

ENDANGERED SPECIES & WETLANDS REPORT

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Politics, regulation and law on ESA, wetlands and takings

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Proposed NWP changes are praised, vilified

Legal basis of Oct. 14 proposal questioned in comments submitted by industry groups

The Army Corps of Engineers should not allow newly proposed wetland permits to be used in the habitat of threatened and endangered species, the Fish and Wildlife Service and environmental groups urged in comments submitted to the Corps.

That suggestion was just one of many contained in about 1,000 comments that the Corps received on its controversial October announcement (*ESWR* Oct, p. 1). In the Oct. 14 *Federal Register*, the Corps said it was extending the use of NWP 26 until Sept. 15, withdrawing the proposed NWP B covering master planned development, and proposing conditions for using the new permits.

Under those conditions, the new permits could not be used in 100-year floodplains as mapped by the Federal Emergency Management Agency or in "impaired waters" or designated "critical resource waters."

Trade associations such as the National Association of Home

(Continued on page 2)

FWS ordered to designate silvery minnow critical habitat

Tenth Circuit overturns New Mexico district court in finding clear violation of ESA requirements

The Fish and Wildlife Service is being forced by the federal courts to reconsider its policy of not designating critical habitat for threatened and endangered species.

In the most significant decision issued last month, the Tenth Circuit Court of Appeals ordered designation of critical habitat for the Rio Grande silvery minnow "as soon as possible" (*Forest Guardians v. Babbitt*, 97-2370). In their published opinion, three judges unanimously overturned a lower court's October 1997 decision that deferred to FWS's listing priority guidance and stayed the case until October 1999 (*ESWR* Nov 97, p. 8).

Another decision involving grazing allotments on Bureau of Land Management land may turn out to be equally significant. Chief Judge David Alan Ezra, sitting in Honolulu, set aside incidental take statements issued in a biological opinion for grazing allotments in Arizona because FWS could not show that

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NWP proposal

(Continued from page 1)

Builders and broad-based organizations such as the Nationwide Public Projects Coalition and the National Wetlands Coalition (NWC) attacked the announcement/proposal with vigor. They said it would effectively force many applicants to apply for individual permits, which will strain already overburdened Corps resources and “slow a program already notorious for its time consuming process,” NWC said.

Comments from environmental groups were generally more abbreviated. They offered suggestions for improving the Oct. 14 proposal, but were obviously pleased with the direction the Corps is taking by withdrawing NWP B and proposing the new conditions.

Looming over the entire proceeding is the question of the legality of the Corps’ nationwide permit program. A lawsuit challenging the program’s environmental fitness under the Clean Water Act is currently pending in a California federal court (*Natural Resources Defense Council v. West*, 98-560 VRW, N.D. Calif.).

But the industry groups signalled that they do not believe the Corps has complied with the law thus far in proposing replacements for NWP 26. For example, NWC said that the Corps has failed to “articulate a satisfactory explanation” for its Oct. 14 action, including “a rational connection between the facts found and the choice made” (NWC quoted a Supreme Court opinion on the Administrative Procedure Act (APA), *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)).

“The Corps in this action has not even begun to meet its statutory obligations; it has not yet found any facts,” NWC said. “If it has, it certainly has not articulated them.”

And the Foundation for Environmental and Economic Progress, a coalition of large landowners such as Del Webb, criticized the Corps’ lack of an administrative record for the proposed changes—including the withdrawal of NWP B.

“Here, in a violation of the APA and due process more serious than in *Portland Cement*, there is no record of data,

facts or information that would support the Corps’ proposal. Thus the public has no basis to evaluate the proposal.”

NWC also said that the Corps “has provided no data to justify the wholesale prohibitions contained in its proposal. Nor has the Corps demonstrated that activities authorized under the NWPs in the 100-year floodplain, in wetlands adjacent to critical resource waters, and in wetlands identified with impaired waters and aquifers, have more than minimal adverse effects.”

The Corps’ own data show that it required about 56,000 acres in mitigation in fiscal 1997, or 22,000 more acres than were destroyed by nationwide wetland permits, NWC said. “Even if one assumes for the sake of argument that only 50 percent of all required mitigation was successful, as EPA has implied, ... the net loss under the entire Section 404 program comes to 6,000 acres—about 120 acres per state,” NWC said.

Suggestions made on which waters to avoid

The Natural Resources Defense Council (NRDC) suggested a broad definition of “critical resource waters,” including critical habitat for listed species, Wild and Scenic Rivers, waters in federal, state or local parks, monuments, recreation areas, or similar areas, including source waters, and waters that have received state designations. “Impaired waters” should also include a variety of waters, including those for which EPA has issued one or more advisories in the previous three years recommending limits on fish or shellfish consumption. Wetlands and waters upstream of such waters should also be considered impaired, NRDC said.

The Fish and Wildlife Service suggested that critical resource waters include “habitat for endangered and threatened species and those that are candidates or proposed for listing, ... particularly any streams used for spawning” by listed species.

100-year floodplain issue debated

The Corps’ proposal to prohibit use of the replacement permits within 100-year floodplains as mapped by the

(Continued on next page)

Clarifications

Due to an editing error, the lead paragraph of an article on the snail darter and Tellico Dam in Tennessee in the December issue misidentified the name of the river. As noted correctly later in the story, it is the Little Tennessee River.

Also, a headline on p. 17 about a proposed HCP in Monroe County, Florida, should have identified the relevant state as Florida, not California.

ESWR regrets any confusion these oversights may have caused.

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NWP proposal

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Federal Emergency Management Agency was questioned by all sides. FEMA Director James Witt called the proposal to require individual permits within those areas “a step in the right direction” but added that “there are actions in wetlands outside of the FEMA-designated floodplain that could adversely impact on flooding that still would be subject to the nationwide permits.”

And the National Park Service (NPS) said that most NPS units “have not been mapped by FEMA for identification on their rate maps.” NPS suggested that the floodplain exclusion apply to proposed nationwide permits A (residential, commercial and institutional activities), E (mining activities), 21 (surface coal mining activities) and 40 (agricultural activities).

The Nationwide Public Projects Coalition said the floodplain proposal would turn FEMA into a wetlands regula-

tory agency. In addition, “by agreeing to accept FEMA’s position, the Corps appears to have gone beyond its section 404 jurisdiction.”

The National Association of Home Builders said the floodplain proposal “will have a disproportional impact on the most heavily populated areas of the United States—areas where the bulk of development projects are likely to occur.” Developing areas near cities will be the most heavily affected, NAHB said.

The National Association of Counties said that if the Corps cannot issue nationwide permits “for areas requiring fill within the FEMA-defined floodplain, counties will have to undertake an expensive and time-consuming process to acquire an individual permit for the same type of projects.” The result, according to NACO, would be the spending of additional taxpayer dollars “without any additional environmental benefit.”

“The best means of discouraging development in the 100-year floodplain is for FEMA to stop selling flood insurance there,” the National Wetlands Coalition said.

Sample quotes from comments on the Corps’ Oct. 14 proposal:

“The exclusion of floodplains from nationwide permits should be expanded to include riparian buffers of 300 feet and should address any uses of the nationwide permits in this area, not merely above-grade fills.”

—Environmental Defense Fund

“[T]he vast majority of electric utility activities covered by the NWPs have little if any direct effect on the flooding of lands within the 100-year floodplain, or on water quality of critical resource or impaired waters. Yet the Oct. 14 proposal would exclude most if not all of these activities from proceeding under a NWP, without demonstrating a direct link between the activities and these effects, which the proposal purports to address.”

—Edison Electric Institute

“We urge the Corps to take another serious look at proposed NWP A.... This proposed permit will allow up to three acres of destruction of freshwater wetlands with no public notice or environmental review.”

—Wildlife Management Institute

“Many infrastructure projects such as public water and sewer are integral to planned developments and public and private applications are often coordinated because of the need to consider a ‘single and complete’ project. NPPC is concerned that many such infrastructure projects may be ‘kicked into’ the individual permit process for proposed permit A because the 3-acre limit will be exceeded in many cases...”

—Nationwide Public Projects Coalition

Web: For full copies of these and other comments, go to <http://www.eswr.com/ish040.htm>.

\$1 B lands spending proposal announced

President Clinton and Vice President Al Gore have announced a \$1 billion Lands Legacy Initiative that includes \$150 million in matching grants for land or easements for urban parks, greenways, outdoor recreation, wetlands, and wildlife habitat.

The proposal also includes \$50 million for easements to protect critical forest habitat, and \$80 million for habitat conservation plans to protect endangered species, according to the White House.

The initiative will be part of the Administration’s fiscal 2000 budget request. The White House called it “the largest one-year investment ever in the protection of America’s land resources.”

Gov’t at end of the line on “Tulloch”

The Solicitor General has decided not to seek Supreme Court review of the D.C. Circuit Court of Appeals’ decision that invalidated the Army Corps of Engineers’ and EPA’s “Tulloch rule,” which prohibited “incidental fallback” resulting from excavation and clearing of wetlands (*National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir, 1998)) (*ESWR* Aug, July, p. 1).

The Corps and EPA are likely to issue some type of rule in the coming months interpreting the decision, but no decision has been made yet on the scope of that rule, said a government official who asked not to be named.

Silvery minnow

(Continued from page 1)

the grazing would actually harm the cactus ferruginous pygmy-owl or the razorback sucker (*Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service and Bureau of Land Management*, 97-2416 PHX SMM (DAE)) (See story, page 7).

The minnow decision follows another adverse ruling on critical habitat from the Ninth Circuit Court of Appeals. In May 1997, that court found fault with the service's determination that CH designation for the coastal California gnatcatcher was "not prudent," and remanded the issue to the district court for further proceedings (*ESWR* June 97, p. 6). (The Tenth Circuit also ruled that critical habitat designation requires National Environmental Policy Act review, in *Catron County Bd. of Commissioners v. U.S. Fish and Wildlife Service*, 94-2280, *ESWR* March 96, p. 1).

The Tenth Circuit ordered Interior Secretary Bruce Babbitt to "issue a final critical habitat designation for the silvery minnow as soon as possible, without regard to [his] other priorities under the ESA."

The critical habitat mandate in the ESA came back to haunt FWS in the Tenth Circuit's decision. The ESA says that "to the maximum extent prudent and determinable," FWS "shall" designate critical habitat at the time of listing.

The ESA also allows FWS to extend the deadline by a year by concluding that CH is "not determinable." The service exercised that option with the minnow, but still missed its March 1, 1995, deadline for making the final determination.

FWS mulls options in wake of decision

Faced with a growing number of court decisions ordering it to designate critical habitat, the Fish and Wildlife Service is taking a close look at its options.

Those include allocating a certain amount of money from its fiscal 1999 listing budget of \$5.76 million for critical habitat, and issuing guidance to field staff about how to most efficiently designate critical habitat.

But at this point, "It's premature to say where we're going to go," said Gary Frazer, deputy assistant director of ecological services in Washington. The service is still discussing how to allocate the listing dollars, he said.

"Clearly the courts are moving us in the direction of designating," Frazer said, even though the service has stated repeatedly that it does not believe designation has much benefit biologically. "In our view, the reach of Section 7 [of the ESA] without critical habitat is in almost all cases the same as critical habitat," he said.

But Frazer added that "there are instances where there might be some benefit [to species], particularly in unoccupied habitat."

The Tenth Circuit's opinion may force FWS to address the issue head-on. "They are going to have to start dealing

FWS conceded it missed the deadline, but said that congressional restrictions on listing funds in 1995 and 1996, followed by small listing appropriations, prevented it from clearing up its backlog of species already proposed for listing and candidate species that also needed decisions.

Following the lifting of the listing moratorium in 1996, the service has published listing priority guidances that have placed CH at the bottom. FWS argues that designation provides little benefit to species beyond that already provided by the ESA's consultation requirement in Section 7.

But the Tenth Circuit said a mandate is a mandate.

"Wisely, the Secretary [of the Interior] does not press the argument that inadequate congressional appropriations relieved him of his ESA duties," the court said. "We could not accept that argument if it had been raised, especially in light of the fact that the specific statutory date by which the Secretary was required to designate the critical habitat for the silvery minnow had already passed one month before the [listing] moratorium was enacted, and the Secretary has continued to ignore that clear statutory deadline for more than two-and-one-half years since the moratorium has been lifted."

Waiting until Oct. 30 to designate CH "threatens serious, perhaps irreparable, consequences regarding the continued vitality of the silvery minnow," the court said. "Despite the Secretary's argument to the contrary, [CH] designations serve to protect species vulnerable to extinction. Without a designated critical habitat, the ESA's requirement that "[e]ach federal agency shall ... insure that any [of its actions] is not likely to ... result in the destruction or adverse modification of [critical] habitat, ... becomes unenforceable."

with it," said Matt Kenna of Kenna & Hickcox in Durango, Colo., who represents Forest Guardians in the silvery minnow case. "Their strategy of doing 'not prudent' findings and relying on the listing priority guidance is just not what the law says."

Kenna said the service should do the best job it can with the resources it has, and "if [the designation] is not perfect, they can go back later and change it."

Frazer said FWS "does its level best with the resources we have available." He also said that the perception of critical habitat "has changed so much over the years" that any benefit it might have had initially "has been diminished because of the way it is perceived."

The push for designation, oddly enough, has come both from elements of the regulated community, who see it as a legal way to force the service to analyze the economic effects of species listings, and environmental groups who see it as a way to provide needed habitat protections for listed species in areas they will need for recovery.

Heather Weiner, a policy analyst with Earthjustice Legal Defense Fund, argued in an article in the May/June *Endangered Species Update* that the main reason FWS refuses to designate CH is because it is afraid of political controversy. "With proper funding, enforcement, and good public relations, critical habitat could provide both private and public resource managers with the clear guidance needed to recover and protect endangered species," she said.

Red wolf reintro program found to be constitutional

Federal judge in North Carolina sees substantial effect on interstate commerce

The Endangered Species Act trumped state law in a showdown over red wolf reintroduction in North Carolina.

In a clear victory for reintroduction programs and the ESA in general, Chief U.S. District Judge Terrence Boyle rejected the contention of Washington and Hyde counties—and two landowners in those counties—that the red wolf program violates the Constitution’s Commerce Clause (*Gibbs v. Babbitt*, 4-97-CV-41-BO, E.D.N.C.).

“The record in this case clearly demonstrates that red wolves are ‘things in interstate commerce,’ and that they substantially affect interstate commerce through their tourism value,” Boyle said in his Dec. 23 opinion. “Under [*U.S. v. Lopez*, 514, U.S. 549 (1995)], it is irrelevant that the threat to red wolf-related commerce comes from intrastate ‘taking’ of red wolves,” the judge reasoned.

Boyle’s decision effectively pre-empts a state law passed in 1994 that allowed landowners in Washington and Hyde counties to trap and kill red wolves on private lands “at any time.” (The law was later expanded to two other counties).

If the service’s reintroduction program had been found unconstitutional, then the state law would have governed, but in light of the ruling, “the state law basically has no meaning now,” said Defenders of Wildlife attorney Mike Senatore. Defenders intervened on FWS’s side in the case.

The plaintiffs will appeal, said Chris Graebe, an attorney with Womble Carlyle Sandridge & Rice, a large North Carolina firm based in Winston-Salem.

When they first filed the suit in 1997, the plaintiffs challenged the process FWS used to adopt the regulations for the program. They eventually dropped those claims.

The landowners felt that FWS had “duped” them by saying at the outset that the wolves would not be subject to federal law if they strayed from federal land, Graebe said. But FWS said the proposed regulation made it clear that the wolves would still be subject to the ESA’s take regulations no matter where they went.

Special regulations fashioned for the “nonessential, experimental” population of wolves allow landowners to ask FWS to remove wolves found on their land, and to kill wolves if they are in the act of killing livestock or pets, or if they are threatening human life.

Graebe, however, said FWS has been “unable or unwilling” to comply with landowners’ requests to remove wolves. Property owners “call them and they never come,” he said.

Brian Kelly, field projects coordinator for the wolf program, said FWS has removed “several wolves” from the two farms that made requests in the past year. FWS will be going back to set more traps now that the holidays are over, he said.

FWS and Defenders “demonstrated that tourists do cross state lines to see the red wolf, and that these tourists

have an impact on commerce,” the judge said.

In addition, the judge found that red wolves are found in several states, and some of the red wolves in Eastern North Carolina “either have crossed state lines or may cross state lines in the future. All of these actions have economic consequences, as tourists, academics, and scientists follow the red wolves. Unrestricted taking of red wolves on private lands would present a clear threat to this commerce.”

Kelly said three different surveys conducted by universities have shown overwhelming support for the wolf program. One study performed by Cornell University estimated that the five-county area where the wolves are located receives anywhere from \$40 million to \$184 million annually from increased tourism due to red wolves.

Judge examines case in light of *Lopez*

In *Lopez*, the Supreme Court found that the Gun-Free School Zones Act violated the Commerce Clause because there was no substantial effect on interstate commerce. The decision defined three categories of activity that Congress can regulate consistent with the Commerce

“Since *Lopez*, no circuit court has determined that a federal statute is unconstitutional because it overreaches the Commerce Clause. This Court does not find that this case compels a crossing of that line.”

—Chief Judge Terrence W. Boyle

Eastern District of North Carolina

Clause, including “persons or things in interstate commerce, even though the threat may come only from intrastate activities.”

Boyle also took note of *Lopez*’s instructions to consider legislative findings, and even congressional committee findings, in determining whether an activity affects interstate commerce. “According to Congress, the various species protected by the ESA ‘are of esthetic, ecological, educational, historical, recreational, and scientific value to the nation,’ ” the judge said, quoting the law. “This value, in the case of the red wolf, leads to a significant impact on interstate commerce.”

The reintroduction program began in 1987 but faced stiff opposition from landowners and local and state lawmakers. A stable population of about 75 wolves has been established; the recovery goal is 220 animals.

FWS recently halted red wolf reintroductions in Great Smoky Mountains National Park because of “extremely low pup survival and the inability of the red wolves to establish home ranges within the Park” (FR 10/8/98, p. 54151-3; fw1008.txt; *ESWR* Oct, p. 19).

HCP, proposed critical habitat for pygmy-owl stir debate

More controversy over endangered bird in Arizona

The conflict over growth and the endangered cactus ferruginous pygmy-owl intensified in Arizona last month as the Fish and Wildlife Service approved its first habitat conservation plan for the bird and issued a highly controversial critical habitat proposal for it.

The service's actions seem certain to keep the status of the bird and development affecting it tied up in court for some time. The Southwest Center for Biological Diversity (SWCBD), the Tucson group that sued to get the bird listed as endangered, said it would sue to overturn the service's approval in early December of an HCP for a 160-acre development in northwest Tucson.

The center also said it would sue over the service's late-December proposal to classify more than 730,000 acres in four Arizona counties as critical habitat (FR 12/30, p. 71820-38; f123098.txt). The service published the proposal in response to a court order in another SWCBD lawsuit (*Southwest Center for Biological Diversity v. Babbitt*, 97-704 TUC ACM, D. Ariz.).

That lawsuit also resulted in a proposed critical habitat designation for the Huachuca water umbel (see below).

The HCP dispute turns on whether the Section 10 permit approved by FWS should authorize the killing of a pygmy-owl even if the death is accidental.

The HCP issued to the Lazy K Bar Ranch on Tucson's northwest side allows the ranch owners to build up to 50 homes on 3.3-acre lots totalling more than 160 acres. The land lies very near where biologists saw pygmy-owls on two occasions in early 1998. In return for permission to harass the birds during construction, and to be able to avoid liability if one owl dies accidentally, the developer has pledged to save well over 100 acres of Sonoran desert land as open space.

And the critical habitat proposal allows any landowner who secures a federally approved HCP to avoid any restrictions that normally are imposed on such habitat. Under the ESA, the service otherwise must protect critical habitat from destruction or "adverse modification" from a federally funded or federally approved project.

The Southwest Center contends that the owl is too rare—32 in Arizona, although numbers are much higher in Mexico—to allow a development that could cause even an accidental death. Such a death could occur, for instance, if a bulldozer or car connected with that development hit an owl. This HCP is apparently the first one approved for a species as rare as the pygmy-owl. Service officials in Washington, D.C., and environmentalists were unaware of any previous HCP for a species with a smaller United States population.

The service strongly defended the accidental death clause. Under the service's "No Surprises" rule, "You must address unforeseen circumstances," said Leslie Dierauf, a

biologist in the service's Albuquerque office. "What if a kid rides a bike and hits an owl?"

Dierauf also plans to recommend that the local Pima County government insert such a clause in a regional plan it will write in the next two years to protect the pygmy-owl and numerous other endangered species throughout the county, as its population grows from 823,000 in 1998 to an expected 1.2 million in 2020.

"These plans are written not only to conserve an endangered species but to provide whoever decides to get a permit the assurance that they will be protected [from liability]," Dierauf said.

Dierauf's stance angered a spokesman for U.S. Rep. Jim Kolbe, a Republican representing southern Arizona. Spokesman Ron Foreman told reporters that the service threw a "monkey wrench" at the county's plan.

"How does it get us where we want to go?" Foreman said. "It's not a Fish and Wildlife Service plan. It's this community's plan."

Environmentalists blasted the service's critical habitat proposal because it would exempt areas covered by HCPs. The proposed designation includes some of the fastest-growing sections of the bustling city, including a huge area lying in the heart of one of the largest collections of ironwood trees in the world. The ironwoods, which live up to several hundred years, regularly play host to the pygmy-owl and shelter baby saguaro cacti.

Service biologist Mike Wrigley defended the exemption on the grounds that incidental take permits aren't easy to get. HCPs, he said, can take up to two years to prepare.

—Tony Davis

Web: Go to <http://www.eswr.com/f123098.txt> for the full text of the proposed critical habitat designation.

CH proposed for Huachuca water umbel

Proposed critical habitat for the Huachuca water umbel includes about 52 miles of streams or rivers in Cochise and Santa Cruz counties, Arizona (12/30, p. 71838-54; f123098a.txt).

Although most of the land being proposed for CH designation is managed by the federal government, FWS said that it is proposing to include some riparian systems on private land, such as the Sonoita Creek segment and the San Rafael Valley segment in the Santa Cruz River drainage. Sites in the Huachuca Mountains are managed by the Coronado National Forest. The San Pedro Riparian National Conservation Area is managed by BLM. The Garden Canyon segment is managed by the Fort Huachuca Military Reservation.

As with the pygmy-owl proposal, FWS said it would conduct an economic analysis before it makes a final CH determination. The comment period ends March 1.

Contact: Tom Gatz, Endangered Species Coordinator, FWS, 2321 West Royal Palm Rd., Suite 103, Phoenix, AZ 85021-4951 (602-640-2720, ext. 240; fax -2730).

Cattle growers win grazing case in Arizona

Judge sets aside incidental take statements restricting grazing on BLM allotments

The Fish and Wildlife Service's effort to protect endangered species from the effects of livestock grazing in the Southwest suffered what could turn out to be a severe blow last month.

A federal judge invalidated restrictions on grazing on two Bureau of Land Management allotments in southeastern Arizona, finding that FWS did not prove the grazing would harm two endangered species (*Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service and Bureau of Land Management*, 97-2416 PHX SMM (DAE), D. Ariz.).

The restrictions only cover about 13 miles of the Gila River, but the judge still has jurisdiction over the rest of the case, which challenges grazing restrictions on allotments totaling nearly 1.6 million acres in southeastern Arizona.

The conditions at issue in the Dec. 10 decision included a ban on grazing in riparian areas in order to protect potential habitat for the cactus ferruginous pygmy-owl and the razorback sucker. They were contained in incidental take statements that FWS issued with a biological opinion in September 1997.

Chief Judge David Alan Ezra, who sits in Honolulu but presided in the case because of a crowded docket in Arizona, slammed the federal agencies' reasoning in his written opinion and at a hearing in federal court in Phoenix in October.

FWS and BLM offered "virtually no evidence that listed species even exist on the land," Ezra said in his opinion. The agencies "are unable to demonstrate that cattle grazing will result in 'harm'—injury or death to members of a listed species—and are unable to meet the definition of 'take' in the regulation."

The clock has not started running on a possible appeal of the decision because Ezra has not entered final judgment yet. The lawsuit by the cattle growers challenges incidental take statements for about a dozen other species.

FWS and BLM reinitiated consultation under the ESA after a hearing was held before Ezra in October. The agencies also asked the judge to stay the case pending completion of consultation, but he declined to do so.

If left to stand, Ezra's decision could set a troubling precedent for the Fish and Wildlife Service, because FWS would have the burden of proving the existence of species before imposing conditions on land use as part of the consultation process.

Ezra said at the Oct. 21 hearing that he is "very much a supporter of vigorous government enforcement of these laws, because I believe ... in the importance of maintaining our environment.... But I am also a firm believer that we should not overenforce these statutes in an unreasonable

way so as to cause people who have no responsibility in causing a problem to be put out of business. It causes a backlash against these laws that does far more harm than good."

Ezra said he saw "no evidence in the record that the grazing that these people want to do, at least on the plots ... for which there is no standing problem, will harm any endangered species whatsoever. And the government has [no evidence]. All you tell the Court is, well, they might be there. And we haven't had a chance to go out there and check."

"I've been on the bench 10 years," Ezra said. "I live in an environmentally sensitive district.... I've ridden all over the Ninth Circuit. Never have I seen a thinner case."

The judge said he saw "no evidence" that the grazing at issue in the case would harm the pygmy-owl or razorback sucker.

An attorney representing intervenor Southwest Center for Biological Diversity said the decision could push FWS toward using critical habitat designation to protect species. "Since critical habitat can, and often does, include unoccupied (potential) habitat which is determined to be essential to the species' recovery and survival, degradation of the same habitat FWS unsuccessfully argued would 'take' endangered species, would clearly constitute illegal 'adverse modification or destruction' of critical habitat in violation of section 7," said Geoff Hickey of Kenna & Hickey in Durango, Colo.

CH has been designated for the razorback sucker but not for the pygmy-owl, though it has been proposed (see p. 6)

Defenders sues Border Patrol on pronghorn

Defenders of Wildlife is suing the U.S. Border Patrol under the Freedom of Information Act for not releasing public information about endangered Sonoran pronghorn that live along the border region of southern Arizona (*Defenders of Wildlife v. INS*, 98-3111, D.D.C.).

Defenders has been trying for more than five months to obtain documentation that describes how the Border Patrol is affecting the Sonoran pronghorn and other endangered and threatened species in the region, the group said.

In Arizona's Sonoran Desert, Border Patrol activities occur within the Barry M. Goldwater Range, Cabeza Prieta National Refuge and Wilderness, Organ Pipe Cactus National Monument, and Tohono O'odham Nation of Arizona. Defenders charges that in these areas, Border Patrol staff fly excessively loud helicopters extremely low, less than 200 feet above ground, directly over Sonoran pronghorn habitat.

"Instead of cooperating with the other federal agencies and sharing public information, the Border Patrol has simply ignored Freedom of Information Act requests," Defenders biologist Dr. Melissa Grigione said.

Timber cutting won't harm owl pair, West Coast says

Company responds to gov't brief in Oregon case

Harvest of the 94-acre Good Hominy Unit will not harm a pair of northern spotted owls, West Coast Forest Resources argued at length in court papers filed last month in federal court in Oregon (*U.S. v. West Coast Forest Resources*, 96-1575-HO, D. Ore.).

West Coast was responding to the federal government's brief in the case, in which District Judge Michael Hogan imposed a temporary injunction on logging until radiotelemetry data were collected (See *ESWR* Nov, p. 9, Sept 97, p. 5). The government argued that harvest of the unit would significantly impair the breeding, feeding and sheltering of the owl.

The case is being closely watched because of its importance in interpreting what constitutes "harm" under the ESA, in light of the Supreme Court's 1995 *Sweet Home* decision.

"The intensive telemetry data collected on the Chickahominy owls since 1997 materially weakens the government's already inadequate case that nesting (breeding), roosting (sheltering) or foraging (feeding) will be significantly impaired if the Good Hominy Unit is harvested," West Coast argued.

The evidence the government plans to offer at a hearing in February "will not meet its burden to prove by a preponderance of the evidence that it is reasonably certain that harvest of the unit will imminently and proximately cause death or injury to the Chickahominy spotted owls," West Coast said. "Without reasonable certainty that habitat modification 'actually kills or injures wildlife,' there is no violation of the harm regulation."

Data collected for a year starting in late 1997 show that the unit was used sparingly by the owls, West Coast argued, with only 3 percent of the telemetry "locations" occurring in the unit. "As expected, no nesting occurred within the unit," the company said. "The unit was also not significant for roosting behavior for either owl," West Coast said; the female owl roosted in the unit only once during the year and the male twice.

West Coast buttressed its case with papers submitted by wildlife biologist Robert Carson of Mason Bruce & Girard in Portland and Larry Irwin, wildlife program manager of the National Council for Air and Stream Improvement, the scientific research arm of the pulp and paper industry.

"The limited use of the unit during the year was not unexpected," West Coast said. "What was unexpected is that the owls spent more than *half* of all their time during the year in pole-young and broadleaf (hardwood) stands, which the government had previously agreed was not suitable habitat for owls. In fact in 1998, the owls nested in a pole-young stand. The total amount of suitable habitat in the owls' home range, including these most-frequently-used stands, was *over 60 percent*, well above the

40-50 percent range at which the government's experts previously admitted they would have no concern about habitat removal. Thus, the habitat picture for these owls is much brighter than the government previously believed."

The company contended that the government's case rests on "a complex [six-step] biological syllogism." In essence, said West Coast, the government reasons that harvesting the unit will reduce the owls' available prey, causing them to become weaker and reducing their reproductive rate, resulting in actual injury or death.

"Yet the *only* step of this six-part construct that the government can actually prove in this case is the *first*—that harvesting the unit will reduce the amount of habitat currently available to the owls," West Coast said. "Beyond this self-evident point, the government has *no evidence at all* to support its biological syllogism: *no evidence* of prey in the unit, *no evidence* of available prey outside the unit, *no evidence* of the prey requirements of the Chickahominy owls, *no evidence* of the effect on the owls of eliminating prey now in the unit, *no evidence* of the resulting effect on the owls' reproductive rate, and *no evidence* of any resulting injury or death."

The government instead offers "unadorned speculation," which West Coast said is "not sufficient to prove a reasonable certainty of actual injury or death."

In his paper based on the radiotelemetry data, Carson found that because the Good Hominy Unit "is not within the core area of the Chickahominy owls," meaning that the unit "does not provide critical resources for the Chickahominy owls."

Grizzly, other well-known species would be covered in Seattle HCP

Seattle has applied for a permit to take six high-profile listed species: the northern spotted owl, the grizzly bear, the gray wolf, the marbled murrelet, the peregrine falcon and the bald eagle (FR 12/11, p. 68469-71; f121198.txt).

The incidental take permit also would cover 77 unlisted species which might become listed in the future, such as the chinook salmon and the Coastal Puget Sound distinct population segment of the bull trout, which have been proposed for listing. FWS has prepared an environmental assessment on the city's draft HCP.

"The plan will cover the city's 90,546-acre watershed and the city's water supply and hydroelectric operations on the Cedar River, which discharges into Lake Washington," FWS said. Nearly two-thirds of the land covered by the plan would be in a "no-commercial harvest reserve."

The HCP "is a set of mitigation and conservation commitments related to ongoing water supply, hydroelectric power supply, fishery mitigation, and watershed manage-

(Continued on next page)

Boise Cascade owl HCP criticized by FWS

Company submits permit application for Oregon land now subject to injunction

The Fish and Wildlife Service has some serious problems with a habitat conservation plan submitted by Boise Cascade for a disputed parcel in Oregon known as the Walker Creek unit.

The timber company has asked for a one-year permit to take threatened northern spotted owls, a pair of which nested in two trees on the 65-acre site between 1990 and 1996. But FWS said it is concerned that Boise's plan may not meet the requirement "that a permittee minimize and mitigate the impacts of the taking to the maximum extent practicable."

The service announced the permit application in the Dec. 23 *Federal Register* (p. 71148-50; f122398.txt).

In October, a federal judge in Oregon enjoined the company from logging the unit until Boise sought a Section 10 incidental take permit (*Boise Cascade v. Spear*, 97-1810-JO, D. Ore.). Then on Nov. 5, a federal Claims Court judge found that Boise's takings claim against the government was not ripe and urged Boise to seek a permit before proceeding with legal action (see *ESWR* Nov, p. 8, for story).

Boise submitted an HCP to FWS and applied for a one-year incidental take permit a week later. In its HCP, it said it would only harvest trees outside of the March 1-Sept. 15 nesting season for the spotted owl and the marbled murrelet—except for road building. It also said it would replant Douglas-fir, Sitka spruce, western red cedar, and/or western hemlock over the harvest units, and comply with Oregon forest practice standards regarding riparian areas and snags.

After a site visit, FWS made a number of suggestions on Dec. 9 and "suggested other options that may be practicable for Boise Cascade to implement," the service said in

its *FR* notice. The next day, however, "Boise Cascade informed the service that it is not interested in any alternative minimization or mitigation measures."

Usually, permit applicants and the service negotiate the details of HCPs and permits before they are even submitted to the service for approval. Granting of the permit then becomes almost a formality.

Not so in the Boise situation. "As stated in the [HCP], impacts from the proposed logging would likely make it impossible for a pair of northern spotted owls to nest on the subject property," FWS said.

"The service does not know whether any potentially suitable spotted owl nest trees would remain, including the two known nest trees," FWS said. "Based upon this information, the value of the site to provide habitat for owls post-harvest is difficult to accurately assess since the distribution and size classes of live and dead trees that will remain standing is not clear."

Nevertheless, FWS "believes that the proposed harvest would diminish or eliminate the value of the site to spotted owls for foraging and roosting, especially in the short term."

The Walker Creek Unit is "relatively small," FWS said, but "it does contain many old growth trees and large snags that generally serve as part of the foundation for suitable, productive spotted owl habitat."

Among the other measures suggested by FWS: Restricting road-building to times outside the nesting season, and retaining eight green trees per acre greater than 20 inches in diameter at breast height, including three trees per acre that are greater than 32 inches in diameter.

FWS also said that 70 percent of the retained trees "should be in clumps of at least 0.5 acres in size. The remainder would be dispersed or in clumps smaller than 0.5 acres. A minimum of 15 percent of the harvest unit area (7.5 acres) would be retained," with trees in riparian management areas not counted toward meeting the retention objectives.

FWS asked for comments by Jan. 22.

Contact: Rich Szlemp, FWS Oregon State Office, 2600 S.E. 98th Ave., Suite 100, Portland, OR 97266 (503-231-6179).

(Continued from previous page)

ment activities." The plan "is based on a decade of studies and the results of over four years of analysis and negotiations with five state and federal agencies."

A 1997 Agreement in Principle "addresses not only issues under the Act but also related issues under state law and issues with the Army Corps of Engineers."

Activities covered under the permit would include timber harvest, thinning, reforestation, and mechanical brush control; construction, repair, reengineering, decommissioning, and maintenance of forest roads, including use of gravel pits and other rock sources, as well as maintenance and replacement of culverts and bridges; and sale of forest products.

Fishery mitigation activities include provision of streamflows for chinook, coho, and sockeye salmon and

steelhead trout, and expansion of a pilot hatchery for sockeye salmon; construction of fish passage facilities (both upstream and downstream) for chinook and coho salmon, and steelhead and cutthroat trout at Landsburg Dam; and funding salmon habitat restoration in the lower Cedar River.

The plan includes "habitat-based conservation and mitigation strategies" for all species addressed in the plan, and "species-specific conservation and mitigation strategies for the 14 species of greatest concern, which include all currently listed species."

Comments were requested by Feb. 9

Contact: Brian Bogaczyk, FWS, 510 Desmond Drive, S.E., Suite 102, Lacey, WA 98503-1273 (360-753-5824, fax 534-9331), and Matt Longenbaugh, NMFS (same address, except Suite 103) (360-753-7761, fax -9517).

Topeka shiner listed as endangered in Midwest

Farming, other land uses could be affected

Once common in Midwestern streams, the Topeka shiner is now found in “a few scattered tributaries,” the Fish and Wildlife Service said in declaring the fish endangered throughout its range. The final rule was published in the Dec. 15 *Federal Register* (p. 69008-21; f121598.txt).

Siltation and tributary impoundment have contributed to an 80 percent reduction in shiner populations, FWS said.

The effect of the listing on farmers, ranchers and other landowners was unclear. In comments to the agency on the proposed listing, farm groups had complained that a listing could cost billions of dollars. But Bill Hartwig, director of the service’s Great Lakes-Big Rivers Region, said the listing should not affect property owners “who are good stewards of their land, and who are good neighbors to landowners downstream.”

In the listing rule itself, however, FWS said that “without knowing precisely what changes may take place on the agricultural landscape in the future, we are unable to make a blanket statement that each of the referenced practices will never result in a violation of section 9 of the Act.”

The use of pesticides “consistent with approved labeling and application protocol, and the use of fertilizer consistent with sound, scientifically based application rates, in combination with stable riparian vegetation buffers serving as filtering mechanisms to reduce non-point source runoff, will not be considered to be a violation of section 9 of the Act,” FWS said.

But the service also noted that “many agricultural chemicals” have not been subject to Section 7 consultation “and the subsequent Environmental Protection Agency implementation of reasonable and prudent measures to minimize incidental take of listed species.” In particular, pesticides have not been evaluated for their effects on Topeka shiners.

“In the future, we anticipate working with the Environmental Protection Agency to identify alternative chemicals and methods to reduce any impacts which are identified to this species,” the service said.

In many areas throughout the shiner’s range, FWS said that “filter strips and riparian areas do not exist,” and row crops extend to the stream channel. “Pesticide and fertilizer applications in these non-protected stream areas have the potential to impact the species, particularly through runoff” after heavy rains.

“[T]here are presently numerous areas along streams without buffers that may impact the species,” FWS said.

The service is not required under the ESA to do an economic analysis when it lists a species. If FWS designated critical habitat for the shiner, then an economic analysis would be required. But as is the case with virtually all listings, FWS decided it would not designate critical

habitat for the shiner.

FWS responded to comments citing a statement by an FWS biologist at a public meeting, that several populations in Kansas would not go extinct even if the shiner were not listed. “There are indeed a number of populations in Kansas that are quite viable, inhabiting very high quality streams,” FWS said. “Unfortunately, the continued existence of these populations is now severely threatened by tributary dam development. Several populations that inhabited this area, previously considered some of the best remaining, are now gone.”

In addition, “since publication of the proposed rule, an additional serious threat to South Dakota’s Vermillion River basin population has developed. Multiple reservoir construction is now planned on streams occupied by the Topeka shiner in this basin, further threatening the species.”

Conservation agreements with watershed districts cannot preclude listing the shiner, FWS said. One such agreement, with the Mill Creek Watershed District (in Wabaunsee County, Kansas), the Kansas Department of Wildlife and Parks, and FWS, has been developed and signed. While it is a “good example of federal-state-private cooperation, ... this agreement is yet to be fully

Where is the Topeka shiner found?

The shiner is “presently known from small tributary streams in the Kansas and Cottonwood river basins in Kansas; the Missouri, Grand, Lamine, Chariton, and Des Moines river basins in Missouri; the North Raccoon and Rock river basins in Iowa; the James, Big Sioux and Vermillion river watersheds in South Dakota; and the Rock and Big Sioux river watersheds in Minnesota.”

—From final listing rule, Dec. 15 *Federal Register*

implemented and has not resulted in the expected on-the-ground conservation benefits to the species.”

Some commenters were concerned that the listing would delay or eliminate state and local road, bridge and culvert maintenance projects. But FWS said that in section 7 consultations involving 404 permits, individual 404 permits “will only be required when the proposed activity may adversely affect the Topeka shiner.”

In the “vast majority of road and bridge projects occurring throughout the range of the Topeka shiner,” nationwide wetland permits will continue to be “the appropriate permitting tool,” the service said.

FWS also encouraged development of habitat conservation plans for the shiner in cases where the activity is exempt from Section 404 but has the potential to take the shiner.

Contact: William H. Gill, Field Supervisor, or Vernon M. Tabor, biologist, FWS, Kansas Ecological Services Field Office, 315 Houston St., Suite E, Manhattan, KS 66502 (785-539-3474).

FWS backs off on questionnaire sent to hunters on wolf shooting

N.M. representative outraged by survey

The Fish and Wildlife Service apologized to elk hunters in New Mexico last month for sending them a questionnaire about Mexican wolf shootings that FWS conceded could be seen as “accusatory and confrontational.”

The quote comes from a Dec. 22 letter from FWS law enforcement chief Kevin Adams to about 240 people who had permits to hunt elk in New Mexico, in an area where a Mexican gray wolf was shot in November. The questionnaire went out to the hunters Dec. 14.

But complaints from the hunters resulted in swift congressional criticism. Rep. Joe Skeen (R-N.M.) sent Interior Secretary Bruce Babbitt a letter on Dec. 17. Skeen said he was “absolutely amazed at the actions of the Fish and Wildlife Service in response to the deaths of several wolves in Arizona.”

Although FWS said the questionnaire is a “standard law enforcement tool” that is used by several government enforcement agencies, Skeen said its use “may be one of the most outrageous actions by a federal bureaucracy that I have seen in my 18 years in Congress.” He said he and other members of Congress “are going to have a number of questions for the Department regarding this incident.”

Unfortunately for the service, Skeen helps decide the FWS budget as a member of the Interior subcommittee of the House Appropriations Committee.

Why the outrage? In addition to asking hunters whether

they shot the wolf or whether they knew who shot the wolf, the questionnaire asked, “Should we believe your answers to the questions?” and follows that with, “If your answer to the last question was yes, give us one reason why.” It also asked, “What were your emotions while filling out this form?” and “Did you feel afraid while filling out this form?”

Those questions came near the end of the form, however. Right off the bat, hunters are put on notice that “this is not a draft. Only write your answers once.... Please write your answers as detailed as you can to enable us to understand your side. Use only a pen while writing (no pencils). No typing allowed.... Do not make *any* corrections... If you feel that you need to change your answers, please do so in the space provided for that purpose, or put the mistaken sentence within parentheses and continue on. Your correction will be taken into consideration.”

In his apology to the hunters, Adams said, “We regret that the survey’s language was viewed as accusatory and confrontational and that we failed to give you a better explanation of why we were contacting you. It should have clearly stated it was a voluntary questionnaire and outlined why we were soliciting the information. If you choose not to complete the survey, disregard it.”

Adams said the survey has helped other law enforcement agencies around the country solve crimes and that FWS had used the same type of questionnaire to investigate wildlife crimes.

McKittrick cert petition rejected

The Supreme Court decided Jan. 11 not to review a Ninth Circuit decision upholding the conviction of a Montana man for killing a reintroduced Yellowstone gray wolf. Chad McKittrick had argued that the wolf reintroduction program was illegal (*ESWR* May, p. 6)

Mexican wolves scheduled to leave Turner ranch for pens in Arizona Jan. 15

The Mexican wolf reintroduction program is moving forward, despite the lack of success in keeping wolves alive in the wild.

Two families of Mexican wolves were scheduled to be delivered to acclimation pens in Arizona by Jan. 15, weather permitting. Biologists from FWS and the Arizona Game and Fish Department will transport the five wolves from Ted Turner’s Ladder Ranch in southern New Mexico to pens in the Apache National Forest.

The New Mexico Cattle Growers Association, which has sued FWS claiming the reintroduction program is illegal, asked a judge in New Mexico last month for a preliminary injunction to halt reintroduction of more wolves. The government was expected to respond to the association’s motion by Jan. 11, said Caren Cowan, NMCGA executive director.

Environmental groups including Defenders of Wildlife and others have intervened in the cattle growers lawsuit (*New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife*

Service, 98-367, D.N.M.; *ESWR* April, p. 19).

Ladder Ranch is a project of the Turner Endangered Species Fund. Turner, the billionaire founder of CNN, is an ardent environmentalist whose conservation efforts are getting more attention. The latest issue of *Audubon* magazine—which features Turner on the cover—describes some of those efforts, such as reintroducing bison on his ranch in Montana.

“The wolves showed us last year they can adapt and survive in the wild,” said Nancy Kaufman, FWS Southwest regional director. “This year we will expand our monitoring, outreach, and law enforcement efforts to ensure they’ve given the chance to survive and prosper.”

Of the 10 wolves released, five are dead, two are presumed dead, and three were recaptured and returned to captivity. One pup also died in the wild.

Two were killed by gunshot and three were “apparently” killed by gunshot, according to the service, although the necropsy results are pending. FWS suspects that the last three wolves to die in the wild—on Oct. 18, Nov. 7 and Nov. 23—were shot to death.

Listing of Umpqua River cutthroat trout upheld

NMFS used “best available” data, judge finds in challenge brought by Douglas County, Oregon

The National Marine Fisheries Service used the best scientific and commercial data available to it when it listed the Umpqua River cutthroat trout as endangered in 1996, District Judge Michael Hogan ruled last month (*Douglas County v. Daley*, 98-6024-HO, D. Ore., 12/14/98).

In a significant opinion on the “best available data” standard under the ESA’s Section 4, Hogan found that even though the Oregon Department of Fish and Wildlife did not provide NMFS with all the data it possessed on the trout, that wasn’t enough to invalidate the listing.

“Although this court is greatly concerned that one government agency may have failed in providing important information concerning the listing decision, such cannot be attributed to NMFS, which made a reasonable effort to obtain such information,” Hogan found.

Hogan also determined that studies completed after the trout was listed in 1996 could not be used to overturn the listing.

Douglas County submitted affidavits from fisheries biologists and a citizen in an attempt to show that NMFS had ignored data about hatchery releases of the trout and other information. Hogan found, however, that NMFS did not have to consider information provided in “informal” phone calls, or data contained in studies completed after the listing.

“[T]his court cannot overturn an agency decision based on information and studies obtained and conducted after

the agency makes its determination,” Hogan said.

The affidavits “present factual information and testimony on NMFS’s decision to list the URCT,” Hogan said. “However, most of this information and testimony was not submitted to NMFS during the status review, the public comment period, or any point thereafter.” NMFS “made considerable effort to obtain relevant data,” Hogan said.

NMFS’s determination “that the best available scientific data justified listing the URCT is entitled to deference from this court and such decision shall not [be] disturbed based on post-hoc rationalizations produced by [Douglas County],” the judge said.

“[T]his court cannot overturn an agency decision based on information and studies obtained and conducted after the agency makes its determination.”

—U.S. District Judge Michael Hogan (Oregon)

“Although an argument can be made that the ESA requires the Secretary to obtain conclusive evidence, this court must defer to the agency in its determination as to what is required in seeking the best *available* data,” Hogan said.

NMFS published a proposed rule to list the URCT as endangered in 1994, and then, complying with a court order to meet its ESA deadline, listed the trout in August 1996.

NMFS is currently reviewing the URCT’s status as part of a larger review of coast-wide sea-run cutthroat trout.

Colorado lynx reintro effort ruled legal, but trappers have trouble finding lynx

A federal judge has allowed Colorado to proceed with plans to reintroduce Canada lynx in Colorado.

U.S. District Court Judge Wiley Daniel refused Dec. 31 to issue a temporary restraining order that would stop the reintroduction of lynx into Colorado (*Colorado Farm Bureau Federation v. U.S. Forest Service*, 98-2696, D. Colo.).

The judge ruled from the bench, so there is currently no final judgment, but he asked a Justice Department attorney to prepare a written order by Jan. 11.

The Farm Bureau and other plaintiffs—the Colorado Cattlemen’s Association, the Colorado Woolgrowers Association and the Colorado Outfitters Association—had challenged the program on National Environmental Policy Act grounds. They argued that the federal government had to prepare an environmental assessment or environmental

major federal action for the purposes of NEPA. The state plans to release the first batch of lynx on private lands that are next to Forest Service lands, said Colorado Department of Natural Resources wildlife management supervisor Rick Kahn. Later releases would take place both on private and on Forest Service lands, he said.

The lack of lynx in Canada, however, is delaying the program. “As far as we’re concerned, we’re moving forward,” Kahn said. “Lynx are coming back to Colorado. Our hang-up now is we don’t have the animals available.” Kahn said trappers in British Columbia have captured only two lynx so far, but are optimistic about capturing another 12 or 13 animals soon.

A state/federal conservation team has identified blocks of suitable habitat lumped into four areas. The first release site, where the state wants to place lynx this year, “will be in a huge block of the Rio Grand/San Juan NF, between Pagosa Springs and Durango,” the Colorado Division of Wildlife said. A second release area “may be in the Gunnison NF and connected parts of the White River and Grand Mesa forests. Rocky Mountain National Park is another possibility.”

Changes on the way at Northwest refuges

Farmers will have to alter their operations in order to benefit wetlands, waterfowl

Farming operations on two wildlife refuges in northern California and southern Oregon may have to be scaled back during dry years in order to comply with federal law, the Fish and Wildlife Service said last month.

In a Dec. 23 letter to farmers who lease land on the Lower Klamath and Tule Lake refuges, FWS said that up to three-quarters of all wetlands acreage “may not receive full water deliveries and could potentially go dry during peak waterfowl migratory periods” in nearly half of all future years.

“Although agricultural areas are used by waterfowl, a full complement of wetland habitats are needed to meet mandates under the Kuchel Act,” the National Wildlife Refuge System Improvement Act, passed in 1997, and relevant executive orders, FWS said.

FWS will renew leases before spring “only if new amendments are added to the lease contracts that would allow for the cessation of farming operations on refuge leased lands should there be an insufficient supply of water” to the Klamath Reclamation Project. (The Bureau of Reclamation runs the project, which supplies much of the water upon which the refuges depend).

Farming practices that may have to be halted include tillage and stubble burning, which eliminate cover and expose soil, creating conditions that are “incompatible with waterfowl management unless water availability for wetlands and lease land agriculture is reasonably certain.”

FWS said it expects to have a new Compatibility Determination and associated environmental assessment available this month, and anticipates making final decisions on the leased land issues by spring.

In order to continue allowing farmers to use some of the refuge lands, FWS has to make “determinations” that those uses are consistent and compatible with the refuges’ purpose under the laws that govern refuge management. Wildlife conservation is the purpose of the Klamath refuges.

Ironically, the FWS announcement came the day before a federal judge issued an opinion that questioned FWS management of the refuges but did not order the service to reconsider its compatibility determinations.

Twelve environmental groups had challenged FWS’s determinations for the refuges, claiming that the farming and its concomitant pesticide use have degraded water quality and harmed birds that use the refuges, including migratory waterfowl and bald eagles.

District Judge Garland Burrell found that despite some problems at the refuges, there would be no point in ordering Interior to take another look at its 1998 decision that the

refuges’ operation was “consistent and compatible” with the refuge laws (*Klamath Forest Alliance v. Babbitt*, S-97-2274 GEB GGH, E.D. Calif.).

The environmental plaintiffs were not happy with Burrell’s opinion, but were pleased by the FWS letter, said their attorney, Mike Sherwood of Earthjustice Legal Defense Fund in San Francisco.

FWS also announced last month that it had completed a draft environmental assessment for an integrated pest management program on the two refuges. Sherwood said that although the service seems “to be headed in the right direction,” his clients will still consider appealing Burrell’s decision.

Sherwood also said he would be filing a motion asking the judge to reconsider certain parts of his opinion and to correct “several mistakes.” One of those errors was the judge’s assertion that the National Wildlife Refuge System Administration Act and the 1997 National Wildlife Refuge Improvement Act do not create a private right of action. “That was not an issue in the case,” Sherwood said.

The judge did not address one of the plaintiffs’ main issues—water deliveries to Lower Klamath NWR—which means that it is still a “live issue,” Sherwood said.

Burrell agreed with the plaintiffs on some points. He said it is “undisputed that the quality of water on the [refuges] has declined in recent years, and waterfowl use is significantly down on the Tule Lake Refuge.”

FWS’s 1994 determinations for the refuges found that agricultural fields benefited migrant waterfowl and that “studies [indicated] pesticide use had not resulted in significant water quality degradation,” Burrell’s Dec. 24 decision said. The service also found that “stabilized sump levels and sedimentation are the primary causes of the decline in water quality on the refuges,” the judge said.

In 1998, FWS adopted that same reasoning without further explanation, Burrell said. He found the 1994 reasoning to be “satisfactory and supported by the record.”

But the 1994 determination for the Tule Lake Refuge included “stipulations necessary to ensure compatibility,” such as: “[1] further integrated pest management and [National Environmental Policy Act] review will be completed through contract by 1996; [2] [c]rops not directly beneficial to waterfowl management will be restricted or eliminated (onions, sugar beets); [3] [a]ll pesticide use will follow [Interior Department] policy.”

The plaintiffs said that those stipulations had not been fulfilled, but FWS said that both [2] and [3] had been fulfilled, and “general IPM considerations were ... being taken into account in the review of all pesticides,” Burrell said.

Burrell said “[i]t is apparent from the record that at least two of the stipulations had not been fulfilled at the time of the 1998 recertification,” pointing to the fact that the IPM environmental assessment was not completed and the “amount of onions and sugar beets grown on the Tule Lake Refuge increased between 1994 and 1996.” But “even if the agency’s failure to give an explanation concerning the outdated stipulations did, on its own, constitute arbitrary and capricious

Lawsuit targets San Diego multispecies HCP

In initial battle, judge allows grading of vernal pools containing endangered San Diego fairy shrimp

Vernal pool species such as the San Diego fairy shrimp have gotten the short end of the stick in San Diego's Multiple Species Conservation Program (MSCP), according to environmental groups who are suing the Fish and Wildlife Service and Army Corps of Engineers.

In a complaint filed in California last month, 14 groups, led by the Southwest Center for Biological Diversity, contend that the two government agencies have violated the Endangered Species Act and the Clean Water Act in numerous ways (*Southwest Center for Biological Diversity v. Berg*, 98-2234-IEG (JAH), S.D. Calif.). The city of San Diego also is a defendant.

The first showdown in the litigation occurred early last month, when the plaintiffs failed in an attempt to halt construction for one of the projects challenged in the complaint—the Cousins Market Center.

On Dec. 11, District Judge Irma Gonzalez denied the plaintiffs' request for a temporary restraining order, finding that the developer's mitigation effort for the endangered fairy shrimp was already too far along to prevent further damage. She also agreed with FWS's conclusion in a biological opinion that the development is not likely to jeopardize the shrimp's continued existence.

Gonzalez acknowledged that over 95 percent of the San Diego fairy shrimp's habitat has been destroyed, but said the plaintiffs had not been able to demonstrate "a likelihood of irreparable future injury" to the shrimp because of the Cousins development.

The judge noted that, as a condition of receiving city and Corps approval, the developer had agreed to spend \$3 million to preserve 8,909 square feet of vernal pool habitat off-site and "enhance, restore and/or create" up to 18,600 square feet of other vernal pools.

"[T]o the extent that this project ever posed a risk of harm to the survival of the fairy shrimp, the Court agrees with Cousin that this harm has already occurred," Gonzalez wrote. Cousins already had collected vernal pool inocula, containing the eggs of the fairy shrimp, from all the vernal pool basins at the development site, she said.

On Dec. 9, San Diego issued a grading permit for the 70-acre site containing 66 vernal pools that served as habitat for the fairy shrimp. A hearing was held before Gonzalez the next day.

Following Gonzalez's ruling, the developer cleared the site.

In their complaint, the environmental groups say that the vernal pools the developer agreed to preserve, restore, create or enhance, do not contain known populations of San Diego fairy shrimp. They also called the FWS-Corps consultation process "meaningless and predetermined." Because of the "No Surprises" guarantees

provided by FWS, the service's biological opinion on the Cousins Project "could not require mitigation measures beyond those included in the city's HCP or permit," the complaint said.

FWS issued its "no jeopardy" BiOp in May 1998 and a month later, the Corps granted a nationwide 26 wetland permit—a "general" as opposed to individual permit, which would have required more analysis. EPA had objected to the granting of a general permit on the grounds that impacts would not be minimal.

Babbitt has called plan "jewel" of HCPs

FWS granted a permit to the city of San Diego in July 1997 for the habitat conservation plan, known commonly as the MSCP. Its purpose is to allow development to proceed in the fast-growing city and surrounding area while setting aside enough land to protect 85 different listed or unlisted species.

The plan covers 550,000 acres, about 172,000 of which would be set aside as a preserve. About an equal amount is targeted for development. Interior Secretary Bruce Babbitt has called it "the jewel of habitat conservation plans."

But the environmental groups say FWS and the Corps have cut corners, both in approval of the plan initially, and in the subsequent granting of wetland permits for development. The groups also are suing San Diego for violations of the ESA's "take" prohibitions in Section 9.

In the complaint, the plaintiffs say the plan started out focusing on preservation of coastal sage scrub used by the coastal California gnatcatcher. But "[u]nlike the gnatcatcher, the vast majority of the 'covered' species were not dependent upon coastal sage scrub for their survival. Because the MSCP was driven by the gnatcatcher, there was a lack of information on species" that depend on wetlands.

"Wetland communities like vernal pools require different management activities, as compared to measures for coastal sage scrub communities, to ensure their survival," the complaint says.

What follows is a sampling of other alleged violations from the complaint:

—ESA Section 10: The city has not allocated money to monitor vernal pools. The HCP also does not identify a mitigation program for vernal pool species.

—ESA Section 10: FWS has not used the best available scientific information on vernal pools and species dependent upon them for survival and recovery.

—ESA Section 7: "FWS relied on data that was not verified in the field. Vernal pools were not quantified. The location of species dependent upon vernal pools are not known. The FWS failed to use the best available science during the consultation process." FWS failed "to insure its actions will not jeopardize the continued existence of the vernal pool species."

Spear says “No Surprises” rule adds to FWS workload

California-Nevada director also blasts critical habitat

The “No Surprises” rule has forced the Fish and Wildlife Service to make “species by species” determinations in approving habitat conservation plans, Michael Spear, head of the service’s California-Nevada office, told an ESA conference last month.

Speaking to attendees of a CLE International conference in San Francisco, Spear said, “We lost all-species plans” with publication of the No Surprises regulation.

“We have to individually justify how the plan protects each species,” he said. “It’s added a lot to our workload.”

The No Surprises rule was published in February 1998 as the result of a lawsuit filed by conservation groups and individuals (*ESWR* March, p. 6). As used in HCPs, No Surprises guarantees holders of incidental take permits that they will not have to commit money, land or other resources to protect species, even if habitat conditions change. The onus for addressing those new circumstances is instead placed on the government.

Many of the same environmental groups and individuals who sued FWS and NMFS to force publication of the No Surprises rule are now challenging the rule itself (*Spirit of the Sage Council v. Babbitt*, 98-1873 (EGS), D.D.C.; see *ESWR* Dec, p. 3).

In his talk, Spear also discussed other hot topics, including critical habitat, the Headwaters habitat conservation plan, and the service’s money woes.

“The listing issue is to some extent behind us. It’s being overtaken by the critical habitat issue,” Spear said.

Echoing the oft-repeated FWS position, Spear said that designation of critical habitat provides “almost no additional conservation value. Some people think so, but it just doesn’t work that way.”

The CH decisions required on 245 Hawaiian plants could “eat up one-third of the national listing budget,” he said. A federal judge ordered FWS to make the decisions (See *ESWR* Dec, p. 16; Sept, p. 9). The service’s listing budget for fiscal 1999 is \$5.756 million

“The idea that we’re spending that much money on something that has that little value really bothers me,” Spear said.

He conceded, however, that critical habitat could be valuable if it helps identify unoccupied habitat that species need to recover. But he also said that the service could probably protect species using the ESA’s Section 7 or other means.

Designations are “very, very subject to the potential for abuse at the time of listing when we’re just beginning to learn about species” and are “drawing big lines” on a map, he said.

Budget doesn’t keep up with needs

The service’s lack of money hurts its efforts to work with communities, Spear said. The Clean Water Act provides a large pot of money for local communities to meet federal mandates, but when FWS officials show up to negotiate

habitat conservation plans, they have no similarly sized cache, he said.

“When we come along to a community, what do we bring?” he asked. “Our good will and some friendly neophyte biologists.” (He noted later that his mention of “neophyte biologists” was meant “affectionately.”)

“The budgets in no way have kept up with the rapid growth of the program,” he said. “It hurts us, hurts our reputation and credibility with [incidental take permit] applicants.”

Spear called the budget issue a “double-edged sword” because some lawmakers feel they can “control the ESA” by limiting funding.

San Diego MSCP hailed as “most important” plan

The service is “very proud of the results” of negotiations on the San Diego Multiple Species Conservation Program, or MSCP, Spear said, calling it “the single most important HCP” and “something that probably set more standards” than any other HCP approved.

San Diego voters recently gave the MSCP an important vote of confidence when they endorsed two pro-growth measures on the November ballot. Spear said developers credited the measures’ success to support from environmentalists.

Environmental groups are challenging the MSCP in a lawsuit (See story, previous page).

In the future, the service will try to work out solutions for habitat protections on agricultural lands in California, Spear said. “We’re hoping to make a breakthrough in the next year or so,” he said. “There’s wariness [from the farm community], but we’re talking.”

Habitat conservation planning is made easier in California because the state has a powerful Endangered Species Act of its own, and the state and federal governments can sit down as equal partners, he said. “You can’t do that in states without an ESA law.”

Negotiations over the Headwaters HCP, however, have delayed progress on other HCPs, Spear said. In a follow-up interview, he said the Headwaters plan “has taken so much of our time of our key people on forest HCPs. It’s regrettable and it hurts the HCP program.”

Despite Pacific Lumber’s “terrible reputation,” which Spear called “richly deserved,” he also said an HCP with Palco would be better than allowing the whole matter to go before a judge in the U.S. Court of Federal Claims.

In September 1996, when Palco reached a tentative agreement on the Headwaters plan, it agreed to suspend its takings lawsuit against the government.

Spear said he had spoken with Interior Secretary Bruce Babbitt, who noted the “lost momentum” on HCPs. “It really was easier three or four years ago,” Spear said at the conference. “We were taking these principles,” such as the “No Surprises” policy, “and working with a clean slate.”

Sacramento splittail listing, critical habitat decisions ordered

The Fish and Wildlife Service must make a final listing decision on the Sacramento splittail by Feb. 1, a federal judge in California ruled Dec. 24 (*Southwest Center for Biological Diversity v. Babbitt*, 98-1009-IEG (POR), S.D. Calif.).

District Judge Irma Gonzalez said she had no choice but to require FWS to meet its statutory deadlines under the ESA. She also ordered the service to propose critical habitat for the fish by Dec. 24, 1999, with a final decision to follow a year later, but FWS is expected to ask the judge to clarify that portion of her order. The courts usually do not order the service to list species or designate critical habitat, but simply to make final decisions to comply with ESA deadlines.

Gonzalez rejected FWS's argument to stay the critical habitat portion of the case. FWS argued that forcing it to designate critical habitat would simply divert precious listing resources from protecting other species and result in only marginal benefit to the splittail.

However, "This court cannot substitute its own or defendants' policy judgments for those of Congress," the judge said. "The policy judgment about the merits of critical habitat designations has already been made by Congress, as expressed in the requirement that such a designation must be made and in the deadlines specifying when it must be made."

FWS proposed the splittail for listing in January 1994 and one year later, extended its deadline for making a final decision by six months. The listing moratorium and various continuing resolutions followed, and on May 18, 1998, the service reopened the comment period on the proposal. Southwest Center sued May 29 to force a final decision.

Ballona wetlands ESA suit dismissed for lack of subject matter jurisdiction

The endangered species portion of the litigation challenging the massive Playa Vista project on the Ballona wetlands in Los Angeles has been dismissed. In a Dec. 22 decision, District Judge Ronald Lew said that since his previous order in a separate case had invalidated the wetlands permit for the project, there now is "no active case or controversy" to resolve (*California Brown Pelican v. U.S. Army Corps of Engineers*, 98-621 RSWL (CTx), C.D. Calif.).

In June, Lew rescinded the Section 404 permit covering 16 acres after finding the Corps had not met National Environmental Policy Act requirements (*Wetlands Action Network v. U.S. Army Corps of Engineers*, 96-8407 RSWL; *ESWR* July, p. 16). That case is on appeal in the Ninth Circuit.

The Southwest Center for Biological Diversity, the Wetlands Action Network and the California Public Interest Research Group were the plaintiffs in the *California Brown Pelican* case. They alleged that the Corps should

Santa Ana sucker decision must be made by Jan. 15

The Fish and Wildlife Service has agreed to decide by Jan. 15 whether to propose listing the Santa Ana sucker as threatened or endangered. The agency further agreed to publish its final decision by Jan. 15, 2000, after a public comment period.

Earthjustice Legal Defense Fund said last month that the service settled a lawsuit brought by California Trout and the California-Nevada Chapter of the American Fisheries Society seeking listing for the fish. In 1997, FWS found the sucker merited protection, but that work on higher-priority species "precluded" its listing.

Once common throughout the Los Angeles Basin, small populations of the fish survive in the headwaters of the San Gabriel River in the Angeles National Forest, Big Tujunga Creek, and the Santa Ana River, said ELDF, which has represented Cal-Trout and the other groups in the lawsuit. A small introduced population inhabits the Santa Clara River.

"If the fish is listed as threatened or endangered, it could lead, among other possibilities, to limitations on suction gold mining in the Angeles National Forest, redesign of a new golf course planned for the Tujunga Wash of the Los Angeles River, and reconsideration of applications to renew the licenses of hydroelectric facilities on the Santa Ana River," ELDF said in a news release.

have prepared a biological assessment and consulted with the Fish and Wildlife Service under the ESA's Section 7 on the project's effect on listed species.

Delmarva fox squirrel HCP proposed

The Fish and Wildlife Service is proposing to grant a permit to a Maryland developer for take of the endangered Delmarva fox squirrel (12/31, p. 72321-2; f123198.txt).

FWS and Winchester Creek Limited Partnership (WCLP) agreed to go through the Section 10 permitting process to settle a lawsuit brought by environmentalists over a WCLP residential development planned for the Eastern Shore (*Gerber v. Babbitt*, 98-773 (JR), D.D.C.).

FWS had issued a "no take" letter to WCLP in November 1997 that would have allowed development to proceed without an incidental take permit. But the service rescinded the letter in May 1998, two months after the lawsuit was brought (*ESWR* June, p. 9).

At that time, FWS said the 25 mile-per-hour speed limit

(Continued on next page)

Nine karst invertebrates in Texas proposed for listing

Representatives of builders, petitioners
express hope that final listing can be avoided

Nine more "cave bugs" may be listed in Texas (12/30, p. 71855-67; f123098b.txt).

FWS has proposed listing as endangered nine species of karst invertebrates, so called because they are found in karst features such as limestone formations containing caves, sinks, and fissures.

Six of the species are arachnids and three are beetles. The beetles include *Rhadine exilis* (no common name) and *Rhadine infernalis* (no common name), which are small and essentially eyeless. *Batrissodes venyivi* (Helotes mold beetle) is a small, eyeless mold beetle.

The arachnids include *Texella cokendolpheri* (Robber Baron Cave harvestman), a small, eyeless harvestman, or daddy-longlegs, as well as *Cicurina baronia* (Robber Baron cave spider), *Cicurina madla* (Madla's cave spider), *Cicurina venii* (no common name), *Cicurina vespera* (vesper cave spider), and *Neoleptoneta microps* (Government Canyon cave spider), which are all small spiders that are eyeless, or essentially eyeless.

Even as FWS was proposing to list the species, representatives of developers and the groups that filed the petition were hoping that listing could be avoided.

"While this is a very troubling development, we may be presented with an opportunity to keep it from having the potential adverse impact it could have by working out a cooperative program with the wildlife service," Austin attorney Alan Glen told the San Antonio *Express-News*. "I think the habitat of these creatures is adequately protected by existing federal, state and local conservation and regu-

(Continued from previous page)

planned for the residential development would not be enough to prevent take of the squirrel, which was listed in 1967.

In its HCP, WCLP proposes a 15 mph speed limit. It also proposes to fund "the maintenance and restoration or enhancement" of about five acres of suitable squirrel habitat in the HCP area, "contribute to a trust fund and other long-term mechanism to ensure successful implementation of restoration activities, and to place under conservation restrictions approximately 31 areas of off-site habitat as identified in the HCP."

The project calls for 16 homes on about 56 acres. About 25 acres of the site are forested, and about 27 acres are in farmland.

The D.C. District Court will retain jurisdiction to enforce the terms of the settlement.

Contact: John Wolflin or Ms. Keren Giovengo, FWS Chesapeake Bay Field Office, 177 Admiral Cochrane Dr., Annapolis, MD 21401 (410-573-4574 or -4538).

latory measures."

And Kyle Cunningham, co-chair of the Helotes Creek Association, told the newspaper that a plan "can be done, but it's going to take a lot of cooperation and should involve both public and private monies. I think it's very damaging to have the uncertainty that comes with listing, but these are indicator species and preserving their habitat also preserves things that are important to humans, such as water quality."

In 1994, FWS began discussing a conservation agreement that might preclude the need for listing, with a coalition of landowners, developers, and other interested parties. But the two sides could not agree on a number of issues, including "determining what is needed for species conservation, responsibility and commitment for implementation and funding, and the amount of time required to implement the conservation measures," the service's proposal said.

FWS left the door open for an agreement, however, "if these issues are resolved before a final listing decision is made." That decision is due in a year. The comment period is scheduled to end April 29. It's likely that one or more public hearings will be held also, considering the widespread interest in the proposal.

In the proposal, FWS said that "threats to the species and their habitat include destruction and/or deterioration of habitat by construction; filling of caves and karst features and loss of permeable cover; contamination from such things as septic effluent, sewer leaks, run-off, and pesticides; predation by and competition with non-native fire ants; and vandalism."

Thirty-five of the 56 caves where the invertebrates are found are located on private land, FWS said, citing that as one reason it was not proposing to designate critical habitat for the species. Publishing maps of the caves would increase the risk of vandalism, the service said.

The caves and karst features are located near growing San Antonio, which makes the species vulnerable because of the capping, filling or destruction of caves. "Destruction of caves in Bexar County and throughout central Texas is common," FWS said. One researcher estimated that 26 percent of all caves in Bexar County have been destroyed.

In addition, nearly 70 percent of the population increase in Bexar County between 1980 and 1990 occurred in the northwest and northeast quadrants, which is where the nine invertebrates occur.

"The recent revitalization of the real estate market and the construction industry has intensified the threat to the nine invertebrates," FWS said. Tracts in Bexar County's northwest and northeast quadrants have continued to be the fastest growing areas in the county in the present decade.

Contact: Alisa Shull, FWS, Hartland Bank Building, 10711 Burnet Rd., Suite 200, Austin, TX 78758 (512-490-0057; fax -0974).

Enforcement briefs

ARCO will restore wetlands, bull trout habitat in Mont. mine waste case

ARCO agreed to pay \$20 million to restore wetlands, bull trout habitat, and other natural resources, in a settlement filed in federal court in Montana. The money will go to the Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes.

A proposed consent decree was filed in November in U.S. District Court and summarized in a *Federal Register* notice Dec. 10 (p. 68296-7; cd121098.txt).

Overall, ARCO agreed to pay \$260 million to settle allegations of liability for cleanup costs and natural resource damages caused by mine waste contamination in the Clark Fork River Basin.

ARCO agreed to create, restore, or enhance 400 acres of wetlands, mainly in the Anaconda area, at an estimated cost of \$3.4 million.

Montana and the tribes have committed to work with FWS on restoring wetlands, other riparian areas, and bull trout habitat as part of the settlement. "This settlement is another step towards restoring the health of the Clark Fork River Basin ecosystem for the benefit of wildlife and the people of Montana," said Ralph Morgenweck, director of FWS's Mountain-Prairie Region.

The agreement "resolves only a part of the federal action and federal claims against ARCO for Clark Fork Basin mine waste contamination," the Justice Department said in a news release. "It commits the U.S. and ARCO to continue negotiations for final cleanup and settlement of all the areas contaminated by mining waste in the Upper Clark Fork River Basin outside of the Streamside Tailings area," and to resolve the rest of the *U.S. v. ARCO* lawsuit.

The cases at issue are *U.S. v. ARCO* (Civ. 89-039-BU-PG) and *Montana v. ARCO* (Civ. 83-317-HLN-PGH).

San Luis Obispo Co. to pay \$240 K for filling of creeks that damaged steelhead habitat

San Luis Obispo County, California, has agreed to pay \$240,000 to settle charges that the county's Public Works Department conducted extensive road and bridge repairs during 1994-95 winter storms without a Clean Water Act Section 404 permit.

"The damage caused by the county Public Works Department at some of the sites included the direct discharge of fill materials into creek flows, which smothered or impeded the movement of fish and other aquatic species," EPA said in a Dec. 23 news release. "At other sites, the county unnecessarily damaged steelhead trout spawning habitat by dumping uncompacted and unvegetated fill

materials into streams in an effort to reclaim creek banks."

A consent agreement filed in U.S. District Court for the Central District of California settles the alleged CWA Section 404 violations.

GM will spend \$28 M on Saginaw River, Bay

General Motors has agreed to spend \$28 million to remove contaminated sediments from the Saginaw River, and restore and protect habitat in the Saginaw River and Bay area, the Justice Department announced Nov. 24.

The river and bay are contaminated by PCBs and related compounds that the federal government alleges have been released from GM facilities since the early 1970s, as well as by contaminants released from wastewater treatment plants in Bay City and Saginaw, Mich.

The settlement resolves lawsuits filed in the U.S. District Court in Bay City against GM at the two cities on behalf of natural resource trustees the Fish and Wildlife Service, state of Michigan and the Saginaw Chippewa Tribe (*U.S. v. General Motors Corp.*, 98-CV-10368 BC, E.D. Mich.).

"This is a great day for birds, fish, and all other species that depend on the Saginaw River and its wetlands," FWS Director Jamie Rappaport Clark said.

The proposed consent judgment was noted in the Nov. 30 *Federal Register* (p. 65812-3; cd113098.txt). That notice said GM and other defendants would have to "restore coastal wetland or lakeland prairie conditions on certain properties conveyed to [the state of Michigan] and [take] measures to restore fish habitat in the Tobico Marsh."

FWS regional director Bill Hartwig said the settlement is the "largest of any case brought by the Department of Interior as the lead federal agency to recover natural resource damages."

The settlement provides for acquisition, restoration and protection of more than 1,740 acres of habitat, which will be owned and managed by the state of Michigan, the service's Shiawassee National Wildlife Refuge, and the Saginaw Chippewa Tribe.

GM, power company will monitor for PCBs in wetlands at Oswego, N.Y., Superfund site

General Motors and Niagara Mohawk Power Corporation have agreed to monitor for polychlorinated biphenyls in sediments and biota at creeks and wetlands at a Superfund site in Oswego, N.Y.

A proposed consent decree was filed in the U.S. District Court for the Northern District of New York on Dec. 15 (*U.S. v. General Motors Corporation and Niagara Mohawk Power Corp.*, Civ. 98 CV 1927 NAM). The Justice Department's *Federal Register* notice was published Dec. 30 (p. 71951-2; cd123098.txt). GM and Niagara Mohawk also agreed to pay the first \$150,000 in oversight costs and any future response costs.

NMFS notes

Permits considered for Wash. utilities

NMFS will prepare an EIS on habitat conservation plans prepared by two public utility districts in Washington (FR 1/6, p. 861-2; n010699.txt).

The Public Utility District No. 1 of Chelan County, Washington, and the Public Utility District No. 1 of Douglas County, Washington, which run three hydroelectric projects on the mid-Columbia River, want incidental take permits to take two listed species—Upper Columbia spring chinook salmon and Upper Columbia steelhead. The districts also plan to seek coverage for unlisted salmon species—summer and fall chinook salmon and sockeye salmon.

In June, NMFS, FWS, the districts, the Washington Department of Fish and Wildlife, the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes and Bands of the Colville Reservation, the Confederated Tribes of the Umatilla Reservation and American Rivers Inc. signed a declaration “acknowledging the work to date on the HCP and their commitment to complete the regulatory actions necessary to issuing a permit.”

The permits would cover operation and maintenance of the Rock Island Hydroelectric project, the Rocky Reach Hydroelectric project, and the Wells Hydroelectric project.

Contact: Jane Banyard, NMFS, 510 Desmond Dr. SE, Suite 103, Lacey, WA 98503 (360-534-9338, fax 753-9517).

Harbor porpoise listing proposal withdrawn

Programs to reduce bycatch of the Gulf of Maine/Bay of Fundy population of harbor porpoises have caused NMFS to withdraw its 1993 proposal to list the species as threatened (1/5, p. 465-71; n010599a.txt).

NMFS said it was making the decision “[i]n view of the

currently decreasing levels of bycatch in Canadian fisheries and the regulatory mechanisms now being implemented” under the Marine Mammal Protection Act.

Bycatch reduction programs in the U.S. and Canada “will help the sustainability of the GOM/BOF population of harbor porpoise based on the following: (1) Strong commitments have been made to carry out these programs; (2) the parties with the authority to implement the bycatch reduction efforts have followed appropriate procedures and formalized the necessary documentation and; (3) objectives and time frames for achieving these objectives have been established and include adaptive management principles.”

NMFS is keeping the population on the candidate species list (1/5, p. 480; n010599.txt).

Contact: Margot Bohan, F/PR2, NMFS-Office of Protected Resources, 1315 East-West Hwy., Silver Spring, MD 20910 (301-713-2322).

Shortnose sturgeon RP available

NMFS has issued the final recovery plan for the shortnose sturgeon, an anadromous fish listed as endangered in 1967 that spawns in coastal rivers along the east coast of North America from the St. John River in Canada to the St. Johns River in Florida (12/17, p. 69613-5; n121798.txt).

NMFS recognizes 19 distinct population segments of shortnose sturgeon inhabiting 25 river systems ranging from Canada to Florida.

“It prefers the nearshore marine, estuarine and riverine habitat of large river systems. Shortnose sturgeon, unlike other anadromous species in the region such as shad or salmon, do not appear to make long-distance offshore migrations.”

Based on life history studies, NMFS believes that shortnose sturgeon populations from different river systems “are substantially reproductively isolated.”

Contact: Nancy Haley, NMFS, 212 Rogers Ave., Milford, CT 06460 (203-783-4264); Marta Nammack (301-713-1401), or David Bernhart (727-570-5312).

Headwaters plan nears publication

Federal biologists have put the finishing touches on Pacific Lumber’s Headwaters habitat conservation plan with an eye toward releasing it for a final 30-day public comment period by Jan. 22.

Pacific Lumber said it had agreed “in principle” to the 200,000-acre plan, which involves the purchase by the federal government of 3,500 acres of ancient redwoods known as the Headwaters forest.

But some outstanding disagreements remain. “We didn’t reach agreement on certain issues,” said Palco spokeswoman Mary Bullwinkel. “We’ll have to review the whole document before we make any determination.”

Interior Secretary Bruce Babbitt was optimistic

about the prospects of success, but also was adamant Dec. 31 that the government would not budge. “This is our last and best effort,” he said, according to the *Sacramento Bee*, “and we are now putting it to bed on a take-it-or-leave-it basis.”

The final plan includes buffer zones ranging from 30 feet for Class 3 streams (classified as those with no aquatic life) to 100 feet for Class 1 (fish-bearing streams), said Interior Department spokesman Tim Ahern. But the *Bee* also reported that the plan compromised somewhat by allowing 10-foot buffer zones along streams on 2,100 acres that Palco wants to log in the next five years.

The 50-year plan would allow incidental take of 31 species, including the threatened northern spotted owl and marbled murrelet and imperiled salmon species.

Register Report

The following items summarize Federal Register notices not reported on elsewhere in this issue. Unless otherwise noted, quotes are from the Register.

To get the full text of any of these notices, go to <http://www.eswr.com/fr.html> and follow the links. You also may go to the notice directly by typing in the above and replacing "fr.html" with the specific Web address. _____

St. Andrew beach mouse listed as endangered

The St. Andrew beach mouse, which lives in coastal areas of the Florida panhandle, has been listed as endangered (12/18, p. 70053-62; f121898.txt).

Major threats to the mouse's survival include "habitat loss and modification from a combination of hurricanes, tropical storms, non-storm related shoreline erosion, and land development and related activities," said Sam D. Hamilton, the service's Southeastern Regional Director. "Other threats include predation by free-ranging, domestic cats and competition from house mice."

The St. Andrew mouse is the sixth subspecies of beach mouse to be listed under the ESA. The others are the Alabama beach mouse, the Choctawhatchee beach mouse, the Anastasia Island beach mouse, the Southeastern beach mouse and the Perdido Key beach mouse.

The Florida Department of Environmental Protection, Gulf County, and Tyndall and Eglin Air Force Bases "control habitat within the historic range of the St. Andrew beach mouse and have already begun habitat protection and restoration initiatives," FWS said in a news release.

In its final listing rule, FWS responded to comments on whether the mouse is a distinct taxon (the service said it is); designation of critical habi-

tat (not necessary, the service said, because of ESA Section 7 protections); and the possibility of interbreeding among the St. Andrew subspecies and other beach mouse subspecies (unlikely, FWS said).

The mouse's current range "is limited to a portion of the St. Joseph Peninsula in Gulf County," FWS said.

Contact: Michael Bentzien, 6620 Southpoint Dr. South, Suite 310, Jacksonville, FL 32216 (904-232-2580, ext. 106; fax -2404).

Pupfish may not be listed because of cons. agreement

State and federal agencies are promising to protect the Pecos pupfish and its habitat from non-native species and potential hybridization with the sheephead minnow, according to a draft conservation agreement (12/28, p. 71424-5; f122898.txt).

The agencies have "made commitments to protect known extant populations of pure Pecos pupfish, expand the distribution of the species within its native range by establishing new populations, and to prohibit the use of sheephead minnow through revision of baitfish regulations in New Mexico and Texas," FWS said. "If these commitments are adequate in removing the identified threats to the Pecos pupfish, listing of the species may not be required."

Contact: Jennifer Fowler-Propst, Field Supervisor, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113 (505-346-2525).

Wyoming plant proposed as threatened

The desert yellowhead, a Wyoming plant known only from a single population that occupies less than five acres, has been proposed as threatened (12/22, p. 70745-51; f122298.txt).

In 1998, FWS said the population contained about 15,000 plants, located

entirely on BLM land. "Surface disturbances associated with oil and gas development, compaction by vehicles, trampling by livestock, and randomly occurring, catastrophic events threaten the existing population."

The plant, *Yermo xanthocephalus*, was discovered by Wyoming botanist Robert Dorn while conducting field work in the Beaver Rim area of central Wyoming in 1990.

The Biodiversity Legal Foundation petitioned FWS to list the plant on an emergency basis in November 1997, but FWS rejected the request, saying that BLM regulations provided some conservation for the species, "and current exploratory oil and gas activities near the [plant's] known occupied habitat were being coordinated with [FWS] staff in the Wyoming Field Office."

Besides, FWS said it was not required to make a petition finding on the plant because it was already a candidate species.

"Although the current oil and gas exploratory wells pose no threat to [the plant], the discovery of an oil and/or gas pool on the lease areas would precipitate field developments that would introduce new threats to the plant and its habitat."

FWS noted that a "two-track, four-wheel drive trail leading to an abandoned oil well bisects the population, and is open to hunters or other recreationists using four-wheel drive trucks and other smaller all-terrain vehicles. The most common activities that attract users to the area are hunting, rock collecting and searching for human artifacts (such as arrowheads)."

FWS did not proposed designating critical habitat for the plant, reasoning that designation would increase the chances of overcollection. In addition, "it is likely that any case of adverse modification of [the yellowhead's] habitat would also constitute jeopardy [under the ESA's Sec-

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tion 7] for the taxon.”

The comment period ends Feb. 22.

Contact: Mike Long, Field Supervisor, FWS Wyoming Field Office, 4000 Airport Pkwy., Cheyenne, WY 82001 (307-772-2374, ext. 34; fax -2358).

Positive finding issued on Bonneville cutthroat

FWS will take a detailed look at threats to the Bonneville cutthroat trout to determine whether it warrants listing under the ESA (12/8, p. 67640-2; f120898c.txt).

The service issued a 90-day finding that the trout may warrant listing as a threatened species, in response to a petition submitted in February 1998 by the Biodiversity Legal Foundation (BLF). In its finding, FWS noted that “resource agencies have identified habitat degradation and the threats from nonnative species as the most important factors threatening the continued existence of Bonneville cutthroat trout. We believe other threats, such as those asserted by [BLF], affect the species as well. The expansion of whirling disease, most recently to Utah waters, is an imminent threat. Fragmentation and the genetic isolation of many populations have also been identified.”

The cutthroat trout “are native to the Bonneville Basin in Utah, Idaho, Nevada, and Wyoming. Their habitat is widely distributed and variable and includes both river and lake ecosystems.”

Based on 1996 data, BLF estimated that 81 populations of the species occupy 234 stream miles. Eighty-three percent of the populations occur on Forest Service lands, and 14 percent occur on Bureau of Land Management-administered lands. BLF rated 72 percent of the current populations as secure or stable, and 25 percent as declining or at risk, with the status of the remaining 3 percent unknown. Habitat conditions for the Bonneville cutthroat trout on national forests have been rated as 13 percent excellent, 49 percent good, 18 percent fair, 11 per-

cent poor and 2 percent extremely degraded, according to BLF’s petition.

BLF estimated that 90 percent of streams within the Bonneville Basin had historic occurrences of Bonneville cutthroat trout, and that the trout currently occupies 3.7 percent of the historic stream miles.

Most of the populations that remain exist in Utah, which has taken the lead in developing a “multi-state, multi-agency conservation strategy” for the trout, FWS said. Utah is preparing a draft document for review by other state and federal agencies.

Contact: Janet A. Mizzi, 145 East 1300 South, Suite 404, Salt Lake City, UT 84115 (801-524-5001).

Fla. cave shrimp remains on list

Even though the Squirrel Chimney Cave shrimp cannot be found, that’s not a good enough reason to remove it from the list of threatened and endangered species, FWS said (12/8, p. 67618-9; f120898a.txt).

The service’s 90-day finding was in response to a delisting petition submitted by the Florida Game and Fresh Water Fish Commission in August 1997.

The species is very rare, having been found only a dozen times since its discovery in 1953. The last time it was observed was in 1973. FWS listed it as threatened in 1990.

If it still exists, FWS believes its only habitat is Squirrel Chimney Cave, located on private land near Gainesville, Fla.

A status survey conducted between 1994 and 1996 suggested that redeye chub “may be responsible for the apparent absence of the shrimp from Squirrel Chimney Cave.” But not enough is known about the shrimp, whose detection “requires extensive sampling,” FWS said.

In addition, “the emergence of redeye chub in Squirrel Chimney and its presence at other nearby underground sites suggest that fissures found at Squirrel Chimney actually may represent underwater connections to those other sites (Doonan 1997). Such passageways may shelter Squirrel Chimney cave shrimp

and also provide for their dispersal.”

Contact: John F. Milio, FWS, 6620 Southpoint Dr. South, # 310, Jacksonville, FL 32216 (904-232-2580, ext. 112).

Also noted...

FWS has extended from Jan. 15 to March 16 the comment period on its positive 90-day petition finding on the redband trout in the Great Basin (1/6, p. 821; f010699.txt; also see *ESWR* Dec, p. 17). **Contact:** Antonio Bentivoglio, FWS biologist (503-231-6179).

HCPs

Supplemental EIS examines Plum Creek/FS land exchange

FWS and NMFS have prepared a supplemental draft EIS on a proposed land exchange affecting Plum Creek Timber Co.’s Cascades HCP in Washington state (12/18, p. 70155-6; f121898a.txt). Public meetings will be held on the draft SEIS on Jan. 20 and 21 in Ellensburg and Issaquah, Wash.

The potential land exchange would result in a transfer to the Forest Service of up to 53,400 acres of the 170,600-acre Project Area previously covered by Plum Creek’s permit and HCP, and the transfer of up to 10,800 acres of Forest Service lands within the 418,700-acre Planning Area to Plum Creek. If modified, the Plum Creek permit area would consist of approximately 127,000 acres.

“The final EIS associated with [Plum Creek’s] original plan is not being reopened or re-analyzed, and the decisions based on the original [EIS] are not being reconsidered.”

Contact: William Vogel, FWS, 510 Desmond Drive, S.E., Suite 102, Lacey, WA 98503-1273, (360-753-9440; fax 360-534-9331); or Bob Turner, NMFS, (same address, except Suite 103) (360-753-6054, fax -9517).

The Dalles, Ore., applies

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Register Report

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for spotted owl permit

An HCP prepared by The Dalles, Ore., qualifies as "low-effect," meaning FWS does not to prepare an environmental assessment under NEPA (1/6, p. 907-8; f010699e.txt).

The proposed permit would allow take of the threatened northern spotted owl in an area encompassing 1,432 acres of city-owned land in the South Fork Mill Creek Watershed of Wasco County, Oregon.

"The permit area occurs in a narrow, linear distribution along the upper South Fork Mill Creek and is nearly surrounded by adjacent Forest Service land."

Much of the permit area contains young or degraded Douglas Fir-White Fir and Ponderosa Pine-White Fir stands that are unsuitable for use by spotted owls. "However, about 850 of the 1,432 forested acres are classified as useable by spotted owls."

Under the permit, the city would agree to maintain riparian buffers along South Fork Mill Creek and Crow Creek, and cooperatively maintain, with the Forest Service, 100 acres of the best spotted owl habitat "as close as possible to identified [spotted owl] activity centers" on city-owned or Forest Service lands. "City-owned habitat within activity centers on city-owned lands must be maintained until it is determined through accepted protocol survey efforts that the sites have been vacated by spotted owls for a period of 3 years."

Contact: Joseph Zisa, FWS, 2600 S.E. 98th Ave., Suite 100, Portland, OR 97266 (fax 503-231-6195).

Mohave ground squirrel, burrowing owl

FWS is proposing to issue a permit to the High Desert Power Project, L.L.C., authorizing take of the threatened desert tortoise and future take of the unlisted Mohave ground squirrel and burrowing owl (12/30, p. 71940-

1; f123098e.txt).

The take would be incidental to the construction and operation of a natural gas power plant, electric lines, gas lines, and water lines associated with the High Desert Power Project in San Bernardino County, Calif. High Desert Power plans to prepare an HCP.

As part of the proposed action, BLM proposes issuing a right-of-way grant to the Southwest Gas Corporation to build and maintain a 32-mile natural gas pipeline through BLM-managed lands designated as desert tortoise critical habitat.

Public meetings on the proposal are slated for Jan. 28 at the Mojave Desert Air Quality Management District Office, Board Chambers (2nd floor), 15428 Civic Dr., Victorville, Calif.

Contact: Denise Washick, FWS, 2493 Portola Rd., Suite B, Ventura, CA 93003 (805-644-1766; fax -3958).

GCW permit near Austin

BRE/Baldwin, L.P., would preserve at least 121 acres of golden-cheeked warbler habitat on-site and buy and preserve another 124 acres off-site, in order to receive a permit to build on the Balfour tract 11 miles west of Austin (12/30, p. 71940; f123098d.txt).

The company's residential and commercial development would cover about 471 acres of the 714-acre tract. FWS said "alternatives to this action were considered, [but] increased development would result in greater levels of take of [GCWs], and selling or not developing the subject property with federally listed species present was not economically feasible."

Contact: Sybil Vosler, FWS, 10711 Burnet Rd., Suite 200, Austin, TX 78758 (512-490-0063).

"Low-effect" levee HCP in Santa Clara County

FWS has determined that Zanker Road Resource Management's plans to replace unengineered levees surrounding a 46-acre landfill in Santa Clara County, Calif., qualify as a "low-effect" HCP (12/14, p. 68785-7; f121498.txt).

The Regional Water Quality Control Board is requiring the action to provide

protection during a 100-year flood event and tidal inundation. Reconstruction of the levees will result in the temporary loss of approximately 0.83 acres of grassland habitat used by the endangered salt marsh harvest mouse.

Contact: Lori Rinek or William Lehman, FWS, 3310 El Camino Ave., Suite 130, Sacramento, CA 95821-6340 (916-979-2129).

Also noted...

Kaiser Sand and Gravel Company would grant permanent conservation easements and take other measures to reduce the impacts on Mount Hermon June beetles and Zayante band-winged grasshoppers for mining at its Felton Sand Plant in Santa Cruz County, Calif. FWS plans to grant an eight-year incidental take permit to the company, which wants to mine sand on 14 of the 47 acres that is undisturbed on the 232-acre site (12/8, p. 67699-700; f120898d.txt).

Contact: David Pereksta, FWS, 2493 Portola Rd., Suite B, Ventura, CA 93003 (805-644-1766, fax -3958).

International

River otter skins can be exported from Missouri

FWS has announced the final findings of the CITES Scientific and Management Authorities of the United States to add Missouri to the list of states and Indian nations approved for the export of river otter skins (1/6, p. 769-775; f010699d.txt).

The addition of Missouri brings to 27 the number of states and Indian nations approved for export of the skins.

"All state wildlife agencies that submitted comments (Montana, Illinois, Indiana, Wisconsin, and Minnesota) supported the proposed rule," FWS said. However, all of the animal welfare organizations that submitted comments, as well as several private individuals, opposed it.

Contact: Dr. Susan Lieberman, Chief, Office of Scientific Authority, Mail Stop ARLSQ 750; 1849 C Street, NW, Wash-

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ington, DC 20240 (703-358-1708, fax -2276); e-mail r9osa@mail.fws.gov; Management Authority finding: Ms. Teiko Saito, Chief, FWS Office of Management Authority, Mail Stop ARLSQ 700; 1849 C Street, NW, Washington, DC 20240 (703-358-2095, fax: -2280).

Recovery plan

Six California plants

FWS will seek voluntary cooperation of private landowners in preserving the existing populations of six California plants with “very restricted distributions in specialized habitats” (1/6, p. 906-7; f010699a.txt).

Two of the plants, Braunton’s milkvetch (*Astragalus brauntonii*) and Lyon’s pentachaeta (*Pentachaeta lyonii*), are endangered. The remaining four—Conejo dudleya (*Dudleya abramsii ssp. parva*), marcescent dudleya (*Dudleya cymosa ssp. marcescens*), Santa Monica Mountains dudleya (*Dudleya cymosa ssp. ovatifolia*), and Verity’s dudleya (*Dudleya verityi*)—are threatened.

The plants occur in grassland, chaparral, or coastal sage scrub vegetation in the mountains surrounding the Los Angeles Basin.

Contact: Tim Thomas, botanist, FWS, 2493 Portola Rd., Suite B, Ventura, CA 93003 (805-644-1766).

Refuges

Mexican wolf, silvery minnow targeted in N.M. refuge’s plan

Captive breeding of Mexican wolves would continue on the Sevilleta National Wildlife Refuge in San Acacia, N.M., under a draft Comprehensive Conservation Plan (CCP) prepared by FWS (12/7, p. 67491-2; f120798.txt).

Goals in the CCP include restoring habitat for listed species to its natural condition; maintaining a viable population of Rio Grande silvery minnows on the refuge’s stretch of the Rio Grande River; evaluating refuge grass-

lands’ potential as an introduction site for the endangered northern Aplomado falcon; and protecting threatened and endangered species on the refuge and adjacent properties through outreach, educational activities and effective enforcement of fish and wildlife laws.

FWS also wants to “reverse declining trends in quality and quantity of riparian/wetland habitats [and] restore, maintain, and enhance the species composition, aerial extent, and spatial distribution of riparian/wetland habitats.” The plan foresees obtaining (through purchase or mitigation) “sufficient water rights to manage refuge wetlands associated with the Rio Grande.”

Contact: Lou Bridges, Project Coordinator, Research Management Consultants Inc., 1746 Cole Blvd., Bldg. 21, Suite 300, Golden, CO 80401.

Least tern is focus of Alameda refuge

Listed species, especially the endangered California least tern, would receive top priority at the proposed Alameda National Wildlife Refuge (12/21, p. 70413; f122198.txt).

“Management actions, including expanding the colony, would be taken to assure that the Alameda least tern colony continues to be one of the most successful breeding sites in California. Habitat management will emphasize keeping most of the currently unvegetated areas free of vegetation to deter predators, removing exotic species of plants, and restoring wetland habitat. Predators of least terns will be managed by an integrated program of preventative and selective humane control methods.”

Contact: Charles Houghten, Division of Refuge Planning (ARW-RPL), FWS, 911 NE 11th Ave., Portland, OR 97232-4181.

CCPs for Michigan NWRs

CCPs will be prepared for the Wyandotte and Michigan Islands NWRs and the East Lansing Wetland Management District as part of the planning process for Shiawassee NWR. A CCP will be prepared for the Minnesota Valley Wetland Management District as part of the planning process for

Minnesota Valley NWR (12/24, p. 71298-9; f122498.txt).

“Wyandotte NWR consists of two islands and adjacent shallow waters in the Detroit River offshore from Wyandotte, Mich. The refuge is situated in what was once one of the most significant migratory staging areas for diving ducks in the United States. Extensive beds of aquatic vegetation have disappeared and only a remnant of the once vast rafts of migratory waterfowl are now seen in Wyandotte.

“Michigan Islands NWR consists of five islands. Thunder Bay and Scarecrow Islands are located in Lake Huron near Alpena, Mich. The islands total 128 acres and are home to the threatened Dwarf lake iris.”

Contact: Chief, Branch of Ascertainment and Planning, FWS, Bishop Henry Whipple Federal Building, 1 Federal Dr., Fort Snelling, MN 55111 (612-713-5429, e-mail r3planning@mail.fws.gov).

CCP planned for Antioch Dunes NWR in California

A CCP will be prepared for Antioch Dunes NWR, which was the first refuge created to protect endangered plants and insects (12/30, p. 71939-40; f123098c.txt).

The 55 acres in Contra Costa County owned by FWS, along with 12 acres owned by Pacific Gas and Electric next to the refuge, support the last known natural populations of the Antioch dunes evening primrose, Contra Costa wallflower, and Lange’s metalmark butterfly.

“The refuge was open for public use until 1986 when it was closed to protect the plants from trampling and wildfire. The refuge consists of two units that are managed to prevent the extinction of these unique species. Intensive management has already resulted in the highest Lange’s metalmark butterfly population in 20 years.”

Contact: Leslie Lew, Planning Team Leader, Antioch Dunes NWR, California/Nevada Refuge Planning Office, FWS, 2233 Watt Avenue, Sacramento, CA 95825 (916-713-2085).

For more FWS ER notices, go to:
www.eswr.com/frr.htm

NEPA Report

Army Corps of Engineers

Restoring Chinook salmon is one alternative the Corps will consider as part of a draft EIS on habitat and water quality restoration of the Green/Duwamish River Basin in King County, Washington. Other alternatives include no action and a multiple-species approach. The Corps will work with King County on a combined NEPA/SEPA document to satisfy federal and state requirements. Under the single-species and multiple-species approaches, "three separate restoration approaches will be evaluated: (a) an ecosystem/habitat forming process approach; (b) an engineered design and constructed habitat approach," and an integrated approach, comprising elements of both (a) and (b). If approved, implementation of the restoration plan would begin in 2001 (12/23, p. 71109-10; c122398a.txt). **Contact:** Patrick Cagney, Biologist, Corps-Seattle (206-764-6577).

Concerns about endangered species and riparian habitat have prompted a study on the "impacts of alternative water storage elevations" at the Alamo Dam, located about 110 miles northwest of Phoenix. The Corps has prepared a Draft Alamo Lake Reoperation and Ecosystem Restoration Feasibility Study and DEIS, which examine 1,125-foot, 1,100-foot, and 1,070-foot plans that attempt to address biological and recreational needs "while still meeting the authorized project purposes." The dam's effect upon recreation, fisheries, listed species and riparian habitat has been a concern since the late 1970s (12/18, p. 70116; c121898.txt). **Contact:** Timothy Smith, Corps-Los Angeles (213-452-3854; e-mail tjsmith@spl.usace.army.mil).

The Corps has extended the comment periods for draft EIS's on the Water Allocation for the Alabama-Coosa-Tallapoosa (ACT) River Basin in Alabama and Georgia and the Apalachicola-Chattahoochee-Flint (ACF) River Basin in Alabama, Georgia and Florida. Both comment periods will now end Feb. 26 (ACT: 12/11, p. 68437-8; c121198.txt || ACF: 12/11, p. 68438; c121198a.txt). Go to <http://www.sam.usace.army.mil/sam/pd/actacfeis> for more information. **Contact:** Joanne Brandt, ACF Basin EIS Project Manager, (334-690-3260, fax 694-3815, e-mail: joanne.u.brandt@sam.usace.army.mil).

The Corps will prepare a feasibility study to determine whether it can prepare a flood control plan for Murrieta Creek in Riverside County, Calif., that will also address environmental restoration and recreation. The study will cover an 11-mile reach of the creek, from the McVicar Street bridge in Wildomar, downstream through the cities of Murrieta and Temecula to the U.S. Geological Survey gaging station, just north of the

confluence with Temecula Creek. "Rapid development over the past two decades has resulted in concerns over flood protection and environmental degradation throughout the project reach." The creek is located in western Riverside County, California, and encompasses a drainage area of about 220 square miles (12/8, p. 67674-5; c120898.txt). **Contact:** David Compas, Corps-Los Angeles (213-452-3850; e-mail dcompas@spl.usace.army.mil).

Bureau of Land Management

BLM is developing a revised draft management plan and EIS for public lands along the John Day River system in Oregon. The John Day River watershed encompasses all or portions of 11 counties, six of which would be directly affected by the proposed plan. BLM will focus in particular on "management strategies that protect and enhance the outstandingly remarkable values for which the Bureau-managed segments were designated. These outstandingly remarkable values are scenic, recreational, geologic, fish, wildlife, historic and cultural. Other values identified as significant are botanical, ecological, paleontological, and archeological resources" (12/31, p. 72323-4; b123198.txt). **Contact:** Dan Wood, Project Manager, Prineville, Ore. (541-416-6751, fax -6798).

Impacts on the westslope cutthroat trout and other sensitive species will be considered as BLM goes about amending oil and gas leasing decisions in Madison and Beaverhead counties, Montana, for the Dillon Management Framework Plan (MFP). FWS is currently conducting a status review to determine whether to propose the cutthroat as threatened. The Dillon Field Office will develop the MFP amendment and associated EIS, which will "provide analysis" for fluid mineral leasing allocation decisions on about 902,528 acres of public land and 1.3 million acres of subsurface mineral estate administered by BLM. The Dillon Field Office administers most of this area, but about 59,000 acres of public domain land located immediately south of the Big Hole River in the extreme northern portion of Beaverhead County are under the jurisdiction of BLM's Butte Field Office (12/17, p. 69645; b121798.txt). **Contact:** Scott Powers, BLM-Dillon (406-683-2337).

The Carson City Field Office and the Navy's Fallon Range Training Complex will direct preparation by a third-party contractor on the impacts (direct, indirect, and cumulative) from required Navy training on public and Navy-owned lands in central Nevada. Four scoping meetings for the EIS are scheduled for January in Nevada (12/21, p. 70416; b122898.txt). **Contact:** Terri Knutson, BLM (702-885-6156) or Sam Dennis, Navy (650-244-3007).

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About 88,000 acres in Idaho would be designated within existing or new Areas of Critical Environmental Concern to highlight unique plant communities, fragile soils, and management and protection of bighorn sheep and elk habitat, under the proposed Resource Management Plan for the Challis Resource Area. The area is located in Custer and Lemhi counties of east-central Idaho. "When compared with the Preferred Alternative [proposed in 1996], the Proposed RMP increases the level of protection to aquatic, riparian, and upland resources by limiting off-highway vehicle use to existing roads, vehicle ways, and trails throughout the Resource Area" (12/10, p. 68294-5; b121098.txt). **Contact:** Kathe Rhodes, BLM-Salmon, Idaho (208-756-5440).

The Interior Department has proposed a rule to "harmonize" regulations for the Wild and Scenic Rivers system. The rule "would establish uniform standards and procedures" so that the agencies that administer the system—BLM, FWS and the National Park Service—"will consider federal licensing of, or assistance to, water resources projects affecting designated Wild and Scenic Rivers or congressionally authorized Study Rivers." The proposal withdrew a 1996 BLM-proposed rule (12/9, p. 67834-7; b120998.txt). **Contact:** John Haubert, NPS (202-208-4290; e-mail: john_haubert@nps.gov).

Bureau of Reclamation

BuRec will take part in a joint EIS/Environmental Impact Report for the Lower Mokelumne River Restoration Program. Woodbridge Irrigation District will be the lead agency under the California Environmental Quality Act. The goal of the program is to "substantially increase fall-run chinook salmon and steelhead populations, enhance critical and limiting aquatic habitats, and restore riparian ecosystem integrity and diversity." The EIS/EIR would provide NEPA and CEQA approval for fish passage improvements at Woodbridge Dam and fish screen improvements at Woodbridge Canal and the North San Joaquin Water Conservation District diversion. The work is being funded through a Category III grant provided by the CALFED Bay-Delta Program and administered by BuRec (12/30, p. 71949-50; br123098.txt). **Contact:** Anders Christensen, Woodbridge Irrigation District (209-369-6808) or Buford Holt, BuRec (530-275-1554).

BuRec and the Sacramento County Water Agency have released for review the final EIS/Environmental Impact Report for BuRec's and San Juan Water District's proposed Central Valley Project water service contracts. The final EIS/EIR addresses the potential environmental and socioeconomic impacts of contract water deliveries. It also addresses the construction and operation of a Folsom Dam temperature control device on the water supply intake (12/23, p. 71153-4; br122398a.txt). **Contact:** Tad Berkebile, Sacramento County Water Agency (916-874-6851).

BuRec has made a preliminary determination that Tulare Irrigation District's water management plan meets the requirements of criteria set up under the Central Valley Project Improvement Act (12/23, p. 71153; br122398.txt). **Contact:** Lucille Billingsley, BuRec-Sacramento (916-978-5215).

Federal Energy Regulatory Comm.

FERC denied requests to extend the comment period on competing applications for a Massachusetts hydroelectric project affecting listed species such as the shortnose sturgeon and the Puritan tiger beetle. FWS, NMFS, the Connecticut River Watershed Council, and the Town of South Hadley, Mass., had all asked for more time to comment on competing applications for the Holyoke Project. FERC staff expect to issue a draft EIS in March 1999, with a final EIS to follow in July 1999 (12/15, p. 69069-70; fe121598.txt). No **contact** was listed in the FERC notice.

FERC will examine in an environmental assessment whether Northern Natural Gas Company's plans to remove aerial pipeline crossings over the Arkansas and Missouri Rivers will affect wetlands, fish, and wildlife. The company plans to abandon about 51 miles of A-Line pipeline in Kansas, Nebraska, Iowa, and Texas (12/23, p. 71111-2; fe122398.txt). **Contact:** Paul McKee, FERC external affairs (202-208-1088).

The threatened bog turtle may occur in the area where Eastern Shore Natural Gas Company plans to build eight miles of pipeline in Chester County, Pa., and New Castle County, Del. The new pipeline also would cross 19 streams and 13 wetlands. FERC plans to prepare an EA (12/7, p. 67473-5; fe120798.txt). **Contact:** Paul McKee, FERC external affairs (see above).

Forest Service

The Forest Service will study the effect on the threatened grizzly bear of timber harvesting on about 400 acres within the Kootenai National Forest in Lincoln County, Montana. The service proposes to restore roads and harvest timber within the Cabinet/Yaak Grizzly Bear Recovery Area. The service also will look at the possible effects of harvesting of about 3 million board feet of timber on water quality and bull trout recovery due to sediment seeping into Pipe Creek, which is a bull trout priority watershed. An estimated 0.3 miles of temporary road and 2.2 miles of permanent road construction would be needed for the project (12/28, p. 71442-4; fs122898a.txt). **Contact:** Kirsten Kaiser, Project Coordinator, Libby Ranger District (406-293-7773).

An EIS has been released on a pilot project required in legislation known as the Herger-Feinstein Quincy

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NEPA Report

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Library Group Forest Recovery Act, signed by President Clinton last fall. The project “is based on an agreement by a coalition of representatives of fisheries, timber, environmental, county government, citizen groups, and local communities that formed in northern California to develop a resource management program that promotes ecologic and economic health for certain federal lands and communities in the Sierra Nevada area” (12/21, p. 70383-5; fs122198a.txt). **Contact:** David Peters, FS, Herger-Feinstein Quincy Library Group Forest Recovery Act Pilot Project, PO Box 11500, Quincy, CA 95971.

An EIS is planned on a proposed project in the Tally Lake Ranger District of the Flathead National Forest “to harvest timber; reclaim, rehabilitate, and construct roads; change road and trail access; place large logs in streams; and burn brushfields or forest understory trees” on 72,000 acres in the Good Creek and Martin watersheds, where “high levels of accumulated fuels pose a threat of wildfire.” The project would protect water quality, create plant, animal and fish habitat, “provide access for management activities over the next 10 years; maintain a variety of recreation opportunities in the Good Creek area; and meet social and economic needs of local communities” (12/31, p. 72243-4; fs123198.txt). **Contact:** Jane Kollmeyer, District Ranger, Tally Lake Ranger District (406-863-5400).

An EIS is planned on timber sales covering about 1,150 acres in the Yampa Ranger District of the Medicine Bow/Routt National Forest in Routt County, Colorado. The sales “are intended to promote healthy stands of timber by reducing the risk of widespread mountain pine beetle outbreak, salvage dead and dying trees, maintain the aspen forest component, reduce risk of spruce bark beetle outbreak in the area, provide commercial wood products to industry, increase vegetative diversity in the area, and ... benefit wildlife species that use forested stands in an early successional stage.” Road-building “will reduce the current roadless character by [about] 2,600 acres within the Morrison Creek Geographic Area. The Morrison Creek Roadless Area will be reduced by [about] 700 acres to 7,614 acres. The Bushy Creek Roadless Area will be reduced by [about] 1,900 acres to 9,543 acres” (12/30, p. 71884-6; fs123098.txt). **Contact:** Kent Foster, Project Coordinator, Yampa Ranger District (970-638-4516).

An EIS is planned on proposed restoration projects in the Colville National Forest in Pend Oreille and Stevens counties, Washington, including commercial timber harvest, pre-commercial thinning, prescribed fire, road construction and reconstruction, road closures, road obliterations, range improvements, range allotment planning, and planting. All the projects would be located in the Tacoma,

Cusick, and Gardiner Creek watersheds of the forest’s Newport Ranger District. The proposal complies with the 1988 Colville National Forest Land and Resource Management Plan as amended by the Regional Forester’s amendments and the Inland Native Fish Strategy (12/24, p. 71264-5; fs122498.txt). **Contact:** Nancy Glines, Interdisciplinary Team Leader, Newport, Wash. (509-447-7300, fax -7301).

FS will prepare an EIS analyzing sections of creek within the Dixie National Forest boundary in Garfield County, Utah, for inclusion in the National Wild and Scenic Rivers System. The creeks under consideration are Pine Creek, Mamie Creek and its west tributary, Death Hollow Creek, East Fork Boulder Creek, Slickrock Canyon, Cottonwood Canyon, Steep Creek, Water Canyon, Lamanite Arch Canyon, and The Gulch (12/21, p. 70381-3; fs122198.txt). **Contact:** Steve Robertson, Wild and Scenic River Planning Team Leader, Dixie National Forest (435-865-3700).

The Shoshone National Forest in Fremont County, Wyoming, will incorporate analysis of a proposed exploratory well into an EIS on forest vegetation management first announced in July 1997. The forest expects to publish a draft EIS by May 1999, instead of February 1998 as originally planned (12/18, p. 70097; fs121898.txt). **Contact:** Bob Rossman, Shoshone NF (307-527-6241).

An EIS is planned on a proposed Master Development Plan for the Anthony Lakes Mountain Resort in Oregon’s Wallowa-Whitman National Forest. The proposed development includes (but is not limited to) construction of one new chairlift, relocation of the existing handle tow and replacement with a short chairlift, and construction of one new surface lift (12/11, p. 68426-7; fs121198.txt). **Contact:** Charles L. Ernst, District Ranger (541-523-4476).

FS will work with BLM and the National Park Service to prepare an EIS in conjunction with revising land and resource management plans and making changes to existing oil and gas leasing decisions for several National Grasslands and Forests on the Northern Great Plains. “The combined revision effort makes sense because of common issues and concerns, and similar ecological landscapes.” Agency decisions in these plans will determine suitability and potential capability of lands for producing forage for grazing animals and for providing habitat for management indicator species (12/10, p. 68245-6; fs121098.txt). **Contact:** Dave Cawrse, Planning Team Leader (308-432-0300).

National Park Service

Alcatraz Island, which houses the famous prison (now unused), will be the subject of a draft EIS. The island, “prominently located in San Francisco Bay, is a National

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Historic Landmark and an important breeding site for several waterbird species and western gulls." It attracts more than 1.4 million visitors a year. The EIS will examine the effects of proposed construction that would be outside the scope of a previously approved construction plan (12/10, p. 68295-6; np121098.txt). **Contact:** Olivia Shinomoto (415-561-4821).

A supplemental EIS/Yosemite Valley Plan (SEIS/YVP) will "consolidate ongoing conservation planning and impact analysis efforts into one plan for the valley," NPS said. "The 1997 Draft Yosemite Valley Implementation Plan/SEIS examined the effects of alternatives for implementing 1980 [General Management Plan] goals of reclaiming priceless natural beauty, reducing traffic congestion, allowing natural processes to prevail, reducing visitor crowding, and promoting visitor understanding and enjoyment in Yosemite Valley." The SEIS/YVP will "pro-

vide for a holistic, landscape-view of critical initiatives so vital for preserving the valley environs for visitor inspiration now and in the future." NPS anticipates issuing the final SEIS/YVP in the fall of 1999 (12/15, p. 69303-4; np121598a.txt). **Contact:** Park staff (209-372-0261).

Navy

The Navy will analyze the impacts of a Shock Trial of the DDG 81 Flight IIA Class Destroyer, on marine mammals and listed species. "A 'shock trial' is necessary to evaluate the effect that shock waves, resulting from a series of underwater explosions and designed to emulate conditions encountered in combat, have when they propagate through a ship's hull," the Navy said. The Navy plans to monitor the effects of no more than four explosive charges on the proposed test area. **More NEPA notices at www.eswr.com/frnepa.htm** **Miss., and Norfolk, Va., have been chosen for the tests (12/18, p. 70116-7; na121898.txt).** **Contact:** Will Sloger, N. Charleston, S.C. (843-802-5797, fax -7472).

quality, wetlands, environmental justice, land use, noise, visual and aesthetic impact, and historic preservation.

ERP No. D-IBR-K39048-CA Rating EC2, Truckee River Operating Agreement, Modify Operation and Selected Non-Federal Reservoirs, Implementation, Truckee River Basin, El Dorado, Nevada, Placer and Sierra counties, Calif., and Douglas, Lyon, Storey and Washoe counties, Nev.

EPA expressed concern that the proposed agreement does not significantly improve Lahontan cutthroat trout (LCT) habitat and recommended that the negotiating parties take this opportunity to better improve LCT habitat. EPA also requested more information on water quality, quantity and conservation, biological resources, groundwater effects, air quality and population growth.

Final EIS's

(12/18, p. 70123-4; e121898.txt)

ERP No. F-AFS-J65274-MT Beaver Creek Ecosystem Management Project and Associated Timber Sale, Implementation, Little and Big Beaver Creek Drainage, Kootenai National Forest, Cabinet Ranger District, Sanders County, Mont.

EPA expressed environmental concerns about the potential adverse effects of increased peak flow and erosion and sediment transport and said the aquatic monitoring program should be improved to allow adequate measurement and detection of aquatic impacts.

ERP No. F-COE-K35036-CA Montezuma Wetlands Project, Use of Cover and Non-cover Dredged Materials to restore Wetlands, Implementation, Conditional-Use-Permit, NPDES and Corps' Section 10 and 404 Permit, Suisun Marsh in Collinsville, Solano County, Calif.

EPA found the final EIS to be generally responsive to EPA's prior concerns on the draft EIS. EPA will continue to work with the Corps on specific conditions for the Section 404 permit.

EPA Comments

The following are summaries of Environmental Protection Agency comments on selected draft and final EIS's. The full text of the comments can be obtained from EPA's Office of Federal Activities (202-564-7167). An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the April 10, 1998 Federal Register (62 FR 17856; Web: eratings.txt). More summaries of EPA comments can be obtained at ESWR's World Wide Web site (<http://www.eswr.com>).

Draft EIS's

(12/18, p. 70123-4; e121898.txt)

ERP No. D-AFS-J65286-MT Rating EO2, Hemlock Point Access Project, Construction of 860 feet of Low Standard Road, Plum Creek, Swan Valley, Flathead National Forest, Missoula County, Mont.

EPA expressed environmental objections about predicted adverse effects to water quality and fisheries, and to the threatened grizzly bear.

ERP No. D-NPS-D61048-PA Rating EC2, Gettysburg National Military Park, General Management Plan, Implementation, Develop a Partnership with the Gettysburg National Battlefield Museum Foundation, Gettysburg, Penn.

EPA is concerned about the potential harm to non-tidal wetlands. The FEIS should examine how to avoid and mitigate for effects on aquatic resources.

(12/11, p. 68451-2; e121198.txt)

ERP No. D-COE-G39031-AR Rating EC2, Grand Prairie Area Demonstration Project, Implementation, Water Conservation, Groundwater Management and Irrigation Water Supply, Prairie, Arkansas, Monroe and Lonoke Counties, Ark.

EPA expressed environmental concerns regarding water

Volusia County will ask Supreme Court to review 11th Circuit's turtle decision

Volusia County, Florida, will ask the Supreme Court to review a decision from the 11th Circuit Court of Appeals that found the county was responsible for controlling lighting that harms endangered sea turtles.

The seven-member county council voted Jan. 7 to let county attorney Daniel Eckert prepare a petition for a writ of *certiorari* in the case. The petition is due by mid-January.

The decision angered Lesley Blackner, the attorney for the "turtle ladies" who brought the case—local activists Shirley Reynolds and Rita Alexander.

"They don't care about taxpayer money," Blackner said. She said that based on public statements by council members—including four who were newly elected in November—she thought the county wanted to let the litigation die and focus on solving the lighting problem at Volusia County beaches, which include Daytona Beach.

But Eckert and a councilman who ran on a platform of ending the turtle lawsuit said that the county, which passed a model lighting ordinance early last month, would continue to work on dimming the lights at county beaches. As a "home-rule charter" county in Florida, Volusia can force beachfront municipalities to comply. A workshop is set for

Jan. 26 with officials from Daytona Beach, Daytona Beach Shores, Ormond Beach and New Smyrna Beach to discuss adoption of minimum standards to meet the county requirements.

"We're proceeding to do the right thing," said newly elected County Councilman Big John (that's his legal name). "We're going to make Lesley Blackner and Shirley Reynolds happy."

But John also said that Eckert had convinced the council to allow the petition to the high court to proceed. "We are fighting back as responsible citizens," John said.

"I campaigned on the idea that we get out of this damn lawsuit. We're still going to get out of the lawsuit," John said.

However, "Our lawyer is a pretty intelligent guy, and he is overcome with the idea that this is blatantly wrong. He's saying that it's an unfunded mandate."

Eckert said he thought the 11th Circuit had "misconstrued" the law when it found the county responsible for lights that belong to third parties, such as businesses along the beach. "Whose job is it under the compulsion of law to enforce the ESA? It's not that of the county government," he said.

The county's incidental take permit covers beach driving, with lighting classified as "mitigation." But the 11th Circuit found the permit "does not authorize [the county] to take protected sea turtles through purely mitigatory measures associated with artificial beachfront lighting."

The county council voted to spend a maximum of \$35,000 on the Supreme Court petition. Most of that—\$25,000—would go to Blackner if the county loses. The county already has spent \$750,000 in legal fees on the case.

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