COMPETITIVE ENTERPRISE INSTITUTE

REFORMING THE ENDANGERED SPECIES ACT: THE PROPERTY RIGHTS PERSPECTIVE

WRITTEN STATEMENT OF
IKE C. SUGG
FELLOW IN WILDLIFE AND LAND-USE POLICY
COMPETITIVE ENTERPRISE INSTITUTE

BEFORE THE

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OF THE

COMMITTEE ON RESOURCES
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1001 Connecticut Avenue, NW • Suite 1250 • Washington, D.C. 20036 • Telephone: (202) 331-1010 • Fax: (202) 331-0640

Thank you Mr. Chairman for the opportunity to present testimony to the Endangered Species Task Force of the Committee on Resources. My name is Ike Sugg; I am Fellow in Wildlife and Land-Use Policy at the Competitive Enterprise Institute (CEI). CEI is a non-profit, non-partisan research and advocacy institute dedicated to the principles of free enterprise and limited government. CEI is headquartered here in Washington, D.C.

CEI's work includes significant efforts to advance public understanding of the hidden costs of government regulation. CEI spends considerable effort researching and promoting free market approaches to public policy issues. CEI also engages in direct legal action where necessary, and has represented victims of regulatory abuse before state and federal courts.

ABOUT CEI'S ENVIRONMENTAL WORK

CEI has been actively involved in U.S. environmental policy debates since its founding in 1984. CEI's founder and president, Fred L. Smith, Jr., has worked on environmental issues since the mid-1970s, when he was a senior policy analyst at the EPA for several years. Since its founding, CEI has been a strong proponent of what is known as "Free Market Environmentalism."

Originated by R.J. Smith, CEI's Senior Environmental Scholar, and developed by Fred Smith and our friends at the Political Economy Research Center in Bozeman, Montana, Free Market Environmentalism has become a respected and useful approach to thinking about environmental problems. Rather than blaming private property rights and individual liberty for causing environmental problems, Free Market Environmentalists view those linchpins of a free society as critical to *solving* environmental problems.

CEI's work on wildlife conservation and land-use policy began during the late 1980s, when the Cayman Island Turtle Farm's (unsuccessful) petition to raise and sell green sea turtles highlighted the conservation benefits of economic incentives. This episode also epitomized the environmental establishment's then-strong opposition to "conservation through commerce." With the Convention on International Trade in Endangered Species (CITES) 1989 ban on trade in African elephant ivory and hides, CEI's involvement in wildlife conservation policy debates became manifest.

CEI's focus on the Endangered Species Act (ESA) began in earnest when the ESA came up for reauthorization in 1992. Since then, I have dedicated the bulk of my time and effort to advancing ESA reform and a deeper appreciation for the ethical and ecological values protected by private property rights. I have also done considerable work on resource conservation issues in developing countries, with special emphasis on wildlife conservation and land-use policies. Some of what I've learned is incorporated in this testimony.

In my testimony I will present CEI's views on the approach Congress should take in reforming the ESA. While CEI's views are by no means identical to those of every property rights organization, they do provide a reliable guide to what other free market and property rights groups are likely to support. A good example of an approach that such groups are unlikely to support is that taken in **S 768**, introduced on May 9 (*see Appendix I).*

INTRODUCTION

CEI is strongly supportive of those principles outlined by the **Grassroots ESA Coalition**, and views them as useful cornerstones for fundamental reform. The thrust of my testimony will focus on the unmistakable fact that fundamental reform is indeed needed. As guideposts to what a reformed ESA would look like, I will use the **Grassroots ESA Coalition's** recently released "Statement of Principles." (*see Appendix II*)

Reauthorization without reform is not a viable option. Even Secretary Babbitt has acknowledged the need to reform the ESA. The law is broken and it must be fixed. So fundamentally is the ESA flawed, so completely has it failed, that CEI believes *Congress should start over from scratch.* Congress should write a law that actually works for wildlife, while at the same time working for the people who depend on that land upon which wildlife also depends. Such a law would:

- Recognize that what is at stake is a matter of values, not an issue of human health or safety;

- Rely on voluntary conservation efforts and cease taking private property through land-use regulations;

- Condemn private property only as a last resort, and require full payment of just compensation for such takings;

- Call upon taxpayers and wildlife aficionados to bear the costs of wildlife conservation, and use revenues from federally-owned resources to finance supplemental wildlife conservation efforts;

- Enlist the private sector in conservation efforts through positive incentives and private property rights;

- Allow States and Indian Tribes to opt out of the federal program entirely (except where treaties on migratory wildlife apply);

- Defer to the appropriate authorities in states on matters relating to non-migratory wildlife within their jursidiction;

- Defer to the appropriate authorities in states outside U.S. jurisdiction on matters relating to wildlife native to foreign countries;

- Repeal the Endangered Species Act of 1973 and nullify all court decisions pertaining thereto.

THE REFORM DEBATE

Opponents of real reform will gasp upon mention of repealing the ESA, just as (according to one such opponent) they "hyperventilate in unison"[1] every time the ESA is criticized and the need for reform is suggested. No one complained in 1969, however, when the 1966 Endangered Species Preservation Act was repealed and replaced with the Endangered Species Conservation Act. Nor did anyone cry wolf when the 1969 Act was repealed in 1973 and replaced with the current ESA. Each successive law was presented as a progressive improvement over its predecessor, and there is no reason why rewriting the 1973 ESA should be viewed any differently.

What must be acknowledged, above all else, is that the ESA is fundamentally flawed -- it has failed both human and non-human beings. No amount of tinkering around the margins will solve its intrinsic problems. Amending the ESA to correct these problems would entail such wholesale changes that the outcome would bear little more than a skeletal resemblance to the 1973 Act. Thus, reforming the Act through amendments would be at most a cosmetic difference from rewriting the law in its entirety. The ESA should not be "gutted;" it should be scrapped. *Congress should write a new, improved law.*

The key to successfully rewriting the ESA is to make it as non-coercive as possible. The Act's impositions have caused so much consternation and anguish that even its supporters have recognized that the law should be changed. The National Wildlife Federation (NWF), for example, recently stated that it "wants to improve the law to make it more workable for private landowners and more effective in conserving our precious fish, wildlife and plant species."[2]

Not until recently did NWF even acknowledge that the ESA posed problems to landowners or had problems recovering listing species, let alone propose that such problems be addressed by amendments. This about-face is a function of the increasing awareness that the Act doesn't work, not for people or for wildlife. What the Act's defenders have failed to acknowledge, however, is the central issue of ESA reform: If wildlife is a public good, then the public as whole should bear the costs of providing that public good. The environmental establishment has avoided this issue and shrouded the ESA from substantive debate.

When the ESA's statutory authorization expired in October of 1992, the majority in Congress wished to avoid the reauthorization debate, and the political pains that would involve. Times have changed since then; but that congressional debate has yet to occur. The Act is still running on "budget authority" -- in clear contravention of House Rule 21 (which essentially says that there shall be no appropriation without authorization).

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[1] Donald J. Barry, *Amending the Endangered Species Act, the Ransom of Red Chief, and Other Related Topics*, 21 Environmental Law 587, 596 (1991).

[2] *The Endangered Species Act: Finding Common Ground*, the National Wildlife Federation, October 1994.

It is high time that the ESA be debated. Once the ESA is fairly and openly debated, the need for fundamental reform will become obvious. Before outlining how the ESA should be fixed, however, it must first be acknowledged that the law is broken.

THE ESA IS BROKEN

Douglas Wheeler, head of California's Resources Agency and co-author of the 1973 ESA, has admitted that "the Endangered Species Act just doesn't work."[3] Peter Berle, head of the National Audubon Society, has similarly stated that "unfortunately, the act is not working well enough to accomplish its purpose."[4] There are many grounds upon which to pronounce the ESA a failure, but the law itself has only one clear statutory objective: to "recover" endangered species. By that standard alone, the ESA has been a complete and utter failure.

NOT A SINGLE RECOVERY TO ITS CREDIT

The Endangered Species Coalition, which consists of over 170 environmental and animal welfare organizations, claims that "the Act does what it sets out to do: conserve endangered species."[5] According to the plain language of the Act itself, "the terms 'conserve,' 'conserving,' and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Chapter are no longer necessary."[6] Thus, as Bill Snape of Defenders of Wildlife acknowledged to congressional staff at the Resources Committee "ESA Staff Briefing" on May 4, 1995, the term "conserve" is "*synonymous*" with "recovery." (emphasis added)

Even the Endangered Species Coalition has acknowledged that "[r]ecovery is the ultimate goal of the Act and the heart of the endangered species program."[7] The problem is, as CEI and the National Wilderness Institute have repeatedly pointed out, no species has *ever* recovered due to the ESA's protections -- not one. Nor have any species even been downlisted from "endangered" to "threatened" because of the Act's protections, except perhaps one, or at the most three (*see Appendix III*). If "the heart" of the law is not working, the Act is already dead.

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[3] Jody J. Olsen, *Private Property Rights: Our Newest Endangered Species*, PERC (Bozeman, Montana), Summer 1993, at 22.

[4] *Id.*

[5] Endangered Species Coalition, *The Endangered Species Act: A Commitment Worth Keeping*, 1992, (published by The Wilderness Society for the Coalition), at 4.

[6] 16 U.S.C. § 1532(3) (1988).

[7] Endangered Species Coalition, *supra* note 5, at 26.

Those who care most about wildlife should be the strongest supporters of fundamental reform. Even if one does not care much about property rights or other civil liberties -- even if one believes that noble ends justify ignoble means -- that person must come to terms with the fact that the law is not working. The ESA's ends are not being achieved. The ESA has been a failure for wildlife and a disaster for people.

THE ESA IS CREATING ENEMIES OF WILDLIFE AND DESTROYING HABITAT

The ESA has failed for many reasons, one of which is that it attempts to do everything and thus ends up doing nothing well. Another, more important, explanation for the Act's failure can be found in the law's regulatory approach to habitat protection. Indeed, it is precisely because the ESA penalizes people for having listed species on their land that the law has created enemies of imperiled wildlife.

As Sam Hamilton, the former Fish & Wildlife Service (FWS) Administrator for the State of Texas, once admitted:

> "The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears. We've got to turn it around to make the landowner want to have the bird on his property."[8]

This insight, above all others, must be understood and remedied if the new ESA is to be successful. Over 75% of listed species in the U.S. depend upon private land for all or part of their habitat requirements.[9] Thus, punishing people for having endangered species on their land will not only harm landowners, but it will harm endangered species, as well.

Most landowners would be proud to have unique and abundant wildlife on their property; to provide food and shelter for endangered species would for most rural property owners be the stuff of which "bragging rights" are made. And this was indeed the case until the ESA's land-use regulations were brought to bear. But since then, landowners all across this country have gotten the message: Endangered species spell trouble, and it's best not to have them or their habitat anywhere near one's land.

That the ESA has created perverse incentives is well-documented. According to the FWS's recently proposed 4(d) rule for the northern spotted owl, for instance, this is a serious problem:

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[8] *Quoted in*, Betsy Carpenter, "The Best-Laid Plans," *U.S. News & World Report*, Vol. 115, No. 13 (Oct. 4, 1993), at 89.

[9] *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, Report to Congressional Requesters, U.S. General Accounting Office (GAO/RCED-95-16), Dec. 20, 1994.

> "This disincentive has had the effect of increasing timber harvest of currently suitable owl habitat and younger forests on non-federal lands which are not presently affected by the the presence of an owl. With regard to younger forests in particular, this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is useable by owls."[10]

Such are the effects of the Act's perverse incentives, which are the direct result of the ESA's often onerous land-use regulations. The precise extent of this phenomenon is difficult to quantify, as few landowners would admit to committing what the FWS (or some litigious environmental group) might consider a criminal act, punishable under the ESA by a $100,000 fine and/or up to one year in jail for each "violation." But few experts doubt that perverse incentives are a serious problem.

As Larry McKinney, Director of Resource Protection for the Texas Parks and Wildlife Department, recently wrote (referring, presumably, to the same species that Sam Hamilton had in mind):

> "While I have no hard evidence to prove it, I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all."[11]

Even Michael Bean of the Environmental Defense Fund has acknowledged "increasing evidence that a least some private landowners are actively managing their land so as to avoid potential endangered species problems."[12] Bean continued:

> "The problems they're trying to avoid are the problems stemming from the Act's prohibition against people 'taking' endangered species by adverse modification of habitat. And they're trying to avoid those problems by avoiding having endangered species on their property. Because the [red-cockaded] woodpecker primarily uses older trees for both nesting and foraging, some landowners are deliberately harvesting their trees before they reach sufficient age to attract woodpeckers, in their view, and in fact before they reach the optimum age from an economic point of view."[13]

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[10] 60 *Federal Register*, 9507-08 (Feb. 17, 1995).

[11] Larry McKinney, "Reauthorizing the Endangered Species Act -- Incentives for Rural Landowners," *Building Incentives Into the Endangered Species Act*, Hank Fischer, *et al.*, Ed. Defenders of Wildlife, Washington, D.C. (1993), at 74.

[12] Michael Bean, speaking at an FWS seminar entitled, "Ecosystem Approaches to Fish and Wildlife Conservation: 'Rediscovering the Land Ethic,'" Marymount University, Arlington, VA, Nov. 3, 1994 (from video; transcript available from CEI).

[13] *Id.*

Thus the ESA actually encourages the harvesting of trees that would not be harvested in a free market, without any regulation at all.

But Mr. Bean was careful not to misrepresent the causal explanation for such perverse behavior:

> "Now it's important to recognize that all of these actions that landowners are either taking or threatening to take are not the result of malice toward the red-cockaded woodpecker, not the result of malice toward the environment. Rather, they're fairly rational decisions motivated by a desire to avoid potentially significant economic constraints. In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program, but others."[14]

Once this key insight is fully appreciated, the wisdom of transforming the ESA from a punitive law into one that is non-regulatory should become manifest. Only by ensuring that it does not work against people will we have a federal program that actually works for wildlife.

THE ESA HAS TRANSPOSED FEDERAL DUTIES ONTO INDIVIDUAL LANDOWNERS

Another key insight into how the current ESA works (or rather, does not work), is that the FWS has imposed land-use restrictions even beyond those that are (purportedly) authorized by the statute. The Committee is surely well aware of the issues involved in *Babbitt v. Sweet Home*, so there is no need to delve into them in great detail. At issue in that case, which is now before the Supreme Court, is whether Congress authorized the Secretary to prohibit "habitat modification" through Section 9's prohibition on "take." CEI's reading of the statute and its legislative history found no such authority. As a result, CEI filed an *amicus curiae* brief in support of *Sweet Home*.

Yet no one, not even the government's attorney in *Sweet Home*, has argued that a prohibited "taking" can occur without "actual death or injury" to the species in question. That is why so many ESA experts and work-a-day property owners find the ESA's implementation so egregious. While the Secretary admits to having no authority to prohibit land-uses that do not result in "actual death or injury," that is precisely what is going on out in America's regulated communities this very day.

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[14] *Id.*

As Secretary Babbitt himself has written: "When a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land."[15] While this statement clearly defies those who claim, as the National Wildlife Federation did recently, that the Act "has never prevented property owners from developing their land,"[16] it does something much more than that. Secretary Babbitt's admission reveals how arbitrarily and capriciously land-use regulation can become -- with, as in this case, no possible linkage to specific "takes" or statutory authority whatsoever.

Anderson & Middleton Logging Co. is but one notable victim of such unauthorized land-use regulations under color of the ESA. In December of 1993, the FWS filed an injunction against Anderson & Middleton to prevent the company from harvesting trees on 72 acres of its own land. The reason for this enforcement action was that a pair of northern spotted owls were nesting, not on Anderson & Middleton's land, but on federal land over 1.5 miles away.[17] One wonders what theory the FWS will contrive to show "actual death or injury" in that case.

Secretary Babbitt's statement in *E Magazine* is especially signficant in regard to "regional habitat conservation planning." Multi-species HCPs are widely vaunted as panaceas to clashes between economy and ecology, preservation and development. Yet they are no such things. It would be folly for the Committee to be duped by such misleading claims. Thus it is of the utmost importance that HCPs are understood in the context of what the statute actually provides. Otherwise, HCPs will gradually become accepted as an authorized means of conserving endangered species.

First of all, there is no mention of "habitat conservation plans" anywhere in the ESA. They arose from the 1982 amendments, prior to which the ESA did not allow any "takings" whatsoever -- incidental or otherwise -- no matter how much land or money a property owner was willing to give up in exchange for permission to use his or her own land. The Act prohibited all "takes," period. Thus in 1982, Section 10 was amended to allow for "incidental takes," provided that the "taking" was not the purpose of the action. The Secretary was authorized to issue "incidental take" permits as long as the "taking" would "not appreciably reduce the likihood of the survival and recovery of the species in the wild."[18]

To receive a 10(a) permit, the applicant must "minimize and mitigate" for the "taking" by proposing a "conservation plan," for which the permittee must "ensure adequate

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[15] Bruce Babbitt, "The Triumph of the Blind Texas Salamander and Other Tales from the Endangered Species Act," *E Magazine*, March/April 1994, at 54-55.

[16] John Kostyack, Letter to the Editor, *The Wall Street Journal*, May 12, 1994.

[17] See, *U.S. v. Anderson & Middleton Logging Co.*, C93-5697R (W.D. Wash. Dec. 9, 1993).

[18] 16 U.S.C. § 1539 (a)(2)(B)(iv).

funding." It is the "conservation plan" that specifies what steps the applicant will take to "mitigate" (i.e., *compensate*) for the taking. Presumably, it is through such "mitigation" requirements that the Secretary can often extract exhorbitant rents -- in the form of land, money or both -- from an applicant in exchange for the rights to use his or her land. The Secretary is also authorized to condition "incidental take" permits on "such other measures as the Secretary may require as being necessary for the purposes of the plan."

It is not surprising to see how sweeping land-use regulations are effectuated through such a regulatory scheme, especially given the open-endedness of "such other measures." It is impossible, however, to infer from Section 10(a) that such "conservation plans" can be legally imposed except in exchange for permission to incidentally "take" a member of a listed species. And there is no authority at all for supposing that "the purposes of the plan" are to "recover" listed species. By law, such plans are not even allowed if the "taking" would "appreciably reduce the likelihood of recovery."

Yet, because Section 2 defines "conservation" in terms of "recovery," it is easy to see how the FWS might want to get away with using Section 10 "conservation plans" as *de facto* "recovery plans." The problem, of course, is that the Act explicitly makes "recovery" a federal obligation -- not that of any non-federal entity.[19] This is but one example of not only how confusing the ESA is, but also of how contradictory some of its provisions are.

To my knowledge, no court, nor any Secretary, has ever claimed that "recovery" is anything but a federal duty. There are some 411 approved recovery plans in existence (thus, only about 43% of U.S. listed species actually have approved recovery plans). However, there are only a few dozen "conservation plans" that have been approved. They are clearly not the same plans; nor were they intended for the same purposes. HCPs impose the ostensible equivalent of compensation requirements for "taking" listed wildlife (what the Fifth Amendment would require for taking private property, if it were abided by). Recovery plans, on the other hand, identify the means and the course FWS (or NMFS) will take in its unsuccessful attempts to achieve the Act's goal.

And yet, HCPs (as everyone but the statute calls them) are being used as just that -- recovery plans -- thus transposing onto private property owners the federal duty to "recover" endangered species. Indirect evidence for this conclusion exists in volumes,[20] but direct evidence seems all but non-existent. The paucity of such direct evidence further suggests that the FWS knows that it is not authorized to use HCPs in lieu of recovery plans (otherwise, the FWS would refer to them as one in the same thing). The evidence, however, does exist.

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[19] 16 U.S.C. §§ 1531(c)(1), 1536(a).

[20] *See, e.g.*, Sam Kazman, *Amicus Curiae* brief of the Competitive Enterprise Institute in Support of Respondents, in *Babbitt v. Sweet Home* (March 24, 1995).

An internal memorandum obtained from FWS through the Freedom of Information Act reveals, beyond any doubt, that the FWS is foisting recovery planning onto regulated communities through Section 10(a). The memo (*see Appendix IV*) clearly states:

> "A vital part of a recovery plan for the [Stephens'] kangaroo rat would be the establishment of large reserves for the species. It appears that a Habitat Conservation Plan (HCP) approach may be a potential solution to this situation."

HCPs are supposed to come from an *applicant* seeking an incidental take permit, not from the FWS seeking to recover a species through federal land-use planning. It is noteworthy that the memo was written in October 1987, *before* listing the Stephens' kangaroo rat was even *proposed*, and a full year before the k-rat was actually listed. It is also significant that the k-rat, which has been listed since 1988, *has no recovery plan*. Nor have any federal funds been spent on the k-rat's recovery, although an estimated $300 million is being spent on the HCP by the regulated community.

In short, a $1,950 per acre "mitigation fee" has been imposed on any and all landowners within a 520,000 acre "fee area" who want to "modify habitat" on their own land. This "mitigation fee" is being used to purchase the "reserves" mentioned in the 1987 internal memo. What is more, that "mitigation" fee applies to *all* private property within the k-rat's 520,000 acre historical range -- regardless of whether or not the land is occupied by k-rats or even whether the land contains suitable habitat. In fact, according the FWS only 30,000 acres of that habitat is actually occupied.[21]

At most, the Act allows for HCPs in exchange for "incidental takes;" there can be no "mitigation" without such takings. Moreover, and perhaps most importantly, it boggles the mind to think that Congress, in amending the ESA in 1982 to allow for "incidental takings," intended to vastly *expand* the Secretary's authority to regulate land-use. In short, it is absurd to believe that Congress, in amending Section 10 -- which is entitled *Exemptions* -- surreptitiously intended to transfer the duty to recover listed species from the federal government to America's landowning communities. The 1982 amendments were unanimously viewed as providing *relief* to regulated individuals and industries, not imposing additional burdens. It is impossible that Congress envisioned HCPs to be used in the way that they are today -- as tools to force landowners to pick up the tab for recovering America's imperiled wildlife.

And the results are clear: By penalizing landowners for having listed species on their property, the ESA discourages people from providing endangered species habitat and actually encourages them to destroy such habitat. The law should make people want to attract wildlife to their land -- not to rid their land of wildlife. The law should work **for** wildlife -- not **against** people. Thus, reform should focus on saving species, not on saving the Act.

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[21] Draft Habitat Conservation Plan for the Stephens' Kangaroo Rat in Western Riverside County, California, Vol. I (July 1994), at S-2.

HOW TO FIX THE ESA

Much has been said about the ESA's flaws and failures,[22] while much less has been said about how to create a federal endangered species program that works, for wildlife as well as for people. As stated on page 2 of this testimony, CEI believes that several fundamental changes need to be made, and supports the **Grassroots ESA Coalition's** principles toward this end. I will reiterate and develop the most salient of those principles below.

The changes necessary to reform the ESA are so numerous that it would be much easier simply to start over, with a clearer, simpler and equitable law. On the other hand, all that fundamental reform really requires is to change the ESA from a regulatory law to one that is voluntary. That is the only reform that absolutely must be made. If it is not, this Committee will continue having these contentious hearings, *ad infinitum*. Not until the federal government respects the rights of private landowners and halts the regulation of private property will the ESA be a sustainable law.

As the FWS recently stated: "Private landowners have played an essential role in the conservation of plant and animal resources since our Nation was founded. Many rare species survive partly or entirely on private land due to careful stewardship."[23] Without the ESA's disincentives, many landowners will go out of their way to ensure that rare species survive and flourish on their land. To do this, in many cases landowners will need no other incentive than the assurance that they will not be penalized for having such species on their land. In other cases, positive incentives will be necessary.

REALIZE THE VIRTUES OF A VOLUNTARY APPROACH

A voluntary approach to endangered species conservation would integrate economic values with ecological values. By relying on those who truly *value* wildlife and wild places to ensure that such natural assets are conserved, we could more accurately and more equitably match the supply of such assets with the demand for such assets. Such an approach would, however, require that the environmental community "put its money where its mouth is," which is not likey to be a welcomed offer. Yet numerous environmental groups, especially those at the grass-roots level, have for years negotiated conservation easements and other such voluntary arrangements with landowners for the benefit of wildlife and habitat protection. Morally speaking, it is far better to exchange values than to impose them onto others against their will.

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[22] *See, e.g.*, Charles C. Mann and Mark L. Plummer, "Is Endangered Species Act in Danger?" *Science*, vol. 267, Mar. 3, 1995, at 1256-58; *see also*, Charles C. Mann and Mark L. Plummer, *Noah's Choice: The Future of Endangered Species*, Alfred A. Knopf: New York (1995).

[23] *Endangered Species Bulletin*, Vol. XX, No. 3 (May/June, 1995), USDOI, FWS, at 1.

It is implausible to suggest, however, that a purely private and voluntary approach will be enough to satisfy the Committee's constituents in every case. In such instances where private arrangements are insufficient, the federal government could play a positive role, while at the same time maintaing a program that remains essentially voluntary. The Department of Interior could offer numerous forms of positive incentives, thus encouraging landowners to do what those in the private sector were unable to convince them was worthwhile. To make it worth a landowner's economic while, the federal government itself could negotiate conservation easements with landowners. Pecuniary inducements, in the form of tax credits or outright transfer payments could also be offered.

Such an approach would, however, require that Congress shoot straight with the American public -- taxpayers would have to be apprised of the fact that conservation can be costly. In this way, we could rely on the environmental community's repeated assurances that the American people place high values on endangered species. CEI believes that they do; but we also recognize that Americans have been led, heretofore, to believe that they are already footing the bill for wildlife conservation. In reality, the costs of conserving endangered species has been foisted onto politically discounted individuals in the regulated community. These costs should be made explicit. Only then can Congress faithfully represent the public's interest in conserving endangered species.

REQUIRE COMPENSATION

In such cases where good faith negotiations fail to produce the desired quantity and quality of conservation, the federal government could exercise its power of eminent domain as a last resort. If the Secretary determines that a given habitat is critical to the conservation of a species deemed vital to the public interest, then he or she could be authorized to condemn the coveted land -- just as the federal government does when it establishes a wildlife refuge or puts some other property under formal federal control. However, condemnation should only be allowed on the condition that full payment of just compensation -- i.e., market value -- is promptly made.

The "takings clause" of the Fifth Amendment to the U.S. Constitution clearly states: "[N]or shall private property be taken for public use, without just compensation." This guarantee is the cornerstone of American liberty. As the Supreme Court stated in 1960, the ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[24] Because impinging upon wildlife habitat does not constitute a public or private nuisance, and because such enchroachment does not present a threat to public health or safety, the Fifth Amendment's "takings clause" should be strictly abided by in every aspect of the federal government's program to protect endangered species.

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[24] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Opponents of property rights have argued that requiring compensation will break the bank. This might have some validity if the Act's disincentives were not removed; if no positive incentives were put in their stead; and if the government maintained its appetitite for controlling private property. Such a scenario would be the fault of the Act's defenders, however, not that of advocates for fundamental reform. To supplement the resources provided through private funds, and those accrued through federally-owned assets, the Committee should seriously consider making funds available through other sources.

Section 5 of the ESA is dedicated exclusively to the acquisition of endangered species habitat through the Land and Water Conservation Fund. Indeed, as Michael Bean wrote in 1977, "the major change made by the 1973 Act was the removal of all dollar limitations on the expenditure of money from the Land and Water Conservation Fund for acquisition..."[25] Yet, only a paltry sum has actually been spent from that revenue source on endangered species habitat acquisition. These revenues should be put to the uses for which they were intended. Another potential source of revenues to create a "private stewardship fund" would be bonus payments and royalties from opening the Arctic National Wildlife Refuge (ANWR) to oil and gas exploration.

While developing parts of ANWR might be heresy to some environmentalists, the arguments for doing so are stronger than those against it. Robert Nelson, a former Interior Department economist and senior fellow at CEI, recently assessed the potential of such development in *Forbes* magazine.[26] By linking ANWR to federal revenues for endangered species conservation, the genuine concern among fiscal conservatives in the environmental community could be addressed.

ALLOW CONSERVATION THROUGH COMMERCE

Many traditional environmentalists have begun to recognize the need for positive incentives. "Strong incentives for conservation on private land must be created," writes Michael Bean. "The Act relies heavily on penalties to deter harmful conduct and virtually not at all on rewards for beneficial conduct."[27] Even Mollie Beattie, the FWS director, has come to recognize that, "[i]f there were an incentive to make the best habitat [for endangered and threatened speices], we'd be miles ahead."[28] As outlined above, the question is: From where are such incentives to come?

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[25] Michael Bean, *The Evolution of National Wildlife Law*, Council on Environmental Quality (1977), at 402.

[26] Robert H. Nelson, "A Frigid Eden," *Forbes*, April 24, 1995, at 122.

[27] Michael Bean, "Fortify the Act," *National Parks*, May-June, 1993, at 23.

[28] Patricia Peak Klintberg, quoting Mollie Beattie from a personal interview, *Beef Today*, April 1995, at 15.

Congress should question whether any species that was both privately owned and commercially valued, has ever gone extinct. I think the Committee will find no such examples. While Congress may not be ready to embrace Free Market Environmentalism, I ask the Committee to at least consider allowing the market to work for wildife as it has for so many other things humans value. As one Interior Department official told the authors of *Noah's Choice*: "What exasperates me is the reluctance to try [the market] approach even when it is practical. Sure, markets won't save everything. But why won't people set them up when they can be useful?"[29]

All it takes is one or two species with relatively high market values. Insofar as such species require wild habitat, an "umbrella effect" protecting all other species in that habitat can be expected to result. I ask that those on the Committee who are interested in "conservation through commerce" please contact CEI for further information. It is my belief that conservation through commerce should be an integral part of ESA reform.

DEVOLVE REGULATORY AUTHORITY TO STATES AND INDIAN TRIBES

Management authority over non-migratory wildlife has traditionally rested with the States. So, too, has management authority over terrestrial, non-migratory wildlife on Tribal lands rested with the Tribes under the various Treaties. Generally accepted principles of sovereignty would support granting such authority to the various States and Indian Tribes. Indeed, States should be able to opt out of the federal program entirely when non-migratory wildlife are within their jurisdiction. While many States would probably prefer to remain involved in the federal program, others might choose to formally opt out. ESA reform should allow such States to make that choice. Given the letter and spirit of the 10th Amendment, as well as recent 10th Amendment jurisprudence, it only seems appropriate that such options be allowed under the new federal law.

LEAVE THE CONSERVATION OF FOREIGN SPECIES TO FOREIGN GOVERNMENTS

The U.S. government has roughly the same jurisdiction over India's flora and fauna as the Indian government has over U.S. cattle -- and for good reason. Yet foreign species are often listed under the ESA, despite the existence of the Convention on International Trade in Endangered Species (CITES) and other Treaties with foreign nations. The only trade restrictions that should apply to foreign species are those imposed by such Treaties or required under the Lacey Act. Given the Supreme Court's ruling in *Defenders v. Lujan*, in addition to years of Interior policy, it seems clear that the ESA has no jurisdiction in foreign countries even through Section 7. ESA reform should concretize this principle by making it explicit in the law.

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[29] *Quoted in*, Charles C. Mann and Mark L. Plummer, "The Butterfly Problem," *The Atlantic Monthly*, January 1992, at 66.

ADDRESS PUBLIC LANDS AND WATER RIGHTS

If reform of the ESA results in a massive spilling-over of regulation onto federal lands, those who depend upon the economic use of such lands will become ever more disdainful, distrustful and disgusted with federal wildlife law, if not federal laws in general. This, I believe, is a problem inherent in the "public" ownership of land and resources. Because there are many "publics," common ownership will inexorably lead to intense political battles over who gets to control the land and the resources thereon. A political version of Hardin's "tragedy of the commons" will forever plague commonly-held resources for which vigorous competition exists.

Insofar as public lands reform will not factor into ESA reform, there is little else I can contribute to the conundrum of endangered species on federal lands. This same analysis pertains to the regulatory issues regarding acquatic species versus water rights. This is not to say that federal land-use regulations should or should not be implemented on federally-owned land under certain conditions.

The critical distinction to draw is this: Private lands should no longer be treated as if they were public lands. Above all else, ESA reform must acknowledge the fundamental difference between the two. On private lands, the only actions that should be prohibited are those that physically injure individual members of listed species (with exceptions for such takings that result in or produce incentives for conservation of the species). This principle would not necessarily apply in States that opt out of the federal program. Such States could either impose stringent regulations or dispense with such regulations entirely. The choice would be theirs.

CONCLUSION

Clearly, CEI believes that ESA reform should embrace an entirely new approach to wildlife law. That approach, however, is nothing new to the practice of wildlife conservation itself. At the end of the day, wildlife is always conserved in the field, not in the offices of government bureaucracies. If wildlife is to flourish, the focus on Washington, D.C. must be redirected to the land upon which wildlife depends. Those who share the land with endangered species are the ones who will ultimately determine their fate. It is thus through incentives that wildlife law influences landowners, and in turn the wildlife on people's property. To date, those incentives have been negative, when positive incentives are all that is needed.

No mix of carrots and sticks will do the job. Sticks are for criminals. If we as a people want to continue criminalizing ordinary land-uses, then so be it. But that is not the way to save endangered species. After 20 years of trying to make the ESA work, Michael Bean admits that, "on private lands at least, we don't have very much to show for our efforts

other than a lot of political headaches."[30] "[S]ome new approaches," said Bean, "desperately need to be tried because we're not going to do much worse than the existing approaches."[31]

Short of the new approaches outlined in my testimony, Congress is expected to focus considerable attention on the listing process. Such attention is warranted; mounting evidence suggests that the science upon which listings are based has been politicized on more than a few occasions. Stricter scientific requirements are imperative, and safeguards to ensure procedural due process should be institutionalized. Nevertheless, CEI is not nearly so concerned about what goes on the list as what happens as a result of listing. In short, CEI believes that too much has been made of the issue of costs, and far too little attention has been given to *those who bear those costs*. As Jim Huffman, Dean of the Northwestern School of Law of Lewis and Clark College, has written:

> "The pervasive notion that society can avoid the costs of public action if government can avoid compensating for property affected is simple self-deception. The costs of government action will be borne by someone. The compensation requirement, like a rule of liability, simply determines who that someone is...."[32]

Once this insight is fully appreciated and embraced, CEI believes that fundamental reform of the ESA will follow soon thereafter.

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[30] *Quoted in*, Rudy Abramson, "Wildlife Act: Shield or Sword?" *Los Angeles Times*, Dec. 14, 1990, at A-1.

[31] *Id.*

[32] James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrine at Work*, 3 Journal of Land Use & Environmental Law 171, n.9 (Fall 1987).

Appendix I

A property rights critique of ESA reform

COMPETITIVE ENTERPRISE INSTITUTE

May 5, 1995

The Honorable Slade Gorton
U.S. Senate
730 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Gorton:

The undersigned have reviewed your proposal, the "Endangered Species Act Reform Amendments of 1995," with interest. This letter briefly outlines our analysis of your proposal and, more generally, the need for substantive ESA reform.

Even Secretary Babbitt has acknowledged that the ESA is in need of reform, and you should be congratulated for attempting to respond to this need. The ESA's flaws and failures are well-documented, as are its often onerous impacts on the lives, liberties and economic livelihoods of those who have suffered under its regulations. The question, then, is not *whether* the Act should be reformed, but rather how best to go about it and how far to go.

Your bill, the "Endangered Species Act Reform Amendments of 1995," contains several positive features, especially in relation to improved procedural safeguards and stricter scientific requirements. Nonetheless, we are convinced that effective reform will require going much farther than your proposal seeks to venture. Real reform necessitates a complete overhaul of the law -- something your proposal falls far short of accomplishing.

We recognize that your proposal has taken some hard hits in the press already, especially regarding questions of authorship. Insofar as the issue of constituencies is concerned, it is our belief that ESA reform should not focus on aggregate economic impacts; it should not appeal to the greatest common denominator. On this point we want to be very clear: We believe that large corporations have the same rights as small businesses -- that all U.S. citizens, individual and corporate, should have equal standing and protection under the law.

But we also recognize that large corporations have the financial wherewithal to hire the attorneys and biologists necessary to navigate a byzantine bureaucracy and comply with a costly and confusing ESA. Large corporations also tend to have

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additional lands with which to "mitigate" for "incidental takings." Small property owners and independent businessmen rarely have such resources. In short, we are not nearly so concerned with the ESA's statistical impact on economic productivity as we are its impact on the lives of individuals, especially those who cannot afford to abide by its strictures.

Addressing the problems faced by the "little guy" will always solve those of large operators, but seldom vice versa. Thus, one of our major concerns with your proposal is that it makes little mention of private property rights; nor does it provide any explicit protection from federal regulations or require any compensation for losses incurred by such regulations.

We do note, however, that your proposal apparently incorporates the D.C. Circuit Court's ruling in *Sweet Home v. Babbitt*. Divesting the Secretary of his (purported) authority under Section 9 to regulate ordinary land uses that "modify habitat" is a giant step toward eliminating the current ESA's negative incentives. Such provisions should also correct much of the current law's abuse of private property owners' Fifth Amendment rights.

It is unclear, however, whether your proposal would actually provide such protections. The proposal seems to perpetuate the current ESA's treatment of private property as if it were public property. Codifying *Sweet Home* would leave the provisions of Section 7 as the only possible tools for private land-use restrictions. Section 7 was originally intended to apply to federal public lands and projects. Thus, true reform of the ESA would seek to eliminate those provisions of Section 7 that have been used to regulate private projects on private lands.

Yet your proposal seems to legitimize extensions of Section 7 to private land, virtually ensuring that private lands will continue to be treated as *de facto* public lands. Federal programs imposing permitting requirements on private property owners have proliferated since the ESA passed in 1973, and many, such as Section 404 of the Clean Water Act, have expanded dramatically. Under the current ESA, such requirements trigger Section 7 consultation which, in turn, can trigger federal regulations of private property. Unfortunately, your bill fails to solve this problem.

We are especially concerned that the ESA has failed to conserve threatened and endangered species. The ESA's record of success, defined by current law in terms of "recovery," is abysmal by any standard. Currently, private landowners have absolutely no incentive to attract listed species to their land, or to retain habitat suitable for use by such species, because listing a species under current law usually results in land-use restrictions everywhere that species occurs. Indeed, under the current ESA, private landowners have every incentive to ensure that such species *never* occur on their land.

No one can doubt that the ESA has created perverse incentives, a sad fact that has contributed to the Act's failure. As you must know, the Act has engendered an unfortunate phenomenon known in the Pacific Northwest as "shoot, shovel and shut up." Rather than making landowners the natural enemies of imperiled wildlife, we think it makes much more sense to encourage landowners to be wildlife conservationists. Yet only by changing the ESA's incentives from negative to positive can this be done. This is another place where our views differ from those underlying your proposal.

As best we can tell, the proposal offers few positive incentives to conserve wildlife. Thus, the species that have floundered under current law are unlikely to fare much better under your Amendments. Also, the proposal totally disregards the wealth of data showing that "conservation through commerce" is one of the most effective approaches to wildlife conservation. For instance, the bill's "captive propagation" provisions fail to enlist landowners and entrepreneurs in species recovery efforts. Private propagation of listed species is not encouraged; such options are left entirely to the discretion of the Secretary. Without requirements to allow such private approaches, however, the Secretary will be more susceptible to political pressures to prohibit them.

Finally, and equally important, the proposal is so convoluted that it will make the law that much more confusing. Like the federal tax code, we believe that federal wildlife law should be simplified, not further complicated. ESA reform should alleviate regulatory burdens and improve wildlife conservation, not provide full employment for attorneys specializing in wildlife law. The average property owner could not possibly wade through the technical morass perpetuated by this bill (without legal assistance).

Conserving endangered species does not have to be so complicated. Nor should ESA reform shy away from addressing the Act's fundamental flaws. Failing to solve the ESA's intrinsic problems will only leave proponents of ESA reform accountable for the "reformed" law's inevitable failure to conserve wildlife and respect the rights of property owners. The law itself must be sustainable, politically as well as environmentally.

Other aspects of the proposal, such as its failure to alleviate the problems created by import restrictions on foreign species, are also of concern. So, too, are such omissions as a provision to allow States to opt out of the federal program entirely. There are serious 10th Amendment issues at stake here, many of which were raised by the seven States that filed *amicus curiae* briefs against the government in *Sweet Home*.

These issues are likely to take on greater significance as a result of the Supreme Court's recent ruling in *Lopez v. U.S.* In *Lopez*, the Court invalidated a federal law that was predicated on the Constitution's Commerce Clause, and which regulated activity that the Court concluded had nothing to do with interstate commerce. Likewise, the federal government's authority to regulate non-migratory wildlife is also predicated on the Commerce Clause. Yet the relationship between interstate commerce and the activity

regulated under the ESA is no less attenuated than was the relationship struck down by the Court in *Lopez*.

In short, we believe that a much bolder approach must be taken if the ESA is ever to work for wildlife, while at the same time working for the people who depend on the same land upon which wildlife depends. These are not incompatible demands. While these problems will by no means be easily solved, nor are they insoluble. It is our opinion, however, that the necessary solutions have yet to find their way into legislative form.

None of this is to imply that your proposal does not have merit. Nor should our concerns in any way be construed as indicating opposition to or support for the bill you plan to introduce. Rather, we simply wanted to give you and other key decision-makers the opportunity to hear our views on ESA reform. We have reason to believe that many people share our views, especially those at the grass roots level. And, as the debate over the ESA unfolds, we have every hope that these views will be given serious consideration.

Respectfully,

Ike C. Sugg
Competitive Enterprise Institute

Robert E. Gordon
National Wilderness Institute

Nancie Marzulla
Defenders of Property Rights

John Shanahan
The Heritage Foundation

Jerry Taylor
Cato Institute

David A. Kidenour
The National Center for Public Policy Research

CC: Senators John H. Chafee, Frank Murkowski, Dirk Kempthorne, Richard Shelby, J. Bennett Johnston and Max Baucus; Congressmen Don Young and Richard Pombo

Appendix II

Grassroots ESA Coalition "Statement of Principles"

GRASSROOTS ESA COALITION (Revised 5/8/95)

STATEMENT OF PRINCIPLES FOR REFORM OF THE ENDANGERED SPECIES ACT

The Endangered Species Act has:

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

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

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

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

- -- Animals and plants should be responsibly conserved for the benefit and enjoyment of mankind.
- -- The primary responsibility for conservation of animals and plants shall be reserved to the States.
- -- Federal conservation efforts shall rely entirely on voluntary, incentive-based programs to enlist the cooperation of America's landowners and invigorate their conservation ethic.
- -- Federal conservation efforts shall encourage conservation through commerce, including the private propagation of animals and plants.
- -- Specific safeguards shall ensure that this Act cannot be used to prevent the wise use of the vast federal estate.
- -- Federal conservation decisions shall incur the lowest cost possible to citizens and taxpayers.
- -- Federal conservation efforts shall be based on sound science and give priority to more taxonomically unique, genetically complex and more economically and ecologically valuable animals and plants.
- -- Federal conservation prohibitions should be limited to forbidding actions intended to kill or physically injure a listed vertebrate species with the exception of uses that create incentives and funding for an ~~animal~~'s conservation.

Appendix III

Information on delisted and downlisted species

Delisted Endangered and Threatened Species

Common Name	Scientific Name	Historic range	Former range where endangered or threatened	Former status	Date of listing	Date of delisting	Reason
1. Mexican Duck	*Anas "diazi"*	U.S.A. (AZ,NM,TX) to central Mexico	U.S. only	E	3/11/67	7/25/78	Data error
2. Tecopa pupfish	*Cyprinodon nevadensis calidae*	U.S.A. (CA)	Entire	E	10/13/70	1/15/82	Extinct
3. Longjaw cisco	*Coregonus alpenae*	U.S.A. and Canada (Lakes Michigan, Huron, Erie)	Entire	E	3/11/67	9/2/83	Extinct
4. Blue pike	*Stizostedion vitreum glaucum*	U.S.A and Canada (Lakes Erie and Ontario)	Entire	E	3/11/67	9/2/83	Extinct
5. Santa Barbara song sparrow	*Melospiza melodia graminea*	U.S.A. (CA)	Entire	E	6/14/73	10/12/82	Extinct
6. Pine Barrens tree frog	*Hyla andersonii*	U.S.A. (FL, Al, NC, SC, NJ)	Florida	E	11/11/77	11/22/83	Data error
7. Sampson's pearly mussel	*Epioblasma (=Dysnomia) sampsoni*	U.S.A. (IL, IN)	NA	E	6/14/76	1/9/84	Extinct
8. Indian flap-shelled turtle	*Lissemys punctata punctata*	India, Pakistan, Bangladesh	Entire	E	6/14/76	2/29/84	Data error
9. Bahama swallowtail butterfly	*Heraclides (=Papilio) andraemon bonhotei*	U.S.A. (FL), Bahamas	NA	T	4/8/70	8/31/84	Data error
10. Brown pelican	*Pelecanus occidentalis*	U.S.A. (AL, FL, GA, SC, NC, and points northward along the Atlantic Coast)	Entire	E	10/13/70	2/4/85	Recovered[1]
11. Palau dove	*Gallicolumba canifrons*	W. Pacific: U.S.A. (Palau Islands)	Entire	E	6/2/70	9/12/85	Recovered[2]
12. Palau fantail flycatcher	*Rhipidura lepida*	W. Pacific: U.S.A. (Palau Islands)	Entire	E	6/2/70	9/12/85	Recovered[3]
13. Palau owl	*Pyroglaux (=Otus) pondargina*	W. Pacific: U.S.A. (Palau Islands)	Entire	E	6/2/70	9/12/85	Recovered[4]
14. American alligator	*Alligator mississippiensis*	U.S.A. (AL, AR, FL, GA, LA, MS, NC, OK, SC, TX)	Entire, but still listed due to similarity of appearance	E & T	3/11/67	9/26/75, 1/10/77, 6/25/79, 8/10/81, 10/12/83, 6/20/85, 10/31/85	Recovered[5]
15. Amistad gambusia	*Gambusia amistadensis*	U.S.A. (TX)	Entire	E	4/30/80	12/4/87	Extinct
16. Rydberg milk-vetch	*Astragalus perianus*	U.S.A. (UT)	NA	T	4/26/78	9/14/89	Recovered[6]
17. Purple-spined hedgehog cactus	*Echinocereus engelmannii var. purpureus*	U.S.A. (UT)	NA	E	10/11/79	11/27/89	Data error
18. Dusky seaside sparrow	*Ammodramus (=Ammospiza) maritimus nigrescens*	U.S.A. (FL)	NA	E	3/11/67	12/12/90	Extinct
19. Tumamoc globeberry	*Tumamoca macdougalii*	U.S.A. (AZ), Mexico	NA	E	4/29/86	6/18/93	Data error
20. McKittrick pennyroyal	*Hedoma apiculatum*	U.S.A. (TX, NM)	NA	T	7/13/82	9/22/93	Data error
21. Spineless hedgehog cactus	*Echinocereus triglochidiatus var. inermis*	U.S.A. (UT, NM), Mexico	NA	E	11/7/79	9/22/93	Data error
22. Bruneau hot springsnail	*Pyrgulopsis bruneauensis*	U.S.A (ID)	Entire	E	1/25/93	12/14/93	Invalidated[7]
23. Gray whale (eastern north Pacific population)	*Eschrichtius robustus*	U.S.A. (CA, OR, WA, AK), Canada, Russia	Entire	E	12/2/70	6/16/94	Recovered[8]
24. Arctic peregrine falcon	*Falco peregrinus tundrius*	U.S.A. (AK), Canada, Greenland	U.S.	T	10/13/70	10/5/94	Recovered[9]
25. Red kangaroo	*Macropus (Megaleia) rufus*	Australia	Entire	T	12/30/74	3/9/95	Recovered[10]
26. Eastern gray kangaroo	*Macropus giganteus*	Australia	Entire	T	12/30/74	3/9/95	Recovered[11]
27. Western gray kangaroo	*Macropus fuliginosus*	Australia	Entire	T	12/30/74	3/9/95	Recovered[12]

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8. With the pioneering of petroleum products around the turn of the century, the market for whale oil and, consequently the number of gray whales killed, was drastically reduced. Yet commercial whaling resumed around the 1920s and gray whale numbers were again reduced. Commercial hunting was banned by an international treaty signed in 1937, but some whaling continued. So in 1946 another agreement, International Convention for the Regulation of Whaling (the precursor of the present day International Whaling Commission) was signed. This put an effective end to commercial whaling. Dr. Bill Fox, Director of the National Marine Fisheries Service (NMFS) in 1991, said "The removal of exploitation of these great whales has been the thing that has allowed these whales to recover." According to Bill Knauss, Administrator of the National Oceanic and Atmospheric Administration (NOAA), "I'm not sure we really understand why they're back. It is certainly, in part, due to the effort of the Mexican government to protect them" [by protecting the calving lagoons]. And according to the NOAA's notice of determination [58 FR 3121; 1/7/93] that the gray whale should be delisted: "The eastern Pacific stock has increased in spite of increased human use of the coastal habitat (i.e., nearshore migration route where mating and calving occur), and a subsistence catch of 167...whales per year by [Inuits living in] the former Soviet Union during the past 30 years." In addition, Mr Knauss had the following observations about the size of the population: "Our best estimate of the amount of gray whales at the time before they were exploited...was there were 15 to 20,000 of these California gray whales in the mid-1800s. Our best estimate now is that there are 21,000 gray whales." Thus the ESA essentially had nothing to do with the gray whale's rebound.

9. The ESA had nothing to do with the arctic peregrine's rebound. The primary cause of its decline was reproductive failure due to the pesticide DDT which caused falcons to lay thin-shelled eggs that were susceptible to breaking. Yet DDT was banned in 1972, one year prior to the passage of the ESA in 1973. Therefore the ESA cannot claim any responsibility for the most important factor leading in the arctic peregrine's rebound. In addition, according to Jay Sheppard of the FWS' Office of Endangered Species, "it was the remoteness," of its nesting habitat in northern Alaska, other than DDT, that was the main reason for the falcon's rebound.

10. "Kangaroos have never qualified as a threatened species in any shape or form," said Gerry Maynes, kangaroo expert for the Australian Nature Conservation Agency.

11. Ibid.

12. Ibid.

Downlisted Endangered and Threatened Species

Common name	Scientific name	Historic range	Present range where threatened	Date of listing	Date of downlisting
1. Apache (=Arizona) trout	*Oncorhynchus (=salmo) apache*	U.S.A. (AZ)	Entire	3/11/67	7/16/75...[1]
2. Lahontan cutthroat trout	*Oncorhynchus (=salmo) clarki henshawi*	U.S.A. (CA, NV)	Entire	10/13/70	7/16/75...[2]
3. Paiute cutthroat trout	*Oncorhynchus (=salmo) clarki seleniris*	U.S.A. (CA)	Entire	10/13/70	7/16/75...[3]
4. Bald eagle	*Haliaeetus leucocephalus*	U.S.A.	U.S.A. (WA, OR, MN, WI, MI)	3/11/67	2/14/78...[4]
5. Gray wolf	*Canis lupus*	U.S.A. (AZ, ID, MI, MT, NM, ND, OR, TX, WA, WI, WY), Mexico	U.S.A. (MN)	3/11/67	3/9/78...[5]
6. Greenback cutthroat trout	*Salmo clarki stomias*	U.S.A. (CO)	Colorado	3/11/67	4/18/78...[6]
7. Red lechwe	*Kobus leche*	Africa (Botswana, Angola, Zambia)	Entire	12/2/70	10/1/80...[7]
8. Leopard	*Panthera pardus*	Africa	Most of eastern, central and southern Africa	3/30/72	1/28/82...[8]
9. Utah prairie dog	*Cynomys parvidens*	U.S.A.(UT)	Entire	6/4/73	5/29/84...[9]
10. Snail darter	*Percina tanasi*	U.S.A. (TN, GA)	Entire	10/9/75	7/5/84...[10]
11. Tinian monarch	*Monarcha takatsukasae*	the island of Tinian in the Mariana Archipelago	Entire	6/2/70	4/6/87...[11]
12. Aleutian Canada goose	*Branta canadensis leucopareia*	U.S.A. (AK, WA, OR, CA)	Entire	3/11/67	12/12/90...[12]
13. Nile crocodile	*Crocodylus niloticus*	Africa (Zimbabwe, upstream portions of the Nile, tropical and southern Africa, Madagascar, Comoros and Seychelles Islands)	Entire	6/2/70	7/17/87; 9/30/88; 9/23/93...[13]
14. Louisiana pearshell	*Margaritifera hembeli*	U.S.A. (LA)	Entire	2/5/88	9/24/93...[14]
15. Siler pincushion cactus	*Pediocactus sileri (=Echinocactus s., Utahia s.)*	U.S.A. (AZ, UT)	Entire	10/26/79	12/27/93...[15]
16. Small-whorled pogonia	*Isotria medeoloides*	U.S.A. (ME, NH, MA, RI, CT, PA, NJ, DE, VA, NC, SC, TN, OH, MI, IL), Canada (Ontario)	U.S.A.	9/10/92	10/6/94...[16]
17. Virginia round-leaf birch	*Betula uber*	U.S.A. (VA)	Entire	4/26/78	11/16/94

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Endnotes

1. One year after it was listed in 1973 as endangered, the Apache trout was downlisted because of conservation efforts over the previous ten years. "The actual Apache trout recovery began long before the passage of the Endangered Species Act. Arizona Game and Fish, along with the U.S. Fish and Wildlife Service and the White Mountain Apache tribe started working with the fish in the early 1960s. This was well before it was described as a distinct species. But it was the native trout of the White Mountains and there was a lot of concern about it decline," said Jim Novy, Fisheries Program Manager with the Arizona Game and Fish Department and the recovery team leader. By 1955 the White Mountain Apaches had closed all streams on their reservation that contained pure strains of the rare trout. In the 1960s the White Mountain Apaches constructed Christmas Tree Lake. This lake, along with Hurricane Lake, became a "renowned trophy Apache trout fishery." (James Yuskavitch, "A Tale of Two Trout," *Trout*, Winter 1993, p.27).

2. The Lahontan cutthroat trout was originally listed as endangered under predecessor legislation which prohibited fishing for the species. The State of Nevada protested the listing, noting that Federal and State hatcheries assured perpetuation of the species and that fishing was controlled by the State. After enactment of the ESA in 1973, which established the threatened classification, and a reevaluation of the available data, FWS reclassified the trout as threatened so that controlled fishing of the species could continue ("Endangered Species: A Controversial Issue Needing Resolution," U.S. General Accounting Office, CED-79-65, July 2, 1979, p.21).

3. "According to FWS regional and field officials, the decisions to reclassify five species [of which the Paiute cutthroat trout was one] were due less to improvements in the species' status than to interest in allowing for the regulated hunting, fishing, or capture of these species, actions that are permitted through special rulings for threatened, but not endangered, species" ("Endangered Species: Management Improvements Could Enhance Recovery Program," U.S. General Accounting Office, GAO/RCED-89-5, December 1988, p.19). Indeed, in the final rule on delisting [40 FR 29864] the state of California requested downlisting to be effective upon the date of the rule's publication, instead of waiting the usual 30 days for the rule to take effect, so that so that sport fishing "could begin immediately."

4. Previous to the final rule [43 FR 6230] the bald eagle was split into two subspecies, with 40 degrees north latitude separating them. *Haliaeetus leucocephalus alascanus* and *Haliaeetus leucocephalus leucocephalus* were the northern and southern subspecies, respectively. *H.l. leucocephalus* was listed as endangered because the line of 40 degrees north latitude was, according to the Federal Register, "arbitrarily selected for the purposes of convenience to separate the two subspecies of bald eagles." Because no significant morphological or geographical differences existed and because there was a good deal of interbreeding and movement among two subspecies, they were combined into one single species, *Haliaeetus leucocephalus*. With this new designation it was recognized that the populations in Washington, Oregon, Minnesota, Wisconsin and Michigan did not warrant endangered status. Furthermore, shooting was identified as the main cause of mortality to immature and adult eagles, accounting for between 40% and 50% of the mortality of dead birds that were found. However, the Bald Eagle Protection Act, passed in 1940 and amended in 1972, prohibited people from taking, possessing, selling, purchasing, bartering, transporting, exporting or importing bald eagles. Therefore, legislation prior to the ESA already existed in order to prevent and stop the shooting of bald eagles. In addition, organochlorine pollutants, primarily DDT, are cited in the Federal Register as continuing to contribute to reproductive failure among bald eagles by causing them to lay thin-shelled eggs. Yet DDT was banned in 1972, one year prior to the passage of the ESA in 1973 so the ESA had nothing to do with by far the single most important factor in the bald eagle's rebound.

5. The wolf was downlisted for several reasons. First, taxonomy: "The Service wishes to recognize that the entire species *Canis Lupus* is Endangered or Threatened to the south of Canada, and considers this matter to be handled most conveniently by listing only the species name." The rule specifically addressed the status of the eastern timber wolf (*Canis lupus lyacon*). When the eastern timber wolf was first listed in 1967, there was no threatened category only the endangered category. But with the passage of the ESA in 1973 there was the newly created "threatened" category which, due to the eastern timber wolf's rebound, was the appropriate designation. Second, population increase: At the time of the ESA's passage in 1973, the population was 500-1000 individuals in Minnesota. Protection under the ESA allowed the population increase, and upon downlisting there were an estimated 1,235 wolves in Minnesota. Third, to allow take: Because the population had grown so large, wolves were killing livestock. So "this take is intended to ameliorate present conflict between the wolf and human interests. Such conflict would hinder conservation efforts and thus work against the long-term welfare of the wolf. A legal take is considered the only practical means by which depredations [by wolves of livestock] can be handled and the current problems relieved" [43 Federal Register 9607]. This was recognized in a GAO report which stated that the wolf's downlisting "w[as] due less to improvements in the species' status that to interest in allowing for the regulated hunting...or capture...actions that are permitted through special rulings for threatened, but not endangered, species ("Endangered Species: Management Improvements Could Enhance Recovery Program," U.S. General Accounting Office, GAO/RCED-89-5, December 1988, p.19).

6. Like other species of trout, the greenback was downlisted to allow limited sport fishing. "It's vitally important that the restoration effort be able to provide a viable fishery in a reasonable amount of time. No land manager is going to give up prime trout habitat for a greenback restoration project it it's going to take 15 years before you can fish there," said Bruce Rosenlund, project leader for the U.S. Fish and Wildlife Service's Colorado Fish and Wildlife Assistance program. With this in mind, and in order to restore populations for fishing, the recovery team recommended in 1978 that the greenback be downlisted (James Yuskavitch, "A Tale of Two Trouts," *Trout*, Winter 1993, p.33).

7. The red lechwe, a species of antelope from Africa, was downlisted because its status in CITES (Convention on International Trade in Endangered Flora and Fauna) changed, not because of any specific conservation measures taken under the ESA.

8. The leopard's status changed because its status under CITES changed.

9. The prairie dog's downlisting, according to the GAO, "w[as] due less to improvements in the species' status that to interest in allowing for the regulated hunting...or capture...actions that are permitted through special rulings for threatened, but not endangered, species ("Endangered Species: Management Improvements Could Enhance Recovery Program," U.S. General Accounting Office, GAO/RCED-89-5, December 1988, p.19). The final rule on downlisting states, "the Service...issues a species regulation that allows a maximum of 5,000 animals of this species to be taken annually...under a permit system." It went on to state, "such taking is in the best interest of the conservation of the Utah prairie dog, and will not be allowed to be inconsistent with the conservation of the populations in question. These populations have increased substantially in recent years, and are now straining the carrying capacity of available habitat." In 1991 the take quota was increased to 6,000 prairie dogs annually [56 FR 27483; 6/14/91]. According to Bob Benton, Fish and Wildlife Service biologist in Salt Lake City, (the person who wrote the 1991 amendment to the downlisting) the prairie dog was downlisted in order to give local landowners "a way to let them feel that they did actually have control over what was happening to their private property." The current goal of the recovery efforts is to transplant the prairie dogs off of private land and onto public land. Ironically, the valleys where the prairie dogs live are private ranches and agricultural lands which have provided very good habitat because of the availability of vegetation and food plants which is why Mr. Benton referred to private lands as "the nursery areas." So long as the ranchers could keep the prairie dogs in check they tolerated them, but when the population burgeoned, as a result of being listed under the ESA, the ranchers insisted on the ability to control the prairie dogs. In addition, the ranchers rarely reach their total take limit.

10. The snail darter is a case of data error. When the gate of the Tellico Dam closed in 1979 the snail darter's extinction was thought to be a foregone conclusion. The stretch of river below the dam was the only known area in which the darter existed. As a result of the dam, the darter's habitat would be permanently altered because silt from the dam would smother the snails on which the darter fed and fundamentally change the water quality from clear to silty. However, surveys done after the dams completion found snail darters in several tributaries to the Tennessee River (South Chickamauga Creek, Hamilton County, TN and Catoosa County, Georgia; Seweee Creek, Meigs County, Tennessee; Sequatchie River, Marion County, Tennessee; Paint Rock River, Jackson and Madison Counties, Alabama) and from the main stem of the Tennessee River near the mouth of South Chickamauga Creek and the Sequatchie River. The other surprise about the snail darter was that it did not require the clear, swiftly flowing water of the original site from which it was known below Tellico Dam. The first steam in which it was rediscovered, South Cickamauga Creek, was turbid.

11. The Tinian Monarch, a species of bird, is a case of data error. "Because its numbers in 1945 were thought to be critically low due to the removal of native forests for sugarcane production and to the destruction of forest by the activities of World War II, the monarch was listed as endangered in 1970, though there had been no surveys of the bird's status in the preceding two decades," states the final rule on downlisting. The rule continues, "surveys conducted by the Service in 1982 found the monarch to be the second most abundant bird on the island." The circumstances under which the Tinian monarch's status improved is almost identical to those under which three delisted species (the Palau owl, the Palau dove and the Palau flycatcher) improved. Both the monarch and the three species of birds from Palau (another archipelago in the South Pacific) suffered habitat destruction because of fighting and bombardment associated with WW II. In the case of the monarch this was compounded by the clearing of forest habitat for sugarcane production around the same time as WW II. Surveys conducted soon after WW II naturally found very few of these birds because their habitat had been devastated. As the birds' forest and shrub habitat slowly returned, so, too, did the birds. Just as the three species of birds from Palau had probably recovered by the time they were listed in 1970 so, too, was the Tinian monarch probably recovered by the time it was listed.

12. Downlisted due to data error. When two remnant populations were discovered in 1979 and 1982 of 132 and 100-120 individuals, respectively, the downlisting criteria for the 1982 revised recovery plan were met. The 1982 plan called for 100 or more pairs established on three distinct areas, with a minimum colony size of 10. Recovery team leader Vernon Byrd had this to say; "well we didn't know about (the other populations) when we first drafted the [original recovery] plan in 1973. It would have changed the criteria." Dave Cline, vice president for the Alaska region for the National Audubon Society, said "the downlisting will make it extremely difficult to save the wetlands used by the birds. Money is easier to raise when an endangered species is involved," (Brigid Schulte, "Nearly Eaten out of Extinction, Alaskan Geese Make a Comeback" *States News Service*, 12/19/90).

Endnotes

1. The principle cause of the pelican's decline was reproductive failure due to the pesticide DDT. DDT caused the birds to lay thin-shelled eggs that were susceptible to breaking. Yet DDT was banned in 1972, and the ESA was passed in 1973. Therefore the ESA had nothing to do with by far and away the single most important factor leading to the pelican's rebound.

2. A 1988 GAO report noted the following; "according to FWS officials...the three Palau species owe their 'recovery' more to the discovery of additional birds than to successful recovery efforts." During WW II southern Palau was subjected to very heavy bombardment and fighting. As a result, much of the flora and fauna was destroyed or damaged. However, the three Palau birds were listed in 1970 on the basis of surveys conducted in 1949 when the flora and fauna were still devastated. Since 1949 the flora and fauna have slowly and naturally repopulated formerly war ravaged areas which is why John Engbring of the Fish and Wildlife Service, and the person who wrote the final delisting rule for the Federal Register, said "recovery" has "not been due to an active program by the service [FWS]" and "probably the majority of recovery...[is]...not attributable to the ESA."

3. Ibid.

4. Ibid.

5. The alligator is a case of data error. The results of a questionnaire distributed by the Louisiana Wildlife and Fisheries Commission (LWFC) published in 1974, found that ten states recorded alligators in part or all of their states. The total population of alligators was estimated to be 734,348, with Florida having 407,585 and Louisiana 200,682. Discounting Florida's 64 counties for which data was not available, 168 counties reported *increasing* populations, 152 counties stable populations and 25 counties declining populations. In one of the final rules in the Federal Register that downlisted the alligator (42 FR 2071, 1/10/77) the following is noted: "since its preparation in 1974, [Ted Joanen's report] additional data accumulated by National Wildlife Refuges, National Forests, government and private research institutions and various states have been accumulating. While these data pertain only to local areas, they have almost without exception produced local population estimates even higher than those used in the Joanen report." These figures are buttressed by the Florida Game and Freshwater Fish Commission's (FGFFC) work which showed at the time of listing there were no fewer than 100,000 alligators in the state. Furthermore, a 1981 report titled *Recent History of the Alligator Management Program in Louisiana*, written by Ted Joanen and Larry McNease of the Louisiana Department of Wildlife and Fisheries, found "the dramatic recovery of this species throughout a major portion of its range took less than 10 years. This is quite phenomenal when one considers the age of sexual maturity is 10 years. The original estimate used to justify the alligator being on the endangered species list must have been grossly underestimated." According to Ted Joanen the decision by the Fish and Wildlife Service to list the alligator as endangered was a political decision which was made in order to use the popular and charismatic alligator to facilitate the passage of the Endangered Species Act. Even the National Wildlife Federation agrees that the alligator was a data error. "It now appears that the animal never should have been placed on the Endangered Species List; recent evidence suggests that the 'gator was thriving in some parts of its range throughout the 1960s, albeit at somewhat lower population levels than now exits" (Thomas A. Lewis, "Searching for Truth in Alligator Country," *National Wildlife*, Oct./Nov., 1987, p.14).

6. The milk-vetch is clearly a case of data error. It was listed in 1978 when only one type location (a small population) and one population were known. These sites totaled approximately 500 and 2,000 individuals, respectively. But when a scientist examined what was thought to be specimens of a close relative, *Astragalus serpens*, they turned out to out to be *Astragalus perianus*, the rydberg milk-vetch. This significantly expanded the known range of the species and led to intensive surveys which turned-up twelve confirmed populations covering approximately 2,073 acres and totaling around 75,500 plants. The delisting proposal enlarged the population to approximately 200,000 individuals. This figure was later revised in the final delisting rule to "well over 300,000 plants." Yet since delisting, the Fish and Wildlife Service (FWS) has claimed the Rydberg milk-vetch as a recovery. However, Jon L. England, FWS botanist in Salt Lake City, Utah, and the person who wrote the final delisting rule in the Federal Register, said of the Rydberg milk-vetch, "that it was essentially a data error" and it was "one [species] where we made an initial mistake." When asked why the FWS has erroneously claimed the Milk-vetch as recovered when in fact it was a case of original data in error, Mr. England said it was "probably a case of our Washington [D.C.] office and us not communicating." Jay Sheppard of FWS' Office of Endangered Species confirmed this when he stated that he knew it was a case of original data in error but was listed as recovered because it was "just an error in our list" and it had "inadvertently [been] put down as recovered." As of April 25, 1994 Mollie Beattie, Director of the Fish and Wildlife Service, maintained that the Rydberg milk-vetch was, indeed, a recovery. And the FWS, in their list titled *Endangered and Threatened Wildlife and Plants* (last published in August 20, 1994) continued this false claim by listing the Rydberg milk-vetch as a "recovered."

7. Invalidated by the U.S. District Court, Idaho, on the basis of an arbitrary and capricious listing in *Idaho Farm Bureau Federation et al., Plaintiffs v. Bruce Babbitt et al., Defendants.*

13. The Nile Crocodile's status changed under CITES (see the endnote for the Red Lechwe for an explanation).

14. The pearlshell, a species of mussel that lives in Louisiana, is clearly a case of data error. Subsequent to listing, surveys were conducted in 1991 and they found a second area, the Red River drainage, in which the pearlshell lives. "The discovery of the new populations has diminished the apparent degree of threat sufficiently to support reclassification." In addition, "within the Grant Parish portion of the range there are several streams that are on posted private property. Since Hall [the person who conducted the surveys] did not survey the streams where he could not get permission to enter the property, it is likely that additional populations of the Louisiana pearlshell occur on private property within the geographic area of the currently known range."

15. This plant is a case of data error. When it was listed in 1979 it was known from approximately 1,000 individuals. Surveys subsequent to listing found the cactus to be much more widespread and common that it was initially thought to be. At the time of downlisting in 1993 there were, at the very least, between 61,500 and 94,300 individuals.

16. The pogonia is a case of data error. When it was listed it was known from 17 sites, but over the next 12 years surveys found an additional 87 sites which resulted in the pogonia's downlisting. Despite this, Susan von Oettingen of the FWS maintains "the Endangered Species Act worked this time" and "there's no doubt about it. We've shown that the Act works."

Appendix IV

Internal FWS memo: evidence of conflating Habitat Conservation Plans with Recovery Plans

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Chief, Endangered Species, Fish and Wildlife Enhancement
Portland, Oregon

October 15, 1987

Acting Field Office Supervisor, Laguna Niguel Field Office

Anticipated proposed listing of Stephens' kangaroo rat

HCP'S AS RECOVERY PLANS

Recently, Peter Stine, Karla Kramer and I met with John Gustafson of the California Department of Fish and Game to discuss the anticipated publication of the proposed rule to list the Stephens' kangaroo rat (Dipodomys stephensii) as endangered. The purpose of the meeting was to discuss means of defusing as much of the controversy as possible that is expected to arise from this proposed rule. During the meeting, several action items which are discussed below were proposed.

We began the meeting with an overview of the status of the kangaroo rat. Most remaining populations are on private land. Federal agencies which own land include the U.S. Navy at Fallbrook Naval Weapons Annex and on Camp Pendleton, the U.S. Air Force Base (March Air Force Base), and the U.S. Bureau of Land Management on isolated parcels near Lake Elsinore. The California Department of Fish and Game owns the San Jacinto Wildlife Area. Large parcels are owned by the Vista Irrigation District and the Riverside Metropolitan Water District. This land ownership pattern is similar to the situation with the Coachella Valley fringe-toed lizard, where a Habitat Conservation Plan was eventually prepared.

With respect to the Stephens' kangaroo rat, Riverside County is already considering the establishment of a reserve system funded by private developers. The California Department of Fish and Game is currently requiring some form of compensation (usually payment of a fee or purchase of off site habitat) for loss of habitat. Unfortunately, under these current policies, the result is a sort of haphazard habitat protection strategy that has little chance of being successful over the long-term. The usual result is habitat loss with a vague committment of future compensation.

A vital part of a recovery plan for the kangaroo rat would be the establishment of several large reserves for the species. It appears that a Habitat Conservation Plan (HCP) approach may be a potential solution to this situation. We do, however, need Regional Office guidance regarding the extent to which we should advocate an HCP approach for this species.

We believe that this proposed rule will be surrounded by much local controversy. This potential listing has the ingredients (potential restrictions on a rapidly growing community, typical compliment of misinformation and misunderstandings) to result in serious negative repercussions (at least temporarily). Additionally, some of the affected agencies may feign shock and surprise, adding to the difficulties. We believe we can diffuse some local opposition to the proposal by meeting with some groups as soon as possible after we know the package has been approved. The groups we propose to meet with are the Riverside County Planning,

Stephens

x4 Files - SE-Kangaroo Rat

Department, the San Diego County Planning Department, the involved Federal agencies, and maybe conservation groups. The purpose of the meetings would be to explain the listing process, review the status of this species and the laws and regulations, and discuss the agencies' responsibilities and options. We would inform the conservation organizations so they may be of help in presenting the Service position. We believe the Department of Fish and Game should help in these meetings if asked to (this species has been State listed since 1980). One Fish and Game commissioner is likely to oppose Federal Listing.

The California Department of Fish and Game has targeted $25,000.00 of tax check off money for work on the Stephens' kangaroo rat. Next year, they hope to acquire the same amount of money. They plan to refine distributional information and conduct year round trapping efforts to assess population fluctuations. Information on specific habitat requirements and potential sites for reserves are also information needs for resolving some of the major issues. This field office plans to pursue section 4 funding to address these additional key issues. Concurrently, the Department of Fish and Game will pursue section 6 funding for this additional work. We concurred that such an approach would provide the best opportunity to guarantee this work would be accomplished. Accomplishing this work would both serve the best interest of the conservation of this species and result in the minimum of unnecessary controversy surrounding the listing action.

The action items we developed in our meeting are listed below:

1) Call OES and asked to be informed immediately when the proposed rule is signed. Subsequently, contact key agencies/organizations immediately to set briefing dates.

2) Prepare a letter to the Department of Fish and Game strongly requesting their assistance/participation in our initial briefing efforts.

3) Prepare well designed presentations for the groups which will be approached.

4) Anticipate a request for a public hearing. The above mentioned presentation may be used (at least in part) for the hearing.

5) Anticipate adverse comments and develop appropriate responses.

6) Begin to determine (in house for now) how many reserves, and how large the reserves need to be to provide an adequate, self-sufficient base of habitat.

7) Prepare a proposal to study specific habitat requirements and identify potential reserve sites for the Stephens' kangaroo rat; submit for Section 4 funding. (related to item #6).

8) Always call it a "kangaroo rat", never a "K-rat", or "rodent".

9) Obtain guidance from the Regional Office on the Service's position regarding advocating an HCP for this species.

10) Continue to comment on all projects which may affect the Stephens' kangaroo rat.

Please provide us your comments on this proposed strategy as soon as possible. In particular, follow up on item #1 as soon as possible. Thank you for your assistance, we believe an active mode on these issues will be far more successful in addressing our responsibilities for the Stephens' kangaroo rat under the Endangered Species Act.

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bcc: CDFG, Sacramento, CA (Attn: J. Gustafson)

KJKramer:nd