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THE IMPACT OF THE EXPANSION OF THE MINNEAPOLIS–ST. PAUL INTERNATIONAL AIRPORT ON THE MINNESOTA VALLEY NATIONAL WILDLIFE REFUGE

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

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CONTENTS

	Page
Hearing held February 3, 1999	1
Statement of Members:	
Minge, Hon. David, a Representative in Congress from the State of Minnesota	17
Prepared statement of	8
Ramstad, Hon. Jim, a Representative in Congress from the State of Minnesota	15
Prepared statement of	16
Vento, Hon. Bruce, a Representative in Congress from the State of Minnesota	3
Prepared statement of	6
Young, Hon. Don, a Representative in Congress from the State of Alaska	1
Statement of Witnesses:	
Ashe, Dan, Assistant Director for Refuges and Wildlife, U.S. Fish and Wildlife Service, Washington, DC accompanied by Richard Schultz, Refuge Manager, Minnesota Valley National Wildlife Refuge	20
Prepared statement of	44
Response to questions from the Committee	88
Response to questions from the Committee	108
French, Nelson, Executive Director, Friends of the Minnesota Valley, Bloomington, Minnesota	25
Prepared statement of	49
Grams, Hon. Rod, a United States Senator from the State of Minnesota	10
Prepared statement of	13
Marzulla, Nancie, Defenders of Property Rights, Washington, DC	24
Prepared statement of	60
Pickard, Lynne, Manager of Community and Environmental Needs Division, Federal Aviation Administration, Washington, DC	22
Prepared statement of	46
Walsh, Mary U., Asst. Chief Counsel for Legislation, Dept. of Transportation, response to questions from the Committee	111
Additional material supplied:	
Committee on Resources, Memo from	70
Hartwig, William F., Regional Director, Dept. of the Interior, statement by	82

OVERSIGHT HEARING ON THE IMPACT OF THE EXPANSION OF THE MINNEAPOLIS–ST. PAUL INTERNATIONAL AIRPORT ON THE MINNESOTA VALLEY NATIONAL WILDLIFE REFUGE

WEDNESDAY, FEBRUARY 3, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC.

The Committee met, pursuant to other business, at 11:22 a.m., in Room 1324, Longworth House Office Building, Hon. Don Young, [chairman of the Committee] presiding.

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. YOUNG. The hearing will come to order. The purpose of this hearing today is to take testimony on the impacts of an airport expansion on one of our premier national refuges, the Minnesota Valley National Wildlife Refuge.

The refuge is home to a broad range of wildlife species which deserve every bit as much protection as do the species that live in other national refuges, including in Alaska refuges such as the Arctic National Wildlife Refuge and Izembek National Wildlife Refuge. Species living in this refuge include threatened bald eagles, 35 mammal species, 23 reptile and amphibian species, 97 species of birds, including the tundra swans, migrating all the way from Alaska.

The new runway expansion will cause so much noise and disturbance that most of the facilities under the path of the runway will be relocated. In fact, the refuge will be so impacted by the noise that the FAA has agreed to pay the Fish and Wildlife Service over $20 million to compensate them for taking of their property by virtue of noise.

Yet, with this level of disturbance, the Fish and Wildlife Service and the FAA found that wildlife would not be disturbed so much that the airport expansion should be stopped. They also found no impact on the threatened bald eagle and no need for the protection of the Endangered Species Act in this case. They found that the wildlife in the refuge will adjust to the noise. They found that there is little significant evidence that wildlife will be seriously harmed by the 5,000 take-offs and landings per month at less than 2,000 feet above those important migratory bird breeding and resting areas.

I'm not surprised by that. Most of us know that wildlife adjust to human presence and in some cases actually thrive, and I have an example of this.

This is my little caribou herd around the wells that have been drilled in the terrible dastardly deeds of the oil companies, and are migrating and living there very happily, scratching their backs on the pipeline, resting their tired, weary souls under the derricks that exist there. I mean, this is an example of how animals can adjust.

Most of us know that wildlife adjusts to human presence, and in some cases actually thrive. Fairfax County, abundant deer and bird and fox population can attest to that with all the building around. We've got more deer and everything else than we've ever had before.

Certainly I would agree that airports must be safe and that human life and safety come first. However, how many times have the members of this Committee been told by the Clinton Administration that important safety projects cannot go forward because it might—and I stress might—impact wildlife. This constant excuse has been used many times in Alaska to oppose vital public safety and health projects.

Mr. Pombo and Mr. Doolittle have heard that in connection with their efforts to get vital flood control improvements needed for the safety of their constituents in California, where we had to save the Blue beetle or the Elderberry beetle.

I know, in fact, that wildlife and human beings can co-exist. In the coastal plain of Alaska, just like I've shown, the caribou have increased, the ducks have increased. I'm showing that picture around to show you they can co-exist. Yet, some members of this Congress, including some in this room and that are going to testify later, have agreed to this airport expansion in Minnesota—have introduced legislation that would preclude most human activities in the Arctic National Wildlife Range by designating it as wilderness.

I guess they believe that wildlife in Alaska can't adjust to human activities, but they can adjust in Minnesota, and I'm really saddened by that because we've probably put more money into our wildlife than any other State. But apparently that wildlife in Minnesota is a lot smarter, and I can't understand that at all. In addition, the Airport Commission, by taxing passengers flying through Minneapolis, will pay over $20 million in compensation for the lost use of refuge lands.

The Fifth Amendment of the Constitution protects private property when it must be used by the public. This administration has consistently threatened to veto every bill that has been introduced that would reduce the burden on private property owners when they attempt to seek compensation for their lost property from the U.S. Government. They have made the process so expensive, so time consuming, so lengthy, and so difficult, that only the wealthiest land owners can have any hope of attaining the compensation guaranteed under the Fifth Amendment.

Yet the Fish and Wildlife Service demanded and received compensation for the impacts on the people who use the refuge without having to file a lawsuit or even threaten a lawsuit. They demanded

compensation and got it. I guess I should not be shocked at anything by this administration, especially their hypocrisy.

As you know, I support our refuges. I've introduced a refuge bill that was signed into law. I have probably sponsored more refuges laws, and I've worked with the refuge system. I want refuges to be places where wildlife can thrive, and I want them to be accessible to the public. I support adequate funding for the refuges. I agree that refuges and wildlife should not be used to stop needed projects and development in nearby communities, but there is a double standard here, my friends. When I can't build a road that saves lives—and to my knowledge there have been no lives lost in this Minnesota airport—yet I have lost 11 lives because this Congress and certain Members of this Congress, especially from the delegations in Minnesota, want to have a wildlife refuge inviolate.

There's something wrong with that. There's a double standard within the Fish and Wildlife Department, there's a double standard within the Members of Congress that don't see that they parallel and track one another. There is the ability to be compatible if we work together. But when you exclude and put wildlife ahead of the safety of people, you are doing great damage to, I think, to the system of Congress and the system of fairness.

I have asked Fish and Wildlife to be fair, and, frankly, to stop discriminating against the rural people of America. It seems it's all right if it's close to a large metropolitan area and you've got the horse power, but when it's a small, little town and there are only 300 people, they are not important. I don't like the double standard, and before this is over we're going to have lots of fun with this issue, especially with the Fish and Wildlife.

As a Member of Congress I can understand. I don't agree with it, I don't like it, but I can understand it. That Fish and Wildlife has this double standard is wrong, it's immoral, and it is corrupt.

[The prepared statement of Mr. Young follows:]

The CHAIRMAN.

I recognize Mr. Vento.

STATEMENT OF HON. BRUCE VENTO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. VENTO. Well, I thank the Chairman for holding the hearing and for drawing together the Minnesota delegation in support of this support of this wildlife refuge, Mr. Chairman. And I would just point out on the basis of the Chairman's remarks—he's got a lot of questions, and I think we have the answers for them, and I think that this is not comparable to some of the examples that were cited with regards to the impact on wildlife and the reasons for the compensation that was and is provided here. Not one single acre of this wildlife refuge is touched on the ground by this. This is the issue of an aircraft overflight issue and a flight path over the sight.

In fact, when this particular refuge was designated in 1976, it specifically had provisions that said it would not impact the surrounding economic development. Beyond that, I would point out that not only did they work very hard to come to an agreement here—and I appreciate the Fish and Wildlife Service work, the FAA, and the Metropolitan Airports Commission in Minnesota, the

work they did. They did a good job, but they also—in terms of this compensation—but the Metropolitan Airports Commission has already paid out $100 million to, in fact, sound-proof homes in the flight path in Minnesota. And when they get done, they are going to spend about $300 million to sound-proof the homes.

And the compensation being offered here—the mitigation results—something in excess of $20 million—has really little to do with the impact on the wildlife because that is very, very difficult to document. It has to do with the center, the significant center that has been built there that is used for interpretation and education in that area.

And I might add, Mr. Chairman, that I have a little experience with this particular airport because as a junior high school teacher about 22 years ago, I taught directly under the flight path of the Metropolitan Airport, the international airport, and I can attest to the fact that it is very difficult, even with my somewhat modest voice, to in fact convey the various cognitive notions that I was trying to convey to those junior high school students.

Now I know I don't have any such problem here this morning, but I can assure you when the flights go over it is very difficult, so it really means that the center that has been developed here and the resources that have been developed here will probably, in all probability, have to be moved to other sites to augment this. And we have, literally, tens of thousands of students, of individuals, that visit this particular center each year, and it's been of tremendous value.

The agreement, of course, is the culmination of over two years of negotiations. It's a symbiotic relationship between all of those that have been involved. The Federal Government recognized the difficulties associated with creating a refuge in an urban environment, and we, in fact, responded to that by limiting it in law.

Beyond that, of course, we have, within law, under the transportation law, the 4(f) provisions. Whenever a transportation project, whether it's a road, airport expansion, or others, they need to, of course, work with the other Federal resources and entities and land managers in that area.

And beyond that, Mr. Chairman, in the re-framed Fish and Wildlife law that you helped write, that you structured and passed through Congress—a compromise—you, in fact, made special efforts to try and limit the ability of the Fish and Wildlife Service in the designation process to limit them as to any rights that they would have as to issues that are trans-boundary. That's what you did in that particular law. I don't think I agree with it.

In fact, what my view is, I think that we should be looking to land managers in most conservation units, whether they're parks, whether they're wildlife refuges or others, to be working on a trans-boundary issue with the other entities.

I mean, it's like the Everglades in Florida and the sheetflow that goes into the Everglades. We have to have an expectation that they're going to be working with the Corps of Engineers, with the Florida conversation districts, because of course what happens in terms of that sheetflow dramatically and significantly impacts the type of—what happens in the Everglades, and so we need to expect land managers to be outside the box, to be outside their bound-

aries, to be voicing their concerns, to be representing the resources and the concerns that they have in the forums, in the States, as partnerships with the States, with the local governments and others—certainly other Federal agencies that are involved. And that is the expectation that we should mandate of Federal land managers so that they are part of the solution rather than simply standing off and entering these things and being involved in simply court cases.

Now, if it's overflight issues that you're concerned about, I think that the record will show that this Committee has had an aggressive posture with regards to the protection and addressing the issues of overflights over parks, over wilderness, over range lands.

In fact, I think we need a better policy in terms of the reservation of air space that takes place on the part of our military. Increasingly, they are, in fact, taking over more and more air space in the western part of the United States, albeit for justifiable reasons in their minds' eye. But I think it's very limiting in terms of what it means, in terms of the use of the land on the surface and what the impact is on grazing, what the impact is on recreation.

So we've got a long way to go in terms of addressing this, and I'm pleased to see the Fish and Wildlife Service in the area I represent pursuing this. And I certainly welcome Mr. Schultz, who is here, and the other witnesses: Mr. French from Minnesota, who works with the Friends of the Minnesota Valley Wildlife Refuge. They've done an excellent job, as well as the administrators with the FAA and the Metropolitan Airports Commission, and I hope we can get to some of those questions you raised, Mr. Chairman.

[The prepared statement of Mr. Vento follows:]

Congressman Bruce Vento

Keeping in Touch

Keeping in Touch Newsletter *On-Line*

December, 1998

EARTH NOTES
Minnesota Valley National Wildlife Refuge Under Siege

The Minnesota Congressional Delegation, working on a bipartisan basis, successfully stopped mischievous legislation that would have blocked a cooperative agreement between Minnesota Valley National Wildlife Refuge and the Minneapolis/St. Paul International Airport. This Refuge, one of the few National Wildlife Refuges located in an urban area and adjacent to the airport, is the home to hundreds of species of wildlife and waterfowl and is a testament to the fact that humans and a wealth of wildlife can successfully coexist.

The Fish and Wildlife Service and the Metropolitan Airports Commission have worked together to lessen the impacts of the new south-north landing strip on the Refuge. This cooperative effort has produced a comprehensive agreement that protects the Refuge, increases visitor usage, and allows for the runway expansion without the loss of one acre of the existing Refuge. Instead of praising this cooperative agreement, some Members of Congress unfairly criticized the Fish and Wildlife Service and sought to block the initiative. Fortunately, the Minnesota Congress Members spoke up and were able to stop this disingenuous criticism and action.

Anti-Environmental Riders Dropped from Must-Pass Legislation

This Congress, like its predecessor, has been marked by continued attacks against our nation's environmental laws and positive progress that has been achieved. During the 1995-96 session of Congress, those attacks were direct and well publicized. The American people rejected that approach and forcefully spoke out on behalf of our environment. Rather than resuming a direct assault, the Majority Party in Congress this 1997-98 term has sought to strangle our environmental laws through new tactics of attaching non-germane legislative riders to must-pass legislation and mislabeling their anti-environmental proposals.

Their hope was that these new tactics would attract less public attention and opposition while still undoing our laws. I and others in Congress fought against these ill-conceived initiatives. Anti-environmental legislative riders were added repeatedly to must-pass funding measures. Provisions were added to gut our national Wilderness Act by allowing helicopters to land in wilderness and to place a new road in the Izembeck National Wildlife Refuge in Alaska. Other mandates were proposed to increase logging in certain national forests and block the Forest Service from removing roads in our forests. Fortunately, those provisions were removed from the final version of the law. Other anti-environmental riders, like the prohibition on the implementation of the Kyoto greenhouse gas emissions reduction treaty, were unfortunately retained, although in a weakened form.

Mo Udall Wilderness Act Gains Momentum

Key legislation for which I have advocated, the Morris K. Udall Wilderness Act (H.R. 900), gained important momentum during the final days of the 105th Congress by attracting more than 150 cosponsors. H.R. 900 would permanently protect the 1.5 million acre Arctic National Wildlife Refuge in Alaska as a wilderness area. The Refuge is a unique ecosystem, essential to the life of over 200 species of wildlife. The Arctic Desert area is best known as the calving area of the 160,000-member Porcupine Caribou herd. Protecting the Arctic Plain is even more urgent with the recent introduction of legislation to permit three-dimensional drilling within the Refuge. This drilling would require 56,000 pound "thumper" trucks, explosive charges of dynamite, miles upon miles of cables and an average crew of 110 workers with 39 vehicles. Such exploration and the eventual development of this area would destroy this spectacular wilderness and jeopardize the survival of many endangered species through spills and other disruptive activities. The growing support in Congress for my wilderness proposal is a strong "no" vote to this needless invasion of the fragile Arctic Plain. Leasing plans, exploration and development proposals are designed to benefit big oil and special interests at the expense of the Arctic Wilderness. These vested interests are already sitting upon a portfolio full of leases they try to control global oil production and prices.

Rhinos and Tigers At-Risk, Oh My!

Despite international agreements to protect the endangered world tiger and rhinoceros populations, their numbers continue to decline in dramatic fashion. It is estimated that today there are only 11,000 rhinos and 5,000 living in the wild. While a number of factors have caused this dramatic decline in numbers, illegal hunting and poaching have been the primary cause. Tiger and rhino body parts have long been used for pseudo-medicinal and ornamental purposes. Despite the development of synthetic alternatives, the demand still exists. To slow the trafficking in medicines containing rhino and tiger body parts, Congress has reauthorized and amended the Tiger and Rhinoceros Conservation Act by banning labels on traditional Oriental medicines from claiming that they contain actual tiger or rhino parts. By barring such claims, it is hoped that pressure to use real tiger and rhino body parts in these traditional medicines will be simply reduced.

Superfund Stalemate

Yet another Congressional session is history and no action has been taken to continue the principal law to clean our nation's most hazardous waste sites, the Superfund law. This failure is because the Majority Party, which controls the agenda, insists upon shifting the burden of the clean-up cost from the polluters who did the damage to the general tax-paying public. In fact, the failure of Congress to reinstitute the Superfund tax has allowed polluters to avoid paying Superfund $3 million to $4 million per day to clean up

Mr. YOUNG. The gentleman's time has expired. I would just like to again remind you—I just read your website. It talks about how you spoke up, and your members, and stopped this criticism of this invasion of this refuge, and then right on the same page saying how you're going to take and lock up the ANWR area in my State, and it's a refuge, too.

I mean there is a two double standard here. Another gentleman says—Daniel Ashe, Assistant Director of Refuge and Wildlife—certainly hate to be in the position of losing any aspect of any refuge, but the Minnesota Valley Refuge is an urban refuge, where urban encroachment is a fact of life and you're going to have to deal with it. Well, what about my small towns up north? They are not urban, but they are small villages, and there are people there and they're being impacted by actions of this Congress, and you have a double standard, and that is incorrect.

I'm going to stress that again. A stabilized standard for all refuges should be put forth. If this was an urban refuge, it should never have been created as a refuge.

By the way, I think you had something to do with that.

Mr. VENTO. I did. I only came here in 1977 to help you with Alaska.

Mr. YOUNG. I know. I realize that.

Mr. VENTO. They sent me here. You needed that help.

[Laughter.]

Mr. YOUNG. But, again, the reason for this hearing is the double standard within the agencies and the Members of Congress. If you believe in a representative form of government, there has to be some understanding and some belief that fairness is equal to justice.

The first two witnesses: the Honorable Rod Grams of the United States Senate—and, boy, if I have kept the Senator waiting, I really apologize for that; the Honorable Jim Ramstad of the U.S. House of Representatives.

Mr. VENTO. Mr. Chairman, I have Mr. Minge's statement. He's involved in an agricultural conference; he's got some serious problems with regards to pork and other issues and he has asked to have his statement put into the record in support of this agreement. Without objection, Mr. Chairman?

Mr. YOUNG. Well, it's fine with me. I mean, it's his district, you know.

Mr. VENTO. Thank you.

[The prepared statement of Mr. Minge follows:]

STATEMENT OF HON. DAVID MINGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. Chairman and Members of this subcommittee, thank you for allowing me the opportunity to speak before this body regarding the proposed runway expansion of the Minneapolis/St. Paul International Airport and its effects on the Minnesota Valley Wildlife Refuge.

I applaud Chairman Young's obvious concern for the well-being of the Minnesota Valley Wildlife Refuge and for the hundreds of species of plants and animals that inhabit the 10,000 acres of this wondrous facility. The Resources Committee certainly has an obligation to look into any Federal project or land transaction that could potentially threaten the full and continued operation of a national wildlife refuge, preserve or national park.

But I can assure Mr. Young that this refuge, of which a significant portion lies within the boundaries of my Congressional District, will see little if any net loss as

a result of the recently proposed airport expansion/refuge mitigation project. Rather, this collaborative effort by the Federal Aviation Administration, the U.S. Fish and Wildlife Service, the Metropolitan Airport Commission and the Friends of the Minnesota Valley should be held up as an example of the kinds of innovative solutions that become possible through cooperative efforts.

These types of expansion projects are frequently portrayed as a clash between technological progress and conservation efforts, between business expansion and natural resources preservation, between private and public interests. Yet in this instance, a very delicately balanced agreement among between diverse interests was reached to accomplish a common goal.

During my six years in Congress, I have worked closely with the Friends of the Minnesota Valley and the U.S. Fish and Wildlife Service in their efforts to create and maintain a unique conservation and educational facility in the Twin Cities suburban area. I have been extremely pleased with the way the refuge has been run and with the high quality of educational services that it provides for students and adults. The opportunity for people from all over the United States to enjoy, appreciate and learn about these native species of wildlife without significant disruption of the animals' natural habitats is a tremendous resource that we cannot afford to lose.

I also recognize the importance of maintaining an effective and efficient transportation infrastructure. As a main hub of airline transportation, Minneapolis/St. Paul International Airport serves not only the citizens of Minnesota but fills a role as an important junction point for thousands of other travelers who cross the Mississippi River every year. There is widespread agreement among state and local leaders in Minnesota that an expansion of the existing airport is crucial, given the increased demand for services and the potential for greater competition among airlines. The only reasonable alternative to expansion would be the construction of a new airport, an option that many agree would be worse both economically and environmentally than expansion.

I am joined by a bipartisan group of eight other Members of the Minnesota Congressional delegation, who believe that the proposed airport expansion should be allowed to continue without hindrance.

When the expansion of our society causes a disruption of a sensitive environmental area, it is important that we consider many important factors to determine the least intrusive means available to accomplish the expansion while falling within reasonable economic parameters. I believe that the parties involved in this project have done this. Their plan calls for compensation to the refuge of an amount no less than $20 million. This funding will allow the refuge to relocate many of its outdoor classrooms away from the noise of the runway, and it will allow for the replacement of more than 4,000 acres of land.

I sympathize with Chairman Young's frustration at not gaining approval for a project in his home state of Alaska that he clearly believes is in the best interests of his constituents. The derailing of a worthwhile project such as this expansion/mitigation plan will have no effect on the ultimate passage or defeat of the Alaskan project. The two projects are not analogous, they are not related and neither project should have any dependence on the other. Each project should be discussed and debate on its own merits. In Minnesota, the stakeholders, including the ardent environmental advocates, have reached an accommodation. I hope that same can occur in Alaska.

In a perfect world, the conflicts between society and the environment would not occur. In a perfect world, the Minneapolis/St. Paul International Airport would be located in an area that does not conflict with the Minnesota Valley Wildlife Refuge or any nearby property owners. Certainly, we do not live in a perfect world.

But when both private and public interests, both business and environmental advocates, can come together and agree on a plan that will benefit millions of consumers, businesspeople and nature lovers—and, at the same time, serve the interests of economic expansion and progress—we should all take notice.

Mr. YOUNG. In all due respect for my good Senator, you have other things on your mind today and the rest of the week, so I'd like to suggest that if you would like to, Senator, go forth with this discussion we have about an airport. By the way, how did you vote on the Izembek Road?

STATEMENT OF HON. ROD GRAMS, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Senator GRAMS. I'll tell you about that.

Mr. YOUNG. All right.

[Laughter.]

I'm very interested. I'm really am very interested. You know, this is a long time coming. Go ahead, Senator.

Senator GRAMS. All right. Thank you very much. Good morning, Mr. Chairman, and also members of the Committee. It's great to see you, and I want to thank you for allowing me to be a part of this hearing and to provide my testimony.

And first, Mr. Chairman, I think it's important to point out that those of us in the Minnesota delegation approach this issue maybe from different angles, but eventually we end up at the same point and that is supporting the agreement that you are examining here today.

First, Mr. Chairman, the legislation you introduced last year to prevent the implementation of the Minnesota Valley National Wildlife Refuge Agreement clearly referenced—and what I've heard this morning is your frustration with the administration's unwillingness to allow a road through the Izembek National Wildlife Refuge in Alaska.

It comes as no surprise that Members of the Minnesota delegation were split on the Izembek road issue, but I want to stress that, as a member of the Senate Energy and Natural Resources Committee, I voted in support of Senator Murkowski's legislation to build that road. Later on the Senate floor, I again supported Murkowski and voted in favor of the bill because I believe the Members of the Alaska delegation made a convincing argument about the health and safety of the citizens of King Cove, Alaska.

Now, Mr. Chairman, I have long been, and always will be, a steadfast proponent of access to our natural resources and allowing local officials more authority of land use issues. I've always felt that the Federal Government exercises too much authority over local units of government in virtually all matters, but, in particular, with regard to land use decisions.

And far too often the Federal Government has turned Federal lands into playgrounds for the elite and cordoned them off to even the most basic of uses, and this problem is only exaggerated in States such as Alaska, Utah, Nevada, and Idaho, where the Federal Government owns more land than does all the citizens of those States combined.

The King Cove situation is a perfect example of a pervasive belief among government bureaucracies that their programs and initiatives are more important than the people that they will impact, or in this matter the health and the safety of the citizens of King Cove.

Mr. Chairman, my State, too, faces problems with an over-active Federal Government bent on decreasing access to our natural resources and zeroing out timber sales on our national forests. This Committee, last year, marked up legislation offered by Congressman Oberstar and I to restore access to the Boundary Waters Canoe Area. And thanks to the efforts of Congressman Oberstar

and Vento, a common sense compromise was found which I hope settles the portage issue for good.

But when Members of Congress advocate more local input and common sense decisionmaking by the Federal Government, as many of us have for so long, they are duty bound to support the Federal Government when it acts consistent with that philosophy as well. I've always been a strong proponent of bringing the Federal Government, the local governments, and the private sector together in a non-adversarial way to reach decisions on land use and on environmental issues which benefit everyone.

I believe only the most extreme activists really want to block any progress and reject compromise. In fact, I believe we must take and make an effort to turn the corner on pitting property owners against government and businesses against conservationists. It's always been my belief that all Republicans share a similar outlook, considering it's a vast improvement over the confrontational way in which we seem to approach matters involving our Federal lands. And that is why all Members of Congress should support the agreement reached on the Minnesota Valley National Wildlife Refuge.

In Minnesota—one of the most environmentally conscious States in our country, by the way—all sides came together and worked together to reach a solution which will protect the wildlife and the health of the refuge well into the 21st century and will also allow for the badly needed expansion of the Minneapolis-St. Paul Airport.

Your legislation pointed out that the refuge is unique as an urban wildlife refuge in a growing metropolitan area, and you were right. When the refuge was created, this fact was not missed by Congress. In fact, Public Law 94–466 dedicated one section to the understanding that flexibility between the refuge's needs and the needs of a growing city would be necessary in the future.

Now let me read for the Committee a portion of section 9 of the refuge enabling legislation, and I quote:

"Nothing contained in this Act shall be construed as prohibiting or preventing the provision of vital public services, including the construction, improvement, and replacement of highways and bridges or any other activity which the Secretary determines to be necessary. Any activity referred to in this section shall be carried out so as to minimize the disruption of wildlife and the reduction of recreational and scenic values of the area."

Now, Mr. Chairman, I submit to you that the U.S. Fish and Wildlife Service did more than comply with this law—they followed it to the letter. And too often we quarrel about Federal agencies that interpret laws their way and that ignore the intent of Congress. But, clearly, both the law and the intent were met by the agreement and the actions of the Fish and Wildlife Service in this case.

I believe it's important to remind the Committee that the agreement does not allow a road to be built into the refuge. In fact, the agreement does not allow the expansion of the runway to touch one acre of land within the refuge. The agreement is aimed at mitigating expected but unmeasurable impacts from the noise of overflights on wildlife and on visitor enjoyment.

As the Committee is aware, the U.S. Fish and Wildlife Service cannot exert jurisdiction over the airspace over refuges as a result

of the National Wildlife Refuge System Improvement Act of 1997—I have just a little bit left, Mr. Chairman—therefore, organizations like the Friends of the Minnesota Valley were left with just two options: either take the matter to court or work with the refuge and other parties to seek a compromise resolution which benefited everybody. And I am proud to say that they chose the latter.

You will soon hear from Nelson French, who is the executive director of the Friends of the Minnesota Valley, and he will more clearly explain the give-and-take that took place to reach this agreement. But I can tell you that his organization, the U.S. Fish and Wildlife Service, the Metropolitan Airports Commission, and even the Federal Aviation Administration all set their differences aside and forged an agreement based on a few primary points.

First, the agreement will allow for a new runway to be built at the Minneapolis-St. Paul International Airport, and that some impacts will occur as a result. Second, those impacts are to be mitigated by a cash payment, as you mentioned, of not less than $20 million. The settlement received from the Metropolitan Airports Commission will be spent on projects designed to offset or replace refuge land, facilities, and/or programs impacted by the runway's construction and future operation.

And third, Mr. Chairman, all parties agree that the agreement does provide full compensation to the refuge and that nothing in the agreement precludes or limits the Fish and Wildlife Service from continuing to appropriately manage refuge lands.

So not only does the agreement preserve every acre of refuge land, it will actually expand its acreage and will allow it to purchase land within the refuge boundaries. And, further, not only will the refuge expand, but its programs and facilities may improve and expand as well. This refuge, following the agreement, will be a more complete refuge and remain one of our Nation's premier urban wildlife preserves.

Now, Mr. Chairman, I regret that I have to come here this morning and defend this agreement with those who took part in its creation. The parties to the agreement should be here today briefing the Committee and Congress on how they approached a very sensitive environmental issue and came out of it with a very workable and common sense conclusion. We should be congratulating them rather than questioning the wisdom of those actions.

Now I hope the members of the Committee will listen closely to what took place in Minnesota, and I hope you will leave the hearing today with a new understanding of what actually happened and also a new appreciation of the approach that the participants chose.

Mr. Chairman, I'm confident this agreement will stand up to scrutiny, and hopefully it will serve as a reminder that local interests can solve local problems, not only in Minnesota, but in Alaska and in other States as well, with local solutions in a way that the Federal Government can and should support.

So, again, Mr. Chairman, I want to thank you very much, and also the members of the Committee, for the opportunity to be here today and provide my statement. Thank you very much.

[The prepared statement of Senator Grams follows:]

STATEMENT OF HON. ROD GRAMS, A SENATOR IN THE SENATE FROM THE STATE OF MINNESOTA

Good Morning, Mr. Chairman and members of the Committee. Thank you for allowing me to provide my testimony.

First, I think it is important to point out that all of us in the Minnesota delegation approach this issue from different angles—but eventually we all end up at the same point and that is supporting the agreement you are examining today.

First, Mr. Chairman, the legislation you introduced last year to prevent the implementation of the Minnesota Valley National Wildlife Refuge agreement, clearly referenced your frustration with the Administration's unwillingness to allow a road through the Izembek National Wildlife Refuge in Alaska. It comes as no surprise that the Members of the Minnesota Delegation were split on the Izembek Road issue. But I want to stress that as a Member of the Senate Energy and Natural Resources Committee, I voted in support of Senator Murkowski's legislation to build that road. Later, on the Senate floor, I again supported Senator Murkowski and voted in favor of the bill. I believe the Members of the Alaska delegation made a convincing argument about the health and safety of the citizens of King Cove, Alaska.

Mr. Chairman, I have long been and always will be a steadfast proponent of access to our natural resources and allowing local officials more authority over land-use decisions. I have always felt the Federal Government exercises too much authority over local units of government in virtually all matters—but in particular with regard to land use decisions. Far too often, the Federal Government has turned Federal lands into playgrounds for the elite and cordoned them off to even the most basic uses. And this problem is only exaggerated in states such as Alaska, Utah, Nevada, and Idaho, where the Federal Government owns more land than do all of the citizens of those states combined. The King Cove situation is a perfect example of a pervasive belief in government bureaucracies that their programs and initiatives are more important than the people they will impact—or in this matter, the health and safety of the citizens of King Cove.

My state, too, faces problems with an overactive Federal Government bent on decreasing access to our natural resources and zeroing out timber sales on our National Forests. This Committee, last year, marked up legislation offered by Congressman Oberstar and I to restore access to the Boundary Waters Canoe Area. And thanks to the efforts of Congressmen Oberstar and Vento, a common-sense compromise was found which I hope settles the portage issue for good.

But when Members of Congress advocate more local input and common sense decision-making by the Federal Government, as many of us have for so long, they are duty bound to support the Federal Government when it acts consistent with that philosophy. I have also always been a strong proponent of bringing the Federal Government, local governments, and the private sector together in a non-adversarial way to reach decisions on land-use and environmental issues which benefit everyone. I believe only the most extreme activists really want to block any progress and reject compromise. In fact, I believe we must make an effort to turn the corner on pitting property owners against government, and businesses against conservationists. It has always been my belief that all Republicans shared a similar outlook, considering it a vast improvement over the confrontational way in which we seem to approach matters involving Federal lands.

That is why all Members of Congress should support the agreement reached on the Minnesota Valley National Wildlife Refuge. In Minnesota, one of the most environmentally conscious states in our country, all sides came together and reached a solution which will protect the wildlife and health of the Refuge well into the 21st century and will allow for the badly needed expansion of the Minneapolis-St. Paul Airport

Your legislation pointed out that the Refuge is unique as an urban wildlife refuge in the middle of a growing metropolitan area—and you are right. When the Refuge was created, this fact was not missed by Congress. In fact, Public Law 94–466 dedicated one section to the understanding that flexibility between the Refuge's needs and the needs of a growing city would be necessary in the future. Let me read for the Committee a portion of Section 9 of the Refuge's enabling legislation:

> "Nothing contained in this Act shall be construed as prohibiting or preventing the provision of vital public services, including ... the construction, improvement, and replacement of highways and bridges ... or any other activity which the Secretary determines to be necessary. Any activity referred to in this section shall be carried out so as to minimize the disruption of the wildlife and the reduction of recreational and scenic values of the area."

Mr. Chairman, I submit to you that the U.S. Fish and Wildlife Service did more than comply with this law—they followed it to the letter. Too often, we quarrel about Federal agencies that interpret laws their way, and ignore the intent of Congress. Clearly, both the law and the intent were met by the agreement and the actions of Fish and Wildlife Service.

I believe it is important to remind the Committee that the agreement does not allow a road to be built in the Refuge. In fact, the agreement does not allow the expansion of the runway to touch one acre of land within the refuge. The agreement is aimed at mitigating expected—but unmeasurable—impacts from the noise of overflights on wildlife and on visitor enjoyment. As the Committee is aware, the U S. Fish and Wildlife Service cannot exert jurisdiction over the airspace over refuges as a result of the National Wildlife Refuge System Improvement Act of 1997. Therefore, organizations like the Friends of the Minnesota Valley were left with two options—either take the matter to court or work with the Refuge and other parties to seek a compromise resolution which benefited everyone. I am proud to say they chose the latter.

You will soon hear from Nelson French, Executive Director of the Friends of the Minnesota Valley. He will more clearly explain the give and take that took place to reach this agreement—but I can tell you that his organization, the U.S. Fish and Wildlife Service, the Metropolitan Airports Commission and even the Federal Aviation Administration, all set their differences aside and forged an agreement based on a few primary points.

First: The agreement will allow for a new runway to be built at the Minneapolis/St. Paul International Airport, and that some impacts will occur as a result.

Second: Those impacts are to be mitigated by a cash payment of not less than $20 million. The settlement received from the Metropolitan Airports Commission will be spent on projects designed to offset or replace Refuge land, facilities, and/or programs impacted by the runway's construction and operation.

Third: All parties agreed that the agreement does provide full compensation to the Refuge and that nothing in the agreement precludes or limits the Fish and Wildlife Service from continuing to appropriately manage Refuge lands.

So, not only does the agreement preserve every acre of Refuge land, it will actually expand its acreage and allow it to purchase land within the Refuge's boundaries. Further: not only will the Refuge expand, but its programs and facilities may improve and expand as well. This Refuge, following the agreement, will be a more complete Refuge and remain one of our Nation's premiere urban wildlife preserves.

I regret that I have to come here this morning and defend this agreement and those who took part in its creation. The parties to the agreement should be here today brieflng the Committee and Congress on how they approached a sensitive environmental issue and came out of it with a workable, common-sense conclusion. We should be congratulating them, rather than questioning the wisdom of their actions.

I hope the Members of the Committee will listen closely to what took place in Minnesota. I hope you will leave the hearing today with a new understanding of what actually happened and a new appreciation for the approach the participants chose. I am confident that this agreement will stand up to scrutiny and serve as a reminder that local interests can solve local problems with local solutions—in a way the Federal Government can support.

Again, Mr. Chairman, I thank you and the Members of the Committee for the opportunity to be with you today

Mr. YOUNG. Thank you, Senator, and I do compliment you. I know how you voted on it. I checked it before you got to the table.

Senator GRAMS. Thank you.

Mr. YOUNG. And I do appreciate your comment about—and again, why I'm disturbed is that, you know, you have a larger State. You have a lot more people involved, and there is a double standard here. There was never an attempt by Fish and Wildlife on the local or the Federal level ever to reach a compromise with this Congressman on the Izembeck Road, and they never, ever, ever could prove the facts that they were putting forth. They were all fictitious. The propaganda that came out of many of the Congressmen and the other organizations that oppose the Izembek Road disallowed the safety factor for those people. And just because there are only 300 and you've got 3 million, I think that's very inappropriate, and I want to stress that again.

I do thank you, and I know you have other things on your mind. I don't have any questions. Does anybody have any questions for the Senator?

Senator GRAMS. But I just wanted to say, Mr. Chairman, I agree with you, and I think fairness is a big issue, whether it's 300 or 3 million. And I will continue to support efforts like this in the future.

Mr. YOUNG. I thank you, and you're excused if you have to go. I know you've got other things on your mind.

Mr. Minge, do you have—you're not on—yes, he is; Mr. Ramstad is on the agenda. I have to go to Mr. Ramstad and then you'll have an opportunity to speak.

Mr. Ramstad—and I know how you voted.

STATEMENT OF HON. JIM RAMSTAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. RAMSTAD. That's right, Mr. Chairman.

Mr. YOUNG. I also know you're a sponsor of ANWR, an original sponsor for two years in a row, two terms in a row, which is in my State.

Mr. RAMSTAD. That's right, Mr. Chairman.

Mr. YOUNG. No, you can testify.

[Laughter.]

Mr. RAMSTAD. But I certainly appreciate the fact that you're letting me—those factors not withstanding—testify today, Mr. Chairman. I did support the FY 1999 Omnibus Appropriations bill, Mr. Chairman, which was a compromise on the Izembik road, just like we have a compromise before the Committee today, and——

Mr. POMBO. Mr. Chairman? Mr. Chairman?

Mr. YOUNG. Yes.

Mr. POMBO. May I compliment Mr. Ramstad on learning so quickly how to get along on this Committee.

[Laughter.]

Mr. RAMSTAD. Well, one thing we agree on, thanks to the chairman's great State, their favorite son, the only native Alaskan ever to play in the National Football League, who happens to be my cousin, just got another Super Bowl ring Sunday blocking for John Elway of the Denver Broncos—number 69, Mark Schlereth. So we can agree on that.

Mr. YOUNG. That's the only reason I bet on Denver, so I can say that right now.

[Laughter.]

Mr. RAMSTAD. Well, thank you again, Mr. Chairman, and members of the Committee. This agreement, which Senator Grams outlined, between the Metropolitan Airports Commission and the Fish and Wildlife Service concerning the Minnesota Valley National Wildlife Refuge, is a practical, reasonable, common sense solution to the problem of urban encroachment.

The agreement is supported by all parties—the Metropolitan Airports Commission, the Federal Aviation Administration, the Fish and Wildlife Service, Friends of the Minnesota Valley National Wildlife Refuge, and the Minnesota congressional delegation.

And, Mr. Chairman, this agreement is a real tribute to all of these parties who worked very, very hard to craft this practical,

common sense compromise. It will improve the airport, improve the refuge, and improve Minnesota. I want to commend, from the Metropolitan Airports Commission, Dave Dombrowski and Nigel Finney, who spearheaded the effort on the part of the MAC; they are here today; Nelson French, whom Senator Grams mentioned, representing the Friends of the Minnesota Valley National Wildlife Refuge, and Rick Schultz, the refuge manager, who does such an outstanding job throughout the year, every year, managing that great refuge; and Dan Ashe, who is the Assistant Director of the Minnesota Office of the Fish and Wildlife Service, who is also, I understand, going to testify today.

I regret, Mr. Chairman, that there have been a few misunderstandings about the scope of the agreement. For example, I've seen in certain accounts that the runway is going to intrude on the refuge. In fact, the runway is not going to expand into the refuge. It will come no closer than 1.25 miles from the refuge. So, it is not true that the runway will in fact extend into or onto the grounds of the refuge. That is simply not true.

The impact of the refuge on the new runway will be the increased noise of take-offs and landings. Yes, there will be more noise, and this was a big concern to me when I first learned of the proposal. But due to good faith efforts of all parties involved, this agreement has been reached, which does, I believe, protect the refuge, increase visitor usage, and allow for the needed runway expansion without the loss of one acre—without the loss of one acre of the existing refuge. And the mitigation, which will amount to not less than $20 million will allow the refuge to purchase new land and construct a new visitors' center.

So, again, I just want to thank all of the parties to this agreement. It proves that government can work when people—local people—work together with government officials, in this case from the Metropolitan Airports Commission, from the Fish and Wildlife Service, and from the refuge.

So, thank you for the opportunity to testify today and to express the concerns of Minnesotans and others who support this agreement.

[The prepared statement of Mr. Ramstad follows:]

STATEMENT OF HON. JIM RAMSTAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. Chairman and members of the Committee, I appreciate the opportunity to testify today on an issue of great importance to the people of Minnesota.

The recent agreement between the Metropolitan Airports Commission and the Fish and Wildlife Service regarding the Minnesota Valley National Wildlife Refuge will provide at least $20 million to mitigate the noise impact of a new runway being built near the Refuge.

This agreement is supported by the Metropolitan Airports Commission, the Federal Aviation Administration, the Fish and Wildlife Service, the Friends of the Minnesota Valley National Wildlife Refuge and the Minnesota Congressional delegation. This agreement is a tribute to each of these parties and represents a common-sense approach by all sides. It will improve the airport, improve the Refuge and improve Minnesota.

Regrettably, there have been a number of misunderstandings about the scope of the agreement. For example, press accounts have reported that the runway would intrude into the Refuge. Let me assure everyone that this agreement will not allow the construction of a runway within the boundaries of the Minnesota Valley National Wildlife Refuge.

The impact on the Refuge of the new runway will be the increased noise of take-offs and landings. While I admit this was a concern to me when I first learned of this project, good-faith efforts by all parties yielded a comprehensive agreement that protects the refuge, increases visitor usage, and allows for the runway expansion without the loss of one acre of the existing refuge.

In fact, the mitigation funds will allow the Refuge to purchase new lands and construct a new visitors center.

Each of the parties involved in this agreement, many of whom are here today, must be commended for working together to create a pragmatic, common-sense solution to this issue.

Again, Mr. Chairman and members of the Committee, thank you for the opportunity to testify today to express the concerns of Minnesotans and others who support this agreement.

Mr. YOUNG. Thank you, Mr. Ramstad.

Mr. Minge.

STATEMENT OF HON. DAVID MINGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. MINGE. Thank you, Mr. Chairman. I'd just like to briefly state that most of the Minnesota Valley Wildlife Refuge is in the 2nd Congressional District, and we view this as a tremendous resource, not just for the district and for the State, but for the entire country, and it's with some regret that we see any portion of this district compromised. In that respect we appreciate your solicitude, Mr. Chairman, for the problems that are faced by the refuge in our State.

There are some very positive things about this agreement, and certainly Mr. Ramstad and Mr. Grams have already alluded to several of them. I would like to point out a couple of others. There has been tremendous pressure to consider the development of another airport in the Minneapolis-St. Paul metropolitan area. That would take many thousands of acres, and many of those acres would be environmentally fragile.

This expansion of a runway minimizes the chance that we will have to have a new airport developed, and if you look at what happened in Denver, Dallas-Fort Worth, and you see what a new airport means in terms of its impact on the communities where it's located, you understand that this is no small consideration. And I think that we should weigh this as we deliberate the objections that have been raised to the process that is being undertaken here.

I would also like to emphasize that the Friends of the Minnesota Valley, headed by Nelson French, have been very vigilant in contesting anything that would constitute development that would compromise this refuge. And I think it's quite a tribute to them and to the compromise that they have supported this, they recognize that there are additions to the refuge and a relocation of the center that will actually enhance the refuge and in the long-run make this a more valuable resource for our area.

Finally, I would like to say that I have spent a fair amount of time at the refuge, and as much as I share the concerns that you have, Mr. Chairman, and several others, about anything that would constitute a compromise here in a context that you feel might have been unfairly handled in Alaska, I do think that we have achieved an accommodation here that is reasonable.

And I would simply urge that in your State every effort be made to bring all of the stakeholders together so that, like was done in

Minnesota, you could have those groups that have been perhaps more contentious, that have been a burr under the saddle for you, if I may say that, on board and supporting whatever resolution you feel would be best in your State. And I think that's what has happened here. Thank you very much. Otherwise, I have submitted my statement for the record.

Mr. YOUNG. I appreciate that, and I want you to understand, the purpose of this hearing is not necessarily to criticize the Valley Commission or the Airport Commission. I am very concerned about the Fish and Wildlife and asking compensation of $20 million. Frankly, that does not help the wildlife out at all. And I also—Fish and Wildlife used arguments on the national level and on the local level in my area that any activity on the refuge would diminish the purpose of the refuge, and yet you know that this is a heavily used refuge which you are representing. And again, it's a double standard.

And, you know, we tried, with the Fish and Wildlife. We tried to explain what we're trying to do. We tried. We said we would build the road without charging the taxpayers one nickel, and they said it was going to cost $100 million. This is pure nonsense. We tried to give them more land. We actually had an increase in the amount of land, and they wouldn't accept that. They just said, "No, we're going to tolerate it. This is a national issue because there are only 300 people involved."

I can understand your desire not to build another airport because it does take a tremendous amount of land. I'm not going to argue the merits of building the other airport. I'm arguing the merits of how the Fish and Wildlife conducted itself, and even how the Commission was blackmailed into paying that compensation of $20 million—and for what? To my knowledge there is nothing that is going to improve the wildlife at all.

There's not a dollar going to be spent on improvement of the wildlife. It's usually spent on moving the buildings, re-establishing new buildings, or buying other private land. It's not for the wildlife. And you know, it's just a total, total lack of consideration. This is a classic example where, I guess, might is right; the few are discarded and the many survive, and the Federal agency that really is supposed to represent everybody on an equal basis has frankly, I think, done the wrong thing—not the people of Minnesota, but the agency itself.

So, I thank you for your comments and we'll get to the rest of it. Thank you very much.

Mr. VENTO. Mr. Chairman, just a comment. I appreciate my colleagues' testimony, all of them in support of this agreement, and I think that we should—there's a vast difference between an air flight path and a road through a wilderness refuge in Alaska. I mean, you're comparing apples and oranges here, and the fact is if there's a case with regards to any wildlife refuge in Alaska that you're looking for compensation because of the impact of aircraft overflights, I would be happy to ally my efforts with yours to gain that type of compensation in that case. And the fact is, this is based upon, yes, the education and resource center that has an overflight path that's going to go over it by virtue of this extension of the runway.

And in addition to that, there are 4,000 acres—there is some acreage being added to this refuge to try and compensate for the impact on the wildlife in that area. But, frankly, as you had noted rightly, because of the laws that you wrote in 1997 and because of the 1976 law which established this, the Fish and Wildlife Service really has very little legal standing to, in fact, pursue the protection of that wildlife. Plus, I think the science is difficult in terms of making the justifications for it.

But, nevertheless, they've been successful, even with these types of handicaps, using the 4(f) provisions of the transportation law for an aircraft overflight path—a flight path, not a road—and this is not a wilderness-designated Fish and Wildlife Service, as was the instance. So, this comparison is completely erroneous that you are attempting to portray. That you have a problem in Alaska, I admit that. I am attempting to designate ANWR's wilderness. I plead guilty with 150 sponsors in the last session. We feel strongly about it.

Mrs. CHENOWETH. Will the gentleman yield?

Mr. VENTO. No, not at this point. But the fact is that this comparison is completely erroneous. It just has no comparison, and I think——

Mr. YOUNG. With all due respect, the gentleman knows that is not true. There is a great comparison; there is a tremendous comparison.

Mr. VENTO. I think in your mind, Mr. Chairman.

Mr. YOUNG. In your mind you think there's no comparison at all, and I understand that. But in the reality, there is a double standard here. Now you know and I know that we tried to reach solutions——

Mr. VENTO. Do you have any instance where there is an aircraft overflight problem in Alaska—an impact—you could find physical resources? I'd be happy to join you in terms of trying to mitigate that particular problem. That's the issue here. It isn't a road. Nobody's putting a road through this particular wildlife refuge, which isn't a wilderness, incidentally, as the one in Alaska is. I understand. I respect your views and your right to hold an opinion on this, but I think, to say the least, the analogy is confusing.

Mr. YOUNG. The gentleman from Nevada.

Mr. GIBBONS. Thank you, Mr. Chairman, and I do take exception to my colleague's comments from Minnesota because as I recall, wasn't it just the end of last year when you objected to an overflight for an airport in Nevada because it was 5,000 feet above a refuge and you said it was totally objectionable to the wildlife habitat to have an airport that had a proposed flight path 5,000 feet above the ground? Not 500, not a half-a-mile away, a mile-and-a-half and 5,000 feet, and you objected to that.

Now, to come here and say that you don't have any objection to 500 feet over a wildlife habitat, and yet to have objected last year to a 5,000 foot or greater seems to me to be, you know, crossing similar arguments without the same degree of good faith involved with what we're talking about here. That was an aircraft overflight.

Mr. VENTO. Would the gentleman yield?

Mr. GIBBONS. No, I won't yield. I'll yield back to the Chairman.

Mr. YOUNG. The gentlelady.

Mrs. CHENOWETH. Mr. Chairman, I think the gentleman from Minnesota is very good at trying to redefine the problem, but the question here is, as Fish and Wildlife stated, in their opinion in this particular case, wildlife could habituate to the human activity—5,000 flights a day at a low altitude. Yet in Alaska, there were very, very few vehicles traveling on a gravel road, and they didn't even give anyone the chance to even evaluate whether the wildlife could habituate to that minimum human impact. And that's what this hearing is all about. It's the inconsistencies of the way the Fish and Wildlife apply their policies, and this is one of the most glaring inconsistencies.

So, I don't think we ought to redefine the problem. This is—definitionally—this is what the problem is about, and for years we've been asking the Fish and Wildlife Service to really examine whether wildlife could habituate to human activity, and obviously in this case it is true.

Mr. YOUNG. The next panel—panel two: Mr. Ashe, Ms. Pickard, Ms. Marzulla, and Mr. French.

We have a vote, so I'm going to make a suggestion that we go over and vote and come back as rapidly as possibly, and the witnesses can go to the restroom if you want to because you have been sitting here all morning. Approximately, I would say 12:30 p.m. because we have two votes in a row.

[Recess.]

Mr. YOUNG. But we had a series of votes, so it took a little longer, and we'll try to progress forth.

The first person on the panel is Mr. Ashe, Assistant Director for Refuges, Fish and Wildlife Service. He is accompanied by Mr. Schultz, Refuge Manager, Minnesota Valley National Wildlife Refuge. Second is Ms. Lynne Pickard, and Ms. Nancie Marzulla and Mr. Nelson French. Mr. Ashe, you're up.

Mr. ASHE. Good morning, Mr. Chairman.

Mr. YOUNG. And welcome, by the way, to the Committee, all committees. You used to work with Mr. Jones; I remember you, and I hope you haven't gone too far astray, but go right ahead.

STATEMENT OF DAN ASHE, ASSISTANT DIRECTOR FOR REFUGES AND WILDLIFE, U.S. FISH AND WILDLIFE SERVICE, WASHINGTON, DC ACCOMPANIED BY RICHARD SCHULTZ, REFUGE MANAGER, MINNESOTA VALLEY NATIONAL WILDLIFE REFUGE

Mr. ASHE. Thank you, Mr. Chairman. Good morning, and as you said, my name is Dan Ashe and I am the U.S. Fish and Wildlife Services Assistant Director for Refuges and Wildlife, and Mr. Rick Schultz is with me today, and he is our manager at Minnesota Valley National Wildlife Refuge.

And Minnesota Valley Refuge is somewhat unique in the refuge system, as it is located largely in an urban setting, co-existing with over 2 million Twin Cities residents. Since establishment, the refuge has acquired 10,000 of its authorized 14,000 acres, built a state-of-the-art wildlife and interpretation visitors' center, and developed top-flight public use programs and facilities.

In establishing the refuge, Congress recognized its urban setting and the need for the Service to work and balance the needs of the refuge with the urbanization of the Twin Cities area. The enabling legislation provided that nothing in this Act shall be construed as prohibiting or preventing the provision of vital public services.

Further, under the National Wildlife Refuge System Administration Act, the Service has no authority to regulate air space above a refuge. And since this particular project will not be built upon refuge lands, the Service had no direct means to influence it. However, under section 4(f) of the 1966 Department of Transportation Act, the Transportation Secretary may not approve a project that requires the use of any publicly-owned land, including wildlife refuges, unless there are no feasible and prudent alternatives to using that land and unless the project considers all possible planning to minimize the resulting harm.

It was under this provision of law that we were able to work cooperatively with the Metropolitan Airports Commission and the FAA to ensure that the disturbance to the wildlife and wildlife-dependent recreation was minimized. It was clear that the overflights from the proposed runway expansion would significantly affect noise-sensitive public activities on the refuge. The intense noise at frequent intervals will significantly impede normal conversation of refuge visitors. Our long-standing and traditional outdoor activities, including conservation education, birding activities, youth waterfowl hunting, and our visiting public's ability to view wildlife in its natural setting without significant intrusions will be compromised.

In view of these noise impacts, FAA correctly determined that construction and operation of the runway will result in a constructive use of refuge lands by the airport and are therefore subject to section 4(f) of the Transportation Act. Consequently, cooperative discussions among the parties led us to the agreement that is reflected in the MOU involving the Metropolitan Airports Commission, the Service, and the FAA.

The MOU provides for mitigation that will replace approximately 4,000 acres of refuge lands, construct a new visitor facility away from the aircraft noise, replace education and interpretive facilities, provide additional operations funds to support the cost of running two facilities rather than one, and offset the Service's planning and administrative costs in support of this project.

Our estimate of this total mitigation project was $26.9 million. Nearly 60 percent of the mitigation will be directed to land acquisition. To the degree possible, all of these mitigation projects will be determined through the refuge comprehensive planning process, which will allow for thorough public involvement.

Mr. Chairman, the impact of this proposed project on the refuge are regrettable, but unavoidable. They were outside of our direct jurisdiction and control. But I must note in concluding that we are pleased with the agreement reached, and I believe that both the American people and the citizens of the Twin Cities region are well-served and that Congress should be proud of the spirit of cooperation exhibited by these three agencies and by private citizens as represented by groups like the Friends of Minnesota Valley.

I hope people like Lynne Pickard and Nigel Finney are proud of their work, and when our testimony is over I'll provide them both with the National Wildlife Refuge System blue goose pin as a very small recognition of their good work in behalf of the Minnesota Valley Refuge and America's National Wildlife Refuge System.

I want to thank you, Mr. Chairman. I'm looking forward, I think, to the opportunity to answer your questions.

[The prepared statement of Mr. Ashe may be found at end of hearing.]

Mr. YOUNG. Thank you, Mr. Ashe.

Ms. Pickard.

STATEMENT OF LYNNE PICKARD, MANAGER OF COMMUNITY AND ENVIRONMENTAL NEEDS DIVISION, FEDERAL AVIATION ADMINISTRATION, WASHINGTON, DC

Ms. PICKARD. Thank you, Mr. Chairman. I'm Lynne Pickard, Manager of the Community and Environmental Needs Division at FAA. Thank you for allowing me to appear before you on behalf of Susan Kurland, Associate Administrator for Airports, who is at our Southwest Region Partnership Conference in Texas today.

The Metropolitan Airports Commission's plans for expansion of the Minneapolis Airport include a new 8,000-foot air carrier runway and associated development to improve airport capacity, operations, safety, and reduce airline delays.

In making our decision on whether to approve the project, FAA evaluated the anticipated impacts on the Minnesota Valley National Wildlife Refuge in an environmental impact statement and in accordance with section 4(f) of the Department of Transportation Act of 1966. Section 4(f) is an important environmental statute, as Mr. Ashe explained. It provides special protection to publicly-owned parks, recreation areas, wildlife and waterfowl refuges, and historic sites of national, State, or local significance.

Section 4(f) applies exclusively to decisions by the Department of Transportation, including FAA decisions on airport development. It permits FAA to approve the use of protected section 4(f) resources for an airport project, only when two standards are met: (1) there is no feasible and prudent alternative to the use of section 4(f) resources, and, (2) the transportation project includes all possible planning to minimize harm.

These standards apply whether the use of section 4(f) land is physical, as in constructing on the land, or constructive. Constructive use occurs when a transportation project located near but not in the section 4(f) resource impacts it in a way that substantially impairs its activities, features, or attributes. FAA made a constructive use determination with respect to the Minneapolis Airport project on the publicly-owned portion of the Refuge closest to the airport.

Specifically, FAA determined that noise increases from aircraft operating on the new runway would substantially impair human outdoor educational and environmental interpretive activities, such as school field trips and scouting visits, as well as recreational activities such as nature walks, bird watching, and fishing.

There is no physical use of the Refuge for the airport project, nor does FAA anticipate adverse impacts on the ecological integrity of

the Refuge. The Department of the Interior was consulted on potential jeopardy to endangered species and critical habitat and determined no adverse effect in this regard.

In accordance with section 4(f), FAA determined there is no feasible and prudent alternative to the constructive use of the Refuge. There was a very sweeping analysis of alternatives. Alternatives that were examined and rejected include possible new sites for an airport, alternative expansion concepts for the Minneapolis airport, high-speed, inner-city rail, a remote runway concept linked to the Minneapolis airport by high-speed transit, the shifting of some aviation users to supplemental airports in the region, alternative flight procedures that might avoid the Refuge, and the alternative of taking no action at all.

Having found no feasible and prudent alternative, FAA participated in a mitigation plan reflected in the Memorandum of Agreement between the U.S. Fish and Wildlife Service and MAC, with FAA as a concurring party. This was developed during consultations over a period of two years and provides a specific program to minimize harm to the refuge.

Mr. Ashe outlined the details of the mitigation. I won't repeat those, except to say that the Memorandum of Agreement also recognizes that the Refuge lands that are subject to constructive use because of aircraft noise will still continue to function as a diminished value wildlife refuge area under U.S. Fish and Wildlife Service management.

The payment of funds by an airport proprietor needing to use a section 4(f) resource to the agency owning the resource so that a comparable replacement can be provided is one of several accepted methods of minimizing harm under section 4(f). The replacement of section 4(f) lands and facilities, as well as design measures to minimize harm, are recognized in published FAA environmental guidance.

FAA has also long recognized that environmental mitigation associated with an airport capital development project qualifies as a capital cost of the airport. There are precedents in FAA experience for the type of mitigation agreed to for the Minneapolis airport project.

I should also note here that the Metropolitan Airport Commission is paying the compensation. There will be no FAA airport improvement program funds used in that compensation. No Federal funds will be used.

I should point out that section 4(f) mitigation for airport development is not a frequent occurrence. This is consistent with the purpose of the statute, which is intended to protect section 4(f) resources, and to set a high standard for their use. Simply put, FAA does not issue a sizable number of section 4(f) determinations because we try not to use section 4(f) resources. Most of our determinations are for uses of urban parks, such as local parks, ball fields, and publicly-used school playgrounds because these tend to be the types of section 4(f) resources in close proximity to airports.

In summary, in formulating the section 4(f) mitigation plan for the Minneapolis airport project, the relevant agencies considered the air transportation needs of the region, the impacts on the Minnesota Valley National Wildlife Refuge, the availability of any fea-

sible and prudent alternatives, and all possible planning to minimize harm.

Thank you for the opportunity to testify this morning, Mr. Chairman. On behalf of Administrator Jane Garvey and Associate Administrator Susan Kurland, I would like to say we appreciate your interest in FAA's perspective on this project, and I would be pleased to answer any questions.

[The prepared statement of Ms. Pickard may be found at end of hearing.]

Mr. YOUNG. Thank you, Ms. Pickard.

Nancie, you're up next.

STATEMENT OF NANCIE MARZULLA, DEFENDERS OF PROPERTY RIGHTS, WASHINGTON, DC

Ms. MARZULLA. Thank you, Mr. Chairman, and members of the Committee. We are enormously pleased to have the opportunity to testify before you here today on behalf of Defenders of Property Rights.

I'm here today to testify or to comment, not on the merits of the proposal which we do not take a position on, but rather to comment on the irony of the situation in which the U.S. Fish and Wildlife Service is here before you asking for over $20 million in payment for the damage to or injury to its property rights.

And I say irony, because at Defenders of Property Rights we litigate cases and represent property owners whose constitutionally-protected property rights have been injured or damaged as a result of actions taken by the U.S. Fish and Wildlife Service, pursuant to its regulatory authority under the Endangered Species Act, and in those cases—many, many of those cases—the U.S. Fish and Wildlife Service is actively opposing the compensation to pay for the damage to the property rights of the private land owners, and so we find it ironic for the Fish and Wildlife Service to be in this posture they are in today.

With respect to the cases that I refer to and are set forth in more detail in my written testimony that I've submitted to you, let me highlight just one example for you today. We represent John Taylor, an elderly man in his eighties, who sought permission from the U.S. Fish and Wildlife Service over two years—now going on three years—ago to build a one-story modular home on his small residential lot in Fairfax County, Virginia. He wants to build the home to accommodate his elderly wife, who has been ill and is now confined to a wheelchair.

Because Mr. Taylor's land is next to public land on which there is a bald eagle's nest, the Fish and Wildlife Service refuses to grant him permission to build the wheelchair-accessible home unless he agrees to the following conditions. They include constructing a platform for bald eagles to nest in the national forest; contribute money—his money—to fund a salmon restoration plan because eagles like to eat salmon; to agree to accept full responsibility for any possible harm done to the eagles if they abandon the nest, even if they leave for reasons beyond Mr. Taylor's control; and agree to a permanent deed restriction that forever bars outdoor use of the yard during the months the eagles like to nest. This would be from

July to November, thus making it unlawful to barbecue, mow the lawn, or have children playing outside during that time period.

As I said, we represent Mr. Taylor in his attempts to either obtain permission from the Fish and Wildlife Service to use his land or to obtain just compensation for the taking of his property rights. Unless Mr. Taylor agrees to these preposterous conditions, Fish and Wildlife Service has told me orally that it will continue to block his building a home on his land as it has done for this three-year time period. We are now, in fact, being forced to file a lawsuit on behalf of Mr. Taylor in Federal court seeking compensation for the taking of Mr. Taylor's property rights.

But, unfortunately, as I alluded to, Mr. Taylor's case is not an isolated example. Indeed, his case is typical in that often the property owner loses the ability to use his land and is forced to seek compensation in court where the Fish and Wildlife Service fights him tooth-and-nail opposing the payment of just compensation. Thus, it is indeed ironic that Fish and Wildlife Service is here today asking for the payment of the damage to its property, in the face of its defiant position toward the constitutionally-protected property rights of private land owners.

We at Defenders have been before Congress many times testifying about the need for legislative reform to ensure that private property owners are paid just compensation for the taking of their property.

We have also testified on more than one occasion about the need for reform of the Endangered Species Act, one of the most Draconian laws on the books in terms of its impact on private property rights. The problems with the Act are exacerbated by the expansive application given the Act by the Fish and Wildlife Service. The Fish and Wildlife Service has consistently opposed every attempt to reform the laws to grant a measure of protection of the rights of private property owners, which are routinely damaged or destroyed by the Service acting under laws such as the ESA.

We are pleased to see that the Fish and Wildlife Service has suddenly discovered the importance of private property rights—at least its own property rights. Now that the Service has experienced first hand the destruction of its property rights by governmental action, we would expect its support for property rights legislation in the 106th Congress.

Thank you.

[The prepared statement of Ms. Marzulla may be found at end of hearing.]

Mr. YOUNG. Thank you, Ms. Marzulla.

Mr. French.

STATEMENT OF NELSON FRENCH, EXECUTIVE DIRECTOR, FRIENDS OF THE MINNESOTA VALLEY, BLOOMINGTON, MINNESOTA

Mr. FRENCH. Mr. Chairman and members of the Committee, I'm Nelson French, executive director of the Friends of the Minnesota Valley.

It is indeed an honor to be invited to appear before you today to speak with you about the Minnesota Valley National Wildlife Refuge and the recently-concluded discussions between the Fish and

Wildlife Service, FAA, and MAC regarding the mitigation of impacts associated with the expansion of the airport in the Twin Cities.

The Friends of the Minnesota Valley was incorporated in June of 1982 as a non-profit organization and is one of many similar organizations cooperating with the Fish and Wildlife Service in local communities across the country. Many of the members here—many of you who have refuges in your districts—may be well-familiar with your Friends organizations.

Before we get to the question and topic I was asked to comment on today, I would like to share with you a bit about our history and the way in which we have chosen to work within our community, as I believe it is relevant to the issue being discussed today.

The dream of having a national wildlife refuge in the Minnesota Valley was developed in the early 1970's by a group of citizens called the Burnsville Environmental Council. Frustrated with their failure to stop the expansion of landfill operations in the Burnsville portion of the Minnesota River flood plain, they decided that a more comprehensive approach was necessary to protect the river bottoms in their community.

As a result, in 1974 the Burnsville group produced a 24-page booklet that proposed a Minnesota River national wildlife refuge and recreation area. The Council sent the booklet to everyone, from local city councils to the President of the United States. Fortunately, then-Congressman Bill Frenzel responded by asking the Department of Interior to investigate the feasibility of establishing a national wildlife refuge in the valley.

The result was the development in 1975 of a proposal for such a refuge. The Burnsville Council reached out across the river and then asked the Bloomington Resources Commission for help. Together they formed a local group known as the Lower Minnesota River Valley Citizens Committee. Now that group is known as the Friends of the Minnesota Valley. This citizens' committee kept up the contacts between volunteers and invited people to share in the vision of the refuge proposal along a 34-mile stretch of the Minnesota River.

Countless presentations were made to communities and community groups up and down the river for the purpose of educating people about the project, seeking endorsements, and working out consensus on issues of concern within the community.

After this engaging process, the citizens' committee was able to get support and resources from more than 40 private groups and public groups, including local and national conservation organizations, chambers of commerce, corporations, the Jaycees, State agencies, the Minnesota legislature, and local units of government. Through this process many issues were worked out between the stakeholders, who had differing views of the refuge proposal, and consensus was reached.

In July of 1975, then-Senator Walter Mondale and Hubert Humphrey introduced a bill to establish the Minnesota Valley National Wildlife Refuge. Then Congressman Oberstar, along with former Congressmen Frenzel and Hagedorn, introduced a similar bill in the House of Representatives. By late September, 1976, both Houses of Congress had passed the authorizing legislation which

we've heard discussed today, and President Ford signed the bill creating the Minnesota Valley National Wildlife Refuge on October 9, 1976—a true community-based and bipartisan effort. The Minnesota Valley National Wildlife Refuge is a magnificent urban refuge that owes its existence to groups like the Friends of the Minnesota Valley and our precursor citizens groups.

Our group did not stop with the establishment of the refuge, however. Our efforts now are focused more broadly on protecting the lower Minnesota River watershed and its environs. Since establishment of the refuge, we have successfully worked with the congressional delegation and the State legislature to acquire refuge lands and associated State properties—two State parks at each end of the refuge—to construct a visitor and education center, which is now a model for nationwide use, and provide an excellent environmental education resource for the Twin Cities public-at-large.

While continuing to work on the basic issues of non-profit organizational existence, like fundraising and membership development—and we now have over 600 members—the Friends have helped enlist volunteers. We have enrolled over 10 percent of the refuge neighbors in our private lands registry program. These are voluntary private citizens recognizing the value of their private property adjoining the refuge.

We have coordinated efforts for water quality monitoring with 13 public schools in the area. We communicate with residents of the watershed regularly and raise awareness of this resource within the Twin Cities, and we are increasingly fostering partnerships to improve the lower Minnesota River watershed and ecosystem, a program begun Minnesota River basin-wide by Governor Carlson eight years ago.

The current situation: In February of 1998, the Friends of the Minnesota Valley, following this style of working in the community, began to see if we could develop, in association with the Airports Commission and other local stakeholders, an agreed upon solution to the potentially contentious issue of expansion of the airport.

We knew the 1996 decision by the Minnesota legislature to expand the airport and route air traffic over the refuge had to be implemented. After extensive review of the situation, our organization, in concert with 16 local and national conservation and community groups supported the concept of mitigating these impacts associated with the expansion of the airport.

We co-sponsored, in association with these groups and others, a public open house at which time representatives from all three Federal agencies—excuse me—the Airports Commission and the two Federal agencies—appeared for the first time together in public to respond to the questions that were revolving around this issue. The outcome of that meeting was significant progress towards the necessary development of a community consensus on the mitigation package.

I can't sit here and say that we don't regret the loss to the public of the resource that's being lost here—the Black Dog Lake unit and the Meadow Lake units of the refuge. They will no longer be available for outdoor, educational, classroom use, birdwatching and other such things.

We, however, recognize that the airport must expand to meet the needs of the flying public, and we have contended that expansion of the airport at this location will result in less overall environmental and natural resource damage in Minnesota than would construction of a new airport on a 21-square mile site affecting many private agricultural landowners.

The Friends of the Minnesota Valley——

Mr. YOUNG. How much more do you have?

Mr. FRENCH. I have about two minutes.

Mr. YOUNG. Take one minute.

Mr. FRENCH. One minute. Okay. We applaud the Airport Commission, the FAA, and the Service for recognizing the serious nature of these impacts. We look forward to working with the Service and the community to develop the National Wildlife Refuge Enhancement Act required comprehensive conservation plan to further the refuge values in this watershed.

I now want to respond to the question that the Committee asked me to respond to. In your letter to us you asked this question: "The Committee would appreciate your addressing the issue of how the Fish and Wildlife Service agreement for compensation will impact the rights of private property owners to receive compensation for the constructive use of their land in connection with the protection of wildlife." In analyzing that question—and I'm not sure we're the ones that need to be asked that—it is our understanding that private wildlife lands are not eligible for review under the constructive use provisions of section 4(f) of the 1966 Department of Transportation Act.

It is also our understanding that the agreement between the Fish and Wildlife Service and the Airports Commission will have no impact on the rights of private property owners to receive compensation for their land through a fee title acquisition transaction in connection with the protection of wildlife.

This concludes my prepared remarks. We really thank you for the opportunity to be with you today. Mr. Chairman, and members, I'll be happy to respond to any questions that you have. Thank you.

[The prepared statement of Mr. French may be found at end of hearing.]

Mr. YOUNG. Thank you, Mr. French.

Dan, who instigated, or where did the idea for compensation to the Fish and Wildlife come from? Was that instigated by your department, or was that instigated by the FAA?

Mr. ASHE. I think during the process of developing the environmental impact statement on the proposed runway project and our comments and response to the analysis of alternatives in the draft environmental impact statement, it was the Fish and Wildlife Service who raised the possibility that there would be a constructive use of the Minnesota Valley National Wildlife Refuge and that the 4(f) provisions of the Transportation Act would apply.

Mr. YOUNG. Actually, the instigating of a fee was started in your department.

Mr. ASHE. I believe the original proposal for a mitigation package was transmitted from us to the FAA.

Mr. YOUNG. Okay. Ms. Pickard, where is that money coming from?

Ms. PICKARD. As I said, the Metropolitan Airports Commission is paying the money.

Mr. YOUNG. And they are getting the money from——

Ms. PICKARD. There will be no Federal funds. They may use——

Mr. YOUNG. And they are getting the money from where?

Ms. PICKARD. They may use airport revenue for the compensation. They may also use some passenger facility charge money, and they may use other money that is not within any knowledge of the FAA, unrelated to the airport.

Mr. YOUNG. Have you studied the constitutionality of this? You're spending money not appropriated by Congress, and you're actually putting a tax on the passengers to pay the $20-some-odd million to Fish and Wildlife, are you not?

Ms. PICKARD. You're referring to the passenger facility charge. Passenger facility charge moneys are eligible for environmental mitigation related to an airport capital development project, and this is considered within that scope. It's local money, not Federal money.

Mr. YOUNG. But it's taxpayers' money; it's not local money.

Ms. PICKARD. It is a head tax, if you will——

Mr. YOUNG. And I thought only the Congress could pass tax law when it comes to redistributing money from one agency to another agency. So what I'm getting to is the Fish and Wildlife are circumventing this Committee in the appropriation process. You're taking over $20 million, and you put down this wish list—and that's why I asked you, Dan, where it came from—and you're asking for new employees, you're asking for new facilities, boardwalks, et cetera, et cetera. And I've got to ask you, what would have happened if the Commission hadn't agreed to this? The Commission is not losing any money. They are taxing people to pay for this. Now if they had not agreed to this amount of money, could you have stopped this project?

Mr. ASHE. We could not have directly stopped the project, Mr. Chairman. What we could have done was continue to express our views about the impacts of the project on the Minnesota Valley National Wildlife Refuge, and the Federal Aviation Administration has the responsibility to consider our views and comments in the conduct of making their decision on the airport to approve the airport construction project.

Mr. YOUNG. Are you telling me the FAA could have gone ahead and built this without your blessing?

Mr. ASHE. It's their decision to make. They have a responsibility, as I read the law, Mr. Chairman, to minimize and mitigate to the extent feasible the impacts on refuge lands. We believe that they have done that in good faith and done that in compliance with the law as we recommended they do. But had we continued to—had they not agreed to this agreement and we had continued to express our reservation, then, again, FAA is the decisionmaker in this case. And, Lynne, I don't know if you have anything else to offer, but they are the decisionmaker.

Mr. YOUNG. Well, you see what I'm leading up to. To me, this looks like sort of a form of extortion because you're not using money to re-establish any wildlife; you're using it to build a pretty good layout—a visitors' center, a walkway, observation towers, ob-

servation platforms, new personnel. I mean, it's a great wish list and I can understand the Commission doing this.

And, by the way, Mr. French, do you get any of this compensation money? Your agency? Your group?

Mr. FRENCH. Mr. Chairman?

Mr. YOUNG. Yes.

Mr. FRENCH. At this point in time we are not getting this money.

Mr. YOUNG. Are you in this mix of this $20 million at all, in any way?

Mr. FRENCH. At this point in time, no.

Mr. YOUNG. What do you mean at this point in time? Are you going to apply for it?

Mr. FRENCH. The community is discussing—no, we're not going to apply for it. I'm sorry, Mr. Chairman. The funds as I understand it will be used to mitigate, through land acquisition and construction of facilities, the impacts associated with the new runway.

Mr. YOUNG. It goes back to what I said, Dan. You are mitigating building the brand new facility, is what you're doing.

Mr. ASHE. That's correct, Mr. Chairman. What I would do, though, is disagree with your assertion that we are circumventing this Congress or circumventing this Committee or the Congress because the Minnesota Valley National Wildlife Refuge is an authorized refuge that's been authorized specifically in legislation by Congress. The legislation directs us to establish and maintain a visitor center and visitor facilities.

The Congress, through the appropriations process, sets the level of FTE's that the Service can have. So, we can gain dollars to help us achieve an objective. We can't achieve that objective unless we have authority granted to us by Congress, and in this case we do have that authority. So I guess I would disagree with your assertion that we are circumventing Congress. We are going to replace—it is our intention to replace the facilities that we believe will be impacted by the noise created by this runway expansion.

Mr. YOUNG. Well, another thing is, Dan, you know and I know that moneys being spent should go either through the Treasury or should go through the appropriation process. And I'm concerned primarily with the purchase of land, and it goes back to private property rights again. Now are you—with the agency—you have inholdings or adjacent holdings—are you enforcing the buffer zone concept that those people have to sell? Or is it willing buyer, willing seller?

Mr. ASHE. We would acquire land, as we do in every instance, from willing sellers.

Mr. YOUNG. Without putting any restriction on them or anything else, like they did in California?

Mr. ASHE. Yes. No, sir; without putting any restrictions on them.

Mr. YOUNG. Okay, you heard what Ms. Pickard—not Ms. Pickard, Ms. Marzulla—had to say about in Fairfax—was that in Fairfax?

Ms. MARZULLA. Fairfax County, Virginia.

Mr. YOUNG. Have you got that documented?

Ms. MARZULLA. Oh, we do, yes.

Mr. YOUNG. Mr. Ashe, are there any salmon in Fairfax County?

Mr. ASHE. I've never heard of or seen a salmon in Fairfax County. That's why it sounds rather far-fetched to me, Mr. Chairman. I would like to—but I am not familiar with the case at all.

Mr. YOUNG. Well, I want to suggest, as the Deputy Assistant Secretary, you get real familiar with that case real quick, because this is the type of thing that gives you really black eyes. I mean, I could see possibly the concern for the bald eagle, although they will nest anywhere they want to nest. I think they've proved that.

Mr. ASHE. If the reference is to salmon in Fairfax County, I guess I would posit myself that that reference is in error on somebody's part, and I would gather that it's probably not our biologist who is claiming that there are salmon in Fairfax County.

Mr. YOUNG. Okay, I'm going to suggest——

Mr. ASHE. My guess would be that it might be shad or one of the other anadromous species of fish that eagles feed on.

Mr. YOUNG. And this senior citizen is supposed to re-establish the shad run? I'm going to suggest that the two of you sit down and work this out somewhere along the line because this is the thing I really like to go to "60 Minutes" about, and I have no reservations about going to "60 Minutes" about this if I can get some assistance in doing it. Because this is an example of what occurs with the lack of sensitivity within the agency itself.

And you know I'm not picking on you, Dan. The whole agency is screwed up, if you want to know the truth.

[Laughter.]

I mean, I've watched it just deteriorate in the last six years to the point where you have no consolation or no consideration for the people that you're directly interfacing with, and we see it probably more in Alaska than in any place in the Union right now, especially the Izembek operation.

I've got a whole series of questions, you know, that just absolutely do not parallel what you're saying here in your testimony, and I won't go into them because my time is up.

The gentleman from Minnesota.

Mr. VENTO. Mr. Chairman, I think that when we get into these anecdotal stories that are sort of unrelated to the topic at hand that it's always good to hear both sides of it before we pass it over to "60 Minutes" or to anyone else.

Mr. YOUNG. Well, I'm saying they had better fix it or it will be on "60 Minutes."

Mr. VENTO. Let's have a hearing on it and let everyone know and put it on the table.

Mr. YOUNG. I want "60 Minutes."

Mr. VENTO. I know. I know what you want.

Mr. YOUNG. I want to be Bill Clinton; that's what I want. I'm going to spin this; that's what I'm going to do.

Mr. VENTO. I know. You want a little word association game here, you know. I understand. You know, I think it does not help in terms of using this as a platform to get up and state, "We're mad as hell and we're not going to take it any more." Well, I've done it, but I don't think it particularly helps here in terms of what's going on.

The issue with the ticket tax—in fact, the revenues here, Ms. Pickard, are coming from property taxes. They're coming from

bonded debt; they could come from a variety of different funds that the Metropolitan Airports Commission has. Is that correct?

Ms. PICKARD. The passenger facility charge would be an authorized fee on passengers using the Minneapolis-St. Paul Airport.

Mr. VENTO. Oh, I know what it is. I'm just saying that the money that they are using here may come from a variety of different sources. They are spending $5 billion to do this project.

Ms. PICKARD. The Metropolitan Airports Commission would have to address that. I would assume it probably is. We have only given them our opinion that they could use airport revenue or they could use passenger facility charges.

Mr. VENTO. Well, they are using that money. We don't approve the money when they spend $100 million to insulate 4,300 homes. The FAA didn't necessarily have to pass judgment on that. That's their authority to use those dollars. Is that correct?

Ms. PICKARD. Sir, they certainly have authority to use airport revenue appropriately for environmental mitigation without FAA approval. We do have to approve the use of passenger facility charges.

Mr. VENTO. Yes. Well, the governance structure—well, they paid that money out of, I'm sure, part of it out of that, or at least when it came into existence they planned on paying and buying—they ended up paying $200 million more for the same purpose in terms of insulating homes in the area against such structure. I'm just trying to point out that private property here is impacted and is compensated where there is a demonstrated effect or where it has an impact insofar as their agreement. Now I don't know that it's gone to court to establish what the property rights issue is.

Mr. Ashe, and Mr. Schultz, who is with you, the Director, I guess, of this Fish and Wildlife Service area, was there any suspension of any of the NEPA laws or EIS laws with regards to this issue?

Mr. ASHE. No. In fact there was complete compliance, and in fact that is, in my view, one of the major contributing factors to what led to the positive resolution in this case, was that we had an agency that took its environmental analysis responsibilities very seriously, looked at all of the alternatives, compared the impact of the various alternatives on the refuge and provided that analysis for both the public and for the Fish and Wildlife Service and other agencies to see. So there was complete compliance as far as I could tell.

Rick?

Mr. VENTO. Rick—Mr. Schultz? I guess he's agreeing with you.

Mr. SCHULTZ. Yes, I feel that. Mr. Chairman, I feel that FAA and MAC did a very nice job of going through the environmental compliance documents. They had both the draft EIS, which was a thorough analysis of the environmental issues associated with the new runway expansion, plus they had the final EIS. They also had the 4(f) evaluation which addressed environmental compliance issues as well.

Mr. VENTO. There's a suggestion, of course, that the information or documentation with regards to the impact on the fish and wildlife in the area—the fauna and flora—was not as well-documented, that it was not, in this instance, possible to document what the im-

pact is. But the 4,000 acres of land that are going to be purchased here to augment and mitigate this, will in fact have a positive impact on the fauna and flora in the area and the purpose and mission of the Fish and Wildlife Service. Is that correct, Mr. Ashe?

Mr. ASHE. I believe it's correct. Rick could probably provide you with a more specific answer. I'd like him to address that.

Mr. VENTO. Yes.

Mr. SCHULTZ. When we went into negotiations with FAA and MAC on this issue, we had two basic principles here. One was to assure that there was a no-net loss of wildlife habitat associated with the project, and number two, we wanted to assure that there would be a no-net loss of the opportunity for the public to view wildlife in its natural setting. And the compensation that we have agreed to will allow us to fulfill those principles.

Mr. VENTO. I just would, again, want to point out there is no road going through here. This isn't a wilderness area. And with response to my colleague from Nevada, I did review just briefly the Ivanpah Airport issue, and I find that in the legislation there is a suggestion.

The proposal was to suspend NEPA and to suspend FLPMA and to override the BLM local policy with regard to—just as starters. So, it may be that one of my concerns, as the gentleman stated, was clearly the fish and wildlife or the impact on the Mojave and other things, but I'd be happy, you know, to work with him on that particular issue.

And the major point here is, of course, to compensate where there is an impact on public land and certainly where there is a legally documented legal impact on private property, as we're doing, obviously, with these flight paths. And I know this is a big issue in the West, and I think, obviously, confusing it with roads through a wilderness wildlife refuge is so——

Mr. YOUNG. The gentleman's time is up. I just want to make one suggestion. According to this one requirement by the Fish and Wildlife, they want so many roads and trails built, so many observation areas built. This is all in the refuge—and parking lots. I mean, this is going to be built. Is that correct, Mr. Schultz?

Mr. SCHULTZ. Mr. Chairman, that is correct. The mission of the Minnesota Valley National Wildlife Refuge has two components to it. One is to restore and protect habitats for fish and wildlife; the other is to provide wildlife-dependent recreation and environmental education activities.

Mr. YOUNG. Okay. Why I'm bringing this up is he keeps talking about a road through a wilderness which was created by this Congress that already had 40-some odd miles through Izembek.

Mr. VENTO. Well, they are replacing the——

Mr. YOUNG. No; I'm just saying, they are replacing it, but they are putting it in the refuge, and all we wanted is a little, old, silly gravel road, just so I can save my people.

May I make a suggestion to the members here? He keeps referring to the purchase of 4,000 acres. Now, have you identified those 4,000 acres? Have you talked to those landowners, and what are their feelings about being purchased?

Mr. ASHE. I think our normal procedure with regard to refuge acquisition would be to establish a refuge boundary. We do an envi-

ronmental analysis. In this case, maybe some parcels are already within the existing refuge boundary, in which case we've already done that type of analysis and public input. As I indicated, our desire in this case is to implement the mitigation agreement through the development of our comprehensive conservation plan for the refuge, which will involve, again, public notification.

Mr. YOUNG. I know my time is up, but I want to get it straight. If I find one member that is being brow-beaten into selling his land because you've put a border around him, you're going to be back before this Committee again.

Mr. VENTO. Mr. Chairman?

Mr. YOUNG. This is what I'm trying to say: You say you're going to buy 4,000 acres, and, you know, when you purchase 4,000 acres, $20 million is being raised by users' fees on people who fly through the Minneapolis Airport. I'm just—I want to make sure that you're not really using the big, heavy hammer.

I'm out of time. Mr. Pombo.

Mr. VENTO. Well, Mr. Chairman, let me just point out that there is also an active program by the State, the RIM program and the conservation reserve program—that they have actually had a series of agreements up and down the Minnesota River Valley which are quite substantial, and it might be well for Mr. Schultz to address that since you're concerned. So there have already been initiatives on those areas.

Mr. YOUNG. Well, I'm not concerned about the State; I'm concerned about the role of the Fish and Wildlife. That's my jurisdiction. Now the State can do anything they want to do. But I'm just saying—I'm very conscious. I've seen this happen to—Mr. Pombo may ask a question about it later on—but I've seen it happen in other areas of the United States.

Mr. Pombo.

Mr. POMBO. Thank you, Mr. Chairman.

Mr. Ashe, in your prepared statement, you state that in the Wildlife Refuge System Improvement Act of 1997 that Fish and Wildlife Service has no authority to regulate air space above a refuge. You further state that, "I want to emphasize again that no part of this runway will be constructed on either existing or future refuge lands."

You also state in your printed testimony that publicly-owned land under the Transportation Act—"publicly-owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance." If you have no authority to regulate air space and if none of the refuge land is going to be used for this runway, how do you tie in section 4(f) in order to obtain the mitigation money?

Mr. ASHE. I guess I would say, going back to Ms. Pickard and the testimony of FAA, that section 4(f) contemplates two types of use of public lands, both physical use—occupying the property—so if they did our land for a runway or a road, that would be physical use.

Mr. POMBO. Which you state is not the case.

Mr. ASHE. Is not the case in this instance—or constructive use, which means the presence of noise generated by aircraft overflights is essentially rendering our refuge useless, from the standpoint of

achieving the purposes which Congress has legislated us to accomplish at that refuge. But we have a public education mission at Minnesota Valley Refuge, where the public has made substantial investment.

Mr. POMBO. So it's your guess—guess—that 4,000 acres of the refuge will be rendered useless because of this runway, and you're going to take the money and buy 4,000 acres somewhere else in order to mitigate, to make up for the impact.

Mr. ASHE. What we have said is that the noise generated from the aircraft will make it difficult for us to accomplish our conservation education and wildlife interpretation mission on those portions of the refuge, and we have asked——

Mr. POMBO. So it's not a full taking; it's a partial taking of the use of that part of the refuge.

Mr. ASHE. Well, it's not a taking at all. We are relying on the constructive use provisions in section 4(f) of the Transportation Act, which provides for mitigation in this case.

Mr. POMBO. And the constructive use is the partial taking of that property. The language that you are using is the same language that refers to private property in that it is a partial taking use. It is a constructive use of your property, just as if some other activity limited the use of your property, it would be a partial taking, a partial taking of that property, a partial use of that property.

I am somewhat confused as to—with all of the laws that are out there right now—how you can still have a mitigation and still require the payment of $20 million on that, because even in reading your statement, I don't see how you start here and end up with requiring that $20 million payment.

But I do need to ask you, was a section 7 consultation done under Endangered Species with FAA on this?

Mr. ASHE. Well, the FAA considered the impacts of the proposed runway on the federally-listed species that are present in the Minnesota Valley refuge area in the conduct of doing their EIS, and the Service reviewed their analysis and made the determination under the Endangered Species Act that it was not likely to affect the bald eagle, which is the resident species there.

Mr. POMBO. Weren't there other endangered species that were looked at on this as well, or was the bald eagle the only one?

Mr. ASHE. Rick is in a better position. The bald eagle is the principal species.

Mr. SCHULTZ. Yes, both the bald eagle and the peregrine falcon are in the area. The peregrine falcon nests on a hacking box on a NSP power plant tower about two miles away from the end of the runway.

Mr. POMBO. Excuse me—on a power plant tower?

Mr. SCHULTZ. That's correct.

Mr. POMBO. Okay.

Mr. YOUNG. If the gentleman from California would do me a favor, I'd like to have you take the gavel. Would you take the gavel, the gentleman from California?

Mr. POMBO. Yes, I'll take the gavel, but I don't want you to take me time.

[Laughter.]

Mr. YOUNG. You can do anything you want when you've got the gavel, buddy.

Mr. POMBO. If I've got the gavel, then I guess I get to keep asking questions.

Mr. YOUNG. You can ask questions as long as you want, as long as you've got the gavel.

I just want to ask, when did this project start?

Ms. PICKARD. The FAA began our review in the early 1990's, with the Federal EIS starting in 1994 or 1995. The State legislature had been dealing with about seven years' worth of planning studies before that point.

Mr. YOUNG. All right. Before I relinquish this, Richard, just one thing. I'm still confused about—my interpretation of the Constitution is the protection of the private property right holder, and you're not private property. Fish and Wildlife is public property, and I don't see where you have the authorization to be compensated by another Federal agency or by the airport.

You know, if I was really nasty, I'd likely take to filing a lawsuit to stop this project, because I don't think you have the authority to do what's been done—either one of you. And if you read the Constitution very carefully, it says ''use'' and it refers to the private citizen, not another Federal agency. I mean it's something I want you to think about for a while. I know you struck a deal; I understand that. But you're messing with the constitutional law here and it really concerns me a little bit.

Mr. Pombo, you're up.

Mr. POMBO. [presiding] I just wanted to get back to the issue of section 7 consultation. You identified at least two endangered species that were looked at as part of this. Under section 7, under the Endangered Species Act, could you have not stopped the construction of this runway if there was not sufficient mitigation to mitigate any impact against those endangered species?

Mr. ASHE. If there were an effect on the endangered species then we could have, but what we would do under the section 7 process is notify the action agency, in this case FAA, that there are endangered species present and there is or is not the likelihood of take in association with the project.

Again, it's the action agency that has the responsibility to avoid take. The law prohibits take. And it's our responsibility at the Fish and Wildlife Service to advise Federal agencies of the potential effects of a project and whether a project is likely to affect endangered species and whether a jeopardy situation may arise in the conduct of an agency conducting their activities. So, it would be our responsibility to advise them.

In this case we did look at the available information and made a determination that the activity was not likely to affect the endangered species.

Mr. POMBO. Under the current interpretation of the Endangered Species Act, take includes harassment, and it's your testimony that the 7,000 flights a month present no harassment or take of the endangered species.

Mr. ASHE. That was our assessment in looking at the project. I guess I would point out to the Committee—and I heard a number of members raising issues surrounding the potential impacts of

overflights on species—and I guess I would just point out that the impacts of overflights on species are case-dependent. It depends on the species; it depends on the airport; it depends on the types of aircraft that are flying; it depends on the time of year that they're flying. And so, looking at any one instance and the specific facts around that instance may lead to a different conclusion.

We have a very active, very vibrant bald eagle population about three miles south of here at Mason Neck National Wildlife Refuge, itself right in the flight path of National Airport, and so there are many instances in which wildlife can adapt to aircraft overflight and do adapt well to aircraft overflight. There are other situations where they do not adapt well to aircraft overflight, and it is dependent upon the species and upon the facts of the specific case.

Mr. POMBO. My time has expired, but I think what you're hitting on is exactly the problem that a number of members have with the Fish and Wildlife Service. It's that at certain times, depending on whatever conclusion you come to, sometimes these are okay, and other times they are not okay. And it appears to a lot of us that there is a regional decision that is made as to when it's okay and when it's not okay, depending upon what part of the country it is or whose ox is being gored by it. And at other times it appears that if there is a sufficient payment made to Fish and Wildlife Service, a lot of times the problems aren't as severe as they would be otherwise.

It makes me wonder if my county had raised $20 million in some kind of a tax and paid Fish and Wildlife off, if we would have been able to maintain our levees, because we were told no and we didn't have endangered species. It was potential habitat. They couldn't find an elderberry beetle for miles anywhere near the levees that we were trying to maintain, but there were elderberry bushes there, so it was potential habitat, so we were told we couldn't do maintenance on our levee system. I wonder if we would have put $20 million into some kitty if we could have done it, and that's the question that a lot of us have.

Mr. Gibbons.

Mr. GIBBONS. Thank you, Mr. Chairman, and in response to my colleague from Minnesota, I want to ensure him and his staff that we are willing to work with you on this Ivanpah bill; however, it does not, and the language in the bill is absolutely, specifically clear, that it does not waive any environmental impact law. It does not waive FLPMA. It's all stated within the bill that those were to be complied with, and fully. So, I appreciate your comments, and I look forward to having my staff work with you on the issue.

Following on with what my colleague from California was talking about on the endangered species and that, Mr. Ashe, I know that in the environmental impact statement that was prepared, there's a quote in there that in essence says that wildlife or waterfowl appear to readily habituate to frequent aircraft overflights: "It is concluded that aircraft noise within the affected environment would not significantly diminish the wildlife habitat in the refuge." Is that true?

Mr. ASHE. That's true. Well, I would say——

Mr. GIBBONS. Now explain to me how aircraft noise, whether it's in Nevada, Minnesota, California, or Timbucktu, does not impact wildlife habitat.

Mr. ASHE. I guess what I would say is I think you correctly quoted our citation in the environmental impact statement. I think that what we have said is the impacts on wildlife from the overflight, in our view, were uncertain. We did not feel that what we knew about the impacts of overflights——

Mr. GIBBONS. Well, the uncertainty is not in your language. It says, "It is concluded"——

Mr. ASHE. Right.

Mr. GIBBONS. [continuing] "that aircraft noise within the affected environment would not significantly diminish the wildlife habitat in the refuge."

Mr. ASHE. And, again, that's our conclusion, because we did a literature search, we looked at the available scientific information on the impacts of similar types of overflights, and we did not feel that there was a way that we could conclusively determine that there would be an impact.

Mr. GIBBONS. So, I can go back and I can use the same argument on any other project which has an overflight and say that you don't have literature or statements available to say it would impact wildlife habitat.

Mr. ASHE. No, sir. No, sir. I believe what I tried to explain to the Committee just a few moments ago, and perhaps did an insufficient job, was that it depends on the type of the species and the time of the year and the type of aircraft.

Mr. GIBBONS. Well, you can't tell me—and I'm an airline pilot—that an airplane makes a different noise in California than it does in Minnesota when it's landing or taking off. You can't tell me that an aircraft makes a different kind of noise in Nevada than it does in Minnesota.

Mr. ASHE. No, sir; I can't do that, but I can tell you——

Mr. GIBBONS. Well, that's what you're trying to tell us.

Mr. ASHE. No, sir. What I'm trying to tell you is that a lesser snow goose is different from a black brandt, which is different from a bald eagle, which is different from a white ibis.

Mr. GIBBONS. Absolutely. Now where in the literature is there that shows that those individual species are impacted by noise differently than the ones in this refuge?

Mr. ASHE. I think that we do have that information. I would like Rick Schultz to be able to present that to the Committee.

Mr. SCHULTZ. I have with me today several literature reviews that talk about the way aircraft impact different species of wildlife. I can get that out of my briefcase, if you would like. There has been an awful lot of work done on noise and aircraft overflights.

Mr. GIBBONS. I would like a copy of that, if you would provide it to my office. I don't know if the Committee needs it, but I would sure like a copy of it for my office.

Mr. POMBO. Without objection, it will be included as part of the record if you could provide that.

[The information may be found at the end of the hearing.]

Mr. GIBBONS. One final question, Mr. Chairman, if I can. The use of the term "urban refuge" indicates that growth—urban growth—

is a reality that has to be dealt with, and I think that's pretty much your statement, isn't it? The reality of urban growth, Mr. Ashe?

Mr. ASHE. I think that we have a refuge that was established in that context, and Congress gave us specific direction with regard to our management and stewardship of that refuge.

Mr. GIBBONS. Well, your statement is an urban refuge, where urban encroachment is a fact of life; you have to deal with it.

Mr. ASHE. Correct.

Mr. GIBBONS. In many of these cases that we see here in this body, they deal with urban settings or community settings within which there are nearby impacts. Those are facts of life, and whether it's in Nevada or California, not only do we deal with them, but you have to deal with them as well, and it distresses me to find that this is a pick and choose sort of an organization, depending upon whose ox is being gored about how you deal with the fact of life about urban growth.

In my community we talk about this Ivanpah Airport, and there is tremendous objection by your organization to a 5,000-foot overflight that has probably—and I'm going to look very closely to the species in this book or this publication that's being presented—may not even be or exist in the proximity of the area of the Mojave Reserve. And I want to find that out for certain.

But I think that what you've presented here today says to me very clearly that it depends upon whose ox is being gored that you're willing to mitigate or willing to find a way to allow for urban growth to become a reality and deal with it.

Mr. Chairman, I yield back to you.

Mr. SHERWOOD. This has been a little interesting to me, and I'm curious—and it's rhetorical if the Fish and Wildlife Service is a little bit mystified at the fervor for which some of these questions come, and I'd like to comment on that a little bit.

No one in the world should be more interested in the success of the Fish and Wildlife Service than I. I'm an avid outdoorsman and a hunter and a fisherman, but I think what you're feeling today is quite a little animosity of the Members of Congress toward the Fish and Wildlife Service, which is very unfortunate. And I think we all need to think about where that comes from, and it's my opinion where that comes from is we all have some specific area in which we think the Fish and Wildlife Service has unnecessarily trampled on the rights of individuals in our home district.

The second issue that I think that is holding this, that is keeping this thing going today, is what we feel is an unconstitutional taxing of U.S. citizens to fill the coffers of the Fish and Wildlife Service. And I think if your Service is going to continue to do the work which you obviously want to do and are trained to do and we agree you should do, that you need to address those issues. And you don't necessarily have to address them to me, but I think those are what's on the mind of the Members of Congress. And I think that if you don't address them in the long run, it will impact your long-term funding.

Mr. POMBO. Mr. Vento, did you have anything more?

Mr. VENTO. Well, yes. I know we want to get going, and I don't want keep members. I appreciate the testimony of the witnesses,

and I would just say, Mr. Chairman, that—maybe I've got to give my colleagues a copy of the book, "How to Talk Minnesotan" in terms of trying to be understood.

But I think, it seems to me that, first of all, when this Fish and Wildlife Service area was designated in 1976, it was limited in terms of it was urban, it was recognized and used for education and outdoor interpretive purposes, and that's the reason for the addition of the land. It's to provide areas that are away from this flight pattern, which, I don't know if you were here earlier, Mr. Sherwood, when I said I used to teach under this flight pattern, trying to talk to junior high school kids. And I guess that's why I developed this small voice I have.

In any case, the issue is then we come back in 1997 and we further limit the Fish and Wildlife Service not to be able to do this. Now we've got 4(f), and they've got under the law, if you read it, it specifically points out that public land—now this is one process. Now if you like 4(f) and you think that's the process that you would like to put other property owners under, well, let's look at it and do it. But this is also a restriction on the Fish and Wildlife Service. They've been restricted many different ways.

And so this is one process. I suspect that most private property owners wouldn't accept that type of limitation. It isn't exclusively used. Actually, we provided for soundproofing of homes in the area, and it's going to be something like 13,000 to 14,000 homes that will be soundproofed in the end by using this particular fund, so I think the fund is legally established. They are using other revenues here to pay for this.

But, you know, to strip away all the powers in the Fish and Wildlife Service—it seems like some of my colleagues are mad as hell at you because you were successful in doing what you've done. Well, I'm not; I favor this. And when this came up I obviously voiced and sent some letters along to this group to encourage them to work together, as I think did other members of the delegation.

Now if there are other ways we can do it—I think what you all have to face up to is you have tied them down in certain ways, but I think that we need to get land managers outside of their boundaries. They need to work on trans-boundary issues. They have to have a voice in our local communities. I want them to do that in my State and in my area, and I want them to do it, frankly, in all the other areas in which we have a national interest.

Others are trying to quiet them, and if you think this is going to stop me from pursuing the ANWR designation or intimidate other members, I think you've got another guess coming. We are going to continue. This is a process and a partnership that has worked. You ought to be adopting it rather than challenging it and trying to intimidate those that are pursuing it. I think it follows the law, it's good policy, it works out in terms of partnership. I think we'll get a lot more done working cooperatively than trying to fight even these sorts of logical explanations.

Mr. Ashe.

Mr. ASHE. If I could, just for a moment, because I hear you, Mr. Sherwood, and you certainly make a valid point. And I guess I would use Minnesota Valley as an example, and I know that Members of Congress take issue with decisions that are made by the

Fish and Wildlife Service every day, but we have a refuge at Minnesota Valley and we duplicate that all over the country and are taking it seriously. And when you see people here, like Nelson French; Rick Schultz has gone out of his way in Minneapolis, as did his predecessors, to reach out to the community and involve the community.

And when Mr. Young expressed his concern earlier about our planned acquisition program there, I would not only not expect to see opposition to that, I would expect to see support for that in Minneapolis because of the good relationship that Rick and Nelson and his organization have built in the community there. And the support that you see for this agreement in Minneapolis is reflective of that good work, which is not to say that we don't have a lot more to do in terms of building those types of relationships more and more across the country and get out of our refuge boundaries and work more with communities, both on refuge management, endangered species, conservation, and other things. I think we certainly can do a much better job of that and are doing, I think the record shows, a better and better job.

What I would do again is caution—I've heard a couple of members implying that the Fish and Wildlife Service is inconsistent in its application, and I would disagree with that, and I would argue that the Committee does not want us to take a one-size-fits-all approach to aircraft noise or species impacts because that reduces our flexibility and our ability to work with people on the ground to do these kinds of things. And so I think that we try to do that judiciously. I realize, again, that, you know, legitimate and reasonable people will disagree on things like this, about whether we have been.

Mr. VENTO. Well, Mr. Chairman, my time has expired, but I was going to point out that they've also—I wanted to try to emphasize that through the Conservation Reserve Program and other Federal programs, they have been instrumental in convincing farm groups on a voluntary basis to set aside land in this corridor, as well as the State program. In fact, we had a big signing out there with Secretary Glickman and our Republican Governor Carlson and many Members. So this has been a bipartisan effort to keep this going.

Obviously, I understand your interest in using it as a platform to take a shot at me on some of the issues in Alaska, but I think that this is something that's working. If you can get this type of agreement, I would commend you to try and do it. I know you've got a lot of problems there, and I think they are much more than what we have.

Mr. POMBO. Well, I appreciate the gentleman's comments and in terms of whether or not this is going to stop you, nobody expects it to. And quite frankly, you get it both ways. You get to take shots at us, and you get your airport approved, so you get it both ways, so why would you stop?

The problem is, if they treated you the same way that they treat us, your airport would not have been approved and you would have gone through years of hassling in order to make it work and then maybe you'd see that there's another side to this. I don't think there's anything wrong with this airport. I think it's fine. I think

it's great that we are able to work out a way that they can build this airport and extend this runway and do everything else.

The problem is, that's not what we get, and maybe it's partially because maybe in my area there's not enough money to make it work for you. Maybe we don't put enough money on the table to make it work. I don't know, but there is definitely a different standard. There is definitely a different approach in dealing with Fish and Wildlife in California than what has happened with this specific case.

There is no way in the world that you can tell me that it is the same approach, that it is the same even-handed, ''we'll work with you, we'll make it work'' approach, because the first thing they tell us is ''No.'' And maybe we just don't put enough money in.

The anecdotal story that Ms. Marzulla told about somebody, an individual property owner, who has a bald eagle's nest near there is told that putting a house on his property is not in line with protecting the habitat or not taking that bald eagle unless he puts enough money on the table or agrees to let you control his property. Whereas, 7,000 flights a month coming out of this particular airport is deemed not harassment and not a significant take of those bald eagles, even the one that's nesting on the power line—or at the power plant. That one seems to be doing okay, but if this guy wants to put a modular home on his property, all of a sudden, hey; he can't do that. He's harassing this bald eagle.

There's no consistency there. I'd be willing to be you though that if he put $20 million on the table, you would not only let him put his modular home in there, you would carry it in there.

Mr. ASHE. I think, Mr. Pombo, the issue is never money, the issue——

Mr. POMBO. It is always money.

Mr. ASHE. The issue is always whether or not efforts are being undertaken to mitigate and minimize the effects of a particular project.

Mr. POMBO. The bottom line is it is always money. If a developer is big enough, if the timber company is big enough that they can put sufficient money on the table or give you control of enough of their land, their problem goes away. But if it's a small guy with a few hundred acres, or in this case a lot, they do not have enough to offer you in order for their problem to go away.

Mr. ASHE. I disagree with that, Mr. Pombo, and I think we——

Mr. YOUNG. Mr. Chairman?

Mr. POMBO. Well, we can go back and forth on that, but it's the case. I can cite you case-after-case-after-case where they were not able to put enough on the table. I can give you cases in my district where developers who put enough mitigation on the table were allowed to build and allowed to go, and ones that did not have the size that they were able to afford to do it were not allowed to go.

It always comes down to money or control. If they give you enough of their property, then you will let them go. If they put enough money on the table, you will let them go. The species is secondary. It is a method for delivering power and money to the agency. It is the most effective tool that you guys have in order to do that.

Mr. YOUNG. [presiding] Mr. Chairman, I deeply admire your comments. I'm going to let you preside more often.

Just for your information, I've already got an inquiry about a "60 Minutes" show, so you might really want to think about this. If we can document it, you're going to be on prime time TV, and we could have lots of fun with it.

So, I want to thank you and thank the witnesses for being here, and I'm going to suggest again—I heard Mr. Sherwood say it—there is definitely, as I've said before, Mr. Ashe, your agency has got a long way to go. I think you've gone too far to the left. You've lost contact with the people. You talk about working with people; my people have tried to work. It wasn't your fault, Dan. Very frankly, I know whose fault it was. The guy's running for President in the year 2000 and got directly involved in it, and you have to be a good trooper. But the injustice of it was totally wrong.

I thank the witnesses. The Committee is adjourned.

[Whereupon, at 2:06 p.m., the Committee adjourned.]

[Additional material submitted for the record follows.]

STATEMENT OF DAN ASHE, ASSISTANT DIRECTOR FOR REFUGES AND WILDLIFE, UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

I am Dan Ashe, the Assistant Director for Refuges and Wildlife of the U.S. Fish and Wildlife Service. I am joined today by Mr. Rick Schultz who is the refuge manager of the Minnesota Valley National Wildlife Refuge. I appreciate the opportunity to provide testimony to the Committee concerning the Minnesota Valley National Wildlife Refuge and the agreement reached between the Metropolitan Airports Commission, the Federal Aviation Administration, and the Service to address the impacts of the Twin Cities airport expansion project on the refuge.

The Minnesota Valley NWR was created over 25 years ago as a result of local residents' strong interest in restoring and protecting fish and wildlife habitats of the Lower Minnesota River Valley. These citizens brought together a variety of interests ... environmentalists, industry, transportation, elected officials, the general public, and natural resource agencies who recognized the value of the natural resources of the area. Based on their hard work and dedication, Congress passed Public Law 94–466, the Minnesota Valley National Wildlife Refuge Act, on October 8, 1976, which established the refuge. Unlike most other National Wildlife Refuges, Minnesota Valley NWR is somewhat unique in that it is primarily located in an urban setting. In this area, fish and wildlife populations coexist with over two million Twin Cities residents.

The mission of Minnesota Valley NWR is two-fold ... (l) to restore and protect the important fish, wildlife, and plant communities of the lower Minnesota river valley and its surrounding watershed ... and (2) to provide top quality wildlife-dependent outdoor recreation and environmental education to Twin Cities residents. Since establishment, the refuge has acquired 10,000 of its authorized 14,000 acres, it has built a state-of-the-art wildlife interpretation and visitor center, and it has developed top-quality public use programs and facilities.

In the establishment legislation, Congress acknowledged of the refuge's urban setting and the need for the Fish and Wildlife Service to work with industry and transportation. Section 9 of the Act, entitled "continued public services" provides that, "nothing in this Act shall be construed as prohibiting or preventing the provision of vital public services, including (1) the continuation of commercial navigation in the main navigation channel of the Minnesota River ...; (2) construction, improvement, and replacement of highways or bridges, whether or not the highway is a federal-aid highway; or (3) any other activity which the Secretary determines to be necessary; if the provision of such services is otherwise in accordance with law. Any activity referred to in this section shall be carried out so as to minimize the disruption of the wildlife and the reduction of recreational and scenic values of the area, consistent with economic feasibility."

Under section 9 of the Act, we interpreted the expansion of the Twin Cities International Airport to be a "vital public service." Further, under the Wildlife Refuge System Improvement Act of 1997, the Fish and Wildlife Service has no authority to regulate airspace above a refuge. However, under section 4(f) of the 1966 Department of Transportation Act (49 U.S.C. 303), the Secretary of Transportation may not approve a transportation project which requires the use of any publicly-owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance unless there are no feasible and prudent alternatives to the use of such land and unless the project includes all possible planning to minimize harm resulting from the use. This law applies to projects that make "constructive use" of such lands, including through the type of overflights that would occur over the refuge in this case.

It was under this provision of law that we worked with the Metropolitan Airports Commission (MAC) and the Federal Aviation Administration (FAA) to ensure that disturbance to wildlife and wildlife-dependent recreation was minimized. From the onset, it was the Service's objective to ensure that this project would not result in a net loss of wildlife habitats and that the public would not experience a net loss of opportunity to view wildlife in its natural setting. We believe those objectives have been achieved.

Let me explain, beginning with some information about the Minneapolis-St. Paul International Airport expansion project. At the direction of the Minnesota state legislature in 1989, the Metropolitan Airports Commission and the Metropolitan Council began a process to determine the best alternative to meet the region's commercial aviation needs for the next 30 years. In 1992, FAA and MAC began the public phase of this planning process by announcing their intent to prepare an environmental impact statement concerning this project. This process was known as the dual tract airport planning process and at that time, several alternatives were considered including expanding the existing airport and the construction of a completely new fa-

cility in the outlying areas of the Twin Cities. In December, 1995, FAA and MAC issued a draft EIS. Comments from the public and affected agencies were then requested and received.

In March 1996, MAC and the Metropolitan Council submitted their report to the state legislature which contained recommendations on the preferred alternative. In response to this report, the Minnesota state legislature, in April, 1996, selected the expansion of the existing airport as the preferred alternative and mandated its implementation.

Among other items, this alternative called for a new 8,000 foot north-south runway to be constructed on the west side of the existing airport property. I want to emphasize again that no part of this new runway will be constructed on either existing or future refuge lands. The south end of this new runway will be located approximately 1 ¼ miles north of the refuge. Upon completion, however, the new runway will result in at least 8,000 commercial flights per month either departing or descending over the refuge at elevations as low as 500 feet. This translates into at least one flight over the refuge at relatively low elevations every other minute. Clearly, this project presented a matter of grave concern for the refuge and the Service.

As we stated earlier, this particular project will not be built upon refuge lands, so fish and wildlife habitats will not be directly used or harmed from the construction activities. Upon a search of the literature, we were unable to determine that commercial overflights of wildlife areas would have significant detrimental impacts upon fish and wildlife populations common to Minnesota Valley NWR. Some information is available suggesting disturbance to some species, but the literature is inconclusive about whether commercial airport operations have any long term effects upon wildlife species common to this area.

What is clear, however, is that the overflights will significantly impact "noise-sensitive" public use activities of the refuge. At Minnesota Valley NWR, the intense aircraft noise at frequent intervals will, among other things, significantly impede normal conversation of refuge visitors. Neither our long-standing and traditional outdoor activities, such environmental education with inner city youth, nor birding activities, which require listening to bird songs to verify visible sightings, will be able to be continued in their current location due to the aircraft overflights. This includes our youth waterfowl hunting, where we practice and demonstrate hunting ethics and proper hunting techniques. Finally, our visiting public's ability to view wildlife in its natural setting without significant intrusions will also be compromised.

In light of these noise impacts, FAA and MAC correctly determined that the construction and operation of the runway will result in a "constructive use" of refuge lands by the airport. This constructive use is harmful to refuge programs and activities and is therefore subject to Section 4(f) of the 1966 Department of Transportation Act.

As mentioned earlier, the Service position was to ensure that this project would not result in a net loss of wildlife habitats or a reduction in the public's opportunity to view wildlife in its natural setting. Towards these ends, we sent a letter to the FAA during the public comment period on their draft EIS expressing our concerns that there was not a sufficient effort to mitigate these effects of the project on the refuge. Consequently, discussions among the parties led us to the agreement we now have entered into with the Metropolitan Airports Commission and concurred in by FAA. We provided MAC and FAA an assessment of what it believed to be acceptable compensation for the impacts of the new runway. The five major components of this mitigation package included (1) the replacement of approximately 4,000 acres of refuge lands adversely impacted by noise; (2) the construction of a visitor contact and environmental education facility located upstream from existing facilities and away from the aircraft noise, (3) replacement of other environmental education and interpretive facilities; (4) an operations trust fund to underwrite the costs of operating two facilities rather than just one; and (5) costs associated with the planning and administration of this project. Based on our best estimates, we valued the total cost of this mitigation package to be approximately $26.9 million.

Two points should be noted here. First of all, the refuge will continue to maintain ownership of the lands to be directly impacted by the overflights—these lands will be managed for their residual wildlife values. Secondly, the Service agreed to a cash settlement with the realization that mitigation for this project was quite complex and could not be easily achieved with traditional forms of mitigation. We felt that to ensure quality, mitigation needed to be accomplished over a period of several years and should be accomplished under the direct supervision of refuge managers and/or biologists. Through the Memorandum of Agreement subsequently signed by the Service and MAC, and concurred with by FAA, the Service received assurance that the refuge would not experience a net loss of wildlife habitat and that the pub-

lic will not experience a net loss of opportunity to view wildlife in its natural setting.

Nearly 60 percent of the mitigation package will be directed towards land acquisition. At this time, the Service has not identified specific lands for acquisition nor scheduled the construction of replacement facilities. To the degree possible, all of these mitigation projects will be determined through the comprehensive conservation plan for Minnesota Valley NWR. Through this process, which is scheduled for completion early in the year 2000, the Service will engage the public and request their assistance in identifying additional lands and facilities which will offset the impacts of the airport expansion project upon Minnesota Valley NWR.

We should also mention that the staff at Minnesota Valley NWR has engaged the public in both the negotiations and subsequent discussions concerning the airport expansion project. The original citizens group, the Friends of Minnesota Valley, has been actively involved and has strongly supported the service in these efforts. In addition, several private conservation organizations including the Minnesota River Valley National Audubon Society chapter, are in support of the mitigation and associated memorandum of agreement.

In closing, we view the impacts of the airport expansion project as a regrettable but unavoidable loss to refuge programs and activities resulting from actions outside our jurisdiction and control. At the same time, we are very pleased with the agreement reached between MAC and FAA and we look forward to working with these two agencies in the future as we address natural resource issues of Minnesota Valley National Wildlife Refuge.

This concludes my prepared remarks and I will be happy to respond to any questions you and the members of the Committee may have.

STATEMENT OF LYNNE S. PICKARD, MANAGER, COMMUNITY AND ENVIRONMENTAL NEEDS DIVISION, OFFICE OF AIRPORT PLANNING AND PROGRAMMING, FEDERAL AVIATION ADMINISTRATION

Mr. Chairman and Members of the Committee:

Good morning. I am Lynne Pickard. the Manager of the Community and Environmental Needs Division in the Office of Airport Planning and Programming at the Federal Aviation Administration ("FAA"). I appreciate the opportunity to appear before you this morning to discuss the impact of the expansion of the Minneapolis-St. Paul International Airport ("MSP Airport") on the Minnesota Valley National Wildlife Refuge ("Refuge"). I am pleased to appear on behalf of the FAA Associate Administrator for Airports, Susan Kurland, who is speaking at our Southwest Region Partnership Conference in Fort Worth. Texas. today.

I know that this Committee is very interested in exploring how the MSP Airport project will affect the Refuge, and what steps the FAA has taken to mitigate any adverse environmental impacts on the Refuge. My colleagues from the Minneapolis-St. Paul Metropolitan Airports Commission ("MAC") and the United States Fish and Wildlife Service ("USFWS") will discuss other perspectives of these impacts, and the work that we have done jointly to address these issues.

In order to discuss fully the FAA's determination of the effect of the expansion of the MSP Airport on the Refuge and the mitigation for the Refuge, I would first like to explain how the Department of Transportation ("DOT") and the FAA interpret and implement Section 4(f) of the DOT Act of 1966. codified at 49 U.S.C. § 303. This statute applies to decisions by the DOT to approve transportation projects, including FAA approval of airport development projects. It provides special protection to publicly owned parks, recreation areas, and wildlife and waterfowl refuges of national, state, or local significance, as well as to land of a historic site (whether publicly owned or private) of national, state or local significance. Section 4(f) permits the DOT to approve the use of these protected resources for a transportation project only when the Secretary of Transportation (or his or her delegee) has determined (1) that there is no feasible and prudent alternative to the use of such land, and (2) the transportation project includes all possible planning to minimize harm resulting from the use. Section 4(f) is an environmental requirement exclusively applicable to transportation projects that are subject to approval by the DOT. The FAA is strongly committed to ensuring that airport development projects that we approve and fund fully meet environmental protection requirements.

As the DOT has implemented Section 4(f), our interpretation of the provision is that it applies not only to the acquisition of an interest in land but also to situations where serious impacts result in "constructive use" of land. "Constructive" use may occur when a transportation project is constructed near, but not actually on, Section 4(f) lands. Constructive use of the land occurs where the proximity of the project

may impact the land sufficiently to constitute a substantial impairment of the activities, features, or attributes of the resource. The same protection standards apply whether the use of the land is physical or constructive. When a transportation project makes constructive use of land, the DOT and FAA adhere to the requirements of Section 4(f) to find that there is no feasible and prudent alternative and to include all possible planning to minimize harm.

With respect to the MSP Airport project, the MAC proposed a new air carrier runway and associated airport development for FAA approval. The proposal was mandated by the Minnesota State Legislature after nearly seven years of planning studies, and includes a new 8,000-foot air carrier runway on the west side of the MSP Airport, new taxiways, and associated facilities. The purpose of these airport improvements is to improve airport capacity, operations, and safety, and reduce airline delays. The cost of this project is estimated at $1.8 billion through the year 2010.

Consistent with its duties under the National Environmental Policy Act of 1969, the FAA prepared an Environmental Impact Statement ("EIS") and, in conjunction with the EIS, made a determination with respect to Section 4(f). The FAA actively sought public involvement and input throughout the preparation of the EIS, and coordinated with Federal, state, and local agencies with environmental jurisdiction and expertise. Ultimately, the FAA determined that the MSP Airport expansion would require the physical use of one historic site and the constructive use of another historic site and of publicly owned lands of the Refuge.

In making the determination of substantial impairment, the FAA considered the potential noise impact of the project. The FAA determined that noise increases would substantially impair the value of some of the publicly owned portions of the Refuge near the airport by adversely affecting their use for outdoor educational and environmental interpretive activities such as school field trips and scouting visits, as well as wildlife recreational activities such as nature walks, bird-watching and fishing. In summary, the noise impact of the new runway was determined to substantially impair the use of portions of the Refuge for certain human activities that currently take place within those areas. According to FAA's analysis, a little over a thousand acres of Refuge under USFWS ownership would be adversely affected by an increase in noise levels. In total, the Refuge comprises over 9,000 acres, interspersed with an additional 6,900 acres of state and locally owned recreation areas, in seven discontinuous management units that extend 34 miles and are part of the 80-mile long Minnesota Valley National Wildlife Refuge, Recreation Area, and State Trail.

The substantial impairment determination and resulting constructive use determination were based on the public use impacts resulting from increased noise levels, and not on impacts to the Refuge's ecological integrity or wildlife resources. The Department of the Interior was consulted on the potential jeopardy to endangered or threatened species and critical habitat and they determined that there would be no adverse effects. Based on studies of wildlife compatibility with aircraft noise, the FAA believes that aircraft noise would not substantially diminish wildlife habitat or resources in the Refuge, although the FAA recognizes in its evaluation that it is difficult to quantify noise impacts to wildlife in absolute terms. The FAA's determination in this case is reinforced by the high degree of waterfowl habituation observed at areas adjacent to existing runways at the MSP Airport. It should also be noted that the portion of the Refuge in close proximity to the airport is located near the urban core of the Twin Cities region and is adjacent to significant rail and road transportation corridors. These transportation facilities existed at the time of the establishment of the Refuge and have always affected the noise environment. Monitored ambient noise levels in the Refuge in the general vicinity of the airport are comparable to levels typically encountered in suburban residential to noisy urban residential areas.

Having made a Section 4(f) constructive use determination, the FAA determined through its review of the airport development proposal in the EIS and Section 4(f) documentation that there was no feasible and prudent alternative to the use of the resource. Alternatives that were examined and rejected include new sites for an airport, alternative expansion concepts for the MSP Airport, high-speed intercity rail, a remote runway concept linked to the MSP Airport by high-speed transit, the shifting of some aviation users to supplemental airports in the region, alternative flight procedures to avoid the Refuge, and the alternative of taking no action at all. As I have mentioned, none of these alternatives were feasible and prudent.

The final Section 4(f) requirement is to include all possible planning to minimize harm resulting from the use of the Section 4(f) resource. As is our practice, the FAA coordinated with and gave deference to the USFWS, the agency with jurisdiction over the Section 4(f) resource when determining appropriate measures to minimize harm. The resulting mitigation plan reflected in the agreement between the USFWS

and MAC, with FAA as a concurring party, was developed during detailed consultations among the three parties over a period of two years.

The agreement, referred to as a Memorandum of Agreement ("MOA"), provides a specific program to satisfy all possible planning to minimize harm to the Refuge from the airport development project. It provides for monetary compensation to be paid by the MAC to the USFWS to offset the unavoidable adverse airport project impacts to the Refuge. No FAA Airport Improvement Program dollars will be used to compensate the Refuge. The MOA provides that the compensation will be used to provide the Refuge with replacement land of habitat quality equal to that impacted by the airport project and to provide for the construction of ponds, hiking trails, and other improvements to replace comparable Refuge components adversely impacted as a result of the airport project. The MOA recognizes that, in exchange for compensation, heights of structures on Refuge property near the airport will be limited to be compatible with aircraft operations, and that aircraft shall have the right of flight and to make noise over the Refuge property that is the subject of compensation. Finally, the MOA acknowledges that USFWS will continue to appropriately manage Refuge lands that are the subject of the agreement—that is, the Refuge lands subject to constructive use because of aircraft noise will still continue to function as a diminished value Refuge area under USFWS management.

The MOA recognizes that the amount of monetary compensation will be based on appraised values in conformance with applicable appraisal standards and regulations. The appraisal process had not been completed at the time of signature of the MOA, and accordingly, there is flexible language in the MOA regarding the $20 million appraised value as of that time. The $20 million figure is regarded as the "floor" of a final appraisal amount, with amounts to be determined for realignment compensation and increased operational costs. The appraisal has recently been completed, and FAA's review of the appraisal is being finalized.

Monetary compensation mitigation plans are not unprecedented in Section 4(f) analyses. The provision of funds by an airport proprietor, such as the MAC, needing to use a Section 4(f) resource to the agency owning the resource, in this case, the USFWS, so that a comparable replacement resource can be provided is one of several accepted means of minimizing harm under Section 4(f). In the past, compensation has been used to mitigate adverse environmental impacts where replacement of land and facilities and/or design measures are warranted. These mitigation measures are recognized in published FAA environmental guidance. The FAA has long recognized that environmental mitigation associated with an airport capital development project qualifies as a capital cost of the airport. The association between environmental mitigation and the airport capital development project is particularly strong when the mitigation relates to Section 4(f) because the statutory requirement is for the project to include all possible planning to minimize harm.

The need for Section 4(f) mitigation plans is not a frequent occurrence. Indeed, this is consistent with the purpose of the statute: to protect and preserve Section 4(f) resources and to set a high standard for using such resources for transportation projects. Simply put, the FAA has no need to make many Section 4(f) determinations because the agency tries not to use Section 4(f) resources. Furthermore, most FAA Section 4(f) determinations and mitigations are for uses of urban parks. e.g., local parks, ball fields, and publicly used school playgrounds, because these tend to be the types of Section 4(f) resources in close proximity to airports.

However, there are examples of other Section 4(f) situations involving airport development projects. The Toledo Express Airport, in a Memorandum of Understanding with a local park district, agreed to provide land on which to relocate a campground that was used by an airport project. Near Cincinnati, a County-owned recreational field was relocated as a result of a runway extension: the airport proprietor agreed to replace the field. Lambert St. Louis Airport will fund the replacement of several urban parks impacted by a recently approved new runway. There are also instances of the replacement of softball fields affected by airport development, and effects on historic property that have been mitigated with the assistance of funds from the airport proprietor.

At this point, it is worthwhile to note that the Refuge compensation plan does not stand alone as a solution to address adverse environmental impacts of the airport development. Rather, it is only a portion of an overall plan. The scope of the MSP Airport expansion project is enormous, with the Refuge accounting for only a portion of potentially affected lands. To address the entire expansion project, the FAA and the MAC developed an extensive mitigation plan that needed to account for a variety of factors. Community noise mitigation and acquisition will cost many times the amount needed to mitigate the Refuge. The MSP airport project as a whole encompasses a range of concerns, from the environmental to the economic, from the sig-

nificance of private use and enjoyment of park lands to the importance of the public benefits of a safe and modern airport.

In this case, the MAC, the USFWS, and the FAA all agreed that this compensation plan and the other terms in the MOA would be the best response to the adverse effects of the MSP Airport project. The monetary component of the overall plan will provide the Refuge with replacement land of habitat quality equal to that which will be affected by the project. Moreover, it will provide for the construction of ponds, hiking trails and trail markers, and other necessary site improvements or replacements.

Mr. Chairman and Members of the Committee, the FAA takes its responsibility to the environment and the public very seriously. In formulating the Section 4(f) mitigation plan for this project, the relevant agencies considered other alternatives that might avoid affecting the Refuge. Each alternative considered involved evaluations of potential Section 4(f) affected lands. These other alternatives are not considered feasible and prudent under Section 4(f) standards.

Mr. Chairman, I appreciate the opportunity to appear before you this morning to discuss an issue that I know is of great importance to this Committee. Improvements to airport capacity and safety can be achieved in an environmentally responsible manner. We at the FAA believe the compensation plan and mitigation steps for the MSP Airport are an example of how this balance can be achieved.

Thank you for the opportunity to testify this morning. On behalf of Administrator Jane Garvey and Associate Administrator Susan Kurland, I would like to say that we appreciate your interest in the MSP Airport expansion project, and look forward to any dialogue with you and the Members of the Committee that may help us improve our work on environmental issues. I would be pleased to answer any questions that you may have.

STATEMENT OF NELSON T. FRENCH, EXECUTIVE DIRECTOR, FRIENDS OF THE MINNESOTA VALLEY

Mr. Chairman and members of the Committee, I am Nelson French, Executive Director of the Friends of the Minnesota Valley. It is indeed an honor to be invited to appear before you today to speak with you about the Minnesota Valley National Wildlife Refuge and the recently concluded discussions between the USFWS, Federal Aviation Administration and Metropolitan Airports Commission regarding the mitigation of impacts associated with the expansion of Minneapolis-St. Paul International Airport.

The Friends of the Minnesota Valley was incorporated June 21, 1982 as a nonprofit organization and is one of many similar organizations cooperating with the USFWS in local communities across the country. Many of you who have refuges in your districts are likely familiar with your Friends organizations.

The Friends envision a healthy Lower Minnesota River Watershed where an informed citizenry takes personal and group responsibility to ensure that natural ecological systems and human economic and social systems coexist in a fashion sustainable into the future. The mission of the Friends is supporting conservation and management of the natural and cultural resources of the Lower Minnesota River Watershed, and promoting environmental awareness.

Before we get to today's topic, I would like to share with you a bit about our history and the way in which we have chosen to work within our community as I believe it is relevant to the issue being discussed today.

History

The dream of having a national wildlife refuge in the Minnesota Valley was developed in the early 1970's by a group of citizens called the Burnsville Environmental Council. Frustrated with their failure to stop the expansion of land fill operations in the Burnsville portion of the Minnesota River floodplain they decided that a more comprehensive approach was necessary to protect the river bottoms in their community. As a result, in 1974, the Burnsville group produced a 24 page booklet that proposed a Minnesota River National Wildlife and Recreation Area. The Council sent the booklet to everyone from local city councils to the President of the United States. Fortunately, then Congressman Bill Frenzel responded by asking the Department of Interior to investigate the feasibility of establishing a national wildlife refuge in the valley. The result was the development, in 1975, of a proposal for the Minnesota Valley National Wildlife Refuge.

The Burnsville Environmental Council reached out across the river and asked the Bloomington Natural Resources Commission for help. Together they formed the

Lower Minnesota River Valley Citizen's Committee—now known as Friends of the Minnesota Valley.

The Lower Minnesota River Valley Citizen's Committee kept up the contacts between the volunteers and invited people to share in the vision of the refuge proposal along a 34 mile long stretch of the Minnesota River. Countless presentations were made to communities and community groups up and down the river for the purpose of educating people about the project and seeking endorsements and working out consensus on issues of concern within the community. After this engaging process, the citizens committee was able to get support and resources from more than 40 private groups including: local and national conservation organizations; chambers of commerce; corporations; the Jaycees; State agencies; the Minnesota Legislature; and local units of government. Through this process many issues were worked out between stakeholders who had differing views on the refuge proposal—and consensus was reached.

On July 11, 1975, then Senator Walter Mondale and Hubert Humphrey introduced a bill to establish the Minnesota Valley National Wildlife Refuge. Congressman Oberstar, along with former Congressmen Frenzel and Hagedorn, followed by introducing a companion bill in the House of Representatives. By late September, 1976, both houses of Congress had passed the authorizing legislation and President Ford signed the bill creating the Minnesota Valley National Wildlife Refuge on October 9, 1976.

The Minnesota Valley National Wildlife Refuge is a magnificent urban wildlife refuge that owes it's existence to the Friends of the Minnesota Valley and its precursor citizen committee and a community with the willingness to work together to achieve common goals.

The Friends of the Minnesota Valley did not stop supporting conservation efforts in the Lower Minnesota River Watershed with the establishment of the refuge, however. We knew that our work had only just begun. Since establishment we have successfully worked to obtain funds to acquire refuge lands, construct the Visitor and Education Center, and provide an excellent environmental educational resource for the twin cities' public.

While continuing to work on the basic non-profit organizational survival needs of fund raising and membership, the Friends have helped enlist volunteers, enroll Refuge neighbors in the private landowner registry program, coordinate efforts for water quality monitoring, communicate with residents of the watershed and the Twin Cities, and foster partnerships to improve the Lower Minnesota River Watershed and ecosystem.

The Current Situation

In February, 1998, the Friends of the Minnesota Valley began working with the Metropolitan Airports Commission and staff to see if we could develop an agreed upon solution to the potentially contentious issue of expansion of the MSP airport and its impacts on the public uses of the Minnesota Valley National Wildlife Refuge. We knew the 1996 decision by the Minnesota Legislature to expand the MSP International Airport and route air traffic over the Minnesota Valley National Wildlife Refuge had to be implemented. After extensive review of the situation, our organization, in concert with 16 local and national conservation and community organizations, supported the concept of mitigating the impacts associated with the expansion of Minneapolis/St. Paul International Airport.

In late May, 1998, the Friends of the Minnesota Valley, Friends of the Mississippi River, Fort Snelling State Park Association, Izaak Walton League-MN Division, Minnesota River Valley Audubon Chapter and Minnesota Audubon Council co-sponsored a public open house and invited representatives from the Federal Aviation Administration, Metropolitan Airports Commission, and U.S. Fish & Wildlife Service to brief the public on the impacts to the Refuge from the airport expansion. This was the first time that these three agencies were together in front of the public addressing the issues associated with the airport expansion and the Minnesota Valley National Wildlife Refuge. This event was well attended and a lot of good information was shared between the agencies and between the agencies and interested citizens. An outcome of this meeting was significant progress towards the necessary development of community consensus on this issue.

The Friends of the Minnesota Valley regrets the loss to the public of a significant nationally recognized natural resource due to the expansion of MSP International Airport—the Black Dog Lake and Long Meadow Lake Units of the Refuge will experience significant noise intrusion and will no longer be available for certain environmental education and natural resource observation activities.

The Friends of the Minnesota Valley recognizes that MSP International Airport must expand to meet the needs of the flying public and has contended that the ex-

pansion of the airport at its present location will likely result in less overall environmental and natural resource damage in Minnesota than would construction of a new airport.

The Friends of the Minnesota Valley has stressed that the loss of natural resource value to in the Minnesota Valley National Wildlife Refuge resulting from the new runway construction and use must be compensated—thereby placing these values on the balance sheet. The proposed agreement of not less than $20,000,000 with the likelihood that total compensation will be greater as actual replacement costs and operational costs are factored in is acceptable compensation for this loss to the community.

The Friends of the Minnesota Valley applauds the Metropolitan Airports Commission, Federal Aviation Administration and USFWS for recognizing the serious nature of the impacts to the Minnesota Valley National Wildlife Refuge and deciding to compensate for the losses.

The Friends of the Minnesota Valley views this as a step in engaging the Metropolitan Airports Commission as a partner in conservation in the Lower Minnesota River Watershed, recognizing that they too are a resident of the watershed and must take personal group responsibility to insure that the principles of sustainable development are achieved.

We look forward to working with the USFWS and the community to develop the National Wildlife Refuge Enhancement Act of 1997 required Comprehensive Conservation Plan for the Minnesota Valley National Wildlife Refuge and mitigate the impacts through related actions in this plan.

Response to Question From Committee

In your letter to us you had asked the Friends to comment on this question: "The Committee would appreciate your addressing the issue of how the Fish and Wildlife Service agreement for compensation will impact the rights of private property owners to receive compensation for the constructive use of their land in connection with the protection of wildlife."

It is our understanding that private wildlife lands are not eligible for review under the constructive use provisions of Section 4(f) of the 1966 Department of Transportation Act (49 U.S.C. 303). It is our understanding that the agreement between the USFWS and the Metropolitan Airports Commission will have no impact on the rights of private property landowners to receive compensation for their land through a fee title acquisition transaction in connection with the protection of wildlife.

This concludes my prepared remarks. Thank you for the opportunity to be with you today. Mr. Chairman, I will be happy to respond to any questions you and the members of the Committee may have.

Friends of the Minnesota Valley
Leadership in Stewardship.

Vision

A healthy Lower Minnesota River Watershed where an informed citizenry takes personal and group responsibility to ensure that natural ecological systems and human economic and social systems coexist in a fashion sustainable into the future.

Mission

Supporting conservation and management of the natural and cultural resources of the Lower Minnesota River Watershed, and promoting environmental awareness.

Organizational History

The Friends of the Minnesota Valley and its predecessor groups have been instrumental in supporting conservation of the Lower Minnesota Valley for more than 25 years. In the 1970's citizens concerned about increasing development in the Minnesota River Valley convinced river corridor commissions and councils that the area could best be preserved as a national wildlife refuge. They held public meetings and spearheaded an extensive letter writing campaign, and in 1976 the Minnesota Valley National Wildlife Refuge was established. To provide ongoing support for the Refuge, and to promote environmental education, the group formed the Friends of the Minnesota Valley in 1982. We have since helped secure federal funding for Refuge land acquisition and construction of the Visitor Center. We have also continued to be an advocate for and promoted awareness of the ecological importance of the Lower Minnesota River Valley through environmental education, community involvement, fund-raising, monitoring legislation and issues that affect the valley, recruiting members and volunteers, and developing a Registry of private landowners that are voluntarily committed to protecting and preserving their land.

Leadership in Stewardship$_{TM}$ Goals

- Protect and conserve biodiversity of the Lower Minnesota Valley.
- Instill within the community a sense of appreciation, responsibility, and stewardship for the Lower Minnesota Valley.
- Develop strong base of resources to sustain and nurture the Friends organization.

Background

The Minnesota Valley acts as migration corridor and home for over 300 species of wildlife, as well as recreational and educational opportunities for 2.2 million people in the metropolitan area. The effects of urban development continually intrude upon the valley's natural communities. The Minnesota River also has the dubious distinction of being the largest source of pollution to the Upper Mississippi River.

The vast majority of people in the metropolitan area, including residents of the Lower Minnesota River watershed, have little awareness of the issues effecting the Minnesota Valley. For many, their only connection with the river is driving across it on a highway bridge. After 20 years, the Refuge is still referred to as the "Twin Cities best kept secret".

Reaching out and activating the local communities is crucial to the maintenance and restoration of a healthy and sustainable river environment. To address this the Friends have implemented a comprehensive public education campaign, Leadership in Stewardship.

Leadership in Stewardship™

The Friends of the Minnesota Valley *Leadership in Stewardship*™ campaign serves as a vehicle to pull our various programs and projects together under a common theme. The goals of this campaign are to protect and conserve biodiversity of the Lower Minnesota Valley, instill within the community a sense of appreciation, responsibility, and stewardship for the Lower Minnesota Valley, and develop a strong base of resources to sustain and nurture the Friends of the Minnesota Valley organization. *Leadership in Stewardship*™ is intended to communicate the message that individuals can make a difference in land use and water quality within the watershed by making simple, easy changes in the way they care for their land and use water. Recent public opinion research has found that people do not understand the sources of river pollution and do not know what they can do to help. *Leadership in Stewardship*™ is communicating the message that individuals can make a difference in water quality of the Minnesota River by making simple, easy changes in the way they use water and care for their land.

Heritage Registry - Approximately 1,500 landowners own property immediately adjacent to the Minnesota Valley National Wildlife Refuge. These landowners, individuals and corporations, are the focus of this program. The Heritage Registry represents a voluntary arrangement between the Friends of the Minnesota Valley and a landowner to protect the biological value of the property. Registrants represent an honor roll of private and corporate landowners who volunteer to protect and preserve their natural land for the benefit of wildlife and the ecosystems that support it. The program is creating a buffer zone of educated and sympathetic landowners surrounding the Refuge in hopes of reducing runoff, erosion and habitat fragmentation. The Registry is a proven tool for providing information to landowners about the impacts they have on the Valley's natural resources. In five years nearly 10% (145) of the adjoining landowners have become registrants - a total of 3,000 acres. More than 75 percent of those enrolled have made improvements in land use practices. This hands-on approach to stewardship and private responsibility is key to protection of biological diversity in this region. River Steward Kits containing simple stewardship techniques that are easily implemented will be distributed to those enrolled in the Heritage Registry.

Long Term Environmental Monitoring - Water Quality Monitoring - 16 water quality sampling sites have been selected by local, state and federal biologists for long term monitoring of the health of water found in the Minnesota Valley National Wildlife Refuge. Responsible public agencies and science education leaders will be brought together to develop a watershed-wide protocol for water quality monitoring and an assessment of the citizen-based component will be conducted. In 1999 the program will be revised to be conducted in the context of a comprehensive watershed monitoring plan and sampling will begin again in FY 2000.

River Steward Events - The campaign officially began in January, 1997 with the a series of ten family oriented River Steward Saturdays. These events have drawn an average of 200 people per event to the Minnesota Valley National Wildlife Refuge to learn endangered species, recycling, native wildflowers, wildlife in the valley, and water quality monitoring. The successful River Steward Events series will be continued in 1998 and beyond.

MN Valley National Wildlife Refuge - The Friends of the Minnesota Valley will continue to work to insure ecosystem-based management principles are in place and that the Minnesota Valley National Wildlife Refuge is able to accomplish its goals of stewardship, biological monitoring, and education. We will begin discussions with all natural resource managers in the Lower Minnesota River Watershed and begin the process of charting a common vision for the Lower Minnesota River Valley.

Conclusion

Leadership in Stewardship™ strives to bring community support together to create a network of Lower Minnesota River neighbors who are aware of the importance and uniqueness of this urban river corridor, who recognize their connection to the river and who are taking an active role in stewardship of the Lower Minnesota Valley.

Board and Staff:

The Friends of the Minnesota Valley Board currently has 15 members and there is a 15 member Honorary Board. We have 2 full time staff, 1 part time staff and interns throughout the year. All of our volunteers are coordinated through the Minnesota Valley National Wildlife Refuge's volunteer program. Currently there are about 100 active volunteers.

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NELSON T. FRENCH

Nelson T. French, is Executive Director, Friends of the Minnesota Valley, a non-profit community-based conservation organization incorporated in 1982. The Friends of the Minnesota Valley has dedicated its efforts to supporting conservation of the natural resources of the Lower Minnesota River Watershed for 25 years. The Friends promoted establishment of the Minnesota Valley National Wildlife Refuge and now focuses public attention on community environmental awareness, public, personal landowner and citizen responsibility for natural resource protection. Our vision is a healthy Minnesota River Watershed where an informed citizenry takes personal and group responsibility to ensure that natural ecological systems and human economic and social systems coexist in a fashion sustainable into the future.

Mr. French served as Vice President/State Director of The Nature Conservancy of Minnesota from December 1991, to June, 1997, where he was responsible for all aspects of operations of Minnesota Field Office. In this position he worked with business, government and private individuals to create innovative conservation strategies and partnerships. During his tenure the Minnesota program doubled in size, reorganized around ecoregional priorities, expanded Nerstrand Big Woods, Temperance River and Tettegouche State Parks with broad community and unanimous legislative support, acquired 30,000 acres of critical natural habitat, including over 15,000 acres in the Aspen Parkland ecoregion.

As Director of Government Relations for The Nature Conservancy of Minnesota, 1987-91, Mr. French worked with all levels of government to increase state resources devoted to the protection of biological diversity in Minnesota. In 1991 he spearheaded a successful campaign which lead to the designation of almost 150,000 acres of Minnesota's patterned peatlands as state natural areas, as part of the Wetland Conservation act of 1991. This designation has defined and designated the largest state natural area system in the country. He was also instrumental in promoting the passage of the Minnesota Environment and Natural Resources Trust Fund legislation and coordinated two successful state-wide ballot campaigns to establish constitutional protection for the fund. He also played a key role in developing the Cannon River Watershed Partnership, a model local non-governmental conservation organization.

Prior to coming to The Nature Conservancy, from 1979 to 1986, Mr. French was Executive Director of the Project Environment and Project Environment Foundation (now Minnesota Center for Environmental Advocacy). He was directly involved in hearings which led to the establishment of the most protective acid rain standard in the United States. He also helped implement programs which improved air quality, promoted sound forest resource planning and management, revised state mineral leasing requirements to protect natural areas, and insured continued protection of Boundary Waters Canoe Area Wilderness (BWCAW).

Nelson was born in Duluth, Minnesota and raised in Hibbing, Minnesota. He attended Coe College in Cedar Rapids, Iowa, majoring in general science with a focus in biology and chemistry. After college he spent three years at the University of Minnesota Department of Surgery, researching tumor immunology in human and animal systems. He took courses in botany, environmental policy and graduate courses in forestry at the University of Minnesota. He has lived in Richfield, Minnesota for 16 years, is married and has one son.

Mr. French currently serves on the Boards of: Sugarloaf Interpretive Center Association; Environmental Trust Fund Coalition; 1,000 Friends of Minnesota; Minnesota Sustainable Development Institute; and is Co-Chair of the Minnesota Sustainable Development Roundtable. He is also a nationally certified stroke and turn judge for United States Swimming. Mr. French's hobbies include vacationing at Lake Vermilion with his family, birdwatching, canoeing, cross country skiing, swimming, grouse hunting, listening to Bob Dylan, walking his golden retrievers and visiting natural areas.

MINNESOTA ENVIRONMENTAL PARTNERSHIP

26 East Exchange Street, Suite 206 Saint Paul, MN 55101 Phone: (612) 223-5969 Fax: (612) 223-5967

Steering Committee Members:
.nce for Metropolitan Stability
Alliance for Sustainability
Citizens for a Better Environment
Clean Up Our River Environment
Clean Water Action Alliance
Conservation Legacy Alliance
Environment and Energy Resource Center
Environmental Association for Great Lakes Education
Fish & Wildlife Legislative Alliance
Friends of the Boundary Water Wilderness
Friends of the Minnesota Valley
Friends of the Mississippi River
Green Institute
Institute for Agriculture & Trade Policy
Institute for Local Self-Reliance
Izaak Walton League of America
Land Stewardship Project
Minnesota Center for Environmental Advocacy
Minnesota Ecosystems Recovery Project
Minnesota Food Association
'nnesota Ornithologists' Union
..e Minnesota Project
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National Audubon Society Minnesota Audubon Council
National Parks & Conservation Association
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Sierra Club Interstate Chapter
Sierra Club North Star Chapter
Superior Wilderness Action Network
Surface Transportation Policy Project
Trout Unlimited
The Trust for Public Land
Urban Ecology Coalition
Voyageurs Region National Park Association
'arner Nature Center
.ilderness Inquiry
Women's Cancer Resource Center

May 19, 1998

Jeffrey W. Hamiel
Executive Director
Metropolitan Airports Commission
6040 – 28th Avenue South
Minneapolis, MN 55450

Dear Mr. Hamiel:

We are writing to you to express the position of the undersigned organizations regarding the request from the U.S. Fish and Wildlife Service to receive mitigation from the Federal Aviation Administration (FAA) and Metropolitan Airports Commission (MAC). We are in support of the request for approximately $27 million in funding to mitigate for the known impacts of the new north-south runway on the recreational and educational values of the Minnesota River National Wildlife Refuge (MNVNWR). We are also supportive of efforts to consider a perpetual mitigation proposal that would provide an ongoing source of funds for conservation in the Lower Minnesota River Watershed.

Many members of our organizations currently enjoy bird watching, nature hikes and environmental education programs either on their own or sponsored by the MNVNWR, Minnesota River Valley Audubon Chapter, and others. The routing of incoming and outgoing air traffic over some of the most heavily used birding and nature education spots in the Twin Cities will certainly eliminate the experience in major portions of the MNVNWR.

Our organizations are in general agreement with the mitigation package proposed to the FAA and MAC by the U.S. Fish & Wildlife Service on May 22, 1997. This request for visitor center facility replacement, outdoor recreation and interpretive facility replacement, operations support, exhibit/retail bookshop space at the MSP International Airport, and planning support, totaling $26,950,300, is a fair and reasonable request given the know impacts that will occur from air traffic on the new north/south (35/17) runway.

As referenced above, our organizations are very willing to explore new, and somewhat creative, alternatives to classic mitigation packages. Public opinion research indicates that nearly 90% of all Minnesotans support efforts to acquire, enhance and protect our precious natural resources, including residents of the Lower Minnesota River Watershed and the flying public. The impacts from the new runway will be perpetual and recurring, and they will limit public enjoyment as long as airplanes arrive and depart from this new runway. Therefore, we would be very interested in exploring a mitigation package that would recognize the ongoing nature of the adverse impact through an

ongoing annual compensation package. The establishment of a Lower Minnesota River Watershed Conservation Fund is something we recommend for your consideration.

We believe that by working together in a cooperative fashion with all interested parties, a proposal that would provide for 1) the new runway expansion so desperately needed to serve the Twin Cities and 2) replacement of areas lost to the recreational public and enhancement efforts to protect additional natural amenities in the Lower Minnesota River Watershed.

Our organizations stand ready to work with you, the FAA and the U.S. Fish & Wildlife Service to seek resolution to this mitigation. Thank you.

Sincerely,

Friends of the Minnesota Valley

By
Nelson T. French
Its Executive Director

Friends of the Mississippi River

By Whitney Clark /TJH
Whitney Clark
Its Executive Director

Alliance for Metropolitan Stability

By Russ Adams /TJH
Russ Adams
Its Director

Institute for Agriculture and Trade Policy

By Niel Richie /TJH
Niel Richie
Its Policy Analyst

Clean Up Our River Environment

By Lynn Lokken /TJH
Lynn Lokken
Its Organizer

Institute for Local Self-Reliance

By John Bailey /TJH
John Bailey
Its Research Associate

Clean Water Action Alliance

By Marie Zellar /TJH
Marie Zellar
Its State Director

Izaak Walton League – Midwest Office

By William Grant /TJH
William Grant
Its Director, Midwest Office

Fish and Wildlife Legislative Alliance

By Gary Botzek /TJH
Gary Botzek
Its Executive Director

Izaak Walton League – Minnesota Division

By Charlotte Brooker /TJH
Charlotte Brooker
Its Immediate Past President

National Audubon Society – Minnesota Office

By Don Arnosti /TJH
Don Arnosti
Its State Director

Land Stewardship Project – 1000 Friends of Minnesota

By Lee Ronning /TJH
Lee Ronning
Its Program Director

Rivers Council of Minnesota

By Molly MacGregor /TJH
Molly MacGregor
Its Executive Director

Mankato Area Environmentalists

By Bernie Lindberg /TJH
Bernie Lindberg
Its Chair

Saint Paul Neighborhood Energy Consortium

By Anne Hunt /TJH
Anne Hunt
Its Executive Director

Minnesota Center for Environmental Advocacy

By Peter Bachman /TJH
Peter Bachman
Its Executive Director

Women's Cancer Resource Center

By Barbara Wiener /TJH
Barbara Wiener
Its Director

cc:
Bruce Babbit, Secretary of Interior
Franklin D. Benson, Manager, Federal Aviation Administration, Minneapolis Airports District Office
Nigel Finney, Deputy Executive Director, Metropolitan Airports Commission
William F. Hartwig, Regional Director, U.S. Fish and Wildlife Service
John Himle, Chair, Planning & Environment Committee, MAC Board
Glenn Orcutt, FAA, Minneapolis Airports District Office
Jim Ramstad, Congressman
Jim Oberstar, Congressman
Richard D. Schultz, U.S. Fish and Wildlife Service, MNVNWR
Rod Sando, Chair, Minnesota Environmental Quality Board

SATURDAY, SEPTEMBER 26 • 1998

Star Tribune Editorial

opinion@startribune.com

Our perspective

Wildlife refuge

Regrettable loss creates opportunities

Walking at the edge of Long Meadow Lake on a foggy midweek morning, it requires no special effort to forget that a metropolitan area of 2.5 million people lies just over the trees. Overcast skies are slowing the sun's work and mist hangs on the water, softening the shore beyond. Footsteps stir a hundred waterfowl to flight and the air hums with the drumming of wings and webs.

In a few years things will be very different in this part of the Minnesota Valley National Wildlife Refuge. The lake will remain, and so may most of the birds. But with a new runway at Minneapolis-St. Paul International Airport launching jets overhead — loud, low and as often as once a minute — most people will find other places to go. School groups won't have much choice; the kids won't be able to hear their teachers.

The federal law creating this refuge gave it no power to resist the runway project, but did entitle it to claim fair compensation for the damage. This week, the airports commission accepted an appraisal that puts the cost of that damage at somewhere between $20 million and $26.9 million.

If that seems like a lot to pay for the impact of aircraft noise on a series of ponds and swamps, in a metro area whose neighborhoods are amply burdened with the same problem, then consider what will be lost. This is one of the national refuge system's few urban sites, and the affected 3,600 acres — centered on the Bass Ponds and Long Meadow Lake — might be considered its heart. The Bass Ponds themselves, built by the Izaak Walton League in the 1920s, are a monument to early conservation efforts, a convenient setting for teaching thousands of Twin Cities youngsters about nature, and one of the best bird-watching spots in the region.

What will be lost here can never be replaced. But with $20 million or more, the refuge can find additional land and build alternative education facilities in the Minnesota River valley. Some interesting possibilities are already emerging, including rehabilitation of an 1860 farmhouse and surrounding property that the refuge owns in Carver, at the upriver end of its holdings.

Refuge managers and advocates are satisfied with the settlement but preferred a different kind of solution — a 25-cent-per-passenger fee that would create a revolving fund for refuge programs. Since the damage to the Bass Ponds will be perpetual, the reasoning went, so should be the remedy.

That idea wouldn't fly, but efforts are underway to turn the settlement funds into an endowment that would provide a continuous, long-term source of money for the refuge. That approach will require the refuge's parent bureaucracies to rethink their standard practices, which favor saving or spending such awards rather than investing them. But investment seems the wise approach here. Runway damage to the refuge is regrettable; transforming it into sustained, long-term enhancement is a resilient response.

DEFENDERS OF
PROPERTY RIGHTS

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Testimony of Nancie G. Marzulla
Before the U.S. House of Representatives Committee on Resources
February 3, 1999

Mr. Chairman and Members of the Committee:

I am pleased to be here today on behalf of Defenders of Property Rights, the only national public interest legal foundation devoted exclusively to protecting private property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Fifth Amendment of the U.S. Constitution, that private property shall not be "taken for public use, without just compensation." Defenders, which is based in Washington, D.C., has a large national membership which is comprised of property owners, users and beneficiaries of the rights protected by the Constitution and traditional property law. Defenders participates in litigation when it is in the public interest and when the property rights of its members are affected, and has also devoted significant resources to analyzing legislative proposals concerning property rights at both the state and federal level.

Today, I am here to comment on a request by the U.S. Fish and Wildlife Service ("FWS") for over $20 million in compensation for a "taking" of its land in the Minnesota Valley National Wildlife Refuge. The Minneapolis-St. Paul International Airport, as part of a comprehensive development program, has proposed to add a new runway which will be located less than one mile from the Refuge and which will increase the noise level in a limited portion of the Refuge. FWS claims authority for this payment under an evaluation required by Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 303, which concludes that the increased noise over a small part of the Refuge will result in a "constructive use" or "indirect taking" of its property. While Defenders is devoted to the protection of constitutional property rights for all property owners, I feel obligated to point out to this Committee the hypocritical nature of FWS's request, in light of its past and present dealings with property owners who encounter endangered species on or near their land.

INTRODUCTION

Despite the fact that the United States Constitution imposes a duty on the federal government to protect private property rights, in reality, they are often trammeled by regulatory actions, notable actions taken by the FWS under its statutory authority under the Endangered Species Act, 16 U.S.C. § 1532.

Indeed, environmental regulations such as the Endangered Species Act destroy property rights on an unprecedented scale, leaving many owners stripped of all but bare title to their property. In recent years, courts have done much to restore vigor to the Fifth Amendment in cases such as *Nollan v. California Coastal Commission, Lucas v. South Carolina Coastal Council, Dolan v. City of Tigard,* and *Suitum v. Tahoe Regional Planning Agency*. Nevertheless, cases in which landowners possess the resources and perseverance to prevail in court against a taking of the property due to a government action are few and far between.

As a result, landowners are increasingly being deprived of most, if not all, economically beneficial uses of their land by government action and regulation without payment of just compensation. The Founding Fathers' intent for private property to be protected was clear. They could never have envisioned, however, the growth of a leviathan environmental regimes which has occurred of late years. If the Fifth Amendment is going to be worth more than the paper it is written on, private property protection must be strengthened. FWS's request for just compensation for the taking of its property which we are discussing today only serves to highlight the continuing need for increased protection of property rights for all Americans.

I. THE CONSTITUTION IMPOSES A DUTY ON GOVERNMENT TO PROTECT PRIVATE PROPERTY RIGHTS BECAUSE PROPERTY RIGHTS ARE AN ESSENTIAL ELEMENT OF A FREE SOCIETY.

As reflected in various provisions in the Constitution, the Founding Fathers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights and economic liberty. Property rights is the "line drawn in the sand" protecting against tyranny of the majority over the rights of the minority.

The founding fathers, in drafting the Constitution, drew upon classical notions of legal rights and individual liberty which recognize the importance of property ownership in a governmental system where individual liberty is paramount. Concurrently, the constitutional framers drew upon their own experience as colonists of an oppressive monarch, whose unlimited powers allowed him to deprive his subjects of their "life, liberty, and property" (subsequently revised by Thomas Jefferson to substitute "the pursuit of happiness" for "property.")

To the framers of the Constitution, the protection of individual liberty was essential. The fundamental liberties guaranteed by the Bill of Rights include freedom of speech and religion; freedom of press and assembly; the right to bear arms; the right to trial by jury and cross examination of accusing witnesses; and freedom from cruel or unusual punishment. Recognizing that a government could easily abuse these civil rights if a citizen's property and livelihood were not guaranteed, the United States Constitution also imposes a duty on government to protect private property rights.

Thus, within the Bill of Rights, numerous provisions directly or indirectly protect private property rights. The Fourth Amendment guarantees that people are to be "secure in their persons, houses, papers, and effects. . . ." The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." In addition to the Bill of Rights provisions, the Fourteenth Amendment echoes the Due Process Clause of the Fifth Amendment, stating that no "State shall deprive any person of life, liberty or property without due process of law. . . ." Indirectly the Contracts Clause of the Constitution also protects property by forbidding any state from passing any "law impairing the Obligation of Contracts." U.S. Const. art. 1, § 10.

The Constitution places such strong emphasis on protecting private property rights because the right to own and use property was historically understood to be critical to the maintenance of a free society. The ability to use, enjoy and exclusively possess the fruits of one's own labor is the basis for a society in which individuals are free from oppression. Indeed, some have argued that there can be no true freedom for anyone if people are dependent upon the state for food, shelter, and other basic needs. Understandably, where the fruits of citizen's labor are owned by the state and not individuals, nothing is safe from

being taken by a majority or a tyrant. Ultimately, as government dependants, these individuals are powerless to oppose any infringement on their rights due to absolute government control over the fruits of their labor.

Accordingly, it is a founding principle of our nation that private land may not be taken for public use (unless it be purchased from the owner). This basic principle – that the government must lawfully acquire private land rather than merely seize it – is predicated upon fundamental notions of fairness. As the Supreme Court stated in *Armstrong v. United States*, "[t]he Fifth Amendment . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960).

The Founding Fathers understood the vital relationship between private property rights, individual rights, and economic liberty. However, the Founding Fathers could never have envisioned the growth of government that has occurred of late years. Never before have government regulations threatened to destroy private property rights on so large a scale and in so many different contexts as they do today. In just two short decades, the United States has developed from scratch the most extensive governmental regulatory programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use, yet very few recognize the fundamental importance of property rights to our Constitution and our system of government under law.

II. THE U.S. FISH AND WILDLIFE SERVICE TOO OFTEN TAKES PRIVATE PROPERTY THAT IS NOT COMPENSATED WHEN IT IMPLEMENTS THE ENDANGERED SPECIES ACT.

FWS has been charged with implementing and interpreting the Endangered Species Act; a task it has often embraced with overzealous vigor, resulting in the unconstitutional taking of private property rights. In particular, the regulatory definition of "harm" under FWS regulations promulgated pursuant to the "take" provision in Section 9 of the ESA are particularly problematic to land owners in this context. Under FWS's current regulations, "harm" is defined to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 CFR § 17.3 (1994). Despite the fact that this

definition can be read as being limited to the actual "taking" of an individual endangered species, in reality FWS has used this regulation to foreclose any use of land that it deems harmful to the species as a whole. The current regulatory definition as applied allows FWS to prevent use of land without regard to the actual presence of an endangered species, and without regard to any actual physical injury to any member of the species resulting from use of land. In 1995, the United States Supreme Court rejected an attempt by landowners to put an end to the government's expansive and confiscatory use of the term "harm." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995). In addition to reaching the wrong result, the greatest vice of the *Sweet Home* decision was in approving a regulation purporting to regulate harm "to the species" because that term, as such, is an abstraction (in contrast to living animals). Thus, under this abstract notion – harm to the species – FWS's ability to regulate is limitless, extending to future generations of animals and potential habitat that may never come into existence.

In this way, FWS has used the Act's prohibition against "taking" an endangered species or its habitat to assert control over a wide range of private activity on private lands. Landowners and businesses have been threatened with criminal or civil prosecution for clearing a fence of brush, cutting trees, using pesticides, or allowing livestock to graze. Although there is a permit process which allows activities to proceed even if they might "take" a species, these permits are time-consuming and expensive to obtain and require the negotiation and funding of "habitat conservation plans." A measure of how pervasive and oppressive these restrictions are is that even though listed species can be conserved through the purchase of habitat with government funding, as well as through the efforts of numerous environmental groups, the primary way species are conserved is through the regulation of private activity on private lands.

Routinely, more landowners are also denied the reasonable use of their private property as FWS continues to list more and more species for protection and summarily prohibits any use of property which may affect those species or modify their habitat in any way. Faced with the grim prospect of the permit process, criminal prosecution, or large fines, the average landowner affected by these regulations cannot afford to challenge FWS's actions. Even the most well-financed and dedicated property owners find

themselves in a steep uphill battle just to get a court to hear their case, not to mention getting the government to actually pay just compensation if a court orders it.

The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens. A few examples of reported and pending cases demonstrate how arduous and interminable the permit process and the litigation of takings claims against the federal government can be:

- Taylor v. United States

John Taylor has been fighting FWS for a permit to build his house for over two years. Intending to build a small, modular home for himself and his disabled wife, John Taylor, an elderly, retired builder, purchased a small, residentially-zoned lot in Fairfax County, Virginia. However, FWS has refused to grant him permission to build unless he agrees to numerous unreasonable conditions to protect an eagle nest located in a tree on another person's property. For example, he must agree to a deed restriction that precludes any disruptive activity, including parties, lawn mowing and children playing on the lot, between the months of November and July, the eagles' nesting period. He has already agreed to refrain from building during the nesting period, but his permit application will not be considered until he accepts full responsibility for any possible harm done to the eagles if they permanently abandon their nest, even though they may leave for reasons beyond his control. Now, more than two years after his application was submitted, Mr. Taylor still has not received either a grant or a denial of the permit and the property in which he invested his hopes and dreams remains dormant and undeveloped.

- The Golden-Cheeked Warbler

In Texas, the potential impact to the golden-cheeked warbler prohibits habitat modification on private property without regard to whether any golden-checked warblers inhabit or use the specific property. Based on the belief that her land "would be suitable habitat" for the golden-checked warbler, and without any indication that this endangered species actually used or existed on the land, FWS informed a landowner in Austin, Texas that "clearing or land development-related activities of this acreage would constitute a 'take' as defined by the Endangered Species Act."

- The Delhi Sands Flower-Loving Fly

Plans for a new hospital in San Bernardino County, California, were put on hold and modified at a significant cost to the county when FWS claimed to have authority to apply the Endangered Species Act to a species whose limited habitat does not stretch beyond California's San Bernardino and Riverside Counties, the Delhi Sands Flower-loving Fly ("the Fly"). A colony of six flies made its home just yards from the proposed site of the new hospital, and FWS had added the Fly to its endangered species list only one day before the ground-breaking was scheduled. The county filed suit against FWS, asserting that the Endangered Species Act could not be applied to the Fly, because Congress does not have the power to regulate species that only live within the boundaries of a single state and are not the subject of interstate commerce.

- Tulare Lake Basin Water Storage District v. United States

In southern California, water is gives value to land and makes development or agriculture possible. Where water is also the natural habitat for endangered or threatened species, property rights relating to the use of water have collided with the Endangered Species Act. In 1992, the federal government started limiting the amounts of water which could be sent south in order to maintain water levels to protect the habitat of two endangered fish - winter-run chinook salmon and delta smelt. As much as two million acre-feet of water was held back annually from municipal and agricultural use in order to maintain certain levels in streams and lakes which constitute the habitat of these fish. Farmers and ranchers have suffered millions of dollars in lost crops and in some instances, have lost their property as it has become unproductive. Landowners and water agencies in the Bakersfield and Tulare Lake regions, all holding contractual rights to receive water from the State Water Project, were denied water from 1992 to 1994. However, they were all required to pay for the water entitlements under their contracts with the state, whether the water was ever delivered or not. Their water rights have in effect been expropriated for the benefit of endangered species, giving rise to a takings claim. In 1998, several of these water agencies filed a lawsuit in the U.S. Court of Federal Claims, demanding just compensation for the taking of the water for federal endangered species purposes.

- Sierra Club v. Lujan

The Edwards Aquifer is a 175-mile long underground conduit which covers an expanse of about 3,600 square miles in central and southern Texas. Water is delivered as a source of pure drinking water for approximately 1.5 million residents of the City of San Antonio and its suburbs, as well as for the irrigation of hundreds of thousands of acres of ranch and farm land. The aquifer discharges naturally at springs which are the sole known habitat for the San Marcos fountain darter, Comal Springs salamander, San Marcos salamander, and Texas wild rice. In 1991, several environmental groups sought an injunction to require San Antonio, the ninth largest city in the country, to obtain its drinking water elsewhere, and to compel the State of Texas to limit other withdrawals from the Edwards Aquifer. In 1993, a federal judge issued the injunction and encouraged the city to build a reservoir system at costs estimated in the billions of dollars. Although the injunction was subsequently modified, it seems clear that San Antonio – despite its undoubted right to extract water under state law – will be required to abandon, at least, a substantial portion of its water rights in order to comply with the Endangered Species Act.

These cases only begin to illustrate the havoc that FWS has reeked on private property owners across the nation. Therefore, it is ironic that the same agency that causes so much misery for private property owners is now asking for compensation as a result of a taking of its own property.

FWS often denies private property owners of the reasonable use of their land, and its regulations are the subject of dozens of "takings" lawsuits by private landowners. Now, this same federal agency asks Congress to approve a deal which will garner them over $20 million for a "taking" of its property near the Minneapolis-St. Paul International Airport. Furthermore, the deal calls for this extraordinary sum to be collected from taxpayers through a surcharge on airport tickets. This deal turns the Fifth Amendment on its head - by asking private citizens to pay compensation to a public agency for a "taking" of federally owned property.

The irony of their request must not be lost on this Committee. FWS now finds itself in the same position as millions of landowners across the country: its land use will be adversely affected by the actions of a governmental body and it wants to be compensated for the damage. The only difference is that FWS did not have to sue the Airport

Commission to get its money. FWS merely negotiated a deal which concludes without argument that a compensable taking has occurred and that will allow it to build new, state-of-the-art facilities without affecting its budget. I doubt that other landowners, who will be equally affected by the airport expansion, were given the opportunity to negotiate such a deal or will be able to obtain just compensation even under the statute or the protections of the Fifth Amendment. FWS, unlike most private property owners, did not have to spend its life's savings on lawyers, court fees, and expert opinion testimony, just to obtain a statement that a compensable taking has occurred, much less to collect just compensation for the loss of property use. Both the fact that FWS negotiated its own compensation and the flaws within the agreement demonstrate without a doubt that it will have an adverse impact on the rights of private property owners to receive compensation from the government for the constructive use of their land in connection with the protection of wildlife. It also obviates the need for legislative reform to provide greater protections for all property owners, a long overdue step towards fulfilling the promise of James Madison, who wrote the Bill of Rights.

III. LEGISLATIVE REFORM IS ESSENTIAL TO FULLY PROTECT ALL PROPERTY RIGHTS AND TO REALIZE THE PURPOSE OF THE FIFTH AMENDMENT.

Property owners should be as entitled to just compensation for the taking of their property as is FWS, if not more so. However, even though private landowners have the U.S. Constitution and the Fifth Amendment on their side, while FWS merely relies on a provision in a transportation department statute for compensation, it will be FWS who receives over $20 million before the new runway is even finished and private landowners who will get nothing once again. This blatant disparity proves once again that positive legislative reform is undeniably necessary to protect the rights of private property owners from the whims of FWS. Past efforts by Congress and others concerned by FWS's actions to amend the Endangered Species Act have met with mixed success, as FWS has continued its aggressive conservation efforts and the courts have been reluctant to check its expansive interpretations of the ESA.

For example, in 1978, to eliminate the notion that government must protect endangered species at all cost, Congress created an economic balancing test between development and conservation for courts to apply prospectively. However, the Court's

opinion in *Sweet Home*, makes it evident that conservation will continue to be weighed more heavily than economic burden. In fact, one commentator noted that only the dissenting justices heeded Congress's balancing test mandate: "'The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin – not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.' Therefore, the far-reaching implications of the ESA continue to intensify the conflict between those who support species preservation and those who believe the economic price of preservation is too high." Note, *O'Neill v. United States: Endangered Species Act and Central Valley Project Improvement Act Can Invoke Contract Clause That Limits Liability Due To Water Shortages*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 201, 208 (1996).

Since the *Sweet Home* decision, amendments to the ESA have been proposed to Congress which would severely limit the government's ability to preclude use of vast areas of land based on hypothetical or speculative value to the abstract notion of species. New statutory language would shift the burden to the government to prove, among other things, that the endangered animal actually exists and has some discernible relationship with the parcel of land in question. Other proposed changes include adding objective, definable standards to the ESA, to prevent the usual cycle of FWS defining terms such as "harm" and "scientifically valid principles" as it wishes and then the courts refusing to substitute their wise judgment for the agency's.

CONCLUSION

Thank you for the opportunity to present this testimony. I would be pleased to answer any questions you may have.

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

January 28, 1999

MEMORANDUM

TO: Committee on Resources

FROM: Resources Legislative Staff

SUBJECT: Hearing on Impacts of the Expansion of the Minneapolis-St. Paul Airport on the Minnesota Valley National Wildlife Refuge

At 11:00 a.m. on Wednesday, February 3, 1999, in 1324 Longworth HOB, the Committee on Resources will hold an oversight hearing on the impacts of the expansion of the Minneapolis-St. Paul Airport on the Minnesota Valley National Wildlife Refuge.

Those invited to testify include representatives of the U.S. Fish and Wildlife Service; the Federal Aviation, Administration, Defenders of Property Rights, and Friends of the Minnesota Valley National Wildlife Refuge.

I. INTRODUCTION:

The Minneapolis-St. Paul Metropolitan Airports Commission (MAC), owns and operates the Minneapolis-St. Paul International Airport (MSP) and is proposing to add a new runway and other airside and landside improvements as part of their new comprehensive development program. The new runway would be less than one mile from the Minnesota Valley National Wildlife Refuge boundaries and would dramatically increase the noise level in the refuge.

The Minnesota Valley National Wildlife Refuge (MVNWR) consists of over 9,300 acres of land. However, only a limited portion of the refuge would be impacted by overflights from the MSP airport. The areas most impacted are the Long Meadow Lake Unit (2,600 acres) and the Black Dog Lake Unit (1,400 acres). The refuge supports a broad range of wildlife species, including 35 mammal species, 23 reptiles and amphibians, and 97 species of breeding birds, including a federal listed threatened species- the Bald Eagle. It is an important winter refuge and stopover for a number of migrating birds. The area most impacted is the Bass Ponds area which is approximately 7,500 feet from the proposed north-south runway.

The Fish and Wildlife Service describes the area as a major migration corridor for

waterfowl, songbirds, and raptors. The first purpose of the refuge is to provide resting, nesting, and feeding habitat for waterfowl and other migratory birds. Indeed, urban sprawl and airport growth accentuate the need for undisturbed habitat for Minneapolis-St. Paul.

FAA SECTION 4(F) EVALUATION:

It is anticipated that if the proposed runway is constructed, there will be 5,620 monthly overflights over the Bass Ponds area that would be between 500 and 2,000 feet above ground level. In 1992, four federal agencies entered into an agreement to use their authorities to prevent aircraft from flying lower than 2,000 feet above ground level when traveling over lands managed for wildlife by the National Park Service, the BLM, or the Fish and Wildlife Service. This proposed runway contradicts this interagency agreement.

Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. 303) provides that the Secretary of the U.S. Department of Transportation may not approve a project that requires the use of any publicly owned land from a public park, recreation area, wildlife and waterfowl refuge or historic site of national, state, or local significance unless there are no feasible and prudent alternatives to the use of such land and unless the project includes all possible planning to minimize harm resulting from the use. (See attached copy of 4(f)).

After conducting a Section 4(f) evaluation, as well as an environmental impact analysis under NEPA, the FAA determined that "*the MSP Airport expansion will require the ...constructive use of land from a wildlife refuge*". According to the FAA "***A 'constructive use' can occur when proximity effects, such as noise, adversely affect the normal activity or aesthetic value of an eligible Section 4(f) property – even though there may be no direct physical effect involving construction of transportation facilities.***" According to FAA regulations "*Substantial impairment would occur only when the protected activities, features or attributes of the resource are substantially diminished.*" 23 CFR 771.135 (p)(2), 56 Federal Register 13273. Apparently, their finding of a constructive use led to the conclusion that the agency was entitled to compensation or mitigation.

The finding that there was a constructive use of the property resulted in a Memorandum of Agreement in September, 1998 between the Metropolitan Airports Commission and the Fish and Wildlife Service in which **the commission agreed to compensate the Fish and Wildlife Service for the "use" of Service land for not less than $20 million.**

Ironically, Section 4(f) does not provide the same protections or compensation for private landowners who suffer identical displacement or harm. According to the Congressional Research Service overflights over private land become a taking "only if they are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of land." Causby v. United States, 328 U.S. 256, 266 (1946). According to CRS, since the Causby decision, the altitude of 500 feet has emerged as a guideline for courts in segregating regular overflights that effect takings (below 500 feet) from those that do not (above 500 feet). Congress has provided that in congested areas a taking is under 1,000 feet. "The rule is best stated that

'when overflights occur in navigable airspace, a presumption of non-taking exists which can be overcome by proof of destruction of, or substantial impairment to the property." Robert Meltz, "When the United States Takes Property: Legal Principles". March 22, 1991, 91-339 A.

The Administration has consistently opposed legislative efforts to clarify the Constitutional mandate that private property owners be compensated for the taking of their property. While fighting legislation to ease burdens on landowners, the Service has sought compensation for the lost use of small portions of this refuge due to the impact of overflight noise. The official position of the Administration on compensation for private landowners was stated in a September 20, 1995 hearing before the Committee on Resources on HR. 2275, a bill to reauthorize the Endangered Species Act. The bill would have provided for compensation for private landowners whose property is taken pursuant to the ESA in much the same manner that compensation was provided to the Fish and Wildlife Service. George Frampton, the current Acting Chairman of the Council on Environmental Quality and at that time the Assistant Secretary for Fish and Wildlife and Parks for the Department of the Interior, testified as follows:

"Most significantly, it (H. R. 2275) creates a complex and sweeping system for compensation of private landowners. Not only do these provisions go far beyond any standard for "taking" that has been established by the courts, they even go far beyond other compensation bills before Congress. Claims for compensation could be based on a laundry list of agency actions which would make it impossible for the Department to administer the Act."

The Administration also opposed and threatened to veto H.R. 1534, "The Private Property Rights Implementation Act of 1997". John C. Dwyer, Acting Associate Attorney General made this statement to the Judiciary Committee regarding that bill opposing its provision that would have compensated for the loss of any portion of a parcel.

"H.R. 1534 also may carry with it the unintended consequence of altering a basic concept of takings law referred to as the relevant "parcel as a whole." Federal courts have long held that the validity of a takings claim depends on the effect of the challenged government action on the entire parcel of property the claimant owns. ..The courts have rejected claimants' attempts to segment property into the affected and unaffected portions of the whole parcel. If segmentation were allowed, "one could always argue that a set back ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."

In this case, only small portions of the refuge were affected. However, the Service was generously compensated for the loss of the affected portion of the refuge.

Again, the Administration opposed HR. 992, The "Tucker Act Shuffle Relief Act of 1997" introduced by Congressman Lamar Smith to reduce the difficulty of bringing takings claims. The bill did not change the standard for a takings claims or make proving one's case any easier, but did streamline the process for bringing suit. Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development, for the Department of Justice testifying on behalf of the Administration to the Judiciary Committee, said the following:

"If read to create federal liability for any government action that adversely affects property rights, the bill would establish a compensation requirement that extends far beyond that currently imposed by the Fifth Amendment. As recognized in the seminal regulatory takings case of Pennsylvania Coal Co. v. Mahon, 260U.S. 393, 413 (1922), 'government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' The Department strongly opposes statutory compensation mandates that would alter the longstanding balance between property rights and public protections that has developed under the Constitution. As we have explained at length in previous testimony and correspondence, such statutory compensation mandates could bust the budget, create huge new bureaucracies, result in a litigation explosion, and undermine our ability to provide vital protections for the American people. Because H.R.992 would confer broad invalidation authority, the bill also creates the risk of being read to allow for invalidation of any federal action that adversely affects property rights, which could mean the end of any federal protection that involves a restriction on the use of private property."

The compensation received by the Fish and Wildlife Service was based on the current interpretation of 49 U.S.C. 303, also referred to as 4(f). **No where in the language of section 303 is anyone required to provide compensation when public lands must be disturbed for other important public purposes.** The statute is a statement of policy to avoid unnecessary impacts on important public lands providing wildlife and historic benefits. The Secretary of Transportation is required to only authorize such projects if "(1) there is no prudent and feasible alternative to using that land and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use."

There is no further requirement in the statute for compensation or for mitigation. The FAA cites one case dealing with the definition of constructive use and refer to their regulations at 33 CFR 771.135(p)(2). While those regulations define "constructive use", they do not require mitigation or compensation when there is a constructive use.

However, the requirement for compensation for private property taken for a public use is enshrined in the U.S. Constitution in the 5th Amendment and according to the Supreme Court is a fundamental constitutional right according to Dolan v. Tigard. **The Constitution provides no basis whatsoever, for the requirement of compensating governmental entities, since the Bill of Rights protects private citizens from government abuses, not the otherway around**. Therefore, unlike the guarantee to private landowners, the compensation provided to the refuge was the result of negotiation and agreement, and not based on the Constitution, a statutory mandate, a regulation, or case law.

The funds for the compensation will be paid by the Minneapolis-St. Paul Airport Commission through a surcharge on airline tickets. Therefore, we now have a case of private citizens paying to compensate a public agency for the "taking" and "constructive use" of federally owned property.

Minnesota Valley National Wildlife Refuge

The Minnesota Valley National Wildlife Refuge (MVNWR) supports a broad range of wildlife species. The EIS for the refuge cited 35 mammal species, 23 reptiles and amphibians, and 97 species of breeding birds using the refuge. The refuge is also utilized by a number of bird species that winter in the refuge or temporarily stop over during migration periods.

The MVNWR encompasses a series of waterfowl concentration areas south and east of the Minnesota-St. Paul Airport. Data collected by the refuge staff and the EIS shows that during the spring of 1995, Long Meadow Lake, one of the refuge units, has the highest waterfowl concentration numbers for March through June with totals exceeding 17,000 birds on a given day, followed by Gun Club Lake with just less than 8,000 birds and Black Dog Lake with over 1,052 birds. In addition, to waterfowl, Long Meadow, Gun Club, and Black Dog Lakes attract concentrations of Double-crested cormorants, great blue herons, great egrets, and several migratory gull species. Also noted in the area were 38 Tundra Swans on their annual migration. Also the American white pelican population at the refuge has been increasing and it is noted in the EIS that these birds may represent a bird strike hazard due to their habit of soaring at relatively high altitudes in large flocks. "*For purposes of bird-aircraft hazard analysis, the entire Gun club/Long Meadow/Black Dog Lake wetland complex has been considered a major waterfowl and waterbird concentration area.*" (Dual Track Final EIS - p. V-28)

The refuge is home to the federally protected and threatened bald eagle. It is also home to the Forster's Tern which is a state-listed special concern species. Mother lake has been designated by the Minnesota DNR Heritage and Nongame Research Program as a colonial waterbird nesting site due to its long-term use by Forster's terns. It was found that the potential impacts to Forster's Terns from the airport, were unavoidable and that there would be a reduction in Mother Lake's habitat value for Forster's terns.

"*Based on coordination with the U.S. Fish and Wildlife Service and the Minnesota Department of Natural Resources, <u>the only known essential habitat</u> for bald eagles near the MSP (the airport) is one <u>consistently used eagle breeding</u> territory along Long Meadow and Gun Club Lakes within the Minnesota Valley National Wildlife Refuge.*"(Emphasis added). (Dual Track Final EIS p. V-36)

The short analysis of impacts on eagles, found that "*it could not be stated unequivocally that impacts to eagle reproduction success would not occur but that it was unlikely that such impacts would occur.*" Accordingly, the Fish and Wildlife Service issued a "no jeopardy" biological opinion and formally confirmed that a formal Section 7 consultation under ESA was <u>not required</u>. (Dual Track Final EIS p. V-37)

Because of the proximity to the airport, bird strikes are a problem. Bird strikes pose the greatest hazard to aircraft at altitudes less than 500 feet above ground level. The selected alternative will result in 5,840 monthly overflights with 3,620 below 500 feet and 2,220 flights between 500 and 2,000 feet above ground level.

The EIS recommends that ongoing goose control measures be pursued to reduce the attractiveness of the area to geese. It also recommended removal of substantial numbers of geese.

No mitigation measures were required for any species, however, a permit was issued for removal of up to 50 Canada geese from the Long Meadow Lake unit for the purpose of reducing safety hazards associated with the airport. According to the permit, "birds will be disposed of consistent with Minnesota DNR procedures." In addition, another permit was issued for the shooting of deer in connection with the city of Edin Prairie deer control program. The compensation payment will allow the refuge to acquire additional land and relocate educational facilities.

IMPACTS OF NOISE ON REFUGES:

The area of potential effect consists of two refuge management areas located closest to MSP, the Long Meadow Lake Unit (2,600 acres) and the Black Dog Lake unit (1,400 acres). The area of potential effect includes those portions of the MVNWR where overflights, specifically approaches, occur at less that 2,000 feet.

"For purposes of this analysis, it has been assumed that overflights above this 2,000 foot threshold will not generate unacceptable disturbance impacts to waterfowl or other wildlife within the MVNWR. However, because it is not possible to quantify noise impacts to wildlife in absolute terms, it remains unknown whether overflights below 2,000 feet above ground level would have meaningful adverse impacts to waterfowl within the MVNWR." (Dual Track Final EIS, p. V-186)

*"Coordination among MAC, FAA, and USFWS in 1997 confirms that MVNWR wildlife managers concur that the effects of aircraft noise on wildlife cannot easily be described herein as **the literature is inconclusive**. As possible evidence, the MAC and FAA note the current extensive waterfowl use in Gun club and Mother Lakes. These features lie outside the refuge but currently incur the majority of MSP overflights, and **waterfowl appear to habituate readily to the noise."*** (Emphasis added) (EIS p. v-186)

The EIS concluded that "***waterfowl appear to readily habituate to frequent aircraft overflights. ... It is concluded that aircraft noise within the affected environment would not significantly diminish the wildlife habitat in the refuge***." (Emphasis added). This conclusion was partially based on research done in Alaska and particularly on a study of the effects of air traffic along the shoreline of **Izembek Lagoon, Alaska**. The FWS observed that out of 623 possible disturbance events for flocks of geese, 65% were caused by jets and propeller aircraft, 14% by helicopters, 14% by gunshots, 2% by people, 2% by boats, 2% by eagles, 1 % by falcons and **less than 1% by land vehicles** and foxes. (Dual Track Final EIS p. V-187)

Other studies indicated that reproductive activity was more dependant on ecological factors including location and physical characteristics of the colony and climatogy, than by noise caused by overflights. (Dual Track Final EIS p. V-187)

At the same time that the Fish and Wildlife Service has used research from the Izembek Refuge to allow 5,620 monthly overflights below 2,000 feet over the MNVWR, it has concluded that an occasional medical evacuation on a one lane gravel road several miles distant, would have devastating impacts on the species found in the Izembek Lagoon. In testimony to the Resources Committee on September 10, 1997, John Rogers, Deputy Director of the Fish and Wildlife Service stated that the Secretary of the Interior would recommend a veto of H.R. 2259, which provided for a road access through the Izembek Refuge. Citing the presence of waterfowl, Mr. Rogers emphasized that the presence of a one lane gravel road and its occasional use, would "disturb these internationally-unique waterfowl populations."

This veto threat was in spite of the offer to give native lands in compensation for the use of the road right of way which would have stayed under the ownership of the federal government. The road easement was just a "use" of the refuge, just like the overflights in Minneapolis are a "use" of the refuge.

In addition, in an April 13, 1998 memo from the Regional Director in Alaska, the Service outlined substantial harm to birds from the presence of this one lane gravel road.

In arguing against this one lane gravel road that would have only allowed for medical evacuations, the Memo made the following statements regarding the impacts of this small road.

- *"Relatively moderate changes in habitat and landscape use pose a major threat to wildlife due to the concentrations of fish and wildlife in the proposed project area, i.e., a high number of individuals could be impacted by one action."*

- *"Behavioral 'displacement' results in lowered 'habitat effectiveness' of lands adjacent to roads. At some point, adjacent land management practices, even on lands managed for wildlife production, cannot mitigate for the barrier and/or mortality sink effects of roads."*

- *"Construction impacts could include:*
  .....
  "behavioral changes in animals, such as avoidance of the road area due to noise..."

- *"Use and maintenance impacts could include:*
  ....
  "Increased highway vehicle and ORV access, significantly expanding the area experiencing human disturbances;"

  ...
- *"An overall increased human presence (fishing, berry picking, wildlife viewing) resulting in increased energy expenditures by disturbance-sensitive species at times when animals would normally be molting or conserving/gathering food prior to migration. Predator species would be forced to increase hunting efforts and possibly expand or abandon territories."*

- *"Although potential adverse impacts of road construction can be described by species/habitat type, the failure of or significant decline in one link of this highly diverse, interconnected biological system will likely lead to degradation of the whole."*

- *"Increased access to the area would place additional pressure on waterfowl populations during critical life stages such as nesting, molting, and brood rearing."*

- *"Other waterfowl species are also thought to be particularly vulnerable to disturbance. Migratory, waterfowl, particularly those that use unique habitats to "stage" prior to lengthy, energy demanding overwater migrations, may suffer energetically from repeated disturbance from public use associated with road traffic."*

The only ESA listed species in the area is the Steller's eider, which spends up to 10 months of the year in Izembeck and Kinsarof lagoons. The Stellar's eider (like the Bald Eagle found in the Minnesota refuge) is listed as "threatened" under the ESA. The memo relied the presence of the "threatened" eider in opposing the road. However, the same Service found that in Minnesota, the overflights would not impact the bald eagle and required no ESA Section 7 consultation.

Conclusion:

The Fish and Wildlife Service appears to be very different standards of protection for wildlife and wildlife refuges between the various regions of the Fish and Wildlife Service. It appears that they are not requiring the same level of protection for the refuges and wildlife under their care. Questions arise as to why there are differences and whether those differences are based on sound science or based on some other motive such as political ones.

The Administration is also protecting their own property interests, while threatening to veto any legislation designed to improve the chances of private landowners receiving compensation under the same type of fact situations. There is also a substantially different standard for the treatment of private property owners when their property must be set aside as habitat and used by the general public. Many times the loss of use of property inflicts extraordinary economic hardship and economic losses on the private property owner. Yet the Administration has shown no signs of lessening the burdens on private property owners seeking compensation when their property must be used for the general public good.

partment of Transportation Act (49 App. U.S.C. 1651 et seq.)".

1991 Amendments. Subsec. (d). Pub.L. 102–240, § 1036(a), added subsec. (d).

Subsec. (e). Pub.L. 102–240, § 5001, added subsec. (e).

1984 Amendments. Subsec. (b). Pub.L. 98–216, § 2(2), substituted "49 App. U.S.C." for "49 U.S.C.".

Effective Dates

1995 Acts. Amendment by Pub.L. 104–88 effective Jan. 1, 1996, see section 2 of Pub.L. 104–88, set out as a note under section 701 of this title.

1991 Acts. Amendment by section 1036(a) of Pub.L. 102–240 effective Dec. 18, 1991, and applicable to funds authorized to be appropriated or made available after Sept. 30, 1991, and, with certain exceptions, not applicable to funds appropriated or made available on or before Sept. 30, 1991, see section 1100 of Pub.L. 102–240, set out as a note under section 104 of Title 23, Highways.

CROSS REFERENCES

Model intermodal transportation plan grants made for consistency with policy under this section, see 49 USCA § 5504.

LIBRARY REFERENCES

Administrative Law

Secretary of Transportation, duties, see West's Federal Practice Manual § 4395.

American Digest System

Duties of federal officers and performance thereof, see United States ⇐41.
Heads of executive departments, see United States ⇐32.
Regulation of interstate transportation; statutory provisions, see Carriers ⇐23.

Encyclopedias

Duties of federal officers, see C.J.S. United States § 41.
Federal transportation policy in general, see C.J.S. Carriers §§ 4, 5.
Heads of executive departments, see C.J.S. United States § 32.

WESTLAW ELECTRONIC RESEARCH

Carriers cases: 70k[add key number].
United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under section

204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(Added Pub.L. 97–449, Jan. 12, 1983, 96 Stat. 2419, and amended Pub.L. 100–17, Title I, § 133(d), Apr. 2, 1987, 101 Stat. 173.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1983 Acts.

Revised Section	Source (U.S.Code)	Source (Statutes at Large)
303(a)	49:1651(b)(2).	Oct. 15, 1966, Pub.L. 89–670, § 2(b)(2), 80 Stat. 931.
	49:1653(f) (1st sentence).	Oct. 15, 1966, Pub.L. 89–670, § 4(f), 80 Stat. 934; restated Aug. 23, 1968, Pub.L. 90–495, § 18(b), 82 Stat. 824.
303(b)	49:1653(f) (2d sentence).	
303(c)	49:1653(f) (less 1st, 2d sentences).	

In subsection (a), the words "hereby declared to be" before "the policy" are omitted as surplus. The words "of the United States Government" are substituted for "national" for clarity and consistency.

In subsection (b), the words "crossed by transportation activities or facilities" are substituted for "traversed" for clarity.

In subsection (c), before clause (1), the words "After August 23, 1968" after "Secretary" are omitted as executed. The word "transportation" is inserted before "program" for clarity. In clause (2), the words "or project" are added for consistency.

Detailed Explanation prepared by the Office of the Law Revision Counsel, see 1982 U.S. Code Cong. and Adm. News, p. 4220.

1987 Acts. Senate Report No. 100–4 and House Conference Report No. 100–27, see 1987 U.S. Code Cong. and Adm. News, p. 66.

Amendments

1987 Amendments. Subsec. (c). Pub.L. 100–17, § 133(d), inserted "(other than any project for a park road or parkway under section 204 of title 23)" following "program or project".

CROSS REFERENCES

Alaska Railroad transfer actions not subject to provisions of this section, see 45 USCA § 1212.
Conrail sale of United States interest and Regional Rail Reorganization service transfer actions not subject to this section, see 45 USCA § 1116.
Federal-aid highways—
Advance acquisition of rights-of-way reimbursement requirements as including compliance with this section, see 23 USCA § 108.

dministration deems appropriate,
\ to assess the impacts of the
as, new information, or new cir-
ances. If, based upon the studies,
iministration determines that a
mental EIS is not necessary, the
istration shall so indicate in the
: file.

. supplement is to be developed
he same process and format (i.e.,
IS, final EIS, and ROD) as an
l EIS, except that scoping is not
d.

supplemental draft EIS may be
ry for UMTA major urban mass
rtation investments if there is
ntial change in the level of de-
project impacts during project
r and development. The supple-
ll address site-specific impacts
ned cost estimates that have
eloped since the original draft

ome cases, a supplemental EIS
required to address issues of
scope, such as the extent of
mitigation or the evaluation
n or design variations for a
ortion of the overall project.
is is the case, the preparation
lemental EIS shall not nec-

ent the granting of new ap-

ire the withdrawal of pre-
ovals; or
ire the suspension of project
for any activity not directly
y the supplement. If the
question are of such mag-
equire a reassessment of the
on, or more than a limited
the overall action, the Ad-
n shall suspend any activi-
would have an adverse envi-
impact or limit the choice
le alternatives, until the
l EIS is completed.

nergency action proce-

or deviations from the pro-
his regulation because of
circumstances (40 CFR
be referred to the Admin-
adquarters for evaluation
after consultation with

§ 771.133 Compliance with other requirements.

The final EIS or FONSI should document compliance with requirements of all applicable environmental laws, Executive orders, and other related requirements. If full compliance is not possible by the time the final EIS or FONSI is prepared, the final EIS or FONSI should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. Approval of the environmental document constitutes adoption of any Administration findings and determinations that are contained therein. The FHWA approval of the appropriate NEPA document will constitute its finding of compliance with the report requirements of 23 U.S.C. 128.

§ 771.135 Section 4(f) (49 U.S.C. 303).

(a)(1) The Administration may not approve the use of land from a significant publicly owned public park, recreation area, or wildlife and waterfowl refuge, or any significant historic site unless a determination is made that:

(i) There is no feasible and prudent alternative to the use of land from the property; and

(ii) The action includes all possible planning to minimize harm to the property resulting from such use.

Statute

(2) Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

(b) The Administration will determine the application of section 4(f). Any use of lands from a section 4(f) property shall be evaluated early in the development of the action when alternatives to the proposed action are under study.

(c) Consideration under section 4(f) is not required when the Federal, State, or local officials having jurisdiction over a park, recreation area or refuge determine that the entire site is not significant. In the absence of such a determination, the section 4(f) land will

be presumed to be significant. The Administration will review the significance determination to assure its reasonableness.

(d) Where Federal lands or other public land holdings (e.g., State forests) are administered under statutes permitting management for multiple uses, and, in fact, are managed for multiple uses, section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes. The determination as to which lands so function or are so designated, and the significance of those lands, shall be made by the officials having jurisdiction over the lands. The Administration will review this determination to assure its reasonableness. The determination of significance shall apply to the entire area of such park, recreation, or wildlife and waterfowl refuge sites.

(e) In determining the application of section 4(f) to historic sites, the Administration, in cooperation with the applicant, will consult with the State Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on or eligible for the National Register of Historic Places (National Register). The section 4(f) requirements apply only to sites on or eligible for the National Register unless the Administration determines that the application of section 4(f) is otherwise appropriate.

(f) The Administration may determine that section 4(f) requirements do not apply to restoration, rehabilitation, or maintenance of transportation facilities that are on or eligible for the National Register when:

(1) Such work will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the National Register, and

(2) The SHPO and the Advisory Council on Historic Preservation (ACHP) have been consulted and have not objected to the Administration finding in paragraph (f)(1) of this section.

(g)(1) Section 4(f) applies to all archeological sites on or eligible for inclusion on the National Register, including those discovered during construction ept as set forth in paragraph (g)(2) of this section. Where section 4(f) applies to archeological sites discovered during construction, the section 4(f) process will be expedited. In such cases, the evaluation of feasible and prudent alternatives will take account of the level of investment already made. The review process, including the consultation with other agencies, will be shortened as appropriate.

(2) Section 4(f) does not apply to archeological sites where the Administration, after consultation with the SHPO and the ACHP, determines that the archeological resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. This exception applies both to situations where data recovery is undertaken or where the Administration decides, with agreement of the SHPO and, where applicable, the ACHP not to recover the resource.

(h) Designations of park and recreation lands, wildlife and waterfowl refuges, and historic sites are sometimes made and determinations of significance changed late in the development of a proposed action. With the exception of the treatment of archeological resources in paragraph (g) of this section, the Administration may permit a project to proceed without consideration under section 4(f) if the property interest in the section 4(f) lands was acquired for transportation purposes prior to the designation or change in the determination of significance and if an adequate effort was made to identify properties protected by section 4(f) prior to acquisition.

(i) The evaluations of alternatives to avoid the use of section 4(f) land and of possible measures to minimize harm to such lands shall be developed by the applicant in cooperation with the Administration. This information should be presented in the draft EIS, EA, or, for a project classified as a CE in a separate document. The section 4(f) evaluation shall be provided for coordination and comment to the officials having jurisdiction over the section 4(f) property and to the Department of the

79

Interior, and as appropriate to the Department of Agriculture and the Department of Housing and Urban Development. A minimum of 45 days shall be established by the Administration for receipt of comments. Uses of section 4(f) land covered by a programmatic section 4(f) evaluation shall be documented and coordinated as specified in the programmatic section 4(f) evaluation.

(j) When adequate support exists for a section 4(f) determination, the discussion in the final EIS, FONSI, or separate section 4(f) evaluation shall specifically address:

(1) The reasons why the alternatives to avoid a section 4(f) property are not feasible and prudent; and

(2) All measures which will be taken to minimize harm to the section 4(f) property.

(k) The final Section 4(f) evaluation will be reviewed for legal sufficiency.

(l) For actions processed with EISs, the Administration will make the section 4(f) approval either in its approval of the final EIS or in the ROD. Where the section 4(f) approval is documented in the final EIS, the Administration will summarize the basis for its section 4(f) approval in the ROD. Actions requiring the use of section 4(f) property, and proposed to be processed with a FONSI or classified as a CE, shall not proceed until notified by the Administration of section 4(f) approval. For these actions, any required section 4(f) approval will be documented separately.

(m) Circulation of a separate section 4(f) evaluation will be required when:

(1) A proposed modification of the alignment or design would require the use of section 4(f) property after the CE, FONSI, draft EIS, or final EIS has been processed;

(2) The Administration determines, after processing the CE, FONSI, draft EIS, or final EIS that section 4(f) applies to a property;

(3) A proposed modification of the alignment, design, or measures to minimize harm (after the original section 4(f) approval) would result in a substantial increase in the amount of section 4(f) land used, a substantial increase in the adverse impacts to section 4(f) land, or a substantial reduction in mitigation measures; or

(4) Another agency is the lead agency for the NEPA process, unless another DOT element is preparing the section 4(f) evaluation.

(n) If the Administration determines under §771.135(m) or otherwise, that section 4(f) is applicable after the CE, FONSI, or final EIS has been processed, the decision to prepare and circulate a section 4(f) evaluation will not necessarily require the preparation of a new or supplemental environmental document. Where a separately circulated section 4(f) evaluation is prepared, such evaluation does not necessarily:

(1) Prevent the granting of new approvals;

(2) Require the withdrawal of previous approvals; or

(3) Require the suspension of project activities; for any activity not affected by the section 4(f) evaluation.

(o) An analysis required by section 4(f) may involve different levels of detail where the section 4(f) involvement is addressed in a tiered EIS.

(1) When the first-tier, broad-scale EIS is prepared, the detailed information necessary to complete the section 4(f) evaluation may not be available at that stage in the development of the action. In such cases, an evaluation should be made on the potential impacts that a proposed action will have on section 4(f) land and whether those impacts could have a bearing on the decision to be made. A preliminary determination may be made at this time as to whether there are feasible and prudent locations or alternatives for the action to avoid the use of section 4(f) land. This preliminary determination shall consider all possible planning to minimize harm to the extent that the level of detail available at the first-tier EIS stage allows. It is recognized that such planning at this stage will normally be limited to ensuring that opportunities to minimize harm at subsequent stages in the development process have not been precluded by decisions made at the first-tier stage. This preliminary determination is then incorporated into the first-tier EIS.

(2) A section 4(f) approval made when additional design details are available will include a determination that:

(i) The preliminary section 4(f) determination made pursuant to paragraph (o)(1) of this section is still valid; and

(ii) The criteria of paragraph (a) of this section have been met.

(p) *Use.* (1) Except as set forth in paragraphs (f), (g)(2), and (h) of this section, "use" (in paragraph (a)(1) of this section) occurs:

(i) When land is permanently incorporated into a transportation facility;

(ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes as determined by the criteria in paragraph (p)(7) of this section; or

(iii) When there is a constructive use of land.

use

(2) Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.

(3) The Administration is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of the Administration.

(4) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(i) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes;

(ii) The proximity of the proposed project substantially impairs esthetic features or attributes of a resource protected by section 4(f), where such features or attributes are considered important contributing elements to the value of the resource. Examples of substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part due to its setting;

(iii) The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area or a historic site;

(iv) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource such as projected vibration levels from a rail transit project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or

(v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

(5) The Administration has reviewed the following situations and determined that a constructive use does *not* occur when:

(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of "no effect" or "no adverse effect";

(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria in the UMTA guidelines;

80

(iii) The projected noise levels exceed the relevant threshold in paragraph (p)(5)(ii) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(iv) There are proximity impacts to a section 4(f) resource, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register;

(v) There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to:

(A) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or

(B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other;

(vi) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);

(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

(6) When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(i) Identification of the current activities, features, or attributes of a resource qualified for protection under section 4(f) and which may be sensitive to proximity impacts;

(ii) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project;

(iii) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.

(7) A temporary occupancy of land is so minimal that it does not constitute a use within the meaning of section 4(f) when the following conditions are satisfied:

(i) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(ii) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(iii) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

(iv) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and

(v) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

[52 FR 32660, Aug. 28, 1987; 53 FR 11066, Apr. 5, 1988, as amended at 56 FR 13279, Apr. 1, 1991; 57 FR 12411, Apr. 10, 1992]

§771.137 International actions.

(a) The requirements of this part apply to:

(1) Administration actions significantly affecting the environment of a foreign nation not participating in the action or not otherwise involved in the action.

(2) Administration actions outside the U.S., its territories, and possessions which significantly affect natural resources of global importance designated for protection by the President or by international agreement.

(b) If communication with a foreign government concerning environmental studies or documentation is anticipated, the Administration shall coordinate such communication with the Department of State through the Office of the Secretary of Transportation.

PART 772—PROCEDURES FOR ABATEMENT OF HIGHWAY TRAFFIC NOISE AND CONSTRUCTION NOISE

Sec.
772.1 Purpose.
772.3 Noise standards.
772.5 Definitions.
772.7 Applicability.
772.9 Analysis of traffic noise impacts and abatement measures.
772.11 Noise abatement.
772.13 Federal participation.
772.15 Information for local officials.
772.17 Traffic noise prediction.
772.19 Construction noise.
TABLE 1 TO PART 772—NOISE ABATEMENT CRITERIA
APPENDIX A TO PART 772—NATIONAL REFERENCE ENERGY MEAN EMISSION LEVELS AS A FUNCTION OF SPEED

AUTHORITY: 23 U.S.C. 109(h), 109(i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104-59, 109 Stat. 568, 605; 49 CFR 1.48(b).

SOURCE: 47 FR 29654, July 8, 1982; 47 FR 33956, Aug. 5, 1982, unless otherwise noted.

§772.1 Purpose.

To provide procedures for noise studies and noise abatement measures to help protect the public health and welfare, to supply noise abatement criteria, and to establish requirements for information to be given to local officials for use in the planning and design of highways approved pursuant to title 23 U.S.C.

§772.3 Noise standards.

The highway traffic noise prediction requirements, noise analyses, noise abatement criteria, and requirements for informing local officials in this regulation constitute the noise standards mandated by 23 U.S.C. 109(i). All highway projects which are developed in conformance with this regulation shall be deemed to be in conformance with the Federal Highway Administration (FHWA) noise standards.

§772.5 Definitions.

(a) *Design year.* The future year used to estimate the probable traffic volume for which a highway is designed. A time, 10 to 20 years, from the start of construction is usually used.

(b) *Existing noise levels.* The noise, resulting from the natural and mechanical sources and human activity, considered to be usually present in a particular area.

(c) L_{10}. The sound level that is exceeded 10 percent of the time (the 90th percentile) for the period under consideration.

(d) $L_{10}(h)$. The hourly value of L_{10}.

(e) *Leq*—the equivalent steady-state sound level which in a stated period of time contains the same acoustic energy as the time-varying sound level during the same time period.

(f) *Leq*(h). The hourly value of Leq.

(g) *Traffic noise impacts.* Impacts which occur when the predicted traffic noise levels approach or exceed the noise abatement criteria (Table 1), or when the predicted traffic noise levels substantially exceed the existing noise levels.

(h) *Type I projects.* A proposed Federal or Federal-aid highway project for the construction of a highway on new location or the physical alteration of an existing highway which significantly changes either the horizonal or vertical

79-077 O—98——14

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Bishop Henry Whipple Federal Building
1 Federal Drive
Fort Snelling, MN 55111-4056

IN REPLY REFER TO:

FWS/ARW

MAY 2 2 1997

Mr. Nigel D. Finney
Deputy Executive Director
Planning and Environment
Metropolitan Airports Commission
6040 28th Avenue South
Minneapolis, Minnesota 55450-2799

Dear Mr. Finney:

For the past several months, U.S. Fish and Wildlife Service (Service) staff have been working with representatives of the Federal Aviation Administration (FAA) and the Metropolitan Airport Commission (MAC) concerning the potential impacts of an expanded Minneapolis/St. Paul International Airport (Airport) upon Minnesota Valley National Wildlife Refuge (NWR). During these discussions, a great deal has been learned about aircraft noise and how it is measured, its potential impacts upon natural resources and the visitors that enjoy these natural resources, and about the public's interest in all of these issues.

This letter has two purposes. First, we articulate what we believe the effect of a new runway will be on the fish and wildlife resources, programs, and activities of the Minnesota Valley NWR. Second, we specify acceptable mitigation for these impacts and estimate their cost.

We offer this analysis in a spirit of cooperation designed to assist FAA and MAC in moving forward with this project. We also offer this analysis with the knowledge that we have the profound responsibility to ensure that the interest of Minnesota Valley NWR and the citizens that enjoy and utilize this resource are fully represented now and in the future.

Please do not hesitate to contact me or Mr. Rick Schultz, Refuge Manager at Minnesota Valley National Wildlife Refuge at (612) 858-0701, if you have any questions.

Sincerely,

William F. Hartwig
Regional Director

Enclosure

Effects of Airport Expansion
and Acceptable Mitigation
Minnesota Valley National Wildlife Refuge
May 22, 1997

I. Background Information

There is a lot of information about Minnesota Valley NWR and the proposed expansion of the Airport. In this section, we identify the most relevant information for this discussion.

A. What we now know about Minnesota Valley NWR.

1. The citizens of the Twin Cities have long recognized the value of the Lower Minnesota River and its associated fish and wildlife. As a result of strong citizen support, Congress established the Minnesota Valley National Wildlife Refuge, Recreation Area, and State Trail 20 years ago.

2. The U.S. Fish and Wildlife Service, on behalf of the U.S. Government, has expended great sums of money within or adjacent to the Lower Minnesota River Valley for the dual mission of protecting the important fish and wildlife habitats of the Valley and providing environmental education and outdoor recreation opportunities for visiting public. Included among these expenditures is the construction of a six million dollar visitor center in 1990.

3. Minnesota Valley National Wildlife Refuge is a national treasure that closely links a major urban center to wild lands and the fish and wildlife species dependent upon these lands.

4. One of the most important attributes of Minnesota Valley NWR is that it offers Twin Cities residents and other visitors an opportunity to experience a peaceful and quiet natural environment close to their home, school, and work.

B. What we know about the Airport expansion proposal.

1. In 1989, the Minnesota State Legislature directed MAC and the Metropolitan Council to examine how best to meet the region's future aviation needs. The product of this effort was a draft environmental impact statement entitled the Dual Track Airport Planning Process.

2. Although several alternatives were considered in this draft EIS, it has been determined that the only feasible alternative is the construction of a new 8000-foot runway that runs roughly parallel to Cedar Avenue.

3. In response to significant public concern over both existing and future aircraft noise associated with the Minneapolis/St. Paul International Airport, MAC has developed a Noise Mitigation Plan.

4. Within the Noise Mitigation Plan, the Minnesota River Valley is identified as a corridor for aircraft with the expressed purpose of reducing noise on residential areas.

5. All incoming and departing flights from the new runway, estimated to be nearly 8,000 daytime flights per month, will be directed over Minnesota Valley NWR.

II. Expected Impacts to Minnesota Valley NWR

This section includes a detailed list of impacts that the Service expects from the new runway. This assessment is based on extensive discussions, a thorough review of the literature, conversations with experts in the field, and by studying and learning about the FAA and MAC noise impact models. Lastly, a small amount of common sense was added to the ingredients to come up with the list of expected impacts.

A. Impacts to fish and wildlife utilizing Minnesota Valley NWR are uncertain. We base this conclusion on a thorough review of the literature.

B. Expected aircraft noise events occurring over the Black Dog and Long Meadow Lake Units of Minnesota Valley NWR will range between 20-30 per hour during daytime hours. The Service believes that all refuge lands located within these units will be subject to noise levels unacceptable to environmental education and outdoor recreation activities such as nature walks and bird watching. This level of interruption will significantly diminish, if not completely eliminate, these activities in the Long Meadow Lake and Black Dog Units.

D. As identified in the Refuge's Master Plan, the present and full value of the Minnesota Valley National Wildlife Refuge Visitor Center (Visitor Center) as a center of environmental education and outdoor recreation is very dependent upon use of the Long Meadow Lake and Black Dog Units. The impacts associated with aircraft overflights on these units will compromise the intended purposes of the Visitor Center, located at 3815 East 80th Street, Bloomington, Minnesota. Of particular concern is the lost opportunity to utilize the Long Meadow Lake and Black Dog Units for environmental education activities targeted to inner city youth.

III. Components of Acceptable Mitigation

Components and associated costs of acceptable mitigation are quantified in this section. Please note that the estimated land value in Section A is based on a 1992 appraisal of lands in this area. This appraisal will need to be updated before moving forward with this project. Also note that replacement costs for facilities and structures are estimates based on 1997 dollars and will need to be adjusted to reflect expected project initiation dates.

A. Replacement of 4,090 acres of refuge lands for environmental education and outdoor recreation activities.

1. Estimated Cost - $15,746,500
   4,090 acres @ $3850/acre

2. Justification

   a. All lands within the authorized refuge boundary are identified for mitigation since this boundary represents future potential. Mitigation representing any acreage less than the authorized refuge boundary would result in a net loss of future environmental education and outdoor recreation opportunities.

   b. The airport expansion project will either eliminate or significantly impact environmental education and/or outdoor recreation activities on 4,090 acres of refuge lands. Consequently, the land base available to the public to participate in these activities needs to be replaced elsewhere on at least a 1:1 basis even though the Black Dog and Long Meadow Lake Units will provide some residual natural resource value to fish and wildlife populations.

B. Construction and Development of Visitor Center/Contact Station at Rapids Lake Unit, Carver County.

   1. Estimated Cost of Facility - $2,548,000

      Project includes exhibit area, classrooms, small theater, administrative offices, and storage.

   2. Estimate Cost of Interpretive Exhibitry - $700,000

      A variety of interpretive and interactive exhibitry would be obtained for the facility.

   3. Justification

      a. The Service's ability to attract visitors, students, and others to the Visitor Center from the inner city will be compromised and its full potential will not be realized if environmental education and outdoor recreation activities are significantly affected on the Black Dog and Long Meadow Lake Units.

      b. In order to compensate for these lost opportunities, a visitor contact station and associated facilities will be developed at the Rapids Lake Unit, Carver County. A completed facility, with an associated land base, will replace opportunities lost on the Black Dog and Long Meadow Lake Units.

C. Replacement of Visitor Access and Environmental Education/ Interpretive Facilities Located at Bass Ponds, Old Cedar Avenue, and Black Dog Lake.

   1. Estimated Cost - $1,805,800

      Nature trails - $739,200
         5 Mi @ $147,840

Fixed boardwalk - $360,000
6,000 SF @ $60/SF

Fixed observation platforms - $37,500
625 SF @ $60/SF

Environmental education outdoor shelter - $36,000

Parking lots, entrance roads, and trail heads - $413,100
Three units at estimated $131,700 per unit

Kiosks, signage, interpretive brochure - $20,000

Fourteen-acre water management demonstration area - $200,000
Actual cost dependent upon specific site

2. Justification

All facilities and structures used primarily by environmental education groups and individuals involved in bird watching or seeking solitude on the refuge are identified for replacement.

D. Operations Trust Fund

1. Estimated Cost - $4,000,000

2. Justification

a. The maintenance and operation of a remote visitor contact station will increase the annual operating expenses of Minnesota Valley NWR by an estimated $400,000.

b. Four additional refuge staff will be needed to administer a remote visitor contact station and to provide environmental education and outdoor recreational opportunities in association with a new facility (salary estimated at $200,000/year).

c. Cost associated with operating and maintaining a new contact station and related facilities is estimated at $150,000/year.

d. Contract busing will be needed to defray the costs of busing inner city students to a remote contact station at estimated cost of $50,000/year.

e. The establishment of a trust fund will provide the refuge with an ongoing source of annual revenue equal to the expected costs associated with the operation and maintenance of these new facilities. The trust fund will be administered by a nonprofit conservation organization committed to returning the annual earnings (estimated at 10%) of this trust fund back to Minnesota Valley NWR for operational needs.

E. Interactive Interpretive Exhibit at MSP Airport

1. Estimated Cost - $150,000

2. Justification

An interpretive exhibit at the MSP Airport designed to share information about fish and wildlife conservation and its associated challenges of the next century is appropriate in light of the airport expansion project. The exhibit will contain a variety of information about Service programs and activities, and how development and fish and wildlife conservation can be compatible if developers and conservationists are willing to work together. The exhibit will target a new audience and compensate, to some extent, for the audience that will avoid the Refuge's visitor Center under the new noise conditions. Costs for operation and maintenance of this exhibit will be obtained from the trust fund (Section IIID).

F. Planning and Implementing Mitigation

1. Estimated Cost - $2,000,000

2. Justification

Significant amounts of Service staff time will be involved in mitigating the effects of airport expansion on Minnesota Valley NWR. Staff activities will include, but not be limited to, organizational meetings; identification and planning of specific mitigation projects; administering the completion of projects; land acquisition; and modification of refuge master plans. An estimated four staff will be involved in project mitigation for five years. Salary for four staff plus administrative and project support are estimated at $100,000 per staff person annually.

GRAND TOTAL - $26,950,300

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

F.A.A., Mpls.
Airports Dist. Off.
SEP 23 1998

In Reply Refer To:
FWS/ARW

SEP 21 1998

Ms. Lynne Pickard
Manager, Community and Environmental
Needs Division
Federal Aviation Administration
800 Independence Avenue, SW
Washington, D.C. 20591

Dear Ms. Pickard:

Over the past several months, the Federal Aviation Administration (FAA), Metropolitan Airports Commission (MAC), and U.S. Fish and Wildlife Service (Service) have worked diligently to address adverse impacts to lands of the Minnesota Valley National Wildlife Refuge (MNVNWR) that are anticipated to result from the proposed addition of Runway 17/35 at the Minneapolis-St. Paul International Airport.

We are pleased that our respective agencies have negotiated and will soon be signing a Memorandum of Agreement (MOA) (copy enclosed) that proposes compensation to address our concerns regarding impacts to MNVNWR resulting from runway expansion. All of our previous concerns have been resolved through discussions with FAA and MAC and by the compensation presented in the MOA. As we have discussed, the adequacy of the implementation of the plan to minimize harm to the refuge depends upon successful negotiation of additional compensation for the realignment of and increased costs to operate the refuge, as called for in the MOA. Based on our extremely cooperative work to this point, with both the FAA and MAC, I foresee no barriers to swift and positive resolution of all remaining compensation matters.

We appreciate the efforts of MAC and FAA in working with the Service to reach agreement on the MOA and look forward to completing negotiations in the very near future.

Sincerely,

Daniel M. Ashe

Daniel M. Ashe
Assistant Director -
Refuges and Wildlife

Enclosure

Don Young question to Region 3

1. **Question: How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?**

Answer: Region 3 has nine biologists who perform this activity as a significant (but not necessarily "primary") component of their workload. Eight of these nine are located in field offices and one is located in the Regional Office in Minneapolis. The field office biologists also conduct other candidate determination, petition review, listing, consultation, and recovery activities. No single individual has candidate review or listing as a primary responsibility.

Don Young question to Region 3

2. Question: How many members of your staff perform as their primary duty the review of proposed listing rules and the finalization of proposed listing rules?

Answer: Region 3 has relatively few candidate species, which means that we prepare relatively few proposed listing rules. Nevertheless, the same individuals identified in Question 1 prepare and review any rules that Region 3 generates and also review rules prepared by other regions for species that also occur in Region 3. Each of our eight field office supervisors also devotes some time to the review of proposed listing rules, as does Regional management.

Don Young question to Region 3

3. **Question: How many members of your staff perform as their primary duty the review and issuance of Section 10 incidental take permits?**

Answer: To date, Region 3 has not issued any Section 10(a)(1)(B) permits. One Regional Office staff member has worked part-time on the development of a Section 10(a)(1)(B) permit for the State of Wisconsin's Karner blue butterfly HCP. This effort has also required considerable assistance from the endangered species specialist and the field office supervisor at the Green Bay Field Office.

Don Young question to Region 3

4. **Question: With regard to the consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the committee with your policy regarding mitigation of impacts of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a section 7 consultation.**

Answer: In its Mitigation Policy (46 FR 7656; January 23, 1981), the Service adopted the Council on Environmental Quality's definition of mitigation to include: a) avoiding the impact altogether by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and e) compensating for the impact by replacing or providing substitute resources or environments (see 40 CFR 1508.20). The Service's mitigation policy is expressly excluded from application to Endangered Species Act matters (see section III.B. of the policy).

The Service, however, routinely works with consulting agencies to identify measures to avoid and minimize impacts to listed species. Documentation where this has occurred would include an enormous number of concurrence letters related to informal consultations where the action agency agreed to either eliminate potentially adverse actions or to modify the timing or scope in such a way as to avoid the adverse effects. In all such cases, the net result was that the potential for "take" of listed species was determined to be so remote as to be either insignificant or discountable, and no "incidental take" authorization was provided.

In answering this question it is likewise important to clarify the differences between the reasonable and prudent alternatives developed to avoid jeopardy and reasonable and prudent measures and accompanying terms and conditions to avoid and minimize incidental take. By regulation, reasonable and prudent alternatives are alternatives the Service believes will avoid the likelihood of jeopardy or adverse modification; can be implemented in a manner consistent with the intended purpose of the action; can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; and are economically and technologically feasible. While the Service generally develops the alternatives to avoid jeopardy with input from the action agency, ultimately it is the action agency's decision whether to implement these measures. The action agency determines whether the reasonable and prudent alternative is within the agency's legal authority and is economically and technologically feasible. In attempting to develop alternatives, the Service considers a whole range of options including compensatory

"mitigation" both on-site and off-site in an effort to identify ways the proposed action can proceed while avoiding the likelihood of jeopardy. If compensatory mitigation is provided as a component of a reasonable and prudent alternative and the agency believes that it has the authority to implement it, the agency may require that mitigation be implemented. Once a jeopardy biological opinion with reasonable and prudent alternative is provided to the action agency, the Section 7 regulations stipulate that they must notify the Service of its final decision on the proposed action. In a biological opinion on the Mitchell's satyr butterfly (attachment 1) the Service included acquisition and/or conservation easement protection of occupied fen and adjacent upland habitat for the butterfly in a reasonable and prudent alternative to avoid jeopardizing the species. The RPA was worked out with the action agency, the Federal Highway Administration, in a series of meetings before finalization of the RPA and the biological opinion.

Incidental take includes the taking of an endangered species that is incidental to an otherwise legal action. When the Service anticipates that an action will result in the incidental taking of listed species it is required to identify those reasonable and prudent measures and their accompanying terms and conditions that are necessary and appropriate to minimize such impact. Measures are considered reasonable when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project, additionally, they must be within the legal authority and jurisdiction of the action agency or applicant to carry out.

While it has been the policy of the Service that it is not appropriate to require mitigation to offset incidental take, it was not explicitly stated in the 1994 Section 7 consultation handbook. Because the Service is aware that there occasionally has been an inconsistent application of this policy, it clarified the policy in its recently approved Endangered Species Consultation Handbook. The Service's new Handbook clearly states that it is not appropriate to require mitigation for the impacts of incidental take. Additionally, to ensure national consistency the Service is providing training to its personnel in the application of Section 7 consultation regulations through classes coordinated by the National Conservation Training Center. During consultation there are instances where action agencies or project developers have initiated and incorporated mitigation measures into the scope of their projects. In many cases, these measures are required as part of other Federal permitting (e.g., Section 404 permits). These measures are factored into the Service's analysis of the effects of the project and may be an important component in avoiding jeopardy. If the action agency chooses not to implement these measures, they would be altering the scope of the project for which consultation was conducted, thereby voiding the biological opinion; and any "incidental take" coverage would lapse. To emphasize the importance of these measures and that implementing them is non-discretionary, Region 3 routinely incorporates them as terms and conditions in "incidental take" statements; but they are not provided to offset any "incidental take" that is anticipated.

Don Young question to Region 3

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom the funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off-site mitigation.**

Answer: In 1994, Region 3 issued a jeopardy biological opinion for a highway project in Michigan that suggested the acquisition of off-site lands to permanently protect habitat for the Mitchell's satyr butterfly as a reasonable and prudent alternative. A copy of the biological opinion and "incidental take" statement are included (attachment 1) as well as a copy of the memorandum of agreement that implemented the purchase of the protected areas (attachment 2). We must emphasize that the acquisition of off-site lands was necessary to offset a potential jeopardy situation, not to compensate for "incidental take" associated with the project. It is also important to note that it was the action agency's decision to implement the alternative once it had determined that it had the authority and jurisdiction to do so.

Don Young question to Region 3

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On-site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: As described in our response to question 4, when the agency includes actions to avoid and minimize the impact of incidental take including "on-site" mitigation measures as part of the scope of work for which they are consulting, Region 3 has occasionally included them as terms and conditions of an "incidental take" statement. In one instance, some land was acquired by the City of Marion, Illinois. The restrictions were part of wetland mitigation required by a Corps of Engineers 404 permit. In a consultation on the project, Region 3 identified that in order to minimize the incidental take of Indiana bats residing in the wetland forest, deed restrictions designed to improve the quality habitat were included as terms and conditions of a reasonable and prudent measure. A copy of the biological opinion is provided as attachment 3.

Don Young question to Region 5

1. **Question: How many members of your staff perform as their primary duty, the review of the status of species to be included as candidate or proposed species for listing?**

Answer: The Endangered species staff in Region 5 (Northeast Region) is distributed among the Regional office and ten Ecological Services field and sub-field offices. There are five biologists in the Regional office; and each of the ten field offices and sub-field offices has either one or two biologists who work full time on Endangered Species activities, and other biologists who work part-time on them. Due to the relatively small size of the endangered species program in Region 5, most biologists are engaged in all aspects of the program, including candidate determination; petition review; listing; consultation; and recovery. Our approach to candidate review has been to appoint ad hoc field teams to review the status of a particular species that might be in need of ESA oversight and make recommendations to the Regional Office as to the need for listing. No single individual has candidate review or listing as a primary responsibility, but they are a part of the duties of all the Region's endangered species biologists.

Don Young question to Region 5

2. **Question: How many members of your staff perform, as their primary duty, the review of proposed listing rules and finalization of proposed listing rules?**

Answer: Similar to the arrangement cited above, no single individual has review of proposed rules and finalization of said rules as primary responsibilities. Such documents are normally prepared in the field offices and submitted to the Regional Office for policy review and approval. Approved packages are then forwarded on to the Washington Office Division of Endangered Species. All rules are reviewed by both the Regional Endangered Species Coordinator and the Regional Assistant Coordinator for biological validity and policy compliance prior to being forwarded to Washington. The Regional Director is the last level of policy review within the Regional Office.

Don Young question to Region 5

3. **Question: How many members of your staff perform, as their primary duty, the review and issuance of Section 10 incidental take permits?**

Answer: Region 5 has issued only one Section 10 (a)(1)(B) incidental take permit in conjunction with a habitat conservation plan. During 1996, the State of Massachusetts was permitted additional beach use during the piping plover nesting season. Although staff time is devoted to these activities, the lead individual will vary depending on the species and geographic area.

Don Young question to Region 5

4. **Question: With regard to consultations performed in your region which result in either an incidental take statement or a reasonable and prudent alternative, provide the Committee with your policy regarding mitigation of any incidental take, including how many incidental take statements have required mitigation, the range of mitigation ratios required by those statements, and the types of mitigation required. For the purposes of this question, the term "incidental take statement" shall include any biological opinion or letter stating mitigation requirements which shall be met in order to obtain an incidental take statement or other permission to proceed with any state, local or federal project or other private project which is the subject of a Section 7 consultation. Please provide a copy of all documents requiring mitigation where a ratio of greater than 1:1 is required.**

Answer: In its Mitigation Policy (46 FR 7656; January 23, 1981), the Service adopted the Council on Environmental Quality's definition of mitigation to include: a) avoiding the impact altogether by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and e) compensating for the impact by replacing or providing substitute resources or environments (see 40 CFR 1508.20). The Service's mitigation policy is expressly excluded from application to Endangered Species Act matters (see section III.B. of the policy).

The Service, however, routinely works with action agencies to identify measures to avoid and minimize impacts to listed species. Documentation where this has occurred would include an enormous number of concurrence letters related to informal consultations where the action agency agreed to either eliminate potentially adverse actions or to modify the timing or scope in such a way as to avoid the adverse effects. In all such cases, the net result was that the potential for "take" of listed species was determined to be so remote as to be either insignificant or discountable, and no "incidental take" authorization was provided.

In answering this question it is likewise important to clarify the differences between the reasonable and prudent alternatives developed to avoid jeopardy and reasonable and prudent measures and accompanying terms and conditions to avoid and minimize incidental take. Reasonable and prudent alternatives by regulation are alternatives the Service believes will avoid the likelihood of jeopardy or adverse modification; can be implemented in a manner consistent with the intended purpose of the action; can be implemented consistent with the scope of the action agency's legal authority and jurisdiction; and are economically and technologically feasible. While the Service generally develops the alternatives to avoid jeopardy with input from the action agency, ultimately it is the action agency's decision whether to implement these measures. The action agency determines whether the reasonable and prudent alternative is within the agency's legal authority and is economically and technologically feasible. In

attempting to develop alternatives, the Service considers a whole range of options including compensatory "mitigation" both on-site and off-site in an effort to identify ways the proposed action can proceed while avoiding the likelihood of jeopardy. If compensatory mitigation is provided as a component of a reasonable and prudent alternative and the action agency believes that it has the authority to implement it, the agency may require that mitigation be implemented. Once a jeopardy biological opinion with a reasonable and prudent alternative is provided to the action agency, the Section 7 regulations stipulate that they must notify the Service of its final decision on the proposed action. no oversight

Incidental take includes the taking of an endangered species that is incidental to an otherwise legal action. When the Service anticipates that an action will result in the incidental taking of listed species it is required to identify those reasonable and prudent measures and their accompanying terms and conditions that are necessary and appropriate to minimize such impact. Measures are considered reasonable when they are consistent with the proposed action's basic design, location, scope, duration, and timing. The test for reasonableness is whether the proposed measure would cause more than a minor change to the project; additionally, they must be within the legal authority and jurisdiction of the action agency or applicant to carry out.

While it has been the policy of the Service that it is not appropriate to require mitigation to offset incidental take, it was not explicitly stated in the 1994 Section 7 consultation handbook. Because the Service is aware that there occasionally has been an inconsistent application of this policy, it clarified the policy in its recently approved Endangered Species Consultation Handbook. The Service's new Handbook clearly states that it is not appropriate to require mitigation for the impacts of incidental take. Additionally, to ensure national consistency the Service is providing training to its personnel in the application of Section 7 consultation regulations through classes coordinated by the National Conservation Training Center. During consultation there are instances where action agencies or project developers have initiated and incorporated mitigation measures into the scope of their project. In many cases, these measures are required as part of other Federal permitting (e.g., Section 404 permits). These measures are factored into the Service's analysis of the effects of the project and may be an important component in avoiding jeopardy. If the action agency chooses not to implement these measures, they would be altering the scope of the project for which consultation was conducted, thereby voiding the biological opinion; and any "incidental take" coverage would lapse. To emphasize the importance of these measures and that implementing them is non-discretionary, Region 5 routinely incorporates them as terms and conditions in "incidental take" statements. Our records indicate that Region 5 has issued three no jeopardy biological opinions where the impacts of incidental take were minimized through mitigation. In one case, the project applicant offered the mitigation as a component of the project description and the Service incorporated it as a term and condition of the reasonable and prudent measures in an incidental take statement. Copies of these opinions are enclosed as attachment 4.

Don Young question to Region 5

5. **Question: With regard to mitigation referred to in question 4, has your region ever required off-site mitigation? "Off-site" mitigation means the payment into a fund or to the Service or any other organization for the purpose of purchasing land or any interest in land or the requirement that some person including a federal or state agency acquire land or an interest in land for the purpose of providing habitat for a species listed or proposed for listing or a candidate for listing under the Endangered Species Act. If the answer to this question is in the affirmative, please provide the Committee with the names of any federal or state agency or private group or person to whom funds have been paid and the purposes of those payments. Please provide a copy of any letter, biological opinion, incidental take statement, or other document requiring the payment of funds for mitigation or the acquisition of land for off site mitigation.**

Answer: We have required off-site mitigation as part of two of the three opinions referred to in question #4 because on-site options were non-existent. Both opinions dealt with activities affecting the dismal swamp least shrew, which required 404 permits from the Army Corps of Engineers. We have not required payment from or to anyone for mitigation.

Don Young question to Region 5

6. **Question: With regard to mitigation referred to in question 4, has your region ever required on site mitigation? "On site" mitigation means the temporary or permanent set aside, preservation, dedication, or conservation of an area of land owned by or controlled by the action agency or permit applicant to be used for habitat for species, either listed, proposed to be listed, or a candidate for listing.**

Answer: Region 5 has included on-site mitigation as part of one opinion referred to in question 4. Specifically, we allowed clearing of 19 acres of wooded habitat for the Delmarva fox squirrel in Maryland as part of golf course construction, with the provision that 177 acres be protected via a conservation easement. The reason was to ensure that a large block of habitat suitable for fox squirrels would remain. The project applicant included the mitigation in the project description and the Service incorporated it as a term and condition of the reasonable and prudent measures in the incidental take statement.

Question 10: For Region 1, please provide a list of every section 10 permit that has been issued that required off-site mitigation or mitigation which requires the permanent preservation or set aside of land. For each permit, please provide the mitigation ratio.

Answer: The requested information is provided in the table below. The mitigation strategy for each HCP is individually negotiated and specific to the circumstances of that HCP. The Endangered Species Act contains criteria for issuing an incidental take permit with an HCP. These criteria require impacts to be minimized and mitigated to the maximum extent practicable and to ensure adequate funding for implementation of the HCP. The mitigation and minimization is determined, in part, by the extent and/or complexity of the impacts. Additionally, some of the land compensation may not require land acquisition because the permittee may set aside land that is already owned by the permittee, or there may be some other means of protecting mitigation habitat. Please note that in many cases, the ratios in this table are an artifact of the conservation strategy arrived at through the negotiation process. These negotiations take into account the species needs, as well as the variable importance and quality of the habitat. The resulting ratios are variable because there is a case-by-case analysis and there are biological differences, such as the quality of the habitat which may vary greatly between each HCP. In addition, some HCPs involve mitigation or conservation banking, where the lands set aside include mitigation credits for the permitted project along with mitigation credits to be sold for future impacts. Some HCPs have formally established management endowments, as indicated in the table. However, other HCPs may have management and/or restoration actions for which an endowment has not been formally established but there has been a commitment of funds.

Project Name	Total Acres	Mitigation Lands (including mitigation ratio, if appropriate)	Other Considerations
San Bruno Mountain	2,750 acres	90% of mountain conserved	management endowment established
Coachella Valley	70,000 acres	Coordinated management of 3 preserves totaling 16,729 acres	Federal, State, and private sources for land acquisition and funds allotted for management activities.
Delano Prison	635 acres	2:1 land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Lennane Properties	48 acres	3:1 acres for acres developed; 3:1 acres replacement of shrubs with seedlings. Mitigation land owned by County	N/A

Project Name	Total Acres	Mitigation Lands (including mitigation ratio, if appropriate)	Other Considerations
City of Marysville	27 acres	3:1 replacement of shrubs with seedlings on City-owned lands	N/A
Coalinga Cogeneration	6.5 acres	3:1 for permanent impacts, 1.1:1 for temporary impacts of off-site acquisition	N/A
Corona Development	715 acres	1:1 basis for acquisition fee	land acquisition under the Riverside County SKR HCP.
Citation Builders	22 acres	1:1 basis for acquisition fee	land acquisition under Riverside County SKR HCP.
EnviroCycle, Inc.	20 acres	60 acres are dedicated for this HCP through a conservation bank (3:1)	N/A
Yucca Valley Church Sites	5 acres	5 acres acquired (1:1)	N/A
Coyote Hills East (UnoCal)	45 acres	64 acres acquired (2.7:1)	management endowment established
Granite Construction	54 acres	162 acres (3:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Pacific Gateway Homes	27 acres	27 acres (1:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	N/A
Sunland Communities Inc.	160 acres	320 acres (2:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Champagne Shores	82 acres	75 acres (3:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Metropolitan Bakersfield	262,000 acres	1:1 for open land, 3:1 for natural land	development fee paid as areas are developed

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Project Name	Total Acres	Mitigation Lands (including mitigation ratio, if appropriate)	Other Considerations
Seascape Uplands	192 acres	147 acres (3.3:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Raley's Landing	13.7 acres	Planting area of 3,600 square feet (roughly 0.08 acres) plus purchase of two credits from a mitigation bank (4:1)	N/A
Kern County Sanitary Landfill	1500 acres	755 acres (3:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	per acre fee for management endowment and enhancement
Kern Water Bank	19,900 acres	3:1 for permanent impacts; 1:1 for temporary impacts	management endowment established
John Laing Homes, Cantara Completion	44 acres	Roughly 4 to 10 acres (1:1 for impacts)	N/A
Natomas	53,342 acres	HCP assumes 12,000 acres of development which would generate 6,000 acre preserve (0.5:1 mitigation ratio)	Development fee paid as areas are developed
Wildwash Mine, E.L. Yeager Construction	35	35 acres acquisition to transfer to BLM (1:1)	N/A
Meadowlark Estates, Sun Cal Co.	125	Off-site acquisition 16.35, on-site restoration 11.9 acres (2.3:1), On-site avoidance of 85 acres	N/A
Western Pacific Housing, Lamco Housing, Inc.	4.2	4.2 acres acquisition (1:1) within an approved mitigation bank	N/A
Correction Corporation of America	105	105 acres acquisition to transfer to BLM (1:1)	N/A

Project Name	Total Acres	Mitigation Lands (including mitigation ratio, if appropriate)	Other Considerations
John Laing Properties, Inc.	30 acres	10 acres (1:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	land acquisition under Riverside County SKR HCP
Fieldstone	1918 acres	942 acres (0.75:1 plus restoration) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	fund established for research and regional HCP planning
City of Waterford	5 acres	3.9 acres (3:1 for acres developed; 6:1 replacement of shrubs with seedlings)	N/A
Clark County Long-Term Permit	525,000 acres	85,000 acres conveyed from Boulder City to BLM	development fee paid as areas are developed
Colton Transmission Line	8 acres	7.5 acres (1.6:1)	management endowment established
Lake Mathews	5,110 acres	1:1 for general habitat values; endangered species requirements on case-by-case basis (e.g. gnatcatchers are 2.5:1).	management endowment established
San Diego Gas & Electric	estimated at about 100 acres	240 credit conservation bank to start, dedication of rights-of-way (2 credits:1 acre for permanent impacts; 1:1 for temporary impacts)	HCP covers entire utility right-of-ways and other lands.
Cushenbury Sand & Gravel	200 acres	123 acre fee title transfer (1:1)	management endowment established
Chevron Pipeline	25.5 acres	28 acres (1.1:1 for temporary impacts)	per acre fee for management endowment and enhancement
ARCO Western Energy	120,320 acres	6,059 acres (3:1 for permanent impacts; 1:1 for temporary impacts)	management endowment established
North of Playa Shopping Center, D.B.O. Development Co.	33 acres	5 acres (0.6:1 plus restoration)	N/A

Project Name	Total Acres	Mitigation Lands (including mitigation ratio, if appropriate)	Other Considerations
Riverside County Long-Term Permit	540,000 acres	12,500 acres non-Federal land; 2,500 BLM lands (1:1)	Federal and non-federal contributions to land acquisition and management
Orange Co. Central Coast Multi-species (NCCP) Plan	208,000 acres	37,378 acres (4.7:1 overall, including lands previously set aside but will be managed under Central/Coastal NCCP)	Federal and non-federal contributions to land acquisition and management
City of Poway	25,000 acres	10,800 acres (3.7:1 overall, including lands previously set aside but will be managed under Poway NCCP)	N/A
P.G.& E. Power Plant	5 acres	10 acres (2:1) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Shell Oil	3216 acres	1,361 acres (5.4:1 overall) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	N/A
Ocean Trails	261 acres	207 acres (2.8:1 overall) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established
Teichert	497 acres	192 acres (3:1 for permanent impacts, 1.1:1 for temporary impacts)	management endowment established
Multi-species Conservation (NCCP) Plan - SW San Diego County	582,243 acres	City + County = 153,280 acres Federal + State = 13,500 acres (ratios range from 1:1 to 3:1 depending on rarity of resource)	State, Federal, and non-Federal contributions to land acquisition and management
Quail Hollow Quarry	32 acres	11 acres (0.6:1 plus restoration) land acquisition or other means of preservation, such as conservation easement or on-site avoidance	management endowment established

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

February 25, 1999

Mr. Dan Ashe
Assistant Director for Refuges and Wildlife
U.S. Fish and Wildlife Service
1849 C Street, NW
Room 3251
Washington, DC 20240

Dear Mr. Ashe:

Thank you for your testimony at the oversight hearing held February 3 on impacts of the expansion of the Minneapolis-St. Paul Airport on the Minnesota Valley Wildlife Refuge. We have one additional question about this issue for the Fish and Wildlife Service. Please submit your written answer by March 4 to help us address our outstanding concerns:

What is the impact of Section 6 of Public Law 105-57, the "National Wildlife Refuge System Act of 1997" upon the ability of the Fish and Wildlife to regulate airspace over the Minnesota Valley National Wildlife Refuge?

Thank you for your prompt response.

Sincerely,

GEORGE MILLER
Senior Democratic Member

BRUCE VENTO
Member of Congress

JEAN

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

MAR 5 1999

Honorable George Miller
Ranking Minority Member
Committee on Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Miller:

I am pleased to respond to the request from Representative Vento and yourself regarding our authority to regulate airspace over National Wildlife Refuges.

In the years prior to enactment of the National Wildlife Refuge System Improvement Act, there had been a debate regarding the extent to which the Fish and Wildlife Service could regulate airspace over refuges. That debate was resolved within the Administration during the 103rd Congress as a position was developed on one of the forerunner bills to the Improvement Act, S. 823 by Senator Graham. It was then determined as a matter of Administration policy that the Service had no ability to regulate airspace, and that this was entirely within the jurisdiction and control of the Federal Aviation Administration. An interagency working group was also established to address concerns by the Service and National Park Service regarding overflights of refuges and parks.

This policy decision was then codified in the Refuge Improvement Act, making it clear that the Service had no authority to regulate airspace under the compatibility provisions of either that Act or the existing National Wildlife Refuge System Administration Act.

I trust this answers your question, and would be pleased to provide any additional information you might require. This reply is also being provided to Representative Vento.

Sincerely,

Dan Ashe

Dan Ashe
Assistant Director for Refuges and Wildlife

DON YOUNG, CHAIRMAN

U.S. House of Representatives
Committee on Resources
Washington, DC 20515

February 25, 1999

Ms. Lynne Pickard
Manager of Community and Environmental Needs Division
Federal Aviation Administration
800 Independence Ave., SW
Room 622
Washington, D.C. 20591

Dear Ms. Pickard:

Thank you for your testimony at the oversight hearing held February 3 on impacts of the expansion of the Minneapolis-St..Paul Airport on the Minnesota Valley Wildlife Refuge. We have some additional questions about this issue for the FAA. Please submit your written answers by March 4, so that they may be included in the hearing record:

1. Is the Federal Aviation Administration (FAA) responsible for providing the funds to compensate the Fish and Wildlife Service for impacts to the Minnesota Valley National Wildlife Refuge caused by expansion of the airport? If not, who is?

2. Does the use of Passenger Facility Charges (PFC) by the Metropolitan Airports Commission (MAC) to compensate the Minnesota Valley National Wildlife Refuge make this an unconstitutional agreement?

3. Have there been Constitutional or other such challenges to such utilization of PFC for such purposes?

4. How does this mitigation plan satisfy the requirements of Section 4(f) of the 1966 Department of Transportation Act to take all possible steps to mitigate harm?

5. How do Section 4(f) remedies for public lands differ from remedies for private/residential property owners who are affected by federal transportation projects?

Thank you for your prompt response.

Sincerely,

George Miller
GEORGE MILLER
Senior Democratic Member

Bruce Vento
BRUCE VENTO
Member of Congress

U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

March 4, 1999

Congressman George Miller
Senior Democratic Member
Committee on Resources
522 O'Neill Building (House Annex 1)
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Miller:

Thank you for allowing the FAA to submit written answers to additional questions from the February 3, 1999 hearing on the impact of the expansion of the Minneapolis-St. Paul International Airport on the Minnesota Valley National Wildlife Refuge. Our answers are enclosed.

If you have any questions, please contact Victoria Wei of my staff at (202) 267-3217. Thank you.

A duplicate copy of this correspondence has also been sent to Congressman Bruce Vento.

Sincerely,

Mary U. Walsh
Assistant Chief Counsel for Legislation

Encl.

POST-HEARING QUESTIONS FROM THE FEBRUARY 3, 1999 HEARING BEFORE THE HOUSE COMMITTEE ON RESOURCES ON THE IMPACT OF THE EXPANSION OF THE MINNEAPOLIS-ST. PAUL INTERNATIONAL AIRPORT ON THE MINNESOTA VALLEY NATIONAL WILDLIFE REFUGE

1. **Is the Federal Aviation Administration (FAA) responsible for providing the funds to compensate the Fish and Wildlife Service for impacts to the Minnesota Valley National Wildlife Refuge caused by expansion of the airport? If not, who is?**

   The FAA is not responsible for providing the funds. There will be no Federal funds used for the compensation because, unless specifically permitted by law, the funds of one Federal agency (i.e., FAA's Airport Improvement Program funds) may not be used to augment amounts appropriated by Congress for another Federal agency (in this case, U.S. Fish and Wildlife Service). The Metropolitan Airports Commission, which is the airport proprietor, is responsible for funding the compensation.

2. **Does the use of Passenger Facility Charges (PFC) by the Metropolitan Airports Commission (MAC) to compensate the Minnesota Valley National Wildlife Refuge make this an unconstitutional agreement?**

   No. Funds derived from Passenger Facility Charges (PFC) are not Federal funds. The PFC program is a Federally-regulated, but locally-imposed and collected passenger fee program. Air carriers collect and remit the fees directly to an eligible public agency authorized by the FAA in accordance with statutory (49 U.S.C. § 40117) and regulatory (14 C.F.R. Part 158) requirements to impose a PFC at a commercial service airport. The Federal government neither collects nor distributes these funds. PFC funds are not appropriated by Congress and are not included in the budget of the United States. PFC funds are not an unconstitutional tax, and the use of PFC funds to compensate the Refuge does not render this an unconstitutional agreement.

3. **Have there been Constitutional or other such challenges to such utilization of PFC for such purposes?**

   No, there have been no Constitutional or other such challenges to such utilization of PFC funds for such purposes. In fact, there is precedent for an airport proprietor's use of PFC funds to compensate a Federal agency for losses incurred due to airport development. In 1995, the Phoenix airport proprietor was authorized to use PFCs to buy out the lease of the Air National Guard in order to build a new runway.

4. **How does this mitigation plan satisfy the requirements of Section 4(f) of the 1966 Department of Transportation Act to take all possible steps to mitigate harm?**

   In this case, it is not possible to mitigate harm on site to the portion of the Minnesota Valley National Wildlife Refuge nearest the airport that will receive noise increases from the new runway. Alternative flight procedures to reduce noise impacts over the Refuge were examined and rejected as not feasible and prudent. Soundproofing structures obviously will not mitigate noise on the outdoor educational and recreational components of the Refuge. The only solution is to replace Refuge land and facilities at another location. The compensation to provide replacement land of habitat quality equal to that impacted by the airport project and to provide for the construction of ponds, hiking trails, and other improvements to replace comparable Refuge components means there will be no net loss to the Minnesota Valley National Wildlife Refuge as a whole.

5. **How do Section 4(f) remedies for public lands differ from remedies for private/residential property owners affected by federal transportation projects?**

   The substantive mitigation standard in Section 4(f), i.e., that the transportation project include all possible planning to minimize harm, is similar to a standard in legislation governing FAA's Airport Improvement Program. In order to approve Airport Improvement Program funding of a new airport, a new runway, or a major runway extension that has significant adverse environmental impacts, FAA must determine that all reasonable steps have been taken to minimize adverse effects.

   The remedies are similar. Homes may be acquired and people relocated because of airport expansion. Avigation easements may be acquired addressing the height of structures, noise, and right of flight over either private or public property. Compensation offered to private/residential property owners, as well as to public entities, for land acquired in fee or easement must be based on appraisals of fair market value. The soundproofing of structures is a mitigation option available for private/residential property, but is usually not practical for parks where the outdoor environment is primary.

   As a practical matter, airport expansion affects many more private/residential properties than it does parks simply because of the respective locations of such properties adjacent to airports. Accordingly, airport proprietors spend many more dollars on remedies for private/residential property than they do for parks. For example, between 1992 and 1996, the Metropolitan Airports Commission (MAC) spent $76.6 million on residential sound insulation around the Minneapolis Airport. In 1996, the Minnesota State Legislature directed MAC to spend $185 million on community noise mitigation and property acquisition between 1996 and 2002. In all,

MAC will have spent over $250 million in private/residential remedies as compared to approximately $20 million for the compensation package for the Refuge.