Statement by the

NATIONAL CATTLEMEN'S BEEF ASSOCIATION

&

PUBLIC LANDS COUNCIL

On

Livestock Grazing on Public Lands

Submitted to the

Subcommittee on Forests and Forest Health

The Honorable Greg Walden, Chairman

Of the

House Committee on Resources

The Honorable Richard Pombo, Chairman

By

Mr. Jim Chilton

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My name is Jim Chilton and I am a 5th generation Arizona rancher. My address is Box 423, 17500 W. Chilton Ranch Road, Arivaca, Arizona 85601. Arivaca is approximately 55 miles southwest of Tucson, Arizona. Our 50,000-acre ranch is adjacent to the town of Arivaca and continues south to the international border with Mexico. The ranch includes private property, state school trust lands and two federal grazing permits within the Coronado National Forest. I am very proud of my wife Sue Chilton, my two sons, my partners (my Father and brother) and ancestors. The entire family is blessed to be able to live preserving our western ranching customs, culture and heritage dating back to pioneering ancestors who entered Arizona Territory in the late 1800's. We have been in the cattle business in Arizona for about 120 years and have a long-term view of the necessity to be excellent stewards of the grasslands we respectfully manage.

The Endangered Species Act: A Hijacked Law

The Endangered Species Act, with its easily-abused present structure, has been hijacked by individual activists and several activist nonprofit corporations. Dr. Alexander J. Thal, Ph.D., Western New Mexico University, in a well documented paper, found that one such organization, the Center for Biological Diversity, has had grave direct and indirect impacts on rural communities in Arizona and New Mexico. Dr. Thal found the Center for Biological Diversity alone has directly and indirectly caused:

1. A loss of over 3,000 jobs in 13 rural communities that lost their major employer displacing thousands of families;
2. A loss of $60,000,000 annual gross receipts from cattle production in Arizona, alone, forcing many small family ranches into financial insolvency; and,
3. Devastation of community social bonds, destabilized families with increased emotional turmoil and resulting mental health issues, severely reduced public services and public works, lost educational programs in local schools, displaced ethnic minorities, and out-migration of youth when productive well-paid employment was eliminated.

The Act has failed to achieve recovery of species. It has only piled up listings that become tools for achieving purposes unintended by Congress. Its present structure rarely helps species and has consistently been co-opted to damage the people and economy of rural America. We have over a thousand listed species. To show for it, we have huge forest fires, devastated timber communities, sold-for-development signs on ranches, fragmented wildlife habitat, and a genuinely endangered species: the western ranching culture. Five major issues cry out for redress by Congress.

1. THE ESA MUST BE AMENDED TO ELIMINATE CONFLICTING AGENCY INTERESTS BY PROVIDING FOR MEANINGFUL APPEAL OF AGENCY LISTING AND RECOVERY ACTION DECISIONS (see page 11 of the attachment)

2. THE USE OF SPECULATION MUST BE SPECIFICALLY ELIMINATED FROM ESA LISTING DECISIONS AND RECOVERY ACTIONS (see page 12 of the attachment)

3. FEDERAL AGENCY EMPLOYEES MUST BE PROHIBITED FROM IMPLEMENTING PERSONAL ACTIVIST AGENDAS UNDER THE COLOR OF ESA AUTHORITY (see page 15 of the attachment)

4. 90-DAY PETITION FINDINGS MUST BE BASED ON SUBSTANTIAL EVIDENCE DERIVED SOLELY FROM THE BEST SCIENTIFIC AND COMMERCIAL INFORMATION AVAILABALE AND MUST NOT BE BASED ON ACCEPTANCE OF THE PETITIONER'S CLAIMS, SOURCES AND CHARACTERIZATIONS TAKEN AT FACE VALUE (see page 17 of the attachment)

5. GEOGRAPHIC RARITY ALONE MUST BE PROHIBITED FROM SERVING AS A SUFFICIENT BASIS FOR AFFIRMATIVE 90-DAY PETITION FINDINGS OR AS JUSTIFICATION FOR A SPECIES' LISTING UNDER THE ESA (see page 21 of the attachment)

The Act Creates Disincentives to Recovery of Species rather than Motivations for Constructive Cooperation

Unfortunately, my family and I have been among the targets of anti-grazing activists like the Center for Biological Diversity since 1997. Groups like the Center have relentlessly employed the Endangered Species Act to achieve their goals, not Congressional goals. We are not alone. The entire unique western cattle ranching culture memorialized in song, poetry, film, literature, art and history has suffered severe damage. This damage is directly attributable to the abuse of the Endangered Species Act by zealots determined to wipe out private property, our economy and our culture. The following chronology clearly demonstrates how, in our case, the Endangered Species Act has been used by the Center for Biological Diversity and other radical organizations to promote their anti-grazing agenda, collect money from the taxpayers and increase donations. The listing racket diverted $992,000 from American taxpayers to just the Center for Biological Diversity in 2003 alone, guaranteeing them money from virtually every lawsuit, win, lose or settle. Their total number of lawsuits filed is approaching 200 including dozens filed during the current year.

Major Assaults on the Chiltons were in 1997 and 1999

The first lawsuit filed by the Center for Biological Diversity and the New Mexico based Forest Guardians in 1997 was designed to enjoin cattle grazing on one of our federal grazing allotments (21,500 acres). In 1999 another suit was filed to enjoin grazing on our other federal grazing allotment (15,000 acres). In both cases the Center alleged the U.S. Forest Service had not consulted with the U.S. Fish and Wildlife Service

regarding federally listed species. The species they named were not known to exist on either of our grazing allotments. The Center followed its established pattern of suing the federal agencies, not the rancher, but actually targeting the ranchers and their essential grazing leases. While we had no responsibility whatsoever for the implementation of the consultation process, we would be the immediate victims of the Forest Service's alleged failure to consult with the U.S. Fish and Wildlife Service. The Center sought an injunction against grazing knowing it would endanger my family's ranching survival. I wondered, with rage, why can we be wiped out financially when we have no control over what the Forest service allegedly did or did not do? Why would Congress enact a law making individual citizens pay the price for agency non-performance?

The Forest Service settled the 1997 lawsuit behind closed doors without our knowledge or agreement or the agreement of the Arizona or New Mexico Cattle Growers associations who were interveners in the suit. The settlement paid the Center substantial sums of U.S. taxpayer money. Outrageously, the Federal court had refused to allow us to intervene and, even more despicably, the Forest Service in the settlement agreed to withdraw important portions of our grazing allotment and take water rights we had under Arizona law.

Two years later in the 1999 Center lawsuit against the Forest Service regarding our other grazing allotment, that Federal judge allowed us and ten other affected ranchers to intervene. The carbon copy lawsuit filed by the Center demanded that the court enjoin grazing while the Forest Service consulted with the Fish and Wildlife Service regarding species that were not known to exist on our allotments. Once again, the Center had strategically availed itself of citizen suit provisions of the Endangered Species Act and to try to eliminate our grazing operations even though the named target was the Forest Service. Why does Congress allow the Endangered Species Act to have such grave impacts on citizens who are collateral damage when the Center, in their war against western ranching, sues the federal agencies? After spending about $400,000 on this lawsuit, the Chilton intervener group successfully argued its case and the Judge ultimately determined the Center's lawsuit was moot.

Agency Activists Abusing ESA Authority

During the late 1990's, we uncovered evidence that some employees of the Forest Service were working with the Center to carry out its anti-grazing agenda. Utilizing the Freedom of Information Act, we discovered that our official Forest Service files were being stuffed with inaccurate data. We immediately realized that we could only defend ourselves against the two-pronged assault from the Center and anti-grazing activists inside the Forest Service by obtaining current site-specific data using peer-reviewed repeatable procedures so science would overcome political science. As a consequence, we retained Jerry L. Holechek, Ph.D and Dee Galt, Ph.D. Dr. Jerry L. Holechek is the lead author of the primary textbook on range management used in universities and by professional range scientists. (**RANGE MANAGEMENT, PRINCIPLES & PRACTICES,** Fifth Edition, published by Prentice Hall) Dr. Dee Galt is a widely-published scholar of range science, hydrology, soils and riparian habitats.

In addition we retained two law firms, a fish biologist, an expert on lesser long-nosed bats, experts on National Environmental Protection Act procedures, and a soils and riparian Ph.D., Dr William Fleming, of the University of New Mexico. Our objective was to bring to the official Forest Service record unimpeachable scientific methods, systematic data collection, and verifiable documentation of the current condition of the range, riparian areas and soils on our forest allotments. Even though one high ranking Forest Service official tried to get professor Holechek to change a report he had written regarding our allotment, after 2000, other Forest Service professionals began to recognize the quality and reliability of the data being assembled and generally began to rise to the new standard.

However, it was miserable during the late 1990's. Specifically, the Forest Service assigned a fish biologist, Jerry Stefferud, to draft a biological assessment for a Mexican minnow, the Sonora chub. Using speculation and political science, Mr. Stefferud concluded that cattle grazing on our 21,500-acre allotment would adversely affect the chub. At the same time, Forest Service officials assigned Mima Falk to draft a biological assessment for our allotment with respect to the lesser long-nosed bat. No evidence whatsoever documented the bat's presence on our ranch. Nonetheless, Ms. Falk asserted that the absent species would likely be adversely affected by cattle grazing even though Dr. Yar Petrysyn and Dr. Cockrum, famed experts on the lesser long-nosed bat, argued in a prestigious peer- reviewed scientific journal that the bat should never have been listed and that the responsible individuals at the Fish and Wildlife Service had relied on insufficient data, poor survey techniques and bad information in the listing process. Stunningly, Mr. Stefferud himself and Ms. Falk's husband have been supporters of the Center for Biological Diversity contributing $200 or more to the Center.

Once the adverse calls on the Sonora chub and the lesser-long nosed bat were made, the Endangered Species Act required the Forest Service to consult on the species with the Fish and Wildlife Service. At the Fish and Wildlife Service, Jerry Stefferud's wife, also a fish biologist, participated in writing the legally binding Biological Opinion. In agreement with her husband, she and her colleagues maintained that the Sonora chub would likely be adversely affected by cattle grazing. The Biological Opinion dictated how we would graze the allotment as a condition for giving both the Forest Service and ourselves the right to kill or injure the Sonora chub without being charged with a felony. We were required to have a five-person team evaluate the pastures into which we were scheduled to move our cattle two weeks prior to moving into each pasture, two weeks prior to moving out of each pasture and two weeks after we moved the cattle out of each pasture. This extremely burdensome and expensive requirement was ostensibly for the protection of a minnow which is abundant in Mexico where 99.7 % of all the fish in a 5,000 square mile three-river basin have been scientifically determined to be secure and abundant. More importantly, the Forest Service had already fenced off and removed from our allotment about 1/4th of a mile of the allotment along California Gulch where some Sonora chub swim under the international border fence. The authors of the Biological Opinion knew one more fact: that the terms and conditions were irrelevant to

the fish because every single one that swims under the international border fence into the temporary pools just north of the border dies when the wash dries up every year.

Victory for science and ranching communities in the Federal Courts

Thanks to the Arizona Cattle Growers' Association, after the Biological Opinion was issued, we filed a lawsuit in Federal District court arguing that the Fish and Wildlife Service had no right to issue an incidental take statement for the chub and the bat when there was no evidence that either was on the ranch. Justice prevailed when Federal Judge Broomfield ruled that the Biological Opinion was arbitrary, capricious and unlawful. Hence the Fish and Wildlife Service could not in the future give an incidental take statement with terms and conditions regulating grazing based on their assertion that an allotment could be suitable or potential habitat for a species not shown to be present.

In reaction to Judge Broomfield's 2000 decision, the Tucson office of the Forest Service decided to prepare another Biological Assessment again using Jerry Stefferud, a supporter of the Center for Biological Diversity, as its fish biologist. Once again, individuals in the Forest Service asserted that both the Sonora chub and the bat would be adversely affected by cattle grazing in spite of not being on the allotment and in spite of Judge Broomfield's decision. As a consequence, consultation with the Fish and Wildlife Service was again triggered giving the same activists another shot at us; consultation led to another an incidental take statement supposedly protecting us from felony charges if our cows somehow harmed a species not present on our ranch. As a condition of the incidental take statement, Sally Stefferud and her colleagues in the Fish and Wildlife Service demanded this time that over one square mile of our allotment be removed from cattle grazing to protect the chub. Fortunately, our lawyers, fish biologist and consultants proved that the canyon Sally Stefferud and her fellow activists said was a stream was a large dry wash most of every year. Thankfully, David Harlow, State Director of the Fish and Wildlife Service, when presented with a large collection of photographic evidence, realized that the Draft Biological Opinion was incorrect in calling the dry wash a stream. He corrected the Biological Opinion and adopted the Forest Service preferred alternative for grazing our allotment. Is that reversal reason to say, "See the system works?" No. We spent tens of thousands of dollars amassing the real data and the legal documents to counteract the taxpayer-funded fiction generated by the activists.

Adding insult to injury, the Fish and Wildlife Service and the Center for Biological Diversity appealed the Broomfield case to the Ninth Circuit Court of Appeals. Dramatically, a three-judge panel of the Ninth Circuit Court in 2001 unanimously agreed with Judge Broomfield that the first Biological Opinion was arbitrary, capricious and unlawful. In addition the Court ruled that the burden of proof as to whether a species was present on a grazing allotment was upon the Federal agencies and not the rancher. Most importantly, the Court stated that even if listed species were proven to be present on a grazing allotment, the Fish and Wildlife Service would need to articulate a rational connection between grazing and killing or injuring the species: a great victory based on logic and common sense; a devastating loss for the Center for Biological Diversity and the Fish and Wildlife Service. However, winning this case required another enormous

legal expense by Arizona ranchers who donated calves at auction to fight this activist onslaught.

Center for Biological Diversity Maliciously Attacks Chiltons

On June 5, 2001 Rob Klotz, an employee of the U.S. Park Service, and members of the Center for Biological Diversity worked together to draft a letter falsely accusing us of having three spots on our ranch that were overgrazed, that three agave stalks were broken by cattle and that we had let cattle into the Forest Service exclosure at the border that had been withdrawn from our allotment to insure against any direct temporary contact with the chub. All of these allegations were asserted to be evidence of illegal harm to the bat and the chub. The Center asked that our grazing permit, that we purchased from the previous holder of the grazing rights for $750,000, be immediately terminated as the remedy for the alleged actions. To the credit of the Forest Service, they immediately investigated and found all charges to be totally false.

Center for Biological Diversity uses NEPA to Assault Chiltons

During the National Environmental Policy Act process on one of our two grazing allotments, the Center for Biological Diversity appealed the Forest Service finding of no significant impact from continued well-managed grazing. Their appeal asked the Forest Service to complete a full environmental impact statement requiring years of preparation and to halt grazing until the EIS was completed. The Forest Service rejected their appeal and renewed the grazing permit for another ten years. Upon being informed of the rejection, the angry Center for Biological Diversity sent a news release to their media contacts and then published a "news advisory" and 21 accompanying photographs on their website. The text of the "news advisory" and the 21 photographs grossly misrepresented the condition of the allotment and reasserted the disproven charges that we mismanaged the allotment in violation of the Endangered Species Act. Our hometown newspaper published the vicious misrepresentations and referred readers to the Center's website to view the 21 photographs.

Chiltons Successfully Sue Center for Biological Diversity

After reading the aforementioned local newspaper article and then going to the advertised website, we asked our lawyers to send a demand letter asking the Center for Biological Diversity to remove the slanderous and defaming website "news advisory" and 21 accompanying photographs. The photographs were all maliciously misrepresentative: five were not on the allotment, one was the bottom of a dry lake; others depicted campsites and mined areas. All the photos implied that grazing was the reason for small bare spots shown in the photographs on the 21,500-acre forest allotment. When the Center ignored our request, we decided to file a lawsuit against the Center of Biological Diversity and three of its employees. On January 21, 2005 a jury found that the "news advisory" and 21 accompanying photographs were intentionally false, were purposely misrepresentative and were made by the Defendants with knowledge of their falsity or with reckless disregard for the truth and with an "evil mind." The jury awarded

us $100,000 in damages and voted to punish the Center for Biological Diversity by awarding us $500,000 punitive damages.

Abuses of the Endangered Species Act

It seemed not to matter that the two species used as surrogates by the Center for Biological Diversity were neither on the ranch, nor would have been in any way affected, by the actions complained of by the Center even if the claims had been true. Published research by reputable scientists has established that the bats have plenty of agave flowers where they actually do live and the chub flourishes on heavily grazed ranch lands in northern Mexico.

The Endangered Species Act, as presently constructed, has allowed hundreds of species to be listed by petition from activist organizations. Approximately 300 listings have been proposed by the Center. Evaluation of the activists' claims that resource uses are threatening the species' survival is up to the Fish and Wildlife Service employee who is entirely empowered to simply accept assertions as if they were science. The public does not read the Federal Register; the public has a life and a job and can not afford the time and expense to monitor the latest listing proposals, hire a scientist to evaluate the activists' claims and submit timely and well-documented responses to ensure that only genuinely needy species are listed and that recovery plans actually address their real threats. The Endangered Species Act, as presently constructed, allows the Fish and Wildlife Service to assure its own permanent job security by liberally listing species that the Service is then tasked with recovering at great cost to the taxpayers and to impacted citizens. For the Fish and Wildlife Service, larger budgets, extraordinary land use control, and expanded power are obtained with each new listing.

The law as presently constructed allows no real recourse to the citizen who becomes a victim of agency employees who, virtually single-handedly, can initiate a chain of events inexorably leading to the bankruptcy of the individual or to the termination of an entire industry. One Forest Service biologist, by making a "likely to adversely affect" call on one species triggers an obligatory Section 7 consultation process in which one more biologist with a "zero cut" or "zero grazing" personal agenda can complete the circle essentially setting terms and conditions for historic multiple uses that make harvest impossible. Additionally, two more opportunities to end multiple use are created as soon as a listed species is claimed to be affected: first, as in our case, activists outside the agencies can seek an injunction against the targeted use during the lengthy period (usually several years) before consultation can be completed or a plan can be written to manage the Forest for the named species. Few, if any, small private businesses like ranches or timber mills can hold out for years with no production while the wheels of agency compliance slowly turn out the required documents. Second, the final plan can be so onerous that production can never be resumed.

The average private citizen has no timely recourse against the well-placed activists inside the agencies. Presently, even a history of excellent stewardship is of almost no

avail in the face of the determined assaults of activists inside and outside of the federal land management agencies.

Fundamental Observations

The Center for Biological Diversity and other non-governmental organizations assert that an "extinction crisis" exists. This claim is used as justification for eliminating a citizen's right to the reasonable use and enjoyment of private property.

Several problems exist with this thesis. First an extinction "crisis" is not proven. It is the product of hysterical extrapolation trumpeted by groups whose income is directly dependent on creating a crisis mentality.

Second, the consequences of an extraordinary level of extinction are unverified. The Center and environmental movement argue a necessity to protect the "web of life" by removing the "human footprint" from over 50% of the American landscape following a program of "restoration." It assumes a static system and denies the millennia of evidence that life is dynamic with adaptability being the rule of survival and with new species arising whenever a niche is opened. A better argument holds that a healthy landscape is one managed through science and disturbance via a reasoned process of adaptive management. Restoration is illusionary; the past cannot be recreated and the present can not be made static.

Third, the real effect of the Endangered Species Act as presently construed is consolidation of America's rural lands and natural resources into the hands of government and non-governmental organizations. This public/private partnership impedes free enterprise and threatens one of history's greatest achievements- the American experience.

The law ought to focus on motivating recovery of species of concern, premised on the reasoned Judeo-Christian notion of a ranking of importance of the various species, with man (individually and collectively) acknowledged as supremely important. Accordingly, intentional killings and the economic trading of bald eagles could be outlawed; the development of a hospital in the fly space of an insect would not be a matter for legal intervention. Such a premise would resonate with ordinary people because that is how truth and reason work. However, the Endangered Species Act is presently being employed to actively debase the Judeo-Christian respect for man and supplant it with a different religious viewpoint.

Private property is not utopian. It is simply the best arrangement for motivating human ingenuity to improve landscapes. This is for reasons of knowledge and innovation. A free people, vested with the security of private property and the rule of moral law, have natural incentives to conserve soil resources, manage fuel loads, provide market product and increase natural diversity, productivity, aesthetics and recreational opportunities.

Conclusion

Clearly, the Endangered Species Act has been co-opted by the Center for Biological Diversity and by a few sympathizers in positions of power in federal agencies. A small number of individuals found it safe and easy to use existing provisions of the law to conduct a ruthless attack intended to eliminate our grazing permit and ranching operations. The good news is that the Forest Service, the Fish and Wildlife Service and the jury ultimately recognized truth in spite of the abusive misapplication of the Endangered Species Act. We sincerely appreciate those ethical and professional employees of the Forest Service and Fish and Wildlife Service who have corrected injustices.

What we learned is that the Endangered Species Act does not recover species. Instead, it drives federal agencies and their non-governmental specters toward an insidious acceptance of the elimination of a citizen's use and enjoyment of private property. This covert drive has caused a degradation of the American landscape and a concentration of wealth within government and its partnering organizations. Environmental law needs to be improved so that honest hard working citizens are not victimized by the Act, but are free to work toward the actual recovery of species that are in fact threatened or endangered. A new focus would lead to recovery rather than to a continuation of a failed listing process. An improving natural world order occurs because of freedom, not in the absence of freedom. And as George Washington said, "private property and freedom are inseparable." Thank you very much.

Respectfully yours,

Jim Chilton

The following paper by Dennis Parker, Esq. develops the five recommendations for improving the Endangered Species Act that I outlined on page 2 of my written testimony. Parker's expert paper reflects decades of experience living with the Act as both a professional biologist and a lawyer.

REMODELING THE ENDANGERED SPECIES ACT:
AN ESSENTIAL FIRST STEP TOWARDS INSURING RESPONSIBLE AND SUSTAINABLE MANAGEMENT
OF NATURAL RESOURCES ON FEDERAL, INDIAN, STATE AND PRIVATE LANDS AND THE SECURING OF A PROSPEROUS FUTURE FOR BOTH ENDANGERED SPECIES AND AMERICAN CITIZENS ALIKE

By Dennis Parker, Esquire

A. INTRODUCTION

The Endangered Species Act (ESA) has been and is being used effectively as a surrogate by environmental activist corporations, like-minded individuals within federal government agencies and many federal courts to affect sweeping, socio-political change in the United States by shutting down the production based economies of many western States. In most cases, however, these ostensibly ESA-oriented restrictions on human economies have proven to provide little if any positive benefit to species listed under the Act while resulting in the wide-scale and costly destruction of the sustainability and social fabric of production based communities. Such result is neither equitable nor acceptable, either from a species protection or rational public policy perspective.

Abundant research is accumulating that the integration of agriculture, ranching, forestry, mining and nature better maintains and enhances biodiversity and the well being of ESA-listed species than simply setting aside large areas of unmanaged landscape where human activity is severely restricted, management is virtually prohibited, and where destruction by fire and disease is inevitable. This research shows that many species, from birds to native fishes, substantially benefit from the integration of human activities and nature. (*See: Holechek, Rinne papers*; *Berlik, M.M., Kittredge, D., and D. Foster (2002) The illusion of preservation: a global environmental argument for the local production of natural resources, Journal of Biogeography, 29, 1557-1558)*

Abundant research is also accumulating that many species now listed under the ESA do not meet the legal requirements for inclusion under the Act. This is because the best scientific and commercial information available neither supports their respective listings nor the speculation of their petitioners, federal agencies, and federal courts that the human activities of agriculture, ranching, forestry, mining, and homebuilding have caused their alleged endangerment. (*See: article on Lesser long-nosed bat, arbitrary and capricious listing of the Cactus ferruginous pygmy owl*).

While it is encouraging that new federal policies are moving in the direction of integrating agriculture, ranching, forestry, mining and nature, without substantive change of the ESA, it is unlikely that this positive trend can be sustained. This is because the ESA, as currently written, contains no checks, balances, or realistic appeals provisions to protect the American people from its currently common-place and destructive abuse by environmental activist corporations, federal agencies, and many of our federal courts. Thus, any meaningful remodeling of the ESA must include checks, balances and appeals provisions to insure due process and to counterbalance the unfettered and unilateral enforcement powers this Act currently cedes to federal agencies alone.

B. PROBLEM AREAS IN NEED OF REMODELING

1. THE ESA MUST BE AMENDED TO ELIMINATE CONFLICTING AGENCY INTERESTS BY PROVIDING FOR MEANINGFUL APPEAL OF AGENCY LISTING AND RECOVERY ACTION DECISIONS

Meaningful remodeling of the Endangered Species Act must begin with the species listing process and therefore must start by correcting the uncontrolled manner in which this Act is currently implemented. As currently written, the ESA cedes unilateral authority to two, powerful executive agencies – the U.S. Fish & Wildlife Service and the National Marine Fisheries Service – to first decide whether a particular species warrants listing and then to administer its recovery if the agency alone decides that it does.

This built-in conflict of interest not only places the agency in a position to unilaterally determine an ever-expanding role for itself in government, but also allows the agency to do so with impunity by unilateral enforcement of these conflicting and often opposite interests. Thus, in lieu of a meaningful appeal process, the ESA currently allows these two federal agencies to act as police forces, prosecuting attorneys, judges and juries in imposing their own unilaterally made decisions on plant and animal species and human communities alike.

The result of this fundamental flaw in the ESA has proven to be nothing short of disastrous, not only for the luckless species that have been singled out for "protection" under its authority, but for the human communities that historically coexisted with them before the federal government stepped in. These facts are reflected not only by the dismal federal track record of species recovery under the ESA (*See: ESA statistics),* but also by the means of choice pursued by federal agencies in accumulating this dismal record – the needless and unjustifiable extirpation of production based communities and economies in the absence of substantial scientific evidence or any semblance of due process. (*See: accounts of ESA abuse).*

Rural America, especially in the West, has been hammered without any semblance of due process and with no evidence of benefit to species. The destruction of the timber industry in Arizona and New Mexico because of a perceived need to "recover" the Mexican spotted owl – a species not even known to inhabit either of these states before 1929, or before the onset of large-scale timbering operations in either of these states – is but one example of the irrational and unconscionable consequences of this current and unchecked approach to ESA decision-making.

Thus, at a minimum, the ESA must be amended to provide for meaningful appeal of all agency listing and recovery action decisions. The appeal process should be simple, readily accessible and, in keeping with the ***Daubert*** line of U.S. Supreme Court cases, should specifically require the pertinent agency to compile a reviewable record as to both the relevance and reliability of the information it used in exercising its decision-making authority under the ESA. Such an approach would go a long way towards effectively eliminating speculation and self-interest as bases for either species' listings or the development of recovery actions.

2. THE USE OF SPECULATION MUST BE SPECIFICALLY ELIMINATED FROM ESA LISTING DECISIONS AND RECOVERY ACTIONS

Although the ESA currently requires that all listings and recovery actions be based solely on the best scientific and commercial information available, lack of explicit definition in the ESA

of what this phrase actually means or encompasses has opened the door to imaginative interpretations of such by both powerful federal agencies and perhaps even more powerful federal courts. Because of this injurious shortcoming, speculation has come to be viewed by both, as well as environmental activist corporations, as a an acceptable basis for supporting species listings and for severely restricting or terminating traditional human social and economic activities in the absence of scientific data.

Among the many examples of speculation substituting for science in ESA decision-making are those involving Mexican spotted owls, warm-water desert fishes, Mexican wolves and Southwestern willow flycatchers, to name but just a few. Each of these species, and a host of others, provide graphic example of just how destructive and costly ESA decision-making becomes when rank speculation is embraced as a suitable substitute for the best scientific and commercial information available. (*See: accounts of ESA abuses*).

As stated previously, Mexican Spotted Owls were not known to inhabit either Arizona or New Mexico before 1929. (*See: Arthur Cleveland Bent's "Life Histories of North American Birds")* Thus, this owl's appearance in Arizona and New Mexico was documented only ***after*** wide-scale timbering operations had long been established in both of these states. Despite this indisputable fact, environmental activist corporations, federal agencies and the federal courts have nevertheless repeatedly concluded that the extirpation of the timber industry in both Arizona and New Mexico is the minimum degree of restriction on human economic activity necessary to properly protect Mexican spotted owls under the ESA.

This so-called "necessity," based on nothing more than factually-contradicted speculation, has resulted in the utter destruction of timber associated economies and communities in Arizona and New Mexico and the loss of more than 5,000 jobs. *(See: Assessment by Dr Alex Thall)*. In addition, there have been severe societal costs, perilous buildups of fuel woods, and conflagrations vastly more intense than historic natural wildfires. (*See: Testimony of Richard Frost*). As a consequence of the termination of scientifically sound forest management practices (timber harvesting, grazing and controlled burning), these conflagrations have destroyed more forest habitat deemed necessary to Spotted Owls and other species in a blink of an eye than can be reasonably attributed to harvest by the timber industry during its entire history in Arizona and New Mexico (*See: Ric Frost's "Unspoken Issues of the Endangered Species Act (ESA)")*. Many of these conflagrations have utterly destroyed watersheds and riparian habitats on which native warm-water fishes also depend.

Like the Spotted owl, these warm-water fishes have also been subjected to egregious mismanagement on the basis of factually-contradicted speculation.
Despite the existence of recent scientific studies showing that light to conservative grazing is beneficial to these fishes and that the elimination of livestock grazing favors the survival of exotic fishes over them (*See: Rinne, Medina studies*), the Fish and Wildlife Service nevertheless continues to claim that the total exclusion of livestock grazing within or anywhere near the habitat of these fishes is essential to prevent their collective extinction. The consequences of this exercise in factually-contradicted speculation have been nothing short of disastrous, not only for livestock growers but for native warm-water fishes such as the Loach minnow and Spikedace.

Factually-contradicted speculation has also proven to be the guiding light of so-called Mexican wolf recovery. Despite its knowledge of scientific evidence to the contrary, the U.S. Fish and Wildlife Service unilaterally declared the Mexican wolf as extinct in the wild in 1987. This use of speculation, of course, greatly expanded the Fish and Wildlife Service's captive inbreeding program for this luckless animal (the genetic base of which was then limited to but

one female and two male, wild-caught founders).

Ultimately, and despite the objections of the foremost expert on Mexican wolves, Mr. Roy T. McBride (the man who caught the wild, aforementioned founders), this “captive breeding program” was expanded to include wolf-dog hybrids (*See: letter from McBride to Parsons*), as well as dozens of zoos, as the sole and necessary means to “recovering” Mexican wolves under the ESA. The net result of this so-called “recovery” effort has been the introduction of captive-bred, wolf-dog hybrids masquerading as “Mexican wolves” to areas of Arizona and New Mexico where Mexican wolves were never known to breed -- all at considerable societal, economic production, and taxpayer expense, and all because of the Fish and Wildlife Service’s factually-contradicted and unilaterally imposed speculation that Mexican wolves are actually extinct in the wild when they are not (*See: Carrera report*).

When the Southwestern willow flycatcher was listed as endangered under the ESA in 1994, the Fish and Wildlife Service already knew that this species was historically regarded as the rarest of all flycatchers found in New Mexico. (*See: Florence Merriam Bailey’s “Birds of New Mexico”).* The Fish and Wildlife Service also already knew that the largest known concentration of these birds in New Mexico was (and remains) that found smack-dab in the midst of a working cattle ranch, the U Bar Ranch, in southwestern New Mexico. On the U Bar Ranch, irrigation of permanent pastures and croplands has enabled and secured the existence of ample and optimal breeding habitat for Southwestern willow flycatchers at water diversion head-gates, along the network of floodplain irrigation ditches, and at these ditches’ returns to the Gila River (*See: Zimmerman letter*).

Nevertheless, the Fish & Wildlife Service unilaterally excluded this information from consideration when it listed the flycatcher as endangered later that year. Instead, and without basis in fact, the Fish & Wildlife Service speculated that this flycatcher had declined “precipitously” from its former historic status in New Mexico and throughout the Southwest, and that the precise resource uses which in fact support this bird’s largest known population in the Southwest – surface water diversion, irrigation, farming, livestock grazing, flood control projects and protective levees – are actually the greatest threats to its very existence.

Taking speculation yet a step further, the Service also determined that the mere presence of livestock anywhere near Southwestern willow flycatchers or their habitat (occupied or not) also threatens this species with extinction because, according to the Fish and Wildlife Service, the mere presence of livestock facilitates parasitism of these flycatchers by Brown-headed cowbirds – although no study did then or does now support the veracity of that conclusion. (*See: comments, DQA petition regarding cowbirds*). To the contrary, ten years of studies of these flycatchers on the U Bar Ranch by private and Forest Service biologists have proven this conclusion wrong. These studies conclusively show that the U Bar population of Southwestern willow flycatchers enjoys the highest rates of reproductive success and lowest rates of parasitism by cowbirds of any known population of this species. (*See: Forest Service U Bar reports*).

Despite these facts, the Fish and Wildlife Service continues to ignore the U Bar study results and continues to cling stubbornly to its baseless conclusions about resource uses and cowbirds and their allegedly detrimental affects on Southwestern willow flycatchers. The net result of this egregious exercise of speculation has been nothing short of an unconscionable attack on the historic and priceless contribution of the Southwest’s ranching community to both the economic and cultural richness of this region.

The Fish and Wildlife Service is apparently not through, however, with its pursuit of

socio-economic and cultural genocide on the alleged behalf of this species. Recently, this agency proposed designation of critical habitat for this flycatcher along thousands of miles of streams in the Southwest where the Service also claims it is essential that all of the above resource uses be either severely restricted or eliminated altogether to prevent this flycatcher's extinction. As a result, the very future of agricultural production and another critical element of southwestern culture are now also imperiled by the Fish & Wildlife Service's continuing abuse of the unilateral authority currently extended to it by the Endangered Species Act.

This legal carte blanche currently shields the Fish and Wildlife Service's determined adherence to speculation by permitting it to steadfastly ignore the growing body of scientific and commercial information clearly contradicting the unsubstantiated underpinnings of its listing and recovery actions. This same legal carte blanche has enabled environmental activist corporations to marshal the overwhelming power of the federal government to advance their socio-political and philosophical ideologies in the name of species protection. These corporations have converted a well-meaning but much abused law into a weapon to attack and destroy critical elements of western culture and economy in the names of species whose interests are more often harmed than advanced by their supposed "protection" under the ESA.

Simply stated, this disastrous situation is unacceptable, from either a socio-economic or a species protection perspective, and thus cannot be allowed to continue. Therefore, it is incumbent on Congress to specifically eliminate the use of speculation as a basis for supporting either listing or recovery action decisions by federal agencies under the ESA. As the above examples clearly show, neither federal agencies nor many of our federal courts are likely to desist from this irrational, inequitable and unconscionable practice if left to their own devices.

3. FEDERAL AGENCY EMPLOYEES MUST BE PROHIBITED FROM IMPLEMENTING PERSONAL ACTIVIST AGENDAS UNDER THE COLOR OF ESA AUTHORITY

The Section 7 consultation process under the ESA presents yet another situation rife for abuse. This problem has proven particularly acute when an employee of a land management agency, such as the Forest Service, has a personal, activist agenda and is also charged with developing a biological assessment (BA) of an agency's action on species listed under the ESA, or, when such a person's spouse, as an employee of the Fish and Wildlife Service, is also charged with developing a biological opinion (BO) from that same biological assessment.

A graphic example of just how destructive, abusive and costly these practices can be is provided by the Lesser long-nosed bat and the Sonora chub and their use by federal employees in the attempt to prevent reauthorization of the grazing permit for the Montana Allotment by the Forest Service.

When the Sonora chub was listed under the ESA as a threatened species in 1986, it was known to occur in the United States at only one location immediately adjacent to the Mexican border. This is because the Sonora Chub is a Mexican species of fish with over 99% of its range located in northern Mexico, where it is decidedly the most common native fish found within its range of occurrence (*See:* *Southwestern Naturalist, June, 1990*), and where mining and unregulated livestock grazing are the predominant human resource use activities practiced.

Nevertheless, in 1997, when the Sonora Chub appeared in an ephemeral to intermittent wash known as California Gulch just north of the Mexican border on the Montana Allotment, the

Forest Service responded by removing 20 acres of this gulch from the Montana Allotment adjoining the Mexican border as allegedly essential for the protection of this fish from livestock grazing. The excluded area had lush riparian vegetation and had been part of a then-successful experiment in progress demonstrating how rest-rotation livestock grazing could be used to enhance riparian condition.

The taking of even this extreme measure, however, apparently wasn't enough in the opinion of one Forest Service biologist to adequately protect this minnow under the ESA. Mr. Jerome Stefferud, then zone fisheries biologist for the Forest Service, concluded in his biological assessment that cattle grazing on the adjacent Montana Allotment was likely to adversely affect the Sonora chub. This conclusion ignored the facts that any plausible habitat for this minnow had already been removed from the allotment, cattle grazing at then-current levels had not been identified as a threat to this minnow in the final rule listing it, and that no scientific study shows that livestock grazing has resulted in harm to this warm-water fish. (*See: Rinne paper*).

In a similar vein, a Forest Service botanist, Ms. Mima Falk, concluded that the grazing of cattle on the Montana Allotment was likely to adversely affect the Lesser long-nosed bat, another ESA-listed but predominantly Mexican species – despite the fact that this bat had never been known to occur on the Montana Allotment. Moreover, the leading researchers on this predominantly Mexican species had published a report strongly questioning the claims that led to its listing before Ms. Falk reached this factually-contradicted conclusion. (*See: article on Lesser long-nosed bat: Petrycyzn and Cockrum*).

Nevertheless, Ms. Falk's and Mr. Stefferud's "likely to adversely affect" calls triggered the ESA's Section 7 consultation process between the Forest Service and the Fish and Wildlife Service. This consultation resulted in the issuance of a biological opinion by the latter in 1999.

That biological opinion, written by Jerome Stefferud's wife, Sally, then a fisheries biologist working for the Fish and Wildlife Service, imposed draconian restrictions on livestock grazing on the Montana Allotment based on Ms. Falk's and her husband's unsupported assertions of harm posed to these species by grazing. Among the restrictions proposed by Mrs. Stefferud was the requirement of incidental take permits (ITPs) for the bat and the chub – despite the fact that neither was even found on the Montana Allotment. In December, 2000, this biological opinion was struck down by a federal district court as arbitrary, capricious and unlawful.

Nevertheless, the Fish and Wildlife Service and the Forest Service reinitiated consultation on the chub, and placed this matter back in the hands of the Stefferuds. The "new" biological opinion, issued in March of 2001, eliminated grazing on 1,200 acres along the usually dry portion of California Gulch found upstream of the recently established chub exclosure as allegedly essential to adequately protect the Sonora chub from livestock grazing.

Only after it was conclusively shown that this portion of California Gulch is in fact ephemeral to intermittent – and not the perennial stream it was repeatedly described as in Sally Stefferud's draft biological opinion -- did the Fish and Wildlife Service's Field Supervisor restore the 1,200 acres that had been withdrawn from grazing on the Montana Allotment. (*See: Testimony of Mr. Jim Chilton on the ESA*).

Nonetheless, many of Jerome Stefferud's unfounded allegations regarding the effects of livestock grazing on the Montana Allotment (*See: Holechek, Fleming reports*) were retained by his wife in the "new" biological opinion. These statements set the stage for the next wave of attacks against livestock grazing on the Montana Allotment by the Center for Biological Diversity

– an environmental activist corporation of which Mr. Stefferud was a member and sustaining financial supporter. (*See: Annual Report, Center for Biological Diversity, FY 2003*).

Simply put, this situation is also unacceptable from either a socio-economic or rational species protection perspective and cannot be allowed to continue. Thus, to prevent such improper collaboration and costly abuse of authority in the future, Congress must act to ensure that federal agency employees are prohibited from implementing their own personal, activist agendas under the color of Endangered Species Act authority.

4. 90-DAY PETITION FINDINGS MUST BE BASED ON SUBSTANTIAL EVIDENCE DERIVED SOLELY FROM THE BEST SCIENTIFIC AND COMMERCIAL INFORMATION AVAILABALE AND MUST NOT BE BASED ON ACCEPTANCE OF THE PETITONER'S CLAIMS, SOURCES AND CHARACTERIZATIONS TAKEN AT FACE VALUE

Section 4(b)(3)(A) of the Endangered Species Act requires the Fish and Wildlife Service or the National Marine Fisheries Service to make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. The pertinent agency is also required to base this finding on all scientific and commercial information available to it regarding the particular species at the time the finding is made. To the maximum extent practicable, the pertinent agency is to make this finding within 90 days of its receipt of a petition and is to promptly publish notice of its finding in the Federal Register. This is not, however, the methodology currently employed by the Fish and Wildlife Service in reaching its 90-Day petition findings.

To the contrary, the Fish & Wildlife Service currently ignores the ESA's requirement that it base all findings, including 90-Day petition findings, on substantial information derived ***solely*** from the best scientific and commercial information available. Instead, the Fish and Wildlife Service makes its 90-Day petition findings simply on that amount of "information," without qualification, that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. (*See: 90-Day Petition Finding for the Gentry indigo bush).*

Building on this loose definition of the "information" it can properly use for ESA decision making purposes, the Fish and Wildlife Service then limits its process of coming to a 90-Day petition finding to a determination of whether the "information" (including speculation) presented in the petition meets the Service's "substantial information" threshold. In doing so, the Fish and Wildlife Service neither conducts additional research nor subjects the petition to rigorous review. Instead, the Fish and Wildlife Service's finding considers only whether the petition states a reasonable case for listing on its face.

Contrary to the claim of the Fish and Wildlife Service, the ESA does not contemplate that the Fish and Wildlife Service accept the petitioner's sources and characterizations of the information presented at face value in reaching a 90-Day petition finding. If such were in fact so, Congress would not have specifically included the requirement that the Service base all of its ESA findings – including 90-Day petition findings – on substantial information derived ***solely*** from the best scientific and commercial information available to it.

By accepting petitions at face value, the Fish and Wildlife Service has allowed the use of philosophical bias and unsupported speculation – both by petitioners and its own employees – to drive the 90-Day petition finding process. This approach has allowed, and continues to allow, the

unfounded allegation of “threats” to proposed species – some of which are abundant on the other side our international borders -- to serve as sufficient basis for affirmative 90-Day petition findings by the Fish and Wildlife Service.

Instructive in this regard is the example provided by the Fish and Wildlife Service’s recent, affirmative 90-Day petition finding for the listing of the Gentry indigo bush as endangered under the ESA. This finding, authored by former Forest Service employee and current Fish and Wildlife Service employee, Ms. Mima Falk, illustrates the complete lack of rigor with which petitions are reviewed by the Fish and Wildlife Service at the 90-Day petition finding level. (*See: Federal Register 90-Day Finding on a Petition To List the Gentry Indigo Bush as Endangered).*

Like the Sonora chub, the Gentry indigo bush is another Mexican species of extremely limited occurrence within the boundaries of the United States. Currently, this plant is known to occur at only one location immediately north of the Mexican border in the United States. This location, Sycamore Canyon in the Atascosa Mountains of Santa Cruz County, Arizona, is actually a tributary to the Rio Concepcion of northern Mexico, and is an area from which all livestock grazing has been excluded for more than a decade now on the alleged behalf of the Sonora chub, a species which is abundant in Mexico. In 1997, the Forest Service rebuilt the international boundary fence in lower Sycamore Canyon to address the issue of sporadic livestock trespass into this area from northern Mexico.

Nevertheless, and at face value, the Fish and Wildlife Service accepted the claim of the petitioner, the Center for Biological Diversity – an environmental activist corporation notorious for its previous dissemination of false and defamatory information about livestock grazing and its alleged threat to endangered species on the neighboring Montana Allotment (*See: Chilton case articles*) – that livestock grazing as a threat to the Gentry indigo bush is supported by “substantial information.”

This “substantial information,” however, actually consists of only two observations regarding livestock grazing and this plant for which the Service fails to provide literature citation. The first of these observations, made in 1982, concerns an area on the western flank of the Baboquivari Mountains on the Tohono O’Odham Nation where this species is no longer known to occur. The second observation, made in 1992, concerns lower Sycamore Canyon, where Dave Gori of The Nature Conservancy observed trespass cattle from Mexico “browsing on, and even uprooting” this species. This latter observation was made five years before the Forest Service rebuilt the international boundary fence in Sycamore Canyon to prevent the trespass of Mexican cattle into this area in 1997.

In fact, both of these observations were known to the Fish and Wildlife Service before it removed the Gentry indigo bush from candidate status for ESA listing in April of 1998. The reasons then given by the Fish and Wildlife Service for removing this species from its candidate list were: (1) the species was more abundant or widespread than previously believed or not subject to any identifiable threats; and (2) the Fish and Wildlife Service had insufficient information on biological vulnerability and threats to support issuance of a proposed rule to list.

Also known to the Fish and Wildlife Service before it removed this species from the candidate list, was the fact that severe winter flooding in 1993 had reduced the number of Gentry indigo bush plants from 1,400 in 1992 to between 15-30 plants in 1993 at one monitoring plot in Sycamore Canyon. In 1997, 499 Gentry indigo bush plants were found in Sycamore Canyon, and, in 1999, 194 plants were found there. Whether this latter fluctuation in numbers was also caused by flooding is unstated by the Fish and Wildlife Service.

However, since 1999, there has been no further survey of the status of the Gentry indigo bush in Sycamore Canyon. While additional survey work has identified at least two locales of Gentry indigo bush occurrence in northern Mexico, the Fish and Wildlife Service currently has no information on either the sizes of those populations or the identity of any possible threats posed to them.

Nonetheless, and without so much as a single citation to scientific authority, the Fish and Wildlife Service now claims, on the basis of its 90-Day review, that the Center for Biological Diversity has presented “substantial information” indicating that the listing of the Gentry indigo bush under the ESA may be warranted. Moreover, the Fish and Wildlife Service has also determined that the Center for Biological Diversity presented “substantial information” in its petition that the main potential threat to this Mexican species appears to be loss of plants and habitat associated with heavy livestock use, an altered hydrograph in Sycamore Canyon, sediment loads in the Sycamore Canyon watershed, and the effects of recreation and other human uses of the drainage – despite the fact that not one of these allegations is actually supported by citation to any scientific study whatsoever.

Omission of citation to scientific study, while unconscionable, is at least understandable here because the best scientific and commercial information currently available – or that body of information from which a finding of “substantial information” can solely and appropriately be derived – supports none of these conclusions in the least, let alone in an amount that would lead a reasonable person to believe that the measure proposed in petition may be warranted. To the contrary, the best scientific and commercial information available to the Fish and Wildlife Service shows that livestock grazing is not permitted within Sycamore Canyon and that the Forest Service has rebuilt the international boundary fence to effectively prevent trespass of cattle into this area from Mexico. On April 3, 2005, this fence was verified to be up and intact Therefore, because no grazing occurs within this species’ area of occurrence in the United States, and because the Fish and Wildlife Service has no information on the identity of any possible threats posed to this species in Mexico, “heavy grazing” is not and cannot possibly be viewed as a threat to this species’ existence at its one locale of occurrence in the United States.

The Fish and Wildlife Service’s further claim that degraded watershed conditions may be a concern in Sycamore Canyon, because livestock grazing is still allowed to take place on the surrounding Bear Valley Allotment, is similarly refuted by the best scientific and commercial information available. That information, in the form of site-specific soil surveys conducted by the Forest Service in 2002, documents that 75% of the soils on the 22,710-acre Bear Valley Allotment are in the highest condition category, while only 1% are classified as being in unsuitable condition. Moreover, monitoring records for this historic ranch document that it is a veritable treasure trove of the highest quality perennial range grasses.

Thus, no evidence actually exists in support of the Fish and Wildlife Service’s further claim that the Gentry indigo bush is also threatened with extinction by either an altered hydrograph or increased sediment loading allegedly caused by the grazing of livestock on the Bear Valley Allotment in the Sycamore Canyon watershed. To the contrary, the best scientific or commercial information available substantially supports the opposite conclusion.

This same lack of credibility also applies to the petitioner’s and the Fish and Wildlife Service’s equally unsubstantiated claim that human recreational uses of Sycamore Canyon also threaten the Gentry indigo bush with extinction. Again, neither the petitioner nor the Fish and Wildlife Service can cite to a single scientific study that supports the need for potentially

draconian suppression of human recreational activities in Sycamore Canyon because no such scientific or commercial information actually exists in support of this claim either.

Put simply, the Fish and Wildlife Service' practice of accepting petitions at face value and basing its 90-Day petition findings on speculation derived from generic information rather than facts derived solely from the best scientific and commercial information available has led, and is continuing to lead, to disastrous and unjustifiable suppression of human economic and recreational activities in the utter absence of any semblance of scientific support or due process. Thus, because this practice is unacceptable from either a socio-economic or species protection perspective, Congress must act to require rigorous critical review of all petitions at the 90-Day finding level and to also specifically require that 90-Day petition findings be based only on substantial information derived solely from the best scientific and commercial information available.

5. GEOGRAPHIC RARITY ALONE MUST BE PROHIBITED FROM SERVING AS A SUFFICIENT BASIS FOR AFFIRMATIVE 90-DAY PETITION FINDINGS OR AS JUSTIFICATION FOR A SPECIES' LISTING UNDER THE ESA

Congress must also act to insure that mere geographic rarity alone – especially when a species is abundant on the other side of our international boundaries – is prohibited from serving as a basis for affirmative 90-Day petition findings or as justification for a species' listing under the ESA. It makes little sense and compromises the basic integrity of the ESA to allow the listing of species of fringe occurrence in the United States that are actually common outside of our borders. It makes even less sense to then impose draconian restriction on resource uses within the minute area of such a species' occurrence in the United States when no such restrictions are in place outside of our borders where that same species is of either common or abundant occurrence.

The fallacy of this indefensible practice is clearly illustrated by listings of both the Sonora chub and the Cactus ferruginous pygmy owl. In regard to the chub, over 99% of its range is located in northern Mexico, where it is of abundant occurrence in the absence of restriction on resource uses. Similarly, in regard to the owl, over 95% of its range is also located in Mexico, where it is also of continuing and common occurrence in the absence of restriction on resource uses.

Nevertheless, the author of the recovery plan for the chub, Mr. Jerome Stefferud, concluded without study that light to moderate livestock grazing as currently practiced within the range of the chub in the United States threatens this species with extinction, while unregulated, heavy livestock grazing as currently practiced throughout this species' range of occurrence in northern Mexico has left its habitat "basically intact." In regard to the owl, it was ultimately decided by the Federal Courts that the listing of this fringe species, and the host of draconian restrictions imposed at great expense on livestock grazing, school construction and homebuilding during the interim, were actually arbitrary and capricious.

Thus, because the listings of these species are indefensible from either a species protection or sound public policy perspective, Congress must also act to insure that mere geographic rarity alone -- especially when a species is common to abundant on the other side of our international boundaries -- is prohibited from serving as a basis for affirmative 90-Day petition findings or as justification for species' listing under the Endangered Species Act.

C. CONCLUSION

Substantive remodeling of the Endangered Species Act is necessary to properly protect both the species listed under its authority and the fundamental Consitutional rights of the American people. These facts are reflected by both the dismal track record of federal species recovery and the gross abuse of federal ESA authority to affect the wide-scale and costly destruction of the economic sustainability and social fabric of production based communities in the absence of either science or due process. Such result is neither equitable nor acceptable, from either a species protection or rational public policy perspective. Thus, it is incumbent upon Congress to reign in this beast of its own creation.

This paper identifies five limited and specific actions Congress can take to establish appropriate checks, balances and due process within the parameters of the Endangered Species Act that will serve to enhance this Act's fundamental purposes. Moreover, because these actions are limited and specific, their enactment is also politically feasible.

Thus, Congress has a fundamental choice now before it for which it will be ever known. That choice is to do nothing and allow the ESA to continue to be used as a surrogate to affect sweeping, socio-political change in the United States by shutting down the production based economies of many western States in the utter absence of due process or benefit to ESA listed species, or, to enact appropriate checks, balances, and realistic appeals provisions within the ESA to insure that both due process and species recovery are served.

For all of the reasons stated throughout, this paper strongly urges Congress to choose the latter of these two alternatives by enacting the five specific and limited changes to the Endangered Species Act identified and recommended herein.