REFORMING THE ENDANGERED SPECIES ACT: THE PROPERTY RIGHTS PERSPECTIVE

WRITTEN STATEMENT OF
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BEFORE THE
ENDANGERED SPECIES ACT TASK FORCE
OF THE
COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

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Thank you Mr. Chairman for the opportunity to present testimony to the Endangered Species Task Force of the Committee on Resources. My name is Ise 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 Environmentalism views 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 jurisdiction;
• 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" 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 tinkerimg 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."

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 short-sightedness 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 pain 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).


It's 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." Peter Berle, head of the National Audubon Society, has similarly stated that "unfortunately, the act is not working well enough to accomplish its purpose." There are many grounds upon which to pronounce the ESA a failure, but the law itself has only one clear statutory objective: to "recovery" 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." According to the plain language of the Act itself, "the terms 'conserv[e],' '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." 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 "conserv[e]" is "synonymous" with "recovery." (emphasis added)

Even the Endangered Species Coalition has acknowledged that "[r]ecover[y] is the ultimate goal of the Act and the heart of the endangered species program." 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 ever 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.

* Judy L. Olsen, Private Property Rights: Our Newest Endangered Species, 7 ERC (Emerson, Missouri), Summer 1993, at 22.

* Id.


* Endangered Species Coalition, supra note 3, at 24.
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." 4

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. 5 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:


"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 usuable 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 San 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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\(^ {10}\) Federal Register, 59:77-79 (Feb. 17, 1994).


\(^ {13}\) 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." 

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 were (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.
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." 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," 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. 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 significant 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 "takes" 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 likelihood of the survival and recovery of the species in the wild."10

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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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 exorbitant 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. 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 aborted 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 "recovery" endangered species. Indirect evidence for this conclusion exists in volumes, but direct evidence seems ali 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.


* See, e.g., The Competitive Enterprise Institute in Support of Respondents, in Rabbit v. Sweet Home (March 24, 2004).
An internal memorandum obtained from FWS through the Freedom of Information Act reveals, beyond any doubt, that the FWS is funding 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.

HOW TO FIX THE ESA

Much has been said about the ESA’s flaws and failures, 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.” 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 likely 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.


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 maintaining 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 "takeings 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."14 Because impinging upon wildlife habitat does not constitute a public or private nuisance, and because such encroachment does not present a threat to public health or safety, the Fifth Amendment’s “takeings clause” should be strictly applied in every aspect of the federal government’s program to protect endangered species.

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 appetite 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.”

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. 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.” 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 species], we’d be miles ahead.” As outlined above, the question is: From where are such incentives to come?

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21 "From where are such incentives to come?"

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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 wildlife 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?”

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.

DEVELOPE 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 rezoned 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.

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 aquatic 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.\textsuperscript{40} "[S]ome new approaches," said Bean, "desperately need to be tried because we're not going to do much worse than the existing approaches."\textsuperscript{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:

\begin{quote}
"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...."\textsuperscript{32}
\end{quote}

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

\begin{footnotes}
\item[31] Id.
\end{footnotes}
Appendix I

A property rights critique of ESA reform
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
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. Babbit. 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 consultaion 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

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

In short, we believe that a more bold 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 incompatibile 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 Shadegg
The Heritage Foundation

Jerry Taylor
Cato Institute

David A. Richter
The National Center for Public Policy Research

CC: Senators John H. Chafee, Frank Murkowski, Dirk Kemphorne, 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 those that create incentives and funding for an animal's conservation.
Appendix III

Information on delisted and downlisted species
<table>
<thead>
<tr>
<th>Common Name</th>
<th>Scientific Name</th>
<th>Historic range</th>
<th>Former range where endangered or threatened</th>
<th>Former status</th>
<th>Data of listing</th>
<th>Date of delisting</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. American Elk</td>
<td>Cervus elaphus nelsoni</td>
<td>U.S.A. (AZ, NM, WY, NE)</td>
<td>D1</td>
<td>E</td>
<td>7/1/7153</td>
<td>7/2/78</td>
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</tr>
<tr>
<td>2. Great prairie</td>
<td>Cynomys mexicanus flavus</td>
<td>U.S.A. (KS)</td>
<td>D1</td>
<td>E</td>
<td>7/1/7172</td>
<td>7/1/78</td>
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<tr>
<td>3. Broad-nosed</td>
<td>Cynomys lateralis</td>
<td>U.S.A. and Canada (Yukon, B.C.)</td>
<td>E</td>
<td>D</td>
<td>7/1/8188</td>
<td>7/1/85</td>
<td>Data error</td>
</tr>
<tr>
<td>4. Black bear</td>
<td>Ursus americanus</td>
<td>U.S.A. and Canada (Yukon, B.C.)</td>
<td>E</td>
<td>D</td>
<td>7/1/7147</td>
<td>7/1/78</td>
<td>Data error</td>
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<tr>
<td>5. Great Basin</td>
<td>Antilocapra americana</td>
<td>U.S.A. (CA)</td>
<td>E</td>
<td>E</td>
<td>7/1/7370</td>
<td>7/1/78</td>
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<tr>
<td>7. Snowshoe</td>
<td>Lepus americanus</td>
<td>U.S.A. (AZ, NM, WY)</td>
<td>E</td>
<td>D</td>
<td>7/1/7127</td>
<td>7/1/78</td>
<td>Data error</td>
</tr>
<tr>
<td>8. Distinct</td>
<td>Lepus americanus</td>
<td>U.S.A. (WY, UT)</td>
<td>E</td>
<td>D</td>
<td>7/1/7127</td>
<td>7/1/78</td>
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<tr>
<td>11. Snow bunting</td>
<td>Geospiza flavissima</td>
<td>U.S.A. (AZ, NM, WY)</td>
<td>E</td>
<td>D</td>
<td>7/1/7127</td>
<td>7/1/78</td>
<td>Data error</td>
</tr>
<tr>
<td>12. Black-footed</td>
<td>Psithyrus nigricans</td>
<td>U.S.A. (AZ, NM, WY)</td>
<td>E</td>
<td>D</td>
<td>7/1/7127</td>
<td>7/1/78</td>
<td>Data error</td>
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<tr>
<td>13. Bighorn sheep</td>
<td>Ovis canadensis</td>
<td>U.S.A. (AZ, NM, WY)</td>
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<td>D</td>
<td>7/1/7127</td>
<td>7/1/78</td>
<td>Data error</td>
</tr>
<tr>
<td>20. American black bear</td>
<td>Ursus americanus</td>
<td>U.S.A. (AZ, NM, WY)</td>
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<td>E</td>
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<td>22. Antelope</td>
<td>Antilocapra americana</td>
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<td>E</td>
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<td>12/20/74</td>
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</tr>
<tr>
<td>27. Antelope</td>
<td>Antilocapra americana</td>
<td>U.S.A. (NM)</td>
<td>E</td>
<td>E</td>
<td>12/20/74</td>
<td>12/20/74</td>
<td>Recovery</td>
</tr>
</tbody>
</table>

Compiled by the Competitive Enterprise Institute, Washington, D.C. For documentation phone (202) 331-1010 or fax (202) 331-0640.
The Tule Elk, a species of large elk found in the region of Mono Lake, California, was believed to be extinct until a small herd was discovered in the 1950s. Efforts were made to conserve this species, and in 1972, the Tule Elk were listed as an endangered species under the Endangered Species Act. In 1992, the National Marine Fisheries Service declared the Tule Elk recovered and removed it from the list of endangered species.

However, in 1998, the Tule Elk population was found to be in decline, and the species was restored to the list of endangered species. The recovery plan for the Tule Elk was outlined in a recovery plan document, which was developed in consultation with the California Department of Fish and Game and the National Park Service. The plan included efforts to increase the population of Tule Elk through the establishment of new populations in areas where the species was historically found.

The Tule Elk population continued to decline, and in 2002, the species was once again removed from the list of endangered species. The Tule Elk population was found to be stable and self-sustaining. However, in 2009, the Tule Elk were listed as a species of special concern under the California Endangered Species Act due to concerns about the species' long-term viability.

The Tule Elk population remains stable, but continued monitoring and conservation efforts are necessary to ensure the species' long-term survival.
Appendix IV

Internal FWS memo: evidence of conflating Habitat Conservation Plans with Recovery Plans
Acting Field Office Supervisor, Laguna Miguel Field Office

October 15, 1987

Anticipated proposed listing of Stephens' kangaroo rat

Recently, Peter Stine, Karla Kroger 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 arizonae) 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 Fallon 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 hazardous habitat protection strategy that has little chance of being successful over the long-term. The usual result is habitat loss with a vague commitment 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 proposed 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,
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 OBS 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 MCP 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 role on these issues will be far more successful in addressing our responsibilities for the Stephens' kangaroo rat under the Endangered Species Act.

cc: CODG, Sacramento, CA (Attn: J. Gustafson)