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S. HRG. 104–171

MORATORIUM ON THE LISTING PROVISIONS OF THE ENDANGERED SPECIES ACT

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HEARING

BEFORE THE

SUBCOMMITTEE ON
DRINKING WATER, FISHERIES, AND WILDLIFE

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 191

A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ENSURE THAT CONSTITUTIONALLY PROTECTED PRIVATE PROPERTY RIGHTS ARE NOT INFRINGED UNTIL ADEQUATE PROTECTION IS AFFORDED BY REAUTHORIZATION OF THE ACT, TO PROTECT AGAINST ECONOMIC LOSSES FROM CRITICAL HABITAT DESIGNATION, AND FOR OTHER PURPOSES

AND

S. 503

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MARCH 7, 1995

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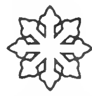

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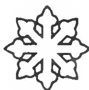

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CONTENTS

Page

OPENING STATEMENTS

Boxer, Hon. Barbara, U.S. Senator from the State of California 4
  Washington Post article, "Easing Protected Species Rules Intended to Gain Support" 5
Bond, Hon. Christopher S., U.S. Senator from the State of Missouri 7
Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 3
Kempthorne, Hon. Dirk, U.S. Senator from the State of Idaho 1
Lautenberg, Hon. Frank R. Lautenberg, U.S. Senator from the State of New Jersey 9
Lieberman, Hon. Joseph I., U.S. Senator from State of Connecticut 17
Reid, Hon. Harry, U.S. Senator from the State of Nevada 14
  Prepared statement 15
  New York Times article, "RX for Endangered Species Law: Empty Medicine Bottles" 16

WITNESSES

Babbitt, Hon. Bruce, Secretary of the Interior 26
  Prepared statement 81
  Responses to additional questions of:
    Senator Chafee 44
    Senator Reid 50
Gordon, Robert E., Jr., director, National Wilderness Institute 55
  Prepared statement 137
Hutchison, Hon. Kay Bailey, U.S. Senator from the State of Texas 10
  Prepared statement 78
Kraft, James, vice president, Plum Creek Timber Company 61
  Prepared statement 132
Perry, Richard, Commissioner, Texas Department of Agriculture 57
  Documents concerning species listing issues in Texas 109–119
  Prepared statement 105
Peterson, Ken, chairman, Board of Supervisors, Kern County, California 63
  Prepared statement 134
Snape, William, legal director, Defenders of Wildlife 59
  Prepared statement 120
Wilcove, David, senior ecologist, Environmental Defense Fund 54
  Prepared statement 126

ADDITIONAL MATERIAL

S. 191, "Farm, Ranch, and Homestead Protection Act of 1995" 73
S. 503, "Endangered Species Listing Moratorium Act of 1995" 76
Paper by Department of the Interior, March 6, 1995: "Protecting America's Living Heritage: Approach to Improving the Endangered Species Act" 88
Statements by:
  Far West Bulletin 149
  North American Equipment Dealers Association 147
  Society of American Foresters 141

MORATORIUM ON THE LISTING PROVISIONS OF THE ENDANGERED SPECIES ACT

TUESDAY, MARCH 7, 1995

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

The subcommittee met, pursuant to notice, at 9:32 a.m. in room 406, Dirksen Senate Building, Hon. Dirk Kempthorne (chairman of the subcommittee) presiding.

Present: Senators Kempthorne, Boxer, Bond, Lautenberg, Reid, and Chafee [ex officio].

OPENING STATEMENT OF HON. DIRK KEMPTHORNE, U.S. SENATOR FROM THE STATE OF IDAHO

Senator KEMPTHORNE. Ladies and gentlemen, I am going to hold the meeting until Senator Hutchison arrives.

I'll now call the meeting to order.

I'd like to welcome and thank all of you for attending this hearing this morning.

The Subcommittee on Drinking Water, Fisheries and Wildlife is meeting today to hear testimony on Senate Bill 191, "The Farm, Ranch, and Homestead Protection Act of 1995." S. 191 imposes a moratorium on listing of species, designations of critical habitat and the conduct of consultations until the Endangered Species Act has been reauthorized. However, I understand we may be asked to consider additional legislation as well.

I am pleased that we will hear this morning from Senator Kay Bailey Hutchison who shares my keen desire to bring balance and common sense to the Endangered Species Act. Reform of the Endangered Species Act is as important to my constituents in Idaho as it is to Senator Hutchison's constituents in Texas.

We intend to hear testimony also this morning from Interior Secretary Bruce Babbitt whom are we honored to have here this morning and from a panel of six Americans with experience working with the Endangered Species Act. Also, I understand that Douglas K. Hall, the Assistant Secretary of Commerce, will be available for questions should any be addressed to the National Marine Fisheries Services.

I know all too well why this legislation has been introduced. My own State of Idaho is suffering from interpretation and application of the ESA that is far beyond the original intent of Congress. As just one example of the economic influence of the law, Americans

pay for the effects of the Endangered Species Act every time they buy a home. Lumber prices have increased sharply from $239 a thousand board feet in the 1980's to $410 last year. A big factor in this price increase is the sharp decline in timber harvested in the Pacific Northwest. We used to harvest 10 billion board feet a year and now we harvest just 3 billion annually. There is no doubt that ESA restrictions on timber harvest is a huge factor in this decline.

To keep these figures in perspective, lumber price hikes have increased the cost of a single family home by thousands of dollars according to the National Association of Homebuilders. These price increases hit hardest at low-income and first-time home buyers.

While increased cost of materials is what all Americans pay when considering new construction, the real tragedy is the effect of the interpretation and administration of this law on individual Americans who own property. The way the law is structured, the principal conservation mechanisms were intended to built around Federal actions and Federal lands. The private property has become the focus in recent years.

What is the other side of this issue? This is the law that has contributed greatly to the successful recovery of the bald eagle, the brown pelican and the peregrine falcon. The ESA focused attention on the plight of these species. Captive breeding, the ban on certain kinds of pesticides, and the cooperative efforts by thousands of Americans helped bring these species back from the brink of extinction.

Yet people across America are angry and fearful about how the ESA is being administered. Some Americans have so much fear of this law that they have called for its total and outright repeal.

Why do people fear the Act that has been described as the centerpiece of American environmental law? Just last week in this very room, we held a hearing about a court's injunction stopping all logging, mining and grazing in six national forests. This ESA-inspired, court-ordered injunction placed 10,000 Idahoans at risk of losing their jobs.

It's not just Idaho or Texas that is suffering from the effects of the Endangered Species Act. Every State in the Union has species that are candidates for endangered or threatened status. Among the States represented by this subcommittee alone, California has 977 candidate species being considered for listing; Nevada has 234; New Jersey has 48; Connecticut has 23; Virginia has 151; North Carolina has 189; Wyoming has 122; Missouri has 87. The listing of these species and the resulting administration of the Act can mean loss of jobs and harm to local economies in every State of the Union.

What can be accomplished with a moratorium? I believe that in this highly charged atmosphere, it can create a climate more favorable for a thorough and thoughtful discussion rather one that is filled with fear and anger. I favor a moratorium that reduces the rhetoric and gives us a forum upon which to write a sound law. I support a moratorium on listings and critical habitat designations, but I do not support a moratorium on section 7 consultations because those types of discussions I believe should continue.

Let me make it very clear that a moratorium is not a substitute for complete review, reform and reauthorization of the Endangered Species Act. The Endangered Species Act is now overdue for reauthorization. There's widespread agreement that reform is needed in the ESA, so with science as the foundation, we can identify and make informed decisions.

With that, I will turn to Senator Chafee, who is the Chairman of the Environment and Public Works Committee. Senator Chafee?

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

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

First, I want to welcome Senator Hutchison here and Secretary Babbitt.

Mr. Chairman, as you say, this is an extremely important hearing and it addresses a serious and significant proposal presented by Senator Hutchison which is the imposition of a moratorium on a number of important activities under the Endangered Species Act.

Under the current law, the Department of the Interior lists a species as "endangered" when the best available scientific information supports a finding that the species is in danger of extinction. A "threatened" species is listed when the best available scientific information tells us the species is likely to become endangered in the foreseeable future. One of the most frequent criticisms directed at environmental regulations as a whole is the suggestion that they are not based on sound science. However, clearly, in this law, there is a requirement for the use of the best science. It is important to remember that the listing of a species sounds the alarm, the warning that our activities may eliminate another species from the complex web of life on earth.

Senator Hutchison and I have agreed that her bill, S. 191, be modified in several important respects and reintroduced as another bill, which is S. 503. It would establish a moratorium 6 months from the effective date, which would be today, March 7. In other words, when this bill passes, it is going to be retroactive to March 7, 1995. I think that is very important and I agree with Senator Hutchison on that point.

Second, we will limit the moratorium to listing determinations and critical habitat designations under section 4 of the Act. In other words, it will not cover section 7, the consultation section that you mentioned, Mr. Chairman.

I encourage the witnesses to comment on the effects of a 6-month moratorium on listings and designations of critical habitat, as well as to what would be the effects of an open-ended moratorium. In other words, suppose we had a moratorium that was in effect until the reauthorization of the Act, or some time in the future.

Like you, Mr. Chairman, I'm concerned that we not be diverted by a moratorium from the important task of reauthorizing the Endangered Species Act. Under your leadership, this subcommittee plans to move the reauthorization bill this calendar year. As everyone knows, I'm a long-time supporter of the Endangered Species Act.

However, I recognize that many of the criticisms of the Act are justified and new policies are needed. For example, we should provide better protection for the shrinking habitats on which a multitude of threatened and endangered species depend; we should provide options for private landowners that are more fair and more flexible; we need to make better use of scientific expertise and management abilities of State and local governments and other public and private organizations.

Yesterday, Secretary Babbitt announced a package of administrative reforms that address some of these issues. These reforms are an example of the considerable flexibility already available under the Endangered Species Act. I applaud and encourage what the Secretary has done and encourage him to continue to explore innovative alternatives for conserving listed species and their habitats under the existing statute.

Despite the criticisms we often hear, it's important to remember that the Endangered Species Act has fostered many successes. As you mentioned, Mr. Chairman, the dramatic recovery of species such as the American alligator, the peregrine falcon, the red wolf, the piping plover, are the result of the Endangered Species Act and I think it is important we remember these.

Although there are plenty of examples of a major conflicts between the savings of a listed species and proceeding with saving on one hand and proceeding with development on the other hand, there are still more examples where the needs of endangered and threatened species,on one hand, and human activity on the other hand, have been accommodated successfully.

Are the requirements of the Endangered Species Act causing some hardships? The answer is yes. Could we do a better job of minimizing these hardships and meeting the conservation needs of imperiled species? Absolutely.

So, Mr. Chairman, I look forward to working with you to address the problems with the Endangered Species Act.

Senator KEMPTHORNE. Senator Chafee, thank you very much.

Senator Reid, who is the ranking member of this subcommittee, will be joining us a little bit later this morning.

With that, let me ask the Senator from California if she has an opening comment and then we will also hear from the Senator from Missouri.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Mr. Chairman.

This is a very important issue to me as well. As a matter of fact, in my campaign, the issue was should we gut the Endangered Species Act or should we reauthorize it? I was in favor of reauthorizing it. My opponent said there was no need for it, so it was really a major issue. Therefore, I am so appreciative of this opportunity to comment on this issue.

I would ask, first, unanimous consent to place in the record this article that appeared in the Washington Post, "Easing Protected Species Rules Intended to Gain Support." It talks about what Senator Chafee, chairman of the full committee, referred to, that the Administration is trying to reach some common ground on this. I

think it is very, very promising, and it is one reason I'm against this moratorium; I think we're moving forward. So I'd ask that be placed in the record.

Senator KEMPTHORNE. Without objection, it will appear in the record.

[The article follows:]

[From the Washington Post, March 7, 1995]

EASING PROTECTED SPECIES RULES INTENDED TO GAIN SUPPORT

(By Tom Kenworthy)

The Clinton Administration, trying to rebuild political support for the beleaguered Endangered Species Act, announced yesterday it will propose new regulations giving small landowners relief from some of the more onerous provisions of the 1973 law.

"We're saying small landowners should be exempted from conservation burdens on the basis of fairness and biology," Interior Secretary Bruce Babbitt said. "Most species won't survive on small tracts of land, and it's not fair to tie up small landowners."

Under the plan, most activities on single-household tracts of land, or those affecting five acres or less, would be permitted to continue free of restrictions under the Act if the land in question harbors threatened species. The broad exemption would not apply if the land contains endangered species, which are defined as more likely to become extinct than threatened species.

The proposed relief for small landowners was announced as part of a larger package of principles outlined by the Administration that Babbitt and D. James Baker, undersecretary for oceans and atmosphere in the Commerce Department, said would guide Administration policy and its approach to Congress's upcoming review of the Endangered Species Act.

Baker yesterday called it a "more balanced and practical approach" to the task of preserving biological diversity. "We know this Act can work for threatened and endangered species," said Baker. "With these changes we are signifying our commitment to making the Act work for the human species as well."

Babbitt and other Administration officials have been trying to demonstrate that the Act, contrary to the assertions of political opponents, allows flexibility in balancing the economic needs of people and the biological needs of threatened and endangered species. To that end, the Administration has stepped up the pace of approving conservation plans that mix habitat protection and development.

The scramble to demonstrate that the Act is not a blunt instrument that costs jobs and tramples on private property rights has assumed new urgency with the election last fall of a Republican-led Congress that appears inclined to enact major changes when the law is reauthorized.

"A lot of what has been going on the last 2 years is the beginning of a silent revolution in how the legislation is administered," said George T. Frampton, Jr., assistant secretary of interior for fish and wildlife and parks. "People are not aware on the Hill that we have a program that . . . reconciles property rights with species protections."

Among the principles outlined by the Administration yesterday for how the Act should be rewritten and implemented were:

Using "sound and objective" science in making endangered species decisions, including the use of peer review panels.

Providing private landowners with clear guidelines about the activities permitted on land inhabited by threatened and endangered species.

Giving States more management authority over endangered species, including approval of habitat conservation plans covering entire States.

At the same time, however, the Clinton Administration yesterday said it would fight any legislative attempts to gut the law.

Senator BOXER. Mr. Chairman, I agree with the statements of the full committee chairman and, as I understand, your statement last week that the objective of the subcommittee is to reauthorize a strong and effective Endangered Species Act. I do look forward to working with all parties on both sides of the aisle to make sure that we give this a careful and thoughtful examination so that we have increased efficiency and approved protection for our planet's many species.

Mr. Chairman, I believe deeply—as I believe the majority of Americans do—that our Nation's long-term prosperity and the equality of our citizens' lives are linked to the health of our environment. Effective environmental laws make good economic sense. I often say, if you can't breathe, you can't work, and we know that's obviously true. When you look at what happened in Eastern Europe when the walls came down, they really couldn't even begin until they had cleaned up some of the messes that had come before. So we must protect the diversity of life in order to leave our country in a survivable condition for future generations and an effective Endangered Species Act is critical to our success.

Let me say this. For California, this is a very important issue. We are world famous for our natural beauty and diversity which is the basis of our economic vitality. We have the largest number of listed threatened and endangered species in the country and the numbers are growing. Of the more than 100 species currently proposed for listing, more than half, more than half, are from California.

Mr. Chairman, the Endangered Species Act has worked. I am not saying it is perfect. I am saying it has worked. Under the Act, many threatened and endangered species have been stabilized and several have made remarkable comebacks from the brink of extinction. Where would the California condor be, the California grey whale, and in many States, where would the bald eagle be, our national symbol, where would it have been without a strong Endangered Species Act.

I want to say that in California, we lost the grizzly bear and California once had so many grizzly bears that more than 200 places are still named after them, but these magnificent animals went extinct because we failed to act in time. I wonder what would have happened if we'd had this Endangered Species Act—we would have had the grizzly bear. If we didn't have it, we wouldn't have the bald eagle. It's pretty clear. This isn't some ideological argument; this is an argument based on fact. Today, the California grizzly is gone forever, a constant reminder of our ignorance and irresponsibility.

Mr. Chairman, I want to work with you and the committee members, and of course, other Senators who are interested in this to ensure that our reauthorization process is careful and thoughtful. Recent actions taken by the House concern me greatly. We must not legislate by anecdotes. As we know, all too often, anecdotes only

tell part of the story. I could give you one on one side, you could give me one on another. We need to be better than that.

I want to give you an example. Critics of the Act charge that prohibitions against disking to clear brush within the habitat of the Stevens kangaroo rat led to the destruction of homes and property during the California fire, the largest of 21 wildfires that stormed Southern California in 1993. The Congress sought the truth and enlisted the GAO to study the case. The GAO report concluded that endangered species protections did not cause the destruction of homes or other structures.

Mr. Chairman, we must find the truth in this debate and craft positive approaches to these serious problems. During this debate, opponents of Endangered Species Act will tell us that it is a law out-of-balance which pits common people against exotic species supported by a runaway bureaucracy. This debate should not really be about humans versus other species, after all, we're all God's creatures and must not be arrogant or we will lose in the end. The ones to lose most will be our children. The Endangered Species Act is about leaving our grandchildren and their grandchildren a world that can support them. A species in decline is a symptom of larger environmental problems that will surely lead to problems for all of us. I think it's important.

Somebody makes fun of some species and they say, what's the difference about that species? God created that species and God created us, and we're all joined together. We must establish public policies which ensure that we don't destroy what God has created. The Endangered Species Act can work better if people come together to make it better and I know in this committee, we can do that with your leadership and the leadership of Senator Chafee.

I believe it is foolish to delay taking action while problems go unresolved. That is why I strongly oppose this moratorium. A moratorium is an admission of failure and we must not fail in this endeavor. We must not take an action which will cause further decline of our most critically endangered species. Why should we wait months and months while we lose flora and fauna that may cure cancer and Alzheimer's? We forget that the most promising cures of these diseases exists in those plants. Why should we wait while species die off?

Mr. Chairman, we must work diligently to reauthorize the ESA, to fix it, to make it work for my communities and for your communities. A moratorium is a cover word for killing, killing these species. Let us not admit failure, let us get to work and reauthorize the Endangered Species Act and make it better.

Thank you.

Senator KEMPTHORNE. Senator Boxer, thank you very much.

Senator Bond?

OPENING STATEMENT OF HON. CHRISTOPHER S. BOND, U.S. SENATOR FROM THE STATE OF MISSOURI

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

I congratulate you and the chairman of the full committee and the ranking member for moving expeditiously on this matter. I welcome the author of S. 191, the distinguished Senator from Texas before this subcommittee.

Senator Hutchison and I co-chair a Regulatory Relief Task Force. After review and consultation, the members of the task force determined what were the No. 1 to No. 10 top regulatory burdens on Americans—individuals, businesses and communities. The Endangered Species Act made No. 1 on the list.

Too many communities, too many individuals, too many areas, too many enterprises have a spotted owl type problem. My State of Missouri has a spotted owl type problem; it happens to be the pallid sturgeon. The Federal Government, in an experiment to improve the breeding habitat or the sex life of the pallid sturgeon, has proposed we increase spring flooding on the banks of the Missouri River and reduce the flows from upstream reservoirs during October and November, a time when the inland waterway system depends on these flows for reliable, cost-effective movement of grain and other commodities to deepwater ports for export. The plan is Government-imposed flooding and Government-imposed destruction of U.S. producers' lifeline to both foreign and domestic markets. This, I'm afraid, is an all-too-typical case where the benefits of the Government-chosen recovery plan are theoretical, but the economic ruin is imminent. I believe we can look and find better ways of achieving the goals without the burdens that would come along with the plan.

A lot of people tell me in Missouri, they don't want the Government to provide for them or guarantee them a job; they would be satisfied if Government simply stopped needlessly eliminating jobs they already have. They want the species protection law reform also to account for the economic and social needs of human beings. They want reliable science and they want to see some balance and common sense injected into a law whose fundamental premise is widely supported. This is Missouri's endangered species horror story.

I don't feel it's necessary to demonize the law to justify changing it. Clearly, this law needs to be changed. I believe that has been recognized by the Department of Interior which has proposed changes. Last week, Assistant Secretary Frampton told the House Appropriations Subcommittee, "We know the Endangered Species Act has problems, we are working to solve those problems." Yesterday, the Department announced a series of fundamental changes. I applaud the Department for its willingness to recognize the problem and to be part of the effort to reform the Act, but frankly, it is a recognition that changes are needed.

The distinguished chairman has stated his desire for an expeditious review and amendment of the Act as part of reauthorization. That brings us to the purpose of this moratorium.

Mr. Chairman, somebody—maybe from my State, maybe from someplace else—said, "When you've gotten yourself into a deep hole, the first thing you have to do is stop digging." This is how I characterize the bill being introduced by Senator Hutchison—I'm pleased to be a cosponsor of it. The Senator from Texas wants to restrain the Government's shovel long enough to draft a reform blueprint with the concurrence and involvement of the American people. I think it prudent, Mr. Chairman, to give the American people a breather from the burdens of the Act until Congress, the Administration, environmental groups, and the American people have

the opportunity to let democracy work its will on the larger task of reauthorization.

I congratulate the sponsor of the bill and appreciate the chairman's willingness to hold these hearings. I look forward to working with the chairman, my colleagues, and with the Administration as we do the important and difficult work of reforming the underlying law.

Thank you.

Senator KEMPTHORNE. Senator Bond, thank you very much.

Senator Lautenberg?

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman and members of the subcommittee.

My commendation as well for moving on this proposed legislation. I'm pleased to take part in a review of S. 191, the distinguished Senator from Texas' bill which would put a hold on administration of the Endangered Species Act until it's reauthorized.

Mr. Chairman, I fully agree with the statement that you made at the hearing last week when you said, "Let's stay away from the polarization and let's make it work." That's the general reference to actions that we may take here. I think it applies. We need to seriously review what's wrong with this Act, what's right and what we can do to make it better.

I look forward to working with you throughout this process in the spirit of full cooperation, but Mr. Chairman, I am concerned about the impact of S. 191 and the effect it could have on endangered and threatened species and on this subcommittee's thorough review of the Act itself. Placing a moratorium on the listing of endangered and threatened species and on the designation of critical habitats will not make the problems go away.

The listing of an imperiled species is necessary to ensure that it receives the protection of the Endangered Species Act. Each time a species is listed, it sends out a warning signal that some part of the ecosystem is in danger. There are currently 118 species that have been proposed for ESA listing. This bill would render us powerless to protect the future of these 118 threatened species.

Mr. Chairman, the process of listing endangered species is a necessary step in maintaining our fragile ecosystems. It's critical for medical and scientific progress. I think it's also important in defining our role as humans in the ecosystem in which we live.

S. 191 doesn't do anything to further these goals. Passing this bill would mean putting our heads in the sand for a few years and when we come up for air at the end of that period, where would we find ourselves—certainly, in my view, much worse off than we are today. Our endangered species will still be endangered; the cost of recovery will simply have increased and we will have learned a very basic and dangerous lesson. The problems go away just because you ignore them.

Mr. Chairman, I want to work together in a bipartisan manner to implement real reforms in the Endangered Species Act and I understand that the Administration has already begun to implement reforms. I look forward to hearing from the Secretary of Interior on

how these reforms are working. I'm particularly concerned about the message that S. 191 would send to landowners. Instead of saying that we're going to work together to find solutions, this bill says to them, we have decided to ignore the ecosystem for the next few years, so don't bother working to improve endangered species protections. Sure, we may be back in a couple of months or a couple of years, and surely, this situation will have deteriorated by then and surely, recovery will be more expensive, but we'll worry about it when the time comes because right now we're not thinking in the long term.

I understand this bill is part of a legislative response to a perceived desire of the American people to put a halt on burdensome regulations, but a recent poll fund that 77 percent of the Americans want to maintain the Endangered Species Act or even to strengthen it. One only need look at the news and see the questions that have arisen about the sudden death of lots of bald eagles; I watch with interest what happens when we try to protect disappearing fish species; and how anxious everybody gets when we see the decline in the supplies of basic fish like cod, striped bass or rockfish, as it's known. Everybody starts to worry about that and rightfully so. We may be cutting off the very opportunity to feed ourselves and to take care of the needs of future populations and also because I don't want to cheat my grandchildren out of some of the wonders and some of the opportunities that I had as a child growing up.

The general public understands that the Endangered Species Act enables us to take proactive steps that address threats to species before the decline is irreversible. They want to save endangered species before key components of our ecosystem are relegated to the walls of natural history museums. We have a moral responsibility to make sure that doesn't happen. I hope that my colleagues will think long and hard about the dangers inherent in this action and that we can work together to reform the Endangered Species Act and not to retard it.

I thank you very much.

Senator KEMPTHORNE. Senator Lautenberg, thank you very much.

With that, I'd like to invite Senator Hutchison to come forward and give us the benefit of her thoughts concerning S. 191 and S. 503, the bills she has authored.

STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman.

I think the interest shown by the participation in the hearing is indicative of how hard-fought the issue is going to be and how important it is that we look at every aspect of reauthorization of the Endangered Species Act. I think that makes it even more important that we pass S. 191 because we need to take a time out as we discuss these major issues to make sure that nothing happens under the clearly flawed, I think, Endangered Species Act implementation. I hope that we can all come to an accommodation of a reauthorization that would allow us to go forward without further conflicts as we have seen.

I'm pleased that Secretary Babbitt has now joined my call for legislative overhaul of the Endangered Species Act. I'm certainly willing to listen to his suggestions. He is correct that small landowners should not bear the burden of protecting species, but neither should ranchers and farmers. Endangered species protection, if it is a worthwhile goal for society, then society at large, not just the men and women who produce our food and clothing, must fairly share the burden and the cost of species protection.

Reauthorization of the Act is made more difficult by the heated public debate over individual listings of species and by overzealous enforcement of the Act by the Fish and Wildlife Service. To make a responsible debate of a reauthorization possible, it is time to call a "time-out" on further listings.

In January, I introduced a bill, S. 191, to put the moratorium on further listings with the cosponsorship of Senators Lott, Burns, Cochran, Gramm, Grassley, Inhofe, Kyl, Nickles, Pressler and Bond. In trying to meet the concerns of members of this committee, yesterday, I introduced an alternative version that limits the moratorium to 6 months from today and omits the moratorium on the consultation mandate. This assumes that we will move forward on a quick basis so that the dates that we have set in the new bill do not become really unfair to our intended compromise of a 6-month moratorium.

The Federal Government will only be able to protect species under the Act with proper direction from Congress and with full support of the public. By restricting land and water use through additional listings, the Fish and Wildlife Service is undermining public support for the Act and is actually harming the cause of protecting species from extinction.

My bill will permit reauthorization debate to go forward without further unconstitutional erosion of private property rights or further damage to the economy and society of affected areas. Right now, the Fish and Wildlife Service is proposing to list a species in the Panhandle of Texas, the Arkansas River shiner, that has been used for fish bait.

The listing of the Arkansas River shiner as an endangered species in Texas, Oklahoma and Kansas is not necessary. There is a shiner population in the Pecos River of New Mexico that is not at risk and others may be established. With separate populations, the shiner is not in danger of extinction. Its listing would subject ground water and surface water in the Texas Panhandle, Oklahoma and Kansas to control by the Fish and Wildlife Service.

Listing the shiner could have a profound impact on the Panhandle's surface and ground water supply. Water from the Ogallala Aquifer serves the citizens of Amarillo and the surrounding areas. If the shiner is listed, use of the aquifer could be cut back, causing severe difficulties to the region's agricultural economy. Similarly, use of surface water is essential to the farming communities surrounding Amarillo and Lubbock; limitations on surface water use could also harm their economies.

Water is scarce in the Panhandle. We cannot afford to give fish bait more protection than people, but if the shiner is listed, it will have more right to the water than the Panhandle farmers and ranchers and the people of Amarillo, TX.

My bill also puts a moratorium on the designation of critical habitat so that property owners won't lose control of their land. Designating critical habitat puts unjust limits on the use, market value and transferability of property. The stigma of critical habitat protection should not be imposed by a government that is claiming to protect property as a constitutional right.

Last year, the U.S. Fish and Wildlife Service, which enforces the Endangered Species Act, proposed that up to 800,000 acres from 33 Texas counties be considered for designation as critical habitat for the golden-cheeked warbler. This action held up land transfers, construction, home and business lending in an area the size of Rhode Island. It also made other environmental problems worse. Landowners couldn't get permits to cut and clear juniper trees—which are known as cedar in Texas—even if the trees were on rangeland, rather than in the creeks where the Warbler lives.

These cedars use tremendous amounts of water, the same water that could recharge the Edwards Aquifer and protect the fountain darter and four other endangered species that live in two springs that flow from the Edwards Aquifer. Stopping cedar clearing also increased pollen discharges and causes a disease known as "cedar fever" in the hill country. This cedar tree pollen is dispersed through the air and it looks like smoke. Thousands of people in Central Texas are allergic to the pollen and lose work from headaches, fevers and nasal congestion. Cedar control is necessary not just for land use, but for public health too.

After the public outcry forced the Interior Department to drop its plan to consider 800,000 acres in Texas for critical habitat designation, Texas and Southwestern Cattle Raisers Association released a study of the impact of endangered species concerns on property values in Texas. The study found that over the last 5 years, the 33 counties most affected by endangered species lost $5 billion in rural land value, while the State, as a whole, lost $23 billion in rural land value. The lost in value in the 33 counties accounted for 22 percent of the State loss in land value. However, such counties have only 13 percent of the State's land.

Land values in all Texas counties were affected by interest rates, grain and livestock prices, in addition to endangered species. But the fact that the loss in land value in the 33 affected counties exceeded the average loss in value for the rest of the State is one objective measure of the impact of endangered species listings on rural land.

The failure of critical habitat designation plan didn't stop Fish and Wildlife from trying. It then proposed a habitat conservation plan for Travis County that would have permitted owners of single family, residential lots to pay $1,500 to apply for a permit to construct their home. Higher fees would have applied for development by the acre; Fish and Wildlife thought that this was a good deal because it was less expensive than the legal fees landowners were incurring in fighting for their own private property rights. They really were holding people up who bought a lot to build a home by ransoming their constitutional rights.

It's no surprise that in the Texas and Southwestern Cattle Raisers study, rural land values dropped more in Travis County than in any other Texas County, $1.3 billion in the past 5 years. The

Fish and Wildlife Service counts nine endangered species in Travis County and is proposing to list the Barton Springs salamander to round it off to ten.

I'm pleased that Secretary Babbitt stated yesterday that "Small landowners should be exempted from conservation burdens on the basis of fairness and biology. Most species won't survive on small tracts of land and it's not fair to tie up small landowners." I hope that means that we won't see the Interior Department extorting funds in Travis County anymore.

With about 300 candidate species in Texas, including 11 flies and 12 beetles, landowners in my State may face problems similar to the golden-cheeked warbler problem again if new species are listed. A moratorium will stop these species from being listed until after Congress enacts new listing standards or 6 months from now. No further losses of property rights or control of water supplies should occur until Congress can put common sense back into species conservation.

I am discouraged to hear that some people may be planning to cast the endangered species debate as an effort to help only large landowners. I don't need to talk about constitutional rights to tell you how wrong that is. In Texas, 3,000 people turned out to talk about critical habitat designation in towns where no more than 1,000 people live. That's not the turnout you get for an issue that only affects the rich.

Rick Perry, our Texas Agriculture Commissioner, has heard from thousands of farmers about the effect of the Endangered Species Act on farmers. He's here today and will be able to tell you what it means on a local level for the people who produce the raw materials for our food and clothing.

In sum, Mr. Chairman, I have not chosen to talk about what I think should be in the Endangered Species Act reauthorization today. I hope I will be able to do that when we have a bill on the table. The 20 years of listings have achieved the primary goal of protecting essential species from extinction. We now have more than 900 species listed. The Fish and Wildlife Service has had adequate time to carry out its primary responsibilities under the Act. It has overzealously enforced the Act by expanding the definition of a harm beyond Congress' intent, listing species without regard to water supplies necessary for the health and safety of the people and proposing habitat without taking economic concerns into account unless it was forced to do so by the people.

Congress, with its legislative and oversight powers, delegates enforcement authority to administrative agencies. When those agencies lose sight of Congress' intentions and lose their common sense, only Congress and the President can set them straight. Now is the time for Congress to review their actions and exercise its legislative power to revise their instructions. Let's call a time-out on listings until we can put endangered species protection back on track.

Thank you, Mr. Chairman.

Senator KEMPTHORNE. Senator Hutchison, thank you very much.

Senator Reid has now arrived. Before we go to a round of questions, let me ask Senator Reid if he has an opening comment?

OPENING STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Thank you very much, Mr. Chairman. I apologize for being late but it was unavoidable.

I appreciate your working with us on the series of hearings on this issue, I'm grateful to you in that regard.

Mr. Chairman, today's New York Times forces me to divert from my written statement. I grew up in Nevada and one of the families that lived close to us was raised by a widow. They were all tough kids, there were eight of them. These boys were the toughest kids in the neighborhood and they became close friends. I played ball with them all through school.

As I became an adult and we married, my friend, Don, the second oldest boy in the family, had this son he was so proud of, a little boy who was a good little baseball player. He hit a ball that should have been a home run and he was coming around third base, and when he slowed down and didn't run as fast as his dad thought, his dad jumped all over him. Well, this little boy had leukemia they found out shortly thereafter and he died quick, real quick.

In the days when my children were young, childhood leukemia was a death sentence for children. It's not now. Why? One of the main reasons is they found a plant that cures childhood leukemia, the periwinkle bush. I don't know what a periwinkle bush is but I know that if Don Vincent's little boy had had the information we have today, he'd be alive now.

I don't know really what we're doing here, Mr. Chairman. We had one bill that we were going to talk about, S. 191, and my understanding is that there's been a new bill, S. 503, that the Senator from Texas has introduced and that the hearing is now on this new bill, is that right?

Senator KEMPTHORNE. That is correct. I think Senator Hutchison's testimony and the questions will clarify that but she has made some modifications to S. 191.

Senator REID. My statement, which I ask unanimous consent of the committee be made a part of this record, indicates that we need to do something about the Endangered Species Act. In fact, this committee recognized it last year. Senators Baucus, Chafee and Graham worked very, very hard on this and we got a long ways down the road to revamping the Endangered Species Act. I acknowledge to the Senator from Texas, we need to update and work on the problems we have had with the Endangered Species Act.

I have to tell you, Mr. Chairman, I think that a flat-out moratorium is the wrong way to go on this. I'm willing to work with the Senator from Texas and anybody else to reauthorize the Endangered Species Act, to make it a more responsive piece of legislation, but I am going to have to have a lot more information than I have now as to why we should have a moratorium. I think it's the wrong way to go, I think it sends the wrong message to everyone, including those people who have problems with Endangered Species now like we have in Southern Nevada where we have listings already. It's not going to help those people. All it's going to do is send a wrong message to everyone.

I'll be happy to work with the majority the best that we can on this but I think we're headed in the wrong direction with a moratorium.

I would ask again unanimous consent that my full statement be a part of the record.

Senator KEMPTHORNE. Without objection.

[The prepared statement of Senator Reid follows:]

STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, I welcome the opportunity to begin the process of moving forward to reform and enhance the overall effectiveness of the Endangered Species Act. Not only do I believe that reform is essential, but I also believe it must be done as soon as possible. Landowners all across my State of Nevada, from all types of industries, homebuilders as well as homeowners voice a recurring theme—we need reform.

Clearly we must do more to ensure that the section 4 listing process is based on sound science, make the consultation and HCP process more workable and efficient, and provide greater flexibility to achieve the laudable goal of preserving species at less cost to landowners. Fortunately, under the capable leadership of Senators Baucus, Chafee and Graham, we as a committee made considerable progress last year in moving toward real reform. we had a number of hearings that focused on ways we could foster conservation of threatened and endangered species on public as well as private lands and explored ways to create economic incentives for landowners.

The Administration, in response to its increasing awareness of the shortcomings of the Act, yesterday published a 10 point proposal to improve the Act by making it more fair, cooperative and scientifically sound. I hope Secretary Babbitt will highlight some of these proposals during his remarks today.

The point is clear. All parties agree. We must reform this Act, and the sooner the better. But this does not mean we should seek a quick fix. Instead we should harness the current, almost universal support for reform, and use it to move toward comprehensive reform. Because I believe this, I have some serious concerns about S. 191 which seeks to amend the Endangered Species Act by imposing a moratorium on section 4 listings and section 7 consultations.

I hope this hearing will help us answer some basic questions I have about S. 191.

Does this bill achieve the goals of making the Act more efficient, more workable and less burdensome, or is this just a bandaid that masks the bigger underlying problems, while letting the species problems get more acute and more severe? Will this moratorium ultimately end up costing the taxpayers more to recover a species that is further down the road to extinction than it would have been in the absence of this moratorium? Do we want to take away the section 7 consultation, a part of the Act that everyone seems to approve of? If we do this, doesn't this force an agency or a private landowner to go through the HCP process—a longer, more time consuming, more expensive and more cumbersome process.

Does this bill give relief to the parties that we intend to help? The moratorium of listings under S. 191, as I understand it, would not give relief to landowners who have specifies on their land that are currently listed. Instead, it would only give relief to landowners who may have species that may be listed in the future. does the bill take away the opportunity for implementing an emergency listing process as provided in section 4? I am very concerned that we be able to maintain this provision, and would appreciate the panelists addressing how they view the legislation impacting on this issue.

To sum up, I have serious concerns over this bill. I am concerned that the bill will worsen the risk of species extinction, make recovery more costly and delay meaningful comprehensive reform. Because of this, I hope that the committee will continue to move forward on more comprehensive legislative reform.

Senator CHAFEE. Mr. Chairman, could I just make one point?

Senator KEMPTHORNE. Senator Chafee?

Senator CHAFEE. Senator Reid and I have discussed this and the original bill that Senator Hutchison had was a moratorium until the Act was reauthorized which was an indefinite point. She's modified that so that it is a 6-month moratorium, starting from March 7, i.e., today. So it's not a major change from the thrust of the Act as you and I discussed. Indeed, in many ways I suppose you could call it a cutback from the Act that you and I discussed.

Senator HUTCHISON. Mr. Chairman, if I could just respond to that?

Senator KEMPTHORNE. Senator Hutchison?

Senator HUTCHISON. It's certainly an accommodation to the concerns of the chairman and other members of the committee on the minority side. I am trying to work with the committee, Senator Reid, and that's why I modified the bill to try to accommodate some of the concerns that the chairman and the minority side had.

Senator REID. I would ask unanimous consent that this article that I referred to in the New York Times where they refer to the periwinkle bush as curing childhood leukemia be made a part of the record?

Senator KEMPTHORNE. Without objection. I also place in the record a statement by Senator Lieberman.

[The article and statement by Senator Lieberman follow:]

[From the New York Times, March 7, 1995]

RX FOR ENDANGERED SPECIES LAW: EMPTY MEDICINE BOTTLES

(By Natalie Angier)

Like a songbird twittering gamely in a thunderstorm, a group of environmentalists last week announced the start of a nationwide campaign to help keep the Endangered Species Act from having its wings clipped or its feathers plucked.

Speaking at a news conference here, members of the Endangered Species Coalition, an alliance of 188 environmental, scientific and civic groups, described their Medicine bottle campaign, an effort to urge Americans to send empty medicine vials to President Clinton or their Congressional representatives. The gesture is intended to underscore the importance of plant products and other wild sources to the Nation's pharmaceutical offerings.

Speakers pointed out that almost half of the medicines and treatments used today can be traced to plants, fungi and extracts from chemically endowed animals like toads and fireflies. The Madagascar periwinkle has yielded what amounts to a cure for childhood leukemia, they said, the Pacific yew tree has provided Taxol, a treatment for breast and ovarian cancer, and nearly all prescription antibiotics were isolated from molds and microbes.

Pleading against changes to the Endangered Species Act proposed in the Republicans' Contract With America, Dr. Thomas Eisner of Cornell University, a renowned biologist and chairman of the coalition, asked for what he called a "contract with nature."

"Nature is a vast unknown," he said. "The most valuable data in the bank is as yet untapped. The irony of the Endangered Species Act is that most species can't be listed on it, because they have no name yet."

As an example of the potential of "the gene bank of nature," he passed around a pungent sample of Lake Placid mint, once called scrub mint for its weedlike ap-

pearance. Last year Dr. Eisner and his colleagues discovered that the plant was rich with a natural insect repellent that deterred swarms of ants. Just within the last couple weeks, he said, he and his co-workers, Dr. John Clardy and Dr. Ignacio Chapela, found that the roots of the plant contained a powerful anti-fungal agent with potential clinical value.

The need for such compounds is dire, Dr. Eisner said, particularly for those with AIDS and other immune deficiencies, who are prey to many devastating fungal diseases that current drugs cannot salve.

The Lake Placid mint, he said, is found only within 300 acres of a protected biological station of central Florida, where he does research. Were it not for its privileged position, said Dr. Eisner, the little plant and its promise might have disappeared long ago.

Also speaking at the meeting was Elaine Forman, chairwoman of the World Hunger Committee, who in May 1991 learned that she had ovarian cancer and was told she had 6 months to live. Conventional chemotherapeutic drugs failed to help her, but upon taking Taxol she went into remission and has now been symptom-free for 2 years. "Were it not for Taxol, I probably would not be alive today," she said. "The drug gave me back my life."

Statement of Hon. Joseph I. Lieberman, U.S. Senator from the State of Connecticut

Thank you Mr. Chairman, for this opportunity to talk about what I regard as one of the most important environmental laws in this Nation. I am opposed to S. 503, the proposed moratorium on implementation of the Endangered Species Act, even with its limits on scope and duration. To the extent that opportunities exist to improve the Act, and I believe they do, my strong preference is to do so through full legislative reauthorization, such as we attempted in the last Congress through the Baucus-Chafee bill, S. 921.

I also believe we should work closely with Interior Secretary babbitt and NOAA Administrator Baker in this process to benefit from lessons they have learned over the last 2 years of implementing the Act. Secretary Babbitt provided "Guideposts for Reauthorization" in his recent announcement that I believe are essential to our deliberations.

In addition, we should encourage administrative improvements, such as those announced recently by Secretary Babbitt, as a thoughtful way to make the law work better without legislation. These flexibility measures provide a major, but carefully considered framework for change. They also demonstrate that the existing Act has far more innovative potential than most of us realize. Some of the administrative actions announced by Secretary Babbitt represent starting points that may require further development or legislation to realize their full potential. Other fix known glitches. We should foster and learn from this process of continuous, administrative improvement.

By devoting this committee's limited time to reauthorization instead of a moratorium, and by working closely with Secretary Babbitt and Administrator Baker, we will achieve the most expeditious and effective resolution of Endangered Species Act issues. I am convinced that a moratorium will not address the issues. I am convinced that a moratorium will not address the real changes needed under the Act, and instead will become a distraction with severe and unintended consequences. We cannot afford to waste time in this manner.

The Endangered Species Act is truly the last line of defense for many wild plant and animal populations in this Nation—and many other places on earth. It is, necessarily, one of our strictest environmental laws. Unfortunately, many species have not survived even with this level of protection. I far too many cases, Federal laws

or other actions intended to prevent species' decline have been inadequate, leaving the Endangered Species Act as the last resort, the emergency room. The solution to overflow in this emergency room is not to shut it down. This Act simply must not fail. The consequence will be extinction of large numbers of plants and animals with untold values.

The need for protection of rare plant and animal groups are simply enormous. According to the U.S. Fish and Wildlife Service (FWS), almost 4,000 populations are candidates for listing as "threatened" or "endangered". As of February 9, 1995, all necessary scientific and legal requirements have been completed for 296 of these; they are ready for immediate listing. Despite this backlog, only about 800 species have been listed nationwide, and 600 worldwide since the Act's inception—again, compared to almost 4,000 candidates.

This list is large for three reasons. First, the other creatures we share this earth with face absolutely unprecedented threats from our own activities. Our human demands have never been greater. Our lack of attention has never been costlier. Second, too often we have not supported the Act adequately with funding and administrative support. Only 12 species were listed during a 2-year periods in the Reagan Administration, including a small crustacean in the National Zoo. Countless others languished in the process, and the list kept growing. Third, too often we have failed to exercise preventive measures that would have nipped population declines in the bud for a fraction of the cost of recovery. Many Federal resource management laws or other programs have not done what we intended to address population declines, and we now are paying the price. An ounce of prevention is truly worth a pound of cure.

The good news is that a strong, smart and comprehensive Endangered Species Act can help resolve each of these problems.

When one considers the disasters we often start with, problems in implementing the Endangered Species Act have been remarkably rare, and successes remarkably common. We have a positive track record to build on. Where opportunities for improvement exist, I am committed to balanced, effective approaches. But there are far too many patients in the emergency room, and far too many waiting, to impose a moratorium. Instead, we should devote our time and energy to reauthorization of a strong Endangered Species Act, and implementation of administrative changes to address real and immediate needs.

We are all trustees of these precious resources, here for a limited time, and responsible for the next generation. Let's join together in the most effective and responsible way to meet this challenge.

Senator KEMPTHORNE. Ladies and gentlemen, let's begin with questions. Let's go ahead and use the timing clock.

Senator Hutchison, I've heard comments from some individuals suggesting that the real intent of a moratorium is to be the permanent solution with regard to the Endangered Species Act and that as long as we leave that in place, we've effectively dealt with the Endangered Species Act. Would you just comment on that? You've stated it, but perhaps restate what your intent is?

Senator HUTCHISON. Yes. Mr. Chairman, I believe the Endangered Species Act is a worthy Act. I think that the regulators have gone beyond common sense and we need to take the time and make sure that we don't throw out the possibility of saving periwinkle bushes and grizzly bears and condors. There is a big difference between eagles and condors and grizzly bears and bait fish and concho snakes and kangaroo rats. I think that we have to put some common sense into it and I think we need to take the time to do it.

The reason that I have introduced the moratorium bill is so that we will not continue to have these absurd uses of the Act during the time that we are clearly going to change some of the intentions of the Act. So I hope that we can come out with a bill that will get 100 percent support of the U.S. Senate, but until we do, I think it's very important that we not continue to allow bait fish to hold up the water supply of an entire region of our country. I think we can take the time and debate and I think we should take the time and give everyone a say in the debate on this issue.

Senator KEMPTHORNE. Just for clarification, your new proposal would put into effect a moratorium for 6 months effective as of March 7, and also your new proposal does not extend the moratorium to the section 7 consultation process, is that correct? Could you give me just your thoughts on that?

Senator HUTCHISON. Yes. It doesn't put a moratorium on consultations, but it puts a moratorium on the consultation requirement in the original bill. We don't mind if consultations continue, that's not the real focus of the bill. So we are certainly accommodating of some of the fears on that one.

Senator KEMPTHORNE. All right.

Senator Chafee?

Senator CHAFEE. I have no questions.

Senator KEMPTHORNE. All right.

Senator Boxer?

Senator BOXER. Thanks, Mr. Chairman.

Senator Hutchison, you're moving in the right direction. Maybe in a couple more weeks we won't have any moratorium whatsoever. I'm very pleased to see that we're getting this moratorium down, you've excluded section 7, but I have to say this. I find it very hard to understand why you would find the need to do this.

You have in the chairman of this subcommittee someone you obviously trust and work with; the full committee chairman is of your party and has a long history in working with both sides. Do you not trust this committee to come to grips with this problem? Should we do a moratorium on every single Act that's up for reauthorization?

Senator HUTCHISON. Senator Boxer, it's not the committee that is in question here; it is the people that we have designated to implement our decisions that I think have gone beyond what Congress intended. It is not a moratorium on anything that the committee might do; it's a moratorium on the Fish and Wildlife Department going beyond what I think Congress intended and what I believe Congress will reauthorize in the future.

Senator BOXER. I understand your point, but in essence, it is this committee and others in the House side, and eventually a conference committee, which is going to debate just those very questions. I think if every Senator just decided they didn't like a bureaucrat and decided to put a hold on legislation, I don't think that's the right way to go about it, but that's a disagreement that we have.

Senator HUTCHISON. Well, Senator Boxer, there are going to be moratoriums requested for many of the bills that will be up for reauthorization.

Senator BOXER. I understand. I would hope that those do not pass over here on this side, but it's a reasonable debate for us to have.

Do you know how many species would be stopped from becoming listed by your moratorium?

Senator HUTCHISON. Yes. There are 118 species that could ripen at any moment; 24 have just been added to the "preliminary findings" level so that they could go to the "proposed" level, so that's where we are, a total of 300. You know, there are several variations. There are candidates and then there are the findings and there are the proposed, and then there are the listed.

Senator BOXER. What is the grand total that would be held up by your moratorium, approximately 300?

Senator HUTCHISON. Well, if we don't have a moratorium, you have 300 that could go into the next level. You have 118 that could go immediately into listings.

Senator BOXER. So it's a pretty broad reach.

I wanted to comment on your point that you made when you said you think the Act is important and you said there is a difference between the bald eagle and the condor and the grizzly and something like the kangaroo rat. I wanted to make a point here because these species that are so grand that we all agree should rightly have been saved live in an environment that is quite connected. If suddenly the grizzly doesn't find any prey and can't find anything to eat, the grizzly is gone.

So for us to say, well, gee, these species up here are wonderful but the ones down there are useless is a very dangerous course for us to take because it is all connected. That is the message we learn when we study the environment.

Have you ever heard of the Pacific yew?

Senator HUTCHISON. Yes, but I'm certainly not an expert. Perhaps Secretary Babbitt could answer your question.

Senator BOXER. I know about the Pacific yew. I just didn't know if you did, if you knew what it is used for?

Senator HUTCHISON. No.

Senator BOXER. Well, let me tell you. The Pacific yew is a plant and it yields the drug taxol which is now the key to the treatment of ovarian and breast cancer. I want to associate myself with the remarks of Senator Reid. If we're going to be so cavalier about nature, we're only hurting ourselves. I don't have to tell you because you're a real fighter against breast cancer, that we lose 40,000 women a year to that disease and taxol right now is our main hope.

I would ask you why you have included plants in your moratorium?

Senator HUTCHISON. Because, Senator Boxer, I think what we have to do is focus on a common sense approach and sometimes these plants do affect the economy. There is a difference between a blind salamander or a bait fish just being able to be part of nature and a bait fish or a blind salamander that cuts off the water supply of the tenth largest city in America. I think you have to make a common sense distinction.

I think when it is a plant that will help cure cancer, there are many ways to save that plant and encourage it without making it stop the building of a reservoir. Those are the kinds of common

sense things that I think we can put in the equation. I don't think we had to break down the entire timber industry of the Northwest to save a spotted owl. A spotted owl could have been saved in nearby public lands.

Senator BOXER. If I might just reclaim my time because it's up, I just want to say this. To me, it is the height of arrogance to turn our back on nature and it is not a common sense approach because when the yew tree, before it was discovered that it had the cure here perhaps for ovarian-breast cancer, taxol, it was being chopped down for its bark and there was a big hue and cry over it. Now finally it is recognized.

So what could happen during this moratorium time is we could lose some very precious gift and I would hope that you would have faith and trust in this committee, and that we can get right to work and resolve those problems because the common sense that you talk about is necessary in this equation and I think we can get at it other than through a moratorium which I think could go against the health and safety of the people of the United States of America.

Senator KEMPTHORNE. I would note that Senator Hutchison is not advocating the repeal of the Endangered Species Act. She is advocating that there be a 6-month moratorium and I believe that Senator Hutchison will be a positive factor as we all share in a good discussion as to that reauthorization of that Act which we know needs to occur.

Senator BOXER. Mr. Chairman, if I might just respond. I know that. I want Senator Hutchison to work with us, but I think a moratorium is an abdication. She herself cited large numbers of plants and species that would be put on hold. What if they're gone by the time we get around to lifting it here. It may be easier just to say at that time, oh, 6-month moratorium, let's extend it again. I think it's just a bad habit to start when it comes to the ESA.

Senator KEMPTHORNE. Senator Bond?

Senator BOND. Senator Hutchison, I would like to hear your comments. Perhaps, as the witness, you might wish to comment further. I do not believe your purpose is to see us lose any valuable species. Would you characterize the moratorium as being an opportunity for this committee to exercise oversight in an area where even those administering the Act realize that changes must be made?

Senator HUTCHISON. I will just say that anything that is on the list right now, has been on the list for a while and I haven't heard any dire predictions of loss. I think it's just a matter of saying we are going to rein in regulations that have gone beyond congressional intent. To have some ripen now that goes beyond our congressional intent, such as an Arkansas River shiner, which is a bait fish, I think would be a tragedy.

Senator Boxer makes a very good point about nature, but what about the people out there who have had drastic effects on their property, their ability to build a home? People who bought residential lots to build their retirement homes are not able to do that because they find that they are in a designated Golden-Cheeked Warbler area. I just think the effects on peoples' lives is not part of the equation that is being used by Fish and Wildlife, and I think Fish

and Wildlife needs more direction. I'm just saying, let's stop now for 6 months while we do have the chance to debate this Act, which I hope to be able to support because I do want to save endangered species.

I think we can do a lot more innovative, common sense things than we are doing now. Let me give you just one example. Almost 20 or 30 years ago, when the blind salamander was considered endangered because the Edwards Aquifer was low because of a drought, they took the blind salamander out, they put it in another habitat. It grew and flourished; the Edwards Aquifer came back up naturally; they put it back in and we went right along.

But this time when we have had a low aquifer, the blind salamander is now being declared endangered and it is threatening the water supply of the tenth largest city of America. There are court orders and other things that the Endangered Species Act has fostered, but that just doesn't make sense. There is a common sense solution and that's what I hope we come to and I hope to be able to work positively in that direction.

Senator BOND. Do you have some suggestions on changes that we might make in the ESA to improve its effectiveness, its credibility and make it less burdensome?

Senator HUTCHISON. Absolutely. I think we need to have a cost-benefit analysis, not of the designation. No one wants to stop the designation, but when you come then to what we do about it, I think there has to be a cost-benefit analysis, whether we save a concho snake and it cost $6 million to move a reservoir or we tear down the timber industry of the Northwest for a spotted owl that could have an alternative habitat, so I think cost-benefit analysis.

I think of making judgments scientific basis. I'm not sure that a rat that is only different from the next species because its feet are 100 millimeters longer isn't just a mutation rather than a different species, such that it would cause a man to be arrested and put in prison because he might have run over one.

I think you could have alternative habitat designations so that if there is public land nearby or other habitat that would not be economically disordered, then you could move it if there is economic disruption.

I think compensation for taking is going to be very important, for instance if you lose the use of your land just as much if you can't cut the cedar trees or if you can't use the water supply as if you had a road running through it for which you would be paid. So those are a few suggestions that I have.

Senator BOND. Thank you, Senator Hutchison.

Thank you, Mr. Chairman.

Senator KEMPTHORNE. Senator Bond, thank you very much.

Senator Reid?

Senator REID. Mr. Chairman, I would hope that the result of this hearing would be more of an incentive to expedite reauthorization of the Endangered Species Act. I still say, unless I'm convinced to the contrary, a moratorium is not the way to go.

For example, the Senator from Texas talks about a bait fish and the Senator from California asked her, why did you list plants. In this same article that is in this morning's paper, as an example of the gene bank of nature, this scientist passed around a pungent

sample of Lake Placid mint, once called scrub mint for its weedlike appearance. Last year, Dr. Eisner and his colleagues discovered that plant was rich with a natural insect repellant that deterred swarms of ants, but they kept studying the plant and just within the last couple of weeks, he and his coworkers—Dr. John Clardy and Dr. Ignatio Chappella—found that the roots of the plant contained a powerful antifungal agent with potential clinical value.

The reason this is important is not only for someone who has had problems with a fungus but it deals with things like AIDS. The article goes on to say the reason this plant is important is the potential it has for working with patients with AIDS.

I simply say that I think a moratorium is not the right way to go. As the Senator from Texas just said, everything that is currently listed, "has been for some time now." That's the whole point. Why do we need moratorium then if they've been listed for some time now?

One question. How do you propose Congress address the issue of species that are proposed for listing that are highly endangered? I assume we have to be concerned about those that may need immediate attention if we're to save a species, and I assume that 6 months could be important to a particular species.

Senator HUTCHISON. First of all, let me say that what we're trying to do is keep some of these on the proposed list from ripening. That is the difference. There has been no showing that the Arkansas River shiner is even really endangered. I think the scientific basis is very much in question. I just think that the chances of something coming up that's very new after we've already listed 900 is probably very small, but the danger of huge loss of property rights and the inability to cut cedar trees which cause great health hazards in my State, are very much real.

You can point out the periwinkle which obviously should be saved and I want to save it but that's not what we're talking about here, Senator Reid. We're talking about a 6-month moratorium so that we have breathing room, so that we will not have people that have to be sick because they can't cut cedar trees from their own property.

Senator REID. I would feel comfortable if we effected a moratorium in Texas and debated that issue rather than the whole country. If there are problems in Texas and there is reason for a 6-month moratorium on a listing, then why don't we do that, but let's not include the whole country.

Senator HUTCHISON. Senator Reid, I just happen to be more familiar with the horror stories in Texas, but I was in Los Angeles 2 weeks ago and the chairman of the Los Angeles Chamber of Commerce told me that there are two major issues that they are concerned about in Los Angeles; one of which is the Endangered Species Act. There are peoples' jobs at stake here. It's happening all over America.

Senator REID. But Senator Hutchison, it's the same in Nevada. People are very concerned about the Endangered Species Act and that's why I am glad I'm on this committee, and that's why I'm glad we did work on it last year. I would hope that all your legislation is make us speed up the reauthorization. I again think that a moratorium is the wrong way to go and I respect your reasons

and feelings for this, but I feel the problems in Nevada are just as complex as in Texas where we were ranked the fourth leading State in the Nation for listings—California, Hawaii, Florida and Nevada. So we've got a lot of problems, but I don't think we should stop everything for 6 months. I think what we should do is in that 6-month period of time see if we can have a reauthorization.

Senator KEMPTHORNE. Senator Hutchison, we appreciate very much the proposal that you have placed before us and your comments you've made. I was encouraged in the discussions and the questions, one, that Senator Chafee, the full committee chair, has made it very clear that the Environment and Public Works Committee has made reform of the Endangered Species Act a priority for this year.

Also I heard consensus, I think, really from all members of this subcommittee that everyone is supportive, that we will move on this at an appropriate pace for the reform of the Endangered Species Act.

I appreciate your proposal because I know how highly charged it is in our respective States. People are fearful and in many cases, angry over the implementation of the Endangered Species Act; and though these feelings are not directed at a subcommittee or Congress, the public is concerned about its implementation. I think it would allow us, for that period while we move quickly for the reform, at an appropriate pace, that we can create an atmosphere where we can lower the rhetoric and get on with the thoughtful, thorough discussion of this.

Senator BOXER. Mr. Chairman, before Senator Hutchison goes, I feel I have to say something because she raised Los Angeles which is a small city in California. It goes to something that Senator Reid said which is that is why I am on this committee because yes, the issue of endangered species is very important to my State. Let me tell you just how important.

Of the 118 species you talked about that are proposed for listing, 81 are plants. Mr. Chairman, I'd like you to hear this—81 are plants; 70 of those plants are in California and you know how many are in Texas? Zero.

I would hope if you're going to pursue this bill, since you've already watered it down somewhat, take another look at that side of it because I can tell you right now, if you just look at the plants and the potential, I would urge you since your interest is economics and mine is as well, go visit Shaman Pharmaceutical, a venture capital company in the Silicon Valley headed by a woman. Do you know what the premise of Shaman Pharmaceutical is? They go to the rain forests of South America and they study the plants and the kinds of cures that are found by the witch doctors there; they are called Shaman. She has started this company and it is most successful. They've gone public, et cetera, and I would urge you to understand something, that when we talk about economics, it cuts both ways. There is a world of possibilities out there, but if we don't save these species there is nothing out there.

So let's not abdicate our responsibilities, Mr. Chairman and rush to mark up a moratorium. Let's rush to begin the reauthorization. I think you've heard comments from everyone on this side, we're ready to work with you. We had a chairman last year, Chairman

Baucus, who worked with Ranking Member Senator Chafee and they introduced the bill, as I remember it. I joined with them to work on it. I think we can do this. We have Secretary Babbitt ready to work with us and also it's very clear that we have some problems with the Act, we all agree. We need to have this based on science. When you get up here and say this isn't an endangered species and that isn't an endangered species, I respect your opinion, but I don't know that you come to us with the credentials for that. I certainly don't come to you with the credentials to say what is endangered and what isn't. We need science that we can all trust and that's what I hope we will get to. I hope we will not go this route, I hope we will go the route of reauthorization. I think we're ready to do that.

Senator BOND. Let me say, I don't believe that Senator Hutchison is claiming to be a scientist. I think that mischaracterizes her testimony, and I really think it's not fair to suggest that Senator Hutchison is proposing anything other than using sound science. That is not the purpose of her bill and I would hope the committee would not be misled.

Senator BOXER. I'm sorry. I was just responding to her comments about the rat with the larger feet and her other comment that dealt with the bait. She had made the statement.

Senator KEMPTHORNE. Senator Boxer, I want to move along out of respect for other witnesses, but much of the issues we're touching on is what we will return to in the hearings on the reform of the Endangered Species Act. Senator Hutchison, I'll give you the final word and then out of courtesy I'm going to invite you, if you have the time, to join us here, and then we're going to move on with the panel members.

Senator HUTCHISON. Thank you, Mr. Chairman. I would like to just have the final word.

First, I want to make one correction. It was the fountain darter, not the blind salamander, that was moved and restocked when the Edwards Aquifer went down.

Senator REID. I knew that. I was just going to see if you could pick that up.

Senator HUTCHISON. Yes. I wanted you to know that I have some scientific credentials here.

Second, I would just say to Senator Boxer's point, I would take the same situation and have a different view. Everyone up here has said that the Act is really in need of reauthorization. It is not functioning in a way that everyone is satisfied with and, in fact, all of us have some problems. It may be different problems, but there are some problems. I think that, in itself, argues for the need to shut down the implementation that we all admit is going in the wrong direction in some ways and say, let's do this right and let's not harm our economy, jobs, health, and private property rights as we do change this Act so that it does reflect congressional intent.

Thank you, Mr. Chairman.

Senator KEMPTHORNE. Senator Hutchison, we appreciate your effective testimony. Time permitting, you're more than welcome to join us here.

Senator HUTCHISON. I will do that. Thank you very much.

Senator KEMPTHORNE. With that, let me invite the Secretary of the Interior, Secretary Babbitt. Mr. Secretary, we appreciate your being here with us and we look forward to your opening comments.

Senator REID. Mr. Chairman, while he's settling in, can I just say something?

Senator KEMPTHORNE. Senator Reid?

Senator REID. I'm going to have to leave here today. As you know, we've had trouble working out the time for this hearing. I think the witness panels you've put forward are appropriate and I intend to work very closely with you on this issue and other issues. You're an easy person with which to work and I'm grateful.

My not being here during the remainder of the hearing does not indicate that I'm not extremely interested in what we do here today and I have my staff covering what goes on.

Senator KEMPTHORNE. Senator Reid, I appreciate that very much and from that, I assume you do trust what we're doing here and we will move forward, and you know you're in good hands.

Senator BOXER. I'm not leaving.

Senator CHAFEE. Mr. Chairman, could I just briefly say, Secretary Babbitt, I took a look at your testimony and in it, you talk about the indefinite moratorium. As you know, Senator Hutchison has changed that to 6 months in the revision of her legislation.

Senator KEMPTHORNE. Mr. Secretary, welcome.

STATEMENT OF HON. BRUCE BABBITT, SECRETARY OF THE INTERIOR

Secretary BABBITT. Mr. Chairman, committee members, thank you. It's a pleasure to be back.

I have a written statement which, with leave of the committee, I would prefer simply to submit and then very briefly summarize some of my thoughts in response to the testimony and some of the major points in my written presentation.

Obviously, I'm not here to support a moratorium proposal. I've been at work in legislative bodies for many years throughout my career and I must say that this is one of the more unusual ideas I've ever seen presented, saying effectively as I see it, in order to clear the decks, level the playing field, induce everyone to come together in a dialog, we're going to start by repealing the law or at least major and significant portions of the law. It's a blunderbuss approach that I simply don't see the logic for.

The section 7 issue I think has already been discussed. That clearly would be a drastic mistake, no matter where one comes from with respect to this Act. I must say I'm not entirely clear from the colloquy during the testimony whether that proposal is on the table, off the table, or somewhere in between.

Another example I would give you is right on to the logic of this approach. We've talked about the species that are on this sort of list that is at the end of the pipeline. I can tell you straight off the top of my head that 75 percent of those species involve no private property impacts or claims of any kind without any exception. The reason for that is that 75 percent of the species that are at the end of the pipeline awaiting our attention are plants. The Endangered Species Act specifically provides that plants have no protection of any kind on private land and therefore, the effect of this morato-

rium is to take with zero justification from any part of this debate, put them on hold, and say to the Fish and Wildlife Service that our efforts with those plants, many of which have been put on the list under court order, many of which are in small, shrinking, remaining areas which have such potential—taxol has been mentioned, periwinkle, and others—and there is no private property implication of any kind with respect to 75 percent of the species.

I make my point and with that, let me see if I can, notwithstanding my distaste for starting a debate by polarizing it into a debate over a totally unnecessary moratorium, see if I may step aside from that and offer you, in the spirit that I believe ought to pervade this discussion, some reflections on where we have been over the last 2 years that hopefully will illuminate to some degree the debate as it moves forward. Most of my points are, in fact, encapsulated in the rather extensive document that was released yesterday.

When I came to this town in January 1993, I said to the Congress and to the public the major difficulty with the Endangered Species Act is that it hasn't been administered in an imaginative way. Ever since its enactment in its current form back in 1973, it has been administered in a passive, negative, reluctant, narrow-minded way. I said I see a different Endangered Species Act. I see one with a lot of flexibility and on my watch, I'm going to devote my time to proving in action, in the field, in my deeds, not in my arguments, but in my administrative deeds how it is that it can be made to work and the potential that I think it has.

If I might, what I'd like to do is use just three examples for you that illustrate, in my judgment, the ten new directions and guideposts for legislative change that I think are important.

My first premise was that we really ought to get out ahead of regulations. We ought to view regulations as sort of an eleventh hour approach, and we ought to be entirely proactive. The place where I think we've done that with the most success is in the forests of the southeastern United States. I would say frankly, the reason we've been able to do that is because the private landowners of the southeast saw the train wreck that occurred in Washington, Oregon and the Northwest, and they were ready to try something different. They saw then and see now, the possibilities in this Act.

That means that over the last 2 years, we have run up I think a completely different pattern of cooperation in the timberlands of the southeast. It began with an unprecedented agreement with the Georgia Pacific Corporation applying to 6 million acres of land. That's as much as the Federal land covered by the major parts of the forest plan in the Northwest. It's a Rule 4(d) agreement; it did not come about through litigation; it came about through negotiation. Georgia Pacific is now managing its lands in a way that protect the red-cockaded woodpecker and has enabled us to go home.

We have followed up with agreements with the International Paper Corporation, and with the Hancock Timber Company. Last week, we announced an agreement with the Pinehurst Country Club Group, a real innovative agreement. It is an agreement under which the Pinehurst Country Club Group is improving the long leaf pine habitat by clearing out the underbrush and making it more attractive for red-cockaded woodpeckers.

They have a sign out at those country clubs saying this is one threatened species we'd like to have on our golf course. Memberships are for free, you're all invited, and we managed to do that under the Endangered Species Act. It's a threatened bird.

How did we do that? We took the provisions of the Act and said in exchange for habitat enhancement, we'll make a deal that if you decide you want to eject them and revoke their membership, give us a little notice and we will show up and we'll see if we can find them a membership in some other habitat. That's obviously a brief explanation of a complex concept but the point I want to make is we're under way, we're in the mainstream.

At the very time that you threaten us with this moratorium, I think we can demonstrate to you that we are making more progress and more innovation than at any time under the 20 years of this Act.

The second of my three examples is this issue of the small landowner. I came to town in 1993 and I said it's unconscionable to burden small landowners with these disproportionate requirements, the uncertainty, the incredible delay that crept into the system largely as a result of this kind of passive, negative, constricted view of the Act.

We began the small landowner process with a pledge that I made out in the Pacific Northwest during the course of the timber plan. I said to the folks in the Northwest, we're going to exempt the small wood lot owners. I came back to Washington and Fish and Wildlife Service said to me, how did you figure that out and I said, I haven't but we're going to do it.

Several weeks ago, George Frampton went out to Washington to announce the implementation of a 4(d) rule which exempts from the requirements of the Act in virtually complete form every private owner of a wood lot in the State of Washington of less than 80 acres. That in turn has given rise to the proposal that you see in the document that we released yesterday saying that for threatened species, we can now move to create an effective exemption for single lot, home sites of 5 acres or less. Again, pretty complex, but that's the bottom line. Under the Act, we can apply that small lot owner exemption only if a species is threatened. I think that legislative help that would expand that concept to endangerment would be very helpful.

Again, I don't understand the logic of saying to us, just as we're instream with all of this, stop because we'd rather just do nothing, let the problems pile up, guaranteeing that by virtue of having stopped and been forced to look the other way, the problems will be not better, but worse. They won't go away, but we'll simply have less flexibility to approach these kinds of solutions.

The third example I'd like to give you which I think is very important is illustrated by events in Florida, Texas, California, and indeed across the country. That is the role of States and localities under the Endangered Species Act.

What I found interesting when I came to town was that in its administration, it has been totally unlike most Federal laws. I grew up in Arizona politics and in State government where most Federal laws were tasked in the context of Federal-State relationships and Federal laws of all kinds—health, welfare, education, environ-

mental, whatever—were always drafted with a lot of attention to this role and normally, there would be some Federal money, some Federal policies laid out and then an explicit mechanism by which the States assumed a partnership role and often by delegation, the actual lead in the administration of the law.

I was astounded to find that in 20 years, this had never taken place under the Endangered Species Act. I went back and read the Act and said, is that what Congress intended. I don't think so. It's not very explicit but there are references to States—section 6 is an example of that. So what I've done is taken this law and said, I think we ought to move outward toward cooperating with States, giving them a lead role wherever possible, working out the science, the impacts, the listing decisions in an interactive way that is consonant with the standards in the Act.

Fortunately, the State of California had an Endangered Species Act which has allowed us to make a major, unprecedented delegation under section 4(d) to the State for efforts that are now underway in southern California. We are moving in that direction in a variety of other States. In many States, it's not as clear that the States themselves have the authority to step up to meet this delegation process, but it's unquestionably the correct way to go. I think it is a most fruitful area for legislative attention.

Finally, a word about good science. As I listened to this debate, all parties acknowledge the need for good science. I was especially pleased to hear Senator Hutchison acknowledge that very strongly, that listing decisions ought to be about science and I acknowledge that we have some improvements to make there.

This issue was one of the major reasons that I organized the National Biological Service because it is my strong belief that a major step to good science is to distance the science from the people who are making the regulatory decisions. Why is that? Well, that's because regulators are human beings and in any area of endeavor, regulators tend to drift toward a view that sometimes runs ahead of the actual scientific reality. The proper way in government to deal with that issue is to set the science outside of the regulatory framework. That's why I've segregated them over there and that's why I went to Georgia and found a scientist who has never been near a government regulatory agency, a guy named Ron Pulliam, with a national reputation. I said your job is to produce science that is at all times unimpeachable so that we can then move into the regulatory quarrel which is very much a matter of attitudes, of perceptions, of tradeoffs, and ultimately a matter for political judgment by the Congress and the President.

In addition to that concept, this document takes us in the direction of increased and enhanced peer review. We need independent assessments of the science that underlies listing decisions, we need State participation, we need to put together a more formal structure which says to the State of Texas they have a superb parks and wildlife unit. I spent 3 days with them down on the intercoastal waterway a couple of weeks ago and I've got to tell you, these guys are as good as any in the land. We need to make that relationship work a lot better.

We also need to see, in light of the experience of the past 20 years, if we can define what level of scientific proof, if you will, we

92-533 - 95 - 2

ought to attain prior to listing. We are working on some of those issues right now and again, I think it's entirely appropriate for this body to join in that endeavor.

So, Mr. Chairman, committee members, you've heard my views on the moratorium, but apart from that, I think we are making a great deal of progress. I think the time is ripe for the Congress to reflect on that experience and to join together in seeing if we can make this Act more efficient, more effective and more acceptable.

Thank you.

Senator KEMPTHORNE. Mr. Secretary, thank you very much for your comments.

I'm sure you've heard from a variety of people that say the Endangered Species Act is so flawed that nothing short of repeal would be satisfactory. Yet, I've heard you say that you only needed time to show that the Endangered Species Act is well and functioning and now we see some proposals which may encouragement. What has brought about the change of your position?

Secretary BABBITT. Mr. Chairman, I don't think there has been a change of position. I noticed that statement in a national newspaper this morning. I think what I said when I came to town, if taken fairly, was reauthorization, in my judgment, is not a priority. I came to town in 1993 saying, look, why have a reauthorization debate when we haven't really tried to make the Act work.

I come here today having been at it very intensively, out in the muck, in the water, out on the ground, with the results that I have outlined and I think that process now has created a body of experience that I can bring and I can now fairly say to you I'm here with some suggestions grounded in my own hands-on experience rather than just a philosophical debate and this is a lot riper issue for productive reauthorization than it would have been 2 years ago.

Senator KEMPTHORNE. So is it fair to say then that you too are an advocate that we need to reform the Endangered Species Act?

Secretary BABBITT. Yes, I think the time is ripe and I think we come to the table with some very helpful experience.

Senator KEMPTHORNE. With regard to the proposed moratorium, the issue before us, I understand the Department of the Interior is under court order to establish judicially enforceable timeframes for publishing those rules to list candidate species?

Secretary BABBITT. That's correct.

Senator KEMPTHORNE. How many additional listings do these court orders represent?

Secretary BABBITT. Well, Senator, it's an interesting topic for this reason. The anchor court order requires us to list slightly over 100 species per year. I think it's 425 over about 4 years. That order really comes out of the experience of the 1980's. In the late 1970's, the Department was up to I think an average of 60 or 70 a year. In the 1980's, the Department effectively laid a moratorium—this is not the first time this proposal has come up—there was effectively an administrative moratorium in the 1980's and in 1 year, the listings went down to four. I think in some measure the court order was a response to that.

To get to your question, in the absence of a court order, how many would we be listing? I don't know that it would be significantly different. I take exception to the court order because I dis-

like, as an administrator, being told by a judge how to allocate the resources that this Congress gives me—among them finishing up habitat conservation plans, doing captive breeding, restoration efforts. There's a whole series of them and all of a sudden, there's a Federal judge standing in my office telling me what to do.

Senator KEMPTHORNE. Many citizens would share that same concern.

Mr. Secretary, will each of these have critical habitat designated for them?

Secretary BABBITT. No. The critical habitat provision of this Act is badly misunderstood by friend and foe alike. The whole requirement could be stricken from the Act and it would not affect the function or the architecture of the Act at all for this reason. Critical habitat was written into the section 7 process and I think it was intended in some measure as a way of kind of defining, or at least setting up a presumption, of the area within which the section 7 consultation would take place. It hasn't really operated that way and section 7 can operate independently of it. I think that all of us believe that concept really needs to be revisited. Certainly the current Act mandates that it be done in the wrong order and the requirement has been largely disregarded.

Senator KEMPTHORNE. My last question then is, how will this moratorium affect the Department's ability to meet the court's requirements?

Secretary BABBITT. I haven't thought very much about that and the reason is that Congress retains the right to modify a court decree. I would never come here and argue that you shouldn't do it because there is a court decree. I'm a child of the legislative and executive branches of government. The idea that I would sit here and tell you a Federal judge doesn't want you to do this is something I would never do.

Senator KEMPTHORNE. Thank you very much.

Senator Chafee?

Secretary BABBITT. At least so far, I am a child of the legislative and executive branches.

[Laughter.]

Senator KEMPTHORNE. But you're aging well.

Secretary BABBITT. Thank you very much, Mr. Chairman.

Senator CHAFEE. Thank you, Mr. Chairman.

Mr. Secretary, I would point out, I know you're opposed to this moratorium, that the House has already passed a law providing that all significant regulations be a moratorium until December 31 at the end of this year with the exception of the Endangered Species Act which goes to December 31, 1996. Furthermore, that affects all regulations whereas Senator Hutchison's provision deals solely with the section 4, and indeed 4(a). So in a way, I'm saying to you, count your blessings.

Secretary BABBITT. Senator, I hadn't thought of her as coming to my rescue with the lesser of many evils.

Senator HUTCHISON. It could be so much worse.

[Laughter.]

Senator CHAFEE. So she's really doing you a big favor.

Let me ask you this, Mr. Secretary. I appreciate and admire you for what you've done in connection with many efforts, and you and

I have worked together in the past as you know on many things. I want to express my appreciation for the leadership you've given to the Department of the Interior and particularly, you and Mr. Frampton and others in connection with the Fish and Wildlife activities.

So you've worked out this arrangement with Georgia Pacific or the country club in South Carolina, but those activities aren't going to be prohibited or delayed or slowed down by the moratorium we're suggesting under Senator Hutchison's legislation?

Secretary BABBITT. That's correct. As long as section 7 is not implicated, I concede that the management activities that relate to species already listed, in the absence of something I don't know about, will certainly continue.

Senator CHAFEE. That's right, and trying to reach arrangements like you did with that tremendous acreage with Georgia Pacific, you can proceed. That's an arrangement you did, I suppose, under section 7, isn't it?

Secretary BABBITT. It's really under section 4.

Senator CHAFEE. It was a voluntary arrangement that you did with Georgia Pacific?

Secretary BABBITT. It was, in fact, an application of section 4(d) of the legislation, but your characterization I think is still essentially correct.

Senator CHAFEE. So that it is clear, I'm supportive of Senator Hutchison's effort here. She and I have worked together on this and I believe that this is going to give us an impetus to get on with the reauthorization of the Endangered Species Act. We're going to be working closely with you on that, receive your suggestions, but it's the kind of thing that is easy to put off because this committee has a full load. Once the moratorium is passed, if indeed it is passed by the committee and by the Congress, we will get right to that reauthorization of the Endangered Species Act and try to do a good job on it. Certainly, that is the goal that I have.

I know there have been some revisions in the bill since you originally looked at the proposal by Senator Hutchison, but you can still go ahead with these unique arrangements you worked out with large private landowners?

Secretary BABBITT. For the most part, yes. There might be some exceptions. If a species is moving toward a listing decision, the background of that proposed decision may, in fact, enhance the ability to do some of the prelisting agreements, but I don't quarrel with your generalization.

Senator CHAFEE. I must say the point I think you made about the 75 percent of the prospective listings are plants that are on Government lands. That is something that is important and I look forward to discussing that with Senator Hutchison and see what her thoughts are on that. I don't want to speak for her, but the problem here doesn't come up with Federal Government lands, it comes with the private landowners.

Thank you.

Senator KEMPTHORNE. Senator Boxer?

Senator BOXER. Thank you very much.

Picking up on that, I want to make sure I understood something you said in your opening comments, that 75 percent of these listings do not affect private property, correct?

Secretary BABBITT. That's correct.

Senator BOXER. I would then underscore what Senator Chafee has stated and perhaps we can look at that a little more.

In your opening, Mr. Secretary, you said, "I don't understand why this moratorium now that we're making some progress." I agree with you. Again, Senator Hutchison has her stories and we all have our stories. The story I like the best is what you did in San Diego, Orange County and Riverside, not the bastion of liberalism and you went in there and we had an endangered species called the gnat catcher, a bird. You went in there, you set up a natural community conservation program. The people love it, the developers love it, everyone is part of it. The board of supervisors like it; we're giving them funding. It's your ideal habitat preservation.

I would say to my friend, Senator Chafee, he puts a really nice light on it. Yes, compared to what's gone over the other places, it's a piece of cake, but it's still bad. The message that is going to go out is "forget about it, don't come to the table." If I were a farmer, a developer, I wouldn't come to the table with this conversation going on over here. There is something called a conference committee and when you get this bill, which I oppose, the Hutchison bill—I hope we can make it better, I'll try to make it as good as it can be—when it gets over to that conference committee and they've got a moratoria, no exception until 1996, tell me what you think the compromise between that will be—moratorium for 6 years, moratorium for 6 months? Generally, we split the difference around here when it comes to dollars but I hope with the leadership of Chairman Chafee, we'll do a lot better on this, but I am very worried about this situation.

You ask, why the moratorium? Let me tell you my opinion. This is only my opinion and I am not saying it is anything but that. I have no proof of that, this is my opinion. I've been around here a long time. I've been in the House for 10 years. In my opinion, if you went out and told the people you were going to kill the Endangered Species Act, the people of this country would rise up. The bald eagle, the condor, God's creations, no way. People would be run out of office.

If you say things like, you don't like the way it's administered and regulation, and moratorium, people say, oh, that's right, you mean just stop it for a little while. So in my mind, it is an end run around the Endangered Species Act and I don't think you need a degree in political science to get it, that's what's going on here. It's an unmitigated disaster and it will lead, in my opinion, to bad, bad things and people will regret it. People will regret it because it has to do with quality of life, it has to do with life-saving cures that could come out of some of these plants. I don't see, again, why we're putting a moratorium on plant designations. To me, it makes absolutely no sense whatsoever.

What do we have to do around here to learn a lesson? The loggers said, we're cutting down the yew tree, it's just bark, and when we said, it has some properties, they said, oh, we're going to cut it down anyway and then they finally came to the agreement,

and maybe we have a cure for breast and ovarian cancer, and we talked about childhood leukemia. So this isn't just a question of some bureaucrat sitting in an office having a good time. If he's in there abusing his authority, he's got to go. I think everyone is agreed on that.

I think we have a Secretary of the Interior here who, by the way, has taken some risks because neither side is always happy with him because he tries to make things work. He's made it work for the gnat catcher. He is saying that we can exempt small owners. I think, Mr. Chairman, we've come a long way here.

I have one question about something going on in California. One of the real horror stories involving the Endangered Species Act is occurring right now in California. Ten years ago, MAXXAM, a large Texas corporation, acquired Pacific Lumber, a small family owned business in northern California. Pacific had been a good steward of its 45,000 acres of redwood forest managing the land for a sustainable yield of lumber for 100 years.

MAXXAM was eager to pay off the junk bonds it had used to purchase Pacific and began a program of rapid clearcutting that saw half of the world's largest old growth redwood forest on private land destroyed in less than a decade. The ESA has been the only thing stopping MAXXAM from destroying the rest. In fact, a Federal court judge, recently imposed an injunction on further clearcutting to protect a bird.

Now MAXXAM has announced that it will use a loophole in the Federal Forest Practices Act to renew logging operations. This continues MAXXAM's pattern of sudden logging campaigns into sensitive areas based on tenuous legal authority. In the past, MAXXAM has completed its logging before the courts could intervene. What I'm asking you is, can I have your assurance that your department will do everything it can to stop illegal cutting before it is too late for the headwaters forests?

Secretary BABBITT. Senator, we've been in discussion with MAXXAM over that issue in California. We have by no means resolved the underlying issues but I believe that we do have an assurance from them that they will hold the status quo until this litigation is worked out.

Senator BOXER. Thank you very much.

Thank you, Mr. Chairman.

Senator KEMPTHORNE. Thank you, Senator Boxer.

Senator Hutchison?

Senator HUTCHISON. Thank you, Mr. Chairman.

Mr. Secretary, in your policy that you announced yesterday, you said that you felt the small landowners, the single family lot owners really did not significantly contribute to the problem and therefore, you were suggesting exemptions if there was a threatened species. Yet the Valcones Canyonlands Plan which I call a $1,500 ransom that your people have proposed in Austin for Travis County, TX, does hit the very people that you have said it is your policy to exempt.

I realize that you have made a distinction between threatened and endangered, but nevertheless, your innovative use of the Endangered Species Act includes this $1,500 ransom for single lot owners. I'm just wondering if you would abandon that Valcones

Canyonland Conservation Plan in light of the spirit of your announcement yesterday?

Secretary BABBITT. Senator, we cannot, under existing law, abandon the Valcones issues. They relate to birds which have been listed as endangered rather than threatened.

My own sense of the Valcones process is that notwithstanding a fair amount of controversy to say the least, that plan has strong support in the Austin community. It is not a plan which is anchored in a department proposal; this is a process and a plan which has evolved out of a very comprehensive plan in Austin and the surrounding areas of Travis County with tremendous community support because what it is really about, in my judgment, is the quality of life in the Austin community. It's about open space. It is primarily, in the eyes of many people in that city, about the urban configuration, the open space requirements, the quality of life in Austin and it has enormous support that rides entirely independent of the Endangered Species Act.

I think in that context, we've made a great deal of progress. I think particularly the development community understands that properly worked out, this plan is going to create value, it is going to enhance the value of everyone's land including the individual lot owners. That's been proven time and time again. That's really what urban development plans and development charges for infrastructure are about, allowing development in a way that enhances and creates new land value. I think it's something I'd like to discuss with you in detail because I think it's absolutely clear that the overall effect of the Valcones Canyonlands Conservation Program is to create additional value and that landowners, every one of them, will come out ahead in that process.

The difficulty, which I acknowledge, is that this thing has been on dead center for too long. I understand the frustration because it's not entirely satisfactory to say to someone, well, good development procedures and history demonstrate that your land will be worth more and they're saying, but in the meantime, I can't do anything. I believe that's something we have to acknowledge and we have to find a way to deal with expeditiously and to try to work these plans in a way that it doesn't freeze peoples' options to put their land in market or develop it for long periods of time, as unfortunately has been the case here.

Senator HUTCHISON. Mr. Secretary, first of all, people were browbeaten, they were hiring lawyers so that they could build on their own lots, they were forced to the table. I would not agree with your proposition that there is support throughout the Austin community. The proposal includes $10 million from Travis County that they say they don't have and I would just say that you have entered into a new policy announcement that came out yesterday that basically said, single family lots should not be included in these designations and should be exempt, and you are not prohibited by law from abandoning that proposal.

I'm just asking you if in the spirit of what you announced yesterday, you would be willing to say to the single lot owners in Travis County that you are not going to continue pursuing that ransom from them to be able to build on their land.

Secretary BABBITT. Needless to say, I don't agree with the characterization but the important thing in response to your question is that it would require Federal legislation.

Senator HUTCHISON. No, it wouldn't because there has been no authorization for this innovative proposal where you would seek a $1,500 fee for people to build on their own lots. It would not take legislation.

Secretary BABBITT. With all respect, Senator, I believe it would. I believe that's a fair subject for discussion in the legislative reauthorization.

Senator HUTCHISON. No one in Congress has suggested to you that you should start requiring people to pay fees to build on their own property, so if you back away from it in the spirit of the policy that you announced yesterday for single family lot owners, I would think it would be consistent.

Secretary BABBITT. Senator, the Act, in its current form, requires that to come out from under the sanctions of section 9 in a habitat conservation plan, there must be a legally acceptable guarantee that sufficient habitat has been protected to provide for the recovery of the species.

There are various ways of looking at the land acquisition that is necessary in order to do that. That has been the subject of an enormous amount of planning and effort in Austin and Travis County. Representative Pickle, for years up here, obtained Federal funds to create a National Wildlife Refuge which anchors part of the protected area and substantially lessens the burden on the remaining land.

A bond issue was successfully passed, or one did not pass. Through a variety of things, we're about two-thirds of the way toward the necessary acreage mandated by law to protect and have the species comply with the recovery plan. We need about another 10,000 acres.

What the community of Austin, the development community and all the people who have been so carefully engaged in this said was, we can do the balance by a process known as mitigation and that is, in exchange for freeing property from the restrictions of section 9, there will be a mitigation charge, not because a mitigation charge is mandated by law, but because the restraints of section 9 cannot be lifted until there is a plan which says we're going to recover the species on an adequate land base.

It was the community itself which said, now that the Federal Government has acquired 10,000 acres of land, now that some of the costs have been spread more broadly through the passage of a bond issue, in the judgment of the community and the people putting this together, the best way to proceed the last step for the final 10,000 acres is to apportion a mitigation fee in a way that is laid out in the proposal.

I'd be willing to go back to the community in Austin and say, would you be interested in restructuring the mitigation fees on different classes of propertyowners provided that you can meet the mitigation targets that will enable us over the next decade or so to put together the final component of the plan so that we have a recovery plan that will work.

Senator HUTCHISON. Mr. Chairman, my time is up and I appreciate your letting me pursue this. I will not go further except to say that the reason you don't have a plan is because so many people are concerned about it. I think you have stated what's wrong with this Act and what needs to be changed so that there is common sense in the equation.

Thank you.

Senator KEMPTHORNE. Mr. Secretary, let's go ahead and have just a few more questions.

I'd like to pursue this discussion. You have referenced the safe harbors—the agreement that you made with the private landowner was that you would assure him that by his cooperation with you now, he would be held harmless for any future instances of take of endangered species. This is similar to your earlier reference to the "deal is a deal" issue. What authority are you using for these agreements?

Secretary BABBITT. For the "deal is a deal" agreement, I read the Act to say that if we, on a multi-species basis, construct a habitat conservation plan, we can meet the statutory requirement that we have provided for as mandated by the Act, the recovery of the species. It is a reasonable reading of the Act to say that if there are additional mitigation requirements, that burden can be transferred to the Federal Government and we can effectively say it will be met from the public sector because in the first instance, we have met the requirements of the Act on a one-time basis as of that time.

Senator KEMPTHORNE. How have you made it clear that agreements made between you, as the current Secretary of Interior, and future Secretaries of the Interior will remain in place? Are they binding?

Secretary BABBITT. Senator, I think so. We've had a lot of discussion about this in some of the HCP processes. I read administrative law and concepts of estoppel as saying that when an administrator makes a settlement with consideration on both sides of the table that has been worked out in public view through the procedures required, that really, as a practical matter, becomes binding and it would be enforceable in court.

Senator KEMPTHORNE. I understand that 4(d) rules can be used for threatened species?

Secretary BABBITT. That's correct.

Senator KEMPTHORNE. But not endangered species?

Secretary BABBITT. That's correct.

Senator KEMPTHORNE. And that they are central to your recent announcements that you've made. Do you have sufficient authority for 4(d) rules at this time or is further legislation needed?

Secretary BABBITT. I think in summary, as indicated in this document, that we could, probably should, in a legislative reauthorization rework the functioning of Rule 4(d). I would think it ought to be possible to create a more graded set of responses. It's not clear to me that it's really ideal to have a statute in which there are so few distinctions between threatened and endangered. They are really too close together. What it drives us to do is to say that in all cases, the heavy presumption upon listing is that all of the requirements of the Act, particularly the take provisions, come into

place immediately until you can sort of carry the burden of peeling them back.

I would think it would be good biology and good regulatory policy to consider at least a sort of more graded, stair-stepped approach to that.

Senator KEMPTHORNE. If you will indulge me, I want to change topics now for just a moment.

You and I have had previous discussions about the training range that the Air Force has stated they need at Mt. Hope. Last week, in front of the Armed Services Committee on which I serve, Secretary Widnall of the Air Force said, "We're also in discussions with the Department of Interior who need to be our partners in either putting together this particular document or having them issue their own document." The document that she's referencing is the draft supplemental environmental impact statement.

Will your department cooperate with the Air Force so that this statement can be completed and published?

Secretary BABBITT. Senator, I didn't come briefed to talk about that. I'm not clear what the policy of the Air Force is at this particular point. We routinely cooperate with any Federal agency that is doing an environmental impact statement.

Senator KEMPTHORNE. Mr. Secretary, this has had high visibility within the Administration, I know. We're just trying to get closure on coming forward with a process for a draft supplemental EIS, so again, attention you could give to it would be greatly appreciated.

The other thing I notice, and I see the yellow light here, in your testimony, you said the Endangered Species Act is a warning light.

[Laughter.]

Secretary BABBITT. That's why I don't want the moratorium, it's on red right now.

Senator KEMPTHORNE. Well, how do we avoid it? I think everyone would agree that if the Endangered Species Act would provide us the warning light, that is extremely helpful, but how do we avoid this Code 3 emergency light that seems to happen which then removes all options?

Secretary BABBITT. Senator, I think there are a variety of answers to that emerging out of this process. Again, good science. There are a lot of negative responses to a document the National Biological Service is now sending to press. It's an extremely interesting document. It is a collection of papers characterizing sort of in the longer view the relative condition of different types of landscapes in the United States. If you read it carefully, it's really interesting because it's clear to me that some landscapes and some ecosystems are doing very well, they are on the upswing. The red is not uniform in color. There are a lot of yellows going to green around this country. I think we need to use that information, not in a way that sort of threatens that if you're red or yellow, there will be dire consequences, but that we can look at that carefully and proactively and ask while there is still time, what kinds of soft decisions, if you will, can be made that will avoid the onset of the crisis.

This multispecies concept is tremendously important. The State of California is really doing first rate work in thinking of regional

areas of the State and trying to analyze where the problems are and what might be done way in advance of problems.

We're doing some cooperative work with a couple of the timber companies in the southeast actually assessing landscapes. We've reached a level of confidence with those timber companies that they don't view that as negative at all. Their judgment is that in most cases, at the end of the scientific process, they will have more options, they will have seen more ways to work the landscape. So I think that is tremendously important, the multispecies issue.

Drawing States into a cooperative partnership in the administration of this Act is I think equally important because the States have a sort of fine-grained view of much of the landscape, as appropriately they should.

Senator KEMPTHORNE. I appreciate that.

Senator Chafee?

Senator CHAFEE. A quick question. I know we have six other witnesses, Mr. Chairman, so I'll make this very brief.

Mr. Secretary, one of the things that comes up under the Endangered Species Act is the so-called emergency listing. There is a possibility that we might incorporate that in this legislation. Again, I'd like to discuss it with Senator Hutchison. How do you work the emergency? I know the statute covers it, but are you familiar at all, have you done any of that? I think none of us want to get into a moratorium that is going to see a species eliminated, but on the other hand, we'd be reluctant to have the word emergency apply to anything that comes along. Could you briefly describe how you arrive at the emergency designation? For instance, you've been there 2 years now, has anything come up under emergency since you've been there that you can remember?

Secretary BABBITT. I can think of a couple. I can think of a mammal in California; I can think of an intensive debate that we had about the Alabama sturgeon.

Senator CHAFEE. Maybe you could submit the number of those to the record because I don't want to put you on the spot. Is it something you rarely use?

Secretary BABBITT. Very infrequently because frankly, reaching the threshold of scientific work that's necessary to do that with any kind of scientific integrity is something we really don't have the capacity to do very often.

Senator CHAFEE. Maybe you could submit a little statement of how you use the emergency thing. We're going to be marking this up in the subcommittee quite soon, so if you could submit that rather quickly, we'd appreciate it.

Secretary BABBITT. Senator, I'd be happy to do that.

Senator CHAFEE. Thank you very much.

Senator KEMPTHORNE. Thank you, Senator Chafee.

Senator Boxer?

Senator BOXER. Mr. Secretary, according to the Environmental Defense Fund, I want to see if you and your people agree with this, by the time you get down to listing a plant as endangered, the median population size of the plant at the time of the listing is less than 120 individual plants.

Secretary BABBITT. I wouldn't quote that as scripture, but I do think it is indicative of the fact that these things have been left to drift pretty close to the brink.

Senator BOXER. Mr. Chairman, I think it's important to note—I say to both of my chairman here, my subcommittee chairman and my full committee chairman—although a 6-month moratorium may not look harmful on the surface, we have to realize we're talking about perhaps only 120 individual plants left and 6 months could be *sayonara* in that situation. So again, I am very concerned about this.

I keep using the plants, not that I feel any less strongly about the other creatures, but I think it's clear when people talk about common sense, it is stupid to destroy a plant that might cure a disease. It's just plain stupid.

I would like to say we're going to be hearing from Supervisor Ken Peterson. I just read his remarks and they are quite humorous as well as serious. He is very upset about the Endangered Species Act. I think he should be encouraged by this conversation because the main concern they have is that they feel their county, because it is home to so many creatures and they do support preservation of these creatures, they feel the creatures are kind of running the county.

Secretary BABBITT. Which county is this?

Senator BOXER. Kern County. So when I look at your comments today that were quoted in the Post, I view this in a very favorable way. First of all, the whole point that the small landowner will not be impacted in the future should be some solace here.

Second, I want to ask you this. You say "Using sound and objective science in making endangered species decisions, including the use of peer review panels," I think that is crucial because when I was having my colloquy with Senator Hutchison, I don't feel that I am capable of saying something is endangered, nor do I think any Senator is unless they happen to be schooled in biology and even then, being here we don't have time to continue our work.

I just think we have to, in fact, rely on experts and when you talk about peer review panels, could you explain that, and comment on this, the length of time to get an answer is sometimes a problem. I spoke to one developer who said that he had no problem doing whatever it was he was told to do, but the people enforcing the law said, we'll just wait until an endangered species shows up. I don't quite believe that but that was the feeling he had, that they didn't find anything in the spring, so it was just a huge, long wait to get an answer. So could you address how you would use these peer review panels, who will be on them? Is this a new thing since you announced it today and can you put a time certain so that a family in Kern County, in Texas, or wherever they are, gets an answer and we don't lose support of the Act?

Secretary BABBITT. Just a couple of thoughts. First of all, a word about the importance of science. In most cases, if we look harder, we find more. There's a wonderful example out in Nevada, the blue butterfly, which was the subject of a petition. Ron Pulliam, working actually with the State up at Reno, organized a little survey and they came back 6 months later and said, there's plenty of these folks. We just haven't done enough looking in Nevada.

Senator BOXER. So in other words, sometimes when you find more, it's not endangered. Is that your point?

Secretary BABBITT. I think in most cases, science shows us, good science shows us more distribution and in most cases, more flexibility in terms of how we can respond with a recovery plan.

Peer review, what we're trying to do——

Senator BOXER. You still didn't answer my question. So if you say to a farmer, for example, we think something may be endangered, we're not sure. How long is that window until you come back?

Secretary BABBITT. The real window that I think is causing the trouble, up to the time of listing, there is no problem. The thing we have to work on is the listing decision is what causes the heartburn because it really does lay out the sanctions. Most Americans respond to that by saying, "that's the law but how the heck do I comply with it and how long does it go on?"

There is no time limit to resolution in the existing law. The reason is that resolution really comes in two ways. One is through section 7 affects how Government agencies respond not only on Government land but in terms of their functions everywhere. The property may not be worth much if the Government withholds Federal aid which is building the freeway or the water system.

The other direct one is section 9. The 1982 Congress passed this section 10 amendment, which allows us to construct these habitat conservation plans. By their nature, they take a lot of time—like several years. What we are trying to do in the meantime is to take a number of administrative directions, first of all, to say to every landowner when we list, we're going to spell out the kinds of activities that are absolutely permissible. We haven't done that in the past. I think it's important to say you can go ahead and continue to farm your land, you can do the following kinds of development, lay it all out.

If you add onto that the small landowner approaches we've been talking about, we ought to be able to pop them out quickly on the front end. That would leave them out quickly on the front end. That would leave the larger landscape and large developers, timber companies, and people who owned big tracts of land. That does take time because it's very analogous to what local communities do when they do development planning. They go through a process of looking at the landscape, calling in all of their experts and going through it. This process for large landowners is very analogous.

Senator BOXER. Because the time is up, could you quickly comment on peer review. This is a new thing?

Senator KEMPTHORNE. Senator Boxer, now you're stretching it.

Senator BOXER. I had asked a two-part question.

Senator CHAFEE. Mr. Chairman, I'm worried. We've got six witnesses here and it's 11:45 a.m.

Senator BOXER. Could we just have a yes or no?

Senator KEMPTHORNE. Sure.

Senator BOXER. Is this a new thing, peer review panels?

Secretary BABBITT. In 20 words, if I may, Mr. Chairman. Peer review is an accepted and crucially important part of all American science which says the way you maintain the high quality and good results is to invite other scientists who don't have a stake in it.

Senator KEMPTHORNE. Senator Hutchison has indicated that she had no further questions.

Other questions we have, we'd like to submit to you for the record. I know Senator Reid had some he definitely would like to submit and too, Mr. Secretary, if you could sometime later this week give me some indication on this other issue with the Air Force, this cooperative issue.

I thank you very much for your input and for your time here this morning.

Secretary BABBITT. Mr. Chairman, thank you. I look forward to working with the committee.

[Additional responses to questions for the record follow:]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

June 28, 1995

Honorable Dirk Kempthorne
Chairman
Subcommittee on Drinking Water,
Fisheries and Wildlife
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter of March 13, 1995, and the opportunity to respond to the Subcommittee's additional questions concerning a moratorium on listing and consultation under the Endangered Species Act.

Enclosed, please find our responses to questions submitted by Senator Chafee and Senator Reid. If there are any additional questions, please do not hesitate to contact me again.

Sincerely,

George T. Frampton, Jr.
Assistant Secretary for Fish and
Wildlife and Parks

Enclosure

cc: Senator Chafee
Senator Reid

ADDITIONAL QUESTIONS FOR SECRETARY BRUCE BABBITT FROM SENATOR CHAFEE

Question 1. On ESA, generally: You alluded in your testimony to the fact that there are provisions in the current Endangered Species Act (ESA) that, while underutilized in the past, provide potential basis for regulatory flexibility. One such provision is section 4(d), which confers authority to issue tailor-made special rules regarding "take" of threatened species to minimize adverse social and economic effects while still providing for recovery of the species. It is my understanding that the recently issued proposed 4(d) rule for the threatened northern spotted owl, for example, calls for reduction or removal of ESA "take" prohibitions on some 70 percent of previously affected private landowners in Washington State, and also contains a special exemption for small landowners. What is the anticipated timing for issuance of any final 4(d) rule for the owl? Also, please indicate where else you are using, or plan to use, section 4(d) to provide relief to private landowners.

Answer. Section 4(d) of the Endangered Species Act grants the Secretary of Interior broad administrative discretion to promulgate regulations that he deems necessary and advisable to meet the conservation needs of those species listed as threatened. The Secretary may apply to a threatened species any or all of the prohibitions against take that the Act makes expressly available to endangered species. These provisions empower the Fish and Wildlife Service to promulgate a "special rule" which adopts species-specific protective regulations for a given threatened species.

When the spotted owl was originally listed in June 1990, the Service did not have sufficient information about the needs of the owl to tailor-make a special rule on take restrictions for the species. As an interim safety net, the owl was protected by the blanket prohibitions against incidental take that are otherwise applicable to endangered species. Relying now upon the Federal Forest Plan and other information, the Service has proposed a special rule for the northern spotted owl in Washington and California, which would relax those incidental take prohibitions that the Service has concluded are no longer either necessary or advisable for the conservation of the owl. The Service hopes to finalize this proposed 4(d) rule by the end of this fiscal year.

The 4(d) rule contains an 80-acre exemption for small landowners. The Service has determined, based on the location of both Federal and non-Federal owl sites and habitat conditions, that the exemption as described in the proposed rule will have a minimal impact on the conservation needs of the owl. This exemption applies only to the northern spotted owl, and does not exempt landowners form restrictions for other species.

In addition to the small landowner exemption, the proposed rule also provides for a Local Option Conservation Plan through which medium-size landowners (up to 5,000 acres) can seek relief through a streamlined Habitat Conservation Planning process. landowners with more than 5,000 acres can use the normal Habitat Conservation Planning process.

A 4(d) rule was issued for the coastal California gnatcatcher when it was listed in 1993. The gnatcatcher special rule lifted restrictions associated with development and land use planning processes conducted pursuant to the California Natural Community Conservation Planning Act of 1991. The 4(d) rule process also was used for the Louisiana black bear. That special rule authorizes take that is incidental to normal forest management activities, so long as den trees are not damaged or destroyed. The 4(d) process has been used to ease restrictions on other species such as the grizzly bear, gray wolf and numerous fish species, but not specifically in conjunction with private landowners. The Service currently is evaluating a nationwide small landowner exemption process that would utilize 50 CFR 17.31 and 4(d) rules to exempt certain described activities from the current take prohibitions.

Question 2. Please elaborate on how ESA has affected, and is affecting private property owners.

Answer. Effects of the Endangered Species Act on private property owners stem from the restrictions of section 9 of the Act related to actions that affected listed species and the obligations of Federal agencies to comply with section 7 of the Act regarding actions they may be involved with on private lands.

For endangered animals, section 9 prohibits taking, including harming or harassing; threatened animals are subject to either general "blanket" regulations that prohibit the same actions prohibited for endangered animals or "special" regulations that may be less restrictive. Similarly, endangered plants are subject to direct statutory restrictions that prohibit removal, cutting, digging up, or damaging or destroying in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law; threatened plants are subject to similar protection under general regulations or may be subject to special regulations. Over the past 2 years, the Service has taken many actions, some of which are described in our March 6 document, to improve the ESA. The Service has been working to demonstrate that the Act can achieve its goals of protecting species and their habitat while respecting the rights of private property owners. If private property owners wish to take actions which would violate section 9, that is a project which would kill, harm or harass a protected species, they are required to obtain a permit provided for in section 10 of the Act. In the past 2 years, under section 10, more than 30 HCPs have been approved and more than 100 are being negotiated, this is in contrast to only 15 HCPs being approved between 1983 and 1992. In an effort to ease concern over possible ESA impacts on people living within a listed species range, the FWS and NMFS will promptly identify activities that would be permitted and those that would be prohibited in final listing rules. In addition, for species listed as threatened, the FWS and NMFS will be proposing regulations that would allow land use activities that result in incidental take provided such activities have no lasting effect on the survival and recovery of the species. In particular, the following activities would not be regulated under this proposal:

- activities on tracts of land occupied by a single household and used solely for residential purposes;
- one-time activities that affect 5 acres or less of contiguous property if that property was acquired prior to the date the species was listed; and
- activities which are identified as negligible.

As a result of the new "no surprises" policy for HCPs which was announced last summer by the Department of the Interior, landowners with approved HCPs will be exempted from any additional requirements for species covered by the planes, (both listed and not yet listed species) for the life of the plan. The Service also recently promulgated a "safe harbor" rule to provide incentives for private landowners to preserve and enhance red-cockaded woodpecker habitat. The agreement, developed for the Sand Hills region of North Carolina, promises that success in attracting more woodpeckers to their property will not limit future development even if the woodpeckers are later jeopardized.

Question 3. More specifically, Senator Hutchison has expressed concerns about the private-property effects that might arise from making final a proposed rule that would list as endangered the Arkansas River Shiner, a small fish found in the Canadian River in New Mexico, Oklahoma, and Texas. The proposed listing (published August 3, 1994) states the shiner is at risk due to habitat destruction and modification form stream dewatering, and water quality degradation. If the Arkansas River Shiner listing is made final, are there any private activities that are likely to be prohibited or restricted?

Answer. The Arkansas shiner has been extirpated from about 80 percent of its historical range as a result of the kinds of habitat alterations referred to in the

question. The listing proposal is a response to that decline. Some statements have been made to the effect that listing of the shiner would lead to reduced availability of water from Lake Meredith on restrictions on use of water from the Ogallala aquifer. The Fish and Wildlife Service, however, has no authority or wish to regulate the use of ground or surface water. The Service likewise does not envision seeking releases from Lake Meredith unless water levels in the reservoir improved considerably, and then only if uncontracted water were available, the biological need were evident, and local communities were to support the action. At present, releases from Lake Meredith could do little to facilitate recovery of the Arkansas River shiner. The Canadian River floodplain for several miles below Lake Meredith is dry and choked with mature woody vegetation. Thus any releases would not restore the floodplain to preimpoundment conditions. Additionally, the Arkansas River shiner continues to exist below Lake Meredith where sufficient quantities of water exist. The Service recognizes that there is very limited hydrologic connection between the Ogallala aquifer and the Canadian River in Texas. Consequently, the Service has no intention of restricting private landowner's water rights if the shiner is listed. The Service believes that the long-term goals of agricultural and municipal water users, directed toward conserving the scarce water resources of the area, would benefit the shiner.

Question 4. Also, please project the likely economic effects if the current proposed rule to expand the geographic scope of the listed jaguar to include portions of Texas were made final.

Answer. The jaguar was originally listed as an endangered species in 1972 under one of the predecessors of the Endangered Species Act. At that time one list was maintained for native wildlife and another for foreign species. For technical reasons, when these two lists were combined under the 1973 Act the jaguar retained listed status only outside U.S. territory, although several States are within the species' historic range. It was to correct this artificial and anomalous situation that the Service proposed include those States with historic range in the publication "Endangered and Threatened Wildlife Plants" (50 CFR 17.11 and 17.12) for the jaguar. Although the proposal is often portrayed as an attempt to list a tiny remnant population of the species within the U.S., in actuality fewer than 5 individual jaguars are known to have crossed the border into the U.S. in the past 20 years, primarily in southern Arizona. The Service is proposing to fill a small gap in the protection that has been afforded to the jaguar under U.S. law for over two decades. The principal effect of extending listed status would be to prohibit shooting of jaguars if they appear in the southwestern States. We anticipate no effect on legal hunting or agriculture in those States.

Question 5. You alluded briefly in your testimony to the rather negligible effects listed plants have a private property owners. Please explain your position in this regard further, especially as it relates to any such potential effects arising from private actions that require some Federal involvement, and thus, which may be subject to certain requirements of section 7 of the ESA.

Answer. The take (harm to include killing) of threatened endangered plants on private property is not prohibited by the Endangered Species Act of 1973 (as amended), provided the take does not violate any State laws or occur as a result of an activity funded, authorized, or carried out by a Federal agency. If an activity on private property involves a Federal agency, it is the Federal agency's responsibility to ensure the activity will not jeopardize the continued existence of a listed species or adversely modify or destroy designated critical habitat. If the Federal agency determines that the activity may adversely affect a listed species or adversely modify critical habitat, the Federal agency is obligated to consult with either the Fish and Wildlife Service and/or the National Marine Fisheries Service, depending on the species of plants involved. As a result of the consultation, it is possible the activity

might need to be modified to avoid adverse effects to species or habitats. Very rarely, an activity might not be funded or authorized because it would jeopardize a species or destroy critical habitat without any reasonable and prudent alternatives.

Question 6. Please clarify the current status, under the ESA framework, of the swift fox, and also state whether the species is likely to be listed imminently under the Act.

Answer. On March 3, 1992, the U.S. Fish and Wildlife Service (Service) received a petition form Mr. Jon C. Sharps to list the swift fox (*Vulpes velox*) as an endangered species in the northern portion of its range, if not its entire range. The Service, in its 90-day finding published in the Federal Register (59 FR 28328) on June 1, 1994, found that the petition presented substantial information and began the 12 month review to determine if the swift fox needed the protection of the Endangered Species Act.

On February 15, 1995, the Biodiversity Legal Foundation and Mr. Jon C. Sharps filed a complaint with the Denver Federal District Court seeking to compel the Service to issue a 12-month finding regarding the status of the swift fox throughout its range. On June 12, 1995, the Service found the listing of the swift fox over the historic range of the species was warranted but precluded. This 12-month finding was published in the June 16, 1995, Federal Register.

Question 7. In your testimony, you stated that species that otherwise would be protected under the ESA by being listed might go extinct during a listing moratorium. If a moratorium bill allowed for emergency listings to go forward, would that prevent, or at least appreciably reduce the likelihood of, species becoming extinct during any moratorium period?

Answer. Emergency listing is a seldom-used process that may be applied to a species that is experiencing a significant, and usually unexpected, threat to its continued existence. Emergency listing may be applied when the normal timeline involved with the standard listing process under section 4 of the Act would not be responsive enough. Circumstances surrounding the use of the emergency listing process result in a species listed as endangered. Section 4(b)(7) of the Act, which addresses emergency listing of species, limits the duration the emergency listing may be in effect to 240 days and this period begins immediately upon publication of the rulemaking in the *Federal Register*. Because a emergency situation exists, no time is permitted for a public review and comment period. After 240 days, the listing determination ceases to have force and effect unless the standard listing process is completed and a rulemaking identifying the species as threatened or endangered has been completed.

Relying on the emergency listing option of section 4 of the Act during a moratorium on rulemaking to keep species from going extinct would not be a viable solution. The emergency would likely not be over or resolved at the end of the 240 day period and the Service would not be able to proceed with a listing. Also, if species were allowed to decline to the point that emergency listings were necessary, their status would be so precarious that recovery would be extremely difficult. If a species is threatened to the point of needing the protection of the Act, the best time to list the species is before it reaches a point of being endangered. The flexibility of the Act can best be used for threatened species and it is easier to recover threatened, rather than endangered, species.

Question 8. How many species would likely be affected by a 6-month moratorium? Please provide the subcommittee with a list of the species currently proposed for listing, that likely would be affected by a 6-month moratorium on listing and critical habitat designations.

Answer. The following is a list of the 93 proposed species that would likely be negatively impacted by a moratorium on listing:

Proposed Species Potentially Affected by a Moratorium

Date Proposed	Common Name (Scientific Name) - States
05/08/92	Sheep, Peninsular bighorn (*Ovis canadensis cremnobates*) - CA, Mexico.
05/08/92	Lane Mountain (=Coolgardie) milk-vetch (*Astragalus jaegerianus*) - CA.
05/08/92	Coachella Valley milk-vetch (*Astragalus lentiginosus* var. *coachellae*) - CA.
05/08/92	Shining (=shiny) milk-vetch (*Astragalus lentiginosus* var. *micans*) - CA.
05/08/92	Fish Slough milk-vetch (*Astragalus lentiginosus* var. *piscinensis*) - CA.
05/08/92	Sodaville milk-vetch (*Astragalus lentiginosus* var. *sesquimetralis*) - CA,NV.
05/08/92	Peirson's milk-vetch (*Astragalus magdalenae* var. *peirsonii*) - CA.
05/08/92	Triple-ribbed milk-vetch (*Astragalus tricarinatus*) - CA.
11/20/92	Arizona willow (=White Mountains willow) (*Salix arizonica*) - AZ.
11/30/92	Braunton's milk-vetch (*Astragalus brauntonii*) - CA.
11/30/92	Conejo dudleya (*Dudleya abramsii* ssp. *parva*) - CA.
11/30/92	Marcescent dudleya (*Dudleya cymosa* ssp. *marcescens*) - CA.
11/30/92	Santa Monica Mountains dudleya (*Dudleya cymosa* ssp. *ovatifolia*) - CA.
11/30/92	Verity's dudleya (*Dudleya verityi*) - CA.
11/30/92	Lyon's pentachaeta (*Pentachaeta lyonii*) - CA.
11/30/92	Hartweg's golden sunburst, (*Pseudobahia bahiifolia*) - CA.
11/30/92	San Joaquin adobe sunburst (*Pseudobahia peirsonii*) - CA.
12/17/92	Wahane (=Hawane or lo'ulu) (*Pritchardia aylmer-robinsonii*) - HI.
03/23/93	None (*Amaranthus brownii*) - HI.
03/24/93	Lo'ulu (*Pritchardia remota*) - HI.
03/24/93	None (*Schiedea verticillata*) - HI.
08/03/93	Gulf moccasinshell (*Medionidus penicillatus*) - AL,FL,GA
08/05/93	Fleshy owl's-clover (*Castilleja campestris* ssp. *succulenta*) - CA.
08/05/93	Hoover's spurge (*Chamaesyce hooveri*) - CA.
08/05/93	Colusa grass (*Neostapfia colusana*) - CA.
08/05/93	San Joaquin orcutt grass (*Orcuttia inequalis*) - CA
08/05/93	Hairy (=pilose) orcutt grass (*Orcuttia pilosa*) - CA.
08/05/93	Slender orcutt grass (*Orcuttia tenuis*) - CA.
08/05/93	Sacramento orcutt grass (*Orcuttia viscida*) - CA.
08/05/93	Greene's orcutt grass (*Tuctoria greenei*) - CA.
08/18/93	Snake, northern copperbelly water (*Nerodia erythrogaster neglecta*) - IL,IN,KY,MI,OH.
08/18/93	Snake, Lake Erie water (*Nerodia sipedon insularum*) - OH, Canada.
09/24/93	None (*Coccoloba rugosa*) - PR.
10/01/93	Del Mar manzanita (*Arctostaphylos glandulosa* ssp. *crassifolia*) - CA.
10/01/93	Encinitis baccharis (=Coyote bush), (*Baccharis vanessae*) - CA.
10/01/93	Orcutt's spineflower (*Chorizanthe orcuttiana*) - CA.
10/01/93	Del Mar sand aster (*Corethrogyne filaginifolia* var. *linifolia*) - CA.
10/01/93	Short-leaved dudleya (*Dudleya blochmaniae* ssp. *brevifolia*) - CA.
10/01/93	Big-leaved crownbeard (*Verbesina dissita*) - CA, Mexico.
10/06/93	Winkler cactus (*Pediocactus winkleri*) - UT.
11/29/93	Lizard, flat-tailed horned (*Phrynosoma mcallii*) - AZ,CA, Mexico.
01/06/94	Splittail, Sacramento (*Pogonichthys macrolepidotus*) - CA.
02/02/94	Frog , California red-legged (*Rana aurora draytoni*) - CA, Mexico.
02/04/94	Whipsnake, (=striped racer) Alameda (*Masticophis lateralis euryxanthus*) - CA.
02/04/94	Butterfly, Callippe silverspot (*Speyeria callippe callippe*) - CA.
02/04/94	Butterfly, Behren's silverspot (*Speyeria zerene behrensii*) - CA.
02/17/94	Salamander, Barton Springs (*Eurycea sosorum*) - TX.
02/18/94	None (*Gesneria pauciflora*) - PR.
03/23/94	Talussnail, San Xavier (*Sonorella eremita* (Pilsbry & Ferris, 1915)) - AZ.
03/28/94	Parish's alkali grass (*Puccinellia parishii*) - AZ,CA,MT,NM.
04/20/94	Stebbins' morning-glory (*Calystegia stebbinsii*) - CA.
04/20/94	Pine Hill ceanothus (*Ceanothus roderickii*) - CA.
04/20/94	Pine Hill flannelbush (*Fremontodendron decumbens*) - CA.

04/20/94 El Dorado bedstraw (*Galium californicum* ssp. *sierrae*) - CA.
04/20/94 Layne's butterweed (*Senecio layneae*) - CA.
05/10/94 Grasshopper, Zayante band-winged (*Trimerotropis infantilis*) - CA.
05/10/94 Beetle, Santa Cruz rain (*Pleocoma conugens conjugens*) - CA
05/10/94 Beetle, Mount Hermon June (*Polyphylla barbata*) - CA.
05/10/94 Golden paintbrush (*Castilleja levisecta*) - OR,WA, Canada (B.C.).
05/18/94 Spindace, Virgin (*Lepidomeda mollispinis mollispinis*) - AZ,NV,UT.
06/27/94 None (*Delissea undulata*) - HI.
07/13/94 Jaguar, U.S. population (*Panthera onca*) - AZ,CA,CO,LA,NM,TX
07/14/94 Eider, Steller's (AK breeding pop.) (*Polysticta stelleri*) - AK, Russia
07/14/94 Elktoe, Cumberland (*Alasmidonta atropurpurea* (Rafinesque, 1831)) - KY,TN.
07/14/94 Combshell, Cumberlandian (*Epioblasma brevidens* (I. Lea, 1831)) - AL,KY,TN,VA.
07/14/94 Mussel, oyster (*Epioblasma capsaeformis* (I. Lea, 1834)) - AL,KY,TN,VA.
07/14/94 Rabbitsfoot, rough (*Quadrula cylindrica strigillata* (B.H. Wright, 1898)) - KY,TN,VA.
07/14/94 Bean, Purple (*Villosa perpurpurea* (I. Lea,1861)) - TN,VA.
08/03/94 Shiner, Arkansas River (native pop. only) (*Notropis girardi*) - AR,KS,NM,OK,TX.
08/03/94 Mussel, fat three-ridge (*Amblema neislerii* (I. Lea, 1858)) - FL,GA.
08/03/94 Slabshell, Chipola (*Elliptio chipolaensis*) - AL,FL.
08/03/94 Bankclimber, purple (*Elliptoideus sloatianus*) (I. Lea, 1840)) - AL,GA,FL.
08/03/94 Moccasinshell, Gulf (*Medionidus penicillatus*) - GA.
08/03/94 Pocketbook, shiny-rayed (*Lampsilis subangulata* (I. Lea, 1840)) - AL,FL,GA.
08/03/94 Ochlockonee moccasinshell (*Medionidus simpsonianus*) - FL,GA.
08/03/94 Pigtoe, oval (*Pleurobema pyriforme* (I. Lea, 1857)) - AL,FL,GA.
08/04/94 Butterfly, Quino checkerspot (*Euphydryas editha quino (=E. e. wrighti)*) - CA, Mexico.
08/04/94 Skipper, Laguna Mountains (*Pyrgus ruralis lagunae*) - CA.
08/04/94 Fairy shrimp, San Diego (*Branchinecta sandiegoensis*) - CA.
08/04/94 Cuyamaca Lake downingia (*Downingia concolor* var. *brevior*) - CA.
08/04/94 Parish's meadowfoam (*Limnanthes gracilis* ssp. *parishii*) - CA.
08/23/94 Spring Creek bladderpod (*Lesquerella perforata*) - TN.
09/09/94 *Helianthus eggertii* (Eggert's sunflower) - AL,TN,KY.
10/04/94 *Cirsium hydrophilum* var. *hydrophilum* (Suisun thistle) - CA
10/04/94 *Cordylanthus mollis* ssp. *mollis* (soft bird's-beak) - CA
12/12/94 Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) - AZ,Mexico.
12/15/94 *Allium munzii* (Munz's onion) - CA
12/15/94 *Atriplex coronata* var. *notatior* (San Jacinto Valley crownscale) - CA
12/15/94 *Brodiaea filifolia* (Thread-leaved brodiaea) - CA
12/15/94 *Navarretia fossalis* (Spreading navarretia) - CA
12/19/94 *Lasthenia conjugens* (Contra costa goldfields) - CA
12/19/94 *Navarretia leucocephala* ssp. *pauciflora* (few-flowered navarretia) - CA
12/19/94 *Navarretia leucocephala* ssp. *plieantha* (Many-flowered navarretia) - CA
12/19/94 *Parvisedium leiocarpum* (Lake county stonecrop) - CA

Total = 93 Species

Proposed Critical Habitat Potentially Affected by a Moratorium

Date Proposed Common Name (Scientific Name) - States

06/20/92 Marbled murrelet (*Brachyramphus marmoratus marmoratus*) - CA,OR,WA.
09/30/92 Gulf sturgeon (*Acipenser oxyrinchus desotoi*) - AL,FL,GA,LA,MS.
12/02/93 Louisiana black bear (*Ursus americanus luteolus*) - LA.
12/01/94 Lost River & Shortnose sucker (*Deltistes luxatus*) & (*Chasmistes brevirostris*) - CA,OR.

12/01/94 Mexican spotted owl - (*Strix occidentalis lucida*) - AZ,CO,NM,UT.
12/12/94 Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) - AZ.

Total = 7 Species

Question 9. Do you interpret the language of section 2 of S. 191 to prevent or restrict any activities undertaken pursuant to the ESA prior to final listing, such as publication of proposed rules on either the status of species or determinations of critical habitat for listed species?

Answer. As written, the language in section 2 would not prohibit proposing species for threatened or endangered status or proposed the designation of critical habitat. However, the Act requires that within 1 year of a proposed rule being published in the *Federal Register*, the Administration must publish a final finding on whether listing or designation is warranted. The only exception is if substantial disagreement about the accuracy of data used to support the finding exists. If so, the finding can be delayed another 6 months.

It is possible that if the Service proceeded with proposing species for listing or habitat for critical habitat designation, the moratorium could prevent a finding being finalized within the 12 month period. This would place the Service in the position of being out of compliance with the Act and a subsequent finding to list a species or designate a habitat as critical could be challenged as not being done within the statutory timeframes set forth by the Act.

Question 10. It would seem that the species that would be most directly affected by any moratorium on listing determinations are currently on the list of Category 1 candidate species. These are species for which substantial information exists to warrant listing as either threatened or endangered. As of 1992, there were approximately 400 Category 1 candidate species. How many species currently are on the Category 1 list and, although the status of each species obviously differs to some degree, generally how you would characterize the level of risk facing species that have made it onto the list if their listing were to be delayed by a moratorium?

Answer. As of April 1, 1995, there are 211 plants and 85 animals classified as Category 1 candidate species. The Service strives to list species based on a ranking system where the most threatened are proposed for listing first. Therefore, the species currently proposed for listing will generally be in greater need of protection than Category 1 candidate species. In addition, the status of proposed species—often including the location(s) and preferred habitat(s)—has been published for public comment. If the protection of the Endangered Species Act is delayed, vulnerability of proposed species is increased. The habitat of proposed species could be deliberately destroyed during the moratorium without violating the take provisions of the Act. Some species—such as turtles and orchids—are highly esteemed by collectors. When such species are proposed for listing, their value often greatly increases and collection pressure will likewise increase.

The next set of species at risk are those Category 1 species which are declining due to significant, imminent threats. Another set of species at risk are those whose status may change for the worse during the moratorium. Such a change could be prompted by private or Federal actions or by stochastic events such as hurricanes or floods.

ADDITIONAL QUESTION FOR SECRETARY BRUCE BABBITT FROM SENATOR REID

Question: I understand the Administration released a proposal to improve the Endangered Species Act by making it more fair, cooperative and scientifically sound. Can you tell us about the highlights of the proposal and how they would fit in with S. 191. And if in your opinion given these changes, whether we need any legislation, and if so, what would you propose? How would S. 191 solve any of the problems associated with the Act?

Answer. In the past year the Administration has taken a number of steps to improve the implementation of the Endangered Species Act. These initiatives have

consisted of several announcements. The first proposal consisted of six policy statements published July 1, 1994, in the *Federal Register*.

- *Cooperative Policy for Peer Review in Endangered Species Act Activities*—Policy to clarify the role of peer review in endangered species activities undertaken by the Service.
- *Cooperative Policy on Information Standards under the Endangered Species Act Activities*—Policy to establish procedures, and provide criteria and guidance, to ensure that decisions on endangered species issues made by the Service represent the best scientific and commercial data available.
- *Cooperative Policy for Endangered Species Act Section 9 Prohibitions*—Policy to establish a procedure at the time a species is listed as threatened or endangered that identifies, to the maximum extent practicable, those activities that would or would not constitute a violation of section 9 of the Endangered Species Act.
- *Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act*—Policy to ensure the involvement of all appropriate agencies and affected interests in a mutually developed strategy to implement recovery actions and minimize the social and economic impacts of the actions.
- *Cooperative Policy for the Ecosystem Approach to the Endangered Species Act*—Policy to encourage the incorporation of ecosystem considerations in Endangered Species Act actions regarding listing, interagency cooperation, recovery, and cooperative activities.
- *Cooperative Policy regarding the Role of State Agencies in Endangered Species Activities*—Policy to clarify the role of State agencies in endangered species related activities undertaken by the Service.

In August, 1994 the Administration announced a "No Surprises" policy. The policy assures landowners and stakeholders that enter into a Habitat Conservation Planning agreements with the Service, that when the Plan is finalized the Service will not require additional land or funding for species or habitats at a future date.

In addition, on December 21, 1994, five draft polices developed jointly by the Fish and Wildlife Service and the National Marine Fisheries Service were published in the *Federal Register* for public comment.

- *Developing Habitat Conservation Plans (HCPs).* A draft handbook has been developed to provide consistent and simplified procedures for agency personnel as they work with private landowners who are applying for incidental take permits under section 10 of the ESA.
- *Managing petitions.* Draft guidelines on petition management more rigorously define those species and actions which may be petitioned under the ESA. The draft guidelines also provide guidance on timeframes for responding to petitions and notification of petitioners.
- *Conserving species that are candidates for listing.* The guidelines set out standards for prioritizing candidate species and mechanisms for taking actions benefiting candidates thereby reducing threats and potentially avoiding listing.
- *Consulting with other Federal agencies.* A draft handbook would provide consistent procedures for consultation, under section 7 of the Act, with other Federal agencies on endangered species issues.
- *Defining "populations" of vertebrate species eligible for listing.* The draft guidelines would guide the evaluation of distinct vertebrate populations for listing, delisting, and reclassification under the ESA.

Most recently, the Administration promoted ten principles to guide the Administration's effort for reforming and implementing the Endangered Species Act. The Administration has identified the following specific measures which Congress could take to further improve the ESA:

MINIMIZE SOCIAL AND ECONOMIC IMPACTS OF THE ACT

Restore the distinction between a threatened species and an endangered species. Provide the flexibility to use, a wide range of administrative or regulatory incentives, prohibitions and protections for threatened species.

TREAT LANDOWNERS FAIRLY AND PROVIDE THEM WITH CERTAINTY

Provide additional certainty to landowners who develop approved HCPs that protect non-listed species as well as listed species. Landowners who have provided for the protection of these species or their significant habitat types under a HCP should be assured that their land use activities will not be disrupted by the subsequent listing of other species dependent upon the same habitat.

Allow certain small landowner activities which result in incidental take of species to include endangered species and provide that incidental take activities undertaken pursuant to an approved State conservation agreement will not be regulated under the ESA.

EXPEDITE RECOVERY AND DE-LISTING OF THREATENED AND ENDANGERED SPECIES

Ensure that the recovery planning process articulates definitive recovery objectives for populations; provides all jurisdictional entities and stakeholders an opportunity to participate in the process; seeks to minimize any social or economic impacts that may result from implementation; emphasizes multi-species, habitat-based approaches; is exempted from NEPA if the planning process is equivalent to that required by NEPA; facilitates integration of natural resource and land management programs at all jurisdictional levels; and identifies specific activities or geographic areas that are exempt from or that will not be affected by the section 9 prohibitions of the ESA concerning "take" of species covered by a plan.

Require that all appropriate State and Federal agencies develop one or more specific agreements to implement a recovery plan. Implementation agreements should expedite and provide assurances concerning the outcome of interagency consultations under section 7 and ensure that actions taken pursuant to the agreement meet or exceed the requirements of the ESA. Upon approval, the agreement should be legally binding and incorporated into the recovery plan.

Designate critical habitat based on specific recommendations in recovery plans and concurrently with recovery plan approval.

Reclassification should be done administratively based on criteria in a recovery plan and should not be subject to the current process required for listing, de-listing and changes in status of a species. De-listing should be triggered when the criteria established by a recovery plan are met.

PROVIDE STATES OPPORTUNITIES TO PLAY A GREATER ROLE IN IMPLEMENTING THE ESA

Require the Secretary to concur with a State conservation agreement and suspend the consequences under the GSA that would otherwise result from a final decision to list a species if a State has approved a conservation agreement and the Secretary determines that it will remove the threats to the species and promote its recovery within the State. Suspension of the consequences of listing a species pursuant to an approved State conservation agreement should be permitted at any point before or after a final listing decision.

Require that special consideration be given to State scientific knowledge and information. Petitions would be sent to each affected State fish and wildlife agency. Require the Secretary to accept a State's recommendation if it recommends against proposing a species for listing or delisting unless the Secretary finds, after conduct-

ing independent scientific peer review, that listing is required under the provisions of the ESA.

Provide States the opportunity to assume lead responsibility for developing recovery plans and any component implementation agreements. Establish mechanisms to ensure participation by and coordination with each affected State in the development of the recovery plan.

Authorize appropriate State agencies, as well as the Secretaries of Interior and Commerce, to enter into voluntary pre-listing agreements with cooperating landowners to provide assurances that further conservation measures would not be required of the landowners should' a species subsequently be listed.

Provide a State with the opportunity to assume responsibility for issuing permits under section 10(a)(2) for areas within a State which have been identified for such assumption in an approved recovery plan or for which there is otherwise an approved comprehensive, habitat-based State program.

S. 191 advocates amending the Endangered Species Act of 1973 to place moratoriums on the listing of species as threatened or endangered or designation of critical habitat. Placing a moratorium on listing of species would work to make the Act less flexible. By precluding the ability to protect species while they are threatened, options (such as section 4(d) rules) which can work to the benefit of private land owners, would be not be available. If the species continued to decline to the point of becoming endangered during the moratorium period, the measures that have to be taken to recover the species become more stringent and the likelihood that these more drastic measures could have an economic impact on private landowners would increase.

S. 191 also proposed to place a moratorium on all section 7 activities. Section 7 is the process that allows projects that involve a Federal agency to proceed. By placing a moratorium on section 7 activities, any project that involved the funding, authorization, or work by a Federal agency could not proceed without risk of violating section 9, the prohibitions of take of listed animal species or destruction of designated critical habitat. Therefore, S. 191 would decrease the flexibility of the Endangered Species Act and place additional burdens on private land owners. Federal assistance, usually in the form of funding or an authorization, might not be available to help private landowners.

S. 191 would not solve any of the problems associated with the Endangered Species Act. The Administration feels that the Endangered Species Act is a fair law that works to conserve the Nation's natural resources. Many of the problems that existed with the Act are being resolved by increased public education and partnerships, by realizing the full flexibility of the Act, and by working to increase efficiency in its implementation. Other problems could best be resolved by adopting the changes identified by the Administration.

Senator KEMPTHORNE. Thank you.

Let me say to all members of the panel which is a distinguished panel, we are anxious to hear your comments because many of you have the firsthand experience with this based on your background. We will use the clock because there are six members of the panel. As you see us approaching the warning light and then the red light, I would just ask you to conclude your remarks and summarize. Also, we will make a part of the record the statements that you have submitted to us prior to this.

Again, we look forward to your comments. Let me begin with Dr. David Wilcove, senior ecologist, Environmental Defense Fund.

STATEMENT OF DAVID WILCOVE, SENIOR ECOLOGIST, ENVIRONMENTAL DEFENSE FUND

Mr. WILCOVE. Thank you very much, Mr. Chairman and members of the committee.

I'm pleased to present this testimony on behalf of both the Environmental Defense Fund and the Society for Conservation Biology which is a professional association of scientists who study the protection of biodiversity.

The gist of my message is that if S. 191 becomes law, it will have some or all of the following consequences: some species may become extinct, the cost and difficulty of saving other species will increase, and we're going to lose the flexibility to design conservation plans that balance the needs of endangered species with legitimate economic activities.

These consequences stem from the sad fact that we tend not to add species to the Endangered Species list until they are teetering on the brink of extinction, and to delay their protection any further, which is precisely what a moratorium would do, would make a bad situation worse.

I'd like to describe a study that my colleagues and I recently published in the scientific journal "Conservation Biology," one that Senator Boxer has alluded to. We asked a simple question, "How close to extinction are species when they are added to the Endangered Species List?" So we looked at all plants and animals that were added to the list between the years 1985 and 1991.

We discovered that half of all of the animals had total population sizes of less than 1,000 individuals at the time they were listed. This number is generally considered to be well below the level that most conservation biologists would regard as minimally safe in the short term.

With listed plants, the situation was even worse. Half of all plants added to the Endangered Species List had total populations of fewer than 120 mature individuals at the time of listing and, in fact, there were 39 plant species that were listed when only 10 or fewer individuals were known to be alive.

This study only covered species listed between the years 1985 and 1991, so in preparation for this hearing, we went back to the Federal Register to find out whether species are still being added to the list when they are extremely rare and the answer is unfortunately, they are.

Just last year in 1994, for example, at least 17 Hawaiian plants were added to the Endangered Species List with total known populations of 10 or fewer mature individuals. I would point out that we cannot predict scientifically which if any of these species will prove to have important medicinal properties or other useful properties.

Bear in mind that even under the best of circumstances, the listing process can take as long as 2½ years. When you're dealing with species that are extremely rare, any further delays could quite literally be fatal to the species involved. Other species, those that are not down to just a couple of individuals, could become so rare that only an expensive program of captive propagation could save them, so we essentially run the risk of creating more high risk, expensive, conservation plans in a time of shrinking resources.

Last, because rare species are likely to become even more rare during the moratorium, we stand to lose some of the flexibility we would have to craft conservation plans that will balance the needs of the species with legitimate development activities. We lose this flexibility because when a plant or animal is down to one or two dwindling populations, there are really very few tradeoffs that can be made that will both satisfy the conservation needs of the species and allow the development activity in question to proceed.

In short, I don't believe that S. 191 solves any problems; I think it creates additional problems.

Thank you, Mr. Chairman.

Senator KEMPTHORNE. Mr. Wilcove, thank you very much.

I'd like to ask each of the panelist to go ahead with your presentation and then we will have questions we'll direct to any and all of you. Also, just for clarification, we do have before us S. 503, which modifies S. 191. It is a 6-month moratorium that is being proposed and it does not include a moratorium on section 7 consultations, just for clarification.

With that, Mr. Robert E. Gordon, director, National Wilderness Institute.

STATEMENT OF ROBERT E. GORDON, JR., DIRECTOR, NATIONAL WILDERNESS INSTITUTE

Mr. GORDON. Mr. Chairman, my colleagues and I have spent a great deal of time studying the implementation of the Endangered Species Act and I appreciate the opportunity to discuss some of that work with you today.

The organization I represent, NWI, is a private conservation organization that is dedicated to using sound, objective science for the wise management of natural resources with members in all 50 States.

For several reasons, one of the many problems now plaguing implementation of a responsible and effective Endangered Species Program is the listing process. First, under the current program, the evidentiary standards for listing are, in a word, BAD. I use the word BAD because it is an acronym for the standards which, under section 4, are "best available scientific and commercial data." The problem with best available data, or "BAD" is that at best it's a comparative word, thus the data need not be reliable, conclusive, adequate, verifiable, accurate or even good.

As the number of listed species now approaches 1,000 with thousands of official candidates in the wings, we're finding that the current standards often lead to mistakes. For example, as a result of the Indian Clam Shell Turtle's inclusion on Appendix I of CITES, the Service subsequently listed the species as endangered. After listing, rather than before, a literature review was conducted to see if supporting evidence justified its current endangered status. No such supporting data could be found and in a further attempt to find supporting information, the Service then contacted turtle experts such as Dr. E.O. Moll. Moll stated that it was "Seemingly the most common and widespread turtle in all of India. How it ever made Appendix I of CITES is a big mystery."

The tumamoc globeberry is another example. It is one of the most recent data errors delisted in 1993. After including this plant

on the Endangered Species List for 7 years, Fish and Wildlife determined "Surveys have shown tumamoc to be more common and much more evenly distributed across its range than previously believed." Although never really endangered, during its 7years on the list, this plan soaked up over $1.4 million in funds from the Corps, BLM, DOD, NPS, the Forest Service, the Bureau of Indian Affairs, the Bureau of Mines and the Bureau of Reclamation, and was the basis for the Fish and Wildlife Service to issue a jeopardy opinion on the Tucson Aqueduct.

It's difficult to know just how many species have been listed on poor grounds but there is evidence to suggest that the number is significant. In Fish and Wildlife's latest report to Congress, only qualitative information about species is included. One species could increase from five individuals to six and it could be called improving. Another could go from a population of 1 million to 999,999 and be called declining. Clearly this information is not too useful without also having quantitative data. According to the Service, we do not even have a qualitative guesstimate for about 27 percent of the listed species. This is an increase of 7.6 percent from the previous report.

Furthermore, in a comprehensive review of 306 recovery plans, many showed that there was little information about the status of listed species. For example, the Cape crayfish, "Sufficient data to estimate population size or trends is lacking." For the Kentucky cave shrimp, "The very small estimated population size of the species at the time of listing, approximately 500 individuals, made it standout as being extremely vulnerable to extinction. Since the time of listing, new populations have been discovered. Population estimates range from approximately 7,000 to 12,000 individuals.

The painted snake coiled forest snail, "Information on the snail's ecology and natural history is almost completely lacking."

Even species the Service calls recoveries were really mistakes. The GAO reports that "Although officially designated as recovered, the three species owe their recovery more to the discovery of additional birds than successful recovery efforts." The Rydberg milkvetch, a plant which was one of the only other supposed recoveries, was delisted because "Further surveys turned up sufficient and healthy populations," in plain English, another mistake.

Second, the listing of species which may not merit Federal protection because of the low standard of "BAD" is compounded by poor criteria for determining endangered or threatened status. Section 4 lays forth that a species may be listed because of, among other things, "threatened modification of habitat or range, the inadequacy of existing regulatory mechanisms, or other natural factors affecting its continued existence." It could be argued that almost nothing escapes the first criteria, threatened habitat modification. The second mentioned criteria is not a reasonable justification for animals or plants which may be otherwise doing fine.

As regards the last mentioned criteria, it is a bit of an impossible guideline for our current policy. For example, for one endangered invertebrate, the Iowa snail, the current Government recovery plan calls for conserving its remaining habitat until the next Ice Age.

A third problem with the current listing process is that a decision by the implementing agency not to list a species may be sub-

ject to the challenge of a citizen suit as outlined in section 4 but decisions to list cannot be challenged and parties successful in their challenges to not list a species may receive attorneys fees in accordance with section 11 giving the agency the incentive only to list.

The poor standard of listing is exacerbated by poor criteria and by a lopsided incentive to list species. When this process is set in motion, it can and has resulted in enormous cost to the public through expenditures of tax dollars and adverse impact on properties and business. Those who care for a responsible and effective Endangered Species Program have a serious obligation to honestly address the situation as these errors cause conflict, drain resources, and plague the Act. Refraining from wrongly listing any more species which may increase conflict between society and the current program, as well as the expanded program that is already performing poorly, seems to be a logical step to take until the many problems inherent in the Act can be addressed during the reauthorization process.

Thank you.

Senator KEMPTHORNE. Mr. Gordon, thank you very much.

Mr. Richard Perry is Commissioner with the Texas Department of Agriculture.

STATEMENT OF RICHARD PERRY, COMMISSIONER, TEXAS DEPARTMENT OF AGRICULTURE

Mr. PERRY. Thank you, Chairman Kempthorne and members for the opportunity to speak in support of S. 503, which would place a moratorium on the listing of endangered and threatened species until Congress reauthorizes the Endangered Species Act, and certainly to Senator Hutchison for not only carrying this very important legislation, for the opportunity and invitation to be here.

I could talk for quite a spell about the problems that we face in Texas with the ESA and specifically about the arbitrary enforcement by the U.S. Fish and Wildlife Service in the way they carry this out. I'll limit my remarks to why I agree that there must be a moratorium on the listings. We have provided you with written testimony and supporting material which will give you more detail of the problems that Texans are facing.

In my opinion, Texas has been hit harder by the Endangered Species Act than many States because 95 percent of our property is privately owned and there is an awful lot of property in our State. Because of our land mass, Texas has a variety of soils, climates and ground cover which leads to a diversity of wildlife and habitat.

Texas currently has 67 species that are federally listed as endangered or threatened. Each listing brings more regulations and restrictions on what a person can do with the property he or she owns. Each restriction creates animosity which hurts rather than helps promote species protection.

Just for reference, let me share with you a map. The colored counties on this map are all home to at least one endangered species which means the majority of Texans have one in their neighborhood. Texans have fought several battles over the Endangered Species Act recently and know all too well what these restrictions can do. Central Texas has 33 counties affected by the endangered

golden-cheeked warbler. Individuals as well as developers have been prevented from building homes on their land. Two weeks ago, Time magazine had an article that talked about one of those, Margaret Richter, a 74-year-old State employee retiree in northwestern Travis County. She had bought a piece of property, 30 acres there, some years ago to assist and aid in her retirement. That land, in 1989, was carried on the rolls of Travis County for almost $1 million and then in 1990, that land was designated as critical habitat for the golden-cheeked warbler. That 30 acres today is on the tax rolls in Travis County for $30,000. So much for her retirement.

Farmers and ranchers face restrictions on simple day-to-day management decisions such as brush control and the number of cattle they can run on their land. In 1991, another Margaret, this time Margaret Rogers, an 87-year-old widow on a central Texas ranch that had been in her family for years and years, received a notification from the Fish and Wildlife Service of a $50,000 fine that would be levied upon her for destruction of critical habitat. While the Fish and Wildlife Service did come back and share their admitted overreaction to that letter, they did tell her that before she used anymore equipment to destroy any fence row, they needed to call and ask them first.

The city of San Antonio and the farmers in the surrounding counties have had their water supply threatened by a continuing Sierra Club lawsuit aimed to ensure there is an adequate water supply to protect two salamanders and two minnows that live in the springs fed by the Edwards Aquifer. The Sierra Club has explicitly threatened to try to cut off water to military bases in San Antonio which would eliminate 150,000 jobs and cut off Federal funds to farmers in a three-county area to protect these species.

Those are just a few of the examples but they should begin to give you an understanding of why we are certainly concerned about more listings. We believe that habitat exists today because of good stewardship by farmers and ranchers. Most producers take pride in having wildlife on their land and are willing to do their part if it makes sense, but it's the lack of common sense in the enforcement of the Endangered Species Act that has Texans irate.

The U.S. Fish and Wildlife Service wants to add the jaguar as an endangered species under the Act despite the fact that it has not been seen anywhere in Texas since 1948. Even the petition lists notes the jaguar has historically only been an occasional wanderer across Texas, yet Fish and Wildlife pushes on for the listing which could restrict about 30 counties along the Rio Grande River.

The listing is being pushed by an environmental group from outside Texas that has no stake or accountability for the outcome of its actions. The ease with which anyone, anywhere can petition to add a species to the endangered list without regard for scientific data or the economic restrictions that listing causes is an issue that must be addressed in the reauthorization of the Act.

As a matter of fact, I was very pleased when Secretary Babbitt talked about the superb—as a matter of fact, he called it one of the best in the Nation—parks and wildlife systems and departments that we have in the State. In the Texas Panhandle, the Fish and Wildlife wants to add the swift fox to the endangered list. This is despite the fact that that "superb, one of the best in the Nation,"

Texas Parks and Wildlife Department biologists tell Fish and Wildlife that biological information does not support a listing, yet 40 counties face restrictions if the swift fox is listed.

The Arkansas River shiner, which I will not go into, that Senator Hutchison very clearly stated the case for it, is another example. These listings, and particularly that listing on the bait fish of the Arkansas River shiner, is quite horrifying because it would restrict access to the Ogalalla Aquifer and 42 counties in the Texas Panhandle, which brings in over $10 billion worth of economic impact in the agricultural community there, would be devastating. Ag producers depend on that water for the produce, the food and fiber for consumers all across the United States.

Fish and Wildlife sent a letter to concerned citizens saying it didn't know if groundwater would be affected, didn't know how it was going to protect the shiner. That's not an issue that we can sign on to at this particular point in time.

What has happened in San Antonio in the Edwards Aquifer where we have the tenth largest city in the United States in jeopardy is a great example of what we see happening with this totally irresponsible implementation of this Act in Texas.

Senator KEMPTHORNE. Mr. Perry, if you could conclude your remarks. The Senator is remaining and we will probably ask you to give us a little more detail at that point.

Mr. PERRY. We support the wildlife system in Texas. There is no doubt about it. I think if you'll give Texas farmers and ranchers valid information, if you'll give them valid regulation, we certainly can and will do all we can to support the wildlife system in Texas.

Thank you.

Senator KEMPTHORNE. Thank you very much.

Mr. William Snape who is the legal director of the Defenders of Wildlife.

STATEMENT OF WILLIAM SNAPE, LEGAL DIRECTOR, DEFENDERS OF WILDLIFE

Mr. SNAPE. Thank you, Mr. Chairman.

My name is Bill Snape. I am counsel for Defenders of Wildlife and I very much appreciate the opportunity this morning to testify.

Defenders believes the Endangered Species Act already possesses the machinery to work but can be made to work even better. Almost every single conflict that arises under the Act, and we've heard several this morning, I think can be attributed to a problem related to implementation, not law. Still, the Act can and should be reauthorized by Congress, but not with ad hoc legislative proposals. I believe S. 503 is an ad hoc legislative proposal. The fact that a new moratorium bill was dropped late last night hardly allays my fears and, in fact, reinforces my greater fear that Congress is taking this type of ad hoc approach.

Although the presumed purpose of S. 503 is to allow a regulatory cooling-off period until Congress can analyze and reauthorize the Act, in this case for 6 months, I believe S. 503 would actually make species conservation efforts more costly and inefficient in the long run. What the Act needs now is a comprehensive examination of its purpose and mandate, not haphazard attacks on its various provisions.

The Act's stated purposes are to conserve listed species and the ecosystems upon which they depend. That is now in the statute. If Congress still supports these purposes, and I hope certainly that it does, then I believe Congress should endeavor to understand the degree to which species and ecosystems in this country are imperiled. This is ultimately a scientific question and I agree with Secretary Babbitt that the National Biological Service could very much help in this endeavor.

S. 503 should be rejected because I believe it avoids the tough questions, forges no solutions, and makes effective conservation needlessly more difficult. At first blush, it might appear that a listing moratorium might provide regulatory relief for a program beleaguered by many proposed candidate species. However, a listing moratorium would be an unwise response to a much broader question about what the Act should be attempting to accomplish.

What is the moratorium's ultimate purpose? Is it to get the attention of the Administration or the environmental community? You have our attention. What would happen at the end of the 6 months? Would it just mean that those species that have been backlogged would now need to be dealt with by the Fish and Wildlife Service? What would happen in this freeze period to species?

If the issue behind S. 503 is how science is being applied during the listing process, then Congress should debate this openly. If the issue is what regulations occur after listing, then Congress should debate this openly. However, to arbitrarily impose a moratorium on all listings is not only a blatant attempt to place undue political pressure on the Act, but I believe also a concession by this Congress that it rejects the present purposes of the Act.

A moratorium on critical habitat designations is also the wrong response. Whatever its intention, a moratorium on critical habitat would not eliminate the need to protect habitat, would not make species conservation anymore efficient or effective. Yet, a moratorium on critical habitat would rob the Federal Government of a major tool in combating the habitat problem. Most noteworthy is that the Act explicitly allows economic factors to be considered during the process of designating critical habitat.

What is our solution? Instead of considering proposals that possess no identifiable long-term answers, Defenders suggests Congress take a positive, proactive approach to species conservation. Our recommendations I believe are relatively straightforward and there are four of them.

The first is to prevent the need for listings. This is one of the areas Mr. Perry was just talking about. I think what Texas needs is a regional approach, a more ecosystem-based approach, a big picture approach to species conservation. I think part of the problem in Texas, as it has been in California, is that the species-by-species approach has made people very nervous. I think we need to step back and really take a look at what we're trying to accomplish and preventing the need for listings would do that.

The second recommendation is to provide certainty and incentives to private landowners. Interestingly enough, S. 503 is aimed at farmers and ranchers. I believe this year's reauthorization of the Farm Bill, and particularly the Conservation Reserve Program, provides huge opportunities to direct already existing Federal

funds to purposes that would protect threatened and endangered species, protect the prevention of erodible soil, protect riparian areas. I think we can get a lot more bang for the buck than we're presently getting. Certainly we should be trying to prevent the disincentives that, again, Mr. Perry spoke of just recently.

I think we should expand the role of State and tribal governments. I think for too long they have not been as full and active partners in this process as they should.

Last is something that cuts throughout all phases of implementation of the Act, we need sound science. We need to agree on what the science is so that we can at least debate on the same page.

S. 503 makes no positive contribution to reauthorization. It does not address the four items I just talked about. The bill should be rejected for the bureaucratic confusion, the added cost, and the immense inefficiencies it would create. During reauthorization, I urge the subcommittee to avoid dwelling on whether to strengthen or weaken the Act, but to make the Act more effective for humans and wildlife alike.

Thank you.

Senator KEMPTHORNE. Mr. Snape, thank you very much.

Mr. James Kraft is vice president of the Plum Creek Timber Company. Welcome.

STATEMENT OF JAMES KRAFT, VICE PRESIDENT, PLUM CREEK TIMBER COMPANY

Mr. KRAFT. Good afternoon, Mr. Chairman and other members of the subcommittee. Thank you for the opportunity to testify on S. 503.

As general counsel for Plum Creek, I have been intimately involved with the Endangered Species Act and how it affects private landowners. We manage approximately 2 million acres of timberland in Washington, Montana and Idaho, which are home to numerous listed and candidate species, including the northern spotted owl, the grizzly bear which isn't extinct, and the bull trout, to name a few.

Today, the subcommittee has heard from a number of witnesses discussing the pros and cons of enacting a moratorium on the listing of new species. I would like to take a step back from the question of a moratorium and discuss the importance of ESA reform and the interrelationship between a moratorium and substantive legislative issues.

First, let me emphasize the obvious. A moratorium is not the ultimate reform that most would agree is needed. We at Plum Creek are concerned that the linkage of a moratorium with congressional action to reform the Act could actually create a disincentive to actual reform because the political pressure may be reduced and ultimately reform may never get passed.

Today, Plum Creek manages its lands under the Act as it's written. While the ESA has many imperfections, as I think everyone here has acknowledged, we are trying to make it work on the ground. I'd like to describe to major examples of what we've been doing.

In the Spring of 1994, we began working with the Fish and Wildlife Service, the Forest Service and the Montana Department of

92-533 - 95 - 3

State Lands to devise a joint program to manage timber resources and conserve grizzly bears. Just last Thursday, we announced that a comprehensive agreement in principle had been reached.

The major elements of this agreement include protection of grizzly bear travel corridors, limitations on our own commercial timber harvests and management, protection of streamside areas, and intensive road management. In addition, it provides for ongoing monitoring and research. The agreement covers nearly 370,000 acres of intermingled ownership in northwest Montana and is based on the state-of-the-art science.

In addition to our grizzly bear agreement, Plum Creek is working to complete a multispecies habitat conservation plan that will cover spotted owls and 17 other species in the I–90 corridor in the Cascades Region of Washington which if you're familiar with the President's forest plan, is the critical area for habitat conservation.

This HCP includes nearly 170,000 acres owned by Plum Creek which comprises nearly half of our ownership in the State of Washington. This agreement, like the grizzly bear agreement, is based on ecosystem principles and largely is built on the policy statement that Secretary Babbitt announced earlier, a deal is a deal and we're hoping that provides us with the certainty and assurance that we can manage our lands in the future and still provide conservation benefits for species.

Projects such as the grizzly bear agreement and our Cascades Multispecies HCP are really laboratories for everyone to see how effective and how flexible the Act really is in practice. As we go through these processes and they still need to be finished for the HCP and we still need to go through NEPA and other processes for the grizzly bear, I think we can provide insights to this committee on how the Act can be reformed so that it works better for both private landowners and species.

Congress has a unique opportunity this year to make needed reforms to the Act. As S. 503 moves forward, we urge you not to lose sight of the bigger objective. Any moratorium must be carefully crafted, particularly as it relates to section 7. I know that has been dropped and we support that. We need to take into consideration all of the objectives of ESA reform, including ongoing activities like our two conservation programs that I described earlier so that we don't preclude or stop species conservation and compliance efforts that are currently underway.

Mr. Chairman, you have stated your commitment to enact an ESA bill this year. Plum Creek fully endorses these efforts and I'm encouraged by I think the consensus I've heard from people on both sides of the table and from the environmental community to move forward for ESA reform. We look forward to working with you and other members of the subcommittee and committee as you begin consideration of substantive legislation.

Thank you.

Senator KEMPTHORNE. Mr. Kraft, thank you very much. Appreciate your comments.

Mr. Ken Peterson is chairman of the Board of Supervisors of Kern County, California.

STATEMENT OF KEN PETERSON, CHAIRMAN, BOARD OF SUPERVISORS, KERN COUNTY, CALIFORNIA

Mr. PETERSON. Thank you very much, Mr. Chairman and members of the committee. Thank you for the opportunity to testify today.

My name is Ken Peterson and I'm chairman of the Board of Supervisors of Kern County, California. I'd like to tell you how a well-intentioned act of Congress is harming our economy and wasting public resources and why I support a moratorium on the listing of endangered species. I realize that has been modified. I think any length of time would give us a breather, even if it is 6 months. I'd prefer longer.

Kern County is 100 miles north of Los Angeles in the Central Valley. We're about the size of Massachusetts with a little over 600,000 people. We're one of the Nation's top farm counties and we are the leading U.S. oil-producing county. Kern County is also home to 16 threatened or endangered species with another 73 candidate species.

Mr. Chairman, Kern County is the Jurassic Park of the endangered species, an experiment gone terribly wrong. Like the dinosaurs in the movie, the many creatures protected by the Endangered Species Act are beginning to run things in Kern County. I'd like to remind the committee that we're the place where 24 armed Fish and Wildlife agents descended in helicopters on a farmer and arrested him and his tractor as he cultivated his land. It was zoned agricultural. His crime was allegedly disking a kangaroo rat. By the way, thousands of those kangaroo rats are killed daily on our highways.

I support and preserve America's natural heritage, but it seems like Kern County and California are bearing a lot of the burden. ESA listings are being used to dictate private land use and impose heavy regulatory burdens that are not based on sound science. Few endangered species are recovering and humans are reeling from the impact. I'd like to cite a few examples.

The Fish and Wildlife Service recently listed the southwestern willow flycatcher as endangered. In Kern County, this bird lives in a riparian area created when the Corps of Engineers dammed the Kern River for flood control back in 1954, but now the Wildlife Service can force the release of water so nesting areas behind the dam do not flood, even though humans created this habitat in the first place. If the lake can't rise with the spring runoff, the dam will become a costly waste. The cost to farmers could reach over $26 million per year.

I would like to remind this committee that Kern County is a desert environment; water is our life's blood. Without water storage, we don't have farming in Kern County.

In September, the Service listed the fairy shrimp as endangered. Governor Wilson indicated that the Environmental Species Act has reached a new low and I agree with that. This tiny and hardy animal is essentially a freeze-dried species dormant during long droughts, then springing to life where there is standing water, even if its a rut in the street. A 1978 paper by a graduate student claimed this habitat has shrunk and this was the basis for the listing of shrimp.

I'd like to also mention that if you are a property owner how do you prove to the Service that there aren't any fairy shrimp on your land? It's like trying to convince some people that Elvis is really dead, it's a negative hypothesis and impossible.

According to the Wall Street Journal, it could cost citizens in the Sacramento area an estimated $500 million in lowered property value over the next 10 years and I don't see any difference for Kern County.

The EPA recently told California farmers they must stop applying commonly used chemicals to control crop-eating rodents since the rodenticide could also affect the San Joaquin fox and the Tipton kangaroo rat. The California Department of Food and Agriculture estimates that Kern County farmers alone will lose $73 million each year if this ruling stands.

A water district had to build a $200,000 lizard fence for those that have never heard of that before, to keep the endangered leopard lizard out of the canal. We're not sure whether a single lizard was saved, but that cost had to be tacked onto farmers' expenses.

A plan to treat and recycle oil field wastes on a 20-acre parcel was held up by the Department of Fish and Game until 380 acres of habitat were bought at a cost of $300,000. That's a mitigation ratio of 19 to 1 for every acre used. I've got many, many more examples, but that's all I have time for.

We can expect more of this because hundreds more species are in the pipeline. A 1992 out-of-court settlement requires the Department of Interior to list some 382 new species, so it must act without adequate scientific evidence or sound recovery plans. I don't think Congress intended the courts to take such a large role in shaping the endangered species law. Perhaps the original Act was not written clearly enough. There are no clearcut scientific standards, there aren't any deadlines for recovery plans, the Act is practically silent on the question of economic costs and who should pay them.

It's been said when you don't know where you're going, any road will get you there. I don't think the agency really knows where they're going with this Endangered Species Act. As debate on the ESA goes forward, I am confident Congress will shape a better Act. Until that happens, it makes sense to me that Congress should halt ESA listings and I ask that the committee approve the S. 191 or its derivative.

Thank you very much for your time.

Senator KEMPTHORNE. Thank you.

First, let me compliment all of you for your testimony, both the written you submitted but also what you discussed here with us this morning. I have questions I would like to ask of you.

Mr. Wilcove, let me begin with you. It would appear from your testimony that our efforts have been ineffective in keeping species from reaching the level where the protections of the ESA are needed. My question is are there any other programs or laws in place to prevent species from ever getting to the level where they are candidates for listing?

Mr. WILCOVE. I think an excellent example of that would be the National Forest Management Act which has a provision that national forests must ensure viable populations of native vertebrates.

In fact, I think it's fair to say that if the Forest Service, going back a decade or so, had followed that regulation more, the spotted owl situation may not have in a sense deteriorated into an endangered species battle. So we have some. We could use more.

Another example would be on the BLM lands where there is a policy of protecting viable populations of vertebrates and other species. It would be advantageous to see that fleshed out more fully.

Senator KEMPTHORNE. Mr. Gordon, how would you suggest that we should obtain the data necessary to prevent listings that have to be later withdrawn because we didn't have enough data at the time of listing?

Mr. GORDON. I would suggest the most important thing to do with that regard is address some of the qualifications and criteria set forth in the law. I think the standard I mentioned, best available data, needs to be changed. Some other type of language needs to be substituted that includes such standards as verifiable and quantitative and sufficient to reach scientific conclusions, and also some of the criteria for what is eligible for listing needs to be addressed. For example, I don't think that just because there isn't some existing Federal regulatory mechanism, that should be a consideration for listing something. The absence of regulatory power over a species that may otherwise not have anything adverse going on in its population doesn't justify adding it to the Endangered Species list.

Senator KEMPTHORNE. Mr. Perry, I appreciated the examples you used and you referenced the woman named Margaret who I believe was 78 years old. You said in 1990, the market value was roughly $1 million on her land and it's now valued at $30,000. Is that actual? Has a county assessor made that statement?

Mr. PERRY. That is correct. That is on the tax rolls of Travis County today. Those are actual numbers and it is because that property obviously does not have a value over $30,000. Quite frankly, Ms. Richter said she hasn't found a fool yet who would pay her $30,000 for it.

Senator KEMPTHORNE. Mr. Snape, you caught my attention when you referenced the farm bill, you referenced incentives and somehow we ought to combine the two. Can you give me a little more information on that. What can we do?

Mr. SNAPE. I'd be pleased and in fact, the Texas Farm Bureau, among other Farm Bureaus has been interested in this idea. No one has made any commitments yet, but there is a lot of interest on this topic.

Basically, in the last 5 years since the reauthorization of the 1990 farm bill, a little less than $2 billion a year is spent on what is called the Conservation Reserve Program which is a farm bill program. There are other related conservation programs under the farm bill like the Wetland Reserve Program, there's a Forest Stewardship Program under the farm bill as well, but the Conservation Reserve Program has the most amount of money.

What we have proposed is nothing draconian. It's a purely voluntary approach which would be to make threatened and endangered species protection a criteria for receiving CRP money. It's to provide that incentive for farmers who do want to do the right thing, who are good stewards of their land, and to receive some

payments that are already going out to protect habitat. It's an example of a win-win approach, so that's my short answer. We have more information we'd be happy to supply to you.

Senator KEMPTHORNE. Good. I'd appreciate that.

Mr. Kraft, you're with the Plum Creek Timber Company. You have done things which I think go beyond what the law requires you to do. It's been very progressive and innovative. How much additional cost is that to the company and does it pencil out for you but also then by undertaking this, similar to what Mr. Snape has talked about, do you find that by improvements to the habitat that may in fact make Plum Creek home to a particular species that may be endangered, that you lose the use of your land ultimately because you are now a host?

Mr. KRAFT. With respect to your first question, we have committed at Plum Creek to what we call environmental forestry which is designed to find a balance between environmental and economic issues. Certainly in the two conservation agreements that I mentioned, if they don't pencil out, if they don't make economic sense, we won't do them. There needs to be a balance.

I think with respect to the HCP that we've been working on for over a year, we've had a team of 20 scientists working around the clock to try to do the ecosystem analyses and so forth and ultimately by the time we're done, we will spend probably a million dollars putting that together.

At the same time, each owl circle today can include as much as $20 million worth of timber and does not lead to necessarily good conservation benefits for the whole ecosystem. So we're trying to make it a win-win, minimize our costs and find an appropriate balance.

As to the question of if once you do conservation on your land and your provide habitat and then let species locate on your property, I think we've long recognized that there is a perverse disincentive to doing what we're doing under the Act which I think we have recommended be changed through the provision of positive incentives. Certainly, the type of incentive that was just mentioned is going in the right direction.

With our HCP, part of it is the need for a multispecies approach. I think once we do one of these, we don't want to have to come back when the next species, the next and the next is listed. So what we're trying to do is provide for a balance of habitat rather than trying to manage species by species.

When you do get to substantive reauthorization language providing the ability or more assurance that multispecies plans and free listing agreements, that they actually be respected in the court should we get challenged legally by whomever, if they will stand up, that will be very helpful.

Those are some of the specifics and we can provide you with other ideas that we've had in the past for providing incentives or other technical language amendments to the Act.

Senator KEMPTHORNE. Mr. Peterson, I will come back with a question for you after Senator Hutchison has had a round of questions.

Senator HUTCHISON. I just have a couple of things. I would like to ask my Agricultural Commissioner, Rick Perry, a question be-

cause I think we've talked about some of the potential listings for Texas that could ripen if we don't have a moratorium before we try to put some parameters around the regulations. We talked about the bait fish and the salamander. The jaguar I think is one of the more interesting potential designations. The jaguar really came I think through South America and as been seen in Mexico, but there were rare sightings I think in the 1940's in Texas but nothing since then. Probably a jaguar had wandered over from Mexico into south Texas from time to time.

If there were a jaguar designation as an endangered species, would you tell me some of the things that might be restricted on property and how big an area and what impact that might have on private property?

Mr. PERRY. Senator, there is the possibility, and we have heard Secretary Babbitt and others talk about the possibilities of what might or might not happen to species and certainly on our side of that battle, there are possibilities that restrictions could be placed on those 40 counties from the standpoint of hunting, which is a very important economic issue in south Texas in particular obviously from the impact of that creature's habitat and impacting its range, livestock movements, the ranching end of it could be impacted.

So there are literally multimillion dollar industries with the ranching industry which is about a $6.5 billion direct sales industry in the State of Texas of which South Texas is an important part, and the wildlife industry could be impacted in a very negative way. So from the economics, it could be staggering to the south Texas region and quite frankly, a region that has some economic stress at this particular point in time, Senator.

Senator HUTCHISON. It would take away the hunting lease potential to hunt anything at all.

Mr. PERRY. It could.

Senator HUTCHISON. For this animal rarely seen 40 years ago.

Mr. PERRY. We haven't seen one since 1948.

Senator HUTCHISON. I would like to ask Supervisor Peterson a question. I had the pleasure of being in your county recently and found that you were the place from which the story came about the farmer that I had heard about many times. It is one of the worst, egregious errors I think the Fish and Wildlife has ever made.

I'd like to talk to you about the plant designation. It was mentioned here that possibly we would look at plant designations. A plant designation for instance in a river bed would have an impact even though it's not on private property, on water use. Also a plant designation on a military base would possibly curtail the use or the ability for the military to chop down a tree that might be on a rifle range.

Would you speak to the issue of the plant designation or the potential for taking that out of this bill?

Mr. PETERSON. First of all, I've been very frustrated. There has been proposed ten new listings in California; three of those are in Kern County of new plant listings. We find the first thing that the Wildlife Service and Department of Interior did is announce there would be no impact to private property and we find that is entirely

not true. There would be some rather drastic impacts to private property as a result of this listing.

I think what I'm hearing today, what needs to be stated is the fact this whole process is faulty in coming to these conclusions. We had a hearing in Kern County on this issue and I attended and we asked for a scientific basis for the endangered or threatened status and these were done by people driving down the road and pointing. I asked for maps designating areas and they have hundreds of square of miles, dots. Scientific, they have no basis. They said, that's why they're having hearings so they can get some scientific basis.

I really don't think the burden of proof ought to be on the individual, the private property owner since there is such an economic disincentive to these listings. I'm not sure I got to the heart of your question.

Senator HUTCHISON. You said there would be damage to private property. Could you describe the things that might happen on private property?

Mr. PETERSON. I can give you an example of the San Joaquin wooly thread (*Lambertia congdonii*). We have a housing area in Lost Hills that was designed for farm workers, low income, and the developer of that particular area was stopped because of what we call a weed. For 3 years now, we have not been able to get that project. We've written letters, we've asked, what do we need to do to mitigate this? Will fertilizer help? We can't get the Department to respond to us so this entire project is stopped 3 years now and counting.

Senator HUTCHISON. Thank you. I just wanted to get that on the record.

Did anyone else want to speak to the plant designation?

Mr. GORDON. Yes, I had a couple of comments. One, it was mentioned earlier that a large number of the listings to be held up would be plants. A lot of those are covered by this lawsuit and I think the Secretary of Interior has expressed some regrets before that he's driven in this direction. So it would seem to me this would be one way to alleviate that problem.

Two, there is often an impact on private properties in that the Endangered Species Act under section 6 encourages States to pass their own laws which often have higher standards. I think, for example, in California, I'm not sure, but if the Federal list includes a plant, it may automatically go on the State list and on the State list I believe there is zero incidental take allowed.

Also, I'd like to mention that Secretary Babbitt said generally when we look for more of these things, we find more. This should be one of the reasons we should have a problem with the current process. Every time we list one of these things by accident under Fish and Wildlife Service's own estimates, it's about $100,000 just in the paperwork of putting it on and take it off which is peanuts here in Washington, but to the average taxpayer it's somewhat of a waste.

As regards Senator Boxer's comments earlier on taxol, I'd like to mention I think when it was initially discovered, the yew tree provided this chemical, there was an effort by some elements of the environmental community to get it listed which may have hindered

the development of the drug used to treat breast cancer and there was a conflict between advocates of women's health and advocates of enforcing the Endangered Species Act.

Mr. SNAPE. On the settlement in particular, all that settlement said was that the Fish and Wildlife Service needed to propose those species for listing and then it would make the determination whether that species was going to be listed during the normal process. In fact, 89 species that were on the original settlement were eventually found not to be warranted, so all that settlement forced the Fish and Wildlife Service to do was not to just throw every single species into the candidate box but to make a decision one way or the other. You may disagree with how that works but in terms of what the settlement does, it has been a bit mischaracterized.

Mr. KRAFT. I would like to just say that there are two other ways even if there is no private land designated as critical habitat or if the endangered plant or species is found solely on public land, private lands are impacted to the extent that there is a Federal nexus or connection. Anytime you need a Federal permit or there is Federal funding of some activity such as getting an access easement to private lands, then there is a Federal action that the private landowner is unable to get to his own property because he can't get the permit or the access easement from the Federal Government.

Senator HUTCHISON. This has been very helpful on the plant issue and thank you for indulging me.

Senator KEMPTHORNE. Certainly. Good question.

May I make this point first. I think one of the significant things in addition to others that I think has come from this hearing is the fact that there is now apparently unanimity that we will reform the Endangered Species Act this year from all quarters. I think that is significant. You would not have heard that a couple of years ago.

The other thing I'd like to say is because of the quality of your comments and your testimony, I would invite you that as we undertake this process of reform of the Endangered Species Act, to provide me comments, written comments of innovations, of changes that you think ought to be made to the Act, also those areas you think should not be changed. Again, based on the quality of what I've heard from you, I would appreciate that. I think you would play a helpful role.

Mr. Peterson, you said in your written testimony that the State placed additional requirements beyond those of the ESA on projects in Kern County. How did the State law interact with the Federal ESA to cause this to happen?

Mr. PETERSON. It works in conjunction and I think the State of California has adopted a higher standard and actually made the problem that much more complex. When you're dealing with something that lacks scientific background, actual hard case proof, I can't believe some of the studies on the three plants in Kern County, the listing, they had people that drove down the street and looked and that was their scientific basis for the best available data.

I think the State is looking to the Federal for help in reforming this. I think you will find the State of California will follow if they see this because they are certainly hearing from us.

Senator KEMPTHORNE. What would happen then if this passed so that we did have this moratorium? What would that mean to the relationship between the State law and the Federal law?

Mr. PETERSON. It wouldn't affect the State law but it would certainly give us a lever to point at and ask our State to also follow suit. I think it would be a tremendous example.

Senator KEMPTHORNE. Mr. Snape, I think No. 3 on your list of items was to extend State and tribal authority. How far would you go? Would you allow the States to have jurisdiction?

Mr. SNAPE. Yes, I would allow the States to have a lot of jurisdiction. What I find interesting about Mr. Peterson's remarks, and I'm not familiar with everything that goes on in Kern County, is that there certainly are a lot of problems but I think the solutions are much broader than what Mr. Peterson just laid out. I am very enthusiastic about the opportunity to make State governments more active partners in species conservation. I'll give you some examples of where I think States can really do perhaps even a better job just given their situation.

Three areas in particular. The first, which they are already sort of doing but I think it needs to be more explicit and more formal, is the management of candidate species. I think States should be given the responsibility to manage for candidate species and, based upon sound science, hopefully keep those species from becoming listed. No one is against that objective.

The second thing I think States can do is take over recovery plan actions. There is no reason why a good State agency can't more actively participate in actions that will lead to species recovery so you can take the species off the list. I think that under section 6 of the Endangered Species Act, States have not been encouraged to do those types of actions.

Third, which I think deserves a lot more attention but something I'll just throw out is that in some instances, States should be given the authority for incidental take permitting authority. I think you'd need to have uniform Federal standards, I think you'd need to make sure that the program put in place actually is conserving species, but in many instances, you are talking about the Federal Government trying to manage species all over the country and the State governments sometimes really are in the best position to do what's best not only for people, but for the wildlife as well.

Senator KEMPTHORNE. Mr. Perry, I understand you have a flight you must catch. Do you wish to make any final comment?

Mr. PERRY. I think we're right up to speed.

Senator KEMPTHORNE. Thank you very much.

Mr. Gordon, in my opening comments, I referenced the bald eagle, the brown pelican, the peregrine falcon, which we're very proud of because the World Center for Birds of Prey is there in Boise, ID. Can you give me any comments about exactly what role did the Endangered Species Act have in the recovery and the role other programs like captive breeding and pesticide regulations played as well?

Mr. GORDON. I'll just read to you from the current issue of National Geographic that states "Because of the eagle's plight spurred a ban on the metabolism warping pesticide, DDT, other imperiled

species such as peregrine falcons and brown pelicans have bounced back as well."

Also, along the lines of that, a recent issue of Audubon Magazine basically credits the ban on DDT which was independent of and unrelated to and preceded the Endangered Species Act as being the primary factor for recovering eagles.

In the case of the Arctic peregrine falcon, when the announcement was made last year that the Fish and Wildlife Service would delist it, the Fish and Wildlife Service Director again attributed its primary cause of recovery as the ban on DDT.

So in some of the cases where we have actually seen real successes in terms of our wildlife populations that everybody is proud of and happy to see, I think they are being overly attributed to the Endangered Species Act rather than other factors.

Senator KEMPTHORNE. Mr. Kraft, you head my question earlier to Secretary Babbitt as to whether or not an agreement entered into with the current Secretary of Interior is binding upon future Secretaries or the Department of Interior. You're an attorney, do you feel they are binding or does it pose any difficulties for private owners in the future?

Mr. KRAFT. We wouldn't do it if we didn't think it could be binding. It's never been tested in court. There are certainly those out there who are going to challenge it and who don't want to see a solution, who think they can negotiate a better deal. So I guess it still remains to be negotiated in our particular case and exactly what sort of assurances we end up getting and how much protection we have still needs to be determined. I don't think any court has ever tested it and that is why I urge, as a part of reauthorization, that there be specific language as opposed to relying on principles of estoppel or administrative law which are indistinct and certainly a judge could come in and make his own determination. I think it would be helpful and strengthen the legal authority that is there to provide for prelisting agreements and issuing incidental take permits for species that are merely candidates.

Senator KEMPTHORNE. Dr. Wilcove, I noted in your list of population sizes included with your written testimony, most of the species listed are island species. Aren't island species, for the most part, limited to a single population by definition?

Mr. WILCOVE. No, I don't think that's correct biologically. They are often restricted to a single island but within that island, they can be separated into a number of populations based on the topography of the island, where the mountaintops and valleys are. It is true though that you will find a higher proportion of endangered species on islands than you will on mainlands.

Senator KEMPTHORNE. Mr. Peterson, I was interested in your comments about the fairy shrimp. This appears to be a species that is, as you indicated, not easy to inventory because certain conditions have to happen before you're aware they exist. Have privately financed surveys or data from nonprofessional observers, nonpeer review data been accepted in the listing of this species?

Mr. PETERSON. To my best information, it hasn't been. It's only been selective biologists who have been able to comment. The paper that I'm referring to was a graduate student paper.

We had a situation out in Ridgecrest which is in the eastern end of our county where we had a sewer pipe exposed and broken and the flooding of effluent created a moist atmosphere. The people there were blocked from repair because the fairy shrimp suddenly appeared and here they had a health hazard that they needed repaired but that's how fast they rejuvenate. So it literally is something you wouldn't know until the moisture is added and they literally are everywhere.

Senator KEMPTHORNE. Thank you.

Senator Hutchison?

Senator HUTCHISON. Mr. Chairman, I have no further questions. I just appreciate your letting me ask questions, particularly the plant issue was a question I had and the testimony helped me very much. I thank you for indulging me on that and for letting me participate.

Senator KEMPTHORNE. Certainly. Thank you for being a part of it and for all that you're doing on the issue.

Again, I thank the panel. You were an excellent group of individuals to give us the benefit of your background and your knowledge. The invitation is there. Please take me up on it to provide me your thoughts and suggestions for the future with regard to the Endangered Species Act.

With that, this hearing is adjourned.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional statements and material for the record follow:]

II

104TH CONGRESS
1ST SESSION

S. 191

To amend the Endangered Species Act of 1973 to ensure that constitutionally protected private property rights are not infringed until adequate protection is afforded by reauthorization of the Act, to protect against economic losses from critical habitat designation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 11 (legislative day, JANUARY 10), 1995

Mrs. HUTCHISON (for herself, Mr. LOTT, Mr. GRAMM, Mr. GRASSLEY, and Mr. NICKLES) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

---

A BILL

To amend the Endangered Species Act of 1973 to ensure that constitutionally protected private property rights are not infringed until adequate protection is afforded by reauthorization of the Act, to protect against economic losses from critical habitat designation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Farm, Ranch, and
5 Homestead Protection Act of 1995".

1 **SEC. 2. MORATORIUM ON DETERMINATION OF ENDAN-**
2 **GERED SPECIES AND THREATENED SPECIES**
3 **AND DESIGNATION OF CRITICAL HABITAT.**

4 Section 4(a) of the Endangered Species Act of 1973
5 (16 U.S.C. 1533(a)) is amended by adding at the end the
6 following:

7 "(4) MORATORIUM.—Notwithstanding para-
8 graphs (1) and (3), during the period beginning on
9 the date of enactment of this paragraph and ending
10 on the effective date of the first subsequent reau-
11 thorization of this Act, the Secretary may not—

12 "(A) determine that a species is an endan-
13 gered species or a threatened species under
14 paragraph (1); or

15 "(B) designate habitat of a species to be
16 critical habitat under paragraph (3).".

17 **SEC. 3. AGENCY ACTIONS.**

18 Section 7(a) of the Endangered Species Act of 1973
19 (16 U.S.C. 1536(a)) is amended by adding at the end the
20 following:

21 "(5) MORATORIUM.—Notwithstanding para-
22 graphs (1) through (4), during the period beginning
23 on the date of enactment of this paragraph and end-
24 ing on the effective date of the first subsequent re-
25 authorization of this Act, a Federal agency shall not

1 be required to comply with paragraphs (1) through
2 (4).”.

○

II

104TH CONGRESS
1ST SESSION

S. 503

To amend the Endangered Species Act of 1973 to impose a moratorium on the listing of species as endangered or threatened and the designation of critical habitat in order to ensure that constitutionally protected private property rights are not infringed, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 6, 1995

Mrs. HUTCHISON introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

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A BILL

To amend the Endangered Species Act of 1973 to impose a moratorium on the listing of species as endangered or threatened and the designation of critical habitat in order to ensure that constitutionally protected private property rights are not infringed, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Endangered Species
5 Listing Moratorium Act of 1995".

1 **SEC. 2. MORATORIUM ON DETERMINATION OF ENDAN-**
2 **GERED SPECIES AND THREATENED SPECIES**
3 **AND DESIGNATION OF CRITICAL HABITAT.**

4 Section 4(a) of the Endangered Species Act of 1973
5 (16 U.S.C. 1533(a)) is amended by adding at the end the
6 following:

7 "(4) MORATORIUM.—Notwithstanding para-
8 graphs (1) and (3), during the period beginning on
9 March 7, 1995, and ending on September 7, 1995,
10 the Secretary may not—

11 "(A) determine that a species is an endan-
12 gered species or a threatened species under
13 paragraph (1); or

14 "(B) designate habitat of a species to be
15 critical habitat under paragraph (3).".

○

Statement of Hon. Kay Bailey Hutchison, U.S. Senator from the State of Texas

LISTING MORATORIUM FOR ENDANGERED SPECIES

Mr. Chairman, thank you very much for inviting me to appear here today. As you are aware, the Endangered Species Act has become a substantial source of conflict between people, employers, local and State governments, and the Fish and Wildlife Service.

It is time to reauthorize the Act and to reexamine the Congress' intentions in protecting species. The Environment and Public Works Committee held hearings on the Act last year, but did not report a reauthorization bill. It is my understanding that hearings will begin again soon under Chairman Chafee and Subcommittee Chairman Kempthorne's leadership.

I am pleased that Secretary Babbitt has now joined my call for a legislative overhaul of the Endangered Species Act. I'm willing to listen to his suggestions. He is correct that small landowners should not bear the burden of protecting species. But neither should ranchers and farmers—endangered species protection is a worthwhile goal for society, and society at large, not just the men and women who produce our food and clothing, must fairly share the burden and the cost of species protection.

Reauthorization of the Act is made more difficult by the heated public debate over individual listings of species and by overly zealous enforcement of the Act by the Fish and Wildlife Service. To make a responsible debate over reauthorization possible, it's time to call a "time-out" on further listings.

In January, I introduced a bill to put a moratorium on further listings of threatened and endangered species and on designation of critical habitat until reauthorization can be completed. Senators Lott, Burns, Cochran, Gramm, Grassley, Inhofe, Kyl, Nickles, Pressler, and Bond are co-sponsors. In trying to meet the concerns of members of this committee, yesterday I introduced an alternative version that limits the moratorium to 6 months from today, and omits the moratorium on the consultation mandate.

The Federal Government will only be able to protect species under the Act with proper direction from Congress and with full support of the public. By restricting land and water use through additional listings, the Fish and Wildlife Service is undermining public support for the Act and is actually harming the cause of protecting species from extinction. My bill will permit reauthorization debate to go forward without further unconstitutional erosion of private property rights or further damage to the economy and society of affected areas.

Right now the Fish and Wildlife Service is proposing to list a species in the Panhandle of Texas—the Arkansas River Shiner—that has been used for fish bait.

The listing of the Arkansas River Shiner as an endangered species in Texas, Oklahoma, and Kansas is not necessary; there is a Shiner population in the Pecos River of New Mexico that is not at risk, and others may be established. With separate populations, the Shiner is not in danger of extinction. Its listing would subject ground water (including the Ogalalla Aquifer) and surface water in the Texas Panhandle, Oklahoma, and Kansas to control by the Fish and Wildlife Service.

Listing the Shiner could have a profound impact on the Panhandle's surface and ground water supply. Water from the Ogallala Aquifer serves the citizens of Amarillo and the surrounding areas. If the Shiner is listed, use of the Aquifer could be cut back, causing severe difficulties to the region's agricultural economy. Similarly, use of surface water is essential to the farming communities surrounding Amarillo and Lubbock; limitations on surface water use also could harm their economies.

Water is scarce in the Panhandle; we can't afford to give fish bait more protection than people. But if the Shiner is listed, it will have more right to the water than the Panhandle farmers and ranchers and the people of Amarillo.

My bill also puts a moratorium on the designation of critical habitat so that property owners won't lose control of their land. Designating critical habitat puts unjust limits on the use, market value, and transferability of property. The stigma of critical habitat protection should not be imposed by a government that claims to protect property as a Constitutional right.

Last year, the U.S. Fish and Wildlife Service which enforces the Endangered Species Act, proposed that up to 800,000 acres from 33 Texas counties be considered for designation as critical habitat for the Golden-Cheeked Warbler. This action held up land transfers, construction, and home and business lending.

It also made other environmental problems worse. Landowners couldn't get permits to cut and clear Juniper trees, which are known as cedar in Texas, even if the trees were on rangeland rather than in the creeks where the Warbler lives. But these cedars use tremendous amounts of water—the same water that could recharge the Edwards Aquifer and protect the Fountain Darter and four other endangered species that live in two springs that flow from the Edwards Aquifer.

Stopping cedar clearing also increased pollen discharges—what's known in the Hill Country as "cedar fever." Every November, the cedar trees' pollen is dispersed. They send up clouds of dusty pollen that looks like smoke. Thousands of people in Central Texas are allergic to the pollen, and lose work days from headaches, fevers, and nasal congestion. Cedar control is necessary not just for land use, but for public health, too.

After public outcry forced the Interior Department to drop its plan to consider 800,000 acres in Texas for critical habitat designation, the Texas and Southwestern Cattle Raisers Association released a study of the impact of endangered species concerns on property values in Texas.

The study found that over the last 5 years, the 33 counties most affected by endangered species (with 20 listed species present) lost $5 billion in rural land value, while the State as a whole lost $23 billion in rural land value. The loss in value in the 33 counties accounted for 22 percent of the State loss in land value. However, such counties only have 13 percent of the State's land.

Land values in all Texas counties were affected by interest rates, grain and livestock prices, and other factors, in addition to endangered species. But the fact that the loss in land value in the 33 affected counties exceeded the average loss in value for the rest of the State is an objective measure of the impact of endangered species listings on rural land.

The failure of the critical habitat designation plan didn't stop the Fish and Wildlife Service from trying; it proposed a habitat conservation plan for Travis County that would have permitted owners of single-family residential lots to pay $1,500 to apply for a permit to construct a home. Higher fees would have applied for development by the acre.

The Fish and Wildlife Service thought that this was a good deal because it was less expensive than the legal fees land owners were incurring in fighting for their property rights. But what they were really doing was "holding up" people who bought a lot to build a home on by ransoming their Constitutional rights.

It's no surprise that in the Texas and Southwestern Cattle Raisers Association study, rural land values dropped more in Travis County than in any other Texas County—$1.3 billion in the past 5 years. The Fish and Wildlife Service counts 9 endangered species in Travis County, and is proposing to list the Barton Springs Salamander, to round it off at 10.

I'm pleased to see that Secretary Babbitt stated yesterday that "small landowners should be exempted from conservation burdens on the basis of fairness and biology.

Most species won't survive on small tracts of land and it's not fair to tie up small landowners." I hope that means we won't see the Interior Department extorting funds in Travis County anymore.

With about 300 candidate species in Texas, including 11 flies and 12 beetles, landowners in my State may face problems similar to the Golden-Cheeked Warbler problem again if new species are listed. A moratorium will stop these species from being listed until after the Congress enacts new listing standards. No further losses of property rights or control of water supplies should occur until Congress can put common sense back into species conservation.

Major changes need to be made to the Endangered Species Act:

First, the Act must require that economic and social impacts be addressed. Under a new Endangered Species Act, a two-step process is needed. Listing a species could be based solely on biological data, but before any restrictions on land use or regulations are put into affect, their impact on the local economy must be considered under a cost/benefit analysis. Sound environmental policy must preserve the delicate balance between preserving natural resources and encouraging economic growth to maintain public support for protection of species, and to create sufficient wealth to fund conservation efforts.

Second, the existence of populations in other locations must be taken into account. Our recent Congressional elections were a call for a return to common-sense in lawmaking. I can't think of a clearer example of common-sense than putting drinking water for people ahead of giving water rights to fish that aren't in danger of extinction.

To ask the citizens of the Texas Panhandle to reduce water for the benefit of a minnow that is not in danger in an adjacent State is ridiculous. Americans are willing to make sacrifices to aid the bald eagle and the grizzly bear, but will not and should not be deprived of water for the benefit of minnows that aren't endangered.

Third, if avoiding extinction is truly the intention of those who argue for more species protection, then the establishment of refuges must be permitted and encouraged. We have millions of acres of government land in national parks, national forests, national wildlife refuges, national monuments, and elsewhere. Whenever possible, we should encourage development of endangered species populations on Federal Government land. We should also encourage fully voluntary conservation measures and private wildlife refuges with tax incentives, such as deductions for donated land. Instead of ignoring opportunities to conserve species in refuges, we should encourage the creation of refuges—such as those created by the Nature Conservancy with private funds and Federal assistance—and count such refuges among the habitat available to species.

Fourth, the Act must provide that species "habitat modification," such as withdrawing water from an aquifer, is not a "taking" of an endangered species. When Congress passed the Act, it intended to stop intentional harms; it did not intend to legislate droughts for cities and farms.

Finally, in addition to these common sense reforms, a critical element of reauthorization is the enforcement of the Constitutional protection of the Fifth Amendment. The Fifth Amendment provides that private property may not be taken without just compensation. For too long the Federal Government has ignored this right by putting more and more onerous restrictions on land use, while avoiding compensation by leaving the landowner with a worthless title certificate. We must stop taking property rights through new listings until we have the opportunity to give the Fish and Wildlife Service listing criteria that take economic and social concerns into account.

Property owners should not have to fight the government to build a new home on their land, or hire lawyers to convince bureaucrats that their farming is in compliance with regulations. Farmers in my State or yours should not live in fear of

being treated like the farmer in California who was arrested in a government raid for allegedly harming a kangaroo rat while he was plowing his field—a rat that is an endangered species for one reason—its feet are one-one hundredth longer than other, similar species that aren't endangered. Instead of seizing land and arresting farmers, we should encourage private landowners to protect species and their habitat with incentives rather than punish them with loss of use of their land.

I am discouraged to hear that some people may be planning to cast the endangered species debate as an effort to help only large landowners. I don't need to talk about Constitutional rights to tell you how wrong that is. In Texas, 3,000 people turned out to talk about critical habitat designation in towns where no more than 1,000 people live. That's not the turnout you get for an issue that only affects the rich. Rick Perry, our Texas Agriculture Commissioner, has heard from thousands of farmers about the affect of the Endangered Species Act on farmers. He is here today and can tell you what it means on a local level for the people who produce the raw materials for our food and clothing.

In sum, Mr. Chairman, the 20 years of listings have achieved the primary goal of protecting essential species from extinction—we now have more than 900 species listed. The Fish and Wildlife Service has had adequate time to carry out its primary responsibilities under the Act. It has over-zealously enforced the Act by expanding the definition of a harm beyond Congress' intent, listing species without regard to water supplies necessary for the health and safety of the people, and proposing habitat without taking economic concerns into account until it was politically forced to do so.

Congress, with its legislative and oversight powers, delegates enforcement authority to administrative agencies. When the agencies lose sight of Congress's intentions—and lose their common sense—only Congress and the President can set them straight. Now is the time for Congress to review their actions and exercise its legislative power to revise their instructions. Let's call a time-out on listings until we can put endangered species protection back on track.

Thank you, Mr. Chairman.

STATEMENT OF HON. BRUCE BABBITT, SECRETARY OF THE INTERIOR

Mr. Chairman, thank you for inviting me to appear before the new Subcommittee on Drinking Water, Fisheries and Wildlife to discuss legislation which would impose a moratorium on listing and consultation under the Endangered Species Act. I look forward to working with you and the other members of the subcommittee to conserve the Nation's fish and wildlife heritage.

The Endangered Species Act is one of the most innovative, wide-reaching, and important environmental law that has been passed in recent times. This hearing signals the start of a debate over whether to authorize continued spending on threatened and endangered species. During this debate, the members of this body of the Congress will decide whether the commitment to threatened and endangered species is worth keeping. This body of the Congress will play an integral role in deciding the fate of the Endangered Species Act.

That is why the Department of the Interior looks forward to this debate and the opportunities to work with this subcommittee in reviewing those problems and how they might best be solved. To this end, I am pleased to share with the subcommittee this morning a 10-point package of improvements to the Endangered Species Act which the Department has just announced that incorporates important administrative policy changes we have already made under the existing law in the past 2 years and identifies additional areas that could be addressed through regulatory or congressional action.

Mr. Chairman, it is hard to ignore the social and economic environment in which the Congress will consider the Endangered Species Act. Our workforce is changing, demanding higher skills at the very time our public education system is being challenged. We face pressing problems about health care costs and other competing economic needs, particularly at the local level. Our demand on our natural resources is increasing just at the time when those resources are being stretched to the limit.

We need to be careful that in our search for solutions to our problems that we do not settle for short-term fixes, especially where they cause even more problems. It is also important that we not scapegoat. The Endangered Species Act has been blamed for everything from homelessness to trade deficits. It is important to properly assign culpability. The Endangered Species Act did not cause the stresses that we have placed on some of our fragile ecosystems. It is only when those ecosystems begin to fail that we find loss of habitat and threats to the very survival of species. The need to manage our resources wisely has always been there—for the benefit of all human beings who rely on the functions they provide. The Endangered Species Act is a warning light. When one species in an ecosystem's web of life starts to die out, all species may be in peril. That includes us.

Mr. Chairman, we have strived to implement the Endangered Species Act in a manner to help resolve or avoid conflicts between the needs of a species threatened with extinction and the needs of our society. Despite the negative publicity about a few cases, I believe the Endangered Species Act works. I believe the examples of problems and conflicts associated with endangered species are rare given the number of species that are currently listed as threatened or endangered in this country. We must find ways to resolve and prevent these problems and we are doing that.

In the Pacific Northwest, for example, we launched a number of initiatives to restore the ecosystem, while minimizing the Act's immediate impact on people and their livelihoods. The Administration has developed a Forest Plan which will preserve the northern spotted owl and support the timber communities in the Pacific Northwest by providing a truly sustainable, long-term flow of timber from Federal lands. That plan will help prevent other species from declining to the point where they will need protection of the Act.

The Departments of the Interior and Commerce have joined with other Federal agencies to help prevent species from becoming threatened 'or endangered. For example, the Forest Service and the Fish and Wildlife Service recently entered into a cooperative agreement to protect a rare species of salamander by stabilizing and protecting its populations in a national forest so that it did not have to be listed as threatened or endangered.

We have entered into three cooperative agreements with private timber companies to protect the red-cockaded woodpecker in the southeastern United States. Because these cooperative agreements benefit both the woodpecker and the timber companies, four other companies are in the initial stages of negotiating similar agreements with the department involving three additional States. The Fish and Wildlife Service is also working on six habitat conservation plans in five Southeastern States involving both industrial and non-industrial forest lands to provide additional protection to the red-cockaded woodpecker.

The Endangered Species Act has been responsible for improving populations of declining species throughout the United States and has been the focus of international conservation efforts. American alligators, the Pacific gray whale, Arctic peregrine falcons, and brown pelicans no longer The bald eagle, peregrine falcon, grizzly bear, eastern timber wolf, whooping crane, black-footed ferret, Columbian white-tailed deer, and greenback cutthroat trout have been recovered from the brink of extinction and are approaching recovery. California condors, gray wolves, and red wolves have been returned to the wild and are improving dramatically. Each of these spe-

cies is important in its own right and critical to the survival of its own ecosystem. Collectively, their presence and their diversity enriches all our lives.

Despite these accomplishments, I am well aware of the controversy that surrounds this Act and of the honest desires of many to engage in a debate about whether the Act should be changed to address problems that have arisen since it was last authorized. But I believe our country needs to maintain its commitment to conserve imperiled species for the benefit of future generations as well as our own. Although our country has made considerable progress with endangered species conservation over the past 20 years, our task is not complete. To ensure that threatened and endangered species are protected and recovered, the Endangered Species Act needs to remain the strong, effective conservation tool that is has been since became the law of the land.

S. 191 is the wrong approach

Mr. Chairman, I want to address myself to the subject of this morning's hearing, S. 191. This legislation would stop in their tracks the listing and the consultation processes under the Endangered Species Act. Unlike most moratorium, which have a finite term, this legislation would bring the Act to a screeching halt until some indefinite time in the future when the Act itself may be reauthorized.

S. 191 is simply the wrong approach. It tries to apply a one-size-fits-all solution to complex issues. If Congress believes that the Act needs to be changed, then we should debate the problems and the alternatives to solve those problems. We should not abdicate our responsibilities by largely repealing the Act or putting it on hold indefinitely. Even worse, putting the Act on hold creates rather than solves problems.

S. 191 would suspend all listings determinations until the Act is reauthorized. This means that no species could be listed, no matter how endangered it became and no matter how certain that the species might become extinct. Species don't stop declining when we stop listing. We would simply be putting off a problem that will grow by our inaction. A moratorium cannot be placed on endangerment.

In fact, species could easily become extinct during this unknown period of time. Certainly the condition of some, perhaps many, species will deteriorate, leaving us with the likelihood of species that might have been listed as threatened, for which a special rule could be developed to limit impact on landowners, but instead will have to be listed as endangered, precluding such a favorable option. This approach limits future options and makes the likelihood of recovery more uncertain and likely more expensive. This is hardly the direction we want to go and hardly the best result for either the species or those who will be impacted by the ultimate listing decision.

S. 191 would also make it impossible for the Department to carry out its responsibilities under the terms of two major settlement agreements agreed to by the Bush Administration. These agreements set judicially enforceable timeframes for publishing proposed rules to list certain high-priority candidate species.

More importantly, the listing ban would exacerbate existing problems. We need only reflect on those two settlement agreements to demonstrate this. Part of the reason we are under court order to list about 100 species this year are the self-imposed listing slow-downs by the Department in 1981 and 1988.

The bill would also ban indefinitely the designation of critical habitat. Again, a ban will not keep critical habitat from being degraded or destroyed, further imperiling species. Furthermore, if the thinking behind the legislation is that we must slow down designations to more properly consider all factors, the Act already provides for the consideration of economic factors in designating critical habitat, and we are doing so.

We are also concerned about the risk that some landowners might take actions harmful to species in anticipation of a listing that might follow. This would espe-

cially be true if the condition of many species actually deteriorated, as I have suggested, merely because of the ban.

Perhaps even worse than the ban on listings under section 4 of the Act is the proposal in S. 191 prohibiting indefinitely the consultation process under section 7 of the Act. This proposal would relieve Federal agencies of their responsibilities under the Act to conserve species, consult with wildlife agencies, and avoid jeopardizing the existence of listed species. This is particularly alarming because it would not only expose all threatened and endangered species to the risk of extinction, but would represent a substantial retreat from the progress we have made to date in the recovery of a large number of listed species. Also, federally authorized, funded, or undertaken activities that would incidentally take an endangered or threatened species would come to a halt because consultation is required to comply with section 9 of the Act. Therefore, the effect of a moratorium on section 7 activities would result in an indefinite delay in the issuance of Federal permits and licenses, the construction of new Federal projects, and a myriad of other Federal activities that are important to citizens throughout the country.

Proposals as sweeping as S. 191 seem to lead to unintended consequences. They tend to sweep up situations never contemplated by their advocates and potentially harm the very people they are designed to help. We must instead seek improvements to the Act with open, creative, and innovative minds.

A better approach

If S. 191 is the wrong approach, you have the right to ask me what is the right approach. First, I would emphasize again that we have already made dramatic improvements in the implementation of the Act. We have committed to making the Act more effective and more efficient without creating the controversy that has surrounded this important legislation since its inception. In the process, we have identified previously unexplored opportunities already contained in the Endangered Species Act and have used them to resolve issues that have seemed intractable in the past. At the same time, we have also examined approaches that have been used before to develop innovative solutions to endangered species recovery in cooperation with private citizens. While doing so, we have discovered that the Endangered Species Act provides a wide array of tools to resolve or avoid the apparent conflict between the needs of species threatened with extinction and the needs of our society. We have also discovered that examples of successful Federal and private cooperation to protect threatened and endangered species are more abundant than most people probably would associate with the Endangered Species Act.

But we agree that more needs to be done. We have developed ten principles to guide the Administration's effort for reforming and implementing the Endangered Species Act. These policies address some of the persistent criticisms associated with the way the Endangered Species Act is implemented and will continue my commitment to avoid the conflicts that have surrounded the Federal Government's attempts to protect threatened and endangered species over the past several years. These policies will minimize the impact of the Act on private landowners, particularly small landowners and provide them with more certainty on how they can comply with the Endangered Species Act when a species is listed. These policies propose new partnerships with State, tribal, and local governments. These policies address concerns about the quality of the science that is used when implementing the Endangered Species Act. Finally, these policies will improve the process of recovering threatened and endangered species and will enlist the participation of a broader array of individuals to help develop these recovery plans.

They are as follows:

1. Base Endangered Species Act decisions on sound and objective science.
2. Minimize social and economic impacts.
3. Provide quick, responsive answers and certainty to landowners.

4. Treat landowners fairly and with consideration.
5. Create incentives for landowners to conserve species.
6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.
7. Prevent species from becoming endangered or threatened.
8. Promptly recover and de-list threatened and endangered species.
9. Promote efficiency and consistency.
10. Provide State, tribal, and local governments with opportunities to play a greater role in carrying out the Endangered Species Act.

I'll briefly summarize our principles under several broad themes.

Minimize impacts on landowners

First, our principles identify administrative measures and legislative concepts to minimize impacts on landowners. We believe that the Act must be carried out in a manner that avoids unnecessary social and economic impacts upon private property and minimizes those impacts that cannot be avoided. One method is our policy directive that requires recovery planning to minimize these impacts and will involve stakeholders in developing and implementing recovery efforts to make sure that goal is achieved. Another is to address the concern of many, especially small landowners, regarding their uncertainty over the impact of listing on their activities, such as clearing vegetation or selling a small homesite. Our policy directs, at the time of listing, the identification of all known activities that are exempt from or that will not be affected by the Act's prohibitions against the take of a listed species. These policies will augment our "no surprises" policy whereby landowners who develop an approved habitat conservation plan will not be subject to later demands for larger land or financial commitment if the plan is adhered to—even of the needs of a species covered by the plan increases over time.

The Congress could extend these proposals and provide even greater certainty to landowners who develop approved habitat conservation plans that protect non-listed as well as listed species. If they undertake actions under the plan which protect candidate species or habitat, the landowners would be able to engage in land use activities even if the candidate species or some other species dependent on that habitat are subsequently listed. This would provide certainty for multi-species planning and would greatly aid landowners concerned that their good deeds could be undermined by a new listing.

Furthermore, we believe that the Act must be administered in a manner that assures fair and considerate treatment for those whose land is affected by its programs. One way is to assure that Federal agencies fully meet their responsibilities for conserving species in order to reduce impacts to private lands. We believe that the section 7 moratorium in S. 191 would take us in the opposite direction.

We also will propose regulations that will allow land use activities by small landowners and landowners whose activities have only a negligible adverse effect on the likelihood of the survival or recovery of a threatened species. Specifically, we propose that activities on land occupied by a single household and being used solely for residential purposes, activities that affect five acres of land or less, or activities having a negligible effect would be allowed. The Department would issue a special rule to regulate activities if the cumulative adverse effect was significant.

The Congress could extend this flexibility to activities having negligible adverse effect on endangered species as well.

The Act currently provides opportunities for minimizing impacts on larger landowners as well. The Department has also published several special rules (called "4(d) rules" after the section that authorizes them), which allows development of private lands to proceed while protecting threatened species. This is a tool which demonstrates flexibility in the Act. A recent example is our proposed 4(d) rule for the States of Washington and California which will generally exempt landowners with

less than 80 acres of forest land from the Act's prohibitions on incidental take of spotted owls.

Finally, with respect to all landowners, we are proposing the use of incentives to encourage them to protect and conserve species on their land. Many landowners are currently reluctant to manage their lands in ways that benefit listed species because they are concerned that any subsequent reduction in quality or quantity of any improved habitat would be subject to the "take" prohibitions of the Act. An excellent example of our efforts in this regard is the proposed habitat conservation plan for the Sandhills Area of North Carolina which we announced just last week. This unique proposal would provide landowners who volunteer to improve the habitat for the endangered red-cockaded woodpecker on their land with an ironclad guarantee that they will not be subject to the Act's prohibitions in the future if they succeed in attracting the bird to their land.

Enhance relationship with States, tribes and local governments

Mr. Chairman, the Federal Government cannot implement the Endangered Species Act alone. In addition to private citizens, we will need the help and cooperation of the States, tribes, and local governments. That is why our package identifies ways in which the Congress could establish a new Federal-State relationship to achieve the goal's of the Act. We believe that building new partnerships and strengthening existing ones with State, tribal, and local governments is essential to achieving the goals of the Endangered Species Act. While we have issued policy directives to enhance the participation of State fish and wildlife agencies in implementation of the Act, for example, the Congress could provide the States with opportunities and incentives to retain jurisdiction over management of a threatened or endangered species in their jurisdiction. Specifically, if a State entered into a conservation agreement with Federal agencies that would remove the threats to a species and promote its recovery in that State, the consequences of the listing of that species could be suspended in that State.

Congress could also provide States the opportunity to assume the lead for developing recovery plans and to assume responsibility for issuing permits under section 10 of the Act for areas within the State included in a approved recovery plan or for which there is an approved comprehensive, habitat-based State program.

Our package also directs that State expertise and information be used in the listing, consultation, recovery, and conservation planning processes. We recognize that States have substantial expertise concerning species within their jurisdiction and we have identified a process which Congress could establish to give special consideration to this State expertise.

Our package also points out that the Congress could stimulate more effective cooperation with State, local and tribal governments by providing the exemption in section 201 of S. 1 from the Federal Advisory Committee Act for cooperative actions between those governments and Federal agencies in carrying out the Endangered Species Act through the.

Base Decisions on Sound and Objective Science

Much has been said about the quality of decisions made under the Act and whether they have always been objective or based on the best scientific information. Our program will toughen the standards for listing; require scientific peer review for both listing and recovery; and enhance the State role in listing and critical habitat decisions.

I also hasten to add that the listing problem is overstated. Our review of actions on listing petitions revealed that for 1990–1994, the Fish and Wildlife Service rejected 68 percent of the petitions either at the 90-day or 12-month stage in the process. We believe that this demonstrates the care with which we are examining petitions to list. Moreover, we are increasingly looking for other ways to provide the

necessary protection for a declining species and their habitat to foreclose the need for listing. A recent example of this is the Alexander Archipelago wolf, a species that occurs almost exclusively in Alaska on Federal land. We were able to make a not-warranted finding based largely on commitments by the Forest Service to provide for the conservation of the species in the management of their lands.

Improve Recovery of Species

Finally, our package addresses the goal of the Act to bring species back to the point at which they will no longer require the Act's protection. We propose that all stakeholders be provided the opportunity to participate in the development and implementation of the recovery plan. Additionally, recovery could be enhanced by Congress requiring that designations of critical habitat occur concurrently with recovery plan approval, rather than at the time of listing. This would assure that only one decision on measures needed for recovery, not two, would be required and that affected parties would be involved in the decision. This would be made even more meaningful if the appropriate State and Federal agencies were required to develop agreements to implement recovery plans and those agreements were legally binding and incorporated into the recovery plan.

Conclusion

This is a brief summary of the major points in our 10-point plan. We are committed—and have demonstrated our commitment—to making the Endangered species Act work better for species and for landowners. We stand ready and willing to work with the committee to address problems with the Act. Although a moratorium may seem like a quick, easy fix, it is not a substitute for addressing the real problems. Furthermore, we believe that it will actually worsen those problems.

Mr. Chairman, we have demonstrated with our 10-point plan a willingness to step to the plate and get to work. We look forward to assisting the committee in its reauthorization efforts and again, I thank you for the opportunity to be here this morning.

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PROTECTING AMERICA'S LIVING HERITAGE:

A FAIR, COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH

TO IMPROVING THE ENDANGERED SPECIES ACT

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MARCH 6, 1995

**PROTECTING AMERICA'S LIVING HERITAGE:
A FAIR, COOPERATIVE AND SCIENTIFICALLY SOUND APPROACH
TO IMPROVING THE ENDANGERED SPECIES ACT**

INTRODUCTION

The Clinton Administration is announcing a package of improvements to carry out the Endangered Species Act (ESA) in a fair, efficient and scientifically sound manner. These improvements build on the existing law to provide effective conservation of threatened and endangered species and fairness to people through innovative, cooperative, and comprehensive approaches.

The Administration believes that this nation needs to maintain its commitment to conserve imperiled species for the benefit of future generations as well as our own. The Endangered Species Act is a landmark environmental law enacted 20 years ago to preserve the ecosystems upon which endangered and threatened species and people depend. The law has been responsible for improving populations of declining species throughout the United States and has served as a model for international conservation efforts. The bald eagle, grizzly bear, and Aleutian Canada goose have been recovered from the brink of extinction and are approaching recovery. California condors and red wolves have been returned to the wild and are improving dramatically. American alligators, Arctic peregrine falcons, gray whales, and brown pelicans no longer need the Act's protection and have been removed from the list of threatened and endangered species. Overall, nearly 40 percent of the plants and animals protected under the Endangered Species Act are now stable or improving as a direct result of recovery efforts.

Although this nation has made considerable progress with endangered species conservation over the past twenty years, the task is not complete. To ensure that threatened and endangered species are protected and recovered, the Administration believes that the ESA needs to remain a strong, effective conservation tool.

At the same time, the Administration recognizes that implementation of the ESA should be improved by building stronger partnerships with States, local governments, private industry, and individuals; by exercising greater administrative flexibility to minimize socio-economic effects and assure fair treatment for landowners; and by reducing delay and uncertainty for States, local governments, private industry, and individuals.

The ESA provides a number of mechanisms—seldom used in the past—to resolve or avoid apparent conflicts between the needs of species threatened with extinction and the short-term demands of our society. In the last year, the Administration, working with non-Federal partners, has launched a series of initiatives to improve the ESA's effectiveness while minimizing its impact on people and their livelihoods. There will be other similar initiatives which together mark the beginning of a new approach to preserving ecosystem health and sustainability, one that looks to the future with comprehensive efforts to avoid crisis management and unpredictable piecemeal approaches.

For example, President Clinton convened a Forest Conference in Portland, Oregon, to address environmental and economic issues associated with management of Federal forest lands in California, Oregon, and Washington. In the 18 months following that conference, the Administration developed and has begun to implement a balanced Forest Plan which will preserve the northern spotted owl and the sustain the economy of timber communities in the Pacific Northwest. The Forest Plan will help prevent other species that depend on late-successional forests, including salmon and related fish species, from declining to the point where they need the protection of the ESA.

In another example, the Department of the Interior has published several special rules (called "4(d) rules" after the section of the ESA that authorizes them), which allow development of private lands to proceed while protecting threatened species. A special 4(d) rule developed for the coastal California gnatcatcher defers ESA requirements to a State planning process because this process will conserve the gnatcatcher and all other species that depend on the same habitat while allowing residential development to continue. In the States of Washington and California we have proposed a 4(d) rule which will generally exempt landowners with less than 80 acres of forestland from the Act's prohibitions on incidental take of spotted owls.

The Departments of the Interior and Commerce have joined with other Federal agencies to help prevent species from becoming threatened or endangered as a result of actions by these agencies. For example, on January 25, 1994, the U.S. Fish and Wildlife Service, Bureau of Land Management, National Park, National Marine Fisheries Service entered into a Memorandum of Understanding (MOU) initiated by the U.S. Forest Service to conserve candidate and proposed species. The Forest Service and the Fish and Wildlife Service quickly applied this MOU by signing a cooperative agreement to protect a rare species of salamander, which lives only on the ridges of the Shenandoah Mountains of Virginia and West Virginia. The cooperative agreement on the salamander was designed to stabilize and protect populations of the salamander on the George Washington National Forest so that the Fish and Wildlife Service will never have to list it as threatened or endangered.

The Department of the Interior has entered into three cooperative agreements with private industry to protect the red-cockaded woodpecker in the southeastern United States. These agreements, which have been signed with Georgia-Pacific Corporation, Hancock Timber Resource Group, and International Paper Company, make significant contributions toward the recovery of the woodpecker and will also benefit all of the species occurring in the longleaf pine ecosystem. Because these cooperative agreements benefit both the woodpecker and the timber companies, four other companies are in the initial stages of negotiating cooperative agreements with the Interior Department.

TEN PRINCIPLES FOR FEDERAL ENDANGERED SPECIES ACT POLICY

Ten principles guide the Administration's effort for reforming and implementing the Endangered Species Act:

1. Base ESA decisions on sound and objective science.

   Federal Endangered Species Act policy must be based objectively on the best scientific information available.

2. Minimize social and economic impacts.

   The ESA must be carried out in a manner that avoids unnecessary social and economic impacts upon private property and the regulated public, and minimizes those impacts that cannot be avoided, while providing effective protection and recovery of endangered and threatened species.

3. Provide quick, responsive answers and certainty to landowners.

   The ESA must be carried out in an efficient, responsive and predictable manner to avoid unnecessary social and economic impacts and to reduce delay and uncertainty for Tribal, State and local governments, the private sector and individual citizens.

4. Treat landowners fairly and with consideration.

   The ESA must be administered in a manner that assures fair and considerate treatment for those whose use of property is affected by its programs.

5. Create incentives for landowners to conserve species.

   Cooperation with landowners in protecting and recovering species should be encouraged through use of incentives.

6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.

   To make effective use of limited resources, priority should be given to multi-species listings, recovery actions and conservation planning.

7. Prevent species from becoming endangered or threatened.

   In carrying out its laws and regulations, the Federal Government should seek to prevent species from declining to the point at which they must be protected under the ESA.

8. Promptly recover and de-list threatened and endangered species.

   The ESA's goal of bringing species back to the point at which they no longer require the Act's protection should be achieved as expeditiously as practicable.

9. Promote efficiency and consistency.

   The ESA should be administered efficiently and consistently within and between the Departments of Commerce and the Interior.

10. Provide state, tribal and local governments with opportunities to play a greater role in carrying out the ESA.

    Building new partnerships and strengthening existing ones with state, tribal, and local governments is essential to each of the nine previous principles and to the conservation of species under the ESA in a fair, predictable, efficient and effective manner.

A PACKAGE OF REFORMS TO IMPROVE THE ENDANGERED SPECIES ACT

The Clinton Administration is announcing a package of reforms and proposed reforms that will have an immediate and positive effect on how the ESA is implemented throughout the Nation. This package builds on the ten principles set forth above. It describes administrative actions that have been taken or will be taken in the near future by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). And the package identifies ways in which implementation of the ESA could be improved through legislative action by the Congress.

1. **Base ESA Decisions on Sound and Objective Science.**

ISSUE DEFINITION: Concerns exist that decisions made under the ESA have not always been objective or based on the best available scientific information.

Administration Position: Federal Endangered Species Act policy must be based objectively on the best scientific information available. Therefore the Administration has initiated the following reforms:

▸ ***Peer review and information standards.*** To ensure that Endangered Species Act policy is based on the best scientific information available, the NMFS and the FWS have issued a joint policy directive requiring independent scientific peer review of all proposals to list species and all draft plans to recover species within the timeframes required by the ESA. A separate directive establishes more rigorous standards for the kinds of scientific information used in making ESA decisions.

▸ ***Listing petition standards.*** The NMFS and the FWS have published draft guidelines for public review and comment that would set tougher, uniform standards for the scientific determination that there is "substantial information" to propose a species for listing and would place more burden on the petitioner to show that the action may be warranted.

2. **Minimize Social and Economic Impacts.**

ISSUE DEFINITION: The ESA has been criticized for not giving greater consideration to the social and economic consequences of listing species under the Act.

Administration Position: The ESA must be carried out in a manner that avoids unnecessary social and economic impacts upon private property and the regulated public, and minimizes those impacts that cannot be avoided, while providing effective protection and recovery of endangered and threatened species. Therefore, the Administration has initiated or supports the following reforms:

▸ ***Recovery plan development and implementation.*** The FWS and the NMFS have issued a policy directive on recovery planning that will require that any social or economic impacts resulting from implementation of recovery plans be minimized. To help ensure that this goal is achieved, this directive requires the NMFS and the FWS to scientifically identify the recovery needs of a species and then involve representatives of affected groups and provide stakeholders with an opportunity to participate in developing and implementing approaches to achieve that recovery. It also will require that diverse areas of expertise be represented on recovery teams.

▸ ***Greater flexibility.*** Flexible and creative approaches are necessary to prevent threatened species from becoming endangered and to provide the impetus to recover them. The CONGRESS should restore the distinction between a threatened species and an endangered species, which was originally intended, by providing the Secretary with flexibility to use, in consultation with the States, a wide range of administrative or regulatory incentives, prohibitions and protections for threatened species.

▸ ***Landowner provisions.*** The policies outlined below to give landowners quick answers and certainty and to treat landowners fairly will minimize social and economic impacts to the private sector.

3. Provide Quick, Responsive Answers and Certainty to Landowners.

ISSUE DEFINITION: Concerns have been expressed by landowners and others that delay and uncertainty in ESA decisions unnecessarily frustrate development and land use.

Administration Position: The ESA must be carried out in an efficient, responsive and predictable manner to avoid unnecessary social and economic impacts and to reduce delay and uncertainty for Tribal, State and local governments, the private sector and individual citizens. Therefore, the Administration has initiated or supports the following reforms:

▸ ***Early identification of allowable activities.*** A joint FWS/NMFS policy directive has been issued that requires the Services to identify, to the extent known at final listing, specific activities that are exempt from or that will not be affected by the section 9 prohibitions of the ESA concerning "take" of listed species. In addition, this directive requires the identification of a single point of contact in a region to assist the public in determining whether a particular activity would be prohibited under the ESA. These initiatives will help educate the affected publics, as well as increase certainty regarding the effect of species listings on proposed or ongoing activities.

▸ ***Streamlining habitat conservation planning.*** The FWS and the NMFS have published a draft habitat conservation planning handbook for public review and comment. It is intended to provide quicker and more consistent answers to applicants for incidental take permits. These permits allow economic use of private land for those who develop a

conservation plan under the requirements of section 10 of the ESA. The draft handbook recognizes three categories of habitat conservation plans based on the level of impact to the conservation of species (high, medium, or low impact). It requires simplified procedures and faster permitting for low and medium impact plans.

▸ *"No surprises".* A policy of "No Surprises" has been issued by the FWS and the NMFS in habitat conservation planning under section 10 of the ESA. Under the policy, landowners who develop an approved habitat conservation plan for any endangered or threatened species will not be subject to later demands for a larger land or financial commitment if the plan is adhered to--even if the needs of any species covered by the plan increase over time. A landowner who agrees to provide for the long-term conservation of listed species in accordance with an approved habitat conservation plan is assured that activities on the land can proceed without having any additional mitigation requirements imposed, except as may be provided under the terms of the plan itself. Consequently, this policy provides the necessary assurances to landowners who are engaged in development activities over a period of many years that their habitat conservation planning permits will remain valid for the life of the permits.

▸ *Certainty for multi-species planning.* The CONGRESS should provide additional certainty to landowners who develop approved habitat conservation plans that protect non-listed species as well as listed species. Landowners who have satisfactorily demonstrated that they will protect candidate species or the significant habitat types within the area covered by a habitat conservation plan should be assured that their land use activities will not be disrupted if the candidate species or additional specific species not covered by the plan but dependent upon the same protected habitat type are subsequently listed under the ESA.

4. Treat Landowners Fairly and With Consideration.

ISSUE DEFINITION: The ESA has been criticized for placing an unfair burden on landowners, particularly small landowners.

Administration Position: The ESA must be administered in a manner that assures fair and considerate treatment for those whose use of property is affected by its programs. Therefore the Administration has initiated or supports the following reforms:

▸ *Greater Federal responsibility.* The Administration is emphasizing the importance of having each Federal agency fully meet its responsibilities for conserving species in order to reduce impacts to private lands. It is facilitating economic use of private land by placing additional federal lands in protection, by acquiring military lands when bases are closed, by enrolling existing federal lands in habitat reserves, and by arranging for purchases of RTC lands.

▸ ***Presumptions in favor of small landowners and low impact activities.*** For threatened species we will propose regulations that allow land use activities by landowners that result in incidental take and individually or cumulatively have no lasting effect on the likelihood of the survival and recovery of a species and, therefore, have only negligible adverse effects. In particular, the following activities would not be regulated under this proposal:

— activities on tracts of land occupied by a single household and used solely for residential purposes;

— one-time activities that affect five acres of land or less of contiguous property if that property was acquired prior to the date of listing; and

— activities that are identified as negligible.

In cases in which the cumulative adverse effects of these exempted activities are likely to be significant, the Secretary would be required to issue a special rule. The Secretary also would be required to consider issuing a special rule to exempt activities on tracts of land larger than 5 acres that are also likely to be negligible.

The CONGRESS should extend this flexibility to include activities that result in incidental take of endangered species and the CONGRESS should provide that incidental take activities undertaken pursuant to an approved state conservation agreement *(see recommendations under point #10)* are not regulated.

5. **Create Incentives for Landowners to Conserve Species.**

ISSUE DEFINITION: Concern has been expressed that current implementation of the ESA fails to provide incentives for species conservation or even discourages such conservation.

Administration Position: Cooperation with landowners in protecting and recovering species should be encouraged. Therefore, the Administration will support or has already initiated the following reforms:

▸ ***Incentives for voluntary enhancement.*** The FWS and the NMFS will provide incentives to landowners who voluntarily agree to enhance the habitat on their lands by insulating them from restrictions if they later need to bring their land back to its previous condition. Landowners often are interested in managing their lands in ways that have as a by-product substantial benefit to threatened and endangered species. However, landowners currently are reluctant to manage their lands in this manner because they are concerned that any subsequent reduction in quantity or quality of the improved habitat would result in a violation of the ESA. The proposed policy would apply only to those

situations in which it is possible to measure a conservation benefit to a species from habitat improvements. In those cases, landowners would not be penalized for having made those improvements.

▸ ***Incentives provided by other landowner provisions.*** In addition, the "No Surprises" policy and the proposed legislative action to encourage landowners to participate in habitat conservation planning to protect multiple species will provide significant incentives for landowners to conserve species.

6. **Make Effective Use of Limited Public and Private Resources by Focusing on Groups of Species Dependent on the Same Habitat.**

ISSUE DEFINITION: The ESA has been criticized for placing too much emphasis on single species and not enough emphasis on groups of species and habitats.

Administration Position: To make effective use of limited public and private resources, priority should be given to multi-species listings, recovery actions and conservation planning. Therefore, the Administration has initiated or supports the following reforms:

▸ ***Multi-species conservation emphasis.*** The FWS and the NMFS have adopted a policy that emphasizes cooperative approaches to conservation of groups of listed and candidate species that are dependent on common habitats. It directs that multi-species listing decisions should be made where possible and that recovery plans should be developed and implemented for areas where multiple listed and candidate species occur. The policy further emphasizes the importance of integrating federal, state, tribal, and private efforts in cooperative multi-species efforts under the ESA.

▸ ***Habitat conservation and recovery planning.*** In addition, the habitat conservation planning and recovery planning policies in this package encourage multi-species and habitat-based conservation efforts.

7. **Prevent Species From Becoming Endangered or Threatened.**

ISSUE DEFINITION: Federal land-managing agencies, States, and others have expressed strong interest in having greater opportunities to put conservation measures in place that would remove threats to species and make their listing unnecessary.

Administration Position: In carrying out its laws and regulations, the Federal Government should seek to prevent species from declining to the point at which they must be protected under the ESA. Therefore the Administration has initiated the following reforms:

▸ ***Federal/State conservation of imperiled species.*** The Forest Service, BLM, National Park Service, FWS and NMFS have signed an agreement with the International Association of Fish and Wildlife Agencies that establishes a federal-state framework to cooperate in efforts to reduce, mitigate, and potentially eliminate the need to list species under the ESA.

▸ ***Pre-listing conservation agreements.*** The NMFS and the FWS have published draft guidance for public review and comment that encourages and sets uniform standards for the development of pre-listing conservation agreements with other parties to help make the listing of species unnecessary. The guidance also is intended to clarify the role of the FWS and NMFS in conservation of candidate species and ensure that there is regular, periodic review of the status of candidate species to help prevent their further decline.

▸ ***Habitat conservation planning for non-listed species.*** Providing additional certainty, as recommended above, to landowners who participate in habitat conservation plans that protect non-listed species as well as listed species will help prevent species from becoming threatened or endangered.

8. Promptly Recover and De-list Threatened and Endangered Species.

ISSUE DEFINITION: Concerns have been expressed that too little emphasis is placed on recovering and de-listing species once they have been listed.

Administration Position: The goal of the ESA is to bring species back to the point at which they no longer require the Act's protection. Specifically, the Administration supports the following reforms to promptly restore threatened and endangered species to healthy status and then promptly de-list them:

▸ ***Effective recovery.*** Recovery should be the central focus of efforts under the ESA. Plans for the recovery of listed species should be more than discretionary blueprints. They should be meaningful and provide for implementation agreements that are legally binding on all parties. They should prescribe those measures necessary to achieve a species' recovery in as comprehensive and definitive manner as possible in order to provide greater certainty and quicker decisions in meeting the requirements of the ESA.

The **CONGRESS** should ensure that recovery planning:

- articulates definitive recovery objectives for populations (including levels that would initiate down-listing or de-listing) based on the best available scientific information and the other requirements of the ESA;
- provides all jurisdictional entities and stakeholders an opportunity to participate in development and implementation of the plan;

— seeks to minimize any social or economic impacts that may result from implementation;

— emphasizes multi-species, habitat-based approaches;

— is exempted from NEPA if the planning process is equivalent to that required by NEPA;

— facilitates integration of natural resource and land management programs at all jurisdictional levels; and

— identifies specific activities or geographic areas that are exempt from or that will not be affected by the section 9 prohibitions of the ESA concerning "take" of species covered by a plan.

The **CONGRESS** should improve the recovery planning process under the ESA by requiring all appropriate state and federal agencies to develop one or more specific agreements to implement a recovery plan. Upon approval of an implementation agreement by each of the appropriate state and federal agencies, the agreement should be legally binding and incorporated into the recovery plan. Recovery plans and implementing agreements should be reviewed and updated on a regular basis. An incentive should be created for federal agencies to approve implementation agreements by providing an easier, quicker section 7 process. Such implementation agreements should:

— expedite and provide assurances concerning the outcome of interagency consultations under section 7 and habitat conservation planning under section 10 of the ESA;

— ensure that actions taken pursuant to the agreement meet or exceed the requirements of the ESA; and

— require that each appropriate agency that signs an agreement comply with its terms.

▸ ***More rational process for designating critical habitat.*** The **CONGRESS** should modify the timing of critical habitat designations so that they result from the recovery planning process. Specifically:

— Designation of critical habitat should be based on the current standards of the ESA and the specific recommendations in recovery plans.

— Designation should occur concurrently with recovery plan approval, rather than the current requirement that it be designated at the time of listing.

▸ ***Prompt down-listing and de-listing.*** Prompt down-listing and de-listing of species when warranted are critical to the success of the ESA. The CONGRESS should give these actions emphasis equal to that of listing. Specifically:

— Down-listing or up-listing should be done administratively based on criteria in a recovery plan that meet the standards of the ESA and should not be subject to the current process required for listing, de-listing and changes in status of a species.

— The de-listing process should be triggered when the criteria established by a recovery plan are met.

▸ ***Recovery planning deadlines.*** The FWS and the NMFS adopted a policy that requires completion of a draft recovery plan within 18 months of listing and a final recovery plan within 12 months of completion of the draft plan.

▸ ***Affirmative species conservation by Federal agencies.*** Fourteen federal agencies have entered into an unprecedented agreement to improve efforts to recover listed species. Each agency has agreed to identify affirmative opportunities to recover listed species and to use its existing programs or authorities toward that end.

9. Promote Efficiency and Consistency.

Issue Definition: The FWS and the NMFS have been criticized for carrying out the ESA inconsistently and inefficiently.

Administration Position: The ESA should be administered efficiently and consistently within and between the Departments of Commerce and the Interior. Therefore, the Administration has initiated the following reforms:

▸ ***Joint NMFS/FWS standards and procedures.*** The NMFS and the FWS are committed to administering the ESA in an efficient and consistent manner so that the public always gets one answer from the two agencies and from different offices within the same agency. The agencies will standardize their policies and procedures through issuance of joint orders, guidance, regulations, and increased training. Consequently, each policy identified in this package is being implemented or proposed jointly by the FWS and the NMFS.

▸ ***Joint section 7 consultation policies and procedures.*** The FWS and NMFS, for example, have published a draft handbook for public review and comment that will standardize the policies and procedures governing section 7 consultations between the Services and other federal agencies concerning actions by those federal agencies that may affect a listed species.

▸ ***National federal working groups.*** The agreement by 14 Federal agencies identified above established a national interagency working group to identify and coordinate improvements in Federal implementation of the ESA, including identification and resolution of issues associated with interagency consultations undertaken pursuant to section 7(a)(2) of the Act.

10. Provide State, Tribal, and Local Governments with Opportunities to Play a Greater Role in Carrying Out the ESA.

ISSUE DEFINITION: State, tribal, and local governments have expressed strong interest in greater utilization of their expertise and in playing a greater role in the ESA's implementation.

Administration Position: Building new partnerships and strengthening existing ones with state, tribal, and local governments is essential to achieving the ESA's goals in a fair, predictable, efficient and effective manner. Therefore, the Administration has initiated and will support the following reforms to establish a new cooperative federal-state relationship to achieve the goals of the ESA:

▸ ***Participation of Indian tribal governments.*** The Departments of the Interior and Commerce will, in consultation with Indian tribal governments, propose a policy directive to clarify the relationship of Indian tribal governments to the ESA and to provide greater opportunities for the participation of these governments in carrying out the Act.

▸ ***Participation of State fish and wildlife agencies.*** The FWS and the NMFS have issued a policy directive to their staff which recognizes that State fish and wildlife agencies generally have authority and responsibility for protection and management of fish, wildlife and their habitats, unless preempted by Federal authority, and that State authorities, expertise and working relationships with local governments and landowners are essential to achieving the goals of the ESA. The policy directive, therefore, requires that State expertise and information be used in pre-listing, listing, consultation, recovery, and conservation planning. It further requires that the Services encourage the participation of State agencies in the development and implementation of recovery plans.

▸ *Facilitate State efforts to retain management authority.* The CONGRESS should provide a State with opportunities and incentives to retain its jurisdiction over management of a threatened or endangered species within its jurisdiction. Specifically:

— To encourage states to prevent the need to protect species under the ESA, the ESA should explicitly encourage and recognize agreements to conserve a species within a state among all appropriate jurisdictional state and federal agencies. If a state has approved such a conservation agreement and the Secretary determines that it will remove the threats to the species and promote its recovery within the state, then the Secretary should be required to concur with the agreement and suspend the consequences under the ESA that would otherwise result from a final decision to list a species. The suspension should remain in place as long as the terms or goals of the agreement are being met. The Secretary should be authorized to revoke a suspension of the consequences of listing if the Secretary finds that a state conservation agreement is not being carried out in accordance with its terms.

— Conservation agreements among all appropriate state and federal agencies within a state should be reviewed and updated on a regular basis.

— Each appropriate federal and state land management agency that signs a conservation agreement to remove threats to a species and promote its recovery should be required to ensure that its actions are consistent with the terms of that agreement.

— Suspension of the consequences of listing a species pursuant to an approved state conservation agreement should be permitted at any point before or after a final listing decision.

▸ *Special consideration of State scientific information.* The CONGRESS should recognize that the States have substantial expertise concerning species within their jurisdiction by requiring that special consideration be given to State scientific knowledge and information on whether a species should be proposed for listing under the standards of the ESA, as described below:

— Petitions should be sent to each affected State fish and wildlife agency. If a State fish and wildlife agency recommends against proposing a species for listing or de-listing, the Secretary should be required to accept that recommendation unless the Secretary finds, after conducting independent scientific peer review, that the listing is required under the provisions of the ESA.

▸*Lead State role on recovery planning.* The CONGRESS should provide States the opportunity to assume the lead responsibility for developing recovery plans and any component implementation agreements.

— In those cases in which a species' range extends beyond the boundaries of a single state, there should be a mechanism to ensure participation by and coordination with each affected state in the development of the plan for the species' recovery.

— The Secretary should approve a state-developed recovery plan unless the Secretary finds that it is not adequate to meet the standards of the ESA.

▸*Lead State role on non-federal habitat conservation.* Decisions concerning use of non-federal lands should be made to the extent possible by state and local governments. Therefore, the CONGRESS should:

— Specifically authorize appropriate State agencies, as well as the Secretaries, to enter into voluntary pre-listing agreements with cooperating landowners to provide assurances that further conservation measures would not be required of the landowners should a species subsequently be listed. Landowners who have satisfactorily demonstrated that they will protect candidate species or the significant habitat types within the area covered by a pre-listing agreement should be assured that they will not be subjected to additional obligations to protect species if the candidate species or additional specific species not covered by the agreement but dependent upon the same protected habitat type are subsequently listed under the ESA.

— Provide a State with the opportunity to assume responsibility for issuing permits under section 10(a)(2) for areas within the State which have been identified for such assumption in an approved recovery plan or for which there is otherwise an approved comprehensive, habitat-based state program.

▸*Remove obstacles to Federal/State/Tribal cooperation.* Federal, state, tribal and local governments should be able to cooperate and fully coordinate their actions in carrying out the ESA. Specifically, the Secretary should be exempt from the provisions of the Federal Advisory Committee Act in cooperating and coordinating with state, tribal or local governments in carrying out the ESA.

CONCLUSION

This reform package reflects the Administration's strong commitment to carry out the ESA in a fair, efficient and scientifically sound manner. The improvements that have been initiated and the legislative action recommended build on the existing law to provide effective conservation of threatened and endangered species and fairness to people through innovative, cooperative, and comprehensive approaches.

STATEMENT OF RICK PERRY, COMMISSIONER, TEXAS DEPARTMENT OF AGRICULTURE

Thank you Chairman Kempthorne and committee members for the opportunity to speak in support of S. 191, which would place a moratorium on the listing of endangered and threatened species until Congress reauthorizes the Endangered Species Act.

I could talk all day about the problems we've faced in Texas with the Endangered Species Act and more specifically with the arbitrary enforcement of that Act by the U.S. Fish and Wildlife Service. But I'll limit my remarks to why I agree there must be a moratorium on listings. We have provided you supporting material which will give more detail of the problems Texans are facing.

Texas has been hit harder by the Endangered Species Act than many States because 95 percent of Texas property is privately owned—and there's an awful lot of property in our State. Because of our land mass, Texas has a variety of soils, climates and ground cover, which leads to a diversity of wildlife and habitat. Texas currently has 67 species that are federally listed as endangered or threatened. We have another 104 candidate species. Each listing brings more regulations and restrictions on what a person can do with the property he or she owns. Each restriction creates animosity which hurts rather than helps promote species protection.

Just for reference, let me just show you a map of Texas. The colored counties on this map are all home to at least one endangered species, which means the majority of Texans have one in their neighborhood.

Texans have fought several battles over the Endangered Species Act recently and know all too well what these restrictions can do. Central Texas has 33 counties affected by the endangered golden-checked warbler. Individuals as well as developers have been prevented from building homes on their land. Two weeks ago Time magazine cited the example of 74-old Margaret Rector, who bought land in Central Texas as an investment for her retirement. It was once worth $1 million but now is worth only $30,000 because it might contain golden-checked warbler habitat.

Farmers and ranchers face restrictions on simple day-to-day management decisions such brush control and the number of cattle they can run on their land. In 1991, Margaret Rodgers received a letter from Fish and Wildlife that warn of fines up to $50,000 or imprisonment. Her crime? A bulldozer cut a fence line across the 87-year old widow's Central Texas ranch. While Fish and Wildlife eventually admitted it overreacted, they told her to check with them before clearing any more land. All this for a bird that has lived on Texas ranches for generations.

The city of San Antonio and farmers in surrounding counties have had their water supply threatened by a continuing Sierra Club lawsuit aimed to ensure there is adequate water to protect two salamanders and two minnows that live in springs fed by the Edwards Aquifer. (*species are: Texas blind salamander, San Marcos salamander, fountain darter, San Marcos gambusia*)

The Sierra Club has explicitly threatened to try to cut off water to military bases in San Antonio, which would eliminate 150,000 jobs, and to cut off Federal funds to farmers in a three-county area to protect these species.

These are just two examples but they should begin to give you an understanding of why we are concerned about more listings.

We believe that habitat exists today *because of* good stewardship by farmers and ranchers. Most farmers and ranchers take pride in having wildlife on their land and are willing to do their part—if it makes any sense at all.

But it's a lack of common sense in the enforcement of the Endangered Species Act that has Texans irate.

The U.S. Fish and Wildlife Service wants to add the jaguar as an endangered species under the Act, despite the fact it has not been sighted in South Texas since 1948. Even the petition to list notes that the jaguar was historically only an "occa-

sional wanderer" into Texas. Yet Fish and Wildlife pushes on for the listing, which could restrict about 30 counties along the Rio Grande River.

The listing is being pushed by an environmental group from outside Texas that has no stake or accountability for the outcome of its actions. The ease with which anyone, anywhere can petition to add a species to the endangered list, without regard for scientific data or the economic restrictions that listing causes, is an issue that must be addressed as the Endangered Species Act is reauthorized.

In the Texas Panhandle, the Fish and Wildlife wants to add the swift fox to the endangered list. This despite the fact that Texas Parks and Wildlife Department biologists tell the Fish and Wildlife that biological information does not support a listing. Yet 40 counties face restrictions if the swift fox is listed.

The Arkansas River Shiner, a minnow that Fish and Wildlife wants to put on the endangered list, also lives in the Panhandle. Once again, the Texas Parks and Wildlife Department has told the Fish and Wildlife that biological information does not support a listing.

This listing is especially scary because it would restrict access to the Ogallala Aquifer, upon which 42 counties in the Panhandle rely for drinking and irrigation water. The Panhandle is one of the most productive agricultural areas in the Nation—generating over $10 billion in economic activity from agriculture. Farmers depend on water from the Ogallala to produce food for consumers across the U.S.

Fish and Wildlife sent a letter to concerned citizens that said it didn't know if ground water would be affected and didn't know how it was going to protect the shiner. Now, tell me—how is anyone supposed to sign on to a deal like that?

You see, we know what can happen in a situation like this because we have as an example the San Antonio/Edwards Aquifer situation I discussed earlier. From the way things have gone there, West Texans can expect pumping limitations and court fights.

And speaking of court battles, as you well know, the U.S. Supreme Court has agreed to hear *Sweet Home vs. Babbitt*, which may render moot the Fish and Wildlife rules on habitat modification. This in itself is a compelling reason to halt listings pending the Court's decision.

I think you can see why Texans support this legislation, which will stop listings until the major flaws in the Endangered Species Act can be addressed.

We support wildlife in Texas. Wildlife populations are flourishing in our State—because of the stewardship of farmers and ranchers who own the land. This didn't come about because of legislation and regulations. This came about through positive, cooperative efforts, not Federal coercion.

Give Texas farmers and ranchers valid scientific information that a species is endangered. Tell them how to help conserve that species and still make a living, and they will respond. We do not want to do away with protection of endangered species. We do not want to destroy the environment. We do not want to kill all wildlife.

We do want information we can believe. We do want solutions that work and will actually increase species populations. We do want to be able to make a living. None of this is happening as the Endangered Species Act is written and enforced today.

TEXAS COUNTIES
WHERE FEDERALLY
LISTED ENDANGERED
SPECIES LIVE

TEXAS BATTLES WITH THE ENDANGERED SPECIES ACT

This is a collection of stories which tell of battles Texans have had with the Endangered Species Act and the U.S. Fish and Wildlife Service. These stories are collected from publications, interviews and testimonies at various hearings and private property rights meetings.

• In Austin, *Margaret Rector* invested in land 25 years ago to prepare for her retirement. She's originally from Haskell in West Texas but she moved to Austin during the Depression and worked for the State of Texas for 35 years. Miss Rector's investment went through the boom and bust of Austin real estate during the 1980's, but in 1990 she owned 15 acres worth $830,000. That year her property was designated golden-cheeked warbler habitat, and its value plunged to $30,000. Even at that price nobody will buy it—not even preservationists, who say it is too small and has too much development around it to be of value to the birds. As Miss Rector says, "you can't use the land to shoot, you can't graze, you can't even have people out because you might harass the birds." All you can do—and it's what Miss Rector is doing—is keep paying taxes on land you can't use and can't sell.

• *Wayne Halbert*, a farmer in San Benito and chairman of the Agriculture and Wildlife Coexistence Committee in the lower Rio Grande Valley, tried to be a good guy and work with the system. In Cameron County, farmers cooperated with Federal bureaucrats to release Aplomado falcons on private property. Then they were told by those same bureaucrats that they couldn't apply pesticides on their farmlands because of the presence of this endangered species.

• In February 1991, *Margaret Rodgers* received a letter from the U.S. Fish and Wildlife Service that warned her she could be subject to fines of up to $50,000 or imprisonment for up to 1 year, or both. Her crime? A bulldozer cut a fence line across the 87-year-old widow's Central Texas ranch, which has been in her husband's family for 80 years, and destroyed some juniper trees. The Fish and Wildlife Service considered this destruction of habitat for the endangered golden-cheeked warbler. Officials later admitted their letter had been sent in error but they requested that Rodgers contact them before clearing any more land on her 3,100-acre Sunset Ranch in northwest Travis County.

• *Marj and Roger Krueger* purchased a lot in a 10-year old Austin development which already included all amenities. Other houses were already built near their lot. After they bought this lot, the golden-cheeked warbler was added to the endangered species list. They submitted a request to the U.S. Fish and Wildlife Service to build on the land. After 6 months of waiting, they were told to resubmit everything. Because they had exhausted their financial resources, the lot still stands vacant. Their current home, which is 10 minutes from downtown Austin, backs onto a greenbelt. They report deer, rabbits, squirrels and birds frequent the unfenced yard, which leads them to ask how not building on the other lot makes a difference to animals.

• In 1992, The U.S. Fish and Wildlife Service toured the *Maverick Ranch* near Boerne to discuss habitat management for two endangered species, the golden-cheeked warbler and the black-capped vireo. Quoting from an April 29, 1992, letter from the USFWS Austin office to the ranch managers: "The Fish and Wildlife Service has some concerns with the recommendations in the Maverick Ranch Habitat management plan regarding the golden-cheeked warbler and the black-capped. . . Not all Ashe juniper (regrowth) in an area should be removed." This directly contradicts what USFWS said publicly—that only old-growth cedars, which are golden-cheeked warbler habitat, should not be cut.

Another issue addressed in the letter—"The buffer around golden-cheeked warbler territories and unoccupied habitat should be 300 feet." Realize that this talks about establishing a buffer zone around unoccupied habitat.

Yet another questionable comment—"If cattle must be stocked on the ranch, an absolute minimum number should be allowed." If cattle must be stocked on the

ranch? What Is the minimum—minimum to make a profit or minimum to impact the unoccupied habitat?

• *Harold Burris* inherited 60 acres of wooded hillside near Austin. He planned to build on one lot and sell the others. But the U.S. Fish and Wildlife Service decreed that building in the area would threaten the habitat of two bird species and five cave invertebrates. The ruling deprived Burns of the cash-flow he needed to service his debt and he lost the property to foreclosure. Ironically, in 1978 he tried to sell the land to the Audubon Society, which rejected the idea on the grounds that millions of acres of identical wildlife habitat nearby made the land worthless to them.

After the Audubon Society turned down his offer, he turned to development. He spent $7 million to build access roads and infrastructure and began to sell the lots to home builders. But in 1990, he received a Federal injunction to stop. Two years later, the bank foreclosed on the bulk of his remaining acreage, worth about $1.5 million.

• *David Trotter* and his partners had 1,102 acres they planned to develop into residential housing. The U.S. Fish and Wildlife Service said they could develop the land if they gave 765 acres as habitat for the golden-cheeked warbler and cave bugs. In exchange for allowing development on the remaining 339 acres, USFWS also said the landowners would need to mitigate the harm they would cause by buying 873 acres of additional habitat. This meant the agency's idea of reasonable and prudent regulation includes forcing the landowner to hand over 1,638 acres of land to the government in order to develop 339 acres.

• In 1966, *the city of Bastrop* donated 1,145 acres to the Texas Parks and Wildlife Department for a state park. Part of the agreement was that the city could someday expand its nine-hole golf course. Now that the city wants to expand the course, they are battling the U.S. Fish and Wildlife Service because the endangered Houston toad lives in the park. USFWS has agreed to let the golf course expand if 3,000 acres of the 3,505-acre park is established as a toad preserve. The toad population in Bastrop County is estimated to be 2,000, which gives the toads over an acre apiece. Golfers will pay a $1.25 "toad fee" for each round of golf. This fee will be used to buy an additional 1,000 acres of toad habitat near the park.

• *Mary A. Davidson* and her husband bought 1.45 acres of land near Austin and eventually saved enough money to build a house. As they prepared to build their house, they were told by their architect to get a document from U.S. Fish and Wildlife Service stating that the land did not contain golden-cheeked warbler habitat. After 16 weeks of waiting, USFWS denied their request, despite the fact it never surveyed the property or that of neighbors. However, USFWS said the Davidsons would need a section 10(a) permit to build on the land. They were told they could purchase land elsewhere to mitigate for building on their 1.45 acres. They hired two different biologists to survey the lot and the biologists determined that the land was not good habitat for the golden-cheeked warbler. The Davidsons were told by USFWS that it was irrelevant whether the species actually lived on their property.

TEXAS PARKS AND WILDLIFE DEPARTMENT,
Austin, Texas, September 30, 1994.

KEN COLLINS,
Ecological Services Field Office,
222 South Houston, Suite A, Tulsa, OK 74127.

DEAR MR. COLLINS: The Texas Parks and Wildlife Department would like to record the following comments with respect to the proposed rule, published in the Federal Register (Vol. 59, No. 148), to list the Arkansas River shiner (*Notropis girardi*) as federally endangered. Our biological evidence does not warrant listing

the shiner as endangered in Texas. In 1983, our biologists collected 786 Arkansas River shiners out of a total of 3,141 fish from 34 samples above Lake Merideth on the Canadian River. In 1990, we recorded 309 individuals of this species from 3 samples on the Canadian River near the town of Canadian downstream from Lake Merideth. From these data, we conclude that the Texas population of the Arkansas River Shiner is neither threatened nor endangered.

In order to gain more information, we are about to initiate an effort to monitor the species within the Canadian. We will be obtaining data on why the species is doing well in Texas and assess the possible threats. Our biologists state that the Ogallala Aquifer is too far below the surface to contribute to the flow in the Canadian River. Therefore, pumping from the Aquifer does not pose a threat. We will, of course, share the results of these efforts with your staff to further conserve the species in other parts of its range.

There is a great deal of interest in this issue from Austin to the Panhandle. Several other interested parties are in the process of developing a response to the proposed rule. Consequently, we would support a request for an extension on the commend period for this rule before public hearings begin.

Sincerely,

LARRY MCKINNEY,
Director, Resource Protection Division.

TEXAS WILDLIFE DEPARTMENT,
Austin, Texas, July 27, 1994.

MS. ELIZABETH MCPHILLIPS,
Acting Field Supervisor, Ecological Services,
U.S. Fish and Wildlife Service, 420 South Garfield Avenue, Suite 400, Pierre, SD.

DEAR MS. MCPHILLIPS, This is a letter to comment on the Notice of 90-Day Petition finding to federally list the swift fox (*Vulpes velox*) as endangered.

The status of the swift fox is currently unknown in Texas and is considered to be a furbearer under State law. Our recent trapping reports indicate that the fur returns on this species is too low for quantitative analysis, but this may be correlated with decreased trapping effort due to a declining trapper population rather than a decline in the swift fox population. However, we do have several recent undocumented verbal reports of the swift fox in the Panhandle and kit fox in West Texas, but exact locations of these occurrences and whether the populations are increasing, stable, or decreasing is unknown.

Because this species is listed as a Candidate Category 2 species, we have just begun a campaign to gather more information concerning their status, as well as the status of the Plains Spotted Skunk (also C2). The 3 steps in this 1–2 year project that began in February 1994 include:

1) soliciting the cooperation of biologists, public land managers, and the general public to report information on the occurrence of swift fox and spotted skunks, whether live populations or road kills,

2) adding the swift fox/spotted skunk to the Texas Parks and Wildlife Department's annual deer/furbearer spotlight survey, and

3) sending information to the 1993/94 licensed trapper on the proper identification of these species and requesting their cooperation in providing trapping and/or occurrence records.

Only Step 1 has been completed and only 2 sightings of swift fox have been reported in the last 6 months. However, informal discussions with TPWD and university biologists have led me to believe that there are probably 'several' populations in the Panhandle and that they may be locally abundant. Step 2 will begin in August, and Step 3 will begin in late October/early November. The open fur season

does not end until January 31, 1995, so results of our efforts described above are not expected until Spring of 1995. At that time, we will assess the situation and establish further goals.

The statement in the Notice of 90-Day Petition Finding (Fed. Reg. 59:104), states that "Kansas, Texas, and Wyoming maintain localized populations with limited distributions." At this time, undocumented reports indicate that the swift fox population in the Texas Panhandle may be localized, however, we have no biological data to support the statement that the populations have limited distributions.

Until the above information is obtained and analyzed, we can not concur that the swift fox is endangered in Texas. The biological evidence in Texas does not warrant the listing of this species. However, we are interested in obtaining this information, and with more time, we hope to be able to resolve some of these questions. Therefore, we believe the current listing for the swift fox as a Candidate Category 2 species is appropriate.

When we complete our campaign for information requests concerning this species, we will provide you with a copy. If you have any further questions, please do not hesitate to contact me at (512) 448–4311.

Sincerely,

PEGGY HORNER,
Endangered Resources Branch.

TESTIMONY OF DALE ARTHO, U.S. FISH AND WILDLIFE SERVICE HEARING, AMARILLO, TX, JANUARY 25, 1995

INTRODUCTION

Mr. Chairman, I thank the members of this committee, for this opportunity to meet today and to express my thoughts on such an important issue. My name is Dale Artho. I farm and ranch in three counties in the Texas Panhandle (Deaf Smith, Oldham, & Randall Counties). My current operations produce grain sorghum, wheat, sugar beets, cattle, and occasional non-traditional crops. I also serve as a director on the Texas Grain Sorghum Producers Board.

PURPOSE

I am very concerned with the USF&WS attempts to classify the Arkansas River shiner as an endangered species, but more so I'm very concerned about the implications of such a proposal. I would like to explain why this type of action taken by a Federal agency would produce this type of fear within the agricultural community.

Idaho

Landowners and County Commissioners fought a strenuous legal battle against the USF&WS over the Bruneau Hot Springs Snail. In this case the USF&WS ruled that this snail as small as a pencil tip was endangered. When in fact it was clearly not a case of endangerment, but a case of environmentalist manipulating an all to willing government agency into implementing their hidden private agenda. Landowners were forced to fight again to retain title to their own land.

California

The USF&WS decided that the kangaroo rat was endangered. They blocked landowners from using normal management of brush on their own land. USF&WS refused to grant permits to control hazardous brush, because detailed biological impact studies have not been done. Landowners would have to prove, at great expense, that the kangaroo rat does not exist in any proposed firebreak. Proving something does not exist, and therefore does not need Federal protection, is unique in U.S.

legal history. The regulators do not have to prove some creature does exist before imposing strict controls on private property.

Texas

March 10, 1992 they raided a 76-year-old rancher on the pretext of killing eagles, resulted in two confiscated pickups and no charges filed. They returned the trucks December 26, 1992, but contents of one pickup were kept. The rancher has been advised by his attorney that fighting his case could lead to further harassment. The ranch, some 56,000 acres, is owned by a foundation and leased by the rancher. The family suspects that Federal authorities want the spread publicly acquired as a game refuge.

RESULTS

This type of behavior by Federal agencies creates an environment of anxiety, fear, and distrust. Back in the 1950–70's the Federal Government was a farmer-friendly partner in conserving and preserving the environment.

Increasingly, landowners worry that environmental radicals are using law's such as the Clean Water Act, Endangered Species Act, etc. as a legal tool for rendering private land economically useless. The enviro-agenda, landowners fear, is really a "re-wilding" of entire areas by getting rid of cultivation and cattle and making it easier for public reacquisition of the land at taxpayer expense.

Nevertheless, when nonfarm environmental groups pushed through the Endangered Species Act, landowners' perception of the Federal Government changed. Today it is considered an eco-police taking command over private land for a particular conservation agenda. Resulting in many cases, of hostility between citizens and government. It is an atmosphere that will drive out employees who seek cooperation and attract those who lust for the power of gestapo tactics. Resulting in an increase of lawsuits against the Federal Government.

All this litigation and rising enmity is a double tragedy: Few gains are made for species protection and the struggle undermines the government's credibility to administer law "with the consent of the governed."

CONCLUSION

First: the USF&WS must quit misinterpreting the Endangered Species Act and use this unique legislation for as it was intended. USF&WS present interpretation of the Act is not about preserving the environment. It is about accumulating power. Especially power to control private land and personal decisions on that land. To that end, government agencies are just a means to divide and intimidate private owners.

Second: Protect this Great State of Texas water rights as provided under the Tenth Amendment to the U.S. Constitution, and protected by the Fourteenth Amendment to the Texas Constitution.

Third: Assert the need for risk/benefit analysis in Federal policy on all effected lands and rivers.

Fourth: Not only our elected officials, but also the citizens of this great Nation must champion private property and constitutional rights.

Fifth: Accountability of all government agencies to its citizenry. This is probably the simplest idea to carry out. Instead of government agencies operating under hidden private agendas, they must live and function under the laws of the Constitution!

Please, do not take this as chastisement, but I would encourage this committee to act very carefully and prudently with the changes recommended throughout this process. These changes will affect a small percentage of the United States population, but in the end these decisions will influence the entire world population.

I would like to thank the members of this committee for allowing me to offer my opinion. Thank You.

Austin American Statesman, Feb. 20, 1994

HABITAT VS. HUMANITY

Different standards questioned for projects in rare species areas

By Ralph K.M. Haurwitz
American-Statesman Staff

When Linda Fernandez proposed building a house in an area of Northwest Austin where an endangered species of songbird is found, federal wildlife officials told her she would first have to obtain a special permit.

She dropped the plan. Fewer than 20 such permits have been issued nationwide in the history of the Endangered Species Act. Fernandez, a free-lance writer and publicist, couldn't afford thousands of dollars in legal and consulting fees for an uncertain outcome.

But when the City of Austin wanted to install a 3,800-foot overhead electric utility line in the same area, the U.S. Department of the Interior's Fish and Wildlife Service gave its blessing. Not only could the city chop down trees and bring in heavy equipment to erect poles and wires, but it didn't have to obtain a permit.

Fernandez said that's not fair.

"The poles are a heck of a lot closer (to the birds) than my house would have been," she said. "We lost an awful lot of time and peace of mind butting our heads against the iron door of bureaucracy."

What's more, she and others are questioning why the city would spend $56,000 to install a utility line to serve a subdivision where the developer has not obtained the necessary wildlife permit or firmed up a source of tap water. The owner of the Westminster Glen subdivision, Dallas-based Lantower Realty Inc., has applied to the Fish and Wildlife Service for the permit.

Wildlife officials say Fernandez is comparing apples and oranges.

"What we have here is an urbanization request vs. a utility line request," said Joseph Johnston, senior staff biologist for the wildlife service.

Johnson said a house, unlike a utility line, permanently disrupts the habitat of the golden-cheeked warbler, a migratory songbird whose prime nesting grounds are in western Travis County.

Construction of a house involves removal of more vegetation, introduces non-native grasses and other plants and creates a permanent source of noise, he said. In addition, cats kept as pets may prey on the warblers, as do bluejays attracted to backyard feeders.

A utility line strung through the woods, with minimal tree clearing and pruning, generally does not harm a warbler area, Johnston said. With no damage expected, no permit is required.

Some landowners, developers, prospective homeowners and environmentalists are skeptical of such distinctions and contend that the Fish and Wildlife Service exercises too much discretion. The critics argue from two different points of view. Developers and landowners say the service is too restrictive, while environmentalists say the agency isn't rigorous enough.

To be sure, many of the service's decisions concerning what would affect a species are a matter of professional judgment, which is not easily reduced to clearly drawn rules.

The standard that the service applies is whether construction of a road, house, office or utility line would result in a "taking" of the species. The term is broadly defined under the species act to include killing or harming any animal classified as endangered or rendering its habitat unusable.

"The question of whether any particular activity is likely to result in a taking is often a murky area, a gray area, not a black-and-white area," said Michael Bean, chairman of the wildlife program of the Environmental Defense Fund, a national conservation group.

In response to pressure for clear guidelines, the federal wildlife agency's Austin office provides a service that it offers nowhere else in the country, said Sam Hamilton, state administrator for the agency. Since May 1990, the service has issued thousands of "bird letters" to prospective homeowners, builders and developers seeking permission to build in or near the habitat of endangered species.

A bird letter is an acknowledgment from the service that it does not regard the proposed project as a threat to an endangered species. Otherwise, the service advises the landowner or developer to apply for a permit.

Only two such permits have been issued in the Austin area — one for LakeLine Mall and one for the Canyon Ridge subdivision. As a condition of such permits, the service requires developers to set aside species preserves to "mitigate" habitat damage. The service also requires funding for preserve management.

The wildlife service turned down a request by Fernandez for a bird letter for a 15-acre tract of juniper and oak trees along City Park Road in April 1992. Jana Grote, assistant field supervisor for the service, wrote that the property is part of a large, contiguous block of habitat occupied by the warblers.

In response, Fernandez proposed moving the house site to an existing cleared area of the tract adjacent to City Park Road, leaving the remainder of the property undisturbed.

The wildlife service's Johnston replied in a letter that "it is the service's determination that warblers likely use the habitat located in the area adjacent to City Park Road for nesting and foraging purposes, including the area proposed for construction. We support our initial determination that any construction occurring on the lot could constitute a take of the species as prohibited under Section 9 of the act, thus requiring a permit."

Fernandez figured it would cost tens of thousands of dollars, perhaps more than $100,000, to obtain a permit. "It's ludicrous to suggest that an individual should get a permit of this ilk," she said.

So she canceled plans to buy the 15-acre tract and bought a smaller parcel at the nearby Glenlake subdivision, where she built a two-story Southwestern contemporary home of stone and stucco.

A few weeks ago, Fernandez noticed city utility crews working in the area where she had sought approval. That made her angry. "It seems to me that they're not playing with the same rules," she said.

Fernandez said the work also raises questions about the Westminster Glen subdivision, which would be served by the utility line. Lantower Realty has applied to the wildlife service for a permit to build 74 houses.

(continued)

The service says construction on 11 of the lots would not affect the birds and therefore requires no permit. Representatives of Lantower and the service are negotiating the terms of a permit that would allow construction on the balance of the lots at the 116-acre subdivision.

Fernandez said it makes no sense to install a utility line to serve houses that haven't been built and whose construction is dependent on a permit that has not been issued.

Neal Graham, a spokesman for the city's Electric Utility Department, said the line was installed at the request of the developer and to provide lighting for four poles in areas where roads have dangerous curves. He said the city has an obligation to provide utility servic .

City planning officials approved the Westminster Glen development several years ago, but the project was dormant until recently, Graham said.

Steve Lowder, a spokesman foı Lantower Realty and president o Lowder & Associates, a Dallas rea estate services company, said the street lights are needed for public safety.

"We are very sensitive to the environmental needs," he said. Lantower Realty acquired the property last May.

Another wrinkle concerning the development involves water supply.

Lowder said Lantower Realty hopes to obtain water from the Glenlake Water Supply Corp., which serves the nearby Glenlake subdivision.

However, the chairman of the nonprofit water system, which is owned by residents of Glenlake, said it has no interest in supplying Westminster Glen, in part because of the uncertain condition of Westminster Glen's underground water lines, which were installed several years ago.

The chairman, Kevin Mac Donnell, said he didn't understand why the city was installing utility lines for a subdivision that had not firmed up a source of water or obtained a federal wildlife permit

"The city needs some chess players on their staff — somebody who can think three steps ahead," Mac Donnell said.

San Antonio Express News, Jan. 27, 1995

Another fish fight

SAX 1/27/95

Here comes the U S Fish and Wildlife Service again, proposing to put a minnow on the endangered species list without adequate evidence

The fish is the Arkansas shiner, found in the Canadian River in the Texas Panhandle and other streams in the Arkansas River basin

The Clinton administration proposed putting the shiner on the endangered list in August Hearings are being held in Texas, Oklahoma and Kansas

Texas leaders denounced the proposal this week. Gov George W Bush, Lt Gov Bob Bullock, House Speaker Pete Laney and Agriculture Commissioner Rick Perry said the little fish is doing just fine in Texas and that federal intervention could harm agriculture.

Perry and Larry McKinney of the Texas Parks and Wildlife Service said information gathered by state biologists show no reason to believe the shiner is in trouble

Last September, three Oklahoma congressmen wrote Fish and Wildlife, asking the agency whether it had considered all available scientific evidence and what effects the ruling would have on agriculture. The agency hasn't deigned to reply.

South and Central Texans are familiar with the costs of the Endangered Species Act. The Sierra Club lawsuit over species in the San Marcos and Comal springs has jeopardized the future of the 1.5 million people who depend on the Edwards aquifer Fish and Wildlife also invoked the golden-cheeked warbler to threaten property rights in 33 counties.

The agency should pay attention to questions and scientific evidence about the Arkansas shiner

It also should pay attention to Bush, who said "Leave us alone. We know what we are doing We care about our land We care about our waters And we know how to run our own business."

ECONOMIC FOCUS

Rural Land Owners Say Pain Goes Beyond Data

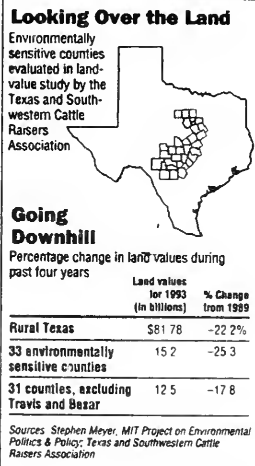
By Susan Warren
Staff Reporter of The Wall Street Journal

Are endangered plants and animals dangerous to rural property owners? Choose a side.

According to a new study by the Texas and Southwestern Cattle Raisers Association, the answer is "yes, very." By analyzing property-tax rolls around the state, the study attempts to show that land values in 33 environmentally sensitive counties have fallen much faster than the state average over the past four years, due in part to enforcement of the federal Endangered Species Act.

Not surprisingly, the association's conclusions are drawing fire from environmentalists. And a professor at the Massachusetts Institute of Technology has weighed in to say that the study actually proves the *opposite* of what ranchers claim.

If nothing else, the flap about the study shows just how tough it can be to apply hard numbers to the highly emotional battle between property-rights advocates and environmentalists. "It's difficult to get your hands on something that will isolate that effect [on property values] conclusively," says Charles Gilliland, an associate research economist at Texas A&M's Real Estate Center.


Looking Over the Land

Going Downhill

Percentage change in land values during past four years

	Land values for 1993 (in billions)	% Change from 1989
Rural Texas	$81.78	-22.2%
33 environmentally sensitive counties	15.2	-25.3
31 counties, excluding Travis and Bexar	12.5	-17.8

Sources: Stephen Meyer, MIT Project on Environmental Politics & Policy; Texas and Southwestern Cattle Raisers Association

Steve Munday, a spokesman for the Cattle Raisers Association, says looking at the study purely from a statistical point of view misses the bigger picture.

The association bolstered its examination of tax records with a survey of statements made by real-estate professionals, rural landowners and local government officials citing the Endangered Species Act's negative impact on land values.

"If the real-estate experts say it's a problem, and local elected officials say it's a problem, and we know from first-person reports that it's a problem, then there's more here than just smoke," Mr. Munday says.

The group's effort came after federal authorities caused a near-panic among landowners earlier this year when they considered designating 33 Central Texas counties as "critical habitat" for the endangered golden-cheeked warbler, a songbird that nests in the region. That plan – which mainly would have placed additional restrictions on some uses of the land – was later shelved under heavy political fire.

But even without the special designation, those counties are already grappling with restrictions because they are home to 19 other endangered species. Property owners who play host to such plants and animals face strict limits on what they can do with their land, including any new developments that might imperil their endangered guests.

To see whether those restrictions translate into lower land values in the countryside, the Cattle Raisers Association look a look at property-tax rolls across the state. The study found that average rural land values in the 33 counties declined 25.3% between 1989 and 1993 – significantly more than the statewide drop of 22.2%.

But Stephen Meyer at MIT, who directs the school's Project on Environmental Politics & Policy, says the association made a basic analytical error. The problem, he says, is that the 33 counties include Bexar and Travis counties, by far the most populous in the study. Because of the proximity to urban areas (Austin is located in Travis County, while San Antonio is in Bexar County), rural land in those counties was much more valuable to begin with, and represented a disproportionate amount of the value in the 33-county sample. It's likely that values dropped much more in Bexar and Travis counties than in the others when the speculative bubble burst in the late 1980s, Mr. Meyer maintains.

Minus the two big counties, average values in the remaining 31 fell just 17.8%, far less than the state average. In fact, land values in 22 of the 33 counties did better than the state average, Mr. Meyer says.

In some cases, the endangered species might have actually helped land values, says Mr. Meyer. He says it makes sense when you consider that species-free land might command a higher price when some land with endangered species habitat becomes undesirable.

That's little comfort to residents of habitat-sensitive land. And the cattle association and real-estate market specialists point out that some problems faced by landowners when trying to sell their property within a suspected habitat area aren't necessarily reflected in tax records. For instance, property that's encumbered by endangered species might be impossible to sell at any price. And landowners whose property doesn't have such problems often must pay for expensive and time-consuming biological surveys to prove it before a prospect will agree to buy or a bank will finance the sale.

Such surveys can cost anywhere from $10,000 to $50,000, depending on the size of the tract. Steve Paulson, director of the Texas office of SWCA Inc., an environmental consultant that provides such services, says business is booming. Without a survey, there is uncertainty, he says. "And wherever there's uncertainty, there's volatility in the market."

That's something George Foote knows about firsthand. Back in 1961, Mr. Foote invested in 50 acres of land outside Austin with the idea that he could sell it in his retirement years. Now, Mr. Foote, 74 years old, can't find a buyer because wildlife officials believe it's a habitat for the golden-cheeked warbler.

Several buyers have expressed interest, but they quickly lose it when warblers are mentioned, says Mr. Foote. If it's warbler habitat, then it can't be cleared to build a house or road – the most marketable use for the property, he says.

"That leaves me with land that has no value," he says, "unless I want to lie to prospective buyers, and that's certainly not the thing to do."

Austin American Statesman, Jan. 22, 1995

Farmers hopeful, wary as legislators consider aquifer

By Ralph K.M. Haurwitz
American-Statesman Staff

1/22/95

HONDO — When A.O. "Odie" Gilliam drilled a well into the Edwards Aquifer 27 years ago to irrigate his corn fields, he scrawled important details into the concrete well pad. The diameter, depth and date are still plainly visible: 15¼ inches, 687 feet, 1968.

Gilliam wishes that his legal right to pump from the aquifer also could be carved into stone.

"You bet it's something to fight over. It's a life's work," said Gilliam, who irrigates 500 acres of a sprawling family-owned farm and ranch in Medina County, 30 miles west of San Antonio.

The fight could come soon in Austin, as state legislators consider an issue they tried to settle two years ago: management of one of the nation's most important ground-water resources. Not only is the Edwards Aquifer the lifeblood of irrigated agriculture in Medina and Uvalde counties, it also supplies San Antonio, smaller towns, industrial users, military bases and springs that harbor endangered fish, salamanders and plants.

But like a glass with too many straws, there isn't enough water to go around. Two years ago, a federal judge ruled in a lawsuit brought by the Sierra Club that unrestricted pumping threatened the rare species, in violation of the Endangered Species Act.

U.S. District Judge Lucius D. Bunton III of Midland warned that he might seize control of the aquifer. In response, lawmakers passed a bill establishing an authority to regulate pumping.

Nearly two years later, no pumping limits are in place. Why not? The U.S. Department of Justice, prodded by the Mexican American Legal Defense and Educational Fund, concluded that the bill contained a fatal flaw: It replaced the elected Edwards Underground Water District with an appointed board, a violation of the Voting Rights Act. Texas Attorney General Dan Morales is challenging that finding in court, but the Legislature is nonetheless expected to revise the bill.

Irrigators want lawmakers to address more than the voting rights issue. Among other things, they want firmer rights to pump water, said Luana Buckner, general manager of the Medina Underground Water Conservation District. She said the disputed bill gave cities a considerable edge.

Although Gilliam is not among them, some farmers and ranchers, buoyed by a burgeoning property-rights movement, would like to kill the bill entirely. However, San Antonio, the Sierra Club and many lawmakers don't want to reopen issues that were thoroughly debated during the last legislative session.

For Gilliam, 67, whose mud-spattered cowboy hat and weathered face testify to long hours outdoors, the dispute isn't just about water, it's about a way of life.

The aquifer gives farmers in this semi-arid region confidence that crops will succeed. They don't pay a cent for the water. Landowners in Texas traditionally have been entitled to pump as much as they want from beneath their property. But diesel fuel or electricity to run well pumps is a major expense. So are the wells themselves, the pipelines and other irrigation equipment.

Gilliam activated the latest in watering technology recently by touching buttons on a computerized console. Water sprayed out of 335 nozzles dangling from a network of pipes mounted on 26 rubber tires. The 2,015-foot-long contraption, known as a pivot irrigation system, began to creep around the field in a circle. The $68,000 system conserves water by operating at low pressure and spraying close to the soil to minimize evaporation.

A growing number of irrigators are installing such equipment, some with low-interest loans from the Texas Water Development Board.

"We're sitting on a wonderful natural resource," Gilliam said. "It's a good life. I don't want it to change."

But change seems inevitable. The bill passed two years ago would create a market for water rights. Although Gilliam has no plans to do so, other landowners might find it more lucrative to sell or lease water rights to municipal users than to irrigate crops. In other words, the role of agriculture could decline.

Page 12 Livestock Weekly August 11, 1994

Letters to the Editor

Dear Sir:

Sixty years ago there was no cedar problem in Central or West Texas. There were lots of goldencheeked warblers and lots of water in the aquifer and in Barton Springs.

The blueberry juniper (alias cedar tree) produces a toxin that kills all competitive plant life. It also produces deep shade, which kills any plant life that manages to survive the toxins. (Don't believe me? Go look at a dense cedar break.) By the way, the birds only need one mature cedar tree per 100 acres. They use the bark, among other things, to make nests. Fish and Wildlife claims the bird was in 41 counties, from Tarrant to Del Rio, 50 years ago. They were doing so well when there wasn't severe cedar infestation.

Cedar starves the wildlife. They need grass and forbs, plus the insects that live on the grass and forbs, to survive. Cedar causes erosion, because there's no other plant life to slow down the rainfall and soil loss. The water runs off, causes flooding, and is wasted. The cedar tree uses huge volumes of water. Heavily cedar-infested areas are classified by county tax offices as *wasteland*. These areas are agriculturally nonproductive, and devaluated accordingly. There is ranch land in Hays County valued at only $50.00 per acre. When the tax base is reduced in one area, the county must make it up elsewhere, thus, the city dweller pays the difference.

Fifteen or so years ago, Big Spring, Texas had lost most of the volume of their famous springs. The ranchers in the watershed-recharge area did a brush control program, planted grass, and deferred grazing for a growing season. Thereafter, livestock was carefully rotated on and off of the area. Within five years, the volume of water in the springs exceeded the flow of the spring in the year 1900.

Grass *catches* water, puts it back in the aquifer, filters it on its way, and produces as much oxygen as trees.

Somehow Fish and Wildlife has gotten turned around. Cedar hurts, not helps the bird, the salamander, and the aquifer.

When the City of Austin became concerned about these issues, they hired a consultant. The consultant went to SCS for advice. He was given the facts about cedar and grass. A cedar control program, preserving hardwoods and other plant species where possible, was suggested. Replanting of the old prairie grasses and other native grasses was recommended. This was rejected by the consultant as not being politically correct. Why couldn't the best, least expensive solution be politically correct? Why couldn't the city ask the SCS these questions? Our SCS director is a range specialist. THE SOLUTION: Bulldoze the cedar, leaving motts of brush for wildlife to hide in. Plant grass, defer grazing until the grass is established, usually one growing season. Graze carefully. Grass requires hoof action to break the soil surface to efficiently re-seed. Most native grasses need to re-seed at least once every three to five years. Cattle, goats and sheep replace the buffalo in this necessary renewal.

There is also a fallacy about not using land and calling it "habitat". Habitat evolves, it isn't static. What is habitat now will not be the same habitat in five years. Good range management provides more habitat than fallow land infested with cedar. There is a balance of wildlife, livestock and plant life that is beneficial to all. Why can't a simple solution be used, rather than the extreme measures proposed? The proposals won't work anyway if the cedar isn't controlled. The city dwellers will psay higher taxes and farmers and ranchers will be inhibited in their ability to produce food. One reason our country is so prosperous is its rich, relatively inexpensive food supply.

Why does Fish and Wildlife have so much power? How can we permit an entity supported by our tax dollars to be so out of control?

Please call or write your U.S. senators and congressmen. They are the ones who can change the laws they made. The Fish and Wildlife Service enforces the laws, laws made with good intentions, but without foresight regarding implementration or their impact on the human population. No land or water should be taken without just compensation and complete regard for the people whose lives are affected.

Coni Ross
Blanco, Texas

Lorenzo (Texas) Examiner, Feb. 10, 1995

Area Leaders Show Opposition To Listing Of Shiner As Endangered

Texas' national, regional, and local leadership stand united in opposition to the U.S. Fish and Wildlife Service's proposed listing of the Arkansas River shiner as endangered in the Canadian River in Texas.

Governor George W. Bush, Lt. Governor Bob Bullock, House Speaker Pete Laney, Agriculture Commissioner Rick Perry, and a host of State Senators and House Members conducted a news conference in Austin on January 24, 1995, to address the issue. Governor Bush said, "We're people of good judgement. We care about our land. We care about our water. We know how to run our own business. I say to the Federal government: leave us alone. We know what we are doing."

U.S. Senators Phil Gramm and Kay Bailey Hutchison introduced legislation to place a moratorium on any further listing of endangered species until Congress has an opportunity to review the Endangered Species Act. High Plains Congressmen Larry Combest and Mac Thornberry introduced and/or co-sponsored similar legislation.

Regional Councils of Government, Commissioners Court, and City Councils throughout the affected area presented resolutions, statements, or letters opposing the listing.

A delegation from Austin led by Senator Teel Bivins and Representative David Swinford flew to Amarillo on January 25, 1995, to present resolutions from the Texas Senate and House opposing the listing of the shiner, as well as any future listing of endangered species in Texas. Representatives John Smithee of Amarillo and Gary Walker of Plains lent their support to the effort. They were accompanied by representatives from the Governor's office, Speaker's office, Attorney General's office, Senator Bill Sims' office, Representative Warren Chisum's and Representative Bob Turners' offices, plus representatives from the Texas Department of Agriculture, the Texas Parks and Wildlife Department, and the Texas Water Development Board.

All elected officials made statements, and those officials who had staff members representing them had prepared statements read into the record.

Over 400 people packed the U.S. Fish and Wildlife Service public hearing at the Texas A&M Research Center in Amarillo. Only 20 of those attending were able to present testimony due to time constraints placed upon the meeting by the U.S. Fish and Wildlife Service. However, many more presented written testimony into the record. Additionally, Senator Bivins and Representatives Swinford, Smithee, and Walker received testimony from approximately 30 concerned citizens, producer groups, cities, counties, and industry representatives earlier in the day. Their comments were videotaped, and the cassette was entered into the record at the U.S. Fish and Wildlife Service hearing.

High Plains Water District County Committee Members and Board Members were well represented at the hearing. At the conclusion of the meeting, Board President James P. Mitchell of Wolfforth said that he was extremely proud of the united effort displayed by the citizens of the region and our elected officials from Austin and Washington.

Testimony presented by the Texas Parks and Wildlife Department, Southwestern Public Service Company, and the Water District disputed the U.S. Fish and Wildlife Service's claim that the Arkansas River shiner is endangered in the Canadian River in Texas. Additionally, geological and hydrologic testimony presented by water districts and the Texas Water Development Board proved false the allegation that pumpage from the Ogallala Aquifer has reduced stream flow in the Canadian River.

Texas Attorney General Dan Morales has been contacted regarding the possibility of filing a suit to obtain a restraining order to prevent the listing until Congress has time to revisit the Endangered Species Act. The U.S. Fish and Wildlife Service must make or drop the endangered species determination within one year of the publication of the proposed rule, which will be August 5, 1995.

Statement of William J. Snape III, Director, Legal Division, Defenders of Wildlife

Thank you, Mr. Chairman. Good morning, ladies and gentlemen. My name is William Snape and I am counsel for Defenders of Wildlife (Defenders), a non-profit advocacy group with over 100,000 members, dedicated to protecting the diversity of life in their natural habitats. I am honored to be here this morning to discuss the Endangered Species Act (ESA) and in particular S. 191.

INTRODUCTION: DEFENDERS OPPOSED S. 191

Few pieces of environmental legislation evoke public emotion like the Endangered Species Act (ESA). While its supporters tout its achievements in fully recovering some species and stabilizing many more, opponents charge that it has placed wildlife above humans and economic growth. What has been lost in the mix, unfortunately, is that the ESA already possesses a number of underutilized mechanisms to promote species recovery and regulatory flexibility. Still, almost all observers—including Defenders—agree the ESA can and should be improved. Consequently, the 104th Congress will almost certainly amend and reauthorize the ESA.

We strongly recommend Congress thoroughly examine the desired goals of the ESA before it seeks to craft specific legal mechanisms for reauthorization. Quick and easy answers to this country's conservation challenges do not exist, and the American public deserves to be an active participant in the policy dialog. In recent weeks, however, several Congressional bills have sought quick and easy answers, which we vigorously oppose.

One example is the subject of this hearing, S. 191. This bill is a misguided attempt at ESA reform that greatly overreaches on remedies to address problems the Act might possess. Although its presumed purpose is to allow a regulatory "cooling off" period on ESA implementation until Congress can analyze and reauthorize the Act, S. 191 would actually make species conservation efforts more costly and inefficient in the long run. What the ESA needs now is a comprehensive examination of its purpose and mandate, not haphazard snipping of its various provisions.

Entitled the "Farm, Ranch, and Homestead Protection Act of 1995," S. 191 would place a moratorium on all listings, critical habitat designations, and interagency cooperation under the ESA. While I will directly address the significant shortcomings of each of these three specific provisions, it is useful to first step back and ask what it is we want the ESA to accomplish in the coming century. If the Congress can agree on the ultimate policy purpose of the ESA, Defenders believes actual reauthorization of the Act will be easier to accomplish.

As written in 1973, the ESA's purposes are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth ... (in the Act)." ESA, 16 U.S.C. § 1531(b). If Congress still supports these purposes, and Defenders vigorously hopes that it does, then it should endeavor to understand the degree to which ecosystems and species in this country are imperilled, as well as how to stem the present tide of decline.

The questions of ESA purpose and scope are not ones that can or should be initially answered by politicians, lawyers, accountants or developers—though Congress and the American people certainly possess the final power to forge socially acceptable answers. Rather, for reasoned debate, the question of ecosystem and species imperilment must be addressed by scientists who are accepted by their professional peers and by both political parties. *S. 191 should be rejected because it avoids the tough questions and forges no solutions.*

EMBRACING SCIENCE

Defenders recommends that the President or Congress immediately convene a National Commission on Species Extinction to conduct a scientific inquiry into the seriousness of the endangered species issue. Such a commission would complement the Bush Administration's 1990 E.P.A. Science Advisory Board that identified species extinction and natural habitat loss as two of the planet's most pressing environmental crises, as well as the upcoming National Academy of Sciences report addressing how well the ESA achieves its scientific mission. A National Commission on Species Extinction would submit a thorough and objective evaluation of three crucial questions:

1) To what extent ecosystem declines, species extinctions, and population extirpations are occurring;

2) If there exists a serious extinction problem, what is its implication for human welfare; and

3) If there exists a serious extinction problem, how Congress might prioritize conservation actions given current temporal and budgetary constraints.

Only with such information in hand can Congress reasonably evaluate how to reauthorize the ESA. And only then can we have a truly rational discussion about what legal tools we should employ to achieve our desired ends.

LISTING MORATORIUM

At first blush, it might appear that an ESA listing moratorium would provide regulatory relief for a statutory program beleaguered by the number of proposed and candidate arbitrary response to the much broader scientific and policy question about what the ESA should be trying to accomplish. This country's list of threatened and endangered species is designed to give us an accurate accounting of our natural heritage. A moratorium would simply not address the regulatory safeguards triggered by listing.

If the issue behind S. 191 is whether science should be the sole criterion for listing decisions, then Congress should debate it openly. If the issue behind S. 191 is how science is being applied during the listing process, then Congress should debate this openly. And if the issue behind S. 191 is what regulations occur after listing, then Congress should debate it openly. But to arbitrarily impose a moratorium on all listings is not only a blatant attempt to place undue political pressure upon the ESA, but also a concession by this Congress that it rejects the purposes of the Act.

Assuming that the Congress desires to continue conserving imperilled species and their ecosystems, S. 191 will clearly make the process of doing so more inefficient and costly. Once the moratorium was over, the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) would face an even bigger listing backlog than they do now. And because S. 191 implicitly instructs the FWS and NMFS not to protect unlisted species in peril, more species will eventually be added to the list once the moratorium is over.

Two presently unlisted species illustrate the bureaucratic difficulties that would be created by S. 191: the Florida black bear and the swift fox of the Great Plains. Both species are in need of listing and both are key biological species for the ecosystems on which they depend. With or without S. 191, the American people will demand that these two creatures, and the landscapes of which they are a part, be protected. S. 191, however, would deny protection for these species without addressing one single ecological threat or resolving one single economic conflict.

CRITICAL HABITAT MORATORIUM

Defenders' objections to a critical habitat moratorium mirror many of the reasons proffered in our analysis of a listing moratorium. Whatever its intention, a moratorium on designating critical habitat would not eliminate the need to protect habitat,

would not make the Federal Government's role in conserving species any easier, and would not solve one problem associated with wildlife protection under the ESA or other legal authorities. Of all the present threats to wildlife species, conservation biologists agree that habitat degradation and destruction is the most serious. Yet, a moratorium on critical habitat designations would rob the Federal Government of one of its major tools in combatting this problem.

The ESA explicitly allows economic factors to be considered during the process of designating critical habitat. If the issue behind S. 191 is how science and economics are applied during this process, then Congress should debate it openly. If the issue behind S. 191 is what regulations occur after critical habitat is designated, then Congress should debate this openly. But to arbitrarily impose a moratorium on all critical habitat designations is not only a blatant attempt to place undue political pressure upon the ESA, but also a concession by this Congress that it rejects the purposes of the Act.

The notion that critical habitat intrudes upon private property rights is a myth. Again, economic considerations are explicitly allowed to be considered during critical habitat designation. In addition, critical habitat plays no formal role in determining whether a private action constitutes a section 9 take.

A good example of the importance of critical habitat is in Louisiana, home to Theodore Roosevelt's (or "Teddy's") black bear. There, despite some initial misgivings, most private landowners are working extraordinarily well with the ESA even though 85 percent of the bear's habitat is on private land. S. 191 would prevent the Federal Government from designating critical habitat for the Louisiana black bear, and impede the flexibility created by a section 4(d) rule created for that species and its ecosystem.

CONSULTATION MORATORIUM

Once again, one must ask what a moratorium on consultations would actually accomplish in the way of ecological or economic benefits. Section 7 consultations are an invaluable tool in enabling Federal agencies to avoid needless harm to species. For instance, under the auspices of ESA consultation, four Federal agencies and the State of California reached a historic agreement on water use in late 1994 regarding the San Francisco Bay and Sacramento-San Joaquin Delta Estuary. This agreement established limits on fresh water diversion for agricultural and municipal uses, as well as protections for the threatened delta smelt and other fish—all of which had been unresolvable for years. S. 191 would not only place a moratorium on these types of solutions, but even upon informal conferences for candidate species. This would deny the Federal Government the opportunity to practice preventive medicine.

Furthermore, the ESA consultation process is extraordinarily elastic. The vast majority of interagency consultations result in either no change in the proposed action or the adoption of a reasonable alternative. According to a recent World Wildlife Fund study, the FWS performed 94,113 informal and 2,719 formal consultations between 1987 and 1992. Of these consultations, the Service issued only 352 jeopardy Biological Opinions, almost half of which were related to a single program by the E.P.A. to register pesticides. Only 54 of these jeopardy opinions resulted in the termination of the proposed activity; the remainder continued after acceptable alternatives were found. In other words, over 99 percent of all consultations have resulted in the completion of the project or action in question. And in the rare cases where no reasonable and prudent alternatives to a proposed action can be agreed upon, the agency can petition for exemption from the constraints of the ESA.

RECOMMENDATIONS FOR IMPROVING THE ESA

Instead of considering proposals that possess no identifiable long-term answers to ESA implementation, like S. 191, Defenders suggests that Congress immediately take a proactive approach to species conservation. Our recommendations are relatively straight-forward:

1) Prevent the need for listings;
2) Provide incentives to private landowners; and
3) Expand the role of State governments.

1. PREVENT THE NEED FOR LISTINGS

Congress should encourage actions that prevent species from declining to levels that require ESA listing. This can be done by promoting the implementation of management plans before a species requires listing pursuant to the scientific criteria in section 4. In addition, section 5 of the ESA should be amended to explicitly authorize Federal agencies to work with each other and with the states to protect wildlife species, to inventory species and habitats in the U.S., and to identify and protect keystone and umbrella species that serve as indicators of broader ecosystem health. Sections 2(c)(1) and 7(a)(1) could be similarly amended to place an affirmative conservation duty upon Federal agencies and States for candidate species.

The long-term research and monitoring conducted by scientists of the National Biological Service (NBS) is essential to the proper understanding and management of all species, listed or otherwise. Defenders recognizes that the consolidation of the separate DOI research units into the NBS was a monumental task designed to cut costs and increase governmental efficiency. Minor setbacks in the first several years should not be interpreted as failure or grounds for reducing funding. Defenders urges full funding for the NBS during the FY96 Interior Appropriations process as a vital tool for preventative species management.

Under no circumstances should species be allowed to decline on lands owned by the American taxpayers, such as national forests, rangelands or wildlife refuges. Preventative action should focus on modern technological tools, such as those utilized by the NBS, that provide valuable biological information. For example, the Gap Analysis Program (GAP) uses satellite and land maps to identify the "gaps" in habitat protection, thus encouraging appropriate conservation actions where they are most needed. When proper precautions are taken in advance to protect wildlife species, Defenders believes it is possible to avoid the ESA's most stringent regulatory safeguards.

2. PROVIDE INCENTIVES TO PRIVATE LANDOWNERS

Because roughly half of all listed species spend at least part of their existence on private land, Congress should explicitly provide incentives for private landowners to conserve species. One major complaint about the ESA revolves around the regulatory treatment of species on private lands. Some claim not only that there are not enough incentives for endangered species stewardship on private lands, but also that there exist major disincentives. Consequently, valuable habitats are plowed and cleared out of fear of possible government regulation. This is certainly not what the ESA intended. To understand the issue, we must visit the roots of the controversy: the much-argued conflict between economic growth and ecological well-being.

Economics and ecology are disciplines grown from the same intellectual rootstock. Realizing this, conservationist Aldo Leopold in his classic *A Sand County Almanac* suggested that we "[e]xamine each question in terms of what is ethically and aesthetically right, as well as economically expedient. A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong

when it tends otherwise."[1] With the overriding purpose of private landownership being to produce economic return, it is essential that Congress heed Leopold's message and develop mechanisms that preserve the biotic community and promote economic expedience. Properly designed economic incentives would not reward private landowners for doing what they are already required to do by law, but would offset burdensome costs of private conservation efforts.

From our 1993 publication of selected papers, *Building Economic Incentives into the Endangered Species Act,* to the series of working roundtables conducted cross the Nation in 1994 and 1995, Defenders has been very active in the development of workable economic incentives. The publication has served as a catalyst stimulating new ideas, and the roundtables have given representatives from the private, environmental, and government sectors an opportunity to collectively develop solutions to private lands conflicts.

Federal legislation to amend the ESA introduced in the 103d Congress in the Senate (S. 921) by Senators Max Baucus (D-MT) and John Chafee (R-RI), and in the House (H.R. 2043) by Reps. Gerry Studds (D-MA), Newt Gingrich (R-GA), James Saxton (R-NJ), and John Dingell (D-MI) (H.R. 2043), each contained economic incentives provisions. Perhaps the most promising proposal was the "Habitat Conservation Planning Pilot Project" contained in section 8(d) of H.R. 2043. That proposal would instruct the Secretaries of the Interior and Commerce to seek and approve a market-based conservation plan and report to Congress on its results. The prime benefit of such a pilot approach is that it would grant the Federal Government significant flexibility in testing incentives without unduly hindering the ability to maintain a strong regulatory approach to species conservation. In other words, through experimentation we could learn what actually works.

Incidental take permits for such a pilot program would be authorized in one of two ways: under the existing section 10(a) habitat conservation plan (HCP) process or pursuant to a new section. This new section would seek to prevent HCPs from being stymied by additional species listings in the affected habitat by not only authorizing conservation plans for proposed and candidate species, but also establishing a revolving and matching loan fund to finance future plans. The Clinton Administration's August 1994 "No Surprises" policy should similarly provide certainty to private landowners. Both H.R. 2043 and S. 921 also proposed to grant Federal assistance directly to private landholders who conserve listed, proposed, and candidate species so long as there is no taking under ESA section 9 and the anticipated action is consistent with other Federal law.

In sum, private landowners in the U.S. are becoming polarized over the ESA because they are concerned about government infringement on their property rights. Many see only proposed regulations and no benefits in conserving threatened and endangered species. Defenders strongly believes that solutions to these problems can be found within the ESA reauthorization process and related legislation like the 1995 farm bill. The tax code also possesses opportunities for wildlife conservation incentives. Having a unique or rare species on one's property should be an asset, not a liability. However, Defenders strongly opposes any attempt to meddle with many years of Constitutional jurisprudence in the area of Fifth Amendment "takings."

3. EXPAND THE ROLE OF STATE GOVERNMENTS

State governments have traditionally been the chief stewards for managing wildlife within their borders. The Federal Government has generally intervened only to protect imperil led species, manage Federal lands, and enforce international agreements. One way to encourage effective proactive Federal conservation strategies is

[1] Aldo Leopold, *A Sand County Almanac* (New York: Oxford University Press, 1949).

to encourage States to assume greater responsibility for threatened and endangered species protection. States are often the greatest engines of governmental evolution, particularly in the environmental arena.

At present, the ESA provides mechanisms for the transfer of authority from the Federal Government to State wildlife agencies through section 6 cooperative agreements. Although ESA authority transfers through such agreements have tended to be limited to scientific research, recent efforts to increase State cooperation and participation in more active species management have been successful. This effort has been predicated upon the belief that State resource managers often have the best scientific and political information to manage local habitat, particularly when they possess adequate financial resources.

In order to address localized threats to listed species and their habitats, much of the authority now vested in the Federal Government could be effectively transferred or shared with State governments, providing appropriate safeguards are taken. While many activities may be accomplished through section 6 of the ESA as now written, cooperation with States should be reexamined and more specifically delineated during reauthorization. Congress should make explicit the authorities of States in implementing the ESA by authorizing cooperative agreements with broader powers. When considering which actions are appropriate for State agencies, it is important to remember that all States administering certain provisions of the ESA must be held to the same Federal standards.

Examples of Transferable Authorities:

(1) *Candidate Species Management*. Although candidate species designation must remain within the scope of the Federal Government, active candidate species management by States should be actively promoted. Positive actions at the State level can prevent Federal listings in the first place.

(2) *Recovery Planning*. Under the ESA, State agencies are already heavily involved in the preparation and implementation of recovery plans. Because recovery plans recommend a range of actions to benefit a species, qualified State agencies should also have the power to plan future recovery activities. However, it is crucial that the Federal Government retain ultimate oversight over recovery plans.

(3) *Take Permitting Authority*. One existing authority that might be appropriate for transfer is incidental take permitting and habitat conservation planning under section 10. Particularly in those instances when small landowners must secure a permit, State agencies might be better equipped to effectively address species conservation and appropriate land use.

REGIONAL ECOSYSTEM MANAGEMENT PLANS

In order to prevent ecosystem fragmentation and promote more rational biodiversity protection, a formal planning mechanism under the ESA is needed to address regional and interstate ecosystem management. The goals of such plans would be to identify key habitats, protect those ecologically important areas, and guide human development to the least sensitive areas. Under a regional ecosystem management plan, general guidelines for habitat conservation and multi-species management could be determined through a cooperative effort between area State governments and the Federal Government. Once a regional ecosystem management plan was established, individual States could administer the contents of the plan through the authorities transferred by cooperative agreements. A regional ecosystem management plan would maintain each State's wildlife program's flexibility while guaranteeing that whole ecosystems and their species are protected. This type of regional planning has already been explored by the State of California to manage coastal sage brush habitat, and by western States to manage grizzly bears.

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CONCLUSION

Congress should refrain from engaging in *ad hoc* reform of the ESA. S. 191 is not carefully crafted or considered, and should be rejected for the bureaucratic confusion, added cost, and immense inefficiencies it would create. S. 191 would also needlessly harm species. During reauthorization, Congress should expressly examine the benefits that the ESA provides to both humans and wildlife. With such an analysis, Defenders believes it will become clear that the problems associated with the Act are vastly overstated. Nonetheless, the environmental community stands ready to assist the 104th Congress in making improvements to the Act. Indeed, Defenders urges this subcommittee to avoid making its objective to either strengthen or weaken the ESA—but to make it more effective for wildlife and humans alike.

STATEMENT OF DAVID WILCOVE, SENIOR ECOLOGIST, ENVIRONMENTAL DEFENSE FUND

I am pleased to present this testimony on behalf of the Environmental Defense Fund and the Society for Conservation Biology. The Environmental Defense Fund is a national nonprofit organization that links science, economics, and law to create innovative, economically viable solutions to environmental problems. The Society for Conservation Biology is a professional organization of scientists dedicated to developing and disseminating scientific and technical information pertaining to the protection, maintenance, and restoration of biological diversity.

A visitor to the Hawaiian island of Molokai at the turn of this century would have surely encountered a tame, little red bird living in the island's lush forests. Native Hawaiians referred to it as the "kakawahie"; scientists from the mainland called it the Molokai creeper.[1] Despite its unimpressive name, the Molokai creeper was a remarkable bird, part of the magnificent assemblage of finches that diversified and spread throughout the Hawaiian archipelago. Scientists regard them as an invaluable living resource, for they have been the source of inspiration and insight for generations of evolutionary biologists and ecologists.

Centuries of habitat destruction and the introduction of non-native species have taken a toll on many of these birds, including the Molokai creeper. Common in the 1890's, it had declined to the point of endangerment by the 1930's; the last known sighting was made in 1963. In 1970, however, the U.S. Fish and Wildlife Service added this bird to the Federal endangered species list. It thus became one of the 17 or more animals that were added to the endangered species list *after* they had become extinct.[2]

I begin with this story because it should serve as a warning about the consequences of adopting S. 191, the so-called "Farm, Ranch, and Homestead Protection Act of 1995." Given what is currently known about the science of protecting wildlife, one can reasonably describe this bill as a likely death sentence for some of our rarest plants and animals. By declaring a moratorium on the listing of additional species and by eliminating the obligation of Federal agencies to consult with the U.S. Fish and Wildlife Service regarding actions affecting listed species, S. 191 will inflict the greatest harm on precisely those species in greatest need of protection.

This conclusion stems from the fact that most species are not added to the endangered species list until they are very close to extinction. In all too many cases their populations at time of listing are so small that even their short-term survival is problematic, much less their long-term recovery. In 1991, two colleagues and I initi-

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[1] The Hawaiian name for this species meant "woodchopping" and was said to describe the bird's chipping call.

[2] McMillan, M. and D. Wilcove. 1994. "Gone but not forgotten: Why have species protected by the Endangered Species Act become extinct?" Endangered Species Update 11(11): 5–6.

ated a study to determine the rarity of species at time of listing. We examined all U.S. species added to the endangered species list from 1985–1991 and published our findings in the peer-reviewed scientific journal *Conservation Biology*.[3]

In brief, we discovered that half of all vertebrate species (mammals, birds, reptiles, amphibians, and fish) had total populations of fewer than 1,100 individuals when they were listed. Half of all invertebrate species (including insects, mussels, and crustaceans) listed had total populations of fewer than 1,000 individuals at time of listing. The winged mapleleaf mussel, *Quadrula fragosa*, was down to a single, nonreproducing population before it became an endangered species in 1991. Among plants, the situation was even worse. Half of all plants added to the endangered species list during this 7-year period had total known populations of fewer than 120 mature individuals at time of listing. Thirty-nine plants were listed with 10 or fewer known individuals left. These numbers are far below the levels that most conservation biologists would consider even minimally safe in the short term. According to Michael Soulé a professor at the University of California Santa Cruz and a leading authority on extinction threats facing small populations of animals, "We normally think of the low thousands as an absolute minimum for most vertebrates." Dr. Eric Menges, a plant ecologist at the Archbold Biological Station in Lake Placid, Florida, considered our numbers for plants to be alarmingly low. "At that level, almost any plant would already be extremely vulnerable to extinction."[4]

Because our published study only included listings through the end of 1991, we have examined last year's listing decisions to see if plants and animals are still being protected at the last possible moment. And indeed they are. In 1994, the U.S. Fish and Wildlife Service added to the endangered species list no less than 17 species of Hawaiian plants with populations of 10 or fewer mature individuals. The Pacific pocket mouse, *Perognathus longmembris pacificus*, was added to the list on September 29, 1994 with fewer than 40 known individuals. The St. Francis satyr butterfly, *Neonympha mitchellii francisci* was accorded endangered status on April 18, 1994 on the basis of a dozen small colonies occupying a total area no larger than a few square miles. Other examples of 1994 listings of extremely rare species are presented in Table 1.

Even under the best of circumstances, the listing process is inherently slow. Citizens can petition the Fish and Wildlife Service to list a species as threatened or endangered. If the Service believes the species in question may be at risk of extinction, the agency may take up to a year to prepare a proposal to list it. The proposal is then released for public comment, and another year and a half can pass before the Service reaches its final decision. In short, over two and a half years may pass between the time the Service receives a petition to list a species and when that species is accorded protection under the Endangered Species Act. Our 1993 study and our review of last year's listing decisions clearly demonstrate the grave risk associated with imposing a moratorium on new listings. Some species could disappear completely if protection is delayed any longer. Others may become so rare that only an expensive and risky program of captive propagation could save them, akin to the efforts undertaken to rescue the California condor and black-footed ferret. Finally, because rare species are likely to become even rarer due to the moratorium, we stand to lose considerable flexibility in designing conservation plans that balance the needs of the species with legitimate economic activities. When a plant or animal species is down to one or two dwindling populations, there are very few "tradeoffs" that can be made which will simultaneously meet the conservation needs of the species and allow development to proceed.

[3] Wilcove, D., M. McMillan, and K. Winston. 1993. "What exactly is an endangered species? An analysis of the U.S. endangered species list: 1985–1991." Conservation Biology 7(1): 87–93.

[4] The comments of Drs. Soulé and Menges are from: Luoma, J.R. 1993. "Listing of endangered species said to come too late to help." New York Times, March 16.

The moratorium on section 7 consultations in S. 191 is also an ill-conceived and counterproductive idea. It would reduce the role of sound science in endangered species protection by depriving Federal agencies of the benefits of consulting with the fish and wildlife conservation experts of the Federal Government. Under the current law, a request for a formal consultation with the Fish and Wildlife Service results in a written Biological Opinion. If the Service determines that the proposed action will not jeopardize the continued existence of a listed species, the project can go forward, subject to any conditions the Service feels are necessary to minimize the incidental take of listed species. On the other hand, if the Service determines that the proposed action will jeopardize a listed species, it must provide the affected agency with some "reasonable and prudent" alternatives that would enable the project to go forward without violating the Act. In each case, the Fish and Wildlife Service is providing its sister agencies with scientific information that can be used to reconcile potential conflicts between endangered species conservation and other activities.

As a means of resolving potential conflicts, the section 7 process has been remarkably effective. According to a recent study, 2,719 Biological Opinions were prepared by the Service from 1987–1992. Only 352 (13 percent) of these opinions resulted in "jeopardy" decisions, and only 54 projects that received jeopardy decisions were ultimately withdrawn or blocked due to section 7. The number of abandoned or blocked projects amounts to less than 2 percent of the total number of Biological Opinions.[5] In the other 98 percent of the cases, the Service either saw no conflict between the proposed activities and endangered species or was able to suggest modifications to the projects to avoid such conflicts. This beneficial interaction between Fish and Wildlife Service scientists and other agencies would be reduced or eliminated completely under S. 191.

In summary, S. 191 could lead to the extinction of many rare species. It would also complicate efforts to rescue endangered species, boost the costs of recovering them, and eliminate numerous opportunities to reconcile endangered species protection with other activities. It would accomplish its intended goal of reducing the size of the endangered species list, but it would do so by turning that list into an obituary page.

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[5] The data on consultations are taken from: Hoskins, D., J. Aldy, K. Crocker, and C. Williams. 1994. For Conserving Listed Species, Talk is Cheaper than We Think: The Consultation Process Under the Endangered Species Act. Report prepared by the World Wildlife Fund, Washington, DC.

TABLE 1: POPULATION SIZES OF SOME ENDANGERED SPECIES LISTED IN 1994[1]

Date of Listing	Scientific Name	Common Name	Number of Known Populations	Total Number of Surviving Individuals at Time of Listing
<u>Hawaii</u>				
12/05/94	*Melicope adscendens*	No common name	1	1
12/05/94	*Melicope balloui*	No common name	2	≤10
12/05/94	*Melicope ovalis*	No common name	1	1
09/26/94	*Pteris lidgatei*	No common name	3	26
06/27/94	*Cyanea grimesiana* ssp. *obatae*	Haha	3	≤18
06/27/94	*Gouania vitifolia*	No common name	1?	≤10[2]
03/28/94	*Cyanea truncata*	Haha	0	0[3]
03/28/94	*Lycopodium nutans*	Wawae'iole	2	<50
03/28/94	*Melicope lydgatei*	Alani	3	<10
03/28/94	*Rollandia crispa*	No common name	4	10[4]
03/04/94	*Clermontia peleana*	'Oha wai	6	8
03/04/94	*Clermontia pyrularia*	'Oha wai	5	5
03/04/94	*Cyanea hamatiflora* ssp. *carlsonii*	Haha	2	19
03/04/94	*Cyanea shipmanii*	Haha	1	1[5]
03/04/94	*Cyanea stictophylla*	Haha	3	15
03/04/94	*Cyrtandra giffardii*	Ha'iwale	3	14-20
03/04/94	*Cyrtandra tintinnabula*	Ha'iwale	3	18
03/04/94	*Plantago hawaiensis*	Laukahi kuahiwi	4	≤10
02/25/94	*Brighamia insignis*	No common name	5	<40
02/25/94	*Cyanea asarifolia*	No common name	1	14[6]
02/25/94	*Dilessea rhytidosperma*	No common name	1	6
02/25/94	*Diellia pallida*	No common name	2	<10
02/25/94	*Hibiscus clayi*	No common name	1	4

02/25/94	*Lipochaeta waimeaensis*	No common name	1	<10
02/25/94	*Melicope haupuensis*	No common name	1	2
Puerto Rico				
09/09/94	*Eugenia woodburyana*	No common name	3	45
09/09/94	*Accipiter striatus venator*	Puerto Rican sharp-shinned hawk	5?	154
09/09/94	*Buteo platypterus brunnescens*	Puerto Rican broad-winged hawk	3?	124
03/02/94	*Auerodendron pauciflorum*	No common name	1	10
02/18/94	*Myrcia paganii*	No common name	3	8
California				
09/29/94[7]	*Perognathus longimembris pacificus*	Pacific pocket mouse	1	36
North Carolina				
04/18/94 (emerg. listing)	*Neonympha mitchellii francisci*	St. Francis' satyr butterfly	1	?[8]

1. Not all species listed in 1994 are included. All data are from the *Federal Register*.

2. One population is made up of five plants growing closely together; they "may represent" clones of a single individual. Nearby is a second, smaller patch, which is "probably" a clone.

3. None known, but some may remain.

4. 19 juveniles in addition to the 10 adults.

5. One mature individual, a few dozen seedlings.

6. And 5 seedlings.

7. Also protected through an emergency listing on 02/03/94.

8. "The sole surviving population of this species is now fragmented into less than half a dozen small colonies that occupy a total area no larger than few square miles."

STATEMENT OF JAMES A. KRAFT, VICE PRESIDENT, PLUM CREEK TIMBER COMPANY

Thank you, Mr. Chairman, for the opportunity to appear today to testify on legislation (S. 191) to impose a moratorium on certain activities under sections 4 and 7 of the Endangered Species Act, including a ban on new listings, designations of critical habitat, consultations, and issuances of biological opinions.

Plum Creek Timber Company, L.P. is an integrated forest products company with timberlands and mills located throughout the Pacific Northwest. As General Counsel for Plum Creek, I have been intimately involved with the Endangered Species Act and how it affects private landowners. Plum Creek owns 2.1 million acres of forestland in Montana, Idaho and Washington, which is home to numerous listed and candidate species including the northern spotted owl, grizzly bear and the bull trout, to name a few. In fact, Plum Creek has the most grizzly bear habitat of any private company and has nearly half of the 44 spotted owl nest sites that occur on private lands in the State of Washington.

The subcommittee will hear today from a number of witnesses discussing pros and cons of enacting a moratorium on listing of new species and other actions under the Act before the ESA is reauthorized. I would like to take a step back from the question of a moratorium to discuss the importance of ESA reform and the interrelationship between a moratorium and reform.

First, let me emphasize the obvious. A moratorium is not the type of reform that most would agree is needed. We are concerned a linkage of a moratorium with congressional action to reform the Act could actually create a disincentive to actual reform. While a broad moratorium may be viewed as a positive short term remedy—and it would serve to relieve the pressure for adding more listings of such species as the bull trout—it may have the unintended consequences of impeding positive activities that are currently ongoing.

We support a thoughtful approach to making the Act work better for both species and private landowners. Plum Creek supports the approach taken by the Endangered Species Coordinating Council (ESCC), a coalition of more than 200 companies, associations, individuals and labor unions involved in ranching, mining, forestry, manufacturing, fishing and agriculture. The ESCC seeks to provide workable procedures and positive incentives in the ESA. The goal is to promote conservation of wildlife in a way that considers economic factors and respects the rights of private property owners without impairing the fundamental commitment in the ESA to protect listed species.

Plum Creek today manages its lands under the Act as it is written. While the ESA has many imperfections, we are trying to make it work. Today, I would like to describe two major examples of what we are doing under the ESA that would be affected adversely by S. 191.

Within the last year Plum Creek has worked with the Fish and Wildlife Service and other Federal and State agencies to implement programs to manage our timber resources and relieve the conflicts with listed species. Just last Thursday, the Fish and Wildlife Service, the U. S. Forest Service, the Montana Department of State Lands and Plum Creek announced a comprehensive agreement in principle for the conservation of grizzly bears in the Swan Valley in Montana.

Major elements of the agreement include protection of bear "linkage zones" or migration corridors in the valley between the Bob Marshall Wilderness and Mission Wilderness, rotation of and limitations on commercial timber harvest, protection of streamside areas and road management. The agreement covers nearly 370,000 acres of intermingled ownership and is based on state-of-the-art science. In addition, it provides for on-going monitoring and research. The agreement outlines strategies for Plum Creek, USFS and Department of State Lands, as the dominant landowners in the valley, through which we can cooperatively manage our lands to enhance

grizzly bear recovery while continuing some forestry activities. This landmark agreement is designed to be implemented through the section 7 consultation process.

In addition to our grizzly bear agreement, Plum Creek is working to complete an Habitat Conservation Plan (HCP) for spotted owls and other species in the 1–90 corridor in the Cascades region of Washington. This HCP would include nearly 170,000 acres owned by Plum Creek, a major component of our ownership in the State. Like our lands in the Swan Valley, it is checkerboarded with Forest Service land which is designated under the President's forest plan for various wildlife conservation purposes. Also, like the Swan Valley project, our HCP will be ecosystem based and dependent on state-of-the-art science and technology. Ultimately when this HCP is complete we will need to go through the section 7 process.

If a moratorium on section 7 consultations were imposed these groundbreaking efforts would be stymied. Projects such as the grizzly bear agreement and the Cascades HCP are laboratories for all parties to test the effectiveness of the Endangered Species Act. Plum Creek is committed to a leadership position in environmentally sensitive resource management—we call it "Environmental Forestry." We urge you not to pass stop gap legislation that halts these efforts but rather address comprehensive ESA reauthorization and reforms.

The efforts by Plum Creek to comply with the ESA have not been without cost. In fact, over the past year and a half, as Plum Creek has developed conservation strategies with Federal agencies, the initial preparatory costs have been in the hundreds of thousands of dollars. More importantly, Plum Creek will forego an as yet uncalculated cost as a result of these negotiations and agreement.

Essential elements of any reform package and a moratorium must be certainty and the creation of a level playing field. Small landowners as well as larger companies such as Plum Creek are dependent upon these elements, recognizing the importance of understanding and defining the roles of Federal lands and private landowners. There is widespread confusion regarding the obligations between public and private landowners. Public land managers, under the ESA, are required to manage public lands to further the recovery of listed species, while private owners are obligated to avoid the "take" of species on their lands. In testimony before the Environment and Public Works Committee last summer in Ronan, Montana (a copy of which is attached), Dr. Lorin Hicks, Plum Creek's Director of Fish and Wildlife Resources, described Plum Creek's view of these roles in this way: "Our interpretation of the ESA suggests to us that public and private landowners can share common goals for conservation of federally listed species but have different roles in the management of these species."

A cornerstone of the ESA reauthorization effort must be application of the best scientific principals. Plum Creek is committed to applying sound science—in managing our lands and in seeking solutions to the conflicts between species and timberlands management. Today, Plum Creek's wildlife and fisheries biologists work hand-in-hand with our foresters as we design and implement timber plans and harvests. Integrated science must be made a greater part of listings and enforcement. Legislation must be structured to incorporate these principles. The government agencies responsible for land and species management policies should respect and enthusiastically endorse integrated science.

Congress has a unique opportunity this year to fully review and make needed reforms to the Act. As S. 191 moves forward, we urge Congress not to lose sight of the bigger objective. A moratorium must be carefully crafted—particularly as it relates to section 7—to take into consideration all of the objectives of ESA reform including on-going activities for species conservation and compliance under the current statute.

Mr. Chairman, you have stated your commitment to enact an ESA bill this year. Plum Creek fully endorses these efforts and looks forward to working with you and

other members of the subcommittee and the committee as you begin consideration of substantive legislation.

I would ask that Dr. Hicks statement before the committee on July 23, 1994 in Ronan, Montana and testimony I presented to the House Subcommittee on Environment and Natural Resources on October 13, 1993 be incorporated in the hearing record as attachments to my statement.

STATEMENT OF KENNETH W. PETERSON, CHAIRMAN, BOARD OF SUPERVISORS, KERN COUNTY, CALIFORNIA

Mr. Chairman and members of the committee, thank you for the opportunity to testify. I am Ken Peterson, Chairman of the Board of Supervisors of Kern County, California. I would like to tell you about how a well-intended Act of Congress is harming our economy and wasting public resources in Kern County, and why I support placing a temporary hold on the listing of endangered species.

Kern County is located in central California at the southern end of the San Joaquin Valley. The County embraces more than 8,000 square miles of desert, mountain and valley terrain the size of Massachusetts which provides a bounty of food, fiber and minerals for the people of the United States and the world. The county's annual farm receipts of $1.5 billion rank third in the country, we are the No. 1 oil-producing county and our total mineral receipts topped $3.8 billion last year. The desert portion of the county contains two important military research, development, test and evaluation facilities, Edwards Air Force Base and the Naval Air Warfare Center at China Lake.

More than 600,000 people live in Kern County. Because we have such widely varying geography, we also have a lot of plant and animal species with small populations and limited ranges that exist nowhere else. Kern County is home to 16 species listed as endangered or threatened under Federal law, and another 73 species are candidates for Federal listing. Kern County is the Jurassic Park of endangered species, an experiment gone awry. And like the dinosaurs in the movie, the many creatures protected by the Endangered Species Act are beginning to run things in Kern County.

The citizens of Kern County support the preservation of America's rich natural heritage. But the Endangered Species Act is not achieving this aim. Instead, the State and Federal Governments are using the Act to dictate the uses of private land, to extort land and money from property owners and to drive the cost of many local public works to prohibitive extremes. The agencies which apply and enforce the Act have almost become a law unto themselves, assuming powers never intended by the Act and, in my view, never granted by the Constitution. In very few cases are any endangered species recovering. Humans, however, are reeling from the impact.

There is wide agreement that the Act is broken and it needs to be fixed. Unless Congress pulls this misguided vehicle off the road by stopping further listings until we can agree how to repair it, this assault on our land, our rights and our livelihoods will continue.

For example, the U.S. Fish and Wildlife Service recently listed the Southwestern willow flycatcher as endangered. One of the ranges for this bird is a riparian area created by the storage of Kern River water behind Isabella Dam, which was built by the Corps of Engineers in 1954. The lake rises and falls seasonally as water is stored and released for flood control, irrigation and municipal use in the valley below. The dam has saved many millions of dollars in flood damage and has been a valuable tool in timing the delivery of water when people need it. But armed with the flycatcher listing, the Fish and Wildlife Service can force the Corps to release

water to avoid flooding nesting areas behind the dam that humans created in the first place.

California has been blessed with above average snowfall in the southern Sierra, which will show up as floodwaters later this spring. Isabella Dam was designed to catch these waters and deliver them later in the year, when they are most needed. If the water level can't rise, however, the dam's purpose and its cost will have been wasted.

A recent study estimated the economic cost of protecting the flycatcher at $26 million per year and $617 million over the long term from lower groundwater levels, higher water and electric costs and resulting farm and business unemployment.

The costs of a more widely known recent ESA listing, the fairy shrimp, are still being reckoned. This tiny and hardy animal is found throughout the Central Valley, Coast Range and Tehachapi Mountains of California and on four other continents. It is so adaptive because it can survive long droughts, then spring to reproductive life virtually any time and anywhere there is standing water.

In effect, the fairy shrimp is a "freeze-dried" species that is not in danger of extinction, but a paper published by a university graduate student more than 15 years ago claimed that humans have destroyed most of the so-called "vernal pools" or mud puddles that the shrimp calls home. So the shrimp was listed. An environmental study firm recently found one million acres of mud puddles in California that contain fairy shrimp. Even so, last September the Service put three kinds of fairy shrimp on the endangered species list. It could cost citizens in the Sacramento area an estimated $500 million in lowered property value over the next 10 years. The fairy shrimp could also cost farmers and ranchers up and down the Central Valley millions more if the Fish and Wildlife Service forces them to have their land biologically surveyed to try and prove that no fairy shrimp live there before they can farm it.

You cannot prove a negative hypothesis. It is like trying to convince some people that Elvis is really dead. Under the Endangered Species Act, property owners may be forced to spend a lot of money to try and prove the unprovable.

The Environmental Protection Agency recently issued a biological opinion preventing valley farmers from controlling rodents such as rabbits, squirrels and gophers with chemicals since these rodenticides could also affect the San Joaquin kit fox and the Tipton kangaroo rat. That means that farmers who may never have seen evidence of a kit fox or a rat on their land must stand by and watch as more common pests ravage their crops. One farmer lost $40,000 of melons last spring to rabbits after that decision. The California Department of Food and Agriculture estimates crop losses in Kern County alone will total $73 million each year. And foregoing commonly used, low-risk rodenticides also increases the public health risk of rodent-transmitted diseases.

The Semi-Tropic Water District near Wasco was recently ordered to construct a $200,000 "lizard fence" to keep the endangered bluntnosed leopard lizard out of its canal. Biologists cannot tell you whether a single lizard was saved from a watery death by this extravagance, but the farmers who use the water must tack that cost onto their operating expenses, which will eventually show up in food prices. Compared to other U.S. farmers, or their overseas competitors, California growers do not have a level playing field. Why penalize California agriculture?

A local entrepreneur had a plan to treat and recycle oilfield wastes as a road surfacing material. His operation uses 20 acres of land that the State Department of Fish and Game has determined is critical habitat for the kangaroo rat. The Department required him to purchase 380 acres of habitat at a cost of $300,000—that's 19 acres of habitat for every acre of usable land—before granting him a permit. This kind of extortion has been repeated up and down the State.

In other cases, decisions hundreds of miles away cause economic havoc to local property owners. Kern County farmers who irrigate their crops with water purchased from the State of California have seen their deliveries slashed—not by drought, but by pumping restrictions due to the endangered listing of the winter run Chinook salmon and the Delta smelt. As a result, farmers have had to idle much of their land, which has plummeted in value. But they still must continue paying the State's costs to build the delivery system they can no longer fully utilize. One farmer has taken 1,300 acres out of production while paying $130,000 for water he will never receive. His land is now worth about 20 percent of its value before the listings.

In 1986, the State spent $32 million to buy 20,000 acres of farmland west of Bakersfield to develop a water bank—and underground storage system that would augment the State Water Project's capacity in wet years. Much of the land was allowed to return to nature, and State and Federal wildlife agencies now claim that the land is home to several listed species including the kit fox and the kangaroo rat. They are demanding that the project set aside some 7,000 acres for a wildlife preserve, along with other burdensome requirements. Because of the huge added cost this represents, the State has all but abandoned any further development of the water bank, and local farmers must repay every dollar of the initial cost.

The Act is adding immensely to the cost of public projects. The State Fish and Game department required Kern County to stop grading a road shoulder that was a public safety hazard. The reason? The shoulder was known habitat of the bluntnosed leopard lizard and the Tipton kangaroo rat. Now the County may not grade its roads, clean culverts or rebuild flood-damaged roads without permits from the Department at a cost of $1,800 per mile.

Two years ago, building on a major State highway interchange in Bakersfield was delayed for several months at great cost because a female kit fox, thought to be pregnant, had set up housekeeping in a concrete pipe. Up and down the State, when counties need to close a landfill, replace a bridge, or widen a road, they are being hogtied by delays, restrictions, and added costs under the Endangered Species Act.

Kern County cannot afford to wait for fullscale reform of the Endangered Species Act. We believe that Congress should declare a moratorium on the listing of species, because listing is a powerful mechanism that triggers the virtual police powers of State and Federal agencies who enforce the Act. And these agencies have made clear that they support preservation of species above any other use of the land.

This fact is well understood by the interest groups who sued the Department of the Interior and forced an out of court settlement in 1992 requiring the Fish and Wildlife Service to list some 382 new species. The Service is required by legal constraints to push through listings without adequate scientific evidence or sound recovery plans. The result will be hundreds of millions more dollars in economic losses and unemployment with no guarantee that any listed species will recover. In fact, rushing into these listings without valid evidence and with no clear idea of how to recover a species virtually guarantees the opposite outcome. Is that what Congress intended when it passed the Endangered Species Act?

Why have the courts been so prominent in shaping endangered species law? Perhaps it is because the original Act was not written clearly enough. There are no clearcut scientific standards for reaching species and habitat decisions or evaluating recovery plans. There aren't any deadlines for consultations or recovery plans. And there is virtually no reckoning of the economic costs involved or any requirement that the public should pay the costs of achieving public aims like preserving species. In Kern County, many are asking, "How much is enough? When does it end?"

Mr. Chairman, it's been said that when you don't know where you're going, any road will get you there. I don't think the government really knows where it wants to go with the Endangered Species Act. As debate on ESA goes forward this year,

I am confident that specific remedies for many of the problems with the Act will be found. Until that is accomplished, it makes sense to me that Congress should declare a halt to the slow strangulation of our economy by an Act that is spinning out of control. I therefore respectfully request that the committee approve S. 191.

Thank you very much for allowing me to testify today.

STATEMENT OF ROB GORDON, EXECUTIVE DIRECTOR, NATIONAL WILDERNESS INSTITUTE

Mr. Chairman, my colleagues and I have spent a great deal of time studying the implementation of the Endangered Species Act and appreciate the opportunity to discuss some of that work with you today. The organization I represent, NWI, is a private conservation organization that is dedicated to using sound, objective science for the wise management of natural resources with members in all 50 States and abroad. Our flagship publication is our journal, the NWI Resource, with a circulation of over 14,000. Recently we produced an issue dedicated to endangered species as well as a comprehensive study of the endangered species recovery program both of which I would be happy to make available to members of the committee.

For several reasons, one of the many problems now plaguing implementation of a responsible and effective endangered species program is the listing process.

First, under the current program the evidentiary standards for listing are, in a word, BAD. I use the word BAD because it is apt acronym for the standards which under Sec. 4(b)(1)(A) are ". . . best scientific and commercial data available . . ." The problem with best available data, or BAD, is that best is a comparative word. Thus the data need not be reliable, conclusive, adequate, verifiable, accurate or even good.

As the number of listed species now approaches 1,000, with thousands of official candidates in the wings, we are finding that the current standards often lead to mistakes. One of three grounds for removal from the list is 'data error.' The fact that this category even exists demonstrates that solid scientific information is not required for a listing. A large number of the species which have been removed from the endangered and threatened list were officially recognized as mistakes. At an estimated $60,000 per listing and $37,000 per delisting, not to mention potentially enormous interim costs, these 'errors' add up. A look at some of these 'data errors' makes a strong argument against the B.A.D. standard.

Regarding 'data error', the Federal Register states: "As a result of the Indian flapshell turtle's inclusion on Appendix I of CITES [a United Nations endangered species list] the Service subsequently listed the species as endangered." After listing, rather than before, a ". . . literature review was conducted to see if supporting evidence justified its current endangered status. No such supporting data could be found." In a further attempt to find supporting information, the Service then contacted turtle experts such as Dr. E.O. Moll, who happened to be researching in India at that time. Moll stated that it was "seemingly the most common and widespread turtle in all of India . . . How it ever made Appendix I is a big mystery."

The story of another 'data error," the pine barrens tree frog, is similar. Only those pine barrens tree frogs found in the frog's southern range were listed. After listing, FWS worked with Florida officials to gather information about how many frogs actually existed. According to the Federal Register, "Data were presented which expanded the species' known Florida distribution from 7 Okaloosa County sites to a total of over 150 sites . . ." in 3 counties. Further studies including Alabama area revealed a total of 165 more sites than were believed to exist when a fraction of this frog's population was listed—a pretty big 'error.'

The Mexican duck, another 'error', was determined to be essentially a "blue-eyed version" [not literally] of a common duck, the mallard. Almost comically, the Federal

Register states "all reports and observations of 'Mexican ducks' in the United States and Northern Mexico must now be interpreted to be of only 'Mexican-like ducks.'" The notice went on '"Mexican ducks' . . . are only identifiable segments of the entire population, just as brown-eyed and blue-eyed individuals are phenotypic segments of the human species."

The tumamoc globeberry, a vine which is the most recent 'data error,' was delisted by FWS on June 18, 1993. After including this plant on the endangered species list for 7 years, FWS determined, "surveys have shown *Tumamoc* to be more common and much more evenly distributed across its range than previously believed. . . ." Although never really endangered, during its 7 years on the list this plant soaked up over $1.4 million in funds from the Corps, BLM, DOD, NPS, USFS, and the Bureaus of Indian Affairs, Mines and Reclamation and was the FWS to issue a jeopardy opinion on the Tucson Aqueduct.

According to a recent planned budget, 40 species will soon be considered for delisting. However, in many of these cases the most acceptable reason for delisting is again BAD data. For example, in the case of the Maguire daisy, the Unita Basin hookless cactus and the Wright fishhook cactus, FWS has discovered greater "species abundance," "additional populations," greater "range distribution," and even that a 'variation' formerly thought to be distinct was not distinct at all.

These are only a small sample of many BAD listings. Others are not even under consideration for delisting. For instance, a National Audubon Society Blue Ribbon Panel concluded in 1986 that "it is likely that there are between 4,000 and 6,000 individuals in the Pacific States." Since that time surveys have indicated much greater numbers such as 6,849 owls in Washington and Oregon alone with an additional 3,234 owls in California—over 10,000 northern spotted owls not including the thousands of Mexican and California spotted owls.

It is difficult to know just how many species have been listed on poor grounds but there is evidence to suggest that the number is significant. In FWS's latest report to Congress only qualitative information about species is included. One species could increase from 5 individuals to 6 and it could be called 'improving.' Another could go from a population of 1,000,000 to 999,999 and be called 'declining.' Clearly this information is not too useful without also having quantitative data. But, according to FWS, we do not even have a qualitative 'guesstimate' for about 27 percent of the listed species. This is an increase of 7.6 percent from the previous report. Furthermore, in a comprehensive review of 306 recovery plans many showed there was little information about the status of listed species. Plans regularly call for "searches for additional sites," 'searches for additional populations" and "surveying suitable habitat for additional populations." Few recovery plans state that we reliably know just how many of a particular federally regulated species exist. Following are a few example drawn from USFWS approved plans.

Alabama Lamp Pearly Mussel: 'Other aspects of the ecology of this species are totally unknown.' and that 'The historically restricted distribution of *L. virescens* and lack of information about changes in various stream populations prevents a more precise determination of the reasons for the species decline.'

Atlantic Green Turtle: 'More information is needed before detailed distribution maps or estimates of population number and structure can be made . . .' The number of nests deposited in Florida appears to be increasing, but whether this number is due to an increase in the number of nest or more thorough monitoring of the nesting beeches is uncertain.'

Cave Crayfish: 'Sufficient data to estimate population size or trends is lacking.'

Higgins' Eye Mussel: 'The historical distribution of L. Higginsi is difficult to accurately assess because of the taxonomic problems involving the species complex to which it belongs.' The plan also states: 'Numerically *L. higgensi* may be less rare today than previously thought, but in all probability this reflects a significantly

greater collecting effort and the ability of a larger number of collectors to identify it.'

Hualapai Mexican Vole: '. . . the subspecies is considered poorly defined owing to limited material available . . .'

Kentucky Cave Shrimp: 'The very small estimated population size of the species at the time of listing (approximately 500 individuals) made it stand out as being extremely vulnerable to extinction. Since the time of listing, new populations have been discovered . . . Population estimates . . . range from approximately 7,000 to 12,000 individuals.'

Knowlton Cactus: 'Because there is inadequate biological data for *P. Knowltonii* and because there is only one viable population, downlisting and delisting criteria cannot be established at this time.

Louisiana Pearlshell Mussel: 'With practically no information on the life history, population levels, and habitat requirements for this species, an estimate of the cost of recovery to the point of downlisting is not possible.

Mona Iguana: 'The status of the Mona Iguana prior to . . . 1972 . . . only can be inferred.'

Palos Verdes Blue Butterfly: 'The historical distribution of the butterfly is unknown . . .'

Red Hills Salamander: 'There is no evidence that the animal has occurred outside its present range within historic times . . .' and 'Comparative data relating temporal trends in population densities are unavailable. . .'

Virgin Islands Tree Boa: 'Population trends cannot be determined because of lack of data.' The plan also states 'lack of available information on this secretive, nocturnal snake precludes formulation of a quantitative level'

Painted Snake Coiled Forest Snail: 'Information on the snail's ecology and natural history is almost completely lacking.'

In at least 79 of the 306 plans reviewed there was some degree of uncertainty regarding the taxonomic classification of an endangered plant or animal.

Even many of the species which have been officially declared as recovered actually were listed based upon inaccurate data. Three birds, the Palau dove, Palau owl and Palau flycatcher, considered 'recoveries' and are limited to a small island nation of Palau about 400 miles east of the Philippines. While FWS calls them 'recoveries,' a GAO report states that "although officially designated as recovered, the three Palau species owe their 'recovery' more to the discovery of additional birds than to successful recovery efforts." Similarly, John Turner, former FWS director revealed during a Senate hearing that the Rydberg milk-vetch, a plant which is one of the only other supposed 'recoveries' was delisted because "further surveys turned up sufficient healthy populations." In plain English, another mistake.

There are a few other species which some people cite as successes. One of these, the American alligator, is thriving, but remains listed as threatened due to a technicality. However, like other officially 'recovered' species, the alligator probably should never have been listed. Florida wildlife officials think the alligator's population dynamics were misunderstood at the time of listing. Even the National Wildlife Federation, which has been hypocritically promoting the alligator as a success now that the Act is up for reauthorization, admitted in its magazine that the "familiar and gratifying" recovery story of the alligator was "mostly wrong."

Second, the listing of species which may not merit Federal protection because of the low standard of BAD is compounded by poor criteria for determining endangered or threatened status. Sec. 4(a)(1)(A-E) lays forth that a species may be listed because of ". . . threatened . . . modification of habitat or range . . .," ". . . overutilization . . .," "the inadequacy of existing regulatory mechanisms . . .," or "other natural factors . . . affecting its continued existence . . ." It could be argued that almost nothing escapes the first criteria of threatened habitat modification. The

meaning of the second criteria, "overutilization" is defined by the opinion of the regulatory The third mentioned criteria is not a reasonable justification for animals or plants which may be otherwise doing fine. If there were no Federal authority to regulate earthworms is that a satisfactory rational to add them to the endangered species list? And as regards the last mentioned criteria, it is a bit of an impossible guideline for our current policy. For example, for one endangered invertebrate, the Iowa Pleistocene snail, the current government plan calls for conserving its remaining habitat until the next ice age.

A third problem with the current listing process is that decisions by the implementing agency not to list a species may be subject to the challenge of a citizen suit as outlined in Sec.4(b)(3)(C)(ii) but decisions to list cannot be challenged; and parties successful in their challenges to not list a species may receive attorney fees in accordance with Sec.11(g)(3)(B)(4). Because of this double standard, the incentive for the implementing agency is to list species.

From USFWS's own reports and statements we know that a large number of the species removed from the list, as well as many others still lingering there, should have probably never been on it in the first place. We know that many of the Act's supposed 'recoveries' are really 'data errors'. We know that for most species we have only qualitative estimates of questionable value. For over one quarter of the listed species we do not even have that. For a great number of species we know little—as demonstrated by recovery plans which state basically that or which call for a population survey as one of the first steps. And we know that two of the most famous or infamous endangered species, the northern spotted owl and the snail darter, were both undercounted.

Today in Austin, Texas people's rights to use their own private property are being effected by 'endangered' black-capped vireos. The information used to list this bird came from surveys of Texas public property, but Texas is over 90 percent privately owned. Not surprisingly, now that the vireo is listed, biologists are finding that the B.A.D. may have been wrong because many more birds than predicted, borrowing the former Director's words, 'turn up.' all these plants and animals were supposedly listed on the basis of 'best available data.' 'Best,' however, is comparative—it obviously does not mean good, reliable, conclusive, adequate or accurate. It means better than something worse, which could be and obviously is sometimes—bad. The poor standard is exacerbated by poor criteria and by a lopsided incentive to list species. When this process is set in motion it can and has resulted in enormous costs to the public through expenditures of tax dollars and adverse impact on properties and businesses. Those who do care for responsible and effective endangered species programs have a serious obligation to honestly address this situation, as these 'errors' cause conflict, drain resources and may plague the Act to the point where it comes to be generally considered as another well-meaning government program gone bad. Refraining from wrongly listing any more species which may increase conflict between society and the current program as well as expand a program that is already performing poorly seems to be a logical step to take until the many problems inherent in the Endangered Species Act can be addressed during the reauthorization process.

Society of American Foresters

Professionals advancing forest science, technology, practice, and a conservation ethic to benefit society

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March 21, 1995

The Honorable John H. Chafee, Chairman
Environment and Public Works
United States Senate
Washington, DC 20510-3902

Dear Senator Chafee:

Enclosed is the Society of American Foresters' (SAF) position on S. 503 -- *The Endangered Species Listing Moratorium Act of 1995*, which the Society opposes. SAF urges Congress to immediately take up the reauthorization issue and avoid delay as is represented by a moratorium on listing threatened and endangered species.

The Society of American Foresters has a keen interest in natural resource issues that originate in your Committee and as Executive Vice President, I would like to extend to you our services in providing or clarifying pertinent information concerning natural resource issues, and forestry issues in particular.

Please do not hesitate to call me or my staff if we can be of assistance to you. Cam Carte is the Society's Congressional Affairs Liaison, and Cam, as well as myself, can be of great help to you concerning forestry issues.

Sincerely,

William H. Banzhaf
William H. Banzhaf
Executive Vice President

ICC/WHB/cas
Enclosure

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THE PROFESSIONAL VIEW

SOCIETY OF AMERICAN FORESTERS

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Endangered Species Listing Moratorium Act of 1995

Re: Comments Provided to the US Congress on S. 503

A Position of the Society of American Foresters*

SAF Position

The Society of American Foresters opposes any legislative initiatives that result in a moratorium on listing threatened or endangered (T&E) species pursuant to the Endangered Species Act (ESA), as amended. The Society of American Foresters believes that the most appropriate way to ensure that constitutionally protected private property rights are not unduly infringed upon by listing T&E species is through constructive discussion during the process of reauthorizing the ESA. The Society urges Congress immediately to take up the reauthorization issue, and to avoid delay as is represented by a moratorium on listing T&E species.

Introduction

The Endangered Species Act of 1973, as amended, is one of the nation's most important environmental laws. It began as a comprehensive attempt to protect species in peril of extinction and to consider habitat protection as an integral part of the effort. Its purposes are to conserve ecosystems on which endangered species and threatened species depend, to provide a program for the conservation of such species, and to achieve the purposes of certain international treaties and conventions.

The Society of American Foresters has continually asserted that the conservation of species and ecosystems as is provided for in the Endangered Species Act of 1973, as amended, is of great importance to professional forestry. As well, the Society of American Foresters has long articulated the significant role and responsibility that private property owners have in the conservation of species and ecosystems. Pursuant to the Fifth and Fourteenth Amendments of the US Constitution, the Society believes that basic private property rights must be considered, valued, and protected where private lands are necessary to conserve a listed species or habitat.

* Adopted by the Officers of the Society of American Foresters on March 20, 1995. This position will expire March 20, 1996 unless, after thorough review, it is renewed by the SAF Council.

ESA Reauthorization

The ESA is in need of and overdue for reauthorization. As a result of a two year review of the ESA Reauthorization by the SAF ESA Reauthorization Task Force, comprised of professional foresters, SAF made the following recommendations to the US Congress in 1993:

- Continue listing of species based solely on science.
- Provide for peer group review before completing the final listing process.
- Develop criteria and guidelines for listing below the species level and use scientific techniques to answer questions on speciation, subspeciation, and distinct populations.
- Mandate recovery plans that address physical and biological feasibility and consequences, economic efficiency, economic impacts, social or cultural acceptability, and operational or administrative practicality of recovery actions. Include a range of recovery alternatives and risk analysis of each.
- Complete recovery plans within one year of listing using a core group of an experienced recovery team, managers, planners, and scientists.
- Develop measurable and clearly defined recovery objectives and recovery timeframes for each species at lowest feasible social and economic costs.
- Evolve toward ecosystem management as public policy for public land management as scientific knowledge becomes available to support this approach.
- Prioritize species for recovery efforts to wisely allocate scarce financial resources.
- Change the composition of the Endangered Species committee ("God Squad") to enhance involvement and knowledge of the issues by members.
- Recognize rights of private landowners and society's responsibility to mitigate costs for species protection on private land.
- Develop a phased approach from voluntary landowner plans to acquisition of property at fair market values for species protection.
- Delete citizen suit provisions against private landowners.

Moratorium on The Endangered Species Act
SAF Position

A Moratorium on Determination of Endangered Species and hreatened Species and Designation of Critical Habitat

S. 503 - Endangered Species Listing Moratorium Act of 1995, is not in concert with the spirit of SAF's aforementioned recommendations of reauthorizing the ESA. A moratorium restricting the determination that a species is endangered or threatened, and the designation of their habitat to be "critical habitat" for six months commencing on March 7, 1995 is unwarranted. SAF generally opposes moratorium language, irrespective of its legislative origin, that affects the full application of the ESA to species determination and "critical habitat" designation. A moratorium does little to facilitate a constructive debate that will enhance or expedite the reauthorization of the ESA. A moratorium as suggested in S. 503 may in fact become a disincentive for Congress to address the issue, because it removes the urgency for dealing with the issue.

A moratorium does not equate to substantive reform. SAF is concerned that a debate concerning the necessity and duration of a moratorium by members of Congress will divert their attention away from the true issue at hand -- reauthorization of the ESA. A broad moratorium of any length would at best be a short term remedy of questionable worth. A moratorium would send a mixed signal to private landowners and corporations who have worked in concert with the Department of the Interior to develop creative, alternative methods of species and habitat conservation.

Habitat Conservation Plans (HCP) have been developed by private entities in voluntary cooperation with the U.S. Fish and Wildlife Service that are effective in preserving and providing habitat for endangered and threatened species. Plum Creek Timber Company has established HCP's for both the Grizzly Bear and the Spotted Owl in the Cascades region of Washington. In the Southeast, Georgia Pacific Corp., Hancock Timber and International Paper Co. have developed HCP's for the Red-cockaded woodpecker. Pinehurst Country Club in North Carolina has managed Longleaf pine to *encourage* the Red-cockaded woodpecker to inhabit their property to facilitate recovery of the species. All of this has been accomplished under Section 7 consultations within the current law.

Realizing the potential for extreme adverse impacts to the private property rights of Pacific Northwest landowners under Option 9 of the President's Northwest Forestry Plan, the US Fish and Wildlife Service has exempted all private woodland owners whose property is eighty (80) acres or less in size from the Spotted owl recovery program. Thus, the Interior Department is utilizing significant administrative leeway provided under the ESA. This is the type of science-based, common sense implementation of the ESA that is needed. More of this kind of innovation and constructive reauthorization discussion is needed, not moratorium legislation.

Moratorium on The Endangered Species Act
SAF Position

The Secretary of the Interior and Undersecretary of Commerce for Oceans and Atmospheres released a lengthy set of documents on March 6, 1995, which describe ten principles to balance endangered species protection with economic development. Their implementation will bring significant change to the way the Endangered Species Act is implemented. These principles are strikingly similar to SAF's recommendations to Congress in 1993 concerning reauthorization of the ESA. They are:

1. Base ESA decisions on sound and objective science.
2. Minimize social and economic impacts.
3. Provide quick, responsive answers and certainty to landowners.
4. Treat landowners fairly and with consideration.
5. Create incentives for landowners to conserve species.
6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat.
7. Prevent species from becoming endangered or threatened.
8. Promptly recover and de-list threatened and endangered species.
9. Promote efficiency and consistency.
10. Provide state, tribal, and local governments with opportunities to play a greater role in carrying out the ESA.

SAF urges Congress to immediately address the issue of reauthorizing the ESA, and avoid being sidetracked by such potentially counterproductive issues as a listing moratorium. A moratorium is not needed or desirable. What is needed and desirable is reauthorization of the ESA through thoughtful discussion to devise legislation that is firmly grounded in science, and with due consideration to economic and social factors.

Moratorium on The Endangered Species Act
SAF Position

ABOUT THE SOCIETY

The Society of American Foresters, with about 18,000 members, is the national organization that represents all segments of the forestry profession in the United States. It includes public and private practitioners, researchers, administrators, educators, and forestry students. The Society was established in 1900 by Gifford Pinchot and six other pioneer foresters.

The mission of the Society of American Foresters is to advance the science, education, technology, and practice of forestry; to enhance the competency of its members; to establish professional excellence; and to use the knowledge, skills, and conservation ethic of the profession to ensure the continued health and use of forest ecosystems and the present and future availability of forest resources to benefit society.

The Society is the accreditation authority for professional forestry education in the United States. The Society publishes the *Journal of Forestry*; the quarterlies, *Forest Science*, *Southern Journal of Applied Forestry*, *Northern Journal of Applied Forestry*, and *Western Journal of Applied Forestry*; and the annual *Proceedings* of the Society of American Foresters national convention.

NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION

Serving Farm, Industrial and Outdoor Power Dealers

John J. Mullenholz, Legislative Director
(202) 296-8000

March 13, 1995

Jimmy Powell, Counsel
Drinking Water, Fisheries and Wildlife Subcommittee
Senate Committee on Environment and Public Works
Washington, DC 20510

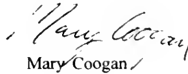
Dear Mr. Powell:

I am submitting the enclosed letter and article for the record on the Endangered Species Act and Property Rights hearing which was held last week. The article was written by E.G. Berchtold, a farm equipment dealer who is a member of the North American Equipment Dealers Association.

If it is too late for last week's hearing record, will there be future hearings on the Endangered Species Act for which we can submit the letter? Mr. Berchtold could also come to Washington to testify.

Please let us know what the hearing schedule is, and if you think Mr. Berchtold can testify. Thank you.

Sincerely,



Mary Coogan

1150 Connecticut Avenue, N.W., Suite 700, Washington, D.C. 20036

NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION

Serving Farm, Industrial and Outdoor Power Dealers

John J. Mullenholz, Legislative Director
(202) 296-8000

March 10, 1995

The Honorable Dirk Kempthorne
Subcommittee on Drinking Water, Fisheries and Wildlife
Senate Committee on Environment and Public Works
406 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Kempthorne:

I am writing on behalf of the over 5,500 U.S. members of the North American Equipment Dealers Association to urge your support of legislation to bring sense to the Endangered Species Act.

NAEDA's members are the farm, industrial and outdoor power equipment dealers located throughout the nation. With an average of 17 employees per dealership, they are often among the largest employers in their communities. Like most other small businesses, they are burdened by a host of unfair laws and regulations. Some are absolutely nonsensical.

The Endangered Species Act is a prime example of a law which has gone awry. A California equipment dealer can attest to that fact. He sold a tractor to a Vietnamese immigrant farmer who had worked and struggled to save enough to buy a farm. The farmer wanted to be a productive citizen in his new country. The dealer, believing in the farmer and his dreams, financed the sale. When the unfortunate farmer unwittingly ran over a few protected Kangaroo Rats (yes, RATS), he was arrested under the Endangered Species Act and the tractor was confiscated. After a flood of publicity the tractor was returned to the dealer.

Congress has an opportunity to redress such wrongs by revamping the Endangered Species Act and similar laws to recognize that people have rights as well as animals.

Sincerely,

John J. Mullenholz

1150 Connecticut Avenue, N.W., Suite 700, Washington, D.C. 20036

A message from one of our own.......

by E G Berchtold, Berchtold Equipment Co, Bakersfield, CA

In previous issues of the Far West Bulletin and in many other forums you have heard about the saga of Taung Ming-Lin who had his new tractor confiscated by the federal government because he allegedly killed three Tipton Kangaroo rats while disking his land near Bakersfield.

Berchtold Equipment Company sold the tractor which they were financing for Mr. Lin. Following is E.G. Berchtold's story of how the incident has profoundly affected him and his outrage at the federal governments taking of private property under the guise of the Endangered Species Act and other extreme environmental measures. EG's message that follows is from the speech he gave at Far West's 47th Annual Convention in Tucson in November of this year

The Endangered Species Act

Less than a year ago, I had no knowledge or interest in it I had not been affected by it so consequently, I wasn't concerned Then something happened to another guy and to me

That changed everything

The other fellow, his name is Taung Ming-Lin, who is a Taiwanese immigrant, speaks no English, moved here to this country and opened a book-binding business in Los Angeles, then decided he wanted to farm in our area He came to Bakersfield, found some property, went to the county offices to check zoning. He was told the property was zoned for agriculture He asked specifics. He was told he could develop the land by clearing and could drill a well for water, which he did at a considerable cost.

He told me at a later date that in his country you went to the head person in each community to get permission to do anything. If you got that permission you could do it He felt that when the county official told him he could farm his land, that was exactly what he could do

He contacted us, after he drilled his well, to purchase a $48,000 tractor He gave us $12,000 down We decided to finance it in house for six months We made a security agreement and documented it with a UCC instrument

After the tractor was delivered, he started working the farm Shortly thereafter, on a Sunday afternoon, while he was disking the ground, 22 to 24 uninformed, armed people came on to his land

Some were even carrying automatic weapons They stopped him from using the tractor They ordered him off the tractor They had a County of Kern Fire Department transportation truck come in and haul the tractor approximately 50 miles away on that Sunday afternoon The tractor, by the way, was an unauthorized oversized load, putting the county in jeopardy of a liability lawsuit The driver himself could have lost his license for driving that truck

After the tractor was removed, they informed Mr Lin that he was subject to be imprisoned, that he was subject to about $300,000 in fines for allegedly killing three rats The only evidence they provided him was a frozen dead rat in a plastic bag they claimed he had killed

They left and there he was standing out there in bewilderment. You can just imagine his own thoughts, "What in the hell is going on here?"

And as someone said
"Welcome to America" Mr Lin"
That was his introduction to the Endangered Species Act. continued.....

Subsequently, he suffered a stroke over this matter

This government raid took place on February 20, 1994 About April 4th we received a document in the mail from the United States District Court in Fresno which stated: "The United States of America vs One Ford Tractor and One Towner disc"

I personally had never seen a document such as this before, where a plaintiff or defendant happened to be an article rather than a person or an entity In checking with our attorney this type of thing is used in forfeiture cases, usually comes from drug cases where the instrument of crime happens to be a boat, airplane or automobile

In any event, the wildlife people were treating Mr Lin on the same level as a drug case and they felt they had the right to confiscate his property

A few days later we received another document, which came from the U S Marshall's office stating that he had arrested "one Ford Tractor "

This was our introduction to the Endangered Species Act Needles to say, we had some concern about whether we were going to get our money or the tractor if the payment wasn't made on the due date.

Shortly afterward, I was interviewed by a young lady from the Bakersfield Californian regarding the entire matter The following day, she wrote a real great article which appeared on the front page of the business section of the newspaper and that's when the stuff hit the fan.

Our phones started ringing off the hook. I got calls from people I know, from people I don't know, all expressing their outrage, offering help, offering money You name it. Local TV and radio stations were in contact with me

And then the calls started coming in from all over the country Connecticut, Michigan, Tennessee, Alaska, New Mexico I was interviewed on radio talk shows in Saginaw, Memphis, San Francisco, Fresno, Los Angeles, over on the coast and more I can't even remember

Then, Rush Limbaugh started talking about it, at first mispronouncing my name to 30 million people He finally got it right. I don't know how many times he had it on the radio, perhaps a dozen or more I did see him once on tv Gordon Liddy had it on his show I'd be interrupted in the office when someone would come to me and say "Associated Press is on the line", or "Tony Snow from USA Today is calling from Washington "

Articles and cartoons were appearing in the Washington Post, the Chicago Tribune, the Detroit Free Press How many other places I don't know It even made the National Enquirer magazine and Reader's Digest I was informed that it has been featured in the press of some foreign countries

Articles started coming to me through the mail and by fax, describing some of the horror stories taking place each and every day, everywhere Then people started telling me I should do something about this I finally thought, if I didn't do something, who would?

I joined the very active local group, the Coalition to Preserve and Protect Private Property Rights It was formed about a year before to raise funds to help local people who had been caught up by the Endangered Species Act. Since the Lin case, however, this group has expanded and has gained the support of industry organizations and private property rights groups around the state

This group opposes the uncompensated taking of land by the state and federal governments It has come in contact with other grassroots organizations around the country that are working to change, modify and reform the Endan

continued......

gered Species Act so that it is more fair to the individual American people who happens to own land on which endangered species are found.

There's the case of Steve Jordon over in Lompoc whose property goes out into a dry riverbed It only fills up when there is a great amount of rain. The city of Lompoc was letting water drain into it and some willows grew in there. A few birds showed up The fellow went out there to clear the willows so his property would not be flooded if it started to rain. The wildlife people came along and said "You can't do that or we'll imprison you" Why? "It's habitat protected under the Endangered Species Act"

After a long fight the situation remains the same Now they are just sitting and waiting until they get a wet winter and then it's going to flood his farm. It's also going to go down and inundate the city of Lompoc

There's another case of an elderly couple living in Tulare on the Tula Vista Farms The wildlife people came to them and said "You killed some lizards" They had 160 acres of ground and after fighting back and forth and getting nowhere, they just gave up and surrendered 60 acres of their ground to keep from going to court

Then there is the case of the families in Riverside, who were prevented by the wildlife people from disking open lands around their homes to guard against the all-too-common Southern California wildfires The lands were habitat and the weeds were habitat.

Consequently, when a fire did come, 29 homes were destroyed. Ysmael Garcia, one of the homeowners, said "I'm now among the homeless. The ESA is responsible for the loss of our home and everything we own on this earth and of the near loss of our lives."

The wildlife people back-peddled. Did not apologize, did not admit any guilt but now agree that people who live in open mountain areas can disc around their homes to protect themselves against wildfires

These cases are endless, each one reported in the local newspaper but normally not heard about in other areas. No publicity, like the Lin case. They have designated 33 counties, repeat 33 counties, in Texas as critical habitat so that the Golden cheeked worbler can be protected This is stopping development, bankrupting builders and preventing people from building homes on their lots

Farms in California's rich Central Valley are losing their water supplies so that fish can be protected in the Delta Efforts to protect underground water supplies in the Valley are being thwarted because endangered species live in areas on which water officials want to flood

In Southern Arizona, they're spending millions of taxpayer dollars reimporting quail now living in Mexico that haven't been here for years and years In the last report they spent $270,000 for each quail and they don't even know if they will survive.

There are many cases where individuals are being hampered, hurt and financially destroyed by this law One more thing, they are teaching our children to follow in their paths Children these days are not seeing farm animals in the classrooms. Animals like cows, horses, pigs and chickens. Instead they are seeing "endangered rats and lizards." A friend of mine told me his grandchild came home and said, "Papa don't run over the poor little rat with your tractor"

The environmentalists groups that support this law are extremely well organized and well financed. I have a list for example that shows that the top 25 environmental groups, led by Green Peace, have a total annual operating budget of $544 8 million continued......

Probably the biggest gun pushing all this is that illustrious son of you Arizonans, Bruce Babbitt, the Secretary of the Interior. Here's one way Babbitt wants to spend your tax dollars. How many plants, animals, squirrels, cockroaches, share our homeland? There are probably 500,000 species in the U S and there are easily billions of living creatures. No one knows how many Babbitt wants to survey and catalog every non-human living organism in the U S He says it will make the environmental laws more efficient. What it really will do is it will make it easier for the federal government to take away the property rights from all landowners under the guise of environmental protection. Big Brother has arrived!

Here is one of the disasters that is just about to happen This could be the worst scenario of all. I'm talking about the biodiversity treaty, which the Senate was asked to sign this past year If ratified, the national sovereignty of the United States will be at stake. It will be handing a blank check to the world's extremist environmental movements Repeat, extremist environmental movements The United States, its Congress and the American people will be legally bound to implement any articles adopted by these non-elected agencies The Doctrine of Sustainable Use demands that human existence will have no more judicial rights than lesser species

Most present day natural resource based activities, including farming, logging, fishing and mining violate the tenants of the definition. Fertilizers, insecticides and pesticides would be banned. According to the fanatics who wrote the treaty, present day consumption patterns and outdoor activities are also considered unsustainable

This treaty violates the Constitution and separation of church and state because biodiversity is not a scientific theory It is a religious dogma that espouses a believe that man has no rights higher than those of animals and insects

This treaty was signed and strongly supported by President Clinton Luckily, the Senate which has the power to sign treaties took no action before it recessed. We, all of us, must let our Senators know that they must not sign this treaty, catalogued as "103-20" Mark my words, it will reappear in January when Congress reconvenes

In comparing environmentalism to socialist dictatorships, it is said that while socialism is the redefintion of the relationship between man to man, environmentalism is the redefinition of the relationship between man and nature.

Extreme environmentalism means the end of religion and society as we know it

Does this outrage you and make you mad? It should Bear in mind- activity is far more effective than hostility

Why are we in this fix?

I call it the BS Syndrome One guy complains to another guy and then they both complain to each other And then they go on and complain to someone else But nobody actually does anything

You may not think any of this has anything to do with you, but it does

For us at Berchtold Equipment Company, all the publicity surrounding the Lin case got us back our tractor Lin has lost his investor financing and has no money to make the payments.

We did, however, have to affirm to the governmental that we had no control of what Lin was going to do with the tractor. That we had no knowledge that he was going to disc land where there were endangered species. We also had to supply affidavits from the people who made the sale and who made the delivery

continued....

This scared me because I didn't know what our people had done. Had the driver seen this guy run over any rats? Did the salesman know that federal agents considered the land habitat,even though it was not designated habitat?

This is something that all of you are going to have to think about when you sell equipment. You are going to have to make sure that it is not being used on land that has been designated by the federal government as critical habitat or you could also be held liable for its destruction

Don't sell any equipment on an open account basis. Don't loan equipment.
If we had done so in this particular case, and had not the publicity come about, I am sure the government would have confiscated the tractor and all we would have had was an account receivable on which we never would have collected An incident like this doesn't just affect one landowner It affects his lender, his employees and everyone with whom he does business

Regarding Mr Lin The feds have egg all over their faces Because of all the publicity they said they would drop all charges if he would sign a release against them and the government

I know Babbitt has harshly criticized his people "Who was the idiot who picked on this guy?" Lin said "No settlement " He'll see them in court in December This could well be a landmark case

Why am I telling you all this? Why am I involved?

An author once wrote. "There is nothing more American than a tractor salesman."
I am an American and so are you - I have been very fortunate to have lived in the greatest era in history - I was born and raised in East Bakersfield, the wrong side of the tracks, where there were only 3 economic levels Your family was either poor, real poor or super poor Most of us were from ethnic parentage But out of the area came doctors, heads of hospitals, attorneys, judges, educators, military people who went all the way to the top in every service.
My best friend was voted outstanding young farmer of the year in California. Many became very successful business people

Some even became giants
I never knew a bum
This same scenario took place all over the country This is America. Or this was America But, we are losing it fast. America has been real good to me But nobody goes to lunch forever without picking up the check My marker has been called

I feel it's my duty and my obligation to pay back. And I'm saying to you, it's your duty too The usual remark is someone should do something about this Who is someone? Someone is you and me Someone had damn well better start doing something now Someone has to stop the government from taking our land in the name of environmental protection We have got to take it back from the unelected bureaucrats and regulators The environmental regulations they are upholding are making criminals of hardworking American citizens doing ordinary things.

We've got to do this before it is too late We have to fight for what is honorable, right and constitutionally guaranteed Everything that we and our children have is all on the line

We have to form tremendously large grassroots organizations that can stand up and combat the legislatures that are making these laws that abuse our rights.
I suggest that we spend just an hour a week to become informed on existing laws and what is happening. I urge you to find a coalition in your area and join it. Or join the one I'm in Or form one of your own. Our group is a member of a nationwide fax network that sends out information daily

continued....

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We need to urge our representatives that when they go back to Congress in January they must support legislation to amend the Endangered Species Act so that the rights of individuals, of landowners, or ordinary hardworking citizens are taken into consideration

The few bills authored to amend the Act died last month when Congress recessed We must let our representatives know that when they return in January they must tackle this issue Their positions in Congress depends on it

Our individual way of life is too important not to stand in defense of it

Wake up Americans Get involved Perhaps it's not too late to take back control of our property, to use it in the way that our local governments have designated it to be used Then maybe, just maybe, landowners once again will be able to comfortably look out their windows and say to themselves, "This is my land "

EDITORS NOTE:
Mr Berchtold, since the Lin incident, has become very actively involved with the "Coalition for Property Rights"(CPR), headquartered in Bakersfield The Coalition was formed in 1992 because of an attempt by the government to take 40 acres from a local rancher in an effort to mitigate for an endangered wildflower which had cost the rancher over $100,000 in legal fees

They are committed to assisting Mr Lin and his fight as well as other issues where private property is at risk because of ESA Call 1-800-308-FREE to find out more and to join this worthy organization

PRIVATE PROPERTY RIGHTS ARE IMPORTANT

Susan Sutton, Family Water Alliance

The implementation of many of the environmental bills such as the Endangered Species Act, the National Biological Survey and the Desert Protection Act have created an attack on traditional private property rights Those who are not concerned with private property rights do not feel that they must protect these rights as the loss of property does not affect them either socially or financially However, they are grievously mistaken

The League of Private Property Voters, of which FWA is a supporter, has identified five reasons why we must be vigilant in protecting these rights, not only for the individual but for our society and American way of life The recap is as follows

•Secure and enforceable property rights are necessary for civil order When property ownership becomes vague and unsettled, strife and social breakdown soon follow

•Our free market economy is based on secure and enforceable property rights Our prosperity depends on property ownership

•Private property is what allows people to pursue their own goals, independent of the state and society Without the ability to own property, the personal achievement of individuality is put out of reach for all but a few

•Protecting the environment requires private property rights When people own resources in common, they take as much as they can as quickly as they can. No one owned the buffalo herds on the Great Plains, for example That is why they are gone and have been replaced by cattle herds Many of the professional environmental pressure groups often deny the crucial

continued on page 11.....

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