESA. Such an HCP makes more effective use of the Services' resources by promoting broadscale voluntary compliance and conservation efforts instead of case-by-case enforcement. In addition, participating landowners and irrigation ditches covered by the incidental take permit will no longer require separate review and conditioning under Section 7 consultation where a Federal authorization is involved. This will add efficiency and savings for other Federal agencies such as the Forest Service, which is currently embroiled in consultation issues involving special use permits in the Methow Valley. Finally, a successful waterbank HCP will provide a model that may be replicated in other watersheds throughout the range of West Coast salmonids listed under the ESA, and throughout the United States where water rights are in conflict with instream flows and ESA-listed fish.

**IV. Barriers and Recommended Solutions:**
**Changing ESA Implementation Without Changing the Law**

Early discussions indicate that NMFS is highly skeptical concerning the conservation benefits of the proposed Methow Valley waterbank. Specifically, NMFS demands that any conservation plan guarantee that specific instream flows will be achieved within a specific time frame. *See* Exhibit 5 (April 27, 1999 Letter from NMFS to Okanogan County Commission). It is the County's view that the guaranteed increase of instream flows within a guaranteed period of time is not possible under state law. Most of the water that is required to satisfy NMFS's fundamental condition is the property of numerous third parties. Neither the County nor the State can make the commitments required by NMFS. To bridge this gap, NMFS will have to exercise its discretion to exchange regulatory assurances under an incidental take permit for voluntary commitments that restore instream flows in an incremental fashion. The County appreciates that NMFS has expressed its willingness to work cooperatively with the community, but a realistic recognition of the limitations on mitigation that can be guaranteed by the County or State is essential to progress. Otherwise, the opportunity to build instream flows through voluntary, incentive-based action will be lost. To prevent such a result, we recommend the following:

1. *Accept that Immediate Regulatory Action to Build Instream Flows and Guaranteed Biological Outcomes are Legally and Biologically Impracticable:* The Services, and particularly NMFS, appear to insist that any programmatic solution for ESA compliance offered by the County and State must provide immediate and certain assurances that specified levels of mitigation such as higher instream flows will be achieved. If there is to be any hope of a cooperative relationship between the Services, the State, and the County, the Services must realize that the ESA does not command immediate regulatory action by the State or County. The ESA must be implemented through cooperation, recognizing the legal and financial limitations that the County and the State must abide, just as the Services are limited in their legal authority and fiscal resources. Moreover, as biologists, the Services must accept that biological certainties are impossible and, at best, biological probabilities are the target. The ESA, itself, uses standards based on biological probabilities. The Services should feel comfortable in proceeding with cooperative efforts that improve the probabilities that fish habitat will be improved over time. Programmatic HCPs that provide

incentives for voluntary participation should not be ignored only because they do not guarantee participation or biological outcomes.

2. *Accept Voluntary Incentive-Based Programs That Achieve Mitigation Objectives in Increments:* The Services should recognize the benefit of providing incidental take coverage for voluntary actions that are sure to benefit listed fish, even in the absence of a regulatory framework that commands action beneficial to listed fish. While, in theory, a regulatory approach to ESA compliance seems more certain to achieve ESA conservation objectives, it requires overwhelming resources to establish and enforce regulatory oversight and it often requires a change in law. A voluntary approach is more likely to be immediately accepted, and it is consistent with the basic structure of the ESA, which requires voluntary compliance by nonFederal entities. Indeed, the FWS has, in the past, approved incidental take permits that are extended to third parties who voluntarily commit to implementing the terms of a programmatic HCP. Through a waterbank HCP, the County brokers ESA compliance and mitigation for individual property owners that NMFS would otherwise have to approach separately to obtain the same commitments. The Services should embrace and build upon the programmatic and voluntary approach rather than abandon it based on unrealistic expectations.

3. *Target Federal Funds for Salmon Restoration and Columbia River Federal Power System Mitigation to Programmatic Efforts Such as Waterbank HCPs:* Okanogan County is aware of the fish and wildlife mitigation program overseen by the Northwest Power Planning Council in connection with the operation of the Federal power system and dams in the Columbia Basin. Okanogan County has also learned of Federal appropriations that have been made or are under consideration for salmon recovery in Washington State and along the West Coast. Okanogan County urges that these substantial Federal funds for salmon recovery be used, in part, to support programmatic long term solutions such as the waterbank HCP proposed by Okanogan County.

4. *Encourage the Environmental Protection Agency to Integrate Clean Water Act Compliance Objectives and Assurances with Waterbank/Watershed HCPs that Address Water Quality Issues Such as Low Flows and Temperature:* Many of the issues addressed in water resource planning are also issues of water quality. Where a water resource planning mechanism, such as a waterbank HCP, addresses water quality issues such as low flows and high temperatures, regulatory assurances from the Environmental Protection Agency and state-delegated Clean Water Act program should also be extended to the permittees. Although many agree with this principle, the Federal family of agencies has yet to work out a means by which the ESA and Clean Water Act can be integrated through the same mitigation and compliance efforts. Integrated compliance under the ESA and Clean Water Act should be a top priority in Federal regulatory innovations.

**V. Requested Action**

1. *A Commitment from the Services to Work Cooperatively on a Waterbank HCP:* The County will soon prepare a waterbank HCP conceptual proposal that it will share with the Services and the State of Washington. The County hopes that the Services will be encouraged to treat the waterbank HCP as a serious proposal, and will commit through a memorandum of understanding to provide the resources and attention necessary to work together with the County and the State to build a model waterbank HCP.

2. *Mitigation Credit for Immediate Action In Advance of HCP Development and Approval:* The County will move forward with the State in conducting watershed planning and establishing a waterbank. The County hopes that the Services will give the County full mitigation credit for these early efforts and will confirm that position in a memorandum of understanding with the County for proceeding with an HCP.

3. *Financial Support: The County requests that Federal funding be made available through the Federal Columbia River mitigation program or other federally-funded salmon restoration initiatives to assist rural counties such as Okanogan County with the development and implementation of programmatic HCPs for the benefit of the broader public and ESA-listed fish.*

4. *Interim Action and Relief: While the County and State of Washington work to complete watershed planning and establish a waterbank, the legal requirements of the ESA continue to impact and threaten the stability of Okanogan County. The County recognizes that the Services must enforce the ESA, but several interim measures should be considered to minimize ESA impacts on the community.*

First, it appears that 1999 will be an exceptionally high water year in the Methow Valley. As such, it would be appropriate for the Services to permit irrigation diversions affected by consultation to proceed pending the completion of biological opinions because the diversions will not be irreversible or irretrievable commitments of resources. The Services have provided some relief to a few irrigators under Section 7(d) of the ESA, but many Methow Valley water users remain hamstrung by incomplete consultation.

Second, it is essential that the Services expressly disclose in biological opinions issued for the Methow Valley in 1999 that those opinions are based on incomplete information that is likely to be revised in the future in accordance with better data that will be forthcoming through the State-County watershed planning process. To discourage unfounded citizen suits, it would also be helpful if 1999 biological opinions explained that reasonable and prudent alternatives or terms and conditions set forth in an incidental take statement should not be used as a presumptive standard for take in connection with the use of water resources by other parties who are not subject to the consultation.

Third, it is recommended that the Services consider working cooperatively with irrigation ditches to research the effects of ditch operations on stream flows and fish and provide the irrigators with incidental take permits for cooperative scientific research under Section 10(a)(1)(A) of the ESA. Information collected in this fashion would be helpful to the County's watershed planning process and to the development of a waterbank HCP.

Mr. POMBO. Thank you.

Mr. Bruton.

**STATEMENT OF VINTON CHARLES BRUTON, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RALEIGH, NORTH CAROLINA**

Mr. BRUTON. Yes, sir. Mr. Chairman, Committee members, my name is Charles Bruton, and I am the assistant manager for the Project Development and Environmental Analysis Branch for the North Carolina Department of Transportation.

Today, I take great pride in telling you about the most recent effort we have undertaken to protect the habitat of an endangered species, the red-cockaded woodpecker, in North Carolina. The most recent endangered species mitigation project funded by the North Carolina Department of Transportation is the acquisition of a tract of about 10,000 acres in rural Tyrrell County on the Albermarle Sound in eastern North Carolina. This $16.3 million real estate transaction took place on April 28, 1999 with funds provided by the North Carolina DOT to the Conservation Fund, a Maryland nonprofit corporation. The Conservation Fund, which conveyed a conservation easement to NCDOT, used the proceeds to purchase the tract from the Prudential Insurance Company of America operating as Pru-Timber.

The idea for this acquisition was conceived back in October 1997 when the U.S. Fish and Wildlife Service expressed in writing their intent in NCDOT purchasing the Pru-Timber tract. The Service's letter stated that the tract is rich in biological diversity containing federally listed species. The letter further stated that there is excellent potential for NCDOT to receive mitigation credits for wetlands as well as red-cockaded woodpeckers.

In February 1998, the Environmental Defense Fund sent a letter to North Carolina secretary of Transportation, Norris Tulson, urging his department to increase its efforts to avoid, protect, and mitigate habitat for endangered red-cockaded woodpeckers in its highway construction program. The tract, which borders the Alligator River, is to be known as the Palmetto-Peartree Wildlife Man-

agement Area and is now under protection. The site also has some potential for wetland restoration and preservation.

The voluntary partnership forged between NCDOT, the Conservation Fund, and the U.S. Fish and Wildlife Service will protect one of North Carolina's largest populations of red-cockaded woodpeckers, containing 18 active clusters. A memorandum of agreement dated April 22, 1999 was executed by U.S. Fish and Wildlife Service, the Conservation Fund, and NCDOT to allow for the tract to be managed as a red-cockaded woodpecker sanctuary. The parties to the agreement anticipate that good management of the sanctuary will actually increase the number of active clusters over the existing 18.

The NCDOT intends to use mitigation credits generated from the management and development of the preserve as a means of red-cockaded woodpecker mitigation for future highway construction projects throughout the coastal plain of North Carolina. NCDOT has estimated that over the next seven years, five highway construction projects in the coastal plain, which potentially impact the red-cockaded woodpecker, will have a combined cost of $450 million. The management area will be utilized in the future as needed when NCDOT can demonstrate to the satisfaction of U.S. Fish and Wildlife Service that there are no available or potential red-cockaded woodpecker avoidance and minimization alternatives.

In addition to its mitigation value, the management area is planned to be a primary destination on the North Carolina Bird Trail which is modeled after the successful Texas Bird Trail. Managed by the Conservation Fund in cooperation with Duke University's Nicholas School of the Environment, the sanctuary is expected to increase year-round, nature-based tourism in eastern North Carolina and generate valuable year-round economic benefits to the area. The Conservation Fund will manage the sanctuary for an agreed period of time, after which, it will be turned over to the U.S. Fish and Wildlife Service or if the Service is unwilling to accept the land, to the State of North Carolina or an agency thereof.

Furthermore, the sanctuary will compliment the soon to be constructed Walter B. Jones Center for the Sounds in Tyrrell County which will include an environmental education center and the U.S. Fish and Wildlife headquarters for Pocosin Lakes National Wildlife Refuge.

Mr. Chairman, in closing, the NCDOT is pleased to work cooperatively with the U.S. Fish and Wildlife Service toward enhancing and protecting the environment through initiatives like the one just presented for Tyrrell County. We urge all individuals and agencies in this process to facilitate the means and methods to allow similar environmental initiatives in a manner that allows flexibility in infrastructure development as well as mitigation. We believe that the best method of providing sustainable development and an enhanced environment is through partnership with multiple agencies, and we would appreciate legislative support that fosters this inter-agency corporation.

Thank you.

[The prepared statement of Mr. Bruton follows:]

STATEMENT OF VINTON CHARLES BRUTON, PH.D., NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RALEIGH, NORTH CAROLINA

Mr. Chairman, Members of the Committee, and Guests: Over the past 25 years, Federal Legislation, Executive Orders and related regulations have produced major changes in environmental protection. As a result, the protection of natural resources such as endangered and threatened species, as well as wetlands, have become high priorities in North Carolina.

The North Carolina DOT and the Federal Highway Administration frequently encounter endangered species during the process of locating and designing highway projects. In North Carolina, one such species is the red-cockaded woodpecker *(Picoides borealis)*. Whenever impacts to this species' habitat cannot be avoided, as is frequently the case with widening and major new location highway construction projects in the coastal plain of North Carolina, the use of mitigation measures is required by the U.S. Fish and Wildlife Service.

Such measures are designed to enhance or preserve the remaining habitat as a means of eliminating ecological damage and preserving the species. Without such mitigation measures, state highway construction projects such as the Fayetteville Outer Loop (serving a major city and military base Fort Bragg), the Wilmington Bypass (serving a major city port) and U.S. 64 in Tyrrell and Dare Counties (serving national and international tourism to the Outer Banks and emergency evacuation purposes) would not be authorized by Federal environmental resource agencies to proceed to construction. Thus, in order to avoid potential future project delays, the North Carolina Department of Transportation believes that it is important to acquire and manage valuable red-cockaded woodpecker sites in advance of highway construction.

The most recent endangered species mitigation project funded by the North Carolina DOT is the acquisition of a tract of about ten thousand acres in rural Tyrrell County (see Attachment 1), on the Albemarle Sound in eastern North Carolina. This $16.3 million real estate transaction took place on April 28, 1999 with funds provided by the North Carolina DOT to The Conservation Fund, a Maryland non-profit corporation. The Conservation Fund, which conveyed a conservation easement to North Carolina DOT, used the proceeds to purchase the tract from The Prudential Insurance Company of America, operating as "Pru-Timber."

The idea for this acquisition was conceived back in October 1997, when the U.S. Fish and Wildlife Service expressed in writing their intent in North Carolina DOT purchasing the Pru-Timber tract. The Service's letter, included as Attachment 2, stated that the tract "is rich in biological diversity- containing federally-listed species, migratory birds, estuarine and freshwater fisheries, diverse natural communities, and various types of wetlands." The letter further stated that there is "excellent potential for North Carolina DOT to receive mitigation credits for wetlands as well as red-cockaded woodpecker (RCW's)." In February 1998, the Environmental Defense Fund sent a letter (Attachment 3) to North Carolina Secretary of Transportation Norris Tolson, urging his Department "to increase its efforts to avoid, protect and mitigate habitat for endangered red-cockaded woodpeckers in its highway construction program." The U.S. Fish and Wildlife Service again acknowledged its support in a letter dated August 7, 1998 (Attachment 4).

The tract, which borders the Alligator River, is to be known as "The Palmetto-Peartree Wildlife Management Area" and is now under protection. The site also has some potential wetland restoration and preservation. A letter of support from Tyrrell County is included as Attachment 5.

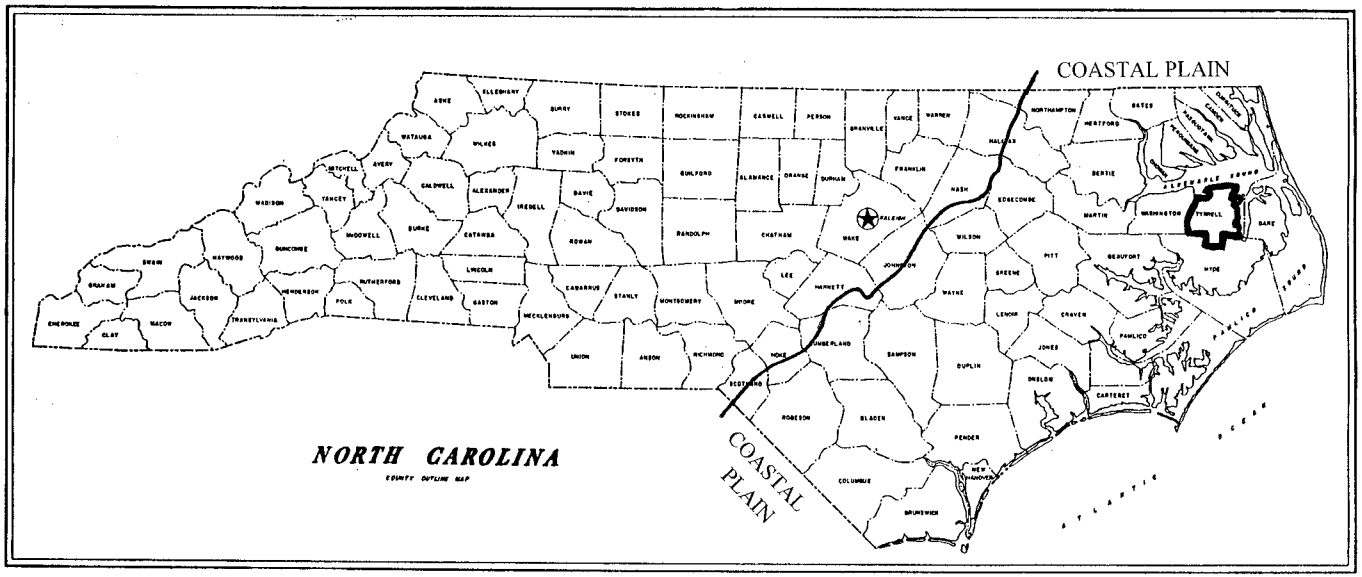
The voluntary partnership forged between the North Carolina DOT, The Conservation Fund and the U.S. Fish and Wildlife Service, will protect one of North Carolina's largest populations of red-cockaded woodpeckers, containing eighteen (18) active clusters. A Memorandum of Agreement number 1448-40181-99-KK-005, dated April 22, 1999 (Attachment 6) was executed between The U.S. Fish and Wildlife Service, The Conservation Fund, and the North Carolina DOT to allow for the tract to be managed as a red-cockaded woodpecker sanctuary. The parties to the agreement anticipate that good management of the sanctuary will actually increase the number of active clusters over the existing eighteen. The North Carolin DOT intends to use mitigation credits generated from the management and development of the preserve as a means of red-cockaded woodpecker mitigation for future highway construction projects throughout the coastal plain area of North Carolina. The North Carolina DOT has estimated that, over the next seven years, five highway construction projects in the coastal plain which potentially impact the red-cockaded woodpecker will have a combined cost of about $450 million dollars. The Palmetto-Peartree Wildlife Management Area will be utilized in the future as needed whenever North Carolina DOT can demonstrate to the satisfaction of U.S. Fish and Wild-

life Service that there are no available or potential red cockaded woodpecker avoidance and minimization alternatives.

In addition to its mitigation value, the Palmetto-Peartree Wildlife Management Area is planned to be a primary destination on the "North Carolina Bird Trail," which is modeled after the successful Texas Bird Trail. Managed by The Conservation Fund in cooperation with Duke University's Nicholas School of the Environment, the sanctuary is expected to increase year-round, nature-based tourism in Eastern North Carolina and generate valuable year-round economic benefits to the area. The Conservation Fund will manage the sanctuary for an agreed period of time, after which it will be turned over to the U.S. Fish and Wildlife Service or, if the Service is unwilling or unable to do so, to the State of North Carolina or an agency thereof furthermore, the sanctuary will complement the soon-to-be constructed Walter B. Jones Center for the Sounds in Tyrrell County, which will include an environmental education center, and the U.S. Fish and Wildlife headquarters for Pocosin Lakes National Wildlife Refuge.

Mr. Chairman, in closing, the North Carolina DOT is pleased to work cooperatively with the U.S. Fish and Wildlife Service toward enhancing and protecting the environment through initiatives like the one just presented for Tyrrell County. We urge all individuals and agencies involved in this process to facilitate means and methods to allow similar environmental initiatives in a manner that allows flexibility in infrastructure development as well as mitigation. We believe that the best method of providing sustainable development and an enhanced environment is through partnership with multiple agencies and we would appreciate legislative support that fosters this interagency cooperation.

Attachment 1
MAP OF NORTH CAROLINA
SHOWING LOCATION OF
TYRRELL COUNTY



Attachment 2

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Raleigh Field Office
Post Office Box 33726
Raleigh, North Carolina 27636-3726

RECEIVED
OCT 08 1997
DIVISION OF HIGHWAYS
PLANNING & ENVIRONMENTAL BRANCH

October 3, 1997

Mr. Franklin Vick
North Carolina Department of Transportation
Division of Highways
P.O. Box 25201
Raleigh, NC 27611-5201

Dear Mr. Vick:

The U.S. Fish and Wildlife Service (Service) would like to express our receptiveness to NCDOT purchasing the Pru-Timber tract of land in Tyrrell County, NC. The tract is rich in biological diversity: containing federally-listed species, migratory birds, estuarine and freshwater fisheries , diverse natural communities, and various types of wetlands.

The Service foresees excellent potential for NCDOT to receive mitigation credits for wetlands as well as red-cockaded woodpeckers (rcw's). As stated at the September 9, 1997 meeting in Raleigh, NCDOT could receive rcw mitigation credits at ratios ranging from 1:1 to 3:1. The specific ratio would be decided upon on a case-by-case basis. As a minimum, decision variables would include: population size, location, forest type, population status, and population ownership. Application of these mitigation credits would apply to the North Carolina Coastal Plain.

The Service encourages NCDOT to consider acquiring this unique property. The Service would be pleased to discuss the potential acquisition with NCDOT and looks forward to visiting the property with NCDOT staff in the near future. Please contact me at 919/856-4520 ext. 11 if you would like to talk about this opportunity further.

Sincerely,

John M. Hefner
Field Supervisor

ENVIRONMENTAL
DEFENSE FUND

Attachment 3

*North Carolina Office*
2500 Blue Ridge Rd., Suite 330
Raleigh, NC 27607
(919) 881-2601
*Fax (919) 881-2607*
*www.edf.org*

February 9, 1998

The Honorable Norris Tolson
Department of Transportation
Box 25201
Raleigh, North Carolina 27611

Re: Protection and Mitigation of Red-Cockaded Woodpecker Habitat

Dear Secretary Tolson:

Congratulations on your recent appointment! We look forward to working with you to improve the Department of Transportation.

We are writing to urge the Department of Transportation to increase its efforts to avoid, protect, and mitigate habitat for endangered red-cockaded woodpeckers in its highway construction program. Mature, fire-maintained pine forests, especially longleaf pine, are increasingly rare in North Carolina and across the South, due to decades of logging, fire suppression, turpentining, and conversion to other land uses. As a result, many species, most notably the endangered red-cockaded woodpecker, are threatened by habitat loss. Further, North Carolina figures prominently in conservation efforts for the endangered woodpecker as the US Fish and Wildlife Service has designated both the Sandhills region and the Coastal Plain as two of fifteen Recovery Populations.

A quick review of NCDOT's aggressive highway construction program set out in the 1997 Transportation Improvement Program (TIP) reveals many projects in the Coastal Plain and Sandhills that will destroy, or have the potential to destroy, or damage habitat for red-cockaded woodpeckers:

- US 13 in Hertford & Gates Counties;
- US 158 in Northampton, Hertford, Gates & Pasquotank Counties;
- US 64 in Martin, Washington, Tyrell & Dare Counties;
- US 70 Havelock Bypass in Craven County;
- New Bern Bypass;
- Global Transpark Connector;
- NC 58 from Kinston to Wilson;
- US 301 Fayetteville Loop in Cumberland County;
- NC 210 in Cumberland County;
- US 74 in Columbus & Robeson Counties;
- NC 87 in Bladen County;
- I-74 Corridor;

FEB 17 1998

*National Headquarters*

257 Park Avenue South
New York, NY 10010
(212) 505-2100

1875 Connecticut Ave., N.W.
Washington, DC 20009
(202) 387-3500

1405 Arapahoe Ave.
Boulder, CO 80302
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44 East Avenue
Austin, TX 78701
(512) 478-5161

5655 College Ave.
Oakland, CA 94618
(510) 658-8008

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Attachment 3 (page 2 of 2)

- NC 24 in Cumberland, Sampson & Duplin Counties;
- NC 24 in Onslow & Carteret Counties;
- NC 55 in Pamlico County;
- US 17 in New Hanover, Pender, Onslow & Jones Counties; and
- widening and paving secondary roads.

While NCDOT needs to do more, we have been pleased by NCDOT's recent efforts to identify, avoid, minimize, and mitigate the impacts of highway construction on wetlands. NCDOT's initial resistance to avoiding, minimizing, and mitigating wetland impacts slowed down construction of many highway projects. The lack of successful wetland mitigation sites continues to slow down some projects.

We would like to know more about the efforts of NCDOT to identify, avoid, and minimize destruction of red cockaded woodpecker habitat. Although we are unaware of any efforts by NCDOT to mitigate impacts on woodpeckers by acquiring and protecting other woodpecker habitat, we would like to know if NCDOT has plans for woodpecker mitigation projects.

We believe that concerted conservation efforts of public and private landowners can restore both the habitat of red-cockaded woodpeckers and a viable population of woodpeckers. We have been pleased with recent efforts by the NC Wildlife Resources Commission and many private landowners to protect and enhance woodpecker habitat, as well as work by the NC Natural Heritage Program to identify critical habitat in cooperation with others involved in red-cockaded woodpecker efforts.

As the largest developer in the State of North Carolina, NCDOT's cooperation, resources, and leadership are needed.

We look forward to hearing from you.

Sincerely,

Jane Preyer, Director
NC Environmental Defense Fund

Derb Carter, Attorney
Southern Environmental Law Center

Camilla Herlevich, Executive Director
National Audubon Society, NC office

Katherine Skinner, Director
The Nature Conservancy, NC chapter

Tom Bean, Executive Director
NC Wildlife Federation

Molly Diggins, Executive Director
Sierra Club, NC chapter

Nat Mund, Director of Gov't Relations
Conservation Council of NC

cc: Mr. Wayne McDevitt, NC DENR
Mr. John Hefner, USFWS, Raleigh

Attachment 4

# United States Department of the Interior

FISH AND WILDLIFE SERVICE
Raleigh Field Office
Post Office Box 33726
Raleigh, North Carolina 27636-3726

RECEIVED
AUG 14 1998
DIVISION OF HIGHWAYS
PLANNING & ENVIRONMENTAL BRANCH

August 7, 1998

Mr. William Gilmore, P.E.
Branch Chief
North Carolina Department of Transportation
Division of Highways
P.O. Box 25201
Raleigh, NC 27611-5201

Dear Mr. Gilmore:

This letter is to acknowledge the support of the U.S. Fish and Wildlife Service (Service) for the North Carolina Department of Transportation's (NCDOT) proposed purchase of a site located in the North Carolina Coastal Plain Physiographic Province, known as the "Tyrrell County Tract".

The Tyrrell County Tract is important for its contribution to endangered species and wetland conservation. We believe that significant credit could be derived from the long-term conservation, management and restoration of the natural communities of the tract. The Tyrrell County Tract is known to provide habitat for at least 18 groups of red-cockaded woodpeckers (RCWs) and 2 breeding pairs of bald eagles. The natural communities of the tract include significant wetlands. Through habitat restoration and artificial cavity enhancement, there may be significant potential to increase the numbers of RCWs and to restore wetlands on the property.

As we previously indicated, NCDOT could benefit from acquisition, management, and restoration of the Tyrrell County Tract through the use of mitigation credits to compensate for transportation project impacts in the Coastal Plain. Because of the potential importance of the Tyrrell County Tract to the recovery of RCWs, additional credit could be extended for translocation of RCWs from the tract to establish groups in the North Carolina Sandhills in order to offset some impacts related to the Fayetteville Outer Loop.

The Service is hopeful that NCDOT will recognize the merits of purchasing the Tyrrell County Tract. Please notify the Service if we may be of assistance. If you would like to talk about this opportunity further, or have questions concerning our comments please contact me at : 919/856-4520, ext.11.

Sincerely,

John M. Hefner
Ecological Service Supervisor

Attachment 5

**Tyrrell County Board of Commissioners**
P. O. Box 449
Columbia, North Carolina 27925
Telephone (252) 796-1371

Thomas W. Spruill, Chairman
Florence E. Bryant, Vice Chairperson
Nina B. Griswell

Durwood M. Cooper, Jr.
Gordon A. Beaver
Connie Hopkins, Clerk

March 8, 1999

William Gilmore, Administrator
Planning & Environmental Branch
Department of Transportation
P.O. Box 25201
Raleigh, NC 27611

Re: Conservation Fund * Palmetto-Pear Tree Management Preserve

Dear Mr. Gilmore:

Tyrrell County is pleased to support the creation of the Palmetto-Pear Tree Preserve. Our support for this project is contingent on the ad valorem taxes being paid in perpetuity. We look forward to working with the Conservation Fund and DOT on this project.

Sincerely,

J. D. Brickhouse by Connie Hopkins, Administrative Assistant

J. D. Brickhouse, County Administrator

Cc: Thomas Spruill, Chairman, Tyrrell County Commission
Charles Ogletree, Tyrrell County Attorney
Dick Ludington, The Conservation Fund

JDB/ch

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PROJECT DEVELOPMENT AND ENVIRONMENTAL ANALYSIS BRANCH

Attachment 6 (page 1 of 4)

FWS AGREEMENT NO: 1448-40181-99-K-005

# Memorandum of Understanding

# between

# North Carolina Department of Transportation,

# U.S. Fish and Wildlife Service and

# The Conservation Fund

**THIS AGREEMENT** (the "MOU") is made and entered into on the date herein below last written, by and between the **STATE OF NORTH CAROLINA, acting through the DEPARTMENT OF TRANSPORTATION** (NCDOT); the **UNITED STATES OF AMERICA, ACTING THROUGH THE U.S. FISH AND WILDLIFE SERVICE** (USFWS) and **THE CONSERVATION FUND, a Maryland nonprofit corporation** (TCF).

## W I T N E S S E T H:

**WHEREAS**, the USFWS is authorized to enter into agreements with NCDOT and TCF in accordance with the Endangered Species Act (18 U.S.C. 1531, et seq.; as amended) (ESA), and

**WHEREAS**, NCDOT and TCF are authorized to enter into agreements with USFWS, and

**WHEREAS**, NCDOT proposes a program to improve transportation projects in the Coastal Plain of North Carolina (the "Projects") which may impact the red-cockaded woodpecker (RCW) which is listed as a Federally endangered species, and

**WHEREAS**, NCDOT desires to minimize the impacts of the Projects on the RCW prior to construction, and

**WHEREAS**, NCDOT shall complete a biological assessment of the Projects and be responsible for conservation and recovery of Federally endangered species under ESA, and

**WHEREAS**, it has been determined in consultation with USFWS, that, the following measures will help offset the loss of the RCW or its habitat resulting from the Projects, and

**WHEREAS**, the parties hereto agree and understand that the impacts to the Coastal Plain Recovery population of the RCW, including, Croatan National Forest, Camp

Lejuene Marine Base and Holly Shelter Game Lands may require additional compensation beyond the terms of this agreement.

**NOW THEREFORE**, the parties hereto agree as follows:

(1) To establish a Wildlife Management Area (WMA) to be known as the Palmetto-Peartree Wildlife Management Area in Tyrrell County, North Carolina consisting of approximately 9,732+/- acres which is more particularly identified in Exhibit "A" attached hereto which will be acquired for the primary purpose of offsetting the loss of the RCW or its habitat associated with the Projects in the Coastal Plain.

(2) The WMA may be used to offset project impacts for other federally listed species with the consent of the parties to this agreement.

(3) Management of the WMA will be coordinated through the parties for the duration of this agreement.

(4) The property owner will be responsible for management associated with the needs of the RCW.

(5) The parties to this agreement will meet annually at an agreed upon time to review the previous year's management activities and to plan the next year's management activities.

(6) The credits in the WMA will be utilized only to offset unavoidable impacts of the RCW when the NCDOT can demonstrate to the satisfaction of the USFWS that there are no available or practical avoidance and minimization alternatives.

(7) It is understood that NCDOT will consult with the USFWS concerning any Project which would affect RCWs. RCW credits from the WMA will be considered for application against those Projects in the Coastal Plain which would impact RCWs and determined by USFWS not to jeopardize the continued existence of the species.

**FURTHERMORE**, the specific obligations of the respective parties to the Memorandum of Understanding are set forth below:

(A) The USFWS will:

(1) Grant NCDOT, RCW credits at ratios ranging from 1:1 to 3:1. Each Project's specific ratio will be determined on a case-by-case basis by USFWS.

(2) Agree that if future NCDOT projects, requiring compensation, occur within the boundaries of the WMA, then the WMA may be utilized to off-set those losses.

(3) Accept title to the WMA through a donation contingent upon (i) completion of planning, (ii) compliance with NEPA and (iii) completion of an approved contaminants survey within five (5) years of the effective date hereof on the condition that the WMA is included in the Pocosin Lakes National Wildlife Refuge and sufficient funds exist to manage and maintain same. The WMA shall be managed in accordance with the substantive terms and conditions of Section "C".

(B) NCDOT will, conditioned upon the approval of the State Transportation Board on April ___, 1999:

(1) Provide funding to TCF for acquisition of the WMA in an amount not to exceed Sixteen Million Three Hundred Thousand Dollars ($16,300,000.00).
(2) Provide Two Hundred Fifty Thousand Dollars ($250,000.00) to establish a management endowment account ("the Management Endowment") designed to partially fund TCF's development of an RCW management plan on the WMA.
(3) Accept title to the WMA subject to terms and conditions of the Easement within five years in the event USFWS is unwilling or unable to do so. In lieu thereof, NCDOT may identify another government or nonprofit 501(c)(3) organization mutually acceptable to the parties to take title to the WMA. The WMA shall be managed in accordance with the substantive terms and conditions of Section "C".

(C) TCF will, conditioned upon its acquisition of the WMA pursuant to a Contract of Sale of Real Estate between The Conservation Fund and PruTimber dated December 31, 1998:

(1) Grant to NCDOT a Conservation Easement (the "Easement") in a form substantially similar to that attached hereto as Exhibit "B".
(2) Provide a natural systems report, including a base-line RCW status and status of other Federally listed species for the WMA.
(3) Develop a management plan in cooperation with USFWS and NCDOT to optimize the development of RCW credits on the WMA provided, however, that the foregoing shall not obligate TCF to expend monies in excess of the escrow account established under (B)(2) above.
(4) Complete a biological assessment for any land disturbing or timber related activities to assure compliance with Section 7 of the ESA and consult with the USFWS for prior approval.
(5) Prepare an annual monitoring report of RCW activity on the WMA.
(6) Formulate and coordinate a strategy to address the concerns of Tyrrell County relating to the establishment of the WMA.

(7) Establish the Management Endowment which in addition to the $250,000.00 provided pursuant to paragraph B(2) shall contain net revenues generated from management activities (including timber harvest, hunting leases, camping fees, etc) and provide an annual accounting to NCDOT of all activities in the account. For purposes hereof, net revenues are defined as: gross revenues minus any and all direct costs, fees and expenses paid to outside consultants and timber managers, management, engineering costs, environmental studies, maintenance expenses, insurance, taxes, assessments and a TCF management fee not to exceed ten percent (10%) of gross revenue. Upon transfer of title of the WMA to USFWS, NCDOT or other party as specified in (B) (3), TCF shall also transfer the management account to the same party.

Amendment or modification of this Memorandum of Agreement may be proposed at any time but will not be adopted unless agreed to by all parties in writing.

**IN WITNESS WHEREOF,** the parties hereto have caused this Memorandum of Understanding to be executed as of the date below last written.

**STATE OF NORTH CAROLINA,**
**acting through the DEPARTMENT OF TRANSPORTATION**

**By:** _____ **Date:** 4-22-99
**Its:** State Hwy Admin, **Duly Authorized**

**UNITED STATES OF AMERICA,**
**acting through the U. S FISH AND WILDLIFE SERVICE**

**By:** _____ **Date:** 4/16/99
**Its:** Regional Director, **Duly Authorized**

**THE CONSERVATION FUND,**
**a Maryland non-profit corporation**

**By:** _____ **Date:** April 13, 1999
**Its:** Vice President, **Duly Authorized**

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Mr. POMBO. Thank you. Thank all the panel for their testimony.

Ms. Clark, just to start off with, I would like to ask you just more of a process question. After the witness list was formalized and made public, a number of the witnesses received phone calls from Fish and Wildlife Service inquiring as to what the nature of the testimony that the witnesses would be giving here today. Were you aware that that was going on?

Ms. CLARK. Well, Mr. Chairman, I actually saw the final witness list at about quarter to nine this morning. So, I was still trying to figure out where I sequenced in on the panels. I don't know specifically that there were conversations, but I don't think it is unusual for conversations to occur among folks that are going to testify, but I didn't—or people voluntarily told me that they were testifying. I did hear from some of the witnesses that either left me messages or with my secretary suggesting that they were testifying at this hearing today.

Mr. POMBO. In your testimony, you state that you do not require mitigation as part of the section 7 consultation, and yet the story that we hear is that it is required. How do you square that?

Ms. CLARK. Very carefully, Mr. Chairman. I actually had significant conversations over the last few days about the word "mitigation" and what is meant by mitigation, and, as I tried to summarize in my oral statement, it is very clear to me that the term "mitigation" in the technical sense is used much more loosely than is probably efficient, and we do take responsibility for that. When we are dealing with a kind of merging of the Clean Water Act, Endangered Species Act, all the kind of planning responsibilities and trying to be most efficient in addressing the needs of species and the needs of economic growth, I believe sometimes the word "mitigation" is used much more loosely than the technical or statutory term would allow. Mitigation in the legal sense, the policy sense, is truly only allowable in section 7 when it is part of a reasonable and prudent alternative; that alternative that is necessary to offset or avoid the jeopardy to a listed species. But the term "mitigation," the term "minimization," the term "offset" are used very loosely among all the parties negotiating what is needed.

Mr. POMBO. What term would you use if someone was developing a piece of property and they were told they had to set aside a third of their property as habitat that would be under control of either Fish and Wildlife Service or an NGO that would be named, or if they had off-site mitigation and they had to buy three acres of land for every acre they were developing, what term would you use to describe that?

Ms. CLARK. It would depend on the project, and it would depend on the species, and to answer you directly, many of the species that we are dealing with—let us just use California as an example, since it is high on people's minds—many of the species that are listed today in California are in dire shape. They are highly endangered and some approaching blinking out or extinction. And, so the notion of the status of the species, many of them are very close to a jeopardy baseline. So, if in fact we were dealing with a project that encompassed a large part of those species' remaining range and it were through section 10, we would be minimizing and mitigating. If it were through a Corps of Engineers or an EPA or some

other Federal connection and the species would receive a jeopardy biological opinion, a reasonable and prudent alternative would be some form of mitigation. Otherwise——

Mr. POMBO. I don't know why we are going back and forth on this. We can use whatever term you want to use. The Fish and Wildlife Service routinely requires an exaction out of the people that they are dealing with, whether it is development—I mean, when we dealt with the floods in California two years ago, there was a 5 to 1 mitigation, 5 to 1 exaction. I mean, you required them to mitigate—you don't want to use the word "mitigation"—you required an exaction out of them in order to do that, and there has been a series of these exactions that have been required, and in looking through the records and the testimony that has been presented here today, it appears that California, for some reason, is almost all the exactions that are being required are being done in California. Very few are being done outside of California proportionately. Even if you are talking about similar species and similar topography, we do not see the same kind of exactions that are being required in California being required elsewhere, and that is one of the reasons why a lot people begin to question the activity of Fish and Wildlife Service in California, because they don't see it in other places.

We had testimony about irrigation ditches and what the exaction would be for them to be able to use their irrigation ditches, and I am sure that—well, Mr. Gilchrest stepped out—but I am sure Mr. Gilchrest his farmers don't have the same kind of exactions in order to use their irrigation ditches. So, that question is out there.

I have more questions, but I will pick them up on the second round.

Would you like to respond to that?

Ms. CLARK. Well, again, I can respond to it in summary, but we will end up getting into a specifics discussion very quickly. The longstanding work that has been done in California has really set up some processes that blend all of the environmental statutes, and it blends all of the involved parties. So, the condition of the species, the projects that are involved often dictate the terms and an attempt to be equitable and an attempt to be efficient and an attempt to streamline processes, oftentimes, these kind of negotiated offset, mitigations, minimizations are arrive at. But what we try very hard to do is not have a cookie cutter approach. So, what may happen on the Eastern Shore of Maryland would not be what is happening in Sacramento, California. It is species-specific; it is project-specific, and it is negotiation-specific.

Mr. POMBO. I am not necessarily asking for a cookie cutter approach; in fact, you and I have had these discussions before.

Ms. CLARK. Right.

Mr. POMBO. But with the elderberry beetle, there was not a jeopardy decision that was issued. With the fairy shrimp, there was not. It seems like you are just requiring exactions in California every time that you come in on a section 7 or a section 10, and that is one of the concerns.

Mr. Miller?

Mr. MILLER. Thank you, very much, and thank you to the panel. Ms. Clark, just so you don't feel like you were alone in talking to

members of the panel or prospective members of the panel, many members of this Committee talked to members of the panel and people who didn't want to testify and people who wanted to testify and weren't allowed to testify, so it all kind of washes out here.

Let me follow up—you know, obviously—and we will hear from cities and developers and others—it is not easy to be a city and not easy to be a developer, whether you are commercial or residential or whether you are a city trying to expand its infrastructure, and it seems to me that if you look at the process in this country, at all levels of government, if you are a developer, the school board goes to the city council and says, "We need new schools. This is going to be new development. This development is going to have to take 100 percent responsibility for the capital costs, and they have to develop a school." Somebody else says "They are going to have to pay for the increased capacity in the sewer plant, in the waterworks." Somebody else says, "Well, we need the roads widened," so they are going to have to widen the roads, and if you want to build a tall structure in an urban area, they say, "We want setbacks" from the property line so you don't block viewsheds. I mean, this is a constant, constant practice of extractions from people who want to develop their property, whether it is under zoning or whether it is under neighborhood mitigation or wildlife mitigation, in this particular case, the client are species. But if the client is the school district or the client is the community that says, "Fine, we will accept 100 homes, but we want them to be transportation sensitive; we want them to be mass transit-friendly; we want running trails and hiking trails, and we want open spaces and parks, people say, "Yes, that is the way you create a community," and that generally has the support of the people who are there. And then somebody has to come in a advocate on behalf of endangered species because we have made a national decision about protecting and recovery of endangered species. So, I don't know that this all terribly foreign to the people involved in it.

I think when we get to the species, however, there is more ambiguity, if you will, or questions of whether it is listed or whether there are jeopardy opinions that starts to drift over. One of the witnesses later will testify about the effort to try to protect soil, and soil is not part of that. After long negotiations, finally, the admission was made, yes, really, they didn't have the legal authority to protect the soil in this case, and the entire nature of the mitigation was changed.

I think what I find as I deal with these from various communities and developers and others is that you don't want a cookie cutter approach; you want to customize to the needs and the species and the nature of the property and the habitat, but by the same token there really aren't very bright lines about how to proceed, and I think that is why a lot of people hold out hope for HCPs in the sense that you would then know on a larger landscape area how you can proceed and on a timely basis. But by the same token, we don't appear to have the resources to develop the HCPs within the Service.

I mean, time and again, the witnesses here this morning and the people who have come to my office and other Members of Congress, there is a long timeframe of trying to process these, and I just won-

dered if you could sort of tell us where you are in intensive areas like the southeast or certainly in the State of California in terms of matching up the demand and the resources? Maybe we will learn this from the GAO report too.

Ms. CLARK. And I do hope we do, because I think there is an amazing story to tell.

The notion of advocating for species certainly is the responsibility of the Fish and Wildlife Service and National Marine Fisheries Service, and I will tell you, to add to your list, it is not easy being a Fish and Wildlife Service employee these days either. But the idea of trying to respond to an increasing demand for economic growth and economic expansion—which is a good thing—and the need to try to balance it with species conservation needs—which is a good thing—is elevating and increasing exponentially, and I have seen it in my career in the Fish and Wildlife Service pretty dramatically.

We have had previous hearings where we discussed the deployment of resources in the Fish and Wildlife Service, but I am happy to have that discussion over and over again, because I think it is instructive. We try to deploy our resources where the biological hotspots, where the biological diversity, merges particularly with elevated and increasing economic growth, so it is not a surprise to see resources on the west coast, resources in the Southeast, resources being sent to the Southwest. That is where the biological hotspots are, and that is where the fastest growing parts of our country are.

We continue to juggle workload ourselves, as do our colleagues in the National Marine Fisheries Service, to address technical assistance demands and technical assistance needs, and when thing are going well, I don't tend to hear about them here in Washington, but when somebody is not getting a permit fast enough or negotiations are slowed down because we have moved onto something else, you can best believe I hear about it, and then we start sequencing and rearranging deck chairs. But the workloads are increasing dramatically, which is why I continue to go back to the President's budget request.

Over the past few years, our number one budget request has been in the endangered species consultation arena. That is the part of the budget that deals with technical assistance for HCPs and compliance with section 7. It continues not to be met, and we continue to stagnate in our ability to provide accelerated response time, which is frustrating not only for the applicants and the Federal agencies and the landowners, it is very frustrating for us as we try to work out creating landscape solutions. So, we continue to try to balance and to try to address the most demanding needs as best we can in hotspots around the country.

Mr. MILLER. Thank you. Just quickly, Mr. Bruton—my time is up—as I calculated, the mitigation costs for the Department of Transportation was roughly about, what, 3 or 4 percent?

Mr. BRUTON. Three and a half percent, sir.

Mr. MILLER. Three and a half percent? Thank you.

Mr. BRUTON. Yes, sir; that was those five projects that I mentioned, and over the $16 million divided by the $450 million, roughly, is about 3.5 percent, I think.

Mr. MILLER. Thank you.

Mr. POMBO. Mr. Calvert?

Mr. CALVERT. Thank you, Mr. Chairman. Ms. Clark, you are the one—I am one of those people you have been hearing from, I suspect. I want to thank you for coming before the Committee today to address some of our concerns with the enforcement of the Endangered Species Act.

I last saw you in March at the hearing before the Fisheries Subcommittee, and the Subcommittee sent some follow-up questions to you back on March 3, and, unfortunately, we have yet to see a response to those questions. So, I am hoping to see a response to those questions sooner rather than later; in fact, with the permission of the chairman, I would ask that we insert them into the record.

Mr. POMBO. So ordered.

Mr. CALVERT. With regard to the Corona case that the city manager of Corona indicated, the Corps initiated a formal consultation on May 20, 1998 and has yet to be resolved. This is certainly well over a year ago, well beyond the 135-day requirement under the Act. This appears to be a pattern. As you know, I have a number of those type of issues before us, especially around my district, which probably is impacted as anywhere in the country. How often does the Service meet the required deadlines?

Ms. CLARK. We generally—I can't give you a specific percentage, though I would be happy to tell you——

Mr. CALVERT. How about just a general idea.

Ms. CLARK. I would say, as a general matter, we meet it a good bit of the time——

Mr. CALVERT. Do you ever meet it in my area, in southern California?

Ms. CLARK. They tell me yes.

Mr. CALVERT. Any particular instance where you can point out that they have met that required deadline?

Ms. CLARK. I will tell you what I can do: I can get back to you a list of——

Mr. CALVERT. Yes, why don't you give me an idea, a percentage of the times in southern California you actually meet the required deadline under the Act.

Ms. CLARK. I would be happy to.

Mr. CALVERT. Does the Endangered Species Act allow retroactive mitigation on projects you have already permitted as far as 30 years, as in the case of the city of Corona?

Ms. CLARK. Retroactive mitigation——

Mr. CALVERT. Retroactive mitigation on projects that you want to have mitigated for 30 years of disturbance prior to today's date.

Ms. CLARK. Put the way you said it, Congressman, no. What it does do is allow us to evaluate the environmental baseline at the time that we are conducting the evaluation and address the conservation needs based on the environmental baseline.

Mr. CALVERT. So, the Endangered Species Act does not allow retroactive mitigation on projects——

Ms. CLARK. For something that has already occurred?

Mr. CALVERT. For something that already occurred.

Ms. CLARK. Not to my knowledge.

Mr. CALVERT. Mr. Workman, in your section 7 consultation for your maintenance projects, have the employees at the Fish and Wildlife Service demanded or required any mitigation for the take of species and what did they demand?

Mr. WORKMAN. Well, I would refer to that letter of August that I had mentioned earlier where the Corps has continually demanded 3 to 1 mitigation and threatened 10 to 1 mitigation, and what is interesting about all that is that our conversations as well as the tenor and tone as related to this long-term impact. A number of the discussions today have talked about not wanting a cookie cutter approach to solving these issues, but I would submit that we need a level playing field across the country, running from Maine to California, in how we deal with these things, and then, secondly, we need some sort of certainty that there is going to be something that is going to happen.

With your permission, I would like to give you another quick illustration of the things with regards to litigation, and in our particular case, we have an airport, a small recreational airport, located in the Prado Basin that has been there 35 years, and the FAA has continually told us we need to cut the trees down to improve the safety of the pilots flying into that airport. In contrast, the Fish and Wildlife Service sends us letters as well as orally tells us that they don't want any plane crashes there, because it hurts the environment. Well, I have got one agency saying, "Don't have any plane crashes;" another agency saying, "Don't cut down the trees," which is Fish and Wildlife Service. "And if you do cut down the trees, Mr. Workman, it has to be on a 3 to 1 basis," not three trees for every tree you cut down but three acres for every acre. If there is one tree in a acre and it is cut down, that relates to providing three acres of mitigation. So, if there was an approach that we would hope the Committee would take a look at and the Service would take a look at would be some reasonableness. If you are cutting down one tree to meet FAA regulations, that you plant another tree, and then we move on instead of this 3 to 1 mitigation that really becomes extraordinary.

Mr. CALVERT. But in comment to that, as a former pilot who used to fly in and out of that airport, I appreciate keeping those trees trimmed to a certain level.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Doolittle—I am sorry—Mr. Udall.

Mr. UDALL OF COLORADO. Thank you, Mr. Chairman. Good morning, panel. We appreciate you taking time to join us here in Washington.

Director Clark, I had a couple of questions for you. As you know, in Colorado, we have been grappling with a listed species, the Preble's Meadow jumping mouse, and in 1998, the appropriations bill included $400,000 for the Service to work with all these various entities to try and develop some momentum in this area. And, in addition, I understand another $400,000 has been appropriated for this year, but what I am hearing back home is that the money hasn't reached the people who need it, and, as you also know, recently I wrote you a letter, and I was curious if you had any update on that situation?

Ms. CLARK. I did, in fact, Congressman, talk to the regional director about that, and the response to your letter should be coming very shortly, and I will check into that as soon as I get back. But I know that there is a lot of effort and energy being expended in a very collaborative fashion. We have had folks out there from our Washington office to deal with both Colorado and Wyoming on it, and my impression is that the money that was appropriated is being allocated as it was intended, but I will gladly respond to you with the specifics of where the money is and where it went.

Mr. UDALL OF COLORADO. I would really appreciate that.

[The information follows:]

Mr. UDALL OF COLORADO. As you know, when these situations arise, it looks like delaying and stalling is occurring when instead there are very good intentions on the part of your Service and other people to move this ahead. So, let us continue to work together.

Ms. CLARK. I will be glad to follow up.

Mr. UDALL OF COLORADO. Let me move on to a related matter. I think you know, last week, Secretary Richardson was in Colorado. Congressman Tancredo and I and others were out at the Rocky Flats Plant, and the Secretary set aside 800 acres there for a wildlife preserve, and, as I understand, turned it over to you all to manage part of this buffer zone around Rocky Flats. Can you tell me a little bit about the timetable on which you are operating? What kind of consultations you are going to have with neighboring communities? What kind of resources you may need to implement this agreement?

Ms. CLARK. Sure. What Secretary Richardson announced at Rocky Flats, along with our regional director, was a cooperative effort whereby Energy has asked the Fish and Wildlife Service for technical assistance in evaluating the buffer areas of the Rocky Flats for their unique values and for their appropriateness as a wildlife conservation area. We made the commitment to Energy that we would conduct a biological inventory of the Rocky Flats lands and provide Energy with a sense of their richness. We did not make a specific commitment to bring the Rocky Flats buffer area into the refuge system, but we did make a commitment that we would evaluate it and consider it, along with the Secretary of Energy. So, the MOU or the commitment that was made is that we would work with Energy in a public collaboration to inventory the biological richness of the Flats area.

Mr. UDALL OF COLORADO. Do you foresee any need for legislative authority to move ahead in this regard?

Ms. CLARK. Not to my knowledge, but I will be glad to go back and check. I believe Energy and Interior both felt they had what they needed to work across agency and within the government to conduct the inventory.

Mr. UDALL OF COLORADO. I would like to make another comment on that particular site. I think it has been characterized to be very effective and I think model ground-up, grassroots effort where a lot of the local community citizen groups, other stakeholders have been involved in creating a vision for Rocky Flats and what it might look like after the post-cleanup. So, the more you can participate in that, as you move ahead, I think the better for all of us.

Ms. CLARK. Great.

Mr. UDALL OF COLORADO. Let me to another species—the black-tailed prairie dog. I know you have begun a nine-month process to evaluate the research and to consider whether it should be listed. Can you talk again about that process and how the public would be consulted and take part?

Ms. CLARK. Sure. We responded positively to a petition to list the black-tailed prairie dog throughout its range, primarily due to habitat fragmentation and some other threats to its existence. We, in the 90-day finding, suggested that we would do a more detailed status review, and that is underway right now in advance of ultimately a decision that will be made whether or not to propose it for listing. The Fish and Wildlife Service, along with the involved States and a number of the conservation community folks and agricultural community, have come together in a much more collaborative environment, bigger than the black-tailed prairie dog, because there are a number of species, like the black-tailed prairie dog, that are beginning to disappear in that part of the country, like the swift fox, like the mountain plover, and so they are looking at a more holistic way of addressing the needs of the species across that range. So, we are dealing with the petition process for an individual species, while we are actually trying to deal in a much more open landscape, public involvement restoration opportunity for the habitat throughout that part of the country.

Mr. UDALL OF COLORADO. Mr. Chairman, I know my time is up, but if I could make one last comment? I was out at the Rocky Mountain Arsenal a few weeks ago and want to commend the Fish and Wildlife Service for the work that is going on our there. We are truly turning weapons into wildlife, and while I was there, it was pointed out to me that the prairie dog, when you look at the whole ecosystem profile, that there are 140 species that are tied into the survival of the prairie dog. So, I think at great risk do we ignore the fact that we need to preserve this species.

Ms. CLARK. Thank you.

Mr. POMBO. Mr. Doolittle.

Mr. DOOLITTLE. Thank you. Mr. Weygandt, as your constituent in Placer County, I am very happy to see you here today.

From your testimony, it seems as if Placer County has been one of the more proactive jurisdictions in implementing much of the Fish and Wildlife Service has been asking. Yet despite this fact, it is troubling to me that the Sacramento field office has made the approval of important public infrastructure projects unnecessarily burdensome, and I just wondered if, for the benefit of the Committee, would you explain how the Fish and Wildlife Service's policy of service area impacts has been an impediment to the timely approval of important public infrastructure projects in Placer County?

Mr. WEYGANDT. Yes. There are three current public infrastructure projects that are very important to the existing development of the country from an economic perspective as well as accommodating the growth pressures that we are experiencing. There are two interchanges on a freeway, and one is a sewage treatment facility expansion.

Again, the idea of service area impacts, or what in California we refer to as cumulative impact, is not something new to us. We also

think that the notion has merit, but, clearly, there needs to be clarification and improvement as to the delivery of those policies as it relates to the Service.

In our experience, recently, beginning with the interchanges, there was correspondence issued that related the concerns about these cumulative impacts, but, in fact, when the county became involved initially in the process, the original discussions were simply a communication to the Service that the service area impacts, the cumulative impacts, in the first case, the Blue Oaks Interchange, were much more restrictive than for the map that Fish and Wildlife Service had reflected. In other words, we were collecting fees to build these interchanges based on a region that was far smaller than the large map that the Service had reflected in its letter. So, we communicated that; we communicated the methodology by which we had done the calculation of the fees, and we were able to make progress in that communication, but there clearly is a learning curve; there clearly was a delay in the project. The tenor of the communication caused a huge amount of anxiety, I think, in the community, and it is an area that in fact had already been taken into consideration in the local review processes that were necessary for that project.

And that is similar with the other interchange, the Pleasant Grove Interchange, and also in the city of Roseville Sewage Treatment Facility, it in fact was actually a regional facility. There are phases of it. The first phase, which needs to be initiated immediately, has included a huge amount of environmental review, years of environmental review, a huge of investment in that. And, again, that first phase is something that is going to be necessary to serve entitlements that have already been the through the review process. In the development community, they call the public sector taking two bites out of an apple for which they should only get one bite, and in fact I think everybody would acknowledge that environmental quality has a cost to it. What is incumbent upon those of us in the public sector is to make sure that that cost provides value, and if we are wasting costs by basically going through the cost cycle twice, it decreases the value, and all of us that are involved in the regulatory process, I think, needs to have incentives in providing that value to the constituents at the lowest cost, because that in fact is going to further environmental quality.

Mr. DOOLITTLE. How many months do you think you lost on those three projects having to duplicate this analysis on the service area?

Mr. WEYGANDT. I would say that on the one interchange, Blue Oaks, with which I am most familiar, because it is also in my supervisorial district, there, clearly, had processes been different, were probably three months that were unnecessary in terms of the timeframe that was used for the evaluation, and, in fact, if the process was such that the Service plugged into the review process in the very beginning, the evaluations could have been done concurrently, and there would have been no extra time or cost necessary.

In addition to that, politically, as the county was going through our legacy process, the implementation of our open space program, it created a huge amount of anxiety locally amongst the cities of

Rockland and a local development community, which didn't even help us further the politics of our legacy program, which has broad-based support amongst our constituents and unanimous at the board of supervisor level. So, there are other costs just in terms of time; it is politics also.

Mr. DOOLITTLE. My time is up, but is it only just three months. Is that the only amount of time we are talking about or was it a longer period when you consider all three of the projects, as you discussed?

Mr. WEYGANDT. That is a good point, and it is not something I guess I have the ability to definitively answer here. I know that the first correspondence that I saw was issued in early January. The Blue Oaks permits were received a couple of three weeks ago, perhaps, and I understand that the permits on the other two infrastructure projects were essentially completed or received as of yesterday.

Mr. MILLER. Would the gentleman yield just for a second? I know you are yielding your time that has run out.

Mr. DOOLITTLE. Well, yes, I will yield the time I don't have. Go ahead.

Mr. MILLER. On this point, Mr. Weygandt—because in the meeting I had with some of the Roseville people, the entitlements in phase 1 here were all agreed to and approved. Is that correct?

Mr. WEYGANDT. It is my understanding that those are correct, but that would have been a permit that was issued.

Mr. MILLER. And this was negotiations over a change in the footprint on the treatment facility?

Mr. WEYGANDT. That I don't know.

Mr. MILLER. I think that is the case, and I think this is sort of a little bit of a case—if I might make this point, Ms. Clark—is that there really was no authority to turn down the treatment plant and the phase 1, because it had been approved, but then through a tiny, tiny modification on the footprint, discussions were then leveraged into the phase 2 and what would the city be prepared to do and what would the waste treatment facility be prepared to do, which then started to threaten your ability to get underway in phase 1 to meet your commitments to developers, and I guess some commercial development or economic development was also taking place.

Mr. WEYGANDT. That is correct.

Mr. MILLER. And while there was no authority, you don't want to upset the people who are then going to rule on phase 2. So, you engaged in fairly protracted long discussions here under the cloak of some legal authority, but it probably wasn't really there, and I think that is what drives cities, developers, and others kind of people crazy from time to time, because a project that has, for all intents and purposes, been approved, is now being held up to try to leverage some discussions about future activities, because Placer County and Roseville, as I understand it, has this legacy, and Roseville is part of that, and this service area would be part of that, although the county is much larger than that. And, so you are kind of watching two scorpions dance here, and nobody wants to upset the other person when, in fact, even in this case, I believe the Service admitted, "Well, yes, we know you can go ahead, but we want

to talk to you about this," and that is where some of the delay came from in terms of, then, people being able to time the development with the treatment facility being able to take them on-line. And I just—you know, there is nothing illegal about this, I guess—but it is this drift sometimes where you are kind of leveraged into a position, because you are talking to the regulator, and sometimes that turns out to be real time and money for a city or for a developer or for others.

Mr. WEYGANDT. And, in fact, if I may, in phase 1 on the sewage treatment facility, not only was the permitting process evaluated in the sewage treatment facility, itself, the entitlements——

Mr. MILLER. Which it was going to service.

Mr. WEYGANDT. [continuing] which it would still be serving, have also gone through exactly the same exhaustive and expensive review, and, frankly, in my opinion, there is absolutely no need for any time delay at all, but it is a function of the culture and the effectiveness——

Mr. MILLER. And, as I understand it, the sewage treatment is part of the larger HCP, but it was all leveraging them into that decision. They could have gone alone on an individual permit, and I understand that, and, as I understand it, this thing, more or less, is going forward now, and it is okay, but it is that kind of leverage, I think, that disturbs people. I don't know—Director Clark might want to respond.

Mr. WEYGANDT. But then in addition to—with the Blue Oaks Interchange, specifically, there is public financing and bonding that was involved in a partnership between the city of Rockland and the local development community. The timing of that was very critical, and, again, the anxiety that drove the local politics kept me busy for a while more than I wished I would have been.

Mr. DOOLITTLE. Mr. Chairman, if you would indulge us, could we invite the Director to respond to the issues Mr. Miller and I have raised?

Mr. MILLER. I realize you don't have all of the facts, but I think this is the drift that we, as Members of Congress, hear all too often at the local level in terms of those who are trying to process the applications for permits and do other actions.

Mr. POMBO. This is the root of a lot of the problems that we hear about all the time. Exactly in the way this question and answer were laid out for you is the root of a lot of the problems we hear. I mean, what Mr. Calvert laid out a few minutes ago was a very similar problem. So, I think that I would like to hear your response to it.

Ms. CLARK. Well, I will respond, maybe not so much to the specifics, but I get enough of the gist of the frustration that I clearly endorse the frustration, and I can appreciate it on a number of projects.

What it does is send a signal to me, very strongly, that early involvement and early collaboration is key to success of these projects, and when you have sequenced issues, like the State CEQA process, that then is followed up by the Federal Corps process; it then has a Clean Water Act provision; then you have the Endangered Species Act, the county or the landowner, or whoever is having to deal with the "regulator" are seeing bite after bite after bite

at the apple, and they think they have something figured out, and they think they have a deal, and then in comes another piece.

And in this particular project, what I do know about it is there was a lot of stop and start, and there was some confusion over trying to understand the terms of the project and trying to understand the specifics involved, and I think it is back on course. But, I have talked with our folks, and we encourage them to try to get involved earlier in the process, so that if we resolve it during, for instance, the State CEQA process, then, quite frankly, we have no business coming back and tinkering and asking for more or asking for supplements. But, oftentimes, it is an issue of deployment of resources. What comes in the door first and just the shear demand for technical assistance that we don't have the ability to kind of stick with the process and get engaged in understanding the process sufficiently to address the counties' or the landowners' needs. But I believe a lot of this is and can be—without minimizing the notion of communication and early involvement—can be resolved if folks are working together simultaneously versus sequentially, which happens in a lot of these projects.

Mr. POMBO. Ms. Clark, I don't think that with these two projects, that either one was a surprise to Fish and Wildlife or they didn't know it was happening; that they weren't in on the process early; that they weren't completely and fully aware of everything that was going on. It was not a lack of funds or a lack of employees or anything. I think you basically had them over a barrel, and you were going to get a little bit more.

Ms. CLARK. Well, Mr. Chairman——

Mr. POMBO. Because you get to say yes or no, and they know that, and that is how we end up doing hearings like this.

Ms. CLARK. True, true. Well, this is, as I said in my opening statement, it is projects like these that I am happy to get personally involved in and look at with the regional directors and the folks. I think there are different stories and different perceptions here, from what I hear, but certainly looking at it personally is something I am happy to do in trying to keep these issues on track.

Mr. POMBO. Well, in my working with you, I know you have been willing to do that, and, unfortunately, you will probably have to move to California by the end of the hearing.

[Laughter.]

Mr. Gilchrest.

Mr. GILCHREST. That is not a bad thing.

[Laughter.]

Thank you, Mr. Chairman. Well, I am from Maryland, and my district is both sides of the Chesapeake Bay. This was not one of my original questions, but I will bring it up. I would like maybe some of the Fish and Wildlife people from California to move over here to my district, some of the enforcement people, because we are about ready to dump dredge material overboard into the bay that we have seen and the Corps of Engineers has concurred with us that it is going to equal the amount of nutrients that you get from the sewage treatment plant from the city of Annapolis as far as the ammonia and phosphorus release is concerned, and the Feds and the State don't require a permit for that release of nutrients. So, we are fighting that, and so if you have anybody from Fish and

Wildlife in California who wants to move over here and enforce that in my district, we will accept them, and we can send a guy here over there. He is a nice fellow, but the fellow here is okay, and he has been helping with this.

Some of the inconsistencies of the application of regulations is pretty amazing.

Mr. DOOLITTLE. If the gentleman will yield, I believe California has 193 out of a total of 345 nationwide.

Mr. GILCHREST. And the Chesapeake Bay has four. But, anyway, the early collaboration, I think, is really crucial on people that are able to feel that their opinions are respected to resolve some of these issues.

We have an issue, Ms. Dalton, that you are probably familiar with—it is a State issue, more or less; deals with the States, and it is Menhaden. Menhaden in the lower Chesapeake Bay does not need any management plan. You can catch as much fish as you want, and we are seeing a decline of a whole range of other species and problems as a result of overfishing of Menhaden.

So, we got a group of people together over a series of meetings—Fish and Wildlife, National Marine Fisheries Service, local Department of Natural Resources, charter boat captains, fishermen, all kinds of people—and we decided that the management plan for Menhaden has to be a certain amount for the charter boat captains, for the fishermen, for a range of other people that want those fish for economic reasons, plus, enough has to be set aside for rock fish to eat. They need, in order for the ecosystem to work, a certain number of Menhaden.

And the third thing that was important, among many other things, was that Menhaden are filter feeders. At certain stages, they eat zooplankton and they eat phytoplankton, and they filter the bay to make it cleaner, like oysters. And, so the bay depends on a certain number of Menhaden to do that particular job.

And, so, basically, what everybody did, through a series of meetings, almost coming to a successful conclusion, is understand, literally, the complexity, the virtual infinite number of variations and the mechanics of natural processes, and I think we have reached a stage of our development as human beings since the frontier is gone, our resources are being diminished, the population is increasing, and all we have left in all these communities is the democratic process and the character of the people engaged in that democratic process. And, so we really need to respect the motivations of other people; let them be heard; have a collaborative effort at the very beginning, and then move on, but understanding human beings have activities that impact the natural processes and not in the same way as Menhaden and rock fish used.

Agriculture is the biggest industry in my district, and we have seen improved management practices, so that not only is the bay coming back because of greater buffer strips, the grass is coming back and a whole range of other things. The whole region is becoming more prosperous for a lot of reasons—tourism is up and things like that—and I didn't mean to talk my whole five minutes.

The point is that—and I am not too—these guys will attest that my too crazy—Ken will attest it; Rick may not attest it——

[Laughter.]

[continuing] Jim Hansen—I am not too crazy, but, basically, we are marooned here on planet Earth. We are marooned here; this is it. We have the planet; we have our community. The children depend on responsible adults to collaborate and find out the best kind of information. I didn't know that Menhaden were filter feeders. I didn't know the reason large numbers of rock fish were dying of starvation was because they didn't enough to eat in certain portions of the bay. We got everybody together, and we stopped fighting, and we stopped arguing. We said, "How can we hold on to the resources that we have; manage what is left, because they are being diminished?"

Anyway, I think everybody up here has given fine testimony. You have each picked out a piece of the problem, and I think all of us together can help solve it.

Mr. POMBO. Mr. Sherwood.

Mr. SHERWOOD. Thank you, Mr. Chairman. I want to thank the panel. It has been very illustrative for me today to get into the depths of some of these issues, and, Ms. Clark, I would like to explore white-tailed deer with you a little more; that is an area of interest to me.

But one of the things that I am not satisfied with what we have done here today is I think you very frankly told us that you didn't think mitigation for prior—retroaction mitigation was in the law, and yet as I heard Mr. Workman's testimony, I am afraid your two statements are inconsistent, and I would like to explore that just a little more, because sometimes we don't see the facts the same, and I am not sure exactly what they are, but I have been trying to listen to both sides, and I think your position and maybe your office's position or Mr. Workman's testimony of your office's position are at odds, and I think that is one of the areas we need to run down, because there is a perception around that we all want the same goals. I think we all want the same goals that are the goals of the Fish and Wildlife Service, but we often hear that the ends to those goals create a lot of obstacles, and I think this is a good example of that, and I would like to explore that a little further.

Ms. CLARK. Be happy to. I was carefully listening to the testimony of the other panelists to see if I could isolate some specific challenges. The notion of retroactive mitigation, the notion of requiring something for something that has been already approved is an issue that I need to look into more specifically given specific projects and the policy that I believe.

But, again, I am convinced that some of this might be an issue of communication and perception and that some of this is related to—you have a project. Either the project changes or something changes, and there is a requirement for an additional permit, and when our folks are evaluating the environmental effects, they are looking at the baseline of the species; they are looking at the environmental condition of the cumulative effects of everything that has gone on before or they are looking at the baseline of the species and its habitat at the time they are evaluating the impacts of the additional extension, expansion, whatever is on the table before them. And it is based on that that they are making the rec-

ommendation of the decision on what is appropriate for mitigation and minimization.

So, as I was leaning back and talking to some of the California folks, I think it is entirely appropriate that the question is being asked and that we consider in detail some of these cases and see if in fact we do have a policy, which I am not clearly prepared to admit, or we have a mechanics, communication issue, and I would be glad to get to back you once I have had some more, kind of, detailed involvement in some of these projects.

Mr. SHERWOOD. Thank you. Mr. Workman, you made the statement about 30 years of mowing ballfields. Now, I would like to know specifically why you used that phrase? Is that a phrase that came from Fish and Wildlife or is that your interpretation of what they are doing?

Mr. WORKMAN. That is an illustration. When we talk about maintenance activities in the Prado Basin. In the Prado Basin, we have a variety of things that are going on—recreational activities, such as the airport I mentioned, the ballfields; we have a sewer treatment plant; we have drainage facilities; we have roads that serve the public. And that cumulative impact over 30 years has been with us, and we have dealt with it. We have worked effectively on a number of projects with the Fish and Wildlife Service, but in this particular case, in this Maintenance Manual, which is basically for not new construction but for things that are currently in place and what things we need to continue to maintain, whether it be drainage ditches or the ballfields, that is something specific that our staffs have discussed and looked for in terms of what that mitigation is going to be, and in making notes to myself here, I continue to think of things through this mitigation process and just to do these maintenance types of things.

They are also requesting that I hire a full-time patrol position in the Basin, so I have the means to respond quickly, quickly control any fires, environmental contamination spills, and the like to protect the environment. Well, this Basin is acres and acres and acres, and I would have to hire another fire department and police department to do what is being requested here.

So, when I use the term "ballfield," that is just one part of the things that are going on in the Prado Basin and that we are willing to talk about mitigation and very willing to mitigate for things, but 30 years of mowing ballfields and 30 years of cleaning ditches and 30 years of running airplanes in and out of an airport, that becomes difficult for us to understand.

Mr. SHERWOOD. Thank you.

Mr. POMBO. Mr. Gibbons.

Mr. GIBBONS. Thank you very much, Mr. Chairman, and as I sat here today listening to this panel and their presentation, my recommendation would be that we hold one of these hearings on the endangered species every week so that we can bring the administration to the table with many of the constituents in all our districts to have them hear some of the same horror stories, and I appreciate their patience with us today.

Mr. Chairman, of course, I represent most of Clark County, Nevada, which has the infamous desert tortoise, a species now which has accumulated over $30 million toward its restoration. I am curi-

ous just exactly how much money it is going to restore this species? If there is a time deadline, how many golden habitats do we have to build for the desert tortoise at this rate to achieve a significant recovery plan? How many more millions are we going to have to spend on this species?

Ms. CLARK. Well, I am assuming that is directed at me?

Mr. GIBBONS. Yes, ma'am.

Ms. CLARK. I can't give you the specific answer about what it is going to cost to recover a species. I could go into a long biological litany that our species didn't get to the status that they are overnight, for sure, and that there is a lot of development that has gone on that has affected them. But the desert tortoise actually does have a very comprehensive recovery plan that lays out a series of action tasks and responsibilities and implementation tasks that will ensure its recovery and ultimately delisting, and, from what I understand, it has been a pretty involved process and a pretty collaborative process that involves academia, even, in assessing the biological status and biological needs of the species.

Mr. GIBBONS. Could you give us an update what the status is today with the desert tortoise? Whether it is recovering? What your predictions are as far as having it recovered?

Ms. CLARK. I would be glad to get back to you for the record. I don't have the specific information.

Mr. GIBBONS. Let me go off on another area. I noticed from these special funds, which—of course, the desert tortoise has a Desert Tortoise Public Lands Conservation Fund, which we have just talked about—which has over $30 million in it. That is for one endangered species in Nevada, and yet I see Hawaii on the list here with 298 endangered species with no section 10 permit requirements, no habitat conservation plans. Can you tell me how many special funds there are in Hawaii for these 298 endangered species at the present time?

Ms. CLARK. I don't know if there are any special funds, but I can tell you a little bit about the difference between Hawaii and Nevada.

Mr. GIBBONS. Well, I think everybody in this room can tell you the difference between Hawaii and Nevada, but I think it is the species we are after. Why the difference between Hawaii, which has 298 endangered species, doesn't have any section 10 permits, doesn't have any habitat conservation plans, and why aren't there special funds for these?

Ms. CLARK. What I was referring to, Congressman, I was trying to get at, was the difference between the State laws, and the State of Hawaii, until very recently, had a State endangered species law that prohibited the take of species, which was actually much more stringent than the Federal ESA, which allowed for permits to take species. So, the State law often trumped the Federal law in protective capabilities and protective oversight of the Hawaii listed species. Unlike Nevada, which tracks much more closely to the Federal law that allows for mitigation, allows for incidental take of listed species. It was very recently that Hawaii relaxed, if you will, or clarified their law to allow for incidental take, and in fact we are engaged with the State and private landowners in habitat con-

servation planning and consultations to permit the take of listed species.

Mr. GIBBONS. So, in the future, we will see the same habitat conservation plans enacted in Hawaii, the same special funds for species recovery?

Ms. CLARK. You very well may see—and I would expect you would—habitat conservation plans developed for species in Hawaii in accordance with State and Federal laws.

Mr. GIBBONS. The same type of mitigation requirements in a 3 or 10 to 1 offset?

Ms. CLARK. Again, it would be species-specific and project-specific, so I can't dictate or project the—predict the outcome of these negotiations, but it would be done according to the species and individual needs of the project.

Mr. GIBBONS. One final question, Mr. Chairman, to parallel your first question that you asked Ms. Clark, did you initiate, request, or direct yourself or anyone on your staff to question the panelists on what their testimonies would be?

Ms. CLARK. No, sir; I did not.

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

Mr. POMBO. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. Director Clark, I wanted to ask you, does your agency or, Ms. Dalton, does your agency issue incidental take permits to people who are fishing in the ocean for the salmon—commercial fishermen?

Ms. DALTON. Basically, the way that we have dealt with ocean fishing is through a fishery management plan. For example, we just had a fishery that was opened up for hatchery-raised Coho Salmon, and what they will do is manage it, in part, under an incidental take statement pursuant to a Biological Opinion rather than a section 10.

Mrs. CHENOWETH. Under this plan, is there mitigation required for replacement of the take, like 5 to 1, like we have heard testimony?

Ms. DALTON. Well, the fishery, itself, is directed entirely on hatchery-raised and released fish, so there is no mitigation required. Fishers are required to release any non-fin-clipped salmon that they catch, and those are generally released alive.

Mrs. CHENOWETH. Director Clark, what is being done about the problems with the terns at the mouth of the Columbia that are taking thousands and thousands of salmon through predation?

Ms. CLARK. Our folks are working, along with National Marine Fisheries Service and others, I believe the Corps of Engineers, to look to phase the terns off of the island and to try to move this colonial nesting colony to other islands. So, we are actively engaging with the other Federal agencies in the State to try to move the terns. It is only part of the solution, for sure, but we have not stood in the way of either National Marine Fisheries Service or the Corps in trying to phase these birds over into some other historic nesting habitat.

Mrs. CHENOWETH. There is something wrong with this picture. We just heard Commissioner Schulz testify that because of the listing of three anadromous fish they can't turn their water out to their ditches, and their farmers are not able to irrigate, and yet we

have massive taking in the oceans through commercial fishing; we have massive taking through predation, and both Services are imposing unbelievable restrictions on Okanogan County, and, frankly, I strongly suggest that there is no jurisdiction for the agencies to do this.

Mr. Schulz, I think your testimony was utterly shocking. In light of a recent Supreme Court decision, Bennett v. Plenner, the court ruled unanimously that humans are within the zone of interest to plead for their damages, and in your testimony, you have set forth four terms that you would like for us to cooperate with you on. One of the terms is, you would like some financial support, and I can understand why; your county is drying up. Your mining has gone down; your timbering has gone down, and now they are going after your farmers, and your farmers aren't able to get their water. And you come to the Congress and request that Federal funding be made available through the Federal Columbia River Mitigation Program, hoping that a few crumbs will trickle down to Okanogan County.

Well, Commissioner, I want to suggest that what the Services are doing is taking the property, and you ought to be in this Congress demanding with your property owners—who, without that kind of production on their property, your tax base shrinks—you ought to be demanding from this body the full restitution for the take. Now, the President has been sent numerous times, most recently with the new world mines where the taxpayer ponied up $66 million for the taking of a mine.

I suggest to Mr. Schulz, I am just furious that by mitigation when the agencies say, "We don't want to do away with the hope of cooperative agreements," they get the county to sit down and mitigate an HCP plan on waterbanking, and the county becomes involved in an agreement where they accept liability. The State, your watermasters in Idaho—I mean, in Washington, also, work directly for the State, not for the county, and so the county has become involved in an agreement and accepting liability for something the Federal Government is imposing, and the recent Supreme Court decision, such as Bennett v. Plenner, such as Page v. U.S.—Bennett v. Plenner was a Supreme Court decision; Page was a court of claims or a claims court decision. It is instructive out there; they have no jurisdiction in your ditches, and I would just encourage the county—excuse me, Mr. Chairman; I would like just one more minute—I would—one more minute? I would encourage the county to protect your property rights, protect your water, because the way things are going, the county is being set up for a liability that you shouldn't have to assume. The Feds have to be asked for permission to sue, but you don't.

So, I just think that you need to take another legal look at what is happening out there in Okanogan County with the whole line of Supreme Court cases and water cases are on your side, and I would encourage your ditchmasters and watermasters to open those head gates and let that water flow, and if the Federal Government doesn't like it, they can try to stand on your line of cases that have stood with the irrigators in the States. Your testimony was startling, and I wish you luck, sir.

Mr. SCHULZ. May I briefly comment?

Mr. POMBO. Yes.

Mr. SCHULZ. I have been involved in the planning department for 17 years and 7 years now as a commissioner. So, 25 years, we have worked very hard in Okanogan County to protect the environment. We are very concerned about the environment. On the PDs, that is the plan year development—we have very tough zoning laws—we allowed a development, a very small one of eight units to go in, and that individual put 97 percent of his land in open space for our key and critical and all our different species. He gave up 80 percent of his water right for in-stream flow, and I was told last week that is not enough. They will shut him down completely, because there is not enough water in his in-stream flow.

Mr. POMBO. I have got to interject. Who said it is not enough?

Mr. SCHULZ. The National Marine Fisheries Service.

Mr. POMBO. But they don't require mitigation, so——

Mr. SCHULZ. They are working on that now.

Mr. POMBO. Mr. Tauzin?

Mr. TAUZIN. Thank you, Mr. Chairman. Let me, first, make a couple points, and then I will get some responses. We are seeing several trends associated with mitigation, which is one of the reasons we are so concerned about the way it may be inappropriately used in the ESA cases. One of the trends, of course, is good on the one hand, it is the development of mitigation banks, such as has been described to us in North Carolina. Other States are developing mitigation banks. Landowners are putting their lands in mitigation banks, in some cases, and making a killing, however, because the ratio of mitigation keeps going up—1 to 1, 2 to 1, 5 to 1, 10 to 1. We have a case in Louisiana where there is now a 2,200 percent increase in the rate of valuation of mitigation required in wetlands cases—2,200 percent increase in a couple years. Some landowners who are lucky enough to be in that mitigation bank are making a killing.

The problem is, is that it has to do with two things. Number one, there is no apparent legal definition of what the ratios ought to be, so that somebody ends up having discretionary power to decide whether it is going to be a 2 to 1, 5 to 1, 10 to 1, or 2,200 to 1 ratio in mitigation, because Congress has never defined what is appropriate in terms of a formula to decide what is proper mitigation. Somebody out there has the power of King John or King Richard who walk around the land deciding, on an individual case, who is going to contribute how much to the general fund depending upon their particular view of the situation out there. How many chickens, how many eggs, how many cows have to be slaughtered to satisfy the King today? And there is no law governing, no protection for the citizen, but there is a limit on that individual. The problem with the mitigation banks, which have been generally regarded as good features on the landscape, is that very wealthy applicants keep raising the bar for everybody else. On the one hand, they enjoy the relative bargaining power, because they may have some ability to bargain better with the agency on what is going to be required of them in a mitigation circumstance. On the other hand, because they have such good resources at their disposal, they are building a big development project or it is an oil company that is going to spend a ton of money to develop a property for mineral

value or a coalminer or whatever it is, a mineral mining company, that they raise the bar. They agree to these large percentage mitigation requirements, and all of sudden that becomes the standard for every small landowner who doesn't have that kind of bargaining power—the farmer down the street; the family that wants to build on a one half acre plot of ground, build a home for their kids. The bar gets established and all of a sudden they all have to meet it, because that is what is required. You have got to contribute to the mitigation bank, and if there is a 2,200 percent increase this year, so be it, even though Congress never enacted a tax to that degree for the purposes of conducting whatever protection we want to conduct in this country.

And individuals working for your agencies end up making those decisions. We hear from the testimony and from the evidence presented to this Committee, that biologists are going around requiring mitigation under section 7 when the agency says it is most inappropriate to do so. I guess, we have sort of turned the Fifth Amendment on its head. The Fifth Amendment says you are going to be compensated when the government takes your property. That is now been turned on its head, and the government, through a biologist, can tell you how much you have got to pay to use your property, and they can determine how much that is going to be on a given day. And the rich in our society are setting the bar for the poor. This is becoming a real ugly mess, and it is not creating a world where landowners are cooperative agents in preserving species. They are becoming enemies, and we ought to be working together for a common cause. We have got to do better.

Let me ask this—I just want to get one answer from each one of you, Ms. Dalton and Director Clark. If you catch your biologist requiring mitigation when you testify it is inappropriate, what is your responsibility? What are you supposed to do in those circumstances? Either one of you.

Ms. CLARK. Let me try and clarify your question. If——

Mr. TAUZIN. If you are presented with a case where your biologists out there are requiring or pressuring or leveraging the power of the government to insist on mitigation, either on- or off-site, when you have testified and your agency policy says that it is inappropriate to do so, what is your obligation under those circumstances, each one of you?

Ms. CLARK. Well, certainly, my obligation—if I believe that the mitigation or minimization doesn't match the project design, my obligation, as Director, is to correct it, and——

Mr. TAUZIN. How about where it is not required at all, and it is being required, what is your obligation?

Ms. CLARK. Well, I think it falls under the same category. If in fact I have not seen—in the earlier part of the discussion in this hearing, we talked about the confusion over the term "mitigation" and the fact that mitigation is tied to the specific projects and the specific species, but, certainly, if indeed anybody in the agency, including myself, has made a call that could have been different, could have been better, then I think we are obligated to correct the call and to fix the decision.

Mr. TAUZIN. Which means to undo the requirement of mitigation?

Ms. CLARK. If that is the issue. I have not seen——

Mr. TAUZIN. Ms. Dalton, is that your responsibility too?

Ms. DALTON. As an agency we probably have had less experience with this. Most of it has been in the area of endangered salmon. My understanding is that we do have a fairly standard practice when there is riparian habitat that is eliminated or lost in the course of an activity. We have a 3 to 1 replanting requirement.

Mr. TAUZIN. Who decided that it was 3 to 1?

Ms. DALTON. From the biological standpoint, what we estimate is that if they replant the area in a 3 to 1 ratio, the net productivity that they get out of the final product——

Mr. TAUZIN. Could you change it to four tomorrow if you wanted to? If you decide—your biologists tell you to move it to 4 or 5 or 10 next week, if they wanted to?

Ms. DALTON. It would be incumbent on us, I think, to use the best biological information we have available.

Mr. TAUZIN. But you could do it, couldn't you?

Ms. DALTON. Sure.

Mr. TAUZIN. Yes. Thank you, Mr. Chairman.

Mr. POMBO. Yes, we are going to do a second round.

Mr. Workman and Mr. Weygandt, both—you both talked about accumulated impacts with this service area or whatever. How do you mitigate for accumulated impacts? So, let us say, activities over the past 30 years, if you have a new development or new activity coming in to your city or county and Fish and Wildlife says that you have mitigate for activities over the past 30 years, how do you pay for that? Where does the money come from?

Mr. WORKMAN. Well, one of my areas of expertise is governmental finance, and I always use the term "it is a mandated cost," either from the State of California or from the Federal Government, and I don't have a way to pay for that, particularly for it being a public use in the Prado Basin that we are talking about. There is a long-term lease from the Federal Government, so I can't go back and charge anybody for the types of things that are going on there.

Mr. POMBO. In a current law, you can't charge a developer for accumulated impacts. You can charge him for his impacts.

Mr. WORKMAN. I imagine I can charge him for his impacts, but, again, in the city of Corona's case, I would be charging myself and charging the citizens of Corona——

Mr. POMBO. So, there would have to be a general obligation bond for the city of Corona.

Mr. WORKMAN. Obligation bond or raise the property tax or divert money from other areas that are very important to the city.

Mr. POMBO. Mr. Weygandt?

Mr. WEYGANDT. Pretty similar answer. One of the benefits I think that we have at our disposal in Placer County is that as we start this NCCP process or HCP process or whatever it ends up being, if that ends up being a constructive effort on our part, we feel that we are a good 20 years before being in a crisis situation, so the cumulative impacts, especially as it relates to endangered species, are something that we some management flexibility in. But, again, in the context of economics, obviously there is a cost of those mitigations. From the private sector it, in our county, is born by the developer, which essentially passes it on to the consumer.

Mr. POMBO. But you can't charge the developer for anything more than his developments impact.

Mr. WEYGANDT. That is correct. There is the nexus rule, so there has to be a strict correlation between that project's impact and what is extracted from them with regards to traffic or whatever else there is. But, if, for example, in their negotiations with other agencies, those mitigations are different, then obviously that cost is borne by them and the result is on the consumer. If it is a public works project, the cost is borne by the residents who live there in the same way.

And as it relates to ratios, one of the—as this technology, if you will, develops, we, again, have a mitigation bank in our county, and I am a proponent of that notion. Our bank, because it has been effective, has the ability to sell credits down to—I am sure it is at least one-tenth of an acre; it could be one-hundredth of an acre, I am not certain. So, getting pretty good at that science and the question of ratios and the resulting costs are, again, another area that certainly could be reviewed and visited upon as it relates, again, to the economics or the context of all of this.

Mr. POMBO. And you entered into this habitat conservation plan, countywide habitat conservation plan, in an effort to satisfy Fish and Wildlife?

Mr. WEYGANDT. We had multiple incentives for doing it. The county, again, in its general plan has a "no net loss" policy, and there is a lot of policy articulation with regards to protection of habitat and specifically endangered species, so part of what I am saying is that we have incentives that are local that reflect those goals. The NCCP component of Legacy which, again, is only a component of it, is desired for a couple of reasons. One is, we want to maximize local control over that process, so if we can negotiate an agreement with the Service and the Army Corps of Engineers and essentially be the permit-issuing entity at the local level, especially as it relates to economic development programs, for example, when a company, like HP, looks in our area—and we are fortunate to have some very quality manufacturers in South Placer—they need a very quick timeframe by which to typically make their decisions to do a site location. So, if we can even streamline that process at the county, there is huge benefit to it.

Mr. POMBO. Now, let me ask you this question: after you have this set up and in your effort to satisfy the Federal agencies, in your effort to meet your own general plan objectives, if there is a new endangered species that is listed and Fish and Wildlife revokes your ability to mitigate your impact by using this and you have to go back to the drawing table, you have to go back to the negotiating table with Fish and Wildlife, what kind of position does that put you in for the future?

Mr. WEYGANDT. It could potentially be devastating, so we will be going through those processes. Again, the cost is tremendous.

Mr. POMBO. You would be starting all over again.

Mr. WEYGANDT. We would be, and we are going forward under the notion that—the theory of "a deal is a deal" is going to be honored by both sides as we complete those negotiations. And, again, that is also a policy issue, but we are working hard to have our policies based on good science which not only considers our existing

endangered species but, in total, the habitat and the county and potentially any likely to come listings but also the context of just good management for those resources.

Mr. POMBO. According to a recent report, the Fish and Wildlife Service plans to add a new twist to "no surprises" rule that they would allow the HCPs to be revoked if they are found to jeopardize species.

Mr. WEYGANDT. And, again, those—we will be going through those negotiations, but——

Mr. POMBO. Then they are telling you a deal is not a deal.

Mr. WEYGANDT. Well, and if that were true, it would be potentially devastating to our negotiations.

Mr. POMBO. Mr. Miller?

Mr. MILLER. Thank you. I want to revisit—Director Clark, I want to make sure that we are properly interpreting your answer. When we talk about retroactive mitigation, your answer to that when asked was about reviewing the baseline, and that is obviously you take the habitat or the species in the condition in which you find them and then the question of whether or not a use of the property is going to cause further degradation of that species or habitat, then it has to be dealt with on that property. And, so one of the problems I find is that it is sort of the last person through the door pays the heaviest price, and I think that is why a lot of developers and others like the idea of an HCP, so you can spread it out across the landscape. In one form or another, more or less, you are dealing with a degradation of species and habitat because of prior uses of the land and decision that have been made in the local community. Is that a fair statement?

Ms. CLARK. That is a fair statement.

Mr. MILLER. I don't see—I guess we keep treating this as somehow foreign or unique, but there is a lot of landowners today that have 30-foot or 60-foot setbacks on their property, because of traffic loads that are already in the community, and other people on their property had 10-foot setbacks, and I appreciate that there is a nexus—we all like to pretend there is a nexus—but I think the local planning commissions and city councils and boards of supervisors stretch the nexus sometimes the way we are critical of Fish and Wildlife stretching the nexus.

I know developers that have to build child care centers that far exceed the capacity of their subdivision. I know developers that have to build a school that far exceeds the capacity of their subdivision, and I know people who can move into that community in an older home with seven kids and don't pay anything, but they are going to send their kids to that school. We have made a decision that we are going to load all of these costs on a new development. Every city council, every board of supervisors does that time and again. If we are pretending that the only obligation to the developer is for the burdens of the subdivision, it just isn't so, because there is a lot of developments that are designed for people whose families are more or less grown, have very little burden on the school system, but they still have to meet a square foot tax on bedrooms or however it is to meet the obligations the obligations of the local communities. That would be retroactive mitigation; in some cases, futuristic mitigation beyond even that development.

So, I am not sure that this is all so unusual as cities plan, as counties plan, and as Fish and Wildlife or National Marine Fisheries requires. Mitigation in ocean for example, you were asked by Mrs. Chenoweth about this. People in California have had their seasons shortened. They lost 10 fishing days or 20 fishing days. The sizes move from 31 inches to 35 inches. If you are a party boat owner or you are a commercial fisherman, that is big time mitigation, and that is true—we have done that just as we do for recreational fishermen; For hunters, we limit the number of ducks; we limit the kinds ducks; we limit the number of days you can hunt; For fishermen, we limit the number days you fish, what you can take, what you can't; some streams, people decide are barbless or not barbless or catch and release or not catch and release. That is all mitigation. I mean, that is sort of the glue that holds this together as a society is that different people make a series of different decisions that have a cumulative impact, and if you don't do it right, then the people take into their own hands, like they are doing in the congressional district next to mine where we have four initiatives on the ballot that say if you want to develop more than 10 houses, you have got to go to the people in a direct initiative.

If you think developers are unhappy with mitigation, try ballot initiatives. That is why I think they now want to sit down and talk about having an HCP in Contra Costa and Alameda Country, because they would rather have one HCP than have to go to every community on a ballot initiative. Those ballot initiatives are probably going to pass this fall. Now, you are talking about serious mitigation when you have to run a campaign every time you want to develop your property. So, let us not pretend like this is a one-way street.

I have got 20 seconds left here. Let me just ask you a question. When we talk about resources, Director Clark, if HCPs seem sort of what county government is looking forward to doing for getting certainty—Mr. Tsakopoulos will testify later as a major developer in the Sacramento area. The HCPs make sense, developers in my area think so, counties, the cities. Is there a way or should we be thinking about putting additional resources available to you for the development of these HCPs, because you seem to be sort of doing that on one hand and then trying to do the individual permits on the other hand? You have got the plates and the sticks going pretty well here, and then somebody suggested we have a hearing a week, so you can put that plate on a stick and do it, and the we are going to send you some subpoenas, and you can do that.

But on the question of HCPs, does it make sense to try to talk to the Appropriations Committee about putting additional resources so that we can get some of these landscapes done, because one of the things I have heard from other counties is, "Yes, we would love to have that, but there is really no benefit in the timeline to getting that or getting individual permits." There is all the benefits that are outlined in this book in terms of certainty, in terms of public participation, and all these other things that take place between individual permits and HCPs, but it takes so long to get to the end of the HCP where then you have the certainty you are looking for.

Again, time is money in this world. Does it make any sense for us to look at whether or not, for these projects, whether that would make sense in our region so we could get these HCPs done? I think in your county you said you are waiting approval of the one in San Joaquin, and everybody is watching to see if that will really work.

Ms. CLARK. Well, certainly, it makes great sense to get any support this Committee is willing to——

Mr. MILLER. But can you segment your workforce like that?

Ms. CLARK. Pardon?

Mr. MILLER. Can you segment your workforce for people that would do HCPs?

Ms. CLARK. Well, we can segregate. In fact, that has happened to some degree in California, and, as I said earlier, our number one demand for Fish and Wildlife resources is either in the section 10 HCP or the section 7 consultation arena, and that—California is a much greater scale of what is happening nationwide. It is our number one budget request for the Endangered Species Program in 2000. So, any support the Committee would give us or National Marine Fisheries Service would be welcome.

Mr. MILLER. Well, that is a good question. This is all sort of a roll of the dice.

Mr. POMBO. We were just talking—yes, this is a roll of the dice, because you are being challenged on your HCPs in court, and what happens if all these developers and counties all go into HCPs, and we put more money into developing HCPs, and you lose in court?

Ms. CLARK. Well, there are challenges, Mr. Chairman, on a number of fronts. We are very proud to stand with the applicants on the deals that are made for the HCPs that have been approved by us. We are being challenged in areas that are very concerning to the Fish and Wildlife Service. Certainly, the "no surprises" issue continues to be challenged, but we are working very hard on that issue. We are being challenged in areas like whether or not we are following through on the monitoring requirements and the effectiveness evaluations of the HCPs that we have already approved. We don't, quite frankly, have the resources to go back and evaluate whether the terms of these HCPs that have been approved, negotiated and approved, are actually being carried out. So, we have folks out there that are coming to us or filing suit suggesting that the deals that we made or the deals that we entered into in fact aren't being evaluated, and we are getting challenged for not enforcing the Endangered Species Act, so to speak. But, clearly, the deals that we have made, if followed and implemented according to the terms of the agreement, are ones that we feel very confident can withstand any challenge.

So, where we are being challenged is not necessarily, though, in some cases, are on the substance, and we are happy—I am happy to put any of our biologists on the stand to debate what they ultimately negotiated and whether or not they believe it is appropriate for the species, because I know them well enough to know they wouldn't enter into a deal they didn't believe in.

Mr. POMBO. But the bottom line is you are being challenged on the very ability of Fish and Wildlife Service to enter into HCPs.

Ms. CLARK. No, we are being——

Mr. POMBO. Because those HCPs, in order for them to work, have to include the "no surprises," have to include the other things you are being challenged on, and if those provisions are thrown out, then the HCP crumbles.

Ms. CLARK. Well, you are right, but the "no surprises" policy, regulation, is under challenge. Our folks feel very confident that we are going to withstand that challenge, and we have a lot of folks working hard at that and solicitors and the Justice Department.

Mr. TAUZIN. Will the gentleman yield?

Mr. POMBO. Yes.

Mr. TAUZIN. Is part of the defense of the "no surprise" policy that you can surprise the landowners, nevertheless? Aren't you proposing a change in the rules that would say that the biologist who enters the HCP can later on determine that because of so-called unforeseen circumstances the "no surprise" is avoided? I mean, that is the argument you made in court. I am reading from an article in the Endangered Species/Wetland Report: "The Fish and Wildlife Service plans to add a new twist to 'no surprises' rule, which would allow"—the argument in court is that under very narrow circumstances, they would in fact revoke the incidental take permits despite the "no surprises" agreement.

Ms. CLARK. I don't know what you are specifically referring to, Congressman, but I believe what this issue is all about what we have been asked on a number of occasions: Is a deal a deal? And in the event unforeseen circumstances come up and the species is in jeopardy, what would we do? Would we stand by the terms of the deal and allow the species to go extinct or would we step in and address the permit? Both Secretaries have said on numerous occasions, as have we, in negotiating these deals that we believe there are adequate Federal authorities to step in before a species would reach jeopardy, but it is——

Mr. CALVERT. Would the gentleman yield?

Mr. TAUZIN. The Chair has the time. If I could just finish—would the gentleman yield further, just quickly?

The story goes on to indicate that the Assistant Secretary of Fish and Wildlife and Parks, Don Barry, he signed a final rule on this matter on March 22; expected in the Office of Management and Budget and cleared for publication. So, there is a new rule coming out saying that the "no surprises" agreements can be voided at the discretion of the biologist?

Ms. CLARK. There is a rule jointly between our agencies that clarifies the jeopardy issue. This isn't new; it never has been new, and the issue of jeopardy to a species has always been inherent in all the negotiations. What Assistant Secretary Don Barry has also testified to, we had to clarify what jeopardy means for the regulation, but we also feel very confident that there are enough incentives; there are enough other authorities, and there are enough other opportunities to address the species' needs that would continue to decline through no fault of the implementation terms of an HCP, such that jeopardy would not be arrived at. It has never happened yet, and we intend for it not to happen through our negotiations.

Mr. POMBO. Mr. Calvert.

Mr. CALVERT. Thank you, Mr. Chairman. Isn't it true that San Diego County has an HCP?

Ms. CLARK. Yes, it is.

Mr. CALVERT. What happened recently with the Quino Checker Spot Butterfly? Would you say that that is a violation of the "no surprise" letter? Since the Quino Checker Spot Butterfly was added—since it was not on the list of species, supposedly; it was entered into under the original HCP. Somebody mistakenly had forgotten that particular species. Haven't you, in effect, obliterated the HCP process in San Diego County?

Ms. CLARK. No, Congressman, we haven't. The "no surprise"——

Mr. CALVERT. What would you call it to the landowners in San Diego who are unable to develop their property; who went in good faith to put together an HCP; who are now, in effect, being held in jeopardy, whether you want to call it that or not, because they can't get permits to develop their property?

Ms. CLARK. "No surprises" is a policy and is a part of the deal that is made under the terms of an HCP, but the "no surprises," "a deal is a deal" is extended to those species that are covered by the deal. The Quino Checker Spot was not covered by the deal.

Mr. CALVERT. Well, if you mistakenly—there is, as you know, the process of putting together this list, and nobody, I guess, foresaw the Quino Checker Spot Butterfly. I understand in Orange County—the gentleman from Louisiana pointed out—where wealthy people can tend to make deals, there are two or three landowners that own most of Orange County, were able to enter into an HCP by concentrating density of development in certain areas and putting up the rest of the property as open space. They are frantically looking through their list right now wanting to amend their HCP process because certain environmental groups are coming on saying that the HCP is not enforceable, because there is going to be species added to—that are endangered that are not on that list, and isn't it a fact that you can then, if they are added to the list, that you can stop development within those areas even though they have an HCP?

Ms. CLARK. Species that are not covered by the terms of an HCP that we or the applicant haven't anticipated are not covered by the "no surprises" regulation, but——

Mr. CALVERT. Okay, and, furthermore, in the Agua Mansa industrial area in Mira Loma where the developer was required by the lender to go out and get a clearance letter from Fish and Wildlife who picked the biologist and showed the property clear of endangered species. And then went ahead and put $60 million worth of infrastructure, and then down the road Fish and Wildlife finds the Flower-Loving Delhi Sand fly and stops development in the Agua Mansa industrial area. Wouldn't you say that that is a violation of the "no surprise" letter?

Ms. CLARK. I don't know the specifics of that case. I would have to look at it.

Mr. CALVERT. I just wanted to point out to the chairman and to the Committee that there are some problems with the HCP process that we are going to have work out, because at Riverside County, we are—as you know, we are trying to put together an HCP, and we are trying to work with the landowners, the developers in good

faith, but at the end of the process, we must know that we have an agreement; that we are not going to be back here in three months or six months or two years and revisit this issue in an area such as southern California where we are always going to have conflicts.

Thank you, Mr. Chairman.

Mr. POMBO. If the gentleman would yield for just a second, this is the problem with the agency doing something and Congress never authorizing it, because it is a habitat conservation plan, not a species conservation plan, but it is being adopted as a habitat conservation plan but being implemented as a species conservation plan, and Congress has never laid out the ground rules that they are supposed to play by, and this is why when we try to look at reauthorizing the Endangered Species Act that these issues need to be addressed, because these guys are going to lose their habitat conservation plans before this is over with.

Mr. TAUZIN. I just want to make a point. I know the gentleman from California earlier made the point that somehow mitigation is all around us, and it is natural in the order of things. The courts have said otherwise, Mr. Chairman. The courts have said very clearly that where agreements are designed for the good of all the parties who are subject to the agreement, that no taking under the Fifth Amendment occur, such as zoning agreement, building codes, standards that are developed, laws in which we agree to operate under in a community that benefit all those in a community. They said very clearly many decisions that where something is done by government for the general good of the population, such as species preservation but a very few people in our society end up bearing the burdens for carrying out that policy, that a taking can and often does occur for which compensation should be provided.

The city of Tigard is a good example of that. It was a case where in fact a property owner, a business, was being told by the government, "You have to give up some of your property for a green space and we are not going to pay you for it. Otherwise, we are not going to give you a building permit." And the Supreme Court said "You can't do that." They basically said under that case that government can extort from individuals money and obligations that the Constitution says the government take from them in order to do something for the general good.

I was just thinking about the way this mitigation stuff is working. It is literally like the government, through a biologist, going to a single landowner and saying, "The job you are doing is not as clean as the job somebody else is doing. We like accountants; they do clean work. We don't like plumbers; they do dirty work. So, we are deciding that plumbers are going to have to pay an 80 percent income tax, and accountants will only pay a 20 percent income tax." We couldn't do that constitutionally, but that happens in mitigation. Biologists decide that somebody in our society is going to have to put up an 80 percent tax, a 2,200 percent tax in Louisiana, and somebody else, on the other hand, is only going to have to put a 10 percent tax, a 20 percent tax, or no tax at all.

I know my friend from California likes to make that broad analogy about all of us in government agreeing to mitigate our activities, mitigate our obligations or our responsibilities to one another.

That is generally true, but the courts have clearly said that when it comes to exacting from landowners obligations for the general good, that takings occur for which compensation should be provided. There are limits to this stuff, and the problem we have got is that because we haven't spoken on what the limits of an HCP are, what the limits of mitigation ought to be, and what the ratios ought to be—we haven't spoken; we have left it up to bureaucrats to make those decisions and to tax people at different levels and at their own discretion and that should not pertain in our society, and that is probably why, Mr. Chairman, we, at some point, are going to have try to legislate as to what is a proper mitigation? What is a proper taking? What is a proper obligation of some of us in this society for the good of all of us in species preservation? And until we do that, we are going to continue to have great problems with agencies that do this on their own and do it so subjectively

And, Mr. Miller, let me make one other point about his comment: It is true that government often extorts from individual obligations, and individuals yield to that extortion, because they want a permit so badly. Mrs. Dolan, her husband could have yielded. Instead, he filed a suit that went to the Supreme Court. He died in the process of that suit. His wife carried it on. She could have given up any step of the way; most people do. Most people say, "Here, take that property. I am not going to the Supreme Court to defend my rights." But she fought it all the way, and she established something for the rest of us.

So, there are limits to this stuff. Yes, we want to preserve species; that is for the good of all of us, but you simply can't keep asking a few individuals in America to bear all that cost at the discretion of a biologist. That is inappropriate, and it is our fault if we don't settle this somewhere. If we leave it to bureaucrats to make those decisions on a case-by-case basis, and if we can't, in this Congress, define what an HCP is and give it the authority of law, you betcha, it is going to constantly come under attack; you betcha, it is going to be invalidated, because, in the future, some biologist will say, "Oops, we made a mistake; it doesn't count anymore." Surprise, surprise. Mr. Chairman, it is our fault if we don't clear this mess up, and we ought to try.

Thank you, Mr. Chairman.

Mr. POMBO. Mr. Doolittle.

Mr. DOOLITTLE. Director Clark, I want to get back to something Mr. Workman was talking about with the trees. What is your reaction to the idea that if one tree needs to be cut down, why can't we just replant another tree, and that would be the end of it? How do you react to that idea, instead of having apparently three acres of mitigation occur as a result of that one tree being cut down?

Ms. CLARK. Certainly, Congressman, given the facts of the case, which is—what you just said is all I know, it makes sense on its face, but I don't know the specific facts of the case, and I would hesitate to try to engage without knowing the species involved and the specifics of the term, but I am happy to look into it.

Mr. CALVERT. Would the gentleman yield for a moment?

Mr. DOOLITTLE. Yes, I will yield.

Mr. CALVERT. You know, at some point, sometimes you make this easy on us as critics. Don't you think at some point there is some

common sense—in the issue that the city manager brought up, this is in front of a runway—airplanes take off—don't you think it is common sense that those trees have to be cut off a clearance zone at the end of the runway, which has always been there, and then all of sudden someone changes their mind and says, "Look, we have to mitigate for keeping an area clear of trees and obstructions for the safety of the pilots?" Don't you think that is just common sense?

Ms. CLARK. I absolutely do think it is common sense——

Mr. CALVERT. Thank you.

Ms. CLARK. [continuing] to get obstructions out of the way, but I can't dictate the terms not knowing the specifics of the case, but, certainly, I imagine it is a safety issue.

Mr. POMBO. But they don't require mitigations, so it is voluntary.

Mr. DOOLITTLE. Well, let me—I have to raise two or three issues with you, Director, and, frankly, I am encouraged to hear your willingness to meet, and I am going to ask, if I may, that you and I meet specifically on the situation I am about to bring up, but I would like to briefly describe it to you, so I can understand a little bit more about it.

I have a very fast growing district in the foothills, and one of these counties, El Dorado County, has a severe problem. Seven years ago, legislation was passed through here allowing several jurisdictions—and this being one of them—to take more water out of Folsom Reservoir. I guess, under the NEPA process it is required that different affected Federal agencies be able to sign off on that.

Now, it so happens, this county, they discovered five rare and endangered plants that only grow in a certain type of soil, and that happens to be in this county. The water that we seek to take really has nothing to do with the plants at all, but it has been the non-jeopardy opinion to be issued has been held up, and the strong suggestion has been given that they are not going to get the non-jeopardy opinion until they set aside thousands of acres of plant preserve.

Now, they have put together a $12 million preservation plan for the plants, but now Fish and Wildlife has issued a draft recovery plan for the species, and it is projected to—in order to meet the requirements of that plan, it is going to cost up to $50 million. This is really a semi-rural developing county. We would just literally bankrupt the county to do that.

I just don't understand why should two unrelated issues—it doesn't seem right to me, and I don't think the law should allow for the Fish and Wildlife Service to hold up giving their sign-off so that the Bureau of Reclamation can execute a contract with El Dorado County for the water, because they are trying to make something else happen that has no relationship. Have I given you enough of the flavor of this that you could respond in any way?

Ms. CLARK. You have given me enough of the flavor to know I need to meet with you.

[Laughter.]

Mr. DOOLITTLE. Okay.

Ms. CLARK. And I would be glad to do that. I would like to go back and talk with the California folks and get some of the specifics and then answer you in a——

Mr. DOOLITTLE. All right. Well, I would welcome that opportunity, and we will get in touch with your office.

Let me just ask you this: If you could explain to me, the Service's current policy in evaluating the economic impacts of its decisions, do you believe that that policy is being carried out uniformly?

Ms. CLARK. Evaluating the economic effects of its decisions.

Mr. DOOLITTLE. Yes. Well, of its decisions on the affected area.

Ms. CLARK. Let me answer your question in a general way, because I am not sure I get the specifics.

Mr. DOOLITTLE. Sure.

Ms. CLARK. It depends on where in the Endangered Species Act you are talking. We do not factor in economics when we are determining whether or not to list a species. That is a biological decision.

Mr. DOOLITTLE. Yes, I do understand that.

Ms. CLARK. By policy, when developing recovery plans, we look at multiple ways to achieve the recovery and ultimate delisting of the species, and, by policy, we work to minimize, along with stakeholders and partners, minimize the social and economic impacts associated with species recovery. So, certainly, in developing recovery plans and implementing recovery tasks, we look for ways to minimize the effects on constituents and local communities——

Mr. DOOLITTLE. I guess I am——

Ms. CLARK. [continuing] while achieving the biological goals of recovery.

Mr. DOOLITTLE. All right. Are there specific criteria that exist under this? I guess, it is just a policy that you have, right?

Ms. CLARK. Yes, sir.

Mr. DOOLITTLE. Do they exist in writing?

Ms. CLARK. Yes. There is a policy that was drafted in 1994 that talks about minimizing social and economic impacts of recovery planning and implementation. I will be glad to share that with you.

Mr. DOOLITTLE. Did you believe this in your mind that that policy is being carried out uniformly by Fish and Wildlife throughout the country?

Ms. CLARK. I believe there is a misconception of what is usually contained in recovery plans. In recovery plans, we often have a series of recovery tasks and menus of recovery tasks of implementation strategies that, if followed in some form, will ultimately result in recovery. People often mistake it as a all-inclusive, everything adds up, and everything needs to be incorporated, which is how a lot of times we get these huge price tags. But I do believe across the board that our folks are working very hard to minimize the effects of achieving species conservation, which is their responsibility, and effects on the economy.

Mr. DOOLITTLE. Well, let me just say, I do thank you for appearing before the Committee today. I am going to thank all the members of the panel.

Director, the interaction between your Sacramento field office and my constituents is very important to me, and I just want to say that I, along with Senator Feinstein and others, are going to be looking very closely at what goes on with the expectation that we can get a fair and reasonable and expeditious resolution to these difficult issues that seem to exist to a greater degree in our

region and Mr. Calvert's than in many others, and I am encouraged by the comments I have heard from you today, and I will look forward to meeting with you personally.

Ms. CLARK. Thank you.

Mr. DOOLITTLE. Thank you.

Mr. POMBO. If there are no further questions—Ms. Chenoweth, did you have further questions?

Mrs. CHENOWETH. No.

Mr. POMBO. If there are no further questions, I will dismiss this panel. Thank all of you for—thank you for your testimony. There will probably be further questions that will be submitted to you in writing. If you could answer those in writing for the Committee. Ms. Clark, I understand that there are people from your agency who have agreed to stay throughout the hearing in case there are further questions?

Ms. CLARK. Yes, Mr. Chairman. Mike Spear, our Operations Manager for California-Nevada is here. He is the ranking official here and will back me up as I have to leave for another appointment.

Mr. POMBO. All right. Thank you very much, and I will excuse this panel.

I would like to call up the second panel—Mr. Angelo Tsakopoulos, Mr. Edward Weinberg, Mr. Dwight Worden, Mr. James Johnston, and Mr. Michael Bean.

Thank you. If I could have this panel stand and take the oath for just a minute. Raise your right hand.

[Witnesses sworn.]

Let the record show they all answered in the affirmative.

Thank you very much, and I appreciate your patience. Mr. Tsakopoulos, we will begin with you.

**STATEMENT OF ANGELO K. TSAKOPOULOS, AKT DEVELOPMENT CORPORATION, SACRAMENTO, CALIFORNIA**

Mr. TSAKOPOULOS. Thank you, Mr. Chairman, and good afternoon, members of the Committee. My name is Angelo Tsakopoulos. I am a farmer, builder, and developer of masterplan communities in California's beautiful Central Valley in the Sacramento area. Over the last three decades, our company has helped to develop projects that are now home or will soon be home to over 100,000 people and 20 million square feet of businesses.

Throughout these years, our team has worked in close coordination with the communities where we live and develop land. Our projects take many years to plan and to complete. They involve public-private partnerships with the cities, the counties, original officials, close coordination with community and neighborhood groups, and the identification of and mitigation for possible impacts to the environment as required by the California Environmental Quality Act.

But with the extending role of the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, the development process has become unnecessarily difficult. I would like to summarize one example. In 1993, we obtained a permit from the Army Corps for the fill of 2.8 acres of vernal pools for now a 520-acre Stoneridge project, which is located in the city of Roseville.

On April of 1998, after a 10-year planning process and 60 public hearings, Stoneridge was approved, but, by this time, the Corps permit had expired, and we were forced to reapply to fill the wetland. When the Service issued their biological opinion, they stated that there may be fairy shrimp living in that 2.8 acres, and this potential shrimp may have evolved differently from those living nearby, because the soil was different. As a result, we could not mitigate but would have to create a preserve in the center of the project. I should note, we already had a 117-acre preserve on-site which was mandated by the city of Roseville, which included other wetlands but not these wetlands, not these 2.8 acres. This new preserve would have to take the site of key infrastructure improvements and the elementary school. The estimate cost for this mitigation measure was approximately $14 million; that is for 2.8 acres of vernal pools.

We just now appeared to have resolved the situation but only after involving the offices of Senators Feinstein, Boxer, and Representatives Doolittle and Matsui who questioned the need for such expense. So, it is a result, but even this solution will cost us $2 million to $3 million; more like $3 million for a solution that a few years earlier we would have had to pay nothing.

This example and others are described in our formal submission to the record in our letter to the Committee and all point to the fact that the process is broken and needs fixing. To help do this, we suggest you consider the following recommendations: individual Service staff has a great deal of latitude to interpret their ESA mandate. There must be increased oversight to ensure consistency in the implementation of ESA as well as equal treatment among permitees. For instances, President Bush's mandate in 1991 was for "no net loss" of wetlands, but in our area, we are required to mitigate at an arbitrary rate of a 3 to 1 ratio instead of President Bush's 1 to 1, and, in some cases, a lot more than 3 to 1.

Two, Service staff must state under consideration the economic impacts of its decisions. The President and the Vice President, again and again, have stated that our ecology and our economy should co-exist. The Service should take that under consideration.

Three, Service staff often use the permitees as adversaries. They look at us as enemies rather than as partners. They must be directed to work together with the permitees, with the private sector to determine what to implement—to determine and implement efficient and effective solutions. We have got to work together.

Four, permits, once issued, should not be able to expire. Once the mitigation has been carried out, it is totally unfair to get a permit, to mitigate for that permit,and then have the Service come back at a later date and ask for additional mitigation.

Five, prohibit double-dipping. Service staff use these loopholes and minor inconsistencies in validly issued permits to extract additional mitigation or to stack mitigation on top of mitigation.

Six, require recovery plans to be developed contemporaneously with the listing of species. Let the regulated public know in that sense what the regional staff expects to accomplish for each species listed under the Endangered Species Act.

Seven, encourage the preparation and timely implementation of habitat conservation plans—and this is very important—by pro-

viding sufficient funds for such activities. I feel if we give them the funds, they must perform. They would not have anymore excuses, hopefully. But be sure to establish and require strict adherence to timeliness to prevent the process from experiencing undue delay.

To the greatest degree possible, standardize HCPs, so that each jurisdiction is not forced to reinvent the wheel.

I hope my comments and written submission are of use to the Committee in its deliberations on this important matter. I welcome questions or comments. I thank you for the opportunity to appear before you.

[The prepared statement of Mr. Tsakopoulos follows:]

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**Sacramento, CA 95826**

May 25, 1999

The Honorable Don Young
Chairman, Committee on Resources
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Young:

I feel compelled to write to you as you reexamine the implementation of the Endangered Species Act ("ESA"). As a developer and builder of integrated communities in the Sacramento, California area, I have some experience with a small part of that implementation. In my experience, I have witnessed the troubling practices by United States Fish and Wildlife Service ("FWS") staff of "double-dipping" for mitigation and of either deliberately or callously delaying projects without regard to cost. In part this problem is fostered by the ESA's broad mandate, which allows insufficiently supervised staff to construe the ESA to further their personal agendas.

This letter describes just three recent cases within my personal experience, although I have no reason to believe that staff's disturbing actions are confined to these instances. Based on my observations, staff is either unaware or unconcerned that its actions are driving up the cost of homes in the Sacramento region. Everyone recognizes that FWS has important duties under the Endangered Species Act. Those duties do not justify staff's behavior. I believe that the FWS can fully and effectively meet its duties while demonstrating sensitivity to the costs of its actions on developers and the would-be home buyers.

You can help by reducing the discretion of overzealous local staffers and increasing the FWS's budget for habitat conservation plan development. When projects are examined on a case by case basis, the problems that occur vary in direct proportion to the staff person assigned to the project. While some staff are more reasonable and are willing to work with developers to both protect species and keep costs to a minimum, other staff seem to view their ESA mandate as a blank check and require the most costly mitigation without regard to proven effectiveness. (See, e.g., Memoranda from Committee Staff, dated May 20, 1999, p. 4 (documenting one persistent type of 'inconsistent' application of FWS policy among staff).) More upper level management or oversight can help. However, I believe the solution is to give the FWS more money for HCPs. FWS avoids adopting HCPs because they "lack funds" or have "insufficient staff" to help devise and implement them. HCPs are developed in a very public impersonal process to assure that species are protected in a planned and rational manner. Furthermore, from my perspective, they offer huge benefits in terms of planning and certainty. Under an HCP, I know what it will cost to mitigate for the construction of 400 lots in a particular area, for instance. And I am no longer subject to the whims and personal animosities of any particular staff person.

The three cases described below illustrate the difficulties that can be caused by a single or a few overzealous and antagonistic staff. In these three instances, FWS staff have repeatedly returned to the

same well to "double-dip" for mitigation. After appropriate measures have been devised to minimize impacts on species, staff has either invented, exaggerated, or even orchestrated excuses to revisit the matters and impose further onerous mitigation measures that are neither biologically nor legally justified.

***1. Silver Springs Project***

On May 9, 1994, the Army Corps of Engineers ("Corps") authorized the fill of 5.96 acres of wetlands on the Silver Springs property under Nationwide Permit 26. The authorization imposed several conditions. Those conditions included as mitigation the preservation of 8.69 existing-wetland acres and 7.75 constructed-wetland acres in the Laguna Creek Parkway as wetland and wildlife habitat. Mitigation, therefore, was provided at a ratio of 2.5:1.[1]

Additionally, the Corps conditioned approval of the permit on the set-aside of 88 acres containing vernal pool wetlands ("set-aside area") and on the maintenance of a 50-foot buffer around all mitigation and set-aside areas. Although vernal pool fairy shrimp and vernal pool tadpole shrimp were not yet listed, the amount of mitigation and other conditions imposed clearly demonstrates that the Corps was mindful of the proposed listing of these species and fully mitigated for impacts to the species. The FWS maintained that these set-aside areas were to be permanently preserved as mitigation for impacts to wetlands. Since the set-aside areas contain about 12 acres of wetlands, the FWS would calculate the mitigation ratios at about 5:1.

In September 1997, a portion of the property was sold to JTS, a home builder, whose construction crews on the project site accidentally intruded into the buffer and some portion of the set-aside area. Apparently, a vernal pool was "clipped" during ground preparation. In addressing this intrusion, the Corps consulted with FWS. FWS staff used this limited consultation as a bootstrap for revisiting the entire project. On November 17, 1997, the FWS issued a Biological Opinion that, conceded that all direct impacts on species had been mitigated but maintained that indirect effects had not.

The Biological Opinion, employing a high level of speculation and little, if any, scientific information, presupposed that the project would have significant indirect effects on vernal pools in the set-aside area. In fact, the Opinion concluded that 7.12 wetland acres in the set-aside area would become totally unsuitable for species habitat.

Despite the fact that the FWS calculated that the project already provided mitigation for lost wetlands habitat and species at a ratio of 5:1, the FWS maintained that indirect effects were never mitigated.

The Biological Opinion included "reasonable and prudent" measures to: (a) minimize impacts from accidental intrusions into buffer areas and prevent future accidental intrusions; and (b), in a stunning display of logical contortion, *both* (i) avoid at great cost alleged indirect impacts to vernal pools in the set-aside areas, and (ii) mitigate for the entire loss of these pools as species habitat.

The Biological Opinion would require, among other things: (1) dedication of conservation easements over 6 lots to FWS; (2) maintenance of a buffer over an additional 12 lots, rendering them unusable; (3) construction of a six-foot, partially undergrounded wall between the project and set-aside areas; (4) creation of an endowment to maintain the set-aside area as a preserve in perpetuity; and (5)

[1] This figure represents an incredibly generous mitigation ratio in light of the standards at the time. The Corps and Service today typically demand ratios in excess of 3:1. This mitigation ratio is excessive and is devastating to America's economy.

purchase of about 0.34 vernal pool creation acres and 7.33 vernal pool preservation acres. [2]

In a cooperative effort with JTS, I attempted to demonstrate the FWS staff that I could engineer less costly ways to insulate the set-aside area from any indirect impacts from the adjacent development. I proposed to employ the same technology, in fact, previously approved by the FWS for another project adjacent to the set-aside area. I also proposed to hire experts to monitor the area for any actual indirect impacts and to mitigate for any demonstrated indirect impacts. The FWS staff approved the use of alternative technology in concept but refused to relent on its position that indirect impacts would be presumed and must be mitigated. These subsequent developments have delayed and jeopardized the construction of homes on that property.

**2. *Stoneridge-Olympus Oaks Project***

This project, known as Olympus Oaks, along with other components of the City of Roseville's comprehensive, long-term land use planning efforts, has been the subject of local planning and review for 10 years. The FWS, along with the Army Corps of Engineers, has prejudicially abused and exceeded its regulatory authority by arbitrarily and unlawfully imposing permit conditions that: (i) bear no rational relationship to the project's impacts; (ii) are economically impracticable; (iii) ignore the extensive, biologically-superior offsite mitigation plan proposed by the applicant; and (iv) are based on misapplications of the laws these agencies are charged to implement in a reasonable and equitable manner.

The Olympus Oaks project is a vital component in the City of Roseville's long-term land use planning efforts. The project site lies in the center of the City adjacent to U.S. Highways 65 and 80, and for years has been intended to provide critical links in the City's infrastructure, including roads, bike trails, water lines, and sewer lines. In particular, the City's infrastructure plan relies on Olympus Oaks to provide the crucial final link of the "Roseville Parkway" to connect currently separate east and west sides of the City of Roseville. Similarly, Olympus Oaks is expected to provide the last link of a 48" diameter water pipeline to connect the City's second-largest employer (NEC) to the City's water treatment facility. In reliance on the availability of services anticipated in the City's infrastructure plan and the Olympus Oaks project's role therein, NEC announced a *$1.4 billion* expansion that requires the water this pipeline would provide.

As the subject of comprehensive land use planning efforts since 1989, the Olympus Oaks project has been discussed in detail and at length at over *sixty* public hearings. Specifically, the City of Roseville held *forty* hearings on its general plan, which designated the Olympus Oaks site as an urban area, and held *twenty* public hearings on the Olympus Oaks project itself. Although they were properly notified of these hearings and were invited to participate, the Corps and the FWS declined such opportunities. Instead, the Corps and the FWS sent one- and two-page form letters, respectively.

The applicant for the Olympus Oaks project submitted a formal application to the City of Roseville and to the Corps in 1992. To grade or fill any wetlands on the project site, both local and federal approvals were required.

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[2]/ It is important to note that the mitigation demanded — 7.33 vernal pool preservation acres — is significant overreaching in itself. At a preservation bank, vernal pool preservation acres cost, on average, between $50,000 to $70,000 *per acre*. Thus, 7.33 preservation acres would cost between $370,000 to $520,000.

Because the regulated resources potentially affected by the project are minimal, the Corps authorized the Olympus Oaks project in March 1993 pursuant to Nationwide Permit 26 (under which minimal impact is presumed and "avoidance" or "onsite" mitigation is not required or even necessarily preferred). The Corps' authorization would have allowed the Olympus Oaks project to proceed by filling 2.67 acres of scattered wetlands on the site.

In January 1995, the applicant requested authorization from the Corps to begin implementing a modified offsite mitigation plan while the City of Roseville continued to process the local land use application. In February 1995, the Corps replied that "[o]ur regulations indicate we should substantially defer to local land use agencies. . . . [U]ntil the City of Roseville indicates that your proposal would be consistent with their general plan, we will not consider approving your plan."

In March 1998, because the Corps' first Nationwide 26 authorization had expired, the applicant resubmitted its request for such authorization, with a proposed mitigation plan that is extraordinary in terms of both its cost and its diligence in finding resources (specifically, vernal pools on a specific soil type) to preserve that are of *superior* biological quality to those potentially impacted by the project.

Also in March 1998, the Corps removed the regulatory staff member who processed the initial request for authorization and replaced him with a staff member who is testifying against the project applicant in ongoing litigation of another matter. Because this individual clearly is in a position adverse to the applicant and is incapable of objectively reviewing the project, (in fact, the individual admitted under oath to making derrogatory remarks about the applicant) the applicant has repeatedly requested that this staff person be removed from the file. To date, the Corps has ignored the applicant's requests.

On April 1, 1998, the City of Roseville issued the local land use approvals for the project. These local approvals did not require the onsite preservation of vernal pool habitat.

On April 30, 1998, the Corps informed the applicant that consultation with the FWS and preparation of a biological opinion pursuant to section 7 of the Endangered Species Act was required before the Nationwide 26 authorization for the project could be re-approved.

On June 22, 1998, prior to the completion of consultation as required under section 7, staff representatives of the Corps and FWS met informally and "agreed" that to mitigate impacts to 1 acre of wetlands potentially affected by the project, a *25-acre onsite preserve* would be required. While never disclosing this "agreement" to the applicant, a FWS staff representative remarked to a biological consultant retained by the applicant that she was "considering" an onsite preserve and requested that the applicant provide an analysis of the economic impact of such a decision.

The FWS's required that the applicant demonstrate economic impracticability of an onsite preserve for the project, and the applicant provided the appropriate analysis demonstrating impracticability.

The economic analysis requested by FWS was performed by one of the state's leading experts in real estate economics and public finance, and demonstrated that the 25-acre preserve contemplated by FWS and Corps staff would cost no less than *$14 million*, and would eliminate the only site in the project area that the Roseville School District would accept as suitable for a 15-acre school site.

In short, a 25-acre avoidance area would kill the project; it would nullify 10 years of careful, comprehensive local planning, and would undermine investments in tens of millions of dollars in City infrastructure placed in reliance on the City's infrastructure plan, including the links to be provided by

Olympus Oaks. Despite the FWS's decision to require an analysis of the economic consequences of an onsite preserve, the FWS and the Corps have completely ignored the enormous economic impact of their actions.

What is central to the unlawfulness of the Corps' and the FWS's decision is their explicit mission to preserve a group of vernal pools formed on a particular soil — mehrten soil. In so doing, the Corps and FWS have prejudicially abused and exceeded their regulatory authority by arbitrarily and unlawfully imposing permit conditions that attempt to assert jurisdiction over a certain soil type, not a listed species or a designated critical habitat. Without any reasoned analysis and without any evidence, these agencies have determined that the mehrten soil formation underlying the vernal pools on the project site "may be genetically significant." The FWS's jurisdiction is limited to the protection of listed species and *critical* habitat areas, however. No critical habitat has been designated for fairy or tadpole shrimp. Because soil formations are not subject to listing and protection under the ESA, and because there is absolutely no evidence that shrimp in mehrten vernal pools are different from any other shrimp, the agencies' attempt to regulate soil types on the Olympus Oaks project site arbitrarily and unlawfully exceeds their jurisdiction.

In utter disregard of: (i) the Nationwide 26 regulatory framework, (ii) the obligation under the Endangered Species Act to review and consider all relevant information and rely upon only the best scientific and commercial data available; (iii) the lack of any authority under the Clean Water Act or the Endangered Species Act to base the final agency action at issue on the specific soil type on which the vernal pools are formed; and (iv) the devastating economic and social consequences of its actions, the FWS issued a Biological Opinion in September 1998 that would make a 25-acre onsite preserve a special condition of project approval.

The applicant submitted a response to the Biological Opinion on October 30, 1998, which identified some of the many errors and omissions in the FWS's document. Despite the applicant's subsequent requests to meet with the Corps and the FWS to discuss these issues, the agencies refused to do so unless the applicant "offer[s] more mitigation."

Ultimately, the FWS issued a revised biological opinion that complied with the requirements of the Endangered Species Act — but only after the FWS' misbehavior was brought to the attention of Senators Feinstein and Boxer, and Representatives Doolittle and Matsui. The revised biological opinion mandated mitigation at a cost of between $2,500,000 to $3,000,000. These costs, in turn, increase the cost of homes and other valuable economic growth.

***3. Kramer Ranch Project***

On March 8, 1994, the Corps authorized the fill of 3.78 acres of wetlands on the Kramer Ranch project site under Nationwide Permits 7 and 26. Accordingly, all approved wetlands were filled. Before filling, all wetlands were scraped, and all vernal pool crustaceans and cysts were removed from the pools, pursuant to a Corps approved mitigation plan. At the completion of scraping, the former vernal pools contained no endangered crustaceans or cysts. Furthermore, impacts on endangered Giant Garter Snakes (GGS) were mitigated. After the listing of the GGS, FWS forbade any further construction activities on site, maintaining that endangered GGS were on or used the project property and therefore reopened the consultation process.

A dispute arose over the proper measures to reduce impacts on GGS. The FWS demanded: (1) additional upland refugial habitat be provided for the GGS; and (2) that jeopardy could result from a proposed levee in the project design.

Significant project delays arose as the project was redesigned to eliminate the levee. In addition to redesigning the project, the applicant devised other measures to address the FWS's concerns. The project applicant agreed to donate 50 acres on Lewis Ranch, which is adjacent to the Stone Lakes National Wildlife Refuge, as mitigation for this and other projects. The applicant created, or caused to be created, 5 seasonal wetland acres on the property. The applicant has also agreed to donate $5,000, which will be used to maintain the 5 seasonal wetland acres. The 50 acres on Lewis Ranch is appropriate for GGS upland refugial habitat. Thomas Harvey, Project Leader for the Stone Lakes National Wildlife Refuge, has agreed to manage 30 acres on the Lewis Ranch property as upland habitat suitable for GGS on behalf of the project. AKT and FWS reached agreement and the Stone Lakes National Wildlife Refuge took possession of the 50 acres.

In sum, the project was expected to impact 7 to 10 acres of GGS upland refugial habitat, and the applicant proposed to mitigate those impacts with 30 acres of GGS upland refugial habitat on the Lewis Ranch property. The proffered mitigation meets the FWS's programmatic formal consultation requirements for GGS of 3:1 mitigation. The project fully mitigated for lost seasonal wetlands on site with the construction of 5 acres of seasonal wetlands on the Lewis Ranch property.

On June 26, 1998, the Corps terminated consultation. The Corps determined that, based on project alterations, the project fully complied with the terms of a 1994 Biological Opinion issued for the project site and a 1996 Biological Opinion issued for a regional flood control project for the entire Laguna Creek area. FWS staff refused to terminate consultation.

On July 14, 1998, FWS issued a Biological Opinion and incidental take statement, which purported to "supercede" the previous 1994 opinion. In doing so, FWS reneged on the earlier agreement. The incidental take statement indicated that it was conditioned on the above measures *plus* the elimination of 22 lots from the project and the dedication those lots to the FWS. Furthermore, the 1998 Biological Opinion recognized that 50 acres would be donated to "fulfill mitigation to seasonal wetlands," but stated that the 50 acres could not also serve as mitigation for lost GGS habitat. Staff did not explain its rationale. [3]

Finally, FWS and the project applicant reached an agreement on appropriate mitigation. Although the applicant was not convinced that the mitigation package was biologically and legally justified, the applicant agreed to a mitigation package that included the above measures and the dedication of six lots on site. The agreement was conditioned on timely issuance of an incidental take statement.

The project applicant emphasized that time was of the essence in the agreement. The adjacent flood control development on Laguna Creek was expected to generate large stockpiles of earth. The

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[3]/ The 50 acres contains suitable GGS habitat. To the extent that this condition is premised on the assumption that the 50 acres does not contain sufficient suitable GGS habitat, the condition is without factual support. To the extent that the condition is premised on staff's belief that the applicant cannot compensate for lost wetland and lost GGS habitat with the same 50 acres, staff's reasoning is ludicrous. Analogizing the project site to an apple pie, staff's reasoning is thus: (1) you have bruised the apples; (2) you have removed some cinnamon; (3) and you have substituted butter for margarine. To mitigate for these three impacts to the pie, you must provide us with three pies: (1) one with unbruised apples, (2) one with more cinnamon, and (3) one with butter. Apparently, one apple pie with unbruised apples, cinnamon, and butter is not acceptable to staff.

applicant made clear to the FWS that if the earth could be spread, pursuant to an incidental take statement, rather than stockpiled and then spread at a later date, more than $500,000 would be saved. Without apparent explanation, FWS delayed issuing its revised Biological Opinion and incidental take statement and the project applicant was forced to stockpile earth at costs of more than $500,000.

On August 27, 1998, the FWS wrote to the applicant, indicating that vernal pools had reemerged on the property. Despite the fact that the vernal pools had been previously scraped, removing all species, the FWS determined that before the project applicant could develop the property it would require Endangered Species Act take authorization for the reemerged wetlands, even though it was solely the actions of FWS that prevented the project proponent from preventing reemergence.

In sum, FWS maintained that such take authorization was needed even though: (a) the pools had been previously scraped; (b) the pools were therefore sterile of endangered species; (c) the pools had been filled; (d) the previous fill was fully mitigated; *and* (e) the only reason the pools were allowed to reemerge was that the project applicant was not allowed to maintain the fill or build its project due to the FWS's unjustified orders and delays.

Just last week, this issue was finally resolved with FWS staff. While additional mitigation is required for indirect impacts to GGS and for the "reemerged pools," AKT has chosen to accept this mitigation so that building can commence this year.

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***Conclusion***

None of these problems had to happen because of the way the ESA is written. In each of the three cases, the described problems, which have held up the construction of much needed homes in the Sacramento region for years, derived solely from the unchecked discretion of overzealous staff at the FWS. In short, they derived from the subject of your investigations — implementation of the ESA.

I want to emphasize, however, that I do not believe that the solution lies in cutting FWS's budget. In fact, I believe that course of action would only exacerbate matters. The best course, I believe, is to increase the FWS's budget with respect to the *timely* formulation of habitat conservation plans (HCPs). One HCP has been developed in the Sacramento region and I have been able to work with the FWS through that process with few problems and little acrimony. Hundreds of thousands of private funds were contributed toward that process. HCPs work well because they are developed in a highly public impersonal process to assure that species are protected; because the process is highly public, there is little opportunity for unchecked overreaching; because it is impersonal, there is little opportunity for staff to treat any particular applicant differently because of interpersonal bigotries. Once the HCP is in place, projects can go forward with an acceptable level of certainty and fairness.

Thank you, again, for the opportunity to share my experiences with you. I hope that they prove helpful in your deliberations.

Respectfully submitted,

Angelo K. Tsakopoulos

Mr. POMBO. Thank you.
Mr. Weinberg.

**STATEMENT OF EDWARD R. WEINBERG, NATIONAL ASSOCIATION OF HOME BUILDERS, WASHINGTON, DC**

Mr. WEINBERG. Chairman Pombo and members of the Resources Committee, thank you for the opportunity to appear today before you and share my experience regarding implementation of the Endangered Species Act.

My name is Ed Weinberg. I am president of EW Consultants, an environmental consulting firm that regularly practices in the field of Endangered Species Act regulation as well as an associate member of the Florida Homebuilders Association.

I am here today on behalf of the 197,000-member firms of the National Association of Home Builders to discuss reform of the ESA and its mitigation requirements. As a professional biologist and a conservationist, I am a firm believer in the goals and principles of the Act. Unfortunately, in my experience, there are two fundamental areas that the Act is falling short of those goals in its day-to-day application. First, many species continue to be in decline, because the recovery planning and critical habitat designations mandated by the Act are not being completed in a timely or scientific fashion.

Second, the implementation of the Act places an inordinate burden of protecting listed species on private property owners, especially in the building industry. Builders and developers are consistently forced to provide expansive and expensive preserves to which the public benefits without any such burden or responsibility.

To help understand some of these day-to-day problems that are occurring with the Act, I would offer the following example: in the early 1990's, I was a consultant to a landowner on a 500-acre residential development in Brevard County, Florida. The project secured an Army Corps of Engineers wetlands permit in 1991. In February of 1992, the Fish and Wildlife Service informed the landowner that the property may provide habitat for the Florida scrub jay, a threatened species. Over the next 16 months, the landowner was required to reapply for a new Corps permit, including a section 7 consultation through the Fish and Wildlife Service. The permit was ultimately issued in June of 1993 and required 14 acres of scrub jay mitigation land to be purchased outside the project area with an additional $1,000 per acre to fund perpetual management of the mitigation. Later, in 1993, an individual that was not affiliated with the project reported to the Service that he had observed scrub jays on the construction site. Based on this report, the Service sent a letter to the landowner advising that all construction and lot sales cease immediately or he would be in violation of the Endangered Species Act. This was on a site that had already been reviewed and permitted through the Service.

Fish and Wildlife Service data indicated that approximately 110 acres of the site were inhabited by scrub jays. The scientific surveys that I conducted personally at the landowner's expense concluded that only 28 acres were actually inhabited by scrub jays. Nearly two year after being shut down, a section 10 permit and HCP was issued that required 80 acres of land to be purchased off

the project site for scrub jay mitigation and $20,000 in cash for perpetual management of that property. There was little, if any, scientific relationship between the 80 acres of mitigation and the 28 acres of scrub jay habitat.

In addition to the landowner's direct costs, the time delay he experienced was onerous. The time consuming bureaucratic delays included the Fish and Wildlife Service conducting a section 7 consultation with itself to determine whether the section 10 permit was consistent with the Act. Redundant regulatory requirements like this cause delays to landowners, and they divert the Service's staff and resources away from actually protecting listed species.

I am not one to identify problems without offering a solution. I believe the Act can minimize these kinds of problems in the future by incorporating a clear, concise, and scientifically-based regulatory framework. This should include research-based methodology for providing landowners with certainty about the presence of listed species or habitat within their property. There should be scientifically-based recovery plans available to landowners in a timely fashion so that appropriate conservation measures can be planned for rather than applied on an ad hoc basis. When mitigation is required, it should reasonably reflect the project scope. And, finally, the Act should include meaningful incentives that create a desire for stewardship on the part of landowners rather than an atmosphere of uncertainty about listed species. If the Act can provide this kind of predictability and certainty to landowners, they will become your partners in the process of protecting and recovering the national treasure that our listed species represent.

Thank you.

[The prepared statement of Mr. Weinberg follows:]

STATEMENT OF EDWARD R. WEINBERG, THE NATIONAL ASSOCIATION OF HOME BUILDERS

I am an environmental consultant, President of EW Consultants, Inc., practicing primarily in the State of Florida, and regularly in the field of Endangered Species Act (ESA) issues. I have conducted field surveys, documentation, and permit negotiations under both Section 7 and Section 10 of the ESA on behalf of public entities such as municipalities, as well as private landowners and builders. I am here today on behalf of the National Association of Home Builders' (NAHB's) 197,000 members, to discuss the reform of the Endangered Species Act including mitigation under the Act. Throughout my experience, I have encountered a variety of situations and circumstances where applicants have been unnecessarily delayed, landowners have felt they were not treated fairly, and resource decisions that are not in the best interest of listed species have been made. As a result of these experiences, I have prepared this written statement, as well as presenting oral testimony as to how the ESA could be improved so that these types of experiences are kept to a minimum.

As a biologist and conservationist, I am a firm believer in the goals and principles of the ESA. It is incumbent on all of us to do our part to protect and preserve these species. Unfortunately, as noble as the principles and goals of the ESA are, there are many instances where we are falling short of achieving those goals. Federal agencies are holding private landowners to unpredictable and often unreasonable mitigation standards to address conservation needs for listed species. In addition, sufficient scientific data is often lacking when establishing the mitigation requirements.

In my experience, there are two fundamental areas that the ESA and its present form of implementation have not achieved their desired or intended goals. First, there are a variety of species that continue to be in decline, and additionally there is a long list of species that are candidates to become listed. Although there have been several well-publicized delistings or changes from endangered to threatened status, there are more species being added to the list than there are being removed. One of the basic principles that the ESA is based on is the creation and implemen-

tation of recovery plans with the goal of delisting species because they are no longer threatened with extinction, rather than because they have become extinct. It is my understanding that the Senate is currently addressing this issue as it pertains to establishing reasonable timelines for developing recovery plans and designating critical habitat.

The second fundamental shortfall is that the present form of implementation of the ESA often places inordinate burden on select groups of individuals, especially private property owners in the building industry. All citizens have the opportunity to benefit equally from the protection and recovery of listed species. However, not everyone is sharing equally in the responsibility for protecting these species. Often, a landowner that is honest and forthright enough to point out the presence of listed species on his property is required to establish large preserve areas and/or participate financially in mitigation programs to protect and manage the species. The adjacent owners and the public at large all benefit from the protection provided at the expense of this individual or group, but they are not shouldered with any of the burden of affording that protection.

Certain existing mitigation requirements offer little incentive to the private property owner to preserve species and their habitat, in fact, the threat of mitigation requirements can do the opposite. For example, in my home state, the Florida scrub jay is a listed species that is well adapted to human contact, and often able to coexist with low-density residential development. Their status as a listed species, as well as the implementation of protective measures for their habitat through the ESA have led individual homeowners to remove and replace their landscaping with vegetation that does not attract scrub jays. In this case, the uncertainty as to the repercussions of scrub jays on private property has led landowners to reduce habitat opportunities for scrub jays and further hamper their recovery. Reasonable incentives are necessary to preserve habitat rather than an approach that penalizes private landowners without tangible benefits to the environment.

**Application of ESA and Justification for ESA Reform**

The preceding discussion hinted at several areas where the practical application of the ESA has not met its stated goals and purpose. The following example is from my own personal experience as a consultant to landowners that worked through the process. My experience is limited primarily to the southeastern U.S. and Puerto Rico, however discussions with professionals practicing in this field elsewhere in the U.S. indicate that there are similar occurrences throughout the country. An example from my experience follows.

In the early 90's, I worked on a residential project called Cypress Creek in Brevard County, FL. The project covered an area of approximately 500 acres, and was divided into three phases. As part of the approval process for the project, an Army Corps of Engineers Section 404 permit was necessary, and was issued in 1991. Subsequently in February 1992, the U.S. Fish and Wildlife Service (USFWS) informed the landowner that the property may provide habitat for the Florida scrub jay, a threatened species. Site surveys were conducted and scrub jays were determined to be present. Over the next 16 months, the landowner was required to reapply for a Corps permit and conduct a Section 7 consultation through USFWS. The permit was ultimately issued in June 1993, and required provision of 14 acres of off site preserve (purchased by the applicant) and $1,000/acre funding for perpetual maintenance and management.

In August 1993, a field scientist that was not affiliated with the project entered the site, observed scrub jays, and reported to the USFWS that up to four families of scrub jays were present in Phase I of the project, which was under construction. This was subsequent to having had the site surveyed and permitted by USFWS. A letter was sent to the landowner from USFWS advising that all construction activity cease immediately or the landowner would be in violation of the ESA. The field information from the scientist that initially observed the scrub jays indicated that approximately 110 acres of the 155-acre Phase I area was occupied by scrub jays. In January 1994, the landowner entered into the Section 10 permitting process, and collected field data approved by the USFWS indicating that approximately 28 acres of Phase I were occupied by scrub jays. More than 21 months after being instructed to cease construction activity, a Section 10 permit was issued to the landowner. It required purchase and preservation of nearly 80 acres, donation of the land to Brevard County, and a cash payment to the County of nearly $20,000 for management of the property. The combination of on-going uncertainty for the private landowner, insufficient scientific data, and lack of predictable mitigation requirements placed an unreasonable burden on this landowner. There was little, if any scientific basis for requiring 80 acres of mitigation land and $20,000 in cash to replace 28 acres of occupied habitat.

One of the unique characteristics in this particular situation was that there were a number of lots within the subdivision that had been sold prior to the requirement by USFWS to cease construction. Although several of these lots fell within the area that was ultimately determined to be scrub jay habitat, the owners of the lots were allowed to proceed with construction of their homes as long as scrub jay nests were not present. The logic that was the basis for this was that it would somehow be unfair for a single lot owner who was not aware of the presence of scrub jays to bear the burden of protecting them on these single lots. There was little if any technical difference between habitat on "sold" lots and those lots that had not yet sold. Although this approach was certainly helpful to those individual lot owners, it allowed for differing levels of protection for scrub jays, and put the entire burden for their protection onto the project landowner.

This example provides a number of instances where the application of the ESA fell short of its goals and principles. Perhaps the most important concern in this situation was that it took more than three years from the first time the USFWS addressed the presence of scrub jays on the site until the issue was finally resolved. This kind of delay and hold up is enough to bankrupt many landowners and/or builders. Fortunately in this case, the landowner had not borrowed money to construct the project; thus he was not in a position of making payments without revenue. Under different circumstances, this project may have ended up in foreclosure, with a bank holding listed species habitat as their collateral.

In this case, the delays are directly attributable to the lack of clear and concise habitat requirements and evaluation for scrub jays. Throughout the process, there were examples of areas that did not meet the habitat requirements for scrub jays that initially were not required to be surveyed, and ultimately were required to be protected in an effort to "err on the side of the species." The initial habitat delineation of 110 acres that was relied upon by USFWS was nearly 80 acres more than the 28 acres that was scientifically determined to be habitat at the landowners expense. According to all of the published literature, much of which formed the basis of the listing for this species, there should not have been scrub jays in this area. Although the occurrence of scrub jays here made for an interesting academic discovery, it created an intractable circumstance for the landowner. The landowner had proceeded in all good faith, secured all necessary permits, coordinated directly with the USFWS, set aside mitigation and provided for protection of scrub jays, and none the less was shut down in an area that was not considered habitat.

The implementation of the ESA on the Cypress Creek project was a "learn as you go" process for all involved. Clearly this placed an undue burden on the landowner who was on hold while new information about the habitat tolerances of the Florida scrub jays were discovered on his property. I am not personally aware of the sum total of the data and information that was used to determine that scrub jays should be listed. However, it appears that either some information was not available, or it was not provided in a readily accessible form such that USFWS staff, practicing professionals, and the general public could make use of it in evaluating decisions regarding property and regulation. In this case, if the habitat tolerances of scrub jays are much wider than what was assumed in the basis for the listing, perhaps the listing was premature or unnecessary.

When I look back on this experience, what strikes me most is the amount of public and private resources that were expended in this effort. There were hundreds and hundreds of hours of my time, the landowner's time, and perhaps most importantly USFWS staff time committed to this particular project. Much of that time was the result of attempting to resolve the technical issues in a regulatory framework that is at best ever changing. The ESA's provisions for understanding and protecting habitat rather than species are very sketchy, and result in reinventing the wheel on a regular basis. The rules appear to be made up as you go along, and there are a variety of bureaucratic hurdles that extend the process interminably.

The best example that I can remember from this process is this. The permit issued in this case was an incidental take permit under Section 10 of the ESA. It authorized taking of scrub jays incidental to the project construction and required mitigation through habitat protection. You would think that would be a sufficient authorization for the project to continue. However, according to the ESA, the USFWS was required to conduct a Section 7 consultation with itself to determine whether the "Federal action" of issuing the Section 10 permit was consistent with the ESA. Every hour spent by USFWS staff meeting circular regulatory requirements such as these is one less hour spent actually protecting listed species.

Although I take great professional pride in having worked through the process described above, and achieving a successful resolution in this case, I would like to think that things could be done much more efficiently and provide more stable protection for listed species. In this case there was constant negotiation and com-

promise that resulted in a permitted solution under the rules that existed and their implementation. However, within the same project area, scrub jays on single lots were afforded less protection than those on lots still held by the project landowner. Further, the mitigation program that was ultimately agreed to will provide habitat for scrub jays, but there is no scientific understanding of whether that habitat or those scrub jays will contribute in any way to the long term recovery and stability of this species. Unfortunately, the decisions seem to have been made in a vacuum from the perspective of achieving the goal of delisting this species. The results of the regulatory program were that at least a backward step was not taken. However, until the ESA can make forward steps toward recovery in its regulatory program, it will be more and more difficult to recover our listed species.

**Opportunities for ESA Reform**

Although the information I have provided may seem critical of the ESA and its implementation, the intent is to try to develop solutions that can eliminate these concerns in the future. Identifying these concerns provides the framework for developing the solutions that can make the ESA successful in achieving what the Act intended, recovery of our listed species.

First, the ESA needs a clear, concise, and scientifically based regulatory framework that consists of a predictable set of scientific criteria for determining the presence of listed species. There are a variety of publications and generic information, however, no comprehensive research based methodologies for providing a landowner with certainty about the presence, or absence of listed species. The result is that these discoveries are often made "after the fact," which precludes the ability to plan for and accommodate these species where and when they occur. By requiring that the appropriate scientific data and criteria be made available at the time of listing and in recovery plans, the burden is no longer placed solely on the private landowner. With the availability of sufficient scientific data early in the process, ESA stakeholders are able to identify appropriate conservation measures and predictable, reasonable mitigation.

Finally, the ESA needs to include a set of meaningful incentives to create a desire for stewardship on the part of all landowners. It is the uncertainty of the ESA requirements for conservation measures and mitigation that causes landowner concern. This uncertainty could be eliminated with incentives that codify "No Surprises," Candidate Conservation Agreements, and Safe Harbor Agreements. In addition, uncertainty is reduced when timelines are established for developing recovery plans and designating critical habitat. But most importantly, landowners should be ensured that they are able to proceed with desired land use when appropriate measures have been taken to reduce the threat of land use activities on listed species and reasonable mitigation has been identified.

If we can provide the necessary predictability and certainty to landowners both small and large, we can harness the power of all our citizens to join in protecting the national treasure that our listed species represent.

Mr. POMBO. Thank you.

Mr. Worden.

## STATEMENT OF DWIGHT C. WORDEN, BRONDI DEVELOPMENT, INCORPORATED, FAIR OAKS, CALIFORNIA

Mr. WORDEN. Chairman Pombo, Resources Committee, my name is Dwight Worden, and I live in Fair Oaks, California, and I am a corporate government liaison for Brondi Development Corporation in Santa Rosa. It is an honor to be here, and I wish I had more time to say all that I know, because I have been living this problem for two years that you are trying to legislate. So, I find it possible to make, through this Committee, possibly, Fish and Wildlife more accountable.

My testimony is on requirements for mitigation, which the Department of Interior and Secretary Babbitt, Fish and Wildlife Service Director Jamie Clark are directly responsible, but they refuse to answer specific regulatory and policy questions. And other staff screened my attempts to contact them directly, and I don't get any responses because of their screening.

Now, we have a prior use of land, which is a former air base, Army air base, back in the World War II area. It has got ammunition dumps, nerve gas buried, equipment buried. It is a non-jeopardy, a non-critical habitat, low-quality land, but we have got problems, and they go something like this: The Corps, Army Corps in San Francisco issued an individual permit with conditions for mitigation based upon Fish and Wildlife's programmatic formal consultation which was produced on 17 July 1998. It was developed by the Fish and Wildlife Service and utilized by both the Fish and Wildlife Service and the Corps, but they became opponents, nonflexible, unfair, and unreasonable in their carrying out this particular programmatic. This was not in accordance with a White House Executive Order Flexibility Act and other Executive Orders that are related.

One of the things that was a problem was that there was no mechanism to implement it, and the Fish and Wildlife Service's programmatic, which is attached to your copy of this testimony, is based on flawed, federally funded task force information, and the mitigation ratios are unreasonable and unworkable. The preservation mitigation is misleading and non-functional, because the congressional intent is not practiced in using policy.

Now, the President's wetlands plan, 1993, clearly emphasizes the implementation of the Clean Water Act and the Endangered Species Act based upon a goal of "no overall net loss." The "no overall net loss" was trimmed down in words to "no net loss," and in practice is used as a cookie cutter approach. In fact, not all mitigations are the same, but Fish and Wildlife wants to treat everyone the same, and that is the problem.

Resultantly, an excessive amount of power was assumed and exercised and abused in consultations with this corporation which turned into dictatorial demands on the Corps and the applicants and permitees, and Director Clark was contacted but refused to answer. I have contacted Secretary Babbitt; no answer. He did get an answer when I had to go to the extent of having a letter delivered to him through the Cabinet at a Cabinet meeting. It was the only way I could get it to him, and the Office of the Inspector General, Donald Berry, refused to answer me. The White House called and asked his staff to contact me, and they refused to contact me or to deal with this matter; on and on.

But one of the things that came out of this is that a permit with special conditions was issued for endangered species, goldfields in this particular instance, and we had to have what they call seeds and soil, and when we had these seeds and soil of this endangered species, we had to collect it and store it, but it turns out that this programmatic didn't have any means of implementing it. So, we ended up keeping it for nine months instead of the Fish and Wildlife taking care of it within a six-month period. So, the Fish and Wildlife Service resisted and refused and delayed. It still hasn't been completed like it should have been. It has cost us some $300,000 for something that should have cost maybe $10,000.

We have a new application, and I asked for a section 7 consultation, and we had meetings, but nothing was done. They don't understand the regulations. They don't understand "no overall net loss" policies, and that is a problem. If they would use the "no over-

all net loss" goal, then they wouldn't have to issue a permit for every mitigation consultation—for every permit that would be applied for.

Thank you for my opportunity to contribute to the Committee's efforts, and I am ready to answer any questions that you have.

[The prepared statement of Mr. Worden follows:]

WESTWIND
BUSINESS PARK

brondi71.wri

24 MAY 99

US House of Representatives
COMMITTEE ON RESOURCES / Chairman Rep Don Young
Washington DC 20515

Ph(202)2257800 Elizabeth Megginson / Chief Counsel
Ph(202)2255150 Christine Kennedy / Chief Clerk

Committee Oversight Hearing / May 26, 1999 / 10:00 / 1324 Longworth House Office Building

TESTIMONY ON REQUIREMENTS FOR MITIGATION which the Dept of Interior Secretary Babbitt and the Fish and Wildlife Service Director Jamie R-Clark are directly responsible, but refuse to answer specific regulatory & policy questions; other staff screen with a zero response.

1. COE/SF issued an Individual Permit with conditions for mitigation based upon a FWS Programmatic Formal Consultation (17JUL98) which was developed by the FWS and utilized by both the FWS and the COE/SF in an opponent, nonflexible, unfair, and unreasonable fashion.

2. FWS Progammatic: based on flawed FederallyFundedTaskForce information. The Mitigation Ratios are unreasonable and unworkable. The Preservation Mitigation is misleading and non-functional in reality. The President's Wetland Plan (93) clearly emphasizes the implementation of the CWA based upon a Goal of "No Overall Net Loss". The "No Overall Net Loss" was trimmed down to "No Net Loss" as a Policy by the FWS. Resultantly an excessive amount of power was assumed, exercised, and abused in consultations, which turned into dictatorial demands on the COE/SF and the Applicant/Permittees and Congresswoman Lynn Woolsey.

3. FWS knew about the "No Overall Net Loss" Goal, but continued to mislead (using a Goal as a Policy) the COE, Representative Lynn Woosley, Board of Supervisors (Sonoma County), the Mayor of Santa Rosa and the Developers in the Santa Rosa Plain. Also misled is the Dept of Agriculture and the Farm Bureau. Misleading breaks down into, withholding information, distorting information, falsifying information, using Goal as a Policy to cause excessive and economically harmful over-mitigation to "make" the Developer and County Governments pay.

4. CWA 404(b)(1) Individual Permit Special Conditions read: The following Special Conditions shall be taken to ensure project-related impacts to endangered 'goldfields' are consistent with the provisions of Biological Opinion 1-1-98-F-0053 (Programmatic 98),

a. ... shall purchase Mitigation Credit for creation and Mitigation Credit for preservation

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b. ... Seed and/or top soil containing seed of the endangered 'goldfields' shall be collected from seasonal wetlands on the development parcel ... the seed & soil shall be stored under appropriate conditions until it can be used for restoration or reintroduction of 'goldfields' populations at other locations ... methods of collection and storage shall be coordinated with and approved by the FWS prior to the commencement of work on the development parcel. [this was illegally required by an unauthorized Programmatic]

5. Above, 4. a. , Mitigation Credit was purchased for preservation, but the money was never used, and the Wright Bank 'goldfield' flowers did not bloom, later learned, no flowers existed.

6. Above, 4. b. , Seed & Soil was collected on an expensive ten days short notice, stored in a controlled facility, documented for FWS & COE. FWS Programmatic stated within 6 months, instructions for disposition. FWS stated throw the National Resource / Endangered Species in the dump; EPA stated don't even think about it, would be a Federal crime. WBP insisted to properly transfer jurisdiction of the Seed & Soil, FWS resisted and refused and delayed, COE did not know what to do with the Seed & Soil. FWS had no follow-up plan for what to do with the endangered specie flower, as well as no follow-up plan for other mitigation options in the Programmatic(98), in violation of White House EOs, & President's Wetland Plan (93), & MOAs.

7. Resultantly, at great expense to the developer, unreasonable storage costs were incurred due to delays by the FWS not knowing what to do, not having a complete Programmatic that was workable, FWS continued to delay and mislead and ignore the FWS's responsibility to provide for the proper disposition of the National Resource they required to be stored. The developer was forced to produce a Certificate of Disposition for the Endangered Species, and still the FWS and the COE are dragging their feet to sign it, one month later, after the CDFG picked up the Listed Species and took it illegally out of the Listed Species Flower's Native Area.

THANK YOU FOR THE OPPORTUNITY TO CONTRIBUTE TO THE COMMITTEE'S EFFORTS

Dwight C. Worden

Dwight C. Worden / CorporateGovernmentLiaison, Brondi Development Inc / PhFx(916)9655882

WESTWIND BUSINESS PARK

20APR99

# CERTIFICATION OF SEED AND SOIL MATERIAL DISPOSITION/LOCATION

Dept of Interior Fish & Wildlife Service (FWS) CERTIFICATION of Disposition and Location of the Westwind Business Park US Army Corp of Engineers (COE) Permit #23495N Special Condition for Seed & Soil Material "take" and "storage". [Calif Dept Fish & Game (CDFG)]

COE Individual Permit #23495N Special Condition required a Wetland Vernal Pool Habitat occupied with Burke's goldfields to be collected under the supervision of the Dept of Interior FWS and required the Seed & Soil Material be stored in an approved fashion in the Westwind Business Park Building E. Storage of Seed & Soil Material was facilitated with 42 tied and numbered bags of mowing and raked material, and 10 orchard bins of seed and soil material. The Seed & Soil Material was stored in place as required on August 7, 1998.

FWS and CDFG removed all of the following Seed & Soil Material from the Westwind Building E at Westwind Business Park, Santa Rosa, CA on April 21, 1999, 42 labeled bags:

| | | | | |
|---|---|---|---|---|
| 1. VAC A-3 | 11. HIGH MOW A-7 | 21. A-2 2ND PASS | 31. RAK A-3 | 41. HIGH MOW A-6 |
| 2. 3RD VAC A-3 | 12. HIGH MOW A-5 | 22. VAC A#1 2ND PASS | 32. HIGH MOW A-5 | 42. HIGH MOW A-7 |
| 3. VAC A-1 1ST PASS | 13. HIGH MOW A-5 | 23. 3RD VAC A-4 | 33. HIGH MOW A-5 | |
| 4. VAC A-6 | 14. HIGH MOW A-6 | 24. HIGH MOW A-5 | 34. LOW MOW A-7 | |
| 5. HIGH MOW A-7 | 15. HIGH MOW A-5 | 25. VAC A-4 1ST PASS | 35. RAK A-4 | |
| 6. HIGH MOW A-7 | 16. HIGH MOW A-5 | 26. HIGH MOW A-5 | 36. LOW MOW A-5 | |
| 7. HIGH MOW A-6 | 17. HIGH MOW A-5 | 27. LOW MOW A-5 | 37. LOW MOW A-6 | |
| 8. VAC A-5 | 18. VAC A-5 | 28. LOW MOW A-6 | 38. VAC A-8 | |
| 9. VAC A-3 2ND PASS | 19. HIGH MOW A-7 | 29. A-2 1ST PASS | 39. VAC 2ND PASS A-4 | |
| 10. VAC A-7 | 20. LOW MOW (?) | 30. HIGH MOW A-8 | 40. RAK A-1 | |

FWS and CDFG removed all of the following Seed & Soil Material from the Westwind Building E at the Westwind Business Park, Santa Rosa CA, on April 21, 1999, 10 Orchard Bins:

| | | | | |
|---|---|---|---|---|
| ~~1.~~ #3 & 6 Bot 2" | ~~2.~~ #1,2,4,5 ~~Bot~~ Top | ~~3.~~ Area 1,2,4,5 Bot 2" | ~~7.~~ #7 & 8 Top 2" | ~~9.~~ #7 & 8 Bot |
| ~~2.~~ #3 & 6 Top 2" | ~~4.~~ #1,2,4,5 Top | ~~5.~~ Area 1,2,4,5 Bot | ~~8.~~ #7 & 8 Top 2" | ~~10.~~ #7 & 8 Bot |

All of the above identified Seed & Soil Material (in identified containers) was:

Released for removal from Westwind Business Park Building E, Santa Rosa CA
By Westwind Officer _____ title April 21, 1999.
Jenifer Strobel

PickedUp for FWS&CDFG from Westwind Business Park Bldg E / Transported to Yountville CA
By CDFG Driver _____ title April 21, 1999.
Mike Lewis

Received for CDFG for storage at the CDFG Yountville CA site
By CDFG Official _____ title April _____, 1999.
Carl Wilcox

Certified Completion of COE Permit #23495N Special Condition Mitigation
By FWS Official _____ title April _____, 1999.
Wayne White

Entered into the COE Permit File #23495N at the COE / San Francisco CA
By COE Chief, Regulatory Branch _____ title April _____, 1999.
Calvin Fong

PICKED UP REMAINING TWO BOXES ON 4/22/99 Mike Lewis

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
**Sacramento Fish and Wildlife Office**
**3310 El Camino Avenue, Suite 130**
**Sacramento, California 95821-6340**

IN REPLY REFER TO:
1-1-98-F-0053

July 17, 1998

Mr. Calvin Fong
Chief, Regulatory Branch
Department of the Army
U.S. Army Engineer District,
San Francisco District, Corps of Engineers
333 Market Street
San Francisco, California 94105-2197

Subject: Programmatic Formal Consultation for U.S. Army Corps of Engineers 404 Permitted Projects that May Affect Four Endangered Plant Species on the Santa Rosa Plain, California (File Number 22342N)

Dear Mr. Fong:

This is in response to your February 6, 1998, letter initiating formal consultation with the U.S. Fish and Wildlife Service (Service) for all Clean Water Act Section 404 permit activities that may affect federally listed plants on the Santa Rosa Plain, Sonoma County, California. Your request was received in our office on February 11, 1998. This document represents the Service's biological opinion regarding the effects on four federally listed endangered plant species, Sonoma sunshine (*Blemosperma bakeri*), Burke's goldfields (*Lasthenia burkei*), Sebastopol meadowfoam (*Limnanthes vinculans*), and many-flowered navarretia (*Navarretia leucocephala* ssp. *plieantha*), which would result from 404 permit issuance that is consistent with this programmatic consultation. This consultation document has been prepared pursuant to section 7 of the Endangered Species Act of 1973, as amended (Act), and 50 CFR 402 of our interagency regulations governing section 7 of the Act.

The purpose of this programmatic consultation document is twofold:

(1) to expedite formal consultations, on a project-by-project basis, for limited effects to listed species in "low-quality"[1] seasonal wetlands, under specifically defined circumstances; and

[1] The term "low-quality" has specific meaning in the context of the Santa Rosa Plain Vernal Pool Ecosystem Preservation Program and does not denote biological value. For the purpose of this programmatic consultation, low-quality seasonal wetlands are those which score as low-quality under biological resource criteria outlined in the Army Corps of Engineers Habitat Quality Evaluation Procedure. (See also definition section of this programmatic consultation.)

(2) to outline a comprehensive conservation program that would address effects to the listed species resulting from 404 permit issuance for fill of seasonal wetlands throughout the Santa Rosa Plain.

Future projects meeting the conditions specified below, or that the Sacramento Fish and Wildlife Office (SFWO) of the Service has determined will have similar impacts, may be appended to this consultation document.

This biological opinion is based on information provided in 1) the Santa Rosa Plain Vernal Pool Ecosystem Preservation Plan (VPEPP) (CH2M Hill 1995); 2) the Seasonal Wetland Baseline Report for the Santa Rosa Plain, Sonoma County (Patterson *et al.* 1994); 3) the Public Notice of a General Permit for Fill of Vernal Pool and Seasonal Wetlands in the Santa Rosa Plain, dated September 3, 1997, from the U.S. Army Corps of Engineers (Corps); 4) a letter from the Service dated October 31, 1997, responding to the public notice; and 5) numerous meetings with the Corps and other members of the Vernal Pool Task Force as described in the Consultation History/Background section of this document, below. A complete administrative record of this consultation is on file at the Service's SFWO.

The Service will reevaluate the effectiveness of this programmatic consultation document on the Santa Rosa Plain vernal pool plant species at least every six (6) months to ensure that continued implementation will not result in effects to the listed species that would preclude their survival and recovery. This opinion may be modified during reevaluation if it is determined that projects allowed through the programmatic consultation could preclude the survival and recovery of the listed species.

**Consultation History/Background**

Representatives of various regulatory and resource agencies (including the Service), local government entities, environmental groups, local developers, representatives of agriculture, and landowners formed the Vernal Pool Task Force in 1991. The Task Force was formed to address the concerns of the Santa Rosa community regarding issuance of permits for seasonal wetland fills, in light of the pending listing of three endangered plant species: Sonoma sunshine, Burke's goldfields, and Sebastopol meadowfoam. The study area for the task force was selected to include most of the ranges for these species, which are primarily restricted to the seasonal wetlands of the Santa Rosa Plain. Federal, State, and local agencies entered into a Memorandum of Understanding (MOU) to formally establish cooperative relationships for development of the Santa Rosa Plain Vernal Pool Preservation Program, a component of which is the VPEPP. The Task Force planned to complete the VPEPP in two phases, with the first phase focusing on planning and the second phase to involve implementation.

In 1995, the Task Force completed the VPEPP Phase I Final Report. The Phase I Report explains the program's history and outlines the goals and objectives for Phases 1 and 2 of the program. The report contains background information important in the Task Force planning efforts, including information on (1) the Santa Rosa Plain, its ecosystems, and its sensitive species; (2) historic, current, and planned land uses on the Santa Rosa Plain; (3) basic conservation and preserve design principles; and (4) data sources and procedures for entering

planning options for the establishment of a regional preserve system that would allow for the survival and recovery of the listed plant species.

Projects that are not consistent with these conditions may be allowed under this interim program only as the Service deems appropriate. For example, a project that affects more than 3 acres of seasonal wetlands, but has effects similar in scope and nature to those analyzed in this biological opinion as determined by the Service, may be allowed under this program.

2. Mitigation

This section describes the mitigation requirements for impacts to seasonal wetlands allowed under this consultation for the interim program.

Determination of affected acreage. Affected acreage is based on direct and indirect effects (see Definitions, above) of the project on seasonal wetlands.

Listed species presence. A project applicant may choose whether to have the project site surveyed for listed plant species, consistent with established Service protocol (Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed Plants on the Santa Rosa Plain, Appendix A).

a. If the applicant chooses not to survey, the Service will assume the listed species are present throughout the seasonal wetlands on-site.

b. Because of the probable persistence of seed banks (see Status of the Species and Environmental Baseline), all seasonal wetlands on sites with any past record of listed species presence will be treated as currently occupied habitat, regardless of whether current surveys have detected the species on-site.

No Net Loss Policy

c. If surveys have been conducted according to Service protocol and no listed plants have been found, the seasonal wetlands on-site will be treated as habitat. This programmatic consultation addresses effects and mitigation for this habitat type where the listed plants have not yet been observed because a persistent seed bank may be present even if the plants have not been detected, and because currently unoccupied but restorable habitat is believed to be important for the survival and recovery of the species covered in this biological opinion. (See also Status of the Species and Environmental Baseline.)

Components of mitigation. Project effects will be mitigated by both preservation and restoration/construction (see Definitions above) components. The preservation component may be fulfilled either by dedicating acreage within a Service-approved ecosystem preservation bank, or, based on Service evaluation of site-specific conservation values, preserving high-quality seasonal wetlands on the project site or on another non-bank site as approved by the Service. Habitat not ranked as high-quality may be evaluated for mitigation suitability on a case-by-case basis. Similarly, the restoration/construction component may be fulfilled by dedicating acreage

Area-based mitigation. The action area is divided into the following mitigation units:

a. northern unit: north of Airport Boulevard;
b. central unit: between Airport Boulevard and Highway 12; and
c. southern unit: south of Highway 12.

Key

To assure impacts during the interim planning period do not preclude the ability of the long-term conservation program to protect and restore the listed plants throughout their respective ranges (see Status of the Species section, Status and Distribution), mitigation must take place within the unit where the impact occurs unless otherwise approved by the Service. Should future data fail to support the delineation of separate mitigation units, this approach may be modified.

Habitat ranking and mitigation ratios. All sites must be ranked according to the HQE manual. Once a site has been ranked and surveyed, mitigation requirements can be identified using the key below and Table 1 (page 9). Mitigation ratios identified below are to be read as acreage of mitigation: affected acreage (e.g., 2:1 = 2 acres of mitigation required for 1 acre affected). Affected acreage is based on direct and indirect effects of the project on listed plant species habitat. If endangered plant species have been observed or are assumed to be present at a site, all seasonal wetlands at that site are to be mitigated as if the species is present in them.

1a. If the site scores as high-quality for biological resources according to the HQE, the project cannot be appended to this opinion. An individual permit is required.

1b. If the site scores as low-quality for biological resources according to the HQE, go to #2.

2a. If the wetlands on the site include no seasonal wetlands as defined in this biological opinion, apply for Corps nationwide permit or individual permit for any riparian or fresh water marsh wetlands.

2b. If the wetlands on the site include seasonal wetlands, mitigate through restoration/construction and preservation.

Restoration/construction: Restore or construct seasonal wetlands at a mitigation ratio of 1:1 if the restoration/construction has been deemed successful by the Service prior to project impacts (with demonstrated functional vernal pool hydrology for at least 1 year), or at a ratio of 1.5:1 if the project proceeds before the hydrology of the restoration/construction site has been deemed successful.

Preservation: To determine preservation requirements, conduct appropriate surveys for the listed plants based on USFWS guidelines (Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed Plants on the Santa Rosa Plain, Appendix A), or assume the listed plants are present. Check for previously recorded occurrences of the listed species on the site. Go to #3.

Mr. POMBO. Thank you.
Mr. Johnston.

**STATEMENT OF JAMES R. JOHNSTON, COUNSEL, FOUNDATION FOR HABITAT CONSERVATION, SEATTLE, WASHINGTON**

Mr. JOHNSTON. Thank you, Mr. Chairman, members of the Committee. My name is Jim Johnston. I am here from Seattle. I serve as counsel to the Foundation for Habitat Conservation, and I am here today on their behalf as well as a similar organization, the Coalition for Habitat Conservation, which is based in southern California.

The foundation that I represent is comprised primarily of forest landowners. We have about 800,000 acres currently committed under successfully operating HCPs. We are working on about two million acres more worth of forest land HCPs.

The Coalition's members are primarily members of a development community in southern California and have been deeply involved in the community conservation planning projects in southern California.

I am pleased, also, to say that the American Forest and Paper Association has endorsed our comment today.

My focus is on HCPs, and the Coalition and the Foundation sent me here to tell you four things. One, we believe that HCPs are very good things. We believe that they are good for landowners; we believe that they are good for species. Some of the very best science being done today on threatened and endangered species is a direct outflow of the habitat conservation planning process. Second, I am here to tell you that the "no surprises" rule is a critical component of successful habitat conservation plans. Third, there are issues related to section 7 consultations that I believe Congress must address if we are to sustain a successful HCP Program. And, finally, we are here to help. Our two organizations are actively engaged in conversations with both Services. Some of the members of the foundation met just last week with Secretary Daly and Secretary Babbitt, and we are pleased with their cooperation and support for the multi-species and single-species HCPs.

Now, about HCPs, I look at them from three perspectives—the landowner, the species, and then from the government's perspective. From the private landowner's perspective, if I have got an endangered species on my property or I think I do, I have the section 9 take prohibition that I have to deal with. Either I have to run risks or I have to find ways to find greater certainties. The HCP process, frankly, is the best game in town for me to find a reasonable level of certainty for the future, so that I can support the kinds investments in both the business side, financially, as well as the conservation measures that are going to be benefiting the species. Without certainties, the process simply won't work.

One of the key things is to be able to cover unlisted species. The multi-species plan is very critical. It avoids some of the problems of getting a plan, making some commitments, and finding out a year later that you have got a whole other species to deal with.

The last thing about conservation planning that is the most important, perhaps, is that it is in fact voluntary. I do not have to

do an HCP. I can choose to live with the regulatory structure; that is the landowner's choice.

From the species perspective and with the incidental take permit issuance, I have an opportunity to manage my land in a way where I am not constantly worried about section 9. Section 9 is a disincentive. How can I allow habitat to grow on my property if it is going to attract a species that later precludes me from using my property? The HCP takes that away; it removes the disincentive. The very process of doing an HCP educates the landowner. The landowner is only going to be a better steward of his or her land if you know what the needs of the species living on your land are.

It also provides the opportunity for protection of unlisted species. Section 9's take prohibition simply doesn't apply to them. A multispecies HCP plan gives them advanced protection, and, hopefully, if there are enough of them and they are successful, we won't have as many new listings.

From the government resources standpoint, what are the options? You can enforce section 9 individual species-by individual species, beak-by-beak, and member-by-member or you can try to collect things into an HCP, whether it is a statewide or a regional plan. We have a successful opportunity—or so far a successful opportunity—in Washington State on a statewide plan covering eight million acres that will ultimately lead, if it is successful, to a statewide HCP providing coverage for large and small landowners for the whole forest products sector.

The "no surprises" policy is an essential component of any HCP. We would urge that the "no surprises" policy simply be made part of the Endangered Species Act. We are confident the Services will be successful in defending the lawsuit, but this is a cloud that should be taken away.

Finally—and I realize I am at the end of my time—I want to talk for a moment about section 7 consultations. Section 7 consultations, as interpreted by one of the district court judges in northern California, precludes the irreversible commitment of resources during consultation by an HCP applicant. In this case, as it applied in the situation of the PALCO HCP, the judge said that no timber harvest could occur while consultation was underway and also said that consultation means all consultation, all discussions with the Services. That would be the ultimate sacrifice a landowner would be asked to make; to have to shut your entire operation down while you are in consultation. So, section 7(d) should simply be made not applicable to permits issued under section 10, and in fact one could argue that I think with a great amount of force that section 7, itself, is largely, if not completely, redundant when applied to HCPs. Some of the resources that are being spent on section 7 now for HCPs could be redirected elsewhere.

Thank you for the indulgence in running over my time, and I would be happy to answer any questions.

[The prepared statement of Mr. Johnston follows:]

STATEMENT OF JAMES R. JOHNSTON, FOUNDATION FOR HABITAT CONSERVATION AND THE COALITION FOR HABITAT CONSERVATION

**Introduction**

My name is Jim Johnston. Thank you for the opportunity to testify.

I serve as counsel to the Foundation for Habitat Conservation, based in Seattle. I also come to you with the background of having worked with several landowners on habitat conservation planning efforts.

I am testifying today on behalf of both the Foundation and a similar organization—The Coalition for Habitat Conservation—headquartered in Laguna Hills, California. I am also pleased that the American Forest and Paper Association, the national trade association of the pulp, paper, paperboard and wood products industry, has endorsed our statement today.

I am pleased to appear before the Committee today to discuss the Endangered Species Act. The specific focus of my testimony is the habitat conservation planning (HCP) program under Section 10 of the ESA.

The Foundation and Coalition strongly support viable voluntary habitat conservation planning under the Endangered Species Act (ESA). It is a very valuable tool for private landowners, and for preserving species and their habitat. HCPs will remain viable only if HCPs provide reasonable certainty at a reasonable cost. To succeed, an HCP must mesh scientific credibility with business sensibility.

The Foundation and Coalition commend the agencies for their support of the HCP program. The recently issued joint directive of Secretaries Babbitt and Daley documents the agencies commitment to HCPs. Yet, both the Coalition and Foundation see challenges facing landowners (and the agencies) that, left unchecked—will significantly reduce the incentives for voluntary private contributions to species preservation.

Specifically, for HCPs—and all the good they can do—to remain viable, the No Surprises Rule must be protected and the ESA Section 7 problems fixed.

**The Foundation for Habitat Conservation**

The Foundation for Habitat Conservation *(www.habcon.org)* is a not-for-profit (501 (c)(6)) organization formed in April of 1998. The Foundation's purpose is to "research, communicate, and support the workings, role, and benefits of habitat conservation plans and related, incentive-based private conservation initiatives." The Foundation has participated in a number of forums discussing HCPs and ways to improve them.

The Foundation's members include a number of landowners that either hold HCPs, are developing HCPs, or both. At present, the members of the Foundation have over 820,000 acres of land in operating HCPs in three states, and have HCPs in various stages of development on over 2 million additional acres in a total of seven states. Foundation members own timberland and focus mainly on forestry HCPs, while Coalition members develop property covered by current and proposed regional HCPs. Some of our members have also been very active supporters of a collaborative state-private-Federal effort to put a statewide regulatory plan in place in Washington state under which a programmatic HCP will be used to address the needs of salmon and other species on over 8 million acres of private land. The plan, called "Forests and Fish" was approved by the Washington State Legislature last week.

**The Coalition for Habitat Conservation**

The Coalition for Habitat Conservation is a group of Southern California property owners and public utilities that together own more than 300,000 acres of land in Orange, Riverside and San Diego counties. It was formed in 1991 as a 501(c)(6) corporation to pursue the mutual interests of its members in finding solutions to endangered species issues that are sound environmentally and economically.

The Coalition has supported California's Natural Communities Conservation Planning Act as a vehicle to create large-scale HCPs that protect multiple species, and has promoted these plans in forums throughout the region. Coalition members have participated in several HCPs that involved the creation of habitat preserve systems totaling more than 210,000 acres in Southern California, and are currently participating in the development of plans that will cover significant additional acres. A signature of these plans is that, while landowners make large contributions of private lands to the HCPs, others participate as well. In the case of the Orange County Central & Coastal Natural Communities Conservation Plan, for example, 21,000 acres were contributed by a private landowner and 17,000 acres were contributed by a transportation authority, state and local jurisdictions, all of whom are dedicated to the success of the plan.

**The Value of Habitat Planning under the ESA**
**HCPs provide incentives for voluntary, private contributions to species.**

In many parts of the country, significant populations of threatened and endangered species are found on privately owned lands. Section 10 of the ESA is the only mechanism currently available that gives incentives to the private sector to volun-

tarily provide extensive land and resources to protect threatened and endangered species. Without the ESA-related certainty that the government can offer a private landowner through the HCP program, few if any landowners could afford or justify to make the kinds of commitments that have and are being made in the context of HCPs. And, for the agencies, the alternative is a regulatory enforcement program that must be implemented on an "individual-by-individual" basis. From the standpoint of agency resources and landowner participation, HCPs are advantageous.

For example, in my home state of Washington, through the historic "Forests and Fish" Agreement, owners of 8 million acres of forestland have committed to a massive overhaul of riparian management practices under a proposal that will lead to statewide HCP coverage for all forest landowners. Over 2 billion dollars of timber and tree growing capacity is being set aside to achieve greatly increased streamside buffers. This unprecedented *and voluntary* commitment would not have been possible if not for the ability (and willingness) of the National Marine Fisheries Service (NMFS) and U.S. Fish & Wildlife Service (FWS) to offer long-term certainty to landowners regarding fish and a number of amphibians that are or might become listed under the ESA. The extensive and long-lasting benefits of such a program cannot be seriously questioned. Nor can I envision another mechanism whereby the government could obtain—in one fell swoop—covering 8 million acres with carefully considered and negotiated conservation measures.

A good measure of the value of HCPs is to compare results under them with results in their absence. Under the "no take" rules, circles around owl or gnatcatcher nests are protected but landowners are left to harvest or develop other areas effectively preventing the development of new habitat over time. The "take" prohibition creates a powerful disincentive to ever allow non-habitat to grow into habitat. Under the Simpson HCP in Northern California some incidental take *is* allowed *but* the HCP is devised to allow habitat to grow and increase over Simpson's ownership over time, because of the HCP removed the disincentive. Owls have prospered on that ownership and owl habitat will increase significantly over the life of the HCP with Simpson carrying out a successful timber operation. The HCP made success for the owl and for Simpson possible. Southern California's Central & Coastal NCCP provides protection for rich habitat areas and creates links between these areas, while allowing development in poor habitat areas. The net effect is better habitat capable of supporting greater numbers of threatened and endangered species—while still allowing the development necessary to meet the needs of a growing human population.

**Multi-species plans offer especially important opportunities.**

Multi-species plans are a particularly valuable part of the HCP program, as they are most likely to focus management or development of property from the broadest possible wildlife perspective. And, by covering unlisted species, they provide certainty to long-term land managers that investments today are likely to result in meaningful returns. From the perspective of wildlife, multi-species plans also provide tangible benefits to species that are not yet listed and for which no regulatory or "take" restriction exists.

**Single or limited species plans must remain a viable option as well.**

On the other hand, single-species or focused plans (e.g., fish only) are equally appropriate in some settings, either because of landscape-specific circumstances, landowner and agency priorities or simple landowner preference. Single-species planning is particularly conducive to development of mitigation banks, where private landowners have additional incentives to create and maintain habitat.

**No Surprises Rule**

The No Surprises Rule is the heart of the HCP program. It represents the primary guarantee of certainty essential for voluntary conservation planning by a landowner. It also represents certainty on the part of the wildlife agencies that the plans have a sound design, and are, in effect, low-risk propositions. Yet, the No Surprises Rule is under heavy attack. Public and legal challenges have sought to erode its strength over time. Without the No Surprises Rule, voluntary HCP commitments will cease, and the superior species protections afforded by large-scale HCPs will terminate. Both the Coalition and Foundation believe that Congress should codify No Surprises as the most important element to ensure HCPs' success.

From the standpoint of business, the reasonable certainty afforded by No Surprises is needed to attract and sustain long-term investments. For businesses affected by listed species, HCPs are the best mechanism that Congress has provided to attain certainty. HCPs, quite simply, are the only game in town, and No Surprises is the most important player in that game.

**Adaptive Management**

Certainty for landowners under HCPs is, of course, not boundless. Both the Foundation and Coalition recognize that adaptive management provisions are appropriate elements of many long-term HCPs. Adaptive management—through appropriate monitoring and a focused feedback mechanism—can result in more efficient and effective management techniques. This can result in the HCP performing more effectively as we learn more—by improving results without increasing burdens on the HCP holder beyond that incorporated into the adaptive management provisions established during development of the HCP.

Of course, adaptive management must be based on something measurable. Information to drive adaptive management comes from monitoring the HCP results, from new research discoveries, or both. It is not appropriate to require HCP holders to perform or fund research. Reasonable monitoring requirements are appropriate, but should be focused on events that occur.

Adaptive management is a tool that can be very valuable if it is used in the context of the "best science available." Some of the best science being done today is in conjunction with HCPs. However, adaptive management can be misused if it is a substitute for a reopener clause to force new mitigation techniques which undermine certainty. It is also inappropriate if the agencies insist on very stringent restrictions—using "worst case" assumptions—and then require landowners to use expensive research to "prove" the worst case scenario incorrect. On the other hand, adaptive management can also be very valuable if it is used as a method to resolve questions of science that could delay development of the HCP and ensure that mitigation will provide the intended benefits, which start with reasonable operating assumptions, and allow for appropriate adjustments. Finally, while adaptive management works both ways, it must have some bounds, or it will subsume all notions of certainty. Those bounds must be set during HCP development, as they are but one part of the "package" of commitments a HCP holder is making.

**HCP process concerns and ESA Section 7**

Of course, for all their good, HCPs must be affordable and "doable" within a reasonable time frame. The HCP process must be streamlined so applicants can move through it at a reasonable pace and cost, thus allowing timely protection of resources. Foundation members and others have been meeting with the agencies to discuss this. Last week, the joint directive of the Secretaries of Interior and Commerce committed the agencies to measures that should help them do a better job managing the HCP "process." We will continue to work with them to make the HCP program a success.

Other than an adverse outcome in the current lawsuit challenging the No Surprise Rule, Section 7 of the ESA currently poses the biggest single risk to the continued viability of the HCP program, and one that Congress can and should fix. Section 7(a)(2) requires that all Federal agencies "consult" with NMFS or FWS, as appropriate, prior to issuing a permit or funding an activity whenever the agency believes that such action "may adversely affect" a listed species. The agencies construe Section 7 consultation as applying to their issuance of an incidental take permit upon approval of an HCP. Accordingly, the agencies "consult" with themselves before approving an HCP.

The purpose of consultation is to determine whether the proposed agency action "is not likely to jeopardize" the continued existence of any listed species or result in the adverse modification of critical habitat. As elucidated in NMFS/FWS regulations, if the determination is "no", then the agency action can proceed. If the determination is "yes", then the consulted agency must propose reasonable and prudent alternative measures that would mitigate the likely jeopardy. The agency then must consider the jeopardy opinion, the alternatives, and decide for itself whether it believes jeopardy is likely. The applicant will then decide how it wishes to proceed. Of course, in the context of an HCP, where NMFS or FWS is consulting "with itself" (or themselves), the jeopardy opinion is conclusive, and the action cannot proceed unless an alternative is found.

**Is consultation on HCPs appropriate?**

There is a legitimate argument, based on careful review of the ESA and its history, that Section 7(a)(2) consultation on HCPs was not intended at all and that Section 7 consultation standards are redundant with the Section 10 HCP approval standards. In developing an HCP, the applicant and agencies are engaged in the focused consideration of how to minimize and mitigate the impacts on the species to the maximum extent practicable. An activity cannot pass muster under the HCP standard of ESA Section 10 and still be found to pose jeopardy to the species. If the consultation concept is believed to "add value" to the HCP process, we believe

that it should be incorporated into the Section 10 HCP development and evaluative processes.

**The impact of ESA Section 7(d).**

Section 7(d) of the ESA provides that after initiation of "consultation," neither the agency nor the applicant may make any:

> irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

An interest group has argued—and one court has recently agreed—that under this subsection, an HCP applicant cannot continue to engage in everyday management practices that alter habitat because such alteration—otherwise an entirely legal activity—would foreclose a possible alternative that called for that particular habitat to be left unaltered under the HCP. This came up in the context of a forestry HCP—under the logic of the ruling, no harvest activity could occur during consultation. Moreover, the court construed "consultation" as including the entire time period that the applicant and the agencies are working together. Thus, under such an interpretation, an HCP applicant who was engaged in consultation would have to cease all operations on the land covered by the HCP. This interpretation and the potential erosion of the No Surprises Rule are the most serious clouds over the HCP program today. No prudent manager would risk the expense, uncertainty, and disruption if such a suit might succeed.

Arguably, the Section 7(d) problem goes beyond the HCP approval stage. That is because under agencies' regulations, a completed consultation may be "reinitiated" when certain circumstances are present (where agency discretion or control over the HCP holder is retained, and some new information or issue arises). While one court has (correctly) held that as a general matter, having an HCP does not give an agency general discretion or control so to cause reinitiation of consultation just because a new species (not covered by HCP but arguably present in the area) was listed, there are circumstances under many HCPs where some agency discretion is retained. A good example of this is adaptive management, where in ongoing HCP negotiations the agencies are seeking approval functions as a part of the process. Under this view of Section 7(d), every time adaptive management was underway the HCP holder could be forced to shut down the whole operation.

A relatively easy fix for this problem is possible. Either a different standard should be articulated for HCP holders, or, more simply and effectively, Section 7(d) should not apply to incidental take permits applied for or issued under Section 10 of the ESA.

**Recovery of a species is not an appropriate requirement of an HCP applicant.**

While, under the ESA, recovery is clearly not the responsibility of the private landowner, HCPs offer the most constructive way for private parties to contribute to the ultimate goal of recovery while meeting their requirements to mitigate for the privilege of obtaining an incidental take permit. While recovery is the government's responsibility, care must be taken not to let that overall governmental goal become translated into the standard for HCP approval.

ESA Section 10 requires landowners to minimize and mitigate the impacts of any taking of covered species the landowner would cause—and to do so to the maximum extent practicable. In other words, the mitigation burden imposed on each landowner in the HCP process is intended to be dependent upon the impacts of taking that would be caused by the landowner's future activities. We believe that ESA Section 10 is consistent with the Supreme Court's Dolan decision—the burden imposed on the applicant must be proportional to the impacts that would be authorized by the incidental take permit.

If landowners are asked in the HCP context to assume responsibility for—and agree to correct—all landscape conditions that are believed to be inadequate, including conditions not caused by the applicant, then this proportionality concept is lost. Under a "properly functioning habitat" standard, applicants are asked to ensure that their ownerships will develop the same "ideal" habitat conditions, regardless of the extent of the impacts on covered species the landowner's future operations would actually cause or the pre-existing conditions of the property. By definition, there is no proportionality under the properly functioning habitat standard.

**The Role of "Science" and How to Measure Success.**

Of late, much has been said about the role of science in HCPs. HCP opponents raise the battlecry that "HCPs are not based on science." For starters, this ignores

the important concept that HCPs are more than scientific documents. They are also business plans. The Foundation and Coalition agree that available scientific data should be used in developing the HCP measures. We do not believe that it serves a useful purpose that every HCP becomes a written compendium of every known fact about a species. That adds unnecessary cost and delay. Science should play an important role in formulating an HCP, but ultimately the plan must balance the minimization of impacts with the notion of practicability. It is a balance.

We also do not support the contention of some that where there are significant gaps in science, an HCP may be inappropriate. There are and always will be gaps in our knowledge, and how significant our gaps are is not even known until after the fact. There are at least two reasons that denial of HCP coverage in the face of uncertainty is inappropriate. First, we adhere to the tenet that if the agencies knew enough to list a species, they know enough to cover it in an HCP. Second, even if significant species-specific data is not available, often there is data concerning the general habitat requirements of other, similar species, and the HCP can be crafted to move management into the realm of what is likely to be required. Those situations could also be candidates for reasonable adaptive management provisions.

The "success" of any HCP must be judged by a blend of both scientific and business criteria, tempered by practicability. Any purely "biological" or "scientific" review of HCPs misses a good deal of the equation. Perfection can be the enemy of the good.

HCPs should not be measured based on whether they "guarantee" achievement of certain population recovery goals. First, private landowners by law have no responsibility to "recover" a species. Second, HCPs can only cover a portion of the landscape. The actions of others, including government, can profoundly affect a species' status. All HCP holders can do is provide or protect habitat. Third, most species can move in and out of the HCP area. Whether members of a species actually use the habitat that the HCP holder provides or whether the species continues to be adversely impacted by other causative agents—natural or human-induced—is often outside the control of the HCP holder. For example, if an HCP holder provides habitat for salmon, but fish are not (?) returning to the HCP area due to passage restrictions, poor ocean conditions, predation by marine mammals, unnatural congregations of birds, or over-fishing, that HCP should not be held accountable for fish populations. That responsibility can only be the government's, as only the government has the power to influence all pertinent factors.

**The Solutions**

- Make No Surprises the law.
- Fix the Section 7 consultation—and the Section 7(d) problem in particular. Section 7(d) should not be applicable to HCPs. Consultation for HCPs should be streamlined and incorporated into Section 10.
- Bolster support for multi-species plans. We commend Secretaries Babbitt and Daley, along with leadership in the agencies, for their support of such plans.
- Keep HCPs affordable and available in a timely manner.
- Prevent adaptive management, which is also vital to the HCP process, from swallowing No Surprises.

Mr. Chairman, both the Coalition and Foundation are working on solutions to these issues, and stand ready to assist you in whatever manner we can. Thank you for the opportunity to testify today.

FOLLOWUP AND SUMMARY SHEET

**U.S. House of Representatives Resources Committee on May 26, 1999 on behalf of Foundation for Habitat Conservation and Coalition for Habitat Conservation**

**Witness:**

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**Outline of Testimony:**

**The Value of Habitat Planning under the ESA**
**No Surprises Rule**

**Adaptive Management.**
**HCP process concerns and ESA Section 7**
**Recovery of a species is not an appropriate requirement of an HCP applicant.**
**The Role of "Science" and How to Measure Success.**

- Make No Surprises the law.
- Fix the Section 7 consultation—and the Section 7(d) problem in particular. Section 7(d) should not be applicable to HCPs. Consultation for HCPs should be streamlined and incorporated into Section 10.
- Bolster support for multi-species plans.
- Keep HCPs affordable and available in a timely manner.
- Prevent adaptive management, which is also vital to the process, from swallowing No Surprises.

Mr. POMBO. Thank you.
Mr. Bean.

**STATEMENT OF MICHAEL J. BEAN, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND, WASHINGTON, DC**

Mr. BEAN. Yes, thank you, Mr. Pombo—Mr. Chairman and members of the Committee. It is a pleasure to have a chance to testify before you today.

I am Michael Bean, and I am representing the Environmental Defense Fund for which I work. The Environmental Defense Fund is an environmental organization, but I want to point out to the Committee that we have worked closely with a number of landowners in developing HCPs and addressing other issues that have arisen under the Endangered Species Act. Most recently, for example, we worked closely with International Paper Company in developing its HCP for its forest practices affecting the red-cockaded woodpecker. We have worked with Westvaco Corporation in South Carolina, but we have also worked with some very small landowners and small business interests. We worked, for example, with the North Carolina Pine Needle Producers Association. These are, literally, people who make their living by raking pine needles off the forest floor in the Sandhills area of North Carolina, and we worked with them in putting together the first habitat conservation plan that embodies a safe harbor agreement.

In the testimony I want to give this morning, I don't pretend to speak for any of those landowning interests, but I do think that the experience I have had working with those different landowners has informed my conclusions about this topic of mitigation. I have just a few points I want to emphasize. First, we unfortunately know very little about the efficacy of mitigation, and we need to know much more about that. I think Mr. Weygandt, this morning, in the first panel, said that if we are incurring costs, we have to know that we are getting value back, and the unfortunate reality is that we often don't know how well mitigation is working. The only way to find out, frankly, is to do the monitoring of the efficacy of that. That will require resources, and I would like to echo what Mr. Tsakopoulos and others, this morning, have said about the need for giving the agencies resources to do those sort of tasks.

The second point I want to make is that to measure the efficacy of mitigation, you need to have some articulated and measurable goals that mitigation is to serve, and those goals need to be set with reference not to whether particular actions are taken but whether those particular actions have an anticipated benefit or im-

pact on affected species. In setting those goals, the question then becomes what kind of standards should guide them? It seems to me very clear that what mitigation should try to accomplish is that the combined effect of the permitted action coupled with its mitigation measures should not diminish the viability of the species that we are concerned about.

You brought up, Mr. Pombo, in your opening statement this morning, the Supreme Court's decision in the City of Tigard v. Dolan. That case articulated the rule of proportionality; that is the exactions or the mitigation requirements imposed on landowners should be proportional to the impact they cause to public goods; in this case, endangered species impacts. Frankly, from my perspective, if we could achieve proportionality and if mitigation did offset or mitigation did improve the prospects of survival by an amount roughly equal to which development and other projects are diminishing prospects of survival, we would be much better off than we currently are.

The fourth point I want to make is that compliance with mitigation cannot be simply assumed. Indeed, my testimony cites the results of one study carried out in Florida a few years ago that found widespread non-compliance, and in some cases total non-compliance with mitigation requirements. There is a need to monitor implementation of mitigation and that, too, will require resources which the agencies largely lack at the present time.

The fifth point is I think that certain types of mitigation should be strongly discouraged. I have identified in my written testimony the practice that has occurred in the Southeast for several red-cockaded woodpecker HCPs of requiring landowners to pay a sum that is then used to manage Federal lands; in most cases, to manage Federal lands in ways that those lands should be managed anyway, and it seems to me that is shortchanging a species to mitigate in that manner.

A final point I want to make is that we need to be creative with mitigation requirements and create incentives for landowners to do beneficial things for species conservation, and in saying that, I think I am echoing what many members of these two panels have said this morning already. Mr. Weygandt of Placer County talked about the need for market-based approaches; Mr. Schulz emphasized the need for incentives, and the gentleman from the North Carolina Department of Transportation gave an example of using the marketplace to design effective mitigation strategies.

I want to emphasize to you one of the recent HCPs with which we worked that I think embodies exactly that—and I will wrap up here very quickly. The International Paper HCP creates an incentive for that company to do better on a parcel of land that it is managing for mitigation purposes than it has to, because if it does better, it can then earn mitigation credits that it can then sell to third parties, those third parties that are in need of mitigation. That, I think, is a very creative approach. Many of the mitigation banks that have been established in California about which you have had some testimony this morning were the response to Governor Wilson's initiative in 1995 to encourage those banks, and, by and large, that is a market-based, incentive-driven instrument that I think can play a useful role in endangered species conservation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bean follows:]

STATEMENT OF MICHAEL J. BEAN, CHAIRMAN, WILDLIFE PROGRAM, ENVIRONMENTAL DEFENSE FUND

In 1982, Congress relaxed a nearly absolute prohibition against taking endangered species. It did so by authorizing the U.S. Fish and Wildlife Service and National Marine Fisheries Service to issue permits allowing the taking of endangered species "incidental to . . . an otherwise lawful activity." Previously, the Services could issue permits authorizing the taking of protected species only for scientific research and a few other, very limited purposes. As a result of the 1982 amendments, however, private landowners and other non-Federal parties secured a means of avoiding the prior prohibition against any action that incidentally took an endangered species. To receive such a permit, however, the statute provides that a permittee must "to the maximum extent practicable, minimize and mitigate" the impacts of the authorized incidental taking. Absent such mitigation, no permit may issue. This mitigation requirement, embodied in section 10(a)(2) of the Endangered Species Act, is the primary focus of the testimony that follows. A secondary focus is on the requirements that attach to private land activities requiring some other type of Federal permit and therefore subject to review under Section 7 of the Endangered Species Act.

Three principal conclusions can be drawn from the experience to date with mitigation under these provisions. First, the goals that mitigation measures are intended to serve need to be explicitly stated. Second, the Fish and Wildlife Service has sometimes inappropriately used the mitigation requirements of the Endangered Species Act to shift onto private landowners some of the costs of managing Federal lands in accordance with the requirements of that same Act. Third, and perhaps most important, some recently approved mitigation strategies offer the salutary potential to improve the survival prospects of imperiled species while at the same time creating economic incentives for private landowners to become active and willing partners in conservation efforts. These new strategies thus may be capable of making the Endangered Species Act both less onerous for landowners and more effective for rare species. Each of these conclusions is developed in more detail below.

**The goals that mitigation measures are intended to serve need to be explicitly stated.**

Mitigation under the Endangered Species Act has the same purpose as it has under the Clean Water Act, the Fish and Wildlife Coordination Act, the National Environmental Policy Act, and other laws. In its ordinary, dictionary sense, mitigation refers to the "abatement or diminution of something painful, harsh, severe, afflictive, or calamitous." It is, in other words, a means of making a bad thing less bad, of neutral consequence, or even beneficial. In a variety of environmental contexts, mitigation refers to the efforts undertaken to reduce or offset the negative environmental consequences of activities that are permitted to occur, notwithstanding their negative impact.

In the endangered species context, the reason that mitigation requirements must be imposed when the incidental taking of an endangered species is permitted is quite straightforward: in general, any taking of a species already facing a high probability of extinction increases that probability and thus runs directly counter to the law's goal of achieving the recovery of such species. Mitigation, if effective, is a means of accommodating non-conservation objectives by allowing otherwise prohibited activities to go forward without necessarily reducing an imperiled species' likelihood of survival.

Unfortunately, very often the biological goals that mitigation requirements are intended to achieve are never clearly stated. With a clear statement of goals, one can at least determine whether the particular mitigation requirements imposed one project worked sufficiently well to impose them again on another similar project. Without a clear statement of goals, the most that one can determine after the fact is whether the mitigation requirements were carried out, not whether they actually accomplished anything useful to conservation. Surprisingly, sometimes the mitigation requirements are not even carried out. A 1990 Fish and Wildlife Service review of the implementation of quite simple and inexpensive mitigation requirements associated with permits authorizing the construction of fourteen marinas in areas occupied by endangered manatees found widespread noncompliance. The review found that—

77 percent failed to supply a required manatee education display board;

62 percent did not post required manatee warning signs;

38 percent failed to establish slow-speed zones near the marina;
three failed to comply with any manatee permit conditions; and
only two complied with all manatee permit conditions.

These findings underscore the need to ensure that Federal conservation agencies have sufficient resources to monitor compliance with permit conditions. The failure of some permittees to carry out their mitigation responsibilities will only make it more likely that later permittees will face even more stringent mitigation requirements or even permit denial.

**The Fish and Wildlife Service has sometimes inappropriately used the mitigation requirements of the Endangered Species Act to shift onto private landowners some of the costs of managing Federal lands in accordance with the requirements of that same Act.**

The Endangered Species Act's prohibition against taking protected species applies broadly to all parties, both Federal and non-Federal. In addition, however, the law imposes special duties on Federal agencies. They must avoid actions that jeopardize the continued existence of any listed species and they must affirmatively use their various authorities to further the conservation of listed species. These affirmative duties have special significance for Federal land managing agencies. Because of their land ownership and broad management authority, they can create, restore, enhance, and manage habitat so as to further the goal of recovering listed species. To the extent they actually carry out such affirmative measures, they can lighten the burden that private landowners may otherwise bear.

In fact, however, mitigation requirements imposed under Section 10(a)(2) have sometimes had the effect of shifting to private landowners the cost of carrying out the very affirmative Federal land management that Section 7 requires. At least five habitat conservation plans approved in the Southeast require private landowners to mitigate for the impacts of timber harvest on red-cockaded woodpeckers by paying specified sums to Federal land management agencies to enable those agencies to carry out affirmative habitat management on Federal lands. Other habitat conservation plans elsewhere follow similar strategies of exacting payments from private landowners that will be used to fund beneficial management on Federal lands.

Arrangements such as these shortchange the species they are intended to protect. The actions that these mitigation payments buy are actions that Federal land managing agencies ought to be undertaking anyway, pursuant to their obligations under Section 7, and with their own appropriated dollars. Moreover, it is often impossible to ascertain what management actions were bought with these mitigation payments and what other actions were carried out with the agencies' own appropriated funds. Thus, it is impossible to determine whether the mitigation even worked. Finally, the practice of allowing endangered species mitigation to take the form of payments to Federal agencies for actions that such agencies are supposed to undertake anyway is fundamentally inconsistent with the U.S. Fish and Wildlife Service's own recent draft policy disallowing most wetland losses elsewhere to be mitigated on National Wildlife Refuge lands, precisely because those sorts of improvements are supposed to occur there anywhere.

Though I am strongly critical of the above practice, let me be clear that the blame does not rest entirely with the Fish and Wildlife Service. The reality is that Congress has often failed to appropriate sufficient funds to enable land managing agencies to do the beneficial management that Section 7 requires. In doing so, Congress has been penny wise and pound foolish, effectively forcing the agencies to look to mitigation payments from private landowners as a source of funding for beneficial management practices on Federal land. If Congress consistently gave Federal land managing agencies the resources to restore, enhance, and beneficially manage habitat for endangered species, many species would be further along on the road to recovery, and the need to exact significant mitigation requirements from private landowners would be reduced.

**Some recently approved mitigation strategies offer the salutary potential to improve the survival prospects of imperiled species while at the same time creating economic incentives for private landowners to become active and willing partners in conservation efforts.**

Because many endangered species mitigation requirements have been onerous from the landowner's perspective and ineffective from the conservationist's perspective, there is a clear need to explore new strategies. There are, in fact, some recent models that offer the potential of being simultaneously more effective at producing conservation benefits and more attractive to the landowner. These are deserving of more widespread use.

An example of a recent innovative approach to mitigation is contained in the recently approved habitat conservation plan of the forest products company, International Paper. International Paper worked closely with the Environmental Defense

Fund to develop a habitat conservation plan for the red-cockaded woodpecker unlike any other that had been done for this species. The essence of the plan is that International Paper has committed to managing a part of its "Southlands Experimental Forest" in Georgia with the goal of establishing and maintaining up to 30 family groups of red-cockaded woodpeckers there. Only three solitary males of this species survived on this site when work on this plan began. If International Paper succeeds in meeting the foregoing goal, it will be permitted to take, incidental to timber harvest operations, red-cockaded woodpeckers found elsewhere on its operational timber lands in the Southeast. Although International Paper has extensive land holdings in the Southeast, only 16 family groups of red-cockaded woodpeckers are known to persist in widely scattered remnants on its operational land. Thus, if the population goal set for the Southlands Experimental Forest is achieved, International Paper will have created more woodpecker groups than currently exist on all its land and it will be able to earn "credits" for the excess that it may be able to sell to others as mitigation for new highway projects or other developments in woodpecker habitat. As a result, as International Paper's Craig Hedman noted in *The Charlotte Observer*, "[i]nstead of a problem to overcome, you can view that species as an asset."

On a smaller scale, another forest products company, Champion International, has already accomplished exactly that. It recently agreed to assume the mitigation responsibility for another landowner's development project in Texas in return for a substantial monetary payment. In its case, endangered species habitat that the company has voluntarily enhanced with no expectation of financial return has in fact produced a substantial return.

What International Paper and Champion International have recently done is closely akin to an idea that former California Governor Pete Wilson championed with a formal 1995 policy to encourage "conservation banking" for endangered species and sensitive habitats. Pursuant to that policy, dozens of conservation banks have been created in California, including in Alameda, Kern, Riverside, Sacramento, San Bernardino, San Diego, San Joaquin, Santa Barbara, Shasta, Sonoma, and Tehama Counties. Many of these are the result of entrepreneurs recognizing the potential to profit from investing in conservation—entrepreneurs that range, by the way, from the Bank of America to the Boys and Girls Clubs of East County Foundation in San Diego County. They are, moreover, giving other landowners who must mitigate development actions elsewhere a choice that they would not otherwise have.

When Governor Wilson's policy was announced in 1995, Bank of America Vice Chairman Martin Stein hailed it as "a common sense, market-based initiative that will help move development forward while still providing a significant level of environmental preservation." Other major companies that have entered the conservation banking business include Chevron and Arco, although most of the conservation banks established in California are operated by much smaller interests. It is clear that any conservation bank for endangered species must be designed with considerable care and scientific rigor. Evidence of successful restoration of endangered species must be clear and unambiguous before the bank is allowed to earn and sell credits. While the jury is still out on the success or failure of the conservation banks currently in operation, they represent a creative, positive response to the need to design effective mitigation for authorized development actions. If they work, they will have given landowners a choice they did not otherwise have, they will have given rare species better mitigation results than they have often gotten, and they will have reduced the overall cost of achieving conservation goals.

Mr. POMBO. Thank you.

Mr. Johnston, you said something in your testimony about HCPs being voluntary, and you brought up the PALCO situation. If I remember correctly, when negotiations over the HCP began to break down, there was a statement made by one of the Fish and Wildlife agents—in fact, I have it here—it said that if PALCO Pacific Lumber didn't come back to the table, a Federal agent promised extremely stringent enforcement of the Endangered Species Act beginning on Tuesday. Does that sound voluntary to you?

Mr. JOHNSTON. Well, I had heard—someone else had read me that same quote before, and I wasn't involved in that situation, so I don't have any first-hand knowledge, but it is clear that the take prohibition exists, and the landowner has to live with it. I mean,

I guess, really, that goes to a question of the discretion of the agency to enforce it, and in some cases I suppose you could say that enforcement might be used as stick. I think, perhaps, that is what you are suggesting. Then, it is something less than voluntary. Well, I guess, in one sense, if the take prohibition—well, the take prohibition is a given; that is the starting point that every landowner has to deal with. Now, as a landowner, I can make a choice, and I could——

Mr. POMBO. You could make the choice to use your land and enter into the HCP or not use your land.

Mr. JOHNSTON. Well, I could use my land to avoid take, and if it is impossible to use my—your question would only arise when it was impossible to use my land, and I don't think, at least in my experience, is usually the case. It is a question of landowner——

Mr. POMBO. In your experience, you have dealt with HCPs which are basically managing a landscape.

Mr. JOHNSTON. Yes.

Mr. POMBO. And, Mr. Tsakopoulos, Mr. Weinberg, Mr. Worden, in their cases, if they were to enter into and HCP, there is an exaction from them. In Mr. Tsakopoulos' case, I believe it was—he had to give up—what did you say, 170 acres in the middle or——

Mr. TSAKOPOULOS. One hundred and seventeen acres.

Mr. POMBO. One hundred and seventeen acres in the middle of his project.

Mr. TSAKOPOULOS. Mr. Chairman, that was not an HCP.

Mr. POMBO. But that was an exaction that came out of you in order for you to use your property, and the point is, is that there a huge difference between a timber company and an HCP which is able to manage their holdings and manage their landscape in a way that satisfies Fish and Wildlife and National Marine Fisheries, in many cases, and someone else who is using their land, that in order for them to use it for development purposes, they either give up a large portion of their property or they have to pay a substantial amount of money into a fund. Mr. Gibbons brought up earlier Los Vegas. In that particular case, they have raised in the last 4 years—I believe it is—over $30 million. It is a per acre fee that is going into a fund that every property owner has to participate in if they want to use their land. That is not voluntary.

Mr. JOHNSTON. Well, I do agree with you that there are differences between different kinds of lands uses as you approach the HCP process, and while a developer faces one set of challenges, we face on the forestry side some others; that being that we plan to manage the entire landscape over the long-term, and the "no surprises" assurances and the ability to have multi-species plans becomes critical for us.

Mr. POMBO. I am not saying you don't have problems. I am very well aware of what has gone into the negotiations on a number of the HCPs that have been entered into and how difficult it has been to get from here to there, and in some cases I didn't think it was going to happen, and it ultimately did, and it is very difficult. But I do take somewhat issue with you saying that they are voluntary, because they are anything but voluntary, and Fish and Wildlife may take the official position that they voluntary, but for people

out in the real world, they are not voluntary. It is either pay the piper or you don't use your land.

Mr. Doolittle.

Mr. DOOLITTLE. Mr. Tsakopoulos, in your written testimony, you refer to a problem with Fish and Wildlife staff double-dipping for mitigation. Could you briefly describe what double-dipping is, and tell us your experiences with it?

Mr. TSAKOPOULOS. What I refer to is a particular project that we had permitted. We went ahead and destroyed the wetlands that we were permitted to destroy, and the project was underway. We sold the portion of the property that was permitted to be developed, and the contractor's agent—one of the tractors did not see one of the posts and clipped one of the vernal pools, 100 to 200 square feet. That was sufficient reasoning for the Army Corps and Fish and Wildlife to come back and declare that we should revisit or they should revisit the whole permit, and they have requested—we still have not settled that particular problem—they requested that we mitigate for off-site indirect effects, and the indirect effects are enormous. We already had mitigated, quite substantially, for all the damages. This is the double-dipping. They find an excuse to come back, and when they do come back, they exact additional pounds of flesh, as we sometimes call it. These people that worked at Fish and Wildlife—young people, usually, who have tunnel vision and who believe that their mission in life is to exact as much protection for the species as they possibly can without regards to property rights or what the law is or what is fair and just and prudent. This is why, Mr. Doolittle, we very strongly recommend that the formation of HCPs, similar to the one we have in North Natoma, prevent a lot of this from happening. You know what the fee is and when they set up the HCP, there is a lot of pubic hearings, and that prevents Fish and Wildlife from asking too much. So, hopefully, you come up with a fair agreement, and then everybody knows what the rules are.

Mr. DOOLITTLE. So, If I understand, in this particular instance, you had already gotten all of the permits needed for this; you sold off a part of it. The part you sold off, the fellow clipped one of the vernal pools, and then the Corps consulted with Fish and Wildlife, and Fish and Wildlife thought it could get a whole new biological opinion and go back and now seek mitigation for indirect effects? Is that what happened?

Mr. TSAKOPOULOS. Yes, that is correct.

Mr. DOOLITTLE. Well, that sounds utterly arbitrary and capricious.

Mr. TSAKOPOULOS. It is.

Mr. DOOLITTLE. And it sounds like that is, frankly, your concern with individual personnel; that you are not dealing with any standard of certainty of having fairness involved. It appears to be at the personal whim of the government official who is assigned to the particular project.

Mr. TSAKOPOULOS. There is no question that the way the law is today, Fish and Wildlife and Army Corps of Engineers is together, they are the sheriff, they are the judge, the jury, and the executioner as far as the private sector or whoever the permittee is. They decide; they have such an extreme latitude that they can

make decisions that are not fair, that are not just, and that are not prudent.

Mr. DOOLITTLE. I guess I would just observe, Mr. Chairman, this is exactly why our Founders gave us a written Constitution and a separation of powers and a Federal system and a bill of rights, so the power against a citizen by government officials could not be used in a arbitrary and capricious fashion, and yet it seems we have repeated examples of that displayed in the testimony today.

I wonder, Mr. Tsakopoulos, based on your experiences with the south Sacramento habitat conservation plan, if you could explain to the Committee what you consider to be the single biggest problem with the HCP process?

Mr. TSAKOPOULOS. I wish I could put my finger on the biggest problem; there are quite of few of them. We started working on the south Sacramento HCP approximately five years ago at the request of Secretary Babbitt. We were hoping to complete it within a year or year and a half. Five years down the line it is not done, one of the reasons is that the staff at Fish and Wildlife is overstretched. They don't have sufficient people to put on this particular project to complete it, and not only to participate but to give direction. We need people that are knowledgeable with HCPs that would give direction and work together with the county and the developers to put it together. I know they ran out of money a couple of times. The private sector agreed to provide a lot of the funds, and we have done so, but the time is going by—five years have gone by, and it is not done yet. Now, it appears that within a year, we may be able to get that particular HCP done, but that is why, Mr. Doolittle, if at all possible, if the funds can be provided so that they can provide knowledgeable people from the Service to make sure that they can give direction, proper direction, to get the HCPs formed. The HCPs will be very beneficial to the present and future requests for permits.

Mr. DOOLITTLE. In reading your testimony, it sounds like one of the biggest benefits you feel exists with HCPs is that they are done in more of an impersonal, public forum where you get more fairness and less arbitrariness, I guess, in the decision-making. Is that a fair reading of your comments?

Mr. TSAKOPOULOS. Yes.

Mr. DOOLITTLE. It is funny, as I have considered HCPs, those things would never have occurred to me, and yet you have dealt with it on this practical level, and it is interesting to me to hear your comments.

Mr. TSAKOPOULOS. We at least hope that is what will happen. There was a tremendous battle to get the HCP done in North Natoma this year, but at least it is there, and we know what the cost is; we have agreed to it, and we are moving. When we were forming that HCP, it looked like we were paying way too much. Looking at today, that was a good deal. We are happy with it. Let us move on with it, because the time, to us, is critical, and we cannot lose time in the development.

Mr. DOOLITTLE. I guess, speaking as a developer, I would assume time is always critical in that kind of a business, isn't it?

Mr. TSAKOPOULOS. Yes, sir.

Mr. DOOLITTLE. Mr. Chairman, I have a couple more questions. I would be happy to yield back to you and go for a second round.

Mr. POMBO. We can do a second round.

Mr. DOOLITTLE. Okay.

Mr. POMBO. Ms. Napolitano?

Ms. NAPOLITANO. Thank you, Mr. Chairman. The things I am hearing from this panel—and I apologize for not being here, but I had another committee that I had to sit in on—is that there is a consensus that the HCPs are workable for both the preservation of the habitat and also for the development of land and working with the developers and its users. If the HCP—and excuse me, I am not quite sure how the HCPs are set up. Who asks for them? How do they begin to work for these communities?

Part of the other question that I have—and I am hearing and read some of the information—that a lot has to do with either not enough personnel to be able to help work through the project or on the HCP as well as possibly the funding to be able to establish or expedite the process to be able to become more timely on both sides of the fence, and I would like to Mr. Johnston to address some of these, because I don't know what timeframes that the agencies give the developers to be able to begin the process of approving the projects, themselves, or does it help to go through the HCP? Where would funding help to be able to be to expedite the process to help both? I am assuming both are in agreement that there is a way to work together, and that is what we are—especially, in my case, I am very interested in finding a way to be able to work together. Let me start off with those.

Mr. JOHNSTON. I am not sure I got them all, but I will take a stab at what I think the salient ones were. In terms of the process and the way I look at it and the way clients that I work with individually look at it, is if we have an endangered species issue, whether we have one on a piece of property or we think we might or we have habitat that could support a species, one has to make a decision or a judgment, an assessment, of whether you want to go the pure regulatory route; that is assume that you are going to have to live with the take prohibition of section 9, or whether you think a planning process might achieve a greater degree of certainty for you. And if you, as a private individual, decide you want to go that way, then, procedurally, either you develop the kinds of measures or the kinds of mitigation features that you think would be sufficient to meet the standards in section 10 of the Act for issuance of an incidental take permit or you work cooperatively, more typically, cooperatively with the Services, or the Services, to try to develop what those measures might be and how they might apply on your particular piece of property.

Now, once you have reached a basic agreement, then you start the formal application process, and this is how it pretty much works in the field. And that process, then, is taking the written document that you have worked up and beginning the process through the ESA approval and through National Environmental Policy Act compliance.

One of the criticisms that has been expressed to me and that we have heard here today is the timeliness issue. How long does it take to process one of these things? Well, that has been a concern

of ours, as well, and, in fact, recently, the Secretaries Daly and Babbitt have announced a commitment to have their agencies sit down with the applicants at the front end of the process and develop a timeline, and this was not something that was typically done before. I think that is a step in the right direction.

I think it is clear that specific devotion of resources for the section 10 HCP Programs would be a step in the right direction, and, as I said in my initial testimony, I think there are some things that can be done to streamline it, and that is what many of our members have been trying to work with the Services on. We believe in the process. We think good can come out of it. It has to be made more efficient than it has been in some of the cases.

Mr. TSAKOPOULOS. I would appeal most of your questions to Fish and Wildlife. They can tell you a lot better as to how it is run; how it is formed. They are the experts.

What I can tell is that once the HCP is formed, it makes it a lot easier for someone to get a permit to utilize their land. Now, whether it is clear or not or whether we should paying as much as we are, et cetera, those are things that have to be discussed probably at different times. What we hope to do is to make the process a little friendlier, and I think we can do that.

Now, I know there are experts here from Fish and Wildlife if they want to answer some of your questions.

Ms. NAPOLITANO. We can do without the HCP background. I can find that out essentially by contacting the Director or asking staff.

But my concern is—and I hope no one takes offense—but I found, not only at the State level but the Federal level, that the agency bureaucracy sometimes is insurmountable and that you go into a package that you have to contact your representative or go beyond to try to get some faster solution or some sanity to an issue that shouldn't be that hard, and while I wouldn't say that all agencies are the same, sometimes that happens because maybe from the administrative level there is not enough information coming down to the people who actually handle the caseloads to understand what the definition is of be able to user-friendly. And I am using very basic terms, because that is how people come at me and ask me for assistance and support in getting projects looked at just for resolution, never mind partisanship. We are trying to get things done, because they want them done. I think it is just fairness.

Mr. BEAN. Mrs. Napolitano, in my experience, frequently I have had developers and development interests say to me that because time is money to them, they would put far more money on the table for conservation purposes if they could get a resolution of these issues quickly. Now, unfortunately, they can't get a resolution of these issues quickly. If the agencies charged with processing these permit applications don't have the resources to proceed more quickly——

Ms. NAPOLITANO. That was my other point.

Mr. BEAN. [continuing] we would be much better served and conservation would be better served if these agencies had resources commensurate with that task.

Mr. TSAKOPOULOS. I agree with the answer that was given, that it appears that—there are two things that happen. One, that we do not have sufficient upper management people that understand

the whole process that probably are willing to be responsive to the public with this tremendous permit request. Number two is that you have people who are trained into biology that have tunnel vision only, and time is not important to them, neither is the economic factor, and that tends to cause a lot of problems.

Ms. NAPOLITANO. Thank you.

Mr. POMBO. Mr. Doolittle?

Mr. DOOLITTLE. Mr. Tsakopoulos, in your testimony, you said that you believe the Fish and Wildlife Service must take greater consideration of the economic impacts of its decisions, and we did hear from the Director that the policy, which is a written policy, that they try to implement. Do you feel that in the Sacramento area that the Sacramento field office has done an adequate job of considering the economic impacts of the decisions it has made on your projects?

Mr. TSAKOPOULOS. I do not believe they have done a good job considering economic factors.

Mr. DOOLITTLE. Do you have any suggestions as to what we might do or they might do to improve the situation?

Mr. TSAKOPOULOS. I do. We must remind them what the leadership is saying again and again. I don't know if—I assume the President and the Vice President mean what they say that the economy and the environment must co-exist, and, my goodness, it must. We live on this Earth, and we have got to take care of it, because it has to be prudent and reasonable. That is important. The possibility of having an ombudsperson—do you understand me; ombudsman or ombudsperson—that is neutral to check some of these decisions from time to time may be a solution. Right now, there is no such person.

Mr. DOOLITTLE. That is an interesting thought.

Mr. Chairman, I wonder, it was my understanding that there is a Fish and Wildlife person here, even though the Director is not here. I wonder if we could invite that person to come forward and react to Mr. Tsakopoulos' comments?

Mr. POMBO. Yes. If you could join us at the table and identify yourself for the record.

Mr. SPEAR. My name is Mike Spear. I am the Manager of the California-Nevada Operations Office for the Fish and Wildlife Service.

Mr. POMBO. Thank you. Mr. Doolittle?

Mr. DOOLITTLE. Mr. Spear, you have heard the interplay about the Sacramento field office and the concern about not taking into account the economic impact. Could you share with us your perspective on this?

Mr. SPEAR. Well, my perspective on the subject of the panels, in general, I would certainly like to share, but specifically to the question about economics brings in a challenge in the law, itself, where the fundamental biology is basically our direction. In recovery planning, there is, in the way we prepare them these days where we have both a technical, biological, scientific group as well as stakeholder community—the idea being we get the best biology and then we develop stakeholders to help design the best economical way to develop that plan—is one way economics is brought in. It is brought in also in the critical habitat determinations. Specifically,

as it relates to section 7 type analysis, which Mr. Tsakopoulos is referring to here, a jeopardy determination, for instance, or an analysis is very specifically a scientific, biologically-driven determination.

I think a big element, though, that is within our discretion that has a lot to do with economics, and that is the pure concept of time is money, and speeding things up, expediting the process, working with people early, coming to conclusions, not revisiting them, et cetera—those are principles that have economic consequences deriving from biology and things which I subscribe to. I was listening to Mr. Tsakopoulos' list of 10 points, and I found very little, really, to disagree with.

If the chairman might indulge me a second, I would like to make a couple comments about—what I would say, drawing from the members and my own experience—I have had as much experience, frankly, as anybody in the Service in preparing HCPs, both forest types in the Northwest and urban types in San Diego and Orange County and a big effort now in Riverside County—let me just list some things about the HCP countywide effort. The local government is in control. I tend to agree with the Chairman's comments about how they are voluntary, and I try not to use the word. I think it can be overused about the voluntary nature of them, but when the county comes to us or a group of local jurisdictions and says they would like to do a multi-species plan, a countywide HCP or a large landscape—and I would say 100 square miles or better—they are leading that plan, and we see that over and over. Those plans cannot proceed without them. I am working very closely with the board of supervisors, for instance, from Riverside County; talk to them weekly about developing a plan. There is wide participation from all stakeholders.

The biology is reviewed, and there is peer review of that biology for the purposes of making sure in the end that we conserve the species and we can also defend against mitigation. Nobody wants a plan that fails later on, but the key is everybody sees the biology.

Mitigation ratios you talked about. Sometimes plans have mitigation ratios. Those are a negotiated mitigation ratio related to the biology and the specific circumstances, but stakeholders, landowners, et cetera are part of that process. San Diego has a series of mitigation ratios embedded in the plan. If this happens, then everybody knows why they are there; how they got there; what the biology behind them is. There was differences, yes, but in the end this is the—the determination was made. and now it is applied, and they are agreed to in advance.

There is broad support when you get all done or else it doesn't get done, quite frankly, because it usually has to be voted by a city council or a board of supervisors. I attended many meetings in San Diego, Orange County, Riverside County in front of city councils and boards, and started "From the Federal point of view, here is what this plan is; here is what we offer" responding to their questions at the local level. They are the land use entity.

It is efficient. From our point of view, it is efficient; from the landowner's point of view, it is efficient, and from the county's point of view, it is efficient, and that is, we stay away from project-by-project review. We simply cannot, in the State of California, con-

duct ESA project-by-project, and that is part of the complaint we are hearing. We are overwhelmed with the kind of development that is going on right now and the ubiquitous nature of the species.

So, we have to move towards larger landscape level countywide. I have taken this approach to the Secretary about three weeks ago; briefed him on it; briefed many of the members of the Department. There are 30 plus counties in the State that really should be thinking that way. We are working with probably half of them in some ways and some of them we have very direct relationships—I mentioned Riverside and Placer Counties, specifically—others, we are in more formative stages, but there are probably 30 of them we ought to be working with.

It is a great opportunity to spread the cost, because you have the local decisionmakers who have taxing powers, that can decide whether they want the last developer to pay or to spread it throughout the community, and that is a decision they can make, and, again, sometimes it has to be voted on. The public sees, how did the costs get spread to these agencies?

And, finally, from our point of view, it is best for the species. We get landscape type of plans that do a lot better and are less expensive overall for the species. So, for all those reasons, our direction, I think, has to point that way or else we are going to have a lot of these sorts of issues you have heard about today for many different reasons.

Thank you.

Mr. DOOLITTLE. May I continue, Mr. Chairman, or what would you prefer since my time is up?

Mr. POMBO. I will let you continue. I do have questions that deal specifically with the way Mr. Spear just described that, but I know you had specific questions, so go ahead.

Mr. DOOLITTLE. I don't object—go ahead. My questions are going to take an entirely different text, so go ahead and ask your questions related to——

Mr. POMBO. One question I have for you, Mr. Spear, is why—I understand Mr. Tsakopoulos wanting an HCP because of the certainty. I made the comment earlier that you have to pay the piper to use your land. Well, with him, he at least knows what he owes them up front, and he is getting it out of the way up front, and he has some certainty in being able to do that. And that is if you accept the process that is in place as being, number one, legal, and, number two, being necessary.

Why is it that in California we need large regional HCPs, countywide HCPs; large property owners have to enter into HCP. Throughout the entire region you are from or that you represent here today, that it is necessary that we do that, and yet in the rest of the country, they issue almost no section 10 permits. They don't go through large regional HCPs with the exception of—I think it is Austin—Austin, Texas. They don't have the large regional HCPs. They don't go through all of this. They don't have the conflicts on a daily basis. The congressmen that represent those areas don't have people in and out of their offices every day complaining about the Fish and Wildlife Service.

Why is that your region needs all of this, and the other regions of the country don't? And I won't buy the bio-diversity—the hotbed

of bio-diversity that we have in California, because there are similar hotbeds of bio-diversity throughout the country where they don't have this.

Mr. SPEAR. I know in other hotbeds of bio-diversity, they do have it, and you mentioned Austin, and we heard earlier about Florida scrub jays; Washington County, Utah with their desert tortoise problem. They are having a huge issue right now in Tucson, Hema County, over an owl and I am not sure what else, a cactus. The idea that this doesn't occur elsewhere is just not correct.

Mr. POMBO. I am just going by the records that Fish and Wildlife Service gave us as to where their HCPs were, where their section 10 permits were issued. If they gave us inaccurate information for this hearing, please correct it. I will give you the opportunity to do that.

Mr. SPEAR. I know for a fact that there is a huge issue in southeast Arizona right now over—it is in Hema County, largely Tucson, over exactly these sorts of issues. I was involved in the early days of the Austin HCP where when I was Regional Director in Albuquerque, and that one has continued because of—but the other factor, it is not just bio-diversity; there has to be growth and change. Not all parts of the country are expanding anywhere near some of the issues along the Southeast or the Southwest or, in particular, California. We have up in the Northwest, the forest issues, largely single landowner HCPs. But that situation is changing because of the salmon listing. The city of Portland, the city of Seattle, some of the other cities up there are now seeing their urban landscape affected by anadromous fish listings traveling through those areas and finding out that some of the practices of cities, or urban environments are going to affect it. So, you will see up there, as well.

I won't try to use the bio-diversity, but I will indicate to you that it is this notion—it is the element, also, of the rapid development. To the extent that you have listed species in most places, when somebody goes to develop—and that is the difficult about habitat conservation planning. I tend to agree with your argument about voluntary. If you don't do it countywide, then you have to do it project-by-project, and if we can't get it done project-by-project, the unfortunate thing is it is not as if the problem doesn't still exist, because then they face section 9 enforcement if they go ahead, and that leave us in a terrible circumstance. We are in a situation where we can say no to people, because they have no recourse, then, but to face section 9.

I just have to indicate, Mr. Chairman, California is the example, the poster child, for this issue. It is not the sole area, but it is—there is more there than anywhere else.

Mr. POMBO. There is no question; it is not even close. And if we compare other areas of the country that are experiencing rapid growth—the suburbs of Washington, DC, which are experiencing rapid growth, they don't have any regional HCPs here.

Mr. SPEAR. I don't know if there is any endangered species——

Mr. POMBO. There are endangered species. In fact, there is, I believe, three in Washington, DC, itself. There is little or no enforcement of the Endangered Species Act here. There are next to no employees in this area, and there is almost zero enforcement of the Endangered Species Act here. In the State of Hawaii, which is

probably as biologically diverse of any of the States, why do they not have section 9 problems there? Why are there not takes there? I mean, I was in Hawaii last year, and I saw a new roadway that was built through the middle of a rainforest, and they were talking about how fantastic this was that they were able to have a new roadway through here so people could see it, and it is a tourist thing. Why was there no section 10 permit issues there? Why was there no section 9 problem with takes on that one?

Mr. SPEAR. Mr. Chairman, I can't speak to the specifics of the road, but I—having been Regional Director prior to coming to Sacramento, covering Hawaii—and Director Clark mentioned it earlier, some differences—up until very recently, there was no authority. They couldn't get State permits, so they were not going to get a Federal permit for take when it wasn't allowed by the State——

Mr. POMBO. I understand that, but they build the road. I have got a road that they are building in my district that you are holding up, because they have not sufficiently mitigated their impact on the San Joaquin kitfox. It is an existing road that they are widening and the Fish and Wildlife Service is holding up the process of them doing that right now. They built a road through the middle of a biologically diverse area. You can't tell me that you don't have authority there in the State of Hawaii, but you have authority in San Joaquin County, California.

Mr. SPEAR. The primary problem in Hawaii is not the habitat issue; it is the exotic species. The threat to most species is the exotic plant, animals, insects that have altered the landscapes of generally the species that are on the hillside. This road is an obvious exception, but there is not the immediate development impact on most of those species. The problems come from the plants coming in, overtaking, changing the habitat and not so much from a development issue. So, we have a character change as to why things are affected. So, if you didn't you find a jeopardy on the road——

Mr. POMBO. I will have to ask the Committee's indulgence on this, because I believe this is extremely important.

I have, in my hometown, a developer who wanted to develop a piece of property that had development on four sides. It was 700 acres; it had development on four sides of it, and he still had to pay a 3 to 1 mitigation in order to develop that property. It was not a change of landscape issue. It was an abandoned railroad site. It had been used since the 1860's—1865 of 1864—it had been used, and yet in order for him to use that, he had to mitigate. The problem that we have got in California is that it has become mandatory that if you are doing anything with your property, you have to mitigate regardless of the impact; regardless of the jeopardy decision; regardless of anything else. That is why we have these regional HCPs. That is why we have individual property owners who have problems. It is because the official position in your region has become that if you are doing anything, you have a mandatory mitigation, a mandatory exaction from property owner who is doing that.

The reason they don't have this in Hawaii or elsewhere throughout the country is because they look at these cases, case-by-case, or they don't look at them at all, and they don't have a mandatory exaction from every property owner, and that is the difference.

In your region of the country it is mandatory, and that is why we are ground zero for these problems with mitigation is because sometimes they just don't make sense. Sometimes it is not necessary to mitigate; sometimes it may be, but sometimes it is not necessary, and that is why we have so many problems in California with this particular issue.

Mr. Doolittle?

Mr. DOOLITTLE. Mr. Spear, you indicated that it was science that was driving the determination of the Fish and Wildlife Service on these issues, but you heard Mr. Tsakopoulos. I think the idea has been implicit in the comments of—or the testimony of many of the other witnesses. I mean, Mr. Tsakopoulos used words like personal bigotries of the individual or unchecked discretion, conveying the idea that there is a good deal that is arbitrary, capricious, and subjective. Do those characterizations give you concern that, perhaps, it isn't as objective as it might be amongst certain people in your area?

Mr. SPEAR. I would say, of course they give me concern, if that is the perception of the way our people operated. I think that Mr. Tsakopoulos also went on to say that he thought that we have got to get this to a more cooperative, user-friendly basis, and I would totally agree with that, and I wouldn't agree with his characterization that that is the way our people operate in any sort of a general fashion. Could I sit here and say that none of my people have ever acted in such a way that they might appear arbitrary sometimes? No, I can't say that, because we all know that people make statements at times that you later regret. But, as a generalization, I certainly do not agree—but I do agree that that is the way we ought to be striving to.

I have spent a lot of time, I know, working with landowners on these kinds of issues, particularly, as I say, with local units of government trying to help wade through these problems, and, frankly, sometimes I bring a broader perspective to bear on an issue to try to break through logjams, but I increasingly feel that our focus on California, as we have had experience with this program—and, as I say, some of the—most of the experience anywhere in the country, our people are—every day they get better at being able to make sure that they can deliver these kinds of programs to the public efficiently, with sound advice, and to help move things through. I mean, the difficulty is we just don't have enough people to deal with enough people that want to talk to us at any one time. But they are causing me concern, and I will continue to work on it.

Mr. DOOLITTLE. I mean, you have got 55 people. Isn't that the second largest office in the United States?

Mr. SPEAR. In Sacramento?

Mr. DOOLITTLE. Yes.

Mr. SPEAR. It might be the largest.

Mr. DOOLITTLE. Well, it looks like Carlsbad has that distinction.

Mr. SPEAR. Okay, they are close. They are both big.

Mr. DOOLITTLE. You know, I was just thinking about Mr. Pombo's comments. We all lean back here, and we see what goes on around here. This has got to be one of the most quickly developing regions in the United States, and I think this is in the

Chesapeake Bay region, and they have got 4 as opposed to our 55. Now, I know you are going to tell me the difference in listed species, but I bet you if you gave them 55, they would find a few more species around here, too.

I am going to share with you my opinion based on what I hear through my office. It is almost impossible for me to go anyplace in my district where I don't hear bitter complaints about actions of the Fish and Wildlife Service. Now, I am not in a position to know whether those are or are not well grounded, but I do know that I hear a lot about it, and there is a strong feeling that is a great deal of unfairness and a great deal of abuse of power because of this life and death power, at least financially, they have over people of what they are going to do. And, so they will agree to all kinds of extraordinary demands. It seems to me—and if you care to react to this, I would be interested in hearing your reaction—but in that example on the Silver Spring project that Mr. Tsakopoulos talked about where some guy he sold a property to accidentally clipped one of these vernal pools. For the Fish and Wildlife Service person to go in and reopen up the whole thing about indirect impacts when that had already been addressed once before, is totally arbitrary, capricious, and absolutely outrageous, in my opinion.

Do you want to react to that?

Mr. SPEAR. Yes, the circumstances that are indicated here cause me concern, okay? And it is something I will look into when I get back.

Mr. DOOLITTLE. You know, I wish you would, and if you wouldn't mind, I would appreciate an update, because it is heartening that you and the Director, both, when you were made aware of specific things, it seems like—I mean, you didn't sit there and defend them—it seem like you were concerned, too, and that gives me encouragement. If our government officials—because you are the ones who manage these people, and if there is—I mean, here is another way you have got that we didn't get into too much specifically, but it is in his testimony, called the Kramer Ranch project where they got permission to scrape off the vernal pools, and they mitigated for these in another place, and then Fish and Wildlife delayed it so long that somehow the vernal pools reestablished themselves, and then they were going to make them go through the whole ESA take analysis all over again after they had gone through extensive studies, original mitigations, and then, because of this delay brought on by the Fish and Wildlife Service, itself, and the puddle forms and fairy shrimp spring to life. All of a sudden, they have got to go through this analysis all over again? I mean, that it just ludicrous, I think. What do you think?

Mr. SPEAR. Well, I have learned that when these things come up, you have got to look behind them and see. One of the things that does occur is that you can get a listing—and I don't know if that is the case here—where all of a sudden you go back and if you were to say that, "Well, we already did that before even though we have had this listing in the interim and maybe the permit has expired and you have to come back." The dilemma is you leave the developer out there subject to third parties. If you haven't dealt with the fact that there is a list of a species and in some way made rec-

ommendations as to how to handle it, come to some conclusion, if you just ignore it, then nobody is served.

Mr. DOOLITTLE. I mean, in this case, they knew about the listed species. They got specific permission to scrape it all off and reestablish somewhere else, and then because of the delays of the Fish and Wildlife bureaucracy, these things formed all over again on the land that had been scraped off. I mean, that sounds—it just sounds unbelievable to me.

Mr. SPEAR. Well, frankly, it does to me, too.

Mr. DOOLITTLE. Well, would you look into that and get back? Mr. Spear, would you be willing to look into that and get back to the Committee?

Mr. SPEAR. Yes, I would.

[The information follows:]

Mr. DOOLITTLE. Okay, good. Thank you, Mr. Chairman.

Mr. POMBO. Ms. Napolitano?

Ms. NAPOLITANO. Thank you. I think I will make mine real brief. I think we have a vote to go after.

But I remembered Mr. Johnston made a point of saying that Congress must address the section 7 issue, and I would like to know why and what we can do with it?

Mr. JOHNSTON. Thank you. Well, one of the requirements of section 7—well, let me back up and start at the beginning—section 7 consultation is required when the agencies take an action, like issuing a permit, and in the issuance of a habitat conservation plan or the issue of a permit for a plan, that is construed as being such an action that is subject to section 7 where the Service will consult with itself, which is sort of an interesting concept, but that is the way it has been interpreted. So, they prepare the plan and then enter into a consultation process that is specified in their regulations. During that period, both the Services and the applicant are prohibited from making any irretrievable or irreversible commitment of resources—that is the phrase in section 7(d)—while consultation is underway, you cannot make any commitment, and now the court, at least one court, in the context of a forestry HCP, that means you can't cut any trees, so you have got to shut your operation down during consultation, and, by the way, consultation means all forms of consultation, not the formal 135-day consultation in the regulations, but once I start talking to the Service, I am arguably subject to having to shut my operation down. That is a pretty clear problem for anybody looking at HCP given the opportunities for third parties to bring a lawsuit, and that is also one that, frankly, would be pretty easy for Congress to fix.

Mr. POMBO. We have a series of votes on the floor. Because we are probably going to be over there for quite some time, I am going to go ahead and adjourn the hearing.

I want to thank you all for your testimony——

Mr. WORDEN. Can I make one more comment, real quick?

Mr. POMBO. Yes, you can.

Mr. WORDEN. If there is a "no overall net loss" goal to be used as a goal and Fish and Wildlife would stop using it as a policy, I think it would solve all of these problems, because you don't have to give a permit for every—in every instance, and that is what the goal is. And if they would just read the regs and do what Congress

has mandated, it would solve—like what you said, it is in place—if they would use it and follow the "no overall net loss" goal instead of using it as policy, it would work. I hope you can do something to make that come about.

Mr. POMBO. Well, I agree with you, and I appreciate you being here. I appreciate all of you being here and for sharing your testimony with the Committee. Unfortunately, we do have to run over to the floor, but thank you all very much, and the hearing is adjourned.

[The information follows:]

[Whereupon, at 2:21 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF J. MARK NIELSEN, CHAIRMAN, BOARD OF DIRECTORS, EL DORADO COUNTY WATER AGENCY

Dear Chairman Young:

On behalf of the El Dorado County Board of Supervisors, sitting as the Board of Directors of the El Dorado County Water Agency, I appreciate the opportunity to submit the following testimony for the Committee's consideration. My testimony addresses the role that the United States Fish & Wildlife Service is playing in one of the most deeply divisive issues El Dorado County has ever faced. It dramatically illustrates how the demands of the Federal Endangered Species Act (the Act) frequently create intractable dilemmas for both Fish & Wildlife and local government.

A small region of unique soils in western El Dorado County harbors five plant species listed as endangered or threatened under the Act. The primary jeopardy to these species is the destruction and fragmentation of their habitat resulting from rural residential development in the fast-growing Sierra foothills. Ironically, this means that many of the parties responsible for pushing the species into listed status, having completed their developments, cannot now be compelled to help solve the problem they participated in creating.

Over the past decade, the County has struggled mightily to define and shoulder its legal responsibilities to preserve this habitat. The County's first step was to convene an expert advisory committee and commission a professional study to propose a rare plant preservation program, years before the species were listed under the Act. This committee, which included a representative from Fish & Wildlife, as well as the state Department of Fish & Game, recommended that the County adopt and fund a 3,500-acre system of five plant preserves, spread among the north, central, and southern portions of the plants' range.

At that time, however, the County agreed to designate only four preserves, and took no funding actions. The fifth, southern preserve was rejected as too expensive and inappropriate, given the landowner's vociferous opposition and its location on prime commercial and residential land in downtown Cameron Park, just north of the main thoroughfare in the county, U.S. Highway 50.

The County's rejection of the southern preserve and its failure to establish funding mechanisms for acquisition and operation of the preserve system were express factors in Fish & Wildlife's subsequent decisions in 1994 and 1996 to propose listing, and then to list, the plant species under the Act. Significantly, Fish & Wildlife's listing action was also prompted by the settlement of a citizens' lawsuit that alleged it was neglecting its legal duties under the Act. Meanwhile, others filed lawsuits to invalidate the County Water Agency's and the County's water-supply and land-use plans, respectively, in part because of the claimed inadequacy of the County's rare plant preservation program.

Contemporaneously, Fish & Wildlife and the United States Bureau of Reclamation (USBR) put the water purveyor to this part of the county, El Dorado Irrigation District (EID), on notice that the preservation of these plants would be a key factor in EID's ability to increase—or even maintain—its water supplies from Federal facilities such as Folsom and Sly Park Reservoirs, via the "Section 7 consultation" required by the Act in conjunction with the execution of water supply and Warren Act contracts with USBR.

These factors prompted the County and EID to overcome their prior reluctance and take the following actions, starting in 1997: they agreed to designate a southern preserve of several hundred prime commercial and residential lands in downtown Cameron Park; they spent a combined total of nearly $2.7 million dollars to help fund the immediate acquisition of that preserve; and they imposed heavy building permit and water hookup fees to fund the future costs of acquiring, maintaining, and operating the entire $12 million, 3,500-acre, five-preserve system previously recommended by Fish & Wildlife and all other experts.

It is no exaggeration to say that these were perhaps the most unpopular actions that these elected officials have ever taken. The conservative citizens of this rural county simply could not understand why their leaders committed $12 million to rare plant preservation when so many other critical public needs in the county were going unmet.

Nevertheless, these county entities struggled forward in good-faith belief that these agonizing actions would meet their legal responsibilities under the Act. As mentioned, the preserve system and funding program they adopted met the prior recommendations of the expert task force. Fish & Wildlife willingly contributed $500,000 toward the acquisition of the southern preserve. Further, the state Department of Fish & Game issued a written endorsement of the County's program as sufficient to avoid jeopardy to the plant species. Moreover, the County's actions were

consistent with the dictates of Fish & Wildlife's own 1995 biological opinion for Central Valley Project water contract interim renewals.

Unlike state Fish & Game, however, Fish & Wildlife declined to take a position at that time on whether this locally funded, five-preserve, 3,500-acre program was sufficient to avert jeopardy to the listed species. Also, the Section 7 consultations related to EID's present and future water supplies still loom on the horizon today, their outcomes unknown. In the meantime, Fish & Wildlife has taken another action required by the Act—the preparation of a draft Recovery Plan for the listed species.

The purpose of a Recovery Plan differs from that of a Section 7 consultation. A Recovery Plan prescribes ambitious measures that will enable a species' condition to improve sufficiently to "de-list" the species, while the modest goal of a Section 7 consultation is simply to avoid putting a listed species in jeopardy of extinction. The constant threat of lawsuits from citizens who believe that Fish & Wildlife is not sufficiently zealous in enforcing the Act, however, plunges that agency into a dilemma that directly threatens El Dorado County's economic well-being. Specifically, Fish & Wildlife must aggressively perform its legal duty to prepare the Recovery Plan, but then the Recovery Plan's ambitious program will likely end up being converted into mandatory County actions via the Section 7 consultation.

In other words, the Act itself, coupled with Fish & Wildlife's desire to blunt environmental criticism, causes a "raising of the regulatory bar" that would in this case impose new and unbearable burdens on the local governments and citizenry of El Dorado County. Specifically, the County's preservation program will be undone, broken under the weight of some *$50* million in costs—with the ironic consequence that the listed plants will be in *greater* jeopardy than ever.

Understanding why this is so requires some sense of what the Draft Recovery Plan calls for. Among other things, the plan prescribes approximately *1,600 acres* of *additional* preserves, above and beyond what any expert has ever deemed appropriate and what the County has adopted and funded. Rather than the already onerous cost of $12 million, the Recovery Plan estimates the price of its program at $50 million. A substantial part of that $50 million cost arises from Fish & Wildlife's call for additional acreage in the northern preserve. If it becomes a mandate through the Section 7 process, however, this unrealistic feature of the Recovery Plan will actually be counterproductive to the goal of plant preservation.

The County's existing plan features an innovative, pragmatic acquisition strategy: in exchange for being allowed to build on several hundred less sensitive acres in the area, two large developers would be required to donate, *at no cost*, more than *1,000 acres* of prime rare plant habitat. The resulting preserve meets all prior expert recommendations. In contrast, the Recovery Plan calls for all of this acreage, including the developable portion, to become part of a northern preserve much larger than has ever before been proposed. Of course, doing so makes the developments infeasible, which means that instead of receiving more than 1,000 acres of plant preserve for free, the County would have to purchase approximately *2,000 acres at full market value*—at an estimated cost of nearly *$11 million.*

The Recovery Plan identifies no funding source for this or any other expense it would impose, and quite frankly, none exists at the local level. The County's adopted $12 million program stretches fiscal and political feasibility to the limit, particularly for a rural county whose revenues have been hit hard in recent years by declines in timber and other resource-based industries, as well as state fiscal policies.

Without funding, this northern preserve acquisition simply will not occur. The paradoxical real-world result is that imposing Fish & Wildlife's plan on the County will yield some 1,000 fewer acres of plant preserves than the County's already-adopted approach. We respectfully question which approach serves the purposes of the Act, and the listed species at issue here, better: an infeasible, unfunded $11 million paper preserve, or an attainable no-cost preserve that, although smaller, meets all prior expert recommendations?

We have similar concerns about all of the Draft Recovery Plan's $38 million in unfunded preserve acquisitions. There is simply no way that local sources can provide this level of funding. Furthermore, the County's economic burden, whatever its size, can only be spread among those who have yet to develop. The County's dilemma is that past developments, which are largely responsible for causing the listing and creating these mandates in the first place, are now beyond the County's regulatory power. Future developments are rightfully responsible for only part of the problem, but they are saddled with funding the entire cost of the solution.

Hence, the County faces the dilemma that any further tightening of the regulatory screws will run the County into fiscal realities and political backlash that will doom its existing program to failure. Yet, failure to preserve the plants will prevent the County from moving forward with the economic development it wants. The

County's adopted plan is reasonable, expert-endorsed, and the product of a good-faith effort to meet its legal duties under the Act. The irony is that the Act itself, coupled with undue influence from outside interests, is poised to obliterate that attainable preservation program in favor of an infeasible and extreme ideal that may look good on paper, but will only increase the jeopardy to these plant species in the real world.

We all share the goal of providing effective protection to endangered species, and the County has gone to the wall, fiscally and politically, in pursuit of that goal. In a rational world, that effort would be rewarded. Instead, we may be on a collision course with ecological failure.

On behalf of my board, I appreciate this opportunity to explain the dilemmas that Fish & Wildlife and the County find themselves trapped within, and to illustrate how actions taken in the name of endangered species preservation can unintentionally produce quite the opposite results.

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FOLLOW-UP QUESTIONS FOR PENELOPE DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

On Implementation of the Endangered Species Act

**1. A recent letter from the National Marine Fisheries Service (NMFS) to the Washington Department of Ecology suggests that the state agency and Okanogan County, Washington could be liable under Section 9 of the Endangered Species Act for take of listed fish species if immediate action is not taken to curtail the exercise of private water rights and increase instream flows in the Methow River Basin of Washington State. Does NMFS interpret the ESA as requiring state agencies and local governments to use the maximum extent of their authority to enact regulations and ordinances to prevent potential take by third parties?**

The NMFS does not interpret section 9 of the ESA as a command to states to regulate, but rather a generally applicable prohibition on activities by states and others that cause harm to listed species. However, NMFS encourages state and local governments to implement laws and regulations to prevent the taking of federally-listed species. With respect to stream flows, we prefer that states take the lead in developing water conservation measures to benefit listed species. In turn, we will work with states to develop criteria to measure the extent, necessity, and effectiveness of such measures.

**2. Where state agencies or local governments do not have sufficient authority under state law to prevent take by third parties, does NMFS interpret the ESA to require a change in state law?**

NMFS does not interpret the ESA to require states to change their laws. As stated above, section 9 of the ESA is not a command to states to regulate, but rather a generally applicable prohibition on activities by states and others that cause harm to listed species. However, NMFS encourages state and local governments to implement laws and regulations to prevent the taking of federally-listed species.

**3. Section 10 of the ESA provides that the Fish and Wildlife Service and NMFS may issue an incidental take permit to an applicant who prepares a habitat conservation plan that describes, among other requirements, how the applicant will minimize and mitigate incidental take to the maximum extent practicable. In evaluating incidental take applications from public entities, do the Services consider existing authority under state law to be the "maximum extent practicable" or can an applicant be required to obtain a change in state law to obtain an incidental take permit?**

NMFS has never required an applicant to obtain a change in state law to obtain an incidental take permit. What an applicant can do to minimize and mitigate the taking of listed species to the "maximum extent practicable" is made on a case-by-case basis. It may be considered practicable for the applicant to seek state or Federal funding to assist in implementing a Habitat Conservation Plan (HCP), and this funding may require legislation.

**4. Under Section 10 of the ESA, the Services have previously granted incidental take permits based on programmatic habitat conservation plans where certificates of participation are issued to landowners who volunteer to provide conservation commitments under the terms of the programmatic HCP. Do the Services continue to be willing to grant incidental take permits on the basis of programmatic HCPs where conservation commitments by participating landowners are made voluntarily rather than through a mandatory regulatory process? Would the Services prefer to deal individ-**

**ually with landowners rather than through a programmatic approach sponsored by state or local government with voluntary participation by landowners?**

NMFS supports programmatic approaches sponsored by state or local governments with voluntary participation by landowners. Specifically, we would have preferred a programmatic approach for ESA compliance by the Methow Valley water users. Although a plan was drafted, it was not implemented. Without an approved, broad-based conservation effort from valley water users and state agencies, NMFS had to focus on Federal actions in the valley that affect salmon, including Forest Service special use permits. That step galvanized state and local officials to renew their efforts under the "Chelan Agreement." In fact, the agreement we are working toward now should result in a programmatic approach to resolving ESA issues in the Methow Valley.

**5. What is the NMFS position on the use of a voluntary water banking system to resolve conflicts such as those testified to by the witness from the Methow Valley? Will the NMFS allow the use of a water banking system in the Methow Valley as a means of meeting the requirements of the ESA?**

NMFS favors using a water banking system in the Methow Valley to meet ESA requirements. However, a common incentive to put water in a bank is the ability to sell a percentage of it to someone else. This practice usually changes a seasonal agricultural water use to a year-round domestic use which may result in less water available when needed by species. Therefore, to comply with the ESA, measures would have to be taken to ensure that water conserved actually stays in the river to benefit listed species.

**6. What is being done in Okanogan County, Washington to complete theSection 7 consultation begun over a year ago regarding the special use permits from the Forest Service to water users?**

NMFS will be able to complete the necessary biological opinions after the Forest Service completes the required biological assessments, provided an agreement can be reached with the state and county on preparing an HCP for the Methow Valley. A section 7(d) determination is in effect which allows all ditches with adequate screens to operate without the opinions. The Biological Opinions will be completed in the near future. The principle unresolved issue centers on the need for the opinions to reference the agreement with the state and the county to prepare an HCP. If an agreement is reached, the parties, including NMFS, hope to be able to allow ditches to operate later this summer, even when in-stream flows drop below healthy levels.

**7. Why wasn't a programmatic consultation conducted so that you don't have to consult on each and every water withdrawal? Wouldn't that save employee time and resources?**

As stated in our response to Question 4, our preference would have been to base ESA compliance for the Methow Valley water users on a state-approved water allocation and conservation plan.

NMFS spent nine months working with the Forest Service, the State of Washington, and local authorities alerting them to the need for water conservation measures that would enhance salmon protection. Our initial goal was to address Methow water withdrawals on a programmatic basis through implementation of the Chelan Agreement negotiated between water users, the state Department of Ecology, and the state Attorney General in 1994. However, provisions of this agreement were never implemented in the Methow Valley. In the absence of an approved, broad-based conservation effort from valley water users and state agencies, we had to focus on Federal actions in the valley that affect salmon, including Forest Service special-use permits.

**8. It appears that the Services may, in the context of their Section 7 consultation process, be requiring an analysis of the indirect and cumulative impacts of a Federal action that arise from past, present, and future actions, including those over which the Federal action agency has no discretion or authority. Is the NMFS requiring such analysis, what is the legal basis for doing so, and if the response to this question is yes, please provide specific case examples in each of your Regional offices where this has been required.**

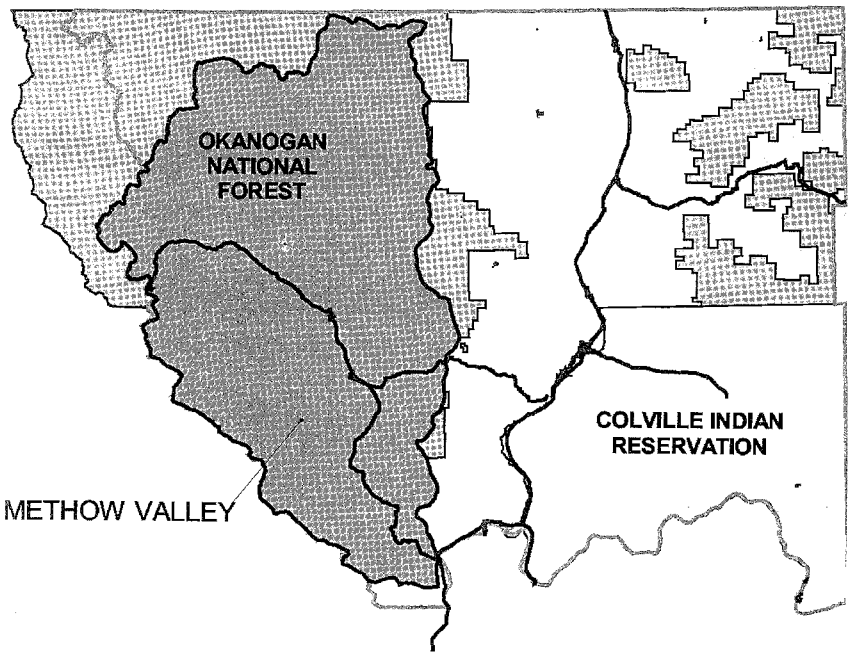
Federal regulations implementing section 7 of the ESA require the Services (NMFS and U.S. Fish and Wildlife Service) to consider the direct, indirect and cumulative impacts of Federal actions that arise from past, present and future actions. CFR Sections 402.14(g) and 402.02 ("effects of the action" definition) require the Services to evaluate the direct and indirect effects of actions (including non-Federal activities) that are interrelated or interdependent with the Federal action.

We must also consider the past and present impacts of all Federal, State or private actions or other human activities in the action area. "Cumulative effects," as defined by these regulations, include the effects of future non-Federal activities that are reasonably certain to occur in the action area. This definition is consistent with Federal Appeals Court case law, in particular, *National Wildlife Federation v. Coleman,* 529 F.2d 359 (5th Cir. 1976). This analysis is required of all Service personnel when writing biological opinions.

**Attachment 1**

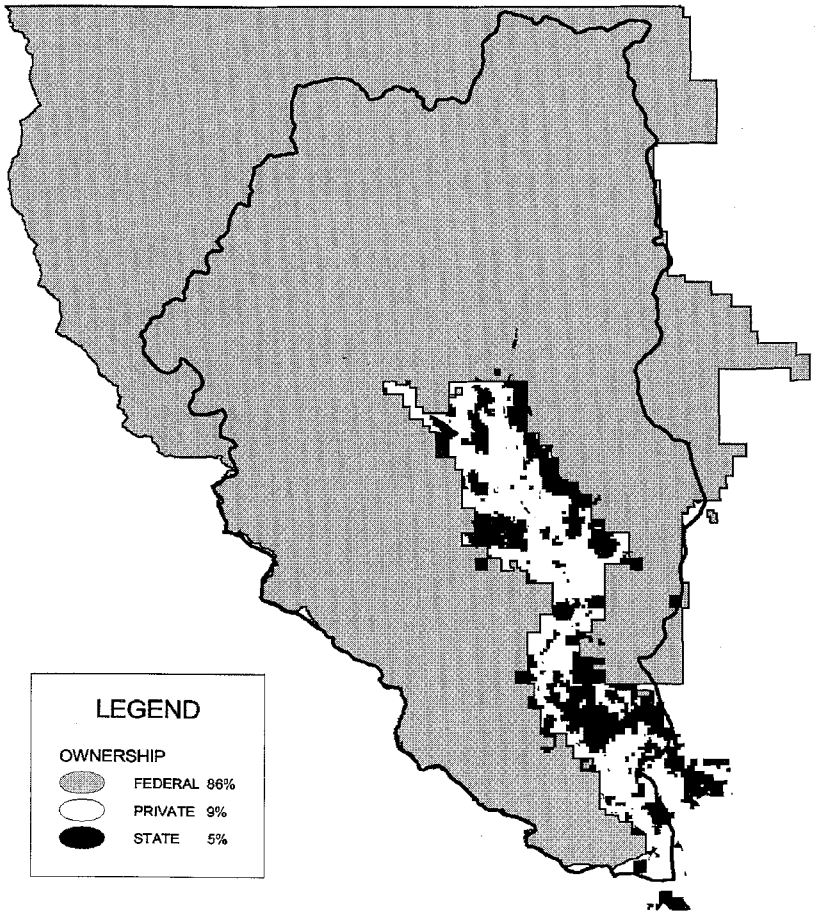
**Map of Okanogan County and the Methow Valley**

# Okanogan County Washington

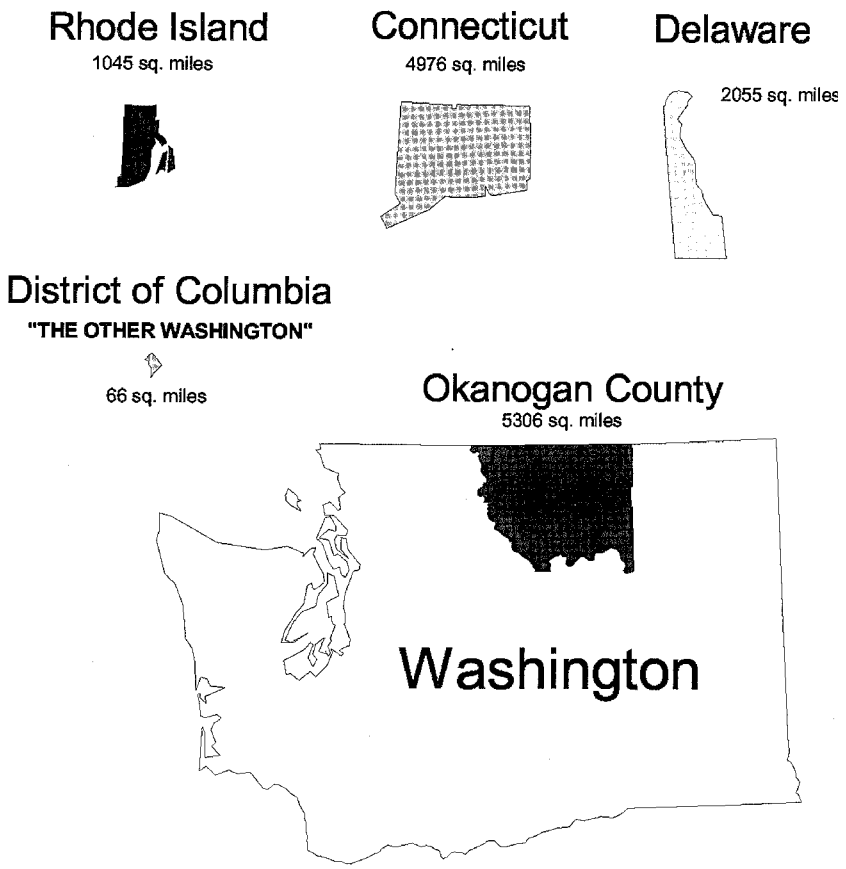


# Okanogan County Washington

METHOW VALLEY AREA



# HOW LARGE IS OKANOGAN COUNTY?



**Attachment 2**

**April 22, 1999 Letter from U.S. Forest Service to National Marine Fisheries Service Concerning Untimely Consultation on Special Use Permits in the Methow Valley**

USDA United States Department of Agriculture | Forest Service | Pacific Northwest Region 6 Okanogan National Forest Supervisor's Office | 1240 South Second Avenue Okanogan, WA 98840-9723 (509) 826-3275

File Code: 2670
Date: April 22, 1999

Steve Landino
National Marine Fisheries Service
Habitat Conservation Program
510 Desmond Drive SE, Suite 103
Lacey, WA 98503

Dear Mr. Landino:

The consultation process as it pertains to the irrigation ditches on the Okanogan National Forest has stalled and the Forest is unable to justify why the process is now floundering. There is a need for ditch operators to potentially adjust their operation on an agreed upon timeline to be consistent with Biological Opinions, but that need is right now, prior to irrigation season. This floundering process is clearly not serving the ditch operator's needs and I also fear it is not serving the long term needs of listed species either.

The Okanogan National Forest and the National Marine Fisheries Service (NMFS) have been consulting on the actions of irrigation ditches under Special Use Permit or Easements. This has not been easy due to the complexity of the issues at hand; state water rights, the Endangered Species Act, and level of discretionary authority. Resolution of these issues may very will be precedence setting Nation-wide. Never the less, the Forest has been doing what it can to complete consultation. NMFS on the other hand seems to be non-responsive to the issue.

The Okanogan National Forest has been consulting with NMFS on irrigation ditches since March 1998. The Forest has followed the process as outlined by the "Streamlining Consultation Procedures Under Section 7 of the Endangered Species Act- February 1997 Procedure Guidance' (2/28/97 letter) and the 50 CFR 402 "Interagency Cooperation- Endangered Species Act of 1973, as amended' (10/1/98 edition). The Forest has initiated several meetings with NMFS to facilitate the development of biological opinions (BO) beginning November 1998. To date, the Okanogan National Forest has not received a BO from NMFS let alone any documentation identifying incomplete or inadequate biological assessments, written requests for additional information, and/or extensions. On February 14, 1999 there was a meeting of Level 1 Team members, County agencies, Washington Department of Wildlife and other FWS/NMFS personnel where information to be gathered from the permittees was identified. As much of this information was obtained as possible and forwarded to NMFS. It did not change the effects determinations nor meet the triggers for new information and therefore did not re-start the clock for completing the BOs.

According to the "Streamlining Consultation Procedures', which were signed by the Regional Executives of the Forest Service and the NMFS, after review of the BA by the Level 1 team, the Forest Service will submit the BA with a written request for consultation. "*The regulatory agency will review the consultation package for adequacy within two weeks of receipt and, if inadequate, notify the action agency in writing that the 60-day timeframe has not started. If the action agency is not notified of an incomplete BA within two weeks, it will be assumed the*

*document is complete and that the 60-day period started when the BA was submitted.'* **The Forest has not received any documentation from NMFS that the BAs are incomplete.**

The 50 CFR 402 identifies consultation procedures for and responsibilities of the action agency and regulatory agency;

- 402.12 (j) The action agency shall submit a complete BA to the Director of NMFS for review. *''The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment.'* **The Forest has yet to received any written documentation from NMFS.**
- 402.14 (e) The ditch permittee has applicant status under the ESA. *''If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, a written statement settingforth... . A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant.'* **Neither the ditch permittees nor the Forest has requested an extension of consultation.**
- 402.14 (f) The information submitted is the best scientific and commercial available at the time. *''If formal consultation is extended by mutual agreement... the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension.' If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.'* **An extension has not been requested nor has a BO been received.**
- 402.14 (g) (5) The Forest and the ditch permittees are to be kept informed and involved in discussion of the development of a BO. *'' Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraph (g) (1) through (g) (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7 (e) (2).'* **Neither the Forest nor the applicant has been involved in discussions of the contents of the BOs.**
- 402.14 (g) (5) The Forest and the applicant are interested in reviewing the draft BOs. *''If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives.' ''The applicant may request a copy of the draft opinion from the Federal agency.'* **Both the Forest and the applicants are interested in and [would like to] formally request a copy of the draft biological opinion in order to analyze the reasonable and prudent alternatives. The applicants have already notified the Forest that they would like to review the draft.**

As the following summary displays, the steps the Forest has completed to facilitate consultation for each of the watersheds includes:

Endangered Species Act Determination for Irrigation Ditch and Water Transmission Line Special Use Permits in the Twisp River Watershed, 1/30/98 & 2/20/98.

- 3/4/98- Level 1 review of BA. Comments and additional information requests by NMFS noted. 3/13/98; comments and additional information requests by NMFS incorporated into BA.
- 4/23/98- Mailed BA with Cover Letter to Steve Landino requesting formal consultation and a BO.
- ***2/14/99- meeting of Level 1 Team members, County agencies, Washington Department of Wildlife and other FWS/NMFS personnel where information to be gathered from the permittees was identified. This information was obtained as possible and forwarded to you. It did not change the effects determinations.***
- 3/4/99- Letter addressed to Matt Longenbaugh (Level 2 contact) amending the BA and requesting a BO. Amendments did not change the effects determinations.
- 4/5/99- Letter addressed to Dennis Carlson (Level 1 contact) amending the BA with additional information developed from the 2/14/99 meeting and request for a BO before April 15, 1999. Amendments did not change the effects determinations.

BA for Water Conveyance within the Chewuch Watershed, 2/20/98.

- 3/5/98- Level 1 review of BA. Comments and additional information requests by NMFS noted. 3/10/98; comments and additional information requests by NMFS incorporated into BA.
- 4/23/98- Mailed BA with Cover Letter to Steve Landino requesting formal consultation and a BO.
- ***2/14/99- meeting of Level 1 Team members, County agencies, Washington Department of Wildlife and other FWS/NMFS personnel where information to be gathered from the permittees was identified. This information was obtained as possible and forwarded to you. It did not change the effects determinations.***
- 3/4/99- Letter addressed to Matt Longenbaugh (Level 2 contact) amending the BA and requesting a BO. Amendments did not change the effects determinations.
- 3/25/99- Letter addressed to Dennis Carlson (Level 1 contact) amending the BA with additional information specific to the Skyline Ditch developed from the 2/14/99 meeting. Also request a BO for the Skyline Ditch. Amendments did not change the effects determinations.
- 4/5/99- Letter addressed to Dennis Carlson (Level 1 contact) amending the BA with additional information developed from the 2/14/99 meeting and request for a BO before April 15, 1999. Amendments did not change the effects determinations.

BA for Authorization for Water Conveyance by the Wolf Creek Reclamation District Irrigation Ditch, 3/4/98.

- 3/19/98- Level 1 review of BA (conference call). Comments and additional information requests by NMFS noted. 3/25/98; comments and additional information requests by NMFS incorporated into BA.

- 4/23/98- Mailed BA with Cover Letter to Steve Landino requesting formal consultation and a BO.
- ***2/14/99- meeting of Level 1 Team members, County agencies, Washington Department of Wildlife and other FWS/NMFS personnel where information to be gathered from the permittees was identified. This information was obtained as possible and forwarded to you. It did not change the effects determinations.***
- 3/4/99- Letter addressed Longenbaugh (Level 2 contact) amending the BA and requesting a BO. Amendments did not change the effects determinations.
- 4/5/99- Letter addressed to Dennis Carlson (Level 1 contact) amending the BA with additional information developed from the 2/14/99 meeting, and request for a BO before April 15, 1999. Amendments did not change the effects determinations.

BA of Irrigation Special Use Permits in the Early Winter Watershed, 7/29/98.

- 8/3/98- Level 1 review of BA. Comments and additional information requests by NMFS noted. 8/7/98; comments and additional information requests by NMFS incorporated into BA.
- 8/18/98- Mailed BA with a Cover Letter to Steve Landino requesting formal consultation and a Biological Opinion (BO).
- ***2/14/99- meeting of Level 1 Team members, County agencies, Washington Department of Wildlife and other FWS/NMFS personnel where information to be gathered from the permittees was identified. This information was obtained as possible and forwarded to you. It did not change the effects determinations.***
- 3/4/99- Letter addressed to Matt Longenbaugh (Level 2 contact) amending the BA and requesting a BO. Amendments did not change the effects determinations.
- 4/14/99- Letter addressed to Dennis Carlson (Level 1 contact) amending the BA with additional information developed from the 2/14/99 meeting, and request for a BO before April 15, 1999. Amendments did not change the effects determinations.

The Okanogan National Forest has made every attempt to fulfill our responsibilities as outlined in the "Streamlining Consultation Process', (2/28/97 letter) and in 50 CFR 402. In addition, the Forest initiated meetings this winter with the regulatory agencies and Operations/Maintenance meetings with the ditch operators to facilitate issuance of BOs prior to "turn-on" this spring. The Okanogan National Forest expects NMFS to fulfill their statutory responsibilities in accordance to the "Streamlining Consultation Process' and the 50 CFR 402 which includes written correspondence (BA concurrence, requests for extensions or additional data, and draft BOs), timeliness of consultation process steps, involvement of both the Forest Service and the ditch operators (as applicants) in the review of draft BOs, and ultimately the issuance of Biological Opinions.

We are also aware of NMFS's interest in by-pass flows as a part of a cumulative effects analysis as "additional data" and your request for our involvement in that process, however the Forest has no other data or analysis to address this question. Actually, the question that comes to mind at this point in the consultation process is why further delay consultation for minimum flow/cumulative effects information when the WA State mandated HB 2415 process (Local Watershed Planning) is underway and has been endorsed by NMFS? With the heavy snow pack

the Cascades have this year (140-240% of normal), why not complete the BO prior to ditch turn-on and have the BO defer to an interim or final product of the 2514 process.

The Forest Service understands that we are dealing with a difficult issue, but all the Forest Service and ditch operator's information is on the table and the irrigation season is upon us -- we need to address both the needs of the listed species and the ditch operators. There are clear consequences to both groups.

***Finally we must request that BOs be prepared and drafts submitted for Forest Service and permittee review. We believe the statutory timelines prescribed for consultation have been greatly exceeded. We have no additional information available. To secure credible instream flow data it would require 1-3 years field work and $25-50,000 per small stream--funds we do not have or anticipate getting. Furthermore, neither we nor the applicants have agreed to an extension of the consultation process. Our understanding of the consultation regulations indicate that without such agreements the NMFS is bound to issue a BO based on the information at hand.***

Sincerely,

Sam Gehr

SAM GEHR
Forest Supervisor
Okanogan National Forest

Attachment 3

**Undated Letter from National Marine Fisheries Service to Washington State Department of Ecology Concerning Potential Liability for Failure to Take Immediate Action on Instream Flows**

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
510 Desmond Drive S.E., Suite 103
Lacey, Washington 98503

Mr. Tom Fitzsimmons
Director, Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Subject: Section 7 and Memorandum of Agreement

Dear Mr. Fitzsimmons:

I want to update you on actions the National Marine Fisheries Service (NMFS) is taking to restore adequate flows for fish species listed under the Endangered Species Act (ESA) in the upper Columbia River Basin. As you know, this summer NMFS must implement Section 7 of the ESA which requires, among other things, that federal agencies "consult" with NMFS to ensure that their actions do not "jeopardize" listed species. In the upper Columbia, adequate flows for listed fish are a major concern and a focus of NMFS' Section 7 responsibilities. NMFS continues to desire close collaboration with the state, particularly the Department of Ecology, on the immediate development of necessary information to complete the Section 7 consultations so that we minimize negative impacts on local interests.

The U.S. Forest Service (USFS) is working under Section 7 to complete its required biological assessments (BA) of the special use permits for irrigation ditches crossing USFS lands. Although it is clear that existing low flows harm listed fish, many of the BAs lack data on what level of flow is adequate for fish. This information is needed to complete the analysis of the impact of these diversions on listed fish. It is only after the already-delayed BAs are completed that NMFS can begin its review and issue the required Biological Opinion (BO) for the permit. A BO typically requires up to 135 days to finalize. While NMFS is prepared if necessary to complete this process without assistance, it believes that collaboration with the state on determining initial flows necessary for fish can improve the outcome and likely reduce the delays.

It has been NMFS' understanding since our meeting on January 5, 1999, that your staff would work with the Governor's Salmon Recovery Office to help make an initial determination of flows necessary for the protection of listed fish in the upper Columbia. Our initial focus has been on the Methow Basin and, in particular, on establishing interim flow targets in Early Winters Creek so that local water users can proceed with NMFS and the state on a conservation planning initiative in that tributary. At the February 11, 1999 meeting, we discussed the benefits of Ecology adopting these interim flows into an emergency rule in order to benefit fish, insulate Ecology and Okanogan County from potential "take" claims under Section 9 of the ESA, and provide a framework for a collaborative, negotiated water conservation plan. In addition, the

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effort would provide necessary information for Section 7 consultations with the USFS so that local irrigation companies that require special use permits could have received them prior to the irrigation season.

Initially, NMFS sought to conduct its Section 7 consultations in the Methow Basin in a manner consistent with the Memorandum of Agreement ( MOA) developed between Ecology and Okanogan County, signed in July 1998. However, NMFS understands that significant tasks called for in the MOA have not been completed within the timeframes provided. For instance, it has been the understanding of NMFS based on the MOA that the water bank was to be adopted into a final rule by the end of February 1999. NMFS has been informed that the water bank rules are yet to be adopted and, that neither the water bank rule or the water savings program (also called for in the MOA) which will be in place before the conclusion of the 1999 irrigation season. As we have discussed, NMFS must have confidence that a conservation plan is to be implemented if that plan is to affect determinations NMFS must make under the ESA. Because the MOA with Okanogan County is not being implemented as negotiated, NMFS cannot rely upon it. As a consequence, NMFS must proceed in the Methow with its Section 7 responsibilities and looks to Ecology for its assistance. NMFS hopes that Ecology and other interests recognize that proceeding under Section 7 immediately is the best means to remove uncertainties under the ESA.

NMFS is generally concerned about the amount of time that has passed since the 1997 listing of steelhead in the upper Columbia without significant progress in restoring flows necessary for fish. While NMFS would prefer a local or state initiated conservation strategy, it must expedite this process. To that end, NMFS will initiate the analysis and seek to establish a technical team comprised of state, federal, and tribal agencies to assist with determining adequate flows for fish in stream reaches where low flows are identified as limiting factors in the Biological Assessments for the USFS permits beginning in the Methow Basin. I request Ecology designate an individual to be assigned as a member of the technical team to assist in the determination of flows necessary for fish. A meeting of the team will take place on April 26, 1999 at 1 p.m. in room 261 in the NMFS Lacey Office. We expect to complete our flow analysis for the Methow within a month, and move quickly to other basins in the Upper Columbia Region.

Please forward your questions about flows and the name of your designee to Mike Grady at: (360) 753-6052.

I look forward to your assistance in this urgent matter.

Sincerely,

Robert A. Turner
Washington Area Director

**Attachment 4**

**Proposed Rulemaking for Methow Valley Waterbank**

# PROPOSED RULE MAKING
(RCW 34.05.320)

CR-102 (7/10/97)
Do Not use for expedited adoption

Agency: Department of Ecology A.O. # 94-32

☒ Original Notice
☐ Supplemental Notice to WSR _____
☐ Continuance of WSR _____

☒ Preproposal Statement of Inquiry was filed as WSR 95-12-059; or
☐ Expedited Adoption--Proposed Rule Making notice was filed as WSR _____; or
☐ Proposal is exempt under RCW 34.05.310(4).

(a) **Title of rule: (Describe Subject)** Chapter 173-548 WAC, Water Resources Program in the Methow River Basin, WRIA 48

**Purpose:** Amend rule to establish trust water right water bank to assist with water management in the basin.

**Other identifying information:**

(b) **Statutory authority for adoption:** Chapter 90.44 RCW; Chapter 90.54 RCW

**Statute being implemented:** Chapter 90.54 RCW, Water Resources Act of 1971

(c) **Summary:** In early 1998, the Department of Ecology and Okanogan County signed a Memorandum of Agreement to work together, in conjunction with the Department of Fish and Wildlife and the Governor's Salmon Recovery Team, to cooperatively develop and implement an improved water resources management program for the Methow River Basin. As part of this agreement, Ecology agreed to propose a rule amendment that would establish a water bank in the Methow Basin.

**Reasons supporting proposal:** While the basin's water is substantially renewed annually, there isn't always water at the right place and time for all existing and proposed uses; the water bank would help address this

(d) **Name of Agency Personnel Responsible for:**

| | | Office Location | Telephone |
|---|---|---|---|
| 1. Drafting | John Monahan | Yakima, Washington | 509-457-7112 |
| 2. Implementation | Bob Barwin | Yakima, Washington | 509-457-7107 |
| 3. Enforcement | Bob Barwin | Yakima, Washington | 509-457-7107 |

(e) **Name of proponent (person or organization)**
Washington Department of Ecology and Okanogan County Commissioners

☐ Private
☐ Public
☒ Governmental

(f) **Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:**

(g) **Is rule necessary because of:**

| | | | |
|---|---|---|---|
| **Federal Law?** | ☐ Yes | ☒ No | If yes, ATTACH COPY OF TEXT |
| **Federal Court Decision** | ☐ Yes | ☒ No | Citation: |
| **State Court Decision?** | ☐ Yes | ☒ No | |

(h) **HEARING LOCATION:**
The Barn, 51 N. Highway 20, Winthrop, Washington

**Date:** June 10, 1999 **Time:** 7:00 p.m. to 9:00 p.m.

Assistance for persons with disabilities:
**Contact** Paula Smith **by** June 1, 1999.
**TDD:** (360) 407-6006 **or** (360) 407-6607

**Submit written comments to:**
Thom Lufkin, Water Resources Program, Department of Ecology, PO Box 47600, Olympia, WA 98504-7600, or e-mail at tlhw461.ecy.wa.gov

**Fax** (360) 407-6574 **By** June 18, 1999

DATE OF INTENDED ADOPTION: July 7, 1999

NAME (TYPE OR PRINT)
Dan Silver

SIGNATURE
*DAN SILVER*

TITLE
Deputy Director

DATE
4/20/99

CODE REVISER USE ONLY
CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED
APR 21 1999
TIME: 10:09 AM
WSR: 99-09-092

(COMPLETE REVERSE SIDE)

**(j) Short explanation of rule, its purpose, and anticipated effects:**

Although water in the Methow River Basin is substantially renewed annually through rainfall and snowmelt, there isn't always water at the right place and time for all existing and proposed uses. In early 1998, the Department of Ecology and Okanogan County signed a Memorandum of Agreement to work together, in conjunction with the Department of Fish and Wildlife and the Governor's Salmon Recovery Team, to cooperatively develop and implement an improved water resources management program to address the water situation in the Basin.

As part of this agreement, Ecology agreed to propose a rule amendment that would establish a trust water right "water bank" in the Methow Basin. The water bank would provide a means to account for water use and availability, and is perceived as a necessary step to assist with water management in the basin.

**Does proposal change existing rules?** ☒Yes ☐No **If yes, describe changes:**

The amendment would create a trust water right water bank in the Methow Basin (please see above for more background).

**(k) Has a small business economic impact statement been prepared under chapter 19.85 RCW?**
☐Yes. **Attach copy of small business economic impact statement.**
**A copy of the statement may be obtained by writing to:**

telephoning: (_____) _____
faxing: (_____) _____

☒No. **Explain why no statement was prepared.**

The proposed amendment to Chapter 173-548 WAC establishes an administrative entity, a water bank, which will provide a process for tracking and allocating water in the Methow River Basin. As such, the amendment does not materially add to the administrative requirements for obtaining water rights, building permits, or other development-related permits or approvals in the area. Its effects on small businesses are not expected to differ from those on large businesses.

**(l) Does RCW 34.05.328 apply to this rule adoption?** ☐Yes ☒No
**Please explain:** This amendment is not a significant rule under RCW 34.05.328 because it is procedural in nature, creating an entity for tracking and allocating water; it does not create additional administrative requirements for the regulated community.

# CHAPTER 173–548 WAC
# WATER RESOURCES MANAGEMENT PROGRAM ((~~IN~~)) FOR THE METHOW RIVER BASIN, WRIA 48

WAC
173-548-001 Purpose of rule.
173-548-002 Definitions.
173-548-005 Authority.
173-548-010 General provision.
173-548-015 Methow River basin map.
173-548-020 Establishment of base flows.
173-548-030 ((~~Future allocations -- Reservation of surface water for beneficial uses.~~)) Future water use -- general.
173-548-031 Future water use -- Storage facilities.
173-548-032 Future water use -- Reservation of water for in-house domestic purposes.
173-548-033 Future water use -- Change of place of use or point of diversion.
173-548-034 Future water use -- Conservation and change of purpose of use.
173-548-035 Future water use -- Salmonid habitat.
173-548-036 Future water use -- Water reuse.
173-548-037 Future water use -- Allocation of saved water.
173-548-040 ((~~Priority of future water rights during times of water shortage.~~)) Future water use -- Priority of appropriation.
173-548-050 Streams and lakes closed to further consumptive appropriations.
173-548-060 Ground water.
173-548-070 Effect on prior rights.
173-548-075 Administration.
173-548-076 Organization and management of workload.
173-548-080 Enforcement.
173-548-090 Appeals.
173-548-100 Regulation review.

NEW SECTION

**WAC 173-548-001 Purpose of rule.** (1) The purposes of this rule are to establish a water bank and to provide guidelines and procedures for the management of the water resources in the Methow River basin. These guidelines and procedures apply to both surface water and ground water that is in hydraulic continuity with the Methow River or its tributaries. These guidelines and procedures are intended to provide a means to develop water supplies for beneficial out-of-stream uses such as domestic and agricultural purposes, protect and enhance beneficial instream uses, enhance habitat for anadromous salmon and steelhead, and protect existing water rights.

(2) It is determined that water is not reliably available for certain times of the year within the Methow River basin, including hydraulically connected ground water. New appropriations under water right applications filed under RCW 90.03.250 and RCW 90.44.050, must be made in accordance with the procedures described in WAC 173-548-030(1), WAC 173-548-031, or WAC 173-548-032.

(3) This rule complements and is implemented in conjunction with applicable Okanogan County ordinances and/or resolutions that require water to be used and managed in a manner consistent with state laws, regulations, and local management objectives described in the ordinances and/or resolutions.

(4) In promulgating this rule revision, consideration was given to the recommendations of the Methow River basin pilot planning committee; the Methow River basin ground water advisory committee; chapter 173-548-030 WAC, filed on December 28, 1976; Okanogan County subdivision and critical areas ordinances, comprehensive plan, zoning code, shoreline master program; and the Mazama water quality protection system.

NEW SECTION

**WAC 173-548-002 Definitions.** For purposes of this chapter, the following definitions apply:

(1) "Allocation" means the maximum rate and volume of water approved by the department under a water right permit or certificate for a specific beneficial use.

(2) "Community domestic use" means any water intended or used for human consumption for more than one single-family residence.

(3) "Community domestic water system" means a system that delivers water primarily-for community domestic uses.

(4) "County" means Okanogan County.

(5) "Department" means the Washington state department of ecology.

(6) "Exempt water use" means any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day.

(7) "Hydraulically connected ground water" means ground water aquifers or bodies where withdrawals of ground water have an impact on (reduce flow or level of) the surface waters.

(8) "Hydraulic continuity" means the connection and dynamic interaction between ground and surface water. An aquifer is in hydraulic continuity with lakes, streams, rivers, or other surface-water bodies whenever it is discharging to, or being recharged by, surface water.

(9) "Impairment" means the condition, caused by other than a natural event, where the holder of a valid water right cannot accomplish the beneficial use or uses for which the right was granted.

(10) "In-house use" means water used inside the home (e.g. sinks, toilets, shower/bath, laundry), and does not include uses of water outside the residence (e.g. lawn, garden, ornamental landscaping, car washing).

(11) "Net water savings" means the amount of water that is determined to be conserved and usable within a specified stream reach or reaches for other purposes without:

(a) Impairment or detriment to water rights existing at the time that a water conservation project is undertaken;

(b) Reducing the ability to deliver water; or

(c) Reducing the supply of water that otherwise would have been available to other existing water uses.

(12) "New water use" means a use of water which was not legally authorized before the effective date of this rule.

(13) "Open space" means land within or related to a development, not individually owned (undivided interest), which remains undeveloped and that is dedicated to one or more of the following purposes:

(a) Historical/architectural preservation;

(b) Fish or wildlife habitat;

(c) Agriculture; or

(d) Recreation.

(14) "Planned development" means land on which a variety of housing types and/or related commercial and industrial facilities are accommodated in a pre-planned environment under flexible standards, such as lot sizes and setbacks, different from those restrictions that would normally apply to a subdivision in the underlying zone. Planned development standards contain requirements in addition to those of the standard subdivision, such as building design principles and a landscaping plan. Planned developments are served by a community domestic water system as defined in this section.

(15) "Saved water" means the quantity of water historically diverted or withdrawn to satisfy a beneficial use that, as a result of system improvements or a change of use is no longer diverted or withdrawn from its source for the historical beneficial use.

(16) "Stream management units" are the four mainstem Methow River and three tributary segments, each of which contains a control station, that together make up the Methow River basin. Base flow levels and other elements of the 1977 water resource management program are defined by and will be administered within each management reach.

(17) "Trust water right" means any water right acquired by or donated to the state under the trust water right provisions of chapter 90.42 RCW. Trust water rights are immediately junior to, but maintain the same priority date as, the water right from which they were acquired or donated.

(18) "Valid water right" means a water right recognized by law.

(19) "Water bank" means the system by which trust water rights can be dedicated to one of several future instream and out-of-stream uses.

NEW SECTION

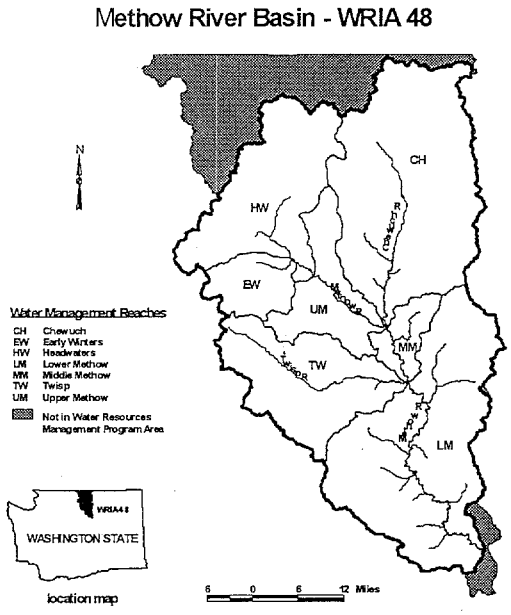
**WAC 173-548-005 Authority.** This rule was developed and adopted based on Chapters 18.104, 43.27A, 90.03, 90.22, 90.42, 90.44, and 90.54 RCW, and was developed consistent with the rules and procedures in applicable Okanogan County ordinances and resolutions, Chapters 19.27, 36.36, 43.21A, 43.83B, 58.17, 90.46, and 90.48 RCW, and Chapters 173-100, 173-160, 173-200, and 173-500 WAC.

AMENDATORY SECTION

**WAC 173–548–010 General provision**. These rules, including any subsequent additions and amendments, apply to waters within and contributing to the Methow River basin, within WRIA 48 (see WAC 173–500–040). Chapter 173–500 WAC, the general rule((s)) of the department of ecology for the implementation of the comprehensive water resources program, applies to this chapter ((~~173-548 WAC~~)). The Methow River basin includes those lands which are depicted on the map in WAC 173-548-015. Information regarding stream management units in the Methow River basin is provided in WAC 173-548-020. [Order DE 76–37, § 173–548–010, filed 12/28/76.]

NEW SECTION

**WAC 173-548-015 Methow River basin map.**



AMENDATORY SECTION

**WAC 173–548–020 Establishment of base flows.** (1) Base flows are established for stream management units with monitoring to take place at certain control ((~~points~~)) stations as follows:

STREAM MANAGEMENT UNIT INFORMATION

| Stream Management Unit Name, Control Station Name and Number | Control Station Location by River Mile, Section, Township, Range | Affected Stream Reach (includes tributaries) |
|---|---|---|
| Lower Methow | | |
| Methow R. nr. Pateros (12.4499.50) | 6.7 20–30–23E | Methow River confluence with Wells Pool to confluence with Twisp River. |
| Middle Methow | | |
| Methow R. nr. Twisp (12.4495.00) | 40.0 17–33–22E | Methow River from confluence with Twisp River to confluence with ((~~Chewack~~)) Chewuch River. |
| Upper Methow | | |
| Methow R. nr. Winthrop (12.4473.89) | 50.2 2–34–21E | Methow River from confluence with ((~~Chewack~~)) Chewuch river to confluence with Little Boulder Creek and including Little Boulder Creek. |
| Methow Headwaters | | |
| Methow R. at Little Boulder Cr. (12.4473.83) | 65.3 25–36–19E | Methow River from confluence with Little Boulder Creek to headwaters. |
| Early Winters Creek | | |
| Early Winters Cr. near Mazama | 27–36–19E | Early Winters Creek from confluence with Methow River to headwaters. |
| ((~~Chewack~~)) Chewuch River | | |
| ((~~Chewack~~)) Chewuch R. nr. Boulder Creek (12.4475.00) | 8.7 35–36–21E | ((~~Chewack~~)) Chewuch River confluence with Methow River to headwaters. |

Twisp River

| | | |
|---|---|---|
| Twisp R. nr. Twisp (12.4489.98). | 0.3 7–33–22E | Twisp River from confluence with Methow River to headwaters. |

(2) Base flows established for the stream management units in WAC 173–548–020(1) are as follows:

**Base Flows in the Methow River**
(All Figures in Cubic Feet Per Second)

[CODIFICATION NOTE: The graphic presentation of this table has been varied slightly in order that it would fall within the printing specification for the Washington Administrative Code. The following table was too wide to be accommodated in the width of the WAC column. The table as codified has been divided into two tables with Part 1 covering the Lower Methow, Middle Methow and Upper Methow and with Part 2 covering the Methow Headwaters, Early Winters Creek, ((~~Chewack~~)) Chewuch River and Twisp River.]

PART 1

| Month | Day | Lower Methow (12.4499.50) | Middle Methow (12.4495.00) | Upper Methow (12.4473.89) |
|---|---|---|---|---|
| Jan. | 1 | 350 | 260 | 120 |
| | 15 | 350 | 260 | 120 |
| Feb. | 1 | 350 | 260 | 120 |
| | 15 | 350 | 260 | 120 |
| Mar. | 1 | 350 | 260 | 120 |
| | 15 | 350 | 260 | 120 |
| Apr. | 1 | 590 | 430 | 199 |
| | 15 | 860 | 650 | 300 |
| May | 1 | 1,300 | 1,000 | 480 |
| | 15 | 1,940 | 1,500 | 690 |
| Jun. | 1 | 2,220 | 1,500 | 790 |
| | 15 | 2,220 | 1,500 | 790 |
| Jul. | 1 | 2,150 | 1,500 | 694 |
| | 15 | 800 | 500 | 240 |
| Aug. | 1 | 480 | 325 | 153 |
| | 15 | 300 | 220 | 100 |
| Sep. | 1 | 300 | 220 | 100 |
| | 15 | 300 | 220 | 100 |
| Oct. | 1 | 360 | 260 | 122 |
| | 15 | 425 | 320 | 150 |
| Nov. | 1 | 425 | 320 | 150 |
| | 15 | 425 | 320 | 150 |
| Dec. | 1 | 390 | 290 | 135 |
| | 15 | 350 | 260 | 120 |

PART 2

| Month | Day | Methow Headwaters (12.4473.83) | Early Winters Creek | ((~~Chewack~~)) Chewuch River (12.4475.00) | Twisp River (12.4489.98) |
|---|---|---|---|---|---|
| Jan. | 1 | 42 | 10 | 56 | 34 |
| | 15 | 42 | 10 | 56 | 34 |
| Feb. | 1 | 42 | 10 | 56 | 34 |
| | 15 | 42 | 10 | 56 | 34 |
| Mar. | 1 | 42 | 10 | 56 | 34 |
| | 15 | 42 | 10 | 56 | 34 |
| Apr. | 1 | 64 | 14 | 90 | 60 |
| | 15 | 90 | 23 | 140 | 100 |
| May | 1 | 130 | 32 | 215 | 170 |
| | 15 | 430 | 108 | 290 | 300 |
| Jun. | 1 | 1,160 | 290 | 320 | 440 |
| | 15 | 1,160 | 290 | 320 | 440 |
| Jul. | 1 | 500 | 125 | 292 | 390 |
| | 15 | 180 | 45 | 110 | 130 |
| Aug. | 1 | 75 | 20 | 70 | 58 |
| | 15 | 32 | 8 | 47 | 27 |
| Sep. | 1 | 32 | 8 | 47 | 27 |
| | 15 | 32 | 8 | 47 | 27 |
| Oct. | 1 | 45 | 11 | 56 | 35 |
| | 15 | 60 | 15 | 68 | 45 |
| Nov. | 1 | 60 | 15 | 68 | 45 |
| | 15 | 60 | 15 | 68 | 45 |
| Dec. | 1 | 51 | 12 | 62 | 39 |
| | 15 | 42 | 10 | 56 | 34 |

(3) Base flow hydrographs, as represented in Figure 1 in the document entitled " water resources management program, Methow River basin," dated 1976, shall be used for definition of base flows on those days not specifically identified in WAC 173–548–020(2)((~~and 173–548–030~~)).

(4) All rights hereafter established through the procedures in RCW 90.03.250 and RCW 90.44.050 shall be subject to the base flows established in WAC 173–548–020(1) through (3), except as provided in WAC 173–548–030(1) and WAC 173-548-032 through WAC 173-548-037.

(5) Future appropriations of water which would conflict with base flows shall be authorized, by the director, only in those situations when it is clear that overriding considerations of the public interest will be served. [Order DE 76–37, § 173–548–020, filed 12/28/76.]

AMENDATORY SECTION

**WAC 173–548–030** ((~~**Future allocations—Reservation of surface water for beneficial uses.** The department determines that there are surface waters available for appropriation from the~~

~~stream management units specified in the amount specified in cubic feet per second (cfs) during the time specified as follows:~~

~~(a) Maximum surface water available for future allocation from the indicated reach is as follows:~~

| Month | Lower Methow | Middle Methow | Upper Methow | Methow Head waters | Early Winters Creek | Chewack River | Twisp River |
|---|---|---|---|---|---|---|---|
| Oct. | 95 | 50 | 44 | 15 | 29 | 09 | 14 |
| Nov. | 116 | 101 | 46 | 06 | 21 | 10 | 15 |
| Dec. | 112 | 99 | 44 | 17 | 26 | 10 | 15 |
| Jan. | 50 | 36 | 26 | 08 | 19 | 03 | 09 |
| Feb. | 51 | 37 | 29 | 09 | 19 | 04 | 10 |
| Mar. | 147 | 139 | 80 | 38 | 19 | 24 | 18 |
| Apr. | 565 | 590 | 273 | 336 | 35 | 118 | 148 |
| May | 2,922 | 2,927 | 784 | 412 | 403 | 809 | 703 |
| Jun. | 3,116 | 2,853 | 1,017 | 1,249 | 294 | 1,292 | 890 |
| Jul. | 965 | 877 | 583 | 608 | 189 | 308 | 298 |
| Aug. | 214 | 192 | 203 | 109 | 94 | 70 | 70 |
| Sep. | 62 | 55 | 76 | 33 | 47 | 23 | 26 |

~~All figures in cubic feet per second.~~

~~(b) The control station for each reach is defined in WAC 173-548-020.~~

~~(c) The appropriation limit is set forth to be an amount equal to the one in two year natural reach discharge on a monthly basis for all management reaches except Early Winters Creek. The appropriation limit for Early Winters Creek is set forth to be an amount equal to the estimated natural mean monthly streamflow for that stream.~~

~~(2) The amounts of water referred to in WAC 173-548-030(1) above are allocated for beneficial uses in the future as follows:~~

~~(a) Allocation of surface waters by use category (April through September):~~

| Use Description | Apr. | May | Jun. | Jul. | Aug. | Sep. |
|---|---|---|---|---|---|---|
| Lower Methow | | | | | | |
| Single Domestic and Stock Use | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |
| Base Flow | 860 | 1,940 | 2,220 | 800 | 300 | 300 |
| Public Water Supply, Irrigation, and Other Uses | Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c) | | | | | |
| Middle Methow | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~650~~ | ~~1,500~~ | ~~1,500~~ | ~~500~~ | ~~220~~ | ~~220~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Upper Methow~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~300~~ | ~~690~~ | ~~790~~ | ~~240~~ | ~~100~~ | ~~100~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Methow Headwaters~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~90~~ | ~~430~~ | ~~1,160~~ | ~~180~~ | ~~32~~ | ~~32~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Early Winters Creek~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~23~~ | ~~108~~ | ~~290~~ | ~~45~~ | ~~8.0~~ | ~~11.0~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Chewack River~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~140~~ | ~~290~~ | ~~320~~ | ~~110~~ | ~~47~~ | ~~47~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~Twisp River~~

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~100~~ | ~~300~~ | ~~440~~ | ~~130~~ | ~~27~~ | ~~27~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~All figures in cubic feet per second~~

~~(b) Allocation of surface waters by use category (October through March):~~

| ~~Use Description~~ | ~~Oct.~~ | ~~Nov.~~ | ~~Dec.~~ | ~~Jan.~~ | ~~Feb.~~ | ~~Mar.~~ |
|---|---|---|---|---|---|---|
| ~~Lower Methow~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~425~~ | ~~425~~ | ~~350~~ | ~~350~~ | ~~350~~ | ~~350~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Middle Methow~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~320~~ | ~~320~~ | ~~260~~ | ~~260~~ | ~~260~~ | ~~260~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Upper Methow~~ | | | | | | |
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~150~~ | ~~150~~ | ~~120~~ | ~~120~~ | ~~120~~ | ~~120~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |
| ~~Methow Headwaters~~ | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~60~~ | ~~60~~ | ~~42~~ | ~~42~~ | ~~42~~ | ~~42~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~Early Winters Creek~~

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~15~~ | ~~15~~ | ~~10~~ | ~~10~~ | ~~10~~ | ~~10~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~Chewack River~~

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~68~~ | ~~68~~ | ~~56~~ | ~~56~~ | ~~56~~ | ~~56~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~Twisp River~~

| | | | | | | |
|---|---|---|---|---|---|---|
| ~~Single Domestic and Stock Use~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ | ~~2.0~~ |
| ~~Base Flow~~ | ~~45~~ | ~~45~~ | ~~34~~ | ~~34~~ | ~~34~~ | ~~34~~ |
| ~~Public Water Supply, Irrigation, and Other Uses~~ | ~~Remaining waters up to the appropriation limit set forth in WAC 173-548-030 (1)(c)~~ | | | | | |

~~All figures in cubic feet per second.~~

~~(c) Allocations presented in this section do not limit the utilization of waters stored for later release, provided such storage does not infringe upon existing rights or base flow and is duly permitted under RCW 90.03.290 and 90.03.350.~~

~~(d) As the amount of water allocated for each category of use approaches the amount available for future allocation set forth in WAC 173-548-030(1), the department shall review the~~

~~program to determine whether there is a need for program revision. [Order DE 76-37, § 173-548-030, filed 12/28/76.]~~)) **Future water use--general.** (1) This rule amendment does not affect water uses under valid water rights or claims which existed before the effective date of its adoption. Authorization of new uses must be obtained from the department and the county through one of the processes defined in WAC 173-548-031 through 036 or, for single domestic and stock purposes, as described in subsection (2) of this section. The water needed to meet new consumptive water uses must now come from:

(a) Water stored during periods of high water flow in the basin;

(b) Transfer of valid water rights;

(c) Water saved from existing rights through the implementation of water conservation or conversion practices;

(d) The water bank; or

(e) Water obtained through reuse.

(2) Up to 2.0 cfs may be used within each stream management unit for single domestic and stock purposes. This amount of water was reserved for future use in the regulation adopted December 28, 1976. The amount that remains available for future single domestic and stock purposes differs within each management unit, based upon the number of appropriations made and the beneficial uses perfected subsequent to adoption of the regulation. Appropriations from this reservation have a priority date of December 28, 1976, and are not subject to the base or minimum instream flows described in WAC 173-548-020.

(3) The Methow River basin water bank is hereby established to account for water saved ("deposits") and water subsequently allocated ("withdrawals") as described in WAC 173-548-037.

NEW SECTION

**WAC 173-548-031 Future water use--Storage facilities.** Storage projects may make water available during periods of low natural water availability. Capture and use of peak spring flows must not negatively affect anadromous fish migration travel time or the base flows in WAC 173-548-020. Evaluation of a storage project proposal in the Methow River basin is formally initiated when an application for a water right for this purpose is filed with the department in accordance with RCW 90.03.255 or 90.44.055. The department shall coordinate its evaluation with the local community and local, state, federal and tribal governments.

NEW SECTION

**WAC 173-548-032 Future water use--Reservation of water for in-house domestic purposes.** (1) The director finds that a reliable supply of water for community domestic uses during the period from the end of the irrigation season to the beginning of the following irrigation season is essential for successful implementation of the pilot planning committee recommendations and is in the overriding interest of the public. Water, in the amount of 2 cfs within each stream management unit, may be appropriated under this section for systems providing community domestic uses, by filing an application in accordance with RCW 90.03.250 or RCW 90.44.050. However, such an appropriation may only take place during the period from the end of the irrigation season to the beginning of the following irrigation season, and only if the applicant has met the conditions described in subsection (2) of this section. Permits authorizing the use of water from this reservation are not subject to the base flows described in WAC 173-548-020.

(2) The applicant must save water during the irrigation season by implementing water conservation practices or by changing the purpose of use of the water, and the saved water must be conveyed to the state by a trust water agreement donating a portion of the existing water right to the accounts described in WAC 173-548-037(4) as follows:

(a) One-half of the conserved water or water for which the use was changed must be dedicated to the instream flow account; and

(b) One-sixth of the conserved water or water for which the use was changed must be dedicated to the development account.

(3) The reservation described in subsection (1) of this section will be reviewed and may be revised in a subsequent rule-making to establish the procedures and guidelines associated with the comprehensive water savings plan which will govern management of the water bank for each stream management unit.

NEW SECTION

**WAC 173-548-033 Future water use--Change of place of use and point of diversion. [RESERVED]**

NEW SECTION

**WAC 173-548-034 Future water use--Conservation and change of purpose of use. [RESERVED]**

NEW SECTION

**WAC 173-548-035 Future water use--Salmonid habitat. [RESERVED]**

NEW SECTION

**WAC 173-548-036 Future water use--Water reuse. [RESERVED]**

NEW SECTION

**WAC 173-548-037 Future water use--Allocation of saved water.** Allocation of water from the water bank must be consistent with chapter 90.42 RCW and the following:

(1) Water placed in the trust of the water bank may only be authorized for single domestic, stock, instream flow, agriculture, community domestic, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems.

(2) Water placed in the trust of the water bank must remain in the bank until criteria for the allocation of saved water have been established, unless the county and the department agree in writing to use water from the water bank to address critical water supply problems consistent with chapter 90.42 RCW.

(3) Water placed in the trust of the water bank may not be re-allocated to uses outside the Methow River basin.

(4) Water placed in the trust of the water bank must be designated to at least one of the

following accounts which are hereby established for each stream management unit within the Methow River basin:

(a) Agriculture account;
(b) Development account;
(c) Instream flow account; or
(d) Habitat account.

AMENDATORY SECTION

**WAC 173–548–040** ((~~**Priority of future water rights during times of water shortage.**~~ ~~(1)~~)) **Future water use--Priority of appropriation.** As between ((~~rights established in the~~)) future water uses within each use category, the following priority dates apply:

(1) For single domestic and stock uses described in WAC 173-548-030(2) the priority date is December 28, 1976, and

(2) For community domestic uses described in WAC 173-548-032, the priority date is the effective date of this section.((~~pertaining to waters allocated in WAC 173–548–030 (2)(a) and (b), all rights subject to this program shall be regulated in descending order of use category priority regardless of the date of the priority of right.~~

~~(2) As between rights established in the future within a single use category allocation of WAC 173–548–030, the date of priority shall control with an earlier dated right being superior to those rights with later dates. [Order DE 76–37, § 173–548–040, filed 12/28/76.]~~))

AMENDATORY SECTION

**WAC 173–548–050 Streams and lakes closed to further consumptive appropriations.**

(1) The department, having determined based on existing information that there are no waters available for further appropriation through the establishment of rights to use water consumptively, closes the streams and lakes listed in ((~~(a) and (b)~~)) subsections (3) and (4) of this section, and ground water hydraulically connected with these surface waters to further consumptive appropriation. This includes rights to use water consumptively established through permit procedures and ground water withdrawals otherwise exempted from permit under RCW 90.44.050. Specific situations in which well construction may be approved are identified in section (2) of this section.

(2) No wells ((~~shall~~)) may be constructed for any purposes, including those exempt from permitting under RCW 90.44.050, unless one or more of the following conditions have been met and construction of the well has been approved in writing by the department ((~~prior to~~)) before the beginning of well construction:

((~~(1)~~)) (a) The proponent has a valid water right permit or certificate recognized by the department. For an existing community domestic use, a water right permit or certificate must be held by a purveyor of an approved system. (For the purposes of this chapter, an approved water system is one in compliance with the state drinking water regulations, chapter 246–290 WAC and the state surface and ground water codes, chapters 90.03 and 90.44 RCW); or

((~~(2)~~)) (b) The proponent has obtained a valid state surface water or ground water right through a transfer or change of water right approved by the department under the statutory authority of chapter 90.03 or 90.44 RCW; or

((~~(3)~~)) (c) The proponent is replacing or modifying an existing well used for an exempt use ((~~developed~~)) under ((~~the exemption from permit clause of~~ )) RCW 90.44.050 ((~~and this has been approved in writing by the department~~)); or,

((~~(4) If the ground water being sought for withdrawal has been determined by the department not to be hydraulically connected with surface waters listed as closed, the department may approve a withdrawal. When insufficient evidence is available to the department to make a determination that ground and surface waters are not hydraulically connected, the department shall not approve the withdrawal of ground water unless the person proposing to withdraw the ground water provides additional information sufficient for the department to determine that hydraulic continuity does not exist and that water is available.~~)) (d) The department has determined that ground water being sought for withdrawal is not hydraulically connected with streams or lakes listed as closed, and the department has issued a permit in response to an application in accordance with chapter 90.44 RCW.

((~~(a)~~)) (3) STREAM CLOSURES

The following streams are closed all year, including all ground waters hydraulically connected to these streams.

| Stream Name (Includes Tributaries) |
|---|
| Wolf Creek |
| Bear Creek |
| (Davis Lake) |
| Thompson Creek |
| Beaver Creek |
| Alder Creek |
| Benson Creek |
| Texas Creek |
| Libby Creek |
| Cow Creek |
| Gold Creek |
| McFarland Creek |
| Squaw Creek |
| Black Canyon Creek |
| French Creek |

((~~(b)~~)) (4) LAKE CLOSURES

The following lakes are closed all year, including all ground waters hydraulically connected to these lakes:

| Name | Location |
|---|---|
| Alta Lake | 3 mi. SW of Pateros |
| Black Lake | 25 mi. N of Winthrop |
| Black Pine Lake | 9 mi. SW of Twisp |
| Crater Lake | 10 mi. W of Carlton |

| | |
|---|---|
| Davis Lake | Bear Creek Drainage |
| Eagle Lake | 11 mi. SW of Carlton |
| French Creek | Sec. 28, T.31N., R.23E.W.M. |
| Libby Lake | 10 mi. W of Carlton |
| Louis Lake | 20 mi. W of Winthrop |
| Middle Oval Lake | 16 mi. W of Carlton |
| North Lake | 20 mi. W of Winthrop |
| Patterson Lake | Sec. 8, T.34N., R.21E.W.M. |
| Pearrygin Lake | Sec. 36, T.35N., R.21E.W.M. |
| Slate Lake | 14 mi. W of Winthrop |
| Sunrise Lake | 16 mi. W of Methow |
| Upper Eagle Lake | 12 mi. W of Carlton |
| West Oval Lake | 16 mi. W of Carlton |

[Statutory Authority: Chapters 34.05, 90.54, 18.104, 90.03 and 90.44 RCW. 91–23–093 (Order 91–27), § 173–548–050, filed 11/19/91, effective 12/20/91; Order DE 76–37, § 173–548–050, filed 12/28/76.]

AMENDATORY SECTION

**WAC 173–548–060 Ground water.** If it is determined that a future development of ground water ((~~measurably affects~~)) is hydraulically connected to surface waters subject to the provisions of chapter 173–548 WAC, then rights to ((~~said~~)) that ground water shall be subject to the same conditions as affected surface waters. [Order DE 76–37, § 173–548–060, filed 12/28/76.]

AMENDATORY SECTION

**WAC 173–548–070 Effect on prior rights.** Nothing in this chapter ((~~shall~~)) may be construed to lessen, enlarge, or modify existing rights, whether acquired by appropriation or otherwise, ((~~and~~)) which were legally vested ((~~prior to~~)) before the effective date of this chapter or amendments to this chapter. Rights established under chapter 173-548 WAC or emergency rule amendments thereof are subject to laws, rules, and regulations in effect at the time the right was established. [Order DE 76–37, § 173–548–070, filed 12/28/76.]

NEW SECTION

**WAC 173-548-075 Administration.** The department and the county each have a role in the review of requests for new uses or requests to change existing rights and claims under this rule. These roles are described below. The water bank is created under this rule to manage the deposit and re-allocation of saved water. Re-allocation of saved water is only possible when water is available, or as identified in sections WAC 173-548-032 through WAC 173-548-035. In general, the process, and the responsibilities of the department and the county, are as follows:

(1) The county is responsible for initial contact from the landowner or developer proposing a development or seeking authorization of an existing unauthorized water use.

(2) The county and the department will together obtain information regarding existing water rights and proposed uses.

(3) The department and the county are responsible for working with the project proponent to identify potential sources of water for a proposed project.

(4) The department is responsible for evaluating water rights, and determining the amount of saved water to be deposited into state trust, and to be made available for future use through the water allocation system.

(5) The county is responsible for maintaining a record of withdrawals from and deposits to the water bank, consistent with this rule. This register must include records of department issued permits, change authorizations, and certificates.

(6) The county is to manage water bank accounts by stream management unit. In some instances, accounts may be managed by subbasin within a stream management unit. For each stream management unit or subbasin, separate accounts are administered for agricultural purposes and development.

(7) Water stored in the water bank maintains the priority date of the original right consistent with chapter 90.42 RCW.

(8) Municipal water supply systems must demonstrate they have employed water conservation practice before they can withdraw water from the water bank.

NEW SECTION

**173-548-076 Organization and Management of Workload.** The department is generally required to process water right applications from the same water source or basin in the order that the applications were accepted. In order to better implement the policies contained within this rule and to more effectively use water resources, the department may process applications for new water rights or changes of existing water rights within each stream management unit based on the following priority order:

(1) The application resolves or alleviates a public health or safety emergency caused by a failing public water supply system currently providing potable water to existing users. See WAC 173-152-050(1);

(2) The application for change or transfer, if approved, would substantially enhance the quality of the natural environment;

(3) The application is made under section 173-548-031 WAC;

(4) The application is made under section 173-548-032 WAC;

(5) The application is made under section 173-548-033 through 036 WAC;

(6) The application is for a change or transfer of a water right; or

(7) The application is for a new water right.

# MEMORANDUM OF AGREEMENT

between the

WASHINGTON STATE
DEPARTMENT OF ECOLOGY

and

OKANOGAN COUNTY

for

## Water Resource Management in the Methow River Basin

THIS MEMORANDUM OF AGREEMENT MOA is made and entered into by and between the DEPARTMENT OF ECOLOGY (ECOLOGY) and OKANOGAN COUNTY (COUNTY).

IT IS THE PURPOSE OF THIS MOA to memorialize the mutual agreement that, in order to meet water resource management objectives in the Methow River Basin, it is imperative that the COUNTY and ECOLOGY work together, along with the Washington Department of Fish and Wildlife (WDFW) and the Governor's Salmon Recovery Team, to cooperatively develop and implement an improved water resources management program for the Methow River Basin. The program must address, at a minimum, issues related to water for growth, agriculture, instream flows, maintenance and enhancement of fish and wildlife habitat, and the protection of existing water rights.

GENERAL STATEMENT OF AGREEMENT. The efforts of the COUNTY and ECOLOGY under this MOA are based on laws, rules, regulations, and ordinances in existence at the time of the signing of this MOA. The efforts of the COUNTY and ECOLOGY are also based, in part, on the findings and recommendations of past planning efforts in the Methow River Basin that include, but are not limited to the Methow River Basin Plan prepared by the Methow Valley Water Pilot Planning Project Planning Committee and the Methow Valley Ground Water Management Plan prepared by the Methow Valley Ground Water Advisory Committee. In addition, these efforts are based upon the Okanogan County Comprehensive Plan, the Growth Management Act Critical Area Regulations, Subdivision Regulations, the Zoning Code, the Shoreline Master Program, the Mazama Water Quality Protection System, and approved Building Codes that require mandatory water conservation.

ECOLOGY and the COUNTY agree that priority effort under this MOA shall be directed toward managing water uses and dealing with water needs in the Methow River basin. While the Methow River basin has a substantial quantity of water renewed annually in the basin, there is not always enough water at the right place, at the right time for all the existing and proposed uses

of water in the basin. Therefore, the COUNTY and ECOLOGY agree to work with the watershed planning unit to identify areas and times of critical water supply, with a focus on the most consequential water uses, needs, and opportunities.

SPECIFIC STATEMENT OF AGREEMENT. ECOLOGY and the COUNTY agree to undertake the following actions to develop and implement a revised Water Resources Program for the Methow River Basin, as described below:

1. ESTABLISH THE METHOW RIVER BASIN TRUST WATER RIGHTS PROGRAM (Water Bank): ECOLOGY, working with the COUNTY in a negotiated rulemaking process consistent with the Administrative Procedure Act (Chapter 34.05 RCW), will propose a rule that amends Chapter 173-548 WAC to create a Trust Water Right water bank for the Methow River Basin. The water bank shall be jointly managed by the COUNTY and ECOLOGY, including addressing water right applications, change applications, trust water right decisions, and purchased water rights. ECOLOGY and the COUNTY agree to pursue the funding and any necessary authority for purchase of water rights for deposit to the water bank.

   Further, the COUNTY and ECOLOGY shall jointly develop an initial water savings plan for presentation to the public that may include, but not be limited to: metering of new wells, conservation devices, seasonal irrigation limits, domestic limitations (e.g. 700 gpd) for new wells, and water storage. After completion of public review, the COUNTY and ECOLOGY will jointly develop, propose, and implement the necessary regulatory processes to achieve this plan.

   In establishing the water bank and initial water savings plan, the COUNTY and ECOLOGY agree to jointly negotiate and develop the necessary rule and ordinance changes, hold joint public hearings, respond to public comments jointly, and adopt rule and ordinance changes that are acceptable to both parties.

2. ESTABLISH TRUST WATER ACCOUNTS AT THE SAME TIME THAT THE WATER BANK IS ESTABLISHED. Decisions for projects that put water in the water bank shall receive priority processing by ECOLOGY. Saved water for deposit to the Water Bank may be from sources that include, but are not limited to: the proposed MVID rehabilitation project, individual projects such as those enabled by the Emergency Rule, proposed projects on Wolf Creek and the Twisp River, other individual projects, and purchased water rights. In addition, ECOLOGY and the COUNTY agree to consider, quantify, and provide credit for conservation efforts and water saved from emergency rule and similar ongoing and proposed projects. The COUNTY and ECOLOGY agree to work cooperatively to identify water resources projects and secure the water necessary for the water bank.

3. GRANT FUNDING. Upon meeting the requirements of HB 2514, Ecology shall provide grant funding of $ 95,412.00 to Okanogan County. Thereafter, Ecology shall provide HB 2514 grant funding up to a total of $ 404,588.00 over four years, consistent with HB 2514 and this MOA. In addition, ECOLOGY shall join the COUNTY in their efforts with other state and federal agencies to secure additional funding assistance necessary for a successful watershed planning effort (e.g., HB 2496, IAC, etc.). Once established, the 2514 planning unit shall assume all responsibilities required under 2514.

4. SALMON RECOVERY INITIATIVE. The COUNTY and ECOLOGY agree to work cooperatively towards addressing salmon recovery efforts in the Methow River Basin in conjunction with the Governor's Salmon Recovery Team. ECOLOGY and the COUNTY agree to participate with the Salmon Team's Task Force to inventory past projects and identify possible future salmon recovery projects in the Upper Columbia. ECOLOGY and the COUNTY agree that the joint water resource management program for the Methow River Basin will be an important feature of the salmon recovery efforts in the Okanogan County area.

5. RESOURCE COMMITMENT AND SCHEDULE. In order to fully achieve the water management objectives of this MOA, including processing of water rights, ECOLOGY and the COUNTY agree to provide the necessary resources, continuity, and consistency in implementation of the terms of this MOA for a period of not less than 4 years, or the duration of this MOA.

Immediate resource needs include, but are not limited to, those necessary to complete the following tasks as scheduled:

A. By November 1998: Propose rule changes (and ordinance changes as necessary), for the establishment of a water bank; and inventory projects that may deposit water to the water bank.

B. By February 1999: Adopt rules (and ordinances as necessary) to establish the water bank; and develop a target list of projects for deposit to the water bank.

C. By March 1999: Conduct public review of alternatives for an initial water savings program in cooperation with the watershed planning unit.

D. By May 1999: Propose rules and ordinance changes, as necessary, to establish the initial water savings program.

E. By September 1999: Adopt rule and ordinance changes, as appropriate, for the establishment of an initial water savings program.

If the COUNTY and ECOLOGY cannot reach agreement on final rules or ordinances through the joint process within the time frame prescribed in this section, each party reserves the right to proceed with separate, unilateral action. Unilateral action by Ecology shall include increased enforcement against illegal and wasteful water practices, increased enforcement of metering, and adoption of a revised Methow River Basin Plan.

Upon unilateral action by either party, including unilateral adoption of emergency rules this agreement is voided.

PERIOD OF PERFORMANCE. The date of the effectiveness of this MOA is the first date that this MOA has been signed by all parties.

ANNUAL REVIEW OF PERFORMANCE. The COUNTY Commissioners and the Director of ECOLOGY, and appropriate staff, agree to meet annually, by July 1, to review performance under this MOA.

AMENDMENTS. This agreement may be amended upon the mutual agreement of the parties. ECOLOGY and the COUNTY agree that new laws do not nullify this MOA, but may require an evaluation and change of the MOA as appropriate.

TERMINATION OF THIS AGREEMENT may only occur with 90 day's written notice by either party.

INDEPENDENT CAPACITY. The employees or agents of each party who are engaged in the performance of this agreement shall continue to be the employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

Okanogan County Commissioner, District 1 — 8/4/98 date

Okanogan County Commissioner, District 2 — 8/4/98 date

See Attached Sheet - No
Okanogan County Commissioner, District 3 — 8/4/98 date

Washington Department of Ecology, Director — 8-4-98 date

## Position Statement

Okanogan County Commissioner, Spencer Higby, requests the attachment of this paper to the Memorandum of Agreement between the County and the Washington State Department of Ecology (DOE) signed on August 4, 1998. This paper delineates my position and rationale for opposing said agreement. I have chosen to remain involved in the negotiation process to develop such an MOA, but with the expressly stated purpose to seek concessions for the County and reserving the right to still oppose this MOA.

Philosophically, I oppose the complete authority given to / assumed by DOE or NMFS to impose a moratorium, unilaterally, upon the citizens and local government of Okanogan County. That moratorium involves, directly and indirectly, water and property rights, building and development permits, and the economic stability of business owners, citizens, and local government. Further, if the origin of such infringements upon personal freedom, local responsibility, and states rights is the Endangered Species Act (ESA) and related federal court rulings, then I believe that it is imperative that it be amended to rectify these heinous results.

Personally, I am offended by the attitude of a state agency that says, "play the game by my rules or I go home and you forfeit the game." This attitude is not only implied in numerous situations, but expressly stated publicly by the Director of DOE, an appointee by the governor. Subsequently, the Governor's Natural Resource Advisory Committee and Salmon Recovery Team through the Attorney General's office and DOE reinforce this directive. I believe that state agencies and appointed committees have often exceeded the original intent of the legislature through overly intrusive regulations (WAC's), practice over time (policies), and the failure of the courts to limit social and environmental tampering with laws. These same arguments apply to the National Marine Fishery Service (NMFS).

I recognize that an argument could be made that this agreement will place Ecology in the position of a proponent for the County to NMFS under the ESA. Thereby gaining an exemption (4-D) under the ESA. However, this position was recently overruled in Oregon on a similar set of local, cooperative efforts. There is no surety or protection with the current climate of federal judicial proceedings.

Politically, my stance against state and federal creation and imposition of mandates upon the personal freedoms of local citizens will be widely supported in Okanogan County. However, I do recognize that the temporary loss of freedoms / rights through regulations will be a hardship upon many people. Regardless, the level of frustration, contempt, and outright anger of citizens concerning all levels of government must someday come to an accounting. A founding father, Benjamin Franklin, once said "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

I, hereby, vote NO on this MOA as my official action.

Spencer W. Higby
Okanogan County Commissioner

**Attachment 5**

**April 27, 1999 Letter from National Marine Fisheries Service to the Okanogan County Commission**

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

April 27, 1999

Board of County Commissioners
Okanogan County
Okanogan, Washington

Dear Okanogan County:

Thank you for your letter received this morning concerning efforts of the community to remove legal risks currently in place because of the 1997 listing under the Endangered Species Act (ESA) of steelhead in the upper Columbia River basin, including the Methow River basin. Last month, the National Marine Fisheries Service (NMFS) also listed upper Columbia River spring chinook as endangered.

Your letter emphasizes the community's desire to address factors contributing to the decline of these endangered fish, particularly issues related to stream flows and water diversions. Certainly, many other factors such as mainstem hydroelectric projects, predation and harvest issues must and are being addressed through the ESA at the same time that we must deal with these difficult stream flow-related problems. You may be aware, for instance, that media reports today indicate that President Clinton may appoint distinguished diplomat Lloyd Cutler to a position responsible for bringing a harvest agreement with Canada to closure. This example illustrates that salmon recovery receives the highest attention of this Administration. Initiatives are addressing all factors that stand in the way of recovery of the listed fish.

NMFS genuinely appreciates the desire of the community to address flow needs in the Methow River. Last year, NMFS reflected its support for this approach by indicating to the Department of Ecology (Ecology) its intention to work with federal agencies under Section 7 of the ESA in a manner consistent with the Memorandum of Agreement (MOA) between Ecology and Okanogan County. NMFS took this action even though it was uncomfortable with the MOA and had previously indicated to Ecology that the time frames agreed to in the MOA would allow yet another irrigation season to pass without any actual improvement in the provision of adequate flows for fish. NMFS had suggested the use of specific "default" measures should time frames not be met. As the attached letter to Ecology Director Tom Fitzsimmons indicates, the failure to meet the agreed-to deadlines (for circumstances foreseen or otherwise) in the MOA makes it extremely difficult for NMFS to rely upon it. In this regard, I note you acknowledge in your letter the need for certainty of implementation, an attribute lacking from the MOA in the absence of "defaults."

To repeat, NMFS greatly prefers and supports collaborative, community-based solutions. But NMFS needs certainty that endangered fish in the upper Columbia River basin will receive adequate flows. NMFS repeatedly has indicated to Okanogan County (and any other person who has asked) that any flexibility that may exist for flow restoration in the near-term is contingent upon specific commitments that specific flows will be provided within a specific, albeit, longer

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term. Only with specific commitments can biologists analyze the effects on fish and provide a scientific justification for the delaying flow restoration.

NMFS has indicated to the Governor's Salmon Team, to the Department of Ecology and to the legislature that it believes the "2514 process" *could* lead to the certainty to restore flow within a given time frame if a basin group chose to do so, but *does not necessarily* lead to that conclusion. NMFS is aware of no instance where "2514" planning groups have been forthcoming with immediate and specific commitments to restore adequate flows over time.

In summary, any indication or belief that either the MOA nor the "2514 process" meets ESA requirements under the ESA has not originated from NMFS.

Under Section 7 of the ESA, NMFS is consulting with the U.S. Forest Service on the special use permits required for certain irrigation facilities. Your letter indicates that the biological assessments associated with the facilities show significant progress in reducing the amount of water diverted from streams. To the extent that NMFS has reviewed these assessments, NMFS does not yet see adequate progress in this area. The ESA requires, and therefore measures its success on, actions which *avoid jeopardy* to the continued existence of species.

The attached letter to Director Fitzsimmons outlines the direction NMFS must take in completing its Section 7 consultation with the Forest Service on the special use permits. NMFS recognizes that, in order to avoid "jeopardy," some of these permits likely must be conditioned on achieving adequate flows for fish before the permit holder can use the diversion. NMFS is seeking the assistance of technical experts and the community to determine these flow levels. Once appropriate flow levels are achieved through conservation measures by the permit holder, others in the sub-basin, or both, the permit holder will be able to use their diversion.

The NMFS appreciates the frustration you speak of in your letter. At the same time, NMFS is charged by law to conduct consultations under section 7 of the ESA and conserve endangered salmon and steelhead. The likelihood of success for both the fish and the community in this difficult issue may be proportional to our ability to work together constructively. To that end, I can commit to you that the NMFS will continue to cooperatively engage the Forest Service and the community in discussions to develop a solution that will be defendable under the ESA.

Sincerely,

William Stelle, Jr.
Regional Administrator

Enclosure

cc: Tom Fitzsimmons, Ecology
Dr. Curt Smitch, Special Assistant to the Governor
for Natural Resources