

# **U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT DESIGNATION CHANGES**

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U.S. REPRESENTATIVE RICHARD POMBO (R-CA), CHAIRMAN

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## **Body**

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HOUSE COMMITTEE ON RESOURCES HOLDS A HEARING ON CRITICAL HABITAT

APRIL 28, 2004

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DESIGNATION CHANGES

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DESIGNATION CHANGES

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POMBO: Good morning. I'd like to call this hearing on H.R. 2933 to order.

I look forward to listening and gaining greater insight from the witnesses today and from my congressional colleagues on how the Endangered Species Act is being implemented by federal agencies and interpreted by the courts specific to critical habitat.

The Endangered Species Act has given wildlife very little to cheer about as it barrels out of control through its 30th anniversary year. Since its inception, more than 1,300 species have been listed as threatened or endangered, yet only seven domestic species listed under the ESA have ever been recovered in those 30 years. Not one of these species was recovered as a result of the ESA alone; their removal from the ESA is to be linked to other vital conservation measures and human intervention.

Sadly, that is the history of the Endangered Species Act. Born of the best intentions, it has failed to live up to its promise and species are more threatened today because of its serious limitations. Thirty years of the same prescription have failed. Moreover, despite the evidence, some maintain that we can only use one treatment, the one prescribed 30 years ago.

But for the last 30 years, the ESA has remained a law that checks species in but never checks them out. It has been a failing form of managed care, specifically the diagnosis and treatment aspects of the law are fatally flawed. They are ambiguous, open to arbitrary personal judgment and do not rely on sound science or peer-reviewed research. Known as listing in critical habitat respectively, each key elements of the act are responsible for the misdiagnosis of species as endangered or threatened in the application of a one size fits all solution.

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

For over a decade, Congress has worked to reauthorize the Endangered Species Act so that it both conserves species and the rights and needs of Americans. During the same time, designation of critical habitat under the ESA has evolved into a source of controversy. Due to the rigorous mandates required, specifically critical habitat designations, many think the program is unworkable.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Rampant environmental litigation has undermined the already broken system at the expense of species recovery. In fact, there have been so many lawsuits that the federal critical habitat program went bankrupt last year.

Litigation has left the United States Fish and Wildlife Service with a limited ability to prioritize its species recovery programs and little or no scientific discussion to focus on those species in greatest need of conservation.

The administration acknowledges that court orders and mandates often result in leaving the Fish and Wildlife Service with almost no ability to confirm scientific data in its administrative record before making decisions on listing the critical habitat proposals.

In the wake of this decade long trend, the current administration -- supported by the previous Clinton administration -- recognized that critical habitat designations provide the majority of listed species and proposed to be listed species little, if any, additional protection.

POMBO: Since the last authorization of the Endangered Species Act expired in 1993, there has been great optimism and hope that we would be able to amend the act and implement a process based on sound science and common-sense approaches to species conservation recovery -- goals similar to those that the 1973 Congress envisioned when they originally adopted the law.

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

Celebrating these failures as many are doing on this 30th anniversary year of the act is not how we should mark this occasion. Instead, we must begin to improve it for the immediate and long-term health of America's wildlife.

As we are doing here today by closely examining H.R. 2933, Congress must focus on legislative reforms that foster the science, technology and innovation that have made America successful in other endeavors.

I realize amendment and reauthorization of the Endangered Species Act has dragged on since it expired in 1993. This is not for lack of trying and Congress has come close to reaching an agreement a number of times. But unfortunately, some groups would rather play politics and benefit from the current state of dislocation under the act than to have to agree on what is best for the species.

It is this selfish attitude that has resulted in the uncertainty the wildlife is facing nationwide with critical habitat in absentee recovery bills. So now that the candles are blown out on the 30th anniversary celebrations, it is time for the House Committee on Resources to start its work on meaningful reauthorization of the act.

Today we begin the process and as chairman, I wish for all committee members to take note that we will finish this this time.

I would like at this time to recognize the ranking member, Mr. Rahall.

RAHALL: Thank you, Mr. Chairman.

Mr. Chairman, when you became chairman of this committee, there were some, and I think it's no secret, who felt deeply that you would take a meat axe to the Endangered Species Act, that you intended to gut the ESA. I have to tell you when I heard such things, I simply could not believe it. Amidst the hand wringing, I told anyone who asked, sure, it would be far better if I was chairman of the committee, but in the alternative, I do think Chairman Pombo intends to take a much more deliberative approach to the ESA than the past rhetoric would lead one to believe.

And so far, to date, my assessment has been correct. While supporters of H.R. 2933 and myself have fundamental differences on how we view the Endangered Species Act, this bill represents a piecemeal effort to address what some view as problems with the statute.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And I've said for many years that I do not believe the ESA needs to be amended. Problems do exist with the act's implementation. This is not a function of the statute itself, but rather a lack of adequate funding and a failure of the Fish and Wildlife Service to issue instructions to its managers outlining how the critical habitat management program should be run and I would note that the GAO twice recommended this.

And I think some people confuse the situation, because (inaudible) or perceived problems with certain aspects of the act's implementation due to a lack of funding, they may confuse the issue and believe that the act itself is in need of reform.

The Bush administration's fiscal year '05 budget would cut ESA recovery programs by \$10 million below current year levels. It would also slash about \$2 million from the ESA's consultation and habitat conservation planning program. These shortcomings are going to affect real people in the real world, including private property owners, developers, federal agencies and local units of government.

Take, for instance, Snowshoe Ski Resort in the congressional district I have the honor of representing. It's owned by a major corporation, Intrawest. It is an 11,000-acre facility. They are engaged in a habitat conservation plan and lo and behold, things are proceeding too slowly. Yet, Intrawest is not joining the chorus that ESA is broken and must be amended.

Do you know what their main complaint is? The Elkins, West Virginia Fish and Wildlife Service field office is overworked and underfunded, and they are right.

The bottom line is that without critical habitat, species will go extinct. And who are we to determine which species shall perish? As people of faith, and I know that we all are, we should acknowledge these words from Ecclesiastes: "Man's fate is like that of animals. The same fate awaits them both. As one dies, so dies the other. All have the same breath."

I will conclude by noting how pleased I am that we have a witness today that will bring the Christian perspective to this debate, Dr. Joseph Sheldon from Messiah College in Pennsylvania. While I note he has been placed last on the witness list, the word of the faith will refuse to be heard last in our deliberations on this issue.

Thank you, Mr. Chairman.

POMBO: Thank you.

I'd now like to call up our first panel, which is made up of the Honorable Judge Craig Manson, Assistant Secretary for Fish, Wildlife and Parks.

Mr. Manson, if I could just have you remain standing for a minute.

Do you solemnly swear or affirm under the penalty of perjury that the statements made and responses given will be the whole truth and nothing but the truth so help you God?

MANSON: I do.

POMBO: Thank you.

Thank you, Judge Manson. It's nice to have you back before the committee.

And I think it's appropriate to begin the deliberations on this legislation that was introduced by my colleague, Mr. Cardoza, with the comments from those that are charged with overseeing the act.

Judge Manson, when you are ready, you can begin.

MANSON: Thank you, Mr. Chairman.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I appreciate the opportunity to appear once again before this committee, particularly today on H.R. 2933, the Critical Habitat Reform Act of 2003.

Let me begin by saying that we in this administration are absolutely committed to achieving the primary purpose of the Endangered Species Act, which is the recovery of threatened and endangered species and to improve the efficiency and effectiveness of the act.

We believe that the conservation of habitat is vitally important to successful recovery and delisting of species, but critical habitat is another matter altogether. As you have indicated in your remarks, the Fish and Wildlife Services' efforts to carry out the ESA requirement of designating critical habitat have been a source of controversy for many years.

As the Clinton administration noted several years ago, in more than 30 years of implementing the act, the service has found that designation of official critical habitat provides little additional protection to most listed species while consuming significant amounts of scarce conservation resources.

The Department of Interior, the service, the Congress and interested parties must work together to determine how to get the most value for species conservation out of available federal resources.

In that regard, we believe that H.R. 2933 is a step in the right direction, and we'd like to continue to work with the author and the committee on any proposed amendments concerning the designation of critical habitat.

As you pointed out, for more than a decade, the service has been embroiled in a relentless cycle of litigation over the implementation of the critical habitat and listing provisions of the act. And the service now faces a program in chaos, due not to agency inertia or neglect, but due to a lack of scientific or management discretion to focus available resources on the actions that provide the greatest benefit to those species in greatest need of conservation. And the keystone of that situation is critical habitat.

The service has for a number of years characterized the designation of critical habitat as required under the act as the most costly and least effective class of regulatory actions undertaken by the service. It's often counterproductive and can result in negative public sentiment toward the designation and toward the act.

For these reasons and others, for many years the service often found the designation of critical habitat to be not prudent and did not designate it for most listed species and this approach was formalized under the previous administration.

However, the legislative history is clear that Congress intended the findings to be limited -- not prudent to be limited to exceptional circumstances and as a result, we face the flood of lawsuits that you alluded to earlier.

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

Now with respect to the issue of funding, the administration's budget request for 2005 provides funding to meet our resource protection goals and address the growing listing program litigation- driven workload. The requested increase includes a total of \$13.7 million for critical habitat for already listed species. That's an increase of \$4.8 million over the FY '04 funding level.

The increased funding will allow the service to meet its current and anticipated court orders for the designation of critical habitat. In this regard, I would note that as of April 26th, there were 76 lawsuits pending or threatened related to critical habitat or other Section 4 actions.

With respect to H.R. 2933, it directs that the timing of critical habitat be concurrent with the approval of recovery plans, a concept which has been supported over the prior administration and we recognize that this is one of a

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

number of limited potential solutions to address the problems that we are talking about here today. The bill also specifies factors for consideration when conducting an economic impact analysis, including the direct, indirect and cumulative impacts associated with the designation.

It further modifies the content of required notices for the proposed designation to include any municipality having administrative jurisdiction over the area in which the species is believed to occur. We believe that these steps are in the right direction to address several of our concerns about the current designation process.

We are also pleased that the bill codifies some of the reforms that the administration has carried out over the past three years. As I said earlier, we are dedicated to working with the Congress to find a solution to the problems associated with critical habitat.

I would note that I have directed the Fish and Wildlife Service to strictly construe the provisions of the Endangered Species Act with respect to the timing of critical habitat designations and that is a measure that we've taken in order to staunch the bleeding, if you will, and stem the tide of litigation to the extent that we can.

I've also issued an endangered species guidance letter on critical habitat to the Fish and Wildlife Service, outlining several important points concerning designation of critical habitat.

Later this week, this draft, "Critical Habitat Guidance," will be finalized and the service will begin applying it.

So although we believe that the current system of designating current habitat is broken, the combination of administrative measures and legislative action will work to solve that issue and we are prepared, again, to work with the committee to identify ways to provide relief and ensure that the legislation clearly and efficiently accomplishes its goals.

Mr. Chairman, that concludes my prepared testimony. I'd be pleased to respond to any questions that you or other members of the committee may have.

POMBO: Well, thank you, Mr. Manson.

To begin, I'll just start by asking you a fairly simple question. Do you believe that having the -- or protecting habitat is necessary for the recovery of endangered species in order to recover those that ultimately have ended up on the list?

MANSON: I do believe that the protection of habitat is essential to the conservation and recovery of species. I happen to believe that critical habitat as the act outlines it presently is not the best way to do that. I think that frequently there are far superior methods to do that, including voluntary actions on the part of landowners in partnership with the service.

MANSON: In that regard, I have announced today revised regulations that will encourage private landowners to undertake these voluntary conservation measures to benefit species that are listed and that are at risk, and this results in the creation of real habitat that one can touch and see and feel and it's done all without a legal and administrative process that's burdensome and imposes great costs.

POMBO: Previous administrations like you have been critical of what the critical habitat designation process has become.

I have noticed in researching for this hearing that you -- this current administration and previous administrations never said that protecting habitat was not important, and yet the process that designation of critical habitat has become has become a very real problem for Fish and Wildlife Service and you've been fairly outspoken about that, as well as the previous administration was very outspoken about that.

And what we are searching for here today and what I believe that Congressman Cardoza was attempting to do with the introduction of this bill was to change that legal process under the Endangered Species Act for the designation

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

of critical habitat so that it was something that would work for the administrative process of implementing the Endangered Species Act.

MANSON: I think you are exactly right, Mr. Chairman.

This is not about the issue of -- there is no debate about the role that habitat plays in conservation biology. There is simply no debate about that. And I have never disputed that. No one else in our administration has ever disputed that.

The issue is, as you put it, a process which is counterproductive and takes resources away from other far superior processes that provide a greater conservation benefit. So that process needs to be fixed.

POMBO: I know you are attempting to change administratively how this process works and there are some things you can do. There are other things that will take Congress to take action, but the question that I get repeatedly is that it's -- if an area is designated as critical habitat, how does that change the use of that land?

MANSON: Well, you have to take into account that the designation of critical habitat is part of the listing process as the current law has it set up and under the listing process, a listed species is subject to Section 9 of the act which prohibits the take of that species, which is defined specifically in the law and in the regulations.

The designation of critical habitats would still allow the issuance of incidental take permits under that law but it becomes a particular issue when Section 7 of the act is applied which requires consultation over actions that may affect a listed species, particularly focused on the adverse modification of habitat. And Section 7 is often said to refer only to those actions which require a federal nexus, but it's very difficult to find actions these days in the ordinary course of business or even life that doesn't have some federal nexus.

And so, many things, many activities are tied to the consultation provisions of Section 7 of the act.

POMBO: Finally, in your understanding, your reading of Mr. Cardoza's bill, is there anything in there that would lessen the amount of protection there is for endangered species under the act? Would people be allowed to go out and destroy habitat or take endangered species under the definition of the act?

MANSON: I saw nothing in the bill that would weaken the protections of the act. I saw this bill as reforming a process that in itself was often counterproductive and the process in and of itself is a weakness in the act as far as I am concerned. But there is nothing in this bill that lessens the protections afforded to listed species.

POMBO: Thank you. Thank you very much.

I'd like at this time to recognize the author of the legislation of which we are holding this hearing, Mr. Cardoza.

CARDOZA: Thank you, Mr. Chairman. Is this an appropriate time for my opening statement? Thank you.

I'd like to thank the chairman, Ranking Member Rahall and all members of the committee. I appreciate the opportunity to have this hearing today on the legislation H.R. 2933, the Critical Habitat Reform Act. I look forward to a lively and productive debate on some of the problems involving the critical habitat issues under the Endangered Species Act.

When ESA was adopted in 1973, it was celebrated as groundbreaking environmental legislation. The ultimate goal of ESA was to focus sufficient attention on listed species so that in time, they could be returned to a healthy state and removed from the list. I fully support this goal and believe that recovery and ultimately delisting the species should be the Fish and Wildlife Service's top priority.

Unfortunately, we have been driven off course from a system that should have been directed by biology to a system driven by litigation. The efforts by the service to recover species have been hampered by litigation, court orders and unrealistic time lines which are preventing the exercise of discussion and frustrate the original purpose of the act.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

The critical habitat program is a poster child of a broken policy. I know this from personal experience and my folks back home know this from personal experience.

A case in point is the service's recent designation of critical habitat for vernal pool species. The original proposal would have designated over 1.7 million acres in California and Oregon as critical habitat. Over 330,000 acres in Merced County, California, located in my congressional district, would have been designated as critical habitat. That is over one third of the entire acreage of the county.

Another more recent example is the service's proposal to designate over 4.1 million acres in California as critical habitat for the red-legged frog.

These designations defy logic. If the species can be found all over 1.7 million acres, either the species cannot by definition be considered endangered, or the entire zone of habitat cannot by definition be considered essential to the conservation of the species. It simply makes no sense.

My experience with these designations has convinced me that we can do a better job of achieving the original goal of ESA to recover the species if we do a few simple things.

First of all, we need a system that encourages the gathering of better information to enable the service to make more informed decisions on critical habitat. Before designating critical habitat, it is important that the service have a plan for recovery of the species. We're putting the cart before the horse in many instances, designating millions of acres of land as critical habitat when we don't have the information as to what truly is needed to recover the species.

The service should involve local governments and landowners in critical habitat designations and should consider local resource data, including maps, when considering areas of possible designation and they should provide GIS maps when providing public notice of the proposed designations so that folks know that their land is actually affected.

The service should consider all economic impacts to the proposed designation, including direct, indirect and cumulative impacts. Secondly, areas that are already protected under federal or state local conservation plans such as habitat conservation plans should be excluded from critical habitat designations.

And finally, and perhaps most importantly, the Fish and Wildlife Service needs to be put back in the driver's seat. We need to let them do their job by prioritizing listings, recovery and critical habitat designations. Biology and sound science, not litigation, should drive the service's critical habitat program.

Again, I wish to reinforce my commitment to ESA in getting us back on track to achieving our goal of recovery of the species and let me state for the record that I have no intention of gutting, dismantling or eliminating this important legislation.

But the system is broken. My constituents have been affected and I was sent here to do something about it. I understand that there are concerns from both sides of the aisle on some of the provisions I have included in my bill. I look forward to discussions during the hearing and pledge to work with all those parties who are seriously interested in moving forward on moderate, common-sense changes to the critical habitat designation process.

Again, I want to thank you, Mr. Chairman. You've been very helpful in this process. I want to thank Ranking Member Rahall and the members of the committee.

POMBO: Thank you.

Mr. Gilchrest?

GILCHREST: Thank you, Mr. Chairman. Thank you for calling this hearing.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Secretary Manson, welcome. The secretary, Mr. Chairman, has been in my district many times. We do have some refuges, bear refuges in Maryland; they're beautiful places. And the secretary has helped us enormously with a number of our situations and problems out there.

And I (inaudible) that the secretary, as a result of a stringent hiking incident some time ago, is a little bit under the weather, but we look forward to your full recovery and then maybe climbing some of those beautiful mountains around the vast arenas of this country.

Thirty years ago we passed ESA and there is no doubt that we know a lot more about the ecological systems than we did 30 years ago, so it would be only prudent, I think, for us to take a closer look at the act to see where we can improve those provisions in the act to enhance the wildlife that we are trying to protect -- enhance their habitat, improve recovery plans, have a better understanding of what habitat is and a better understanding of what critical habitat is and have a better understanding of how to do that with some management flexibility for the Fish and Wildlife to reduce the problem and the cost, the time of litigation.

I think as we move through this though, very often when we discuss the Endangered Species Act or when we discuss the Clean Water Act, when we discuss wetlands or we discuss a whole range of statutes and various acts, we do it in isolation.

And just a quick comment before a question, Mr. Secretary, about a couple of things.

One, if we can improve this act by improving communication between the various federal agencies, especially when they come into conflict with Section 7 and Section 9 and most often both of those sections of the act, in advance of designating critical habitat or some type of habitat -- because you are right, Mr. Secretary, habitat loss means species loss; there is no question about it -- but improve within the confines of the act the ability and the flow of information between different federal agencies and certainly the ability of local communities to have input into this conversation, because we need to go broader than just saving a particular type of species in California or Oklahoma or Maryland, because when you preserve forests, you preserve nature's ability, free of charge, to clean the water and clean the air.

Above the forest there is less carbon dioxide and there is more oxygen. When you have forested wetlands, when you have forests, you have a retention of water, you have a cleansing of that water. You don't have to develop a very expensive prosthesis to do that. It does it by itself and by the same token also preserves the species.

When you look at wetlands -- it controls floods, it cleans water, it provides habitat for wildlife.

So as we go through these things, whether or not to designate this area or that area for habitat, there is a whole broader question about preserving nature's infrastructure upon which our infrastructure depends. Whether it's a road, a highway, a school or whatever it is, a sewage treatment plant, we depend on nature to process our activity, to make it clean so future generations can live here.

I think the question I have is not for -- and I look forward to looking at this legislation and working with the gentleman from California to pursue a better process for this particular legislation to preserve habitat, to do it in a way that everybody has a stake in it.

I think at some point in the near future, we are probably going to come to a place where we'll have to plan that this area is going to be habitat for wildlife, this area is going to be for our industry, this area is going to be for commercial activity, this area is going to be for residential activity and this area is going to be for agriculture.

GILCHREST: And that plan will help preserve nature's infrastructure, habitat for species and allow human beings to be able to sustain their dynamic economy and the quality of their life.

The chairman of this committee -- and I'll close with this statement, because I think I'm probably over my time, although I keep looking for the lights; I've got a yellow yet.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

The chairman, Mr. Pombo, helped develop a pilot project on the Delmarva Peninsula as a statute within the farm bill for a conservation corridor program.

And we've been working on that for the past year and it helps preserve an agricultural corridor -- which is fundamentally our economy and it's been that way for 300 years, along with the fishing economy and tourism -- a corridor for agriculture, a corridor of forested wetlands and wetlands that preserve the hydrology and species habitat, and a corridor where people live.

So we're working on this pilot project to try to understand how we as humans can perpetuate our economy, improve the quality of our life, protect the air and water and habitat for species.

So I look forward to working with the author of this bill. Certainly, Mr. Secretary, I look forward to continuing to work with you.

And thank you, Mr. Chairman, for the time.

POMBO: Mr. Inslee?

INSLEE: Many of us believe that this is not the time to weaken the Endangered Species Act, that this was a fundamental decision made decades ago by America and we should heed to and strengthen if not anything rather than weaken it. Many of us are very concerned that by attacking the fundamental character of critical habitat that is exactly what will be happening here.

Now I must express, Judge, I think you have a difficult job this morning, because you carry a lot of baggage -- it may not be yours personally, but it is due to your administration. You come to us with some ideas, you've made some suggestions about this issue, but the baggage you carry is working with an administration that many people believe has the worst environmental record of any American president in American history.

The attempts to weaken the clean air laws, the reduction of mercury toxic levels, getting in the roadless area bill, the extension of resource development in critical habitat areas -- not critical habitat areas, but in our interior West; a whole slew of things that have simply gone backwards on protecting clean air and clean water.

So I think you have kind of a difficult road to hoe, not due to your personal difficulties, but the administration's. I just want to make sure you are aware of a concern that we have generally.

What I want to ask you about, because I understand that you know that this may be one of the sixth period of extinction, of global extinction in world history, what we're seeing right now, what we've got in the United States. Nine hundred and eighty five are endangered species and that's just in the United States, and many scientists think that we are in a global occurrence of extinction that really has only happened maybe five times before in global history.

Before it's happened because of asteroids, climate change; now there are some things that we're responsible for. So many of us think we shouldn't be weakening America's fundamental tool used to fulfill this American value of keeping species around for our grandchildren.

Now, I understand you are sort of a point person in the administration for this process. I want to ask you about your beliefs, because I read some things that caused me some concern. I read in a Grist magazine article where you had said, quote, "I don't think we know enough about how the world works to say that," referring to extinction of the species. In another place you said that, "Critical habitat had very little additional benefit to the conservation of a listed species."

Now, I want to tell you that caused me concern, because as the person responsible for our government, responsible for protecting endangered species, who's publicly said that you don't think we know enough to know whether that's vital or not when it's the policy of America for 30 years, and when the person responsible for dealing with critical

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

habitat designation and you said you don't think it adds much value apparently, I just want to give you a chance to explain that to tell me where you think the sunny side is of extinction.

MANSON: Well, first of all, I've never said that there was a rosy side to extinction.

My point was that we don't know enough about how the world works to know, A, all the causes of extinction, and B, whether or not in every case that's necessarily something that nature doesn't have as part of some greater dynamic plan. That was the point there.

Now as for critical habitat, my view is the same that the Fish and Wildlife Service has held for 25 years that there is little additional benefit added by critical habitat designations.

And again, the point here is not that habitat is not essential; habitat is essential. The question is, do we have a process that gets us what we need in terms of conservation benefit? And that's where for many years, various administrations have felt that we do not have such a process.

INSLEE: I want to tell you with all due respect that those answers really don't wash, and I'll tell you why. It's sort of like saying the fellow in charge of protecting Fort Knox is sort of saying, "Well, gold isn't everything in life." It is when you are in charge of critical habitat designation, which I understand to be your responsibility, and it is when you are in charge of implementing the Endangered Species Act. And I read quotations that, you know, you think it has some lesser value.

And with all due respect, I would think a person would be aware of the science that human activity is causing, and our activity, all of us in this room, in some sense, is causing massive extinction. And to sort of pawn it off as this minimalist issue is very distressing, particularly when you then come and suggest in some form that we weaken the Endangered Species Act by reducing -- and we will talk about this in length, but this clearly reduces the level of protection that we provided species, particularly in giving them corridors for travel and the like.

So I just want to tell you that it's very distressing and if you want to make any comment on that, go ahead.

MANSON: Well, again, I don't see this as a weakening of the act. There will still be critical habitat designated under this particular bill. There will still be all of the other protections of the act and most importantly from my point of view, we have an opportunity to put resources into other programs which have demonstrated a greater ability to protect actual habitat on the ground that you can touch and you can feel and that critters can actually live on.

And those programs are proven successful. Some of those programs are voluntary programs in partnerships with landowners. Some of them are habitat conservation plans. Some of them involve conservation banking, all of which I believe are superior ways to protect habitat for species which are not only endangered, but may be not listed, but at risk of becoming endangered.

POMBO: Mr. Calvert?

CALVERT: Thank you, Mr. Chairman, and I want to thank you for having this hearing. I want to thank the author of this legislation, Mr. Cardoza, for bringing this up, and certainly thank you, Judge Manson, for coming here, Mr. Manson, for having the time to come here.

I have the privilege to represent a district that has the distinction of having one of the most impacted areas by the Endangered Species Act of anywhere in the United States: Riverside, California.

And certainly Mr. Baca's district, San Bernardino County shares that distinction. We certainly live every day with critical habitat and the distinction of having to deal around that.

In Riverside County we've been somewhat proactive. We're attempting to create a multispecies habitat conservation plan, one of the largest in the United States.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Hopefully we're very close to putting this together, which proactively deals with the Endangered Species Act in a way that hasn't been done before. We have found through experience that critical habitat -- you are absolutely correct, Mr. Manson, in saying that that does not help the situation, it hinders the situation.

The complexities of dealing with critical habitat is well known and by the way, the concept of saying that science in fact weakens the law -- using science -- is, absolutely, I find, amazing. We have been attempting to make sure that science is part of the law as we deal with the Endangered Species Act.

We have one species that is in Mr. Baca's district called the Delhi Sands flower-loving sand fly, which is somewhat famous. We can't find the fly, but we've been told it's there. They can hear it. They can't see it. But the community that Mr. Baca represents, Fontana, is being, in effect, held hostage to this species which we can't deal with rationally.

We have the new Santa Ana sucker fish -- again, an area where this species -- where we have designated critical habitat where the species does not exist. And that's a question I want to ask you, Mr. Manson.

How do we deal with or how do we justify designating unoccupied habitat as critical?

MANSON: Well, the statute itself has a provision for the designation of unoccupied habitat. The statute says that unoccupied habitat may be designated as critical habitat, but as I read that provision of the statute, that should be done only where the occupied habitat is not sufficient to provide a conservation benefit to the species.

CALVERT: Is your experience -- have you found that people who designate unoccupied habitat base it on objective, scientific information or in many cases base it upon subjective information between various parties?

MANSON: Well, that's one of the reasons why we're putting out this guidance, so that the public can be confident that the folks in the field who are doing the work are guided by principles that comport with not only the statute, but with good sense and good science as well.

CALVERT: Well, I would hope so.

In our area, again in the Inland Empire of California, one of the apparent reasons why this critical habitat was put together wasn't done because of any particular study; as we understand it, it was based upon two personal communications with biologists who stated in e-mails to the service that designating that area was important.

Now, we have a similar situation up-river where the federal government spent several hundred million dollars putting a dam in based upon scientific information at the time, for instance, that the San Bernardino kangaroo rat habitat would not be harmed and now we are getting reports that the service may require us to go ahead and just open the flood gates and not allow for the flood protection that this dam provides.

It seems inconsistent to us in government that are in charge of trying to use taxpayers' money logically to make sure that what we are attempting to do is not incompatible with species protection and I think science is an important part of that.

And again, I want to thank Mr. Cardoza for bringing this legislation forward, for having this conversation, for having this hearing and I hope that your legislation is successful and if there is anything I can certainly do to assist you, I will do.

Thank you, Mr. Chairman.

POMBO: Thank you.

Ms. Bordallo, did you have questions?

BORDALLO: Thank you very much, Mr. Chairman. Hafa Adai.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Members of the committee and Mr. Cardoza, I am very pleased that you have brought this bill up before us, and I represent a territory that has been impacted by this.

I'd like to take a few minutes to explain to Assistant Secretary Manson why I at this stage will be supporting the Cardoza bill or at least support what defined many of the concerns which it seeks to address.

The Fish and Wildlife Service has been demonstrating everything that is wrong with the current system of critical habitat designation through which management of the Ritidian Point Wildlife Refuge in Guam and its proposed critical habitat overlay for substantial land on the rest of the island.

Mr. Chairman, in 1993, the Fish and Wildlife Service took property that was slated to be returned to the people of Guam after it was declared access by the Air Force, thereby effectively cutting off those residents who live at the northern end of the island from having visitors to their property at Tagachang Beach.

For the last decade, the Fish and Wildlife Service has been opposing the rights of access through the refuge for these landowners to their property. Efforts to resolve this matter have been ongoing, but the Fish and Wildlife Service continues to either point a finger at the Air Force or hide behind their lawyers at the Justice Department rather than having an open discussion on how to achieve long-use management that meets the needs of the local population and the endangered species.

Meanwhile, two endangered species in Guam have recently been declared extinct: the Mariana mallard and the Guam broadbill. The Fish and Wildlife Service has not adequately managed to control the invasive brown tree snake, which is the prime threat to endangered species on the island, not the lack of habitat.

BORDALLO: And it seems pretty clear to me that the Fish and Wildlife Service is not demonstrating effective land use management at Ritidian and critical habitat designation would not meet the needs of our community.

So I support the notion in this legislation of tying critical habitat designation and having a recovery plan in place and to considering local concerns such as access to private property.

An alternative beyond the constraints of critical habitat designation is sorely needed.

And this bill offers the prospect of alternative land management that respects (OFF-MIKE) and until the Fish and Wildlife Services comes to its senses regarding access to Tagachang Beach, I must support the bill.

Assistant Secretary Manson, I would welcome your comments on this problem. And I hope you will convey my message today to those within your organization responsible for dragging this land access issue out for over a decade so it can finally be resolved.

MANSON: Well, thank you, Congresswoman.

You may know that I went to Guam a few months ago and I visited the refuge. I had conversations with the governor and all of the folks in the government of Guam who are in the natural resources arena.

I also convened a meeting with the Air Force, the Navy, the Fish and Wildlife Service and the government of Guam, and began working through this issue.

The matter is in litigation, so I am constrained as to what all I may say about this. But I will tell you that about two weeks ago, we received from the government of Guam a proposal that the Fish and Wildlife Service has found adequate to meet the needs that we discussed in the meetings back several months ago.

That plan of the government of Guam is now out for public review and comment, and I'm hopeful that that's a pathway forward for all the difficult issues on Guam.

BORDALLO: I am well aware of the plan.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Mr. Secretary, just how long is the litigation going to continue? I mean...

MANSON: Well, the court has a schedule. And if the plan that's out for public notice and comment passes muster with all of the parties, then there's a good chance that that litigation can be over with this summer.

BORDALLO: Thank you very much. Thank you.

Thank you, Mr. Chairman.

POMBO: OK.

Mr. Gibbons?

GIBBONS: Thank you very much.

Judge, welcome to the committee. We're happy to have you. And your testimony certainly has been helpful to us.

I, like my colleagues, am very supportive of this idea about amending the Endangered Species Act. And I think it's important to know that we're in the 31st year of the implementation of the Endangered Species Act.

And I think it's important also to know that some people believe that simply by listing a species in the Endangered Species Act will result in its preservation well into the future. I think they'd also be surprised to hear that 1,304 and rising species are on that list, but only 12, less than 1/100th of a percent, have been recovered and 9 percent are in the recovering phase or stable.

I think one of the issues that we have is science. One of the problems we have is science versus emotion. There is no doubt that the emotion of a species becoming extinct yields unintended consequences on both sides of the aisles and both sides of the debate, I should say, on this issue.

I'm a firm believer that before a species is listed, it should have -- or within a period of time after it's listed, say, 60 to 90 days, it should have a recovery plan and that recovery plan should indicate how we plan to go forward with the recovery and preservation of that species.

Because as I look at it today, with 1,304 species and only 12 recovered, the plan for the Endangered Species Act has been a failure to preserve and protect those species which were listed.

So I would ask what your thoughts are on implementing and requiring a recovery plan as part of the listing of a species and what you think should be included in that recovery plan?

MANSON: Well, I think it's very important to have a plan or a strategy to recover endangered species. I don't know if at the time of listing we frequently know enough about a species to do it on that short a time frame.

But I do strongly believe that the goal of the act is recovery, that it's not simply sufficient to put a species on the list.

That would be like saying -- the analogy would be in our health care system that we put people in the hospital and never let them out of the hospital. That would be a failure of a health care system if we were to do that.

GIBBONS: And you do nothing while they're in the hospital but just let them lie there.

MANSON: Right. Right. That would be a failure of the health care system.

It's likewise a failure of the Endangered Species Act if we don't recover species, because that's the goal, not just to list them.

GIBBONS: How many of the 1,304 species currently on the Endangered Species Act have a recovery plan?

MANSON: Only a very small percentage. It could be as many as 25 percent. I can get you that figure.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

GIBBONS: OK.

Let me ask a question about science because I, too often, hear the mantra of people saying we're weakening the Endangered Species Act by requiring science or we're weakening it by requiring a habitat to be protected or listed for the preservation and recovery of this species.

Let me give you an example that occurred in the district I have the great fortune to represent with the bull trout.

The bull trout was listed at the request of a Trout Unlimited Group, a fishing group at the request to the Fish and Wildlife Service. Yet at the same time, the state of Nevada biologists had for the preceding three decades studied the bull trout in the very location where the issuance of the Endangered Species Act limitation was to take place.

As a result, the state of Nevada provided the Fish and Wildlife Service with the information and the biologic data, which was summarily disregarded. The species was listed as endangered despite what the biologists of the state of Nevada had said, that it was not an endangered species. Yet today, we're engaged in a very long and extensive process, much of which has gone through litigation over the status of a bull trout in this area.

I am concerned that we too often let emotion rather than science drive the indication of whether a species should be listed. It's often listed for purposes other than recovery. In other words, oftentimes the species is listed to block, stall or delay any kind of use or development of land in its adjacent areas.

What are your thoughts on science as a criteria for listing an endangered species?

MANSON: Well, the law makes that a very firm criteria. In the guidance that we're issuing this week, we address the quality of information that is used to find the best available science. And the guidance that we issued this week makes clear that there are different qualities of information and that we want to use the highest quality of information that we have on any particular species. So I think that the issue that you raise is one that we are addressing now.

GIBBONS: Well, thank you, Judge. I look forward to working with you on this issue.

I thank Mr. Cardoza for introducing this bill.

I thank the chairman for giving me the extra time, because the light is red, to question this.

And I look forward to making common sense work in this very important piece of legislation. Thank you.

POMBO: Mr. Grijalva?

GRIJALVA: Thank you, Mr. Chairman.

Not any questions for the witness, but a couple of comments, if I may.

In my community in the area I represent, Pima County, we had the pygmy owl that was listed as an endangered species. What has resulted from that listing is a multigovernment, state, federal, local effort and a multispecies habitat recovery plan for the species.

And in the process of doing that, all the essential players in that decision-making process, development interests, environmental interests, have come together to work on a plan that now has broad-based support and broad-based support from the voters in terms of passing bond (ph) elections for land acquisition and habitat protection.

I mention that because I believe to this day that if that listing had not occurred, there would not have been the impetus to bring all those people together at the table to begin to discuss protection and recovery, but also how to balance economic and development needs with the needs to protect the environment.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I think the bill that we have before us today will render ESA's critical habitat provision fruitless and no longer able to provide help to species as it was intended to do 34 years ago. I cannot support this legislation because it will do nothing to further the goals of ESA and will instead make it more difficult and less likely that we will be able to recover species.

The proposed legislation will limit habitat designations to areas where species currently live. This will preserve the smallest possible area. It'll make it impossible to recover species to a point where they no longer need listing.

This bill would also prioritize economic impacts or environmental impacts in the designation process, thus robbing us of an opportunity to create balance in those decision-making processes. And I think this bill takes us backwards in our goal to recover endangered species. It will result in less protection for species and a reduced likelihood that species will recover.

As the bill stands today, I cannot support it, and I believe this bill takes us back to a time that 34 years ago, this country in its wisdom and this Congress in its wisdom set aside as a time to begin to protect critical habitats and in doing that, protect the species.

And so with that, Mr. Chairman, I don't have any further comments.

CARDOZA (?): Mr. Grijalva? Mr. Grijalva, would you yield a moment? Thank you. I appreciate it.

I wanted to ask the judge about an issue of guidance on designation of critical habitat. We've already had a little bit of discussion about that.

It's my understanding that one of the concerns is a lack of definition of critical habitat. And apparently the definition of, quote, "destruction or adverse modification of critical habitat," closed quotes, I believe is the language out of the statute.

That (inaudible) regulations were thrown out in 2001 by a court. The court ruled that the federal government wasn't abiding by the statute. Now we're in 2004. I'm told that the -- your agency still has not issued guidance or regulations for that definition despite the passage of three years. Is that correct?

MANSON: You're talking about the issue of the definition of adverse modification of habitat?

CARDOZA (?): Correct.

MANSON: In Section VII of the act. And yes, for the last three years, the Fish and Wildlife Service and the Noah Fisheries have worked on such a definition. We are coming closer to closure on that, but we're not quite there yet. That's true.

CARDOZA (?): Well, you know, this is just extraordinary. Here we are talking about weakening the fundamental American protection for endangered species, but the agency charged with the responsibility both to recover species and to be fair with property owners so that property owners will know what the rules of the game are has spent three years -- we fought World War II in four years -- to come up with some guidance to Americans about what the rules were.

Now, it's no wonder that people are griping about the Endangered Species Act when the agency responsible for telling Americans how to play the game hasn't told us what the rules are. Now, I find that totally unacceptable. The only possible explanation for that is that you don't have the budget to get a rule adopted.

But that's not much of an excuse either when your administration wants to cut the budget by \$10 million to deal with recovery of species. So can you give me some explanation of what you're going to do to solve this problem without gutting the Endangered Species Act?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

MANSON: Well, as I said, first of all, we're dealing not with the issue of guidance on critical habitat, but with a definition that the court found, in its view, did not comport with the statute. We've taken a very deliberate approach to creating such a rule. It's not a simple process.

CARDOZA (?): You have been deliberative like a glacier is deliberative.

Thank you.

POMBO: Mr. Renzi?

RENZI: Thank you, Mr. Chairman.

Judge, I appreciate you coming today. I want to take advantage of your legal mind here.

I have great respect for the congressman from southern Arizona, I consider him a friend. There is a lot of debate over the pygmy owl. One of the issues that's come up in southern Arizona has to do with geographical area. The pygmy owl in its northern migration pattern comes up into what is southern Arizona. It is said to be a flourishing species in Mexico.

And so, as you look at geographical area, in particular, in the language of this legislation which I do support, will there be an understanding as to migratory patterns, particularly from foreign soil into those areas like border states?

MANSON: I'm not entirely sure I get the gist of your question.

RENZI: When we look at geographical area, we look at habitat. When we look at the idea of critical habitat and of a species and we have a situation where that species may be rare in southern Arizona or in southern California but it is plentiful in Mexico, will there be an ability to weigh or will there be an ability to take into consideration the species' primary habitat in foreign soil?

MANSON: Well, the question that you ask is really one of listing.

The critical habitat provisions as they currently exist do not allow us to designate critical habitat outside the United States. And so, when we look at what is essential for the conservation of the species, we're constrained to look at that which is in the United States itself as opposed to what may...

(CROSSTALK)

RENZI: Thank you.

Here's where I'm going with this.

As we see data that shows the species may be moving north and hasn't entered the United States or is just entering the United States and we're looking at the possibility of critical habitat being further north, the idea that we may have heard the bird fly over this area or we may feel that as the bird continues its northern migration it may inhabit this area, under the language here, "occupied and used," we wouldn't be in a situation where the speculation would occur as to species that would be moving north, would we?

In other words, geographical area is really defined as "occupied or used," not so much "may occupy" or "may be projected to use" as the species moves north?

MANSON: Right. That's the definition in...

(CROSSTALK)

RENZI: Right.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And so, this language would actually bring a definition as to that speculation that is occurring in our backyard in Arizona?

MANSON: It definitely puts sideboards on the issue of which habitat ought to be designated as critical habitat.

RENZI: I appreciate that.

When we look at the issue of economic impact and the balancing and the weighting of that in comparison to the designation -- in Arizona, we've got the Tonto Forest which used to support 50,000 head of cattle. We've got a willow flycatcher bird that we're able to see exactly where the nesting sites are.

But we've also designated now five miles within that area, even close to that area because the cowbird may go in and lay its egg. And so, we're kicking cattlemen off the ranch. We've gone from 50,000 head of cattle down to less than 1,500 head of cattle in an area where John Wayne used to own his own ranch.

So the Arizona beef industry is essentially almost decimated in the Tonto National Forest. It's millions of acres.

When you look at economic impact, how do you see it balancing and how do you see it being weighted in consideration of the species itself?

MANSON: Well, there is a provision of the statute that's known as 4(b)(2) which allows us to weigh the economic impact of designating critical habitat as we're not allowed to do with respect to listing. And, in fact, that provision says we can weigh economic impact or any other relevant impact as long as -- and the limit is the extinction of the species.

RENZI: So is it an equal weighing, an equal balancing in comparison with the species itself, economic impact? Or is it a three-legged stool? Is it equally weighted?

MANSON: Well, we balance the benefit of including an area in critical habitat versus the benefits of excluding it, and that provision has been used only sparingly until this administration. We've made more robust use of that provision.

For example, in Mr. Cardoza's district and throughout California with respect to vernal pool species, we used that. We looked at the economics of the situations in various counties. And based upon the greater economic impact versus the limited conservation benefit, we excluded a number of counties from that designation.

RENZI: OK. Thanks very much. I appreciate it.

Thank you, Mr. Chairman.

POMBO: Mr. Baca?

BACA: Thank you very much, Mr. Chairman.

First of all, I'd like to thank Mr. Cardoza for introducing this legislation which I believe is very much needed. And I'm a co-sponsor of it, so I'm on the opposite of some of our members out here.

And the reason why is Mr. Calvert also mentioned the problems we have had in the Inland Empire, especially as it pertains to the Endangered Species Act and the Delhi Sands flower-loving fly and, of course, the kangaroo rat that has impacted both of our areas.

Before I make an additional statement, I'd like to thank the judge, you know, for working with us in trying to solve a particular problem that we had in Fontana in the immediate area. But this has been very controversial in the Inland Empire, is the Endangered Species Act and the definition, especially when the Delhi Sands flower-loving fly that comes.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

It's only been in existence for some time. We don't even know if it even currently exists right now. It's distinct. We have Santa Ana winds that are blowing. We don't know when the Santa Ana winds are blowing, where it's at and if it's still there.

Yet it's cost millions and millions of dollars, especially for the city of Fontana and some of the surrounding areas like Colton with this particular fly, and revenue and default bonds (ph) that have stalled even commercial development and preserved pockets of lands in connecting the corridor for this fly. And it's hard to imagine a fly.

I mean, if all of us saw a fly right now, we'd slap it. I mean, if anybody now had a fly swatter, I'd swat it. I wouldn't know if it had a little yellow on it and if it's distinct, or when it even comes up.

But yet, you know, we had this in part of this Endangered Species Act in the definition. We don't know when it's -- we don't even know if it's still alive. But yet the blight in the surrounding areas, so many things that can be done that's cost millions of dollars.

And because of this designation of both the fly and also the kangaroo rat, you know, we've designated between San Bernardino and Riverside County, like, 33,000 acres of critical habitat just for the kangaroo rat alone. And that economic impact -- and people have got to understand the cost.

It's cost us up to \$130 million over 10 years. That's a heck of a lot of money that you have for a fly that we don't know whether it exists, a fly that most of us would slap, or a kangaroo rat that exists that we say it's part of this Endangered Species Act that's there.

I believe that Congress also has a responsibility not to burden beyond the financial responsibility, to protect not only our communities, but also as we look at this fly and this rat.

That's why one of the questions that I have and I'd like to ask as we begin to work in our area, Judge, as you know, there is a difference between habitat conservation plan and critical habitat designation.

As the Endangered Species Act stands now, the Fish and Wildlife Service can exclude HCPs from critical habitat. In dealing with the endangered Delhi Sands flower-loving fly in my district, an HCP was created, but no critical habitat designated, which is most likely a good thing. This was not allowed under the law.

But is there any current law that would prevent HCP from being turned into a critical habitat in the future, question one? And question two is would H.R. 2933 be effective in making sure that habitat conservation plan is prohibited from becoming a critical habitat?

MANSON: Well, as to your first question, any party can petition to have critical habitat revised under the current statute. So it is possible that someone could petition to have the HCP areas included in critical habitat under the existing statute.

That's not going to happen during our administration because in the guidance that we've issued, HCPs which conserve the species are to be excluded from critical habitat. That's in our guidance that's coming out.

But at some other point, someone might well be able to do that. Now this...

BACA: That's why it's important to have the law and the definition be explicit, correct?

MANSON: Well, that's right.

And our guidance is based upon our analysis of the current law and our belief in the strength of HCPs as a superior way to conserve habitat as compared with critical habitat designations, because critical habitat designations are more of a legal exercise, although they have consequences, whereas a habitat conservation plan provides real conservation benefit to species.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Under this bill in the definition of critical habitat, this bill would revise the definition of critical habitat to explicitly provide that habitat conservation plan areas are not part of critical habitat definitionally.

BACA: Thank you.

POMBO: Mr. Cole?

COLE: Thank you very much, Mr. Chairman.

And I, too, want to thank Mr. Cardoza for introducing this legislation. It's, frankly, very important legislation. I appreciate us having a hearing on it as well.

Secretary Manson, if I could, I want to ask you just a serious question. I'm really particularly interested by the amount of litigation that the Endangered Species Act seems to generate. And am I correct in my opinion that there seems to be an inordinate amount of litigation, particularly for a piece of legislation that's now over 30 years old and ought to be pretty well understood?

MANSON: Well, folks are -- you know, lawyers are always finding new aspects of the statute and new areas in which to litigate, and it may be that that's part of the process of a statute maturing. I don't know.

I do know, though, that the current tide of litigation which is about eight or nine years old has really hampered the Fish and Wildlife Service's ability to carry out discretionary actions. And when we have biologists writing declarations and spending more time with their lawyers than with the critters, then that's not the way to run a conservation agency.

COLE: Again, that would suggest that if we're having that degree of litigation that either there is something defective in the law or Fish and Wildlife Service are not doing their job. And one of the two would be the logical surmise. Do you have an opinion on that as to which it is?

MANSON: Well, the current amount of litigation is generated in the listing and the critical habitat program. And it's my belief that the critical habitat process, the provisions of designating critical habitat, are defective and need to be fixed.

COLE: You know, last year we had testimony before this committee and before the Armed Services Committee about the application of the Endangered Species Act on military reservations and training reservations. And during the course of that, in both committees there was testimony that actually the military had done a pretty good job in its military reservations of enforcing the Endangered Species Act, but was constantly running into litigation and a very slow process in terms of getting critical decisions done that it needed.

And we took action, I think and as I recall, in the DOD bill with the concurrence of this committee to try and deal with that problem. I mean, are you telling us, in effect, that we have this problem across the board, that we really are having a hard time administering the law because we're involved in so much litigation about the law?

MANSON: Well, I think there are two things. And I gave some of that testimony on the DOD bill.

MANSON: The process itself is defective when it comes to designating critical habitat, and one of the defects is the strict time lines which necessarily create a hook for litigation. And the second problem, then, is the litigation itself, because it's caused a diversion of resources from core missions and it's resulted in court orders that stretch out through the year 2007 or so in order to be complied with.

And that means that other things which might be a higher priority in the view of the biologists don't get done because we don't have discretion to do those things without running afoul of the court orders.

COLE: I just want to thank you and thank again Mr. Cardoza for helping us in this critical area. I don't think we have a debate, certainly not in this committee, about protecting endangered species. I think we would find agreement.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

The real question is a process whereby we can achieve that goal that's efficient and that is expeditious, which I think both the species themselves, not to mention the rest of us that are dealing with this could benefit from.

So I appreciate very much your efforts in that regard.

And again, I thank my friend, Mr. Cardoza for his efforts in focusing on this critical problem. Thank you.

Thank you, Mr. Chairman.

POMBO: Mr. Udall?

(UNKNOWN): Thank you, Mr. Chairman.

And thank you, Judge, for being here today with us. Clearly, Judge, we must find a better way to implement the Endangered Species Act. And I think that's the thrust of many of the questions you're hearing today about implementation, about the failure of your agency to really move forward in an aggressive way and issue regulations and implement where you could resolve some of these issues in terms of litigation.

But let me just start with the proposition that we have, a piece of legislation that my colleague, Mr. Cardoza, has introduced back, I believe, in July of 2003. And you're the political appointee that's over this Fish and Wildlife Service, this whole agency. And we're approaching you -- if we were at this July, it would be a year since this legislation is pending.

And are you taking -- is the administration taking a position on this piece of legislation? Do you have a -- are you supporting it? Are you opposing it? Are you suggesting changes? What are you doing as far as this piece of legislation that we're hearing today?

MANSON: We are prepared to work with Mr. Cardoza and the rest of the committee on the legislation. We think that it solves many of the issues that we've been talking about over the last year in terms of critical habitat designation.

(UNKNOWN): And so, is this an unqualified support, then, of this piece of legislation?

MANSON: I'm not authorized to state an administration position.

(UNKNOWN): So you don't have a position, then, on this piece of legislation?

MANSON: In the terms that we talk about positions, that's correct.

(UNKNOWN): Judge, could you explain to me the period of time we've gone through here where this legislation has been pending? You folks have the scientists to look at this kind of legislation. I mean, occasionally on a congressional staff we will have the ability to hire a Ph.D. scientist or have a fellow come in.

But you have under you in the Fish and Wildlife Service all the professionals that understand this and have been working with it for years.

And yet, I don't see any effort on your part to come forward and enlighten us on these kinds of provisions. And now you tell me today that you're not taking a position on this, that the administration is not taking a position on this piece of legislation. I personally don't understand it.

Could it be that you don't want to take a position on such a controversial piece of legislation in an election year? Is that part of what's going on here?

MANSON: I think I said last year I'm not in charge of developing positions on legislation. I can tell you what I think of the bill, which I have, which is that it addresses most of the issues.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

(UNKNOWN): Well, can you tell me are you supporting the legislation? You're not taking a position, right, on the legislation?

MANSON: That's correct.

(UNKNOWN): Yes. OK.

More than a year ago, Judge, you made a statement to the Senate. And this is a quote: "The present system for designating critical habitat is broken." And I'd like to know what have you done to improve the situation.

Have you proposed legislation? Is there any legislation that your scientists and your people -- I mean, we all want to get the science right here. Have the career people that are working on this issue in your department suggested changes based on science? Have you come forward with some legislation in this critical habitat area?

MANSON: We've not proposed any legislation. We have taken administrative steps that are within our ability to take to improve the administration of the critical habitat provisions. Those steps have been somewhat on an ad-hoc basis over the last year. But this week, they are now compiled in a single guidance document that the Fish and Wildlife Service will begin applying.

(UNKNOWN): Now, is that the one that it's taken five years to get out? We're talking since 1999? We're talking five years to get some guidance out?

(CROSSTALK)

(UNKNOWN): Let me ask you, in August of 2003, the GAO issued a report called the "Endangered Species Fish and Wildlife Services Uses Best Available Science to Make Listing Decisions, But Additional Guidance Needed for Critical Habitat Designations." And it says in the footnote on page 15, "The service is currently drafting interim peer-review guidance that will provide objectives and procedures for implementing the 1994 peer review policy."

When will this guidance be issued on peer review?

MANSON: We have a peer-review policy.

In the interim, OMB has developed peer-review guidelines to be applied throughout the government. And so, we are not actively looking presently at peer review. We are concentrating right now on the critical habitat guidance, which is going to be -- started to be applied this week.

POMBO: The gentleman's time is expired.

(UNKNOWN): Thank you, Judge. I'll be back on the next round.

Thank you very much, Mr. Chairman.

POMBO: Mr. Osborne?

OSBORNE: Thank you, Mr. Chairman.

And thank you, Judge, for being here.

I'd like to thank Mr. Cardoza. You have been thanked profusely today.

I represent a district that is almost entirely rural, 85 percent of Nebraska. The Endangered Species Act has been a real problem to the landowners in this area. So I appreciate the judge's comments on involving landowners and state groups in this designation more thoroughly.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

At the present time, I think the feeling that I pick up from so many of my constituents is that there has been an inordinate amount of power accorded to sometimes a relatively few number of biologists in making designations of species and also habitat. Also a major concern has been the almost total lack of consideration of economic impact.

For example, one process that's now under way would involve taking 150,000 acre feet of Platte River water each year and designating that as water that should be used in ways that would preserve the whooping crane in the Central Platte. And there is also some indication that that might go to 400,000 acre feet, which comprises almost all of the irrigation water used in the Platte River on an annual basis.

Now, if that happened, then we would have an awful lot of farmers completely put out of business. And so, we think that certainly some consideration of economic impact needs to be done.

And, of course, the last issue -- and I think it has been addressed by Mr. Cole and you also, Judge -- is just the litigation issue, which I would hope that everyone here could agree on that so many of the funds that you need to implement the Endangered Species Act in terms of preserving the species is now being tied up in court.

And with that, let me just ask one question that may be somewhat peripheral to what Mr. Cole asked earlier. But can you tell me what best practices exist in other agencies for managing the impact of litigation on programs and work priorities?

In addition, what additional administrative or managerial actions could Fish and Wildlife take more effectively to manage the impact of litigation on programs and work priorities? Can you amplify or discuss that question?

MANSON: I can't really say much about the first part of the question because I'm just not familiar enough with that. What we have done this year is a couple of things with respect to critical habitat litigation. One is we did increase the budget for critical habitat designations.

Second, I have directed the Fish and Wildlife Service to comply with the provision of the law that requires critical habitat designation to be done at the time of listing. And the idea there is to prevent further lawsuits over deadlines.

And third, we have new guidance out this week that the Fish and Wildlife Service will apply in designating critical habitat. It addresses the various definitions that are in the law. It addresses the issue of economic impacts, although there will be further guidance on that issue. And it also addresses the matter of information quality. And all of those things taken as a whole should serve to reduce the amount of litigation that will result in the future.

OSBORNE: OK.

Well, thank you, Judge. And I'm glad to hear that you've taken those steps. They seem to make sense to me and hopefully they will bear some fruit.

And with that, Mr. Chairman, I yield back.

POMBO: Mr. Cardoza?

CARDOZA: Thank you, Mr. Chairman.

I'd like to start by thanking Judge Manson for coming today. And while I can't attest to things that happened -- Mr. Udall raised the issue of a five-year period of time it's taken to get some of these clarifications. I can't attest to that whole period because it predates my service.

I can attest to the fact that I've been assisted to a great deal by Judge Manson's input on this bill and I appreciate the information that I have gotten from him and his service.

My question goes to a report. In October 2003, a report on critical habitat was issued by the Center for Biological Diversity. I have it here in my hand.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

The center states that the populations of endangered species with critical habitat designations are more than twice as likely to improve a species without critical habitat designations. I reviewed this report and don't see how the center arrived at this conclusion.

The center states that it relied upon the data provided to them by the Fish and Wildlife Service. Sir, could you please comment upon the report and its findings and conclusions and whether you agree with them or not?

MANSON: Well, I don't agree with it. And my disagreement is based on having asked the career scientists in the Fish and Wildlife Service about the methodology of that particular study.

First of all, there was no data provided by the Fish and Wildlife Service for the purposes of that study.

My understanding is that what the center did was they took a look at other reports, other data prepared for other purposes and somehow extrapolated this conclusion out of those other reports and used the Fish and Wildlife Service data in those other reports for a purpose that it was not intended to be used for. The career scientists in the Fish and Wildlife Service that I asked about this said that that methodology was flawed and that they don't believe the conclusion is correct.

CARDOZA: Thank you, sir.

Some have stated that the problem we're dealing with is one of implementation and that regulatory and legislative changes are not necessary. I understand, however, that the courts have actually stated that a legislative solution is necessary. And can you provide us with any information as to court rulings on the need for a legislative fix?

MANSON: Several federal judges have commented in the course of litigation that they believe, as one judge put it, that the service is in a quandary trying to comply with the existing provisions on critical habitat designation. And they have suggested that a legislative fix is the proper way to go in addressing the issues that create this box that's bounded by strict deadlines on the one hand and the lack of available information at the outset of the listing process on the other hand.

CARDOZA: Well, I concur.

Looking at what's happened in Merced County, we've had wide swathes that were designated that you, then, went back and corrected in the process. I recall in one case there was a parking lot that had been paved over. In the information that the Fish and Wildlife Service had on its maps it indicated that there were some endangered species there when, in fact, we're parking cars on it.

So certainly it's difficult. We need accurate information and you need that information in order to be able to make the best call possible. Isn't that correct?

MANSON: That's right.

CARDOZA: Thank you for your help, sir.

POMBO: Mr. Pearce?

PEARCE: Thank you, Mr. Chairman.

And thank you, Mr. Cardoza, for bringing this bill. We've got some questions about it, but mostly we'll work through those. I'm appreciative that we're talking about the common sense of the legislation because sometimes that appears to be lost.

As soon as I was elected, I visited all 18 counties in a vast rural, sprawling district that every county said one of the most difficult things for them to deal with are the losses of property rights and private property rights, community property rights caused by the Endangered Species Act.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

One example is that along our Rio Grande River, it cuts right down through the middle of the big, square state of New Mexico, the silvery minnow is declared endangered. And during times of drought, we were not able to sustain the flow of water through the river that normally it had. And in order to keep the minnow alive, we dumped 50 years worth of stored water in upstream reservoirs to sustain a flow that nature will not sustain now that we've emptied that.

And so, my question, Mr. Manson, is why don't we breed that minnow in captivity? Why don't we have hatcheries that -- you used the word if we have a failure or there's a failure, if we do not recover the species. And why don't we use fish hatcheries to do that?

MANSON: Well, first, with respect to the silvery minnow, there is a program that is going down that road. There is a lot of controversy about the use of captive breeding and hatchery-produced creatures to count with respect to endangered species. It's been the subject of litigation. There is biological disagreement about it.

And those are some of the reasons why it's not (inaudible) widespread.

PEARCE: Basically what you're saying is that there is objection to doing that?

MANSON: There is in some quarters, yes.

PEARCE: Mr. Manson, also in my district, the agency follows the practice of not breeding in captivity minnow pairs, but it does follow in my district, same district, same economic impact, it follows the practice of breeding wolves in pairs in captivity and then releasing them. Why do we have one standard for one species and another standard for another species?

MANSON: Well, the difference has to do with the biology of the species.

PEARCE: I see.

So the wolf is more needed, and it's better to breed them in captivity, but the minnow is not? And that's the common sense that I'm talking about, Mr. Manson. We just seem to have lost that.

We have in my district also the lesser prairie chicken. And we shut down -- we're dying for jobs in this country. We're dying for affordable energy, and we shut down drilling rigs so that the lesser prairie chicken can procreate. Is that not true?

MANSON: I'm not aware of...

PEARCE: Well, just be aware that there is a moratorium on drilling and activities that create noise in order that the lesser prairie chicken might breed. I wonder if maybe we shouldn't be piping in Bolero or maybe some Vivaldi to help these poor chickens.

Now, keep in mind that the day after that the moratorium elapsed -- and it elapses at the same time every day -- that people on these rigs were watching the thumping and the grinding and the booming of the breeding pairs still with the noises going on. And I suspect that the people in the agency who write up the rules either haven't watched the breeding pairs of many species, including homo sapiens, that possibly noises just don't always interrupt. But that's the lack of common sense that would take away jobs and would take away economic activity.

And especially the endangered species of the silver minnow along our Rio Grande River -- we've got 400 years of cultures. The Hispanics moved in, the Native Americans were there and 400 years of culture on that river that can't get access to the water because it's being left in the river. They can't irrigate their small 10 and 12 and 15-acre plots. And we have economic destruction occurring in a very poor state.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

New Mexico ranks about 47th. And if you want to put us back even further, then you'll continue to eliminate common sense from this whole idea. But just the three examples I'm saying here. We can't breed minnows in captivity, but we can breed wolves. We can't have noises because the chickens might not mate.

Where is the common sense? Where is the economic reality?

When do we get to the realization that nature in drought years -- and we've had 2,000 years of recorded moisture history, 2,000 years. Sometimes the Rio Grande was dry for 10 years at a stretch and the silvery minnow somehow made it through.

And I suspect that in those years when the river had no flow of water that it did not reach the CFS, cubic feet per second, that your agency is prescribing now.

The common sense is absolutely gone. I would hope that we can get some common sense. None of us would watch any species go extinct.

But one of my farmers on the Rio Grande said, "Please, put in the Rio Grande farmers as an extinct species or endangered species." So if you would kindly list them in your agency and maybe get some treatment for the endangered farmers of America, I would appreciate it.

Thank you very much.

POMBO: Mr. Inslee?

INSLEE: Thank you.

I want to thank Mr. Pearce for the work on our ratings here, too.

I think the question we have here is whether the act is broken or whether the actors, or in this case, nonactors, are broken, meaning the agencies. Now, you just discussed and told us that your agency has failed now for somewhere between three and five years to adopt the needed guidance that your agency recognized in 1999 was needed for definition of critical habitat.

But there's another one I'm concerned about. Twenty Nobel laureates wrote some time ago the president expressing a concern about a repeated failure to level with the American public and give scientific information, in fact, pointed out repeated circumstances where the administration had suppressed information from the American public. And I want to ask you about one of those.

Recently, Fish and Wildlife released an economic impact analysis designating critical habitat for the bull trout. And suppressed from the final government report issued by your administration were 55 pages that detailed \$215 million in economic benefits primarily from the re-establishment of a sport fishery stemming from critical habitat designation.

The press reporter was quoted saying, quote, "The removal was a policy decision made at the Washington level. It did not come out of Denver or Portland," closed quote.

Now, it seems to me in working with the Endangered Species Act, leveling with the American public and sharing information should be a value rather than a suppression.

Could you tell us why the department removed this analysis of economic benefits of designated critical habitat and the economic contribution of sports fishing?

MANSON: You know, the first I heard about that was when I read it in the newspaper and subsequently I found out that those 55 pages or so were removed by the Fish and Wildlife Service at a mid-career level.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

The chief of the branch in Arlington of the Fish and Wildlife Service that does this said that she removed those pages because they did not comply with OMB guidelines for economic analysis.

I signed that critical habitat rule and I signed the notice putting out the economic analysis for public comment, but even -- she had not told me that 55 pages had been removed from the economic analysis.

So I don't think this is a case of suppression. I think it's a case of a public servant who looked at something, said this doesn't comport with the guidelines put out by OMB for economic analysis, and so she took the action that she thought she needed to take.

INSLEE: So did she call the local agency, then, and said this doesn't comply with the rules, we need a legitimate analysis of the economic benefits of bull trout sports fishery; let's redo it so Americans can make sure they know about the benefits of recovering this species? Or did she just put it in the trash can? What should she do? What did she do?

MANSON: I don't know what she did.

INSLEE: Well, she put it in the trash can, didn't she? She didn't go back to the agency and say, "Look, you didn't comply with the OMB rules. You need to redo this because I don't want to keep the American public in the dark about the economic benefits of species recovery. That wouldn't be the right thing to do."

She put it in the trash can, didn't she?

MANSON: I have no idea what she did with it. I can tell you this, though. I have looked at those pages subsequently after I heard about this in the press and I've looked at the OMB guidelines, and she was correct.

There are methodologies in those pages which were done by the contractor which do not comport with OMB guidelines.

INSLEE: So you think -- do I understand that it is your policy -- you think it's good leadership in your agency to encourage people to keep Americans in the dark about the benefits of recovering species when you get economic benefits of a sports fishery? You think that's good public policy to not go back and do an honest appraisal of that benefit and then tell Americans about it? Is that your testimony?

MANSON: No, my testimony is that it's good work on the part of a public servant who sees something that's not correct and takes action to correct it.

INSLEE: Well, my point is I want to make sure you understand the nature of my question. If she saw that this was not done according to OMB analysis, she had a choice, didn't she? And she had a choice under your leadership.

What she should have done, if that was the case, was to go back and ask them to do it right, to come up with the right number of the economic benefit. But the economic benefit that you want Americans to believe in the recovery of endangered species is zero, because that's the economic benefit that your agency told the American public would get from the recovery of bull trout. And that is wrong, isn't it? There is an economic benefit of the recovery, isn't there?

MANSON: I can honestly tell you that as I sit here today I don't know. That analysis has not been done.

INSLEE: You don't know that the recovery of having a sports fishery is a major economic benefit to the Western and Eastern United States? You haven't seen the development of these real communities coming back from the development of recreational industries? You don't know that?

MANSON: The question is whether there was an economic benefit from the designation of critical habitat, not from the recovery of the fishery.

POMBO: Mr. Walden?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

WALDEN: Thank you, Mr. Chairman.

So, Judge, what you're saying is that the analysis that was done didn't meet the legal guidelines that your agency was supposed to follow?

MANSON: That's right.

WALDEN: And a career public servant followed the law?

MANSON: That's correct.

WALDEN: And that the issue here isn't about whether you have an economic benefit by the species being recovered to a point where it could be harvested then. What that analysis was declaring whether this habitat had an economic benefit. Is that right?

MANSON: Whether the designation of critical habitat had an economic benefit or not. That's the question.

WALDEN: Not the recovery of the species to the point where it could be harvested and eaten?

MANSON: Not the recovery of the species. Right.

WALDEN: OK.

Mr. Chairman, it seems to me in the 30 years the Endangered Species Act has been on the books, we've really had few recoveries. I think something in the order of 12 of 1,304 species have been recovered according to Fish and Wildlife Service's own data.

Judge, does that sound right?

MANSON: That sounds about right.

WALDEN: So that's a -- what? I mean, the percentage is pretty small, a hundredth of a percent that we're getting. If this were any other law, wouldn't we say that there's a problem that in 30 years we're not getting results?

MANSON: Well, I have said that the results have been good for a handful of species and not so good for many of the rest.

WALDEN: And I guess as I look at that, I want to make sure the actions this government's taking are based on sound science and peer-reviewed science.

WALDEN: It's what we demand out of medical journals and Clean Water Act and elsewhere, that we rely on really peer-reviewed science.

Is there that requirement in the law today, for the work your agency does, that everything you do has to be peer reviewed?

MANSON: There is not an explicit requirement in the statute itself for peer review. There are policies in place for peer review.

WALDEN: But they change administration to administration; they're subject to change?

MANSON: They are.

WALDEN: And there's no requirement that your agency do outside, independent peer review with, say, the National Academy of Sciences?

MANSON: No such requirement in the statute.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

WALDEN: And it seems to me, as I've read through this information brought forward as a result of Mr. Cardoza's legislation, that your agency is really driven by whatever species happens to have an attorney that wants to file a suit to protect it, regardless of how threatened that species is with extinction.

MANSON: Well, that is one of the problems that we have pointed out, that the biologists lack the discretion to make those determinations anymore, because they have to follow the order prescribed by the courts.

WALDEN: Well, given the emphasis in this legislation by this committee on legitimate science-based and supported evaluation of determinations of species habitat, we're obviously watching the central California tiger salamander decision with great interest.

How is the Fish and Wildlife Service utilizing and incorporating the scientific information provided to you and your staff in the fall of 2003, demonstrating the stability of the CTS's range and population in the Central Valley, the existence of suitable CTS habitat, and importantly, the aggressive application and mitigation and habitat replacement activities where human activity impacts CTS habitat?

MANSON: Well, that is -- that species is currently the subject of a rule making that will be complete in several weeks and so I would be reluctant to comment specifically about that.

I can tell you this, however, that I expect the Fish and Wildlife Service to utilize all of the best available science as the statute requires, and when it comes to critical habitat, the information quality -- the guidelines that are included in our new guidance that's out this week.

And so, I have every confidence that the service will apply that in whatever rule making they're currently engaged in.

WALDEN: A few years ago -- I think it was May of 1999 -- your predecessor from the Clinton administration, Jamie Rappaport Clark said -- and I quote -- before a hearing in the Senate:

"In 25 years of implementing the ESA, we found that designation of official critical habitat provides little additional protection to most listed species while it consumes significant amounts of scarce conservation resources. We believe the critical habitat designation process needs to be recast as the determination of habitat necessary for the recovery of listed species."

Further, in 2001, Jamie said, "Critical habitat has turned our priorities upside down. Species that are in need of protection are having to be ignored. This is a biological disaster."

MANSON: Well, that's the same situation that exists today.

WALDEN: And what needs to be done to fix that?

MANSON: Well, we've taken limited administrative steps that are available to us. But ultimately, it's a legislative fix that needs to be -- that needs to happen.

WALDEN: All right.

Thank you, Mr. Chairman.

POMBO: Mr. Bishop?

BISHOP: Mr. Chairman...

POMBO: Turn your mike on.

BISHOP: In view of the time and the votes that is going on, let me just submit any questions by writing and then you can go on.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

POMBO: Ms. Cubin, did you have questions?

CUBIN: Thank you, Mr. Chairman.

I do have some questions about the wolf delisting, or not, in Wyoming, Idaho and Montana. I will submit those in writing.

But could you just briefly sum up for me what's happening with Idaho and Montana? Obviously, Wyoming has filed suit and they are different. But what's the status of the other two?

MANSON: In Idaho and Montana, we have to delist the wolf as a complete population, so we can't delist Idaho and Montana separately under the law.

CUBIN: Will they be treated -- will conditions or requirements, restrictions, be different in Montana and Idaho than they are in Wyoming?

MANSON: Yes. We have proposed a rule that would apply in Idaho and Montana that gives those two states more flexibility in terms of managing the wolf populations in those states...

(CROSSTALK)

CUBIN: Why is that? Why should they be managed differently in Wyoming?

MANSON: Well...

CUBIN: We're talking about one population.

MANSON: Right.

The issue is whether or not there -- ultimately, when delisting occurs, the states will have management authority over those species. And so the issue is, how can we give them some flexibility at this point, although we cannot completely delist. And...

CUBIN: Well, that doesn't answer my question.

My question is, why should the restrictions or the, you know, the treatment of the wolves be different in Wyoming than it is the other two states? Why?

MANSON: The difference is the management schemes that those states have proposed as opposed to the management plan that Wyoming has proposed.

CUBIN: But that doesn't answer the question.

We're talking about preserving this species and we're talking about one population of wolves.

And so, why would the management be different in those states? It isn't because there's a state plan. Isn't it because we are being punitive toward Wyoming?

MANSON: No, not at all. It has to do with the fact that the law in Wyoming is different than the law in...

(CROSSTALK)

CUBIN: But the ESA is a federal law.

MANSON: Well, except in terms of -- the issue is how much flexibility do the states get under the rules we proposed or under a scheme of delisting.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

CUBIN: But how they're treated -- how the states are treated differently, it makes no sense. And I don't want to take any more time.

But we will be submitting questions. And I hope you will answer that question more directly than you have today when we submit it in writing. Thank you.

POMBO: Thank you.

I know that Mr. Udall had additional questions and because we've been called to a vote -- there's two votes -- we're going to recess just very shortly and allow the members to go vote and come back.

But I'd ask Mr. Udall if he would submit those questions in writing.

(UNKNOWN): I'd be happy to, Mr. Chairman. You bet.

POMBO: Thank you.

I know there were several members of the committee that had additional questions. We would submit those to you in writing, Judge. If you could answer those in a timely fashion so that they can be included in the hearing records.

MANSON: We'd be pleased to do that.

POMBO: Well, thank you very much. Thank you for your perseverance with all the questions.

I'm going to release you at this time. When the committee returns from recess from the votes, we will seat the second panel.

MANSON: Thank you, Mr. Chairman.

POMBO: We stand in recess.

(RECESS)

(RECESS)

POMBO: I'm going to call the committee back to order.

I'd like to call up our second panel: David L. Sunding, Lawrence R. Liebesman, Rob Roy Ramey II, Ph.D., and Jamie Rappaport Clark.

If I could have you all stand and raise your right hand.

Do you solemnly swear or affirm under the penalty of perjury that the statements made and the responses given will be the whole truth and nothing but the truth, so help you God?

Thank you very much. Let the record show they all answered in the affirmative.

I'm going to begin with Mr. Sunding.

Before you start, I just wanted to in advance apologize to the panel for the delay. I know that the first panel, Judge Manson, was a long time. I appreciate all of you sticking with us here.

And, Mr. Sunding, if you're ready, you can begin.

SUNDING: Thank you, Mr. Chairman.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

My name is David Sunding. I'm a professor of environmental and natural resource economics at Berkeley, where I'm also the director of the university's Center for Sustainable Resource Development.

As a threshold comment, I'd like to point out that I'm not here to represent any particular group, but simply to represent the results of research that my colleagues and I, working with our fantastic graduate students, have conducted at Berkeley.

I'd like to refer in particular to two types of studies. First some studies that deal specifically with the question of the economic impacts of critical habitat designation. These studies include the red-legged frog, vernal pools, and the gnatcatcher.

I'd also like to refer to the results of some more general studies on the impact of environmental regulation on regional housing markets.

In the interest of time, I'd like to limit my remarks here today to the impacts of designation on housing for a couple of reasons.

First, recognizing the fact that an enormous amount of the wealth in the United States is held in the form of real estate, upwards of 70 percent, and also realizing that critical habitat designation does have the ability to profoundly impact the development and completion of housing projects.

Having said that, I'd also like to point out that critical habitat designation has the potential to touch a variety of economic activities, ranging from agriculture to mining, transportation to utility industries, especially in the provision of water.

I'd also like to note -- and I'm sure we'll hear from the witnesses later today, given their affiliations -- that critical habitat designation can also impact the activities of state, and especially local governments.

Now, with respect to the research, I'd like to begin at the project level where critical habitat designation can have three general types of impacts on housing projects.

First, critical habitat designation increases the costs of development. It can cause the developer to redesign the project, can create a need to hire outside experts to get through the permitting process, these experts including attorneys and biologists.

Critical habitat designation also imposes a requirement in many cases to perform needed mitigation at some expense.

Taken in total, the increase in development costs can easily be in the thousands of dollars per housing unit and can in some cases exceed \$10,000.

The second type of impact critical habitat designation has on housing projects is to reduce the output of the project. This is caused by the necessity to avoid on-site impacts.

And I'll speak in a second about the market or regional implications of a reduction in housing availability.

Third, critical habitat designation delays completion of projects. This is what I tell my students is a very good example of the hidden costs of regulation. It's often overlooked, but it's of great practical importance.

Delay imposes costs on consumers, developers and landowners alike. And these costs can in some cases account for some, if not the majority, of total impacts of designation.

Now, having spoken a little bit about the project level impacts of critical habitat designation, the main role of economic analysis, moving beyond just description, is to take these project level impacts and convert them into market impacts, and in particular, the incidence of impacts to different groups in society.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

At the market level, critical habitat designation can decrease housing availability in a region and thereby increase its price. This implies a large wealth transfer, and it's something that's worth discussing at some point today.

And second, marginal consumers -- those with the lowest ability or willingness to pay for housing at a particular location -- can find themselves pushed to a suboptimal location, or in some cases, out of the housing market altogether.

In fact, I think it's fair to argue that most impacts of critical habitat designation are borne by consumers of housing, since developers have some capacity, which varies from project to project, to pass along costs to consumers.

In closing -- and again, in the interests of time -- I'd simply like to note that where we come to with respect to the economic analysis is that the costs of critical habitat designation can easily run to the millions of dollars per acre actually conserved as a result of the designation process.

Whether or not that's a good policy decision is a larger question. What I'm trying to do here today is simply point out the magnitude of the wealth transfer that can result from designation of critical habitat.

Thank you.

POMBO: Thank you.

Mr. Liebesman?

LIEBESMAN: Good afternoon, Chairman Pombo, and members of the committee.

My name is Lawrence Liebesman. I'm a partner in the Washington, D.C. office of Holland & Knight.

I'm here, and it's a privilege to be here, to testify in support of House Bill 2933.

By way of quick background, I've been practicing environmental law for over 30 years, including 13 years with the federal government with the Department of Justice, where I was a senior trial attorney, handling many different cases under various environmental statutes.

Over the last 15 years, I have been very involved in the Endangered Species Act for litigation and policy matters, particularly critical habitat.

Recently, I co-authored the "Endangered Species Deskbook," published by the Environmental Law Institute with Rafe Petersen from our firm. And I'm also planning co-chair for the American Bar Association's ESA course next year.

H.R. 2933 will address many of the very serious problems we've heard about today in critical habitat. It will provide clear direction by more precisely defining how critical habitat is designated, by setting forth clear criteria for considering and balancing economic impacts.

Most significantly, the bill will especially advance the basic OVF (ph), and that is to get species delisted through sound science and a fair process.

When you look at the various provisions of the bill, I think they help achieve that result.

Section 2 of the bill, "Designation of Critical Habitat," will mesh the timing of critical habitat designation with the development of recovery plans. Recovery has got to be fundamental to getting species off the list. And unfortunately, we have seen a terrible disconnect between critical habitat designation and the approval and development of recovery plans.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

As a matter of fact, the Alabama -- excuse me -- the Alameda wood snake case in California is a prime example, where the service's designation of over 400,000 acres in four California Central Valley counties for critical habitat were struck down. Well, that occurred two years before the adoption of a recovery plan for the snake.

It was overturned on several grounds, and particularly the court stated, and I quote, "If the service has not determined at what point the protections of ESA will no longer be necessary, how can it possibly determine and identify the features of habitat that are indispensable in getting a species off the list?"

The bill's linkage will help alleviate that kind of disconnect and problem.

It is also consistent with sound science. And I'd point the committee to the 1995 National Academy of Sciences report, "Science and the ESA," that specifically recommended that critical habitat designation be meshed procedurally with the approval of recovery plans.

The bill will also recognize what I think is a very important common sense objective. And that is, if there is an existing plan that achieves substantially the same results as critical habitat, that the service does not need to go through with the designation process; that there's a habitat conservation plan or some other kind of plan in place.

And what this does, in my judgment, is that it tends to -- it elevates form -- what we have now is form over substance as opposed to focusing on what protections are being provided by a management plan. And the flexibility in place is really essential.

We've seen problems in litigation with this that has not been recognized. The Mexican spotted owl case, for example, is a prime example, where the judge said, you still have to designate critical habitat despite extensive and very well-defined management plans for both public and private land in Arizona.

The clarification -- Section 5, the clarification of the definition of critical habitat will also go a long way toward promoting sound science and fair gathering of data and information.

What we've seen, unfortunately, is that unoccupied areas are often swept in to the critical habitat definition, the idea that sort of lowering of the distinction between ordinary habitat and critical habitat.

And it's important that we get it right, that science be sound and carefully defined, because critical habitat should not encompass all possible habitat. It's only the habitat that's essential to bringing that species to the point of recovery.

And in that regard, I think the language of the bill, while it's good, needs to be thought through, because the language of defining "essential" as absolutely necessary and indispensable may be subject to some confusion, and so -- and potentially some abuse by regulators, albeit well meaning in the field.

So I'd recommend looking more precisely toward kind of biological criteria that will allow that kind of sound science approach to be applied to that definition.

Now, the basis for the determination -- Section 3 -- again, some very important points, I think, in this bill that the committee should seriously consider.

Getting information from local governments is essential. Oftentimes, local agencies are the best repository of information on habitat. But I'd go a step further. You need to look at state agencies.

I do a lot of work in Maryland -- a very good Department of Natural Resources, a great repository of information. That can help ease the information gathering and provide a sounder scientific basis to gather information.

Economics -- and we've heard a lot of talk about economics. The New Mexico cattle growers case is a very, very significant case. And what it says is, you have to consider the full range of economic effects.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Unfortunately, the service for years has not done that. And with all due respect, I think they're trying to do it right now, but they still haven't gotten it right.

And that they have to look at the total effects of both listing and critical habitat, because for years they said there's no distinction. And so, essentially, the increment above listing is nil, and therefore, there's no adverse economic consequences.

Court after court has rejected that principle. The service has taken remands on that regard. So I think looking at both direct and indirect effects is very important.

Working with clients and landowners by putting critical habitat, essentially, you in many ways redline property -- you affect property values, as Professor Sunding pointed out. You cannot look at economics strictly on the number of Section 7 consultations that may occur.

So the bill's broader approach is very important in the whole balancing process of making sound judgments.

But that's got to be also coupled, in my view, with the service, of revising the definition of adverse modification and jeopardy out of the Sierra Club opinion that Congressman Inslee mentioned and he asked in a question to Judge Manson.

It's very important to recognize, in my view, that there is a lower threshold for critical habitat. It will trigger more of an impact. And the service has got to go back, in my view, and go through a rule making to recognize that and formalize that. And I think hopefully the bill will encourage that.

Final point, information to the public. Section 4 is very important in providing clear guidance, requiring designations to be posted on the Internet. The public right now is confused.

I work with landowners. A lot of -- no real common sense in understanding what is critical habitat and what is not so people can make rational decisions.

Property owners are not out there to kill species. They want to manage species, in many ways, deal with government agencies in a fair and sound approach, and they can't do that right now. It's very, very frustrating.

So in conclusion, I would say that H.R. 2933 provides an excellent vehicle to address this most contentious issue today, and get to the fundamental purpose of the Endangered Species Act.

Let's get these species delisted through sound science, fairness to the public, to everybody out there. And let's follow through in a concerted effort and a bipartisan effort to make this happen.

And I'd be very happy to take questions from the committee. Thank you.

POMBO: Thank you.

Mr. Ramey?

RAMEY: I'm Rob Roy Ramey from the Denver Museum of Nature and Science. I'm the chair of zoology and curator of vertebrate zoology.

I'm not speaking on behalf of any group, but I have 23 years of experience in endangered species research and management. That includes research and management on peninsular ranges, bighorn sheep, Sierra Nevada bighorn sheep, California condors, peregrine falcons, African elephants and agali sheep in Mongolia.

We need to update the Endangered Species Act to meet today's scientific standards and to make use of today's technologies. Genetic analyses, computer-aided modeling, statistical analyses have provided us with powerful analytical and predictive tools. These are some of the same technologies that have aided advancements in medicine, criminal justice, space exploration and national defense.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

But more importantly, we need to update the standards for what constitutes best available science used in day-to-day ESA decisions. It appears there is a substantial disconnect between accepted scientific standards in the mainstream of science and how science is used in decisions regarding endangered species.

The Preble's meadow jumping mouse and bighorn sheep in the peninsular ranges -- both projects I've worked on -- provide examples of fundamental ESA science issues.

Listings made without adequate evidence -- questioning of evidence, hypothetical threats treated as if they are real threats, anecdote and unsubstantiated opinion are treated with equal seriousness to conclusions that are reached through empirical data and hypothesis testing.

Objective and independent peer review are often lacking.

We would never approve new drugs or go to the moon or cure cancer and AIDS on the kind of evidence which can pass for scientific evidence in the administration of the ESA.

Endangered species management can produce passionate empathy or disdain for some listed species. When passion and a lack of critical thinking are coupled with the decision-making power under the ESA, decisions can easily deviate from having a sound scientific basis.

The consequences of this can be far-reaching.

What can we do about this problem? The solution is to raise the bar on scientific standards used in support of ESA decisions and more clearly define disputable terms.

I urge the committee to support bills like H.R. 2933. This bill raises the bar on the definition of critical habitat and therefore represents a significant step along the path of ESA reform.

It also allows us to calculate the real cost of critical habitat designations, or the benefits.

By delaying the designation of critical habitat until there's a recovery plan, H.R. 2933 provides the Fish and Wildlife Service with more time to gather evidence on species occurrence. And also, it provides time for communities to develop alternative strategies for habitat conservation, including those with incentives.

In addition to the proposed changes at H.R. 2933, I urge the committee to consider requirements for scientifically defensible tests of genetic uniqueness for candidate species on this and other ESA bills. This question should be asked before listing petitions are considered or critical habitat is designated.

Furthermore, protection of species should deal with real, observable threats and not hypothetical threats. Recovery goals should be realistically achievable. Empirical evidence and predictive models should be utilized to define critical habitat.

Objective and independent peer review should be sought for listings, recovery plans, critical habitat, biological opinions and delistings.

And finally, it is presently difficult for the service to admit and revise some errors on critical ESA decisions. In the field of science, however, all hypotheses are potentially falsifiable with new evidence or new analyses. A good scientist is a good skeptic, especially of their own hypotheses.

As an example, I provide for the record a correspondence, an (inaudible) review, that I solicited from Dr. Philip Krutzsch, the scientist who originally described the Preble's meadow jumping mouse as a new subspecies in 1954, a research project where we tested it by utilizing genetic data and morphologic data.

Krutzsch is 84 years old, underwent open-heart surgery in January and is still an active scientist. Regarding the taxonomic re- evaluation of this subspecies he wrote, "The study clearly invalidates the *zapus hudsonius preblei*, and demonstrates its relationship to *campestris*."

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Perhaps most significant is the model you provide to unequivocally establish the uniqueness of an organism and its relationships before declaring it in danger of extinction. Such an analytical approach would prevent the implementation of a process to support an agenda or a point of view.

I can think of other listed species that could have benefited from a prior, detailed scientific appraisal.

In conclusion, Congress and the people expect much from science in protecting and preserving the existing species. Many of the choices contained in the ESA use vague and broad words to convey a desire, but not a path to achieve that desire.

Litigation has been used as the chosen method to describe that path, and has led to the misallocation of resources and unnecessary limitation on many benign activities.

Congress needs to define the path more precisely, place better and more limited definitions on disputable terms, and ensure that decisions are based on scientific evidence.

Thank you.

POMBO: Thank you.

Ms. Clark?

CLARK: Mr. Chairman and members of the Resource Committee, thank you for the opportunity to testify today on H.R. 2933, the Critical Habitat Reform Act of 2003.

I'm Jamie Rappaport Clark, executive vice president, Defenders of Wildlife, a 501(c)3 nonprofit organization with more than 475,000 members and supporters.

Our mission is the protection of all fish, wildlife and plants and the habitat that sustains them.

CLARK: Today, loss of habitat is widely considered by scientists to be the primary cause of species extinction and endangerment. And while the act has successfully prevented hundreds of species from going extinct, the loss of habitat continues to threaten scores of plants and animals, including many species that are already protected under it.

Despite its billing as the Critical Habitat Reform Act, there is, in reality, nothing reforming about H.R. 2933. It would effectively eliminate one of the Endangered Species Act's central tenets -- the designation and protection of critical habitat -- and replace it with absolutely nothing.

H.R. 2933 would fundamentally weaken the protection of habitat by effectively making the designation of habitat discretionary, by requiring critical habitat only, quote, "to the maximum extent practicable, economically feasible and determinable," end quote.

This would have the practical effect of making the designation of critical habitat the exception rather than the rule.

H.R. 2933 would also move the designation of critical habitat from the time of listing to the time of recovery plan as approved by the secretary, a shift that Defenders does not oppose.

But, by requiring the designation of critical habitat concurrently with the approval of the recovery plan, without imposing a deadline for such plans, H.R. 2933 would not only greatly diminish, if not eliminate, meaningful enforcement of the provision, it would further delay development of any blueprint for species recovery.

And finally, H.R. 2933 also fails -- neglects to address at all the grave problems regarding this administration's implementation of the act's critical habitat provisions, problems that are severely undermining and exacerbating the challenges associated with the conservation of endangered and threatened species habitat.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

But let's take a step back for a minute and look at the broader issue. What we're ultimately talking about today is the kind of world we'll be leaving to our children.

Unfortunately, our nation has not really succeeded in protecting a conservation legacy as rich and diverse as the one we inherited. Often we sacrifice tomorrow's bounty for today's gains. Some of these failings are reversible, but others are not. And the most permanent of them is extinction.

In 1973, our nation's government passed the Endangered Species Act with wide bipartisan support. Our leaders realized then what the years since have only confirmed: That we owe it to future generations to be good stewards of the environment, and that good stewardship includes the prevention of species extinction.

Congress also realized how vital habitat was to species recovery, so much so that they highlighted in the original construction of the Endangered Species Act that protection of habitat is one of its key purposes.

Since then, the ideas behind the Endangered Species Act and the act itself have continued to enjoy broad bipartisan support.

A recent poll done by a coalition of conservation groups, including Defenders, revealed some astonishing numbers. Ninety percent of voters subscribed to the view that they owe it to their children and grandchildren both to be good stewards of the environment and to avoid causing species to go extinct.

The Endangered Species Act itself enjoys the support of 86 percent of voters, and a full 95 percent agree and understand that one of the most effective ways to protect species is to protect the places in which they live.

Clearly, any suggestion that there's a groundswell of support for weakening the Endangered Species Act is unfounded. Voters are strongly supportive of species protection in general, and the act specifically, especially with regard to protecting habitat essential to species recovery.

In summary, the Endangered Species Act with its central tenet of habitat protection continues to stand as one of our nation's most important and effective instruments (inaudible) restoring the conservation legacy we pass on to our children.

We must never forget the central purpose of the act and the extraordinary foresight of the act's original authors, who saw the wisdom in both species conservation and habitat protection. After all, it hardly matters what you do for species on the brink of extinction if you don't protect their habitat.

It is clear that if we are to recover species on the brink and prevent additional species from suffering a similar fate, we simply must do a better job of protecting the habitat they depend on.

I challenge all of us, as we discuss any proposed changes to the Endangered Species Act or its implementation, to answer the question: Will it improve and ensure the conservation of habitat? It is only (inaudible) with a positive answer that we have meaningful reform that will guarantee a rich legacy for future generations.

Thank you.

POMBO: Thank you. And I want to thank the entire panel for your testimony.

Ms. Clark, in your testimony, you talk about the results of a poll and where 80-plus percent of the American people are in terms of the Endangered Species Act and protecting habitat.

And in listening to the questions -- I haven't seen the poll -- but in listening to the questions the way that you testified, I would have been, personally would have been with the 80 percent plus if those questions were asked of me in the way that you presented them to the committee.

But one of the problems that we have in trying to reform the act and make changes is that's not what we're talking about.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I don't think that Mr. Cardoza is trying to introduce a bill or is trying to amend the Endangered Species Act in a way that would remove protecting habitat. Now, we may have a difference of opinion in terms of how do we do that. How do we have a system that works better than what we currently do?

And, you know, you've testified before this committee many times. I've always had a great working relationship with you.

And I've always felt that in your time of service as part of the previous administration, even though we may have disagreed, I always felt that you were doing what you felt was right and within the boundaries of the law, regardless of what the issue was.

And I always appreciated that, and I think that's why we always got along when we were trying to work together on this.

But what Mr. Cardoza is attempting to do is, I think in line with what you said when you were the director of Fish and Wildlife Service, and that's to make the system work better than what it currently does. And there are ways to do that.

And I would make an open invitation to you to work with you. If there are specific parts of this bill that you think go too far or are wrong in the way that they try to approach it, I'd be more than happy to work with you to try to find that.

But I do believe that this is the right direction to go in terms of trying to reform the critical habitat provisions that are in the bill.

CLARK: Well, I would welcome -- we would welcome working with the committee to assure that any reforms, including critical habitat -- but, since the discussion of critical habitat today -- that it meet that test of sustainability of habitat protection for the long haul. I don't think anybody would disagree with that.

POMBO: Well, I don't believe they do. And I think that's what brought us to where we are today.

And I don't think it's helpful to the debate or the discussion -- you know, I've read some of the stuff in the paper over the last few days, saying that this bill guts the act and all this other stuff, which is blatantly untrue.

And everybody knows that it's untrue. But that's the level of debate that we've devolved into when it comes to the Endangered Species Act.

I believe this is an honest attempt to try to make the act work within the boundaries that we all have.

You, as a former director of Fish and Wildlife, repeatedly pointed out the shortcomings in the critical habitat process and that we needed to change that and reform that.

And, you know, quotes from you have been put out there and, you know, we can spend all day doing that. But at this point I don't think it's helpful. I just -- in trying to move forward in a bipartisan way of trying to come up with a way to fix this better.

And I appreciate you being here today and your testimony.

I did want to ask Mr. Sunding a couple of questions in terms of his testimony. And this is something, that I think there's a lack of education or a lack of understanding when it comes to the Endangered Species Act and what some of the impacts are.

You know, you talk about it -- I'm assuming that you live near the university in what is probably one of the most expensive housing markets in the country, if not in the world.

SUNDING: Yes, that's right.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

POMBO: And my district, which is very close to the university, I have cities in my district where the average house is \$650,000 plus. And most of the people that are your typical, middle-class, working family could not afford to buy the house that they're living in, because of those costs and the result of that.

As a result, we are getting more and more people that are moving out into the Central Valley into my hometown of Tracy. We have just exploded in terms of population in my hometown. And now our average housing price is \$350,000 plus and we're pricing people out of that market.

In the context of all of that, the Endangered Species Act has played a major role in that. And I would like to ask you if you could share with the committee what role the Endangered Species Act has played in terms of those housing costs and the impact on your average middle-class family that happens to live in that area.

SUNDING: Yes, I'd be happy to talk about.

Let me say first, I had the very good fortune to attend the conference here last week sponsored by the Department of Housing and Urban Development on regulatory barriers to housing affordability.

And one of the main areas of focus of that gathering was the role of environmental regulations in decreasing housing affordability for some particularly vulnerable groups.

So just say, to begin, in general, that this is an area where researchers are beginning to connect the dots. There does appear to be a very strong connection.

Having said that, I'll also say that the connection is going to vary a lot from place to place, and particularly the role of environmental regulation in driving up housing prices. And by inference, the role of the ESA in driving up housing prices is going to vary a lot from place to place.

The bay Area, the Inland Empire area of Southern California, coastal areas of Southern California -- those are three cases where I think you can make a very strong general argument that environmental regulations are both driving up housing prices, and also, as you point out, pushing consumers to more and more distant locations, forcing them to commute longer and longer distances to their jobs, which causes all kinds of other regional, economic and environmental problems.

So I think the connection is quite strong even if, in fairness, it's just beginning to be understood by people at the university.

POMBO: Well, thank you. I appreciate your testimony and I'd like the opportunity to continue to discuss that with you.

Mr. Inslee?

INSLEE: Thank you.

There was a suggestion earlier during our discussion that because only a relatively small number of species have actually been recovered -- I think someone used the number 12, I don't know if that's accurate or not -- that somehow the act is a failure and it hasn't provided Americans with substantial benefits.

But it would appear to me that, at a minimum, it had given an opportunity for many, many species that probably, or at least a significant chance, would have been extinct by now had this act not been in place.

And just to give people a flavor of what we're talking about, if you look at the act now, the woodland caribou gone, the Columbian white-tailed deer gone, the jaguar gone, the Point Arena mountain beaver gone, the ocelot gone, the Sonoran pronghorn gone, the pygmy rabbit gone, the Hawaiian monk seal gone, the bighorn sheep gone, the Hawaiian duck gone, (inaudible) gone -- that's just the beginning of a list.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

It appears to me that the act has had, at a minimum, a benefit of assisting the preservation of these species while we work on their recovery, and at least has given a significantly better chance of at least keeping the genetic stock available while we work on these recovery plans.

Would the panel pretty much agree with that? Would you all agree with that assessment? If someone disagrees with that, feel free to -- I'm seeing mostly yes's and one quizzical look. So if you think of some other idea, let me know.

I want to ask about this new guideline. I'm told today, after three plus years without guidance, after a court struck down what the administration, or the agency, was doing, that the agency's finally got around to doing something here.

And that's really troublesome to me, because we really are trying to figure out whether the act is broken, or the actors are broken -- namely, the agencies that implement the law.

And there was a GAO report -- I don't know if you folks have seen it. It was requested by Mr. Pombo and others. It came out last year on the Endangered Species Act.

And what its conclusion was -- I'll just cite the title, because it kind of says it in a nutshell. Quote, "Fish and Wildlife Service uses best available science to make listing decisions, but additional guidance needed for critical habitat designations," close quote.

And basically, the GAO study said the agency needs to get off the dime and issue some guidance. That's the problem here. The agency under this administration has not acted.

Now, the question I have is, some of you who have supported this bill, have you been on the agency's case, in a polite way of saying it, since the Bush administration came into office, to get off the dime to issue some guidance here?

LIEBESMAN: I, too, have been very troubled by the lack of guidance over the last couple of years. I think it's very unfortunate when courts are running the program and the administration does not respond effectively to address some of those issues.

I mean, a case in point deals with the consideration of economics. You know, the cattle growers case out of the 10th Circuit, that basically took the service historically to task for not adequately considering the broad-based economic effects of listing for this critical habitat.

The message quite clearly out of that case is, you really have to come up with clear-based guidance about how economics enters into the analysis. And now we're just beginning to see something.

The other issue that I mentioned in my testimony that you had picked up on your questioning earlier is the Sierra Club case.

It got -- out of the 5th Circuit, which talked about, basically struck down the uniform standard that is applied by the service, historically for jeopardy as well as adverse modification, saying that Congress intended a lower threshold when you're dealing with adverse modification of critical habitat, as opposed to jeopardy. You know, adverse modification, going toward the idea of recovery of the species, as opposed to jeopardy, going to the issue of survival.

And clearly, the message from that decision is, go through a rule making.

So I think -- indeed, I've been on that case. I think it's very important that the service move forward. It's good to see the guidance is going.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

But I do want to say one other thing. I don't think guidance is the only way. I feel very strongly that we need some legislative -- clear legislative mandate to make this happen.

(CROSSTALK)

LIEBESMAN: Go ahead.

INSLEE: I want to ask you about that mandate.

Basically, the thrust of the bill in a variety of ways -- this is my characterization, you may challenge it -- but I think weakens in a significant way the method of adopting critical habitat.

For instance, it makes concurrent designation for a recovery plan that doesn't have any deadline for that occurring. It restricts the critical habitat to the range of currently occupied area of the species. But if you conclude scientifically that that's going to result in extinction of the species, you haven't solved the problem.

And economic benefit -- it doesn't define economic benefit. It could -- or economic conditions -- it could mean that just if the administration doesn't appropriate enough money, economically, for the administration to do this, this problem doesn't get solved.

Would anyone want to comment on those concerns that I have about this proposal?

CLARK: If I could.

And while I don't support the current form of the bill, I still have an opinion on the guidance that Judge Manson referred to.

What I find most troublesome about his announcement about the guidance -- that nobody has seen, and that I think is interestingly timed to today's hearing -- is that for an issue that seems to have been as controversial, dating back to my time, even, with the Fish and Wildlife Service, I find it a bit curious and troubling that it's a guidance of such magnitude to provide guidance or policy for how the service will move forward in critical habitat determination that it is not subject to public notice and comment.

I've never heard of that before. Or that, indeed, from what I understand, the Fish and Wildlife Service was not even involved in the development of the guidance.

So I would just bring that to your attention. I'm very interested in looking at how this administration has determined that they would move forward with critical habitat determination.

The issues that -- the concerns that you raised with the current bill are very real, because at the end of the day, it becomes a question, not only of priorities, but of all the resources.

The notion of shifting the determination, science-based determination of habitat that's essential for recovery, to the recovery planning stage, which would suggest an open, collaborative fashion for figuring out what's necessary to ensure safe passage to recovery, makes clear sense.

But I can tell you, after many years of implementing the act in my current life -- or former life -- that absent some kind of affirmative deadline and velvet hammer, if you will, approach to getting a recovery plan completed over the finish line, not only will you not have recovery plans completed, because of a ripstorm (ph) of priorities, but neither will you have habitat articulated. And it becomes a double jeopardy problem.

INSLEE: I just want to make a very brief comment, again. I just think that's really an important point, given the budgetary pressures that the agency is under.

We've got to have something to make sure these decisions get made in a timely fashion.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Thank you.

(CROSSTALK)

RAMEY: I wanted to disagree with your comment -- the first blanket comment -- that all these species would be gone if it wasn't for the ESA.

Let me speak specifically...

INSLEE: I want to make sure you understand the premise. I didn't say they'd all be gone. I wanted to say there'd be a significantly increased opportunity for them to survive. And I just wanted to make sure you understand. I didn't say that they would all be gone...

RAMEY: OK.

(CROSSTALK)

RAMEY: But let me point out that in the case of Sierra Nevada bighorn sheep, they were specifically listed to gain federal supremacy over state law to control mountain lion predation, which was causing the significant decline in the population.

The mountain lion population has crashed in the eastern Sierra Nevada and that bighorn sheep population has increased dramatically in the recent years.

And they've only removed two or three mountain lions from this area. So -- under the act -- but the mountain lions basically did it on their own.

In the peninsula ranges, the primary causes for decline of that population initially, from empirical evidence is, mountain lion predation, respiratory disease. And yet the effort is actually going to other areas for hypothetical threats such as human disturbance.

And so, in that particular case, the real causes that are demonstrated are not being dealt with.

LIEBESMAN: Can I just comment very briefly, if I can, on the recovery plan mandate issue?

One of the things I think is going to have to be thought through is that the service has adopted a lot of recovery plans already. I don't have the numbers, but a lot have been in place.

And I understand a lot of them are out of date. They need to be updated.

So I would agree with, in many ways, with the premise that you raised. What you need to have, some action forcing mechanism to adopt these plans.

So you have to put that in sort of a realistic context. That is, the plans have actually been adopted. Do they need to be updated? When would they be updated? How would critical habitat tie into an updating of a plan? What plans haven't been updated? And then you move forward.

So it's not so simple as saying, well, let's just put a deadline for recovery plans.

Resources are important. I could not agree with you more. If you're going to really achieve the goal of the act, you have to ensure that there's sufficient resources to develop recovery plans and to mesh all this together in a common sense way.

And we can't do it in bits and pieces. So it's not an easy issue to say, you know, let's just have a deadline. There's a lot involved in this process.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

POMBO: Mr. Walden?

WALDEN: Thank you, Mr. Chairman.

And I think my colleague from Washington sort of made the case for why we need to fix what's wrong with the Endangered Species Act. We are losing species. We are not recovering them as fast as a lot of us would like to see.

But it seems to me in this debate that designating critical habitat up and down a system, whatever it is, without having a recovery plan first is like trying to build a house without a plan.

You can go to Home Depot and lock up everything that's there in the building, but you only may need half of it. And we don't know what we're going to end up with if we don't ever have a plan.

And it seems like in the recovery planning process, you could both develop a plan that would be better for recovery of a species and produce more public support, because then the public would know what it is we're trying to do and how we get there and how there's an endpoint.

I mean, I faced this problem in the Klamath Basin, when the scientists declared we had to keep a higher lake level in Upper Klamath Lake to protect the sucker fish when, in fact, the biggest die-offs occurred during the highest lake level years.

And they can't tell us how many fish were ever in the lake, how many are there now, or how many they want there. Then, the plan's done.

And that to me -- forget deadlines. There's not even a plan and that's nuts.

What we have to do is update this law so that we have a recovery plan, gather the information, and then decide what's necessary to achieve that plan. It's a pretty simple planning process.

I mean, is it just me or does it look like all this is driven by whoever has a letter or wants to do fund-raising somewhere out there to support and featherbed their own nest, oftentimes, rather than dealing with what's at the top of the threatened list?

Isn't this litigation-driven?

Anybody want to tackle that?

LIEBESMAN: Sure, since I'm the only lawyer on the panel.

(LAUGHTER)

LIEBESMAN: I guess, by default, I have to respond to your comment.

I think there's been a tremendous amount of litigation, unfortunately, that has driven the process. And I think a lot of it is because you have deadlines in the bill -- in the original act - that were unrealistic. Critical habitat has deadlines that you designate within a year of listing.

And the service, historically, in my view, didn't think critical habitat was that important. They said, Let's put our resources elsewhere. They said that, basically, the standard for adverse modification -- same as jeopardy -- Section 7, no difference.

And so what happened is that smart plans in the environmental community and elsewhere said, well, here are deadlines. We can enforce that by going in and filing a citizen's suit and working out settlements. And that, of course, starts the cycle of a schedule.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And then, of course, the plan comes out oftentimes not tied to a recovery plan, inadequate. And then folks unhappy with that sue to challenge the substance of that.

And so, that it creates an endless cycle where there are entry points through litigation to drive the process. There are not enough resources on the part of the service to respond effectively. And judges are forced to grapple with a statute that's very clear with deadlines and a process that's broken.

And so, I think that's where we have come, unfortunately -- the way this has all evolved over these many years -- and why this kind of legislation, in my view, is essential to try to put a halt to that process and create some rationality so that judges and courts are not running the program.

WALDEN: Well, and you're not alone.

The Tulane University Environmental Law Journal says, and I quote, "The entire ESA budget runs the risk of being consumed by the bottomless pit of litigation driven by listings and designations.

"And which habitat is most vulnerable and should be designated as critical, litigation-driven actions prioritize only those species that have a plaintiff behind them and often a larger political objective rather than those species that are most endangered."

And it seems to me that the professional biologists and scientists should be looking at what's most threatened and endangered and trying to save them first, and the resources that we have ought to be applied to those species in a constructive way but that has a recovery plan in mind.

You get the data. It's peer reviewed. It's scientifically sound. We put parameters. We involve local communities and the state.

One of you mentioned how states and localities often have some of the best data.

Why wouldn't we try and seek out the best data when we're talking about whether or not a species is going to go out of existence or not?

We should open this process and make it transparent, and then come up with the best peer-reviewed recovery plan we can, taking into account all the other parameters as outlined in this bill.

So, I appreciate your testimony. And thank you, Mr. Chairman. With that, I yield back.

POMBO: Mr. Cardoza?

CARDOZA: Thank you, Mr. Chairman.

I'd like to submit this question to Ms. Rappaport Clark.

Ms. Clark, you've made some broad and, in my mind, unfair statements regarding the bill; that my bill devastates the ESA. You claim that critical habitat won't be declared by the secretary.

I'd like to have you look at page 2 of the bill, Section 3, which states, "The secretary shall, in accordance with Subsection B, to the maximum extent practical, economically feasible and determinable, shall, concurrent with approval of the recovery plan for the species under Subsection F, designate any habitat of such species that are then considered critical habitat."

My question to you is, if you're secretary and you feel that there's critical habitat needing to be designated, you don't think you can designate under that regulation?

CLARK: If I'm secretary, it makes a difference, but...

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

(CROSSTALK)

CLARK: And because what is laid out in this construct is, when you have words like "practicable, economically feasible" and the economic analysis debates that are ongoing now...

(CROSSTALK)

CARDOZA: That's exactly my second question I wanted to ask you. Because the point of those -- that terminology being in this bill is, by your logic, conversely, if we determine it's unpracticable, uneconomically feasible and undeterminable, we would still have to declare that critical habitat.

We would have to turn logic on its head and we would have to determine critical habitat even though it's undeterminable.

CLARK: No, that's not correct.

CARDOZA: Well, that's the way I understand it.

CLARK: What I was linking here is the factors of practicable, economically feasible and determinable concurrent with the development of a recovery plan.

Now, I absolutely agree with all of the comments that have been said prior to this conversation about shifting the designation of habitat essential to recovery to the recovery planning stage.

But having worked as a biologist all the way up to the director in the Fish and Wildlife Service, my frustration -- their frustration -- will continue to be, and I suggest it's probably this current administration's frustration, that there is not a deadline with commensurate, appropriated resources to fulfill that by which to compel the recovery planning process to be completed.

The debate on habitat, whether it's practical, economically feasible or determinable, will not occur.

CARDOZA: Well, I'm perfectly willing to engage in a dialogue with regard to deadlines, because I think that there may be some issue that we have to deal with there.

But it is my feeling that if you don't have a plan and -- how can you designate critical habitat if you don't have a plan? That's one of my concerns.

CLARK: I don't disagree.

CARDOZA: And also, I am concerned that the discussion is more political than biological and that's one of the problems I have with some of your testimony, is because it's who is secretary is your concern.

And when we're dealing with the law, that's part of democracy. It doesn't -- you can't determine -- we can't write the law for when you're secretary versus when Mr. Manson is secretary. We have to write a law that's there all the time.

CLARK: I don't disagree with that. So let me, if I could, clarify what I meant.

I think there's been a lot of discussion and debate over the years, regardless of whether it was Secretary Babbitt or Secretary Norton sitting in the chair, the Interior Department.

Regardless of who sits in the chair, it is troubling to me, is how the discussion of, quote, "critical habitat" has shifted away from being the notion of habitat essential to recovery of listed species to try to counter this ongoing rhetoric and attack about how that's been a failure and hasn't recovered any species to one of cost and economics.

And so, there's got to be a balance in there.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

What I've seen in the last few years is a serious shift to economics and economic analysis. And I find interesting that when the economic analysis work that's being done today only addresses economic costs and per OMB, I sat in a meeting with a Fish and Wildlife Service economist within the last three months where they told me they were forbidden from evaluating economic benefits.

I think that's half of an evaluation.

CARDOZA: Mr. Chairman, I have a number of questions I'd like to submit, including some to Mr. Liebesman, would like to do in writing after the hearing.

POMBO: We will hold the record open to allow members to prepare further questions to be submitted to the panel in writing, because I know there are a lot of questions of this panel.

CARDOZA: Thank you.

POMBO: Mr. Tancredo?

TANCREDO: Thank you, Mr. Chairman.

I'd like to ask the members of the panel -- and I know some of you have addressed this at some point in time.

But in the 30 years -- over 30 years since this law has been on the books, has nothing changed in terms of our ability to make better assessments as to exactly what is critical habitat? What is the nature of the process that would bring something to the point of being listed as endangered?

Has nothing changed in the science in that period of time?

RAMEY: Let me speak to that.

Yes, quite a bit has changed and we have new standards in the judicial system for evidence.

And we have computer-aided modeling for making predictions about where species are occurring. So we can take evidence from where they presently occur, and make predictions where they could occur or could have occurred in the past, that are far more certain than just simply based upon opinion.

And so, yes, we do have the tools, but it's not a requirement to apply those tools presently.

We have a paper coming out in about two months in the wildlife society boards (ph), and where we utilized a large data set from the Fish and Wildlife Service on observations that they didn't use. And we used it to develop a model for asking, how much of this critical habitat area has a low probability of sheep (ph) use (p). And 66 percent had a near zero probability.

So it's really a question of picking your battles and putting your resources where they count most.

TANCREDO: Go ahead, sir, yes.

LIEBESMAN: Well, I just wanted to sort of follow up, not being a scientist, but being a lawyer, and having seen the process go.

And I think that policy has evolved to be hopefully a little more rigorous in how you make these decisions. But still, because there's no clear guidance and no way to pull together the best science in a rational, clear way, we've seen sort of a crazy quilt of decisions going on all over the place.

For example, I talked about the Alameda wood snake case, which is a very interesting example and a recent decision that came out within the past year, where the critical habitat designation of over 400,000 acres in Central Valley of California is overturned, in many ways on bad science.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Basically saying that the service had presumed that habitat was critical based upon a theory that the snake might be there, or trying to do some connection based upon data that may not be scientifically supportable. And the judge basically said, the record was not sufficient to make that judgment.

And what was very important about that case is, the court jumped on the fact that a recovery plan had not been adopted. And basically saying, it's like shooting in the dark. It's like shooting darts against the wall.

Without a recovery plan with clear goals, with the science laid out, how can you make a judgment about what part of that habitat is essential to the survivability of the species?

You need to have some clear guidance. And that's why I think the linkage issue is so critical to this bill. And maybe we need to think through about deadlines and timing and how you deal with past recovery plans that may be out of date. I think that's got to be an important part of the debate. We can't just leave it hanging.

But at the same time, the recovery plan has got to be the driving force. And I think that's the way to pull science together, from what I've seen.

And the way courts are looking at this, judges are having to jump in and make decisions, in many ways, beyond their capability, because they're being thrust a statute that is so hard to interpret. These court decisions are the biggest I've seen, in many ways, in 30 years of litigating environmental cases. They've gone 50, 60 pages.

These judges, you know, are just trying to understand the process. And they shouldn't be administering a statute that way through litigation.

So that's sort of my assessment about where we are and why recovery plans are so essential.

RAMEY: May I give you one more specific example?

In the Preble's meadow jumping mouse case, part of the landowners would often be asked to have a survey done for the mouse on their property. In one case, a consulting group with Halligan Reservoir in northern Colorado, sent us five specimens - five ear punches for a mouse - and asked if we would run DNA testing on those.

And two of those specimens, the DNA sequences came out wildly divergent from the rest of our data set, and I realized that there was a problem.

So I called the consultants up and said, can you tell me about these two samples? It turns out, once they had examined the photograph they had taken of the mouse, it was a hista (ph) pocket mouse, and that they actually caught three Preble's and not five.

Well, everybody laughed about this example, except it's very serious. These individuals used the best practices for physical evidence for species occurrence.

A lot of what is occurring out there is consultants with a certain level of training and experience, saying, yes, I caught it. But when they're asked for this, the physical evidence, they can't produce it.

RAMEY: And so, these species occurrence are being based upon opinion, instead of experimental evidence. The service at one time required ear punches and photographs to be taken. They dropped that requirement several years back. I do hope they consider it again, and it'd be considered in other cases.

TANCREDO: Thank you all. My time has expired. But I also have questions, Mr. Chairman, that I'd like to submit for the record, since there are plenty of issues here to develop that just time doesn't allow us to do so.

POMBO: Mr. Bishop.

BISHOP: Thank you. Let me ask a couple of quick ones, if I could.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Dr. Sunding, to begin with, your testimony was interesting. You talked about how some of this Act can shape urban areas. I think you used the term, phrase "leapfrog development."

Are you telling us that this critical habitat designation can lead into urban sprawl situations?

SUNDING: Essentially, yes. It can push development further out as land is set aside for habitat protection, closer to the center of the urban area.

BISHOP: All right, thank you. Dr. Ramey, the same - not the same question, but I recognized how sometimes vague definitions create some time of problems. And I realize the gentleman from California is attempting to try and tie those definitions down as best possible, so that it's not, you all guess the right question, you get the right kind of answer syndrome that may be coming up here.

In your opinion, having looked at this bill, do you think the Cardoza bill brings better and tighter science, and less discretion to the process?

RAMEY: Yes. It tightens up the definitions. And by always giving more time to make a decision, and specifying that critical habitat has to be that area that's occupied with the species or found to be absolutely essential to their existence, it does help.

I think that it could go farther, however.

BISHOP: As far as the definitions?

RAMEY: As far as the definitions, and also requiring some more specific standards for what constitutes evidence of species occurrence. Is it a vague recollection from the 1970s? That you wrote down 30 years later? Or is it actual physical evidence of them being there, or a vouchered museum specimen, which would obviously be of great value?

BISHOP: So, if we go down that road, is it your opinion, then, that you actually improve the science?

RAMEY: Yes. Any time you are able to define the question more clearly, the terms more precisely, I think that you reduce the amount of dispute and unnecessary controversy on the subject.

Scientists will often argue a lot about terms and definitions. But that is a part of the process so you can get a cleaner result later.

BISHOP: So the assumption is that once you can do that, you move past the point which could bring litigation in, which sucks up the resources necessary to the program. And therefore, you would actually, by being able to tighten those definitions, you'd actually be able to have a better recovery opportunity in the future.

RAMEY: Correct. It's all about an allocation of resources.

We're in a situation of triage on species. And so it's better that the money go to the species instead of to legal fees.

BISHOP: OK.

And Ms. Clark, if I could also ask a question. The term (ph) of California actually went to the crux of it. And I'll give you a couple of softballs here, that'll be easier for (inaudible).

The one dealt with the phrase of his bill, which talked about the maximum extent practicable, economically feasible, determinable, as the standards were used.

It just seems difficult to understand why that becomes a portion of the bill to be criticized, because, as I think you said, the opposite of that means something that is impracticable, that is - how is it - economically infeasible and vague.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I thought those would be the pluses of his particular bill, in some particular way. So, if you want to have another crack at that, answering that question, I'd appreciate it.

The second one also - and maybe I can lump all these together and then just let you run wild with them.

I'm assuming you were here earlier when the representative from Oregon was quoting some of the statements you've made in the past about the ESA. And I'm assuming that you still stand by those statements you made earlier, that that was nothing that was inaccurate.

And I guess the other - to go along with, probably in defense of that language, which I kind of like, was, during your service, in this particular agency, both you and Secretary Babbitt seemed to be supporting critical habitat reform.

And as I'm listening to your testimony now, I guess the question comes in, like, you know, what happened?

CLARK: (inaudible) ...

(CROSSTALK)

CLARK: A couple of things. The terminology practicable, economically feasible and determinable, it sets up - in my mind, it sets up a presumption that there are, could be cases where there is no linkage and no importance of habitat, necessarily, for recovery of species.

What this bill does do that's very positive is it links the articulation of critical habitat, if you will, to the recovery planning stage. And so, again, as I mentioned to Mr. Cardoza, it's the connection of these two issues.

Because what I would be concerned that when we have a term to the maximum practicable, economically feasible and determinable, it could make, would make the designation of critical habitat an exception rather than a rule.

And because we link it to recovery, which then becomes not mandatory, it turns what is now a mandatory requirement for the secretary to evaluate and determine or to decide whether or not critical habitat is prudent, into one that's totally discretionary. So it becomes a snowball effect.

Now, regarding what I said before, as the gentleman from Oregon quoted me, yes. I stand behind, I think what I heard him say in my quotes, in that any time that you take an agency full of, I think, highly competent and highly trained biologists who have proficient (inaudible) service, and you totally upset the apple cart and rearrange their biological priorities, that is a recipe for a problem.

And it was very frustrating during my time, and I'm sure it's very frustrating now, the amount of litigation that surrounds the Endangered Species Act.

And we worked very hard to assert biological priorities for addressing the listing program, which includes critical habitat. I can't speak to what this administration has done to try to assert those as priorities.

I have been on record agreeing that the form of critical habitat is important, and could be positive, and, in fact, worked with the late Senator John Chafee, Senator Domenici, in the last administration, the last Congress, which gave a lot (ph) a (ph) percent (ph) of the 1,100 (ph) that addressed a lot of what Mr. Cardoza is trying to address, I believe, with his bill.

So, any kind of a form that will guarantee safe passage for species recovery, that will highlight the importance of habitat and enter the importance of habitat conservation for species recovery, can only lead to a positive outcome.

BISHOP: Yes, and I appreciate you saying - especially with that last part. Because as I'm listening to what I'm hearing going on here with the judicial intervention, basically supplementing their decision for others that are professionals, the failure of sound science, the collateral issues that are coming on here.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Any step to try and define this - narrow the definitions, to move it forward, to make it more obvious the direction it should become, should be a step forward in the process. I'm actually very much dismayed about the lack of what the status quo has been doing, and dismayed about any kind of efforts not to try and make something to change that status quo, so moving forward.

Mr. Chairman, I just - the bell rang on me. I'm done, right?

POMBO: Yes, you're done.

BISHOP: I knew all those years in school would pay off.

POMBO: Well, thank you. Just before I dismiss this panel, there were a couple of things that came up in the questioning. And I asked to clarify on a couple of issues.

In terms of the new regulations that are being issued, Fish and Wildlife Service was included and consulted in the matter of drafting those new regulations.

And in terms of an economic analysis, economic benefit - the Fish and Wildlife Service or the administration is not banned from including the economic benefit in their analysis. Because I don't believe that any economic analysis that does not include the benefits as well as the costs is complete. And that is something that I wanted to follow up on and get any answer to.

In terms of previous quotes, former Interior Secretary Bruce Babbitt said, the best alternative is to amend the Endangered Species Act, giving biologists the unequivocal discretion to prepare maps when the scientific surveys are complete. Only then can we make meaningful judgments about what habitat should receive protection.

And I believe that that is the spirit, if not the essence, of what Congressman Cardoza is attempting to do in the legislation that sits before us.

Also, in terms of the written testimony, Mr. Liebesman in his prepared testimony, in talking about the Alameda whipsnake said - quoted the court that held that if the Service has not determined at what point the protections of the ESA will no longer be necessary to the whipsnake, it cannot possibly identify the physical and biological features that are an indispensable part of bringing the snake to that point.

I think that was an extremely important point that was made earlier, in that, I think a lot of the struggles that the members have talked about, a lot of the anecdotal evidence that they bring forth from their districts, the problems that they've had that their constituents are having to face, is rooted in that one quote right there.

And I can't expect the administration, whether it's the current administration or the previous administration, to come up with critical habitat - court-ordered critical habitat - unless they have the scientific evidence in front of them. You can't expect them to do that.

And, you know, in my district, as well as Congressman Cardoza's, we've had the whipsnake. We've had the kit fox. We've had the red-legged frog, and we've all of these different things that have come out.

The red-legged frog came out. There were places in my district that were listed as on the critical habitat map, where it's physically impossible for the frog to live. And yet, it was included as critical habitat.

And I don't blame the Service for that. They have a court-ordered critical habitat map that they have to release, so they do things without all of the evidence in front of them.

And I think what Congressman Cardoza is attempting to do with this legislation is give them the tools that they need to make the right choices. That doesn't mean they're always going to make the right choices. That doesn't mean we're still not going to complain.

But at least we can make things better. We can at least give them the tools that they need to do their job.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

So I appreciate the testimony of this panel. It was very informative, very educational, and I look forward to working with all of you in the future, as this legislation moves forward.

Thank you very much.

LIEBESMAN: Thank you.

RAMEY: Thank you.

POMBO: I'd like to call up our third panel.

(UNKNOWN): Mr. Chairman, could I just ask a question on this one?

I hadn't had a chance...

(CROSSTALK)

(UNKNOWN): OK.

POMBO: I'm sorry.

Steven E. Webster, Steve L. McKeel, Kathleen M. Crookham, Paul L. Kelley and Donald B. Walters, Jr.

(RECESS)

POMBO: Now that you've all found your seats, if I could ask you to stand.

Please raise your right hand. Do you solemnly swear or affirm under penalty of perjury, that the statements made and the responses given will be the whole truth and nothing but the truth, so help you God?

Thank you very much. Let the record show that they all answered in the affirmative.

POMBO: I want to thank this panel for sticking around with us. We're trying to get through this as quickly as we can. But, obviously, it's an important issue to a lot of members.

Mr. Webster, if - we're going to begin with you. I'll remind the panel that your entire written testimony will be included in the record. If you could contain your oral statements to the five minutes allotted.

Mr. Webster?

WEBSTER: Chairman Pombo and members of the committee, I welcome this chance to speak in support of H.R. 2933. And I'm very grateful to Representative Cardoza for his sponsorship of this very good bill.

In Florida, what we call "manatee madness" has so afflicted the state, that his book, "The Florida Manatee Conspiracy of Ignorance," is becoming a political bestseller. The Endangered Species Act is the enemy.

Yes, we all agree that the Act is well intentioned, but for over 30 years, some very well-heeled Washington lawyers have subverted and corrupted the Act, to the point where it doesn't protect endangered species, but it does harass, injure and sometimes even kill innocent Americans.

In Florida, the manatee is the poster child for regulatory excess. And the farther you get from Florida, the more endangered the manatee becomes.

And since none of you are from Florida, you probably believe that the manatee is highly endangered, and that small, fast power boats are literally slicing and dicing the poor things into extinction.

Wrong.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I can't tell you how many visitors think manatees are either extinct already, or that the rivers and estuaries are full of their floating carcasses.

The truth is, they're all over the place.

I'm the Executive Director of Florida Marine Contractors Association, and Vice President of Citizens for Florida's Waterways. And we know there have never been more manatees than there are today, both in terms of range and density.

And I'm not talking about one every square mile. I'm talking about sardines.

Near our home two months ago, a tiny, block-long drainage ditch was filled with more than 120 manatees. And since they weigh a ton or more each, well, there was more manatee than water.

Now, speaking of our home, back in 1996, when manatee slow speed zones were first proposed for our area, they were planned for the Western Shore. But when the zones were ordered, after a court settlement, the zones were built along the Eastern Shore - my family's shore. And to this day, I wonder what happened between 1996 and 2001, that completely flip-flopped the plan.

And the only answer I've found that instead of science-based rules, the Washington lawyer and a Washington federal judge are now in charge of manatee protection in Florida. The lawyer has made bagfuls of money suing the Fish and Wildlife Service, and the judge - well, he's wrong. He's terribly wrong.

They have used the ESA to close down factories, shut down permitting, wreck boating, endanger our kids and sacrifice jobs. They haven't reduced the rate of manatee mortality. They haven't found a way to count manatees accurately.

They haven't helped reduce increasingly frequent manatee deaths from disease.

They have blocked important scientific research and they do hamstring state programs. They wouldn't know science if it kissed them on the lips, and if it did, they'd accuse science of being a whore.

(LAUGHTER)

WEBSTER: Thanks for the laugh. I was worried about that line.

(LAUGHTER)

WEBSTER: Though (ph) having a loud response in the program managers to do what should be done, they have ham-handedly demanded what the law says can be done.

I represent an industry that contributes \$4 billion a year to Florida's economy, \$1 billion in sales in another three and multiplier effects. Dock-building is big industry. It's huge, even - a substantial part of Florida's economy.

But while it's a big industry, it's all small business. Every single member of the association is a small business. And the Endangered Species Act is endangering us.

Even in the midst of a real estate boom, we already have members who have been forced out of business, and more are ready to go. Last year in my home county of Brevard, not a single dock-building permit was issued until December.

Why? Because the Fish and Wildlife Service and the lawsuit plaintiffs, including the Defenders of Justice who were here earlier, were having a fight with state agencies over how many slow speed zone signs are required before Brevard manatees can be deemed adequately protected.

Because of the settlement agreement, if there's not adequate protection, then Army Corps permits won't be issued.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

How many small businesses do we know that can survive a year without work? This sort of nonsense happens day in and out in Florida. Similar events are being played out in counties across the state.

And truthfully, I could keep you here all day and still not adequately discuss everything that's wrong with the implementation of the ESA in Florida, because literally, everything about the implementation is wrong.

And let's face it. Government is big, so a lot of ground to cover.

But I will leave you with one specific request. In the packet of information we provided, we have seven additional recommendations and suggestions for both form and clarification.

If I could pick just one, it would be that this committee have clarified a relationship between the Endangered Species Act, and the Marine Animal Protection Act, so that the requirements, if they or the ESA are satisfied, and so, too, the requirements of the MAPA will be satisfied.

I swear there would be a street celebration in Tallahassee if we could get that passed.

I greatly appreciate this opportunity to speak in support of Representative Cardoza's bill. Thank you, and later I will be happy to answer any questions.

POMBO: Thank you.

Mr. McKeel.

MCKEEL: Thank you, sir.

Good afternoon. I'm Steve McKeel, Manager of Natural Resources for the Southeast Division of Martin Marietta Materials. We're the second largest producer of crushed stone, sand and gravel in the United States.

I have a degree in geology from the University of North Carolina, and I've worked in the mining industry since 1982.

I expect you'll hear testimony today on listed animal species. But my testimony involves two federally listed plant species.

In 1989, Martin Marietta Materials leased 700 acres near (ph) Augusta, Georgia, containing a 40-acre exposure of granite. It was ideally suited for crushed stone production.

Exposed rock is rare in the Southeast, and a few minute outcrops, resembling a paved parking lot, do exist. The best known is Stone Mountain, which is dome shaped and rises a few hundred feet above the surrounding Atlanta area.

These outcrops also represent an unusual habitat for plant species where shallow pools have formed over time. We became aware that some endangered plant species found only in these pools might be present on our 40-acre granite outcrop.

My company needed a permit for wetlands crossing and access to property. We informed the Corps of the possible endangered plants. And my written testimony that you have chronicles the permitting events that triggered the consultation provisions of the ESA.

During our informal consultation with Fish and Wildlife Service, we conducted, at our expense, a habitat evaluation survey for threatened and endangered plant species. We identified two pools containing the threatened *Amphianthus pusillus*, or snorklewort, and endangered *Isoetes tegetiformans*, or mat-forming quillwort. The quillwort is known to exist in only eight localities in Georgia.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

We could not avoid these plants during mining. We tried negotiating their possible transplant, but the Fish and Wildlife Service wanted them to remain intact. Several months of informal consultation transpired without results, so we sought legal guidance.

We found, one, the takings provision of the ESA is more limited regarding listed plant species, and does not prohibit the landowner from relocating or even destroying the listed plant species. And, two, the listed plants did not occur on lands under federal jurisdiction, or even jurisdiction on wetlands.

The finding triggered formal Section 7 consultation, postponing our wetlands permit.

Throughout the consultation process, we stressed our desire, and our landowners desire, to work with agencies and organizations alike to preserve and relocate these plants.

They even proposed both (ph) of (ph) boarding the plants for two years, and funding a relocation program.

The Service finally issued a jeopardy opinion for the quillwort, and drawing heavily from a recovery plan that was still in the agency draft stage, the opinion went on to state that the endangered quillwort was historically known to current (ph) in both pools, so, therefore, both species should be protected under this act.

The jeopardy opinion also recommended reasonable and prudent alternatives, which seemed to me neither reasonable nor prudent. In order to maintain a permanent, fenced buffer for 100-foot radius around the plants, we were to mount an industrial fan above the pools that was to run at all times during quarry operations to blow the dust away.

And since we would be mining essentially all the way around these pools, we were to leave - we were presumably leaving a several- hundred-foot-tall column of rock rising from the middle of our pit. And I guess they envisioned something like a butte in Montana.

We needed to provide stairs or some other way to climb up and monitor the plants, and, of course, maintain the fan.

These "reasonable" and "prudent" alternatives, would have been laughable if they did not represent so much time and expense to us, such a travesty to the private property rights of the landowners, and the continued drain on taxpayer dollars.

We withdrew our wetlands permit application and negotiated a separate easement into the site that did not require wetlands crossing. I continued to seek to relocate the plants through various agencies and botanical gardens.

Our landowners then decided it was in their best interests to relocate their plants themselves. Their explanation to me by letter, I quote, we feel that law (ph) (INAUDIBLE) have cost us a considerable amount of monetary consideration and mental anguish.

I simply must question a federal agency process that so stridently attempts to regulate plant species that are the sole property of the landowner.

If I can briefly quote Senate Report 100-240 with reference to my report, the basis for this differential treatment of plants and animals under the Act, was apparently the recognition that landowners traditionally have been accorded greater rights with respect to plants growing on their lands than with respect to animals.

The amendment made to the Act does not interfere with the rights traditionally accorded landowners, but instead reinforces them in a way that also benefits the conservation of endangered plant species.

If this was the intent of Congress, then the ESA failed miserably in our case.

The aggregate industry produces crushed stone in all 50 states, in virtually every congressional district, and it is significantly impacted by the Endangered Species Act.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

I strongly support H.R. 2933, the Critical Habitat Reform Act of 2003, introduced by Congressman Dennis Cardoza, especially those provisions found in Section 3, which requires an economic impact analysis be conducted prior to designating species' critical habitat.

Thank you.

POMBO: Thank you. Ms. Crookham.

CROOKHAM: I thank you, Chairman Pombo, and members of the committee.

My name is Kathleen Crookham, and I'm the County Supervisor in the County of Merced in California. I appreciate the opportunity today to testify in support of H.R. 2933, Critical Habitat Reform Act of 2003.

As a county supervisor, a private landowner, I have first-hand experience in how important it is to reform the current processes in designating critical habitat.

I would like to briefly summarize for you what happened in Merced.

The board of supervisors and the community members were surprised, and quite frankly, disappointed to read their local newspaper on September 25, 2002, that the U.S. Fish and Wildlife Service proposed to designate 1.7 million acres of critical habitat for a threatened and endangered vernal pool species.

A total of 337,514 acres of this particular proposal were critical habitat located in Merced County - more than twice the amount of any other county in California or Oregon.

The proposed designation covered 26 percent of our entire county, which in addition to 307,280 acres that were already protected as government lands wetlands and easement.

This would be a total of 50 percent of our county under protected lands - quite a devastating blow to the county, whose primary industry is agriculture.

Despite the fact that Merced County had the largest acreage from this proposed habitat within the jurisdiction, the Service to hold a hearing in our country because of "time constraints."

As a result, many landowners in eastern Merced County who had been sensitized to the issues surrounding the Endangered Species Act were stunned by the proposed designation. They felt that the Service was trying to slip a critical habitat designation, flying in under the radar screen, hoping that no one would notice.

The board finally convinced the FAWL (ph) Service to make an informal presentation regarding the proposed habitat for Merced County. While the presentation was helpful, it was not an official public hearing, and the information presented stirred up more questions than answers.

The maps presented were outdated and did not provide enough detail for property owners to be able to determine if their land was in or out of the proposed habitat.

The two months comment period was hardly enough time for landowners to attend a public hearing, gather materials and then provide thoughtful feedback concerning the impact of the proposed designation.

Clearly, the proposed habitat was poorly designed. The proposed acreage in Merced County was not scientifically or thoroughly selected, and included already developed shopping areas, parking lots and even Castle Airport.

It is evident that the proposed habitat would only escalate our economic problems. The community recognized that habitat would devalue their land and increase regulations on land use, because individuals would lose their own property rights, and the government would lose control over local planning and growth.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Granted, Merced County is a rural community, but the residents really rallied together. Local residents took it upon themselves to quickly raise awareness. They compiled a list of affected property owners in the county and paid for the mailing of the information to hundreds of individuals. Actually, it was about 1,200 people.

They shouldered the burden of the expense, knowing that someone needed to fill the gap and the void that the Service had left empty.

While the County of Merced was excluded from the final ruling, on this particular proposed critical habitat designation, we anticipate finding ourselves along a similar path once again.

Based on my own personal experience, I would like to reiterate two key issues that I have with the current process for critical habitat designation.

Landowners must be notified and given ample time to provide feedback. The Service should consult local agencies in order to obtain resource information that is detailed and accurate.

The Service must sincerely make efforts to communicate with landowners, and I support providing a user friendly Web site mechanism to help landowners determine if they are affected by the proposed designation.

And secondly, the economic analysis must include consideration of lost revenues, to the landowners as well as to the federal, state and local governments, so that the designation does not protect the species at the expense of the people.

Chairman Pombo and members of the committee, I appreciate this opportunity to share my personal story with you today. And I'm optimistic that this committee will find a positive resolution to this issue.

And I would also like to openly express my appreciation to Congressman Cardoza for his steadfastness in championing this issue. He has been a strong support and a guide for our local board. And thank you for allowing me to speak to you today.

POMBO: Thank you. Mr. Kelley.

KELLEY: Thank you, Mr. Chairman, and thank you to the committee for allowing me the opportunity to come before you and testify in favor of Congressman Cardoza's bill, H.R. 2933.

My name is Paul Kelley. I'm a County Supervisor in Sonoma County, where I was elected 9.5 years ago, and have had the honor to serve my constituents and friends in a premium wine grape growing region of California.

I'm here before you today to discuss the challenges that the residents of Sonoma County have faced, subsequent to the listing of the California tiger salamander, and also to speak in favor of Congressman Cardoza's bill.

On July 22, 2002, the Sonoma County distinct population of the California tiger salamander was listed as endangered on an emergency basis. The final rule was later published.

An inability to find a balanced solution to this listing was particularly disappointing to the residents of Sonoma County, while we have been willing and very willingly shouldered all the responsibilities in the past to protect our environment, regardless of the mandate, recognizing it's the right thing to do.

Sonoma County is the home of 450,000 people. In addition to that, we're the home of other endangered species, specifically steelhead, coho and chinook salmon. And local governments, including the county, have had a long history of reviewing policies and procedures to ensure their protection.

Our communities have diligently worked hard to protect our environment. We even have a local sales tax initiative that was passed, that provides the opportunity to protect different lands and land conservation program that brings in over \$13 million a year.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

As a result of our historical success at preserving the environment, our community felt confident that we could address the challenge of the salamander.

Although paralysis in terms of construction and project approvals, infrastructure maintenance and construction has been incredibly costly, and potentially millions of dollars, we do feel confident that we have begun a process that will meet with success.

Through the efforts of Wayne White of the Sacramento office of Fish and Wildlife Service, we have embarked upon a conservation strategy for the CTS in Sonoma County. He has offered us an opportunity to work together so that the economic impact to the community is minimized, and the opportunity to protect, recover and conserve the salamander was maximized.

If we are successful, we hope that this can be duplicated elsewhere.

This strategy team has two tasks over the next 60 days. First to identify lands that need to be set aside for conservation, and second, to craft solutions that are economically palatable to our community.

The members of the strategy team include representatives from appropriate regulatory agencies, local governments, private landowners and the environmental community.

The Endangered Species Act should be about a conservation strategy and recovery. This bill is the right step to recovery. We in local governments and communities need the tools or the path for recovery.

Beyond the first 60 days of formulating strategy, improvements will be made to certain parts of the landscape. This will undoubtedly include the creation of perpetual conservation easements on both public and private properties.

If the team is not successful, we are very concerned that the Service does not have the resources or the personnel that would allow them to respond in a timely manner to requests for assistance and permits from public and private stakeholders.

This could mean a moratorium on construction, both public and private, including infrastructure critical to all of our constituents.

In summary, my testimony today is meant to emphasize the many components of our local team's effort that support the congressman's legislation.

They include critical habitat designation would be made concurrent with the recovery plan, by developing the conservation plan first, as is currently underway in Sonoma County. And we hope that the designation of critical habitat will more accurately reflect what is actually needed to recover the species.

Properties that are already part of a conservation plan would be excluded from critical habitat designation. In Sonoma County, we're looking at properties that now support or sustain the salamander that are already subject to conservation measures.

At the time the critical habitat is designated, economic impacts of the designation would have already been considered.

And finally, the legislation's proposed word change from "essential to the conservation of the species" to "essential to the conservation of the species as areas which are absolutely necessary and indispensable to conservation" would undoubtedly support efforts at crafting a workable conservation plan.

And in conclusion, we need the tools to recovery of species that are listed. And that Congressman Cardoza's bill will in the long run offer a better protection for threatened and endangered species. It will go a long way in ensuring recovery of listed species and will strike a balance that also addresses the needs of the people that we all serve.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And I appreciate and thank you for the opportunity to speak and testify before you, and look forward to any questions at the end.

POMBO: Thank you.

Mr. Walters.

WALTERS: Chairman Pombo, members of the House Committee - I'm pleased to share with you today the views of the 215,000 members of the National Association of Homebuilders on H.R. 2933, the Critical Habitat Reform Act of 2003, introduced by Congressman Dennis Cardoza. I thank you for the opportunity to appear before you today.

My name is Donald B. Walters, Jr., and I'm a homebuilder and developer from Flagstaff, Arizona.

As founder and president of Primary Systems Services Group, I oversee a full-service, general contracting corporation involved in homebuilding, development and commercial construction.

My family has lived in Arizona's Verde Valley since the 1860s. And my company and I have a deep appreciation and respect for the land in which we live and build.

As a result of the failure to either, A, designate critical habitat, or, B, properly conduct the analysis required under the ESA, critical habitat designations have become increasingly driven by litigation and inaccurate or incomplete science and data.

The problems and difficulties experienced by private landowners with respect to critical habitat are well documented and numerous. In seeking a legislative solution to the current crisis regarding critical habitat, H.R. 2933 proposes several important reforms to the process by which the services designate critical habitat.

NAHB supports the majority of the reforms H.R. 2933 proposes. However, we do reserve concerns over provisions in the bill linking critical habitat designations to the recovery planning process.

The following comments to the committee address, in turn, four broad provisions of H.R. 2933.

Section 2 of the bill proposes to link the designation of critical habitat to the approval of a recovery plan. Although well intentioned, NAHB believes that this may unintentionally create a new litigation threat, and place a higher regulatory burden on the regulated community.

First, NAHB is concerned that by linking critical habitat designation to recovery planning, the inherently discretionary nature of the recovery planning process would be supplanted by the mandatory nature of critical habitat designations.

Second, recovery plans are guidance documents that do not have the force and effect of law.

If critical habitat, the designation of which does have regulatory impact, is morphed as part of the recovery planning, the unintended consequence would be likely that the elements of the recovery plan would be transposed as having a binding legal effect on private parties.

Finally, if critical habitat were tied to a recovery plan, NAHB is concerned that the boundaries of critical habitat, traditionally interpreted as a smaller area than that which may lead to a species recovery, would likely coincide with the larger area of recovery habitat.

Mr. Chairman, NAHB stands ready to work with bill sponsors and the committee to address these concerns with H.R. 2933.

Next, H.R. 2933 would exempt habitat conservation plans, HCPs, and other management plans from critical habitat designations. NAHB supports the exclusion of HCPs and other species management plans from critical habitat designations, and therefore supports these provisions of H.R. 2933.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

NAHB believes that nationwide, private landowners represent a vital component to species conservation and preservation actions. While the Fish and Wildlife Service has exempted approved HCPs from critical habitat designations, these exemptions are more a matter of administrative policy and interpretation, and are therefore subject to change.

Accordingly, NAHB supports the provisions of H.R. 2933 that will codify these important practices.

Section 3 of the bill would require the consideration of direct, indirect and cumulative economic impacts on designated critical habitat.

For years, NAHB has questioned and challenged the assumption by the Fish and Wildlife Service that all costs are borne at the time of species listing. And as a result, there are only incremental economic impact attributed to the designation of critical habitat.

The economic analysis conducted for critical habitat routinely and significantly underestimate the true costs imposed by the designation. As such, NAHB support the provisions of H.R. 2933 that at long last would provide this important direction to the services.

Mr. Chairman, Section 5 of the bill would establish statutory definitions for key terms relating to critical habitat under the ESA. And NAHB also supports these provisions, as they would re-state and re-emphasize the definitions of geographical area occupied by the species, and essential to the conservation of the species.

These are two terms that have been traditionally misread and misinterpreted, and NAHB supports provisions in H.R. 2933 that seek to correct these past failures.

Mr. Chairman, in closing, I would like to express NAHB's appreciation for your longstanding leadership on the issues surrounding ESA reform and for holding this important hearing today. On behalf of NAHB, I would also like to thank Congressman Dennis Cardoza for his leadership in introducing H.R. 2933.

Chairman Pombo and members of the committee, I thank you for your consideration of NAHB's views on this matter, and hope that the endangered species conservation in this country becomes less about litigation and gridlock and more about common sense conservation policies and programs.

With a notable exception of linking critical habitat and recovery planning, NAHB believes that H.R. 2933 makes great strides in this direction. Thank you.

POMBO: Thank you. I thank the entire panel for their testimony.

In this panel, I'm going to change things around a little bit. I'm going to recognize Mr. Renzi first for his questions.

RENZI: Thank you, Mr. Chairman.

I want to thank Don Walters from Flagstaff, Arizona whose family has been up in the Verde Valley since the 1860s, and who is a true corporate citizen and a great leader in our community.

I wanted to talk a little bit about economic impact.

We had a situation where the (INAUDIBLE) fire killed. And I'll just thank between 12 and 14 breeding pair of spotted owls. We had a situation where a pygmy owl was found to be nesting at the Tucson International Airport underneath one of the eaves of the building.

And there were those in our community who actually felt that we should consider shutting down the airport. And now that we've got this legislation from Mr. Cardoza that economic impact would be factored in, you talked about underestimates that have occurred in the past.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And can you help me understand maybe some of the economic impacts, that if they had been done in the past, what they would have revealed? Mr. Walters.

WALTERS: Well, I'd like to answer it this way.

The services should base their decision on the economic analyses that are sound and complete, fully addressing the direct and indirect cumulative impacts of critical habitat designation. As such, NAHB support provisions of H.R. 2933 that would provide this direction to the services.

Did I answer your question?

RENZI: Appreciate it very much.

When we're looking at economic impact, we've had situations in the past where we had a high school that was getting ready to go in to Tucson, Arizona. We spent three or four years fighting over the location. It drove up millions of dollars as to where the location would finally be.

RENZI: So here we were in the state of Arizona -- we were about 48th or 49th for public education in America -- trying to build a new high school. We've got our students that are overcrowded in a local high school and while we're ready to go and finally had the funding to build a new high school, we were unable to do it for three or four years.

And so, some of those stories I want to pull out and get on the record as far as economic impact not only being the costs associated but the costs to our future generation, the costs of the education to our children as well as some of the other absurdities that I've listed today.

So I want to welcome you and thank you for your testimony and yield back.

Thank you, Mr. Chairman.

POMBO: Mr. Cardoza?

CARDOZA: Thank you, Mr. Chairman.

I'd like to direct my questions to Supervisor Crookham. My bill requires the service to provide GIS maps on the Internet when proposing critical habitat. Can you please tell us how this would have impacted the public comment period relative to the vernal pool designation?

CROOKHAM: Yes, thank you.

The problem -- I couldn't even tell you how many people came into my office and said, "Am I in this proposed designation or not?" We had some really nice fuzzy maps and it was very difficult to see exactly where the line might have gone or was going and it was just a very confusing matter all the way around.

And if we had had -- or even if they had talked to us about the maps that we had within our county, we had a (inaudible) map, but nobody even approached us. So, as a result, we spent a lot of time trying to help people define whether they were within the proposed designation or not.

So I would think that it would behoove the service to talk to local entities for whatever kind of mapping they might have, including GIS.

CARDOZA: As we're hearing you discuss this, the anger comes back from the meetings that we held, I recall that there was a number of areas that were clearly developed that were included in the original designations.

CROOKHAM: Well, including a brand new TNT (ph) Center that had just opened, it was under the designation; Castle Airport, which I mentioned in my report today was listed. There were housing developments that had

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

already gone in. It was just like somebody had taken a big brush and gone "hee hee hee hee hee" and wherever it happened to land, that's where it was. And when we realized that we had over 300,000 acres in the county that was thrown into this map, we realized that it wasn't probably defined too clearly.

CARDOZA: I know from personal experience that residents of Merced County commented in great numbers once they found out about what was happening with the service regarding their concerns. Yet you stated in your testimony initially the community was not aware of the designation ordering packs (ph). How did the community become engaged in this issue?

CROOKHAM: Well, it's really a long story and I'll make it very short.

I actually read the article in the paper and I asked somebody what they thought it meant, and the person I asked said, "Oh, I don't think it amounts to anything. I mean, I don't worry about it." But somehow in the back of my mind it didn't feel quite right, and I did speak to your staffers and Dee Dee D'Adamo probably a short time later, and she said "Kathleen, that does matter, it really is very important."

So probably a month passed before I ever heard from everybody again, and then I had two constituents call me and say they had heard from someone that it probably wasn't anything they needed to worry about, but they were concerned and as a result of those two people who came to me, and I said, "No, it does matter." And then, at that point, we had a local businessman who paid for the postage for the first notice that went out to the folks, and the first meeting we had, we had it in the third floor of our county administration building. People couldn't even get off the elevator so many people came. And so, we mailed out about 1,200 letters.

And then the second meeting we had was at the high school and Congressman Cardoza was there with us and it was amazing. And then, we filled the auditorium with people. People were very, very concerned and they wondered how this had gotten this far without anybody taking the time to notify them.

CARDOZA: In fact, people's property were being considered with no notice. The federal government doesn't issue notices to people when they...

(CROSSTALK)

CARDOZA: ... their property.

CROOKHAM: Right.

The service said to us, "Oh, we don't have money to notify people." We just like letting them find out through osmosis, I guess.

CARDOZA: I want to, at this point, congratulate you and thank you for your leadership in our community. It wouldn't have gotten to the level of attention had you not taken the steps and frankly, I probably wouldn't have been quite as far along as I am today with this bill had you not stepped in.

My bill requires that the service analyze the impacts of proposed designations on state and local governments. Can you tell us the impact that the vernal pool designation would have had on Merced County?

CROOKHAM: I mean, I wish I could tell you specifically, because I know I had those figures some place along the line. But just as many people have mentioned before, it isn't the initial impact, it's how the rippling effect affects so much of what goes on.

And when we start talking about any kind of development, any kind of -- any land use changes -- I guess I have a major concern owning a ranch in eastern Merced County. Could we put a fire guard in? (Inaudible) plow through (inaudible) holes? Can I put a new corral in? Can I remodel a barn? I don't know.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

These are the things that I think really raise a lot of questions and a lot of concerns, but I know it had a real rippling effect financially on our whole community. And you know, we have huge unemployment; like many of the people in the Central Valley, we're a very poor county and this was just going to be a devastating blow. It probably would have crippled us totally.

I wanted to say one more thing, please, kind of off, but you know, I thank you for the nice compliments, but you know, really, how we got as far as we did was everybody working together and I think that it's a wonderful example of how a small county can marshal its resources and make something happen.

CARDOZA: Thank you.

Thank you Mr. Chairman. Again, thank you for the bipartisan cooperation on this.

POMBO: Mr. Udall?

(UNKNOWN): Thank you, Mr. Chairman.

And thank you members of the panel for being here today with us.

Let me direct my first question to Mr. Webster here.

Turning to critical habitat, which is the subject of this hearing: Protecting and maintaining areas important for manatees, which you described the manatees in your testimony. These areas that are important to maintaining them -- grass beds, estuaries and rivers -- also benefit the fishing industry and fishing and other marine and freshwater resources and the tourism industry.

And I understand that tourism is one of the top industries in Florida, comprising 20 percent of the economy, and that in a recent University of Miami study, 92 percent of the tourism industry leaders said they agreed or strongly agreed with the statement that protection of the environmental and cultural resources is necessary for their business.

Moreover, according to a 2001 opinion survey, 83 percent of Floridians support increasing the number of manatee sanctuaries and making them off limits to boats and jet skis. It seems that the sensible checks and balances in place for manatee protection are a win-win situation all around, supported by Floridians and benefiting both Florida's economy and the environment.

Could you give me your thoughts on that? Because it seems like there's a whole another side here, Mr. Webster, on benefits to the environment, to your industry and economics down there in Florida.

WEBSTER: Mr. Udall, I disagree with everything you just said.

I think most people in the state of Florida, especially those who live in coastal areas would disagree with it. I can assure you that every member of our association disagrees with it. In fact, the studies that you cite are generally studies that are concluded by groups that do have an interest in environmental stakes -- not environmental stakes, but environmental law stakes in the state of Florida.

There was, for example, a survey that the Manatee Club gave which claimed that homes on slow-speed zones would increase in value faster than homes not on slow-speed zones. That study was so bad that the county appraisers of various counties in Florida actually spoke out publicly to point out the flaws in the study, yet it's still cited to these days.

As far as protection in Florida, we are all for protection. Unfortunately, what's happening with manatees in Florida is not protection; it's the result of litigation. If we were seriously interested -- if Fish and Wildlife Service was seriously interested in saving manatee lives and increasing the size of the herd, they would focus on what their own peer-review literature states is the leading cause of deaths, and the number two and number three causes of deaths, and let me outline what those are.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

(UNKNOWN): Let me just take a second here...

WEBSTER: I'm sorry.

(UNKNOWN): ... because you mentioned litigation and you talked about the federal judge, in your statement, exercising control over new manatee protection measures.

Now, as I understood that case that you're talking about, those measures actually came about as a result of a compromised settlement agreement between a broad coalition of conservation, animal protection organizations, the Department of Justice and major industry groups, including the National Marine Manufacturers Association, the Marina Operators Association of America and the Marine Industries Association of Florida.

If this settlement agreement was so draconian as you've described, then why was it signed by these four major industry groups? It seems to me that this is a good compromise here.

WEBSTER: Well, the reason it was signed by those groups is that they did not want the agreement, the implementation of the settlement going forward without persons from the other side of the table seeing what was happening in the judge's chambers.

I can tell you, knowing personally the people involved in that settlement, that if they had it to do over again today they would have pressed forward with the lawsuit at that time rather than a settlement. They themselves as respondents spent \$2 million or \$3 million in legal fees just to watch the process in the courtroom.

My own organization wasn't allowed as a respondent, and even though the purpose of the settlement agreement ultimately says the final litigation is to restrict dock building, there was not a dock builder on that panel, nor was there an active boater organization member on that panel that signed that agreement.

No, we don't think it was a broad coalition or representative of the needs of Florida or the people.

(UNKNOWN): But these are four major industry groups that signed on, that were a part of this court settlement, they all had able counsel, and so I just don't see after they do that -- I mean, they know the conditions of the settlement. To now rewrite it after the fact, I think, is a little bit late and it seems to me a little bit disingenuous in a way.

Let me ask Mr. McKeel, because I'm not sure about your -- you talk about the two plants that existed out there...

MCKEEL: Yes.

(UNKNOWN): And the land you were trying to lease was not designated as critical habitat for these endangered plant species, right? They were only listed, no critical habitat, right?

MCKEEL: Yes.

I think possibly the pools themselves may have been called critical habitat designated at the time of the listing, but I'm not entirely certain of that fact.

(UNKNOWN): Well, I think they were just listed, that there was no critical habitat designation. And in that case, this bill wouldn't apply to that situation at all. This bill is a restructuring, it's a procedural bill dealing with critical habitats, so this bill wouldn't have helped your situation.

MCKEEL: I see that you're referring to the bill as pertaining to critical habitat.

(UNKNOWN): That's what my colleague and friend's piece of legislation does, it restructures critical habitat. Your situation dealt with two plants which were listed, but critical habitat was not designated.

Now moving on secondly on that, as a result of the listing, you then had to participate and get involved in the transplanting of the plants. Is that correct?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

MCKEEL: Well, what transpired is we volunteered to re-locate the plants at our expense and through meeting wetland permitting, Section 7 came into play.

The Fish and Wildlife Service, after considerable months of negotiation came back with a jeopardy (ph) opinion basically that they wanted them left where they were, but I think the crux of our matter was that plants are treated differently than animals. And after we withdrew from the permitting process, the landowner was free to move those plants within certain parameters of the Endangered Species Act, and he did so.

We maintained to the end that we would have rather had a competent biologist or botanist transplant those species or they could have gone into a heritage program at a botanical garden or something of that nature. What wound up happening was through the adversarial position, through the Endangered Species Act, the consultation process, the landowner himself ended up having to move the species on his own.

(UNKNOWN): And today, you're in fact mining on the property, is that correct?

MCKEEL: Yes. That is correct.

(UNKNOWN): Yes. OK. Thank you.

Thank you, Mr. Chairman.

POMBO: Mr. Inslee?

INSLEE: Thank you.

Mr. Walters, I think you probably heard concerns expressed about the failure of the administration to act within three years to adopt better guidance for the definition of critical habitat and the like. Many of us cannot understand why the administration has not acted to try to correct some of these issues by means of rule making or guidance. It's been three years or more now. Is that a concern you share during those three years with the administration?

WALTERS: Sir, I'm not qualified to respond on that at this time. If you'll submit those in writing to us we will respond in writing to you.

INSLEE: Well, do you think that it would have been helpful for the administration instead of sitting on their hands for three years to issue guidance for rule making during that three-year period?

WALTERS: Again, sir, I don't know enough about the issue to answer on that.

INSLEE: Well, let me just explain a little bit to you.

The situation here is this statute has been in existence for three decades. In 2001, a court struck down what was going on. A lot of people were urging the agency to issue a rule or guidance in some sense to try to give property owners some certainty about critical habitat and those who are interested in species recovery, and yet the passage of three years goes on and the agency didn't give property owners any additional guidance or rule-making enlightenment at all until today when we have this hearing -- all of the sudden we're told that this guidance is going to pop out this week by some miracle, apparently, with no hearings, no testimony, no input by anybody.

Do you think that was a good way to run a railroad (ph)?

WALTERS: Sir, again, I heard a lot of testimony today. I hear what you're saying now, but I heard testimony from the current -- the gentleman that was sitting here in panel 1, and I'm not sure I agree with you.

INSLEE: OK.

Mr. Kelley, I'm sorry I didn't get to hear your testimony, but I note in your written testimony you said that, quote: "We are concerned that the service does not have the resources or personnel that would allow them to respond in a

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

timely manner to request for assistance and permits from public and private stakeholders conducting activities in the salamander habitat area," closed quote.

Many of us are concerned that the agency has not been given the resources necessary to effectively carry out the statute, and here we have efforts to change the statute. Many of us believe that the agency needs more resources so it can do their job, both to recover species and to deal with local concerns that you've expressed eloquently that deal with the difficulties associated with these programs.

Are you aware that this administration actually wants to cut \$10 million out of the recovery budget -- planning budget on a national basis?

KELLEY: I'm not aware that they're proposing that they're going to cut their funding. I would say that one of the reasons why, as described in my written testimony, that we've embarked on a local initiative to work with the service, provide them much of their resources that they need as well as we need to facilitate the conservation strategy that would move into the critical habitat designation, it is because of that concern that I described.

I also think that if there's a more succinct definition of creating a recovery plan and a critical habitat at the same time as the bill is being proposed now, that there may not be as much of a need for the resources within the agency to actually accomplish that.

INSLEE: Let me just ask you: Would you suggest to the administration that they revisit this decision to cut this agency \$10 million or not?

KELLEY: Well, I would suggest that they review it. I think that as it relates to all of the activities that we're dealing with -- that they're dealing with throughout the country, we know specifically in our area that we've had to come up with our own resources to try to facilitate accomplishing the needs of our area.

INSLEE: I think what you're seeing is really a microcosm of what's going on nationally where the federal government is reneging on some of its obligations and pushing down these obligations down on local governments. And you're not seeing it just here, you're seeing it on a whole host of issues and I think that's regrettable.

When you get a chance after you do review it, I hope you'll help us get this agency the dollars it needs to get this job done, because I think there is a true need. One, so we can recover species, but two, to deal with the clear difficulties that property owners do have in getting these permits processed and getting decisions and having certainty so that they can make decisions.

Thank you.

POMBO: Mr. Walden?

WALDEN: Thank you very much, Mr. Chairman.

Mr. Walters, you mentioned in your testimony the problem specific to the economic impact of critical habitats of the pygmy owl and you suggest that no attention was paid to a number of regional impacts. Could you explain for us what some of those impacts would have revealed?

WALTERS: Sir, the Fish and Wildlife Service's study for the economic impact of the critical habitat for the pygmy owl failed to take into account any effect on the local economy, local governments or tribes, and regional economic impacts. Tax revenues, secondary impacts and increased housing were all excluded because they were assumed to be minimal.

WALDEN: They were assumed to be minimal? And what would you think they are?

WALTERS: Again, sir, I'm not qualified to express an opinion on that. I just know what I've been told; the information that was gathered and collected was not these items.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

WALDEN: OK.

WALTERS: I think these items need to be taken into account to really understand the economic impact.

WALDEN: And they weren't?

WALTERS: And they were not.

WALDEN: OK.

Supervisor Kelley, there is a pending May 15th decision regarding the CTS in both Sonoma and Santa Barbara counties. What would you like to see happen and why?

KELLEY: Well, I think what we'd like to see happen is that the listing be downgraded to threatened, which would open up some different options for those of us that are local property owners as well as local governments, and that the distinct population designation be eliminated because I don't feel that that has been properly studied or considered.

For those two reasons it would also allow those of us in local government to deal with some of the infrastructure needs that we have. There was a discussion about the costs being in limbo, and having to do studies just to get a waterline in or to do some maintenance on roads are incredible costs to our local taxpayers.

WALDEN: I had a forest ranger tell me several years ago she had to do an aquatic study to replace the steps on a fire lookout on top of a hill -- a fish study. Now, there aren't too many walking fish out there, but they still had to go through it.

And I think that's one of the issues that at some point Congress needs to address is the overlapping laws and rules and regulations that we put on your backs and average taxpayers' backs just to comply when we ought to focus on the outcome and the goal, which is to protect species in the best way possible.

And I was just reading some of the important points put out in the guidance by the director today apparently. It says things like, "Accordingly, designations should not detract from other conservation efforts that provide greater species benefits." That seems pretty logical guidance. I'm actually sort of surprised they have to tell people that. "Critical habitat designations should not be based on speculation or determinations that lack supporting data."

I mean, this is the guidance we're hearing so much about. It seems pretty reasonable. And, "Do not designate critical habitat where existing management or protection measures adequately conserve essential habitat and those measures are likely to continue for the foreseeable future. Protected lands such as state and national parks, wildlife refuges, national forests, et cetera, are examples of areas that may not need special management or protection."

Are those things that you all agree make sense in terms of guidance and common sense?

KELLEY: It sure makes a lot of sense and I think there's a lot of common sense to be said that, especially for local jurisdictions and local governments that already have property set aside for certain conservation activities that could be used for these activities as well, thereby obviating the need to impact many of the other infrastructure projects that we have. It makes imminent sense.

WALDEN: You know, there's another issue that comes up and that's this issue of habitat conservation plans, and I know landowners are encouraged and are into that one. Half the habitat out there is in private hands. If we're truly going to have a government/private landowner partnership for the benefit of the species, then you have to be able to cooperatively involve private landowners. And it seems that when you have HCPs in place, those ought to be good and the government shouldn't come back and ask for another bite at the apple.

Do you concur with that? Am I missing something here?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

KELLEY: Well, I would completely concur with that. I think that the issue that we have here and one of the reasons why I think it's so important that providing the road map to recovery and delisting of species is that when you have that road map to recovery and a conservation strategy, then people know what they're actually paying for and they know what they're going to accomplish by paying for that.

The current system has a black hole of dollars and the more dollars you spend, the less you know how much you have to spend in the future, and it's kind of once you're in the system, or in the maze, there's no road map out. And that's one reason why we in local government feel really serious about wanting the road map, and that's one of the reasons why the bill that's before us today would provide that.

WALDEN: You'll especially like this then: Part of their guidance also says, "Working with landowners, local governments, states and tribes on a voluntary partnership basis often provides conservation benefits superior to the designation of critical habitat."

And finally, just pointing to others here in terms of guidance, "Continued accurate administrative records are essential to the process of critical habitat designations."

Now, whether this is done in a very bureaucratic way or simply done, the important thing is I think it makes sense what the administration is suggesting as guidance to people making these decisions. Use common sense, work with local governments, believe somebody outside of this imperial (ph) place back here may have a lick of common sense that might help in recovering the species and protecting the habitat in a meaningful way.

KELLEY: Well, I would concur, Congressman.

And I think, as you'll see in my written testimony, the activities that we in Sonoma County have done in some ways are patterned after what those guidelines sound like are being laid out.

WALDEN: Thank you.

And thank you for your indulgence, Mr. Chairman.

POMBO: Thank you.

A couple of points before I go to my questions.

One of the things that's been repeatedly brought up during this hearing is that one part of Fish and Wildlife's budget has been cut and I think in full disclosure it should be noted that the administration's request for Fish and Wildlife Service increased spending by over \$60 million for Fish and Wildlife Service.

And their request, while I don't completely agree with where they put all their money, but their request is a response to and reaction to, I believe, a lot of the litigation that has occurred over the past several years where they are trying to shift the money in to respond to areas where they're being sued and to be able to have money in those accounts. Just so that no one walks away from this hearing with the idea that we are somehow cutting Fish and Wildlife Service's budget.

The request was an additional \$60.3 million, a 3 percent increase into Fish and Wildlife's budget.

In terms of the impact that this has had on local government, we have two members of boards of supervisors to testify as part of this panel. I'm familiar with -- obviously familiar with both of your areas and it's -- I think this is something that a lot of times Congress misses in terms of the overall impact of what we're doing and what it does to real people out there that are trying to live under this act.

Supervisor Crookham, I can tell you, in your answers to Mr. Cardoza you talked about what the impact is of private property owners -- if you happen to have a farm, what EMS (ph); can you build a new corral, can you build a fence, can you do all of that?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

In my area, one of my constituents had grazing land, irrigated pasture land and wanted to shift from a cattle-based operation to planting vineyards. That was considered a conversion to development by the Fish and Wildlife Service and in order for him to accomplish that he would have had to give up over half of his property to Fish and Wildlife Service as mitigation for being able to plant grapes on the rest of his property. And they considered that a conversion to development as if someone was coming in and building houses on this property.

And as you know, things aren't always good in the cattle business and sometimes you want to do something else that you might make enough money to pay your taxes, and this gentleman ultimately ended up having to sell the place because he couldn't afford to keep it.

CROOKHAM: We actually have horror stories very much the same as yours in our county and I think that's one of the things that gets so confusing about all of these regulations when people really wish to do a higher and better use of land and then it's called conversion or it's called development and it really isn't; it's just a way of actually increasing the revenue.

We talk about how that affects us economically, and it does, it affects a person who's trying to make the change, it's tax dollars, revenue dollars that are coming back to us, and I just think it's -- it really needs to be overhauled and I'm just so glad that you're looking at it at this point, and I'm probably not the most objective person when it comes to talking about it.

POMBO: I don't think anybody is totally objective here. Everybody that is here has an opinion and that's why they're here.

It's people that have had to live with this act and have had to go through the struggles of trying to comply with it. I think it's important to hear from all of you.

One interesting thing with the fairy shrimp was that when that was originally listed you weren't considered habitat. The only place they looked at was further north in California, and if you go back and look at all of the so-called science that was done on the listing of the fairy shrimp, you weren't part of that. It was only after it was listed that they discovered that you were critical habitat.

CROOKHAM: Right, and it was a response to a lawsuit like most of these things are, and then it came into play and then there was this quick time line and all these things that happened, so you're right. Totally right.

POMBO: One interesting thing about this legislation and the attempt that's being made by Mr. Cardoza here is that it's something that we've seen repeatedly. You're seeing it firsthand, but when something is listed as endangered it's done with incomplete information that causes it to be listed as endangered, and Fish and Wildlife is making the decision based on what is incomplete science.

They then list it and then they go through the process of critical habitat and adopting a recovery plan and all of that, and it's at that point that they discover that the species is much more common than it was when it was listed. And we go through all of the trials and tribulations of trying to manage what is then considered critical habitat, and I found it interesting to hear you talk about land that was developed that was included as critical habitat.

And in my area we have other endangered species that had court-ordered maps that were listed and we had -- in one instance we had a city of over 40,000 people that almost the entire city was included as critical habitat, and different things like that where I believe they just looked at a map and decided, well, we'll just go around all these different areas without ever actually looking at what was on the ground.

We had -- for the red-legged frog, we had areas that are dry creek beds that on the map it says that it's a creek, and it never has water in it, it's just a dry creek bed. When we get 100-year flood action, there might be some water going through there, but normally there's no water in there. And being from the Central Valley, you're fully aware of how hot it gets in these dry creek beds and to consider that habitat for a frog is -- it's pretty outrageous, but that's what they did.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And I know when it comes to fairy shrimp, which I have fairy shrimp in my district as well -- a lot of the areas that were considered habitat, if anybody had ever actually looked at them they'd know that it wasn't habitat, that the map didn't actually fit. But that's the way we resulted in it.

But I appreciate the testimony of this panel. It was very informative, it's something that not only helps us with this legislation, but I think gives us the ability to go back to the administration and ask them questions about decisions that are being made and what those decisions are based on.

Mr. Weldon has legislation dealing with the science that is used in this whole process that I am very interested in looking at and hopefully being able to move forward on, along with the legislation that Mr. Cardoza put in.

I think if we look at those two areas, we can have some kind of broad consensus that we can move forward and really start to bring some common sense to the way this law is being implemented out in the real world. We can say all we want back here in these buildings, but the truth of the matter is it's you people that have to live with it everyday.

CARDOZA: Mr. Chairman?

POMBO: Mr. Cardoza?

CARDOZA: Would you yield for a comment on your topic? Because I think there's two points I'd like to raise.

First of all, that the comments by Ms. Crookham about the real impacts on individuals, because it's widely circulated when these designations are made that there are no impacts on current landowners. That's true if you don't ever want to change anything on your property. The minute you want to change something, there are significant and costly impacts to your property, as well as there may be a chilling effect on the value of your property because if anyone else -- if you want to sell the property for another use, someone who is purchasing it may very well not purchase it for the same price.

The second point is the notice provision. All this happens to you without any requirement for the federal government to give you notice that they're doing something to your property and to the value of your assets. And while we didn't include that in this bill, it may be something that the committee needs to think about as we go forward.

The Fish and Wildlife Service has indicated privately that that's awfully expensive and they are already short of funds, but the reality is that to take someone's property or affect someone's property without any formal notice is something that I think is foreign to our way of government.

And I just wanted to raise those two issues.

POMBO: Both of those are extremely important points and it's -- your last point in terms of notice is something that I have been working on for a number of years in terms of how do we do this.

And there are two real issues. One is notifying the affected property owners that their property is going to be considered critical habitat, and two is what restrictions are going to be placed on them, because right now, they really don't know, and no one tells them what restrictions are going to be placed on them.

And I think those two issues probably will go a long ways in removing some of the fear and concern that property owners have, because it would get it all out in the open as to exactly what restrictions would be placed on the property.

So I want to thank this panel very much for your testimony. It's very worthwhile that you were here. Thank you.

I'd like to call up the fourth panel: Michael Doebley, Michael F. Martini, Joni L. Gray and Joseph K. Sheldon.

Thank you, and if I could have you all stand and raise your right hand.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Do you solemnly swear and affirm under the penalty of perjury that the statements made and the responses given will be the whole truth and nothing but the truth so help you God?

Thank you very much. Let the record show that they all answered in the affirmative.

Before we begin with this panel I want to thank you. I know this has been a very long day and you've all been waiting for the opportunity to testify, so I appreciate you all being here and your patience with the committee.

Mr. Doebley, we're going to begin with you.

DOEBLEY: Thank you, Mr. Chairman and members of the committee.

My name is Michael Doebley. I am the deputy director of government affairs for the Recreational Fishing Alliance. RFA is a national grassroots organization representing over 75,000 marine recreational fishermen and recreational fishing industry on marine fisheries issues.

Our mission statement is to safeguard the rights of saltwater anglers, protect marine jobs and ensure the long-term sustainability of our nation's saltwater fisheries.

And I'm here today very pleased to speak in favor of H.R. 2933, the Critical Habitat Reform Act.

There are a great number of individuals here today who know so much more about the technicalities of the act. I really wanted to just let you know some of the perspectives and the real-world impacts on marine recreational anglers.

One of the biggest issues in the country right now, as you heard from Mr. Webster, regards how they went about designating critical habitat for manatees in Florida.

It was this committee, through the Atlantic Coastal Act of 1993 and the Sustainable Fisheries Act of 1996 that we now see our nation's saltwater fisheries rebuilding, and because of that, Florida enjoys some world-class recreational fisheries. People come from everywhere to go fishing there. The problem they're running into is a problem of access, and the access is being denied because of the critical habitat provisions.

These no-speed zones for manatees where you have to go at slow or idle speed -- folks can't put in their private docks, as Mr. Webster pointed out. But even if they can have their private dock, what used to be perhaps a 15 minute run to the ocean to get to the fishing grounds is now taking over two hours.

And one of the things that most saltwater anglers like to do is you always try to find that little trip you can sneak in in the morning or at night, before work, after work, before you have time with the family or whatever obligations you may have.

Going from a 15 minute run to a two hour run? It takes you right out of it. Forget it. That's longer than the amount of time you had to get down to run a line.

So there's a definite impact on the quality of life there.

Ramp access: Without the private docks, you have to use your ramp -- well, ramps are becoming crowded and because of this designation you can't build new ramps or (inaudible) so again, you're losing time. And some folks can't use a ramp to launch a boat, they're either getting older, they have a disability. It's always a dicey proposition -- multiple person operation to get that done. Again, access being denied.

So this has become a real problem for us. There is another example that was brought to my attention by one of our members who heard that I was going to be here today and this deals with piping plover habitat, and this is a shore bird, it's a shore nesting bird. They're endangered, and I don't think there's any question about that.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

What happens is in many parts of the East Coast, piping plover arrives in the spring, and they set their nest up literally on the beach, they lay their eggs on the beach. So many areas have been designated critical habitat. Now, the anglers are prohibited from going there for that particular fishing season while the birds are present. And we're acceptable of that, we want to preserve the species.

But within the first few weeks of these birds showing up, the biologists go out and determine whether or not those birds are actually present that year.

Some years they go to the critical habitat areas. Being migratory they go as far as South America. Some years they choose another beach. It would be very easy for them to go out, look at a beach, say "No birds," and let us on. But instead, those areas are closed year after year after year. And we're losing the six best months of the year from May through September/October.

So that's just another one of these real world applications.

Recreational fishing is a huge business. We're talking about over 16 million participants in this country; about \$60 billion in activity; hundreds of thousands of jobs.

It sounds impressive but it is, as Mr. Webster pointed out, a business of small margins, slim profit margins, and any of these actions if taken, without good science and a sound policy, certainly have an impact and leads to loss of jobs, loss of businesses and, again, the loss of our quality of life.

We have a tradition of conservation going back over 100 years. We're very proud of that. But we would also like to see a little bit more common sense brought into how these designations are made. And we'll be the greatest partners out there for conservation, but there's a lot of frustration, especially when we lose access because of a law that needs some amendments and needs reforms.

So thank you, again, Mr. Chairman and members of the committee. I'll try to answer any questions you may have.

POMBO: Well, thank you very much.

Mr. Martini?

MARTINI: Good afternoon, Mr. Chairman and members of the Resource Committee.

My name is Mike Martini and I serve on the city council for the city of Santa Rosa, and I am very happy to be here today to allow me to discuss some of the impacts the listing of the California tiger salamander has had on our communities.

My written testimony is before you so I'll abbreviate my comments in the interest of time.

But it's interesting to me that Santa Rosa shares with this committee a lot of the values that have been discussed throughout this hearing today. Its citizens embrace the preservation of resources, the cessation of sprawl and the protection of the environment, so much so that every single municipality in Sonoma County has adopted voter-approved urban growth boundaries.

In addition, as Supervisor Kelley pointed out, we have a voter- approved quarter cent sales tax for the acquisition and protection of open space. Millions of dollars are used each year for the public acquisition of community separators, agricultural lands, habitat preservation and restoration. And it would be safe to say that if a poll was taken of the citizens of the city of Santa Rosa similar to what was discussed earlier today, that the vast majority of its citizens would support the Endangered Species Act.

But as Roseanne Roseannadanna often would say, "It's always something." And it's not just the Endangered Species Act. It's the interaction of the Endangered Species Act with the other public policy decisions that we make that cause local government consternation.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

And a couple of examples: A lot of conversation today was around housing, but by imposing voter-approved urban-growth boundaries, we have set aside -- we have made a statement in our general plans where we expect to see urban growth and where we expect to see the urban separators and where we expect to see agriculture.

The listing of the tiger salamander overlays one quarter of the area of the city of Santa Rosa, which is earmarked in our general plans for our future growth, and the studies that are required because of that listing are easily adding \$20,000-\$30,000 per finished house and that does not count in any litigation for the loss of habitat.

And Santa Rosa shares with the chairman's district in terms of the cost of housing, and it is quite high in Sonoma County, and that's great news to our homeowners, but it's very difficult news to our children who can no longer buy a home in the town that they grew up in. And as a parent of a 20-year-old, I'm beginning to think he may never move out of the house.

Another example of where we've come in conflict is in our wastewater treatment. Santa Rosa, in cooperation with the county and working with the listing of endangered species in the Russian River, of coho salmon and steelhead, we have tried to modify the flow of wastewater into the river. We treat the water to an advanced tertiary-treated level. We ship it 42 miles up to a steam field and generate green energy out of about half of it, and the other half is used for agricultural irrigation. And this has proven to be a wonderful support for agriculture in our area and maintaining an economic balance, but it requires storage, because, as you may no, agriculture doesn't need water all year long.

The expansion of this system would require additional storage and the listing of the tiger salamander is going to have a significant impact on them. It's already forced us to spend thousands of dollars in studies.

Transportation is another area that I identify in my written testimony.

Homeless shelters is another area that I identify in my testimony, as well as sewer lines.

But I think what's really important is coming here today, I am encouraged that this committee is taking a look at the Endangered Species Act and how it does not act in a vacuum.

I'm very encouraged that you are considering the legislation that is being proposed, and most importantly I am encouraged that Mr. Wayne White of the regional office for Fish and Wildlife Service is working closely with the city and private property owners, as well as the environmental community, to come up with a conservation plan so we are not dealing with this on a piece-by-piece basis, that we're actually doing something about the recovery of a species as opposed to just studying it to death.

Thank you very much.

POMBO: Thank you.

Ms. Gray?

GRAY: Thank you.

And it's always a pleasure to follow someone that's named Martini in the afternoon.

And I wanted to particularly thank the members of Congress who are here to chat with us today and hear what we have to say.

I'm from a district called Santa Barbara County, but I'm from the north end, so my district is more like Chairman Pombo's and the honorable Mr. Cardoza.

So it's great to be here and I'm very impressed with the bipartisan support. My county is made up of about 400,000 people. My district is 80,000, and I represent the district that is the most agro-oriented district.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

As a local official, I work with mayors, city council members. In fact, I have City Council Member Alice Patino here with me from the city of Santa Maria. I work with school trustees, work with special district members and we all take this responsibility very, very seriously, as you do, given the responsibility that we have to meet the challenges of providing for our communities with these very limited resources that we have.

We have to -- and you know, I've heard it all morning and I'm sure appreciative of this. I've learned more by sitting here than I could ever imagine and that that's -- that you guys really know a whole heck of a lot. So that's encouraging and I want to thank you, but we want balance.

So I'm going to give you my story, not just my story, but the story of what happened in Santa Barbara County.

On January 19th, 2000, the United States Fish and Wildlife Service in an emergency rule-making listed a subset of the California tiger salamander species in Santa Barbara County as an endangered distinct population segment. The rule making became final in January of 2001.

Now, true, there are disagreements as to whether it's scientific, whether it's right, whether it's wrong, but as a public servant I, my fellow mayors, city council people, school trustees, we've got to work with that. Now, some of the impacts that you heard today, because everyone --much more of an ability to tell you this than I do -- have talked about the things.

In my district we've had a delay on a project to build a food bank. No, you can't build a food bank because there might be a red- legged frog there.

We've had a six month delay on an animal shelter, a shelter that would stop the euthanasia of animals, because the tiger salamander might live there.

We have had tremendous problems with attracting business; there's been delay in both residential and industrial construction; there's delay in the needed infrastructure such as roads, flood control, water, sewer, all those types of things. And this has greatly impacted our ability to provide affordable housing; housing for those children that need to move out.

Howard Rifdell (ph) has got one that's 30 years old, so it's only going to get worse as we go along here.

We also have delays on our high schools. We can't build high schools because there's a problem. The salamander is probably (inaudible) to my district. One of my friends who's lived on a ranch for many, many years tells her daughter, "Wouldn't it be a great idea to study this little yellow and black lizard that's been on our ranch for, I know, 100 years?" Daughter and mom start digging around, they're finding things, they're talking to -- whoops, the mistake -- a UCSB scientist. So from that point forward she is now in a heated controversy over the protection of the tiger salamander.

Well, Mrs. Sainz, her name is Jeanette Sainz, thought, "This is a challenge, I'll just give them some property and that tiger salamander can go live there." California Department of Fish and Game said, "Great idea, let's do that." They decided, they were all ready to go forward, "We're going to plant grapes, we're going to change this property" -- whoops, the Fish and Wildlife came in and said "Not acceptable."

So Mrs. Sainz, the winery, and Mrs. Sainz's daughter had now caused a problem and no one has the answer. That's what all of you have said today that's the single most important thing.

Let me move along.

There's thousands of people in my community that would like very much to co-exist and get along and do what the plan is, if they knew the plan or if they were included in the plan.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

It really came down on my community this January 22nd. The United States Fish and Wildlife proposed 14,000 acres of critical habitat for the protection of the tiger salamander in northern Santa Barbara County. The proposal was large -- it was poorly prepared by scientists that were chosen by the service who met privately. Underline that word "privately."

Their meetings were with what they called stakeholders -- that's us ordinary people -- only occurred once in a very, very limited amount of time. Once they decided to publish the proposal, they announced that there would be a meeting. Now, they didn't notify the county and they didn't notify city officials, but they said there would be a meeting and the meeting only identified the 14,000 acres.

Now, it wasn't until the day of that meeting, which was March the 10th, when my constituents' government representatives raised their voices so strongly and so angrily that the Fish and Wildlife has now scheduled another hearing for May 11th where there will be a public hearing and we can talk about it.

In a way, we're the reverse of Sonoma County, because first the Department of Fish and Wildlife drew the map, then finally they talked with us. And what causes that problem is that people become so angry.

I'm going to hurry along and I would like to thank Paul Henson (ph), the assistant manager of the Sacramento office, and Diane Nohda (ph) in the Department of Fish and Wildlife. They are finally recognizing that it is going to be a problem for us.

I want to thank Congressman Cardoza, because I think if his bill would have been in place, critical habitat designation would be made concurrent with a recovery plan. Properties that are a part of the conservation plan already in effect or protected by another state agency would be excluded. Darwin and Janet Sainz could plant their grapes and the salamander could have protection.

At the time the critical habitat is designated, economic impacts would be considered and then the affected jurisdictions with fewer resources available to deal with this listing could be adequately noticed and we wouldn't have our constituents rising up, screaming, yelling and having a fit.

It was interesting, the gentleman from Washington talked about why hadn't Mr. Manson, who was sitting in this seat, done something sooner. In my experience, he has.

Three years ago, prior to his taking over, the administration of Fish and Wildlife, we couldn't get answers, we couldn't get responses, we couldn't even get a "No." We couldn't get a "Yes." We could maybe get a "Maybe," but the "Maybe" changed two weeks later.

So all we're asking for is a plan and I think that's what all of you are attempting to do. The public needs to know. Just give us the plan and we'll do it.

Thank you so much, Chairman, for letting me be here and I admire your effort.

POMBO: Thank you.

Mr. Sheldon?

SHELDON: Chairman Mark Pombo and members of the Committee on Resources, Honorable Mr. Cardoza, it's a pleasure and an honor to be here today.

I applaud your efforts to strengthen the Endangered Species Act, but there are some areas that I have some concern about and I'd like to address those specifically.

I direct my comments to you as a Christian and as a conservation biologist. I have been invited to speak out of my concern for the stewardship of biodiversity that was brought into existence and sustained by God.

## U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT DESIGNATION CHANGES

Many Christians consider themselves to be stewards of God's creation and their stewardship to be an act of worship. Others see stewardship of creation as an act of responsibility for their children and grandchildren.

In both cases we are not the owners, but rather act on behalf of either the One above or those to come in our efforts to maintain and assure the fruitfulness of God's creation.

A responsible steward must have sufficient foresight to anticipate and prevent problems from occurring in the first place. Lost, threatened and endangered species, as a result of human impact, testify to our past failure as stewards. Yes, we must address problems when they are recognized, but it is your responsibilities as high stewards in Congress to make meetings like this unnecessary in the future, as we are doing our job properly and preserving the creation.

As stated by theologian Stephen Bouma-Prediger: "All creatures are designed to sing the praises of God. To see a tree only as so many board-feet or a river as only a place to fish are forms of near-sighted utilitarianism that reduce all value to human terms. A focus only on human use, even if wise use, is a stunted viewpoint that fails to acknowledge intrinsic value in a world that is not of our making."

H.R. 2933 reduces some of the essential protection for present and future species. It strengthens other areas that are necessary.

Habitat destruction and degradation is the primary factor responsible for more than 80 percent of the U.S. species that are currently listed under the Endangered Species Act.

SHELDON: By the time a species qualifies for ESA listing, their viability is already seriously threatened and they often survive only in degraded and marginal habitat, and that's critical to understand.

The remnant population of most endangered species could still be recovered by removing the factors that have threatened them. Often, this will require suitable habitat currently unoccupied by the species for reintroduction or recolonization.

Rather than assuring adequate habitat for recovery, H.R. 2933 limits habitat protection to absolutely necessary and indispensable landscape presently occupied by the species. That does not give any room for reintroduction or recolonization.

Now, I'm assuming that the critical habitat is also habitat that has been identified by the best scientific means, and it isn't the middle of a tennis court or a housing development that already exists. I mean, I'm talking about critical habitat that is necessary for the sustainable living of the species.

A minimum viable population requires a minimum dynamic habitat, but a minimum viable population is hardly the fruitful population described in Genesis 1:22. Are we not stealing the birthright of God's creatures when we fail to provide them with the essentials necessary not just to survive but to flourish?

Resource managers base their production goals on maximum sustained yields, yet when God's creatures stand in our way, we set minimum viable populations as an acceptable standard.

The Endangered Species Act is an act in process. It depends adaptive management from the scientific end and adaptive legislation from your end.

The steward's role, your role, must be to craft a win-win solution for all stakeholders and to transform the ESA into an act that is supported by property owners who see value in preserving and enhancing the fruitfulness of their piece of creation, not the current practice of shoot, shovel, and shut up.

We live in the richest nation in the world that the world has ever known. We have a national heritage of conservation that is persisted even through the worst of economic times. Surely, we can and we must have the political will to commit the necessary resources to live sustainably within God's creation.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Humanity was placed in Eden, in the garden, to serve and to care for creation. Adam's first task in the garden was to name the animals. It is this act of loving servant leadership that must characterize our lives today. As we step back and evaluate our job as stewards, let us remember that we have only one chance to do the job right.

A real danger lurks here. Webster's New Collegiate Dictionary defines "blasphemy" as the act of insulting or showing contempt or lack of reverence for God or the act of claiming the attributes of God. If we deny the fruitfulness of God's creatures, have we crossed an unacceptable line?

In our arrogance, we have created a committee that we call the God Squad to decide whether a species is worthy of continued existence.

Section 3 of the current bill extends this policy by inserting an economic impact argument as the primary determining factor on evaluating whether to protect critical habitat. It is the steward's job to care for creation. Only the creator has the right to determine when it is time to call a species home.

I applaud your efforts. I encourage you. We need to change the Endangered Species Act, but we need to do it in a way that will guarantee the fruitfulness of the species that have been placed in our hands to care for.

Thank you.

POMBO: Thank you.

And I want to thank the entire panel for their testimony.

I'd like to begin with Mr. Martini.

You talked about the impact of costs, housing costs, that you have locally. Obviously, in your position, you know that there are hundreds, if not thousands, of things that impact housing costs, the decisions that are made by city councils, by boards of supervisors impact housing costs, the supply and demand, and there are a lot of things that impact the cost of housing in a particular area.

What you described was a community that I think took a step beyond what is typical with local government and, in your general plan, your long-term planning, you set aside areas that will be permanent agriculture, permanent open space, as well as what is proposed for housing/industrial development off into the future.

My understanding of the way that you described that is you have this plan for the future, and the area that was set aside as potential development land, it is that land that is now habitat. Is that accurate?

MARTINI: The range that has been listed includes that area. It also includes areas outside of the city's urban growth boundaries, and I want to say that the city of Santa Rosa has probably done as many things to artificially increase the cost of housing.

We have urban growth boundaries. We've said, "This is all we're going to grow to." We have growth management. We say, "We're only going to build 950 homes a year." That, in conjunction with a very high demand in our area, drives the prices up.

But, at the same time, this is a community that is very concerned about maintaining balance, not becoming so gentrified that only the wealthy can live there. We have inclusionary zoning policies. We have in-lieu fees that are paid by builders to help subsidize. We are very active and aggressive in going after federal and state tax credits.

We have at least three major not-for-profit builders in our community who work very hard at providing housing available to low and very low-income families. We set aside money from our real-estate transfer tax so that as people gain in their appreciation of the property, when they sell it, that money goes back in.

We have an equity-sharing pool that the community has set up, recognizing that we need to have that balance in our community. You need to have a place for your service workers, for your teachers, for your firemen because, if

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

you don't have that, what you've now done is you've exacerbated your transportation problems, your infrastructure problems and everything else that goes along with it.

We're not perfect. We're trying very hard to arrange a level of balance where we respect and preserve resources, but at the same time allow that economic balance to take place.

We thought we had a lot of the pieces in place and then the listing of the tiger salamander came along, and as I said, many in my community would support that. But in overlaying in that one major portion of our community, it has significantly impacted what plans we had in place to try to address some of the inequities that we were facing in terms of housing.

It's that conflict as we try to deal with the various public policies of affordable housing, of responsible waste treatment, providing homeless shelters, improving transportation infrastructure -- those are all concerns that I have to balance as a local policy maker. When we look at it with blinders on, to a certain extent, that you have one entity, the Endangered Species Act, you have to take into account the rest of these items.

POMBO: In the context of all of that -- and both of my local elected officials that are here come from areas that in many ways are similar in terms of being outlying areas, outside of the major urban areas that have experienced growth over recent years.

But in context with everything that you're doing -- Santa Barbara County is a very progressive area, they do a lot of things, as well as the city that you represent.

But you heard earlier a discussion of a poll that was done: Do you support the Endangered Species Act? Do you think that we ought to set aside more habitat? You know, all of those issues are asked in a very black-and-white way.

My guess is that, overwhelmingly, your constituents would answer in the affirmative as those questions were asked because that, I believe, is a moral value that we as Americans share. We don't want species to become extinct. We feel it is our responsibility to keep animals, to keep plants, to keep wildlife from becoming extinct.

And yet if you asked people in a little different way, "Would it be OK if we set aside this land in our town if it meant that your house was going to cost \$50,000 more?" They may answer a little differently, and that's kind of what we're struggling with.

I mean, it's your responsibility as local elected officials to determine your rate of growth, where you're going to grow, what's going to remain open space. All of that is your responsibility. It should not be ours. It should not be Congress's.

And yet we are taking away from you the tools that are necessary for you to make those decisions, because we're stepping in on top of you with land-use decisions through the Endangered Species Act.

GRAY: In response to your question about the poll, the answer would be that, by far, the majority of my constituents would have supported the endangered species maybe five years ago.

But today, there are bumper stickers in my community that say "Free Surf Beach" because the snowy plover is there and the folks can't go to the beach. There are bumper stickers that say "Eat Salamanders, Save the Broccoli," and, you know, things are changing here, which is not the direction that we would like to move.

So the answer to the poll is there's an attitude developing out there that is an attitude because of frustration, and I think that's what you're moving in to do.

Also, the man who wanted to build a patio on to his house in an urban area -- urban meaning semi-rural kind of -- you know, he lived in a subdivision. "I want to build on to my house." "Well, oops, you can't. You're in the circle

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

where there may be an endangered species." Those are the kinds of things that cause the attitude to change and folks to get a little bit testy.

MARTINI: Chairman, if I can just add to that, the piece of this poll that's important has also changed the question. You're right. You ask the question of anybody walking down the street, "Should we save endangered species?" You're right. It's a value system. Everybody says yes.

But if you ask the citizens of Santa Rosa, "Now, is it appropriate to spend \$500,000 of very scarce transportation dollars to study whether or not the salamanders can get across an existing four-lane freeway in order to add a third lane, or do we take \$250,000 and acquire habitat to acquire or to support financially a conservation or a recovery plan?" And, clearly, they would jump at the latter as opposed to the prior.

That's why we are encouraged by what you're doing here, what Wayne White is doing in the area so that we're not just spending money identifying more studies but that we're actually spending money to accomplish the thing that we're trying to accomplish. And I think that's the key that we have to look at, that in addition to having it in balance with all of the other priorities we have in the municipality.

POMBO: Thank you.

Mr. Cardoza?

CARDOZA: Thank you, Mr. Chairman.

As usual, we're on the same wavelength, and my question goes to exactly the same area. It has been my contention for some time that misapplication of the Endangered Species Act, specifically the critical habitat aspects of this act, are constantly degrading public support for what should be the overarching goal of preservation.

And when we start dealing with Mr. Baca's problems about the Delhi sand-loving whatever fly...

BACA: (OFF-MIKE)

CARDOZA: Thank you -- versus the bald eagle, not that all species aren't deserving of being protected, but there are differentiations amongst the public sentiment for different creatures. And, in fact, as Mr. Baca said, "(inaudible) swat me flies," and we're crying about the fact there isn't enough bald eagles or there wasn't -- actually, that's probably a poor case because my understanding is they've come back and that's one of the success stories.

But there really is a differentiation, and I just want to in my question ask if you aren't seeing that on the local level like I'm seeing it at home as well; that, in fact, when you talk about the Endangered Species Act what you see is not people caring about it, but the frustration on their faces immediately about what they've seen happen in their communities.

Even though they care about the overarching goal of preserving species, they're very frustrated by the bureaucratic processes the government has set up to deal with that concern.

GRAY: You've got it nailed. That's exactly what it is, because it's the misapplication and not the fault, in my opinion, of the Department of Fish and Wildlife. It's because they didn't have a plan.

And the fellow that said, if you're going to build a house, you don't go down to Home Depot and buy everything in the store and then figure how it's going to -- I mean, he nailed it. That's what we're trying to do.

I live in a county that is so pro-environment that, I mean, every person in planning and development comes out of University of California at Santa Barbara environmental studies, and even they say, "Just give us a plan. We don't know what to tell the people that come in." And that's why your bill is working, because we need to know.

We'll do it. You know, we might gripe. Someone said we might gripe, but we'll do it. But we need to know how to do it. So you've got it nailed.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

CARDOZA: Thank you, Mr. Chairman.

POMBO: Mr. Rehberg?

REHBERG: Thank you, Mr. Chairman. I think just exactly like you as well.

(LAUGHTER)

REHBERG: You know, I want to go off in the same direction but a little different point, and that is I understand -- and I apologize that I don't know California as well as I should. So I'm not specifically knowledgeable about your area.

You're a county commissioner?

GRAY: Right.

REHBERG: And you're a mayor?

MARTINI: No, I was the mayor. I'm a city council member.

REHBERG: OK.

Are we aware of the unequal application of the Endangered Species Act between the East versus the West?

I specifically asked the staff of those in the discussion today if perhaps you had heard while sitting here of the case back in Washington, D.C., right here of sludge being dumped into the Potomac and a lawsuit that will be filed by the wood (ph) guys -- we came up with an environmental name so that we would sound like environmentalists. And the lawsuit was, "It's not good for you to be dumping sludge from the Georgetown sewer into the Potomac affecting the slug-nosed sturgeon."

Unfortunately, a stay of execution was given by the federal government saying, "Well, it's OK for the next five years until you can get your act together for you to continue dumping the sledge and affecting that endangered species. And, oh, by the way, you can go ahead and build the Wilson Bridge."

Are you aware of some of the inconsistencies that are occurring throughout the nation in reference to the problems that you're having most recently in your city and in your county?

GRAY: My answer is no. The only time there's an unequal application is when the service changes a worker. So, if there's one scientist there that sees it one way, then her interpretation will be what we're working with in year 2000. If that scientist moves, then we're working with the interpretation of 2001.

But that's different from what you're setting forth. Mine is just that begging for the plan again.

REHBERG: And just following the theme of being on exactly the same wavelength as not only the chairman, as everybody in the commission today, it would be far from me to ever comment that Washington, D.C., is treated differently than Virginia and Maryland, unfortunately.

I guess my point is I'm from Montana, and Congressman Walden and I and Mr. Pombo for a different reason -- but we fought the Healthy Forests Initiative, trying to get it passed. We were up against a brick wall until Colorado started having fires, and then I'll be darned if Southern California didn't start having fires, and then Mr. Daschle made a special exception for the Black Hills. Also, we had a coalition built to pass this. So it never would have occurred if it hadn't been real to people in California, Colorado and South Dakota.

My point is I hope you'll go back to the National Association of Counties and I hope you'll go back to the league of cities and towns and tell them of the problems that you're having and the inconsistencies that are occurring

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

nationwide, because until we develop enough of a coalition to get people to support the repeal or the reform of the Endangered Species Act as we know it, it's not going to occur.

And we've felt the problems in our individual districts, in our individual states, but it's now starting to build. And again, I apologize for not knowing California, but I welcome you now to the fight. It's nice to have you help the problem...

(CROSSTALK)

GRAY: And I was commenting on that because I was doing my research in the bar last night to find out, you know, what people thought of stuff.

REHBERG: So you are an insider in Washington?

GRAY: Right.

(LAUGHTER)

GRAY: So one of the things that kept occurring as the conversations were going was the difference in the Eastern interpretation of what's going on with the endangered species than with the Western.

In fact, I did not think that the other part of the country saw it as a problem, as we do in California, because we have so many -- Wyoming, obviously, Montana, Nevada, Florida -- so it's coming. I hear what you're saying.

REHBERG: Real quickly now, Mr. Martini, was it you that mentioned the 15,000 acres?

GRAY: Me.

REHBERG: That was you, Ms. Gray.

Is that private land? Are the...

GRAY: A combination. Mostly private land. Some public airport. Mostly private.

REHBERG: Do you have a map? I mean, did they hand you as part of the process -- it was a secret procedure, right?

GRAY: Right.

REHBERG: You were not involved, and so they unveiled something. Are there clearly defined legal descriptions that show exactly...

GRAY: No. No, it's just a circle. But we need -- I'm going to get these letters wrong -- GPS so we know exactly, because we still don't exactly and we just have panic guessing.

REHBERG: The question I have then, Mr. Chairman, is: Can the executive create an executive order to establish critical habitat similar to what they did in Montana in the last throes of the Clinton administration, saying, "Well, we've lost our position, we're not going to be president and vice president anymore, so here it is. For all eternity, this is the Missouri Breaks Monument without deference to the -- us being involved in the determination of the boundaries? Can a president do the same?

POMBO: Well, that's, in essence, what they're doing, is unilaterally drawing a circle on a map. And, you know, in my instance with my district, it wasn't a circle. It did look like somebody took a brush and just went like that and everything within that area became habitat. Anybody that actually knew what was on the ground wouldn't have drawn the map the way they did. And I'm taking from this testimony that that's the...

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

GRAY: Right. They located...

POMBO: ... conclusion you have.

GRAY: ... pools where they thought that the salamander might breed, and then they said, "We'll go so far from there and that should work. But, no, maybe we ought to go a little further and that should work." So then pretty soon it resulted in a big circle that started from little circles from the various -- very similar to what happened to you and in your vernal pool situation -- very similar.

REHBERG: OK.

Thank you, Mr. Chairman.

POMBO: Mr. Udall?

(UNKNOWN): Thank you, Mr. Chairman.

And thank you, members of the panel for being here. Sorry I didn't get to hear all of you, but, you know, I did get to hear some.

Mr. Chairman, I have two statements to put in the record. Our colleague, Congressman Grijalva -- I'd like to submit his statement for the record, and then comments of the North American section of the Society for Conservation Biology. Can I have permission to put those...

POMBO: Without objection, they'll be included in the record.

(UNKNOWN): Thank you very much.

Dr. Sheldon, you've been sitting here today, I assume, for a bit listening to what's been going on, and you are a conservation biologist. Is that right?

SHELDON: That's correct, yes.

(UNKNOWN): You've been teaching conservation biology and been involved in...

SHELDON: I've been a member of the North American Society of Conservation Biologists for 20 years.

(UNKNOWN): One of the things I'm wondering -- I mean, you're sitting here as a conservation biologist and, you know, you hear a lot of the arguments here, and you hear all the down sides of saving species and the problems. And, you know, this panel and the previous panel and many other witnesses today have brought those home in a passionate way and looked at those specifics and brought them to light for us, and I applaud them for doing that.

I wonder if you could help us on the up sides of a healthy ecosystem. I mean, what's in it for men and women? I mean, having a healthy environment, are there -- when you hear these kinds of arguments, what comes to your mind when you think of the Endangered Species Act and why it's important to have a balanced healthy ecosystem?

SHELDON: Critical habitat provides green space in the middle of an urban area which otherwise would be wall-to-wall houses. It gives place for enjoyment. It gives place to celebrate the awe and wonder of creation. I mean, green space is essential.

There's a point I think at which in some communities, as we've heard, we have boundaries for growth, but, too often, we simply assume that our economy and our society can grow infinitely within a finite world. If it's a choice between human growth and the protection of species, there's always going to be enough political power to push us on the side of the human growth at the expense of the species.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

There has to be a balance. It's not a either-or. It has to be a both-and. We somehow must find the willpower to recognize that there are limits to growth. We have to have quality of life, but quality of life depends upon a healthy creation around us. It's necessary.

It's very similar to the analogy that's been given that if you have an airplane, what we're arguing about is how many of the rivets can fall out of the wing before the wing falls off? There's thresholds within the ecological system beyond which the system will crash, and we don't know where those thresholds are right now.

The critical thing from a conservation biology perspective -- and it's widely applied in many of our lives -- is to operate by the precautionary principle. We don't have to have all of the information in to be absolutely sure before we err on the side of conservation. Sometimes that means that we may protect habitat in the beginning and realize that the habitat isn't necessary in the long run and can be released.

But I'm hearing the pain of some of the people around here, and I hear it loudly where, "We didn't have enough funding in the ESA to draw adequate maps so that we knew on the ground what the distribution was of the critical habitat to protect for the tiger salamander." That's a classic example of a failure not to release enough funding to do the science adequately to allow us to live sustainably within our communities.

It's a joy to be able to say, "I've got an endangered species in my backyard." I have one acre of land, and I've identified 109 species of birds on that one acre of land. I have a house on it. It's covered with wildflowers. I have 19 species of trees on my one acre. I walk out on to my back porch and I celebrate the beauty around me.

I don't have to go on a vacation to feel a release from the pressure. I just walk out on to my porch because I've landscaped the wildlife and invited them to be part of my backyard, too.

I think the question is whether we have the willpower in the country to learn that we have to live with the creation instead of against it and figure out how to do that. That's the essence of what you have to do here, is to come together and recognize that there's going to be boundaries. We have to recognize when we say no. We've got to be able to have a quality of life.

I look back, I grew up in Oregon. I'm from the Pacific Northwest. I teach during the summer at the Au Sable Institute of Environmental Studies on Whidbey Island, northwest of Seattle. It is a gorgeous place.

But when I was growing up in my high school and my grade school in St. Helen's, Oregon, I didn't know of a single person in my entire history in the school who had asthma and, as I went to church all my life, I never knew of a single person that suffered from cancer as a child.

When I ask my class today, "How many of you in my class have asthma?" 25 percent of my students acknowledge the fact that they're suffering from asthma today. You look around you and ask how many people in your community are struggling with cancer.

This isn't dealing with the Endangered Species Act, but it is very much part of the message that we're fouling our nests. We've got to learn what quality of life is. We've got to learn how to say no. And when it comes to the Endangered Species Act, as I said in my testimony, we've got to figure out how to craft that act so that we have a win-win situation instead of a win-lose situation as it so often happens.

Frankly, if we've got enough money to give a half a trillion dollars to tax rebates to bail the country out for short-term economic stability, we certainly have got enough money to provide a sufficient amount of funds to maintain the biodiversity that not only we depend upon but all of creation depends upon, and it's a matter of choices.

We simply have to determine what is important. And for me and my household, we will serve the Lord. And for me and my household, we have to maintain the sustainability of the global creation.

So that's how I'd answer your question.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

It's a matter of choices, and we in this room all are living with problems. We're all struggling with aspects of an Endangered Species Act that, frankly, is broken, and it needs to be fixed.

Part of the current bill will, indeed, move us in that direction, but critical habitat, the critical habitat description, that aspect is absolutely necessary. The critical habitat is the habitat that the species needs to flourish on and we have to have good science to provide us with that information.

And then we're going to have to recognize that sometimes we've got to make the choice that having a tiger salamander in my backyard is really great, but there may be a financial cost to it, too. But we need to preserve the species.

POMBO: The gentleman's time has expired.

Mr. Walden?

WALDEN: Thank you, Mr. Chairman.

I think what we're hearing is a growing consensus on the need for critical habitat reform. This dates back to the days of Secretary Babbitt or Jane Leftfoot Clark (ph) or Michael Bean, an environmental defense attorney.

Republicans, Democrats on this committee today, we must focus on how we can get recovery, which is what the Cardoza bill does, and we must improve science. I fully agree with that.

I think that is the foundation for our decisions so we don't make decisions that are actually harmful to the species, which is what happened in my district when two agencies made two bad decisions, both of which were threatening to the very species they were supposed to protect.

One agency said, "Let's flow warm water out of a lake down the river system" that had microsprings in it that kept the water cold, and when you diluted that with warmer water, it would imperil the salmon they were supposed to protect.

The other agency said, "Maintain a high lake level because we think that's the thing to do," when the history and the science showed just the opposite once the National Academy of Sciences did the review.

So sometimes, it seems to me, government rushes to make decisions that aren't based on sound science, and in doing so not only upends an economy perhaps but also may actually imperil the very species we're supposed to protect, we're supposed to be stewards of.

We need to get it right, and that's why Mr. Cardoza's legislation makes sense to me, and it's why my legislation requires outside independent peer review. I think it makes sense for the Endangered Species Act modernization. This is a 30-year-old law that we're seeing some result from, but I think it could do more and do it better than 12 or 13 species out of 1,300 or whatever the number is after 30 years.

And we've learned a lot. You were talking about growing up in St. Helen's. I grew up in The Dalles and Hood River. I've got to tell you people are living longer today in this country than they did 20, 30, 40, 50 years ago, and we're detecting some of these diseases because of the miracles of modern technology and the things we've learned.

I mean, technically -- we were just looking this up -- under the ESA, there's probably a violation to rid the face of the globe of polio, if you read the statute correctly, and clearly, the only exception are insects that are a threat to humanity. That's the only specific exception.

And so, you know, are we doing something terrible here because we've got to rid the face of the globe of polio or some other disease that we as a civilization decide is bad for us?

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

To me, we can find a balance and, to me, there is a certain sense that communities and countries that are stronger economically probably are more engaged to protect, preserve and enhance their environment than those that are struggling to develop, and I've seen that in China when I've been there. I've seen that in other Third World countries, certainly. They don't care.

What my colleague from Montana said, I think, made a lot of sense. You know, right out here in this river system, one of the first listed species, the short-nosed sturgeon, now gets to swim through sewer sludge because it would take five years to fix the problem.

In my home state, there's a city that every other day on average dumps sewer into the Willamette River, and they get 10 or 15 years to fix it because it's a big problem and an extraordinarily expensive problem, and I understand that.

But we can do better, we should better, and I think, every once in a while it's a good idea to look at one of these laws and say, Is it working? Does it make sense? Is it causing hardships that aren't necessary? Can we do it a better way with a partnership, especially when the bulk of the lands that are needed for habitat are private?

And so, I would say I admire you for what you do on your property. It sounds splendid. But there could come a day when they come and say, "Your house is in the way, and we need to have you tear it down," and you probably would say, "Fine. Take it. I'll find something else to do."

But for a lot of people, trying to change out from maybe a cattle ranch to planting grapes shouldn't be -- I mean, they shouldn't be upended. They shouldn't lose their property over that, in my opinion. That's part of what this country's about, is private property rights, and so we need to find a balance in the law.

Mr. Chairman, I appreciate your work on this issue, and, Mr. Cardoza, yours as well, and I think together we can come and find solutions that work to modernize the Endangered Species Act, to protect the species that allow for our country to have a strong economy and not poverty.

Thank you, Mr. Chairman.

POMBO: Mr. Pearce?

PEARCE: Thank you, Mr. Chairman.

I will not stoop to declare that my beliefs are the same as yours...

(LAUGHTER)

PEARCE: ... but I would like to associate myself with the comments of Mr. Cardoza and Mr. Rehberg just in case that it works well.

(LAUGHTER)

PEARCE: I was fascinated by Mr. Sheldon's comments and his perspective growing up on a small five-acre farm.

As one of six kids in the 104-degree temperatures of southern New Mexico, I began to believe the words of the Lord, the one that says -- Genesis 3:17-20 -- that "the ground is going to be painful for you to toil and it's going to produce thorns and thistles by the sweat of your brow." I learned that very, very carefully and very early at an early age, and I have not gone back to that five-acre farm since leaving, but I appreciate that.

Mr. Sheldon, you did say that you're a practicing evangelical, right? Many evangelicals come down in the debate that falls very close to your field choosing creation theory over evolution theory. Where do you fall on that?

SHELDON: I didn't. I'm not defining how he used -- what process he used.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

PEARCE: OK.

And also, just to put it in perspective, on the question of the one-acre farm and the way that you're able to use that - if no one else in the world produced anything, food, would you pry out that habitat to provide your family with food?

That comes down to the essential question for all of us, is if we choose one thing with our own property, depending on others to do with their properties, to mine the ore that's used in the metal for our cars, to drill the wells on their property to get the fuel for the cars that we drive -- if we drive cars or if we fly on airplanes -- then sometimes we, I think, simplify the decisions before the society and in these equations.

So how would you use your one-acre if no one else produced food?

SHELDON: No one else produced -- that's a very interesting question.

PEARCE: I'll just let you ponder that. I really don't want...

SHELDON: I'm looking forward to moving to Whidbey Island because I'll have five acres there. I'll be moving there in four years, and I have a garden spot planned. But it's a question that we have to pose.

PEARCE: It's a very deep question that we all are troubled with and have to wrestle with.

SHELDON: Yes.

I think I'd struggle with the question. I certainly would not cut all of the trees on my half an acre that I might be forced to grow some of my produce on. Can you feed a family on one acre?

PEARCE: I don't know, but you see where there's a quandary for all of us if you have...

SHELDON: A quandary. Yes, it's...

(CROSSTALK)

PEARCE: We've got members in this body with 12 people in their family and that might not do it.

Before my five minutes expires, Ms. Gray, thank you very much for the balance that you bring into this, and you've expressed the frustrations that all of us do, that we must have some common sense. We've got to reach the balance somewhere here.

I made comments earlier today in this same hearing that we're taking away private property rights from people and that is not in the best interests of the country; that if we just have a plan, almost all of us will live by it.

I was really amazed that people talk about Republicans and their concern for the environment.

In January, the Clear Skies Initiative was discussed, and we have in the Clear Skies Initiative by the president a 70 percent reduction in emissions under the president's plan -- never before. Usually, the reductions are in 10 percent and 12 percent and 4 percent and 3 percentages -- 70 percent reductions -- and business is saying, "We can do those in return for one thing: certainty. Just stick with those rules."

We can do almost anything here. It's when we set the rules and we begin to move them around that I think that the entire balance, the need to preserve a species, the need to have jobs, and the need to provide livings and food sources and heat sources for our entire civilization.

So I hope, Mr. Chairman, that we will drive ourselves through that. Again, Mr. Cardoza, thank you for presenting the valuable discussion, and, if any of you want to make comments on the things I brought up, feel free to until the red light goes on.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

Thank you.

CARDOZA (?): Will the gentleman yield? Oh, I guess the time's up.

POMBO: Time's up.

CARDOZA (?): I just wanted to get a last question on his time, Mr. Chairman.

POMBO: You can ask one more question.

CARDOZA (?): OK. Thank you.

You know, Dr. Sheldon, one of the things that has struck me today listening to the testimony is that, you know, people have an emotional connection to different kinds of critters. Clearly, you know, you've got the American bald eagle, and it's a national symbol. Everybody loves the eagle, and we've done an incredible job at recovering the bald eagle.

But there are all these other insects and plants that are out there, and, you know, everybody can probably think of the animals -- the little plants and insects that they like the least, flies and chiggers and ticks, and you can think of all of those. But is it dangerous to judge species based on an emotional perception?

You know, when we were talking about ecological balance and the whole equation, you need all the -- flies and bees are part of the pollinization process. I mean, what would be your comment on this kind of emotional attachment? We save the things we really like, but the others we don't. Do you have any comment on that?

SHELDON: Conservation biology is recognizing the difference between fine-filtered approach and coarse-filtered approach to solving the biodiversity crisis.

The fine-filtered approach went in with the Endangered Species Act. We identify critical species and we try to help them one at a time. The coarse-filtered approach recognizes that we have so many species that are currently threatened that that's not a long-term viable solution. The only long-term solution is actually ecosystem- level protection.

If we preserve the ecosystems that the species depend upon sufficiently, the species themselves will remain viable with an ecological system.

What's critical here is to recognize what are referred to as ecosystem processes -- energy flow and biogeochemical cycles within the ecological systems -- and the interesting thing there is that many of the players, many of the absolutely critical players in ecosystem processes, the key functioning that drives the sustainability of the system, those key players are the microscopic organisms. They are the things that we're, by and large, unfamiliar with.

That's what is generating and recycling the soils. If it weren't for those creatures, you'd be up to your eyeballs in dead dinosaurs right now.

We have to have the recycling -- the program within the system. It's part of what I would describe as the fruitfulness that's been built into the ecological system itself from the beginning by the creator. It's what keeps the system going. And so, we're very quick to identify with the pandas and the bald eagles.

My work currently is to work -- I am working on a research project on the grasshoppers of Pennsylvania. It's never been done. The last work on the Northeastern grasshoppers was done in 1922. We can't identify the species that are there. We have no idea what the distribution is and The Nature Conservancy has no idea where an endangered species even exists in Pennsylvania because they're so poorly known.

But the point is that some of the things that we feel have essentially no value, the fly that we'll swat or the grasshopper that we will render into a grease spot with mechanical controls while we're walking down a sidewalk, those are the species that are the glue that hold this whole system together.



U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

That's what keeps the integrity of the processes going. It's not the few species that we see on the top, the big charismatic species. Too often, those are already so few, their populations have been reduced to the point from an ecological perspective they're already extinct.

I mean, we do have American bison in the U.S., but from an ecological perspective they're an extinct species. There's virtually no place in the country where they're carrying out the keystone roles that the American bison were known for.

There aren't any wolves or cougars in the Eastern United States. The keystone predators are missing, and, as a result, we're having an explosion of coyotes, and the mezzo-predators (ph) in the middle are taking over filling in the role.

Those animals we can identify with, but it's the other things that we often are very hesitant to even acknowledge with the Endangered Species Act because if you start listing grasshoppers under the Endangered Species Act, everybody's going to scream their head off if there's habitat description set aside, protected areas for grasshopper species, because most people can't recognize their value at all.

I think that's one of the big issues that we're struggling with. How do we really deal with the preservation of all of the creatures, even those that we as a general public don't see as being critical for the functioning of the ecosystems?

So it's the processes that are important on an ecosystem level. It's the landscape processes that we have to maintain.

The Endangered Species Act is critical because it's filling in the gap and it's protecting species in the short-run. In the long-run, we've got to have habitat protected sufficiently to maintain those processes, and, as we do that, we shouldn't lose that many more endangered species.

If we're preserving the integrity of the habitat, if we're learning to live with creation itself, maintaining its fruitfulness, then a lot of the problems that we're addressing here are not going to be ones that are going to be major problems in the future. It's simply learning to live with the system.

CARDOZA (?): Thank you, Dr. Sheldon.

Thank you to the rest of the panel.

And, Mr. Chairman, thank you for your indulgence.

POMBO: Thank you.

Just in wrapping up this hearing, first of all, I want to thank Mr. Cardoza for his legislation, for his work in trying to bring people together on what has proven to be a controversial issue over many years, and it's efforts such as his to try to bring balance to the act, to try to bring so many different people together to come to a compromise, knowing that there are some people that are just going to be opposed to it no matter what, and it doesn't matter what the bill says, their response to it will be that it's gutting the act.

Mr. Sheldon, to you, I found it very interesting to listen to you and your responses, not only your testimony, but your responses to the questions that were asked, and I would like you to think about maybe on a somewhat larger scale what you're talking about on your one acre. You want your home, what is necessary for you to live, and the rest of your acre you are using as habitat. And it's not just endangered species. It's wildlife. It's the beauty of God's creation surrounding you.

Ms. Gray talked about somebody with their farm, and it doesn't matter if it's one acre, 1,000 acres, 10,000 acres. They are setting aside what is necessary for them to live and thrive and produce, and the rest of it they are willing to set aside as wildlife habitat.

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

That's all we're asking for. We're asking for the flexibility in the act for Mr. Cardoza's constituents to be able to earn a living off of a farm and set aside the rest as that habitat and be able to do that in a proactive way and to remove some of the disincentives that exist under the current act and its implementation so that people can do that.

I mean, I grew up in the California Delta and I loved every day of it. I can tell you what it's like to see a bald eagle or a hawk hunting. I can tell you what it's like to be out in those rivers fishing. That's what I grew up with and I never wanted to leave it. I mean, that to me was paradise growing up as a kid.

And yet so many of my friends and neighbors are terrified today that you're going to find an endangered species on their property because they're afraid they're going to lose it. They're afraid they're going to lose the ability to use that property, and that's what drove me to get involved in this crazy game to begin with.

And to be able to come back here and be part of the effort that's being made to bring some rationale and some common sense back into the act -- because I believe that the members of this committee can sit down and come to a compromise, can come to an Endangered Species Act that accomplishes exactly what you describe and, at the same time, takes care of the issues that these local elected officials are having to deal with every day.

You know, in listening to all the debate today and all the talk today, people talk about setting aside habitat -- How much? At what point do you say, "OK, this is enough"?

The federal government owns a third of our country right now. A lot of that could be used to recover endangered species. A lot of that should be used to recover endangered species.

We have land in my district, in Dennis's district that are set aside with conservation easements on it, and land that's been paid for under habitat conservation plans. That all ought to be part of what the ultimate solution is.

But the way the act is being implemented today, we still have things where the city of Santa Rosa is running into problems, where the county of Santa Barbara's running into problems, and that balance is what we need to find. That's how we need to come up with a solution that removes some of the negative incentives and perverse incentives that exist under the act today and turn it into a positive if you find an endangered species on somebody's property.

That's what we need to do, but the law right now doesn't allow that. That's not the way it's being implemented, and that's why it gets so frustrating for those of us that are up here in trying to deal with this, because I agree with most of what you're saying.

I think you're right, but that's not the Endangered Species Act we're living with, and we need to change that.

So I appreciate the testimony of this panel, all of the panels that were here today. I think this was a very worthwhile hearing to have. I think we got a lot of very important information.

I know that Mr. Cardoza and I can go back and sit down and take another look at this bill and see if there are things that we can change that address some of the issues that have been brought today.

But I think it's a good bill. In general, I think it's a very good bill and it's something that we need to move forward with.

So I thank all the panels. I thank the witnesses for your testimony today. I thank the members of the committee for sticking around during all of this. I know it's been a long day. So thank you all very much.

The hearing's adjourned.

END

U.S. REPRESENTATIVE RICHARD POMBO (R-CA) HOLDS HEARING ON CRITICAL HABITAT  
DESIGNATION CHANGES

## Notes

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[????] - Indicates Speaker Unknown

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## Classification

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**Language:** ENGLISH

**Subject:** US CONGRESS (90%); US DEMOCRATIC PARTY (89%)

**Person:** KEN CALVERT (79%); THOMAS G TANCREDI (79%); JAY INSLEE (79%); JEFF FLAKE (79%); JOHN J DUNCAN JR (79%); TOM UDALL (79%); TOM COLE (78%); JOHN E PETERSON (73%); JIM SEXTON (73%); JIM GIBBONS (72%); DON YOUNG (58%); WALTER B JONES (58%); FRANK PALLONE JR (58%); ROB BISHOP (58%); DEVIN NUNES (58%); BARNEY FRANK (58%); ELTON GALLEGLY (58%); GRACE NAPOLITANO (58%); GREG WALDEN (58%); CHRIS CANNON (58%); DENNIS R REHBERG (58%); RAUL M GRIJALVA (58%); RON KIND (58%); DALE E KILDEE (58%); BARBARA CUBIN (58%); STEVAN PEARCE (58%); MARK UDALL (58%); DENNIS A CARDOZA (58%); MADELEINE Z BORDALLO (58%); MARK E SOUDER (58%); NICK J RAHALL II (58%); SOLOMON P ORTIZ (58%); WAYNE T GILCHREST (58%); RICK RENZI (58%); DONNA M CHRISTENSEN (58%); GEORGE RADANOVICH (58%); NEIL ABERCROMBIE (57%)

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