America's Working Lands: Updating the Endangered Species Act to Ensure Successful Species Recovery and a Productive Future.

SUMMARY RECOMMENDATIONS AS RELATED TO THE ACT AND ITS IMPLEMETATION:

I. SECTION 2. §16 U.S.C. 1531 FINDINGS, PURPOSES, AND POLICY

Key Points:

- **The Findings which created the basis for the Act are outdated and do not reflect the elevated attention we have for our environment today. The Act should be amended in this and all other Sections to reflect this progress.**
- **Many of the Findings were based upon incomplete species data at the time.**
- **The system of incentives referred to in Section 2 is only reflected in the Act through programs that prevent punitive actions. This language should include programs that include <u>rewards</u> and incentives.**
- **The language in Section 2 of the Act is too broad in focus in stating the goals and too narrow in focus to accomplish the goals.**
- **Too little emphasis is placed on cooperating with state and local agencies early in the listing process for issues related to all types of resources.**

In Reference to Section 2 (a)(1) – Findings: In the original findings of the Endangered Species Act (the Act), it is written that Congress *finds and declares various species of fish, and wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.* The ESA continues to be implemented according to this finding which has remained un-amended in 40 years. In roughly the same time period Congress also passed and amended numerous other environmental regulatory acts such as: the Clean Air Act, Clean Water Act, Federal Land Policy and Management Act, Fisheries Conservation and Management Act, Marine Mammal Protection Act, and National Environmental Policy Act. All of these Acts have resulted in regulatory mechanisms that control the actions of the Federal Government as well as state/local governments, and private citizens. All require immensely more concern taken prior to action than existed in 1973 at the passage of the ESA. All have resulted in considerable impacts to economic growth and development, changing the way that citizens and government within the United States care for the environment.

In Reference to Section 2 (a)(2) - At the time of the 1973 finding an assumption was made as to the overall depletion of species numbers and such assumptions continue today. Many listings are made with little quantitative data to substantiate the finding or provide a baseline number from which to set recovery goals.

In Reference to Section 2 (a)(5) - The original findings do not adequately address all parties involved and its reference to a system of incentives does not adequately address the need for a system of rewards and incentives as being the key to safeguarding the Nation's heritage in fish, wildlife, and plants.

> *…encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.*

These concerns will be addressed more thoroughly in comments directed specifically towards Section 10 of the ESA later in this document.

In Reference to Section 2 (b) - The purpose of the Act as originally written refers to "a means" and "a program" to provide for the "conservation" of threatened and endangered species.

> *The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species….*

This language is extremely limiting in scope and sets a tone for species and habitat management which is inflexible and non-adaptive to changing environmental and social conditions, while at the same time the term "conservation" is too broad of a term for use in the Act as a basis for "a means" and "a program" to meet the intent of the Act itself. The use of the term "conservation" makes the Act far more regulatory and all inclusive of the actions of everyday life which are needed to maintain local economies and the country's sustainability. The standard of "conservation" is not a measurable goal. If the intent of the Act is to prevent extinction, it should therefore result in the creation of *means and programs* that ensure *survival* of the species. To meet the standard of species survival would result in a more focused, cost effective and efficient implementation of the Act than is currently happening. This would result in better scientific review of actual species endangerment and critical habitat requirements.

In the original policy of this section too little emphasis was placed on cooperating with state and local agencies at the start of the listing process to ensure that a complete picture of the current status of the species and its habitat are taken into consideration. In this portion of Section 2 it only refers to cooperation as related to water resource issues and no other natural resource issues. Incorporating local planning knowledge and expertise into the listing and recovery process is the key to the survival of a species and its habitats.

Without this broad coordination early in the process there is insufficient scientific evidence for making informed decisions and little buy in of state and local governments as well as private landowners all of which are vital to recovery. The Act may be National and global in scope but it is local in its effects.

II. SECTION 3. §16 U.S.C. 1532. DEFINITIONS

Key Points:

- **Ambiguity in the language and intent of the Act has caused inefficiencies in its implementation and resulted in endless litigation. Amending the Act to clearly define key terms will assist the Secretaries of the Interior and Commerce (herein referred to as the Secretary) in making more succinct decisions in a timely manner and ensure a focus on species protection for those species that are proven to be in actual danger of extinction.**

There are several definitions within the Act that can be interpreted in various ways, leading to excess litigation over semantics. There are also several terms used in the Act that need to be added to the definitions section. The interpretation of the following terms is of utmost importance in creating the rules and regulations for the implementation of the Act. The following terms are at least a partial list of those that should be defined in Section 3:

Conservation vs. Survival: The term *conservation* is used throughout the Act and yet is not specifically defined. The use of this term is misleading as to the intent of the Act as well as its implementation. The term *conservation* as written into the Act results in implementation measures that over -regulate even the most benign actions that occur within the habitats of listed species. At times actions that would be beneficial to the species are stymied because of the ambiguity of the term conservation. Only actions proven to have an effect of which will impede the actual *survival* of a species should be addressed through the rules and regulations of implementation. The term *conservation* is too general and should be replaced with the word *survival* wherever appropriate in the Act.

Critical Habitat: The definition of *critical habitat* should be more specifically detailed to include those physical and biological features essential, meaning indispensable, to the *survival* of the species. This is more in line with the intent of the Act to prevent the threat of and/or definite extinction of fish, wildlife, and plant species that are proven to be in a severe pattern of decline. In reference to critical habitat it is stated in the Act, *"Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."* This creates a situation where decisions about the area of designation for critical habitat

are subject to the political whims of the Secretary of Interior, and not according to the best available science. The economic impact of designating areas of critical habitat in any area where a species can exist and may not have been historically or even presently is an undue burden on communities, public lands and private property owners to maintain habitat that is not occupied by the species.

Significant Portion of its Range: The term *significant portion of its range* is not defined independently in the Act, but used in defining species status. The term *significant* should be applied as either 1) in reference to a majority of, or 2) if used as an independent inquiry for determining endangerment, be narrowly focused to areas presently occupied by the species and having the physical and biological attributes integral to the life cycle of the species, and therefore having a unique and irreplaceable relationship with the ability of the species to survive. When used as an independent inquiry as a basis for listing, the designation must solely apply to that portion of the range.

Essential : The term essential is not defined in the Act and as used in the definition of critical habitat should be defined as indispensable, necessary and of utmost importance.

Harm: The term *harm* is not defined independently in the Act, but is used in defining *take*. It's meaning is reflected in regulation which does not accurately implement the intent of the Act. *Harm* should be specific to actions that cause the death of or physical injury to an "individual(s)" listed species, and/or habitat currently occupied by an "individual(s)" listed species. The current meaning of harm as defined in existing regulation encourages habitat destruction pre-listing to prevent anticipated land use restrictions, even when an "individual(s)" is not occupying the habitat.

Limiting Factor: A factor of population limitation identified and verified by the use of the best scientific and commercial data available.

Destruction or Adverse Modification: A direct or indirect harmful change that measurably diminishes or destroys the ability of critical habitat to provide for both the survival and recovery of a listed species based solely on analysis of the best scientific data available.

Occupied Habitat: The specific area(s) resided in by a species, at the time of its listing, on which are found those physical or biological features (1) essential to the survival of the species and (2) which may require special management as determined by analysis of solely the best scientific data available.

Recovery: Improvement in the status of a listed species to the point at which listing is no longer necessary based solely on analysis of the best scientific data available.

Substantial: More than a scintilla, but less than a preponderance.

Survival: The continued existence of a threatened or endangered species.

Supporting Documentation: The full text, images, tables, charts, graphs, and all other materials included in any and all studies, papers, and any other documentation presented as evidence supporting the listing of a species, and shall also include the full text, images, tables, charts, graphs and all other materials included in any study or evidence cited within those materials.

Species: The current definition of species allows for the enforcement of the Act for hybrids and should be clarified to include only taxonomic units defined by the highest recognized scientific authority for the class.

III. SECTION 4. §16 U.S.C. 1532. DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

Key Points:

- **Public comment is invited too late in the process. The petition period is critical for determining the merits of initiating the process. The information and data base for which the process is built should be more thorough.**
- **The language for the five statutory factors for listing is overly inclusive.**
- **Only negative findings are judicially reviewable. This creates an incentive to reach a false positive finding to avoid litigation. Positive and negative findings should both be reviewable. The current system violates the public right to equal protection under the law because only negative findings are currently judicially reviewable.**
- **The timelines for Service review and public comment should be extended to better reflect a more realistic time period for review of scientific and commercial data submitted and decrease litigious actions based on process.**
- **Transparency and notification of the listing process is very limited and needs to be improved.**
- **Adequate review can only realistically be achieved with parameters put into place that limit the number of species that may be petitioned at one time by the same petitioner. This would encourage petitions that focus on species with the greatest need.**
- **Any exemption rule promulgated under Section 4 (d) of the Act should also be applicable to species listed as endangered.**
- **Quantitative information to create baseline population data is profoundly lacking in the process.**

- **The Act over reaches its intent with the extension of protection for species which are similar in appearance, and becomes limitless with its allowance for the Secretary to continue monitoring activities for de-listed species.**

Section 4 mainly determines why a species is qualified for listing and how that will be done. It also provides guidance for the designation of critical habitat and the creation of recovery plans.

It is unrealistic to assume that an informed decision that will permanently impact a species, its environment, associated species, and the human environment can be made in 90 days using only information that is currently *available* to the Secretary and may be outdated, insufficient, or totally lacking in verifiable and repeatable information. All 90 day timelines for Service review should be extended to at least 180 days. Whenever there is substantial scientific disagreement regarding the sufficiency or accuracy of the available data relevant to a determination or revision by the Secretary, the Secretary should always extend the review period of a proposed rule or listing determination.

The term *substantial* used throughout this section is insufficient in describing the quality and quantity of data required to determine a positive or negative finding for listing or critical habitat. All references to the data gathered during the listing process should be specific to *the best scientific and commercial data available*, as required by both the Endangered Species Act and the Data Quality Act, and that information should provide a preponderance of scientific data that supports the finding. Even the use of the word *best* is insufficient in determining whether the data is verifiable, reliable, conclusive, or adequate. Too often necessary quantitative data is substantially lacking in determinations and/or findings made by the Secretary, and in many instances what passes for data is speculation at best. This has resulted in inefficiencies in implementation of the Act, inaccuracies in making determinations, and failure in achieving successful protections for species.

When the Act was originally passed the internet and other information technology that is widely used today did not exist. This technology makes transparency of the process easily attainable. Currently there are regulations restricting a multitude of activities which are the result of the findings of the U.S. Fish and Wildlife Service and National Marine Fisheries Service (herein referred to as "the Services"). Often these findings are based upon scientific information that is difficult and in many cases impossible for the impacted public to access, with the added hurdle of limited comment periods. In general, a requirement that all supporting documentation should be readily available to the public digitally on the Services' website at the time it is referenced in the Federal Register should be included throughout the Act.

All *Notices of Intent to Sue* the Secretary and supporting documentation should be published in the Federal Register and on the website of the Regional Service office.

In Reference to Section 4(a) - Five Statutory Factors for Listing: When a species is considered for listing the Services consider whether the species or its habitat meet *any* one of five statutory factors. Included in the five factors are the *modification of its habitat, inadequacy of existing regulatory mechanisms, or other natural or manmade factors affecting its continued existence.* Given that the determination for a species listing is based upon these five factors and that a species listing has permanent and lasting effects, the determination should be based upon a combination of at least three of the five factors so that the determination is accurate and thorough. The modification of a species' habitat will not necessarily have any effect on a species or the habitat. Actions that modify habitat can be beneficial for the species under consideration or for another species which shares the same habitat. Including the term modification in the five listing factors encourages single species management and establishes a very low bar to meet for the listing of a species. There is no requirement to determine the specific effects of the modification, just that the modification exists. For the Act to say there is an inadequacy of existing regulatory mechanisms ignores the fact that the Act is in itself a regulatory mechanism. The Services have, as standard practice, ignored all highly protective existing land use regulations within the species range such as the blanket prohibitions against mining, commercial development, roads and/or grazing that are prevalent in National Monuments, National Wilderness areas, National or State Parks, National Forests, National Conservation Areas, etc. Furthermore, when a listing rule is promulgated it is inherently assumed that a new regulation is necessary, even in the instance when the listing states that scientific knowledge is lacking for a species. This assumption precludes adequate review and analysis of existing regulatory mechanisms. Other factors including but not limited to predation and hybridization, which occur naturally and affect the continued existence of a species, are vital to the evolutionary process of a species and its environment. The regulatory actions of man intended to ensure the survival of a species contrary to the natural progression of that survival is irrational. Therefore, only those detrimental effects that are scientifically proven to be solely "man-caused" and threaten the survival of the species should be included in the listing decision. A primary example of human tinkering with natural progression is the new rule requiring the mandatory killing of barred owls to stop their hybridization with spotted owls, which in a natural environment would create "sparred owls."

In Reference to Section 4(b) (2) - Critical Habitat Consideration of Impacts: According to the Act, *the Secretary shall designate critical habitat after taking into consideration the economic impact and any other relevant impact of specifying any particular area as critical habitat.*

The Secretary should propose a rule designating critical habitat only after taking into consideration the economic impact and any other relevant impact of specifying any area of critical habitat.

Other relevant impacts must include: national security, border security, the local, regional, and national economy, state and local agency management plans, as well as plans for the management and survival of other species.

In Reference to Section 4 (b)(3)(A) – Critical Habitat Petitions, Petitions for Listings, Review and Findings: The Services should be allowed 180 days to review any petition to revise a critical habitat designation. The petition should be published in the Federal Register upon receipt by the Secretary. All supporting documentation should be made available to the public via the Services' website at the time of such publication. Following publication in the Federal Register, the Services should hold a public hearing and allow a 90 day public comment period inviting new scientific and commercial data regarding the species and its habitat to augment the decision-making process.

In 1982 Congress amended the Act to require that the Services only have 90 days to determine whether a petition for listing contained *substantial* information to initiate a more rigorous process for a listing determination. The amendment was made in order to address a backlog of petitions that had not been processed up to that point. Unfortunately, this amendment has led to a frenzy of litigation based largely upon the Services not meeting the 90 day timeline rather than disagreements as to substance in meeting the standard of providing *substantial* information required to engage the Services in further analysis. Given that the entire process rests heavily on this initial 90 day finding, and the information contained in the petition provides the basis for the continuation of the listing process, the amount of time allowed the Services for processing this petition should be extended to 180 days. The extension would still meet the intent of the 1982 amendment, while allowing for a more thorough review of the data submitted in the petition to ensure that it is in fact substantial.

Too low a standard of measure for a finding that substantial information exists has evolved because the Services can be and are often litigated for exceeding the 90 day timeline, yet cannot be litigated for any positive finding no matter how flawed. Currently, the information supplied in a petition can be later renounced by the Services during the 12 month finding period if it is discovered after further analysis that the information was faulty. When this occurs, an automatic trigger should be enforced that renders the 90 day finding null and void and closes further analysis of the petitioned listing until such a time when a valid petition is presented to the Secretary for that species and the process begins again.

Currently there are no limits to the number of species that may be petitioned during the same time period. This has enabled a litigious environment whereby habitual litigants deliberately overwhelm the resources of the Services. To ensure that species listing and de-listing receives a proper and thorough review, there should be a maximum limit of one species per petitioner, or any entity with which the petitioner is associated, in a 180 day period during which time no new petitions can be accepted for listing. This would drastically reduce warranted but precluded findings because adding these parameters would encourage petitioners to focus on those species which are in greater need of analysis.

There is too little transparency during this initial petitioning process. All petitions received by the Services should be addressed in the order in which they are received. A notice should be published in the Federal Register with the announcement of a public hearing and 60 day comment period opened for the public to provide any new information available regarding the species. The petition should be published in the Federal Register upon the Service receiving the petition. The Services should also be held responsible for posting the content of the petition and all supporting documentation on the Services' website at the time of publication in the Federal Register.

Within 180 days of publication of the petition in the Federal Register, the Secretary would then make a preliminary finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action requires further review. At this point there should be another opportunity for public comment and an opportunity to present any new information to the Services before that finding is made final.

As the Act exists today, only a negative finding is judicially reviewable. This fundamental flaw in the Act violates equal protection. This both encourages and enables the Services to default, in the absence of accountability, to a positive finding even if the best scientific and commercial data available is neither adequate nor substantial. All petition findings therefore should be subject to judicial review to ensure that the purpose of the Act is met.

In Reference to Section 4(5) - Notification: All proposed rules, findings, and designations including the complete text thereof and all supporting documentation should be provided to the State agencies that are responsible for the conservation of wildlife, water, and other natural resources in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur. Concurrently the Services should open a comment period of no less than 90 days to invite the comment of such agencies, and each such jurisdiction. Notice should be given to all professional and scientific organizations on record with the agency as interested parties. A summary of the proposed rule or any extension of comment period should be provided to all relevant and local area news media outlets in the area affected by the action. Public

hearings should be held in each of the affected areas within 45 days of the opening of the comment period.

The publication in the Federal Register of any proposed or final rule should include a summary by the Secretary of the *scientific* data on which the regulation is based. If the regulation designates or revises critical habitat the summary should always include a brief description and evaluation of those activities which when undertaken may adversely modify such habitat, or may be affected by such designation. All supporting documentation should be available in full on the Services' website. This would allow the public to have access to the scientific documents justifying a proposed rule and a more complete understanding of the effects that the final regulation or designation will have on likely activities and allow the public a more educated and informed basis for submitting substantive comments.

In Reference to Section 4(c) - List Review: Currently the Act requires a review of listed species only once every five years. It fails to specify the requirements of this review, thereby allowing the Secretary too much discretion as to how involved the review should be. The Secretary is not currently required to publish the results of such reviews in the Federal Register. Every review for all listed species should be published in the Federal Register and simultaneously all supporting documentation of that review should be made available to the public in its entirety on the Services' website.

In Reference to Section 4(d) - Protective Regulations: Under Section 4(d) of the Act, rules can be promulgated that exempt incidental take of a threatened species from the Section 9 regulations when the take results from activities included in the rule and occurs on private, State, or Tribal lands. These rules apply only to species that are listed as threatened. Once a species has been up listed to Endangered the rule no longer applies.

The creation of such a rule is intended to avoid the need to obtain Section 10 take permits for actions that are not likely to further the endangerment of a species but that may result in a take inadvertently, are routine to the area and/or such activities may actually benefit the survival of the species long-term. Voiding the rule when a species is up-listed to Endangered creates a strong disincentive to establish the agreement for the rule initially. Such rules actually reflect an attempt at implementing the Act effectively and should apply to all listings.

In Reference to Section 4(e) - Similarity of Appearances Cases: This section should be completely eliminated from the Act as it provides protection to species that are not threatened or endangered and have not gone through the process of review or public comment. Enforcement of the Act in cases where a species similar in appearance has been "taken" can be accomplished with the use of newer technology and science than existed at the time the Act was originally passed.

In Reference to Section 4(f) - Recovery Plans: Incorporated into each plan should be scientifically verified population figures, limiting factors data, and specific delisting criteria which when met automatically triggers a species review regardless of the five year review period in place. Plans are currently written in a manner making it difficult to quantify recovery progress because the investigative process prior to listing provided insufficient baseline data to establish a recovery goal or to monitor trends. The appointed members of recovery teams should be subject to the Federal Advisory Committee Act (FACA). Currently they are not.

In Reference to Section 4(g) -Monitoring: Once a species is recovered and de-listed, it no longer receives the protections of a listed species. Therefore, the Secretary should have no further jurisdictional authority over that species as it relates to the ESA.

***In Reference to Section 7 (a)(2) - Federal Agency Actions:** Within Section 7 of the Act is the requirement, when appropriate, of consultation with the States for the determination of critical habitat. This language should be in Section 4 and should include local agencies of government as well. This consultation should always be appropriate. Local agencies and local governments are the most knowledgeable of the natural resources in that area.

IV. SECTION 5. §16 U.S.C. 1534. LAND ACQUISITION

Key Points:

- **Any acquisition of real property must be in cooperation with the states.**
- **Payments to landowners should compensate for the loss of income due to restrictions of resource use or loss of land value as a result of the Act.**
- **Landowners should be compensated for the propagation/proliferation of a protected species.**

In Reference to Section 5 (a) and (b) – Implementation of Conservation Program; Authorization of Secretary and Secretary of Agriculture: Any land acquisition program implemented for the furtherance of the Act should be carried out in active cooperation with the respective states in order to consider the effects federal ownership will have on the tax base for the state and its ability to manage soil, water, and other natural resources. Unlike in the existing language, the Act should be very specific in allowing this through purchase, donation, or exchange.

The Secretary is permitted to acquire lands for the purposes of the Act through the Land and Water Conservation Fund. The Secretary should determine annually whether those

funds used for property acquisition can be more effectively allocated to provide incentives for property owners to enhance the survival of endangered and threatened species.

Currently the ESA allows the federal government to take, by regulation, uses of private property having a listed species or critical habitat. This is done without compensating the owners for the "taking" of their property as required by the Fifth Amendment of the U.S. Constitution. This section should address the duty of the Secretary to make payments to private land owners for any losses suffered when land use restrictions diminish the value of that land and impose significant economic constraints.

Financial incentives to landowners for the propagation and proliferation of protected species should be permitted in this section.

V. SECTION 6. §16 U.S.C. 1535 COOPERATION WITH THE STATES

Key Points:

- **Failure to de-list species can be partly attributed to the lack of active and meaningful cooperation of the Secretary with local governments and state agencies.**
- **Cooperative Agreements should apply to programs of the State and local governments that work toward ensuring survival of the species.**
- **Significant portions of the Act are outdated and refer to timelines that have long since passed.**

In Reference to Section 6 (a) – Cooperation with State Agencies: The survival of threatened and endangered species is dependent upon the involvement of local agencies and other local entities of government as well as the State. The Act recognizes the importance of cooperation with the States, but neglects to recognize the importance of the involvement and cooperation with local governments and agencies. All references to cooperation within the Act should include the same activity with local governments and agencies.

In Reference to Section 6(c) – Cooperative Agreements: This section of the Act authorizes the Secretary to enter into cooperative agreements with States to establish programs for the conservation of threatened and endangered species. Those agreements should be extended to local governments and local agencies. The focus of those programs should be the survival of the species in contrast to the current language, which states that the programs will further the conservation of the species. The use of the term *conservation*

is too broad of a term to describe actions and programs included within this section and should be amended to reflect the intent of securing the survival of listed species.

Land acquisition, and annual *payments in lieu of taxes* for all such lands acquired, should be paid for from monies budgeted annually for implementation of the Act.

In Reference to Section 6(g) – Transition: This entire section should be eliminated, as it refers to a transition period that expired within a year of the Act being passed.

VI. SECTION 7. §16 U.S.C. 1536 INTERAGENCY COOPERATION

Key Points:

- **Agency adherence to the Act should be based upon the best scientific and commercial data available and should be stated as so in this section.**
- **The terms "destruction" and "adverse modification" should be defined in the Act.**
- **Consultation should not be a requirement for species proposed for listing.**
- **The requirement for consultation should not apply to proposed critical habitat.**
- **Biological assessments should be completed in 180 days without extension.**
- **The limitation on the commitment of *resources* during the consultation process should be specific to *natural resources*.**
- **The Endangered Species Committee should be more inclusive of Commerce, Homeland Security, the States, and local governments.**

In Reference to Section 7 (a)(1) and (b)(3)(a) – Federal Agency Actions and Consultations and Opinion of the Secretary: All references to the data gathered during the consultation process should be specific to *the best scientific and commercial data available* and that information should provide a preponderance of data that supports the determination of the consultation. Even the use of the word *best* is not sufficient in determining whether the data is verifiable, reliable, conclusive, or adequate. Often there is a substantial lack of or total lack of quantitative data used in determinations/findings made by the Secretary and in many instances this data is speculative at best. This has resulted in inefficiencies in implementing the Act, inaccuracies in making determinations, and failure in achieving successful protections for species.

In Reference to Section 7(a)(2)- Federal Agency Actions and Consultations and Opinion of the Secretary: : As written in the Act the agency is to *insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued*

existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. It is important that consultation with the Secretary result in the timely determination of the agency whether or not such actions will result in *destruction or adverse modification of habitat* and that can be determined as substantial to the point of jeopardizing the continued existence of the species. The phrase *destruction or adverse modification of habitat* is not defined in the Act and leaves too much to interpretation of the Secretary and other Federal agencies. It may be very likely that a lawful and commonplace activity taking place within critical habitat for a listed species will in some way modify the habitat of the species or even cause destruction of some portion of existing habitat. That alone does not mean that the continued existence of the species is jeopardized if that portion of the habitat were altered. As written in the Act, without definition, the measure of the effects of such alteration are subjective to both the Secretary and the Courts if litigation were pursued ,as it often is, for commonplace activities within critical habitat.

Also within this section of the Act is the requirement, when appropriate, of consultation with the States for the determination of critical habitat. This language should be in Section 4 and should include local government as well, given the intimate knowledge of the natural resources at the local level. The "when appropriate" language should be eliminated in favor of consulting with State and local government in all circumstances.

In Reference to Section 7(a)(4) - Federal Agency Actions and Consultations and Opinion of the Secretary: Consultation should be required for only those species that are listed as threatened or endangered, and apply to agency actions that are likely to jeopardize the continued existence of candidate species which are warranted for listing but precluded. To apply protections such as agency consultation to species that are proposed for listing is pre-decisional and affords the legal protection of the Act to species that have not yet been determined to meet the requirements for listing. As is the same argument for eliminating the language in this same section that affords protections for proposed critical habitat. The current consultation requirement for actions that will take place within proposed critical habitat encourages pre-emptive overregulation of resources that have not yet been determined as vital for the existence of the species. Incentives should be developed to manage such habitat in ways that benefit said species.

In Reference to Section 7(b)(B) – Opinion of Secretary: Consultation with the Secretary for applications involving permitted or licensed activities needs to be more timely. The complicated and ambiguous language of this section and extension of consultation periods results in uncertainty in the marketplace, and instability of production agriculture – which is a permitted and beneficial use of public lands and maintains open space on associated private lands while providing economic sustainability of rural communities.

In Reference to Section 7(b)(4)(C)(iv) – Opinion of the Secretary: It is important to qualify "terms and conditions" in the Act as being those that are *reasonable and prudent to achieve the minimum protection necessary to avoid species extinction. These terms and conditions may be subject to review and concurrence by other technical and professional personnel associated with individual projects.* Very often biological opinions include terms and conditions that are unreasonable, unrelated to species recovery or protection, and reflect the opinion of one biologist employed by the Services that may or may not be able to provide an objective view point. These terms and conditions are made with little consideration of the economic and social impact of imposing such measures and often include monitoring requirements for agencies that do not have the budget to implement such monitoring and are then litigated for not following through on all of the terms and conditions. This process as is, without any outside oversight, is susceptible for abuse of an extortive nature towards applicants with deep pockets and totally debilitating for applicants such as grazing permittees who do not have the resources to implement nonsensical terms and conditions.

In Reference to Section 7(C) – Biological Assessment: It is commonplace within Federal agencies to move very slowly with biological assessments for reasons of budget constraints and personnel issues. Those factors are not the fault of the applicant to the agency. Consistency in the procedures of consultation with the Secretary needs to be uniform throughout all Federal agencies regardless of individual viewpoints within the agency and budget constraints of the agencies. The Biological Assessment is critical to the consultation process and therefore should be timely and include the use of the best scientific and commercial data available. The time permitted in the Act of 180 days is ample time to provide this initial information to the Secretary for further consultation and review. Habitual extensions for these assessments unnecessarily delay progress to the detriment of the project applicant.

In Reference to Section 7(d) – Limitation on Commitment of Resources: In many instances the applicant must expend a substantial amount of financial and planning resources in order to enter into the consultation process to provide a clear plan or project design of activity to the agency. The limitation on the commitment of resources during the consultation process should be specific to *natural* resources. The funding cycles of federal programs that cost share voluntary landowner conservation activities are very difficult to coordinate due to the interpretation of this provision to include financial and personnel resources.

In Reference to Section 7 (e) and (g) and (k)- The Endangered Species Committee, Committee Actions and Reports, and Major Federal Actions for the Purposes of NEPA: In an amendment to the Act in 1978 Congress created The Endangered Species Committee to grant exemptions for federal actions halted by the Act if the economic benefit for those

projects outweighed the benefits for protection of the species. Even though engagement of the Committee in the past for exemptions has been very limited, the usefulness of the Committee should extend to matters of human health and safety.

The Committee should include representation from the Department of Commerce, Homeland Security, and standard representation by the Governor's office of the affected state(s). Local government representation should be present by appointment of the Governor and quorum of the committee should exist with the presence of two-thirds of the Committee to include at least two members from each state. A more appropriate Chairperson for the Committee would be the Secretary of Commerce given that the Department of Interior must bring the issue before the Committee for review.

Meeting records, notifications, and determinations for exemptions should be timely, readily available and directed to the State. National Security exemptions should include those found necessary by the Secretary of Homeland Security as well as the Secretary of Defense.

Given that there is little time to prepare a NEPA document for exemptions of national security and natural disaster aid, requiring such a document would be counter to the exemption process.

VII. SECTION 8. §16 U.S.C. 1537 INTERNATIONAL COOPERATION

Key Points:

- **All Federal financial commitments should be focused on domestic efforts.**

In Reference to Section 8 (b) and (c) – Encouragement of Foreign Programs and Personnel: The monies accrued by the U.S. Government through the Agricultural Trade Development and Assistance Act of 1954 was intended for food aid to developing countries. Those monies are not intended for financial assistance to foreign countries for the conservation of fish, or wildlife, or plants. This section is questionable for inclusion in the Act given that the U.S. Government has no jurisdiction over enforcement for the protection of Endangered Species on foreign soil, especially when domestic funding efforts are insufficient and too concentrated on litigation response instead of active species management and protection.

If in fact U.S. assistance is necessary for the future existence of a species and the foreign country has insufficient resources available to address this extinction, then any personnel dedicated by the Secretary to efforts in foreign countries should be restricted to efforts to ensure the survival of threatened and/or endangered species only. Currently the language within this section is very broad to include the conservation of <u>any</u> fish, wildlife, and plants.

VIII. SECTION 8A. §16 U.S.C. 1537a CONVENTION IMPLEMENTATION

Key Points:

- **Section 8a should be removed entirely from the Act.**

In Reference to Section 8a – Convention Implementation: The U.S. has largely implemented the four provisions of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (WHC) through the passage of the several environmental laws previously cited and implementation of the Endangered Species Act. The treaty itself has a weak structure, is not enforceable as structured, and the focus of WHC is not solely on threatened and endangered species; therefore, this section should be removed from the Act.

IX. SECTION 9. §16 U.S.C. 1538 PROHIBITED ACTS

Key Points:

- **Consideration for some licensed commercial activities dealing in the propagation of species which are listed as threatened or endangered could be a benefit to the species' recovery as a whole.**

In Reference to Section 9(b)(1) - Species Held In Captivity Or Controlled Environment :

Holding of protected fish and wildlife for commercial activity is currently prohibited by the Act, but consideration for some licensed commercial activities dealing in the propagation of species which are listed as threatened or endangered could be of substantial benefit to the species' recovery as a whole.

In Reference to Section 9(d)(e)(f)- Imports and Exports, Reports, Designation of Ports:

These sections address activities related to the import and export of fish or wildlife not listed pursuant to section 4 of the Act as threatened or endangered and so therefore should not be included in the Endangered Species Act. This section of the Act should be removed.

X. SECTION 10. §16 U.S.C. 1539 EXCEPTIONS

Key Points:

- **Any permit allowing for the take of a listed species or its habitat should require only those measures that are reasonable, prudent and essential to the survival of the species.**

Ref. Section 10 (a) – Permits: The Act statutorily requires that any non-federal entity that causes a taking through habitat modification or other harm to an individual species is subject to liability in Section 9. In order to allow activities that are likely to result in a taking to continue, such as housing or commercial development, Section 10 establishes exemption permits.

The granting of such a permit is dependent upon a taking being incidental to the activity and not the purpose of the activity, and the acceptance by the applicant to carry out mitigating measures intended to offset the impacts that the proposed activity will have on the species. Section 7 is careful to include in the incidental take statement the language "reasonable and prudent" to describe the measures required during interagency cooperation in order to minimize impact, but Section 10 does not include this language and leaves the required measures much more to the discretion of what the *Secretary may require and deems necessary or appropriate*. Subjectivity on the part of agency personnel often results in terms and conditions that are unnecessary and overly regulatory, ultimately stopping a project from happening because the costs of the terms and conditions outweigh the benefit of the project. Unfortunately, this happens for projects that are *not likely to jeopardize the continued existence of the species*, but are unpopular with Service personnel. Often those projects are beneficial for resource management to the watershed as a whole. One would like to believe that all agency personnel carry out their responsibilities without bias, but in reality we know this is not the case. With some serious attention to language and definitions in the Act, a significant portion of subjectivity can be eliminated. The emphasis on the use of the best scientific and commercial data available should be language included consistently and throughout the Act to include when determining reasonable and prudent mitigation measures and the terms and conditions that coincide.

In Reference to Section 10 (d) – Permit and Exemption Policy: This section is contradictory and confusing. It states that the Secretary may only grant exceptions that *if granted and exercised will not operate to the disadvantage of such endangered species.* While Section 10 (a) (1) (b) states *the Secretary may permit, under such terms and conditions as he shall prescribe – any taking otherwise prohibited by Section 9 if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.* One could argue that

if an activity does not operate at some point to the disadvantage of the species, then there is no need for the permit. The justification for the mitigating measures and terms and conditions is to counteract any operations to take place *to the disadvantage* of the species. By replacing the language "operate to the disadvantage of "with more specific language that disallows the permitting of certain activities that *threaten the extinction of* the listed species, this confusion would be eliminated. It would be difficult to mitigate for activities that so threaten the survival of the species as a whole and therefore should not be granted an exception.

In Reference to Section 10 (i) - Noncommercial Transshipments: This section is not specific to threatened or endangered species and therefore should not be included in the language of the Act.

XI. SECTION 11. §16 U.S.C. 1540 Penalties and Enforcement

Key Points:

- **The burden of proof in all civil penalty actions must be by a preponderance of the evidence rather than by "substantial" (more than a scintilla but less than a preponderance) evidence.**
- **Any person engaged in business as an importer or exporter of fish, wildlife, or plants must also knowingly violate the Act in order for civil penalty assessment by the Secretary to occur.**
- **Two convictions and a show-cause hearing must be required before the head of any federal agency may suspend or revoke a lease, license, permit or other agreement authorizing the use of federal lands.**
- **It is inappropriate to single out livestock grazing.**

In Reference to Section 11(a)(1) – Currently, this section does not require intent of violation of the Act and its regulations by persons engaged in business as an importer or exporter of fish, wildlife or plants before civil penalty assessment by the Secretary can occur. Intent to violate must be established before any individual or business can be subjected to civil assessment issued by the Secretary. Also, this section currently allows civil assessment to occur, and be enforced by the courts, on the basis of "substantial evidence." That burden of evidence (more than a scintilla but less than a preponderance) is much too low. Instead, the burden of proof for all civil assessments must be by a

preponderance of the evidence in accordance with that required by the courts in civil actions.

In Reference to Section 11(b)(2) – Currently, this section allows the head of any federal agency to suspend or revoke any lease, license, permit or other agreement authorizing the use of federal lands issued to a person or business upon first offense conviction of violation of the Act and its regulations in the absence of any show cause hearing. This penalty for a first offense conviction is too harsh. Instead, such sanctions should only occur upon a second conviction and after a show cause hearing before the particular agency has occurred.

It is inappropriate to single out livestock grazing as an example of a federally permitted action that is subject to suspension or cancellation upon conviction of violation of the Act.

XII. SECTION 15. §16 U.S.C. 1542 Authorization of Appropriation

Key Points:

- **The ESA has not been re-authorized since 1992.**
- **Appropriations for the Act should be based upon an annual review of administrative and implementation costs.**

In Reference to Section 15 (a) – In General: This section has not been updated since 1988 and includes outdated figures and authorized appropriations. The entire section needs to be amended to reflect consideration of the actual costs of the Act in the past 24 years, and an annual review of costs for administration and implementation.

XIII. SECTION 18. §16 U.S.C. 1544 Annual Cost Analysis by the Fish and Wildlife Service

Key Points:

- **Annual cost analysis of the Act should be specific as to species AND include a specific itemization of implementation for the Act.**
- **A comparative cost analysis of land purchase versus land owner incentive program expenditures should be done annually.**

In Reference to Section 18 (1): In order to more efficiently fund implementation of the Act and successfully recover listed species, the Secretary must prioritize what species and recovery efforts receive protection based upon actual jeopardy of extinction and actual recovery costs. Those species in the most jeopardy should receive the focus of recovery efforts and funding. In order to realize the need for prioritization, the public and Congress need to have a clear understanding of the actual cost of the petitioning process, listing process, critical habitat designation, de-listing, mitigation, management, litigation, recovery, incentive programs, and actual cost in losses suffered by landowners when land use restrictions diminish the value of that land and impose significant economic constraints.

The Act is used as a means of free land-use control by the federal government. Regulators set aside large amounts of land at no cost to the agency or the taxpayer. That leads to abuses of this power, encouraging the agencies to inflict regulation and taking of property even when that action will have little benefit to the recovery of the species. If the actual cost of species recovery were reported and borne by the agency/public and not by the individual property owner then the result would be 1) prioritization of regulatory measures in the most critical situations, and therefore focusing funding for the most efficient use, 2) encouragement to the landowner to foster habitat instead of destroying or modifying the habitat during the petitioning/listing process as a pre-emptive act to avoid the regulatory taking of their property as a result of the listing and associated designation of critical habitat.