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CRISIS OF CONFIDENCE: THE POLITICAL INFLUENCE OF THE BUSH ADMINISTRATION ON AGENCY SCIENCE AND DECISION-MAKING

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

Tuesday, July 31, 2007

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OVERSIGHT HEARING ON "CRISIS OF CONFIDENCE: THE POLITICAL INFLUENCE OF THE BUSH ADMINISTRATION ON AGENCY SCIENCE AND DECISION-MAKING."

Tuesday, July 31, 2007
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to call, at 10:00 a.m. in Room 1324, Longworth House Office Building, Hon. Nick J. Rahall [Chairman of the Committee] presiding.

Present: Representatives Rahall, McMorris Rodgers, Kildee, Christensen, Napolitano, Holt, Grijalva, Sarbanes, DeFazio, Kennedy, Capps, Inslee, Baca, Bordallo, Duncan, Cannon, Brown, Sali, and Lamborn.

STATEMENT OF HON. NICK J. RAHALL, A U.S. REPRESENTATIVE FROM THE STATE OF WEST VIRGINIA

The CHAIRMAN. The Committee on Natural Resources will come to order, please. The Committee is convening today in light of unsettling reports about officials within the administration who are tweaking scientific data in order to advance a political agenda.

It is a practice, quite honestly, worthy of the Middle Ages, when the pioneers of astronomy were forced by officials of the time to recant their science and to swear that the Earth was flat. That such a ludicrous disregard for the truth is being allowed to influence our public policy today is simply untenable.

Our government is fortunate to have forces of individuals, of scientists, earnestly heading to work each day to provide their expertise for the betterment of our nation. These learned men and women have proudly put their good minds to use in public service so that government decisions can be enlightened by fact.

But this administration possesses a troubling willingness to disregard, or even to undermine, the science if it interferes with its political agenda. At Interior, we have witnessed time and again how such meddling compromises America's treasury of natural resources and undercuts the trust of the American people in their elected government. Instances of highly placed officials berating and twisting the arms of already fearful and demoralized, lower-level scientists in a host of agencies are numerous and continuing to come to the surface.

For example, Sunday's front page Washington Post article about unelected, unaccountable bureaucrats suppressing public health reports is only the latest in a string of stories that ought to outrage every American citizen.

The fiasco at the Klamath River Basin is a case study in the political heavy-handedness so prevalent throughout this administration. Their political intervention wreaked havoc on the balance of wildlife, land, water, economy, and livelihoods of an entire region.

While political tinkering has long been fingered as a culprit in this disaster, it was only recentLY that a Washington Post article traced the strings to the Vice President of the United States of America, behind the doors of executive privilege.

This Committee invited the Vice President to appear today. I will not pretend to be surprised that he declined our invitation, but I am obliged to express disappointment at the difficulty we have had in trying to learn the truth and conduct basic oversight over an agency within the administration and an administration that has made secrecy and lack of accountability hallmarks of its tenure.

At the very least, we could have expected the Secretary of the Interior, Dirk Kempthorne, to come before the Committee. The Secretary, who I have publicly commended many times as wanting to get to the bottom of the culture of corruption at the Department of the Interior, he who has repeatedly claimed a desire to clean up his agency's ethical lapse. He was invited. He was provided a chance to help restore some of the lost integrity, transparency, and accountability to the management of our natural resources, but, unfortunately, he also declined.

When it comes to political interference and ethical lapses at the Department of the Interior, Klamath River is just the tip of the iceberg. The recent announcement by the agency that it will revisit a list of eight decisions pertaining to endangered species should be welcome news to this Committee, which has pressed so hard for a renewed look at the work of Julie MacDonald and others. But one has to question the methods used to determine which decisions to revisit.

I have little confidence that this latest action is anything more than another on the long, distressing list of actions taken by this agency, merely for the sake of appearing to correct its ethical lapses.

I find it difficult to see how we can trust any decision made in an agency that has, time and again, betrayed its own career scientists, repeatedly failed to hold its appointees to ethical standards, and has so callously disregarded its mission for the sake of political gain.

The stewardship of God's creatures and America's most sacred landscapes should be a selfless endeavor informed by the moral responsibility and scientific understanding.

By bringing these issues into the public forum of this hearing today and others, we may yet prevent the people's lack of confidence in their government from reaching critical mass.

I now recognize the acting Ranking Member, the gentlelady from Washington, Mrs. McMorris Rodgers.

[The prepared statement of Mr. Rahall follows:]

Statement of The Honorable Nick J. Rahall, II, Chairman, Committee on Natural Resources

The Committee on Natural Resources convenes today in light of unsettling reports about officials within the Administration who are tweaking scientific data in order to advance a political agenda. It is a practice worthy of the Middle Ages, when the pioneers of astronomy were forced by officials of the time to recant their science, and to swear that the Earth was flat. That such a ludicrous disregard for the truth is being allowed to influence our public policy today is untenable.

Our government is fortunate to have forces of scientists, earnestly heading to work each day to provide their expertise for the betterment of our Nation. These learned men and women have proudly put their good minds to use in public service, so that government decisions can be enlightened by fact.

But this Administration possesses a troubling willingness to disregard or even to undermine the science, if it interferes with its political agenda. At Interior, we have witnessed, time and again, how such meddling compromises America's treasury of natural resources and undercuts the trust of the American people in their elected government.

Instances of highly placed officials berating and twisting the arms of already fearful and demoralized lower level scientists in a host of agencies are numerous and continually surfacing. Sunday's front-page Washington Post article, about unelected, unaccountable bureaucrats suppressing public health reports is the latest in a string of stories that ought to outrage every American citizen.

The fiasco at the Klamath River Basin is a case study in the political heavy-handedness so prevalent throughout this Administration. There, political intervention wreaked havoc on the balance of wildlife, land, water, economy and livelihoods of an entire region.

While political tinkering has long been fingered as a culprit in this disaster, it was only recently that a Washington Post article traced the strings to the Vice President, behind the doors of executive privilege.

This Committee invited the Vice President to appear today. I will not pretend to be surprised that he declined our invitation. But I am obliged to express disappointment at the difficulty we have in trying to learn the truth and conduct basic oversight over an agency and an Administration that have made secrecy and lack of accountability hallmarks of their tenure.

At the very least, we would have expected Secretary of the Interior Dirk Kempthorne to come before the Committee. The Secretary, who has repeatedly claimed a desire to clean up his agency's ethical lapses, was invited. He was provided the chance to help restore some of the lost integrity, transparency, and accountability to the management of our natural resources. But he also declined.

When it comes to political interference and ethical lapses at the Department, Klamath River is just the tip of the iceberg. The recent announcement by the agency that it will revisit a list of eight decisions pertaining to endangered species should be welcome news to this Committee, which has pressed so hard for a renewed look at the work of Julie MacDonald and others. But one has to question the methods used to determine which decisions to revisit. I have little confidence that this latest action is anything more than another on the long, distressing list of actions taken by this agency merely for the sake of appearing to correct its ethical lapses.

I find it difficult to see how we can trust any decision made in an agency that has, time and again, betrayed its own career scientists, repeatedly failed to hold its appointees to ethical standards, and so callously disregarded its mission for the sake of political gain.

The stewardship of God's creatures and America's most sacred landscapes should be a selfless endeavor—informed by the moral responsibility and scientific understanding. By bringing these issues into the public forum of this hearing and others, we may yet prevent the people's lack of confidence in their government from reaching critical mass.

STATEMENT OF HON. CATHY McMORRIS RODGERS, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman. The title of today's agenda suggests that there is a crisis in confidence when it comes to the Endangered Species Act and other environmental laws and the way that they have been carried out. I could not

agree more, but for different reasons than outlined by Chairman Rahall.

The area that I represent in eastern Washington is the poster child of how many people have lost confidence in the Endangered Species Act. Like everyone, hard-working folks in eastern Washington agree with the goals of the ESA and are trying to do their part. However, when a judge virtually rules our rivers, and, in one case, mandates a policy that led to the expenditure of almost $4 million per salmon with little to show, it begs the question of whether the ESA really works as it was intended.

Meanwhile, electricity ratepayers pay over a quarter of their monthly bills toward endangered salmon, and there is little progress in determining success and settling this issue. We need to protect species and our way of life with science, collaboration, and results-driven measures, but there is no confidence in eastern Washington that our current endangered species law, which encourages legal conflict and blunt judicial force, can do that.

We have been told that the heart of this hearing is over the Klamath Basin controversies detailed in the Washington Post article. Although the article generated political intrigue and buzz inside the beltway, you will find this truth today, that there was no improper political meddling in the Klamath decision-making process, and independent, peer-reviewed science trumped all in the end.

If the point of this hearing is to find a crisis of scientific confidence, just talk to the Klamath project irrigators, who experienced a devastating water shutoff, only to find later that the scientists and the biologists got it wrong in the first place.

Despite the loose allegations and inferences that Dick Cheney's actions led to an historic fish kill, you will hear that there is no scientific proof of this either.

Mr. Chairman, the only smoking gun you will find here today is that the ESA has been broken for decades and urgently needs to be updated for the benefit of people and species.

If you continue to focus on Klamath, our Committee resources could be better spent on the positive discussions and negotiations going on now on the Klamath Basin. A field hearing at a neutral location may actually help these parties move past the goal line and find a resolution, as opposed to the unproductive blame game that could go on today.

The last time this Committee held a field hearing on this issue, the area SWAT team was on standby. You will find that times and attitudes have changed, if and when you actually hold a field hearing on this positive development.

Finally, Mr. Chairman, I will take you at your word that you want to find the truth on all of these matters before us. I am sure the name, Julie MacDonald, will come up today, and I hope she does because the American people deserve to know more about this situation. I am sure the public does not know that this grandmother never had the chance to refute the allegations levied against her and that there could be more sides to this story.

She has been unfairly called a future "convict" by a senior Member of this Committee, but there is no basis for such irresponsible talk, especially when the Inspector General found she did nothing illegal.

Mr. Chairman, the public deserves the right to know the facts. As such, I ask that you join me in requesting the Interior Department release all of her e-mails as relates to her activities detailed in the Inspector General's report.

I very much look forward to this hearing and hope we can work together to separate fact from fiction. Thank you, Mr. Chairman.

[The prepared statement of Mrs. McMorris Rodgers follows:]

Statement of The Honorable Cathy McMorris Rodgers, a Representative in Congress from the State of Washington

The title of today's agenda suggests there's a "Crisis of Confidence" when it comes to how the Endangered Species Act and other environmental laws have been carried out. I couldn't agree more, but for quite different reasons than the ones outlined by Chairman Rahall.

The area I represent in Eastern Washington is the poster child of how many people have lost confidence in the ESA. Like everyone, hard-working folks in Eastern Washington agree with the goals of the ESA and are trying to do their part, however when a Judge virtually rules our rivers and, in one case, mandates a policy that led to the expenditure of almost $4 million dollars per salmon and with little to show, it begs the question of whether the ESA really works as it was intended.

Meanwhile, electricity ratepayers pay over a quarter of their monthly bills towards endangered salmon and there's little progress in settling this issue and determining success. We need to protect species and our way of life with science, collaboration and results-driven measures, but there is no confidence in Eastern Washington that our current endangered species law—which encourages legal conflict and blunt judicial force—can do that.

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If the point of this hearing is to find a crisis of scientific confidence, just talk to the Klamath Project irrigators who experienced a devastating water shut-off only to find later that the scientists and biologists got it wrong in the first place. Despite the loose allegations and inferences that Dick Cheney's actions led to a historic fish kill, you will hear that there's no scientific proof of this either. Mr. Chairman, the only smoking gun you will find here today is that the ESA has been broken for decades and urgently needs to be fixed for the benefit of people and species.

If you continue to focus on Klamath, our committee resources could be better spent on the positive discussions and negotiations going on now in the Klamath basin. A field hearing at a neutral location may actually help these parties move past the goal line in finding resolution as opposed to the unproductive blame game that could go on today. The last time this Committee held a field hearing on this issue, the area SWAT team was on standby. You will find that times and attitudes have changed if and when you actually hold a field hearing on this positive development.

Finally, Mr. Chairman, I will take you at your word that you want to find the truth on all of these matters before us today. I'm sure the name of Julie McDonald will come up today and I hope she does because the American people deserve to know more about this situation. I'm sure the public doesn't know that this grandmother never had a chance to refute the allegations levied against her and that there could be many sides of the story. She has been unfairly called a future "convict" by a senior member of this Committee already, but there's no basis for such irresponsible talk, especially when the Inspector General found that she did nothing illegal. Mr. Chairman, the public deserves the right to know the facts. As such, I ask that you join me in requesting that the Interior Department release all of her emails as it relates to her activities detailed in the Inspector General's report. (Pause, look at Chairman and try to get his commitment).

I very much look forward to this hearing and hope that we can work together to separate fact from fiction.

The CHAIRMAN. The Chair would just note for the record that, since Julie MacDonald's name has been mentioned—I brought her

up first—we had scheduled to invite her, but she resigned one week before our hearing was held.

The Chair recognizes the gentleman from California, Mr. Miller.

STATEMENT OF HON. GEORGE MILLER, A U.S. REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Mr. MILLER. I thank the Chairman, and I want to thank you very much for this hearing. I think this is an important hearing.

I appreciate that people have different opinions about the Endangered Species Act and different views on how it should or should not be implemented, but I think what this hearing points out is what you should not have is you should not have political appointees tramping through the scientific findings and overriding the scientific findings and seeking to withhold scientific evidence from the determinations that are made.

As we tragically found out in the Klamath case, this led to a disaster, not just for that particular salmon run at that time but also for people up and down the Pacific coast who had their small businesses threatened, who had their livelihoods threatened, and ended up—I think our share of the bill was about $60 million to overcome those decisions that were hastily put together to justify the diversions of that water.

In the area that I represent, the San Francisco-Sacramento Delta, we now have a whole series of contracts that have been signed, we have decisions that have been made, we have plans that are being developed, and we find out that the underlying science on which those decisions are being made now has to be completely redone.

This is one of the last great delta systems in the world, but it is also a huge economic generator, it is a huge environmental generator for mid-California, and it is also the water supply for tens of millions of Californians, and how we are able to administer that, how we are able to run it to balance the interests of our state, we are required to have the best science available to us, and the public record is starting to strongly suggest that that was not the case.

Having Ms. MacDonald walk through these political offices, send information to opposing parties to lawsuits, to override scientists, to get people to withhold information is not how we should administer it. If you do not like the law, change the law, just change the law. Come through the democratic process and change the law.

This Committee had a number of false starts over the last several years in that effort. That does not mean that we should, therefore, stop. I, too, have raised problems and concerns and worked, on a bipartisan basis, on a number of efforts to change the Endangered Species Act, but because we have not been successful does not mean that people get to violate the law. It does not mean that people get to violate ethical standards. It does not mean people get to embrace conflicts of interest, and it does not mean that political appointees get to override the science because it does not work for them or one of their clients, and that is what this hearing is about. Mr. Chairman, I thank you very much for holding it.

The CHAIRMAN. The gentleman from South Carolina, Mr. Brown.

STATEMENT OF HON. HENRY E. BROWN, JR., A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. BROWN. Thank you, Mr. Chairman. As I understand the situation in Klamath River Basin that we are talking about today, you have three protected fish species managed by two different agencies. The fish species have two very different water needs. The two related species need water kept in the Klamath Lake, and the other needs water spilled over the river. On top of that, you have agricultural water needs for farms and farmers that have been in the area for almost 100 years.

This is a recipe for difficult decisions. Even figuring out the right thing to do scientifically for two different fish species is a very difficult task. All of the affected Klamath River Basin constituent groups—fishermen, agriculture users, tribes, scientists, and government officials—have been at the negotiating tables for some time now.

I find it disconcerting that some people may be viewing this hearing as a way to disturb these delicate negotiations and assert political partisanship into this important issue.

As I understand it, the decision to hold this hearing was based on a newspaper article that claimed that there were political influences brought to bear on this issue almost five years ago.

Mr. Chairman, since 2001, the Bush administration has invested over $500 million in the 10-million-acre, Klamath River Basin watershed for habitat restoration, water quality improvement, and water conservation. Tremendous progress has been made, and while much work remains to be done in the process, it has been very positive after years of no action by the prior administration.

Western water issues are complicated and are made even more so when protected fish species compete for water. Well, let us not play party politics on issues as important as fisheries restoration and conservation when people are at the table trying to resolve these difficult issues.

Thank you, and I look forward to hearing the testimony from our witnesses.

The CHAIRMAN. The gentleman from Oregon, Mr DeFazio.

STATEMENT OF HON. PETER A. DeFAZIO, A U.S. REPRESENTATIVE FROM THE STATE OF OREGON

Mr. DEFAZIO. I thank the Chairman, thank him for calling this important hearing. You know, like many issues that pertain to natural resources in the West, this engenders a tremendous amount of emotion because we are dealing with life and death decisions, life and death decisions in terms of both citizens of our nation and how they make their living and how their communities prosper, and life and death decisions in terms of the future of our environment and the integrity of it.

Quite a number of years ago, a little more than a decade, I supported a bipartisan proposal to deal with some of the problems with the Endangered Species Act offered by Mr. Saxton and Mr. Gilchrest. Instead, Mr. Pombo and Mr. Young chose to make mischief and create something that was, at best, laughable, which was

so embarrassing, Newt Gingrich would never even bring it to the Floor of the House.

So there has been no good-faith effort from many on the other side of the aisle to deal with these issues, only a few, who were then stomped on by their leadership, both in terms of what positions they were given on Committees and, in that case, in terms of offering an honest alternative.

I hope we can get back to honest alternatives here, but this administration, as will come out in this hearing, has specialized in polarization, to take people who are frightened and worried about their future, manipulate them politically, get the election results, and then throw them in the trash bin. They have done it to my timber workers and my timber communities. They did it to the farmers in the Klamath Basin. They have done it to the fishers on the Oregon coast and the California coast time and time again.

These people, I believe, are no longer be suckered in, and they want to see some real solutions and some real forward movement on these issues. I would be thrilled to have Ms. MacDonald come before this Committee and explain how she manipulated the process and why they have to revisit eight major decisions because of her manipulation.

I doubt that she would come, or perhaps, like Harriet Miers, the President would claim executive privilege, and she would not be allowed to come. But I would urge the Committee to extend the invitation, and then Mrs. McMorris Rodgers would have an opportunity to defend the good name Julie MacDonald before this Committee.

I think that would be a very difficult task because she has put in place a number of slow-motion train wrecks on yet more critical issues to favor a few special interests but, in the end, to come up with productive result that will withstand public scrutiny and legal scrutiny, and that is very unfortunate.

I hope this Committee can get these things righted and begin to put us on a more sustainable path, legally, environmentally, and socially, for the people who live in the West. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Colorado, Mr. Lamborn.

STATEMENT OF HON. DOUG LAMBORN, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. LAMBORN. Thank you, Mr. Chairman, and thank you for this opportunity to address some of the issues involving the process of listing species under the Endangered Species Act.

While we may not be coming from the same perspective, I do agree that there are many opportunities to address the issues surrounding the listing or delisting of species. In particular, Colorado and Wyoming have been significantly impacted by the decision by the Fish and Wildlife Service to list the Preble's meadow jumping mouse.

In keeping with today's theme, I would ask unanimous consent that the written testimony, which I will provide to the Committee, of Dr. Rob Roy Ramey, a scientist closely involved in the Preble process, be submitted as part of this hearing so that both sides can have a full opportunity to be heard.

The CHAIRMAN. Without objection, at the proper place in the hearing record, it will be made part of the record.

[The statement of Dr. Rob Roy Ramey submitted for the record by Mr. Lamborn follows:]

Statement submitted for the record by Rob Roy Ramey II, Ph.D.

My qualifications

As a field biologist and conservation geneticist, I have 27 years of experience in conservation, research and management of threatened and endangered wildlife. I have worked with: peregrine falcons; California condors; goshawks; rainforest birds; desert, Sierra Nevada, and Rocky Mountain bighorn sheep, argali sheep of Asia, meadow jumping mice, and African elephants. I have studied parasites and pathogens including: Psoroptic scabies mites; respiratory bacteria, and HIV. I earned a Ph.D. from Cornell University in Ecology and Evolutionary Biology; a master's degree from Yale University in Wildlife Ecology; and a bachelor's degree in Biology and Natural History from the University of California Santa Cruz. My postdoctoral experience included research at University of Colorado, Boulder and as a visiting scientist at the Center for Reproduction of Endangered Species at the San Diego Zoo. I was Curator of Vertebrate Zoology at the Denver Museum of Nature & Science and served as a consulting Science Advisor to the Office of the Assistant Secretary of the Interior in Washington, D.C. I am member of the Caprinae Specialist Group at the International Union for the Conservation of Nature (IUCN). I presently consult on endangered species scientific issues and conduct scientific research with Wildlife Science International, Inc.

Introduction

This hearing is focused on questionable actions of the current administration relative to science. However, to avoid science falling prey to partisan politics, there is a need to focus briefly on the larger question of what distinguishes science from non-science. The fundamental distinction between science and non-science is the criterion of falsifiability. In other words, all hypotheses must be testable. When clear-cut criteria are laid out in advance of data collection and all information considered, then there is less room for bias through the selective interpretation of the information (the scientific method). For the Endangered Species Act (ESA), which relies on scientific information, that means that data must be publicly available, conclusions open to question, and all information considered—including contrary information. If ESA decisions are not made in such an open and transparent way, then the moral authority of the ESA is compromised and valuable resources are diverted away from conservation.

I write today because there does appear to be a "Crisis in Confidence" with some of the "science" used in Endangered Species Act decisions. This is an issue that crosses administrations and sides of the aisle. The examples below show that there is a "crisis" occurring, for reasons other than what you may have been led to believe. There can also be serious consequences for those who dare to ask questions about information used in some ESA decisions.

Case 1: The Preble's Mouse Jumping Mouse

In the case of the Preble's mouse (listed as an endangered subspecies), the record will ultimately show that special interest groups, individuals, and academics with vested financial interests, and some U.S. Fish and Wildlife Service (USFWS) staff, have managed to maintain an invalid subspecies as an ESA-listing by obfuscation, intimidation, and ignoring contrary evidence. I have five years of experience on this issue because I was the scientist who led the work that questioned the validity of the Preble's mouse subspecies and its presumed rarity, and concluded that it was not a valid subspecies.

Obfuscation

The USFWS erroneously reported twice in the Federal Register that the Preble's delisting petitions relied primarily on the results of our study. That is contrary to the fact that our research was only mentioned on half a page of the 106-page delisting petitions. The delisting petitions provided abundant information that these mice are more common and widespread than previously thought. Yet the USFWS has still failed to address these data over three years later.

The USFWS Denver office organized two sets of peer reviews of our research prior to publication. However, they had failed to rigorously review the weak evidence that was used previously in support of the listing.

After our original research refuting the validity of the Preble's mouse as a subspecies was published in 2005, the FWS at Region 6 went looking for another study that would support the listing. Shortly thereafter, a report came out by a USGS biologist that concluded that Preble's was a valid subspecies and made a wholesale portrayal of our work as inaccurate. This USGS report was leaked to the press by a pro-listing environmental group amidst much media fanfare. Most of the press did not bother to read any of the original papers, or our responses. The key difference between these studies was how the problem was approached. We set criteria in advance of data collection and measured to those thresholds, whereas the USGS study relied on post-hoc interpretations and used a level of divergence so low that almost any population could be listed as endangered under the ESA, effectively removing such decisions from the realm of science.

In March of 2006, the staff at Region 6 sought to rush through approval of a peer review panel composed largely of agency biologists and scheduled for a time when I could not attend. After their efforts failed, another peer review panel was organized. The lead author of the USGS study, as well as environmental groups, influenced the structure and composition of the panel. A double standard was applied to evaluating panelist's conflicts of interest and to evaluating the evidence itself. Instead of reviewing all of the available science, the panel arbitrarily created its own burden of proof, which it then unilaterally applied only to our study. Rather than focus on the real issue of appropriate thresholds that can be used to define subspecies, they diverted attention by focusing criticism on results from a handful of specimens in our study. The panel failed to acknowledge that reanalysis of our data without these specimens, did not alter the overall results or conclusions of our study. Ultimately, if this panel's recommendations are followed and applied to other cases, it would mean that many inadequately defined subspecies would not be potentially falsifiable (i.e. could never be questioned). This effectively puts ESA listed subspecies evaluations outside the realm of scientific investigation.

We respectfully disagreed with the conclusions of the USGS study and prepared a response paper. That paper was accepted for publication in February 2007, however, the lead author of the USGS study managed to delay publication of our paper for months.

Intimidation

Over the course of two years I was harassed and intimidated by USFWS Denver staff, most notably, the leader of the Preble's Recovery Team who cursed me in harassing telephone messages, wrote fallacious slander about me to my supervisors, and threatened to withhold research funding for the project. A Preble's mouse consultant, representing a coalition of environmental groups, USFWS staff, and academics, all of who have financial stake in the Preble's listing or others like it, put pressure on my employer.

Ignoring contrary evidence

Most contrary information to the Preble's listing is absent from the USFWS Preble's Meadow Jumping Mouse Home Page. The USFWS gives dismissive treatment to contrary information in Federal Register notices, or does not provide it to peer reviewers. This speaks volumes about the selective use of information by this agency. For example:

- The USFWS has not acknowledged that this supposed subspecies was originally based on measurements of only three specimens, nor have they acknowledged that the original scientist who described this subspecies in 1953 went on record in 2004 rejecting the validity of the subspecies.
- The USFWS has not acknowledged that an earlier (1997) genetics study that was used in support of the listing was never published and the data were never made publicly available, despite repeated requests. In short, that study was never subjected to a rigorous review.
- The USFWS has not acknowledged that the 1995 distribution study that was used in support of the listing was based on minimal effort and never published.
- The USFWS kept over a decade of Preble's trapping data in their files but never analyzed them. Independent analysis of those data showed that the supposedly rare Preble's mouse subspecies was far more common and widespread than previously thought.
- Contrary information missing from the USFWS website includes:
  1) A 1981 dissertation that examined 9,000 specimens of jumping mice and concluded that there were no subspecies of meadow jumping mice.
  2) A series of five papers in the journal Animal Conservation that followed our original study, including a 2006 response paper by my coauthors and

myself. The only paper from this series that appeared on the website was the paper which supports the continued ESA listing.

3) A 1986 experimental study that showed that another species of rodent, the meadow vole, out-competes the meadow jumping mouse. In other words, when meadow vole numbers are high, meadow jumping mouse numbers are low and they are hard to catch.
4) An independent quantitative analysis of both the raw genetic data from our 2005 paper and the data from the USGS study. That quantitative analysis used thresholds from the literature and found no support for Prebles as a subspecies, let alone as an Evolutionary Significant Unit (ESU) or Distinct Vertebrate Population Segment (DPS).
5) Our August 2006 response to the Preble's review panel report that we provided to the USFWS.
6) Our response paper to the USGS study that we provided to the USFWS.
7) A 2003 study published in Conservation Biology that revealed that the Preble's subspecies ESA listing actually encouraged landowners to take steps that were counterproductive to conservation.

Case Two: The Coastal California Gnatcatcher

Two peer reviews of the coastal California gnatcatcher taxonomy were conducted by the USFWS (listed as an endangered subspecies). One internal peer review by federal agency biologists omitted substantial contrary information that was in the public record. The omitted contrary information included six technical reports reanalyzing the original data used to describe the subspecies, one peer-reviewed paper on gnatcatcher taxonomy, and a deposition by the scientist who described it as a new subspecies. In that deposition, the scientist recanted the reliability of key measurements, admitted to substituting estimates for missing data, and told of destroying original copies of his data before he finished his dissertation and published the results. Despite these revelations, the scientists who conducted the internal agency peer review then made a Powerpoint presentation to senior decision makers at the Department of Interior in Washington, D.C. That presentation made no mention of the omitted contrary information and thus the subspecies listing of the coastal California gnatcatcher was maintained.

Case Three: Critical Habitat of Desert Bighorn Sheep in the Peninsular Ranges of California

The recovery plan for desert bighorn sheep in the Peninsular Ranges of southern California (listed as an endangered DPS) specifically called for a quantitative habitat analysis. Consequently, an extensive database of 21,055 bighorn sheep observations was compiled. However, Critical Habitat was subjectively defined by the USFWS and based upon the opinions of Recovery Team members rather than on a quantitative analysis of the observation data.

Several colleagues and I published a scientific paper on the determination of Critical Habitat for this population. We had to obtain the bighorn observation data under a Freedom of Information Act request because the local USFWS office would not release the data when requested. When we obtained the data, we found that it had been stripped of many attributes. When I asked for these additional data, I was told by the USFWS to go to the individual researchers. When I went to the individual researchers I was told: "The USFWS data was deliberately provided in a format that would not facilitate a detailed analysis by those unfamiliar with the manner in which it was collected."

In our subsequent analyses, we found that over 60 percent of designated Critical Habitat in the northern Santa Rosa Mountains had a near zero probability of bighorn sheep use. Critical Habitat for this DPS has been vacated in part and remanded for new rulemaking by the Court. In this case, both our analysis and the Court did not agree with the USFWS staff's so-called "science".

Conclusion

Congress and the Department of Interior could ask: "Why don't we ask the right questions in the first place before questionable subspecies and populations are added to the Endangered Species list?"

Obfuscation, intimidation, and ignoring of contrary evidence have contributed to the continued ESA-listing of the Preble's mouse subspecies. As shown with the second and third examples, the Preble's case is not an isolated incident; it is symptomatic of deeper problems within agencies charged with administration of the ESA. While there are many competent and dedicated staff within these agencies, there are neither adequate safeguards nor oversight to prevent other staff from cherry-picking, engaging in subjective interpretations, or completely ignoring contrary in-

formation altogether. There are scant few with the expertise or the time needed to detect such occurrences.

There are productive steps that could be taken to ensure that ESA decisions are based upon science rather than opinion and politics, while ensuring that priority for conservation effort goes to truly endangered species. I have suggested a number of these in previous Congressional testimony and publications.

Briefly, these include:

1) Take steps to ensure that all information, including contrary information, is considered in peer reviews, listing/delisting decisions and biological opinions. Consistent questions and standards in these peer reviews would serve conservation. Rather than internal agency peer reviews, require external/independent reviewers.
2) Require that data used in peer reviews, listing/delisting decisions, and biological opinions be publicly available.
3) Establish legally-definable minimum thresholds for the uniqueness of taxa that can be listed. Set the bar at a quantifiable and biologically meaningful level of distinctiveness.
4) Establish quantitative thresholds for "significance" used in DPS listings. This could be quantified in terms of percent range and/or census numbers.
5) Establish a quantitative approach for designating Critical Habitat.
6) Require compliance with priority rankings in order to allocate listing and recovery effort.
7) Take steps to eliminate financial and other conflicts of interest in Recovery Teams and peer reviews.
8) Evaluate hypothetical threats using a well-defined problem analysis approach.

In conclusion, I urge this Committee to pursue this reasonable and science-based path to protecting endangered species.

Thank you for the opportunity to write to you about these issues.

Mr. LAMBORN. Thank you, Mr. Chairman. And I would also ask unanimous consent to submit a letter sent to Secretary Kempthorne yesterday by my esteemed Colorado colleague, Senator Wayne Allard, detailing troubling efforts by certain Fish and Wildlife staff to discredit Dr. Ramey's testimony.

The CHAIRMAN. Without objection, at the proper place in the record, it will be made part of the record.

Mr. LAMBORN. Thank you, Mr. Chairman.

In Dr. Ramey's testimony, he articulates a pattern of intimidating involving the decision-making process, as noted by the following excerpt, and I will just read two sentences out of his testimony: "Over the course of two years, I was harassed and intimidated by U.S. Fish and Wildlife Service Denver staff, most notably, the leader of the Preble's recovery team, who cursed me in harassing telephone messages, wrote fallacious slander about me to my supervisors, and threatened to withhold research funding for the project. A Preble's mouse consultant, representing a coalition of environmental groups, USFWS staff, and academic, all of whom have financial stake in the Preble's listing or others like it, put pressure on my employer."

Frankly, what we are talking about today involves transparency. My colleagues on the other side of the aisle are questioning decisions that were made, and that is fine, but if they are serious about transparency and not just using this hearing as an opportunity to score political points, then they will join me in calling for all information regarding this process to see the light of day.

I hope you will agree that allowing written testimony from a U.S. senator and someone intimately involved in the Preble decision-making process helps accomplish this. Thank you, Mr. Chairman.

[The letter from Senator Allard to Secretary Kempthorne submitted for the record follows:]

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United States Senate

WASHINGTON, DC 20510-0606

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July 30, 2007

The Hon. Dirk Kempthorne
Secretary
U.S. Department of the Interior
1849 C St., NW
Washington, D.C. 20240

Dear Secretary Kempthorne:

I am writing in regards to correspondence I requested from you on the proposed delisting of the Preble's meadow jumping mouse in August of 2006. Upon careful review of these correspondences, the information paints what appears to be a troubling picture of a coordinated effort on behalf of U.S. Fish and Wildlife Service (FWS) staff to retain the listed status of the Preble's regardless of what the best available science tells us.

The delisting petitions on Preble's were based on significant increases in known numbers and range. Both the States of Colorado and Wyoming have called for the immediate delisting of Preble's based on this data and taxonomic error. Many local governments also support delisting. It appears that FWS has chosen to ignore population and range data despite roughly 100 pages of data on the subjects submitted in the delisting petitions and publication in a peer-reviewed journal. This is illustrated in an e-mail correspondence between FWS officials in March of 2005. I have not included the specifics of this correspondence at this time because the Department has claimed this correspondence is privileged, but I would be happy to provide further details upon request.

The original delisting rule was based solely on the genetic and taxonomic review of Dr. Rob Roy Ramey. It appears that following the original delisting recommendation that Fish and Wildlife Service staff then embarked upon an aggressive campaign to discredit Dr. Ramey, ignoring that listing was based largely on the review of only four adult specimens of mice. With help from interested parties in academia, and perhaps environmental groups, FWS employed and funded an agency ally, USGS researcher Dr. Tim King, to protect Preble's listed status. After this, FWS staff influenced what was to be an "independent review" of the genetic and taxonomic issues related to Preble's.

It appears that FWS staff set their minds on rebutting Ramey whatever the cost. FWS staff were threatened and angered by Ramey's results. This is displayed in a Jan. 21, 2005 email from Preble's Recovery Team Leader Bruce Rosenlunt to University of Colorado Professor Andrew Martin: "I was going to include something with the e-mail on Ramey, but I did not want to make it seem I was mad as hell. To lower my blood pressure, I wrote a letter and sent it to the recovery team. Most of the Preble's Recovery Team was also mad, but Rob has a very strong following north of Cheyenne."

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215 FEDERAL BUILDING
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On October 28, 2004 Rosenlund also e-mailed Dr. Ramey's superior at the Denver Museum of Nature and Science (DMNS) complaining about national press embarrassing the FWS. In this email Rosenlund seemed to imply Ramey was pro-development, blustered that Ramey was not meeting deliverables and threatened to withhold funds from the DMNS. By spring, the FWS was writing press releases for the DMNS on the publication of Ramey. "Here is my suggestion of what I would like to get out today. Appreciated your help on this and want to maintain a positive public image on this." Rosenlund stated in a email to Stuckey in May of 2005. Later, in June of 2005, Rosenlund admitted that Ramey's manuscript met the FWS target "ahead of schedule."

Based on my research it appears that FWS staff may have encouraged others to exert pressure on the DMNS about Ramey's work. In e-mail correspondence to a consultant often employed to do Preble's trapping, FWS staff said, "Carron: Thanks again for your time and effort you have devoted to the DMNS Preble's issue. . . ." (Rosenlund to Carron Meaney, July 3, 2006.) Meaney had previously threatened Ramey in e-mail correspondence, "there are a lot of people who question your approach and have concerns about working with the museum in the future. I love the DMNS, and am very concerned to watch the alienation your behavior has wrought between the museum and the biology community." This concerning behavior was noted in the Vincent Carroll article, *On Point: The mouse that roared*, Published in April of 2006 in the Rocky Mountain News.

Following this the FWS turned to sympathizers in academia for help justifying the Preble's listing. "Sorry to hear there is so much bad news. Thanks for the Excel info. I can't advocate for one, or two or three or however many species based on mtDNA and a poorly designed morphological study." (Andrew Martin responding to Rosenlund, Jan 21, 2005.) Three days later, Martin again wrote to Rosenlund, "Hi any chance agency or non-profit folks are considering funding a genetic study of zapus that is independent of the Ramey group? . . . If this is on the burner, please consider us."

Less than two weeks after the above correspondence, Region 6 FWS staff communicated, "Since the Preble's has now published and the reality of what we need to accomplish is now coming into focus, we're starting to think more seriously about this USGS study." To perform the study the FWS enlisted, Dr. Tim King of the USGS, to refute the previously published work. Dr. King's one-sided history of splitting into subspecies and distinct population segments (DPSs) has been seriously questioned by his peers, in particular as it related to Maine Atlantic salmon. Newspaper reports suggest Dr. King refused to release, and may have altered, crucial data to support his findings. Here, Dr. King's work has been hotly criticized for bias in sampling, misrepresentations and inexplicable conclusions.

This situation is problematic for numerous reasons.

I see a waste of tax payers dollars:

I have reviewed correspondence between FWS staff that shows them scrambling to reallocate funds from other programs to cover the cost of King's review. These emails show willingness by staff to go to almost any lengths to provide funding for the unnecessary review. In addition I understand that this review went far beyond original

cost estimates eventually costing taxpayers hundreds of thousands of dollars. I have not included the specifics of these correspondences at this time because the Department has claimed the correspondence is privileged.

I see a violation of Interagency Policy on Peer Review:

Soliciting King's review was in violation of the FWS's Interagency Policy on Peer Review. The FWS violated its own peer review policy by commissioning Dr. Tim King to conduct, at public expense, yet additional review of Ramey outside of the comment period of the proposed listing.

I also see items that some could view as collusion with outside environmental interest groups:

As King's budget escalated, so too did the communications between FWS staff, environmental groups, academia and biologists with vested interests in Preble's listed status. In November of 2004 FWS employee Wiley passed along the Ramey work to environmental litigants, the Center for Native Ecosystems. Then on August 9, 2004, Jacob Smith of the Center for Native Ecosystems requested a meeting with the FWS regarding a 12-month finding for Preble's. Wiley replied that the FWS would set something up.

It appears Wiley may have gone so far as to have arranged for King to update the FWS's allies on King's progress. "What is the audience seeking an update?" asked King of Wiley, Aug. 16, 2005. Preble's Recovery Team Leader Bruce Rosenlund alluded to a meeting with undisclosed "parties," and offered to send a misleading request for Preble's samples to the recovery team. Rosenlund to Mary Jennings, May 19, 2005.

FWS kept the USGS study under wraps. But on January 3, 2006, Wiley writes to King: "[T]he word is out!! I'm amazed it stayed under wraps this long." Later in May of 2006 it appears that Tim King actually solicited positive comments on his views on Preble's from other splitters. Environmental groups were in touch with King too. On July 21, 2006 Sylvia Fallon with NRDC corresponded with King about the possibility of genetic standards in listing decisions.

I am also concerned about misleading request for Preble's Samples:

"Seems like this could be a real bombshell as written. On the other hand, may be a good way to open the door on the USGS genetics study." (FWS employee Rosenlund to Mary Jennings, May 19, 2005.) Alluding to a meeting with undisclosed "parties," Rosenlund offered to send a misleading request for Preble's samples to the recovery team under the guise that there had been some confusion about certain Preble's samples.

Upon review of numerous correspondences I am concerned that outside influences may have been exerted in the Preble's Review Panel.

The FWS campaign culminated in what was supposed to be an independent panel review of Ramey and King's work. But FWS staff seems to have colluded with King and

academia to influence even the review process. FWS staff had behind-the-scenes contact and communication with the panel chosen to review Ramey's work. In April, the Sustainable Ecosystems Institute (SEI) seemed to be ringing alarm bells with FWS staff over a high-level meeting held in Washington on genetics and listing decisions. (Wiley to Mary Henry, April 26, 2005). Wiley didn't want to get his SEI "contact" "in trouble" for spreading the word.

Perhaps using their "contacts" at SEI, the FWS tried to push through a stacked panel review of King's work compared to Ramey. "Per Ralph's [Morgenweck] direction, please let our panelists know that they should stand down." This from a Oct 20th 2005 email between Julie Lyke to P. Plage, S. Wiley. There is further evidence of collusion in a email between Plage and Hopi Hoekstra on Jan. 20, 2006. It looks as though some interested parties in academia wanted to influence the Preble's decision. Hoekstra, one of the researchers that works on listed subspecies of beach mice, suggested a kindred spirit, Sacha Vignieri, that CU's Martin had also blessed. This was indicated in a communication from Hoekstra to Plage on Januray 22, 2006. On March 3, 2005, Alabama researcher Michael Wooten asked the FWS for information on the status of delisting Preble's and noted that the people that work on listed subspecies of beach mice were watching closely. Later, Martin wrote to Vignieri, copying King and Hafner about the SEI panel and his desire to get one of them to represent "our arguments." Martin to Vignieri, June 20, 2006.

In addition FWS staff crafted an agenda for the SEI meeting and passed it along to Tim King. (Wiley to King, June 7, 2006.) Perhaps in response to the FWS agenda, the SEI panel changed it's agenda from equal time on the agenda to almost 2:1 in favor of the critics of Ramey. The panel also applied a double standard as to who could participate in the review with more deference to the critics of Ramey.

Apparently due to complaints from Dr. King, a panelist was removed from the SEI panel based on fears he would be sympathetic to the Ramey work (Dr. Eric Routman of San Francisco State University). But another panelist, Dr. Scott J. Steppan, remained on the panel despite his history of collaborator with Dr. Jim Patton.

The panel review on Preble's was a model of selective interpretation. The SEI panel claimed Ramey's work was "based on insufficient data to support their suggestions for taxonomic change," yet ignored the weak inference and small sample size used originally by Krutzsch (1954) to describe this subspecies (measurements of only 3 skulls and comparisons of only 4 skins). The panel criticized Ramey for using museum samples, but King admitted, "we have previously extracted DNA from 60-year old samples . . . and from numerous dried [Preble's] ear punches provided by the Colorado Natural Heritage Program." King admitted this in a correspondence to Robert Mark Timm on Sept. 13, 2005.

The SEI panel also failed to acknowledge that Dr. Krutzsch no longer supports his original subspecies description; ignored that a study across the entire *Zapus* genus had already been conducted by Jones (1981) that examined specimens from 123 collections, totaling almost 9,900 individuals and concluded that: "There is no evidence of any population of Zapus hudsonius being sufficiently isolated or distinct to warrant

subspecific status" (pages V and 303 from Jones 1981). Finally, SEI ignored a review of both Ramey and Kings work commissioned by the State of Wyoming that heavily favored Ramey's work. Crandall and Marshall (2006).

Perhaps the SEI panel was sensitive to academia's fear of the Crandall work. On the first of June, 2006, Andrew Martin wrote to King, and copied Vignieri, Hafner & Wooten, "[T]he Crandall report apparently commissioned by the State of Wyoming is interesting and contradicts, in very specific terms, the King et al. study. I have two questions: First, why was the Crandall report commissioned? And what the @#$%$#@ is going on?" Martin to King, June 1, 2006. This independent review of the Ramey and King data sets was conducted by internationally known population geneticists.

Prominent on the FWS Preble's web page is Dr. King's work and the SEI panel review. Crandall and Marshall (2006) is nowhere to be found. Also conspicuously absent from the FWS web page are:

- Crandall, K.A. (2006) Advocacy dressed up as scientific critique, Animal Conservation. 9:250–251

- Ramey, R.R. J.D. Wehausen, H.P. Liu, C.W. Epps, and L. Carpenter (in press), How King et al. (2006) define an "evolutionary distinct" mouse subspecies: a response. Molecular Ecology.

- Ramey, R.R., J.D. Wehausen, H.P. Liu, C.W. Epps, and L. Carpenter (2006) Response to the report: Evaluation of Scientific Information Regarding Preble's Meadow Jumping Mouse (prepared by the Sustainable Ecosystems Institute). Submitted the FWS (Aug. 2006).

- Ramey, R.R., J.D. Wehausen, H.P. Liu, C.W. Epps, and L. Carpenter. (2006) Response to Vignieri et al. (2006): Should hypothesis testing or selective post hoc interpretation of results guide the allocation of conservation effort? Animal Conservation. 9:244-247.

- Emma Marris, the species and the specious, Nature (Mar. 2007)

I am not sure why these items are absent but it would seem that these items should be available.

Perhaps emboldened by their ability to silence the best available information, FWS staff began to explore outsourcing their review of Preble's population and range to their allies at SEI. (Susan Linnear to M. Stempe, Aug. 3, 2006.) Wiley kept Tim King informed all the way. "See bold text below [proposing SEI review Preble's population, range and potential for DPS status] I think our folks are likely to be interesting [sic] in pursuing this more . . . let's keep talking." (Wiley to King, Aug. 3, 2006.)

Preble's was listed because the FWS concluded there was a loss of populations over a significant portion of its range. Post-listing surveys have shown Preble's to be quite

common. In fact, the number of sites known to be occupied by Preble's has increased over 400% (from 29 sites to more than 132 sites -- and counting).

Recently, the journal Nature published an article on controversy related to genetic and taxonomic status. Emma Marris, *The species and the specious*, Nature, 250 (Mar. 2007). Interestingly, the article explained that polar bears are not considered a species separate from grizzly bears. As you know, polar bears appear quite different than grizzly bears. They are located in dramatically different habitats and rely on different food sources. By contrast, Preble's (a listed subspecies) is physically indistinguishable from other subspecies of meadow jumping mice. In addition, the other so-called subspecies of meadow jumping mice reside in similar habitats, rely on similar food sources, and exhibit no known behavioral differences.

The contrast between Preble's and polar bears points to the need for sound policy for listing decisions. Accordingly, I urge you to use the disagreement on Preble's as an opportunity to ensure questionable subspecies with little or no quantifiable physical differences cannot be listed under the ESA.

State and federal governments are spending more on the Preble's meadow jumping mouse than over 1,135 species of wolves, whales, bighorn sheep, trout, tortoise, squirrels, snakes, birds, beetles and butterflies. "Funds for endangered species are very limited. Why would you want to spend these precious resources on taxa that are originally based on weak data and do not hold up to scientific scrutiny." K.A. Crandall, Advocacy dressed up as scientific critique, Animal Conservation (2006).

The FWS is long past its statutory deadline to act on the Preble's delisting. Now, as a result of a lawsuit filed by the State of Wyoming, the Department of Interior will issue a decision by October 31st. In addition I understand that the Department of Interior is looking into allegations that political influence was used when determining the listing status of several species including the Preble's Meadow Jumping Mouse. As the Department goes through this process I would hope that they look to see if political rationale was used to prevent the delisting of the Preble's Meadow Jumping Mouse.

The distribution, abundance and trends of Preble's support delisting regardless of taxonomic status. However, Crandall et al. (2006) constitutes the best available science on Preble's genetics and Jones (1981) constitutes the best available science on taxonomy. Accordingly, I urge you to issue a final rule delisting Preble's based on data error. I would also like you to look into any possible violations of Department of Interior policy as they relate to this case.

I appreciate your assistance with this matter.

Sincerely,

Wayne Allard

Wayne Allard
United States Senator

The CHAIRMAN. The gentlelady from the Virgin Islands, Mrs. Christensen, is recognized.

STATEMENT OF HON. DONNA M. CHRISTENSEN, A U.S. DELEGATE FROM THE TERRITORY OF THE VIRGIN ISLANDS

Mrs. CHRISTENSEN. Thank you, Mr. Chairman. Thank you for the opportunity to make a brief opening statement. Mine is going to be a bit more general because, in retrospect, I remember coming from a territory, having conversations with the transition team for the Bush-Cheney administration in 2001, and it became clear to me then, in talking with them, that the Interior team would be protégés of the Vice President. Then, the way my schedule and my travel work, going to the Virgin Islands, I would often be flying home on Fridays, and that became a day that I could really go through the paper from end to end.

A pattern clearly began to develop of news that the administration wanted to pass below the radar screen being published on Fridays, and much of that news happened to be about changes made to eight oversight agencies, the scientific panels, or other commissions where individuals with glaring conflicts of interest replaced respected, scientific leaders or experts on the issues of the group or the agency's jurisdiction.

I complained about it several times and wrote letters to the editor, which were never printed. So I am glad, Mr. Chairman, that we are having this hearing today, which I feel we must have if we are to fulfill our oversight responsibility for the natural resources of our nation.

I will submit the rest of my written statement for the record, but I mentioned before that, in 2004, in a health report, the entire report on health disparities was changed from what the scientists within the Department of Health and Human Services had written, to indicate that there were no health disparities for people of color in this country. It was fortunate that some Members of the Government Reform Committee had gotten wind of the original report, and we were able to have the original report sent out and the other one rescinded, but the entire report was changed.

So I think this is an important hearing. It is focused on natural resources and the Endangered Species Act, and issues under our jurisdiction, but it speaks to a larger problem within the administration.

[The prepared statement of Mrs. Christensen follows:]

Statement of The Honorable Donna M. Christensen, a Delegate in Congress from the Virgin Islands

The inquiry of this hearing is very much in order since in my speaking with the Bush transition team in 2001, it became clear that the Department of the Interior team was likely to be "protégé's of" Vice President Dick Cheney. But the issue of interference in to decision making based on sound science goes far beyond the Department of the Interior.

Our schedule and travel to the Virgin Islands being what it is, I would often be flying home on Fridays so that became a day I could read the paper cover to cover. A pattern clearly developed of news that the administration wanted to pass below the radar screen being published on Friday. Much of that news happened to be about changes made to scientific panels or other commissions where individuals with glaring conflicts of interest replaced respected scientific leaders or experts on the issues of the group's jurisdiction.

I complained about it several times in letters to the editor. They were not printed. And so I am very glad Mr. Chair and Ranking member that we are having this hearing, which we must have if we are to fulfill our responsibility, today.

As a matter of fact, I have gotten to the point where I do not feel secure relying on any scientific reports coming from this administration since the 2004 Health Disparity Report in which they completely changed the report to say that there were none—any thinking person would know that this could never be true.

We were able to have the original and genuine report released, and today we are taking another step to correct any harm the altering of scientific reports may have had on our environment or our people and prevent this from happening going forward.

The CHAIRMAN. The gentlelady from California, Mrs. Napolitano.

STATEMENT OF HON. GRACE F. NAPOLITANO, A U.S. REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Mr. Chairman. I join my colleagues, and I echo their sentiments in regard to the behavior of the Department of the Interior, which is allowing politics to trump science without regard to the consequences. The American public expects the agencies, expects us, to be of reproach in our actions to represent them.

Today, I am going to focus on an example of my own experience. About three weeks ago, the Water and Power Subcommittee, which I chair, conducted an oversight hearing into the delta smelt crisis in California's Bay Delta, the largest estuary on the West Coast and water supply for over 25 million people.

The delta smelt, once the most abundant fish species in the delta, has reached such critically low levels that they are at risk of extinction. It is on the C list, and it, along with other fish species, have crashed over the last five years.

While we acknowledge that there are many interacting factors that probably have contributed to the decline, our Subcommittee received extensive sworn testimony that the decline of the fish populations in the delta were likely directly related to the operation of the large Federal and state water projects in the delta. Agency employees who manage our fisheries, public lands, minerals, and other natural resources must be absolutely free to make decisions based on the best available information.

This apparently did not happen in the case of the smelt. In fact, a Federal judge was asked to intervene and found that the biological opinion produced by the Fish and Wildlife Service, with regard to the smelt, was fundamentally flawed and illegal.

As of now, the delta smelt and water projects are all in limbo because the agencies could not take corrective action when it was needed, and a new biological opinion must be written, which will take more than a year. In the meantime, the Bureau of Reclamation continues to pump water out of the delta under the rules of an outdated and illegal biological opinion.

There is no way that we can have this continue, and there is no way for the Federal agency to manage our country's natural resources. In California, where we are so dependent on the delta, a large portion of our economy is at risk if the water exports are completely stopped to protect the endangered fish.

The Bureau of Reclamation, of course, is reluctant to stop the pumping, and why? Because we have no backup. Why have not we developed more alternative supplies through water recycling and conservation? Why have not we looked for more groundwater stor-

age and banking? Perhaps the most important question, Mr. Chair: Should we trust the Federal agencies to make good decisions in the future? How do we know that current political leadership in the agencies is not cooking the books to match their own agenda?

I asked these questions at our recent hearing on the delta smelt, and I still have no answers. Now, I come to this hearing and find that I am not the only one struggling with this. Mr. Chairman, I hope we get some real answers today. We must act now to assure our constituents that the precious natural resources will be there for them, for our children, and our great-grandchildren. I thank you, Mr. Chairman, and look forward to the testimony.

[The prepared statement of Mrs. Napolitano follows:]

Statement of The Honorable Grace F. Napolitano, a Representative in Congress from the State of California

I would like to begin by thanking Chairman Rahall for holding this critical hearing on a disturbing pattern of behavior in the Department of the Interior that allows politics to trump science without regard to consequences. The agencies must be above reproach in their action to represent their respective charge.

Today, I am going to focus on an example from my own experience. Three weeks ago, the Water and Power Subcommittee, which I chair, conducted an oversight hearing into the delta smelt crisis in California's Bay-Delta, the largest estuary on the west coast and the water supply for 25 million people. There, delta smelt, once the most abundant fish species in the delta, has reached such critically low levels that they are at risk of extinction in the near future. The smelt is listed as a threatened species under the Endangered Species Act.

The smelt, along with several other fish species, has literally crashed over the last 5 years. While we acknowledge there are many interacting factors that probably have contributed to the fisheries decline, our subcommittee received extensive sworn testimony that the decline of fish populations in the delta is likely directly related to the operation of the large Federal and state water projects in the Delta.

Agency employees who manage our fisheries, public lands, minerals, and other natural resources must be absolutely free to make decisions based on the best available information. This apparently did not happen in the case of the smelt. In fact, when a federal judge was asked to intervene, he found that the Biological Opinion produced by the Fish and Wildlife Service with regards to the smelt was fundamentally flawed and illegal.

As of now, the delta smelt and the water projects are all in limbo. Because the agencies could not take corrective action when it needed to be taken, a new Biological Opinion must be written, which will take more than a year. In the meantime, the Bureau of Reclamation continues to pump water out of the delta, under the rules of an outdated and illegal Biological Opinion.

This is no way for a federal agency to manage our country's natural resources. In California, we are so dependent on the Delta, that a large portion of our economy is at risk if water exports are completely stopped to protect endangered fish. The Bureau of Reclamation, of course, is reluctant to stop pumping. Why? Because we have no backup. Why haven't we developed more alternative water supplies through water recycling and conservation? Why haven't we looked to more to groundwater storage and banking? And perhaps the most important question: should we trust the federal agencies to make good decisions in the future? How do we know the current political leadership in the agencies isn't "cooking the books" to match their own agenda?

I asked these questions at our recent hearing on the delta smelt, and I still have no answer. Now I come to this hearing, and find that I am not the only one struggling with this. Mr. Chairman, I hope we get some real answers today. We must act now to assure our constituents that their precious natural resources will be there for them, and their children.

Thank you, Mr. Chairman. I look forward to the testimony.

The CHAIRMAN. The gentleman from Arizona, Mr. Grijalva.

STATEMENT OF HON. RAÚL M. GRIJALVA, A U.S. REPRESENTATIVE FROM THE STATE OF ARIZONA

Mr. GRIJALVA. Let me join with my colleagues, Mr. Chairman, in thanking you for holding the hearing. I think there is a great need for Congress to investigate what has been going on at the highest levels of the Bush administration, in this instance, with regard to decisions affecting endangered species, but, as my colleague, Mr. Miller, pointed out, this is one area of many areas, and there seems to be a pathological pattern to warp science, warp fact, and create decisions that fit a political agenda.

What came out in the revelations regarding the role of Mr. Roe and Mr. Cheney in the Klamath decision and the devastating loss of fisheries; Julie MacDonald and changing biological opinion on behalf of herself and the industry; this is probably the tip of the iceberg.

So this hearing is important. I applaud you for holding it, and I look forward to the testimony.

The CHAIRMAN. I understand that the gentleman from Texas does not wish to make an opening statement.

The gentleman from New Jersey, Mr. Holt.

STATEMENT OF HON. RUSH D. HOLT, A U.S. REPRESENTATIVE FROM THE STATE OF NEW JERSEY

Mr. HOLT. Thank you, Mr. Chairman. It should be repeated again and again that Congress has a role in addition to legislation, which is oversight. It looks as if we are going to be busy for a long time with oversight, considering the number of questions we have in front of us here, and I thank the Chairman very much for setting up these hearings so that we can set things right and get the ship back on course.

The CHAIRMAN. Thank you. We are now ready to proceed to our first panel, and the Chair wishes to express its appreciation to our colleagues and friends that have patiently waited for their testimony, and if it is the panel's desire, the Chair will recognize those Members in the order in which, I understand, they came in, and that would be The Honorable Greg Walden, a former Member of this Committee, from Oregon, followed by The Honorable John Doolittle from California, to be followed by our colleague, Wally Herger, also from California, and then to clean up, Mr. Mike Thompson.

If that is OK with you, gentlemen, you may proceed, Greg.

STATEMENT OF HON. GREG WALDEN, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. Mr. Chairman, you are the Chairman. We are happy to follow your lead on this.

Mr. Chairman and Members of the Committee, for the record, I am Greg Walden, and I represent the people of Oregon's Second District, including those in the Klamath Basin. I want to thank you for letting me testify today and for letting me join you on the dais afterwards.

During my eight and a half years in the Congress, no set of issues has consumed my time and energy more than those involving the very complex situation at Klamath Basin.

I want to make three key points this morning. First, the decisions made affecting the fish farmers and tribes in the basin have been thoroughly and independently evaluated by the Inspector General of the Department of the Interior. The Inspector General's findings, more than three years ago, completely dismissed the allegation of undue political influence.

You each should have a copy of that response, and I would ask unanimous consent that Mr. Devaney's March 1, 2004, response to Senator John Kerry be made part of the official record.

The CHAIRMAN. Without objection, so ordered.

[The Devaney letter submitted for the record follows:]

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, DC 20240

March 1, 2004

The Honorable John F. Kerry
United States Senate
Washington, DC 20510-2102

Dear Senator Kerry:

This is in response to your August 6, 2003 letter in which you requested that the Office of Inspector General (OIG) conduct an investigation into the Department's management of water resources in the Klamath Basin. You directed our attention to a July 30, 2003 article in the *Wall Street Journal* entitled, "Oregon Water Saga Illuminates Rove's Methods with Agencies" and called into question the Interior Department's ability to meet its legal responsibilities in the Klamath Basin.

In your letter, you aptly observe that "[c]ommercial fishermen, Native Americans, irrigators, conservationists and federal officials have been engaged in a contentious regulatory proceeding over water management in the Klamath Basin that dates back several years." Clearly, the management of the water resources in the Klamath River Basin Project by the Department of the Interior has been fraught with criticism and contention from all sides, two of which are within the Department of the Interior itself. The concerns you advanced based on the issues raised in the *Wall Street Journal* article, as well as those raised in other venues, made the Klamath matter ripe for investigation by the OIG.

As outlined in my letter to you dated August 28, 2003, the OIG focused its investigation on three areas:

1. What would be the normal regulatory process in a matter such as this, assuming that this was an Administrative Procedures Act-governed regulatory matter.

2. What actually did happen in the administrative process in the Klamath Basin matter.

3. How the Klamath Basin matter deviated from the norm (if at all) with special attention being paid to:

   a. The science
   b. Any suppressed information
   c. Any evidence of political interference

In conducting our investigation, we interviewed all of the key individuals – some of them several times – who were involved with the Klamath River Basin Project. These individuals

represent all aspects of involvement in the Klamath Project – from staff-level employees of the Bureau of Reclamation (BOR), the Fish and Wildlife Service (FWS) and the U. S. Geological Survey (USGS) to the highest-level decision makers within the Department; the independent scientists charged with reviewing competing reports and information; and the government scientist who filed for Whistleblower protection with the Office of Special Counsel. We reviewed hundreds of documents, including the documents contained in the Administrative Record supporting BOR's final decision regarding the Klamath Project's Operations, as well as documents filed with the United States District Court for the Northern District of California where suit had been filed challenging BOR's decision-making process.

As a result of our investigation, we found fiercely competing interests among the Klamath Tribes, irrigators, fishermen, environmentalists and even among opposing Federal officials relating to the use and/or conservation of limited water resources in the Klamath Project. We also found that these interests have highly charged differences of opinion concerning what constitutes the best scientific and commercial data available, how the Project should be operated, and how to accommodate specific, diverse and competing interests. Unfortunately, when the competing interests are mutually exclusive of one another – as in the Klamath matter – accommodation becomes impracticable.

We determined that the administrative process followed in this matter did not deviate from the norm. Our review of the available documents and the rulings of the U.S. District Court for the Northern District of California support the conclusion that the Department had compiled the necessary information to support its various decisions related to the Klamath Project.

None of the individuals we interviewed – including the Whistleblower – was able to provide any competent evidence that the Department utilized suspect scientific data or suppressed information that was contained in economic and scientific reports related to the Klamath Project. To the contrary, the National Research Council of the National Academy of Sciences in its Final Report, issued October 2003, specifically disagrees with the criticism that had been directed against the Federal agencies for using "junk science". This position is bolstered by the findings of the U.S. District Court for the Northern District of California, which concluded that in light of the conflicting state of scientific evidence, the decisions were based on the best available science at the time.

Finally, we found no evidence of political influence affecting the decisions pertaining to the water in the Klamath Project. The individuals at the working-levels denied feeling pressured at all. Based on our experience in past OIG investigations, these would have been the most likely sources to provide evidence of such influence. Higher-level decision makers, both political and career, also denied feeling any political pressure to render a decision one way or another. Collectively, these decision makers described a process of thorough and thoughtful consideration of all the competing interests and requirements, although frustrated by the fact that certain interests and requirements were mutually exclusive. The consistent denial of political influence by government officials was corroborated by the view of the outside scientists and one former DOI official, all of whom denied feeling any pressure – political or otherwise.

While we confirmed a passing reference to the Klamath River Basin Project during an otherwise-unrelated presentation to senior Interior officials, we found nothing to tie Karl Rove's comments or presentation to the Klamath decision-making process. The former DOI official, who had spoken to the *Wall Street Journal* about Rove's presentation, clarified to our investigators that his use of the term "chilling effect" was not related to the Klamath Project. Of the multiple DOI officials we interviewed who attended the presentation, only one person specifically recalled the context in which Rove mentioned Klamath. This official recalled that Rove merely cited Klamath as an example of the complex problems the Department had to deal with.

The complexity of the issues involved and the ferocity of the debate clearly fueled the flames of suspicion and distrust in this matter. Based on the results of our investigation, however, we conclude that the Department conducted itself in keeping with the administrative process governing the Klamath Project, that the science and information utilized supported the Department's decisions, and that no political pressure was perceived by any of the key participants.

I hope this information puts to rest your concerns. If you have any questions, please do not hesitate to call me at (202) 208-5745.

Sincerely,

Earl E. Devaney
Inspector General

Mr. WALDEN. Second, the National Academy of Sciences report, four years ago, rejected the allegation that the Klamath project was to blame for the fish kill in 2002, just as it concluded that the agencies did not use junk science but did accept, as they wrote, "a high risk of error in proposing actions that the available evidence indicated to be of doubtful utility."

I would also ask unanimous consent that the National Academy of Sciences, National Research Council, Committee on Endangered and Threatened Fishes in the Klamath Basin, Final Report be made part of the official record.

[NOTE: The Final Report has been retained in the Committee's official files.]

Third, the Committee's hearing today, to the extent it opens old wounds and reignites past conflicts, runs the risk of aborting a mediated settlement process that includes 26 parties in the basin, who, in the past, would have been at each other's throats, but, on the contrary, for the last many months, have been at each other's tables trying to find a basin-wide solution.

As Craig Tucker and Leif Hillman from the Karuk Tribe told the Oregonian newspaper on July 16, 2007, and I quote: "The real story on the Klamath is not what politicians did four years ago but what Klamath Basin residents and coastal fishermen are doing today to solve the Klamath crisis."

Mr. Chairman, just as you called on the Department of Agriculture one month ago to do everything possible to assist the farmers of 46 counties in West Virginia who are suffering from a lack of water because of a drought, so, too, did I and my colleagues in the basin ask everyone, from the President on down, to do whatever was within the scope of the law to help the farmers in the

Klamath Basin when the conditions in 2001, because of a drought, resulted in loss of water to the project for the first time in nearly 100 years.

The picture you see on the screen here demonstrates what happens when the water to the farmers is turned off because downstream from the Klamath project is the Klamath Wildlife Refuge. The water flows through the project to the refuge, and you can see the devastation done that year to waterfowl habitat.

I also worked closely with your two predecessors to hold oversight hearings on the problems to help identify what went wrong and how we could fix it. We called on the Department of the Interior to seek a review by the National Academy of Sciences during a field hearing at the fairgrounds in Klamath Falls. We looked at the problems, including a lack of screens on the A canal and fish passage in Chiloquin Dam, as you can see here. This administration responded aggressively by pushing the agencies to get results on both.

Today, a multimillion-dollar complex fish screen prevents sucker larvae from ending up in the irrigation system rather than staying in their natural habitat, and, within a year or two, Chiloquin Dam, which was the main cause of the original listing of the sucker, will be gone, reopening 95 percent of the habitat up the Sprague River.

In addition, the basin has seen 370 partnership ecosystem restoration projects, a 100,000-acre water bank, water taken out of productive use and used for fisheries, and more than $500 million in Klamath watershed habitat restoration, water quality improvement, and water conservation efforts since 2002.

Good things are happening in the basin like never before. It is unfortunate that the Committee's valued time is not spent encouraging more forward progress in the basin, but I hold out hope that it will.

As for the fish kill, I implore you to listen to the words of Professor William Lewis, who will testify later today and who chaired the Committee on Endangered and Threatened Fishes in the Klamath River Basin, a committee of the National Research Council, the world's premier, independent, scientific body.

He says, and I quote: "The Klamath project is located over 150 miles upstream from the mouth, and water flowing through the Klamath project accounts for only 10 percent of the total flow at the mouth. Large tributaries entering the river below the Klamath project contribute most of the flow at the mouth. Furthermore, the Klamath project releases water that is warm because it comes from storage lakes rather than reaching the stream through groundwater or surface runoff.

"The committee concluded that a relatively small amount of warm water propagated over a distance of 150 miles would not have made a critical difference to the salmon that were staging for migration at the mouth of the river.

"The committee also examined previous conditions and found that low flows, similar to those in 2002, had occurred in several years within the period of record without any accompanying salmon mortality.

"The committee, therefore, concluded that mortality was the result of an unusual combination of conditions, probably including

unusually low flow plus the absence of a cool pulsive flow that even a brief precipitation event might have provided."

Now, to my third, and final, point, Mr. Chairman. The Klamath Basin Settlement Group has worked in private for the last several years to reach common ground on complex issues. Their goal is to recommend to Congress a comprehensive settlement plan that will work for the fish and the fishermen, for the tribes and for the farmers, and hope to have that ready to go by November of this year.

While the talks remain confidential, I know they are complex, just as the problems are complicated. I wish them well in their work and would encourage them to ignore the political noise in Washington and stay focused on the long-term solutions they seek, and I implore this Committee and its staff to do the same.

Prior sessions of Congress have helped those in need—farmers and fishermen—when they have suffered losses, and prior sessions of Congress have investigated what went wrong and why. I implore this Committee to not go down the partisan path of political provocation but, instead, to rise above it and provide support to those good citizens who are laboring to find common ground in a basin-wide settlement.

Let us do what is best for the fish, the farmers, the tribes, and the fishermen. Let us encourage them to find common ground, not rub salt in old wounds, when they are so close to an historic agreement of enormous significance.

Thank you, Mr. Chairman. I ask that my full statement be made a part of the record.

[The prepared statement of Mr. Walden follows:]

Statement of The Honorable Greg Walden, a Representative in Congress from the State of Oregon

Mr. Chairman, members of the Committee. For the record, I am Greg Walden and I represent the people of Oregon's Second District, including those in the Klamath Basin. Thank you for letting me testify today and for letting me join you on the dais afterward. During my eight-and-a-half years in Congress, no set of issues has consumed my time and energy more than those involving the complexities of the Klamath Basin.

I want to make three key points this morning:

First, the decisions made affecting the fish, farmers and Tribes in the Basin have been thoroughly and independently evaluated by the Inspector General for the Department of the Interior. The Inspector General's findings more than three years ago completely dismissed the allegation of undue political influence. You each have a copy of that response and I would unanimous consent that Mr. Devaney's March 1, 2004 response to Sen. John Kerry be made part of the official record.

Second, the National Academy of Sciences report four years ago rejected the allegation that the Klamath Project was to blame for the fish kill in 2002, just as it concluded that the agencies did NOT use "junk science," but did, accept, as they wrote, "...a high risk of error in proposing actions that the available evidence indicated to be of doubtful utility." I would unanimous consent that the Nation Academy of Science, National Research Council Committee on Endangered and Threatened Fishes in the Klamath Basin final report be made a part of the official record.

Third, the Committee's hearing today, to the extent it opens old wounds and reignites past conflicts, runs the risk of aborting a mediated settlement process that includes 26 parties in the Basin who in the past would have been at each others throats and for the last many months have been at each other's tables trying to find a Basin-wide solution.

As Craig Tucker and Leaf Hillman from the Karuk Tribe told the Oregonian newspaper on July 16, 2007, and I quote: "The real story on the Klamath is not what politicians did four years ago, but what Klamath basin residents and coastal fishermen are doing today to solve the Klamath crisis."

Mr. Chairman, just as you called on the Department of Agriculture one month ago to do everything possible to assist the farmers of 46 counties in West Virginia who are suffering from a lack of water because of a drought, so too did I and my colleagues in the Basin ask everyone from the President on down to do whatever was within the scope of the law to help the farmers in the Klamath Basin when the conditions in 2001 resulted in a loss of water to the Project for the first time in nearly 100 years.

I also worked closely with your two predecessors to hold oversight hearings on the problems to help identify what went wrong and how we could fix it. We called on the Department of Interior to seek a review by the National Academy of Sciences during a field hearing at the fairgrounds in Klamath Falls.

We looked at the problems, including a lack of fish screens on the A Canal and fish passage at Chiloquin Dam. And this Administration responded aggressively by pushing the agencies to get results on both. Today, a multi-million dollar, complex fish screen prevents sucker larva from ending up in the irrigation system rather than staying in their natural habitat. And within a year or two, Chiloquin Dam, which was the main cause of the original listing will be gone, reopening 95% of the habitat up the Sprague River.

In addition, the Basin has seen 370 partnership ecosystem restoration projects, a 100-thousand acre water bank, and more than $500 million dollars in Klamath Watershed habitat restoration, water quality improvement and water conservation efforts since 2002. Good things are happening in the Basin like never before. It's unfortunate that the Committee's value time is not spent encouraging more forward progress in the Basin.

As for the fish kill: I implore you to listen to the words of Professor William Lewis who will testify later today, and who chaired the Committee on Endangered and Threatened Fishes in the Klamath River Basin, a committee of the National Research Council, the premier, independent, scientific body in the world:

"The Klamath Project is located over 150 miles upstream from the mouth, and water flowing through the Klamath Project accounts for only 10% of the total flow at the mouth; large tributaries entering the river below the Klamath Project contribute most of the flow at the mouth. Furthermore, the Klamath Project releases water that is warm because it comes from storage lakes rather than reaching the stream through groundwater or surface runoff. The committee concluded that a relatively small amount of warm water propagated over a distance of 150 miles would not have made a critical difference to the salmon that were staging for migration at the mouth of the river."

"The committee also examined previous conditions and found that low flows similar to those of 2002 had occurred in several years within the period of record without any accompanying salmon mortality. The committee therefore concluded that mortality was the result of an unusual combination of conditions, probably including unusually low flow plus the absence of a cool pulse of flow that even a brief precipitation event might have provided."

Now, to my third and final point, the Klamath Basin Settlement Group has worked in private for over the last several years to reach common ground on complex issues. Their goal is to recommend to Congress a comprehensive settlement plan that will work for the fish and fishermen, for the Tribes and for the farmers by the end of November of this year.

While the talks are confidential, I know they are complex, just as the problems are complicated. I wish them well in their work and would encourage them to ignore the political noise in Washington and stay focused on the long-term solutions they seek. And I implore this Committee and its staff to do the same.

Prior sessions of Congress have helped those in need, farmers and fishermen, when they've suffered losses. And prior sessions of Congress have investigated what went wrong and why. I implore this Committee to not go down the partisan path of political provocation, but instead to rise above it and provide support to those good citizens who are laboring to find common ground in a Basin-wide settlement.

Let's do what's best of the fish, the farmers, the Tribes and the fishermen. Let's encourage them to find common ground, not rub salt in old wounds when they are so close to an historic agreement of enormous significance.

The CHAIRMAN. Without objection. All statements will be made part of the record. John?

STATEMENT OF HON. JOHN T. DOOLITTLE, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. DOOLITTLE. Thank you, Mr. Chairman and Mrs. McMorris Rodgers and distinguished Members. It was my privilege to serve as a Member of this Committee for 10 years, and I always feel like I am coming home when I appear before it. I will also note that the same dynamic clash of ideas, philosophies, and world views is still strongly present in the Committee.

I wish to offer testimony today on behalf of my constituents in the Klamath River Basin. My greatest concern, as I sit here today, is that anything said here should interfere with the discussions by the 26 parties in the Klamath Basin settlement group, who are a mere months away from an historic agreement. As Mr. Walden indicated, these people were at each other's throats for years, and they have finally come together in a remarkable cooperative structure, and we think that will produce final results shortly.

Therefore, I would like to use this opportunity to highlight some of the progress that has been made since the water was shut off in April 2000 so that we may provide not concern but, indeed, encouragement to those settlement parties as they approach the finish line.

Since 2002, as has been mentioned, the Federal government has spent well over $500 million in the Klamath watershed for habitat restoration, water quality improvement, and water conservation.

Furthermore, as a result of the National Academy of Sciences's independently peer-reviewed report, which told us that the operation of the Klamath project was not the cause of the 2002 fish die-off, several initiatives are either underway or completed, which, unlike shutting off the water, will benefit the wildlife, wetlands, and fish passage along the Klamath River.

Mr. Walden alluded to these, and I just want to mention them again. These initiatives include the completion of a fish screen, which is a major project at the main project diversion; 370 partnership ecosystem restoration projects; and the removal of Chiloquin Dam to open up 95 percent of sucker fish habitat.

These conservation activities and the ongoing settlement negotiations are where Congress should be directing its resources. Instead, we are here today in Washington, as opposed to the Klamath River Basin itself, scavenging for evidence of wrongdoing regarding Klamath where none exists.

An examination into wrongdoing was already conducted. In 2003, Senator John Kerry requested that the Department of the Interior's Inspector General investigate whether the White House political staff sought to influence the management of the water resources which led to the 2002 fish die-off.

In his response, Inspector General Earl Devaney was explicit in answering no. No White House political staff intervened. I wonder, what about Mr. Devaney's findings that this Committee believes is inadequate in order to bring us here today to revisit that same question?

To be clear, we absolutely must ensure the science we based our decisions upon is accurate and sound. This is why we have Dr. Lewis's National Academy of Sciences report, which followed the Fish and Wildlife Service's findings regarding the endangered

species in the Klamath River watershed, and if Congress should deem it necessary to investigate the integrity of those reviews on the basis of media reports, I could support that as well.

But here we are, nearly four years after Senator Kerry asked the same question we are asking today, and we will soon be hearing the same answer Senator Kerry received, that there was nothing improper behind the scientific findings at the Departments of the Interior or Commerce.

So while I believe the issues facing the Klamath River Basin deserve the attention of this Congress, and while I would like to reiterate the requests of Congressman Walden, Congressman Herger, and me in our June 29th letter inviting this Committee to the basin, I would like to conclude my testimony by simply asking that this Committee consider the fragile alliance of groups working toward a solution, with an agreement by all of the relevant stakeholders just a handful of months away, and after all of the conservation efforts and the hundreds of millions of dollars spent by the Federal government to improve the habitat conditions for the species in the watershed, I can only hope that this hearing may be conducted in that same constructive spirit, working toward achieving a permanent solution to the panoply of issues confronting stakeholders in the region. Thank you.

[The prepared statement of Mr. Doolittle follows:]

Statement of The Honorable John T. Doolittle, a Representative in Congress from the State of California

Mr. Chairman, Mrs. McMorris-Rogers, thank you for the opportunity to present the committee with testimony on behalf of my constituents in the Klamath River Basin.

My greatest concern as I sit here today is that anything should interfere with the discussions by the 26 parties in the Klamath Basin Settlement Group who are mere months away from an historic agreement. Therefore, I would like to use this opportunity to highlight some of the progress that has been made since the water was shut off in April 2000, so that we may provide not concern, but, indeed, encouragement to those settlement parties as they approach the finish line.

Since 2002, the federal government has spent well over $500 million dollars in the Klamath Watershed for habitat restoration, water quality improvement, and water conservation. Furthermore, as a result of the National Academy of Science's independently peer-reviewed report which told us that the operation of the Klamath Project was not the cause of the 2002 fish die-off, several initiatives are either underway or completed which, unlike shutting off the water, will benefit the wildlife, wetlands, and fish passage along the Klamath River. The initiatives include the completion of a fish screen at the main Project diversion, 370 partnership ecosystem restoration projects, and the removal of Chiloquin Dam to open up 95 percent of sucker fish habitat.

These conservation activities and the ongoing settlement negotiations are where Congress should be directing its resources. Instead, we are here today—in Washington as opposed to the Klamath River Basin itself—scavenging for evidence of wrongdoings regarding Klamath where none exists. An examination into wrongdoing was already conducted. In 2003, Senator John Kerry requested that the Department of Interior's Inspector General investigate whether White House political staff sought to influence the management of the water resources which led to the 2002 fish die-off. In his response, Inspector General Earl Devaney was explicit in answering "No. No White House political staff intervened." I wonder what about Mr. Devaney's findings this committee believes is inadequate in order to bring us here today to revisit that same question.

To be clear, we absolutely must ensure the science we base our decisions upon is accurate and sound; this is why we have Dr. Lewis' NAS report which followed the Fish and Wildlife Service's findings regarding the endangered species in the Klamath River Watershed. And if Congress should deem it necessary to investigate the integrity of those reviews on the basis of media reports, I could support that

as well. But here we are, nearly four years after Senator Kerry asked the same question we are asking today, and we will soon be hearing the same answer Senator Kerry received, to wit; there was nothing improper behind the scientific findings at the Departments of Interior or Commerce.

So while I believe the issues facing the Klamath River Basin deserve the attention of this Congress, and while I would like to reiterate the request of Congressman Walden, Congressman Herger, and me in our June 29th letter inviting this committee to the basin, I would like to conclude my testimony by simply asking that this committee consider the fragile alliance of groups working toward a solution. With an agreement by all the relevant stakeholders just a few months away, and after all the conservation efforts and hundreds of millions of dollars spent by the federal government to improve the habitat conditions for the species in the watershed, I can only hope that this hearing may be conducted in that same constructive spirit, working toward achieving a permanent solution to the panoply of issues confronting stakeholders in the region.

STATEMENT OF HON. WALLY HERGER, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HERGER. Thank you, Mr. Chairman and Members. If there is one unfortunate truth that the constituents I represent in the northern California portion of the Klamath Basin have learned, it is that Federal regulatory decisions that do not rely on sound science can have devastating impacts on people in their communities.

The decision to shut off water to agriculture in 2002 sent shock waves throughout the upper basin community. Farms dried up, and local businesses were severely impacted. Waterfowl in the basin—namely, migrating ducks and geese that depend on agriculture for an estimated 50 percent of their food—were harmed as well. With an entire community on the brink of disaster and feeling it had been wronged by questionable science, we did not merely request clarification on the Federal decision which perpetrated this crisis; we demanded answers.

The administration did the responsible thing, and they did it openly and without a single word of protest from any stakeholders. After all, who can possibly be against an objective, independent review of Federal scientific decision-making to ensure it was done properly.

The administration asked the National Academy of Sciences to convene 12 of America's top scientists to independently review the decision to shut off water to agriculture. Their work was unanimously approved by every member of the research team and was itself independently peer reviewed by additional scientific experts from top universities.

The National Academy reported that the decision to withhold lake water from the Klamath project and provide higher flows in the Klamath River was not justified by science and potentially harmful to the endangered fish the agencies were trying to protect.

They also reviewed the fish die-off that occurred in 2002. Their report, again, a unanimous report, independently peer reviewed, declared that roughly 32,000 salmon died and that there was no obvious linkage between Klamath farming and the fish die-off. This makes common sense, as the Klamath project farms are about 200 miles away from where the fish die-off actually occurred. The claim that the Klamath farming project was responsible for the fish die-off is not justified by science and is, in my view, overly simplistic.

This region experienced very similar water conditions in 1988, and no fish die-off occurred. The claim that political influence had a role in Klamath operations is equally absurd. The Inspector General has reviewed such claims and reported that "none of the individuals interviewed, including the whistleblower, was able to provide any competent evidence that the Department utilized suspect scientific data or suppressed information."

But, Mr. Chairman, there is good news to share. Over $500 million has been invested in improving conditions in the Klamath watershed since 2002. Only cooperation, not partisan bickering, would fix the problems in the basin. Twenty-six parties from above upper Klamath Lake all the way to the coast have been working together to reach a compromise on the river. These people desperately need a predictable and sustainable outcome to this situation.

Mr. Chairman, we are elected to serve them and do what we can to help. Dredging up untrue and unproven political accusations does nothing to further their efforts and may even discourage them. This is why I have requested a field hearing in the mid-basin community of Yreka, California, so the Committee can visit with those who wish to forego conflict in favor of a cooperative local solution.

I would like to renew that request today, and I would also like to invite you to my district to meet with the farmers I represent. I think it would be incredibly valuable for you to see firsthand the impressive work they are doing to conserve fish and wildlife while continuing their rural way of life. Again, I thank you very much.

[The prepared statement of Mr. Herger follows:]

Statement of The Honorable Wally Herger, a Representative in Congress from the State of California

Mr. Chairman, if there is one unfortunate truth that the constituents I represent in the Klamath Basin have learned, it is that federal regulatory decisions that don't rely on sound science can have devastating impacts on people and their communities.

The decision to shut off water to agriculture in 2001 sent shockwaves throughout the Upper Basin community. Farms dried up and local businesses were severely impacted. Waterfowl in the Basin, namely migrating ducks and geese that depend on agriculture for an estimated 50 percent of their food, were harmed as well. With an entire community is on the brink of disaster and feeling it had been wronged by questionable science, my colleagues and I didn't merely "request clarification" on the federal decision which perpetuated this crisis, we demanded answers.

The current Administration did the responsible thing, and they did it openly and without a single word of protest from any stakeholder. After all, who can possibly be against an objective, independent review of federal scientific decision-making to ensure it was done properly?

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The National Academy reported that the decision to withhold lake water and provide higher than normal flows in the Klamath River was not justified by science, inconsistent with available data, and potentially harmful to the fish the agencies were trying to protect.

They also reviewed the fish "die off" that occurred in 2002. Their report—again, a unanimous report, independently peer-reviewed—declared that roughly 32,000 salmon died and that there was no obvious linkage between Klamath farming and the fish die off. This conclusion makes common sense, as the Klamath Project farms are about 200 miles away from the where the fish die off occurred.

The claim that the Klamath farming project was responsible for the fish die-off is not justified by science, and in my view, overly simplistic. This region experienced very similar water conditions in 1988 and no fish "die-off" occurred.

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Thank you very much.

The CHAIRMAN. Mike, the bases are loaded, albeit with slow runners, but it is your chance to hit it way out to give them a chance to get home.

STATEMENT OF HON. MIKE THOMPSON, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. THOMPSON. Thank you very much, Mr. Chairman and Members of the Committee. I appreciate the fact that you are holding this hearing, and I, too, believe that there should not be partisan bickering, and it should not be a political or a partisan issue.

I think that everyone here would agree, that is the issue. That is why we are having a hearing. We need to make sure that the work that is done is done with unadulterated science, and the people that devote their life to working scientifically on these issues are allowed to do their work and not to be pressured or bullied by someone in the political arena.

We know for a fact that some of that has happened. We know that the chief political operative did PowerPoint presentations to career folks over in these agencies explaining the need to address political issues rather than scientist issues. We have heard from whistleblowers who have said that they have been pressured and bullied, and I think it is very appropriate that this Committee take the time to make sure that this is not happening and does not happen in the future.

There are a few things that are just not disputable. One is that this administration sidestepped a process that has been in place and been adhered to for 30 years, and they violated the law. They violated the Endangered Species Act. As Mr. Miller said, if you do not like the law, change the law, but the fact is, they violated the law, and three courts have stated that that was the fact and that was done in a capricious and arbitrary manner.

The other thing I want to mention is that there has been a lot of talk, both from the dais and from the witness table, about this unprecedented working group that has surfaced in the Klamath

Basin. I think that is true. The work that they are doing is good. They have had more progress than ever.

It is not the first time there has been a working group in that basin. As a matter of fact, there was an attempt, during the fish-kill days, to take all of the funding away from the folks who were doing cooperative work up in that basin. They are making progress. They should be allowed to continue, but they should be allowed to continue with the benefit of knowing that they are going to have good science and good scientific support.

They are not going to have the agencies bullied and their arms twisted to get some outcome that is not in line with both the science and the work that they are doing. Someone much smarter than me once said that they would rather own the referees than the best team.

Now, I think we have the best team up there working, but if the referees, who are providing documentation and support, are being bullied and forced to do something that is not in the best interests of the area, it is going to be a mess for a long time to come.

Some suggest that even the salmon may be at fault because they came too early to the Klamath to go up to spawn. That just pains me to hear that. It is like saying that the lady that was killed when the guy ran the red light was at fault because she decided to go to work early that day. The fish are not on some schedule. They go up those rivers to spawn when it is time to spawn.

In this particular case, because of bad water conditions that I would argue that were at least contributed to by fudging the science, nearly 80,000 salmon died of gill rot. It was a disaster. It was a disaster to the entire State of California and the State of Oregon.

Remember, there are three parts of that Klamath Basin. There is the upper basin, which Mr. Walden represents; there is the mid-basin that, I guess, John and Wally represent; and then there is the lower basin, that area that comes out on the map—it is not on the screen anymore, but empties out at the mouth of the Klamath River, and everybody that had any business in regard to commercial or sport salmon fisheries took a significant hit because of this fish kill.

As Mr. Miller pointed out, that was a $60 million hit. Mr. DeFazio mentioned it also, for both his State of Oregon and our State of California, and it was not just the people that fish for a living; it was everybody else how has anything at all to do with the fishing industry. It was marinas and bait shops. It was ice houses, it was lodging facilities and restaurants. People lost their businesses. People lost their boats. People lost their homes. People have been financing the maintenance of their boat and their fishing equipment on credit cards so they can hopefully come back and fish.

As everyone, I think, well knows, this was the biggest commercial salmon-fishing disaster in history. The Department of Commerce came in, declared it a disaster, and then we had to work overtime to try to get the money for those folks to make sure that they could have a host at coming back and going into business.

Again, I want to applaud the work that is being done. I think there is room to both fish and farm in the basin, but it has got to

be done in an honest, transparent basis so everyone is working from the same science, and everyone's interests are protected, not one interest over the others.

So I look forward to your work today, Mr. Chairman, and thank you for allowing me to be present.

The CHAIRMAN. The Committee thanks each of you for your time this morning. I just have, very quickly, a question, since it has been referenced a number of times this morning, in regard to the previous Inspector General's report. It has been stated this morning that that IG report found zero political influence.

It is my understanding that that report looked particularly at Karl Rove's influence, and he was specifically mentioned as having had zero political influence.

My question would be, What about the Vice President? Was he mentioned in that report, and was he cleared of any political influence? Anybody can answer.

Mr. WALDEN. Mr. Chairman, I would be happy to take it on. You have people here from the IG's office from Interior. I do not believe the Vice President was specifically referenced, at least in the letter to Mr. Kerry. If you can give me just a second, though, and I believe you have a copy of the letter. They do specifically look at Karl Rove because he is the one who is referenced in the Wall Street Journal story. But they go on. Let me see if I can find.

The quote is: "The complexity of the issues involved and the ferocity of debate clearly fueled the flames of suspicion and distrust in this matter. Based on the results of our investigation, however, we conclude that the Department conducted itself in keeping with the administrative process governing the Klamath project, that the science and information utilized supported the Department's decisions and that no political pressure was perceived by any of the key participants."

I read that to be no political pressure was perceived by any of the key participants. I do not know, and you could ask the IG's folks——

The CHAIRMAN. We will.

Mr. WALDEN.—whether or not they found only Karl Rove, political pressure was not there, or if the statement is as it reads, clearly that no political pressure was perceived by any key participants. It obviously goes on to say many other things.

The CHAIRMAN. But if the Vice President is not part of the executive branch, I guess he is not part of the political system either.

Mr. WALDEN. No, but he could bring about political pressure perhaps in this issue, but they found no political pressure perceived by any key members. So I think they look at that, they went up and down the chain at the Department of the Interior.

I think the other part is the comment that the agency conducted itself in keeping with the administrative process governing the Klamath project. I was on some of those phone calls on the fish issue because I was concerned about the loss of the salmon season and all of that, and I can tell you, in conversations that I was involved in with Secretary Gutierrez and others, there was a lot of pressure being put on by those of us who are concerned about the salmon cutoff, fishing cutoff, just to the opinion that it reminded

me a lot of the pressure that some of us put on in terms of the water cutoff. It is no different.

It is much like your letter to the USDA, saying, We have a drought in West Virginia. Help our farmers. They are taking water out of the storage ponds and trying to figure out what to do for hay and all of that. We all react that way.

Now, here, it does not reference the Vice President specifically.

Mr. THOMPSON. If the gentleman would yield, I just want to point out that, on those conversations with Commerce, I think it was a different issue. The issue was through which window were we going to assess the harm done to those in the fishing industry.

It has been the practice in the past to wait until after the season is over, all of this fish are in, then check the numbers, and that process could run a very long time. It was our fear, and, I think, Mr. Walden's as well, that if that were allowed to happen, that those fishermen would be over. They would lose their boats, their businesses, and everything else.

What happened was the decision to truncate the season itself was an indication as to how much fish these guys would be able to catch, and that was the pressure, if you will, that folks were trying to encourage the Secretary of Commerce to speed up the process to do the evaluations. We already knew they could not catch any fish. We did not have to wait until after the season or after all of the fish were weighed. They could not catch fish, given the season that they had. They were given weeks in which to fish, and those weeks were the times that the fish were not in those areas. It was virtually no season at all. That was the only pressure, I think, that was on Mr. Gutierrez.

The CHAIRMAN. The Chair recognizes the gentlelady from Washington.

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman. Just going back to this letter, when this issue was visited in 2004, I was going to point out another part of the letter in response to your question, Mr. Chairman, and this is on the bottom page 5, where the letter says: "Finally, we found no evidence of political influence affecting the decisions pertaining to the water in the Klamath project. The individuals at the working levels denied feeling pressured at all. Based on our experience in the past OIG investigations, these would have been the most likely sources to provide evidence of such influence. The consistent denial of political influence by government officials was corroborated by the view of outside scientists and one former DOI official, all of whom denied feeling pressure, political or otherwise."

This is the Inspector General's letter that we referenced earlier.

The CHAIRMAN. The gentleman from California, Mr. Miller.

Mr. MILLER. Thank you, and I want to thank my colleagues for testifying.

I just want to sort of go over this one more time. What I find interesting, just in terms of the atmospherics here, the Bureau has worked for a number of years on this habitat and these fisheries, and they have made a determination that diverting water would harm the two Federally protected species. That causes a blowup in the basin. That blowup gets the attention of the Vice President of the United States. He decides, one of the people quoted him as say-

ing, that "we have got to get the science on the side of the farmers," not exactly a request for an objective review.

He then proceeds to see how he can get the science on the side of the farmers, and he calls a person at the Department of the Interior, Ms. Wooldridge, who we later find out had serious lapses of ethical standards during her career that impacts other investigations of conflict of interest that take place, and she makes it very clear that, again, the Vice President—is that the farmers have to be able to farm. That is where he is coming from on this question, not, does this science work?

So through Wooldridge to Gale Norton, he gets the Academy to review this. They do a one-month review. That review is critiqued by the National Marine Fisheries, which determines that they object to that plan. That critique is scuttled. The Academy comes on, makes their findings, and all hell breaks loose when the dead fish show up at the mouth of the river. Now we have massive cooperation. This sounds like a lot of people who burn down their own house and now have a barn raising going on before the winter comes.

This cooperation did not exist there. This was a fight over these resources. There were scientific determinations made. Those were then overruled, albeit perhaps in a scientific fashion, but when you have weekly calls from the Vice President's office on this, you have these determinations made. It is clear in the Department of the Interior. With all due respect, those are not the atmospherics that tell me that this was an independent review.

It is turned out to be a catalyst for working together in the region, but it turned out to be a very expensive catalyst, and, in fact, you could have taken the initial review, and you could have made a determination that, based upon the Bureau of Reclamation, these actions were necessary to take so that the plan would work because those were not part of the original plan. Now they have been fast tracked because of your involvement, and things are working in the region.

So I appreciate the testimony of my colleagues, but, with all due respect, this was not done on the merits; this was the result of a concerted effort to move the science, and I think it was rather successful, to the detriment of the fisheries and the impacted individuals and businesses and what have you. But it is not sufficient just to suggest, well, because now we have all of these projects going forward, and the Federal government has spent a lot of money, that, therefore, we can accept this as a way of arriving at scientist conclusions about how we should proceed in these very complex watersheds. I just refuse to accept that as a rationale for doing that. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from South Carolina, Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman. I am just curious, being from the East, I am sure we have similar problems but not to this severity. Have you all had an opportunity to sit down together before and to talk about this issue, or this is kind of an open opportunity to come this morning? Have you all had an open dialogue on this before this hearing, or is this your first opportunity? I am sure that is a big issue for you back over in Oregon and, I guess, in California.

Mr. WALDEN. Well, Mr. Brown, I appreciate your comments. We have had dialogue, and we have fought. We have represented different areas of the basin and different constituencies in the basin. They have fought in the basin. They have fought to nearly violence, although that has been held back, frankly, in very difficult times. If you are losing your ranch, or you have lost your fishing boat, you have lost your livelihood, and you are pretty angry about it. I have had constituents who died over this or committed suicide over this.

These are very, very difficult problems, and for the first time in 100 years when the water was cut off, these families were left with a drought. As you find in the discussions, the Inspector General's comments to Senator Kerry or in the National Academy of Sciences and our sea report, there is debate in the scientific community about what should happen here.

This is more art than science, and so when some of us asked, and the Department proceeded with a request to the National Academy of Sciences to review the science and the decisions, it was knowing that whatever this independent team came out with, we would have to live with, and we did not know, when we asked, that they would say that the science basically was sound but that two of the main principal decisions were a high risk and probably should not have been made.

You will hear from the head of this Committee later today about its independence, its independent peer review of its own work, and that there was not political influence in the process, or Members would have stepped out of the process. His testimony is before you.

There are a lot of allegations out there, none of which, I believe, have been independently reviewed like this has, and we knew we would have to live with this.

The key, though, is, and you have all mentioned it are the 26 parties who, today, are tired of fighting and want to find a solution. That solution, by the way, may come before this Committee, and we are all going to have to be willing to step up and evaluate it and see if it is something we can swallow, but it may involve removal of three of the main dams on the Klamath River. It may involve enormous conservation investments, much like the Florida Everglades.

This, as my colleague from California, Mr. Thompson, said, a huge basin. It is very complex, and so we are talking more than we have.

Mr. HERGER. Thank you, Mr. Chairman, and I would like to respond to my good friend, Mr. Miller's, comments.

I think we need to look at what happened here. Now, I represent, along with Mr. Walden and Mr. Doolittle, over 100,000 people that live in an agricultural area that have been farming here since World War I that had 100 percent of their water shut off. Now, those of you who have never been in agriculture, can you imagine where you are dependent on farming, and you do not have any water? Not half of it shut off, not 25 percent of it shut off, but it was completely shut off.

I would ask my good friend from California, Mr. Miller, if you were representing a group that had all of their water shut off, and it was done supposedly in the name of science, would you not be requesting that, at least, we look the science over, that we inves-

tigate to make sure it was good science that we used in determining destroying the entire economy and the people's lives?

Mr. MILLER. I would say that the gentleman has a different request than the Vice President made, which was "to get the science on the side of the farmers," is the quote.

Mr. HERGER. Let me just finish. Let me, again, ask my question. If you had all of your water shut off, would you not be requesting that a group of those—this is what they do—the Academy of Sciences—that is who we asked for, that is where they went, and we had 12 scientists, and they are the ones who unanimously came up with the decision that this was not good science. It was not good science that they shut all of this water off. So that is really what this whole issue is about.

The CHAIRMAN. The Chair is going to have to cut the gentleman off because I think we are diverting from the original question of the gentleman from South Carolina quite a bit.

Mr. THOMPSON. On the original question, Mr. Chairman, I will just tell the gentleman that Greg and I have sat down. I have legislation that I have had for a while that encompasses much of what the working group is looking at doing to fix it up. I talked to him about joining forces to get that passed. I even went up to Greg's district in the upper Klamath basin and met with the Klamath water users and talked to them, trying to figure out if there is a way.

So there is an interest on the part of some to bring about resolve in a pleasant way, and I do not think that is out of our reach. But we do have to have honest and transparent facilitators on this. As I said earlier, we cannot have somebody plan the science.

The CHAIRMAN. The gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman. I yield time to the gentleman from California, Mr. Miller.

Mr. MILLER. I think one of the points is, as I understand it, the Research Council of the National Academy, it says: "The NRC Committee found sound scientific bases for recommendations of the biological opinion involving coordinated operations, reducing ramping flows below the main stem dams. The Committee did not, however, find scientific basis for NIM's recommendation of the increased minimum flows on the Klamath main stem."

So this bastion of scientific second-guessing that took place was then cherry picked for specific purposes. That is according to Mr. Lewis, who was the chairman of the committee.

Mr. WALDEN. May I respond?

Mr. MILLER. That was the testimony that was given to this Committee beforehand.

Mr. WALDEN. I have read that, but I think my understanding of it is they evaluated all of the decisions and all of the science, and they said——

Mr. MILLER.—you could operate this basin in a different fashion than perhaps the Bureau suggested——

Mr. WALDEN. Correct.

Mr. MILLER.—but they did not endorse the lake levels and the flows that were then implemented.

Mr. WALDEN. Right, right. That was our complaint.

Mr. MILLER. Everybody who questioned the result was sort of kicked aside, in one fashion or another.

Mr. WALDEN. Actually, I think you are making my case. The issue here was the decisions by Fish and Wildlife to keep upper Klamath Lake at a higher lake level because the historical record indicated that the largest sucker kill-offs occurred at a higher lake level, not lower lake level, and the NRC, and I do not have the exact language in front of me—found that releasing the warm water out of the lake to increase flows might actually imperil the coho they are supposed to save because there are actually cold-water microsprings in the Klamath River that the coho would come around and cool down. If you added warm water out of the upper Klamath Lake, that is where you caused the problem.

So the portion you read, my friend, Mr. Miller, actually was the issue the NRC found that led to the conclusion that the decisions made were at high risk and were not based on historical data the agencies had, and that is what caused the water cutoff.

The CHAIRMAN. The Committee is hearing from Mr. Lewis later, so we can make that determination. The gentleman's time has expired.

The Chair, in order to allow our colleagues to get on with the rest of the schedule today, asks, rather generally, which Members have questions, and I will recognize you. The gentlelady from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Just very quickly to all of you, what would you suggest, what would you think, would help resolve disputes within the agencies regarding the scientists so that we do not face this again? What steps should be taken? What should be put into place?

What recommendations would you have to be able to ensure that future renderings are not politically motivated, are not totally one way for the farmers and one way for the state but, rather, a cohesive—you are talking about? What would you say would be a way of doing it?

Mr. WALDEN. If I might, Mr. Chairman, I think, on these decisions, especially involving listed species, there should be an independent peer review of the data, of the scientific data. Let us face it. Even biologists may have their own agenda. That is not outside the realm of possibility.

The point is, having an independent peer review would sort that out, would find out if there is an agency problem, and would find out if there is political pressure that should not be there, and that is, frankly, why I had legislation to do that that this Committee considered and passed. It is why we asked for an independent peer review by the National Academy of Sciences.

I really think, when the life of the species is on the line, or the life of the farmers or the fishermen are on the line, or the tribal obligations are on the line, having an independent outside look where there is no conflict of interest—these people are all vetted but are also some of our most brilliant scientists—give us a second opinion.

Mrs. NAPOLITANO. You talk about the National Academy of Sciences, but what about the National Research Council?

Mr. WALDEN. That is a division of the National Academy of Sciences. There is the National Research Council, there is the National Institute of Medicine, the National Institute of Engineering, and there are some others. They fall under the National Academy of Sciences.

So the 12-member committee of the NRC is actually under the National Academy of Sciences, and then their work is independently reviewed within the National Academy to make sure there is no political influence and that it is done properly.

Mrs. NAPOLITANO. Anybody else?

Mr. THOMPSON. Mrs. Napolitano, the other panel will have agency people, and you can ask them. I would suggest that we stay within the process that has worked fairly well for so long. For instance, do not sidestep the Section 7 consultations when these thorny, vexing issues come forward. We saw that here. We saw that, as I understand it, in the delta with the smelt.

Mr. DOOLITTLE. Well, I would just observe that there is a lot that is not understood in this area. Mr. Herger stated in his testimony that they had similar water conditions in 1988 and no fish die-off. No one has figured out why that was the result there versus what the result was here, with those similar water conditions in 2000.

So that, I think, puts added importance on having this independent peer review, recognizing you are not going to have perfect knowledge about this, and in order to avoid doing harm in the solutions you come up with, you want to make sure you have at least got the best approach that we are capable of getting, recognizing you do not have perfect knowledge.

When the water was cut off, it produced a devastating result, not only for the farmers but for the environment in that region as well. You saw the picture of the wildlife refuge, one of the biggest wildlife refuges in the country. It was dried up. So you want to be more careful about what happens.

I am glad you are going to hear from Dr. Lewis because I think, as Greg talked about, this was independent. This was peer reviewed. This was a better analysis than the agency's——

Mrs. NAPOLITANO. Mr. Doolittle, I have one more thing, and I am sorry to cut you off. Because I was reading in the testimony that there is a reference about an implementation of the ethics rules, and it has not yet been implemented. Would you believe that continued oversight of ethics within the agencies, and I am not just talking about this one agency—I am talking about all agencies—that should be honest, transparent, and with integrity that the people of this country demand of us and of them?

Mr. DOOLITTLE. Well, I am not going to disagree with that statement.

The CHAIRMAN. The gentleman from Idaho, Mr. Sali.

Mr. SALI. Mr. Chairman, can I yield to the Ranking Member?

Mrs. MCMORRIS RODGERS. Thank you, Mr. Sali.

I just wanted to ask a quick question of the panel, and I find it interesting that really we are disputing today the words that were in a Washington Post article versus the words that we have from the office of an Inspector General and the findings of the office of Inspector General.

On the NSA study team, Mr. Walden, I wanted just to ask you, does not that team also include some representative from Trout Unlimited and the Nature Conservancy?

Mr. WALDEN. Madam Ranking Member, I believe my assistant, Vanna White, here has a list of the peer review of National Academy of Sciences report, and so these are the people who did the peer-review work of the report, and then I believe we have the members of the NAS committee that actually wrote the report.

So the chart to the left indicates the scientists who did the investigation and the report, and the chart to the right is the peer-review group that then reviewed the work of the other scientists, and you can see that Trout Unlimited was on there; a consultant from McCall, Idaho; university professors from Berkeley and Oregon State and Wisconsin; the Nature Conservancy; Natural Resources Scientists, Inc.; Johns Hopkins.

These are some of the best in the country, if not the world, in these areas of expertise. So you had a different brain trust that did the initial report, and then you had another group that reviewed it as well. They have very, very rigorous standards all the way through.

So that is why I think you make a really important point here. You have the world's leading scientists, a peer-reviewed report that looked at all of this information, and an Inspector General's report that looked at similar charges involving White House involvement that ruled there was not any undue influence against a quote in a Washington Post story.

I am going to default to, with all due respect to the press, of which I have a journalism degree, I am going to default to the NRC because it is actually a peer-reviewed report.

Mrs. NAPOLITANO. Thank you.

The CHAIRMAN. The gentleman from Washington, Mr. Inslee.

Mr. INSLEE. Thank you. I think one problem is that the Bush administration really has been in a war with science on a whole host of issues for the last seven years. This is not unique, that the President's administration has corrupted science in the administration of the Endangered Species Act. It is a pattern and practice through all of these issues.

We hear from the surgeon general about suppressing science when it comes to family planning information just in the last couple of weeks. We hear from Jim Henson, who has had his scientific information attempted to be suppressed; our most brilliant scientists at NASA and the world on this subject suppressed by the administration regarding climate change.

We have had suppression of science regarding stem cells, and now we have repeated instances of failure to follow the law and the science and the Endangered Species Act. I think the problem with the administration now is that to come and ask for the trust of the American people on any of these contentious issues is damaged.

I can understand why Americans are concerned about this. Look at the track record. In the first George Bush's four years in office, the first President George Bush listed 234 species as endangered.

Mr. BROWN. Mr. Chairman.

Mr. INSLEE. Let me continue. President Clinton listed 521. President George Bush and his administration has not listed, as far as

I can tell, one single endangered species unless required to do so by court order or action of citizens requiring the administration to act.

The problem is that this administration has a pattern and practice of suppressing science on a whole host of subjects. So when we come to a situation which is contentious in the Klamath, and I can understand the tensions involved on all sides of this controversy, it has no credibility with the American people in making these decisions.

When you have an administration that has not listed an endangered species, are we supposed to think that when George Bush was elected, the pressures on American species have disappeared, that somehow we do not have endangered species anymore, unless a court orders them to be listed?

In fact, what we get is the Assistant Attorney General that George Bush hired says—this is Assistant Secretary of Interior Craig Manson, a fellow whose job it is to follow this law. What does he say about the Endangered Species Act? "If we are saying that the loss of species in and of itself is bad, I do not think we know enough about how the world works to say that."

Mrs. MCMORRIS RODGERS. Would the gentleman yield?

Mr. INSLEE. No, just a moment. This is a guy whose job it is to make sure we follow the science on the Endangered Species Act.

So I guess the question I would pose to you, is there something to suggest that the reason for the Endangered Species Act has been removed because these species are not threatened anymore, and has the credibility of this administration been damaged so that it makes it difficult for all of us in these difficult situations to really trust the Federal government regarding science?

Mr. WALDEN. Mr. Chairman, Mr. Inslee, I would say this on the Klamath situation. I have not seen Judge Manson's quotes in full——

Mr. INSLEE. That was not in regard to the Klamath situation; it was regarding another listing.

Mr. WALDEN. Right. Without getting into that, let me just speak about Klamath.

In 1993, the Fish and Wildlife Service listed the sucker fish as a threatened or endangered species, and in that report they said they did so principally because of the loss of habitat because of the blockage at Chiloquin Dam that had been there almost 100 years. That was in the Clinton administration. That was one of those listed species.

When this Committee began to look into the problems there, we said, Why do not we remove Chiloquin Dam? So I passed legislation that brought the farmers, the fishermen, and the administration together. We are on a track to do that now.

The same issue came up about sucker larvae that were being literally sucked out the A canal and find themselves scrambling around on farmers' fields, which is not very good habitat for fish, because prior administrations had not pushed hard to screen the A canal. It is a multimillion-dollar project. They went into hyper speed and got that screen in—we have a slide of that—to deal with that issue.

So I think, at least in this case, you can take comfort in knowing the NRC reviewed the data and the decisions by the agencies under the Bush administration, because that is the one independent look we have. You can look at some of the progress that has been made in the basin, including the water bank, including the equipment. funds, including some of these conservation efforts and habitat.

I think, actually, I would love the Committee to come out and go on the ground with me and see some of the progress that has been made in this case. There is still an enormous amount of work to be done, though. Whenever these decisions in science can be transparent to the public and to us, as lawmakers, we will have better decisions, and we will have less undue influence by either side or any side, and the more we can have them independently peer reviewed, the more reliable those data will be.

Mr. INSLEE. Well, I appreciate your trying to give me comfort. I do not have it yet, but I appreciate your optimism. Thank you.

The CHAIRMAN. Do any other of my colleagues on the Committee have questions? If not, gentlemen, we thank you for being with us today. Per our previous discussions, you are free to join us on the dais and participate in the remainder of the day's hearing, by unanimous consent.

Mr. MILLER. I assume we will get a second round of questions before non-Members of the Committee.

The CHAIRMAN. That is correct. Members of the Committee will be recognized for the first and second round of questions first. OK.

Mrs. MCMORRIS RODGERS. Mr. Chairman, I have another unanimous consent request. I would like to request the next two panels be combined because there is going to be questions raised by the first panel that I think the third panel witness would be able to help answer and clarify.

The CHAIRMAN. The Chair would respond, since we do have votes coming up shortly on the House Floor, the Chair would like to proceed with Panel 2—these two individuals, I think, are going to receive a number of questions—before we consider joining the other panels.

Mrs. MCMORRIS RODGERS. OK. Panel 2 and 3?

The CHAIRMAN. No. I would rather keep Panel 2, the Inspector General's, separate.

Mrs. MCMORRIS RODGERS. OK. I had another request, unanimous consent request, that, given the importance of this hearing today, that the witnesses be sworn, that their testimony be sworn.

The CHAIRMAN. The Chair would respond to the gentlelady that the witnesses were not notified in advance that they would be sworn in, and, therefore, the Chair does not feel it is fair to ask them now to take an oath of testimony.

Mrs. MCMORRIS RODGERS. I would find that unfortunate. I would like to point out that, under the False Statements Accountability Act of 1996, witnesses should be aware that giving false testimony or answers to Congress could result in Federal perjury penalties of up to five years in prison and $250,000 in fines.

The CHAIRMAN. The Chair appreciates the gentlelady reading that warning. The Chair would expect that common sense would direct the witnesses to not do otherwise but to tell the truth.

Mrs. MCMORRIS RODGERS. Thank you.

Mr. MILLER. Mr. Chairman, you do not get to lie to Congress, either under oath or not under oath.

The CHAIRMAN. The gentleman makes a good point.

The Chair will now call Panel 2: Mary Kendall, the Deputy Inspector General, U.S. Department of the Interior; and John M. Seeba, the Assistant Inspector General for Auditing, U.S. Department of Commerce.

We welcome you to the Subcommittee. We do have your prepared testimonies, and, without objection, they will be made a part of the record. Mary, do you want to proceed first?

Ms. KENDALL. Mr. Chairman, thank you.

The CHAIRMAN. And it appears we will have time for testimony, and we would then have to come back for questions.

STATEMENT OF MARY KENDALL, DEPUTY INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR

Ms. KENDALL. Mr. Chairman and Members of the Committee, I want to thank you today for the opportunity——

The CHAIRMAN. Do you have the microphone drawn to you and turned on, please?

Ms. KENDALL. Is it on now?

The CHAIRMAN. Better.

Ms. KENDALL. I am sorry. Thank you for the opportunity to be here today to testify about a recent Office of Inspector General investigation that calls into question the ethical integrity of science-based decisions at the Department of the Interior.

As you know, we recently issued a report of investigation on Deputy Assistant Secretary for Fish, Wildlife, and Parks Julie MacDonald. Our investigation was based on allegations that MacDonald had unreasonably interfered with scientific findings relative to the Endangered Species Act issues that she had conducted herself outside the chain of command by interacting directly with field personnel, and, in doing so, she had been heavy handed with staff.

During the course of our investigation, we also discovered that Ms. MacDonald had provided nonpublic information to friends and colleagues outside of the Department and the Federal government. In one instance, this nonpublic information was provided to individuals who had litigation pending against the Department.

Our investigation determined that MacDonald did, in fact, inject herself personally in a number of Endangered Species Act issues, particularly those that had the potential to impact her home state, California. Although the Endangered Species Act issues were clearly within the realm of her responsibilities, Ms. MacDonald involved herself far more profoundly than might be expected of a Deputy Assistant Secretary.

Based on our interviews, it became clear that Ms. MacDonald's management style was abrupt and abrasive, if not abusive. Her conduct demoralized and frustrated her subordinate managers, intimidated field personnel, and led to at least one instance in which the substitution of her judgment for that of the field was simply wrong and was promptly overturned by the Court.

An issue of equal concern, however, was our discovery of the release of nonpublic information by Ms. MacDonald to her friends and colleagues, to lawyers and lobbyists, who had interests in vari-

ance with the Department, and to an individual with whom MacDonald had become acquainted through Internet role-playing games.

Although Ms. MacDonald claimed that she tried to respond to everyone equally when asked for information, our investigation made clear that close acquaintance with Ms. MacDonald equated to special access to information and documents.

As you know, we are conducting a follow-on investigation into Ms. MacDonald's role in the decision to withdraw the Sacramento splittail. Our preliminary findings suggest that while she probably should have recused herself from involvement in the Sacramento splittail decision, due to a conflict of interest, she did not appear to materially affect the outcome of this particular decision with her involvement.

We are continuing to investigate several attendant ethics and conflict-of-interest issues related to this matter. Overall, the impact of Ms. MacDonald's conduct on the Department of the Interior has been considerable. It has cast a vast cloud over the Department's scientific integrity.

Having reviewed the Endangered Species Act decisions in which Ms. MacDonald involved herself, the Department has determined that eight additional decisions must now be reviewed and perhaps reversed or modified. Other decisions may be at risk for legal challenge simply by virtue of Ms. MacDonald's personal involvement.

This is not the first time that the Office of Inspector General has been called upon to investigate allegations of scientific misconduct, although it is the first case that involves someone at the Deputy Assistant Secretary level.

More than five years ago, following our investigation into allegations of tampering with scientific field samples and findings related to an Endangered Species Act study, we recommended that the Secretary ask the Department's chief scientist to convene a working group consisting of internal and external scientists to review and make recommendations on how to restore rigorous science to the Endangered Species program and to design and implement a Department of the Interior scientific code of ethics.

While an effort was undertaken to develop a draft code of scientific conduct, it has never been finalized or issued Department wide. While we believe that this code needs to be revived in its present form, applicable primarily to employees and volunteers who participate in hands-on scientific activity, we also believe that it needs to be expanded to specifically include policymakers like Ms. MacDonald.

This case highlights the need for just such a policy, one in which clear expectations of scientists and policymakers alike are articulated, and processes are established by which disputes and differences of opinion can be efficiently and constructively resolved.

As recently as last week, the Inspector General had a discussion with Secretary Kempthorne about this very matter and advised him of the stalled policy document and the need to expand its application. We are hopeful that somehow the Congress, the Secretary, and our office can work together constructively to rid the Department of conduct that brings disrepute to its programs and decisions and replace it with an ethical culture in which honest dif-

ferences can be resolved, and sound, science-based decisions are advanced with integrity and transparency.

This concludes my formal testimony. Thank you for the opportunity to appear this morning, and I will be happy to answer any questions.

[The prepared statement of Ms. Kendall follows:]

Statement of Mary L. Kendall, Deputy Inspector General, U.S. Department of the Interior

Mr. Chairman and members of the Committee, I want to thank you for the opportunity to testify today about a recent Office of Inspector General (OIG) investigation that calls into question the ethical integrity of science-based decisions at the Department of the Interior (Department or DOI).

As you know, we recently issued a Report of Investigation on Deputy Assistant Secretary for Fish and Wildlife and Parks, Julie MacDonald. Our investigation was initiated based on allegations that MacDonald had unreasonably interfered with scientific findings relative to Endangered Species Act (ESA) issues; that she had conducted herself outside the chain of command by interacting directly with field personnel; and, in doing so, she had been heavy-handed with staff.

During the course of our investigation, we also discovered that MacDonald had provided non-public information to friends and colleagues outside of the Department and Federal Government. In one instance, this non-public information was provided to individuals who had litigation pending against the Department. The information provided to them served as the basis of a motion to re-open the record in Federal District Court.

Our investigation determined that MacDonald did inject herself personally in a number of ESA issues, particularly those that had the potential to impact her home state, California. Although ESA issues were clearly within the realm of her responsibilities, MacDonald involved herself far more profoundly than might be expected of a Deputy Assistant Secretary. Based on our interviews, it became clear that MacDonald's management style was abrupt and abrasive, if not abusive. Her conduct demoralized and frustrated her subordinate managers, intimidated field personnel, and led to at least one instance in which the substitution of her judgment for that of the field was simply wrong, and was promptly overturned by the court.

An issue of equal concern, however, was our discovery of the release of non-public information by Ms. MacDonald to her friends and colleagues—to lawyers and lobbyists who had interests in variance with the Department, and to an individual with whom MacDonald became acquainted through internet role-playing games. Ms. MacDonald's various, and sometimes contradictory, explanations for releasing information that she knew was not releasable, suggests that she was uninformed, disingenuous or both. Although Ms. MacDonald claimed that she tried to respond to everyone when asked for information, our investigation made clear that close acquaintance with Ms. MacDonald equated to special access to information and documents. That she failed to recognize the seriousness of these actions is most disconcerting.

As you know, we are conducting a follow-on investigation into Ms. MacDonald's role in the decision to withdraw the Sacramento Splittail, as well as some related ethics issues. Our preliminary findings suggest that while she should probably have recused herself from involvement in the Sacramento Splittail decision due to a conflict of interest, Ms. MacDonald did not appear to materially affect the outcome of this particular decision with her involvement. We are continuing to investigate several attendant ethics/conflict of interest issues related to this matter.

Overall, the impact of Ms. MacDonald's conduct on the Department of the Interior has been considerable. It has cast a vast cloud over the Department's scientific integrity. Having reviewed the ESA decisions in which Ms. MacDonald involved herself, the Department has determined that eight additional decisions must now be reviewed, and perhaps, reversed or modified. Other decisions may be at risk for legal challenge, simply by virtue of Ms. MacDonald's personal involvement. These impacts will undoubtedly be both time-consuming and costly.

This is not the first time that the Office of Inspector General has been called upon to investigate allegations of scientific misconduct, although it is the first case that involved someone at the Deputy Assistant Secretary level. More than five years ago, following our investigation into allegations of tampering with scientific field samples and findings related to an ESA study, we recommended that the Secretary ask the Department's Chief Scientist to convene a workgroup consisting of internal and external scientists to review and make recommendations on how to restore rigorous

science to the Endangered Species Program, and to design and implement a DOI Scientific Code of Ethics. While an effort was undertaken to develop a Draft Code of Scientific Conduct, it has never been finalized or issued Department-wide. While we believe that this code needs to be revived in its present form applicable primarily to employees and volunteers who participate in "hands-on" scientific activity, we also believe that it needs to be expanded to specifically include policy-makers, like Ms. MacDonald.

It would be unproductive to speculate as to whether or not such a policy might have prevented the inappropriate conduct of Ms. MacDonald in this instance. This case, however, highlights the need for just such a policy, one in which clear expectations—of scientists and policy-makers, alike—are articulated, and processes are established by which disputes and differences of opinion can be efficiently and constructively resolved.

The Inspector General has testified previously about ethics failures on the part of senior Department officials—taking the form of appearances of impropriety, favoritism, and bias. Ms. MacDonald is among a number of high-level Interior officials who have left the Department under the cloud of OIG investigations into bad judgment and misconduct.

As recently as last week, the Inspector General had a discussion with Secretary Kempthorne about this very matter, and advised him of the stalled policy document and the need to expand its application. We are hopeful that somehow the Congress, the Secretary, and the Office of Inspector General can work together constructively to rid the Department of conduct that brings disrepute to its programs and decisions, and replace it with an ethical culture in which honest differences can be resolved, and sound, science-based decisions are advanced with integrity and transparency.

This concludes my formal testimony. Thank you for the opportunity to appear before the Committee today. I will be happy to answer any questions you may have.

The CHAIRMAN. Thank you. Mr. Seeba.

STATEMENT OF JOHN M. SEEBA, ASSISTANT INSPECTOR GENERAL FOR AUDITING, U.S. DEPARTMENT OF COMMERCE

Mr. SEEBA. Thank you, Mr. Chairman. Mr. Chairman and Members of the Committee, I appreciate the opportunity to discuss the Office of Inspector General's work on the environmental review process for the long-term operations, criteria, and plan, or OCAP, for the Central Valley project and the state water project.

On October 8, 2004, 19 Members of the U.S. House of Representatives requested that the Commerce and Interior IGs review allegations that the Bureau of Reclamation, "in its haste to finalize water contracts in California, has improperly undermined the required NOAA fisheries environmental review process."

On October 22, 2004, the Southwest Regional Office issued a biological opinion stating that the long-term OCAP, essentially the roadmap for how the Central Valley project and the state water project will manage the water supply, would not jeopardize endangered and threatened species.

We conducted an audit of the review process used to issue the October 2004 opinion. We sought to determine whether the Marine Fisheries Service followed its policies, procedures, and normal practices for consultations in issuing the OCAP opinion. Our purpose was not to evaluate the science involved but, rather, the integrity of the process.

Our assessment of the process leading to the biological opinion revealed that the Southwest Regional Office did not follow its normal procedures.

First, it initiated the consultation with insufficient information rather than waiting until it received all required details from the Bureau of Reclamation.

For comparison, we examined 10 other consultations conducted by the Southwest Region, and none were initiated without sufficient information.

Second, the Southwest Regional Office did not follow the policies and procedures in place that are intended to ensure that biological opinions are sound. For example, the designated, regional, Section 7 coordinator did not review or clear the OCAP opinion, a key management control. The coordinator told us she did not complete her review of the draft because the Assistant Regional Administrator for protected resources had stepped in to work on the draft with the lead biologist and then sent the draft to the Bureau of Reclamation for review.

She did not clear the final because the Assistant Regional Administrator sent it out when she was away from the office conducting training. She added that she would not have signed off on the opinion anyway because she believed the conclusion did not match the scientific analysis.

According to the coordinator, the only other time that she could recall the Assistant Regional Administrator performing her duties was during the 2002 consultation on the Klamath operations.

Third, the Southwest Region has Section 7 coordinators and field offices, who are supposed to review opinions for clarity, conciseness, and logical analysis and conclusions, but the local coordinator in this case said she was instructed by her managers to send the opinion to the regional office without completing a review.

Finally, the Office of General Counsel never cleared the opinion, though legal review and clearance is part of the Marine Fisheries Service consultative process to ensure that opinions comply with pertinent laws and are defensible.

The regional general counsel told us that his office reviews highly controversial or politically sensitive opinions and highlighted the OCAP opinion as a specific example of the type of opinion that should be reviewed. He did know, until our auditors told him, that no one on his staff had cleared that opinion.

We also looked into allegations that a draft jeopardy opinion had been initially provided to the Bureau of Reclamation and was later changed to a no-jeopardy without sufficient justification. We found no corroborating evidence that this occurred. The administrative record only documented delivery of a no-jeopardy draft to the Bureau of Reclamation in September 2004.

In summary, by initiating the consultation without sufficient information, and by failing to obtain review and clearance from the appropriate Section 7 coordinators and the Office of General Counsel, the Assistant Regional Administrator circumvented key controls designed to ensure the integrity of the biological opinion.

In responding to our report, NOAA agreed with our recommendations to revise its policies and procedures and to conduct an objective peer review of the OCAP opinion.

In early 2006, three independent reviewers examined the OCAP opinion. Two of those reviewers found that the agency had not used the best available science, and all made recommendations to im-

prove NOAA's consultations from a scientific perspective. NOAA's science staff generally agreed with the reviewers' recommendations.

On April 26, 2006, the Bureau of Reclamation reinitiated consultation on the 2004 OCAP biological opinion to include newly designated, critical habitat. We understand that this consultation with the Bureau of Reclamation is ongoing.

A complete text of our report can be found on the OIG's Web site at the Department of Commerce, and, again, I appreciate the opportunity to discuss our work on this subject and welcome any questions you have.

[The prepared statement of Mr. Seeba follows:]

Statement of John M. Seeba, Assistant Inspector General for Auditing, U.S. Department of Commerce

"The National Marine Fisheries Service Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated from the Region's Normal Practice"

Mr. Chairman and Members of the Committee, I appreciate the opportunity to discuss the Office of Inspector General's work on the environmental review process for the long-term Operations, Criteria, and Plan (OCAP) for the California Central Valley Project and the State Water Project.

On October 8, 2004, 19 members of the U.S. House of Representatives requested that the Commerce and Interior IGs review allegations that the Bureau of Reclamation, "...in its haste to finalize water contracts in California, has improperly undermined the required NOAA Fisheries environmental review process...." On October 22, 2004, the southwest regional office issued a biological opinion stating that the long-term OCAP—essentially the roadmap for how the Central Valley Project and the State Water Project will manage the water supply—would not jeopardize endangered and threatened species.

We conducted an audit of the review process used to issue the October 2004 opinion. We sought to determine whether NMFS followed its policies, procedures, and normal practices for consultations in issuing the OCAP opinion. Our purpose was not to evaluate the science involved, but rather the integrity of the process.

Our assessment of the process leading to the biological opinion revealed that the southwest regional office did not follow its normal procedures. First, it initiated the consultation with insufficient information, rather than waiting until it received all required details from the Bureau of Reclamation. For comparison, we examined 10 other consultations conducted by the southwest region, and none were initiated without sufficient information.

Second, the southwest regional office did not follow the policies and procedures in place that are intended to ensure that biological opinions are sound. For example, the designated regional Section 7 coordinator did not review or clear the OCAP opinion—a key management control. The coordinator told us she did not complete her review of the draft because the assistant regional administrator for protected resources "stepped in" to work on the draft with the lead biologist and then sent the draft to the Bureau of Reclamation for review. She did not clear the final because the assistant regional administrator sent it out when she was away from the office conducting training. She added that she would not have signed off on the opinion anyway because she believed its conclusion did not match the scientific analysis. According to the coordinator, the only other time she could recall the assistant regional administrator performing her duties was during the 2002 consultation on the Klamath operations.

Third, the southwest region has Section 7 coordinators in field offices, who are supposed to review opinions for clarity, conciseness, and logical analysis and conclusions. But the local coordinator in this case said she was instructed by her managers to send the opinion to the regional office without completing a review.

Finally, the Office of General Counsel never cleared the opinion, though legal review and clearance is part of the NMFS consultative process to ensure that opinions comply with pertinent laws and are defensible. The regional general counsel told us that his office reviews highly controversial or politically sensitive opinions and highlighted the OCAP opinion as a specific example of the type of opinion that should be reviewed. He did not know until our auditors told him that no one on his staff had cleared that opinion.

We also looked into an allegation that a draft "jeopardy" opinion had been initially provided to the Bureau of Reclamation and was later changed to "no jeopardy" without sufficient justification. We found no corroborating evidence that this occurred. The administrative record only documented delivery of a no jeopardy draft to the Bureau of Reclamation in September 2004.

In summary, by initiating the consultation without sufficient information, and by failing to obtain review and clearance from the appropriate Section 7 coordinators and the Office of General Counsel, the assistant regional administrator circumvented key internal controls designed to ensure the integrity of the biological opinion.

In responding to our report, NOAA agreed with our recommendations to revise its policies and procedures and to conduct an objective peer review of the OCAP opinion.

In early 2006, three independent reviewers examined the OCAP opinion. Two of those reviewers found that the agency had not used the best available science and all made recommendations to improve NOAA's consultations from a scientific perspective. NOAA's science center staff generally agreed with the reviewers recommendations. On April 26, 2006, the Bureau of Reclamation (BOR) re-initiated consultation on the 2004 OCAP biological opinion to include newly designated critical habitat. We understand that this consultation with the BOR is ongoing.

A complete text of our audit report on this issue can be found on our website at http://www.oig.doc.gov.

Again, I appreciate the opportunity to discuss our work on this subject and welcome any questions you may have.

The CHAIRMAN. We thank you for your testimony.

Due to votes on the Floor, the Committee is going to stand in recess prior to questioning, hopefully, for no more than 30 minutes.

[Whereupon, at 11:40 a.m., a recess was taken.]

The CHAIRMAN. The Committee will come to order. Prior to the recess, we had heard from our Panel No. 2, and it is now open for questions.

I do thank both of you for your testimony, and I want to begin with you, Ms. Kendall, and first thank you for your public service that you and Inspector General Devaney have performed in seeking to improve the accountability at the Department of the Interior, not only for science-based decisions, which, of course, is the subject of the hearing today, but also in regard to oil and gas royalty management and many other matters that come within our jurisdiction.

Unfortunately, there is no shortage of new business that appears to be generated by this administration for our Inspector Generals. I would like to ask about a previous Inspector General investigation—I believe you heard me ask it of the previous panel—concerning the allegation of Karl Rove's involvement in influencing Klamath policy.

In March 2004, the Inspector General concluded, and I quote, that "the Department conducted itself, in keeping with the administrative process governing the Klamath project, that the science and information utilized supported the Department's decisions and that no political pressure was perceived by any of the key participants."

Yet, on June 2, 2007, the Washington Post reported that, shortly after Inauguration Day 2001, the Vice President of the United States called then Deputy Chief of Staff and staff for the then Secretary of the Interior, Gale Norton, concerning Klamath policy. This, according to the Post, was an initial contact and a sustained effort by the Vice President and his office to influence Klamath water and ESA decision-making.

The Post story states, and I quote: "Because of Cheney's intervention, the government reversed itself and let the water flow in time to save the 2002 growing season, declaring that there was no threat to fish. What followed was the largest fish kill the West has ever seen. With tens of thousands of salmon rotting on the banks of the Klamath River, characteristically, Cheney left no tracks."

Now, while I am not asking you to validate the Post's reporting, I do want to know specifically whether the Inspector General's 2004 Klamath investigation considered any involvement of the Vice President in reaching the conclusion that "no political pressure was perceived by any of the key participants."

Ms. KENDALL. If I may, Mr. Chairman.

The CHAIRMAN. Yes, you may.

Ms. KENDALL. Our focus in that investigation was on the very specific allegation that Karl Rove influenced the Klamath decision based on his attendance at a meeting of senior political appointees.

As you know, the Office of Inspector General is not a subject matter expert in terms of science. We are not qualified to opine on science. What we did in that investigation was to follow the process, which, in the past, when we were in an area where we do not have subject matter expertise, is the best indicator of transparency and due process. In the end, we do not know what we do not know.

All of the information available to us at the time we issued that report led us to the conclusion that Mr. Rove did not exercise undo influence. However, I do not believe it ever occurred to our investigating agent to ask the question, did the Vice President himself lend influence? It may not, in the end, change the final conclusion, but it may color the transparency of the process in a different shade.

I understand, Mr. Chairman, that we have provided the Committee with a copy of our full report, including the report of interview of Sue Ellen Wooldridge. I would leave it to the Committee to draw its conclusions based on review of that interview. My personal feeling is we did not have all of the information that may have been available to her, and we did not know, at the time, what questions needed to be asked to ascertain certain information that she may have had.

The CHAIRMAN. So it would appear, in response to my question, then, that there was no consideration of involvement by the Vice President. You had no facts. You had no tracks, so to speak, by which you could be led through such an investigation, and, therefore, none was done.

Ms. KENDALL. That is fair, yes.

The CHAIRMAN. OK. Let me ask you one last question. Given Mr. Devaney's reputation for toughness and thoroughness in his investigations, in your opinion, would the Inspector General have investigated the involvement of the Vice President as to whether those contacts did, in fact, have any influence on the Klamath decision-making at the Department of the Interior?

Ms. KENDALL. I believe, in retrospect, we would have followed any tracks that were available to us, any information that was made available to us. I would say that, in this case, we did not have jurisdiction even over Mr. Rove, but we did have jurisdiction to determine what influence, if any, was exerted on DOI officials.

The CHAIRMAN. So, in characteristic Vice President fashion of undisclosed locations and undisclosed tracks, there were no tracks there that could have led you to believe that he would have had an influence.

Ms. KENDALL. At the time of conducting the investigation, we did not have any such information.

The CHAIRMAN. Let me ask you for a clarification. Did Sue Ellen Wooldridge not volunteer to you that the Vice President had regularly called her?

Ms. KENDALL. She did not.

The CHAIRMAN. She did not voluntarily give you that information.

Ms. KENDALL. That is correct.

The CHAIRMAN. OK. Thank you.

Mr. Sali is recognized, the gentleman from Idaho.

Mr. SALI. Thank you, Mr. Chairman.

Ms. Kendall, there are some questions on how the Inspector General carried out the report on Julia MacDonald, and I understand that your office interviewed her twice before the report was issued. Did your office ever meet with her for an opportunity to rebut the specific allegations that were contained in the written report?

Ms. KENDALL. Our office does not, as a practice, provide the subjects of investigations an opportunity to rebut.

In the matter of process, we will provide the Department with the conclusions of our investigation, basically, the facts, and the Department then takes whatever action it determines is appropriate, and part of that process is to give someone who is the subject of an OIG investigation the opportunity to be heard for the Department.

Mr. SALI. I understand that your office received some additional information from Ms. MacDonald in the form of a letter where she addressed the allegations in the report.

Ms. KENDALL. I am afraid I am not aware of that letter, sir.

Mr. SALI. All right. Let us see. Ms. Kendall, on page 1 of your report on Ms. MacDonald, you mention that you discovered no illegal activity on her part. Is that correct?

Ms. KENDALL. I am afraid I do not have the report in front of me, but I believe we presented the investigation to either the U.S. Attorney's Office of the Department of Justice, Main Justice, but I do not have specific recollection, and they declined to prosecute.

Mr. SALI. Let me quote from page 1 of your report: "We discovered no illegal activity on her part." Do you stand by that statement?

Ms. KENDALL. I do, yes.

Mr. SALI. So she will not be prosecuted criminally for any of the activities that have been discussed in front of the Committee today.

Ms. KENDALL. Any of the activities contained in that report, yes.

Mr. SALI. Is it possible that she will face some kind of future questions about criminal activity?

Ms. KENDALL. I think it would be improper for me to speculate on that. I do not know.

Mr. SALI. Is your office investigating her at this time?

Ms. KENDALL. We are conducting an investigation into the splittail decision and some attendant conflict-of-interest and ethics issues related to that decision.

Mr. SALI. But you are unable to comment on that further at this time. Is that correct?

Ms. KENDALL. That is correct.

Mr. SALI. All right. Thank you. That is all I have, Mr. Chairman.

The CHAIRMAN. The gentleman from California, Mr. Miller.

Mr. MILLER. Thank you. Ms. Kendall, thank you very much for your work. You have, obviously, a very difficult job, but thank you for the manner in which you handle it.

When did you begin your investigation on Ms. MacDonald? There have been two. Is that correct?

Ms. KENDALL. Yes. There is the one that, I believe, you have a copy of the first report——

Mr. MILLER. Right.

Ms. KENDALL.—that was general in terms of her the allegations of her interference with the Endangered Species Act decisions, and then, I believe, we received a specific request from this Committee to look into the specific decision regarding the splittail, which was alleged to have impacted property that she owned in California.

Mr. MILLER. When did you first put the Department on notice that you were initiating an investigation? What was that first date?

Ms. KENDALL. I apologize. I really do not have a specific recollection of dates. The report may indicate when we began the investigation.

Mr. MILLER. My concern is that it appears that two of the eight MacDonald decisions that DOI has now sort of self-determined need additional review were made while she was under investigation by your office, and three were made after she had been personally briefed by Director Hall regarding responsibilities and ethics and conduct.

I appreciate, for the moment, in the first study, you found no illegal behavior, but, in your testimony today, you talked about that she cast a vast cloud over this Department, and, in fact, that her management style was abrupt and abrasive, if not, abusive, and it led to at least one instance where the substitution of her judgment for that of the field was simply wrong and promptly overturned by a court.

I raise that in the sense that—we will talk to Fish and Wildlife later—this was not a minor player in this field in this region. She was apparently constantly involved in these decisions. I just wonder how you separate the atmospherics that she creates and the scientific outcome. You create atmospherics in an organization, and the organization starts to take on those characteristics very often.

I am just concerned here whether we are drawing lines here—does it on the OCAP, saying, Well, we did not pass on the scientific judgment. We looked at the ethics and the integrity. It seems to me, those are hard lines to draw in terms of when people are thinking about their careers, their decisions, and who is interested in the outcome.

Ms. KENDALL. I agree with you that they are hard lines to draw. The line I would draw is the difference between illegal and im-

proper. We did determine that her conduct was improper, although not illegal.

Mr. MILLER. I appreciate that. That is a distinction you have to draw. In your testimony, you suggest sort of that situation, that our preliminary findings suggest, while she probably should have recused herself from involvement in the Sacramento splittail decision, due to a conflict of interest, it does not appear that it materially affected the outcome of that particular decision.

How did you arrive at that conclusion? Did you talk to the affected parties?

Ms. KENDALL. Exactly.

Mr. MILLER. And they tell you what in that situation?

Ms. KENDALL. Well, preliminarily, and I always have to caution——

Mr. MILLER. I understand this is ongoing.

Ms. KENDALL.—because it is ongoing, but that decision was going in the direction that it ultimately ended up, prior to Ms. MacDonald's involvement.

Mr. MILLER. So she had made inquiries into that decision. She did not recuse herself so——

Ms. KENDALL. She did not recuse herself, and it is my understanding that there was involvement, that she did have involvement, in that decision but that the decision was going in the direction where it ended prior to her involvement.

Mr. MILLER. Did she accelerate it, slow it down, move it?

Ms. KENDALL. The details, I am afraid, I am not familiar with. I just know that her involvement did not materially affect the ultimate outcome. Whether it moved it quicker, slowed it down, I just do not know.

Mr. MILLER. You mentioned that you are continuing to investigate several other attendant ethic conflict-of-interest issues related to that matter, "that matter" being the Sacramento splittail.

Ms. KENDALL. Yes. There were several other questions that the Committee posed in its request for our investigation. Those are the other issues that we are addressing.

Mr. MILLER. So those are not finished yet. Are you aware, or do you have any knowledge, of how the Department made a determination as to which of her involvements warranted further investigation? They picked out, I think, eight—is it now 10?—it is eight, I guess, that they said warrant a fairly decent review, and other decisions did not. Are you aware of how those were made?

Ms. KENDALL. No, I am not, other than reports that I have read.

Mr. MILLER. OK. We will save that for the Department when they come here. The question, and you have referred to it in your statement, of the leaking of material to selected individuals; that simply falls in the range of improper.

Ms. KENDALL. Yes. There is an ethical code that—I am going to have to summarize it from memory, but essentially not giving preferential treatment and not sharing nonpublic information with the public, and this is something that she did on both accounts.

Mr. MILLER. What was the Department's response to that?

Ms. KENDALL. I do not know that we got a formal response.

Mr. MILLER. All right. Thank you very much.

The CHAIRMAN. Let me follow up, if I might. You said, in your testimony, that she was responsible, Ms. MacDonald was responsible, for disclosure of nonpublic information to parties who had litigation against the Department.

Ms. KENDALL. In one instance, yes. There was a party in litigation with the Department. My recollection is that she provided an e-mail that indicated that there was some disagreement within the agency and that then served as the basis for the litigants to reopen the case in Federal District Court.

The CHAIRMAN. And that is not illegal?

Ms. KENDALL. Improper, not illegal.

The CHAIRMAN. It is a violation of Federal regulations, is it not?

Ms. KENDALL. Of Federal regulations, yes. I guess what I would say is it is not a prosecutable crime.

The CHAIRMAN. What is the penalty in violation of Federal regulations?

Ms. KENDALL. It would be considered probably in the Code of Conduct and Penalties in the Department's code, to consider what she had done and what the appropriate penalty would be. In my experience in the case of political appointees, that table of penalties is not usually applied. It is sort of an all-or-nothing kind of matter.

The CHAIRMAN. Did her resignation prevent further actions against her?

Ms. KENDALL. Exactly.

The CHAIRMAN. So it appears there is a policy that the best witness-protection program is retirement.

The Chair recognizes the gentleman from Idaho.

Mr. SALI. Ms. Kendall, you are saying that Ms. MacDonald would be subject to penalties based on the information, the conclusions that were reached, in the report from your office. Is that correct?

Ms. KENDALL. Based on the factual information our office provided to the Department, yes.

Mr. SALI. But you did not give her any opportunity to come and rebut the conclusions that were made in that report. Is that correct? I thought I heard you testify to that. Correct?

Ms. KENDALL. That is correct.

Mr. SALI. So if you made a conclusion without all of the information, your office might, if she still worked for the agency, your office might have imposed a penalty on her without giving her the benefit of responding in any way. Is that correct?

Ms. KENDALL. No, sir. Our office has no authority to impose penalties on employees other than our own. We refer it to the Department to consider whether or not to impose penalties. The Department has that authority to do so or not, and perhaps not in a political appointee situation, but if we talked about general service employees, they would have due process, an opportunity to be heard in response to the report that we provide to the Department before a decision is made.

Mr. SALI. OK. You make that report without giving any opportunity for Ms. MacDonald to rebut the conclusions in the report. Is that correct?

Ms. KENDALL. In essence, yes. The report itself is factual in nature. We will often have a transmittal letter that draws some conclusions of the Inspector General, but the report is the factual basis

for the Department to consider whether or not to take administrative action against an employee.

Mr. SALI. I understand that Ms. MacDonald sent a certified letter to your office in response to your investigation on her and that your office is in receipt of that letter, and yet I understand your testimony today is you are not aware of any such letter. Is that correct?

Ms. KENDALL. I am not personally aware, no.

Mr. SALI. Can you respond in writing, both to the Committee and to my office directly, on whether that was received?

Ms. KENDALL. I will.

Mr. SALI. Thank you. That is all I have for now, Mr. Chairman.

The CHAIRMAN. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. Just following up on Mr. Sali's questions, do I understand this correctly, that you talked with Ms. MacDonald on a couple of occasions, but you did not give her an opportunity to respond specifically to the particulars that you are investigating?

Ms. KENDALL. Yes. That is true. When we conduct an investigation, the opportunity for a subject to provide the information that they wish is during the course of an interview. It is not our practice, nor the practice of any inspectors general that I know, to provide the subject of an investigation an opportunity to review and rebut a report prior to its issue.

Mr. CANNON. That is not quite the same thing. When you had an interview with her, presumably, you asked her questions about things you wished to understand, and that is an appropriate thing to do. Has she ever had the opportunity to know what the allegations were and to respond to those prior to this letter that she has now sent to you?

Ms. KENDALL. I believe, when she was interviewed, she knew what the allegations were.

Mr. CANNON. Did you do the interview?

Ms. KENDALL. No.

Mr. CANNON. Who did?

Ms. KENDALL. The investigating agents.

Mr. CANNON. Why do you think that she knew what the charges were, or what the allegations were, that she was dealing with?

Ms. KENDALL. Well, my recollection of this investigation is that because the allegations were so key to anything that an agent would ask her that she would necessarily know what the allegations were.

Mr. CANNON. Well, with all due respect, in my experience, having followed some investigations, typically, agents who are trying to figure out what is going on want to be obscure about things. As a matter of policy, are your investigators trained to, on the one hand, find information but, on the other hand, give people the information they need so that they can actually say, "Oh, that is what you are talking about. Let me explain"?

Ms. KENDALL. I believe Ms. MacDonald was fairly explicit in many of her responses when we interviewed her. My specific recollection on the details is not, admittedly, great.

Mr. CANNON. When you say, "when we interviewed her," you mean your agent interviewed, and you reviewed the transcripts of the interview.

Ms. KENDALL. I do not believe I reviewed the transcripts of the interview personally, but the record would have transcripts of the interview if, in fact, the interview was transcribed. Oftentimes, an interview is summarized in a report of interview.

Mr. CANNON. I am wondering, when you say we handled this, what was your involvement in the actual process of identifying whether she understood the allegations that were made? You have given me some conclusions about process. I would like to know what you know about what she understood about the allegations at the time.

Ms. KENDALL. I personally do not know what she understood about the allegations.

Mr. CANNON. So you are testifying that, in the ordinary course of doing an investigation, she would.

Ms. KENDALL. Both in the ordinary course and based on my recollection of a review of the final report.

Mr. CANNON. Did you review any of the documents upon which the final report was made or just the final report?

Ms. KENDALL. I may have reviewed some of them. On this one, I do not specifically recall.

Mr. CANNON. Have you seen the letter that she sent?

Ms. KENDALL. No, sir.

Mr. CANNON. So you are probably not in a very good position to talk about the specifics that she was charged with and may or may not have understood during the course of the investigation.

Ms. KENDALL. Clearly, I am not, sir.

Mr. CANNON. Are the Inspector General's e-mails and phone logs suggest to the Freedom of Information Act?

Ms. KENDALL. Subject to the Freedom of Information Act, yes.

Mr. CANNON. And certainly available for this Committee, if we want to look at those.

Ms. KENDALL. If the Committee requests, I believe so.

Mr. CANNON. Now, apparently, your office is involved in the critical habitat for the splittail fish and that the habitat is something like over 200 miles from the MacDonald family ranch, and that will be part of your investigation, I take it. What plans do you have to meet with Ms. MacDonald and others involved in the splittail fish issue?

Ms. KENDALL. I do not know, sir.

Mr. CANNON. That is not an issue you are involved with.

Ms. KENDALL. Not personally, no.

Mr. CANNON. Thank you, Mr. Chairman. I see my time is almost ready to expire, so I yield back.

The CHAIRMAN. Thank you. The gentleman from California.

Mr. MILLER. One of the questions was whether or not the splittail listing document was edited in Washington after it left Sacramento. Are you aware of that?

Ms. KENDALL. The issue sounds familiar to me, but I am not specifically aware, no.

Mr. MILLER. We have this document that was supposedly seriously edited, and it ended up taking the scientists' names off of the

document in Washington, but if you do not have knowledge of it, then I will not pursue it with you. We will pursue it elsewhere.

Mr. Seeba, let me ask you, in your testimony today, you testify on the OCAP, which is, obviously, a very critical document to the operation of this very complex water system in California. To paraphrase your testimony, or to go through it specifically, they did not use sufficient data to make these determinations and that the Section 7 coordinator was not able to review or to clear this opinion, but they went forward with it, and, in fact, that was taken out of her hands while she was away. Is that correct?

Mr. SEEBA. That is correct.

Mr. MILLER. The testimony?

Mr. SEEBA. Yes.

Mr. MILLER. Who was the individual that reached in and made that decision over her involvement?

Mr. SEEBA. The Assistant Regional Administrator in the Southwest Region.

Mr. MILLER. And that is who?

Mr. SEEBA. You will have to forgive me. This was a project that was conducted before I actually arrived at the Inspector General's office. Mr. James Lecky.

Mr. MILLER. Mr. James Lecky, and when she added at that time the section 7 coordinator, again a person critical to this and required to this process, she would not have signed off on the opinion because she believed that the conclusions did not match the scientific analysis, and then she went on to say that the only time she could recall an Assistant Regional Administrator performing her duties was during the 2002 consultations on the Klamath River, and that again was Mr. Lecky, was it not?

Mr. SEEBA. That is correct.

Mr. MILLER. And Mr. Lecky has since that time been promoted?

Mr. SEEBA. That is correct. He is actually out of that area now, and is a——

Mr. MILLER. I think he is back here.

Mr. SEEBA. Yes. He is an intergovernmental liaison position.

Mr. MILLER. Well he does wander around a lot. So that is probably helpful. We also then have the situation where you go on to say that the Office of General Counsel never cleared the opinion though legal review and clearance is part of this process of the NMFS consultive process. That is correct?

Mr. SEEBA. That is correct.

Mr. MILLER. So you have here a document that is seriously flawed from the process point of view, and does not hold up, and in fact has been successfully challenged?

Mr. SEEBA. That is correct.

Mr. MILLER. And that when you had independent reviewers look at it, they found that the agency had not used the best available science, and had all made recommendations to improve that, and that apparently has now caused it to be reinitiated, is that correct?

Mr. SEEBA. That is correct.

Mr. MILLER. Again in your testimony my concern here is that as you say your purpose was not to evaluate the science but rather the integrity of the process. I am concerned about how we reinitiate all of this within an organization that apparently this was not a

major decision but just ripped right through the procedural requirements and safeguards of the law so that the decision could stand up because a whole series of decisions now flow from the OCAP document. What has happened since then that should give us any confidence that this is going to get that kind of independent review and reinitiating a review of the science?

Mr. SEEBA. Well the Marine Fishery Service and NOAA's response to the OIG report basically said they were going to review all their policies, practices and procedures, and in fact when we had issued the report we had specifically targeted just the southwest region because that is where the opinion was generated from.

In their response they basically said we needed to look at it from a nationwide perspective because there was conflicting policies and procedures in different regions, and so NOAA came back to put in a standardized process across the board, and as part of the response, they also wanted to put in a quality assurance process where they would do peer reviews on subsequent opinions.

Mr. MILLER. Is that done?

Mr. SEEBA. We know that from their status reports that they provide to us on our audit followup system that they have initiated those. They put those changes in place. We have not tested them.

Mr. MILLER. And the Department of Interior, Ms. Kendall, you reported has not yet taken your recommendations as to controls? Am I correctly stating your testimony?

Ms. KENDALL. In response to which report?

Mr. MILLER. You said that you had raised with the new Secretary the standards that should be put in place in the office to prevent this kind of activity from happening again, and that has not yet happened in the department?

Ms. KENDALL. That is correct.

Mr. MILLER. But, Mr. Seeba, you believe that they have put in some of these safeguards?

Mr. SEEBA. They have acknowledged that they have put those in, in their status reports to us, and it is one of the things that we will—once the next opinion is issued in what we expect in 2008—is to initiate some followup ourselves to make sure that they are in place.

Mr. MILLER. What concerns me is that I think I appreciate Mr. Lecky's title but it is my understanding he is also in charge of NOAA's entire endangered species program. Are you aware of that?

Mr. SEEBA. That I cannot speak to. I do not know.

Mr. MILLER. Well if that is the case, I find it rather interesting that a person that twice reached into two very, very important environmental and scientific processes so that we could work out problems in these complex watersheds now has been promoted to oversee the very process that he tampered with, and so when you tell me that the safeguards are in place, it sounds to me like the fox just got put in charge of the hen house here, and he is now going to be in a position to administer these new safeguards which were based upon the exact violations that he administered prior to this.

Mr. SEEBA. I would share the same concern with you. The thing is is that if they do follow the processes, if they do have the regional section 7 coordinators as well as the local section 7 coordi-

nators participate in the process as well as get independent peer reviews that should hopefully ensure the integrity of the science.

Mr. MILLER. I appreciate your comment. There is a problem here, Mr. Chairman, in that there is a pattern here. I appreciate Ms. MacDonald would like to clear her name now. She was in the employ of this agency when these findings were made. She could have gone to the department counsel and stated her case. From the time she tampered with the evidence and sent confidential information to one party, to the oil companies in that case, three years the department did not do anything.

Mr. Lecky, who reaches in and tampers with the process and upsets and now sets back in time, money, effort and contractual reliances the California operation of this water system, the Federal state systems out there, he gets promoted. I appreciate Mr. Tenek got the Medal of Freedom but there is a pattern here where bad behavior you either resign or you are promoted, and yet we are supposed to believe as we now see a reinitiation or reexamination of these decisions and activities by these personnel on which huge outcomes depend, certainly on the ones with respect to the OCAP.

You know over 200 contracts have been signed based upon those decisions and the representations about the science, and I think we have a ways to go, and I really appreciate the work of the Inspectors General on these matters but this goes to the absolute integrity of these big systems and the public confidence in them and the integrity of the Federal laws.

As I said in the beginning, if you do not like the law, change it. You do not get to simply be cavalier with it and be arbitrary and capricious to get the outcomes that are dictated to you by political people in the department. It is tough enough for these scientists to make these determinations and to stand with them when they do the best job they possibly can, and to have a bunch of political appointees starting to ride roughshod over them is the beginning of the end of this process.

We have all had hotly contested environmental matters taken up in our respective Congressional districts but you do not get to put the ham handed approach of the Administration's political operation on one side of the scale, whether it is the Vice President's ham handed or whether it is Mr. Lecky's ham handed or it is Julie MacDonald's ham handed, you have really destroyed the integrity of the difficult decisions that people in these departments have to make, and I want to again thank you for holding this hearing but I think we have a ways more to go in determining some of these answers but the Inspectors Generals have been very helpful. Thank you.

Mr. SALI. Mr. Chairman, are we still under the five-minute rule for questioning?

The CHAIRMAN. Yes, we are, and we are still recognizing members of the Committee first before we go to those members we have allowed to sit on the dais with us.

Mr. SALI. Well we have a number of members that are here.

The CHAIRMAN. We still have members of the Committee that we have not recognized yet.

Mr. SALI. I understand that. Mr. Miller just went on for 12 minutes, and if we are going to have a five-minute rule to——

The CHAIRMAN. Well I think I have been very fair in allowing you all to go over time too.

Mr. MILLER. It sounds like a long time when I ask questions.

Mr. SALI. It does.

The CHAIRMAN. The Chair recognizes the gentlelady from California, Ms. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair. And I too have grave concerns about the confidence factor of the Administration, of the agencies themselves. But to both of you—and I appreciate your forthright testimony—but what kind of policies or procedures have been developed and implemented within the agency to address the concerns you raised in your respective reports, and are they satisfactory or do you think these policies should be applied that are not? And I asked the previous panel of Members of Congress the question about what would work to be able to ensure that this does not happen again.

Mr. SEEBA. The one thing I would say from the Department of Commerce's view is the independent analysis from these peer review groups. They tend to be I would hope more objective and provide a sound support or rejection of the findings for the departments' staff. So to me that is one of the most critical things where you can get outsiders essentially looking in and doing their oversight over the science that we do.

Mrs. NAPOLITANO. But are their recommendations generally followed?

Mr. SEEBA. Generally speaking, yes. We provide recommendations, and they come back either with alternatives or follow those recommendations. Generally they adhere to them.

Mrs. NAPOLITANO. Ms. Kendall.

Ms. KENDALL. In Interior's case, as a result of an investigation that occurred now almost five years ago or three or five years—my recollection is faulty—we did make a specific recommendation that a policy document be developed and implemented. It did get drafted. It made it through a draft stage.

Mrs. NAPOLITANO. But it was never implemented.

Ms. KENDALL. It was not implemented, and in fact, even so we do not feel that as it stands it would have addressed the policymakers' role in decisions where I think that it should be appropriately addressed.

Mrs. NAPOLITANO. Do you think then that policies should be implemented as soon as possible or why the stopgap? Why has it not been implemented?

Ms. KENDALL. I do not know why it was not implemented. I think it should be revived and revised and then implemented.

Mrs. NAPOLITANO. What do you both think might work that would help resolve the disputes within the agencies regarding scientists who feel political appointees have inappropriately interfered with their work?

Ms. KENDALL. In my view, I think that a policy and process needs to address that as well so scientists who feel that there is undue influence have a vehicle by which to resolve those differences in some sort of established and known process.

Mr. SEEBA. I would agree with Ms. Kendall. If you get the scientists, especially the career scientists, throughout the agency to

work together and to essentially peer review themselves and to make sure that they are looking at the best available science and working cooperatively, I think that goes a long way in getting the best possible science out there.

Mrs. NAPOLITANO. Do you believe the agencies then in the Interior and Commerce must work together to resolve these issues, the ESA issues such as the NMFS and the Bureau of Reclamation, so they can properly communicate and work together to resolve not only disputes between the agency scientists and political appointees but also between competing stakeholders of the natural resources?

And I guess maybe I can point to the western water. We often have water users conflicts with those that want water kept in the river, and often no corrective action is taken by the agencies to resolve it until there is a crisis, and then we are you know trying to figure out what do we do now? And the delta smelt being the perfect example. Are there any policies you would recommend that might foster a better working relationship between the agencies to help us find solutions, real solutions, rather than more litigation?

Ms. KENDALL. My sense is that it certainly is a multi-agency issue. The question as to whether or not you can establish policy that would govern all aspects of this sort of decision I think is terribly ambitious and in some instances the differences simply cannot be resolved which is why the Administrative Procedures Act has a process by which those can be resolved. Unfortunately so many of them end up in court but that is the proper jurisdiction for resolution of the issues that simply cannot be resolved.

Mrs. NAPOLITANO. Thank you so very much. Any——

Mr. SEEBA. I have no further comment.

Mrs. NAPOLITANO. Yes. Thank you, Mr. Chair.

The CHAIRMAN. The gentleman from Maryland, Mr. Sarbanes.

Mr. SARBANES. Thank you, Mr. Chairman. I just have a couple of questions, and then I would be pleased to yield any balance I have to Congressman Miller. I am sort of interested in—this is following a theme of the questions here but it is more kind of a philosophical question or a question about the culture inside the Department of Interior—and that is well first off the allegations that prompt your investigation, I mean how do those manifest? Is it you start to hear a buzz, and then you investigate it or is it more specific and concrete than that?

Ms. KENDALL. It can be any one of many sources. We have a hot line. We have a whistleblower protection Assistant Inspector General who people are very comfortable coming to. We have developed sort of I think a reputation where people feel comfortable in coming and providing information directly. So it can come from any number of sources. Oftentimes anonymous as well.

Mr. SARBANES. Given the work that you do, do you have a sense of whether a particular agency can have a culture of resistance to political manipulation and interference that is high or low or medium in comparison with other agencies, and if so, how would you judge it to be within the Department of Interior relative to other organizations?

Ms. KENDALL. Relative to other departments or agencies?

Mr. SARBANES. Yes. Do you have any sense of that?

Ms. KENDALL. I am not sure that I have a good sense of that.

Mr. SARBANES. Well then just based on your experience, would you say there is a strong resistance or is the scientific community because it is particularly attentive to you know empirical evidence and keeping politics out, is it in some ways more vulnerable when someone comes in who does not respect that? If you could just speak to kind of the cultural resistance that there can be or should be.

Ms. KENDALL. Well I can maybe speak more generally about it. I think the Department of Interior has so many things under its jurisdiction that evoke high emotion, are very valuable to people in many different forms, that the department is probably barraged more than some other departments and agencies. As to susceptibility, I really do not have a sense other than the effort will be made to influence because the stakes are so high.

Mr. SARBANES. And if they are being barraged, if you have an extra high level of intensity in terms of the pressures that are brought to bear, that would raise the ante on making sure there is a good, strong process in place that allows these things to bubble up and sort of find the light of day I would assume?

Ms. KENDALL. I would agree with that.

Mr. SARBANES. OK. No further questions. I would be pleased to yield.

Mr. MILLER. Thank you, Mr. Chairman. I just would like to put in the record part of the staff developed timeline, and that is that the March 27, 2007, the Interior IG published a report on the activities of the Deputy Assistant Secretary MacDonald, and no comment was issued by the Department of Interior. A month later, April 30, MacDonald resigns from the Department of Interior, and then before this committee, Deputy Secretary Scarlett testifies before our committee telling the committee members that Julie MacDonald strived to do what she thought was her duty to ensure a quality product.

There is a major, major misfit here in terms of her activities and the ethical views of the higher ups in this department. I ask that that be made a part of the file of the Committee.

The CHAIRMAN. Without objection, so ordered.

Timeline—DOI dates of interest

January 2001 - Gail Norton becomes Secretary of Interior. Posts message on DOI website telling all new and existing employees that the President wants them to pay extra attention to observing all the standards of ethical conduct that apply to Federal employees, adding "I would like to add my support to the President's Memorandum. It is very important to me that all Department of the Interior employees become familiar with and observe all the standards of official conduct as they pursue their daily responsibilities."

March 13, 2002 - Sue Ellen Wooldridge testifies before the Resources Committee that the Secretary's general goals for science within the Department were: high ethical and professional standards, appropriate training and allocation of staff resources, independent review of science when appropriate and time permits...."

July 2002 - Julie MacDonald joins the Department of the Interior as Special Assistant to Assistant Secretary for Fish, Wildlife and Parks, Craig Manson. She is promoted to Deputy Assistant Secretary (DAS) in 2004.

February 4, 2004 - DAS MacDonald sends, via email, a copy of the non-public, classified internal FWS document, Interim Guidance for the Designation of Critical Habitat under the ESA, to an attorney with the Pacific Legal Foundation. According to the Inspector General, this action was a violation of 5 C.F.R. § 2635.703 (Use of Nonpublic information)

April 28, 2004 - Assistant Secretary Craig Manson tells Members of the Resources Committee at a hearing that the same critical habitat guidance document—that Members had sought for some time—would be released "later that week," but it never was.

January 2005 - FWS Southwest Regional Director Dale Hall announces a new policy, prohibiting regional scientists from using any new information on species genetic diversity discovered after the initial listing of a species as endangered when determining the relative risk of extinction.

February 5, 2005 - Union of Concerned Scientists and PEER release their survey of Fish and Wildlife Service scientists. Despite Agency directives that they should not respond to the survey, almost 30% of scientists do anyway. Almost half of those respondents reported that they "have been directed for non-scientific reasons, to refrain from making jeopardy or other findings that are protective of species." 70% of scientists and 89% of scientist managers knew of cases where "DOI political appointees have injected themselves into Ecological Services determinations." Several respondents identified DAS MacDonald by name as a political appointee who is making scientific determinations.

March 6, 2005 - DAS MacDonald receives a $9,628 "Special Thanks for Achieving Results" award for her performance in the 2004 Senior Executive Service performance cycle. A Freedom of Information Act request by the Endangered Species and Wetlands Report shows that there is no paperwork in the file providing justification for the award. The award was approved by DOI's Executive Resources Board which included Assistant Secretary for Policy Management and Budget Lynn Scarlett, DOI Chief of Staff Brian Waidmann, Solicitor David Bernhardt (then Deputy Chief of Staff for Secretary Norton), DOI Deputy Secretary Steven Griles, and DOI Solicitor Sue Ellen Wooldridge.

June 20, 2005 - 163 scientists send a letter of protest to Dale Hall, explaining that the new Southwest Region's policy on using genetic information on species "does not reflect the best available science". Hall does not respond.

October 2005 - Dale Hall becomes Director of Fish and Wildlife Service, claims scientific integrity is his "highest priority". Begins to examine how ESA packages were reviewed in Washington, both in the FWS and by DAS MacDonald...and "became troubled by the apparent lack of clarity in the division of responsibilities."

February 3, 2006 - Director Hall issues memorandum "Maintaining Integrity in Our Scientific Decision-Making Process" to address the lack of clarity he had observed between the division of responsibilities as related to policy and scientific determinations.

February 7, 2006 - Hall meets with MacDonald and DASs Smith and Hoffman regarding the memorandum, and tells Scarlett the results of the meeting were successful from "both a team concept and integrity of science approach."

February 8, 2006 - Hall sends an email to MacDonald, Paul Hoffman, David Smith and others affirming the discussion of February 7th.

April 11, 2006 - Interior Inspector General receives anonymous complaint from FWS employee alleging unethical and illegal activities by DAS MacDonald.

April 13, 2006 - Final critical habitat designation for California red-legged frog is published in Federal Register. Decision has now been identified by FWS as one needing additional review based on inappropriate interference by DAS MacDonald.

May 26, 2006 - Dirk Kempthorne becomes the 49th Secretary of the Interior. Makes ethics briefings his first priority and in his first written message to DOI employees and at his first all employees meeting he emphasized ethics compliance.

August 15, 2006 - Proposed critical habitat for 12 species of Hawaiian picture-wing flies is published in the Federal Register. Decision has now been identified by FWS as one needing additional review based on inappropriate interference by DAS MacDonald.

October 30, 2006 - Article appears in the Washington Post, regarding DAS MacDonald and her consistent rejection of FWS' staff scientists' recommendations under the ESA.

November 9, 2006 - Final critical habitat designation for the Canada Lynx is published in the Federal Register. Decision has now been identified by FWS as one needing additional review based on inappropriate interference by DAS MacDonald.

Late January 2007 - The Secretary of the Interior receives the report of the Interior IG's investigation into DAS MacDonald. No apparent action is taken.

March 27, 2007 - The IG report is publicly released on the activities of DAS MacDonald. No comment is issued by the Department of the Interior.

April 30,2007 - DAS MacDonald resigns from the Department of the Interior.

May 9, 2007 - DS Scarlett testifies before the Natural Resources Committee, telling the Committee Members that "Julie MacDonald strived to do what she thought was her duty to ensure quality product." When asked "yes or no" as to whether

there was an ongoing effort to systematically review the decisions that DAS MacDonald might have improperly influenced she does not answer the question, instead pointing to the policy Director Hall had put in place in February 2006.

May 22, 2007 - DS Scarlett sends a memo to Dale Hall asking him to "please review all work products that were produced by the Service and reviewed by Ms. MacDonald and determine if any of those packages require any revision based on her involvement."

June 26, 2007 - Former Deputy Secretary Steven J. Griles, the subject of two Inspector General Investigations, is sentenced to prison for his role in obstructing an investigation regarding influence peddling at DOI by convicted lobbyist Jack Abramoff.

June 27, 2007 - More than a year after taking office, the Secretary introduces his 10-point plan to make DOI a "Model of an Ethical Workplace." A key aspect of that plan is the establishment of a new Conduct Accountability Board that would be led by Assistant Secretary for Water and Science, Mark Limbaugh.

July 13, 2007 - Assistant Secretary for Water and Science, Mark Limbaugh, resigns to take a job with the Ferguson Group, a lobbying firm representing local and state water agencies with interests before the Department of the Interior.

July 17, 2007 - Lyle Laverty appears before the Committee on Environment and Public Works in the Senate to discuss his nomination as Assistant Secretary for Fish, Wildlife and Parks. Assures Senators that he believes "science in the foundation of sound public policy," and that he was "committed to ensuring that scientific integrity is maintained and scientific determinations are accurately and clearly communicated to policy makers." He also pledged, that if confirmed, he would "immediately..ask the Solicitor's Office and the Designated Agency Ethics Officer to brief the staff on the rules and regulations with regard to the protection of and disclosure of information received by the Office."

Mr. MILLER. I yield my time back.

Mr. SARBANES. No further questions.

Mr. MIKE THOMPSON. Would the gentleman yield?

Mr. SARBANES. Yes.

Mr. MIKE THOMPSON. Thank you. Thank the gentleman for yielding. Thank you, Mr. Rahall. I just have a question for Mr. Seeba, and Mr. Miller talked about it a little bit, and that was the violation of the section 7 process, and how you stated in your statement that the only other time that anyone knew of that happening was on consultation of the Klamath operations. Can you just kind of tell us why it is important to do the section 7, and the fact that they did violate it in Klamath, is that something that is going to be or needs to be further investigated?

Mr. SEEBA. Well what happened the Assistant Regional Administrator basically served in the role of the section 7 coordinator in his statements. He felt at the time that the discussions with the staff and the section 7 coordinator was not making progress. So that is why he stepped in. At this point, it is a violation of the process. I think that is the extent that you can say. These are senior biologists and scientists that are experts in their field and would be expected to participate in these particular type of reviews.

To me you know in this process she was cut out of the process, and I think it probably was in the end vindicated with the peer reviews that came out subsequent to that that her instincts were correct. That there was not the best available science there, and the department and the Marine Fishery Service needs to ensure that those processes are not violated.

The CHAIRMAN. The Chair will continue to recognize members of the Committee before recognizing our guests, and the next to be recognized will be the gentlelady from Guam, if she has any questions, Ms. Bordallo.

Ms. BORDALLO. I do not have any questions, Mr. Chairman. For the next panel, yes.

The CHAIRMAN. OK. The gentleman from Washington, Mr. Inslee.

Mr. INSLEE. Thank you. I have been very concerned about the wholesale failure during this Administration to enforce the Endangered Species Act in a variety of contexts. You may have heard me earlier citing the statistics that in the first presidency of the first George Bush the Administration had listed I think it was over 250 species that needed protection. While President Clinton was in office it was over 500, and this Administration not one single species has been listed for protection unless it was by court order or lawsuit or citizen petition.

This appears to be an enormous systemic failure of the Administration to act. Now there are only two explanations for that. One, there has been a sudden miracle that no longer these species are threatened by climate change and development and over harvest and over resource development or two this Administration is not doing its job on a systemic basis to provide for the protection of these species, and I am very concerned about that.

We have talked about numerous specific today instances of potential misconduct but I would just like to ask you about whether there has been an effort to restore the integrity of this whole process that to me just looking at the results clearly is dysfunctional and not getting these species listed for protection. Now if this is beyond your scope, let us know but any comments you can give us in that regard I would appreciate it.

Ms. KENDALL. I appreciate your latter comment. I do not feel qualified to comment on the endangered species process overall. It is simply not something that I have any personal expertise in, and we develop sort of instant expertise when we investigate issues that come to our attention such as the one that I have testified about here today.

Mr. INSLEE. Well I am sorry you could not help but we want to get to the bottom of this eventually. Have either of you been involved in a review of the owl recovery plan in the northwest? We are very concerned that there has been again a political decision to reduce the protection in the northwest of the spotted owl, and it appears that science again has not been followed in that context.

The spotted owl has multiple threats, including invasion of the barn owl into its territory, and now the reduction of protection is not just the owl we are concerned about but multiple species because we now have a reduction or elimination of the need to evaluate multiple species in this habitat. Have either of you reviewed that situation?

Ms. KENDALL. We have not.

Mr. SEEBA. We have not either.

Mr. INSLEE. Well at some point I encourage you to do so because looking at the testimony of Dr. Dominick DellaSala and others I think you will find cause for great concern there that the science again has not been listened to, and some have said, well we do not have to look for these other species now because it is all the barn owl's fault. In fact, it should heighten our need for scientific inquiry rather than reduce it.

I want to ask something, Ms. Kendall, you talked about the limitation on ability to control political appointees if you will. In other words, even if you find some problem that there is some limitation because some of these rules would not apply to political appointees or something of that nature. Could you elaborate on what you were referring to?

Ms. KENDALL. What I believe I said was that when it comes to misconduct or violations of regulation or ethical rules, when it pertains to political appointees, although the department has a conduct and discipline manual that is usually applied to the general service population of employees, with politicals—at least in my experience—it is sort of an all or nothing kind of thing.

Either it is something worthy of having someone removed from office or they are retained. I am not giving you a legal answer. I am just telling you that in my experience this is how it works.

Mr. INSLEE. Well just listening to you it sounds like we do not really have an ethics criteria that applies to the political appointees, and perhaps that is one of the reasons we have had this. Is that the situation?

Ms. KENDALL. Well it does apply to them. The problem, if you will, is that it is not in the Inspector General's hands to make a decision as to what happens to an employee. It becomes the department's responsibility in essence to make a determination as to what happens to someone who based on facts that we provide in the department's estimation either is or is not a violation.

Mr. INSLEE. Well your purview is somewhat limited I realize to criminal violations, but these species are going downhill whether or not there were criminal violations because we are not getting them listed, and I hope this hearing today somehow jump starts that process. Thank you.

The CHAIRMAN. The gentleman from Rhode Island, Mr. Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman. Just overhearing this kind of discussion I would like to ask just some broad questions, and those pertain to the transparency to these investigations and how the public gains some kind of insight into how when this happens they have confidence that all that has been going on is fully brought to light, and insofar as that is concerned, I would like to ask when there is any political appointee or White House official, Administration official, if the Vice President or whomever calls a staff member of an agency and exerts political influence on a scientist to try to influence the scientific finding, are those calls logged?

Are they part of the record much like as we as Members of Congress we write letters to agencies petitioning on behalf of constituents and so forth? All of that is part of the official record. In the course of your investigations in all of these types of matters, are all of these thoroughly vetted where these calls are easily accessible to the public?

Ms. KENDALL. I am not sure if I completely understand your question.

Mr. KENNEDY. The question is simple. The question is: When the President's Administration in time and time and time again has manipulated scientific evidence for its own political purposes, is that transparent now for the public record? For us to be able to put

on the public record for everyone to see? Is that now able to be sifted through so we can now publicly document that?

And in the course of your investigations when you go through these reviews, can you now cull that and say, oh here is these records because we did record that? Did the staff record these calls? Were they supported insofar as were they encouraged to record these calls? Can you give us some sense of whether that was the environment in which they worked?

Ms. KENDALL. I am not aware of any recordation of calls like this. Oftentimes we will scour email and emails often are our very best friend but if there is no hard record, phone calls are not necessarily as easy as say an email, and we might be able to find record of a call coming in from an outside phone number but in this case, in the case of our Klamath investigation, we did not have those records.

Mr. KENNEDY. Well we did have the story from The Post that showed the Vice President called staff.

Ms. KENDALL. We did but our investigation was conducted now over three years ago at the time, and we did not have that information available to us.

Mr. KENNEDY. I guess that is what I am looking for is to try to find out how many other instances like that we did not get the full story of because there was not that kind of encouraged transparency that we need in order to get the full confidence of the American public back in their institutions and the science upon which these decisions are being made, and I understand that you are putting in place this new peer review to kind of remedy that but I would just hope that you could give us some assurance that you from here on out would tell us what kind of resources you are making available to staff and the like of these various agencies if they ever feel like their work is being suppressed due to political pressure.

Ms. KENDALL. I feel certainly from my office's perspective that people feel comfortable in letting us know these things.

Mr. KENNEDY. OK. Well we certainly look forward to ensuring that that is the case, and I think that is the purpose for these hearings.

Mr. MILLER. Would the gentleman yield?

Mr. KENNEDY. I would be happy to yield.

Mr. MILLER. Just if I might ask either one of the witnesses, where does a person go today if they are under political pressure? I mean sometimes these give the appearance of career decisions. Where do you go to independently deal with this problem?

Mr. SEEBA. I would say in the departments most IG's have these or either you call the hotline, you write a letter to the IG's office you know explaining the situation. GAO has a hotline also that you can call in either anonymously or you know giving your name. So I think those are ways that you can provide information you know to the organizations that something is not going correctly.

Mr. MILLER. And then you initiate? You make a determination based upon whether to gather additional evidence or questions and whether or not later to initiate an investigation, and the beginning of that is anonymous?

Mr. SEEBA. That is correct. I mean generally speaking, you evaluate the credibility of the information.

Mr. MILLER. Yes.

Mr. SEEBA. And then initiate. If it is credible, you tend to initiate investigations.

Mr. MILLER. And that facility is recognized within the agencies that that is a safe place to go so to speak?

Mr. SEEBA. Absolutely.

Mr. MILLER. OK. Thank you. Thank you. I just wanted to follow on what Mr. Kennedy was——

Mr. KENNEDY. No. I would just say that I think that probably does not engender much confidence on the staff's part when you make the point earlier as you did that you have the former Surgeon Generals all sign that they were all muzzled when they were Surgeon Generals, when you have the top scientific officials in this country all say that their global warming findings were all tampered with by oil and gas lobbyists hired by the Administration to rewrite documents that they had written, when you have time and time again this Administration rewrite scientific documents, and then do so with absolute impunity.

It seems to me if you are a scientist you would say well why should I stick my neck out? There is certainly nothing to be gained. If I stick my neck out, nobody's head is going to fall for politicizing this process because that does not seem to be against the norm in this town, and I think it seems like it is a very intimidating process. If you do call and be a whistleblower, nothing happens. That is a very intimidating environment it seems to me if you are a scientist actually working for the public good in this town.

The CHAIRMAN. The gentlelady from Guam, Ms. Bordallo.

Ms. BORDALLO. Thank you. Thank you, Mr. Chairman, for giving me the opportunity. Ms. Kendall, I have a question for you. Your testimony says that the impacts of Ms. MacDonald's actions will undoubtedly be both time consuming and costly.

Ms. KENDALL. Yes, Madame.

Ms. BORDALLO. So can you please elaborate on this point? For example, do you know what does it cost the government to promulgate a critical habitat designation in terms of staff time and Federal Register publication costs? If we are to assume that the eight reviews recently announced by Director Hall are the universe of decisions where Julie impacted the science unfairly, what is the estimated cost that taxpayers will spend now to take another look at them?

Ms. KENDALL. I cannot give you a specific amount but——

Ms. BORDALLO. Can you give me an estimated?

Ms. KENDALL. Well if you look at the number of people involved and the processes, it is actually quite involved. I am sure it is considerable but I hedged my testimony because I do not have a specific number.

Ms. BORDALLO. You have no idea in what neighborhood it would be? Thousands?

Ms. KENDALL. I am afraid I do not. I am afraid I do not.

Ms. BORDALLO. All right. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. OK. One last question I have. Actually it is a repeat question, Ms. Kendall, from before, and I would like just to

make sure the record is perfectly clear on the matter we discussed earlier, and that is if you knew then what you know or suspect now, the Interior Inspector General would have sought to investigate to the extent it is empowered to, the involvement of Vice President Cheney for meddling in the Klamath affair?

Ms. KENDALL. The impact on DOI employees, yes.

The CHAIRMAN. Thank you. The Chair will now recognize the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I appreciate your courtesy today and unanimous consent to allow us to participate even though I am no longer a member of the Committee, although I was for eight years. Ms. Kendall, I want to follow up on that comment because I am disturbed by the letter to Senator Kerry that came from Mr. Devaney then in light of your recent comments here before the Committee, and I want to read from that letter, and I assume you have seen it and know it. Were you involved in the investigation that is encapsulated here in the letter to Senator Kerry from Mr. Devaney?

Ms. KENDALL. To the extent that I am involved in investigations at a fairly high level, yes.

Mr. WALDEN. Then let me read from this because he says, and I quite, "As outlined in my letter to you dated August 28, 2003, the OIG focused its investigation on three areas: One, what would be the normal regulatory process in a matter such as this assuming that this as an Administrative Procedures Act governed regulatory matter; two, what actually did happen in the administrative process in the Klamath Basin matter; three, how the Klamath Basin matter deviated from the norm if at all with special attention being paid to A, the science, B, any suppressed information, C, any evidence of political interference", and then they go on from there. On the face of it, this language about any evidence of political interference seems pretty broad.

Ms. KENDALL. Yes.

Mr. WALDEN. And it is my understanding that this investigation included talking to a known whistleblower. It is referenced in the letter.

Ms. KENDALL. Yes.

Mr. WALDEN. And personnel up and down the agency.

Ms. KENDALL. Yes, it did.

Mr. WALDEN. And in the course of that investigation, was there ever any limitation on the individual's ability to comment about political interference? Was it constructed in a way that you can only talk about it if it was Karl Rove?

Ms. KENDALL. Well that was the focus of this investigation. There was a very specific allegation about Mr. Rove's attendance at a senior political appointee meeting held offsite.

Mr. WALDEN. Right.

Ms. KENDALL. And specific mention of the Klamath issue. The allegation focused on——

Mr. WALDEN. I am aware of that.

Ms. KENDALL. And that was really the focus of our investigation.

Mr. WALDEN. But the investigation seemed to have drawn some pretty substantive conclusions when you say, "We determined that the administrative process followed in this matter did not deviate

from the norm. Our review of the available documents and rulings of U.S. District Court in Northern District of California support the conclusion. The department had complied with necessary information to support its various decisions related to Klamath project." Even if Dick Cheney was involved, your or Mr. Devaney's findings indicate nothing was awry.

Ms. KENDALL. Well as I said——

Mr. WALDEN. Or that the process was followed correctly, correct?

Ms. KENDALL. We are not scientific experts.

Mr. WALDEN. Sure. I understand that.

Ms. KENDALL. And we do not substitute our judgment. We really follow the process.

Mr. WALDEN. Right.

Ms. KENDALL. But as I said earlier, the influence—if you will and taking The Washington Post article at face value—may or may not have influenced the final decision but it does reflect on the transparency of the process, and really beyond that it would be mere speculation.

Mr. WALDEN. I would agree with that. I guess what troubles me is to read, "We determined the administrative process followed in this manner did not deviate from the norm, and further that none of the individuals we interviewed, including the whistleblower, was able to provide any competent evidence the department utilized suspect scientific data or suppressed information was contained in economic and scientific reports related to the Klamath project. To the contrary", and it goes on.

I read this to be a fairly comprehensive review of not just the Wall Street Journal story but of the entire administrative process because the conclusion that was drawn here about the administrative process not deviating from the norm had to be more than just did Karl Rove put a call in or did he do a slide presentation that affected you, right?

Ms. KENDALL. That is correct.

Mr. WALDEN. So I guess I am just a little perplexed by this notion that maybe Dick Cheney in the background did something that you would not have spotted if you talked to all these people and they all agreed and there was no other evidence shown of political involvement.

Ms. KENDALL. Well I——

Mr. WALDEN. And deviation from the norm of the process. That is what you were looking at, right?

Ms. KENDALL. That is what we were looking at, yes.

Mr. WALDEN. All right. I guess that is where I get frustrated is I get a document like this. It seems to say the agency followed their procedures and their processes. I have the report from the National Academies of Science that reviewed not only the decisions but the science and the fish kill off and independent peer review of those things, pretty comprehensive, and then I hear allegations flying around that are not substantiated yet, and I do not know about anybody else in this committee, but there has been one or two times where a report in a publication has not been exactly accurate as it relates to something I have said or done. So anyway my time has expired. Thank you.

The CHAIRMAN. The gentleman from California.

Mr. DOOLITTLE. Thank you. Just looking at the same letter dated August 6, 2003. No, that is not the date. Dated March 1, 2004, from the Inspector General, the Department of Interior, to Senator Kerry, and it says in the letter, "Finally, we found no evidence of political influence affecting the decisions pertaining to the water in the Klamath project. The individuals at the working levels denied feeling pressured at all."

Now I realize you said your focus was on Karl Rove but surely you would not suggest that when the individuals said they felt no pressure at all that they would have answered differently if they had been asked about pressure from the Vice President as opposed to Karl Rove. That would not be your position, would it?

Ms. KENDALL. I am not sure——

Mr. DOOLITTLE. In other words, this letter says, "The individuals at the working levels denied feeling pressure at all." Now I take that to mean that they did not feel political pressure from Karl Rove, Vice President Cheney, the President, the Pope or anyone else.

Ms. KENDALL. Based on our interviews of those individuals, yes.

Mr. DOOLITTLE. OK. So the fact that you were not focused particularly on the involvement of Vice President Cheney would not affect the truthfulness of this statement, would it? The individuals basically did not feel at the working level any pressure at all.

Ms. KENDALL. That is correct.

Mr. DOOLITTLE. Had they felt pressure from Vice President Cheney or his aides or contacts, I would infer from this statement that they would have felt pressures, would you not?

Ms. KENDALL. Yes, sir.

Mr. DOOLITTLE. OK. So I think that is clear. And then going on, "Higher level decisionmakers, both political and career, also denied feeling any political pressure to render a decision one way or another." Would that not be a reasonable conclusion that like the individuals at the working level one could infer that the Vice President was not putting pressure on them, even though your focus was not on the role of the Vice President in this matter?

Ms. KENDALL. Without speculating one way or the other, sir, we rely on——

Mr. DOOLITTLE. But inference is a speculation but it is a logical speculation. Are you telling me you cannot? I am sorry. I am interrupting you. Go ahead and give your answer.

Ms. KENDALL. Based on what people told us, that is a correct conclusion.

Mr. DOOLITTLE. OK. So all of this folderol about it is very exciting, the Vice President is like a magician, it is really a great endorsement of the influence of the man that he can do these amazing things, and they cannot be detected by human powers of perception somehow but you know you did interview the people at the working level in the Interior and at the higher level, and they all testified they did not feel any pressure, and I am sure if the Vice President had been secretly doing things that would have caused pressure, and they would have had to have reported to you that they felt pressured but you wrote in here or your Inspector General did that they felt no pressure.

Ms. KENDALL. That they told us they felt none, yes.

Mr. DOOLITTLE. Right. So I just wanted to be clear about that. That it is clear from your office, the head of that office, that the people in Interior felt no pressure of a political sort from Karl Rove or anybody else.

Mr. MILLER. Would the gentleman yield?

Mr. DOOLITTLE. Well I do not have very much time. How much time do I have? I will yield. Why not?

Mr. MILLER. Thank you. I believe that Ms. Kendall testified earlier that as a matter of omission Ms. Wooldridge did not inform Inspector General in that report that she had been contacted I think repeatedly by the Vice President's office. That was just not part of the record because it was never volunteered, is that correct?

Ms. KENDALL. If I may just make——

Mr. MILLER. Clarify that. Yes.

Ms. KENDALL.—a clarification.

Mr. MILLER. Sure.

Ms. KENDALL. Her interview might be read that way. I personally cannot draw a conclusion based on that but her interview and the report I think stands on its own.

Mr. MILLER. There is nothing in the report that indicates that she did say that? That she indicated that she had those contacts?

Ms. KENDALL. She did not at all indicate that she had any contact.

Mr. MILLER. All right. Thank you. I thank the gentleman for yielding.

Mr. DOOLITTLE. Yes. Thank you, Mr. Chairman.

The CHAIRMAN. Any other questions? Mr. Sali.

Mr. SALI. Yes, if I could, Mr. Chairman.

The CHAIRMAN. Sure.

Mr. SALI. Ms. Kendall, following up on this letter, it goes on in that same paragraph that the good gentleman just referred to where Mr. Devaney said, "The consistent denial of political influence by governmental officials was corroborated by the view of the outside scientists and one former DOI official, all of whom denied feeling any pressure, political or otherwise."

And the final paragraph he says, "No political pressure was perceived by any of the key participants." Now you are saying today that there was political pressure that was perceived by someone but they did not disclose it during Mr. Devaney's investigation?

Ms. KENDALL. No, sir. I am saying that I would stand by what we reported in 2004. I think based on the information contained in the Washington Post article there is room to perhaps interpret that information was not provided but without going back to an individual and reinterviewing, I do not know that we can draw a conclusion one way or the other.

Mr. SALI. You would agree that you made some pretty serious charges against the Vice President today? That he did influence the decisions around the Klamath?

Ms. KENDALL. I do not believe I did that, sir.

Mr. SALI. I thought I understood you to answer the Chairman that that was the case. Am I incorrect?

Ms. KENDALL. No. My answer to the Chairman was that if there were indications that there was that sort of political influence on a DOI employee it would be appropriate for us to look into that.

In this case, we did not see that. There was no evidence at the time we were investigating to follow any sort of lead like that.

Mr. SALI. Do you plan any kind of investigation at this point?

Ms. KENDALL. Not at the moment, sir.

Mr. SALI. Has anyone complained to you that you should have an investigation?

Ms. KENDALL. We have not, to my knowledge, received such a complaint.

Mr. SALI. So am I correct then that you do stand by the investigation and the results that were reported by Mr. Devaney on March 1, 2004?

Ms. KENDALL. Based on the information we had at the time, yes, sir.

Mr. SALI. Are you aware of any additional information today that would change your mind about that?

Ms. KENDALL. I am not, sir.

Mr. SALI. And so your conclusion today would be you have no information that would change your mind about any of the conclusions that are represented in this March 1, 2004, letter from Mr. Devaney?

Ms. KENDALL. With the exception of the allegations in the Washington Post which I have no personal basis to know one way or the other, that is correct.

Mr. SALI. But you do not believe those rise to a significant level of concern that you are going to start an investigation at this point, is that correct?

Ms. KENDALL. Well to answer your question, at the moment, no, and going back I believe I testified that in the end I am not sure even if that influence were corroborated that the end result would be any different other than as I said earlier sort of the transparency of the process and what influence may have been brought to bear.

Mr. SALI. Well once again I want to make real sure that we have a clear record here. At this point, you have not heard from anyone on this committee, anyone in your agency, anyone in the public that has reported anything to you that would cause you to begin an investigation regarding any kind of political influence by Vice President Cheney, is that correct?

Ms. KENDALL. As I sit here, yes, that is correct based on what I have received or reviewed.

Mr. SALI. All right. Thank you, Mr. Chairman.

The CHAIRMAN. Any further members that wish to be recognized? Yes? No? Any of our visitors? Any of our guests wish to be recognized?

Mr. WALDEN. Thank you, Mr. Chairman, but I will yield.

The CHAIRMAN. All right. We thank you.

Ms. KENDALL. Thank you.

The CHAIRMAN. Thank you for your patience and being with us today. The Chairman will now call panel three composed of H. Dale Hall, the Director, U.S. Fish and Wildlife Service, U.S. Department of Interior who I understand is accompanied by Steve Thompson, the Manager, California/Nevada Operations Office, U.S. Fish and Wildlife Service and Mr. Robert W. Johnson, the Commissioner of the Bureau of Reclamation, and William T. Hogarth, the Assistant

Administrator, National Oceanic and Atmospheric Administration, the U.S. Department of Commerce accompanied by Mr. Rod McInnis, the Acting Regional Administrator, National Marine Fisheries Service Southwest Region.

Gentlemen, we welcome you to the Committee today. Appreciate your patience as well. We have your prepared testimony. It will be made a part of the record as if actually read, and Director Hall, do you want to proceed first. Welcome once again to the Committee.

STATEMENT OF H. DALE HALL, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE [USFWS], U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY STEVE THOMPSON, MANAGER, CALIFORNIA/NEVADA OPERATIONS OFFICE, U.S. FISH AND WILDLIFE SERVICE; ROBERT W. JOHNSON, COMMISSIONER, BUREAU OF RECLAMATION

Mr. HALL. Thank you, Mr. Chairman and members of the Committee. In the interest of time, I will have a brief oral statement and thank you for entering the full written statement into the record. As you have stated, Steve Thompson our California/Nevada Operations Director is with us as well as Bob Johnson, the Commissioner of the Bureau of Reclamation in case questions come up in their areas of knowledge.

As you are aware, a recent Inspector General's investigation has come forward regarding Julie MacDonald. We have just heard a panel of witnesses discuss that so I will discuss that briefly but I also want to discuss some of the very positive things that have been happening in the Klamath Basin, and you have also heard a great deal of information on that today.

In the interest of time, I would simply like to highlight two or three points. Number one is it is extremely important to recognize the significance of those 26 different entities that are meeting together in the Klamath Basin. Seldom in my career have I seen that many disparate groups with disparate interests sit down at the table and say, you know enough fighting is enough.

We need to find some solutions, and I really compliment everyone that has sat down at the table and stayed with it, and I also want to take a little parochial pride and thank Steve Thompson for the leadership that he has provided in that Basin for us. But again, having worked in that Basin for six years myself, I can tell you that is no small feat.

So the 26 people meeting together and the support and funding that has come out there for significant projects from the Sprague River, Williamson River, Chiloquin Dam and lots of other places across that Basin, and it is a beautiful Basin, to include our national wildlife refuges, especially lower Klamath and Tulana Lake that do depend on the return flows from the farming operations. So it is critical that we work in partnerships there.

But this Administration I believe has tried to help us achieve those goals, and just in 2007 $90 million has been dedicated to the Klamath River Basin, and I believe it is a Basin that well deserves it. We have also placed and my understanding is for the first time FERC flow requirements in the Klamath Basin, and I believe that is the first time for the Klamath Basin, and that was done in col-

laboration and partnership with a lot of people working in the Basin to come up with something that could work.

I would like to quickly also touch on the Inspector General's findings and things that we have done since then. When I came on board in October of 2005, I spent the first three or four months just kind of looking things over, as many people would do, and I just felt some discomfort in some areas of relationship between the Assistant Secretary's office and the Director's office in the Fish and Wildlife Service in general.

I felt actual concern in some areas where it dealt with science, and so I had discussions with the Assistant Secretary's office and really said it is inappropriate for someone that is first of all not a scientist but second of all in the Assistant Secretary's office to reach down and have biological type discussions with GS-5, 7s, 9s or 11s, and so I had a discussion with them, and that was ceased. And we then started looking at the proper role to be played in evaluation of packages as they came forward.

And I think it is important for us to remember I have 29 years working as a scientist in this agency but also have always recognized that there is a policy role, and it is not as if above the scientists nothing ever should happen. I have recognized that in my career, and now I find myself half scientist and half policy starter in trying to move those things forward, but it is really important that we remember the distinctness of those things, and that as a policy person we should not be reaching down unless you have the credentials to do so and really get into the science.

After the testimony that Deputy Secretary Lynn Scarlett did here in May, Steve Thompson and I had already begun discussing how we might look at actions that may be suspect, in California in particular, but Secretary Scarlett asked me to do it service wide, and so I did. I went to all of the regional directors, and I asked them to go with their support staff and their field staff, their field supervisors, and let me know any package, any action—and that could be listing, it could be critical habitat, it could be section 7 consultation for that matter—that they felt that the outcome was changed as a result of interference or involvement by Ms. MacDonald.

They went through that process, and they recommended 11 packages or that is what we call an action, 11 actions. One of those was dismissed by the Regional Director, and that was the Mexican garter snake, because he learned that Ms. MacDonald had no role in that whatsoever. That that was decided by our own career staff in Washington.

And then the other two were the marbled murrelet five-year review and the bull trout, and the Regional Director there said that that was really policy discussion, and the science was not altered to the point that it changed any decision we were doing. We have been moving forward with those, and we will relook at those eight packages, and we will reanalyze them to see if they need to be modified.

And the filter that was used for this other than saying what was the decision and was the decision modified or changed as a result of the involvement, and then the second filter is, is it something that we really do think stepped up to the level that we needed to

relook at it and analyze it, and was it overly involved? And so we put these filters on there to make sure that everyone had A, the ability to put anything on the list they wanted. I rejected nothing. And B, I even asked them do you want to add more, and gave them an opportunity to do that, and they declined.

So with that, we are moving forward, and I want you to know that we take our scientific business very seriously at the department, and the Fish and Wildlife Service has been my home for 29 years, and I certainly intend to do everything I can to make sure the scientific integrity is there. Thank you.

[The prepared statement of Mr. Hall follows:]

Statement of H. Dale Hall, Director, Fish and Wildlife Service, U.S. Department of the Interior

Mr. Chairman and Members of the Committee, I am H. Dale Hall, Director of the U.S. Fish and Wildlife Service (Service). I am here today to discuss implementation of the Endangered Species Act (ESA), including our activities in the Klamath River Basin. I appreciate the opportunity to appear before you. Joining me today to answer any questions that may relate to the Klamath River Basin and other issues that fall within their responsibilities is Robert Johnson, Commissioner of the U.S. Bureau of Reclamation (Reclamation), and Steve Thompson, the Service's California/Nevada Operations Manager.

Background

As you are aware, a recent Inspector General's investigation and media reports have raised questions regarding science and agency decision-making under the ESA. Let me begin my testimony by stating, from the outset, that I take these reports very seriously and am committed to ensuring that the Service implements the ESA with the utmost scientific integrity.

Science is the cornerstone of the Service's work; it is what guides the agency's decisions. To the extent that these recent reports cast doubt over the scientific integrity of the Service's ESA decisions, I want to assure Congress and the public that I will act to correct any decisions that did not use the best available science, as required by law.

My testimony will also highlight the actions of this Administration and our Klamath Basin partners in moving toward resolution of the long-standing conflicts that have gripped this region. The Klamath has been a hot spot in the ongoing and very real struggle resulting from multiple demands for too little water. Today, I am pleased to report that the Klamath Settlement Group has committed to settle these issues and to find long-term solutions for managing the water needs of local communities, irrigators, power generation, and wildlife, such as the shortnose and Lost River suckers and the Coho salmon, which are on the Federal list of Endangered and Threatened Species.

It is important to note that both science and policy have roles in the implementation of the ESA. For example, the Service does not always have full information about a species such that it can know with the utmost reliability a species' risk of extinction, population levels, rate of decline, or recovery needs. Under the ESA, the Service must use the best available science, be explicit about the level of uncertainty in that science, and leave it to decision makers to choose among the options that achieve the objectives of the decision. In addition, policy decisions in critical habitat designations are appropriate in the section 4(b)(2) exclusion process of the ESA, pursuant to which the Secretary must weigh the benefits of exclusion against the benefits of inclusion. Thus, the assimilation, application, and interpretation of science often represent the beginning point in making policy decisions under the ESA. The peer review process, agency leadership, and the public comment process help to ensure high quality decisions.

The Klamath River Basin

It is my understanding that you would like us to discuss our role in the ongoing efforts to manage the resources of the Klamath River Basin. The Klamath region straddles 16,400 square miles of south-central Oregon, northern-central and northwest California, with the Klamath River flowing 254 miles from its Oregon headwaters into the Pacific Ocean. The people of this region are bound together by the Klamath River's economic, ecologic and cultural importance to their communities.

The Klamath River has been and continues to be important to the economies and social fabric of that entire region. The Klamath Basin was renowned for its salmon fisheries in the Pacific Northwest, as the Klamath River was once the third largest producer of salmon in North America. Reclamation's Klamath Project, as well as private systems, supply irrigation water for a wide variety of agricultural crops throughout the upper basin. The Service operates six national wildlife refuges that provide important habitat for migrating birds. Historically, the Yurok, Hoopa, Karuk, and Klamath Tribes have relied on fish and other natural resources provided by the Basin.

Many notable accomplishments have been achieved in the Klamath Basin since 2001. Structural improvements were completed to Klamath project facilities that have helped screen the majority of both juvenile and larval suckers from the A-Canal. The Link River Dam fish ladder became operable in 2005, giving suckers and redband trout, an Oregon State species of concern, access to historic habitat, including spawning areas in Upper Klamath Lake and its tributaries.

Additional projects are currently underway to improve habitat for other ESA-listed species and species of concern. For example, Reclamation has developed the Water Bank Program, which provides surface water storage, groundwater pumping, and land fallowing options. Since its creation, the Program has developed water supplies for Coho salmon flows. Also, The Nature Conservancy (TNC) and the Service have provided $7.25 million and $2.47 million, respectively, in addition to $1.62 million from Reclamation, to acquire Barnes Ranch for increased water storage in Agency Lake and additional habitat for the Upper Klamath National Wildlife Refuge. The total acreage of this acquisition will be 9,650 acres.

Reclamation and the Bureau of Indian Affairs are also in the process of removing Chiloquin Dam to improve fish passage on the Sprague River in southern Oregon. Removal of the dam, scheduled for completion in December 2008, will open up approximately 80 miles of spawning habitat. In addition, TNC, in partnership with the National Fish and Wildlife Foundation, the Service, and Reclamation, is undertaking the Williamson River Delta Restoration project. This project should be completed by winter of 2008 and will reconnect the Tulana and Goose Bay Farms to Upper Klamath Lake, providing 5,860 acres for increased water storage, enhanced fish and wildlife habitat, and improved water quality in Upper Klamath Lake. Reclamation and the Service each provided $2.5 million to the project.

Since 2005, a diverse group of Klamath River basin stakeholders, including Indian tribes, farmers, conservation groups, and state and federal agencies have committed to developing a detailed Klamath Settlement Agreement by November 2007. For the past two years, this group has persevered toward the development of a proposal to restore the Klamath River fisheries, meet agricultural needs, protect water quality and sustain the ecology and economies of the Klamath Basin. The group is committed to prepare and present a balanced agreement.

In January 2007, the Department of the Interior and NOAA Fisheries in the Department of Commerce announced the submission of their joint modified fishway prescriptions for the relicensing of PacifiCorp's dams and hydroelectric facilities on the Klamath River to the Federal Energy Regulatory Commission (FERC). Like their March 2006 preliminary prescriptions, the modified prescriptions include fish passage, both upstream and downstream, for PacifiCorp's Iron Gate, Copco I and II and J.C. Boyle dams, but provide a lower cost alternative for down stream passage at Copco and a less prescriptive approach for tailrace barriers and spillway modification. This is the first time any Administration has required fish passage in prescriptions for FERC relicensing in Klamath.

In Fiscal Year 2007, the Administration has allocated more than $90 million to support restoration, research and management in the Basin and, from 2003 through 2006, the Department has obligated $215 million for this effort. We are committed to continuing to work with everyone in the Basin to ensure the long-term sustainability of the natural resources and people of the Klamath region.

Decision-making Under the Endangered Species Act

The remainder of my testimony will focus on actions that have been undertaken to ensure the integrity of the Service's scientific decisions under the ESA. Since becoming Director, I have made scientific integrity my top priority. Having been a scientist with the Service for 29 years, I am acutely aware of the importance of science in the Service's activities and decisions.

Shortly after I was confirmed as Director in October 2005, I began to examine the process for reviewing ESA decisions in Washington. I identified problems with the division of responsibilities for ESA decisions between the Service's headquarters and the Office of the Assistant Secretary for Fish and Wildlife and Parks. The apparent lack of a clear delineation between the roles of the Service and of the Office of the

Assistant Secretary for Fish and Wildlife and Parks concerned me. As a result, I began a series of discussions with the Deputy Secretary to address and correct the situation. On February 3, 2006, with the concurrence of the Deputy Secretary, I issued a memorandum detailing my views on how science should be used in making recommendations and decisions, as well as the process by which science would be reviewed in a policy and legal context. A copy of this memorandum is enclosed with my written statement (Attachment 1).

In addition, I held several meetings with then-Acting Assistant Secretary Matt Hogan and his staff to discuss how the division of responsibilities for ESA reviews and decisions should be implemented. A copy of an email on these responsibilities is also included with my written testimony (Attachment 2).

In sum, we agreed that the formulation of science would be the responsibility of the Service, while discussions between the Director's office and Assistant Secretary's office would focus on policy decision-making. With the Deputy Secretary's concurrence, we also agreed that there would be no requests for information from the Assistant Secretary's office to the Service's regional and field offices while ESA packages were being formulated, a practice that had occurred in the past. I instructed the Regions and Washington office staff that this review process had been established to ensure the integrity and credibility of ESA decisions and asked them to let me personally know of instances where the process was not honored.

Secretary Dirk Kempthorne was confirmed by the Senate in May 2006, and I have been impressed by his strong emphasis on ethical and scientific integrity. As you know, on March 29, 2007, the Department's Inspector General released a report on the Deputy Assistant Secretary's involvement in ESA decisions. This Committee held a hearing on May 9, 2007, where Deputy Secretary Lynn Scarlett committed to conducting a review of ESA decisions that may have been inappropriately influenced by Ms. MacDonald.

On May 16, 2007, I visited the Service's California-Nevada Operations Office (CNO) to meet with CNO Manager Steve Thompson and his key field office leaders about the course of action for reevaluating certain ESA decisions from 2002 to May 2007. This discussion was informed by insightful input from the field, as the CNO Manager had previously initiated a discussion with Regional leadership on this topic.

Immediately following my discussions with CNO, I received a memorandum dated May 22, 2007, from Deputy Secretary Lynn Scarlett requesting that the Service review all work products that had been produced by the Service and reviewed by the Deputy Assistant Secretary in order to determine if any of this material required revisions based upon her involvement. This memorandum is also being submitted with my testimony (Attachment 3).

I then directed each of the Service's Regional Directors to engage the appropriate field and regional staff in identifying what, if any, ESA decisions may have been influenced by the Deputy Assistant Secretary. My directive to the Regional Directors recognized that policy formulations and interpretations were the proper responsibilities of the Office of the Assistant Secretary. I instructed the Regions to identify only those decisions that may have involved the improper modification of science, which would have resulted in undermining species conservation. The Service reviewed hundreds of actions, and the Regional Directors each submitted a memorandum to me outlining the results of their reviews. These memoranda are enclosed with my testimony (Attachment 4). The Regions recommended that 11 ESA actions warranted further review.

On July 11, 2007, prior to submitting the results of the review to the Deputy Secretary, I held a conference call to have a final discussion with all of the Service's Regional Directors to discuss each ESA decision. As the Regions discussed their recommendations, it became apparent that, in one case, the Mexican garter snake, the Southwest Region had recommended a review of this package based on my directions; however, it was determined instead that the Washington Office of Endangered Species had questioned the decision. Therefore, the Mexican garter snake was removed from the list of species to be re-evaluated.

I also want to point out that during our discussion, the Regional Directors indicated that on a number of occasions they were successful in explaining the Service's recommendations, with the result being that the Deputy Assistant Secretary's comments were not included or did not affect the Service's recommendations or decisions. By the end of the call, the Regional Directors had identified 10 ESA decisions that should be re-examined in order to ensure that the decisions comport with the best available science and appropriate legal standards. The next day, I submitted a memorandum to Deputy Secretary Scarlett summarizing the results of our review and recommending that we re-evaluate these decisions. That memorandum is also enclosed with my written testimony (Attachment 5).

On July 19, 2007, Pacific Northwest Regional Director Ren Lohoefener informed me that two decisions that were initially recommended to be re-evaluated were based upon an interpretation of policy, which is appropriately the responsibility of the Assistant Secretary's office. These two decisions, the 5-year review for the marbled murrelet and critical habitat designation for the bull trout, were withdrawn from our list at his request. The July 19 memorandum from Ren Lohoefener is being submitted with my written statement (Attachment 6). Following this action, I sent a memorandum to the Deputy Secretary amending the earlier list (Attachment 7).

In sum, the Service determined that the following eight ESA decisions warrant re-evaluation: 1) Arroyo toad critical habitat, 2) California red-legged frog critical habitat, 3) 12 species of picture wing flies critical habitat, 4) White-tailed prairie dog 90-day finding, 5) Canada lynx critical habitat, 6) Preble's meadow jumping mouse 12-month finding/proposed delisting, 7) Preble's meadow jumping mouse critical habitat, and 8) Southwestern willow flycatcher critical habitat.

Reevaluation has already commenced for three decisions, the Preble's meadow jumping mouse 12-month finding/proposed delisting; the White-tailed prairie dog, where we are working on the 12-month finding; and the 12 species of picture wing flies, where we are working on a rule to re-propose critical habitat.

Conclusion

In conclusion, I would like to emphasize my personal commitment to ensuring the scientific rigor, validity, and integrity of the Service's decisions under the ESA. The reevaluation of the eight ESA decisions is emblematic of this commitment. Neither I nor the Department will tolerate instances in which scientific soundness and integrity have been compromised, and I am confident that scientific excellence will continue to guide our agency's work.

Mr. Chairman, I thank you for the opportunity to appear before you today, and I would be pleased to respond to any questions that you or other Members of the Committee might have.

[NOTE: Attachments have been retained in the Committee's official files.]

Ms. BORDALLO. [Presiding.] I thank you very much, Mr. Hall, and now the Chair recognizes Mr. William T. Hogarth.

STATEMENT OF WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION [NOAA], U.S. DEPARTMENT OF COMMERCE; ACCOMPANIED BY ROD McINNIS, ACTING REGIONAL ADMINISTRATOR, NATIONAL MARINE FISHERIES SERVICE SOUTHWEST REGION

Mr. HOGARTH. Thank you, Madame Chair. I am Bill Hogarth, the Assistant Administrator for National Marine Fisheries Service. Thank you for the opportunity to discuss the activities to implement the Endangered Species Act, including those in the Klamath River Basins. I would like to discuss the efforts NMFS has made to restore the important fishery resources in these areas.

The conservation of fish resources throughout the west is very difficult, and it is complicated by the competing uses for a very limited water source. The Klamath Basin is one area where the tough decisions related to water and fish have received a lot of attention. The cutoff of water deliveries to farmers in 2001 and the fish kill in 2002 have focused much attention on the role played by the ESA in the Klamath Basin. That has also stimulated renewed cooperative efforts to restore fish populations of the Klamath by providing greater certainty to the agricultural communities.

Federal agencies have taken significant actions over the past years to improve the conditions. You have heard from my partners in the Fish and Wildlife Service, and I would like to discuss a little bit of what we have done. As you heard, four fishways for four

Klamath dams and possible dam removal have been prescribed pursuant to the Federal power authorities.

Fishways and four dams on the Klamath is a major accomplishment. This passage will provide access to hundreds of miles of river that have been blocked for nearly a century. We also participated in alternative settlement negotiations with the PacifiCorp, a diverse group of interested partners. I have met personally with many of these groups and sat down with them and discussed the future, and as part of these discussions they are seeking a comprehensive solution to water, fish, power generation, agriculture and wildlife issues in the Klamath Basin as a whole.

Second, NMFS has provided over $20 million to the State of California and Indian tribes to restore salmon and their habitat through the Klamath River Basin. And third, we have just completed a Klamath River coho recovery plan that was required by the Magnuson reauthorization. This coho plan relies heavily on the State of California's coho recovery plan and integrates the findings from many Klamath River watershed groups and coalitions established throughout the Basin to improve habitat conditions for fish and salmon.

We are now undertaking to actively develop a ESA recovery plan for southern Oregon and northern California coho which includes the Klamath River coho. NMFS and its fellow partners have been working side-by-side with stakeholders in the Klamath Basin to find achievable, long-term solutions to the ecological problems we face. However, we cannot solve this by pitting one side of stakeholders against another.

Now I would like to turn briefly to the California Central Valley. NMFS has listed winter chinook as endangered and spring chinook and steelhead as threatened. Working with multilateral Federal and state agencies as well as stakeholders, we are succeeding in bringing the winter chinook from the brink of extinction in 1991 of 189 adults back to over 17,000 adults in 2006. Spring chinook have also increased substantially.

The Office of the Inspector General's report on the 2004 biological opinion on the joint Federal and state water operations in Central Valley identified the need for improvement in the process that NMFS uses to review and approve section 7 consultations. Subsequently we had this biological opinion peer reviewed, and independent scientific reviews identified more scientific information that should be included and considered in the future opinions.

In response to those recommendations, I withdrew and consolidated the agency's section 7 delegations of authority. On December 15, 2005, I issued a new delegation of authority for the conduction of consultations under section 7 of the ESA and section 7 improvement plan.

The delegation of authority created new requirements to ensure section 7 policies and procedures were being followed. Specifically each NMFS region and headquarters office of protected resources must develop a quality assurance program which was implemented in March of 2006. Second, all section 7 determinations must be reviewed and approved by the NOAA office of general counsel unless they waive their right in writing.

Third, there will be a national section 7 coordinator and regional section 7 coordinators to advise pertinent staff and managers of section 7 issues and also provide training. Fourth, there will be a tracking system of all section 7 consultations in a national database. And fifth, we would maintain proper records of all consultations.

This has all been accomplished, and we report regularly to the IG, and it is also reported regularly to me. In addition, to make sure this is all being carried out, I have contracted with a private outside consultant to review the progress to date to make sure that all these requirements are being followed. This has been undertaken now, and they expect to get a review from this by the end of August. Thank you for the opportunity to be here today, and I will be happy to answer any questions.

[The prepared statement of Mr. Hogarth follows:]

Statement of William T. Hogarth, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service

Mr. Chairman, I am Bill Hogarth, Assistant Administrator for the National Marine Fisheries Service (NMFS).

Thank you for the opportunity to discuss our activities to implement the Endangered Species Act (ESA), including those in the Klamath River basin. The events in the Klamath basin have again been the subject of recent news. I would like to take this opportunity to discuss the efforts NMFS is undertaking to restore its important fishery resources.

The Magnuson-Stevens Act and the Endangered Species Act—and the state water laws of Oregon and California are the principal rules for sustaining the resources and communities of the Klamath, and for working out competing interests among the many people involved in this complex system. The Federal Power Act, which regulates Klamath hydro-electric power plants, also plays an important role.

A drought that began in the late 1990s has made it difficult for the watershed to produce enough water and fish for everyone. Ocean conditions that influence the survival of salmon at sea are cyclical, and are a key variable affecting the numbers of adult salmon returning to the Klamath to spawn.

These conditions led to the following major events:

- The crisis of 2001, when irrigation for farming and wildlife management was severely curtailed, drying up 170,000 acres of farmland and two National Wildlife Refuges.
- In 2002, a combination of low flows, high air and water temperatures, a large salmon run that entered the River early in the season, and disease that contributed to a record die-off of adult fish.
- Three years of low returns of adult Klamath River Chinook salmon (2004, 2005 and 2006).
- Two parasites killing possibly half or more of the juvenile salmon before they reach the ocean.

Federal agencies have taken significant action over the past several years to improve conditions. My colleagues from the Interior Department can speak to their actions. NMFS' efforts include:

1. New Fish Passage in the Klamath Basin. NMFS has prescribed, pursuant to its Federal Power Act authorities, fishways for fish passage at four dams on the Klamath River. The passage will provide access to hundreds of miles of river that have been blocked for nearly a century. NMFS is also participating in alternative settlement negotiations with PacifiCorp and a diverse group of other interested parties. As part of these discussions parties are seeking a comprehensive solution to water, fish, power generation, agriculture, and wildlife issues in the Klamath basin as a whole.
2. Pacific Coast Salmon Recovery Fund (PCSRF). NMFS has provided over $20.0 M since 2000 to the State of California and Indian tribes to restore salmon and their habitat throughout the Klamath River basin.
3. Klamath River Coho Recovery Plan. NMFS recently completed a Klamath River Coho recovery plan that was required by the new Magnuson Act reauthorization. The Coho Plan relies heavily on the State of California's coho re-

covery plan and integrates the findings from many Klamath River watershed groups and coalitions established throughout the basin to improve habitat conditions for fish and coho salmon. NMFS is also actively developing an ESA recovery plan for Southern Oregon/Northern California coho (which includes Klamath River coho).

I will now focus more generally on our efforts to ensure that the best available scientific information guides our decisions and activities related to the ESA. The foundation of the ESA is its reliance on the use of the best available scientific data in making sound decisions regarding the protection of species. The ESA requires federal agencies to use the best scientific data available (1) in making decisions to list species as threatened or endangered, (2) in designating critical habitat, and (3) during interagency consultations.

To ensure that the best scientific data are relied upon in making decisions under the ESA, NMFS and the U.S. Fish and Wildlife Service (the Services) issued a joint policy in 1994 guiding the use of best available scientific and commercial data. That policy requires the Services' biologists to evaluate all scientific and other information available that will be used to support listing actions, develop or implement recovery plans, prepare biological opinions, and other ESA decisions. The Services also routinely seek peer review of their listing decisions and draft recovery plans.

In addition, the Services published a joint Interagency Consultation Handbook in 1998. The handbook instructs biologists that are conducting an interagency consultation under Section 7 of the ESA to use the best available scientific and commercial data to make their findings. When conducting interagency consultations, the Services' biologists are often faced with a lack of information or uncertainty in the information that is available. In such circumstances, the Services must apply their best professional judgment regarding the anticipated effects of the action under consultation. In so doing, NMFS applies the precautionary principle to address areas of uncertainty so that risks are viewed cautiously in favor of the species and their designated critical habitat but does so in a balanced way that attempts to minimize disruptions to the action under review.

U.S. Department of Commerce Inspector General Reports on the Interagency Consultation Process

In July 2005, the U.S. Department of Commerce Office of the Inspector General (OIG) issued a report entitled, The NMFS Review Process for the California Central Valley and State Water Projects' Biological Opinion Deviated from the Region's Normal Practice (STL-17242-5-0001/July 2005). The report concluded that NMFS deviated from its procedures for conducting interagency consultation pursuant to the ESA in developing its biological opinion on the Long-Term Central Valley and State Water Project Operations Criteria and Plan (OCAP). To address those deficiencies, the report contained several recommendations, including a review of our policies and procedures for conducting interagency Section 7 consultations, ensuring that those policies and procedures are followed, and conducting peer review on the OCAP biological opinion.

In response to these recommendations, I withdrew and consolidated the agency's Section 7 delegations of authority. On December 15, 2005, I issued a new Delegation of Authority for the conduct of consultations under Section 7 of the ESA and a Section 7 Improvement Plan.

NMFS' Delegation of Authority to Conduct Section 7 Consultations

The Delegation of Authority created several new requirements to ensure Section 7 policies and procedures are being followed. Specifically, it required: (1) each NMFS Regional Office and the Headquarters Office of Protected Resources (which coordinates our ESA implementation efforts nationally) develop a quality assurance plan by March 16, 2006, (2) all section 7 determinations be reviewed and approved by the NOAA Office of General Counsel, unless NOAA General Counsel waives its review in writing, (3) there be a National Section 7 coordinator and regional Section 7 coordinators to advise pertinent staff and managers on Section 7 issues and provide training, (4) tracking of all section 7 consultations in a national database; and, (5) maintaining proper records for all consultations.

Section 7 Improvement Plan

Concurrent with the issuance of the 2005 Delegation of Authority, NMFS issued a Section 7 Improvement Plan designed to improve the quality of the agency's Section 7 consultations. That plan required the development of up-to-date standard guidance for conducting section 7 consultations, enhanced training requirements for staff conducting consultations, and conducting an annual review of consultation documents prepared by the Regional Offices to ensure that consultation documents comply with the requirements of the Delegation of Authority.

Peer Review of the OCAP Biological Opinion

Also in response to the OIG's recommendations, NMFS sought peer review on its OCAP Biological Opinion. NMFS asked the CalFed Bay-Delta Authority Science Program (CBDA) and the Center for Independent Experts (CIE) each to conduct independent peer reviews to evaluate whether the scientific information used in the biological opinion was the best available. The peer review reports raised multiple and complex issues that merited evaluation in the context of future improvements to NMFS' Section 7 program and the OCAP biological opinion.

In April 2006, the Bureau of Reclamation (BOR) re-initiated Section 7 consultation on the 2004 OCAP biological opinion. The NMFS Southwest Region and BOR are working together to develop a strategy to address the scientific recommendations. Consultation with the BOR is ongoing. In July 2007 the BOR indicated its intent to transmit a final biological assessment to NMFS and FWS by the end of calendar year 2007. A firm date for a new biological opinion has not been scheduled, but NMFS expects to complete a new biological opinion during calendar year 2008.

Conclusion

NMFS and its federal partners have been working side by side with the stakeholders in the Klamath basin to find achievable long-term solutions to the ecological problems we face. However, we cannot get there by pitting one set of stakeholders against another.

Furthermore, NMFS has taken and will continue to take significant steps to restore important fishery resources in the Klamath basin and in the Central Valley. We continue to do all that we can to ensure the quality and integrity of our ESA programs. Our decisions are guided by the best available science and in instances where the science is not definitive and policy discretion is required, we rely on the experience and judgment of our senior career professionals to inform the decision making process. I believe Congress can and should be confident in the NMFS' ability to manage the resources entrusted to it. Thank you for this opportunity and I will be happy to take any of your questions.

The CHAIRMAN. [Presiding.] Thank you, gentlemen, for your testimony. Let me begin with you, Director Hall, and thank you for your testimony. It does provide the Committee assurances about your commitment to sound science and ethics, and we appreciate that as we do from each of the panelists. Much has been made by you and the others of the new policy maintaining integrity in our scientific decisionmaking process.

You put this in place in February 2006 to delineate a clear separation of the responsibilities between the review of documents to ensure conformance with established policy and the gathering and analysis of science. According to your own memo, this policy was developed after you examined how ESA packages were reviewed in D.C., both in the Fish and Wildlife Service and by Julie MacDonald, and you became troubled by the apparent lack of clarity in the division of responsibilities. Is that all accurate?

Mr. HALL. Yes, sir.

The CHAIRMAN. OK. Is it not true that you personally met with Julie MacDonald and others on February 7, 2006, to discuss the new policy and to make sure everybody was on the same page?

Mr. HALL. Yes, sir.

The CHAIRMAN. Then that being the case, why is it that three of the eight decisions made by Julie MacDonald that the Fish and Wildlife Service is now being forced to reassess because questions had been raised about the integrity of the science were made after, after the announcement of your new policy and your personal meeting with her and others to clarify the policy?

Mr. HALL. Thank you, Mr. Chairman. It is correct that three of the packages that we are going to review are post the new policy and how we will operate. The difference between those and other

packages is that the Director of the Fish and Wildlife Service has delegated the authority to sign all listing/delisting packages but the Assistant Secretary for Fish, Wildlife and Parks signs the packages for critical habitat determinations.

Those three were on there because our Regional Directors believed that there was an inappropriate application of the policy side. Not necessarily the science side or that the science side was not strong enough to support the policy side, and as I said in my opening comments, I rejected no package that a Regional Director wanted to send forward. So I included those.

We did have concerns about each of those packages. The Assistant Secretary's office though made the final policy decision on those three packages.

The CHAIRMAN. So it would appear then that Ms. MacDonald disregarded the new policy?

Mr. HALL. The Assistant Secretary for Fish, Wildlife and Parks actually signs the packages but I think it is fair to say that she would have interpreted it that that was in the policy side of section 4[b][2] or section 3[5][a] exclusions and felt that it was not in the science side and made those recommendations to the Assistant Secretary.

The CHAIRMAN. So you do not think she in any way thought the new policies did not affect her?

Mr. HALL. I think she knew from the time that it happened because I had further discussions along the way with her that her comments, editing of science was not going to be accepted but I think that in her mind she was interpreting that this was a policy type decision that she could make on those three packages because they were decisions that the law delegates or assigns to the Secretary.

Section 4[b][2] is where economics or other factors may outweigh the benefits of designating critical habitat, and section 3[5][a] is where adequate conservation measures may already be in place the Secretary can determine that critical habitat is not necessary. Those packages and the reasons for their reelevation was based on that.

The CHAIRMAN. So if this happens again in the future, how is it going to be handled?

Mr. HALL. We will continue to work on the exact interpretations of those policies and how you implement those decisions, and we are working on a lot of different policy approaches. Whether they come out in the form of proposed regulations or whether they come out in the form of policy proposals, we are working on all of those fronts.

The CHAIRMAN. OK. Have other staff been briefed on the policy?

Mr. HALL. Other staff? I am not sure who you mean.

The CHAIRMAN. Other——

Mr. HALL. You mean other folks in the Assistant Secretary's office?

The CHAIRMAN. Yes.

Mr. HALL. That may have come on board?

The CHAIRMAN. Right.

Mr. HALL. Yes. As a matter of fact, we have two brand new Deputy Assistant Secretaries that they just showed up, and I will sit down and visit with them on it the same way.

The CHAIRMAN. You have done that?

Mr. HALL. No. I will. They just showed up yesterday. I think yesterday. So I will sit down with them as well.

The CHAIRMAN. OK.

Mr. HALL. Hopefully I do not anticipate any others like that happening.

The CHAIRMAN. OK. Thank you. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. Mr. Hall or Mr. Johnson, a letter from Julie MacDonald to the Inspector General's office was referred to earlier in the hearing, and I am told that Secretary Kempthorne has received a letter as well that a response was sent back. Are you aware of this?

Mr. JOHNSON. No, sir.

Mr. HALL. We are not included in those kinds of decisions. Her response goes to the department, and we are not privy to those.

Mr. CANNON. Can you ask the Secretary to submit that to the Committee?

Mr. HALL. I certainly can, sir.

Mr. CANNON. Thank you. I appreciate that. Now for Mr. Hall or Mr. Hogarth, the title of today's hearing attempts to create the impression that political influence in management decisions is something new—hard be it by me to suggest that—and has only occurred during the Bush Administration. In your experience, are attempts to influence resource managers on management decisions something new or different?

Mr. HALL. Go ahead and I will follow.

Mr. HOGARTH. I think the influence on resource managers comes from lots of different levels. As far as political influence from the Administration, I have had zero since I have been here. So I have not seen any. I have had discussions with members of the Hill. I have had discussions with members of the fishing industry. I have had discussions with most people who are regulated by my agencies but as far as being pressure by the Administration, I have had zero and the delegations have been delegated to me from the Secretary.

Mr. CANNON. And Mr. Hall?

Mr. HALL. I think that that is what I was alluding to in my earlier comments about there is a role for policy and there is a role for science. I remember schedule C appointees being actively involved with me when I was working the northern spotted owl recovery plan, and then into the FEMAT process in working Central Valley Project Improvement Act and the Bay Delta, southern California for HCPs and other things. The involvement is nothing new. Every Administration——

Mr. CANNON. And Congressmen certainly do it.

Mr. HALL. And Congressmen do it as well.

Mr. CANNON. And is there anything improper about that?

Mr. HALL. No, sir. As long as the line is not crossed, there is nothing improper.

Mr. CANNON. Thank you. Let me go to this just because time is limited. With the approximately 500 species listed under the Clinton Administration, how many were the result—this is for Dr. Hall—how many were the result of court ordered decisions, citizen suits or other outside pressure?

Mr. HALL. Well I will start with 414 of them because that was the Fund for Animals court settlement, and I happen to know that number because 314 of them landed in my lap in Portland.

Mr. CANNON. So 414 out of 500 were lawsuit?

Mr. HALL. Four hundred and fourteen listing decisions were given to us through the Fund for Animals court suit. Any other court suits I really cannot recall. There were some plant settlements. There were some other things but I cannot recall all of them.

Mr. CANNON. When you say settlements, those were settlements as a result of litigation?

Mr. HALL. Yes, sir.

Mr. CANNON. So like how many purely scientific decisions were initiated in the Clinton Administration that were not forced by lawsuits?

Mr. HALL. You know I am not sure I can remember when the last time was we were able to actually have the Fish and Wildlife Service decide on what we were going to list.

Mr. CANNON. Wait a minute. You are joking, right?

Mr. HALL. No, sir. I wish I were. When we got that Fund for Animals court suit, it took us three years to go through those 414. Shortly after that, you may recall that we had a moratorium on listing that was passed in Congress. That put us further behind the eight ball, and then as we came back Director, at the time, Jamie Clark, actually had to formulate a tiered process to answer the courts.

Mr. CANNON. So the short of this is the Clinton Administration was not some knight on a white horse with shining armor that protected all these species. They reacted to court orders?

Mr. HALL. Well you know I do not want to knight in shining armor or villain either one.

Mr. CANNON. That is my characterization. You do not have to——

Mr. HALL. We all——

Mr. CANNON. Pardon me. Let me just follow up with Dr. Hogarth for a moment. Do you remember there being any political influence brought to bear when the Federal government was close to being shut down over the Steller sea lion protection measures, and was the negotiation over these measures taken as high as the White House, that is the Clinton White House, Chief of Staff?

Mr. HOGARTH. I was new in the game but I will tell you I was sitting in the front office and there was a great deal of pressure from all over on Steller sea lions because it was shutting down one of the major fisheries in the country in Alaska, and it was holding up the budget for the country but no, that did not affect the decision that was made on the listing of Stellers or the impact on fishermen, but it was a major issue that created quite a bit of controversy.

Mr. CANNON. And lots of political influence?

Mr. HOGARTH. A lot of political influence. Yes, sir.

Mr. CANNON. Mr. Chairman, I see that my time has expired, and without any kind of political influence here, I am pleased to yield back.

The CHAIRMAN. The gentleman from New Jersey, Mr. Holt.

Mr. HOLT. I will be very brief because we have a vote underway on the Floor. I understand, Mr. Hall, that when various decisions were listed as needing review because Ms. MacDonald may have had improper involvement in them, along the lines of interfering with the science and this as a scientist disturbs me a great deal—I spent a lot of time in this Congress trying to stand up for integrity in science—there were some items removed from the list including bull trout.

Now, is it not true that Ms. MacDonald actually reduced the proposed critical habitat designation from about 300 miles to about 50 miles or something of that sort?

Mr. HALL. Yes, sir, that is correct.

Mr. HOLT. And you call that policy, not science?

Mr. HALL. Because it was 4[b][2] reductions, and that was the Regional Director's conclusion.

Mr. HOLT. So that was not inappropriate use of science. It was just a policy decision?

Mr. HALL. The science question comes at the end of any 4[b][2] or 3[5][a] exclusion in saying, will the nondesignation lead to the extinction of the species, and the finding by the biologist was it would not lead to the extinction of the species.

Mr. HOLT. The mindset here, the degree of brainwashing or whatever it is, is astounding to me. That is not science? That is what biologists do. They determine habitat you know numerically, and here you were already alerted to the fact that there was perhaps perversion of the science, and you carry it even farther. I am astounded. Thank you, Mr. Chairman.

Mr. CANNON. Would the gentleman yield?

Mr. HOLT. I do not have any——

Mr. CANNON. Would the gentleman yield?

Mr. HOLT. Yes.

Mr. CANNON. I am just wondering are you suggesting that biological science is like mathematics? You can be absolute in the numbers of the acres of habitat and the amount of water and the diversity of species or is this something that is a little softer than that in your mind?

Mr. HOLT. Scientists live much more comfortably with uncertainty than most people do but it does not mean just because there is a range of uncertainty in scientific work it does not mean all bets are off, and this strikes me as clearly in the province of science. It may be that the scientific experts are wrong. It may be that there is a little fuzziness in their numbers. That is true. But this is clearly the province of science. This is not a policy question.

Mr. CANNON. Would the gentleman yield again?

Mr. HOLT. Yes.

Mr. CANNON. As I recall, Secretary Babbitt under the Clinton Administration the scientists recommended 23 million acres to preserve two birds in Texas, and that was massively reduced by Sec-

retary Babbitt. Is that an interference with science in the gentleman's view of the world?

Mr. HOLT. I am not familiar with that.

Mr. CANNON. I yield back to the gentleman.

The CHAIRMAN. The Chair will announce that we do have a series of eight votes on the Floor of the House. The Chair will recognize the gentlelady from Guam, Ms. Bordallo, for asking questions of the panel, and then not excuse the panel as there are other members that still have questions they would like to ask when we come back from the roll call voting on the Floor. The gentlelady from Guam is recognized, Ms. Bordallo.

Ms. BORDALLO. Thank you. Thank you, Mr. Chairman. I have some questions for Dr. Hogarth. Doctor, the National Marine Fisheries Service has spent the past three years developing regulations to protect the critically endangered wright whale from ship strikes, one of the greatest known causes of death of whales from human activities according to your agency, is that correct?

Mr. HOGARTH. Yes, Madame.

Ms. BORDALLO. Yet despite extended public comment periods on the rule, the rejection by NOAA Fisheries of emergency measures that were recommended by both the Marine Mammal Commission and a group of 16 scientific experts and your assurance to the District Court of the District of Columbia that the final rules would be released in June, the rule still has not been released. So could you please comment on the current status of this final rule? Why has the rule not yet been release, and what is the cause for the delay?

Mr. HOGARTH. In producing the rule we went through a very major process of approximately five years and a lot of consultations. The rule at the present time is in final review, and it is at the Office of OMB, I think most people know, and it is now being looked at as for its final approval. We do expect to have a decision hopefully by the end of this week or next week. We do feel like it is critical to protect wright whales. It is one of the most endangered whales that we now deal with, and so the agency is hopeful that this rule will be released quickly. Quicker than it has been.

Ms. BORDALLO. Well good. That is good news. Dr. Hogarth, further complicating matters it appears that the objections to the rule by the World Shipping Council have garnered the attention of personnel at the White House and the staff of the Council of Economic Advisors, a politically appointed council charged with providing the President with economic advice. The Council of Economic Advisors is reviewing and questioning the scientific data and analysis used to devise and support the rule.

Can you please comment on the role of the personnel at the White House, and in particular the Council of Economic Advisors in reviewing and analyzing rules of NOAA Fisheries and their role in analyzing the scientific data that underlies your agency's actions? Is this their expertise? And can you please comment specifically with respect to the wright whale strike rule that is pending as well as past practices? How often would you say this situation we find ourselves in with respect to the wright whale rule occur?

Mr. HOGARTH. Well I think in this instance—I have been here approximately six years—and this is the first time we have had

some disagreements with the Office of OMB, who reviews all the rules within that process. We have been able to work them out.

This rule has some significance both to wright whales and potentially shipping lanes and economics. We feel like as science has reviewed that. Economics has reviewed it, and it has been elevated, and it is part of the process that we go through is to elevate when you cannot reach agreement, and it is in that stage of elevation, and we expect it to be resolved this week or next week as I said.

Ms. BORDALLO. In your opinion, Doctor, I just want to go over that last question again. Do you know why the Council of Economic Advisors is involved? I mean this does not seem to be their expertise. So do you have any idea why they are involved in this process?

Mr. HOGARTH. I think, yes, my understanding is that there is some question about the economics that the agency may have used in our analysis, and so when the OMB looks at these rules they look at the economics. Our opinion is when you look at an Endangered Species Act, I think the Act is very clear that the economics is not a factor. The science should be the overruling factor.

I feel confident, very confident that the science backing this rule will be held up but I think the process that we go through for review, I do not disagree with the processing. It is open to transparent debate on a rule of this significance, and that is the way it is, and I am confident that our science will stand up when it is over.

Ms. BORDALLO. I see. How do you personally feel about this Council of Economic Advisors being involved? I would like to get an answer on that.

Mr. HOGARTH. I think, as I said, I think the science should be the overriding factor.

Ms. BORDALLO. That is right.

Mr. HOGARTH. And I am confident in the science but I think there is some question that some of the reviewers further up beyond me had with the science but I stand behind the science. I will stay behind the science, and in talking to the others who have been elevated, the Department of Commerce, NOAA supports us, and I think when it comes to an issue that you cannot resolve, it is up to the Office of Council of Environmental Policy gets involved because it has been elevated, and that is the way it is. I elevated the decision, and I am waiting for a decision.

Ms. BORDALLO. Yes. So Doctor, in your opinion are they asking scientific questions or——

Mr. HOGARTH. I think, yes, Madame. I think so.

Ms. BORDALLO. Or are they just speaking on the economic side of it, and who in the council has this expertise?

Mr. HOGARTH. Well I am not aware of all the people that get involved up above me, and you know when it gets to that level because like I say it is part of the review process when it has been elevated. We feel like we have had an opportunity. We feel like we defended the science. I stand behind the science. I stand behind the economics that we understand, but regardless it should be based on the science because this is an Endangered Species Act question, and wright whales are one of the most endangered stocks we deal with, around 300 or less, and so we have to make a tough decision.

Ms. BORDALLO. Exactly, and I am glad to hear of your decision on that that this should be a scientific process rather than anything else. My last question, are you aware of whether the Council of Economic Advisors staff or other personnel at the White House have any expertise to analyze data and science developed and compiled by NOAA Fisheries over many years to support the rule, and what qualifies academic economists and economic statisticians to question NOAA Fisheries science? It is basically the same question but I just want you to comment on that.

Mr. HOGARTH. Well there is a science office in the White House, and I would rather personally I think they do have some expertise in some fiscal analysis, and they are looking at the rigor of our fiscal analysis.

Ms. BORDALLO. Doctor, those experts you say do they sit on the Economic Council or are they just in the White House?

Mr. HOGARTH. I do not know. That would be speculation on my part, and if you want me to try and find an answer, I can. I just know that there is a process, and we are working through that process.

Ms. BORDALLO. Could you for the Committee? I would like to ask you if you could find out, yes, who is working at this process and why and where their expertise lies. Thank you, Doctor. Now since I am the remaining member here on the Committee, and I am a territorial representative, so I do not vote on the bills on the Floor. I just vote for amendments. So I want you to know that is why I am here. I am not skipping votes.

So the Committee will now recess for the votes, and the Chairman has asked that you please stay because he will continue the rest of the Committee meeting. Committee is recessed.

[Whereupon, at 2:15 p.m. the Committee recessed, to reconvene at 3:40 p.m., the same day.]

Ms. BORDALLO. [Presiding.] The Committee on Natural Resources now reconvenes the hearing, and the Chair recognizes Mr. Lamborn, the gentleman from Colorado.

Mr. LAMBORN. Thank you, Madame Chairwoman, and Mr. Hall, I have a few questions for you. I represent a district where there are a lot of people concerned about the Preble's meadow jumping mouse listing or delisting or relisting in particular, and I just want to make sure that the Fish and Wildlife Service is aware of some of the studies at least that have taken place concerning this animal.

For instance, are you aware of the Jones study in 1981 that examined specimens from 123 collections totaling almost 10,000 specimens and concludes, "There is no evidence of any population of Zapus hudsonius," whatever it is, "being sufficiently isolated or distinct to warrant subspecific status?" Is that something that your service is aware of?

Mr. HALL. Well I would have to assume that our staff is aware of it but we will make sure.

Mr. LAMBORN. OK. Thank you.

Mr. HALL. Because our staff is working through that kind of analysis right now.

Mr. LAMBORN. OK. Thank you. And maybe the most recent and I think academically superior study is that of Crandall and Mar-

shall completed last year commissioned by the State of Wyoming, and they evaluated both King's and Ramey's work, two people on opposite sides of this issue, and they are internationally known population geneticists, Crandall and Marshall, and they evaluated the two studies that have been done, and they strongly support Ramey's findings, and they contradict King's findings. Are you aware of the Crandall study?

Mr. HALL. I am aware of it by name, and so I know our staff has that one but I could not tell you. I have not read it myself.

Mr. LAMBORN. Because I ask some of these questions because you have on your website the Fish and Wildlife Service Preble's web page. All of the information it looks like that goes for finding that as a separate subspecies but none of these works that show it as not a subspecies which to me indicates the possibility of bias.

Mr. HALL. Well that certainly is not our intent, and I will get with our Regional Director in Denver, and we will make sure that the website reflects whatever we have.

Mr. LAMBORN. OK. But not just the website but the thinking and the research because we are very concerned about that. Also are you aware that the original scientist who found that it was a separate subspecies, Crutch, back in 1953 he had used a total of three specimens. Three skins or four skulls. And so it is based on very scanty evidence, and then later recently he has recanted that work, and he says it is not a separate subspecies. Are you aware of that?

Mr. HALL. I have in discussions heard that said but the question that we need to go through is if he truly believes that, then we need to have it go through that same sort of peer review type of process with the journals that accepted his first documentation. I think in the scientific world until something is overturned, which is what is being discussed right now between for example the Ramey and King work and other works, it really needs to go through that same process as when it did in the beginning when it was put on and classified. This is the taxonomic field, and we need taxonomists to help us understand that.

Mr. LAMBORN. And also are you aware that after the first listing of the mouse there have apparently been a lot more population found? When it was first listed, there were only 29 sites. Now there are over 132 sites where the mouse has been found, a 400 percent increase. So the original conclusion by the Fish and Wildlife Service that there was limited population and the possibility of loss to me maybe it should be revised. Are you aware of the recent indication that there are a lot more of these mice than originally thought?

Mr. HALL. I am aware that there are more. I could not give you the numbers. More populations have been evaluated. I cannot tell you how many of those were assumed to be the Preble's subspecies hudsonius or whether or not it was the other one which is causing the conflict. So I am not exactly sure how many of those populations fit in whatever category but I am aware that more populations have been found.

Mr. LAMBORN. And also it is now in the record Rob Roy Ramey's testimony that he would have presented had he been allowed to be a witness here today and also the letter from Senator Wayne Allard of Colorado, those two documents now are part of the record,

and I hope that your people study those documents, and Mr. Allard raises some very troubling questions over the whole process that has taken place.

You know there was some talk earlier by other members of this committee on people that in the Fish and Wildlife Service in the past that recently resigned that maybe used bad science or something like this. When I read these documents, I am troubled by the bad science that looks like to me was behind the Preble's meadow jumping mouse listing in the first place, and then the refusal to delist when there has been a lot of information showing that it is not endangered, that there is more of these than we thought, and that it is not even a subspecies in the first place.

And I just really hope that your agency looks at this. It has tremendous economic impact on a high growth area like my district in southern Colorado, and it even affects public safety. And there was a highway project that—I will not go into that. But there have been slowdowns on needed public safety programs because of this creature that were slowed down and fatal accidents resulted.

And so there is money involved. There is public safety involved, and I just hope that your agency really does look at these things that support the non listing of this animal. Do you agree that these things should be looked at?

Mr. HALL. Absolutely. Congressman, what I have asked the region to do is to look at everything. There has been so much controversy, sides chosen, you know those that think it is separate, those that think it is not, and so my request and my instructions to the region are we want you to look at everything. Whatever the truth is that we can ascertain, that is what we want to find out.

Mr. LAMBORN. OK. Well I appreciate that answer, and you will look at the Rob Roy Ramey testimony?

Mr. HALL. We will look at everything that has been submitted to us.

Mr. LAMBORN. You will look at Senator Allard's letter dated July 30, yesterday, to send it to Secretary Kempthorne?

Mr. HALL. Yes, sir. Everything that comes into us we go ahead and put it in the record, and it is looked at.

Mr. LAMBORN. OK.

Mr. HALL. Part of the process.

Mr. LAMBORN. Thank you very much. Thank you, Madame Chairwoman. I yield back my time.

Ms. BORDALLO. I thank the gentleman from Colorado. I have a question for Mr. Dale Hall. We understand that Julie MacDonald may have contracted with Bob Ramey to do the work on the Preble's jumping mouse. Did the department pay for Dr. Ramey's work or did Ms. MacDonald pay Dr. Ramey with her own money?

Mr. HALL. Dr. Ramey was contracted by Deputy Assistant Secretary MacDonald to work with her on scientific issues. I cannot honestly tell you that I know whether or not that funding to assist actually paid for his work or whether or not she was relying on him for other advice but it is correct that he was on the payroll of the Assistant Secretary's office.

Ms. BORDALLO. So you are not so sure whether this was from her own money or from the department's money?

Mr. HALL. No, Madame, I am not.

Ms. BORDALLO. What about your assistants? Do they?

Mr. HALL. This would have been at the Washington level. The way the Assistant Secretary's office is funded is through the capital fund. Some funds go into the Assistant Secretary's office and that is their operating budget, and they operate however they feel appropriate.

Ms. BORDALLO. All right. Thank you. The Chair now recognizes Ms. Capps.

Ms. CAPPS. Thank you, Madame Chairwoman, and I know it has been a very long day for many of you but I want to welcome this panel, and I would like to have a conversation if I could with Director Dale Hall. Based on the agreement of Fish and Wildlife Service to revisit several decisions and the knowledge now or it seems clear at least that that revisiting might lead a need to investigate further, some questions for example about Fish and Wildlife Service next steps in a review of the royal toad and the red-legged frog critical habitat designations.

In particular my question is about wanting to know if the Fish and Wildlife Service expects that there will be a new rulemaking proceedings for these two species?

Mr. HALL. Thank you, Madame. We will reevaluate. I have instructed each region that submitted their packages that they think should be reevaluated I have instructed them to go ahead and as soon as they can—we are at the end of one fiscal year and so we will have to look at funding for the next—to start looking at those from an evaluation standpoint. So I would expect something, whatever their finding is, to come out in the Federal Register at the end point.

Some of them are 90-day findings. Some of them are revisiting critical habitats. It depends on the packages but the royal toad and the red-legged frog I will ask Steve Thompson to give you very specifics on that one.

Ms. CAPPS. Pardon? OK.

Mr. STEVE THOMPSON. We will get those in line. We will be working on them, and they will walk through the process again, and we are concerned at this point that there may have been you know inappropriate influence, scientific influence there. So we are going to take a hard look at those, and we will run them back through the process, and it may be as simple as an appendage to the critical habitat.

Ms. CAPPS. The part I believe that I am interested in is when you do this kind of evaluation, I wondered if you would be attempting to limit any kind of rulemaking or decisionmaking to specific provisions that are impacted by this particular individual, Julie MacDonald's interference or would you issue a new proposal for the entire critical habitat designation. The latter is what I am trying to lead to because it would seem to me—and I know you want to take this step-by-step—but this hearing is about going down the next steps with you.

It would be difficult to me to try to truly pinpoint the full extent of one person, Julie McDonald's influence on these rulemakings. So you know I think if it is reopened as a response to a particular set of actions that had further reaching effect than was originally thought, that then the entire habitat designation it would seem to

me would warrant a revisiting, and rulemaking that would be more expansive rather than more limiting because of the impact on these critical species. I would open it to anyone to respond.

Mr. STEVE THOMPSON. No. I think we would agree with you, and we are going to go back and take a hard look at those, and some of them on our two packages we do not know yet until we take a hard look but it may be a full blown review. It may be less than that but we will take the appropriate look at it and run all the way through it.

Ms. CAPPS. Well, Madame Chairwoman, I would hope that we would be a part of that. That we would enter into that conversation at the point of which some of those decisions are being made because I think they are so critical. For example and this by way of getting into a further discussions, Director Hall, you have stated that Fish and Wildlife will not review cases where Julie MacDonald's role was limited to changing policy.

I have some concerns with this decision because to my knowledge Julie MacDonald is not an economist, yet in many cases she changed the way economic analysis was conducted for evaluating critical habitat. In other words, the whole underlying premise and foundation from which further decisionmaking led was sort of altered in the beginning. To me it is inappropriate whether or not to call that a policy. It has such a wide ranging impact.

My question then: Why should not Fish and Wildlife revisit all of these policies by Ms. MacDonald? Would that not give us and give the public also confidence that the term policy is not used to be hiding certain political decisions?

Mr. HALL. I think your question is a very legitimate one, and we had a hard time with that ourselves in trying to decide what we were going to go back and look at and earlier I had testified about section 4[b][2], and in section 4 of the law, subparagraph [b][2], it states that the Secretary can modify, overrule if you will, or exclude critical habitat based on economics or other factors, and that was why I said that really is a legal policy interpretation. It is not really a scientific question because the science is on the table.

We have said what we think the science should be for critical habitat, and that clause allows the Secretary or designee to look at that. When it comes though to questions of where is the economic expertise or where is the legal expertise, the Solicitors do the review from the legal standpoint to see if it is appropriate but economics we do not have the expertise to challenge the economics. That is why we contract out all of our economic analyses for that.

So I am not sure that the Fish and Wildlife Service biologist is capable of talking about economic tradeoffs as the law calls for, and we do defer that to the Secretary's office or the Assistant Secretary's office.

Ms. CAPPS. I know, Madame Chairwoman, I have overstated my time but could I just follow up? I want to pinpoint back to my question, and you were right to say this is the 4[d] rule. My question then is this rule also being reviewed by the Service, the rule itself or is the review limited to just the critical habitat designation for the red-legged frog?

Mr. HALL. For the 4[b][2]?

Ms. CAPPS. Yes.

Mr. HALL. No, Madame. We are not reviewing that part.

Ms. CAPPS. The 4[d].

Mr. HALL. No, 4[b][2].

Ms. CAPPS. My question is about the special 4[d] rule.

Mr. HALL. The 4[d] rule?

Ms. CAPPS. Yes.

Mr. HALL. I am not aware of that part. Are you?

Mr. STEVE THOMPSON. Are you talking about the California red-legged frog?

Ms. CAPPS. Yes, and the royal toad.

Mr. STEVE THOMPSON. If we look at that package and we see that the science was different or influenced by the Deputy Assistant Secretary, then we would propose to redo the whole package.

Ms. CAPPS. Thank you, and I apologize for going over my time.

Mr. HALL. And I apologize for misunderstanding which section.

Ms. CAPPS. Well those little letters of the alphabet get mixed up. Thank you very much.

Ms. BORDALLO. Now that the apologies were all made, we will continue. Thank the gentlelady from California. I have a question, and I would like to welcome the Acting Ranking Member, the honorable gentlelady from Washington, Mrs. McMorris Rodgers. I have some questions here for Director Hall. It is my understanding that you did not provide Regional Directors a written directive explaining how they were to conduct a review of decisions made by Julie MacDonald, is that correct?

Mr. HALL. Yes, Madame. We did it by conference call so that I could get all of their input on what the right way to do it was.

Ms. BORDALLO. OK. Then you answered my next question then. How are we to be assured that all the Regional Directors received the same instructions?

Mr. HALL. They were all on the phone will me.

Ms. BORDALLO. All on the phone.

Mr. HALL. And I gave them all the opportunity to ask questions, and at the end I summarized OK, is this the way we are going to go about it? Everyone is going to do it the same way.

Ms. BORDALLO. You had them all together on conference. OK. In a memo dated May 22, 2007, Deputy Secretary Scarlett asked you to review all work products that were produced by the Service and reviewed by Mrs. MacDonald. Why did you choose to review only those decisions where Mrs. MacDonald may have influenced, the science, instead of leaving the determination up to the regions of all the work products?

Mr. HALL. OK. Let me restate what I think you asked to make sure that I can answer it the right way. You are asking me why I left it to the regions to determine those packages that may have been scientifically influenced?

Ms. BORDALLO. That is correct.

Mr. HALL. OK.

Ms. BORDALLO. That is correct.

Mr. HALL. I did it because they are the ones that put the first packages together. They are the ones that submit them to us, and they are the place where the science is formulated, and so they would be the best ones talking with their staffs, their leadership and with the field leadership to say, was this package altered in

the process to the point where the decision was different? I felt like they were the right ones to tell me that because they had the ownership of the packages to start with.

Ms. BORDALLO. Did they use different criteria?

Mr. HALL. As far as I know, everybody used the same criteria. We were looking for decisions that were modified, recognizing that the department at each level does have the legitimate role of legal and policy interpretation but the science should be left alone, and that is what I asked them to do.

Ms. BORDALLO. The other question I have is the Inspector General found that many of the attorneys in regional offices of the Interior Department refused to surname decision documents during Mrs. MacDonald's tenure because they believed that the documents were not legally sufficient. Have you asked the regional solicitors to compile a list of decisions made during Mrs. MacDonald's tenure that should be looked at again?

Mr. HALL. No, Madame. The Regional Solicitors work for the Solicitor of the Department of the Interior, and I would not have the authority nor the prerogative to ask them to do work like that but no, I did not.

Ms. BORDALLO. All right. I would like to ask the Ranking Member if you have any questions. All right. Then I will proceed on to the gentleman from Washington, Mr.——

Mr. WALDEN. Actually Oregon.

Ms. BORDALLO. Of Oregon.

Mr. WALDEN. But I take no offense to that. Washington was once part of Oregon.

Ms. BORDALLO. Next door.

Mr. WALDEN. And we gave it up. It has never been the same since. No. Madame Chair, I am going to waive, given the hour and all. I appreciate your courtesy to allow me to ask questions but I think we have heard great testimony from the panel and their responses to the questions. So I would yield.

Ms. BORDALLO. I thank the gentleman from Oregon. And now I would like to thank the panel members for I know it has been a long afternoon for all of you. I would like to thank Mr. Hall, Mr. Thompson, Mr. Johnson, Dr. Hogarth and Mr. Rod McInnis for your testimony. Thank you very much. And now the Chair would like to call on panel four to please come up to the table.

Mr. William M. Lewis, Jr., the former Chairman of the National Academies of Sciences Committee on Endangered and Threatened Fishes in the Klamath River Basin, and Mr. Mike Kelly, the former USFWS and NOAA Fisheries biologist. I wish to thank all of the panelists this afternoon, particularly panel three and four who had to wait so long. You know that we are back and forth on the Floor voting. This is the busiest time of the year for the U.S. Congress. So thank you very much for your patience, and we will proceed. We will go ahead with our first, Mr. William M. Lewis, Jr., and your testimony we would like to keep it within the five-minute limit. The rest of your testimony will be entered into the record.

STATEMENT OF WILLIAM M. LEWIS, JR., FORMER CHAIRMAN OF THE NATIONAL ACADEMIES OF SCIENCES' COMMITTEE ON ENDANGERED AND THREATENED FISHES IN THE KLAMATH RIVER BASIN

Mr. LEWIS. Thank you. My name is William Lewis. I am a faculty member at the University of Colorado in Boulder, Colorado, and from the latter part of 2001 until most of 2003 I was Chair of a Committee formed by the National Academy of Sciences to investigate the degree of scientific support for some decisions that had been made by the Federal government relevant to endangered species in the Klamath River Basin. The species in question are three. Two of them are endangered suckers listed Federally, and the third is a threatened population of coho salmon.

In the Basin the coho salmon action related to the Endangered Species Act is overseen by the National Marine Fisheries Service, and the suckers get the same protection oversight from the U.S. Fish and Wildlife Service. Also in the Klamath Basin is a large Federal water project called the Klamath Project, and it manages irrigation waters of the upper Klamath Basin for the benefit of about 220,000 acres of irrigated land in the upper basin. This has been going on for many decades.

In 2001, a crisis arose among the agencies because a tightening in the use of irrigation water by the Klamath Project through the USBR had reached a point at which it was threatening to cause a shutoff and did cause a shutoff of waters delivered to the irrigators. The USBR raised questions about the validity of these additional strengthening measures that were taken at the decision of the protection agencies, the ESA agencies, and the Department of the Interior at that point called in to the Academy to request a study from the outside to provide additional opinions on the strength of evidence that was behind these decisions, and that is how the committee was formed.

The committee was composed of 12 individuals of diverse backgrounds relevant to the subject at hand, and they were given a charge, and the charge as usual for Academy committees was restricted to matters of science and technology and was not to involve policy administration. As you know, the Academy performs this work routinely and was formed in 1863 by the U.S. Congress in order to provide advice to the government but not to be part of the government, and this was the work that was done by my committee.

The committee studied the documents. It had numerous public hearings and heard from constituents from government experts, from consultants, from the Tribes, and local people, and collected also the formal documents that had been prepared by the Federal government and studied those. It issued an interim report in 2002 and a final report in 2003.

The committee found the documents prepared by the Federal agencies—that is all three Federal agencies—to be very solid in the way they were prepared. Very credible, reflecting a lot of study and thought and correct use of data with one exception. The committee in examining the opinion that waters of the Klamath Project should be managed differently so as to be more conservative and provide more water for the fishes in the Basin to be in contradic-

tion to some of the evidence that had been collected by the agencies over the years of the 1990s.

In addition, however, the committee found that the recommendation of the USBR for future operations was flawed in that it assumed that it would be possible to operate the project in a way that was more liberal than had been in place over the previous 10 years, and there was no scientific basis for that request or that assertion. So the committee left I suppose the evaluation with the concept that continuing operating practices as prevailed in the 1990s could not be successfully challenged based on what was in these documents.

Now in addition, the committee went on to carry out a second part of its charge, and that was to evaluate the long-term needs of these fishes, and the committee found that the agencies had identified many problems other than the operations of the Klamath Project and identified them but that the action on these other issues had not been taken up vigorously because the attention of the agencies had been wrapped up in determinations about the operations of the Klamath Project.

The committee urged the Federal government to begin vigorously pursuing some of these problems including massive habitat degradation, blockage of fish migration pathways, introduction of very large numbers of nonthreatened, nonendangered fishes that might be competitive with the species under protection, loss of woody vegetation and stream sides and so on, and also urged that a much broader participation in the efforts to cause recovery of these species be encouraged by the Federal agencies through mobilization or encouragement of local efforts to work toward solutions of these problems.

The final report was published in 2004 by the National Academies and may have had an effect in at least broadening the work that has gone on in the Klamath Basin, bringing more attention to it and refocusing on a more realistic scope. That is the end of my testimony. I would be glad to take questions. Thank you.

[The prepared statement of Mr. Lewis follows:]

Statement of William Lewis, Professor of Biology, and Director, Center for Limnology, Cooperative Institute for Research in Environmental Sciences

My name is William Lewis. I am employed by the University of Colorado at Boulder, where I am Professor of Biology and Director of the Center for Limnology within the Cooperative Institute for Research in Environmental Sciences. My field of specialization is inland waters, including lakes, streams, rivers, and wetlands.

The National Research Council (NRC) is the operating arm of the National Academy of Sciences (NAS) and the National Academy of Engineering (NAE). The NRC forms and manages committees under policies and guidelines set by NAS. Between the 1970s and the present, I have been a member or chair of several NRC committees. Between 2002 and 2004, I was chair of the Committee on Endangered and Threatened Fishes in the Klamath River Basin ("Klamath Committee"). The work of the committee, as defined by its statement of task, was to review documents prepared by agencies of the federal government regarding effects of the U.S. Bureau of Reclamation's Klamath Project, which manages water for irrigation, on three fish species in the Klamath River Basin that are listed as threatened (coho salmon) or endangered (shortnose sucker, Lost River sucker) under the Endangered Species Act. The committee's study was sharply focused on the scientific basis of agency decisions through which the Endangered Species Act was being implemented in the Klamath Basin. The work of the committee is described in its final report, which was published by NAS in 2004.

The Klamath Committee considered the possibility, as proposed by the U.S. Fish and Wildlife Service and National Marine Fisheries Service, that new restrictions on operations of the USBR's Klamath Project could offer significant benefits both to the endangered suckers and threatened coho salmon. After studying valuable information collected by federal agencies and others, the committee concluded that stricter operating requirements for the Klamath Project, as proposed by the ESA implementation agencies (USFWS, NMFS), would be unlikely to benefit the ESA-listed species. This conclusion was reached by the committee on a scientific basis, without any consideration of economic or political factors, as directed by the committee's scope of work. The incidental effect of the conclusion, however, was to call into question a tightening of water management for the Klamath Project that would have caused significant and frequent shortfalls of water delivery to agricultural water users.

In considering documents prepared by the federal agencies and others, the committee also concluded that a proposal prepared by the USBR, if approved, would have left operations of the Klamath Project open to a wider range of water use than had been the case in the recent historical past. The committee noted that intensifying water management in this way could not be supported scientifically because more intensive water management had not been studied environmentally. Therefore, while the committee could not find reasons for new restrictions on water management, it also could not find a scientific basis for a greater latitude of water management than had been in place for the preceding decade.

Because the biological opinions issued by the ESA implementation agencies made reference to numerous factors other than water management that might be affecting the listed species, the committee considered all other possible causes for failure of the listed species to recover. For each of the species, the committee found compelling arguments for numerous kinds of remediation that could be effective in improving the likelihood of recovery for the species. Options identified by the committee include removal of small dams, restoration of cool water to tributaries, experimental elimination of heavy stocking of non-endangered species, restoration of streamside vegetation and woody debris, and numerous others. Some of these measures have been undertaken since the committee finished its work.

Circumstances leading to the creation of the Klamath Committee followed a pattern that is typical for NRC committees formed under direction of the NAS. Within the Klamath Basin, the U.S. Bureau of Reclamation is responsible for operating the Klamath Project for the benefit of private irrigators, and the U.S. Fish and Wildlife Service has the responsibility of implementing the requirements of the ESA for nonmigratory fish species. Both of these agencies are administered by the Department of the Interior. Over years of study and debate leading to increasing degrees of restriction on the USBR's water management practices for the benefit of endangered suckers, the two agencies had reached a critical point at which the USBR strenuously objected on technical and scientific grounds to further restrictions on its management of the Klamath Project. Furthermore, the National Marine Fisheries Service of the Commerce Department, which administers ESA requirements for anadromous migratory fishes, including coho salmon, was also calling for increased stringency of water management based on welfare of coho, again in opposition to the USBR's analysis of the probable benefits of increased restrictions. Thus, three agencies of the federal government were involved in a scientific and technical dispute with substantial potential consequences both for endangered species and for agricultural water use and its economic derivatives. Assistance in resolution of this problem by nonpolitical means is exactly the type of task for which the National Academy of Sciences, which is not a government agency, was created. The Academy has been a consistent source of independent analysis and review on scientific and technical matters of importance to the federal government for over a century. In other words, the formation of an NRC committee to examine the scientific and technical issues related to endangered fishes in the Klamath Basin was well justified and timely, with no detectable overtones of partisan political motivation.

Over the many decades that have elapsed since its formation by Congressional Charter in 1863, the National Academy has developed procedures insuring that the work of its committees will not be influenced politically or by any other means not related to an independent and factual examination of scientific and technical information. The safeguards are numerous and have proven highly effective. They include the following: 1) NAS does not accept a committee charge that directs the committee to reach specific conclusion or type of conclusion, 2) NAS populates its committees with individuals who come from varied backgrounds, have varied expertise relevant to the problem at hand, and have established national and international reputations as experts in their fields, 3) while the committee collects evidence and opinions in open meetings, it is insulated from external pressure during its delibera-

tions, 4) NRC committees are directed to prepare a report containing conclusions that can be approved by all committee members, and not just a majority of members, 5) NRC committee reports are reviewed anonymously by as many as 10-15 experts who give anonymous opinions that must be considered by the committee and either rebutted effectively or reflected in revisions of the report, 6) the report and revisions to NRC reports are overseen in detail by two officials representing the interest of the NAS in the integrity of the report, 7) final reports must be approved by the chair of the NAS Report Review Committee, 8) members of NRC committees formed by the NAS are not compensated, 9) committees are dissolved when their task is completed; they do not have lasting influence except through their final report, 10) committee members are rigorously screened for conflict of interest and bias.

During 2002, while the committee was conducting its work, the Klamath Basin was experiencing a severe drought, and in early fall there was a mass mortality of adult salmon at the mouth of the Klamath River. The federal agencies sponsoring the NRC Klamath study requested specifically that this incident of mortality be addressed by the committee as an addendum to its statement of task. Mass mortality of salmon at the mouth of the Klamath attracted much attention to the work of the Klamath Committee.

The mass mortality of 2002 involved the death of a conservatively estimated 32,897 salmon. Three hundred forty-four (1%) were coho; 32,553 (99%) were fall-run Chinook salmon out of a run of approximately 170,000 fall-run Chinook. Coho salmon in the Klamath are listed under the ESA, and the NMFS is charged to protect them from any unnatural mortality.

The immediate cause of death of the salmon was massive infection by bacterial and protozoan disease agents. These disease agents are common and cause mortality of fish that are stressed or crowded.

The salmon that died in 2002 were gathered in a dense mass at the mouth of the Klamath in preparation for group migration up the main stem of the Klamath. This is an annual phenomenon and would not be considered unusual. The salmon await favorable conditions for migration. A typical trigger for upstream migration is a cool pulse in flow, the natural cause of which would be precipitation in the lower part of the basin. Because the weather was extraordinarily dry, it appears that this pulse did not come, and the prolonged crowding of the salmon led to the mass mortality.

An important question considered by the committee and many others is whether management of water by the Klamath Project was responsible for withholding the pulse of flow that would have allowed the salmon to migrate. The NRC committee concluded that this is very unlikely. The Klamath Project is located over 150 miles upstream from the mouth, and water flowing through the Klamath Project accounts for only 10% of the total flow at the mouth; large tributaries entering the river below the Klamath Project contribute most of the flow at the mouth. Furthermore, the Klamath Project releases water that is warm because it comes from storage lakes rather than reaching the stream through groundwater or surface runoff. The committee concluded that a relatively small amount of warm water propagated over a distance of 150 miles would not have made a critical difference to the salmon that were staging for migration at the mouth of the river.

The committee also examined previous conditions and found that low flows similar to those of 2002 had occurred in several years within the period of record without any accompanying salmon mortality. The committee therefore concluded that mortality was the result of an unusual combination of conditions, probably including unusually low flow plus the absence of a cool pulse of flow that even a brief precipitation event might have provided.

In summary, formation of the Klamath Committee in 2002 followed a series of events that is typical for formation of NRC committees by the NAS: conflict over technical or scientific issues within agencies of the federal government leading to a need for opinions from an independent body, which often is the NAS. Once formed through the NRC by NAS, committees are managed so that their findings cannot be manipulated politically, nor would committee members continue to serve in the face of manipulation.

Ms. BORDALLO. I thank you, Mr. Lewis, and now the Chair recognizes our next speaker, Mr. Mike Kelly.

STATEMENT OF MIKE KELLY, FORMER USFWS AND NOAA FISHERIES BIOLOGIST

Mr. KELLY. My name is Mike Kelly. I am representing myself at my own expense at this hearing. I was a fishery biologist of the U.S. Fish and Wildlife Service from 1995 to 2000, and with the NOAA Fisheries from 2000 to 2004. My duties included analyzing Federal projects under section 7 of the Endangered Species Act to ensure protection of ESA listed salmon species. I would like to thank you for giving me this opportunity for which I have been waiting for about five years. So thank you for finally inviting me.

In this testimony I will describe my role as the technical lead biologist during the development of the 2002 NOAA Fisheries biological opinion which was found to violate the Endangered Species Act. I will discuss problems that I see with the National Research Council's interim report, and if I have enough time I will discuss some possible ideas for helping avoid future problems.

The courts found that the NMFS 2002 biological opinion for the 10-year Klamath Project operations plans was illegal on three separate points. In this part of my testimony I hope to clearly demonstrate to the committee that NMFS' final decision was no accident, and that someone at a higher level than the regional NMFS office was responsible for forcing the illegal action.

I will kind of start at the end by reading from the final court decision a couple of quotes here. "While the NMFS can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence. An agency does not avoid the likelihood of jeopardy to a listed species when it disregards the life cycle of the species in crafting the measures designed to protect it nor can the agency provide only partial protection for a species for several generations without any analysis of how doing so will affect the species. The biological opinion clearly presents specific quantitative target flows that the NMFS concluded were necessary to avoid jeopardy. The Federal defendants asked us to disregard their quantitative conclusions in favor of their assertions that the first eight years of the 10-year plan RPA, reasonable and prudent alternative, will avoid jeopardy."

"We conclude that the RPA is arbitrary and capricious because it fails to analyze the effects of 8 of 10 years of proposed action on the coho salmon, a species with a three-year life cycle." These reasons are specifically the reasons that I have brought up in my whistleblower disclosure.

In the winter of 2001, NMFS selected me to be the technical lead fisheries biologist for the upcoming consultation on the Klamath Project. The previous years' biological opinion found jeopardy to coho salmon which of course resulted in a lot of controversy. My immediate supervisor advised me early on that she had been informed that Vice President Cheney had been briefed on our consultation, but that is the only time that the Vice President was mentioned to me during the process. I was also aware that President Bush had declared that he would do everything he could to get the water to the farms, and I was keenly aware of all the controversy.

I realized the political pressure might be applied to my superiors but I naively believed that I was shielded from such pressure. I

thought that my analysis would, as is always required, be based on a logical analysis, essentially a more complicated version of one plus one equals two but as it turned out I was essentially asked to support a conclusion that made as much sense as one plus one equals three.

I was told that my draft biological opinion, my first draft, was reviewed by the Department of Justice and was deemed indefensible. I am going to skip ahead a little bit. I am running out of time but after we were told that the opinion was not defensible without any further explanation Mr. Jim Lecky came to our office to help us presumably put together a defensible biological opinion, and then there was a decision to allow proposed flows in April and May from the Iron Gate Dam out of the project where Mr. Lecky wrote a letter saying that there would be no adverse affect. It was not likely to adversely affect the coho salmon for the same action that we had already concluded would jeopardize the coho the previous year, and that we had in our analysis presently said was jeopardy which made no sense.

We had meetings to discuss this alternative which was not acceptable to Reclamation. In that meeting they presented us with a proposal that they would be responsible for 57 percent of whatever we said was necessary to avoid jeopardy, and that was never analyzed. That ended up being the reasonable and prudent alternative, and that was never analyzed in the final biological opinion.

I have much more, and I am glad that goes into the record but I have to stop speaking now. I will entertain any questions. Thank you.

[The prepared statement of Mr. Kelly follows:]

Statement of Mike Kelly, Former USFWS and NOAA Fisheries Biologist

My name is Mike Kelly. I am representing myself at my own expense in this hearing. I was a fishery biologist with the U.S. Fish and Wildlife Service (USFWS) from 1995 to 2000 and with NOAA Fisheries (NMFS) from 2000 to 2004. I am currently a private consultant specializing in the monitoring of construction projects to ensure permit compliance and avoidance of adverse impacts to aquatic resources. While with NMFS I worked in the Protected Resources Division as an Endangered Species Act (ESA) section 7 biologist. My duties included analyzing Federal projects under section 7 of the ESA to ensure protection of ESA-listed salmon species.

In this testimony, I will:

1) describe my role as the "technical lead" biologist during development of the 2002 NMFS Biological Opinion (BiOp) for the Bureau of Reclamation's 10-year Klamath Operations Plan, which was found to violate the ESA;
2) discuss problems with the National Research Council's (NRC) interim report, which reviewed the 2001NMFS and USFWS BiOps, and demonstrate that NRC itself admitted in their final report that it did not apply the standard that the law required;
3) discuss possible ways to avoid future abuse of ESA decision making processes, and to strengthen the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Management and Conservation Act.

Development of the 2002 Biological Opinion for the 10-year Klamath Project Operations plan

The U.S. District Court for the Northern District of California (Case #C-02-2006) found the NMFS 2002 BiOp for the 10-year Klamath Project Operations Plan to be illegal on three separate points. In this part of my testimony I hope to clearly demonstrate to the Committee that NMFS' final decision was no accident, and that someone at a higher level than the regional NMFS office was responsible for forcing the illegal action.

To make it more obvious to the Committee where this long story is headed, I provide these excerpts from the final court decision, which address one of the three illegal aspects of the BiOp:

> *(w)hile the [NMFS] can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on no evidence. An agency does not avoid the likelihood of jeopardy to a listed species when it disregards the life cycle of the species in crafting the measures designed to protect it. Nor can the agency provide only partial protection for a species for several generations without any analysis of how doing so will affect the species.*
>
> *Phase III clearly presents "specific quantitative target flows" that the NMFS concluded were necessary to avoid jeopardy. The federal defendants ask us to disregard their quantitative conclusions in favor of their assertions that the first eight years of the RPA will avoid jeopardy.*
>
> *We conclude that the RPA is arbitrary and capricious because it fails to analyze the effects of eight of ten years of the proposed action on the SONCC coho, a species that has a three-year life cycle.*

In the winter of 2001 NMFS selected me to be the "technical lead" fisheries biologist for the upcoming (2002) ESA section 7 consultation for Klamath Project Operations. The previous year's (2001) BiOp found "jeopardy" to the Southern Oregon/Northern California Coasts (SONCC) coho salmon, which resulted in dramatically reduced irrigation deliveries to farms in the Klamath Project, and much controversy. So we began to prepare early for an anticipated similar proposal from Reclamation.

My immediate supervisor advised me that she had been informed that Vice President Cheney had been briefed on our consultation, apparently with the intent of impressing upon me the importance of this consultation. That is the only time that the Vice President was mentioned to me during the consultation process. I was aware that President Bush had declared that he would do everything he could to get the water for the farms. And I was keenly aware of the controversy surrounding the 2001 decision.

However, my duty—which was to determine whether the proposed action would jeopardize the continued existence of SONCC coho salmon, and what would be required to avoid jeopardy if that were the outcome of the analysis—was all that should and did matter to me.

I realized that political pressure might be applied to my superiors, but I naively believed that I was shielded from such pressure. I thought that my analysis would, as is always required, be based on a logical analysis of the best available science, and have a logical outcome. I viewed it as a somewhat complicated case of 1+1=2. Regardless of what I found in my analysis, it would have to make sense and satisfy the legal requirements of the use of science under the ESA, and certainly no political pressure could magically change that. I never suspected that I would be asked to support the conclusion that 1+1=3, but I was.

I developed a draft BiOp, in which I used every approach I could think of to analyze the effects to coho salmon, and in each case the result was that the proposed action was inadequate to avoid jeopardy to coho.

I then developed an alternative 10-year plan that I thought would be adequate to avoid jeopardy, but still allow the Klamath Project to operate, as is required of any "Reasonable and Prudent Alternative."

My draft BiOp was then reviewed by the Department of Justice, according to my supervisor, and deemed "indefensible." I was never told what was indefensible about it, and I think Justice was mistaken in their conclusion. My draft was certainly more defensible than the final BiOp. I suspect that it was called indefensible simply because it was not perceived as being consistent with the interim National Research Council (NRC) report on the 2001 BiOp. (More about the NRC report later.) Therefore, I would suggest that the GAO look into Justice's role, if they did actually review my draft.

Jim Lecky, the Assistant Southwest Region Administrator at the time, then came to our field office in Arcata, California to help us finish a "defensible" BiOp. Mr. Lecky developed a different jeopardy analysis, which I thought was much weaker than mine, but was consistent with the NRC report. I continued to build a case for the alternative to avoid jeopardy.

But before Mr. Lecky came to Arcata, and before my original draft BiOp had been reviewed by Justice, he sent a letter to Reclamation concluding that the Klamath Project "was not likely to adversely affect" coho salmon if they operated the project as proposed while we continued to develop the final BiOp. (Reclamation had delivered their proposal to us much too late to finish our BiOp before the start of the 2002 irrigation season.)

This is when I began to worry. Stating that Reclamation's proposed April and May flows would not be likely to adversely affect coho, for the same action that we had already concluded would jeopardize SONCC coho in 2001 and in our working draft, was a case of 1+1=3 logic. In fact, my supervisor told me that Lecky had written the letter without our input in order to "distance" us from his action. Not only was this action bizarre, but it may have been a violation of section 7(d) of the ESA, which prohibits the irretrievable commitment of resources that may otherwise be required to protect species on completion of the consultation.

The decision to allow the proposed April and May flows is the federal action that made it possible for Secretaries Norton and Venneman, and U.S. Senator Gordon Smith to pose for cameras while opening the Klamath Headgates on April 1 to ceremoniously begin the irrigation season. Obviously, there was a lot of incentive for the decision in order to show support for the Administration's political base.

As we continued to develop the BiOp, there was at least one additional "1+1=3 moment" proposed by Lecky. I don't recall the exact details, but it had to do with how we treated outmigrating juvenile coho in our analysis. I warned him that I would refuse to continue working on this assignment if we did as he advised. My supervisor backed my position and Mr. Lecky gave in to our logic.

Eventually we finished our draft BiOp and delivered it to Reclamation. The final alternative flow schedule was less cautious in terms of protecting coho than my original draft, but I thought it still marginally would avoid jeopardy. However, Reclamation promptly advised us that our alternative was unacceptable to them, which is their prerogative. Reclamation proposed that we meet to work out a solution.

We met for two days in April at Reclamation's Shasta Lake office. When Mr. Lecky, my supervisor, and I arrived, Reclamation already had their alternative plan posted on wall charts. They clearly had no intention to negotiate. They were only willing to accept 57% of the responsibility for any water that we decided was needed to avoid jeopardy to coho, with additional water to come from unidentified sources. This was based on the completely arbitrary calculation that they only operated 57% of the irrigated land in the upper basin. This proposal was quite "innovative" so we obviously needed some time to consider its implications under the ESA. (Of course, NMFS ultimately accepted this proposal, which was later ruled to be in violation of the ESA due to its illegal partitioning of jeopardy-avoidance responsibility, which is entirely the responsibility of the federal action agency.)

We considered their proposal during the first day, but obviously could not accept it for further analysis until we fully understood it. On the morning of the second day, Mr. Lecky was on his cell phone when my supervisor and I met him in the hotel lobby. After the call, Lecky informed us that he had been told that we needed to stop "stonewalling" Reclamation's proposal. He seemed somewhat un-nerved by the call. He did not say who he had spoken to or where the order to stop stonewalling had originated.

During the second day, Reclamation's Regional Director, Kirk Rodgers, and Mr. Lecky left the room for approximately 45 minutes. I assume they made a call to someone up the chain of command. When they returned, Mr. Rodgers asked Mr. Lecky to make the announcement that NMFS would accept Reclamation's alternative.

On the way home I once again warned my supervisor that if we were to accept Reclamation's alternative without a complete analysis, I would be forced to refuse to continue working on the project.

A day or two later, my supervisor and I received a call from Lecky stating that we would accept Reclamation's alternative with no further analysis. So I requested to be dismissed from the project team because I would not participate in an illegal action. I never took insubordination lightly, and this was by far the most difficult moment of my professional life. But I was being asked to provide scientific support for a "1+1=3" conclusion, which, of course, would be a clear violation of my professional ethics and official federal ethics rules, as well as a possible violation of the law.

I also had hoped that my refusal to participate would apply some "back pressure" up the chain of command. I expected that it would be untenable to develop a BiOp without a staff biologist. But my insubordination was never entered into the record, so no one would have known that I had protested if I hadn't filed for whistleblower protection. Also, I was never reprimanded, and, in fact, I received an award for my work on the BiOp. I think that they didn't reprimand me and gave the award because NMFS knew that I was right all along.

It was obvious to me that someone up the chain of command was applying a tremendous amount of pressure on Mr. Lecky. There's simply no other explanation for anyone in NMFS developing or accepting such a completely bogus and illegal BiOp.

NMFS sets a very high bar for our BiOps. Our BiOps go through a very rigorous review process, and they are routinely returned to biologists if there are any faults in the "logic train," any misinterpretations of the ESA or agency policy, or even minor problems with formatting, etc. Again, I would like to stress that NMFS would never accidentally produce such a faulty BiOp, especially when the lead biologist clearly points out the faults during its development. Additionally, a report by the Commerce Inspector General (IG) into Mr. Lecky's alteration of biological conclusions of the Central Valley Project/OCAP BiOp, found that Mr. Lecky had bypassed the normal checks used in development of BiOps. These checks include a detailed review by the regional section 7 coordinator. The section 7 coordinator revealed that Mr. Lecky had also bypassed these checks during the Klamath consultation, and that these two instances were the only two of which she was aware during her tenure.

So my superiors finished the BiOp without me. I don't know how to stress any further just how bad this BiOp was. Clearly it didn't matter if 1+1=3. They had obviously been ordered to push the thing through anyway.

I began to investigate whether and how I should file for whistleblower protection and disclose what I had observed. I certainly didn't want to cause unproductive trouble for my supervisor—I just wanted to find a way to legally get NMFS to go back and re-do the consultation. And I felt secure that I had made the correct ethical decision in refusing to support the BiOp, so filing a whistleblower disclosure was not ethically required and was probably premature.

Then a couple of weeks after issuance of the BiOp, we received a letter from Kirk Rodgers at Reclamation stating that NMFS had mischaracterized their 57% alternative and, therefore, Reclamation was rejecting the BiOp. I wrongly assumed that this letter spelled the end of the faulty BiOp, and that soon we would get another chance to get it right. This certainly would have been the case in any other consultation. So I gave up on the idea of filing a whistleblower disclosure.

Then came the fish kill. The USFWS officially estimated that approximately 64,000 adult salmon died in the lower Klamath River with low river flows being a causative factor. The vast majority of the dead fish were non-ESA listed Chinook salmon and steelhead trout, but at least several dozen ESA-listed wild coho salmon were also killed. Several dozen adult fish may seem small compared to the overall magnitude of the kill, but it is a large number of a rare species. While the death of several dozen fish in a single incident may not doom the SONCC coho to extinction, it may have been a significant portion of an early-returning sub-population from a particular tributary, which could have significant impacts to the overall population in the long term. Also, this was only the first year of the 10-year plan, so it would be possible to repeat this incident several times in short order, which could then have a cumulative effect that would be highly significant.

Whether the fish kill was clearly a direct result of the BiOp should not have mattered. A precautionary approach should have caused NMFS to conclude that there was a significant likelihood that there had been unauthorized "lethal take" of coho due to the project, and should have caused us to call for a re-consultation. In my experience, this would usually have been the case if even a single juvenile coho had been unexpectedly killed under any other BiOp.

So I once again assumed that we would get another chance to do this consultation correctly and provide adequate protection for the fish. However, Lecky told the audience at a conference in October 2002 that the BiOp was "working" and that NMFS expected to "get a couple more years" out of it. That's when I decided that I had no choice but to disclose what I had observed during the consultation.

While I was certain that the BiOp was illegal for several reasons, I focused my disclosure on the lack of any analysis of the first eight years of Reclamation's alternative. The body of the BiOp clearly demonstrated the need for river flows that were protective of coho salmon, yet the alternative did not provide the flows for the first eight years of the 10-year plan.

I filed my whistleblower disclosure using the normal Office of Special Council (OSC) process. The OSC punted my case to the courts, stating they could not be "arbiters of science." This conclusion was mistaken, however, since NMFS was actually in violation of procedure as we had argued to the OSC.

Ultimately, the courts found the BiOp to be "arbitrary and capricious" for at least three separate reasons. These reasons included the exact reason that I had originally given for refusing to help finish the BiOp and that I had detailed in my whistleblower disclosure. The other reasons, detailed in the U.S. District Court for the Northern District of California (Case #C-02-2006) include the 57% jeopardy avoidance responsibility discussed above, and the improper reliance on actions that are not reasonably likely to occur to avoid jeopardy.

If the Committee intends to investigate political manipulation of the process used to develop the 2002 BiOp, I suggest asking the following questions.

I would begin by questioning Jim Lecky about communications he had with his superiors. Specifically, I would ask him who directed him, or otherwise suggested to him, that he provide the "not likely to adversely affect" letter regarding Reclamation's April and May 2002 flows. I would ask who called him to complain that we were "stonewalling" Reclamation's alternative at our April meeting. I would ask who he and Kirk Rodgers spoke to, or what they discussed, just before Mr. Lecky agreed to accept Reclamation's alternative. I would ask whether Mr. Lecky informed anyone that his lead biologist had refused to continue working on the BiOp, and, if so, what their response was and why it wasn't entered into the record. And I would then ask any superiors that he identifies who up the chain of command they had communicated with on these matters.

Additionally, NMFS Director Bill Hogarth made the following statement regarding development of the 2002 BiOp to the NR Committee on March 13, 2002, in his testimony about the NRC report:

> *I can assure the Committee that we will work hard to get the work completed as soon as possible, and I will be monitoring the progress of our efforts very closely.*

While Mr. Hogarth may have "monitored the progress of our efforts very closely," he never contacted me for my thoughts, even after I had refused to continue my participation. Therefore, I would ask Mr. Hogarth a similar set of questions.

Additionally, because there is strong evidence that ESA-listed salmon were killed due to a blatantly illegal decision, there should be an investigation by the appropriate authorities, including those outside the agencies, such as the Public Integrity Section of the Justice Department, to determine whether any civil or criminal violations of any law may have occurred, for example, of the take provisions of the ESA.

Typically, NMFS Law Enforcement would investigate illegal take of listed species, so I've never been sure why they have not pursued this case when presented with such compelling evidence of illegal action. Certainly, the magnitude of the taking and strength of the evidence (court rulings as well as scientific studies of the mechanism of the taking) should make this an obvious case for enforcement. If this had been caused by a private individual, rather than the agency charged with protecting the fish, NMFS Law Enforcement would have pursued, and likely won, this case. Agency personnel or others who did not have reason to believe that the BiOp was engineered to specifications weaker than the law requires should not be liable of course, but those who did have reason to know should be held to account like any other person who commits an un-permitted taking or other violation of law.

Problems with the National Research Council review of the 2001 BiOps

The Departments of Commerce and Interior requested that the NRC independently review the scientific and technical validity of the government's 2001 biological opinions for the Klamath Project. The recent Washington Post story questions the Bush Administration's use of the NRC to review the BiOps.

As described above, we were required by someone higher in the Administration, not the law, to ensure that our jeopardy analysis was consistent with the findings of the interim NRC report (Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report), which considerably weakened our ability to use our ESA-required professional judgment based on unpublished literature, non-peer reviewed literature, personal communication with professionals in the field, our own experiences in the field, and relevant information from studies conducted in other locations.

Here is an excerpt from the February 2002 interim NRC report's executive summary:

> *On the basis of its interim study, the committee concludes that there is no substantial scientific foundation at this time for changing the operation of the Klamath Project to maintain higher water levels in Upper Klamath Lake for the endangered sucker populations or higher minimum flows in the Klamath River main stem for the threatened coho population.*

This conclusion begs two questions. Firstly, how does the NRC define "substantial scientific foundation" (that is, what burden of proof) and, secondly, is their definition consistent with the required standard of the ESA? The NRC did not choose to address these important questions until their final report 18 months later.

A parallel report issued by the State of Oregon sheds some light on these questions. *The Independent Multidisciplinary Science Team Review of the USFWS and NMFS 2001 Biological Opinions* (IMST Report) reached the opposite conclusion of the NRC Report.

The IMST Report concludes:

IMST agrees with NMFS that increased instream flows in the Klamath River are defensible.

Additionally, the IMST report cites a report jointly developed by the University of California Davis and Oregon State University that also supports NMFS' conclusions, stating:

OSU-UC Davis report says increased flows in mainstem Klamath River are justified based on presence of coho salmon.

So, why does the NRC conclusion differ from the IMST, OSU-UC Davis, and the NMFS/USFWS conclusions? Because they used an inappropriate burden of proof.

The IMST Report directly addresses this point:

Thc NRC (2002) focused its conclusions on relationships for which there is clear evidence from measurements in Upper Klamath Lake and did not give strong weight to evidence from the larger scientific literature and broader scientific concepts in its findings (D. Policansky, pers. comm.). However, the IMST considers information on habitat use, studies of other lake systems and fish Communities, as well as empirical evidence from Upper Klamath Lake to be relevant scientific information that resource management agencies are required to use in making resource management decisions.

We recognize the increased certainty provided by basing conclusions only on direct evidence for a specific location, such as the National Research Council applied in its evaluation of management actions for Upper Klamath Lake. At first glance, the more limited and conservative perspective of the NRC committee would seem to lower the chances of being wrong. However, limiting the scientific basis for the determination of appropriate management actions increases the potential for placing a resource at risk simply because the available observations are inadequate and the larger body of valid scientific information from other systems has been ignored. If management actions for all natural resources were limited only to the specific system that was being managed, many lakes and streams would have no management because empirical evidence for those individual lakes or streams is nonexistent.

In its final report issued in the fall of 2004 (Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery), the NRC Committee finally acknowledges that they used a different burden of proof than the standard required by the ESA. From chapter 9 of the NRC final report:

The NRC committee's charge to assess "whether the [agencies'] biological opinions are consistent with the available scientific information requires the committee to adopt a burden of proof that would apply in the scientific community rather than the legal burden of proof that applies under the ESA.

Therefore, the NRC used an inappropriate standard for evaluating the BiOps. They used an entirely different standard to evaluate the BiOps than the standard that was required to develop the BiOps. This fact renders the interim NRC Report irrelevant in judging the appropriateness of the BiOps' conclusions; however, that is what the Bush administration (predictably) used the report for.

Why did the NRC chose this inappropriate standard without acknowledging it? Certainly, at least some of the NRC committee members knew that the ESA requires a completely different burden of proof. And they should have known that the Bush Administration would use their interim conclusions in development of the 2002 BiOps for the Klamath Project. If any members knew that the standard was inappropriate, did they state it to the rest of the NRC committee members? If the stated it, why did it not appear in the interim report?

I can only conclude that Bush Administration officials knew that the NRC would use an academic burden of proof, rather than the ESA standard, which would necessarily not support the BiOps' conclusions. Simply stated, the Bush Administration asked the NRC the wrong question. And in my opinion, officials in Interior and Commerce, as well as certain members of the NRC Committee, would have known that it was the wrong question to ask. I am convinced that the interim NRC report was engineered to give the Bush administration its desired answer. As one biologist familiar with the situation put it, "The Bush Administration played the NRC like a fiddle."

I would recommend that this Committee question the Administration officials involved in requesting the NRC review what they knew regarding the burden of proof to be used by the NRC versus the legal standard of the ESA. I would also ask the NRC committee members with background in ESA law (e.g., Dr. J.B. Ruhl) why the NRC did not choose the appropriate burden of proof. I would also question Dr. William Lewis, the NRC committee chair, about his involvement in developing the review in cooperation with administration officials.

I have also provided as an attachment an analysis of the NRC report that was developed by the biologist who wrote the 2001 BiOp. I had included this analysis in my original draft of the 2002 BiOp in order to help demonstrate why the NRC report provided little relevant information. Mr. Lecky removed this section from the draft and final BiOps, and it was not entered into the administrative record until the courts ordered it to be.

I would like to add that the NRC's final report includes many excellent recommendations and related information that should be used in efforts to restore the Klamath River.

IDEAS FOR AVOIDING FUTURE ABUSE IN ESA DECISION MAKING

I have had many discussions over the years with colleagues and former colleagues about ways that ESA decision making, and specifically the section 7 process, could be better implemented to avoid abuse by administrators. These ideas have come from biologists with considerable experience in ESA decision making and analyses. Two relatively simple remedies are repeatedly cited.

Currently, only the final BiOps signed by an administrator are routinely entered into the administrative record. This practice makes it relatively easy for administrators to alter the conclusions of biologists without leaving a trace. Allowing the lead biologist(s) to co-sign the final BiOp as acknowledgement of support for the conclusions/reasoning could greatly decrease the ability of administrators to alter conclusions for non-scientific reasons. Alternatively, a "biologist's draft" BiOp could be entered into the record to allow comparisons with the final version, and administrators would be required to explain any changes they made.

A second/additional remedy could be to have the lead agency attorney for the consultation sign the final BiOp as an indication of legal approval. In my experience, and in the experiences of my colleagues, agency attorneys have always provided excellent guidance during our development of BiOps. Guidance supplied to biologists and administrators is protected by attorney/client privilege, so the guidance does not appear in the record. I suspect that legal guidance is often ignored by administrators when the guidance does not support predetermined outcomes. I also suspect that this is the reason that administrations lose so many ESA law suits.

STRENGTHENING OF THE ESSENTIAL FISH HABITAT PROVISIONS OF THE MAGNUSON-STEVENS FISHERY MANAGEMENT AND CONSERVATION ACT

Whenever NMFS does an ESA section 7 consultation, it conducts a concurrent Essential Fish Habitat (EFH) consultation for affected federally-managed species. The result of these consultations is a set of recommendations intended to protect the habitat of these species. Some of these species are the same as the ESA-listed species, and others are not ESA-listed. In the case of the Klamath Project, the affected EFH species were the ESA-listed coho salmon and the non-listed Chinook salmon.

During the 2002 Klamath Project consultation, when I asked about doing the EFH consultation, I was told that we would not be doing one. Our EFH coordinator in the Regional Office must have realized this and produced a generic EFH consultation for us. I edited this generic consultation to include specifics for Klamath coho salmon, which is my specialty species, and developed at least a dozen recommendations to protect coho habitat. I then informed my superiors that one of the office biologists with Klamath Chinook expertise should review the EFH document and make recommendations for that species.

I don't know whether another biologist analyzed the effects to Chinook salmon, but the final EFH document did not include specific recommendations meant to protect Chinook salmon habitat, and it did not include any of the additional recommendations that I had developed for coho. The single EFH recommendation was simply to implement the alternative in the BiOp.

The EFH recommendations should have recognized that while Chinook and coho have very similar habitat requirements, the Klamath fall Chinook up-river migration run typically peaks a month or more earlier than the coho migration. A legitimate EFH analysis would have recognized this fact and would have recommended higher flows in September. Higher flows in September could have averted the fish kill.

The reason that NMFS administrators are "not willing to fall on their swords for EFH" (a quote to me from my supervisor) is that the EFH provisions only require making recommendations to action agencies. Agencies are then free to ignore these recommendations. As one biologist I know was fond of saying, "EFH is a gummy bear—no teeth, no claws."

I recommend that Magnuson-Stevens Fishery Management and Conservation Act be strengthened to provide EFH requirements, not just recommendations. Such a measure would make NMFS take EFH seriously, and could help avert future fish kills and preserve commercial fisheries.

In closing, I would like to mention that much progress has recently been made by parties in the upper and lower Klamath Basins toward restoration of the Klamath River. While I think it is very important to investigate what happened during development of the 2002 NMFS BiOp in order to prevent future abuses of the ESA, I sincerely hope that any investigation does not interfere with the encouraging progress in the Klamath Basin.

8.1 National Academy of Sciences Report

Due to the controversy surrounding the basis for Klamath Project water allocation decisions in 2001, the Department of the Interior initiated a review of the situation by the National Academy of Science. Accordingly, the National Research Council formed the Committee on Endangered and Threatened Fishes in the Klamath River Basin (Committee), made up of scientists and other experts, to develop both a narrowly-focused interim report on the 2001 situation and a broader final report about the biological requirements of listed fish in the Klamath Basin.

The prepublication version of the Interim Report from the Committee, entitled "Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin" was released to the public in February 2002 (Interim NRC Report, National Academy Press 2002). Although the substance of the Interim NRC Report is "final," a final interim report will reportedly be available in April 2002. The "Statement of Task" (Appendix to the Interim NRC Report) included the following language regarding the Interim NRC Report:

> The interim report will focus on the February 2001 biological assessments of the Bureau of Reclamation and the April 2001 biological opinions of the U.S. Fish and Wildlife Service and National Marine Fisheries Service regarding the effects of operations of the Bureau of Reclamation's Klamath Project on listed species.
>
> The committee will provide a preliminary assessment of the scientific information used by the [USBR], [USFWS], and the [NMFS], as cited in those documents, and will consider to what degree the analysis of effects in the biological opinions of the [USFWS] and [NMFS] is consistent with that scientific information.
>
> The committee will identify any relevant scientific information it is aware of that has become available since the [FWS] and [NMFS] prepared the biological opinions. The committee will also consider any other relevant scientific information of which it is aware.

NMFS is grateful to all members of the Committee for volunteering to undertake an expedited review of 2001 proposed and implemented Project operations, and looks forward to the final report that will provide additional valuable information. By definition, the Committee's interim report task was different from NMFS' Endangered Species Act section 7 responsibilities (i.e., ESA section 7 consultation consistent with the implementation regulations [50 CFR ' 402]). Although the context is different, additional data, analyses, and current conclusions always move the understanding of the Klamath River forward.

The conclusions of the Interim NRC Report with regard to coho salmon seem to be: (1) there is a paucity of data about coho salmon in the Klamath River Basin, but that population levels are unknown but probably low; (2) operation of the Klamath Project consistent with Reclamation's January 22, 2001, biological assessment may not be scientifically supported; (3) substantial improvements in the amount of coho salmon habitat in the mainstem Klamath River cannot currently be attained in dry years, relative to river flows in the last decade; (4) factors limiting Klamath River coho salmon production are not related to conditions under the Project's control, at least during dry years; (5) current hatchery practices are flawed; (6) there is no substantial scientific foundation for changing the operation of the Project to maintain higher Klamath River mainstem flows for the threatened coho salmon (e.g., those flows recommended in the NMFS April 6, 2001, biological opinion RPA); (7) there is no substantial scientific evidence supporting changes in Project operations, nor the resulting IGD flows, relative to the past 10 years; (8) avoiding coho salmon stranding due to downward ramping rates at IGD seems reasonable and prudent; and, (9) that the Committee's conclusions are subject to modification in the future if scientific evidence becomes available to show that modifications of flows would promote the welfare of Klamath River coho salmon.

Regarding the availability of population data, the Interim NRC Report acknowledged that "[s]tocks of native coho salmon have declined greatly in the Klamath River Basin over the past several decades" and that "...standard methods for observing and counting spawning [coho salmon] are not easily applied, and the size of the spawning population is unknown." These conclusions are consistent with the NMFS 2001 biological opinion addressing Klamath Project operations, and this biological opinion.

NMFS agrees that the amount of mainstem Klamath River coho salmon spawning is probably not currently limiting coho salmon population recovery. But the extent of mainstem spawning prior to pre-dam and water development activities is unknown, as is the extent of mainstem spawning in the future that may support recovery of listed coho salmon.

Preliminary coho salmon fry habitat modeling, conducted according to commonly accepted methods, produced results suggesting that within the available range of flow magnitudes, suitable fry habitat was expected to increase with increasing flow. Depending on the method of calculation, the estimated mainstem Klamath River coho salmon fry habitat available under the NMFS 2001 biological opinion RPA is about 10 to 200% higher than that available under Reclamation's proposed Project operations as described in their January 22, 2001, biological assessment (see related information provided in the April 6, 2001, NMFS biological opinion). This also appears to be the case for chinook salmon fry. The Committee apparently has limited confidence in the estimates of the amount of suitable habitat available under various flow magnitudes, noting that such estimates in their final form require "...extensive field measurements that are not yet available." The draft Phase II flow study report (Hardy and Addley 2001) includes extensive descriptions of the various methods (including field measurements) used to develop the currently available estimates of fish habitat in the Klamath River for the Committee's continued consideration.

The Interim NRC Report also indicates that coho salmon smolts require adequate habitat, but does not provide any relevant conclusions. Available information, apparently without exception, indicates that smolt survival is expected to increase with mainstem flow magnitudes in the spring. As these fish have survived sometimes difficult freshwater habitat conditions, and in consideration of the populations apparent status (and associated uncertainty), it seems prudent that management of the Klamath River mainstem should provide for expected increases in smolt survival as these fish will contribute to the adult population.

Although coho salmon have been found in the Klamath River when water temperatures have been elevated (apparently in contrast to investigations in the Mattole River), the NMFS shares the Committee's deep concern about elevated water temperatures in the mainstem Klamath River during the summer and that dramatic improvements cannot be made simply by releasing more IGD water. However, modeling results and temperature data indicate that modest temperature improvements (both daily mean and maximum) are expected under some IGD release scenarios. Further, decreases in mainstem temperatures that can probably be realized are similar to the difference between some tributary temperatures and those in the mainstem (e.g., see McIntosh and Li 1998), so that consistent with the expectation that tributary confluence areas may provide survival benefits for coho salmon fry and juveniles in the mainstem, decreases in mainstem temperatures may also provide such benefits.

The Interim NRC Report apparently concludes that thermal refuge areas associated with tributary confluences in the mainstem Klamath River may be important for coho salmon, and that "[a]ddition of substantial amounts of warm water could be detrimental to coho salmon by reducing the size of these thermal refuges." By extension, readers of the Interim NRC Report must conclude that the Committee believes alternative IGD flow regimes could also not be detrimental to coho salmon (i.e., beneficial). For example, it is currently unknown whether the amount of suitable habitat (in terms of temperature, water depth and velocity, and cover components) and the associated "carrying capacity" of individual thermal refuges would be increased or decreased under specific IGD release regimes, relative to other specific flow regimes. Indeed, the relationship between mainstem flows and total thermal refuge carrying capacity may be different for different thermal refuges and vary with water supply conditions and meteorology. Finally, given that apparently little to no tributary accretions contributed to mainstem flows between IGD and Seiad Valley during August 2001 (Figure XX), another question to be considered must be: How much water should be in the mainstem between IGD and Seiad Valley (i.e., IGD releases), given the expected mainstem thermal regime and physical habitat conditions?

Given the considerable uncertainty about how to optimize salmonid carrying capacities in the mainstem Klamath River in the summer, NMFS believes that experiments should be conducted with the goal of providing scientific evidence and foundation for summer management of the river.

NMFS agrees with the Interim NRC Report's conclusion that habitat degradation in some tributaries is contributing to the decline of Klamath River coho salmon, although NMFS is unaware of any scientific evidence that this situation is limiting or that any other measures taken to improve coho salmon survival or production would be overwhelmed or negated by poor tributary conditions. The fact remains that all individual coho salmon must use the mainstem as juveniles transforming to smolts, and as adults. By extension, the survival of all coho salmon that enter the mainstem will be affected by mainstem habitat conditions. During ESA section 7 consultation, NMFS has no choice but to consider information and develop life stage survival expectations, regardless of the absence or paucity of "scientific" evidence or foundation.

NMFS also agrees with the Interim NRC Report's apparent conclusion that recent Iron Gate Hatchery practices are probably not optimum. Further, NMFS is aware that the CDFG has accomplished changes in some practices that are expected to benefit the naturally-spawned coho salmon population, and is currently evaluating other changes to their program that could provide additional benefits. For example, hatchery access for returning hatchery-produced adults has been improved for a number of years, and the practice of returning "excess" hatchery adults to the river has been curtailed and this should result in less straying into tributaries. Also alternative hatchery production rearing practices and release strategies for some species are currently being considered, and this could lead to additional release timing flexibility.

The Committee concluded that there is no substantial scientific foundation for changing the operation of the Project to maintain higher flows in the mainstem for coho salmon (presumably relative to the past decade), but no specific definition of "substantial scientific foundation" was offered. Although the Committee offered similar conclusions about Reclamation's proposed Project operations as described in their January 22, 2001, biological assessment, the Committee apparently based this solely on the possibility that lower IGD flows (e.g., lower than 398 CFS) than have been observed before could result. The Committee seems to simply be saying that, if certain low magnitudes of flow have occurred before they are acceptable, if they have not occurred before, there is no substantial scientific foundation and such flows are not acceptable. NMFS observes that this does not seem to be a responsible way to view Klamath River management in light of the complex problems at hand, and not consistent with ESA evaluation processes. Regardless of the definitions and standards used by the Committee, and in which particular instances they should apply, readers of the Interim NRC Report reader must also conclude that Project operations prior to 1996, and the resulting IGD flows, do not have a substantial scientific foundation. Finally, NMFS observes that it is not likely (i.e., very low probability) that IGD flows that consist of water that others cannot use or store (e.g., IGD flows in the early 1990s) are flows that provide appropriate survival levels for literally all coho salmon that must occupy and depend upon the river.

NMFS agrees with the Interim NRC Report conclusion that avoiding coho salmon stranding due to excessively rapid downward ramping of IGD flows seems reasonable and prudent. In the April 6, 2001, biological opinion NMFS noted that 7 coho fry were stranded during IGD flow changes in April 1998, and included a recommendation of alternative ramping rates in their RPA. This is consistent with NMFS' belief that steps, both long- and short-term, must be taken to increase the expected survival of this coho salmon life stage. Further, such steps are appropriate even prior to developing a substantial scientific foundation for individual measures, and with the knowledge that some of these measures (including less dramatic ramping ramps) require that more water volume be allocated to IGD releases during portions of the year.

As with any conclusions drawn from the consideration of flow management and the resultant affects to Klamath River salmon populations, NMFS is pleased to know that the Committee may modify the conclusions described in the Interim NRC Report if "...scientific evidence becomes available to show that modifications of flows would promote the welfare of Klamath River coho salmon." Although the Committee does not offer any prediction about when such evidence may become available in the future, NMFS observes that scientific evidence that is robust enough to provide absolute confidence that any Project operational regime is consistent with the short- and long-term survival and recovery of Klamath River coho salmon may not be available within the next decade. This is particularly true if costly and time-consuming investigations to develop this evidence (e.g., statistically valid survival esti-

mates, or "cause and effect" determinations) are not initiated immediately. Although the recommendation to manage Klamath Project operations with regard to mainstem flow as close as possible to the 1990 to 2000 period is not explicitly offered in the Interim NRC Report, it is a common perception that this is the Committee's recommendation (e.g., see Reclamation's February 27, 2002, biological assessment addressing Klamath Project operations) in lieu of additional, high quality and site-specific scientific evidence that may or may not be developed in the future.

In summary, while NMFS may agree with the Committee's conclusion that there is no substantial scientific foundation for changing mainstem Klamath River flow management, NMFS cannot agree with the perceived Committee recommendation that absent conclusive scientific evidence the Project should be managed as it was in the 1990 to 2000 period. Instead, NMFS must also determine and consider expectations about the resulting effects to Klamath River coho salmon populations based on the best available information. NMFS cannot ignore selected information simply because it does not meet various standards applied by various interests. Finally, NMFS must consider these expectations in the context of tremendous uncertainty as to the status of the species, and after explicitly determining what other activities that adversely affect the fish (e.g., activities not subject to ESA section 7 consultation) are reasonably likely to occur. This includes the cumulative effect of substantial water management activities outside of the Project boundaries.

From the 30 July 2003 Issue of The Wall Street Journal

OREGON WATER SAGA ILLUMINATES ROVE'S METHODS WITH AGENCIES

TOM HAMBURGER
Staff Reporter of THE WALL STREET JOURNAL
July 30, 2003

WASHINGTON—In a darkened conference room, White House political strategist Karl Rove was making an unusual address to 50 top managers at the U.S. Interior Department. Flashing color slides, he spoke of poll results, critical constituencies—and water levels in the Klamath River basin.

At the time of the meeting, in January 2002, Mr. Rove had just returned from accompanying President Bush on a trip to Oregon, where they visited with a Republican senator facing re-election. Republican leaders there wanted to support their agricultural base by diverting water from the river basin to nearby farms, and Mr. Rove signaled that the administration did, too.

Three months later, Interior Secretary Gale Norton stood with Sen. Gordon Smith in Klamath Falls and opened the irrigation-system head gates that increased the water supply to 220,000 acres of farmland—a policy shift that continues to stir bitter criticism from environmentalists and Indian tribes.

Though Mr. Rove's clout within the administration often is celebrated, this episode offers a rare window into how he works behind the scenes to get things done. One of them is with periodic visits to cabinet departments. Over the past two years Mr. Rove or his top aide, Kenneth Mehlman—now manager of Mr. Bush's re-election campaign—have visited nearly every agency to outline White House campaign priorities, review polling data and, on occasion, call attention to tight House, Senate and gubernatorial races that could be affected by regulatory action.

Every administration has used cabinet resources to promote its election interests. But some presidential scholars and former federal and White House officials say the systematic presentation of polling data and campaign strategy goes beyond what Mr. Rove's predecessors have done.

"We met together and talked a lot about issues of the day, but never in relation to polling results, specific campaigns or the president's popularity," says Lisa Guide, a political appointee at Interior during the Clinton administration. Frank Donatelli, political director in the Reagan White House, says "we were circumspect about discussing specific administration rulings that had yet to be made."

Mr. Rove declined to comment. White House spokeswoman Ashley Snee says the agency visits simply were designed to keep political appointees apprised of the president's accomplishments and priorities. Klamath River water levels were an issue at least as far back as the 2000 presidential campaign. During the unusually dry summer of 2001, angry farmers stormed the head gates to forcibly release water, but the Bush administration generally resisted their demands. In 2002, the issue continued to loom large as Mr. Smith faced a potentially difficult re-election challenge.

On Jan. 5, Mr. Rove accompanied the president to an appearance in Portland with Mr. Smith. The president signaled his desire to accommodate agricultural interests,

saying "We'll do everything we can to make sure water is available for those who farm."

The next day, Mr. Rove made sure that commitment didn't fall through the cracks. He visited the 50 Interior managers attending a department retreat at a Fish and Wildlife Service conference center in Shepherdstown, W.Va. In a PowerPoint presentation Mr. Rove also uses when soliciting Republican donors, he brought up the Klamath and made clear that the administration was siding with agricultural interests.

His remarks weren't entirely welcome—especially by officials grappling with the competing arguments made by environmentalists, who wanted river levels high to protect endangered salmon, and Indian tribes, who depend on the salmon for their livelihoods. Neil McCaleb, then an assistant Interior secretary, recalls the "chilling effect" of Mr. Rove's remarks. Wayne Smith, then with the department's Bureau of Indian Affairs, says Mr. Rove reminded the managers of the need to "support our base." Both men since have left the department.

An Interior spokesman, Mark Pfeifle, says Mr. Rove spoke in general terms about the Klamath conflict in the course of a broader discussion. Without directing a policy outcome, Mr. Pfeifle says, Mr. Rove simply "indicated the need to help the basin's farmers." In the end, that is what happened when Interior reversed its previous stance and released more water. Mr. Rove's intervention wasn't the only reason. Mr. McCaleb himself says the biggest factor was a report from the independent National Research Council, which questioned the basis on which Interior scientists had made earlier Klamath flow decisions.

But Mr. Rove didn't let the matter drop after the Shepherdstown meeting. Weeks later, he returned to Oregon and met with a half-dozen or so farmers and ranchers. Thereafter, the White House formed a cabinet-level task force on Klamath issues. The results became clear on March 29, when the water was released to parched farms.

That hasn't ended the controversy. Environmentalists blame the change in water levels for the subsequent death of more than 30,000 salmon, calling it the largest fish kill in the history of the West.

A National Marine Fisheries Service biologist, Michael Kelly, has asked for protection under federal "whistle-blower" laws, saying he was subjected to political pressure to go along with the low-water plan and ordered to ignore scientific evidence casting doubt on the plan. This month, a federal judge ruled the administration violated the Endangered Species Act in the way it justified the water diversion.

Administration officials note that the judge found fault only with a narrow portion of the biological opinion, and didn't order changes in water flow. Interior is investigating the cause of the fish kill, Mr. Pfeifle says.

Oregon farmers point to other factors in the salmon kill, including water temperature and the presence of an infectious disease during salmon-spawning season. And they haven't stopped pressing to keep the irrigation water coming.

A few weeks ago, the federal Bureau of Reclamation in Klamath Falls warned farmers that the department would curtail the irrigation flow. Irate, Republican Rep. Greg Walden began making calls to protest. His first one went to Mr. Rove's office.

Within hours, the idea was dropped. Interior officials say managers from two cabinet departments agreed on a way to avoid it.

Additional Testimony by Michael Kelly submitted for the record

August 8, 2007

Mr. Chairman, in response to your invitation as I understand it, to submit additional information for the record within 10 days of the hearing, I offer the following supplemental testimony.

My key points in this supplemental testimony are:

1. In his answers to questions at the hearing, Dr. Lewis misrepresented the scientific information that was available in 2001 and 2002, as well as information that was available in July 2007. And the NRC's Committee's (chaired by Dr. Lewis) highly unusual and hasty "interim report" hindered the proper management of a species listed under the ESA (threatened Klamath River coho salmon) by not using the same legal standard as the ESA. The question is why they allowed such a critical distinction to be absent when they should have known the potential risks associated with not using the ESA's legal standard.
2. The Interior Inspector General and the Office of Special Counsel failed to find information that was revealed by the Inspector General of the Commerce Department. This information revealed serious short-circuiting by the same

NMFS Assistant Regional Administrator in two consultations, since ruled to be illegal. Both of these consultations allocated a valuable resource in a way that the normal process would not have allowed.

3. The Committee would do a public service if it were to ask those involved, including the then NMFS Assistant Regional Administrator (who now runs the office of Protected Species), to tell them who ordered or requested both the unusual procedures at the agencies and at the NRC, and who complied and why.
4. The Committee should also consider taking affirmative steps to prevent further similar harm to protected species as a result of risky administrative actions that are implemented faster than they can be reviewed by Congress or the courts.

Re: Dr. Lewis' vague and overly broad assertion that higher flows from Iron Gate Dam could harm coho salmon in the Klamath River.

In answer to a question from Representative Walden, Dr. Lewis claimed that the science shows likely harm to ESA-listed fish if water levels in the lake and flows in the river are increased as required in NMFS and USFWS BiOps. Dr. Lewis was vague about which of the tree listed fish would be harmed, and he did not provide specific information about which season(s) of the year he was addressing. These are very important distinctions, so I would like to clarify them.

I would not argue that higher releases from Iron Gate Dam in July and August, and perhaps early September, might actually be harmful if they raise temperatures without providing a benefit.

However, using data gathered by state and tribal biologists, our own field observations, and our best professional judgment, we determined that flows of 1000 cubic feet per second (cfs) would help juvenile coho in the mainstem Klamath gain access to cooler tributary streams. Many streams that enter the Klamath River are blocked at their mouths by deposits of cobbles and gravel when the river is below 1000 cfs. If fish cannot access these streams, they are forced to live out the summer in the mainstem Klamath River where high temperatures and disease make their chances of survival very low. These fish are probably just as likely to die whether or not higher releases from Iron Gate Dam contribute additional warm water. Therefore, in our best professional judgment, it makes sense to provide flows that allow juvenile coho to swim up cooler streams to get out of the warm water, which they are known to do when given the chance.

("Our" and "we" indicate the opinions of myself and other NMFS ESA biologists at the time of our respective consultations.)

In the spring (April, May, and early June), juvenile coho salmon that have managed to survive the rigors of life in the Klamath and its tributaries for almost a year and a half are migrating out to sea. Available information, apparently without exception, shows higher survival for juvenile salmon that migrate to sea during higher spring flows. Higher flows help speed their migration and avoid predators during this period of very high vulnerability. These fish are critical to maintaining the Klamath population, and it makes sense to provide them with conditions that should improve their survival.

The NRC interim report cites data that don't show a conclusive trend to higher survival to adulthood of Klamath River coho that migrated downstream in high flows. These data also do not show a conclusive decrease in survival. The interim NRC Report also acknowledged that "[s]tocks of native coho salmon have declined greatly in the Klamath River Basin over the past several decades" and that "...standard methods for observing and counting spawning are not easily applied, and the size of the spawning population is unknown." The fact that the adult population is unknown demonstrates that the population trend data is probably unreliable. So how can the NRC Committee justify using such a small amount of inconclusive and unreliable data from the Klamath River to refute the large body of data that conclusively demonstrates benefits in every other place? This use of a small amount of inconclusive data completely shifts the risk to the species, which is not legal under the ESA.

Again, optimal flow releases from Iron Gate Dam in July, August, and early September are just one part of the overall picture. Therefore, I think it is irresponsible to suggest that higher flows could hurt coho salmon at all times, as Dr. Lewis appears to do in answering Representative Walden during the hearing. Spring releases from Iron Gate Dam do not result in increases in temperature that are harmful to coho, yet Dr. Lewis states that higher releases will harm coho due to adding more warm water.

Additionally, there is more recent information on the effects of high spring flows in the Klamath River. This information suggests that parasites which infect and kill juvenile salmon appear earlier in the season when spring-time flows are lower, and

later in the season when flows are higher. Therefore, higher spring flows may delay the outbreak of these parasites and give juvenile salmon more time to migrate to the ocean before the parasites get to them.

Again, the NRC interim report's failure to address spring flows in any meaningful way, and certainly not in conformance with the standards required by the ESA, left the door open to the Administration's political desire to begin full deliveries of irrigation water at the start of the season on March 29, 2002.

While I cannot speak about Dr. Lewis' remarks that high lake levels could be harmful to endangered suckers, I would suggest speaking to Dr. Douglas F. Markle of Oregon State University. The CRS Report for Congress: The Endangered Species Act and "Sound Science," January 8, 2007, states:

> *Oregon State University researchers released an analysis of the NRC Interim Report, concluding that the speedy completion of this document contributed to multiple errors that detract from its scientific usefulness.*

The CRS report cites the following journal article, which I was unable to obtain on short notice:

> *Michael S. Cooperman and Douglas F. Markle, "The Endangered Species Act and the National Research Council's Interim Judgment in Klamath Basin," Fisheries, v. 28, no. 3 (March 2003): 10-19.*

Re: Dr. Lewis' inaccurate statement that Iron Gate Dam contributes only 10% of the water at the mouth of the Klamath River, and is 150 miles upstream of the mouth, and, therefore, wouldn't have caused the 2002 fish kill.

These claims sound more like political talking points than information based on fact and science.

I assume that the 10% figure must be some sort of yearly average of flow contribution to the overall basin run-off reaching the mouth of the Klamath River. It certainly is not the contribution of Iron Gate Dam releases during the summer and early fall. Presently (July 30, 2007) according to stream gages at the mouth of the Klamath, Iron Gate releases are contributing 43% of the total flow. This can be easily verified on the USGS stream gage website. Iron Gate releases contributed about 30% of the flow during the fish kill, and, of course, would have been greater if the flows would have conformed to the flows that NMFS determined in 2001 were required to avoid jeopardy to coho.

And, as stated by the USFWS in their investigation of the 2002 fish kill:

> *Overall, the hydrology of the Klamath River was driven by discharges from Iron Gate Dam during August and September 2002.*

Iron Gate Dam being 150 miles upstream probably makes it more valuable to fish, not less valuable, as suggested by Dr. Lewis. It takes approximately three days for water released from Iron Gate Dam to reach the mouth of the river. Ambient air temperature is such an important factor in determining river water temperature, that the further upstream warm water is added, the more it would be moderated and conform to the temperatures that would exist at the river mouth anyway. As stated by the U.S. Department of the Interior Geological Survey in their 2002 report on Klamath River water conditions:

> *Stream temperatures typically fluctuate in response to changes in the weather, and they closely follow patterns of air temperature.*

I am not claiming that additional water released from Iron Gate Dam would never cause higher temperatures at the mouth, or that bad water on top of bad water would not be a waste. I am claiming that the further away the release originates, the less influence the water will have on temperatures downstream. The 150-mile taking point is at best irrelevant, and at worst is misleading.

In fact, additional water was released into the Klamath River towards the end of the fish kill, with the following effects reported in the USFWS fish kill report:

> *During September 2002, average daily water temperatures declined from 22.8 to 17.3 "C (73.0 to 63.1 "F). While this coincided with the increased discharges from Iron Gate Dam, air temperatures had already started to decline by September 23, 2002*

These findings illustrate that warm water released from Iron Gate Dam doesn't necessarily cause increased temperatures at the mouth of the river. Air temperatures determined what the water temperature would be by the time it reached the lower river. It was actually cooler when it reached the fish, and it appeared to have the desired effect of drawing the fish upstream.

Re: Causes of the fish kill, and the implications for ESA management action (the ESA scientific standard vs. the academic scientific standard)

The two main on-the-ground investigations (USFWS and CA Dept of Fish and Game) into the causative factors leading to the fish kill conclude that low flows were likely to be a contributing factor. The USFWS report emphasizes that if a pulse of additional water would have arrived at the critical time, due to either rainfall or releases from Iron Gate Dam, the water may have triggered the salmon to migrate upstream. Upstream migration would have reduced the density of fish in the lower river and reduced or prevented the mass infection of the fish.

Fish and Game's report gives more weight to the possibility that steady low flows present throughout September caused fish to be unable to migrate upstream because the depths of certain riffles were too shallow. (The USFWS report mentions this as well, but gives it less weight.)

Obviously, there are so many variables that it is difficult to say conclusively that the fish kill would have been averted by more water from Iron Gate Dam—either by higher base flow or a pulse. And because these investigations are not conclusive, it is easy for someone using an academic scientific standard, like Dr. Lewis, to say that the science doesn't support changing the way water is managed. However, as I have stated repeatedly, that academic standard, which requires statistically supported conclusions, is not the legal standard required by the ESA.

We know that there was a unique set of circumstances present in the river at the time of the fish kill. (The fifth lowest flow since 1951; an earlier than normal upstream migration; a larger run size than the 25-year average, etc.) And we have evidence from experienced federal and state fisheries biologists working in the field, who say that the riffles appeared too shallow for upstream migration, possibly due to recent (winter 1997-98) deposits of gravel.

So when a biologist considers this information in an ESA decision making context, how should they use this information to make a legal conclusion? I try to illustrate the process below using the fish example.

Of this unique set of circumstances, the only thing that can be controlled, at least in the short term, is river flow. You can't change the timing of the salmon run; you can't make it rain; you can't make air temperatures cooler; you can't eliminate the presence of disease vectors; you can only change the river flow. The best available data, while not conclusive, shows a reasonable likelihood that more water, either in a pulse or as a higher base flow, could have helped.

So, in an ESA consultation for the Klamath Project, if you want to avoid the unique set of circumstances that we know can cause a fish kill, the only thing that can change that has scientific support, is to provide more flow from Iron Gate Dam. If nothing is changed, you are at high risk of another fish kill. Therefore, you must, by law, give the benefit of the doubt to the ESA listed species, and err on the side of caution in making a conclusion. If you wait for conclusive scientific information that meets the standard used in the NRC interim report, you may never be able to provide reasonable protections for salmon, and that is why this approach would violate the law.

And because, as Dr. Lewis suggests, there could be risks to the fish by adding additional warm water, you would also be required to assess the situation before making in-season changes such as a pulse of water. So, for example, hydrologists should also be consulted to model the situation in real time to ensure that a high temperature threshold [e.g., 21 degrees Celsius, which may halt migration] is not exceeded due to a release from Iron Gate Dam.

Re: The IG 2003 report on Rove's influence.

The Interior IG concluded that nobody working on the 2002 Klamath BiOps claimed to feel any pressure to get a specific result. While I may have told investigators that I was never threatened with a specific "do this or else," I certainly felt pressure when being asked to perform as the technical lead biologist in an obviously illegal action. I think that any reasonable person would say that pressure was applied when I was given the choice to behave in a legal and ethical manner, to help break the law.

Additionally, when the President publically states, "We'll do everything we can to make sure water is available for those who farm," does that not cause some pressure? When Karl Rove tells high level appointees that the political goals of the administration include providing full irrigation deliveries, does that not cause pressure? And when Vice President Cheney calls officials regarding the Klamath consultation, and that fact reaches federal employees on the ground, does that also not cause pressure?

I would assert that all of the above activity creates an atmosphere of intimidation. While there is no direct threat, there is an implied threat, or at best, an under-

standing that the boss will be very happy with you for getting his desired outcome, and not so happy with any other result. Perhaps all of the people up and down the chain of command have ice water in their veins, but I think the result (a blatantly illegal BiOp and intentional bypassing of established controls) speaks for itself. People felt pressure to get the desired result, even if it meant breaking the law.

Additionally, the Interior IG's report finds no irregularities pertaining to development of the 2002 BiOps. As we now know from the investigation into NMFS' OCAP BiOp, Jim Lecky bypassed an established and necessary review by the Regional Section 7 Coordinator during development of the 2002 BiOp.

Additionally, the court ruling by the U.S. District Court for the Northern District of California (Case #C-02-2006) on the 2002 NMFS BiOp occurred in 2006, so the IG would not have known that the 2002 BiOp was later found to be illegal on three major points. (This decision was not appealed by the Federal government, and the 9th Circuit Court of Appeals upheld the lower court's ruling on appeal by the water users.)

In fact, speaking of illegal actions, Committee members had to help the Acting IG to understand and admit that violations of the Code of Federal Regulations are illegal acts. The IG has, therefore, been wrong in stating publicly that it had not found any illegal actions simply because it did not seem to have evidence of criminal violations. This also leads to the question I noted, in part, in my testimony of who reviewed my draft 2002 BiOp and the draft IG reports at Justice, and what guidelines are in place for such reviews.

The former Special Council at OSC, Elaine Kaplan, recently emailed Jeff Ruch at PEER, stating the following regarding my whistleblower disclosure:

> *It looks like we probably made a mistake not referring that one. At the time, I viewed it as a matter that should probably be handled in court under the APA (where it ultimately was addressed). But I think we missed the larger issue of political manipulation.*

Apparently, if the Special Council had known what she now knows, she would have referred my case to the IG for an investigation.

Sue Ellen Wooldridge has now come forth with information that Vice President Cheney, and/or his office, contacted her regularly regarding the Klamath consultations—a fact that was not known or admitted to the IG.

Therefore, the Interior IG failed to find irregularities that existed at that time, and there is new information that lends weight to possible wrongdoing.

If the Committee is interested in "connecting the dots" between Cheney (or other high level officials), Wooldridge, and Lecky, it would be prudent to interview Wooldridge and Lecky about their contacts with each other and other people who may have been in the loop. Also, the biologist who I replaced on the Klamath BiOp mentioned Wooldridge to me as being involved in Klamath issues. So I think it is reasonable to assume that Lecky and Wooldridge knew each other at the time.

The Committee may also want to take steps, including some that I recommended in my testimony, and those recommended by the Acting IG at Interior, such as requiring officials to sign off on any changes they make to career scientists' draft biological opinions and to state the reasons and data supporting those changes.

[NOTE: Additional information submitted for the record has been retained in the Committee's official files.]

Ms. BORDALLO. Thank you very much, Mr. Kelly. I do have a couple of questions for Dr. Lewis. Dr. Lewis, in 2002 you appeared before this committee and testified that the National Research Council did not find a sound scientific basis for operating the Klamath Project at the lake levels proposed by the FWS or a sound scientific basis for the minimum flow levels recommended by NMFS. Yet is it not true that you also testified at that hearing that the committee found no scientific basis for operating the project with the lake levels and minimal flows that were being proposed in the Bureau of Reclamation's 10-year operating plan?

Mr. LEWIS. Yes.

Ms. BORDALLO. All right. When the Bureau implemented the operating plan, did it include the measures that your committee found had no sound scientific basis for, and was this not the same plan that the court later found was arbitrary and capricious?

Mr. LEWIS. I do not know about the findings of the court because they occurred after I ceased being with the committee.

Ms. BORDALLO. All right. And what about the first part of the question? When the Bureau implemented the operating plan, did it include measures that your committee found had no scientific basis for?

Mr. LEWIS. Implemented when? In what year? Was this the 2002 plan or the 2000 plan implemented in 2001?

Ms. BORDALLO. Yes, the 2002 plan.

Mr. LEWIS. The agencies did not take the committee's report as mandatory for implementation. They made up their own minds as to how to proceed given the committee's interim report. What we saw was that when the interim report came out and they saw it, they became more flexible and more inventive. They introduced some new concepts. For example, acquisition of 100,000 acre feet of reserved water that was not in the picture before, and U.S. Fish and Wildlife Service became a little more conservative in the way it was handling its responsibilities for the suckers where the scientific evidence that was available was contrary to what they were thinking earlier on.

So I think you could see the influence of the committee report, the interim report, in the new biological opinions and assessments that came out in 2002 but of course the agencies are not required to take advice from an Academy committee, and they used what they thought they should use and left the rest for the future to consider.

Ms. BORDALLO. So in other words your answer then is they did not take it too seriously? They had ideas of their own?

Mr. LEWIS. No, I think they took it seriously but they chose what they thought they should use and left the rest for later.

Ms. BORDALLO. All right. Thank you. Thank you very much. The Chair now recognizes the gentlewoman from Washington, Mrs. McMorris Rodgers.

Mrs. MCMORRIS RODGERS. Thank you, Madame Chair. I would actually like to yield my time to Mr. Walden.

Ms. BORDALLO. Mr. Walden is recognized.

Mr. WALDEN. Thank you. Dr. Lewis, I appreciate your testimony and Mr. Kelly, yours as well. In Mr. Kelly's prepared testimony, Dr. Lewis, he says and I quote, "The Bush Administration played the NRC like a fiddle." Dr. Lewis, did you feel like the Bush Administration was playing the NRC like a fiddle?

Mr. LEWIS. No. I——

Mr. WALDEN. Did you feel Vice President Cheney manipulated the NRC's work?

Mr. LEWIS. Well I only knew what was happening from the viewpoint of my committee.

Mr. WALDEN. Right.

Mr. LEWIS. I knew that the committee had been given a charge and filled out with members in a way that is absolutely standard for committees of this type. It was obvious that the agencies in the Klamath Basin could use outside committee evaluation.

Mr. WALDEN. Right.

Mr. LEWIS. And the National Academy was the obvious source of this kind of information. So the formation of the committee did not

have any signals of politically motivated interference and seemed quite logical and timely. The committee itself, once formed, is immune from political meddling because of the way the Academy has learned to handle its committees over the last 150 years.

The committee members are chosen so that they come from diverse backgrounds and diverse disciplines. They are carefully screen for conflict of interest and bias. They are required to reach a unanimous conclusion that they can all sign onto. They do not discuss their work while they are in session unless they are in the company of an officer of the Academy, and they deliberate—although they collect information in public and hear testimony—they deliberate on their own without thinking about politics or administration but thinking about the scientific issues.

Mr. WALDEN. And as I understand the way the Academies work there is an independent review panel in addition to yours that reviews.

Mr. LEWIS. Yes. There are several other safeguards. During the report finishing process, the committee's preparation report is monitored by two officials of the Academies, senior people. External reviewers are selected. In this case I think it was over 15 of these. Each one of them writes anonymously a critical opinion. The committee is required to make a written answer to every single opinion that is given in these reports, page-by-page, and incorporate the changes in the report as necessary to satisfy the report monitors.

Mr. WALDEN. Thank you. Let me go into the issues in the Basin. If I understand the NRC's report that you all wrote, which is quite a document, on a couple of things one, the fish kill in the Klamath Basin. There have been press accounts that Dick Cheney was personally responsible for it because he directed the flows, and it is all the project's fault, and 80,000 we heard the latest figure of salmon were killed. As I read your report, the independent scientists say that is not what happened. Is that accurate? Can you describe what——

Mr. LEWIS. Well I can only speak for the committee of course.

Mr. WALDEN. Right. That is all I am asking.

Mr. LEWIS. There are varied opinions on this so let me tell you what happened. There was a mass mortality of salmon in the lower part, let us say at the mouth of the Klamath.

Mr. WALDEN. Right.

Mr. LEWIS. That was responsible for killing 33,000 chinook salmon.

Mr. WALDEN. Thirty-three thousand.

Mr. LEWIS. Thirty-three thousand.

Mr. WALDEN. Principally chinook.

Mr. LEWIS. Yes, 99 percent chinook, out of a total run size of 170,000 fish. This is a very serious matter, and had not occurred before. At the time this occurred, we were in the grip of a drought in the Klamath Basin, and the flows were very low. As soon as the mortality occurred, questions came up as to whether the Klamath Project operations were responsible for this mortality, and our committee was asked specifically by our sponsors and thus by the Academy to add this to our list of things to address in our report.

We first looked to find out how often these kinds of conditions had occurred previously. Going back to 1988, there had been five

previous droughts that were about the same, and a couple even more severe in 1992 for example when there had not been any salmon mortality. Then we began to think——

Mr. WALDEN. And similar flows?

Mr. LEWIS. Flows, yes. The flows that were within the range or in a couple of cases lower than the flows observed in 2002. We began to think that this was not simply a matter of low flow. We also considered the possibility that the Klamath Project operation somehow might be involved, and once again we reached a conclusion it was unlikely.

First of all, the Klamath Project was being operated at that time the way it had operated since 1990 or earlier so there had not been a change in operations. Second, the Klamath Project is very far away from the mouth of the Klamath. It is about 150 miles, 185 miles depending on where you take the mouth or somewhat up from the mouth, and the idea that the Klamath Project which passes only 10 percent of the water in the Klamath Basin could generate flows that would give relief 185 miles away to salmon that were staging to migrate did not seem realistic to the committee.

Another factor in the potential beneficial use of the water from the Klamath Project is that that water is warm because it comes from storage reservoirs. The salmon that are migrating need cool water, particularly the early migrating fishes which include the chinook. They need cool water. We think that the salmon staged normally to migrate. They were waiting for a signal, and that might be a cool flow caused by a little rain, to go upstream. They waited too long because they did not get the signal and disease overtook them and killed a portion of them.

Mr. WALDEN. Thank you. My time has expired. Thank you, Madame Chair.

Ms. BORDALLO. Thank you. I thank the gentleman from Oregon, and now the Chair recognizes the gentlelady from California, Mrs. Grace Napolitano.

Mrs. NAPOLITANO. Thank you, Madame Chair. Mr. Kelly, I read your statement with great interest, and you talk extensively about the difference in the burden of proof employed by the NRC versus what is actually required to make decisions under the ESA. For those who might interpret that as meaning that the agency science conducted under the ESA is somehow less rigorous would you explain the difference and the need for it?

Mr. KELLY. OK. I will start with the academic standard used by the NRC committee in their interim report. They say that a quote from the final report was this, "The NRC committee is charged to assess whether the agency's biological opinions are consistent with the available scientific information requires the committee to adopt a burden of proof that would apply in the scientific community rather than the legal burden of proof that applies under the Endangered Species Act."

Their reasons for this, one being that we are presented with a project, and we have to make a decision within 135 days. We do not have the luxury of designing a scientific study with a hypothesis and a statistical analysis that would then accept or reject the hypothesis and provide a confidence of how right you think you

were in making your decision. Therefore the Endangered Species Act requires us to use the best available science and when the science is not conclusive to use our best professional judgment.

Mrs. NAPOLITANO. But that is given the right information?

Mr. KELLY. Right. Take all the information that we can get, the best available science, and not just studies that are performed on that species in that basin but to gather other general information about the species that is known from scientific studies in other basins for example.

Mrs. NAPOLITANO. OK. Regarding the burden of proof and the use of the broader scientific literature and concepts, et cetera, which the National Research Council did not consider appropriate to use, how in your past experience did the Fisheries use such information in other situations and how did it help you or did it help you and the Fisheries write stronger biological opinions to make better decisions?

Mr. KELLY. Well I can give you an example. I have done a number of Endangered Species Act consultations for replacements of bridges in rivers where there is a lot of excavation and whatnot in the rivers. We are not going to have information from a particular river that says some amount of turbidity caused by excavation in the river is going to kill some number of fish. You could conduct a study like that but we do not have that luxury.

Therefore, we look at the scientific literature in general and see that we can expect a certain level of turbidity to have an effect on the fish that are there based on this general information that is in the literature and not for our particular place. So we have to use that kind of information. That is what we have.

Mrs. NAPOLITANO. OK. And you suggest in your testimony the essential fish habitat provisions in the Magnuson-Stevenson Act should be strengthened because it also applies to non ESA listed species. Do you personally think this could help keep species off the endangered species list and thus prevent conflict?

Mr. KELLY. I think it could. I think if we had done a proper essential fish habitat consultation at the same time as we did the biological opinion we could have required certain things that would have addressed chinook salmon, and perhaps one of those requirements would have been there would be higher flows earlier in the season because the chinook salmon return earlier than the coho salmon. Remember the biological opinion just addressed the coho salmon. So we could have provided some measure of protection for the chinook which may have averted the fish kill but they are just recommendations.

First of all, we did not make them, and second of all if we had made them they would have only been recommendations that could have been ignored.

Mrs. NAPOLITANO. I think I am running out of time but I would like to ask another question in the next round.

Ms. BORDALLO. Please go ahead. You have the time.

Mrs. NAPOLITANO. Well one of the things that I kind of wondered about in your specific situation of being a "whistleblower" is what does that do to your career? I know that you felt it important, correct, because your work was being—how would I say—misinterpreted?

Mr. KELLY. Yes.

Mrs. NAPOLITANO. What would you say to this committee needs to be done in order to protect others or to be able to ensure that the information is not tampered with or that the renderings are those that are going to be transparent, open, honest?

Mr. KELLY. Right. I guess I would start by saying that of course being a whistleblower is a very difficult situation and can have negative consequences to your career within the agency, and I found it interesting that the Inspector General in their 2003 review of Karl Rove's influence stated that there was no pressure felt by any of the working people. I suppose I might have said that no one ever told me directly if you do this or do not do this, this will happen to you. That never occurred.

However, I think any reasonable person would realize that if I am faced with being asked to support an illegal process—which it was an illegal process according to the courts—and I have to chose whether to help with this illegal process or refuse to do the assignment, there is a tremendous amount of pressure associated with that decision. So there certainly was pressure, and I had to decide not to do the illegal thing.

I think possibly you could strengthen and make the process more transparent by perhaps providing a biologist version of their final opinion so that there would be a document to compare the agency's final opinion to. Also I think you could probably—I think as NOAA Fisheries has done as policy—make a requirement that legal staff sign off on the opinions. In my experience legal staff had always provided excellent guidance and information, and I think obviously in the OCAP opinion they were not consulted. I do not know if they were consulted in the Klamath opinion but that would certainly strengthen things.

Mrs. NAPOLITANO. Thank you, Madame Chair. I think it kind of goes to one of the heart of the testimonies where people are in tandem working, saying the things that they are expected to say for fear of retribution I would imagine, and it is not hard for us to understand that that can happen because they are afraid for their job, and unfortunately there has got to be a better way to be able to have an employee or a biologist or a scientist be able to truthfully state what is correct for the benefit of doing the right thing. Thank you, Madame Chair.

Ms. BORDALLO. I thank the gentlelady from California, and now the Chair recognizes the other gentlelady from California, Mrs. Capps.

Ms. CAPPS. Thank you, Madame Chair. Dr. Lewis, I will ask you a brief question just to follow up on the question that Chairwoman Bordallo asked previously but I do also want to move on to Mr. Kelly. The follow up question is: The Bureau of Reclamation implemented a 2002 operating plan which was later found to be arbitrary and capricious that your committee said did not have sound scientific basis. Now does that mean then that the Bureau cherrypicked what they did and did not agree with in your plan? Is that your opinion?

Mr. LEWIS. No. I think we should straighten out the sequence of events that occurred after we issued our interim report. Our interim report dealt with some proposals that the Bureau of Rec-

lamation had made that the committee felt would lead to extremes of water use that had not been in the record in the recent past, and therefore we had no scientific evaluation of them, and we thought it was not reasonable given the lack of experience with those flows for them to propose those flows.

So we questioned the validity of that proposal. However, immediately thereafter both they and the Fish and Wildlife Service made new opinions and made new assessments, and the USBR backed away from some of the things they had proposed earlier, and came up with some new proposals, one of which was the——

Ms. CAPPS. I do want to move on.

Mr. LEWIS. OK.

Ms. CAPPS. The words arbitrary and capricious still not——

Mr. LEWIS. Those words were not involved in my study because that is a result of a court case that came after.

Ms. CAPPS. Well, the court found that.

Mr. LEWIS. Well I did not study the court case.

Ms. CAPPS. OK. Thank you. That helps to clarify it. Mr. Kelly, I will be in tandem with my California colleague. I guess that is not unusual but I want to give you a chance to explain a little bit further. For example, it is understood that it was employee complaints regarding Julie MacDonald's activities that led in part to investigation of her conduct by the Department of the Interior Inspector General. To your knowledge, were there surveys of NMFS employees similar to surveys taken of Fish and Wildlife scientists?

Mr. KELLY. Yes. The Union of Concerned Scientists and Public Employees for Environmental Responsibility (PEER) also conducted similar surveys with NOAA Fisheries staff, and I believe they found actually a slightly less favorable situation in those agencies. I do not have any of the statistics but there were numerous complaints. I believe 57 or 58 percent of the biologists or scientists surveyed had said that they were aware of times when they had been or someone had been asked to change conclusions for nonscientific reasons.

Ms. CAPPS. Right.

Mr. KELLY. So those surveys——

Ms. CAPPS. Those surveys were done. Do you know what happened to them?

Mr. KELLY. I believe you can probably find them on the Union of Concerned Scientists website or PEER's website.

Ms. CAPPS. Was any action taken as a result? There was some follow up following the Department of the Interior's Inspector General there, Fish and Wildlife. There was sort of some action that was taken. Did you see any response after these surveys were taken amongst you and your fellow scientists?

Mr. KELLY. I am trying to think. I am trying to remember whether I was actually still with the NMFS or not but I am aware that there was an email that was sent by Dr. Hogarth that addressed that survey, and I cannot tell you specifically what it said but there was.

Ms. CAPPS. OK. Before you left maybe you could describe—and I know again you have already spoken to this a little bit—as a biologist, as a scientist, what is the work setting like when you see your work produce results and then someone else comes in and

they are altered, some findings, and then those people are rewarded and promoted and so forth? What is the climate and I guess if you could describe that but also leave us with you gave some recommendations and transparency of course is to be desired. Maybe there are some more specific advice you would want to give us.

Mr. KELLY. OK. I would start with another piece of advice that I would give, and that is to be very careful with these peer reviews, and if you are to conduct a peer review with some very well-informed people, you might find out some very valuable things. The final report that the NRC committee put out has all kinds of great information in it, and I hope that the agencies act on most of it.

However, you have to make sure that the committee uses the same standard in reviewing the documents that the documents were required to use when they were developed. It makes no sense at all to use some other standard, and to me that is the main reason I think that something was going on. The NRC committee never addressed what standard they used in their interim report, which was the report that ended up leading to the flows that were started during the beginning of the irrigation season.

They do finally as I quoted state that they used the different standard than the Endangered Species Act in their final report. So be careful with the advisory panels. Take some of their information because it is very good. What else was in the question? I am sorry.

Ms. CAPPS. That is probably sufficient.

Mr. KELLY. I mean the work environment. That is right. I can touch on that. Obviously it is personally very discouraging. I am no longer with the agency, and because fellow biologists know what happened, there is very low morale amongst these people realizing that——

Ms. CAPPS. Do you stay in touch with some people still there?

Mr. KELLY. Yes, all the time. I have good friends there.

Ms. CAPPS. Thank you. Thank you very much. I yield back.

Ms. BORDALLO. Thank you. Thank the gentlelady from California, and now the Chair recognizes our guest colleague here, Mr. Walden from Oregon.

Mr. WALDEN. Thank you, Madame Chair. Mr. Lewis, do you want to comment on this notion that your standards were different than ESA standards and why that might have been and what the practical implications of that are to the report your team finished?

Mr. LEWIS. Yes. I do not see this issue quite the way Mr. Kelly does.

Mr. WALDEN. Why is that?

Mr. LEWIS. Well because the committee did exactly what it was told to do. That was to assess the degree of scientific security of the decisions that were made. So we were basically asked to use a sliding scale and rate some aspects of these decisions, very strongly supported, some partially supported, and some not supported, and we did that. We found one set of decisions related to the Klamath Project where we thought that the agencies had actually made decisions that had been contradicted by data collected from the project.

Mr. WALDEN. Right.

Mr. LEWIS. And that is a totally different matter. That is where the decision process runs against the data, and that is a very risky thing to do that.

Mr. WALDEN. And that was both the lake levels and the outflows?

Mr. LEWIS. Right. Yes. In——

Mr. WALDEN. Two principle decisions that led to the water cutoff I might add.

Mr. LEWIS. Yes. And the committee did put in—and I saw to it that it went in—an acknowledgement that the agencies do not have the latitude under the Endangered Species Act to conduct extended studies, and it is perfectly appropriate for them under those conditions to use professional judgment, comparisons with other habitats and so forth as part of their decisionmaking process.

Mr. WALDEN. But I believe the language you used in the report indicated that maybe that decisionmaking process went against their data.

Mr. LEWIS. Yes. That is——

Mr. WALDEN. And carried with it a high risk.

Mr. LEWIS. That is a different matter. It does not make sense that agencies would run against data that they had collected. However, we have to realize that that data had accumulated slowly and was just about ready for evaluation about the time they did their opinions and assessments. So I think that may possibly explain why that happened.

Mr. WALDEN. And I think it is important to remember too this is not a static basin. There is work ongoing. Your report obviously looked at issues involving fish passage at Chiloquin Dam, Sprague River. That is now on track under this Administration to be completely removed. Do you think that will have a positive affect on sucker habitat access and survival?

Mr. LEWIS. Well it opens up potentially a great deal of habitat for spawning that has not been available for suckers. So it is one of the most useful things we could do. It will be an experiment. It is always possible that that habitat up there is not as suitable as we think it is but the biologists who know about the suckers seem to think there is a good chance this would improve reproductive output.

Mr. WALDEN. And at the time of your report the A Canal was not screened and many of the sucker larvae were sucked out into the fields. Now it is screened. Do you think that will have a positive impact?

Mr. LEWIS. Yes. That was something called out of the high priority by the committee because it is an example of take, and take of course of an endangered species is prohibited under the Endangered Species Act, particularly when it occurs through a Federal agency.

Mr. WALDEN. Let me ask you this on that point on the issue of take. As we all know there is not a commercial harvest on coho.

Mr. LEWIS. No.

Mr. WALDEN. There is a sport fishery on coho.

Mr. LEWIS. On coho, yes.

Mr. WALDEN. On coho. So there is a sport fishery, and my understanding is that in 2007 this year that fishery is 50,000 coho rec-

reational of which they expect a 20 percent hook mortality on the listed species or 1,000 listed coho will accidentally be caught and released and die.

Mr. LEWIS. I do not know those statistics.

Mr. WALDEN. They are from the Pacific Fisheries Management Council's February report.

Mr. LEWIS. Where are these coho located?

Mr. WALDEN. Out in the Pacific Ocean.

Mr. LEWIS. Yes. Well see not all populations of coho are protected by the Endangered Species Act.

Mr. WALDEN. This is from Cape Falcon to Washington. Cape Falcon, California to Washington.

Mr. LEWIS. The population that is protected in this case is the Southern Oregon-Northern California Coast population which is limited geographically to the Klamath Basin and one or two adjacent basins.

Mr. WALDEN. OK. But out in the ocean how do you know the difference?

Mr. LEWIS. Well there is a bit of a problem there. That is true.

Mr. WALDEN. Yes. I know Mr. Kelly's testimony talks about how even a few dozen of the listed species being killed and the kill off that occurred in 2002 is a big deal when you are trying to save a species, and yet we seem to regularly have harvests going on out in the ocean that as an incidental portion of that in sports fishery we get snag mortality that in 2001 was 214 post hook mortality is what they estimated, 2002 they figured it to be about 600 and 2007 they think it will be about 1,000.

Mr. LEWIS. I have no special knowledge of this but it is possible that the National Marine Fisheries Service has seen to it that there are some geographic restriction or other kind of restriction that protects the threatened population but allows sport take elsewhere where the populations are not protected under the Endangered Species Act.

Mr. WALDEN. One final question. I noticed that there were peer reviews from Trout Unlimited and Nature Conservancy as part of the review process. Did they ever question your results over the burden of proof standard?

Mr. LEWIS. We are not allowed to know what names to attach to the individual critiques.

Mr. WALDEN. All right. Thank you.

Mr. LEWIS. We were required to answer all challenges made by the reviewers and amend the report or show the monitors that we could rebut those challenges.

Mr. WALDEN. All right. Very good. Thank you very much. Thank you, Madame.

Ms. BORDALLO. I thank the gentleman. We are required to vote in just a very few minutes. So I just have one quick question to Mr. Kelly. Based on the science that you were familiar with as a NOAA biologist, what do you think led to the massive salmon mortality in 2002? If you could give us a quick answer.

Mr. KELLY. Well I think that the fish had a hard time getting upstream and distributing and became crowded in low, warm water in the presence of disease, and that the parasites ultimately killed them. It is possible, though not definite, that more water and I

would like to point out that Mr. Lewis pointed out that it was a 10 percent contribution to the lower Klamath from the releases at Iron Gate Dam. Presently it is about 40 percent and typically it is anywhere from 30 to 50 percent of the flow.

So if they would have had the flows that we had prescribed as our long-term prescription, there would have been more water which would have made it possibly easier for the fish to move upstream and avoid the crowding situation. That is also the only thing you have control over is the flow. So if you are going to be precautionary about it, you need to consider more flows to help the fish.

Ms. BORDALLO. I thank you very much, Mr. Kelly and Mr. Lewis, and I wish to thank all of the panelists, and again to apologize for the delay because of the votes in between, and thank the other panelists, panel one, two, three and four. And I would also like to thank my colleagues today. The Committee may have additional questions in writing, and the record will remain open for an additional 10 days, and if there is no objection, the Committee on Natural Resources now stands adjourned.

[Whereupon, at 4:45 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

[A statement submitted for the record by Dominick A. DellaSala, Ph.D., Chief Scientist and Executive Director, National Center for Conservation Science & Policy, follows:]

Statement of Dominick A. DellaSala, Ph.D., Chief Scientist and Executive Director, National Center for Conservation Science & Policy

Chairman Rahall and Committee members: thank you for holding this oversight hearing regarding the political influence of the Bush Administration on agency science and decision-making. I am especially appreciative of this opportunity to submit testimony regarding one of the numerous mishandlings by this administration of the Endangered Species Act, as previously documented in the May 9 hearing in this Committee on the "Endangered Species Act Implementation: Science or Politics?" At that time, I testified in front of the House Natural Resources Committee ("Committee") on how interference in the draft northern spotted owl recovery plan by a "Washington D.C. Oversight Committee" led to a scientifically flawed and politically motivated recovery plan. I understand that my testimony was challenged by the Forest Service and Fish and Wildlife Service (FWS) in response to issues raised by members of this Committee. Thus, I am submitting additional testimony to respond to these assertions and to contribute to this oversight hearing. Since June 2006, I have served as a member of the FWS-appointed spotted owl recovery team. During this process, I witnessed numerous instances of distortions of science by the recovery team and FWS, and a shift in the process under which the recovery team operated from consensus to responding to direction from the Washington Oversight Committee.

In this testimony, I emphasize four main points:

(1) the draft recovery plan for the spotted owl was interfered with by a Washington Oversight Committee, which included Deputy Assistant Interior Secretary Julie MacDonald and Deputy Secretary Lynn Scarlett among others, as documented in the excerpts of recovery team meeting notes, emails, and personal meeting notes that were submitted into the congressional record on May 9th;

(2) tthe much needed re-examination of Ms. MacDonald's involvement in ESA decisions should be opened up to a broader range of ESA related issues, especially the draft spotted owl recovery plan;

(3) tthe flawed draft spotted owl recovery plan is tied to several related forest policy decisions, including the recently proposed critical habitat exemptions for the northern spotted owl and the soon-to-be released Western Oregon Plan Revisions (WOPR) of the Bureau of Land Management (BLM); and

(4) tthese decisions should be placed on hold while an investigation is conducted into the draft owl recovery plan and a new recovery team assembled that includes independent scientists.

Although Deputy Interior Secretary Scarlett recently stated "Secretary Kempthorne and I are strongly committed to scientific integrity at the Department of the Interior—I believe we are taking positive steps in this regard," the commitment to examine ESA decisions does not extend to the draft spotted owl recovery plan that also may have been tampered with by Ms. MacDonald and other high-ranking officials. The draft owl recovery plan is a key document that could trigger rollbacks in old-growth forest and wildlife protections, including the recently proposed critical habitat determination for the spotted owl and the BLM WOPR among others. A weak owl recovery plan could result in irretrievable and irremediable losses of remaining old-growth forests not only for owls but in some cases salmon and other wildlife species. It could also trigger the future need to up-list the owl to endangered status.

Prior to September 29, 2006 the recovery team was operating under a consensus charter in reaching decisions on the spotted owl recovery plan. After that draft was submitted to Washington D.C. for internal review, the recovery team was moved out of consensus decision-making and into a lesser defined "advisory role," increasingly responding to direction from the Oversight Committee. At that time, the amount of official agency note taking declined precipitously and meeting summaries became superficial. Therefore, the materials noted in my testimony were derived from the few detailed emails and recovery team meeting notes that contained relevant information and from my personal notes taken during recovery team meetings. These excerpts are backed by letters from scientists and lengthier documents should the Committee require further proof.

ISSUES RAISED BY COMMITTEE MEMBERS, FWS RESPONSE, AND MY RESPONSE

Issue #1: Dr. DellaSala asserted that there was a lack of consensus for decision making.

FWS response: The recovery team fully complied with their charter; they worked hard to reach consensus, and most decisions were achieved through the consensus process. When consensus was not reached, it was only a few individuals who dissented, after much discussion and efforts to accommodate all points.

My response: The recovery team operated under a consensus charter until September 29 when the recovery team's initial draft recovery plan was submitted to D.C. for internal review. While that draft plan did not receive the consensus support of the entire recovery team, for example, several of us expressed reservations or disagreement with the level of habitat protection for the owl, the path to resolving this disagreement—scientific peer review by qualified owl experts—did not appear to be objectionable. Unfortunately this approach to address our disagreements was not followed.

Instead, after September 29, our recovery team was instructed to change its approach. The following direct quotes were extracted from FWS recovery team meetings notes that demonstrate how the process shifted from consensus to the team increasingly responding to direction from the Oversight Committee:

On October 19, 2006 the recovery team received a memo via e-mail from the FWS Pacific Region Office containing a new set of rules for making decisions. The memo recommended **"the team no longer make decisions by consensus."** At the same time, the recovery team received a second memo, identifying topics for discussion at future meetings and teleconferences. Among the topics listed were **"coordination with decision makers"** (i.e., the Oversight Committee), and the need to **"ensure we are exploring the options described by the decision makers."** [emphasis added]

Source: October 26-27, 2006 recovery team meeting notes taken by FWS—"NSO Recovery Team Meeting"

> *"The team discussed moving away from consensus decision making in order to meet our timeline and more fully capture scientific uncertainty associated with the options."*

Source: January 12, 2007 email from Dave Wesley to the recovery team

> *"Here is our plan—the IST will also draft the provincial Option, Option 2, using the best information from our last meeting and guidance (direction/questions) we received from DC.*

The noted shift in the decision making underscores how the recovery team, primarily operating through the IST (Interagency Support Team), was responding to

direction/ questions from the Oversight Committee in D.C. rather than proposing recovery plan options based on the best available science.

From my personal notes taken during a recovery team meeting on February 7, 2007, the recovery team was instructed by Paul Phifer that "consensus is not the purpose—we need to evaluate options based on criteria" and by Dave Wesley "the new direction from the oversight committee changed things—the paradigm has shifted—we need to make Option 2 as best as we can."

It was more than a few individuals that expressed concerns regarding this shift in decision-making. There were misgivings from other recovery team members, including the Washington State governor's office, the Washington Department of Natural Resources, and the Washington Audubon Society (per my meeting notes).

Issue #2: Dr. DellaSala asserted that the FWS did not or would not do peer review, while maintaining that the FWS should conduct peer review because the habitat percentages for various provinces the owl occupies are inaccurate.

FWS response: The habitat percentages in the draft plan were developed by the entire recovery team. The recovery team, including Dr. DellaSala, agreed these percentages were at a point in which they could be peer reviewed, and the team agreed the appropriate time for that review was during the public comment period. In its Notice of Availability published in the Federal Register, the FWS specifically asks for comment on these percentages. Furthermore, the FWS has initiated peer review by contracting with 2 professional societies for independent review and is seeking additional review from the three scientists whose data were used to develop these habitat percentages.

My response: According to my notes from the August 22, 2006 recovery team meeting, we had considerable discussion over a technique for developing habitat thresholds (i.e., how much habitat to include in the reserves) initially proposed by Ed Murphy of Sierra Pacific Industries, during which I and others raised significant objections that he misrepresented data from two studies in the southern part of the owls' range (Franklin et al 2000, and Olson et al. 2004) and was "low balling" the habitat thresholds. My notes go on to say that because there were disagreements over the habitat thresholds, the recovery team reached consensus to send them out for peer review. This came up again on August 23, after the discussion was reopened, and the recovery team agreed a second time to send the thresholds out for peer review rather than hold the plan up over this disagreement. During a September 7, 2006 recovery team conference call with leading owl scientists (Drs. Robert Anthony and Alan Franklin), the scientists supported my concerns that the proposed habitat thresholds appeared too low. However, when higher habitat thresholds were proposed, they were dismissed by the recovery team and FWS refused to consider alternative proposals to expand the reserve network or increase the habitat thresholds. In an October 18, 2006 email to the FWS, I stated that one of the conditions for moving forward with the draft recovery plan was to "convene a science panel with owl scientists and others to discuss the applicability of "new science" and the validity of the assertion that "past" science should be de-emphasized. The panel should also evaluate whether non-reserve strategies are scientifically sound." In particular, the so-called new science the recovery plan purports to be based on pertained primarily to the disputed habitat thresholds in the recovery plan initially proposed by industry.

Given these discrepancies, recovery team members, including myself, the Washington Audubon Society, and the Washington DNR requested that peer review be conducted by FWS of the habitat percentages prior to public release of the draft owl plan. This request was repeated in recovery team meetings and conference calls with FWS on September 11, October 20, November 17, and March 2. In response, the recovery team was instructed by FWS that we needed a decision from D.C. on how they wanted us to proceed before we bring scientists in to discuss the habitat percentages. FWS did not agree to release the habitat provisions for peer review until the March 2 conference call when the Washington DNR and I repeated our request. However, peer review did not take place until after release of the draft plan in the Federal Register on April 26. This seven-month delay in peer review resulted in the incorporation of habitat thresholds into the draft recovery plan that were not based on rigorous scientific standards and were in direct opposition to warnings by researchers whose seminal work was incorrectly used in the recovery plan. I have included the following statements from these researchers that underscore my concerns:

- "...we do not recommend that forest managers use our modeling results as a prescription for managing habitat either within the Oregon Coast Range or elsewhere until other similar studies are conducted." (Olson et al. 2004)

- "I reiterate my concerns that interior older forest and other landscape characteristics, rather than just amounts of older forest, should be considered in developing optimal landscape configurations (as was suggested in the Ecological Monograph). In addition, my co-authors and I have repeatedly noted that the monograph represents just a first approximation of these relationships, which form the basis for future studies, but in itself should not be considered definitive." (November 21, 2006 letter to Paul Phifer from Dr. Alan Franklin).

Also attached is a letter from Dr. Olson to Congressman Inslee. Dr. Olson identified five key areas where her work was misapplied in the draft recovery plan by the recovery team noting "...my general impression with respect to the use of my research is that the Recovery Team lacked an understanding of the methodologies used and deliberately ignored warnings against using it to write management prescriptions.

Thus, the draft recovery plan contains a number of fatal flaws that could allow habitat levels for the spotted owl to be managed at unscientifically low levels at a time when the species is facing multiple threats and an accelerated decline (Anthony et al. 2006). A scientifically sound recovery plan would never recommend low habitat levels at a time when the owl is facing multiple threats.

Issue #3: Dr. DellaSala asserted that the Washington Oversight Committee directed the Recovery Team to rewrite the plan.

FWS response: The Oversight Committee, after reviewing the initial draft, asked the Recovery Team to do three things: (1) reorganize how the plan was presented in order to improve readability and emphasize new science; they did not ask it to be substantively changed; (2) address the barred owl threat more directly, as this threat was assigned the highest recovery priority number by the recovery team—while loss of habitat continues to be a concern, the original draft as prepared by the recovery team included increased concern about the impact of barred owls; however, when the Washington Oversight Committee looked at the actions to address this threat, the actions did not appear substantial; and (3) provide one or more options that provide equal protection for the owl, but do not rely on static reserves.

In recognition of adaptive management principles and some of the science presented in the 5-year review, the Committee asked if owl reserves could be established at the local land manager level, either range-wide or on a provincial basis. At no time did the Committee provide specific direction to change any of the science, ask the measures needed to recovery the owl be changed or diluted, nor did they edit or write any portion of the document.

My response: The following are excerpts from recovery team meeting notes and emails taken by or sent by the FWS reporting to the recovery team on discussions with the Oversight Committee. These excerpts demonstrate that the recovery team was directed by the Oversight Committee in more substantial ways than FWS admits.

Source: October 18 "Northern Spotted Owl Recovery Plan Options"

- "Emphasize the new science indicating habitat variability across the range, and de-emphasize the past".
- "..Note change of name from "mapped" to "managed" owl reserves
- Eliminate the MOCA [Managed Owl Conservation Areas] concept and instead establish provincial habitat targets."
- **"We also need to do a "reorganization and emphasis"** *rewrite* of the existing draft..." [emphasis added].

Source: October 25, 2006 "NSO Options" (this direction was repeated in an October 30, 2006 Northern Spotted Owl Recovery Plan Options—Concept Paper)

- "Option 2: flip and switch...Strengthens references to flexibility for land management agencies".
- ...and summarize the habitat threats discussion into less than a page.
- Revise how we reference the NWFP [Northwest Forest Plan] throughout the document—and then eliminate reference to the NWFP".

Source: January 12, 2007 email from Dave Wesley to the recovery team

- "We just received new direction from Lynn Scarlett, Deputy Secretary of the Interior concerning the NSO Recovery Plan. We have been asked to provide 2 independent options of the Recovery Plan... These options are to address the recent direction we received from DC."
- "Here is our plan—the IST will "delink" Option 1 from the combined draft as it exists now and review it to insure it represents the Teams' best efforts as of September 29th...The IST will also draft the provincial Option, Option 2.."

The following are summaries from recovery team meeting notes that I took:

- Ren Loehefner (10/17/06)—the Washington Oversight Committee "objected to: (1) mapped owl areas—too restrictive and too much of a reserve system; (2) the emphasis on the NWFP and the 1992 draft final spotted owl recovery plan; (3) not enough actions on barred owls; and (4) not enough flexibility.
- Paul Phifer (12/15/06) "the oversight committee has decision-making authority and is telling the recovery team what they want—this is a shift in our approach—we are being moved into an advisory role.

In sum, the Oversight Committee directed the recovery team to: (1) place the barred owl above habitat loss (e.g., by reducing the discussion of habitat to a single page and—"flip and switch"—the presentation of materials so barred owls are ranked higher than habitat losses); (2) deemphasize past science and emphasize new science; (3) delink the recovery plan from the NWFP; (4) develop an option that does not depend on fixed reserves; (5) eliminate the MOCAs; and (6) change "mapped owl conservation areas" to "managed" owl conservation areas. It should be noted that the September 29 draft submitted by the recovery team to D.C. assigned equal priority to the barred owl and ongoing habitat loss.

I have attached a letter from Dr. James Tate, Science Advisor to the Office of the Secretary, Water and Science. Dr. Tate states *"the draft recovery plan for the Northern Spotted Owl [NSO] is needlessly bureaucratically complicated, and fails to address the basic biology of the listed species and the threats to its survival or recovery....I suggest that some of the other actions, especially those that related to the habitat needs of the two species, deserve a much higher priority than lethal control of BAOWL (barred owl—sic—emphasis added)."*.

When this letter was discussed during a subsequent recovery team conference call on January 18, 2007 the recovery team was instructed by FWS to ignore it.

Issue #4: Dr. DellaSala asserted that the habitat criteria were directed by the Washington Oversight Committee.

FWS response: In fact, the habitat criteria were established by the Recovery Team, as described above and with which Dr. DellaSala agreed (pending peer review as previously described). These criteria were developed for both options. In fact, these habitat criteria were developed before the initial plan was ever sent to the Washington Oversight Committee. These criteria are very technical, and at no time did the Washington office inquire about them.

My response: To clarify, nowhere in my May 9 testimony did I state, or even imply, that the Oversight Committee directed adoption of specific habitat criteria. However, as stated in my May 9, 2007 testimony to the Committee, the Washington Oversight Committee, and, in particular, Deputy Interior Secretary Lynn Scarlett, directed the FWS to *"start with newer science, how it works, de-emphasize the reference to the NWFP* **(Source: October 27 meeting notes distributed to the recovery team by FWS)** and to *"summarize the habitat threats discussion into less than a page"* **(Source: November 15 recovery team meeting notes—FWS).** The so-called new science primarily included two studies in the southern range of the owl misrepresented in the draft recovery plan (see response #2 above). In addition, there were numerous other new studies that the recovery plan omitted, including those documenting the impacts of post-fire logging on forest structure and ecosystem processes of importance to the owl (e.g., Beschta et al. 2004, Lindenmayer et al. 2004, Noss and Lindenmayer 2006) and others demonstrating that habitat loss and barred owls are interrelated [equivalent] threats to the spotted owl (Pierce et al. 2005). The 2007 draft owl recovery plan is a significant step backward from the 1992 draft owl recovery plan, which included much stronger restrictions on post-fire logging.

Issue #5: Dr. DellaSala asserted that Dr. Lohoefener, Mr. Wesley and Mr. Joyner after meeting with the oversight committee all stated that the Forest Service and BLM were to receive special treatment and were really in charge of the Recovery Plan.

FWS response: Mr. Joyner, Deputy Regional Forester of the U.S. Forest Service in Portland responded to Dr. DellaSala. In his response he states, "I categorically deny making such a statement nor did I imply that the oversight committee intended to reduce protection to the Northern Spotted Owl, when the committee provide the guidance for Option 2. In a broader context, I disagree with your general assertion that the Forest Service and BLM exceeded an appropriate role in the development of the recovery plan. [Letter from Calvin Joyner to Dr. DellaSalla—sic—dated 5/8/07]." Dr. Lohoefener and Mr. Wesley also deny ever making statements indicating preferential treatment in developing the recovery plan. Because recovery plans are only effective if they are implemented, we did strive to develop a plan that

was responsive the ESA (sic) and would be useable by the U.S. Forest Service and Bureau of Land Management, who manage the vast majority of the land included in the recovery plan.

My response: For clarification, nowhere in my May 9 testimony did I state that the Forest Service and BLM "were really in charge of the Recovery Plan." I merely stated that the land management agencies had disproportionate influence as documented in both of my testimonies. As an addendum to my May 9 testimony and in response to Mr. Joyner's letter regarding my testimony, I submitted the following materials to this Committee and resubmit them here again in support of my ongoing concerns that the Forest Service and BLM inappropriately pressured the FWS during the development of the recovery plan. These materials are excerpts from recovery team meetings notes taken by FWS, an unsigned memo from the Pacific Northwest Regional Forester and BLM State Director (Oregon), and response emails from the FWS.

Source: January 12, 2007 email from Dave Wesley to the recovery team

"As there is a bit of ambiguity in these directions/questions [i.e. from the oversight committee], the IST will be consulting with the FS and BLM to ensure we address their concerns."

Source: Draft Direction (unsigned) memo received on January 16, 2007 from BLM State Director (Oregon) and Forest Service Regional Director (Portland) attached to a cover email from Paul Phifer.

"We appreciate the continued commitment and hard work of the Recovery Team (RT). The Recovery Plan (RP) for the Northern Spotted Owl (NSO) will identify and prioritize recovery actions to guide monitoring, research, project planning and on-the-ground management actions by the federal agencies and describe recovery goals to be considered in developing future land use plans. The northwest forests are dynamic systems that will change considerably over the 30 year recovery period. Our knowledge of the Barred Owl, now the single biggest threat to NSO recovery, will improve dramatically over the same time.

Over the life of the RP, the BLM and U.S. Forest Service will periodically revise the land use planning documents of the nineteen National Forests and six BLM districts covered by the Northwest Forest Plan (NWFP). The RP will provide long term goals for recovery, with both short and long term recovery actions, but it must also provide a reasonable level of flexibility to enable the agencies to continue to adapt and revise land use plans based on new information and observed results.

Therefore, we request the RT proceed as follows:

1. Fully develop Option 2 (province level rule set) independent of Option 1. Use the Interagency Scientific Committee (ISC) report, the 1992 Draft Recovery Plan, and more recent peer reviewed scientific publications, like the 10-Year Status Review, to develop the rule set. Drop rule #1 that carries over the MOCA acres by province from Option 1 and clarify rule #5 that calls for "as much high quality habitat as possible." Clearly describe the goals and objectives of each rule so the agencies can determine, in consultation with the FWS, how best to achieve the goals and objectives of the RP while providing for other goals identified in land use plans. The RP should place primary emphasis on identifying the quality and characteristics (size and spacing) of necessary habitat based on the best information available, including historic occurrence data and describe objective, measurable recovery criteria. Provide to the FWS a final draft by March 1, 2007 for public release by April 1, 2007.
2. Provide additional emphasis on actions to reduce the loss of important NSO habitat by wildfires and to address the threat of Barred Owls. To the extent possible, identify priority areas in need of treatment and describe the goals of such treatments.
3. Rather than assume continued management of the federal lands according to the NWFP, assume the federal agencies will continue to manage federal lands per a land use plan which will be based, in part, on the RP. Also, assume actions to implement federal land use plans will be accompanied with either plan or project level consultations to ensure management actions align with recovery goals.
4. As you prepare the RP, include applicable actions or strategies from the NWFP as specific goals, objectives or recovery actions when necessary to contribute to recovery, but de-link the action or strategy from the NWFP and describe it in independent terms. Any element of the 12 year-old NWFP brought forward into the RP should be re-evaluated based on current knowledge of threats to ensure continued applicability. For federal lands outside the areas to be managed for NSO, assume those lands will continue to represent habitat capable acres.

Though nesting, roosting, foraging and dispersal habitat will continue to be available on federal lands outside the areas to be managed for owls, and will continue to contribute to recovery, the amount and locations of such habitats will vary over time based on implementation of land use plans and naturally occurring events.

5. Recognizing that size and spacing of habitat blocks will be a key element of any RP, a rule set that identifies either the minimum or a reasonable range for each variable will provide both the most flexibility and most responsive management direction. When a range of values is provided, explain the basis for the values that define the range."

Source: January 25, 2007 response from Dave Wesley to the recovery team

The following memo details a point-by-point account of how the FWS incorporated direction from the Forest Service and BLM detailed in the "draft direction" above (only the relevant issues are cited here—the reference to "incorporated" means it was included in the draft recovery plan by FWS).

Fully develop Option 2 (emphasis added) (province level rule set) independent of Option 1. Clearly describe the goals and objectives of each rule so the agencies can determine, in consultation with the FWS, how best to achieve the goals and objectives of the RP while providing for other goals identified in land use plans.

- A fully-developed, stand-alone Option 2 Recovery Plan has been developed with a rule set for deriving habitat blocks that does not include a lower acreage limit. The IST has added purpose statements for each rule in the rule set.
- The rule set has been modified to include a better process for reaching an acceptable spatial extent by connecting most habitat blocks with three other habitat blocks.
- A new Recovery Action (now #35, both options) describing the spotted owl needs on those lands between MOCAs/Habitat Blocks has been created and incorporated into both options.

Rather than assume continued management of the federal lands according to the NWFP (emphasis added), assume the federal agencies will continue to manage federal lands per a land use plan which will be based, in part, on the RP. Also, assume actions to implement federal land use plans will be accompanied with either plan or project level consultations to ensure management actions align with recovery goals.

- Incorporated

As you prepare the RP, include applicable actions or strategies from the NWFP as specific goals, objectives or recovery actions when necessary to contribute to recovery, but **de-link the action or strategy from the NWFP** (emphasis added) and describe it in independent terms.

- Incorporated

Recognizing that size and spacing of habitat blocks will be a key element of any RP, a rule set that identifies either the **minimum** (emphasis added) or a reasonable range for each variable will provide both the most flexibility and most responsive management direction. When a range of values is provided, explain the basis for the values that define the range.

- Incorporated

Source: NSO Recovery Team Meeting October 26-27, 2006

Key Points

(1) "The RT will attempt to draft a concept paper (see Draft Concept Paper) for review by the oversight committee by December 15, 2006. **The intent is to provide some useful information to the BLM's Western Oregon Plan Revision process (emphasis added)."**

** Note—the above incorporation of direction from the Forest Service and BLM by FWS is significant as it led to creation of Option 2 and the emphasis in the recovery plan on de-linking from the NWFP. By de-linking from the NWFP, BLM, in particular, can begin eliminating reserves created for the owl under the NWFP as part of its WOPR. Option 2 was not a product of the recovery team but was an outcome of direction received from the Washington Oversight Committee acting through direction from the Forest Service and BLM.*

Issue #6: Dr. DellaSala asserted that the recovery plan includes habitat protection strategies that are less than those currently afforded the owl under the Northwest Forest Plan

FWS response: The Northwest Forest Plan included provisions for hundreds of species other than the northern spotted owl and did not contain the specific criteria and recovery actions and recommendations for the owl included in the recovery

plan. Nothing in the recovery plan changes the Northwest Forest Plan and nothing in the recovery plan changes the full protection the owl receives under the ESA.

My response: From the draft direction memo cited in issue #5—*"Rather than assume continued management of the federal lands according to the NWFP, assume the federal agencies will continue to manage federal lands per a land use plan which will be based, in part, on the RP. Also, assume actions to implement federal land use plans will be accompanied with either plan or project level consultations to ensure management actions align with recovery goals."*

By de-linking the 2007 draft owl recovery plan (Option 2) from the NWFP, the FWS proposes a recovery plan with lower levels of habitat protections for the owl than the NWFP, which has been recognized as the bare minimum for the owl by the courts. Based on the best available science, however, as well as core Endangered Species Act (ESA) principles for species protection and recovery, the habitat provisions of the NWFP are a "floor" or starting point for any legally adequate spotted owl recovery plan. While some parts of the NWFP also benefit other late-successional species, the ecological assessment of the plan (FEMAT) never considered the parts of the NWFP inseparable. Nor did it indicate which parts could be omitted or reduced and still attain a viability rating for the owl. Greater protection of the owl and its habitat is almost surely needed to provide adequate regulatory assurances for recovering the owl.

Finally, by de-linking the draft owl recovery plan from the NWFP, the recovery plan has opened the door for the Forest Service and BLM to increase logging of old-growth forests in response to the "global settlement agreement" with the timber industry as detailed in my May 9 testimony. The draft owl recovery plan is especially significant to the timber settlement agreement as federal agencies will cite the recovery plan during Section 7 consultations involving forest plan revisions (such as the WOPR).

Issue #7: Dr. DellaSala asserted that the Washington Office oversight on this plan was inappropriate and interfered with science.

FWS response: The northern spotted owl has been a controversial species since before its listing in 1990. Because of the possibility of the species having a huge effect on the economy of the region, it is reasonable Administrations (sic) to have interest in how this resource issue is addressed. In the early 1990s, both the President and Vice President of the United States were directly involved in dealing with this issue. The current political appointees in the Department actively reviewed the recovery plan and suggested that the team explore management alternatives. This review was not unusual or inappropriate, as no factual information was changed or asked to be changed. At no time did the oversight team interfere with the underlying science of the recovery plan, or ask that any changes be made to that underlying science. The team: 1) asked that the recovery plan document be reorganized for greater clarity and readability; 2) asked if the team, which identified the barred owl as a threat to the spotted owl, had any measures to suggest in order to address that threat; and 3) asked if the team, while maintaining the recovery management option in the first draft, could also develop any other options based on adaptive management and performance measures. The team indicated that the initially proposed option was just one possible management option and that they believed it was possible to develop an additional option for consideration and review by the public.

My response: President Clinton directed federal agencies to develop a forest plan that was *"scientifically sound, ecologically credible, and legally responsible."* The President did this in an open and transparent manner that included the public and scientists at the Forest Conference in Portland and also assembled a team of nationally recognized scientists known as the Forest Ecosystem Management Assessment Team (FEMAT). The NWFP, in particular, was developed in response to Judge Dwyer's 1991 ruling that previous management of federal lands was inadequate to maintain the viability of the owl and hundreds of species associated with old-growth forests in the Pacific Northwest. In contrast, the process used by the Bush Administration to develop the draft spotted owl recovery plan was neither transparent nor based on the best available science as developed by career agency biologists and independent owl scientists. Our recovery team did not include any of the well recognized, independent owl scientists. Further, on February 7, 2007, Mr. Loehefner instructed the recovery team to *"don't spend any more time on Option 1, the majority opinion of the oversight committee is they prefer Option 2* (source—my meeting notes—emphasis added). Additional direction from the Oversight Committee included a *"reorganization and emphasis"* rewrite of the September 29 draft (see above), which resulted in inappropriately placing the barred owl above habitat loss and the development of scientifically unsound habitat provisions and recovery plan

options. This occurred while the recovery team's decision making process shifted from consensus to responding to direction from the Oversight Committee.

FWS's assertion that the Oversight Committee merely "asked if the [recovery] team...could also develop any other options based on adaptive management and performance measures" is false. The recovery team was informed that a non-reserve-based option would be included in the plan, with or without the cooperation of the recovery team. Furthermore the statement "the team indicated that the initially proposed option was just one possible management option and that they believed it was possible to develop an additional option" is also incorrect. The majority of the recovery team objected to the heavy-handed interference by the Oversight Committee. That is the primary reason the recovery team was demoted to a poorly-defined "advisory" role. Option 2 was entirely a product of the Oversight Committee and the IST. The recovery team instead was asked to develop performance measures to evaluate Option 2. This option would never have existed if the recovery team had been allowed to work independently.

While FWS has assumed protections for endangered species like the owl are likely to have a "huge effect on the economy of the region," the agency exaggerates this effect. Widespread economic losses were initially predicted as a result of federal reductions in timber harvests, however, the regional economy actually expanded in the decade or so since the NWFP (Niemi et al. 1999a, Power 2006). This is because the economic importance of timber in the Northwest diminished markedly due to many factors, and the regional economy shifted and diversified due, in part, to the many outdoor amenities, clean water, and regional beauty that serve to attract new businesses. FWS has consistently relied on biased economic loss estimators that do not include economic benefits associated with natural resource protections in general (Southwick Associates 2000) and with protecting natural resources that the public holds in high regard such as salmon (Niemi et al. 1999b), presenting one-sided arguments and worse case scenarios.

Issue #8: Dr. DellaSala cites a quotation attributed to Mr. Wesley, published in the Land Letter stating "...the less-defined second option was requested by Interior Department political appointees and other high-level official in Washington, D.C."

FWS response: Although the entire quote is not shown, nor is there any context to the quote, it is essentially accurate that the oversight team requested that the recovery team see if it were possible to develop a second option based on the principles of adaptive management. There is nothing in this quote to indicate the option was less biologically sound, or that the Washington committee asked the Recovery Team to reduce protection for the owl or abdicate their responsibility to use the best available science. Both options rely entirely on the same underlying science and the same recovery objectives and criteria.

My response: The conservation foundation of the NWFP, which is rooted in fixed reserves, is broadly supported in the scientific literature (see Courtney et al. 2004, Thomas et al. 2006, DellaSala and Williams 2006 for reviews). In a five-year status review of the owl, researchers (Courtney et al. 2004) concluded that there was no reason to depart from the NWFP and that the situation for the spotted owl would be bleaker today if not for the NWFP. During a July 12, 2006 recovery team conference call with several well-respected owl scientists (Drs. Robert Anthony, Rocky Gutierrez, Alan Franklin, Barry Noon), the scientists stated that (1) the fixed reserves of the NWFP were the best plan for the owl at this time; (2) the foundation of the NWFP reserves has yet to be proven false; and (3) maintaining the fixed reserves of the NWFP is critical to the owl's recovery (my personal meeting notes). The draft recovery plan for the owl (page 59) states that the conservation reserve strategy under the NWFP was based on sound scientific principles that have not substantially changed since the species was listed. Yet it does a complete reversal by proposing Option 2, which includes non-fixed reserve approaches that have neither been modeled nor tested. It should be noted that Judge Dwyer in 1994 determined that the NWFP was both the backbone to owl viability throughout the region and the bare minimum necessary to satisfy the viability requirements of the National Forest Management Act (NFMA). Both options (and especially Option 2) would drop habitat levels below the bare minimums of the NWFP and in doing so do not meet either the viability provisions of NFMA or, more to the point, the recovery plan standards of the ESA pertaining to best available science. In a related decision, FWS recently proposed to exempt 1.5 million acres of owl critical habitat from protections. As a scientist, I know of no science that would recommend lower habitat levels at a time when the species faces multiple threats and is declining precipitously (Anthony et al. 2006). Consequently, the draft owl recovery plan departs significantly from the habitat protections afforded the owl under the NWFP.

Closing Remarks and Recommendations

I have provided the Committee with excerpts of emails and recovery team meetings notes from the FWS supplemented with letters and quoted statements from well-respected scientists, the administration's own science advisor, and personal meeting notes from recovery team meetings. In spite of my many misgivings about the recovery plan, I have remained a member of the recovery team primarily to ensure that the peer review now underway is responded to openly by FWS and to daylight the political interference with the draft owl recovery plan. Recovery plans are meant to provide guidance to move a listed species to a future where the protections of the ESA are no longer warranted. They are linked to delisting decisions and agency consultations and therefore are required to be based on the best available science. Unfortunately, the draft recovery plan includes numerous scientific flaws, key misrepresentations and omissions of science, and avoidance of warnings from owl scientists and the administration's own science advisor. The process by which the draft recovery plan was handled by FWS has eroded the public's confidence in the ability of the agency to meets its obligation to protect the nation's threatened and endangered wildlife.

The draft owl recovery plan is already being used by federal agencies in related, proposed forest management decisions, including an equally flawed proposed critical habitat determination for the owl and a soon-to-be released BLM WOPR. These pending decisions are collectively tied to the global timber settlement agreement designed to weaken protections for old-growth forests strongly supported by the public. Consequently, I recommend the following remedial actions be taken by Congress:

- Investigate the influence of the global timber settlement agreement on the draft owl recovery plan, proposed critical habitat determination for the owl, BLM WOPR, and other related forest policy rollbacks (e.g., Survey and Manage and Aquatic Conservation Strategy of the NWFP).
- Place the spotted owl recovery plan and related decisions (e.g., critical habitat, BLM WOPR) on hold and convene a panel of independent scientists to redo the draft owl recovery plan.
- Request that the Interior Inspector General, the Government Accountability Office, or the Justice Department's Division of Natural Resources (public integrity section) conduct an investigation into the entire decision chain involved in the draft owl recovery plan and its relation to the global timber settlement agreement in driving the forest planning decisions of this administration.
- Oversee the soon-to-be completed peer review of the draft recovery plan and how FWS responds to it. Given the pattern of political interference in this recovery plan, a credible peer review should be part of the ethical changes and department reviews recently initiated by Secretary Kempthorne.

Thank you again for allowing me to submit this testimony into the congressional record.

Literature Cited

Anthony, R.G. and several others. Status and trends in demography of Northern Spotted Owls. Wildlife Monographs 163. 48 pp.

Beschta, R., J.J. Rhodes, J.B. Kauffman, R. E. Greswell, G.W. Minshall, J.R. Karr, D.A. Perry, F.R. Hauer, and C.A. Frissell. 2004. Postfire management on forested public lands of the western United States. Conservation Biology 18(4):957-967.

Courtney, S.P., J.A. Blakesley, R.E. Bigley, M.L. Cody, J.P. Dumbacher, R.L. Fleischer, A.B. Franklin, J.F., R.J. Gutierrez, J.M. Marzluff, and L. Sztukowski (eds). 2004. Scientific evaluation of the status of the Northern Spotted Owl. Sustainable Ecosystems Institute, Portland, OR.

DellaSala, D. A., and J. Williams. 2006. Northwest Forest Plan Ten Years Later—how far have we come and where are we going? Conservation Biology 20:274-276.

Franklin, A.B., D.R. Anderson, R.J. Gutierrez, and K.P. Burnham. 2000. Climate, habitat quality, and fitness in Northern Spotted Owl populations in northwestern California. Ecological Monographs 70:539-590.

Lindenmayer, D.B., D.R. Foster, J.F. Franklin, M.L. Hunter, R.F. Noss, F.A. Schmiegelow, and D. Perry. 2004. Salvage harvest policies after natural disturbance. Science 303:1303

Niemi, E., E. Whitelaw, and A. Johnston. 1999a. The sky did not fall: the Pacific Northwest's response to logging reductions. ECONorthwest, Eugene, OR.

Niemi, E., E. Whitelaw, M. Gall, and A. Fifield. 1999b. Salmon, timber, and the economy. ECONorthwest, Eugene, OR.

Noss, R.F., and D. B. Lindenmayer. 2006. Special section: the ecological effects of salvage logging after natural fire. Conservation Biology 20(4):946-948.

Olson, G.S., and several others. 2004. Modeling demographic performance of Northern Spotted Owls relative to forest habitat in Oregon. J. Wildlife Management 68:1039-1063.

Pierce, D.J., J. B. Buchanan, B. L. Cosentino, and S. Snyder. 2005. An assessment of the status of Spotted Owl habitat on non-federal lands in Washington between 1996 and 2004. Washington Department of Fish and Wildlife, Olympia, Washington, USA. 164p.

Power, T.M. 2006. Public timber supply, market adjustments, and local economies: economic assumptions of the Northwest Forest Plan. Conservation Biology 20:341-350.

Southwick Associates. 2000. Historical economic performance of Oregon and Western Counties associated with roadless and wilderness areas. Southwick Associates, Frenandina Beach, FL.

Thomas, J.W., J.F. Franklin, J. Gordon, and K.N. Johnson. 2006. The Northwest Forest Plan: origins, components, implementation, experience, and suggestions for change. Conservation Biology 20:277-286.

[The letter of Gail S. Olson, Ph.D., submitted for the record by Dr. DellaSala follows:]

May 16, 2007

The Honorable Jay Inslee
U.S. House of Representatives
Washington, D.C.

Dear Congressman Inslee:

I am a wildlife biologist who has conducted research on the relationships between Northern Spotted Owls and their habitat for the past 8 years. I (along with 6 co-authors) published a paper on some of the results of that research in the Journal of Wildlife Management in 2004 and it has been cited several times in the draft Northern Spotted Owl Recovery Plan. Specifically, results published in my paper have been used to support the habitat provisions for both Options 1 and 2 in the Plan. I strongly believe this to be at least a misinterpretation of my research results and at worst deliberate misuse.

One of the key findings described in the paper was that a mixture of older forest and young or non-forest was positively associated with owl survival and reproductive output within one study area in the Oregon Coast Range. We anticipated the temptation to use this information to write habitat prescriptions when we discussed the "Management Implications" of the research. On p. 1052 of Olson et al. (2004), we stated: "...we do not recommend that forest managers use our modeling results as a prescription for managing habitat either within the Oregon Coast Range or elsewhere...". This statement is alluded to within the Recovery Plan (p. 36) and the claim is made that these results were used only to establish de-listing guidelines and not to set management prescriptions. However, it is difficult to imagine that delisting criteria and habitat prescriptions can be completely de-linked, and the rest of the Plan as written does not appear to separate the two concepts.

Therefore, I believe it is reasonable to assume that my research results were used to set habitat provisions in the Plan. Therefore, I believe it is important to reiterate the reasons why we made that statement in the paper.

1. The amount of variation explained by the models is low. That means that the habitat variables that we examined are not strong predictors of owl population parameters (survival and reproductive output). Many other factors likely have an influence, including habitat components not examined in this study.
2. The habitat variables we used in the study were assessed by transcribing aerial photography images. Errors in this process may misrepresent the amounts of certain habitat types.
3. Our results may reflect unique conditions within our study area and may not be representative of other areas. Replication of this study in other areas is necessary to determine whether our results were typical or anomalous.

In addition to these general caveats, I've identified at least 5 key areas where the results of my research were misapplied within the Plan.

1. Definition of owl habitat. The habitat variables used in our analyses were not the same as those that will be used in measuring "habitat-capable" acres in the provisions within the Plan. Although there may be some overlap in the definitions, no effort was made to determine what this overlap is. Therefore, specific values from my research may translate to entirely different values of the habitat definitions used in the Plan.

2. Scope of analyses and scale of measurement. Our research was conducted within a study area known to be historically inhabited by spotted owls. The aim of our study was to see if we could determine differences in owl demographic performance within this area based on the habitat in the area immediately surrounding owl nest trees and activity centers (owl territories). Thus our study only assessed habitat at a relatively small scale and not across entire landscapes. To infer that the same pattern of habitat found within 1500m of owl territory centers can be applied to landscapes as a whole requires additional assumptions that are certainly not supported by my research and also is contrary to what most ecologists believe about the importance of scale in studying wildlife-habitat relationships.
3. Misinterpretation of habitat fitness potential. The Plan bases much of its support for the habitat provisions on a measure called "habitat fitness potential", which was developed by Franklin et al (2000) as a means of combining the affects of habitat on owl survival and productivity into a single measurement. Because they used a common population modeling method based on a projection matrix, they used the symbol λ_h as short-hand notation to represent habitat fitness potential. This likely has led to confusion and the assumption that this measurement can be equated to the more widely used λ which is a population projection measure used to measure population trends in northern spotted owls (c.f. Anthony et al. 2006). In general, values of λ indicate whether a population is increasing ($\lambda>1.0$), decreasing ($\lambda<1.0$), or stable ($\lambda=1.0$). However, values of λ_h cannot be similarly interpreted because they are based on animals already recruited into the population. They are also idealized values based on the assumption that the models used to estimate the survival and reproductive output parameters used to calculate habitat fitness potential are accurate. They are NOT based on direct analyses of the data collected from spotted owls within those individual territories.
4. Appendix D. The most obvious example of poor use of science in the Plan is found in Appendix D, which purports to describe what habitat fitness potential is and it does nothing of the sort. First, there is no information on how habitat fitness potential is calculated, which is necessary for any understanding of what it is. Second, the analyses presented to determine the province-specific habitat threshold values are completely ad hoc. The "limited data set" attributed to the Olson et al. (2004) paper consisted of 6 data points where were intended as visual examples only, and no data were provided on specific habitat values within the paper. Thus they were estimated from a figure (Figure 5) that was never intended to be used in such a way. The graph in Figure D.2. is not of the true relationship between λ_h and the habitat variable, which can be calculated directly because λ_h was computed based on a formula containing habitat values. Even the analysis based on Figure D.3., which is supposedly taken directly from the Olson et al (2004) Figure 2 is incorrect in that it does not accurately estimate the maximum value, which is known. In general, none of the analyses in Appendix D that relate to Olson et al. (2004) were necessary or appropriate.
5. Lack of uncertainty measures. It is a major tenet of modern scientific analyses that the uncertainty of estimates be reported so that the results can be properly interpreted. Estimates are commonly given with confidence intervals or other measures of variance. The Plan repeatedly ignores such uncertainty and does not consider how such uncertainty may affect the recommendations of the Plan.

In summary, my general impression with respect to the use of my research is that the Recovery Team lacked an understanding of the methodologies used and deliberately ignored warnings against using it to write management prescriptions. I was never asked to answer questions regarding either the methodology nor the recommendations, which further leads me to believe that clarity on these issues was not desired. I hope this letter provides some of this clarity and sets the record straight on what can and cannot be inferred from my research.

Sincerely,

Gail S. Olson, PhD.

[The comments of Dr. James Tate submitted for the record by Dr. DellaSala follow:]

FROM JIM TATE (DOI Secretary Science Advisor) received from Paul Phiffer 1/16/07:

Comments on: 2006 Draft Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)

The draft recovery plan for the Northern Spotted Owl [NSO] is needlessly bureaucratically complicated, and fails to address the basic biology of the listed species and the threats to its survival or recovery. The recovery team [team] has stated that the Barred Owl [BAOW] range expansion and competition with the NSO is the primary factor that needs to be addressed. The team also states that there is incomplete information on the habitat needs of the two species involved, or the habitat management options available.

As a result, the team highly recommends lethal control of the BAOW as the primary action to be taken by the government at a cost of about $100M over 30 years. The team also proposes 39 secondary..."actions that address overall habitat recovery through maintenance and restoration, monitoring of avian diseases, existing regulatory mechanisms, development and implementation of a delisting monitoring plan, management of spotted owl populations and distribution, and management of the barred owl." I suggest that some of the other actions, especially those that relate to the habitat needs of the two species, deserve a much higher priority than lethal control of BAOW.

If the recovery goal for the NSO is..."to recover the spotted owl such that it can be removed from the list of threatened or endangered species," then I suggest that an ongoing and costly BAOW control program of the will not work except possibly in the short term. It is evident to me that nothing meaningful will be accomplished until the recovery team has some rough idea of:

1. the habitat needs of the BAOW that are now present in the range of the NSO, but were not there previously,
2. the habitat needs of the NSO that are unacceptable to the BAOW,
3. the changes that have occurred in the habitats of the Pacific Northwest, and
4. a recovery plan that manages the habitat for long-term persistence of the NSO.

It has been suggested that the government should seek a precedent case where a non-listed species which had increased its range had to be controlled for the sake of a listed species. An example was suggested in the case of the Raven and the Desert Tortoise [DTORT] (see: www.werc.usgs.gov/sandiego/pdfs/Shoot%20EA%20&%20ROD-1994.pdf). This example may meet the criteria of control of a non-listed species on behalf of a listed species, but it also created a firestorm of controversy, and failed to take into account the reasons for the range expansion of the Raven (see: http://www.nwf.org/nationalwildlife/article.cfm?issueID=23&articleID=201).

I predict the firestorm of controversy that will be created by a proposal to control BAOWs will be many times greater than the one created by proposed control of the raven. If, during the efforts to control Ravens, there was an adaptive management element to the program, the BLM in concert with the USGS should evaluate its effectiveness in reaching the goal of increasing survival of DTORT juveniles. Lessons learned from the Raven/DTORT experience can help guide our actions in the case of the NSO/BAOW.

In summary, I suggest—

1. A re-focus on the habitat requirements of the NSO and its competitor the BAOW and learn how to manage habitat that favors sustainable recovery of the NSO. The cost of the appropriate research and field tests to do this might well cost less than the current projected costs. Some of this research has already started in Canada.
2. If there is a need for lethal control of BAOW, a review should be made of the effectiveness of lethal control in the long-term survival of the listed species in previous cases where such actions were taken (ex. Raven/DTORT). Such a review can guide better policy decisions.

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[A letter submitted for the record by Josh Pollock, Conservation Director, Center for Native Ecosystems, follows:]

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August 6, 2007

The Honorable Nick J. Rahall II
Chairman
House Committee on Natural Resources
Washington, DC 20515

Congressman Rahall,

On July 31st, the House Committee on Natural Resources held a full committee oversight hearing. Enclosed please find three documents related to the status of the Threatened species Preble's meadow jumping mouse, a subject which was injected into the Committee hearing by Representative Doug Lamborn when he submitted two documents for the record related to the Preble's mouse.

The July 31st Full Committee Oversight Hearing was titled "Crisis of Confidence: The Political Influence of the Bush Administration on Agency Science and Decision-Making" and was the second hearing during this session on the subject of political manipulation of endangered species science. At this hearing, Representative Doug Lamborn of Colorado introduced for the record a letter to Secretary of the Interior Dirk Kempthorne from Senator Wayne Allard of Colorado and a written statement from Rob Ramey, who has conducted research on the genetics of the Preble's meadow jumping mouse. Though this species was not the topic of the hearing and the attempt to offer it as an example of the sort of political manipulation of endangered species science the Committee is investigating was inappropriate, now that the Congressional record relating to this hearing includes these two documents, we believe that a few other relevant documents should be included as well, to ensure accuracy to the record relating to the Preble's meadow jumping mouse and to restore balance to the version of events presented in the testimony of Rob Ramey and the letter from Senator Allard.

Both Ramey's testimony and the Senator's letter to the Interior Secretary present an inaccurate and incomplete version of the past research into the genetic status of the Preble's meadow jumping mouse. After Mr. Ramey announced the results of his own study, an independent study was published by researchers in the Biological Resources Division of the U.S. Geological Survey (see the enclosed "King et al. 2006"). This study confirmed earlier taxonomic classification of the Preble's meadow jumping mouse as a distinct subspecies and refuted Ramey's conclusions (in particular, I draw your attention to remarks in the conclusion to the paper). Subsequently, an independent review panel was commissioned by the U.S. Fish and Wildlife Service to evaluate the conflicting claims regarding the genetic status of the mouse. This panel concluded that all available data still supported the original taxonomic designation of the Preble's meadow jumping mouse as a distinct subspecies (see both the enclosed "Prebles SEI report" and "Highlights SEI panel report" documents). More disturbingly, the panel found evidence of likely contamination of the samples Ramey used for his genetic analysis.

The documents relating to these significant refutations of Ramey's claims about the status of the Preble's meadow jumping mouse present a markedly different picture than the one-sided version of events Ramey offers in his testimony submitted to the Natural Resources Committee. They deserve to be included in the record to ensure an appropriately balanced view of the situation surrounding scientific research on the Preble's meadow jumping mouse for anyone referring to the record in the future.

Therefore, we respectfully asked that the three enclosed documents be included. Thank you for your consideration.

Respectfully,

Josh Pollock
Conservation Director

Enc.

Highlights: Sustainable Ecosystems Institute's Evaluation of Scientific Information Regarding Preble's Meadow Jumping Mouse

The panel finds that the Preble's meadow jumping mouse should be retained as a valid subspecies.

p. 4 ¶ 2: "Overall, the panel concludes that the available data are broadly consistent with the current taxonomic status of Z. h. preblei and that no evidence has been presented that critically challenges that status."

The panel finds that the Preble's meadow jumping mouse is geographically isolated.

p. 34 ¶ 2: "Gaps in geographic sampling also correspond to ACTUAL gaps in the current geographical distribution. For example, in our panel meetings, Drs. Ramey and King both pointed out that there are actual gaps in the distribution of Z. hudsonius between Z. h. preblei and Z. h. luteus in the south and between Z. h. preblei and Z. h. campestris to the north (160km gap between the latter two subspecies). Thus, Z. h. preblei is geographically isolated from other named subspecies."

The panel finds obvious signs of contamination in Ramey's mitochondrial DNA sequence data for specimens he claimed showed shared DNA patterns across subspecies.

The panel examined the original chromatograms for museum specimens that Ramey claimed had DNA patterns associated with other subspecies, but for which King found patterns consistent with the labeled subspecies. A DNA sequence is made up of individual nucleotides, and a chromatogram shows the chemical signal for each nucleotide in the sequence. The panel found two sets of signals in several of the Ramey chromatograms, indicating that there were two sets of DNA in a given sample, but Ramey used these sequences anyway.

p. 26 ¶ 3: "Many pairs of equal-height peaks were called decisively by REA [Ramey et al.] whereas we could not resolve the ambiguity. There was only 1 read from REA for this sample." in other words, even when the presence of 2 sets of chemical signals was obvious, Ramey did not bother to check his work.

p. 27 ¶ 2: "In summary we reexamined the chromatograms from the 15 museum specimens that were sequenced by both labs and that were cited by REA as providing evidence for shared haplotypes among subspecies. Eleven of the REA sequences were based on single reads. All KEA [King et al.] sequences were based on at least 1 read in both directions (3-13 reads total). None of the KEA data sets show clear evidence of more than one haplotype for any specimen....In 2 of the 3 cases of multiple haplotypes being detected in the REA data, the residual sequence is identical or very similar to the sequence acquired by KEA from the same specimens."

When the contaminated sequences are removed, Ramey's mitochondrial DNA results mirror King's—Preble's mouse genetic patterns are unique.

p. 32 ¶ 2: "Based on the available data, it is the panel's conclusion that there is no reliable evidence for any shared haplotypes between Z. h. preblei and any of the other subspecies at this time. There is evidence for contamination of several key sequences reported by REA, raising concerns about the remaining sequences that have only single reads. If these conflicting mtDNA sequences are simply removed from consideration, the two studies would largely agree..."

The panel finds Ramey's criteria for subspecies delineation inappropriate.

p. 35 ¶ 1: "For example, REA used two critical tests of uniqueness for subspecies and historic genetic exchangeability....These criteria were criticized extensively by KEA as well as by some reviewers. The panel feels that neither of these are critical tests of genetic exchangeability."

p. 39 ¶ 1: "Because Z. h. preblei is a formally described, valid, and commonly recognized taxon, we concluded that the burden of proof should lie in clearly showing that its taxonomic status is not warranted...This is the approach taken by KEA; their null hypotheses view Z. h. preblei as a distinct, formally named taxon, and they therefore require clear evidence of genetic interchange to reject that null hypothesis. REA take the opposite approach..."

p. 40 ¶ 3: "REA and Wehausen and Ramey (2000) consider subspecies to be distinguishable if ≥90% of specimens could be correctly classified to subspecies in LDA with jackknifed posterior probabilities ≥95%. As noted earlier, this is a high standard (although we do not claim that it is unjustifiable) without evidence that it has been widely accepted. Wehausen and Ramey (2000) do not cite a source or justification for this standard and their paper has been cited only 2 times by other authors. We question whether it is appropriate to introduce a relatively strict new convention in as contentious a test case as this one."

The panel finds that none of Ramey's four lines of evidence for removing subspecies status for the Preble's meadow jumping mouse are strongly supported.

p. 3 ¶ 2: "The panel concluded that two of the lines of evidence presented by REA (their analyses of cranial morphometrics and ecological exchangeability) are based on insufficient data to support their suggestions for taxonomic change."

re mitochondrial DNA: p. 42 ¶ 2: "Based on the data at hand, there is no reliable evidence of any haplotype sharing. Thus, the available data suggests the Z. h. preblei is distinct and diagnosable based on the combined control region and cytochrome b haplotypes."

re microsatellites: p. 43: "Thus both datasets (including the smaller dataset of REA) recovered support for a distinct Z. h. preblei. Again the key difference in the conclusion is that REA interpret this as 'recent' genetic exchangeability (i.e., biologically insignificant) while KEA interpret this as 'historic' genetic exchangeability (i.e., biologically significant)....If other independent data (i.e., morphological, behavioral, mitochondrial DNA, climatic data, presence of a clear geographic split, etc.) suggest similar or identical groupings, then these microsatellite data offer strong support that these groups are evolutionarily significant (sensu Avise and Ball 1990)....We find that mitochondrial DNA do support the significant clustering of Z. h. preblei groups, and so these two datasets corroborate the distinctiveness of Z. h. preblei."

[NOTE: The "Prebles SEI report" and "King et al. 2006" documents submitted for the record by Mr. Pollack have been retained in the Committee's official files.]

[The statement submitted for the record by Julie Kay Smithson, Property Rights and Resource Utilization/Resource Providing Researcher, London, Ohio, follows:]

Statement submitted for the record by Julie Kay Smithson, property rights and resource utilization/resource providing researcher

I request that copies of my testimony be distributed to all members of the House Resources Committee and any members of the media or attendees that may desire a copy.

The hearing on Tuesday, July 31, 2007, targets administration misdeeds relating to natural resources and natural resource policy.

Chairman Rahall and members of this Committee, it is safe to say that every action of government is, by nature, political. Just as townships, counties, etc., have political boundaries, the running of government must be considered, at all levels, to be political. Every administration and its agencies are political, from creation to activities.

This is why people, for whom government is supposed to exist, must remain ever-vigilant to the workings of government. Such a creature as government is also a parasite, existing by feeding upon its host, the taxpayer. How much lifeblood can be siphoned from the host before the parasite, grossly engorged and misshapen, must be disengaged?

The very subject of today's Oversight Hearing, while not mentioned directly, is this bloated condition imposed upon Americans, as host, by government, as parasite. Government will do almost anything in order to remain attached to us, its host.

The paradox that appears is when agencies begin acting in such a way as to actually 'invent'—or 'reinvent'—science. How many agency employees are actual experts in their fields? How can "decision-making," by any administration or the various and sundry agencies of government, be based on science when the survival, or "job security," of its employees, depend on keeping the paychecks coming? This is something neither specific nor original to the current administration.

This includes the very public and should-be-humiliating hoax of the "endangered" lynx and its hairs, which were surreptitiously removed from a taxidermied specimen

and placed in certain areas in order to make it appear that the lynx had "habitat" in those places and needed a governmental "helping hand" to "recover."

Gentlemen and ladies, your focus today is on alleged "political influence" on "agency science" and "decision-making." Would it not be more proper and accurate to pull in your collective horns and refocus on what "makes the news" and impacts your host in ways that are not only detrimental, but also of grave danger?

Such a focus would zero in on the "over the top" conflagrations that burn each year with greater intensity, inflicting greater real risk upon the natural resources with which you are charged to oversee. It would also focus on the lame-at-best "science" driven by such "environmental" organizations like The Nature Conservancy, Sierra Club, Audubon Society, Center for Biological Diversity, and others that appear to be at the wheel of this runaway locomotive bent upon the control of all resources, including the resource that is Property—even if that resource must be burnt to a crisp or non-maintained for the health of both it and all those impacted by it. I reference the hoaxes that are "invasive species," "native species," "non-native species," "exotic species," et al, ad nauseam. As long as birds fly, i.e., migrate, and animals travel, i.e., migrate, there will be movement of species. This includes the seeds d plants and animals that are naturally carried by weather, seasonal changes, etc. Mankind has had an impact on these, certainly, but it has been a positive and beneficial impact.

Witness the incredible number of new species and subspecies of horses, dogs, cattle, cats, and so many more! Why, people have been practicing "diversity" for lo! Many years before any "environmentalist" or "conservationalist" invented a lock-up "definition" for diversity! Look at the human diversity here in America!

Should the members of this Committee have further questions, I will be delighted to enjoin conversations based upon my research and sound science, both of which this Committee appears in dire need. In the meantime, my suggestion is that you adjourn this Oversight Hearing, admitting that its very basis is faulty and unnecessary, but decidedly political!

My testimony concludes with this caution, spoken by one wise in the ways of government: "A government big enough to give you everything you want is big enough to take everything you have."—Attributed to Barry Goldwater.

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[A letter submitted for the record by Andrew E. Wetzler, Director, Endangered Species Project, Natural Resources Defense Council, follows:]

By electronic mail

August 8, 2007

Hon. Nick J. Rahall, II
Chairman
House Committee on Natural Resources
1324 Longworth Building
Washington, DC 20515

Dear Congressman Rahall:

Please find enclosed a copy of a letter, written by Dr. Sylvia Fallon to Secretary of the Interior in response to a letter sent to the Secretary by Senator Wayne Allard. Senator Allard's letter concerns the U.S. Fish and Wildlife Service's conduct surrounding the threatened status of the Preble's meadow jumping mouse. Our understanding is that this letter was forwarded to your Committee for inclusion in the record of last week's hearing regarding the proposed delisting of the mouse from the federal list of threatened and endangered wildlife.

As Senator Allard mentioned Dr. Fallon, an NRDC staff scientist, by name in his letter, we felt compelled to respond. Accordingly, we request that you include Dr. Fallon's response in the record along with Sen. Allard's letter.

Thank you for your attention to this matter.

Very truly yours,

Andrew E. Wetzler
Director, Endangered Species Project
Natural Resources Defense Council

[The letter from Sylvia Fallon, Ph.D., Staff Scientist, Endangered Species Project, Natural Resources Defense Council, to Secretary Kempthorne submitted for the record by Mr. Wetzler follows:]

NATURAL RESOURCES DEFENSE COUNCIL

August 8, 2007

The Hon. Dirk Kempthorne
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Dear Secretary Kempthorne:

My name was mentioned recently in a letter sent to you, and then submitted to the House Committee on Natural Resources, by Senator Wayne Allard regarding what he perceives as the U.S. Fish and Wildlife Service's (USFWS) misconduct surrounding the threatened status of the Preble's meadow jumping mouse. Senator Allard is attempting to build a case that USFWS biologists, academic scientists and environmental organizations have conspired to "obfuscate" the best available science and undermined a scientific study by Dr. Rob Roy Ramey II in order to maintain federal protections for the Preble's mouse. These accusations could not be further from the truth and, in fact, represent yet another example of political interference in scientific and endangered species decisions.

Dr. Ramey conducted a study that involved genetic information for the Preble's meadow jumping mouse and its closest subspecies. He determined that the Preble's mouse was not unique and therefore did not qualify for protection under the Endangered Species Act. As USFWS regarded this as the best available science at the time, it proposed delisting the Preble's mouse in February 2006. During the peer review process of the delisting, however, several scientists expressed concerns about Dr. Ramey's study. These concerns were sufficient enough for USFWS to commission a new study to verify Dr. Ramey's results. They asked USGS geneticist Dr. Tim King to complete the study.

Dr. King's study, which used fresh samples from the field--compared to the museum samples that Dr. Ramey used--examined a larger, more robust genetic dataset. His results showed conclusively that the Preble's mouse is a unique subspecies and does not share any genes with surrounding subspecies. As these results contrasted with those of Dr. Ramey's, Dr. King requested the museum specimens that Ramey had sampled. He was unable to reproduce Ramey's results.

Rather than simply favor Dr. King's study over Dr. Ramey's, USFWS then commissioned a panel of independent scientists to weigh the evidence. The panelists interviewed both Dr. Ramey and Dr. King. They also examined their raw data. The panel verified that Dr. Ramey *had contaminated his samples*; they also concluded that Dr. King's study was the best available science and supported the subspecific classification of the mouse.

My involvement in the situation, as referenced in Senator Allard's letter, concerns a collegial exchange with Dr. King regarding my own research – not his or Ramey's. As a geneticist who focuses on

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endangered species, I have been examining how genetic data informs listing decisions. I contacted Dr. King because he has extensive experience in the use of genetics for endangered species decisions. Senator Allard has intentionally construed this communication to imply that I inappropriately tried to sway the Preble's studies when no such communication even occurred.

For Senator Allard to now claim that USFWS biologists acted inappropriately in this situation is astounding. In each step along the way, USFWS followed protocol and sought independent verification of the science that was presented to them. Dr. Ramey also submitted comments at the hearing suggesting wrongdoing by the USFWS. For a scientist whose study has been shown to be based on contaminated samples to accuse anyone of leading a campaign to unfairly discredit him is unfortunate. And for a senator to defend a discredited study because that study suits his political needs is the definition of political interference in science.

Sincerely,

Sylvia Fallon, PhD./ch

Sylvia Fallon, Ph.D.
Staff Scientist, Endangered Species Project
Natural Resources Defense Council

cc: Hon. Nick J. Rahall, II
Chairman
House Committee on Natural Resources