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# EXAMINING IMPACTS OF THE ENDANGERED SPECIES ACT ON SOUTHERN CALIFORNIA'S INLAND EMPIRE

## OVERSIGHT FIELD HEARING

BEFORE THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

Friday, September 10, 2004, in Fontana, California

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# C O N T E N T S


| | Page |
|---|---|
| Hearing held on Friday, September 10, 2004 | 1 |
| Statement of Members: | |
| Baca, Hon. Joe, a Representative in Congress from the State of California | 4 |
| Prepared statement of | 6 |
| Pombo, Hon. Richard W., a Representative in Congress from the State of California | 1 |
| Prepared statement of | 3 |
| Statement of Witnesses: | |
| Bennett, Hon. Deirdre H., Mayor, City of Colton, California | 8 |
| Prepared statement of | 11 |
| Denner, Roy, President & CEO, Off-Road Business Association, Inc., Santee, California | 32 |
| Prepared statement of | 35 |
| Gonzales, Hon. Josie, Fontana City Council Member, Fontana, California | 20 |
| Prepared statement of | 22 |
| MacDonald, Julie, Deputy Assistant Secretary for Fish and Wildlife and Parks, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. | 58 |
| Prepared statement of | 61 |
| Nuaimi, Hon. Mark, Mayor, City of Fontana, California | 13 |
| Prepared statement of | 15 |
| Silver, Dan, M.D., Executive Director, Endangered Habitats League, Los Angeles, California | 48 |
| Prepared statement of | 49 |
| Thornton, Robert D., Partner, Nossaman, Guthner, Knox & Elliott LLP, Irvine, California | 40 |
| Prepared statement of | 45 |
| Vargas, Hon. Grace, Mayor, City of Rialto, California | 17 |
| Prepared statement of | 19 |

# OVERSIGHT FIELD HEARING ON EXAMINING IMPACTS OF THE ENDANGERED SPECIES ACT ON SOUTHERN CALIFORNIA'S INLAND EMPIRE.

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**Friday, September 10, 2004**
**U.S. House of Representatives**
**Committee on Resources**
**Fontana, California**

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The Committee met, pursuant to call, at 9:00 a.m., at Fontana City Hall, Fontana, California, Hon. Richard Pombo [Chairman of the Committee] presiding.

Present: Representatives Pombo, Radanovich, and Baca.

Mr. POMBO. Good morning.

The oversight hearing by the House Committee on Resources will come to order.

The Committee is meeting today to hear testimony on the Endangered Species Act.

I want to thank you for the opportunity to bring the Committee to Southern California and the Inland Empire. I look forward to listening and gaining greater insight from the witnesses today on how the ESA's impacting families in everyday operations in businesses in this region of the country.

Before we begin, I would like to recognize the Kaiser High School ROTC for the Posting of the Colors and then Councilman John Roberts for the Pledge of Allegiance.

If I could have everybody stand, please.

[Presenting of the Colors]

[Pledge of Allegiance]

Mr. POMBO. Thank you.

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

Mr. POMBO. Thank you very much. It is always nice to see some of the impressive young people of this community and this country.

The Endangered Species Act has given wildlife very little to fear as we stagger blindfolded into the 30th anniversary. Since its inception, nearly 1,800 species have been listed as threatened or endangered, yet only seven domestic species listed under the ESA have been recovered in 30 years. Sadly, that is the history of the Endangered Species Act. Born of the best intentions, it has failed

to live up to its promises, and species are more threatened today because of its serious limitations.

Thirty years of the same prescription have failed. Moreover, despite the evidence, some maintain that we can only have one treatment, the one prescribed 30 years ago; but for the last 30 years, the ESA has remained a law that checks species in, but never checks them out. It has been a failing form of managed care.

Specifically, the diagnoses and treatment aspects of the law are fatally flawed. They are ambiguous, open to arbitrary personal judgment and do not rely on sound science or peer reviewed research. Known as listing and critical habitat respectively, these key elements of the Act are responsible for the misdiagnoses of species as endangered or threatened and the application of a one-size-fits-all solution.

When a species is listed for protection, treatment comes in the form of critical habitat designations which forbid the use of lands by or for anything but the species. Critical habitat is one of the most perverse shortcomings of the Act. It has been interpreted to mean that if an animal is determined to be in trouble, there is only one viable option—to designate critical habitat and let nature take its course. Rampant environmental litigation has undermined the already broken system at the expense of species' recovery. In fact, there have been so many lawsuits that the Federal critical habitat program went bankrupt last year. Litigation has left the United States Fish and Wildlife Service with limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on those species in the greatest need of conservation.

The Administration acknowledges that court orders and mandates often result in leaving the Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing in critical habitat proposals. In the wake of this decade-long trend, the current Administration supported by the previous Clinton Administration recognized that critical habitat designations provide the majority of listed species and proposed to be listed species little if any additional protection.

Congress intended for this law to be used to recover species and to increase the number of those in need before triggering Federal regulations. To merely prevent the extinction of a species is a not a long-term measurable success. Congress never dreamed that it would turn into a tool used by vocal and well funded special interest groups seeking to impose court-ordered Federal land and water use controls on the majority of Americans.

Celebrating these failures, as many are doing in this 30th anniversary of the Act, is not how we should mark this occasion. Instead, we must begin to improve it for the 21st Century and what we are doing here today by closely examining its implementation in Southern California's Inland Empire. Congress must focus on legislative reforms that foster the science, technology and innovation that have made America successful in other endeavors.

Congress took a major step toward updating and strengthening the ESA when this Committee passed two major pieces of legislation just over a month ago. These two bills, one sponsored by a Republican and the other by a Democrat, are sound legislative

proposals that the Members of Congress here before you will continue to hammer out in the hope of becoming law before the end of this congressional session.

I would now like to recognize a member of the Committee, an extremely important member of the Committee, somebody that I have worked with very closely over the years on a number of issues, but in particular on the Endangered Species Act, and that's my California colleague, Joe Baca

[The prepared statement of Mr. Pombo follows:]

**Statement of The Honorable Richard W. Pombo, Chairman, Committee on Resources**

Good morning. I would like to call this hearing on the Endangered Species Act to order. Thank you for the opportunity to bring the House of Representatives Committee on Resources to the Inland Empire.

I look forward to listening and gaining greater insight from the witnesses today on how the ESA is impacting families and every day operations and businesses in this region of the country.

The Endangered Species Act has given wildlife very little to cheer about as we stagger blindfolded into its 30th anniversary. Since its inception, nearly 1,800 species have been listed as threatened or endangered. Yet, only seven domestic species listed under the ESA have ever been "recovered" in 30 years.

Sadly, that is the history of the Endangered Species Act. Born of the best intentions, it has failed to live up to its promise, and species are more threatened today because of its serious limitations. Thirty years of the same prescription has failed. Moreover, despite the evidence, some maintain that we can only use one treatment—the one prescribed 30 years ago. But for the last 30 years, the ESA has remained a law that checks species in, but never checks them out. It has been a failing form of managed care.

Specifically, the "diagnosis" and "treatment" aspects of the law are fatally flawed. They are ambiguous, open to arbitrary personal judgment and do not rely on sound science or peer-reviewed research. Known as "listing" and "critical habitat" respectively, these key elements of the Act are responsible for the misdiagnosis of species as endangered or threatened and the application of a one-size-fits-all solution.

When a species is listed for protection, treatment comes in the form of critical habitat designations, which forbid the use of lands by or for anything but the species. Critical habitat is one of the most perverse shortcomings of the act. It has been interpreted to mean that if an animal is determined to be in trouble, there is only one viable option—to designate critical habitat and "let nature take its course."

Rampant environmental litigation has undermined the already-broken system at the expense of species recovery. In fact, there have been so many lawsuits that the federal critical habitat program went bankrupt last year. Litigation has left the United States Fish and Wildlife Service with limited ability to prioritize its species recovery programs and little or no scientific discretion to focus on those species in greatest need of conservation.

The Administration acknowledges that court orders and mandates often result in leaving the Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing and critical habitat proposals. In the wake of this decade long trend, the current Administration, supported by the previous Clinton Administration, recognize that critical habitat designations provide the majority of listed species and proposed to be listed species little if any additional protection.

Congress intended for this law to be used to recover species and to increase the number of those in need before triggering federal regulation (restrictions). To merely prevent the extinction of a species is not a long-term measurable success. Congress never dreamed that it would turn into a tool used by vocal and well-funded special interest groups seeking to impose court ordered Federal land and water use controls on the majority of Americans.

Celebrating these failures—as many are doing this 30th anniversary of the act—is not how we should mark this occasion. Instead, we must begin to improve it for the 21st century. As we are doing here today by closely examining its implementation in southern California's Inland Empire, Congress must focus on legislative reforms that foster the science, technology and innovation that have made America successful in other endeavors.

Congress took a major step toward updating and strengthening the ESA when this Committee passed two major pieces of legislation, just over a month ago. Those two bills, one sponsored by a Republican and the other by a Democrat, are sound legislative proposals that the Members of Congress up here before you will continue to hammer out in hope of becoming law before the end of this congressional session.

The House Committee on Resources is here today as a result of the hard work of my colleague and good friend, Congressman Joe Baca. Mr. Baca has been instrumental with the bipartisan effort to update the ESA this Congress and I would like to thank him for his help and hard work—thank you Joe. I would also like to thank equally the work of my other colleagues and friends, Congressman Miller and Congressman Radanovich.

We are before you today to hear from you and receive your ideas on what we as your elected representatives in Washington can do to improve the implementation of the Endangered Species Act.

Again, thank you for having us and I would at this time like to recognize Mr. Baca.

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## STATEMENT OF THE HON. JOE BACA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. BACA. Good morning.

I would like to welcome the House Resources Committee to Fontana, a historical first in the 43rd Congressional District.

I want to thank Chairman Richard Pombo and the Resources Committee for allowing me to host this hearing here today.

I would also like to welcome George Radanovich to the Inland Empire. I don't know how they both got here, but we all flew in last night. And we weren't out late, we just flew in late. Got in about 1:30 or 2:00 this morning. Apparently they didn't go to sleep and came directly to the hearing.

But welcome to the Inland Empire, both of you.

I want to thank Mayor Nuaimi, Councilwoman Josie Gonzales. It is not her first time appearing in front of the Committee; she has appeared before.

I would like to thank Mayor Bennett and Mayor Vargas for taking the time to share their stories here today as well.

This hearing is an opportunity for the Inland Empire citizens to hear firsthand experience in complying with the Endangered Species Act. The witnesses will share with Congress their successes and struggles and balancing economic growth with species protection. Through their stories, Congress will get a better idea how we can listen to how the negative effects of compliance with the Endangered Species Act in ongoing areas such as the Inland Empire have affected the quality of life in two of the largest growth counties in the United States, that's San Bernardino and Riverside have experienced the largest growth in population.

I hope Congress then will develop and adopt clear recommendations on how the ESA can be applied consistently and more successfully in using commonsense and sound scientific knowledge. Those are two important elements; common sense and sound scientific knowledge.

ESA is a broken law with a record of only 12 species recovered on a list of over 1,000 endangered species. That is a 99 percent failure rate. Meanwhile communities like mine sacrifice beyond their means with little result in land, in money and loss of economic growth.

In 1994, San Bernardino County was forced to shift the site of Arrowhead Regional Medical Center 250 feet, costing the taxpayers in our area $3 million—all because a sand pit was found on the proposed property in which the Delhi Sands Flower-Loving Fly was believed to breed. Since the Fish and Wildlife Service placed the fly on the endangered species list in 1993, San Bernardino County has lost—I state San Bernardino County has lost hundreds of jobs, development has been stalled and millions of taxpayers' dollars have been wasted. That is taxpayers' dollars of our communities have been wasted.

I requested this hearing so that action could finally be taken on these issues.

The ESA was signed into law over 30 years by President Nixon and was intended to save species identified as threatened or endangered to restore healthy population. Remember that. The Act has not been updated since. The Fish and Wildlife Service require landowners to set aside specific acreage for fly habitat in exchange for the right to build; a cost and a loss to quality of life.

Many companies decided to locate elsewhere rather than meet the Act's requirement. And we have lost many opportunities in the past where companies that would have improved the quality of life for the Inland Empire or would have been able to obtain jobs in this immediate area, and many of our youth who are going through our schools would have had an opportunity to be employed here versus going outside into other communities. Who can blame them?

In the year 2002, the City of Colton was required to find a new location for a $12 million baseball park costing taxpayers $1.2 million because of a handful of flies.

In the year 2003, the City of Fontana Empire Center was delayed because of the said siting of flies on one acre portion of property. The City finally received a building permit in March and, in return, the City designated 30 acres of fly habitat. That is a lot of valuable land.

We have had wind storms since then, so there is no telling where these flies are now. I mean, there have been a lot of storms. We do not even know if it is there, yet we reserve 30 acres. The winds continue to blow in this area. The Santa Ana winds continue to come this way.

Congratulations to the City of Fontana for the Empire Center's groundbreaking yesterday. It is outstanding. It is positive for our community. It is positive for the Inland Empire to create opportunities for many individuals here.

For over 10 years the Empire Center was stalled. That is 10 years. Can you imagine how many jobs have been lost, how many opportunities have been lost, what the attitudes were of our communities because we were not able to build in this area? You know, it is taking too long.

If I saw a fly flying around in this room, and apparently this is my fly swatter, what I would probably do like anyone else, is just swat it. I would not know if it was an endangered species or not. I mean, that is normally what any American, any individual would do.

I mean, Chairman, you own horses and cattle. I mean, can you imagine if a fly went on there and your cattle happened to swat

one of those flies, I mean would they be penalized for swatting that fly? Would they know that it is an endangered species, because the winds blew and they happened to land on one of your cattle and the tail of it swatted it?

But these things are ridiculous. I mean, it is something that we do not look for. And none of us look for, we immediately react.

We do not even know how many endangered flies there are. None of us really know. How can we keep track of the flies that only come out once a year to mate, normally in July or August? How can we keep track of flies that get blown around with the Santa Ana winds?

We have the responsibility to protect. And I state we have the responsibility to protect endangered animals and insects from distinction. But first we have the duty to protect the people who make up our community. It is time to modernize this law for the 21st century. I will do everything I can to make sure that the enforcement of the Endangered Species Act does not stall our community's growth any longer.

Again, I want to thank Chairman Pombo, the distinguished quests. And I look forward to hearing testimony today.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Baca follows:]

**Statement of The Honorable Joe Baca, a Representative in Congress from the State of California**

Good morning. I would like to welcome the House Resources Committee to the 43rd Congressional district in California.

Thank you, Chairman Pombo, and the Resources Committee for allowing me to host this field hearing today. It is an honor.

I would also like to welcome Congressman Radanovich to the Inland Empire. Thank you for being here.

Thank you, Mayor Nuaimi, Councilwoman Gonzales, Mayor Bennett and Mayor Vargas for taking the time to share your stories today.

This hearing is an opportunity for the Inland Empire citizens to share their first-hand experiences in complying with the Endangered Species Act.

The witnesses will share with Congress their successes and struggles in balancing economic growth with species protection.

Through their stories, Congress will get a better idea of how we can lessen the negative effects that compliance with the Endangered Species Act has on growing areas such as the Inland Empire.

I hope Congress will then develop and adopt clear recommendations on how the ESA can be applied consistently and more successfully using common sense and sound scientific knowledge.

The ESA is a broken law: with a record of only 12 species recovered on a list of over 1,000 endangered species. This is a 99% failure rate.

Meanwhile, communities like mine sacrifice beyond their means but with little results.

In 1994, San Bernardino County was forced to shift the site of Arrowhead Regional Medical Center 250 feet, costing taxpayers $3 million.

All because a sand pit was found on the proposed property in which the Delhi Sands Flower-Loving Fly was believed to breed.

Since the Fish and Wildlife Services placed the fly on the endangered species list in 1993, San Bernardino County has lost hundreds of jobs, development has been stalled and millions of tax dollars have been wasted.

I requested the hearing so that action can finally be taken on this issue.

The ESA was signed into law over 30 years ago by President Nixon and was intended to save species identified as threatened or endangered to restore to healthy populations. The Act has not been updated since.

The Fish and Wildlife Service requires landowners to set aside specific acreage for fly habitat in exchange for the right to build.

Many companies decide to locate elsewhere, rather than meet the Act's requirements. And who can blame them?

In 2002, the City of Colton was required to find a new location for a $12 million baseball park, costing taxpayers $1.2 million because of a handful of flies.

In 2003, The City of Fontana's Empire Center was delayed because of six sightings of the fly on a one-acre portion of the property. The City finally received a building permit in March. In return, the City dedicated 30 acres of fly habitat.

Congratulations to the City of Fontana for the Empire Center's groundbreaking held yesterday.

For over 10 years, the Empire Center was stalled because of a fly.

If I saw a fly flying around this room, I would swat at it.

We don't even know how many endangered flies there are. How can we keep track of flies that only come out of the sand once a year to mate? How can we keep track of flies that get blown around with the Santa Ana winds?

We have a responsibility to protect endangered animals and insects from extinction—but first we have a duty to protect the people who make up our community.

It is time to modernize this law for the 21st century.

I will do everything I can to make sure that the enforcement of the Endangered Species Act does not stall our community's growth any longer.

Again, I thank Chairman Pombo and our distinguished guests, and I look forward to hearing the testimony today.

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Mr. POMBO. Thank you.

I would like to recognize Mr. Radanovich for any opening comments he may have.

Mr. RADANOVICH. Thank you, Chairman Pombo. And I am glad to be a part of this hearing. I want to thank you for having it in a pretty critical part of the state.

I am glad to be on your turf, Joe.

I am from the Central Valley and my District goes from Modesto to Fresno up to Yosemite, so we got our share of Endangered Species Act problems, both in the Sierra National Forest, Yosemite National Park and the San Joaquin Valley. Of interest, I think, is we are currently trying to locate the tenth of the UC system, University of California. And you were talking about critical habitat that things that need to be given up in order to locate a university I think in a critical part of the state. It is a thousand acres footprint, and in order to get that 40,000 acres had to be dedicated to critical habitat in order to take care of the Fairy Shrimp which is just an amazing a number. I mean, most of the vernal pools were created by cattle when you put a salt block for a period of time, and yet they seem to be—I mean, you can dig one up anywhere you want to and you will get a Fairy Shrimp.

But, clearly, the abuse of the law is there because it is a poorly written law and it is long overdue for reform. And I hope this hearing helps to lead to that end. And I want to concur with both the Chairman's remarks and Mr. Baca's.

Thank you.

Mr. POMBO. Thank you.

I would like to invite up our first panel of witnesses.

Mr. POMBO. We have The Honorable Deirdre Bennett, the Mayor of the City of Colton; The Honorable Mark Nuaimi, Mayor of the City of Fontana; The Honorable Grace Vargas, Mayor of the City of Rialto; and The Honorable Josie Gonzales, Fontana City Council Member.

And if I could have you all stand and raise your right hand. It is the custom of the Committee that we swear in all witnesses.

[Witnesses sworn]

Mr. POMBO. Thank you.

Let the record show they all answered in the affirmative.

Thank you very much for joining us here this morning. As a former local elected official I have learned that when it comes to a lot of the Federal issues it is the people on the ground that have to deal with these laws every day and their enforcement and their regulations that where we can often times learn the most. And I appreciate you all being here and making the effort to be part of this hearing this morning.

Ms. Bennett, we are going to begin with you.

**STATEMENT OF THE HONORABLE DEIRDRE BENNETT, MAYOR, CITY OF COLTON**

Ms. BENNETT. Thank you.

I would like to start by saying thank you very much to Congressman Baca. We really appreciate the efforts you are making, and appreciate this hearing today. And I would also like to thank the Chair, Richard Pombo and George Radanovich for coming out here and joining us to hear what we have been dealing with over the years.

For years the Endangered Species Act has been misapplied. Many of us who strongly believe we need to protect our environment and the species who share the world with us are baffled by the methods used to determine which species will be listed.

The Delhi Sands Flower-Loving Fly is a good example of one that has created a nightmare for the residents of the City of Colton without sufficient scientific data to support its listing.

If you will look to the west on Slover Avenue, you will see a horrible sight. You may even blame the City for allowing so much trash and debris accumulating in a public area. In actuality, this is an example of blight caused by the endangered status of the Delhi Sands Flower-Loving Fly. The United States Fish and Wildlife Service does not want us to disrupt this area as it may disturb the fly. On rare occasions when we could not take it any more and public safety was jeopardized, we cleared the trash from the roadway and shoulders to the outcries of the Fish and Wildlife Service. They will not even allow us to install lights to help thwart the illegal dumping which occurs here. Reduced to the simplest of terms, our national government encourages trash and debris to favor a fly. The American public surely must find this shocking.

If a party wants to develop land they own within designated fly habitat, they must negotiate with the U.S. Fish and Wildlife Service in developing a habitat conservation plan or HCP. If they give you a permit, you must buy other habitat land at your cost plus pay for maintenance. Unfortunately, this process equates to nothing more than legalized extortion.

We believe public projects, which include public safety, public improvements and economic viability are at stake; in essence flies take priority for recreational facilities for children, improved infrastructure and jobs for our people.

Besides our sports facility, another project currently held hostage is the required Pepper Avenue interchange improvements. The County of San Bernardino has been told to mitigate this public safety project by purchasing more than 20 acres of fly habitat at an approximate expense of $5 million. There is only so much money in the bank.

For the past several years, the City of Colton has been greatly hampered by the endangered spices of the Delhi Sands Flower-Loving Fly. Development efforts have been thwarted, resulting in the loss of several million dollars in local tax revenue, not to mention losses to the private sector, including several thousand potential jobs.

The City has tried to be a compatible neighbor to the fly, and we tried to intervene on behalf of adversely affected property owners in a diplomatic manner. Occasionally, a property owner has been able to negotiate a reasonable mitigation, a package with the Fish and Wildlife Service, but those instances are rare exceptions. More often than not, Fish and Wildlife Service wants to study and ponder proposals for an excessive period of time, often conveniently forgetting tentative deal points reached early in negotiations. Such was the situation with the City's proposed Sports Park at Valley Boulevard and Meridian Avenue.

For nearly 2 years, the City of Colton negotiated with Fish and Wildlife Service. At one point we thought we had a tentative agreement until a Fish and Wildlife Service staff person reneged. They reneged on their initial deal and conveniently denied consensus was previously reached. The proposed agreement was identical to ones reached with a local developer where one acre of mitigation was required for every three acres developed. When it fell apart, we opted for a second year fly study. If flies were not found as in the first year study, we could develop the sports park with no habitat conservation plan and therefore, no mitigation.

Unfortunately for us, a few flies (they say five "individuals") were spotted by the biologist hired to do the study. No one watches these biologists and there is no way to prove or disapprove what they observe. In the end, the Fish and Wildlife Service told us they needed 33 acres of habitat for the 15 acres we wanted to develop, a requirement six times greater than those imposed on previous development. The additional cost and time associated with acquiring the additional property for habitat forced us to scale down and relocate the sports park project and leave the Valley Boulevard and Meridian Avenue site in a state of "fly-induced blight." Our conservation estimates placed the additional cost to acquire an additional 33 acres of habitat at around $3 million. Far too much for us to pay to save a few insects with a very brief life span. Again, this is nothing more than legalized extortion.

The U.S. Fish and Wildlife Service also wanted to implement a countywide HCP for the fly, which primarily includes the City of Fontana, Rialto and Colton and the County of San Bernardino. They have been talking about this for more than 5 years but absolutely nothing has been done. This is typical for that agency. The longer they take, the longer development gets held up. This appears to be their MO to stop development entirely in the Inland Empire, or at least in West Colton.

In addition, the land acquisition and cost assumptions in tentative discussions concerning the countywide HCP were from our perspective completely unrealistic as Colton properties are placed into a state of "fly-induced blight" in disproportionate amounts so properties in surrounding communities can develop. In short, they receive revenue, jobs and economic development while Colton

receives DSF Habitat, no revenue, no jobs or economic development. As a result, Colton will not participate in such a plan, ever.

Colton wants to work with its neighbors including the cities of Fontana and Rialto and the County of San Bernardino and we believe that our residents, and to some of you your constituents, have been ill served by the listing of the DSF. We believe the DSF should be taken off the endangered species list, or at least no further habitat conservation should be required for this species. In that is not possible, then we implore the House Committee on Resources to work with us and to work all communities impacted by the DSF, and other species, to ensure that the economic well being of communities are represented before the interests of flies, rates or sucker fish.

Colton has had conversations with a local conservation group, The Wildlands Conservancy. We have discussed an opportunity that could provide a positive environmentally friendly project for the community, some development as well as some habitat set aside for the DSF. While these discussions are in a very preliminary stage and have not yet involved the Fish and Wildlife Service, it does demonstrate that Colton would be willing to consider reasonable accommodations for the DSF.

The ESA began with noble intentions. No one would argue with the idea of protecting a species from complete extinction. However, when the Act is used to stop a community from bringing jobs and improving the life for the people who live in that community, to protect a subspecies that has been separated from the main group, that is wrong. We believe that enough is enough. It is high time that President Bush takes on the Fish and Wildlife Service and rid it of those who enact their world view and land use policies on innocent local communities. If the Administration really believes in local control, it should allow the California Endangered Species Act to be operative in this instance. Under that Act, insects are not classified as being eligible for endangered status, and we do not believe that the authors of the original Endangered Species Federal legislation ever contemplated protecting insects.

The Fish and Wildlife Service staff strategically refer to the fly as an individual or animal. This is outrageous. To us and the majority of Americans with any common sense at all, they are pests. Nothing more, nothing less, pests we have historically grown up swatting, as Congressman Baca stated earlier.

Ironically, another project that has been delayed partly as a result of the DSF, the 3-5 Storm Drain, has created an opportunity for another insect to threaten the health and safety of Colton residents. Because of the fact that the storm drain has not been constructed, excess rain and nuisance water have collected in a low lying area just north of the Union Pacific tracks and east of Rancho Avenue. This area has been identified by County Vector Control to be a breeding ground for mosquitoes and the West Nile Virus.

In summary, our region has lost its ability to provide safety improvements and jobs to its residents because of a fly. We believe a large majority of the American people will agree with the resolutions that we seek:

Number one: Congress should work to de-list the fly as an endangered species;

Number two: Insects should not be considered as being eligible for endangered status;

Number three: Greatly limit the administrative powers of lower level Fish and Wildlife staff to arbitrarily inflict their views on local land use policy, and;

Number four: Create language that requires better scientific data to determine whether a species is truly endangered and disallow the use of the Act to protect pocket species whose main body is thriving in other areas.

And remember please, people matter more than bugs.

Thank you.

[The prepared statement of Ms. Bennett follows:]

**Statement of The Honorable Deirdre H. Bennett, Mayor, City of Colton**

If you look to the west on Slover Avenue, you will see a horrible sight. You may even blame the City for allowing so much trash and debris accumulating in a public area. In actuality, this is an example of blight caused by the endangered status of the Delhi Sands Flower-Loving Fly. The United States Fish and Wildlife Service does not want us to disrupt this area as it may "disturb" the fly! On rare occasions when we could not take it any more and public safety was jeopardized, we cleared the trash from the roadway and shoulders to the outcries of the Fish and Wildlife Service. They won't even allow us to install lights to help thwart the illegal dumping which occurs here. Reduced to the simplest of terms, our national government encourages trash and debris—to favor a fly. The American public surely must find this shocking.

If a party wants to develop land they own within designated fly habitat, they must negotiate with U.S. Fish & Wildlife in developing a habitat conservation plan (HCP). If they give you a permit you must buy other habitat land at your cost plus pay for maintenance. Unfortunately, this process equates to nothing more than legalized extortion. We believe public projects, which include public safety, public improvements and economic viability are at stake; in essence flies take priority over recreational facilities for children, improved infrastructure, and jobs for our people. Besides our sports facility, another project currently held hostage is the required Pepper Avenue Interchange Improvements. The County of San Bernardino has been told to mitigate this public safety project by purchasing more than 20 acres of fly habitat at an approximate expense of $5 million. There is only so much money in the bank.

For the past several years, the City of Colton has been greatly hampered by the endangered status of the Delhi Sands Flower-Loving Fly. Development efforts have been thwarted, resulting in the loss of several million dollars in local tax revenue—not to mention losses to the private sector, including several thousand potential jobs.

The City has tried to be a compatible neighbor to the fly, and we tried to intervene on behalf of adversely affected property owners in a diplomatic manner. Occasionally, a property owner has been able to negotiate a reasonable "mitigation" package with Fish and Wildlife but those instances are a rare exception. More often than not, Fish and Wildlife wants to study and ponder proposals for an excessive period of time—often conveniently forgetting tentative deal points reached early in negotiations. Such was the situation with the City's proposed Sports Park at Valley Boulevard and Meridian Avenue.

For nearly two years the City of Colton negotiated with Fish and Wildlife. At one point we thought we had a tentative agreement until a Fish and Wildlife staff person reneged on their initial deal and conveniently denied consensus was previously reached. The proposed agreement was identical to ones reached with a local developer where one acre of mitigation was required for every three acres developed. When it fell apart, we opted for a second year fly study. If flies were not found as in the first year study, we could develop the sports park with no "habitat conservation plan" and therefore, no mitigation.

Unfortunately, a few flies (they say five "individuals") were spotted by the biologist hired to do the study. No one watches these biologists and there is no way to prove or disprove what they observe. In the end, Fish and Wildlife told us they needed 33 acres of habitat for the 15 acres we wanted to develop, a requirement 6 times greater than those imposed on previous development! The additional cost

and time associated with acquiring additional property for habitat forced us to scale down and relocate the sports park project and leave the Valley Boulevard and Meridian Avenue site in a state of "Fly-Induced Blight". Our conservative estimates placed the additional cost to acquire an additional 33 acres of habitat at around $3 million. Far too much for us to pay to save a few insects with a very brief life span. Again, this is nothing more than legalized extortion.

The U.S. Fish and Wildlife Service also wanted to implement a Countywide HCP for the Fly, which primarily includes the cities of Fontana, Rialto, and Colton and the County of San Bernardino. They have been talking about this for more than five years but absolutely nothing has been done. This is typical for that agency. The longer they take, the longer development gets held up. This appears to be their MO to stop development entirely in the Inland Empire or at least in West Colton. In addition, the land acquisition and cost assumptions in tentative discussions concerning the Countywide HCP were from our perspective completely unrealistic as Colton properties are placed into a state of "Fly-Induced Blight" in disproportionate quantities so properties in surrounding communities can develop. In short, they receive revenue, jobs and economic development while Colton receives DSF Habitat, no revenue, no jobs or economic development. As a result, Colton will not participate in such a plan, ever!

Colton wants to work with its neighbors including the cities or Fontana and Rialto and the County of San Bernardino and we believe that our residents (and to some of you—your constituents) have been ill served by the listing of the DSF. We believe the DSF should be taken off the endangered species list, or at least no further habitat conservation should be required for this species. If that is not possible then we implore the House Committee on Resources to work with us and to work with all communities impacted by the DSF (and other species) to ensure that the economic well being of communities are represented before the interests of flies, rats and "sucker fish".

Colton has had conversations with a local conservation group, The Wildlands Conservancy, to discuss an opportunity that could provide a positive environmentally friendly project for the community, some development as well as some habitat set aside for the DSF. While these discussions are in a very preliminary stage and have not yet involved the Fish and Wildlife service, it does demonstrate that Colton would be willing to consider "reasonable" accommodations for the DSF.

We believe that enough is enough. It is high time that President Bush takes on the Fish and Wildlife Service and rid it of those who enact their world view and land use policies on innocent local communities. If his administration really believes in local control it should allow the California Endangered Species Act to be operative in this instance. Under that act, insects are not classified as being eligible for endangered status, and we do not believe the authors of the original endangered species federal legislation ever contemplated protecting insects. Fish and Wildlife staff strategically refers to the Fly as an individual or animal.

This is outrageous. To us and the majority of Americans with any common sense at all—THEY ARE PESTS—NOTHING MORE—NOTHING LESS—pests we have historically grown up swatting.

Ironically, another project that has been delayed partly as a result of the DSF, (the 3-5 Storm Drain) has created an opportunity for another insect to threaten the health and safety of Colton residents.

Because of the fact that the storm drain has not been constructed, excess rain and nuisance water have collected in a low lying area just north of the Union Pacific tracks and east of Rancho Avenue. This area has been identified by County Vector Control to be a breeding ground for mosquitoes and the West Nile Virus.

In summary, our region has lost its ability to provide safety improvements and jobs to it's residents because of a fly. We believe a large majority of the American people will agree with the resolutions we seek:

1. Congress should work to de-list the fly as an endangered species.
2. Insects should not be considered as being eligible for endangered status.
3. Greatly limit the administrative powers of lower Level Fish and Wildlife staff to arbitrarily inflict their views on local land use policy.

And Remember: PEOPLE MATTER MORE THAN BUGS!

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Mr. POMBO. Thank you, Mayor Bennett.

Mayor Nuaimi?

**STATEMENT OF THE HONORABLE MARK NUAIMI, MAYOR, CITY OF FONTANA**

Mr. NUAIMI. Thank you, Chair Pombo. I do have an exhibit, if we could maybe bring it forward. It is an aerial map of the South Fontana area.

Chairman Pombo, honorable members of the Committee, it is my honor and privilege today to appear before you and offer testimony on the impacts of the Endangered Species Act on the community of Fontana. We are very honored to host you here in Fontana City Council Chambers.

I come before you today as the Mayor of the ninth fastest growing city in the United States, population 154,789, approximately 56 square miles within our sphere of influence. And unfortunately, one of the homes of the Delhi Sands Giant Flower-Loving Fly.

For the past decade, economic development has been adversely impacted in the south Fontana area due to the listing of the Delhi Sands Flower-Loving Fly. From bond defaults to lost develop opportunities to delays in transportation improvements, to productivity loss due to congestion, the Delhi Sands Fly has cost my community directly and indirectly almost $100 million. I do not want to get wrapped around the financial details necessarily in my testimony, but I will offer fairly simple example.

We had a recent freeway interchange project, the Sierra I-10 project that finally got completed, but that project alone was delayed 2 years in construction because the Fish and Wildlife Service would not authorize the permits to move forward with construction because of potential secondary impacts or growth inducing impacts that the freeway interchange might have on habitat from the fly.

Now, when you take a look and you calculate, what does that delay translate to as far as opportunity and productivity costs? Two years of delay, we have 22,500 trips a work day, and there are 10 minutes of delay per trip. It amounts to 1,500,000 hours of additional delay because of a 2-year delay of one freeway interchange project. How much is an hour worth to you folks? We calculate $10 an hour. So, that's $15 million of productivity loss from delaying one freeway interchange for 2 years. We have three more freeway interchanges and overpasses that have been delayed 3 years; Cypress overpass, Citrus Avenue and Cherry Avenue freeway interchanges. All three of those are being delayed again because of this alleged secondary impact or growth inducement potential on habitat.

Which really brings us to what the whole argument turns to. Is it habitat or not? As you look at the map that I have before you, one of the most significant areas of contention throughout this entire process has been the extent and quality of potential habitat for the Delhi Sands Fly. When the fly was listed in 1993 and the recovery plan was adopted in 1997, the Fish and Wildlife Service proposed that over 1200 acres be set aside as suitable habitat for the fly. The problem was that their estimates of available habitat to be set aside ignored the realities of today, that much of the historical habitat in Fontana as an example, was already developed. That much of the historical habitat in Ontario was buried under many feet of manure. They used historical soil maps from the 1970s to determine the historical extent of Delhi Sands in the Inland

Empire. But, as I mentioned, this is not based upon true conditions today.

I have included in my testimony this map of the south Fontana area, and we highlight the historical extent of Delhi Sands, that's the lightened area. And then we highlighted in orange where there is actual sand that remains. As you can see, but a small fraction of the historical sand remains, and yet the recovery plan approved the Fish and Wildlife Service concluded that hundreds of acres were required to recovery this species in Fontana alone. You couldn't find hundreds of acres of sand in Fontana.

What further complicates this entire attempt at species recovery is the lack of a recovery plan based upon financial constraints and reality. In the same recovery plan from 1997, the Fish and Wildlife Service estimated the cost to implement such a strategy at a mere $1.6 million excluding the cost to acquire land, as if the habitat were just sitting around waiting to be placed into conservation.

If you take a look at this map in south Fontana, this is an industrial corridor, a major flow of commerce for much of the nation. Being very conservative, the 1200 acres that the Fish and Wildlife Service wanted set aside would cost $120 to $200 million in land acquisition alone. To give you proof of that value, I would offer that it was mentioned that we recently settled the Empire Center. We had to set aside 30 acres of residentially zoned land, land that was already graded for development, there are pads ready to go. That land today could garnish probably $10 million if sold to private development.

So, that raises the question: is this species recoverable? And there is a number of other questions as well. Can we afford to implement this recovery plan? At what point does the Fish and Wildlife Service declare that this species is beyond recovery? I ask these questions because my residents ask it of us. I cannot tell you how many times I have been asked, "Are you really protecting a fly?" Would not that money be put to better environmental use by relieving congestion in the area?

So, I guess I will pose those questions to you this morning. At what point does the Federal government say we gave it a go and cannot sustain this species?

When I was in Washington, D.C. last year and met with Under Secretary Manson, he indicated that a 5-year assessment was due for this species. Based upon our experience, I would have to conclude the following:

Scientific evidence is lacking that demonstrates that this species is sustainable even after 7 years of attempted conservation. Any proposal for species recovery must include the cost to acquire the land, that unfunded mandate on local agencies cannot go undocumented. There is currently no mechanism in place nor the staffing and resources that allow the Fish and Wildlife Service to modify their recovery plan from 1997 to reflect current conditions. Habitat set-aside requirements should be based upon current conditions, not historical habitat conditions that do not reflect the conditions today.

So, in closing, I would like to offer some suggestions that might avoid these situations in the future.

First, I would suggest that you direct the Secretary of the Interior to convene the "God squad" to determine specifically whether the Delhi Sands Giant Flower-Loving Fly is a subspecies that is worth saving.

Second, I would suggest that we open a U.S. Fish and Wildlife Service office locally in the Inland Empire to be closer and more responsive to the needs of our communities.

Third, adopt legislation that declares property to be exempt from ESA if that property has had a substantial investment in infrastructure made prior to the listing of a species.

Fourth, adopt legislation to exempt property from the provisions of ESA if subsequent scientific evidence shows the land does not or no longer has the environmental ecosystem to sustain a particular endangered species.

Fifth, we'd suggest that you adopt legislation to create a binding arbitration process in lieu of lawsuits.

We would like to see adoption of legislation requiring the Fish and Wildlife Service to develop consistent mitigation standards and criteria for implementation for the conservation and preservation of species.

You heard a mayor refer to their varying tests. We had one acre of habitat, we had to set aside 30. One acre of occupied habitat, we had to set aside 30.

We would suggest that you increase the budget of the Fish and Wildlife Service so that they can hire sufficient staff to be responsive to issues in their respective field offices.

And finally, we need you to create a mechanism for modifying the species recovery plan as updated information becomes available.

And with that, I conclude my comments.

And thank you again for your attendance here today.

[The prepared statement of Mr. Nuaimi follows:]

**Statement of The Honorable Mark Nuaimi, Mayor, City of Fontana, California**

Chairman Pombo, Honorable Members of the Committee, it is my honor and privilege today to appear before you to offer comments and observations regarding the impact of the Endangered Species Act on the Inland Empire—with a specific example of what the City of Fontana has endured.

I come before you today as the Mayor of the 9th fastest growing city in the United States, population 154,789, approximately 56 square miles within our sphere of influence and, unfortunately, the home of the Delhi Sands Giant Flower Loving Fly (DSF).

For the past decade, economic development has been adversely impacted in the south Fontana area due to the listing of the DSF. From bond defaults, to lost development opportunities, to delays in transportation improvements, to productivity loss due to congestion, the Delhi Sands Fly has cost my community directly and indirectly almost $100,000,000. I don't want to get wrapped around the financial details in my testimony but I will offer one fairly simple example. We had a freeway interchange project (Sierra / I-10) that was delayed two years in construction because Fish & Wildlife would not authorize the permits to move forward with construction because of potential "secondary" impacts/growth inducing impacts of the interchange on flies in the south Fontana area. When you do the math, those two years of delay add up to 10 minutes delay per trip, 22,500 trips per day, 200 business days per year, multiplied by the two years. That's 1,500,000 hours of DELAY to my community by simply delaying this one freeway interchange by two years. How much is an hour worth to you? Our regional studies typically use $10 per hour...so, one interchange equates to $15,000,000 in productivity loss. Not to mention the $4 million in construction cost increases due to rising costs of concrete and steel.

This is only one of four freeway interchange improvements that have been delayed. We have experienced over 3 years of delay on the Cypress Ave overpass, the Citrus Avenue Interchange, and the Cherry Avenue interchange through the environmental gauntlet that we are forced to bear—and we still have yet to clear that hurdle. The primary delay is due to the notion that these freeway interchange improvements will be growth inducing and will adversely impact the habitat of the fly.

*FACTS ABOUT THE HABITAT / RECOVER PLAN*

One of the most significant areas of contention throughout this entire process has been the extent and quality of potential habitat for the DSF. When the fly was listed in 1993 and the Recovery Plan was adopted in 1997, the Fish & Wildlife Service proposed that over 1200 acres be set aside as suitable habitat for the fly. The problem was that their estimates of available habitat to be set aside ignored the realities of today—that much of the historical habitat in Fontana was already developed, that much of the historical habitat in Ontario was buried under many feet of manure. They used historical soil maps from the 1970s to determine the historical extent of Delhi Sands in the Inland Empire. But as I mentioned, this was not based upon true conditions today. I have included in my testimony a map of the south Fontana area that highlights the "historical" extent of Delhi Sands and then we have highlighted in orange where actual sands remain. As you can see, but a small fraction of the historical sand remains and yet the Recover Plan approved by the Fish & Wildlife Service concluded that hundreds of acres were required to sustain the species.

What further complicates this entire attempt at species recovery is the lack of a recovery plan based upon financial reality. In their final recover plan in 1997, Fish & Wildlife estimated the cost to implement such a strategy at a mere $1.6 million—excluding the costs to acquire the land. As if the habitat were just sitting around waiting to be placed into conservation. If you take a look at the map of south Fontana, this is an industrial corridor—a major flow of commerce for much of the nation. Being very conservative, the 1200 acres that Fish & Wildlife wanted set aside would cost $120 to $200 million. To give you proof of that value, I would offer that we recently set aside approximately 30 acres as part of the Empire Center project. That 30 acres is zoned residential and would yield $10 million if sold tomorrow—much of the site was already graded for residential development.

*IS THE SPECIES RECOVERABLE?*

So, this raises a number of questions—none more important than the basic question: Is this species recoverable? Can we afford to implement this recovery plan? At what point does Fish & Wildlife declare that this species is beyond recovery? I ask these questions because my residents ask it of us. I can't tell you how many times I have been asked "Are you really protecting a fly?" Wouldn't that money be put to better environmental use by relieving congestion in the area? So, I guess I will pose those questions to you this morning. At what point does the federal government say we gave it a go and can't sustain this species? When I was in Washington, D.C., last year and met with Under Secretary Manson, he indicated that a five year assessment was due for this species. Based upon our experience, I would have to conclude the following:

1. The scientific evidence is lacking that demonstrates that this species is sustainable, even after over 7 years of attempted conservation;
2. Any proposal for species recovery MUST include the costs to acquire the land—that unfunded mandate on local agencies cannot go undocumented;
3. There is no mechanism in place, nor the staffing and resources, that allows Fish & Wildlife to modify their recovery plan to reflect current conditions;
4. Habitat set-aside requirements should be based upon current conditions—not historical habitat conditions that don't reflect conditions of today.

In closing, I would like to offer some suggestions that might avoid these situations in the future:

- Direct the Secretary of the Interior to convene the "God Squad" to determine whether the Delhi Sands Fly is a subspecies that is worth saving;
- Open a U.S. FWS office locally in the Inland Empire to be closer and more responsive to local needs.
- Adopt legislation that declares property to be exempt from the ESA if that property has had a substantial financial investment in infrastructure made prior to a species being listed as an endangered species.
- Adopt legislation to exempt property from the provisions of the ESA if subsequent scientific evidence shows the land does not, or no longer has the environmental ecosystem to sustain a particular endangered species.
- Adopt legislation to create a binding arbitration process in lieu of lawsuits.

- Adopt legislation requiring the FWS to develop consistent mitigation standards and criteria for implementation for the preservation of a species.
- Increase the budget of the FWS so that they can hire sufficient staff to be responsive to issues in their respective Field Offices.
- Create a mechanism for modifying a species recovery plan as updated information becomes available.

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Mr. POMBO. Thank you.

Mayor Vargas?

**STATEMENT OF THE HONORABLE GRACE VARGAS, MAYOR, CITY OF RIALTO**

Ms. VARGAS. OK. I, too, would like to thank Congressman Joe Baca and Richard Pombo and George Radanovich for bring this testimony to the City of Fontana and giving me a chance to speak our piece regarding to these beautiful flies, as you call it.

But anyhow, the City of Rialto experience with the Federal Endangered Species Act and the United States Fish and Wildlife Service staff located in Carlsbad, California deals primarily with listing of the Delhi Sands Flower-Loving Fly. This species was emergency listed by the United States Fish and Wildlife Service in September 22, 1993. You have a copy also on this issue here. And the City received the news of this listing by fax on the same day of the listing.

The planning staff also was contacted by telephone by a representative of the Service shortly after the listing and was instructed not to permit the destruction of habitat by issuing building or grading permits or through discing activities within the impacted areas. The Service would not declare critical habitat for the Sands Fly, and therefore no precise area was delineated. The Service in the news release referred to sandy areas of habitat which proved to be too general or practical use, and you also have the news release there with you. As a result, the City was forced to use older generalized soil maps prepared in the 1970s as our primary basis for review. With this little assistance from the Service staff, the City merely took an educated guess as to the areas to protect. This was just the start of confusion and inconsistencies that would follow.

Taking a proactive approach prior to the emergency listing in early 1993, the City of Colton, the City of Rialto and the County of San Bernardino all members of the Agua Mansa Industrial Growth Association formed a planning committee to determine the feasibility of preparing a habitat conservation plan for the Delhi Sands Fly in anticipation of its listing. This early attempt to prepare a habitat conservation plan prior to the listing was supported by the Service staff. Request for proposals were sent out to various environmental planning firm, and the full Augu Mansa Industrial Growth Association Board considered the funding the of the habitat conservation plan on June 23, 1993. You also, I believe, have a copy of that.

At this meeting, some property owners expressed concerns regarding the cost of such a program. The testimony by Mrs. Linda Dawes, a representative of the Fish and Wildlife Service convinced the board not approve the funding. Ms. Dawes testified that an elaborate habitat conservation plan, as she called it, was not

necessary and that the Delhi Sands Fly issue could work out with effected property owners and the Edison Company. Her testimony influenced the board decision—decision resources to develop a habitat conservation plan, so the properties were left undeveloped. Two individual habitat conservation plans had been completed within the city. These habitat conservation plans took several painful years of study and negotiations with the Service. To date over—and I am saying over 45 acres of industrial zoned land have been set aside. Forty-five acres. Aside for the Delhi Sands Fly preservation within Rialto. The numbers of acres is substantial when compared to the total of acres potentially suitable for habitat within the City limits, which is calculated at slightly over 300 acres of land.

With no governmental or property owner group willing to prepare a comprehensive habitat conservation plan, Rialto adopted a policy that required the property owners to first obtain service clearance before the City would process their development. These owners, developers were sent to talk to the Service, but rarely -but rarely returned to the City to file the projects. The direction that the Service staff gave to the property owners and to the City varied with each new staff member assigned to the Delhi Sands Fly. Since listed various staff members have been assigned to manage the Delhi Sands Fly.

In 1996, the County of San Bernardino proposed a regional multi-species conservation plan that would address threatening and other sensitive plant and animal species, including the Delhi Sands Fly. Each city in the valley contribute funding and staff for this plan. This plan limped along for several years and finally in early 2003 progress was halted. Additional attempts to fund and prepare a habitat conservation plan have been made since 1996. Each one failing due to a lack of funding or other factors, including a basic mistrust of the Service.

In 2003, the Service offered to prepare a habitat conservation plan at no cost to the affected jurisdiction to make this offer valid. All impact cities and County of San Bernardino needed to accept this offer. The offer was rejected by the City of Colton, the City having the most potential habitat due primarily to the lack of confidence in the Service staff.

In 2004, the Rialto City Council authorized the funding of a habitat conservation plan to address the Delhi Sands Fly within our corporate limits and our sphere of influence. This program is a latch ditch effort on behalf of the City to solve the Delhi Sands Fly issue. The draft habitat conservation plan is under review by city staff and should be forwarded to the Service later this fall.

In essence, the City is spending hundreds—and I mean hundreds of thousands of dollars attempting to solve this problem that impacts slightly less—and I mean less than 300 acres of land that we have in Rialto.

In conclusion, I would like to say the Rialto experience with Endangered Species Act and the Delhi Sands Fly listing, and the Service staff has been one of a lack of staff assistance, inconsistencies, frequent staff changes and unjustified policy statements. So, you see we are having the same problem and we have given up 45 acres of land for this fly we do not even see, you do not even know where it is coming from or where it is.

So, with that, thank you.

[The prepared statement of Ms. Vargas follows:]

**Statement of The Honorable Grace Vargas, Mayor, City of Rialto**

The City of Rialto's experience with the Federal Endangered Species Act and the United States Fish and Wildlife Service staff located in Carlsbad, California deals primarily with the listing of the Delhi Sand Flower-Loving Fly. This species was "Emergency" listed by the United States Fish and Wildlife Service in September 22, 1993. (Copy attached). The City received the news of this listing by fax on the same day of listing. The Planning staff was also contacted by telephone by a representative of the Service shortly after the listing and was instructed not to permit the destruction of habitat, by issuing building or grading permits or through discing activities within the impacted area. The Service would not declare "critical habitat" for the Delhi Sands Fly, and therefore no precise area of protection was delineated. The Service's "News Release" referred to sandy areas as habitat, which proved to be too general for practical use (please refer to attached news release). As a result, the City was forced to use older, generalized soil maps prepared in the 1970's as our primarily basis for review. With little assistance from the Service staff, the City merely took an educated guess as to the areas to protect. This was just the start of the confusion and inconsistencies that would follow.

Taking a proactive approach prior to the emergency listing, in early 1993, the Cities of Colton and Rialto and County of San Bernardino, all members of the Agua Mansa Industrial Growth Association, formed a planning committee to determine the feasibility of preparing a Habitat Conservation Plan for the Delhi Sands Fly in anticipation of its listing. This early attempt to prepare a Habitat Conservation Plan prior to listing was supported by the Service staff. Requests for proposal were sent to various environmental planning firms and the full Agua Mansa Industrial Growth Association Board considered the funding of the Habitat Conservation Plan on June 23, 1993. (Copy attached). At this meeting, some property owners expressed concerns regarding the cost of such a program. The testimony by Ms. Linda Dawes, a representative of the Wildlife Service, convinced the Board not to approve the funding. Ms. Dawes testified that an "elaborate" Habitat Conservation Plan, as she called it, was not necessary and that the Delhi Sands Fly issue could be worked out with the affected property owners and the Edison Company (please refer to attached Board minutes). Her testimony significantly influenced the Board's decision not to prepare a Habitat Conservation Plan. Additionally, Ms. Dawes' testimony was in direct conflict with the Service's recommendation to prepare a Habitat Conservation Plan. As a result of her testimony, several months of inter-agency advanced planning were lost and more importantly the momentum to fund the preparation of a Habitat Conservation Plan.

Shortly after the Agua Mansa Industrial Growth Association abandoned the preparation of a Habitat Conservation Plan, a property owner initiated an attempt to prepare an Habitat Conservation Plan which also failed. With no unified attempt to solve this problem, each property owner had to either abandon their attempt to develop their property or develop individual Habitat Conservation Plans. Small property owners did not have the resources to develop a Habitat Conservation Plan, so their properties were left undeveloped. Two individual Habitat Conservation Plan's have been completed within the City. These Habitat Conservation Plan's took several painful years of study and negotiations with the Service. To date over 45 acres of industrially-zoned land have been set-aside for Delhi Sands Fly preservation within Rialto. The number of acres is substantial when compared to the total acres of potentially suitable habitat within the City limits, which is calculated at slightly over 300 acres of land.

With no governmental or property owner group willing to prepare a comprehensive Habitat Conservation Plan, Rialto adopted a policy that required the property owner to first obtain Service clearance before the City would process their development. These owners and developers were sent to talk to the Service, but rarely returned to the City to file their projects. The direction that the Service staff gave to property owners and to the City varied with each new staff member assigned to the Delhi Sands Fly. Since listed, various staff members have been assigned to manage the Delhi Sands Fly.

In 1996, the County of San Bernardino proposed a regional Multi-Specie Conservation Plan (MSHCP) that would address threatened and other sensitive plant and animal species, including the Delhi Sands Fly. Each City in the Valley contributed funding and staff for this plan. This plan limped along for several years, and finally in early 2003, progress was halted. Additional attempts to fund and prepare

a Habitat Conservation Plan have been made since 1996, each one failing due to lack of funding or other factors, including a basic mistrust of the Service. In 2003, the Service offered to prepare a Habitat Conservation Plan at no cost to the affected jurisdictions. To make this offer valid, all impacted cities and County of San Bernardino needed to accept this offer. The offer was rejected by the City of Colton (the City having the most potential habitat) due primarily to a lack of confidence in the Service staff.

In 2004, the Rialto City Council authorized the funding of a Habitat Conservation Plan to address the Delhi Sands Fly within our corporate limits and our sphere of influence. This program is a last ditch effort on behalf of the City to solve the Delhi Sands Fly issue. The draft Habitat Conservation Plan is under review by City staff and should be forwarded to the Service later this fall. In essence, the City is spending hundreds of thousands of dollars attempting to solve this problem that impacts slightly less than 300 acres of land in Rialto.

In conclusion, Rialto's experience with the Endangered Specie Act, the Delhi Sands Fly listing and the Service staff has been one of a lack of staff assistance, inconsistencies, frequent staff changes and unjustified policy statements.

NOTE: Attachments to Ms. Vargas' statement have been retained in the Committee's official files.

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Mr. POMBO. Thank you.

Council Member Gonzales?

**STATEMENT OF THE HONORABLE JOSIE GONZALES, FONTANA CITY COUNCIL MEMBER.**

Ms. GONZALES. Honorable Chair Pombo and honorable members of this Committee, thank you for coming to the City of Fontana and hearing testimony on the Endangered Species Act and its impact on our communities.

The listing of the Delhi Sands Flower-Loving Fly in 1993 as an endangered species has caused considerable adverse impacts to this city's economy, to our citizens' well being. Eleven years have passed and we still do not have a viable plan to save this fly. The U.S. Fish and Wildlife Service prepared a recovery plan in 1997, but it lacked the ways and means to implement said plan.

The recovery plan has been unreal by any stretch of the imagination. And my message to you this morning is please let us get real. Let us get to the point. Let us get somewhere. Let us have some progress. And this—this in fact stretch of the imagination requires the purchase of 1200 acres of land in the City of Colton, Rialto areas in order to turn them back into habitat. This targeted area is in the middle of developed industrial and residential properties. The going rate for one acre of land is anywhere from $100 to $150,000 per said acre. The total cost of the acquired land alone is over $200 million.

Where is this money going to come from? Who knows. We know for a fact that the Federal government does not have this money to help us. So, are we meant to come up with this money? Where is this hypothetical solution to come from? None of us know.

What are the chances that the fly will survive? What is the survivability rate of prognostication? No one knows. Again, hypothetical.

The recovery plan is incomplete because it does not have a business plan. A good business plan would put the recovery plan into a realistic perspective.

Seven years have passed since the plan was adopted and what has been done about it? If the Service is not able in 7 years to put

the plan into action, why should the City of Fontana and any of the other affected cities and property owners be held up and required to comply with said plan?

How has this listing of the fly impacted the Fontana community? I will give you the citizen's perspective since I live and run in my business on this very street before you here in the City of Fontana, which requires me to cross the I-10 freeway any number of times as I go about doing my daily business.

The citizens are frustrated because of the delays they experience in having to get on and off and to cross the freeway. The delays are caused by this imaginary fly that, I know for a fact, the majority of us in this room have never seen.

It took years for Fontana to get a green light to go ahead with the construction of the Sierra, the I-10 and Sierra interchange after the design right-of-way. And even the funding—and even after the funding was in place. The delay affects many people's lives. It affects citizens, business, police, fire personnel and other emergency services. We are still experiencing the delay, particularly at the I-10 Citrus, I-10 Cherry interchanges. So, the story is being repeated where we are held hostage for a perceived fly impact.

It is also almost a year now that environmental experts have determined that neither the Citrus nor the Cherry interchange projects have any impact on the fly, yet there is no formal written determination that these projects are cleared. Why? We are afraid to make decisions. How do we justify said delays? That is why we are here before you.

And most of all, as was mentioned before, what are the economic impacts to the growth of this community? We request that the United States Fish and Wildlife Service clear our projects, particularly on I-10 Cypress, I-10 Citrus and I-10 Cherry that we may proceed with the construction plans to provide safe and proper traffic handling in our community.

Our people and the goods movement depend on these freeway access and overcrossing projects in order to comply and meet the demands within our community.

Thank you very much for allowing us to come before you, give this heartfelt testimony. We live with the everyday frustrations of having our constituents come before us and ask us the ridiculous questions with us being befuddled as to how do we respond with even more ridiculous sounding answers. It is imperative that the intent to go forward be arrived at. There is no other way to that as we sit here this morning before you there are people all over the Inland Empire preparing, I say this in the form of landlords, property owners, to either rent or sell properties to the people who are out there picking up their U-haul trucks getting ready to move into the Inland Empire this very weekend. There is nothing that you can do about it, just as there is nothing we can do about it. But the end result will be that come Monday morning we will be having more people looking for a job, looking for a local place to shop, looking for property than we do at this very minute. We cannot continue to carry this burden that is imposed upon us by these fickle, unknown impositions that ESA has somehow come to a conclusion and feels that we must be entangled with and the lack of efforts to disentangle us from it.

I will simply close by saying that I had the privilege of sitting with the late Congressman George Brown at one of his endangered species meetings that he had here across the way at our police department. And that the end of that meeting I looked over and I spoke to George, he was sitting immediately to my right, and I said "George, what do you think?" And he said "This is a mess." He says "It is a complete mess."

As we walked out, the reporters came to the door and immediately huddled around him and said "Congressman, what do you think? What is your opinion? What progress do you think was made at this meeting today?" His answer, as many many times he had a way of speaking was very simple. He said "Today was a lesson in frustration." That lesson is still being dealt to each and every one of us on a daily basis as we sit in the over crowded freeways we now call parking lots.

With this, I say thank you for coming out and listening to us. Please help us.

I want to say thank you to Congressman Joe Baca because all of these cities that are here before you are within his District, and we have no one else but him to help us to open the way to find a resolution to solve this problem.

Thank you very much.

[The prepared statement of Ms. Gonzales follows:]

**Statement of Josie Gonzales, Fontana City Council Member**

Honorable Chair Pombo, and honorable members of the Committee. Thank you for coming to Fontana and hearing testimony on the Endangered Species Act, and its impact to our community.

The listing of the Delhi Sands Flower-Loving Fly in 1993, as an endangered species has caused considerable adverse impact to the City's economy and to our citizens' well-being. Eleven years have passed and we still do not have a viable plan to save this fly. The U.S. Fish and Wildlife Service prepared a recovery plan in 1997 for the fly, but it lacks the ways and means to implement the plan.

So, my message this morning is simple: "let us get real." The recovery plan is unreal by any stretch of the imagination. It requires the purchase of 1,200 acres of land in Colton, Rialto, and Jurupa areas, in order to turn them back into habitat. This targeted area is in the middle of developed industrial and residential properties. The going rate for one acre of land is $100,000 to $150,000 per acre. The total cost to acquire the land alone is about $180 Million. Where is this money coming from? Even if the Federal Government had the money, what are the chances for the Fly species to survive?

The Recovery Plan is incomplete because it does not have a business plan. The business plan would put the Recovery Plan into perspective, into reality.

What has the Service done to implement the Plan? Seven years have passed since the Plan was adopted, and what has been done about it? If the Service is not able in seven years to put the Plan into action, why should the City of Fontana and property owners be held up and required to comply with the plan?

How has the listing of the Fly impacted the Fontana community? I will give you the citizen's perspective, since I live and run my business in Fontana, requiring me to cross the I-10 Freeway a number of times every day.

The citizens are frustrated because of the delays they experience in having to get on, off, and across the freeway. The delays are caused by the fly. It took years for Fontana to get a green light to go ahead with the construction of the I-10/Sierra Interchange, after the design, right of way, and even the funding was in place. The delay affects many people's lives. It affects citizens, businesses, police, fire personnel and other emergency services.

We are still experiencing the delay, particularly at the I-10/Citrus and I-10/Cherry Interchanges. So, the story is being repeated, where we are held "hostage" for a perceived fly impact.

It is almost a year now, that environmental experts have determined that neither the Citrus nor the Cherry Interchange projects have any impact on the fly. Yet,

there is no formal, written determination that these projects are clear. Why? Are we afraid to make decisions? Do we weigh the delay costs to the community?

We request that the U.S. Fish and Wildlife Service clear our projects, particularly the I-10/Cypress, I-10/Citrus and I-10/Cherry projects, so that we may proceed with the construction plans to provide safe and proper traffic handling in our community. So, much of our people and goods movement depends on these freeway access and overcrossing projects.

Thank you for taking my testimony, and we look forward to realistic plans that do not cause adverse impacts to our community.

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Mr. POMBO. Thank you.

Unfortunately, listening to all of you testify here this morning, this is not the first time or Joe or George have heard this from local officials. This is something that has gone on predominately throughout the west. It is something that we are all dealing with, and it does not matter if it is my District or George's District, we hear our mayors or city council members with the same frustrations in trying to deal with this law and its implementation.

Just as, I guess to clarify this for myself, do any of you feel like we should repeal the Endangered Species Act or that there is no need to have an Endangered Species Act in this country?

Mr. NUAIMI. I don't think any of us think that you need to repeal the Act if it was managed to truly protect species of value to this nation—to the people of this nation. But I think what the original intent of this Act and what is being played out today on the front lines of this battle I do not think the two are in line with one another. The original intent was to protect those species that held value to the history of this country and history of the region and it is being used, as has been expressed by many, as a hammer to stop development or to extort money out of development.

Mr. POMBO. All right. I think that is a very important point that you bring up, Mr. Mayor. Because one of the criticism that this Committee often hears is that there is very little concern paid to endangered species and that all we are attempting to do is to gut the Act or eviscerate the Act or repeal the Act. And I think those that say that do not spend a lot of time actually listening to people like you or the other mayors or council members who have testified here this morning about what some of the problems are.

I would like to ask you, Mayor Nuaimi, you talk about the mitigation and the cost in terms of development to your city. How do you budget for something like that? You know, the State of California does not have money, the Federal government is running a huge deficit. I would guess that even if your city is run extremely well, that you do not have a huge surplus.

How do you budget for that if you are going to provide economic development for the future in your city?

Mr. NUAIMI. You really do not budget for it. You cannot budget for it. It is an unknown as to the extent of the resources needed. Unfortunately, we are forced to tackle these case-by-case, issue-by-issue.

In the case of the Empire Center that was referenced in Congressman Baca's opening statement, that has been a 10-year gauntlet that we have gone through. And through that process, we had bond holders whose bonds went into default. We had the City forced to acquire the land to bring a resolution. We ended up put-

ting $5 million at risk with really no solution readily available. And then it took us an additional 2 1/2 years after that to continue through this negotiation.

Just in that one project alone, one 400 acre development that had 1 1/2 acres of habitat that actually had three flies sited on it, we ended up having to set aside, as I mentioned, 30 acres. And it took us countless years of protocol surveys, countless years of negotiation back and forth because there was not a clear prescription.

I can budget if I know what the prescription calls for. But when the prescription is it is going to change from staff member to staff member or it is going to change from project to project, you cannot budget for it. You grin and bear it and you absorb the costs and, unfortunately, they have been considerable. They have been to the tune of $100,000 a month of debt costs that we had to bear on the Empire Center project. It came to all the engineering designs that we had to do, all the redesigns, all the survey assessments. And then we started dealing with Army Corps of Engineers. It just mushroomed out and continued to mushroom.

And I cringed actually to go back to our staff and say how much exactly did we spend on this, because it has been an ongoing process for years.

Ms. GONZALES. I would like to add something to that. As the population growth has impacted us over the said years within the impacts of the ESA, we have been forced to have a lower quality of life. And when we reached a level that we could no longer permit, we were forced to impose a utility user's tax upon our residents in order to bring in revenue that would bring up the standards for community safety programs.

Everything has to give. If you squeeze here, it gives somewhere else. So, what had to give was the quality of life that we were trying to provide for our residents. And that continues to be the case. We are on the south side of our utility user's tax. We have just eliminated the tax for the residents. We are now on the latter 50 percent 5 years left of the business imposed utility tax. When that goes, and this has not been solved, once again we will have to look to our residents to find some kind of relief.

So, there is a continual negative ripple effect that just comes down the scale and it ends up in the lap of our residents.

Mr. POMBO. Mayor Vargas, there was something in your testimony that I wanted you to expand on. You talked about telling developers that they had to get a sign-off from the Fish and Wildlife Service first and they would come in and talk to you about projects and that they then had to go to the Fish and Wildlife Service. And they never or rarely came. And is that because the cost of complying is too high or the amount of time that it would take to get the Fish and Wildlife Service to sign off is too long, and that is why they are not coming back to you and the City and saying these are the jobs or the housing that we want to bring to your city?

Ms. VARGAS. You are absolutely right. Some of the developers or even the owners do not want to pay that high fee they have to pay in order to develop or anything. So, they just come back or they do not come back or they just call and just they are not going to do it.

So, we in our city also are experiencing the same thing that the other cities, the surrounding cities are experiencing. You know, the lack of development, the lack of the safety.

We, too, at the City of Rialto just passed a utility tax also for safety. And we are doing almost what every other city is doing also.

So, but the person that can tell a little bit more on that would be, if you permit me to call our planning department, because he deals a lot with that. He is right here.

Mr. POMBO. I would like to have him answer for the record, if possible. Answer in writing if possible.

Ms. VARGAS. OK.

Mr. POMBO. And you can give me a little bit of an idea. Because this is one of the problems that we have seen in other communities is that the Fish and Wildlife Service does not tell them no, they just make it so expensive or take so long that they cannot ever do it. So, they are not actually being told no, they just make it impossible for them to comply.

Ms. VARGAS. The expense is too large for some of the owners. Normally what we do on the south end of town where we have the development and also the—some of the owners up in the south end of land cannot develop because of that, because of the fees being high or they just forget us, we are not going to do it. And sometimes we do not even hear. We do not hear.

Mr. POMBO. Thank you.

Mr. Baca?

Mr. BACA. Thank you very much, Mr. Chairman.

First of all, before I ask the question, I would like to acknowledge a couple of people in the audience that are here right now.

First, I would like to acknowledge those who are very much concerned with this issue, the impact scenario, because they represent this area, and that is from Senator Soto's office, Frank Stallworth is here in the audience.

And then the next possible assembly person for the 62nd Assembly, and that is Joe Baca, Jr., who is in the audience and care very much about this.

I am sure there are other individuals, but I want to acknowledge both individuals that care very much about the hearing and what is going on and its impact in the area. Because when you look at this immediate area compared to the other assembly areas, the supervisors areas, and Congressional areas, it is the lowest economic area in this whole valley. And a lot of it has been because of the fly. It has not allowed us to develop to grow in their immediate area. So, it makes it very difficult when we, the mayors, the city council people, supervisors, the assembly persons, are trying to fight to change this to improve the quality of life, so this way we can be just as competitive other than a residential area to create jobs. That has hindered some of the growth in development in the area.

With that, I would like to ask any one of you four a question, and I am sure that you may have indicated, since 1973 since the Delhi Sands Flower-Loving Fly was declared an endangered species, and we know that it comes once a year, it comes out in July and August, it only lives 2 years if it does live that long, have any of you ever seen this fly?

Ms. BENNETT. Congressman Baca, the City of Colton is what the Fish and Wildlife Service calls ground zero for the fly. And in all the time I have been out to that area, we have taken people on tours, we have toured the area personally with our staff, I have not seen a Delhi Sands Fly.

Mr. BACA. Mayor Nuaimi?

Mr. NUAIMI. No. The only time I have seen it, and you refer to it as a fly swatter, is actually your little token of our appreciation, it is a T-shirt with a Delhi Sands Fly. This is the only one I have seen in Fontana of late.

Mr. BACA. An artificial fly, but no real one?

Mr. NUAIMI. No. We are effectively prevented from going anywhere near the habitat because of fear of disturbance. So, the only evidence that we have seen is through the habitat surveys that are conducted for the developers. As the Chairman was asking what makes developers go away, it's a 2-year protocol survey where they have to go out, pay a biologist to go out and sit in the weeds for 6 weeks during the summer and then come back and do it again the next year. That is one of the things. Those are the only folks who have seen them.

Mr. BACA. Mayor Vargas?

Ms. VARGAS. I have never seen it. The only time I have seen a picture of it was in some literature that was given me so I would learn all about this beautiful fly we talk about.

Mr. BACA. Council Member Gonzales?

Ms. GONZALES. Have never seen said fly. And I will tell you that in the south end, because in the past has been primarily poultry and we have got chicken farms out there, we do quite a bit of spraying with vector control. And of late, with the West Nile Virus situation being as serious as it is, we have increased our vector control spraying.

And I will tell you that unlike ourselves who have the power of vision, the spray will kill everything including the fly. So, if in fact there was ever anything there, I am hard pressed at this time to tell you that the spray if it killed the mosquitoes and kills the flies as a result of the chicken farm, I am sure it also killed the Delhi Sands Flower-Loving Fly.

So, I thank you for asking me.

Mr. BACA. And yet in this immediate area—just between two cities and the possibility of Colton—how many acres have been reserved? It was mentioned by Mayor Nuaimi that 30 acres have already been reserved just for the City of Fontana and 45 acres for the City of Rialto. That is 75 acres that have been set aside for a fly that we do not even know exists or is even alive. And I do not know if anyone has seen it. So, we look at the value in cost and the quality that could be improved, and in Colton itself when we talk about Colton, we have problems in this area with the West Nile in the immediate area. We have had death in the immediate area. To me a life is very important and yet we talk about the storm drain in the immediate area. Well, as you know that when they cultivate to that area, what impact has it had, Mayor Bennett, in that immediate area because it has hindered additional growth and development. And I know that we have brought in Federal dollars to deal with the storm drain because in that area we talk

about emergency services, going to the hospital, access to the hospital, as well. Could you elaborate a little bit more on that?

Ms. BENNETT. We did not quantify the number of acres that are put into a habitat this time, because our entire development on the west side has been halted. We have not been able to bring any development and we have several projects that have come, had an interest, found it was impacted by the fly and left the area.

One of the projects brought over 600 jobs to the area, which to me was significant. You cannot quantify that.

The fly has hindered our ability to provide safety measures. During the winter months when the rains come, the I-10 freeway and Valley Boulevard where the hospital is located floods and makes it difficult for emergency services to arrive at the hospital.

As I stated in the testimony, we have recently found a pocket that is impacted by the flooding and the water that is sitting over there that contained West Nile Virus. And so many flies that the vector control was flabbergasted that this is allowed to go on. The owner of the proper was cited because they had not taken care of that area. And they also sprayed in that area, which as Council Member Josie Gonzales stated, would kill more than just the mosquitoes. It is right in the heart of the Delhi Sands area that this was located. And it has been a major detriment to our community.

Mr. BACA. That is why I think it is so important in terms of scientific data, because we do not even know if this fly is currently alive or where it is at right now, or where it has moved to based on winds and the Santa Anas.

Let me ask one additional question. Obviously, the issue has an impact on each of you personally and for those who run the city. What about the residents of each city, is there something that residents are talking about? I just wanted to give the Committee the idea of how big a deal the fly is to people's daily lives and how often you hear about it from the residents. Because, you know, you are hearing it yourself because you are dealing with developers, you are dealing with people, you are trying to improve the quality of life in the area. But what about the residents in the area, do you hear?

I'll leave it to anybody who would like to—Mayor Nuaimi, would you like to start with that?

Mr. NUAIMI. Well, you say how often do you hear about the fly from the residents. Frankly, we hear about the impacts the fly has on the community, but they do not talk about a fly. They talk about "I live south of the 10 freeway yet I cannot get north of the 10 freeway!" The I-10 freeway divides south Fontana from the core of Fontana. Sierra I-10 is the only new transportation improvement that has been completed, again with 2 years of delay.

We have at least four additional projects all being held up because of the environmental that we have to survive because of potential secondary impacts on habitat. And again, as I mentioned, you look at the historic map in south Fontana and you look at the areas that are orange. And then you will see the circles that go along that freeway. Those circles are the freeway interchange projects. There is no sand around them. Why would our environmental process be held up because of potential impacts to sand to

habitat that when you really take a look at the map, it is already developed. There are homes there already.

So, that is what residents hit us up on. Where are jobs? When is a grocery coming? When is a gas station coming? When are jobs coming? Why is there this vacant field? Why can I not get over the I-10 freeway? All of those are the types of impacts that we hear on a daily basis.

And I know our community gets sick of my having to tell them well we are held up 3 years now in our environmental process for our freeway interchanges because Federal highway mandated it to respond to the Fish and Wildlife Service concerns that we do an extended study on secondary impacts. They do not want to know that. They do not care about it, but they want the freeway smoother. They want to be able to get in and out of our community more effectively. They want jobs and commercial development. And they do not want to hear that a two-inch fly that comes out for 2 weeks mates and dies, effectively, that that is what is holding this up.

And what is really frustrating when you tell residents that the actual recovery plan that was approved in 1997 on page 1 part of the introduction says the Service considers this species to have a high degree of threat and low potential for recovery, and we are seeing hundreds of millions of dollars of impact to this region for a low potential for recovery that was documented in 1997. This is Federal bureaucracy run amuck and it just does not leave a good flavor in the mouths of residents.

Ms. BENNETT. Honorable Congressman, may I add to that?

In the packet that we have handed out, there are pictures of our area. Our residents see on a daily basis the impacts of the fly to our community. Slover Avenue is littered with debris, and the residents what we hear continuously is complaints about how this detracts from our city and how they are ashamed that our city has allowed this blight to continue without addressing it.

Mr. BACA. Nobody can get in there, right?

Ms. BENNETT. The only way that we could get it there is if it is removed by hand. And the Fish and Wildlife Service has said that they wanted to have a biologist onsite while we do that.

It would be cost prohibitive for us to send our staff out there without their equipment to remove the debris, the tires, the furniture, the beds, whatever that has been thrown out there by hand.

Mr. BACA. Do they have some kind of detectors that go along like a mine, you know, you find it is going to step on a mine and it explodes? Find out if there is a fly there, you might step on it?

Would anybody else like to comment?

Ms. GONZALES. I would like to add just briefly to Mayor Bennett's situation. I am also aware of the young kids going out there on the weekends, throwing parties. They take their own mattresses, their own couches. They sit on them. Have a good time during the night. Before they leave, they pour lighter fluid on them, set them on fire. And they are gone and the City is left with the ability—or should I say—the inability to clean it up.

The other thing I will tell you, you asked earlier about how we look at this. Let me tell you that in my opinion special interests groups have attached themselves, have latched on to the ESA as a form of receiving notoriety, as a form of accumulating power that

will otherwise disappear if some common sense were to be injected into this situation.

I also know that these special interest groups come out into our community and to many of the hearings that we have, and beat us over the head ESA until we feel guilty, until we become someone is looked upon as a negative element within the community as the ecological process and workout plan of this whole environment is trying to come to an end.

I will tell you that I do not believe for one moment that any of us here want to see the disappearance or the extinction of any species. However, we also need to take into consideration that over the many billions of years that this earth has been in existence, prior to us humans even coming into the picture, there are species documented that became extinct through no help, through no negative contribution from a human.

I believe that there is a natural ecological evolution that takes place. Some species must become extinct in order for others to come on board. And I will say that I fear that on that scale we as humans are soon to be very, very much impacted because we are being extinct in this matter because we are giving the prioritization to an insect over ourselves.

Mr. BACA. Mr. Chairman, I know that I have taken a little bit more of my time, but if I can ask just one question.

How much easier would it be to negotiate a habitat conservation plan if the Fish and Wildlife Service center was located closer to Carlsbad? Because we know time is money and we know that each one of you basically in your testimony indicated that the lack of response during that period of time has caused additional litigation that hes cost us growth and development. And you continue to grow in population. Can you talk about all the problems—population and the growth and the need? But would the part be better served if an office was already located here, since this is where the growth is? And would any one of you like to tackle that? If you are able to go to someone and respond if someone who wants to develop or grow in the immediate area?

Ms. BENNETT. Congressman, from Colton's perspective we have highly frustrated by this whole situation and working with the Carlsbad office. We at one point did ask to be relocated to another office hoping that we would have better success rate.

If you brought an office out to us, we are not opposed to trying to work with them. But as I stated earlier, our history with them has not been very successful.

Mr. NUAIMI. I would suggest that a local presence here would afford better access and there would be greater accountability. If you do just that, I am fearful that the process will still—the process is still broken, it does not matter how close they are. We will still end up going to Washington, D.C. to try and find resolution. And that, unfortunately, is our reality. We end up going to Washington to try and bring forth solutions that a local field office should be offering us.

I think it would be helpful to have local residents who are staffing those offices recognize that the Inland Empire is not Carlsbad. The ecosystem in the Inland Empire is not the same as the ocean. And that we do deserve economic development opportunities and

job opportunities in the Inland Empire as well. I think it would help with the responsiveness, but you still also need to break—you probably need to break the process and rebuild it.

Mr. BACA. Mayor Vargas?

Ms. VARGAS. Yes, I do feel the same way because it is like everything, you know, Fontana has a water department here and I have to come from Rialto to pay it. So, it is closer. Instead of mailing, I would come over here to Fontana and pay it.

And I think that goes the same for the Service department, it would be a little bit more local and maybe communication is also, which I believe is very crucial, that we need to have good communication with them, especially with the owners—the owners that do have land that they want to develop.

And maybe when you come to one-to-one face, they understand the system better or they can explain better to them, where maybe possibly we could do something and get that land developed.

Mr. BACA. Thank you.

Ms. GONZALES. I also believe that it is very important that in the process of considering such a move that the correct person, the right person be hired to man said office. Many times the arrogance and the distancing of the person in charge is what leads to the miscommunication, leads to the lack of participation and the lack of interest.

Mr. BACA. Thank you.

Mr. POMBO. Mr. Radanovich?

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. Nuaimi, I have a couple of questions about your map up there because it is interesting. And you had mentioned that the only part of undeveloped, the only portion that is undeveloped in the Delhi Sands profile, are the orange areas?

Mr. NUAIMI. The areas that are orange are those areas within the historical profile that actually have sand in place, where there is actual sand habitat in place.

Mr. RADANOVICH. OK.

Mr. NUAIMI. The rest is what folks at the Fish and Wildlife Service would consider to be restorable habitat. And by restorable you get to truck in sand to rebuilt a habitat.

Mr. RADANOVICH. And that is the beige area the remaining, not the orange areas?

Mr. NUAIMI. That is correct. The beige area and when you look at that beige area, much of it is developed. There is a significant chunk in the middle right hand portion which you will see Empire Center, that is the 400 acre project that we just negotiated. So, all of that will be developed. So, you look in, this is what is referred to as the recovery unit. There effectively are no areas or very minimal areas that are developable as habitat. And yet we still have to go through additional environmental processes for freeway interchanges.

Mr. RADANOVICH. But if the U.S. Fish and Wildlife Service were to set aside land for the fly, it would probably be those orange areas, if I am right?

Mr. NUAIMI. Well, that is not what they were asking for.

Mr. RADANOVICH. No, no.

Mr. NUAIMI. Yes.

Mr. RADANOVICH. But if they were to set aside land, it would be the orange areas because it is habitat now, right?

Mr. NUAIMI. It is sand. It is not inhabited necessarily, and this is where you get the crux—

Mr. RADANOVICH. It is suitable habitat, yes.

Mr. NUAIMI. It might be suitable, but there may be no populations. Frankly, they do not know where the populations exist because unless an developer goes to develop, you do not do the protocol survey.

Mr. RADANOVICH. Right. OK. And I am sorry I do not know the area very well, but you are ratio of one area to 30 acres for habitat. Has that 30 acres been designated and is that part of those orange areas?

Mr. NUAIMI. Yes. Can I go up to the map and show you?

Mr. RADANOVICH. Yes.

Mr. NUAIMI. Thirty acres comprises this area down here in the southern tip. It is part of our South Ridge community, which is all residential. This area was originally planned to be residential. Protocol surveys were done. They found flies. And it is immediately adjacent to Riverside County area where habitat has been set aside as well.

Mr. RADANOVICH. Yes.

Mr. NUAIMI. So, we ended up going through a transaction where we own this land. We traded this land for that land. And then land was set aside for conservation purposes.

Mr. RADANOVICH. OK. Does that not conclude the big fly issue. This is a two-inch fly?

Mr. NUAIMI. It is a two-inch fly. That concludes the fly issue for the Empire Center because all of this transaction was for one project.

Mr. RADANOVICH. OK. All right.

Mr. NUAIMI. It still does not conclude, although when you look at that you say well that is all the orange areas in Fontana, yet our engineering staff still have to go through additional environmental process for all of those circles along the I-10 freeway. And, again, look at the expanse. The area is developed.

Mr. RADANOVICH. Yes. Interesting. All right. Thank you.

Those are my only questions. I appreciate it. Thank you.

Mr. NUAIMI. OK.

Mr. POMBO. Well, thank you very much. This panel has been very informative for us. I guess the only additional thing I would say to you is that you all talked about the cost of this mitigation, which is somewhat intriguing to me because if you happen to own that land that you cannot develop and if they say there is flies out there you cannot go out there, and that land, comparable land may be worth $150,000 an acre, but the Fish and Wildlife Service just made that land worthless. And whoever ended up owning that land, whoever the poor sucker is that has that has had the entire thing taken away from him, because that land is not worth anything anymore. Because they told you you cannot develop it and you cannot even walk on it unless they send a biologist with you. And to me that is an outright taking of property when that happens. So, that is something that I think we, and I know Joe and I have talked about this before, it is something that we are going

to have to deal with in some way because that is a taking. And you have taken away the value of somebody's land by doing that.

You also have in the process driven up the cost of all of the surrounding lands. And I am sure you are as concerned about affordable housing as we are in my area, and that has just become a thing of the past.

But I want to thank you all for your testimony. If there is any further questions that any of the members of the Committee have, they will be submitted to you in writing. If you could answer those in writing so that they could be included as part of the hearing record, I appreciate it.

And thank you again.

Mr. NUAIMI. Thank you again for joining us.

Ms. GONZALES. Thank you for coming out.

Mr. POMBO. I would like to call up our second panel. We have Mr. Roy Denner, President & CEO, Off-Road Business Association; Mr. Robert Thornton, who is an attorney; and Dan Silver from the Endangered Habitats League.

I'd like to have the three of you stand and raise your right hand, please.

[Witnesses sworn]

Mr. POMBO. Thank you.

Let the record show that they all answered in the affirmative.

I want to welcome all of you to the Committee hearing.

We are going to begin with Mr. Denner.

**STATEMENT OF ROY DENNER, PRESIDENT & CEO, OFF-ROAD BUSINESS ASSOCIATION**

Mr. DENNER. Good morning. My name is Roy Denner. I want to thank you for allowing me to speak to you today.

I am an off-highway vehicle advocate and for more than 40 years I have enjoyed this activity, often with four generations of family members, much of the time within the Inland Empire. I have watched the interpretation and the enforcement of the Endangered Species Act erode OHV recreation activity significantly across the United States. And I am here to echo a previous comment; enough is enough!

When the Endangered Species Act was enacted in 1973, we all believed it was a good thing. Most of us recognized the need to provide protection for some of the magnificent creatures in this country whose population was declining. Then in 1994 California was subjected to a major impact on how public lands can be used with the passage of the California Desert Protection Act. Millions of acres within the California desert and within the Inland Empire were set aside as wilderness. Being naive at that time about the environmental movement and the political process, many of us bought into the idea that we were still being left with plenty of public land for activities like recreation and cattle grazing. After all, we are environmentalists, too, and it is only appropriate that species that had been properly identified as threatened or endangered be provided reasonable protection. Besides, we were told that Congress intended that this would suffice for protection of desert species in California.

Then the environmental movement shifted into high gear. Over the past 10 years 1300 species of plants, insects and animals have been listed as threatened or endangered under the ESA and only a few have ever been actually removed from the list, and several of those have actually become extinct. Every day environmental organizations are petitioning to list more and more species. The U.S. Fish and Wildlife Service makes listing decisions based on "the best science available." Maybe no more than the opinion of a staff biologist.

The result of this frenzy of activity is that the Federal agencies are so busy defending themselves against lawsuits about environmental organizations who use the ESA as a weapon rather than as a tool that they do not have any resources available to actually work on recovering species. This has led to the closure of millions of more acres within the California desert and within the Inland Empire resulting from lawsuit settlements directed by the courts to satisfy claims under the ESA; a perfect catch 22 situation.

Federal agencies manage millions of acres of public lands within the Inland Empire. The BLM has developed new plans for the areas it manages that are actually environmental impact statements providing protection not only for listed species, but for species of concern and special status species. The new BLM's plans identify at least 18 endangered species, at least eight threatened species and at least 80 sensitive species or species of concern that exist within the Inland Empire.

The entire CDCA was managed under this plan for over 20 years. In a misguided effort to avoid future lawsuits, the CDCA has been divided into five separate planning areas, each of which have their own plans, EISs, of two volumes each that look like this. That one is for the Northern and Eastern Mojave plan which has much of its planning area lying within the Inland Empire.

The Department of the Interior's new budget includes not one cent for the implementation of these plans. After a few years of no action on the part of BLM to implement their own plans, the environmental extremist groups will have a field day with new lawsuits against the BLM and the Fish and Wildlife Service. The only available action to the BLM without resources to implement plans will be emergency closures to public access.

I predict the public lands managed by the BLM within the Inland Empire and across the entire California desert will be closed to all but foot traffic within 5 years unless the demands and the interpretation of the ESA change dramatically.

The primary species driving the requirements of these BLM district plans is the Mojave Desert Tortoise. Millions of acres have been closed to many public uses to support the 1994 Desert Tortoise recovery plan, a plan that according to the tortoise experts who drafted it had very little science to support it. They inserted a requirement into their own plan that it needed to be reviewed and updated within three to 5 years when hopefully better science would be available. Here it is 10 years later and restrictions to public land use continues to be implemented to accommodate the Desert Tortoise recovery plan. Good sound peer reviewed science is still not available regarding the tortoise. This is typical of most of

the species that are listed under the ESA that are impacting land use nationwide.

The Desert Tortoise also provides a good example of the impact of the ESA requirements to designate habitat for species. Four million acres of tortoise habitat have been designated in the California desert, all on the notion that this will save the tortoise. A recent ruling by Federal Judge Susan Illston eliminates permits for cattle grazing and OHV use in tortoise habitat. In the meantime, baby tortoises are being killed by the hundreds by a raven population that has doubled over the last 10 years. No action has been taken to date to reduce the raven population because of a Federal Bird Protection Act.

The tortoise is also dying off from a deadly and highly contagious upper respiratory track disease. Very little research is being done on this disease problem. It is much easier to blame to OHVs and cattle grazing and eliminate those activities from species' habitat. That sort of thing is happening nationwide to satisfy ESA requirements.

It is extremely important that Congress get behind Congressman Dennis Cordoza's Critical Habitat Reform Act, H.R. 2933. This is an important first step in the right direction to alleviate a serious problem.

The San Bernardino National Forest lies totally within the Inland Empire. The actions by the Forest Service over the last 10 years to protect the forest have actually made things worse. All logging and thinning of tree growth has been terminated, logging roads, fire roads and recreation routes have been closed and blocked off. Clearing of brush around private property has been restricted. As a result a forest fire last year threatened to wipe out the resort towns of Big Bear and Lake Arrowhead. Many threatened and endangered species were destroyed in that fire. This is a perfect example of how actions taken in the name of the ESA can actually cause a decline in the population of species. Fortunately this year the President signed into the law the Healthy Forest Restoration Act. This Act allows some logging and some prescribed burns, but it is not enough. Many roads and trails are still blocked off to recreational vehicles, which also blocks them off to fire trucks. More vehicle access in the forest will actually improve forest health.

Congressman Walden's Sound Science for ESA Planning Act is a bill that will help stop the misuse of the ESA. The simple process of demanding that land use decisions be supported by good peer reviewed science will eliminate many of the inappropriate land use actions by Federal agencies that are costing taxpayers and the American economy billions of dollars every year. It is extremely important to every person who uses public lands that Congress works very hard to turn Walden's bill into Federal law.

My written testimony elaborates on the issues that I have covered here briefly today. We look forward to seeing Congress fix the ESA.

Thank you for listening to my plea.

[The prepared statement of Mr. Denner follows:]

**Statement of Roy Denner, President & CEO,**
**Off-Road Business Association**

*I. OVERVIEW—ESA AND THE INLAND EMPIRE:*

In addition to the major population areas of San Bernardino, Riverside, and Palm Springs, the area known as the Southern California "Inland Empire" includes a huge portion of the California Desert District as well as a section of the San Bernardino Mountains. Within this geographic area, there are a significant number of plants, animals, and insects that are listed under the Endangered Species Act as "threatened" or "endangered". The listing of these species, and the efforts to protect species that are not listed, have caused a major impact on the public use of public lands within the area. Federal Agencies involved with managing the public lands within the Inland Empire include the Bureau of Land Management (BLM), the National Forest Service (NFS), and the National Park Service (NPS).

Three distinct BLM planning areas can be found in the Inland Empire.

- The entire 1.2 million acre Coachella Valley Planning Area lies entirely within the Inland Empire. This planning area contains Palm Springs, Palm Desert, and Indio and runs east, along Freeway 10 to the Chocolate Mountains. The BLM manages 330,516 acres (about 28%) of the land within the Coachella Valley area. This BLM plan has been approved and is being implemented.
- The southeastern portion of the BLM's Northern and Eastern Mojave (NEMO) planning area from Baker to Needles also lies within the Inland Empire. This BLM plan has been approved and is being implemented.
- About 70% of the 9,359,000 acre West Mojave (WEMO) planning area lies within the Inland Empire. 3,264,000 acres of public lands within the WEMO area are managed by the BLM.

So, the BLM is responsible for managing millions of acres of public lands within the Southern California Inland Empire.

The entire San Bernardino National Forest, including the popular resort cities of Lake Arrowhead and Big Bear, are located within the Inland Empire. These mountain lands are managed by the National Forest Service.

The entire Joshua Tree National Park, managed by the National Park Service, lies within the Inland Empire.

The 271,000 acre Santa Rosa and San Jacinto Mountains National Monument lies within the Inland Empire. Part of the Monument is in the San Bernardino National Forest and part is in the BLM's Coachella Valley management area.

*II. FEDERAL SPECIES WITHIN THE INLAND EMPIRE:*

The species below are listed in the categories shown in the BLM land management plans overlapping the Inland Empire and in the San Bernardino National Forest (SBNF) plans. Many more species have been proposed for listing and are not included herein.

- Federal Endangered Species:
  - * Amargosa Niterwort
  - * Amargosa Vole
  - * Arroyo Toad
  - * California Brown Pelican (SBNF)
  - * California Condor (SBNF)
  - * Coachella Valley Milk Vetch
  - * Desert Pupfish
  - * Desert Slender Salamander
  - * Least Bell's Vireo
  - * Mojave Chub (SBNF)
  - * Peninsular Ranges Bighorn Sheep
  - * Quino Checkerspot Butterfly (SBNF)
  - * San Bernardino Kangaroo Rat (SBNF)
  - * Shay Creek Unarmored Threespine Stickleback (SBNF)
  - * Southwest Willow Flycatcher
  - * Triple-ribbed Milk Vetch
  - * Unarmored Threespine Stickleback (SBNF)
  - * Yuma Clapper Rail
- Federal Threatened Species:
  - * Ash Meadows Gumplant
  - * Bald Eagle (SBNF)
  - * California Red-legged Frog (SBNF)
  - * Coachella Valley Fringe-toed Lizard
  - * Coastal California Gnatcatcher (SBNF)
  - * Desert Tortoise

* Inyo California Towhee (FWS)
* Spring-Loving Centaury

- Federal Sensitive Species/Species of Concern
  * Amargosa Canyon Speckled Dace
  * Amargosa River Pupfish (BLM)
  * Arroyo Chub (SBNF)
  * Banded Gila Monster
  * Bendire's Thrasher (BLM & FWS)
  * Black Milk Vetch
  * Burrowing Owl (BLM)
  * California Gray-Headed Junco (FWS)
  * California Leaf-Nosed Bat
  * Coachella Valley Giant Sand Treader Cricket
  * Coachella Valley Jerusalem Cricket
  * Coastal Rosy Boa (SBNF)
  * Curved-Pod Milk Vetch
  * Darwin Mesa Milk Vetch (BLM)
  * Darwin Rock Cress (BLM)
  * Death Valley Beardtongue
  * Death Valley Round-Leaved Phacelia (BLM)
  * Death Valley Sandpaper Plant
  * Desert Bighorn Sheep (BLM)
  * Ferruginous Hawk
  * Flat-Tailed Horned Lizard (Proposed)
  * Foothill Yellow-Legged Frog (SBNF)
  * Forked Buckwheat
  * Fringed Myotis
  * Geyer's Milk Vetch (BLM)
  * Gilman's Milk Vetch
  * Gray Vireo (BLM)
  * Hanaupah Rock Daisy (BLM)
  * Howe's Hedgehog Cactus
  * Inyo Hulsea (BLM)
  * Inyo Mountain Slender Salamander (BLM)
  * Inyo Rock Daisy (BLM)
  * Jaeger's Caulostramina
  * Jaeger's Ivesia
  * Jointed Buckwheat
  * July Gold
  * Kingston Mountain Bedstraw (BLM)
  * Kingston Mountains Ivesia
  * Large Blotched Ensatina (SBNF)
  * Le Conte's Thrasher (BLM)
  * Little San Bernardino Mountains Linanthus (BLM)
  * Loggerhead Shrike
  * Long-Eared Myotis
  * Mojave Ground Squirrel
  * Mountain Yellow-legged Frog
  * Occult Little Brown Bat
  * Pallid Bat (BLM)
  * Panamint Alligator Lizard (BLM)
  * Panamint Daisy
  * Panamint Dudleya
  * Panamint Mountains Buckwheat
  * Panamint Mountains Lupine
  * Pungent Glossopetalon
  * Rock Lady
  * Ruby's Desert Mallow
  * Saline Valley Phacelia
  * San Diego Horned Lizard (SBNF)
  * Santa Ana Speckled Dace (SBNF)
  * Shining Milk Vetch
  * Shoshone Cave Whip Scorpion (BLM)
  * Shoshone Pupfish
  * Silvery Legless Lizard (SBNF)
  * Sodaville Milk Vetch
  * Southern Rubber Boa (SBNF)
  * Southwestern Pond Turtle (SBNF)

* Spotted Bat
* Stephen's Beardtongue
* Tecopa Birds-beak
* Thorne's Buckwheat
* Townsend's Western Big-Eared Bat
* Tricolored Blackbird (BLM & FWS)
* Western Least Bittern
* Western Mastiff Bat
* Western Small-Footed Myotis
* Western Snowy Plover (FWS)
* Western Yellow-Billed Cuckoo (FWS)
* White Bear Poppy
* White-Faced Ibis
* Wildrose Canyon Buckwheat
* Yellow Blotched Ensatina (SBNF)

*III. THE DESERT TORTOISE—MAXIMUM IMPACT EXAMPLE.*

The Mojave Desert Tortoise is probably the most vivid example of a listed species that has had a tremendous impact on the development and use of public lands across four western states. In spite of the fact that many government biologists believe that the Desert Tortoise population is in a serious decline, there has never been an accurate census taken because the Tortoise is very difficult to count. It spends most of its life underground and monitoring techniques are not very sophisticated. Even within Desert Tortoise Conservation areas, federal agencies have no idea about population trends. Most knowledgeable biologists believe that the Tortoise population is even declining in the areas where they are protected. Actions taken to protect the Desert Tortoise under the ESA have had a significant impact on land use within the Inland Empire.

• The 1994 Desert Tortoise Recovery Plan:

The Mojave Desert Tortoise was listed as "Threatened" in 1990. In 1994, BLM biologists developed the "Mojave Desert Tortoise Recovery Plan (DTRP)". Very little proven peer-reviewed science was available at the time to justify actions proposed under the DTRP. Biologists involved with the preparation of the Recovery Plan acknowledged that the Plan was based on "the best science available" at the time. Having agreed that the science available was not very thorough, the Plan preparers wrote into the Plan a requirement to review the Plan and update it within three to five years, using science that was expected to be developed in the interim time period. At this time—ten years later—the DTRP has still not been updated!

• Designation of Critical Habitat:

Three major California Desert BLM planning areas overlap the Inland Empire. New land use Plans (actually Environmental Impact Statements) developed for those areas are driven, to a large extent, by the alleged need to protect the Desert Tortoise. Approximately four million acres within the ten million acre California Desert have been designated as Tortoise habitat. This designation has severely limited the use of public lands in the California desert.

• DMG & MOG efforts regarding the Desert Tortoise

For the past two years, the Desert Managers Group (DMG) and the Desert Tortoise Management Oversight Group (MOG) have been working on the task of assembling a team of biologists to take on the job of reviewing and updating the DTRP. While this effort is underway, no specific actions—other than new monitoring efforts and designation of millions of acres of Desert Tortoise habitat—are being taken on-the-ground to benefit the Desert Tortoise. Current estimates, by BLM experts, suggest that it will take about a year to come up with a new plan once the team has been assembled. In the meantime, the Tortoise is dying off from a highly contagious Upper Respiratory Disease and a shell disease problem. In addition, ravens—whose population has doubled over the past ten years—are feeding voraciously on baby Tortoises.

• Recent 9th District Federal Court actions:

Recently, ninth district federal court judge, Susan Illston, issued a ruling that no more permits for off-highway vehicle use or cattle grazing will be allowed in Desert Tortoise habitat. In a subsequent ruling, she added a requirement that the BLM is not doing enough with its efforts to protect the Desert Tortoise. She ruled that the BLM must implement a plan to actually recover the species—not just protect it. This ruling will impose a significant added burden on the California Desert BLM office that is already under-staffed and under-funded—leading, of course, to a negative impact on public land use within the Inland Empire.

*IV. ESA IMPACT ON FORESTS WITHIN THE INLAND EMPIRE.*

Many of the species listed in Section II above are found in the San Bernardino Mountain range, which is located totally within the Inland Empire. Actions taken by the Forest Service to satisfy ESA requirements, over the past ten years, have led to:

- Termination of all logging activities.
- Closure and blocking of many logging roads, fire roads, and vehicle access trails.
- Termination of clearing of underbrush.
- Restrictions to establishing fire-breaks around private property.
- Restrictions to all forms of recreation activities within the forest.

As the underbrush has been continually building up, the bark beetle has infected the forest and killed off a large number of trees. The combined effect of these two events has made the San Bernardino Mountains a living tinder box. Last year's disastrous forest fire in this area came very close to burning out the resort cities of Lake Arrowhead and Big Bear within the Inland Empire.

*V. FUTURE OF PUBLIC ACCESS IN THE INLAND EMPIRE.*

- New BLM Management Plans that cannot be implemented:

The BLM's Northern & Eastern Mojave (NEMO) desert land use plan and the Coachella Valley land use plan are approved and are ready to be implemented. The BLM's Western Mojave (WEMO) desert plan is in its final stages. All three of these land use plans are actually Environmental Impact Statements that provide for the protection of listed species and species of concern as well as special status species. Each of these plans consists of two volumes about an inch and a half thick. Significant additional resources will be required in the BLM's California Desert District to implement these plans. There is no funding included in the current Department of the Interior budget for implementation of any of the new California Desert District management plans. With federal funds being burned up by the war and recovery efforts from 9/11, it is unlikely that funds will be committed in the foreseeable future to implement the new California Desert District management plans.

- Lawsuits by Anti-Access Groups:

Lawsuit settlements between the BLM and radical enviro-extremist groups, over the last few years, have led to restrictions on public use of many acres of public lands within the Inland Empire. After a period of time, it will become evident to these anti-access groups, that object to any public use of public lands, that the BLM is not implementing the new land use plans. The door will be open for a plethora of new lawsuits! The only action the BLM will be able to take—without adequate resources—will be "Emergency Closures!" Public lands managed by the BLM within the Inland Empire will be closed to all types of public use until the issues can be resolved in the courts. This could lead to permanent closures as the only acceptable action available to the BLM to satisfy the courts.

*VI. ESA MODIFICATIONS DESPERATELY NEEDED.*

If the current trend continues, with 1300 species listed and only 12 species removed from the list—and new listing petitions being submitted almost daily—it is clear that eventually, all species that live in the Inland Empire will be protected and impacts to the economy and to recreation will continue. Development and land use will be eliminated. ESA reform is imperative if this trend is ever to be reversed.

- Cardoza Bill Extremely Important:

The House Committee on Resources has passed a Bill sponsored by Congressman Dennis Cordoza from California titled "The Critical Habitat Reform Act", H.R.2933. The Cardoza legislation adjusts the arbitrary and now-untenable deadline under which the FWS is required to designate critical habitat, giving the agency more time to collect useable data. This will also reduce the overwhelming volume of the frivolous litigation filed under the ESA, litigation that forces biologists out of the field and into the courthouse. It corrects the dysfunctional critical habitat designation process, linking it to the species recovery planning process, and integrating the data accumulated in that process. The result will be a greater focus on species recovery under the Act and improvement of the abysmal .01% success rate. Considering the amount of critical habitat already designated for various species within the Inland Empire, this legislation can help reduce the negative impacts resulting from enforcing the ESA.

- Healthy Forest Initiative:

On November 17, 2003 the President signed into law the "Healthy Forest Restoration Act." This Act allows actions in the San Bernardino National Forest, that were not allowed previously under the Endangered Species Act, that will have a positive impact on the Inland Empire:

  * Logging of hazardous fuels to protect communities.

* Conduct prescribed burns.
* Log areas with Southern Pine Beetle outbreaks.
* Speed up the appeals process.
* Change the judicial review process.

Implementation of these changes a few years earlier might have saved many homes in the Inland Empire from being destroyed by forest fires.

• Need for Good Science:

Since the enactment of the Endangered Species Act, 1300 species have been listed as "threatened" or "endangered" under this Act. Decisions by U.S. Fish & Wildlife Service (USFWS) to list species have always been based on "the best science available". In many cases, the listing decision is based on the opinion of a few biologists who work for Federal Agencies. Because of the threat of lawsuits from environmental organizations, USFWS typically errs in favor of listing rather than demanding good peer-reviewed supporting science. The decision to list the Mojave Desert Tortoise (as described above), even though the biologists who developed the Desert Tortoise Recovery Plan were not confident of the science available, is a perfect example of how the scale is weighted in favor of listing a species. In one case, USFWS actually listed a species that subsequently was proven to be non-existent! Section II of this report contains a list of the many allegedly threatened or endangered species that exist within the Inland Empire. One can only wonder how many of these species actually have good science supporting their listings. More species within the Inland Empire are being proposed for listing every day.

Earlier this year, the House Committee on Resources passed a bill sponsored by U.S. Congressman Greg Walden, from Oregon called the "Sound Science for ESA Planning Act", H.R.1662. The Walden legislation would strengthen the scientific foundation of species recovery efforts by integrating a peer-review tool into ESA decision-making processes. The absence of peer review explains the overwhelming record of inaccurate data—and data errors—under the ESA. Peer review is a standard scientific safeguard, but has somehow never been integrated into Washington's solution for recovering endangered species. It is vitally important that elected officials and citizens of the Inland Empire support this legislation which will help reduce impacts on the economy and on recreation resulting from decisions made to accommodate the Endangered Species Act.

• Treatment of non-listed species

Section II of this report contains a partial list of species, found within the Inland Empire, that are considered "sensitive species" or "species of concern" by Federal Agencies. Federal land management agencies provide protection for these species in their land management plans even though they are not listed. In many cases they are treated as if they were listed!

The agencies argue that it is necessary to provide protection to this category of species so that they won't become listed. Whatever the reason, significant resources are being expended within the Inland Empire to provide special protection to many species that do not fall under the Endangered Species Act. This is a perfect example of a catch-22 situation—a method of providing the effect of a listing without scientific justification for an actual listing! The irony is that this action is being taken by land management agencies to avoid lawsuits by the enviro-extremist organizations while there is more litigation taking place today than ever before in history!

*VII. CONCLUSION:*

The huge geographic area included within the Inland Empire lends itself well to the purpose of this hearing—to examine the impacts of the Endangered Species Act on Southern California's Inland Empire. The area includes two complete federal management planning areas—one BLM and one Forest Service. It also is overlapped by portions of two other BLM planning areas. All of the land management plans for these Federal areas are driven, to a large extent, by the Endangered Species Act.

The Inland Empire hosts at least eighteen Federal "endangered" species, at least eight Federal "threatened" species, and a mix of at least eighty "sensitive" species and "species of concern". Petitions are being presented every day to add more species to each of these categories.

Lawsuits initiated by environmental groups have led to restrictions on the use of millions of acres of public lands within the Inland Empire. The negative impacts on recreation, ranching, mining, and forest health as a result of actions taken in the name of protecting species have been significant. The economy of the Inland Empire has taken a huge hit at a time when it can ill afford it.

The citizens and elected officials of the Inland Empire need to wake up to the fact that the Endangered Species Act, a law that was originally designed to provide much needed protection to a few important endangered species, has been exploited to the point where every citizen or property owner in the Inland Empire has

experienced some impact—whether recognized or not. People need to become educated to the fact that the ESA is not a law that just protects warm and fuzzy creatures. It also applies to beetles, flies, poisonous plants, rats, and lizards. Enforcement of the ESA costs taxpayers billions of dollars every year and very few species have ever been recovered as a result of the enforcement of this out-of-control law. As it is being applied in the Inland Empire as well as all over the country, the Endangered Species Act is seriously broken and it is time to fix it!

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Mr. POMBO. Thank you, Mr. Denner.

Mr. Thornton?

**STATEMENT OF ROBERT THORNTON, PARTNER, NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP**

Mr. THORNTON. Mr. Chairman, with your permission I would just like to submit my testimony and summarize it, if I might?

Mr. POMBO. OK.

Mr. THORNTON. Thank you.

I am a lawyer. I have practiced for the last 28 years in the natural resources area. I represent landowners and public agencies on ESA matters, a number of other environmental matters. I was the original advocate for what became the Habitat Conservation Plan provisions of the Act in '82. I have worked on a couple dozen HCPs, and I have been involved and I have been involved in a number ESA litigation matters. So, my testimony reflects that background and perspective.

We have a crisis today in the State and in the west in area of critical habitat, following upon Mr. Denner's testimony that I would like to speak to today. This crisis is a product of like three interrelated actions that come together.

One, a tidal wave of litigation that has been brought by the environmental interests to force the Fish and Wildlife Service to designate critical habitat, as indeed the Service is required to do with very narrow exceptions under the Act.

Two, are what we believe are over-broad designations of critical habitat. Over board by the tune of tens of millions of acres.

And, three, court decisions including the decision mentioned recently by Mr. Denner that effectively will prohibit really any economic activity within critical habitat.

But to put this into perspective to consider the overall magnitude, there is the map on the far right, and maybe Ms. Johnson can help by referring to, and there is a smaller version attached to our testimony, probably be more legible.

But this is a map that we had a consulting firm prepare several years ago with GIS data provided by the Fish and Wildlife Service and NOAA Fisheries because I asked the question, gee, how much critical habitat is there in California proposed or designated, because none of the agencies had mapped the critical habitat. Nobody knew the answer to that question. So, we had a consulting agency with considerable difficultly, but ultimately they put together the data map.

And it turns out that in the last decade, for 21 species in California, there have been designated or proposed 40 million acres of land as critical habitat. Now let me put that into perspective.

There is a 100 million acres of land in California total. As we know, about 50 percent of the land mass of California is Federal

land. So, about 40 percent of the total land area of California has been designed as critical habitat or proposed for 21 species.

Of that 40 million, 24 million is on non-Federal land. So, again, going back to our map, 50 million acres of non-Federal land approximately 50 percent of the non-Federal land in this state has been designated or proposed as critical habitat for 21 species. The impact is, frankly, enormous.

Now here is the real kicker; that is for 21 species. There are 298 listed species in California. The Service has only designated or proposed to designate critical habitat for 87 of those 298 species. Again, we know the Act effectively requires the Service to ultimately designate critical habitat for every species. It does not take a rocket scientist to figure out if that trend continues, really the entirety of the State outside of the urban core, and maybe even a portion of the urban core as we heard from the testimony earlier with regard to the fly, is going to be end up designated as critical habitat.

Now, part of the problem I referred to is the over-broad nature of these designations. And I want to focus the testimony at the hearing today as with regard to impacts on the Inland Empire. I want to focus on a key issue in Southern California with which we have been struggling for well over a decade, and that's the California gnatcatcher.

As a result of environmental litigation, the Service proposed and ultimately designated approximately 500,000 acres of critical habitat. There was litigation commenced that we commenced and also the environmental community commenced. We prevailed. The court ordered the Service to reevaluate the critical habitat on the grounds that the economic analysis was flawed. So, the Service came back and has reproposed once again 500,000 acres of critical habitat.

Now, to put that into perspective, when the Service listed the gnatcatcher in 1993 the listing rule indicated that there was potential occupied habitat, entirety of potential occupied habitat in Southern California of 400,000 acres, and that was the principle rational for listing the gnatcatcher. They said, gee, this bird is very threatened because its habitat is limited, has been reduced from historical numbers and there's a maximum of 400,000 acres of habitat. At the same time they said that there was about 200,000 acres of what they characterized as high quality habitat at the time.

In 1999, when the litigation was commenced by the environmental community to force the designation of critical habitat, the Service made a determination that it was prudent to designate about 120,000 acres of critical habitat. So, then in 2000 when they designated critical habitat, they went to 500,000 acres. And the 500,000 did not include a lot of property on Camp Pendleton, on the air station, the Orange County Central Coastal NCCP area and the San Diego HCP conservation plan area.

So, somehow we went from 200,000 acres of high quality habitat in the listing rule to 500,000 critical habitat not including probably a couple of hundred thousand other acres that were excluded from the designation of critical habitat. Now, the map is a little hard to

read from that distance, but I want to focus in on some of the specifics.

Jennifer, if you'll refer to the Riverside County area. Talking about the impacts on the Inland Empire area.

There are large—tens of thousands of acres of critical habitat designated, and this is actually the current pending proposal, of critical habitat in Riverside County, much of it along the I-15 corridor, some of the most valuable developable property the area that is most appropriate for housing development and that is the infrastructure.

Camp Pendleton, obviously an important facility in terms of national defense has critical habitat proposed on it.

I want to point in Ventura and Los Angeles Counties what was referred to as the far northern area. Jennifer, maybe you could go around and point out unit 13 as tens of thousands of acres of critical habitat that has no gnatcatchers on it. This map also includes a mapping of those areas, the most recent data of where gnatcatchers are found. And essentially 13 there are only gnatcatchers in the far western—a few pairs in the far western extreme of that proposed critical habitat area.

There are a number of other examples I could go through. But the bottom line here is that this is one microcosm of the problem, which is that you have got this incredibly over board designation with tens of thousands of acres with no birds in it and yet it is designated or proposed as critical habitat.

Now, what are the economic costs of all of this? As you know, Mr. Chairman, the Act requires the Service to evaluate the economic and other impacts of designated critical habitat. And it is the one portion of the statute that explicitly allows a weighing and balancing of the economic impacts against the environmental benefits of the designation. So, the Service has been going through analyzing the economic impacts. And we have brought litigation challenging several of those because in our view the evaluations were done improperly and the courts ultimately agreed with us and have ordered the Service to change their methodologies for evaluating economic impacts.

But again I asked the question what is the accumulative magnitude of the impact that we are talking about? Dr. David Sunding, an economist, Ph.D. economist at the University of California at Berkeley conducted an analysis with regard to just the 500,000 acres of critical habitat for the gnatcatcher. And remember, this out of the 40 million acres in the State. And his analysis indicated that the impact was between $4.6 and $5.1 billion, billion with a B. OK.

I started thinking and preparing for this testimony. Now, I wondered what is the overall magnitude to the State of the economic impact of critical habitat. And using some very conservative assumptions.

If you assume, for example, that the critical habitat on the Federal land has zero impact, clearly an incorrect assumption but just assume that for a moment. And if you assume the remainder of the critical habitat on the non-Federal land in the State, the other 22.5 million acres other than the gnatcatcher has an impact of one-tenth—10 percent of the impact that Dr. Sunding analyzed with

regard to the gnatcatcher because property in Riverside and Orange County and San Diego is obviously more valuable than more rural property, you come up with a number that is well in excess of the $100 billion. Now that is, obviously, an extremely rough estimate but it gives the Committee some general order of magnitude of the kind of impacts on the society that we are talking about. And, again, this is without even considering the impacts on Federal lands, impacts on military preparedness with regard to military installations and, I might add, it doesn't even talk about water. I have not talked about water.

You have critical habitat designated on the Sacramento River with regard to several fish species. You have critical habitat designated on the lower Colorado River with regard to several fish species.

The decade-long effort to resolve the water wars in California on the Colorado River and the CALFED process and the Bay Delta are in serious jeopardy as a result of the critical habitat designations.

This situation has been made much more extreme just within the last month as a result of several court decisions. Again, Mr. Denner mentioned the decision with regard to the Desert Tortoise by the District Court of the Northern District of California. About 2 days later there was even a more serious problematic decision out of the Ninth Circuit Court of Appeals, the Gifford Pinchot Task Force decision. That decision is, obviously, troubling because: (a) it is a Ninth Circuit decision so now that is the law of the land with regard to Federal district judges in California and in the west.

Gifford Pinchot involved a challenge brought by environmental groups to the so-called Northwest Forest Plan that was the effort by the Clinton Administration to resolve the decade long battle concerning the Spotted Owl and other species on Federal lands in Oregon and Washington. Unprecedented planning effort. I think everyone would admit that it provided an unprecedented level of protection for endangered species, just order of magnitude again. It reduced timber harvests on the Federal lands by about 50 percent. Nonetheless, a group of environmental groups challenged that plan and alleged that the plan violated the critical habitat provisions of the Endangered Species Act because it allowed some minimal amount of timber harvesting on certain critical habitat areas.

The Ninth Circuit in this Gifford Pinchot decision agreed with the environmental plaintiffs and invalidated timber harvests pursuant to that plan. And the most troubling aspect of this decision, the part that everybody is focused on, the court invalidated the so called "adverse modification" definition. Adverse modification was defined by the agencies in 1986 to mean harm to both survival and recovery. So, basically the threshold for determining whether you comply with critical habitat is whether you are having an impact on the survival of the species. What the court said is that is the wrong standard and that the appropriate standard for critical habitat is whether you are impacting recovery of the species. Well, that just ratchets up the requirements under critical habitat tremendously.

But an even more troubling aspect of the decision is essentially the court said that critical habitat areas are inviolate, that is no activities, no economic activities can occur in critical habitat. The

government argued that gee, there is this overall comprehensive Northwest Forest Plan. Yes, we are allowing some timber harvests activities within designated critical habitat, but overall the plan is providing a net benefit for the Spotted Owl, the fish, etcetera because of the combination of all the reserves that were put together under the Northwest Forest Plan and the court rejected that. And let me just quote from a key passage, and this is at page 10611 of the slip opinion.

The court says "If we allow the survival and recovery benefits derived from parallel habitat conversation plan, the Northwest Forest Plan, that is not designated critical habitat to stand in for the loss of designate critical habitat in the adverse modification analysis, we would impair Congress' unmistakable aim that critical habitat analysis focused on the actual critical habitat."

So, what the court is saying is it does not matter how good the plan is overall. It does not matter that the plan is providing net benefits to the species. If you allow any activity within critical habitat, that is prohibited by the Endangered Species Act. That, Mr. Chairman, is blockbuster.

As I said, I have devoted most of my professional career, frankly, to trying to make the Endangered Species Act work in what I call in the trenches, in the real world working with landowners, working with the likes of Dan Silver, the Endangered Habitats League, working with the agencies. If the law of the land is that these plans cannot be put together in away that allows any impact on critical habitat, nothing will occur and the plans that have been approved are in jeopardy.

Let me say just a few words about that.

Mr. POMBO. I am going to have to ask you sum up.

Mr. THORNTON. Sure.

Over the last decade, tens of millions of dollars have been spent in the so called Southern California Natural Community Conservation Planning program to put together a comprehensive plan to once and for all attempt to resolve the endangered species issues and balance jobs, housing needs, etcetera. Riverside County after much effort, tens of millions of dollars, just completed their plan. That plan is now in jeopardy as a result of Gifford Pinchot decision as are the other plans even those plans that have been excluded from critical habitat because plaintiffs will argue that critical habitat was excluded not using the proper test that the Ninth Circuit has now articulated.

So, the net loss of this is not only the fact of the economic impact. I believe that the net loss would be to good sound science-based comprehensive conservation planning. And these are not just my views. These are also the views of responsible people in the environmental community.

I just wanted to end with a quote from Professor Houch. He's a professor at Tulane University and was formerly general counsel of the National Wildlife Federation for many years. And let me read something that he wrote not too long ago, and he's a describing the Southern California and the NCCP program. And he says "The upshot of the Federal state conversation planning that is captured in the subregional plan developed for Orange County, in all of that 80 percent of the habitat and 80 percent of the breeding population

of gnatcatcher will be preserved. When the full plan for the Los Angeles and San Diego corridor is implemented it will project 380,000 acres. With some lingering outsiders, the business community is largely on board, the State is on board, the environmental community is on board: A miracle in Southern California. That effort, that 10 year effort is now in jeopardy as a result of the court decision."

Thank you, Mr. Chairman.

[The prepared statement of Mr. Thornton follows:]

**Statement of Robert Thornton, Partner,**
**Nossaman, Guthner, Knox & Elliott, LLP**

Mr. Chairman and Committee Members:

I am pleased to testify on the impact of the Endangered Species Act on the Inland Empire.

While my testimony reflects my views alone, it is provided from the perspective of a lawyer who has represented landowners and public agencies on ESA and other natural resource issues for over 28 years. I was the original advocate for what the habitat conservation plan provisions of the ESA. I have worked on over two dozen habitat conservation plans. I have litigated a large number of ESA matters and I am counsel in four pending ESA lawsuits.

My testimony focuses on the critical habitat crisis that we have in the Inland Empire and throughout the State. This crisis is the product of three interrelated events:

1. The tidal wave of litigation initiated by environmental interests under the ESA concerning the failure of the Fish and Wildlife Service to designate critical habitat;
2. Over-broad designations of critical habitat impacting tens of millions of acres in California; and
3. Court decisions that prevent any economic activities in large portions of the State and that undermine California's Natural Community Conservation Planning Program.

*A. Forty-Percent of the State Is Proposed Or Designated Critical Habitat—For Only 21 Species.*

Principally as a result of environmental litigation (and resulting court decisions) over the last decade the Fish and Wildlife Service and NOAA Fisheries have designated or proposed to designate nearly 40 million acres of land in California for 21 species. The attached map, prepared from data provided by the Service and NOAA Fisheries, shows the broad extent of the designations in California. This map does not include recent designations.

But to fully appreciate the impact of these designations on the California economy, consider the following:

- There are 100 million acres of land in California;
- 50% of the State is federal land;
- Of the 40 million acres of proposed or designated critical habitat—24 million acres are on non-federal land;
- Thus, nearly 50% of the non-federal land in the State is designated, or is proposed, critical habitat.

Here's the kicker: This map only shows the critical habitat designations for 21 species. There are 298 federally listed threatened and endangered species in California. The Service and NOAA Fisheries have designated or proposed critical habitat for 87 species (or 29%) of the currently listed species in the State.[1] It doesn't take a rocket scientist to figure out that if this trend continues, much of the private land in California outside of urban core will end up designated as critical habitat. We know this to be the case because, as interpreted by the courts, the ESA requires the designation of critical habitat with very narrow exceptions. Over the last decade, the environmental community has waged a successful litigation campaign that has resulted in dozens of court orders forcing the designation of critical habitat. In several instances, the courts have required the agencies to make complex technical and economic decisions affecting large portions of the State in a matter of a few months.

[1] See attached Tables which list the species for which critical habitat is proposed or designated and that describes the status of the critical habitat designations.

There is more critical habitat to come. I have attached a table showing the listed species in California and those species with designated or proposed critical habitat. As is apparent, many more critical habitat designations are inevitable.

*B. The Critical Habitat Designations Are Overbroad.*

Perhaps we could accept the critical habitat designations if we thought that the designations were accurate and actually identified areas essential to the species. But we now that many of the designations are grossly overbroad. Let me provide a prominent example of particular concern to the Inland Empire—the critical habitat for the coastal California gnatcatcher.

It is instructive to consider the following chronology:

- 1993—Service lists gnatcatcher as "threatened" species largely on the basis of the estimated loss of historic habitat in Southern California.
- 1993—Service estimates that there is a maximum of 400,000 acres of "potentially occupied" gnatcatcher habitat in Southern California.
- 1993—Service estimates that there are 200,000 acres of "high value" gnatcatcher habitat.
- 1999—Service determines that 124,000 acres are prudent to designate as critical habitat.
- 2000—Service designates 511,000 acres of critical habitat NOT INCLUDING the habitat within the Orange County Central/Coastal NCCP, the San Diego MSCP, Camp Pendleton, and Miramar.
- 2003—After district court orders Service to prepare new economic impact analysis and reevaluate critical habitat, Service proposes 495,000 acres of critical habitat, including large areas not previously designated, but excluding the several of the NCCP plan areas.

When one considers that the current proposal to designate 500,000 acres of critical habitat for the gnatcatcher excludes the military bases and the areas with adopted NCCP/HCP plans, it is obvious that the amount of "critical habitat" has expanded dramatically over the years. There are two possible explanations:

1. The Service greatly overestimated the threat to the gnatcatcher from the loss of habitat because it underestimated the extent of habitat in Southern California; and
2. The Service has designated large areas that are not "essential" to the protection of the gnatcatcher as required by the ESA.

There is an extensive body of evidence supporting both of the above conclusions. We documented that the gnatcatcher critical habitat designation includes tens of thousands of acres that is not occupied by gnatcatchers. Clearly, the Service itself expanded dramatically the number of acres that it considered "critical habitat"—from 124,000 acres in 1999 to the current designation of 511,000 acres.

*C. Critical Habitat Has Tens of Billions of Dollars of Adverse Economic Impacts—Even Without Considering the Additional Impact of Recent Court Decisions.*

The critical habitat designations are of great importance to the State because the designations are resulting in tens of billions of dollars of adverse economic impact. I do not use the "B" word lightly.

Dr. David Sunding of the University of California at Berkeley evaluated the economic impacts of the proposed designation of 500,000 acres of critical habitat for the California gnatcatcher. Dr. Sunding concluded that the designation would result in adverse economic impacts of between 4.6 and 5.1 billion dollars on the Southern California economy. Even the Service now estimates that that the proposed gnatcatcher critical habitat will have adverse economic impacts of approximately one billion dollars—even though the Service estimate is based on the dubious assumption that the reduction in available land does not translate into increased housing prices.

Consider that the gnatcatcher critical habitat represents approximately one percent of the critical habitat in the State. A very conservative estimate of the adverse impacts of critical habitat designations in California is well in excess of $100 billion dollars.

To be conservative, we made the following assumptions:

1. That critical habitat designations on federal land have zero economic impacts; and
2. That the economic impact of the other designations on non-federal land have an impact that is one-tenth of the economic impacts of the gnatcatcher designation.

Obviously, this is a very rough estimate. But it provides an approximation of the enormity of the problem. The actual impact could easily be higher—especially if economic impacts of the designation of critical habitat on federal lands are included.

Neither the Service or NOAA Fisheries has estimated the cumulative economic impacts of the critical habitat designations—nor to even calculate how much land is designated or proposed critical habitat in the State. As a legal and policy matter, the Service and NOAA Fisheries should be evaluating the cumulative economic impacts of the many critical habitat designations—just as NEPA requires other federal agencies to evaluate the cumulative environmental impacts of agency actions. To date, however, the wildlife agencies have ignored cumulative economic impacts. The issue of whether the Service is required to evaluate cumulative economic impacts is before the courts in several pending litigation matters.

*D. Recent Court Decisions Will Dramatically Increase the Economic Impacts of Critical Habitat.*

Dr. Sunding's estimates of critical habitat assumed that Service would regulate critical habitat in accordance with the ESA critical habitat regulations. However, recent federal court decisions make it clear that Dr. Sunding's estimates are understated. The Fifth and Ninth Circuit Courts of Appeals have now invalidated the ESA regulatory definition of "adverse modification". (Sierra Club v. U.S. Fish and Wildlife Service, 245 F.3d 434 (5th Cir. 2001); Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service (9th Cir. Aug. 6, 2004). The Ninth Circuit decision is particularly troubling because it is now the law in California and will govern the decisions of the district courts in the State in pending and anticipated critical habitat litigation.

The Court invalidated six biological opinions issued by the Fish and Wildlife Service regarding timber harvests within critical habitat in Oregon. The Court held that the biological opinions were invalid because the Service had relied on the regulatory definition of "adverse modification" which the Court held violated the ESA. The Court held that the regulatory definition of "adverse modification" violates the ESA because the regulatory definition sets the bar too low for the protection of critical habitat.

The Service had relied upon a regulation (adopted by the Departments of Interior and Commerce in 1986) defining "adverse modification" to mean actions that "appreciably diminish the value of critical habitat for both survival and recovery" of a listed species. The Court stated that the standard for determining whether activities are allowed within critical habitat is whether the action will impact recovery of the species.

The decision is all the more disturbing because the case concerned timber harvest activities authorized by the vaunted "Northwest Forest Plan" adopted during the Clinton Administration to address the impacts of management of federal lands on the spotted owl and other species. The Forest Plan reduced dramatically timber harvest levels on federal lands in Oregon and Washington and provided unprecedented levels of protection for endangered species. The Northwest Forest Plan was in fact a plan designed to promote the recovery of the spotted owl and the other covered species.

An extremely troubling aspect of the Court's decision is that it suggests that critical habitat is inviolate—even where the critical habitat is just one part of a larger conservation plan that provides net benefits for endangered species. The government argued that the Forest Plan complied with the critical habitat requirements of the ESA because the Plan as a whole provided benefits for endangered species—even if it allowed some economic activities within critical habitat. The Court rejected the government's argument.

*E. The Gifford Pinchot Decisions Jeopardizes the Riverside MSCP and the Southern California NCCP Program.*

The decision is especially ominous for Southern California.

The Riverside MSCP and the other NCCP plans in Southern California are fundamentally premised on the "No Surprises" principle—or as Secretary Babbitt called it—"A deal is a deal." Landowners and public agencies in Southern California have spent the last 13 years and many tens of millions of dollars working on habitat conservation plans to address and resolve endangered species issues. Over 700,000 acres is designated for long-term conservation. Additional tens of millions of dollars are being spent to manage and enhance the habitat on reserves established through the NCCPs. It is not an exaggeration to say that the NCCP program has fundamentally altered future land uses in Southern California to balance the regional need for jobs and housing with the desire to protect large blocks of wildlife habitat. Many prominent figures in the environmental and scientific communities describe the NCCP program as a model for reconciling competing societal needs for jobs, housing and wildlife protection and for avoiding economic train wrecks under the ESA.

All of this work is jeopardized by the Ninth Circuit decision in Gifford Pinchot. For example, the Riverside MSCP authorizes development activities on land designated as critical habitat. Counsel to the Center for Biological Diversity has already announced their intention to challenge the Riverside MSCP. It is likely that the Center will claim that the Riverside MSCP is invalid under the reasoning of Gifford Pinchot.

Even the NCCP plans that do not include critical habitat are at risk. The Service excluded areas within HCPs and military installations from the designation of critical habitat. The Service excluded these areas from critical habitat using its authority in section 4(b)(2) to weigh and balance the economic impacts of a critical habitat designation against the benefits of the designating critical habitat. Even before Gifford Pinchot, environmental plaintiffs argued that the exclusion of HCP areas from the designation of critical habitat violates the ESA because the Service underestimated the environmental benefits of designating critical habitat. For example, the Natural Resources Defense Council is making this claim in its pending challenge to the exclusion of Orange County Central/Coastal NCCP from the designation of critical habitat for the California gnatcatcher. The NRDC will now certainly argue that the exclusions are invalid because Gifford Pinchot indicates that the critical habitat provisions of the ESA prohibit activities that harm recovery of the species.

In summary, the designation of critical habitat is having an enormous economic impact on California. Gifford Pinchot multiplies this impact. It threatens over a decade of hard work by local government, landowners and the environmental community in the reconciliation of need for jobs, housing with the conservation of wildlife habitat.

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Mr. POMBO. Thank you.

Dr. Silver?

**STATEMENT OF DAN SILVER, MD, EXECUTIVE DIRECTOR, THE ENDANGERED HABITATS LEAGUE**

Dr. SILVER. Chairman Pombo and Committee members, thank you very much for this opportunity.

For your reference, Endangered Habitats League is a regional conservation group dedicated to ecosystem protection and sustainable land use. I have spent a large part of the last 13 years trying to solve problems and helping to put together large scale HCPs. And we have supported no surprises in the context of those programs.

I would like to draw a comparison between Riverside County and San Bernardino County. But before that just to make a general statement of the ESA—in my view, it is not broken. The law has brought public support. I do not believe it needs fixing in terms of changed scientific procedures. The safe net does not have to be weakened.

The bottom line for me is that we must do better in responding to species imperilment.

Now, in western Riverside County there is now a comprehensive scientifically sound multi-species habitat conservation program encompassing all the cities as well as the county. The goal is to preserve all of creation, including the Delhi Sands Fly and its ecosystem. There was strong and committed leadership at the local level. The building industry helped fashion the plan, and is strongly supported. The take permits cover all listed species, and the habitat focuses anticipates any newly listed species that might arise.

The result of it is certainly. There is certainly for economic development and for conservation, and very importantly there is a widespread recognition within Riverside County and the body politic

that the natural open space protected by the plan is not just for plants and animals. Rather, it constitutes a critical investment in quality of life, an investment that over the long run will attract business and enhanced regional competitiveness. So, at the end of the day, I believe the impact of the ESA on western Riverside County communities is markedly positive.

As you know, in western Riverside County, as we have all heard today, in San Bernardino County the ESA-related problems have not been solved. From my perspective, because they have not been solved, the Delhi Sands Fly and the San Bernardino kangaroo rat are slowly going extinct under current project-by-project permitting. And without comprehensive permits from a multiple species plan, developers in San Bernardino continue to face substantial uncertainty.

In addition, the last opportunity preserve tranquil open space and associated recreation within a rapidly urbanizing area is being lost. In my view, San Bernardino, its wildlife, its natural heritage and its economic future needs a comprehensive species and habitat plan.

Even though efforts in San Bernardino County toward a multiple plan and even toward a more limited plan for the Delhi Sands dunes have been successful. I do not want to try to assign blame and be confrontational. Rather, let me identify what I think has been missing.

In San Bernardino we have not had a formal, organized effort. There has not been, for example, a stakeholder advisory committee. In my experience stakeholder participation, business community, conservation groups, special districts is essential for a successful plan. The stakeholders can help build consensus, they can bring the creativity of the private sector into play with problem solving ideas, financial mechanisms. I really think this is the missing ingredient, and that is the main purpose of my testimony.

The San Bernardino Association of Governments could convene such a formal effort. It may require additional planning monies if the State no longer has the Federal funds it used to have. We would need the help of our congressional delegation if that is the case, if we do need more planning monies.

These plans are never easy. They are front loaded. But on the other hand, there has been groundwork that has been done in this area. Maybe it would not take that long.

With a practical vision based upon constructive problem solving, I believe the process will work. It does require committed local leadership, but I am sure that that leadership exists here.

The Endangered Habitats League has assisted with these plans in Orange County in San Diego, as well as Riverside County. We offer our experience and expertise, and our good faith, to collaborate with others to the San Bernardino County jurisdictions as well.

Thank you again for the opportunity to testify.

[The prepared statement of Dr. Silver follows:]

**Statement of Dan Silver, MD, Executive Director, Endangered Habitats League**

Chairman Pombo and Committee Members:

Thank you for the opportunity to report to you on how the Endangered Species Act is affecting Southern California's Inland Empire, and to share some thoughts on future directions. For your reference, the Endangered Habitats League is a regional conservation group dedicated to ecosystem protection and sustainable land use.

There is a big difference in how the ESA is impacting Riverside compared with San Bernardino County. In western Riverside County, a comprehensive and scientifically sound Multiple Species Habitat Conservation Plan (MSHCP) is in place, for all the cities as well as county land. The goal is to preserve all of Creation—including the Delhi Sands fly and its ecosystem. There was strong and committed leadership at the local level. The building industry helped fashion the plan, and is in strong support. The take permits cover all listed species, and the habitat focus anticipates any newly listed species that might arise.

The result of the conservation plan approach is certainty for economic development and for conservation. Very importantly, there is wide recognition in Riverside County that the natural open space protected by the plan isn't just for plants and animals. Rather, it constitutes a critical investment in quality of life, an investment that over the long run attracts business and enhances regional competitiveness. At the end of the day, the impact of the ESA on Riverside County communities is markedly positive.

As you know, in western San Bernardino County—just next door—ESA-related problems have not been solved. Meanwhile, the Delhi Sands fly as well as the San Bernardino kangaroo rat are slowly going extinct under current project-by-project permitting. And without comprehensive permits from a multiple species plan, developers in San Bernardino continue to face substantial uncertainty. In addition, the last opportunity to preserve tranquil open space and associated recreation within a rapidly urbanizing area is being lost. San Bernardino—its wildlife, its natural heritage, and its economic future—needs a comprehensive species and habitat plan.

Even though efforts in San Bernardino County toward a multiple species plan—and even toward a plan limited to the Delhi Sand dunes—have been unsuccessful thus far, it is not productive to assign blame or to be confrontational. Rather, let me identify what is missing: a formal, organized effort that includes a stakeholder advisory committee. Stakeholder participation—business, conservation, special districts, etc.—is essential for a successful plan. The San Bernardino Associated Governments, for example, could convene such an effort. Congress could appropriate planning monies, for which we would need our delegation's assistance. These plans are never easy, but with a practical vision based on constructive problem solving, the process will work. I am confident the necessary leadership exists.

The Endangered Habitats League has assisted with multiple species plans in Orange County in San Diego County, as well as in Riverside County. We offer our experience and expertise—and our good faith commitment to work with others—to San Bernardino jurisdictions, as well.

Thank you again for the opportunity to testify before your Committee.

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Mr. POMBO. Thank you.

I thank the panel for their testimony.

I am going to recognize Mr. Baca to begin.

Mr. BACA. Thank you very much, Mr. Chairman.

Mr. Thornton, I do not know, you are quite aware and I want to ask you, you know that you were talking about the gnatcatcher and you are talking about 40 million acres statewide. That is a hell of lot in terms of acres of reserve based on the gnatcatcher. Is that a correct?

Mr. THORNTON. Yes, Mr. Baca. The number for the gnatcatcher is 500,000. But for all the 21 species that we looked at, which is not all the species with critical habitat, totals about 40 million acres.

Mr. BACA. But yet in our immediate area, I do not know if people are aware, not too many years ago, we had a high school in Rancho Cucamonga that apparently had problems because they had already done an EIR and they had already made approval in terms of building the high school in that immediate area, but somehow

they found the gnatcatcher in that immediate area, so exceeding costs and delays of even with that construction of the school site that area. That again will cost the taxpayers dollars, delays during that period of time. And then the quality of education for many of our kids in that immediate area ultimately ended up solving.

Yet, here a gnatcatcher and if anybody saw a bird, this bird that would land in their home or whatever, what would somebody do? Can you describe what you would do if you saw a bird that landed there? I know what I would do. I would basically take it and move it somewhere else.

Mr. THORNTON. The answer is what you have to do under the statute is go through a rigorous regulatory process that—

Mr. BACA. Without touching the bird, right?

Mr. THORNTON. Without harming the bird, correct. That is what the law prohibits or requires.

Mr. BACA. Thank you.

Let me ask this of Mr. Denner. In your testimony I am glad that you mentioned support of the ESA reform legislation. We need to amend the ways of critical habitat is designed, which Congressman Dennis Cordoza will do. But I also agree that sound science is needed, and Congressman Walden's bill does provide that. You state in your testimony that the absence of peer review now explains the increased data and data errors under the Endangered Species Act. You mentioned that the Desert Tortoise is one species that is difficult to keep track of. Some say the population is declining, even in protected areas.

How convinced are you that the peer review and more modern systems would help remove the species from the endangered list and in your estimate of those listed would be taken off the list with better data and peer review data?

Mr. DENNER. Well, I am a member of the BLM's California Desert District Advisory Council. Have been for about 5 years. So, I deal with these questions of species and their impact on land use, you know, on a regular basis.

And in my own personal opinion virtually all of the species that the BLM and other Federal agencies are taking action on completely lack good peer reviewed science.

I brought up the Desert Tortoise as my example of a case, of a species of that is being afforded tremendous amount of protection with very little science, because that is probably the poster child of the land use closures here in the State of California, the Desert Tortoise in terms of public lands and recreation lands, which is of course what I deal mostly with. And you would expect that that species would have had the most studies, the most scientific information supporting actions taken than probably any other species within the California desert district. And I can prove, I mean I have the Desert Tortoise recovery plan right here, and I have been involved with the desert managers group and the Desert Tortoise Management Oversight Group for the California Desert District for at least 4 years. And I can show you and prove to you that there is very little known about that Desert Tortoise.

So, if we have a species there that is the poster child species that has virtually no science supporting it, imagine what the case is with all the other species. So, in my opinion, by demanding really

good peer reviewed science, we are going—it will lead to a situation that we all believe the ESA was originally intended to do: It will lead to showing us species that are truly seriously endangered and that we need to do something about, and it will wipe out 90 percent of the rest of the things that are based on pure biological opinion.

Mr. BACA. Thank you. Because one of the things that you mentioned, and your advice is that you mentioned ESA—could you refine that?

Mr. DENNER. Yes, absolutely. From a recreation standpoint all forms of recreation have been restricted from use of public lands, and it is not just in California. All over the country because of actions taken under the ESA. And that goes right to the peer reviewed science question.

The way it sits now Federal agencies take action based what they think are endangered species. And as I mentioned, the northern and eastern Colorado plan has 22 species within that plan, it's a two volume document like this, that are not listed at all. They are called sensitive species and species of concern. And the very same actions are being taken for those species because the argument is that if they take action now, they will not get on the endangered species list. Well, what is the difference? If they are treating like endangered species and closing lands to the public for recreation and cattle grazing and that sort of thing just because they suspect some day they might be listed, you know, I think that shows the impact of what is happening directly to recreation, certainly, and other activities like cattle grazing are suffering the same consequences.

Mr. BACA. Thank you.

Mr. Thornton, today we have heard a lot of testimony on the high cost of communications and economic impact in the area of the protection of the species. Do you think it would be helpful for the Administration to issue a regulation or policy guideline explaining the methodology to be used to analyze economic impact on critical habitat designation?

Mr. THORNTON. I do. I think it would need to be done by regulation for it really to stick. And there has been, I must say, some progress made since the court decisions invalidated the Service's prior approach. But I do think there should be a regulation that defines the methodology to be employed. And I think methodology, by the way, ought to include an analysis of cumulative effects. None of the analyses today look at any cumulative effects.

Mr. BACA. Thank you.

Dr. Silver, question one, as Mayor Nuaimi mentioned in his testimony, at what point should the Fish and Wildlife Service declare that a species is beyond recovery? Two, in your opinion, what does it take to call out the God squad? And, three, what scientific evidence is needed?

Dr. SILVER. We have had a lot of species that have been reduced to almost numbers that you can count on one hand, yet we have not given up. I mean, we have tried to captive breed species, reintroduce them. And it is not really about the Delhi Sands Fly. It is about the ecosystem of a fly, the sand dunes, the whole community of life. I think it is a very worthwhile effort to try to keep this system going, to have a conservation plan for it.

So, I do not think it is time to give up. I have talked with scientists who have studied the fly and they believe that there are habitat areas of sufficient size that have sufficient relationship to the winds and to the dune formation that you can have something that has long-term biological viability. So, I do not think the fly is at that point that even some of other species reached, that you are into this—there is just a few—literally a few of them left and you are almost into a zoo situation. I do not think we are at that point.

I would have to brush up on the God squad to find out exactly how that God squad is triggered and the requirements for decision-making. I do know it has been used very rarely. And I do not think it really solves the problem. The problem is how can we get along and have economic development, have the species conservation and work out the solutions. And that is the direction that I think we need to move.

Mr. BACA. Dr. Silver, one of the biggest complaints we have heard today, especially the Delhi Sands Flower-Loving Fly is that it is not really known how many currently exist right now. Is it not possible to tag a fly and know where they go when the Santa Ana winds blow? Would it provide more incentives to landowners to come up with their own HCPs if more of the Fish and Wildlife Service budget was focused on science and whether a species should be considered endangered or threatened?

Dr. SILVER. I certainly would not argue with providing the Service more resources to do the proper studies. I think that certainly makes good sense. But I do not think you want to delay and obstruct things that need to be done. If a species needs to be listed, they do need to use the best available science and proceed.

In terms of the fly, the funny thing is it is really, you know, in some ways a fairly resistant animal. It has been found in places that have been even graded and compacted. It has adapted to the sand. It has adapted to the Santa Ana winds. And it is one of the things that has caused problems, and I am sure the elected officials will know that the fly tends to reinhabit areas that even have been intensively disturbed. So, I think it gives us some optimism that if we can identify some core areas that do have long-term viability; generally part of the HCP process is that other areas that do not have the long-term viability are developed, mitigation is done. That's the nature of the problem solving plan. So, you know, I say we have had problems, things have not worked out so far. I am in no position to sort out the fault of the Service, the fault of the jurisdictions, the fault of private developers. I have not been engaged, I have not been asked to be part, like I said, the Stakeholder Advisory Committee to try to help. The only thing I can do is say that I am here to give it a try.

Mr. BACA. Thank you.

I know that my time has run out. But one final—two final questions to determination—one is have you ever seen the fly?

Dr. SILVER. I have not seen a fly that is alive. I have a specimen. And it is impressive for an insect. It is not a house fly type appearing animal. And I have seen the dunes. So, I have seen where they live. But, no, I have not seen a live animal.

Mr. BACA. Because we have seen a lot of life around the areas of the preserve in that area and it is devastating to a lot of our communities.

Well, let me ask you this final question: Do you have any recommendations as to how to provide more incentives for landowners and cities to enter into the regional habitat conservation plans?

Dr. SILVER. Well, I have always believed that the no surprises policy is an incentive, and that is one reason why our group has supported it. I do think you need to provide the incentive of planning monies. Local governments are typically short of cash. The planning, you know for a few hundred thousand dollars in planning monies, you can really get a big bang for that buck. So, I think that is an important incentive.

There is a lot of incentive programs that have been developed for the ESA in terms of, you know, easements or management agreements, long-term management plans. You know, here in this area which is more urbanized maybe some of those do not really apply. But I think the planning money is important. I think the assurances are an important incentive. But there clearly have been some problems in this area that have been so far inattractable. And I think, as one of the elected officials mentioned the fact that so much of the habitat is in Colton, how does Colton, in essence, get enough revenues to keep its city government going given the amount of the habitat. And I think that is where it strikes me that if you got the private sector involved, the business community, the local governments, conservationists working together to look at these financial issues, that is where you know maybe that would get finally get us over the hurdle here that we need to get to.

But in terms of your question, I think the planning monies would be absolutely necessary, and I have found assurances to be an important incentives for local governments.

Mr. BACA. Thank you very much. Because you know it is a form of taxation in one sense and people have to—lands and cities just do not have the revenue. So, it is a form of taxation and burden that is on the communities at that point in terms of further development. And then our constituents that end up paying through other forms of taxes that are imposed upon them. And that is totally unfair. Hopefully we can look at some recommendations and to look at solving this particular problem.

Again, thank you very much.

Dr. SILVER. Thank you.

Mr. BACA. Mr. Chairman.

Mr. POMBO. Mr. Radanovich?

Mr. RADANOVICH. Thank you, Mr. Chairman.

I appreciate your testimony, Dr. Silver. I would like to hear a reaction to your statement about successes in Riverside County and other counties and the lack of success in San Bernardino County and the need for a stakeholder process that might be a solution to it, but most of the people that would respond were probably in the previous panel, who I assume are in San Bernardino County.

Can anybody respond to that? I mean, has it been a lack of just not going through the stakeholder process here that has caused and maybe prolonged some of the difficulty?

Dr. SILVER. Well, when I have looked at the differences between, say, western Riverside and San Bernardino, that is what really struck me was the fact that a number of years ago the multiple species plan that was at that time led by the county, and this is back 10 years ago, it just did not get off the ground. And we never had the formal process, we never had a formal stakeholder advisory committee. And so that struck me as the difference because I know how important it has been to have stakeholder group, build consensus, look at reserve alternatives, look at the biology, look at financial, potential financial solutions. And I just have seen that as a difference.

So, I would certainly as you would like to hear the response of the elected officials, maybe we are at the point where there is nothing to lose by giving a shot. So, I would certainly volunteer to help.

Mr. RADANOVICH. Can I request that any response be provided in writing rather than—I would like that to be done. Thank you.

Mr. POMBO. Dr. Silver, in light of your comments and Mr. Radanovich's questions, I probably had more people from Riverside County in my office complaining about the process that they have gone through over the last 10 years than any other county in the country. And I have become a very reluctant supporter of these habitat conservation plans because the way that the law is being implemented today, I do not see any other way of having economic development in the county unless you adopt some kind of a regional habitat conservation plan. But in light of recent court decisions, I am not sure that these HCPs mean anything anymore. And, you know, I went through a ten or 12 year process in my home county working toward developing an HCP, so I know how painful and expensive that process is. And I am just not sure what they mean today as opposed to what we had worked on for some long.

I do not know where your group or you personally are in this whole process, but it seems to me like no matter what solution we ultimately come up with for dealing with this, there is someone that comes out with a lawsuit. And if they find the right judge, it gets thrown out. And how do you respond to that? I mean, how do we move forward if we keep having lawsuits no matter which way we go?

Dr. SILVER. I think it is really a fair question. And, you know, Rob brought forward this new decision. I have—I am really just learning about it. But certainly I would be very concerned if that decision adversely affected the Riverside plan and the San Diego plan.

Mr. POMBO. I do not know how it couldn't.

Dr. SILVER. Right. So, you know, I share that concern. And my view, these large scale HCPs, the natural community conservation plans, whatever you want to call them, should be de facto recovery plans. That is how I have always looked at them, and that has been my goal to make sure they do meet that bar that they are an ecosystem plan that has the conductivity and the natural systems can keep going; so they do meet that recovery bar. And if they do, I think there should be certainty and assurances and the plan should function. So, I agree with you on that.

Mr. POMBO. Well, listening to your testimony and listening to you talk about this, I think you're sincere in your attempts to try to do something with this. And I guess this is a story that is yet to be written. But in my reading of that opinion it takes the basis for the HCPs that we started on and says that does not count anymore.

Dr. SILVER. Yes.

Mr. POMBO. So, anything we did after that, I am not sure what it means. And it may not be you and your group, but somebody else is going to come along and file a lawsuit when they want to stop something from going forward. And we will end up with—whether it is San Diego or Riverside County's HCPs being thrown out, and we are back to where we were before which quite frankly is why the Committee has worked over the last several years toward looking at what really does have to change with the Endangered Species Act in order to make it work.

I mean, none of us have ever proposed that we appeal the Act or that we gut the Act, or that we take away the protections in the Act. If you ever actually look at the Cardoza bill or what Walden's doing, you may agree or disagree with the fine points of it, but none of that is intended to destroy the Act. We are just trying to make it so that, you know, the mayor of Fontana can have economic development. I mean, that is kind of what we are trying to do with all of this. And that is one of the things that has proven to be so frustrating over the years is that people talk beyond each other instead of actually looking at what we are trying to do. And that gets frustrating for me and I know the rest of the Committee when we are trying to work on this issue, because it is such an emotional issue.

Dr. SILVER. I agree with you.

Mr. THORNTON. Mr. Chairman, maybe just a one comment follow-up.

First, Dr. Silver and his organization has been a real constructive participant in the Southern California planning process, but you really put your finger on the problem. And there are a number of environmental organizations; Environmental Defense, The Nature Conservancy and others that have really played a constructive role in promoting regional conservational planning with assurances. We have, however, pending in the District Court in the District of Columbia a lawsuit brought by a number of environmental organizations challenging the validity of the no surprises rule. We have this lawsuit brought that invalidated the Northwest Forest Plan. So, that is a fundamental problem that really only Congress can solve: Codify the "no surprises" rule; make it legally meaningful; and deal with the jeopardy presented by Gifford Pinchot

Mr. POMBO. I believe that if you go back and look at the original Endangered Species Act as it was written and as it was implemented, it is very difficult to find a problem. But most of the problems that we have developed over the last 30 years have come in court cases and regulations have developed. And if we could go back to what the original intention of the Act was, it would eliminate a lot of problems. We cannot do that, so now we have to go look at the Act and all of those court decisions over the last 30 years and how do we fix what has happened so that we can get to

some form of balance in the way this Act is being implemented. And that is the effort that the Committee has made over the last several years. And hopefully we will get to the point where we can bring a little bit of balance back into the way this thing is being implemented. Because, you know, as you heard from the mayors and city council member, this is being used to achieve other things. It is not just about saving endangered species anymore. It has become a way of controlling land use with a Federal hand.

Mr. Denner, what you have come to us with, it is the same problem but it is a different area in terms of a lot of what you and your members do is involving Federal lands. And I forget the exact the Desert Protection Act, was it 8 million acres?

Mr. DENNER. Yes. It was right around 8 million acres of a 25 billion acre desert.

Mr. POMBO. So, we set aside and that was when I first became a Member of Congress, we had the fun of the Desert Protection Act moving through Congress. And at that time that was the be all, the end all protection of the California desert. We were going to set aside 8 million acres and that was going to be, you know, protected forever. And the idea at the time, and I specifically remember the testimony and debate on the Floor. We are going to set aside a third of the desert to be permanently protected, and the rest of it is going to be managed for multiple use. So, people like you and others that use the Federal lands, the public lands, OK you cannot use this 8 million anymore but the rest of it you can still use. And we have watched over the last almost 12 years that that has gradually gotten to the point where there is little or anything left that there is really public access on that is managed as multiple use.

You look at what Mr. Thornton is talking about in terms of critical habitat designations and what that means to the State, what the Federal lands are, but that does not even take into account the public lands that we cannot touch anymore, that people really cannot go out on. So, you know, the impact on a State like California is immense. And the economic impact on a certain area is immense.

You know, when we went through the Desert Protection Act the story was OK you are going to lose all this economic activity because we are going to set aside this 8 million acres. But we will make up for it in increased recreational use because we will have more people going out to these areas to—in a form of recreation and that will bolster the economies of the surrounding counties and cities. Well, it was not very long after that that they said well no you cannot go out there. So, what happened to the recreation? What happened to the tours? And we said no. So, this is an issue that, you know, it all gets wrapped up inside a number of bills and legislation and how we are going to try to proceed with this. But I happen to believe that there is a way that we can bring balance to this so that the things that Dr. Silver cares about and talks about can be protected and people like Mr. Denner and the people he represents can use the public lands and we can have economic development and build affordable housing. I do not think that all of this is mutually exclusive. I think that there is a way to do this. You just have to quit filing lawsuits and let us do something.

I want to thank this panel. This has been—

Mr. DENNER. Could I respond to that quickly?

Mr. POMBO. Yes.

Mr. DENNER. I think the real problem is that most people, particularly recreationalists and not just OHV recreation, over the years have compromised.

You pointed to the Desert Protection Act. We finally, you know we fought that, we wanted to minimize it and we finally said OK, this is it. This is fair, let us do it, and we compromised.

The problem that we have is that the environmental organizations will not compromise. They want to save every last single bug and weed on this planet, you know. And I represent businesses. And every one of my businessmen, every day when he gets up, has to make a decision about how he is going to invest his resources today. Well, it is time we start looking at what resources are available to implement the Endangered Species Act. Maybe we have to give up the sand fly to protect the Big Horn Sheep.

I voted on the advisory council to set aside the Santa Rosa monument to preserve, to set it aside as a conservation area for the Big Horn Sheep. That makes a lot of sense to me. To stop development in Riverside and San Bernardino because of a fly makes no sense to me. Maybe it is time that they start saying OK maybe we have to compromise. Maybe we are going to lose some of these issues, but if we can come up with something that works for everybody, you know, that represents a compromise, then we can get the job done.

The way it is now with then suing on every single species that exists, we are never going to get there. We cannot fund it.

Mr. POMBO. I want to thank this panel for your testimony. It has been very informative for me and I am sure the other members of the Committee. So, thank you.

I would like to call up our final witness, Ms. Julie MacDonald, U.S. Department of the Interior.

Mr. POMBO. Ms. MacDonald, if I could have you stand and raise your right hand.

[Witness sworn]

Mr. POMBO. Thank you.

Let the record show she answered in the affirmative.

Welcome to the Committee. I think we are all anticipating your testimony, so when you are ready, you can begin.

**STATEMENT OF JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR**

Ms. MACDONALD. Mr. Chairman, members of the Committee, I am Julie MacDonald, Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior.

I am very happy to appear before you today and discuss the Act. We appreciate the Committee's interest in examining the impact of the Endangered Species Act on Southern California. Given the large amount of Federal land in Southern California, we are acutely aware of the of the regulatory decisions we make can profoundly impact local communities.

This Administration believes that conservation does not have to come at the expense of local needs, and we are committed to

achieving a balance. This commitment means emphasizing cooperative approaches to the recovery of endangered and threatened species. But while we have made great strides in improving the administration of the Act, one area of implementation that continues to be both a challenge and a source of controversy as everybody has noted here today is the designation of critical habitat.

As we have previously detailed in testimony before the Committee, the Service has been embroiled in a relentless cycle of litigation over the listing and critical habitat provisions of the Act.

In the past and currently, the Service has characterized the designation of critical habitat as the most costly and least effective class of regulatory actions they undertake. It is often of little additional value or counterproductive and can result in negative public sentiment to the species and to the Act itself. This is fueled by inaccuracies in the initial area designated when we must act with inadequate information to meet strict statutory deadlines. Because of its limitations for many years, the Service often found designation of critical habitat to be not prudent, an approach that was formalized by the previous Administration. In the late 1990s critics began challenging those findings in court. The lawsuits subjected the Service to an ever increasing series of court orders which now consume nearly the entire listing program budget.

The accelerated schedules of court-ordered designations have left the Service with limited ability to take additional time to ensure the rules address all the pertinent issues before making decisions. This in turn fosters a second round of litigation in which those who were suffer adverse impacts from the decisions challenge them. The cycle of litigation appears endless, is very expensive, and provides relatively little protection to the listed species.

Experience has now shown that the courts are equally constrained by the language of the Act. The Department of Justice has sought to secure relief to allow the Service to regain the ability to prioritize their work. Almost universally, the courts have declined to grant that relief.

In 2001, a Federal district judge observed that "the Secretary is caught in a quandary" in trying to "fulfill the myriad of mandatory ESA duties." The judge opined that "more lawsuits will inevitably follow" unless, among other things, the Service regains its discretion to prioritize. The judge suggested that a legislative solution is necessary; otherwise "tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court."

Other courts have agreed with this assessment. Simply put, the listing and critical habitat program is now operated in a "first to the courthouse" mode, with each new court order or settlement taking its place at the end of an ever-lengthening time. At this point with insisting court orders we are funding up until 2008 is consumed and we have currently 72 additional lawsuits pending related to critical habitat or listing.

In short, litigation over critical habitat has hijacked the program.

The Department and the Congress must work together to determine how to get the most value for species conservation out of the Federal resources devoted to the endangering species listing program. However, critical habitat deficiencies are not the only aspect of species conservation we address. As a matter of policy, the Ad-

ministration pursues more modern and effective conservation strategies. As a result we have formed conservation partnerships with States, tribes and non-governmental organizations. And through these various partnership, encourage private stewardship by individuals and businesses. These efforts improve the health of our lands, forests, rivers and other ecosystems and their implementation provides far greater conservation benefits than those we could compel through regulatory action.

For example, through the Canada Conservation program the Service can work with States, landowners and others to voluntarily conserve declining species. The Services works to identify the species for which listing under the ESA is a possibility and provides information and planning assistance and resources to facilitate voluntary partnerships and agreements. The results can contribute to removing the threats that might otherwise necessitate listing under the Act.

Most recently, a candidate conservation agreement developed by the Bureau of Land Management, State of Idaho, Idaho National Guard and several private property owners served as part of the basis for the Service's determination to withdraw is proposal to list the slickspot peppergrass. This is an outstanding example that listing a species in designated critical habitat is not necessarily the only way to achieve conservation.

Similar to Canada Conservation Agreements, Safe Harbor Agreements are also a means to achieve property owner support for species conservation on their land. Under safe harbor agreements, property owners who implement voluntary conservation measures for listed species receive assurances of no additional future regulatory restrictions.

The Habitat Conservation Planning Program, HCPs that everybody's been talking about, provides a process for permitting the incidental take of threatened and endangered species and allows applicants to identify local methods to achieve compliance with the ESA.

Conversation banks are lands acquired by third parties managed for specific endangered species and protected permanently by conservation easements. They help reduce piecemeal approaches to conservation by establishing larger reserves and enhancing habitat while saving time and money for landowners. In 2003, the Service announced new guidelines to facilitate the use and development of these banks.

Another way that we have improved administration of the Act is by avoiding duplicative regulation. It is our view that where programs provide for species conservation and management, critical habitat designation is not needed. Section 3 of the Act states that critical habitat is defined as those areas occupied by the species, which may require special management considerations or protections. It has been our view that areas that are not in need of special management considerations or protection are outside the definition of critical habitat and are therefore excluded from designation.

Now, I might note that one district court has opined that that is not a valid reading of the Act, but we continue to make those findings.

Conserving California's natural resources while accommodating the projected population growth has required innovative use of cooperative conservation in administering the Act. For example, In July of 2004 the Service approved the Western Riverside County Multiple Species Habitat Conservation plan, the plan that everybody has been talking about. Under this landmark agreement a proposed 500,000 acre reserve system as created as habitat for 146 species through the combined efforts of Federal, State and local partners. Because of this, the City of Riverside and local jurisdictions will be able to proceed with economic development projects while fully complying with the mandates of the Act.

As we continue to encourage voluntary ecosystem-based approaches in administering the HCP program, we hope that the Riverside County Multiple Species Habitat Conservation will serve as an example. And, again, it has been mentioned before, these habitat conservation programs have been excluded from critical habitat designations.

These tools, voluntary and multiple species and regional plans, will become all the more important as Southern California continues to experience unprecedented growth.

In closing, I would like to reiterate our commitment to working with Congress to find a solution to the problems associated with critical habitat designation and other related issues. At the same time, the Department will continue to strengthen our partnerships and expand the use of cooperative conservation tools. It is our goal to emphasize to use cooperative conservation to involve local communities and use all the tools at our disposal to implement programs that will eliminate the need for listing by conserving species before they become threatened.

And that concludes my comments, my prepared remarks anyway.

[The prepared statement of Ms. MacDonald follows:]

**Statement of Julie MacDonald, Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior**

Mr. Chairman and Members of the Committee, I am Julie MacDonald, Deputy Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior (Department). I am pleased to appear before you today to discuss the Endangered Species Act (ESA or Act).

We appreciate the Committee's interest in examining the impact of the ESA on Southern California, an area of great biological and ecosystem diversity and one of the fastest growing regions in the United States. Given the large amount of federal lands in Southern California, we are acutely aware that the resource management decisions we make can profoundly impact local communities. However, we believe that resource management does not need to come at the expense of the needs of local communities, and the Administration is committed to achieving a balance between conservation and growth using all the available tools. At the Department, this commitment means implementing a cooperative approach toward the recovery of endangered and threatened species through the development of partnerships with states, tribes, landowners, and other stakeholders. To that end, I would like to discuss how the Administration is working to make implementation of the ESA more efficient and effective.

*Designation of Critical Habitat*

While the Department has made great strides in improving the administration of the ESA, one area of implementation that continues to be both a challenge and a source of controversy is the designation of critical habitat. As we have previously detailed in testimony before this Committee, the U.S. Fish and Wildlife Service (the Service) has been embroiled in a relentless cycle of litigation over its implementation of the listing and critical habitat provisions of the Act. The Service now faces a Section 4 program facing serious difficulties due not to agency inertia or neglect,

but to a lack of scientific or management discretion to focus available resources on the listing actions that provide the greatest benefit to those species in greatest need of conservation.

The Service has characterized the designation of critical habitat as required by the Act as the most costly and least effective class of regulatory actions undertaken by the Service. It is often of little additional value or counterproductive and can result in negative public sentiment to the species and the Act itself. This negative public sentiment is fueled by inaccuracies in the initial area designated when we must act with inadequate information to meet strict statutory deadlines. For example, under the Act, the Service is required to designate critical habitat concurrent with a final listing determination, using the best scientific data available. Unfortunately, in some circumstances, the information supporting such designations have later been found to be incomplete, sometimes resulting in a cycle of litigation, described in further detail below.

In addition, there is often a misconception among the public that, if an area is outside of the designated critical habitat, it is of no value to the species. At the same time, the designation of critical habitat imposes burdensome requirements on federal agencies and landowners and can create significant economic and social turmoil.

As a result, for many years the Service often found designation of critical habitat to be "not prudent," and did not designate it for most listed species; an approach which was formalized by the previous administration. In the late 1990s, some critics began challenging these "not prudent" findings in court; those successes led to a flood of additional suits which continue to this day. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. Consequently, the Service has little ability to prioritize its activities to direct resources to listing program actions that would provide the greatest conservation benefit to those species in need of attention. The previous Administration recognized this when it said that lawsuits which force the Service to designate critical habitat necessitate the diversion of scarce Federal resources from imperiled but unlisted species which do not yet benefit from the protections of the ESA.

The accelerated schedules of court-ordered designations have left the Service with limited ability to take additional time for review of comments and information to ensure the rule has addressed all the pertinent issues before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who will suffer adverse impacts from these decisions challenge them. This cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little protection to listed species.

Extensive litigation has shown that the courts cannot be expected to provide either relief or an answer, because they are equally constrained by the strict language of the Act. The Department of Justice has defended these lawsuits and sought to secure relief from the courts to allow the Service to regain the ability to prioritize the listing program according to biological need. Almost universally, the courts have declined to grant that relief.

In 2001, a federal district judge, in Center for Biological Diversity v. Norton, No. CIV 01-0258 PK/RLP (ACE), observed that "the Secretary is caught in a quandary" in trying to "fulfill the myriad of mandatory [ESA] duties." The judge opined that "[m]ore lawsuits will inevitably follow" unless, among other things, the Service regains its discretion to prioritize its workload. The judge suggested that a legislative solution is necessary; otherwise "tax dollars will be spent not on protecting species, but on fighting losing battle after losing battle in court."

Other courts have agreed with this assessment. Simply put, the listing and critical habitat program is now operated in a "first to the courthouse" mode, with each new court order or settlement taking its place at the end of an ever-lengthening line. We are no longer operating under a rational system that allows us to prioritize resources to address the most significant biological needs. I should note that it is as a direct result of this litigation that we have had to request a critical habitat listing subcap in our appropriations request the last several fiscal years in order to protect the funding for other ESA programs. At this point, compliance with existing court orders and court-approved settlement agreements will likely require funding into Fiscal Year 2008.

The Administration's budget request for FY 2005 provides funding to meet resource protection goals and address the growing listing program litigation-driven workload. The requested increase includes a total of $13.7 million for critical habitat for already listed species. This is an increase of $4.8 million over the FY 2004 funding level. The increased funding will allow the Service to meet its current and an-

ticipated court orders for the designation of critical habitat for already listed species. In this regard, I would note that as of August 23, 2004, there were 72 lawsuits pending or expressly threatened related to critical habitat or other section 4 actions. In short, litigation over critical habitat has hijacked the program.

However, additional funding to stem the tide of this "deadline" litigation is not the solution. When Congress included strict deadlines to ensure that listing measures are completed in a timely manner they could not have foreseen that litigation over deadlines would highjack the program. This highlights the need for a specific legislative solution. The Department and the Congress must work together to determine how to get the most value for species conservation out of the federal resources devoted to the endangered species listing program.

Former Secretary Bruce Babbitt wrote in a New York Times op-ed piece in April 2001 that, in its struggle to keep up with court orders, the Service has diverted its best scientists and much of its budget for the ESA away from more important tasks like evaluating candidates for listing and providing other protections for species on the brink of extinction. We also believe that available resources should be spent focusing on actions that directly benefit species such as improving the consultation process, development and implementation of recovery plans, and voluntary partnerships with states, tribes, and private landowners.

Some of the more significant and efficacious elements of a modern conservation strategy that we have pursued include candidate conservation agreements, habitat conservation plans, safe harbor agreements, voluntary agreements with landowners such as through the Service's Partners for Fish and Wildlife Program, incentive-based actions such as those carried out under the Service's Landowner Incentive Program, partnerships with states, tribes, and nongovernmental organizations, and private stewardship efforts by individuals and businesses. These programs, which consist of combined private and governmental action, improve the health of our lands, forests, rivers, and other ecosystems. Their implementation provides far greater conservation benefits than the designation of critical habitat while avoiding the regulatory, economic and social disadvantages of critical habitat designations.

*Habitat Protection through Cooperative Conservation*

We are continually working to find new and better ways to encourage voluntary conservation initiatives. Indeed, the Service currently has many conservation tools available which provide for close cooperation with private landowners, state, tribal, and local governments, and other non-federal partners that are particularly important in our implementation of the ESA. For example, through the Candidate Conservation program, the Service can work with states, landowners, and other non-federal partners to voluntarily conserve candidate or other declining species. Under this program, the Service works to identify species that face threats that make listing under the ESA a possibility and provides information, planning assistance, and resources to encourage voluntary partnerships and agreements. These resulting conservation agreements or plans may contribute to removing the threats that might otherwise necessitate listing under the ESA.

Most recently, a Candidate Conservation Agreement, developed by the Bureau of Land Management (BLM), the State of Idaho, the Idaho Army National Guard, and several private property owners who hold BLM grazing permits, served as part of the basis for the Service's determination to withdraw its proposal to list the slickspot peppergrass (Lepidium papilliferum). Among other information central to the Service's decision to withdraw the proposal, this formalized agreement was determined to reduce risk to the slickspot peppergrass such that this species is unlikely to become endangered within the foreseeable future. The slickspot peppergrass story is an outstanding example that listing a species and designating critical habitat is not necessarily the only means to achieve conservation.

Similar to Candidate Conservation Agreements, Safe Harbor Agreements also serve as a means to garner non-Federal property owners' support for species conservation on their lands. Under Safe Harbor Agreements, non-Federal property owners who commit to implement voluntary conservation measures for listed species will receive assurances that no additional future regulatory restrictions will be imposed.

In addition, the Habitat Conservation Planning Program provides a flexible process for permitting the incidental take of threatened and endangered species during the course of implementing otherwise-lawful activities. The program encourages applicants to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs. Perhaps the Program's greatest strength is that it encourages locally developed solutions to listed species conservation, while providing certainty to permit holders. Through this process of consulta-

tion and cooperation with our partners, the Program helps provide for the conservation of listed species on non-federal land throughout the country.

On May 8, 2003, the Service announced a new conservation banking guidance to help reduce piecemeal approaches to conservation by establishing larger reserves and enhancing habitat connectivity, while saving time and money for landowners. This guidance, which has been in place since May 2003, details how, when, and where the Service will use this collaborative, incentive-based approach to species conservation.

Conservation banks are lands acquired by third parties, managed for specific endangered species and protected permanently by conservation easements. They may also help avoid the need for designation of critical habitat. Banks may sell a fixed number of mitigation credits to developers to offset adverse effects on a species elsewhere.

*Critical Habitat Exclusions*

These are among the many conservation tools we use that play an important role in our implementation of the ESA. It is our view that where programs provide for species conservation and management, critical habitat designation is not needed. Our support for this interpretation is derived from the definition of "critical habitat" under Section 3 of the Act which states that critical habitat includes areas occupied by the species "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." It has been our view that areas that are not in need of special management considerations or protections are outside the definition of "critical habitat," and are, therefore, excluded from designation.

However, a court decision in the District of Arizona has cast doubt on this interpretation. In a case involving Forest Service lands, the U.S. District Court in Arizona ruled that this interpretation is incorrect, and found that the fact that lands require special management necessitates their inclusion in, not exclusion from, critical habitat.

Although the decision is limited to the critical habitat designation at issue in that case, it may negatively affect our future ability to use this interpretation of "critical habitat" elsewhere. The Service uses other methods besides this policy to encourage voluntary and cooperative conservation. For example, Section 4(b)(2) of the ESA allows the Department to exclude areas if the benefit of exclusion outweighs that of inclusion as long as it does not result in the extinction of the species. This Administration has used this provision to exclude lands subject to Habitat Conservation Plans and other conservation agreements or management strategies designed to conserve species.

*Cooperative Conservation at Work in Southern California*

Deemed a "biological hotspot" by biologists and other researchers, Southern California supports a rich diversity of fish, wildlife, and plant species because of the area's unique geological, hydrological, climatic, and topographic characteristics. As one of the most ecologically diverse areas in the country, Southern California has approximately 100 species listed as threatened or endangered under the Act. In the State of California alone, there are 292 federally listed species, 2 proposed, 16 candidate species, as of June 24, 2004.

The area is also one of the fastest growing regions in the United States. With a projected population of 19 million people, Southern California has five of the six most populous counties in the nation. Riverside County is one of California's fastest growing counties and its population of approximately 1.1 million in 1990 is projected to increase to 1.8 million by 2005. Orange County, although already very densely populated, will likely rise from its current level of 2.9 million to just over 3 million within the next four years. San Bernardino County's population is also on the upswing, with an anticipated increase from 1.4 million residents in 1990 to almost 2 million by 2005. Los Angeles County, already approaching the 10 million mark, is more populous than 42 of our Nation's states.

Conserving California's natural resources, while accommodating the projected population growth, has required the innovative use of cooperative conservation in administering the ESA. For example, in June 2004, the Service approved the Western Riverside County Multiple Species Habitat Conservation Plan(HCP). Under this landmark agreement, a proposed 500,000 acre reserve system was created as habitat for 146 species through the combined efforts of federal, state, and local partners. Through this regional HCP, the County of Riverside and local jurisdictions will be able to proceed with economic development projects, while fully complying with the mandates of the Act.

As we continue to improve upon a more holistic, ecosystem-based approach in administering the HCP program, it is our hope that the Western Riverside County Multiple Species Habitat Conservation Plan will serve as an example for future HCP's. As previously mentioned, pursuant to our authority under Section 4(b)2 of the Act, we have excluded lands that are subject to these plans from critical habitat designation.

Such tools will become all the more important as Southern California continues to experience unprecedented growth.

*Conclusion*

In closing, I would like to reiterate our commitment to working with Congress to find a solution to the problems associated with critical habitat designation and other related issues. At the same time, the Department will continue to strengthen our partnerships and expand the use of cooperative conservation tools. It is our goal to use cooperative conservation and the tools at our disposal to implement programs that will eliminate the need for listing by conserving species before they become threatened.

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Mr. POMBO. Well thank you.

In light of the testimony we have heard this morning and to start with the fly and some of the issues that they have been dealing with. I think that one of the biggest complaints that I hear from local officials and property owners is that it is very difficult, if not impossible, to work with the Fish and Wildlife Service in this area and that there seems to be a real disconnect. I do not know if it is agenda-driven or attitude or exactly what it is, but there seems to be a large amount of consensus that in dealing with some of these issues that the Fish and Wildlife Service has been pretty difficult to deal with.

And I am not sure exactly what the solution to that is, I mean in terms of dealing with some of these problems, but it seems to be very consistent that we do have a problem and maybe opening a new office in the Inland Empire is a possible solution or an option that we should pursue.

Has the Department looked at opening a local office in San Bernardino County?

Ms. MACDONALD. It does not sound like we have done that specifically, but we are aware of the concerns that you have raised.

The Cities of Fontana and Colton were in and talked to the Assistant Secretary last year. I was in that meeting. We are very aware of the difficulties around the fly.

Steve Thompson, who was unable to be here today, has asked his assistant regional manager to be here and also Paul Henson, who is in a new position I think since we spoke to the city. Paul now overseas all the field offices. And Paul is here to listen to some of these concerns. Steve is concerned about this. Whether it is real or perceived does not really matter. But the disconnect between the people that the Service is serving and how they perceive the Service's attitude toward them, they are here to hear these comments and think about ways that we can address the concern; whether it is another field office locally, whether it is just more attention and work done on particular projects. But they are here to listen and to try to address these problems.

Mr. POMBO. In terms of the HCPs, does the Fish and Wildlife Service intend on reevaluating what adverse modification means and the impact in terms of critical habitat? Where do we go from here in light of these recent court decisions?

Ms. MACDONALD. Well, you know, I can basically echo a lot of the concerns that Rob Thornton raised earlier in his testimony.

We are still reviewing the case. But, you know, with the Federal government everybody has to look at it. But we are reviewing the case, we are reviewing the decision, we are reviewing our options. We do not disagree with the way that Rob characterized in his comments. I do not know that I would say that is our position, but those are certainly some of the consequences that we have identified as potential.

We are still basically working through what are our options short term, medium term, long term. What does this mean for HCPs. What does this mean for critical habitat designations. What does this mean for biological opinions. The ramifications are considerable.

So, I do not have a definitive answer for you in terms of where are we going to go from here, but I can tell you that this got our attention immediately and we have been working on it ever since.

Mr. POMBO. Another issue that Mr. Thornton raised was the amount of land that has been designated or is being designated as critical habitat. Just looking at the numbers, and I am going to have to review his testimony further, but just looking at the numbers it looks like somewhere between 60 and 75 percent of the State of California ends up being off limits because of critical habitat and the amount of land that is federally owned. But if you take the figures he used and add on top of that lands that are State owned, lands that are being included in habitat conservation plans and start layering all of these different conservation schemes and lands use plans that get put together, you end up with an extremely small portion of the State of California that can be developed, that there can be some kind of economic activity on.

Does the Fish and Wildlife Service, does the Department ever look at this in this way and say, you know, we are not just talking about the Red Legged Frog or we are not just talking about the fly or the kangaroo rat, or whatever but look at it in its entirety and just look at California and look at what we have done over the last 20 years in terms of conservation and protecting lands, and what we have set aside, and all of that and layer all of this on top of each other and actually take a look at what that means? I think it would be a lot easier for local cities to plan their growth if you guys actually looked at this in its entirety instead of on a piecemeal basis.

Ms. MACDONALD. I think you are right. The short answer is no, we do not do that. But probably the most appropriate place for that to occur would be in the economic analysis that we do for critical habitat designations.

I hate to be an apologist for inadequate review of some of this stuff, inadequate analysis. We do not have a lot of time to complete those because, again, the court-ordered deadlines force us to do a designation. We cannot do an economic analysis until we at least have a proposed designation, which really shortens the amount of time that is available to do the analysis.

The cumulative effects of these designations are devastating. We do attempt to look at the big picture when the critical habitat designations come to the Assistant Secretary's office, and we exercise

the authority that the Act gives us under Section 4.b.2 where we can make exclusions for economic or other reasons. We did that in the case of the Verna Pools. We had an economic analysis that gave us county-by-county information. What we did then in the Assistant Secretary's office was to take a look at the analog to the gross national product for each county and ask the question what is the percent impact on this county on their gross annual product of this listing, of this designation. And then we also looked at unemployment as a proxy for how much can they sustain in terms of a hit to their annual product. And we made exclusions based on that.

We are in court now on those decisions because the environmental community did not think that we should do that.

Mr. POMBO. Well, I know that over the last several years, and it predates this Administration, it does not matter what decision you make, you are going to get sued. I mean, that is just the way it happened. But I think just finally and for me, you know Mr. Denner, I have had the opportunity over the years to talk to him a number of times about what is happening in the California desert and what the impacts are on people. But I think what he is bringing out is just a snapshot of what is happening throughout all of California where, you know, we set aside the 8 million acres and then we sit on top of that, you know, Desert Tortoise and rats and Big Horn Sheep. And it just gradually gets to the point where there is nothing left.

Ms. MACDONALD. Right.

Mr. POMBO. And I think if you look at what he is doing or what he is trying to do in protecting the people that he represents and look at the State of California in the same perspective, it has happened throughout the State of California. And that is why cities like Fontana and Colton and Rialto are coming to us saying you are killing us. And I think you need to look at it in that respect.

I understand exactly what is happening with your budget and with your personnel. Because everything is being sucked up going and defending lawsuits and answering lawsuits and little of it is being used to actually do what you should be doing. I know that is frustrating for me so I am sure it is frustrating for you.

I am going to recognize Mr. Baca.

Mr. BACA. Thank you very much, Mr. Chairman.

Thank you very much, Julie, for being here and listening to the comments that were said. And hopefully you can take those comments back to your office and come back with constructive guidelines in terms of how we deal with the problems that are impacting the Inland Empire, especially as we continue to see a lot of growth in this area and we see more and more people moving and housing and development that continues to be in this area. But we also want to get economic development, as well as to make it very good for a lot of our residents who live in the immediate area.

Let me ask you this question, and I know that I am not the only Member of Congress in California who has difficulty in dealing with Carlsbad Fish and Wildlife Service. As you know, Congressman Ken Calvert requested a General Accounting Office audit to find out how efficiently things were running. The main complaint about was the time the office takes to move forward with habitat plan. As we heard from cities of Fontana today and others, the

amount of red tape, waiting, back and forth is painful. And I want to quote what Mayor Bennett said. "If a party wants to develop land they own within designated habitat, they must negotiate with the Fish and Wildlife in developing habitat conservation plans. And if you get a permit, you must buy habitat land at your costs plus pay for maintenance. Unfortunately, this process equates to nothing more than legalized extortion."

Can you elaborate on why the attitudes and feelings are there when they are trying to deal with the Fish and Wildlife Service and yet the cost and the burden that is on the cities such as Colton or maybe Fontana or others that are trying to have a conservation, yet there is a form of extortion or hostage that they are being held because of the time and the day and the response, and time is money? Can you elaborate on that, please?

Ms. MACDONALD. Yes. I would like to do two answers.

First, I will answer more broadly on a policy basis and then I think I will ask Paul Henson to talk more specifically about the Carlsbad office and what his CNO office has been doing to address some of these problems.

I think that part of the difficulty is the Act requires the Service to ensure that there's no jeopardy. That is the law. And these people are doing their job in terms of OK, you know, there are 15 flies that live on this—I am just making this up—those 10 acres. We only know of 25 flies. If you are going to use this 10 acres for something, we have to be able to make a reasonable argument that this project is not going to jeopardize the continued existence of this species. That is where you end up with, you know, OK three to one or two to one or one to one mitigation or other habitat that you have to buy and restore and maintain.

So, to the extent that this discussion even takes place, the law forces it.

Now I am going to ask—

Mr. BACA. Can I just disrupt you just a second on this, Julie?

Ms. MACDONALD. Yes.

Mr. BACA. When you look at it and are developing this, and you come up hypothetical numbers, does anybody come to inquire to find out if those numbers are even accurate? And has anybody ever seen the fly? Have you personally ever seen the fly?

Ms. MACDONALD. No.

Mr. BACA. I mean, that is why when you look at it—

Ms. MACDONALD. The fly is like—

Mr. BACA.—and you are using that as a legal documents to argue, then it makes it very difficult on other cities.

Ms. MACDONALD. Well, it is horrible because there is no information on this fly. Nobody ever sees the fly, but it is listed and the law says we have to protect it.

Mr. BACA. Go ahead. I yield.

Mr. POMBO. If the gentleman would yield for just a second.

One of my big issues with mitigation is it seems to be based more on ability to pay than it does anything else.

Ms. MACDONALD. Paul, would you like to?

Mr. HENSON. I would be happy to answer questions.

Mr. POMBO. Yes. You want to answer.

Ms. MACDONALD. Paul has more experience, I think, in the field.

Mr. POMBO. Paul, just identify yourself for the record.

Mr. HENSON. Sure.

Mr. POMBO. And you are more than welcome to answer the questions. But in more cases than not mitigation appears to be based on the ability to pay than it does with anything to do with the habitat.

Mr. HENSON. My name is Paul Henson. I'm Assistant Manager for U.S. Fish and Wildlife Service in Sacramento in our California/Nevada Operations Office.

I do have sort of a "buck stops here" kind of responsibility on some of these issues, so I want to make that real clear to you up front, Congressman. And also to the mayors and the former council member here as well. I now supervise the Carlsbad office from Sacramento, as well as several other field offices in California and in Nevada. So, I came in part here, I was not asked to attend to testify or anything like that, but I wanted to hear some of these issues. I need to familiarize myself with these things and look into them a little more closely.

On the mitigation issue, actually what you have described is accurate. And in Section 10, our HCPs that we have been talking about and maybe Rob Thornton had something to do with this something 20 years ago, mitigation is supposed to be provided to the maximum extent practicable. And that definition of what is practicable—this is in the Section 10 context, not in some of these other Section 7 issues. But that definition of practicable assumes a certain reasonableness, a certain what is, say, a large—say in the timber arena, a large company like Warehouser what they're able to do and what a small single family business owner can provide. So, there is a certain interpretation of that, but that is a very difficult thing to render because there is consistency issues.

Now, in terms of mitigation in this context of Section 7 with, say, the Federal highway projects here in your neighborhood, we do not require mitigation in that context. If an agency like the Army Corps is doing a Clean Water Act permit, they do have a mitigation function and requirement. But the Service does not in Section 7, we have to do two things. We have to avoid jeopardy to the species in our biological opinion, make sure that happens. And then second if take is going to occur in that action, we permit the take and we try identify measures that minimize that take. And those measures, sometimes people look at those measures as mitigation and they use that, what we call the M word. But it is not mitigation in the sense like Clean Water Act compensatory mitigation. But if that is happening or some people perceive that has happened in some of these context, I would like to talk more with some of the affected parties to maybe clear that up and certainly improve that if that has a problem in the past.

Mr. POMBO. Thank you.

Mr. BACA. Thank you. I know that we are running short of time, and I know we all have some additional questions. And I will ask you to, hopefully, to respond back to them in writing. But one additional question that I have, one year ago I, along with the City of Fontana, met with Under Secretary Manson concerning the Delhi Sands Flower-Loving Fly. He told us there was a 5-year review to

consider delisting the fly. Do you know where the Fish and Wildlife Service is with this study?

Ms. MACDONALD. It sounds like they have not even started. I know that that direction was given, but I am going to plead the lawsuit because our listing program, our critical habitat program is 100 percent consumed with court-ordered listing for designation. The listing program has about, I think, ten to 15 percent discretionary funds which are funds that are not obligated due to lawsuits. That ten to 15 percent the Service will have used that money to do the status review. It sounds like they did not do it.

I can—I will go back and I will make sure it happens.

Mr. BACA. We appreciate that very much because as we look at the dates and the times and the deadlines, and that is what people are all complaining about. Here again, you know, we were given the 5 years and yet we have not seen what the status or changes or what is occurring in that area, and yet this is the Under Secretary that indicated that we would be working on this. And yet, as Members of Congress, they ask us what is the status and what is going on in terms of finding the solution to the problem.

Finally, if I can, it was mentioned earlier by Mayor of Colton when we talked about the drain storm in the immediate area that has had an effect on a lot of areas, especially with 12 deaths with the West Nile Virus in San Bernardino County and Riverside and Orange County, how flexible is the Endangered Species Act in taking safety of people into account and how much—and how can situations like this be handled without violation of ESA?

Ms. MACDONALD. I think that it is very flexible unless you are in a situation where there is a jeopardy opinion. And I do not hear that that is what is going on with the fly. And so I think that this issue, along with all the others that are brought up, Paul is here, he will be working with the cities and the field office to make sure that some of this stuff gets addressed.

Mr. BACA. Thank you.

Mr. POMBO. Mr. Radanovich?

Mr. RADANOVICH. Thank you, Mr. Chairman.

Ms. MacDonald, you have mentioned I think in your testimony that the agency has such a hard time establishing its priorities. I am assuming it is because of lawsuits and judgment kind of interfere with your setting of those priorities?

Ms. MACDONALD. Right.

Mr. RADANOVICH. And you did mention that the remedy to that, if I am correct, is legislation?

Ms. MACDONALD. Yes.

Mr. RADANOVICH. Right? Can you do it? Can you do it—I mean can you provide the law—

Ms. MACDONALD. We cannot.

Mr. RADANOVICH. Yes. I know. We are supposed to be doing it. But can you write the law in such a way that makes it a little more bullet proof to lawsuits and judgments?

Ms. MACDONALD. I think there are lots of ways to address these issues. And we have been in open discussions with various members who have legislation moving through the process. We have tried—we are very interested in addressing this problems and working with Congress to find solutions.

Mr. RADANOVICH. OK. One quick question regarding the Carlsbad office. I understand that there was a GAO study that was released in 2000 which had mentioned problems in the Carlsbad office, one of them being time lost from office staff turnover and reassignment in part due to the high cost of living in the Carlsbad office or within the Carlsbad area. Is the location of the Carlsbad office a deterrent in your view to the hiring and maintaining of qualified staff to be there on a consistent basis?

Ms. MACDONALD. Again, I cannot speak from personal knowledge, but I know that I have heard repeatedly that it is a high cost of living area, very very high work load, very contentious issues. So, it is not a very pleasant place to work. And so, you know, you couple that with the difficulty in finding a place to live and living comfortably, that is one of the reasons I have been given that it is a difficult office to maintain the staff.

Mr. RADANOVICH. Thank you.

In closing, I just—I have to concur that the legislative answer to this is really the answer and the difficulty that people like Mr. Baca and Chairman Pombo especially and myself over the last many, many years to try to precipitate that in the Congress given the sensitive nature, the Endangered Species Act. And I got to tell you, and I know we got to close, but there is such a discrepancy in the law. Back in Washington there is a Wilson Bridge which is being built to connect the beltway across the Potomac River. And there is the endangered Short-Nosed Sturgeon, it's been listed since 1974. Their method of dealing with it to protect the endangered Short-Nosed Sturgeon was to strip away their habitat, which was the clam beds at the base of the river before they started dynamiting for the new bridge to go in there. And further upstream where they go to spawn, the water that is cleansed for the District of Columbia and Virginia is pulled out into settling ponds and then they add chemicals like allium and chlorine and this sedimentation fills up over a period of time. Well, they bulldozed 200,000 tons of this stuff back into the river through a national park, Heritage River, and the spawning grounds of this endangered species. And there is no issue of habitat conservation. Nobody has brought a big lawsuits only because somebody did not in their own wisdom did not deem that area to be worth the legal efforts to try to stop. A special interest group determined that that should be happening in Fontana rather than in Washington, D.C. The law applies to the same endangered species even though it is administered under NOAA and not Department of Fish and Wildlife. But it is a bad law that allows this kind of inequity to happen in the United States.

And God bless you guys, but I think that more habitat conservation issues need to be in places like Philadelphia and Washington, D.C. and New York City before we are going to precipitate the votes in Congress.

It is sad. It has been awful for people like you, but more Americans need to feel the pain, unfortunately.

Ms. MACDONALD. It is a difficult problem. You are right.

I am done. But, again, thanks for having the hearing, Mr. Chairman.

Mr. POMBO. Thank you. I want to thank you for your testimony. And I know Mr. Baca had additional questions and I have a couple.

Those will be submitted to you in writing. If you could answer those in writing for the Committee, I would appreciate it.

And to the Mayors and City Council Member who are here, since Paul has come on, I mean I have had a chance to talk to him and deal with him a few times. He is a good guy, he really is. And he is somebody that you ought to get to know and talk to because he at least will try and has a little bit of an understanding of what is going on.

There are a couple of people that I wanted to thank. Bee Watson is the Clerk of Fontana City Hall. Larry Watson a production specialist. And Silas Johnson, coordinator who helped us greatly in putting this on.

I also wanted to again acknowledge that Joe Baca, Jr., took the time to be here and pay attention to what was going on. I appreciate him doing that, Joe.

And I would also like to thank Joe for hosting us here. This is something that we have been talking about doing for a long time and it is nice to have an opportunity to be here and hear from your constituents about what some of the issues are and problems that they are dealing with, and hopefully we can move forward with it. And I thank you for all the work you have put on in the Committee to make this successful, along with the Resources Committee staff who put in all the effort to put this hearing together.

It is something I like to do—going out and holding field hearings and hearing from people across the country who have to deal with laws we have passed. It is not easy for staff to pick up everything they do in Washington, D.C., and bring it out and replicate it here. I know sometimes they get frustrated with me, but it is something I enjoy doing because I think it is important.

And I also wanted to thank Mr. Radanovich for making the effort to be here and to hear from people on this issue.

We going to adjourn this hearing. I want to thank all of our witnesses and everyone who was here.

If there are further comments, the hearing record will be held open for 10 days in order to include those in the record.

If there is no further business before the Resources Committee, the Committee stands adjourned.

[Whereupon, at 12:05 p.m. the Committee was adjourned.]