

April 29, 2005

VIA E-MAIL

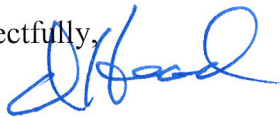
Honorable Mr. Richard W. Pombo
U.S. House of Representatives
Committee on Resources
Washington, DC 20515

Dear Mr. Pombo,

Enclosed are fifteen pages of background, comments, and exhibits that I am prepared to summarize tomorrow in Jackson.

I was only asked to make these comments Wednesday afternoon thus my delay until noon today in organizing them and forwarding to you.

Respectfully,



David H. Head

DHH/mt

Enclosures

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David H. Head

Chief Executive Officer

Head Companies, LLC

Testimony

Before the Committee on Resources
United States House of Representatives

Lessons Learned Protecting and Restoring Wildlife in the Southern United States
under the Endangered Species Act

April 30, 2005

Introduction.

Mr. Chairman, Members of the Committee, good morning and thank you for coming to Jackson to visit with us today. My name is David Head, Sr., I am the CEO of Head Companies. Our development activity along the Northern Gulf Coast includes numerous condominium projects completed, under construction or being permitted. I am an attorney and have been a member of the Alabama Bar since 1962. I have over forty years experience in permitting and developing properties some nine years of which involve the Alabama Beach Mouse.

My company is the managing partner responsible for development of the Beach Club and Beach Club West Projects, located on the Fort Morgan Peninsula of Alabama. In that capacity I have, since 1996, been involved with the Alabama Beach Mouse, which is listed as an endangered species under the Endangered Species Act. I sit as a member of the Alabama Beach Mouse Recovery Team, to which I was appointed in 2004.

My remarks this morning will be brief. I would like to address the following topics: First, the Endangered Species Act, though not so intended by Congress, is too often in practice a local land use tool. Second, the Act has serious economic and other impacts upon private landowners whose property provides habitat for threatened and endangered species. Third, as currently drafted, the Act forces the U.S. Fish & Wildlife Service to make decisions and take positions on poor data and information. And fourth, the Act's provisions regarding critical habitat

designation are neither necessary nor effective as a conservation measure, but impose significant costs to the agency and the public as a result of relatively meaningless rulemaking procedures and consequent permitting obligations.

1. Like it or not, the Endangered Species Act is a Local Land Use Tool

One of the central premises of our federal system is that local land use regulation is left to state and local government. True to this ideal, it is the Department of the Interior's policy that the Endangered Species Act is neither intended nor to be applied as a local land use planning tool. However, in matters where a conflict arises between local land use activities and endangered species conservation, the Act is all too easily invoked as the ultimate zoning tool. And that is what is happening on the Fort Morgan Peninsula.

Our projects are intended to provide recreational opportunities allowing our owners and their guests to visit and vacation by the seaside on Alabama's Gulf Coast. Both Beach Club and Beach Club West are designed utilizing multi-family condominium towers to minimize our project footprint, avoid rural sprawl, and minimize habitat and other disturbance to the Alabama Beach Mouse. That design is sound business, sound conservation, and allows us to dedicate most of the land we own to wildlife conservation, including a substantial habitat preserve area and other measures, including conservation funding, for the benefit of the Alabama Beach Mouse. It is, however, controversial with some living on our part of the Peninsula who would rather see

more single-family residences than our higher-density, more compact developments. So much so that interests on and off the Peninsula have chosen to use the ESA (and the National Environmental Policy Act) as litigation tools to delay or prevent us from making lawful use of our property. I will describe those events to you in a moment. But first let me say, that for whatever reason, the FWS in its ESA implementation has played into the hands of our local opponents.

Our Beach Club West Project and affirmation of the Section 10 incidental take permit has been indefinitely delayed due to litigation and subsequent review under the National Environmental Policy Act (NEPA) over endangered beach mouse concerns, the Service has inexplicably --and quite unfairly -- moved forward to issue scores of incidental take permits for single family residences throughout the Peninsula, including in the very area adjacent to our projects. While our multi-family development is being held hostage in the name of considering the potential impacts to this small rodent, the agency is allowing virtually unfettered construction of single family residences that in aggregate will have at least as significant if not greater impacts to the species and without the concomitant conservation benefits offered by our Beach Club West project. And our opponents including the Sierra Club and others, who ostensibly seek to protect the mouse, are sitting by while some 108+ single-family residences are permitted or being permitted without objection, and mouse habitat is lost. This is not only a subversion of the ESA to use it as a land use tool favoring habitat

destroying single-family residents over habitat conserving multi-family projects, it is fundamentally unfair and poor conservation planning to boot.

2. Chronology of Permitting Activities for Beach Club and Beach Club West

BEACH CLUB (3 years)

July 18, 1996	Started discussions with Fish & Wildlife
December 9, 1996	Beach Club ITP Issued
February 3, 1997	Sierra Club Filed notice of intent to sue F & W
August 4, 1998	Beach Club ITP Remanded
July 15, 1999	Beach Club ITP Reaffirmed

BEACH CLUB WEST (5 years to date)

Spring 2000	Optioned parcel for Beach Club West
June 19, 2000	Started discussions with Fish & Wildlife
Fall 2000	Acquired BCW Property
April 18, 2002	Sierra Club sued F & W over BCW permit
April 19, 2002	BCW ITP Issued
April 2002	Started construction BCW
June 19, 2002	Court granted injunction against BCW construction
October 8, 2002	Agreed to start EIS
June 17, 2003	Lawsuit filed over F & W failure to re-designate critical habitat

3. History and Costs of Alabama Beach Mouse Litigation

Both the Beach Club and Beach Club West required the issuance of Incidental Take Permits because of potential take of the Alabama Beach Mouse. Our experience in obtaining and defending those permits is illustrative of the costs the ESA imposes on land owners. We have obtained two take permits from the Fish & Wildlife Service, as described above. Both permits have been litigated. And litigation continues. Our Beach Club permit was challenged by the Sierra Club in 1997. That lawsuit was finally resolved in 1999 after 2 1/2 years at the cost of over \$1.8 million. Our Beach Club West permit was likewise challenged

by the Sierra Club and other plaintiffs and to date has cost us \$6,649,309 or a total of \$8,449,309 when the Beach Club cost delays are included. That litigation resulted in an injunction against project construction while more detailed environmental reviews were performed under NEPA. The NEPA process is still ongoing; nearly three years after the injunction issued, the FWS still has not issued a draft environmental impact statement. The horizon for that project, at this point, appears very far away.

In addition to litigating our permits, our opponents have sought to prevent our use of our property by first filing a petition with FWS to expand the historic designation of critical habitat for the Alabama Beach Mouse, and then by filing yet another lawsuit in federal district court when the agency failed to act as promptly as the plaintiffs wanted. Their proposal for re-designation would, not surprisingly, require much of our property to be designated and regulated as critical habitat. FWS for its part has been delayed in responding to the petition by limited funds and other resources. In the critical habitat litigation, the plaintiffs have sought an injunction prohibiting FWS from acting upon incidental take permits such as ours until re-designation occurs – a process that could take several years. They do not object to single-family development which is more destructive. The irony of this, if one is a supporter of endangered species conservation, is that critical habitat designation and regulation is not an effective conservation measure. Designation of critical habitat carries with it no promise of conservation measures for the species. In fact, the Service itself repeatedly

has recognized that the habitat conservation plans (HCPs) which are at the heart of Incidental Take Permits provide far greater conservation benefits to threatened and endangered species than does critical habitat designation. (See the attached 25 Mitigation Measures).

The habitat conservation plan for Beach Club West and an adjacent contiguous development known as Gulf Highlands are being permitted under a joint HCP which will result in approximately 110.7 acres being conserved from development and available to the Beach Mouse in perpetuity. The conserved lands include 909 feet of prime gulf frontage that is currently selling for over \$100,000 a front foot for condominium development. In other words over \$90 million of beach front land value (before valuing contiguous interior lands) has been set aside forever for the Beach Mouse.

Under Fish & Wildlife estimates a single family residence creates approximately 1/10 of an acre of impervious lands with no mitigation while Beach Club West and Gulf Highlands development plans call for a clustered development in which the impervious lands are only a fraction of that for a single family home. In an attached exhibit it can be seen that our condominium cluster development is exceeded 230% by a single family home development on a per unit basis while our mitigation measures insure additional acreage that is three times our developed lands will never be developed. None of this would happen as a result of critical habitat re-designation. And it is a fact that critical habitat designation

takes at the least years and many tens if not hundreds of thousands of agency dollars, while (by FWS' own recognition) yielding no greater conservation benefits to the species than already result from the fact the species was listed. Those are dollars, and years, that FWS does not have. And the fact is that the habitat and habitat values which are the subject of critical habitat designation actions is already protected for the benefit of the listed species through application of the ESA's admonition that federal agencies not jeopardize the species. Since beginning our permitting activities over nine years ago, we have calculated that we have incurred legal and consulting fees along with other expenses directly tied to ESA permitting and related litigation in the amount of \$8,449,309.

4. The ESA Requires the FWS to Act in the Face of Too Little Information

I want to illustrate this last point through our own experience. When the Alabama Beach Mouse was listed in 1985, FWS believed there existed only 350 acres of habitat suitable for use by the mouse on the Fort Morgan Peninsula. Over the past five years, as people have studied the mouse, often as the result of Incidental Take Permit requirements, our knowledge of the mouse and its habitat has expanded exponentially. At this time, the Service has confirmed that the Peninsula has some 2,700 acres of habitat suitable to meet the needs of the Alabama Beach Mouse, a far different picture than was believed at the time of listing. Yet the Act requires that listing be performed based on "the best available information," regardless of how little information may exist, or

whether it is credible, reliable information or not. That is a poor basis upon which to perform a regulatory action that can result, as demonstrated above, in the imposition of millions of dollars in regulatory compliance costs before a landowner can make use of his or her property.

Thank you. I would be glad to respond to any questions you may have for me.

Fort Morgan Paradise Joint Venture
 Beach Club West
 Comparison of Typical Single Family Unit
 with Clustered Condominium Unit
 April 30, 2005

A	Single Family Home			
	estimated average footprint (impervious)	4,356	square feet	
	Square feet per acre	43,560		
	Impervious acreage per unit	0.1000	acres	(1/10 of an acre)
	Beach Club West and Gulf Highlands	973	units	
	estimated average footprint (impervious)	1,898	square feet	
	Square feet per acre	43,560		
	Impervious acreage per unit	0.0436	acres	

<p>Single family home impervious area required as a % of Multi family units proposed (unadjusted for mitigation)</p>	230%
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B	Conservation Easement Mitigation Impact		
			sq ft
	Impervious land for average Single Family Home		4,356
	Impervious land for proposed multi-family unit		(1,925)
	Impervious land saved per unit		2,431
	Acreage dedicated under conservation easement	110.7	acres
	Square feet per acre	43,560	
	Sq feet dedicated under conservation easement	4,822,092	
	Multi family units proposed	973	
	Sq feet dedicated per unit under conservation easement - mitigation		4,956

<p>Square footage of land conserved PER UNIT under clustered multi family plan compared to single family plan *</p>	7,387
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<p>* Specifically, 165 acres more land is conserved by our multi family clustered development approach when compared with a single family unit approach of the same number.</p>
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Fort Morgan Paradise Joint Venture
 Beach Club and Beach Club West
 Estimate of Costs Related to Permit Delays
 April 30, 2005

<u>Beach Club (1996 - 1999)</u>	
Legal, Consulting, etc (est)	\$ 1,000,000
Settlement Cost	800,000
Other Consulting	incl above
Interest Carry	not included
Beach Club Cost (1)	<u>\$ 1,800,000</u>

<u>Beach Club West (2000 - 2005 to date)</u>	
Legal	\$ 2,466,730
Engineering	384,863
Other Consulting	226,459
Interest Carry	3,571,257
Beach Club West Cost to Date (1)	<u>\$ 6,649,309</u>

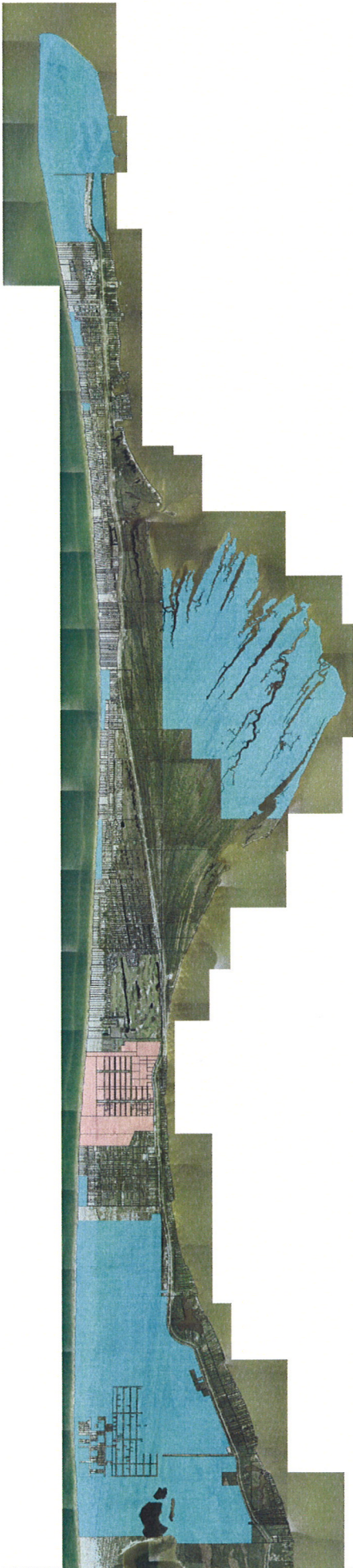
Combined Cost	<u><u>\$ 8,449,309</u></u>
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(1) Does not reflect the losses sustained by Beach Club and Beach Club Village Realty as a result of the delay in bringing units on line.

25 Mitigation Measures

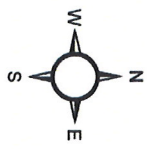
- Clustering development in the southeastern portion of the property to maintain large tracts of ABM habitat in the western and northern portions of the property;
- Preserving approximately 105.5 acres as a conservation area for the ABM;
- Preserving 909 linear feet of open beach areas, primary and secondary dunes, and associated swales, and escarpment;
- Foregoing development of the 102-unit, 17-acre French Caribbean tract, for which an ITP was previously issued in 2000, and which will become part of the conservation area protected by restrictive covenants;
- Locating the two development towers 724 feet and 600 feet north of the Gulf, providing a significant buffer between the towers and ABM designated critical habitat;
- Selectively clearing the canopy and understory of 10.5 acres of the property that are not currently believed to be occupied by ABM to enhance potential beach mouse habitat;
- Constructing a sloped land surface, rather than a traditional concrete retaining wall, along the south side of the project to provide refugia for ABM during high water events;
- Posting signage in the construction area to clearly mark the boundary of the development footprint;
- Designating a prime contractor to be responsible for refuse disposal in tightly closed, rodent-proof waste disposal containers during construction;
- Limiting storage of building materials to the development footprint;
- Requiring disposal of residential waste capable of attracting rodents in rodent-proof containers;
- Stopping construction work and immediately notifying Service personnel upon encountering ABM;
- Removing any injured ABM to a secure spot and immediately notifying Service personnel;
- Building dune walkover for pedestrian traffic to the wet beach;

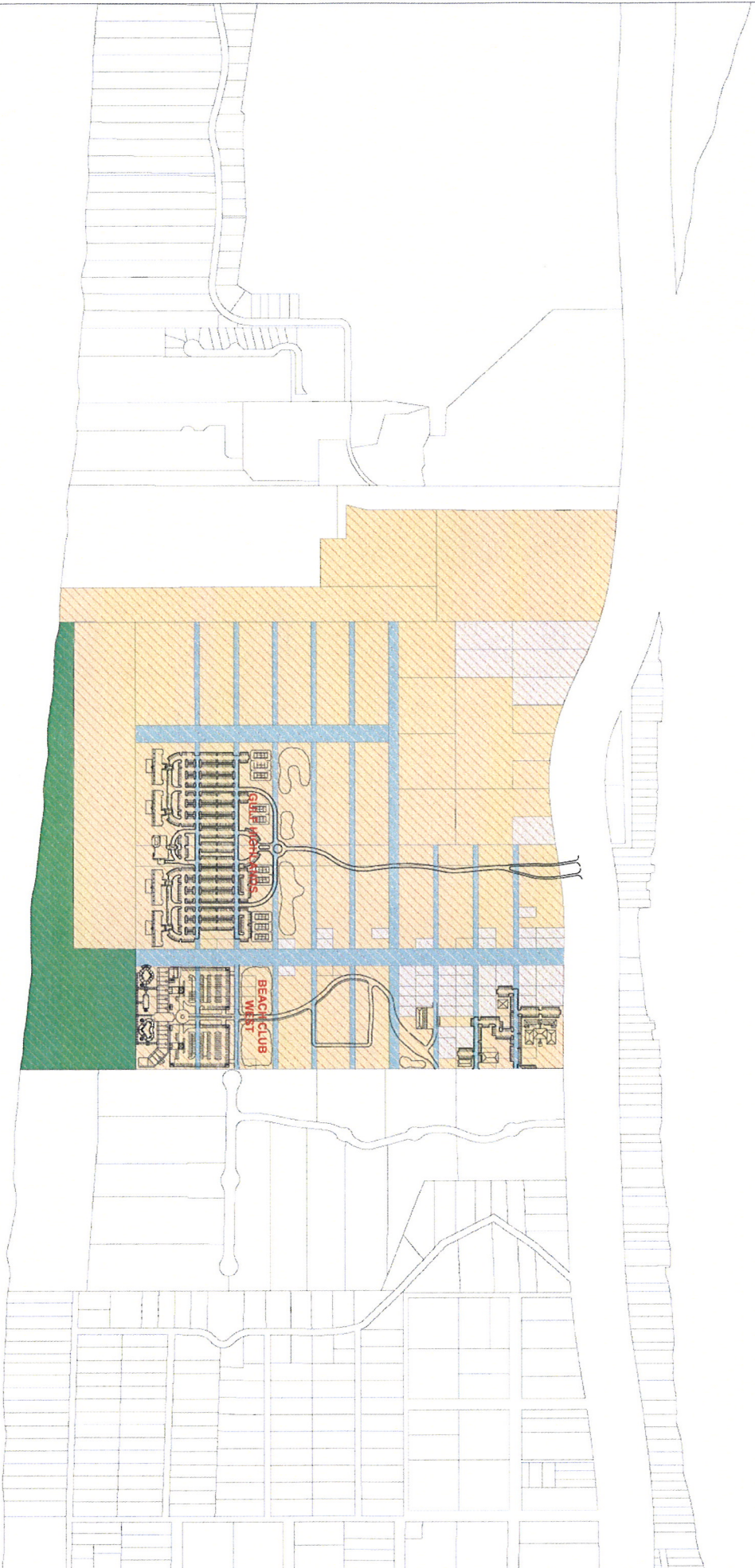
- Posting signs in the dune area to alert visitors of ABM presence;
- Prohibiting off-road vehicles on the dunes or wet beach area;
- Providing educational brochures about the ABM to construction workers and development residents;
- Prohibiting outdoor lights illuminating the dunes;
- Requiring perimeter fencing to contain large enough spaces for ABM movement;
- Prohibiting domestic house cats in the residential development;
- Implementing a seasonal trapping program and a monitoring, reporting and predator-control program for the ABM, house mice, and domestic cat populations;
- Prohibiting the use of rodenticide on the property, except in totally enclosed structures;
- Implementing a dune restoration and enhancement program to be designed and overseen by a qualified expert approved by the Service;
- Assessing a \$100 fee per residential unit per year, adjusted for inflation, to be used for ABM conservation, including 1) acquisition of ABM habitat, 2) enhancement of offsite ABM habitat on non-public lands, and 3) management of ABM on non-public lands; and
- Restoring 35 acres of off-site ABM habitat in the project vicinity, including creation of a minimum 2000-foot corridor connecting existing ABM habitat to the restored habitat.



Legend
PUBLIC LAND = 3,594 ACRES
BEACH CLUB, BEACH CLUB WEST, GULF HIGHLANDS

FORT MORGAN PENINSULA

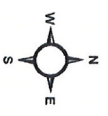








Legend

- PROJECT BOUNDARY = 221.3 Acres
- Permittees' Ownership = 163.1 Acres
- Public Beach = 18.5 Acres
- ROW = 23.7 Acres
- Out Parcels = 16 Acres

**BEACH CLUB WEST/GULF HIGHLANDS
PROJECT AREA**





- Legend**
-  PROJECT BOUNDARY = 221.3 Acres
 -  Out Parcels = 16 Acres
 -  PERMANENTLY CONVERTED HABITAT = 42.4 ACRES
 -  CONSERVATION EASEMENT = 110.7 Acres

BEACH CLUB WEST/GULF HIGHLANDS PROJECT IMPACTS

