

**TESTIMONY OF H. DALE HALL, DIRECTOR,
U.S. FISH AND WILDLIFE SERVICE,
DEPARTMENT OF THE INTERIOR,
BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE REGARDING
SCIENTIFIC AND POLICY DECISIONS UNDER THE ENDANGERED
SPECIES ACT**

JULY 31, 2007

Mr. Chairman and Members of the Committee, I am H. Dale Hall, Director of the U.S. Fish and Wildlife Service (Service). I am here today to discuss implementation of the Endangered Species Act (ESA), including our activities in the Klamath River Basin. I appreciate the opportunity to appear before you. Joining me today to answer any questions that may relate to the Klamath River Basin and other issues that fall within their responsibilities is Robert Johnson, Commissioner of the U.S. Bureau of Reclamation (Reclamation), and Steve Thompson, the Service's California/Nevada Operations Manager.

Background

As you are aware, a recent Inspector General's investigation and media reports have raised questions regarding science and agency decision-making under the ESA. Let me begin my testimony by stating, from the outset, that I take these reports very seriously and am committed to ensuring that the Service implements the ESA with the utmost scientific integrity.

Science is the cornerstone of the Service's work; it is what guides the agency's decisions. To the extent that these recent reports cast doubt over the scientific integrity of the Service's ESA decisions, I want to assure Congress and the public that I will act to correct any decisions that did not use the best available science, as required by law.

My testimony will also highlight the actions of this Administration and our Klamath Basin partners in moving toward resolution of the long-standing conflicts that have gripped this region. The Klamath has been a hot spot in the ongoing and very real struggle resulting from multiple demands for too little water. Today, I am pleased to report that the Klamath Settlement Group has committed to settle these issues and to find long-term solutions for managing the water needs of local communities, irrigators, power generation, and wildlife, such as the shortnose and Lost River suckers and the Coho salmon, which are on the Federal list of Endangered and Threatened Species.

It is important to note that both science and policy have roles in the implementation of the ESA. For example, the Service does not always have full information about a species such that it can know with the utmost reliability a species' risk of extinction, population levels, rate of decline, or recovery needs. Under the ESA, the Service must use the best available science, be explicit about the level of uncertainty in that science, and leave it to decision makers to choose among the options that achieve the objectives of the decision. In addition, policy decisions in critical habitat designations are appropriate in the section

4(b)(2) exclusion process of the ESA, pursuant to which the Secretary must weigh the benefits of exclusion against the benefits of inclusion. Thus, the assimilation, application, and interpretation of science often represent the beginning point in making policy decisions under the ESA. The peer review process, agency leadership, and the public comment process help to ensure high quality decisions.

The Klamath River Basin

It is my understanding that you would like us to discuss our role in the ongoing efforts to manage the resources of the Klamath River Basin. The Klamath region straddles 16,400 square miles of south-central Oregon, northern-central and north-west California, with the Klamath River flowing 254 miles from its Oregon headwaters into the Pacific Ocean. The people of this region are bound together by the Klamath River's economic, ecologic and cultural importance to their communities.

The Klamath River has been and continues to be important to the economies and social fabric of that entire region. The Klamath Basin was renowned for its salmon fisheries in the Pacific Northwest, as the Klamath River was once the third largest producer of salmon in North America. Reclamation's Klamath Project, as well as private systems, supply irrigation water for a wide variety of agricultural crops throughout the upper basin. The Service operates six national wildlife refuges that provide important habitat for migrating birds. Historically, the Yurok, Hoopa, Karuk, and Klamath Tribes have relied on fish and other natural resources provided by the Basin.

Many notable accomplishments have been achieved in the Klamath Basin since 2001. Structural improvements were completed to Klamath project facilities that have helped screen the majority of both juvenile and larval suckers from the A-Canal. The Link River Dam fish ladder became operable in 2005, giving suckers and redband trout, an Oregon State species of concern, access to historic habitat, including spawning areas in Upper Klamath Lake and its tributaries.

Additional projects are currently underway to improve habitat for other ESA-listed species and species of concern. For example, Reclamation has developed the Water Bank Program, which provides surface water storage, groundwater pumping, and land fallowing options. Since its creation, the Program has developed water supplies for Coho salmon flows. Also, The Nature Conservancy (TNC) and the Service have provided \$7.25 million and \$2.47 million, respectively, in addition to \$1.62 million from Reclamation, to acquire Barnes Ranch for increased water storage in Agency Lake and additional habitat for the Upper Klamath National Wildlife Refuge. The total acreage of this acquisition will be 9,650 acres.

Reclamation and the Bureau of Indian Affairs are also in the process of removing Chiloquin Dam to improve fish passage on the Sprague River in southern Oregon. Removal of the dam, scheduled for completion in December 2008, will open up approximately 80 miles of spawning habitat. In addition, TNC, in partnership with the National Fish and Wildlife Foundation, the Service, and Reclamation, is undertaking the

Williamson River Delta Restoration project. This project should be completed by winter of 2008 and will reconnect the Tulana and Goose Bay Farms to Upper Klamath Lake, providing 5,860 acres for increased water storage, enhanced fish and wildlife habitat, and improved water quality in Upper Klamath Lake. Reclamation and the Service each provided \$2.5 million to the project.

Since 2005, a diverse group of Klamath River basin stakeholders, including Indian tribes, farmers, conservation groups, and state and federal agencies have committed to developing a detailed Klamath Settlement Agreement by November 2007. For the past two years, this group has persevered toward the development of a proposal to restore the Klamath River fisheries, meet agricultural needs, protect water quality and sustain the ecology and economies of the Klamath Basin. The group is committed to prepare and present a balanced agreement.

In January 2007, the Department of the Interior and NOAA Fisheries in the Department of Commerce announced the submission of their joint modified fishway prescriptions for the relicensing of PacifiCorp's dams and hydroelectric facilities on the Klamath River to the Federal Energy Regulatory Commission (FERC). Like their March 2006 preliminary prescriptions, the modified prescriptions include fish passage, both upstream and downstream, for PacifiCorp's Iron Gate, Copco I and II and J.C. Boyle dams, but provide a lower cost alternative for down stream passage at Copco and a less prescriptive approach for tailrace barriers and spillway modification. *This is the first time any Administration has required fish passage in prescriptions for FERC relicensing in Klamath.*

In fiscal year 2007, the Administration has allocated more than \$90 million to support restoration, research and management in the Basin and, from 2003 through 2006, the Department has obligated \$215 million for this effort. We are committed to continuing to work with everyone in the Basin to ensure the long-term sustainability of the natural resources and people of the Klamath region.

Decision-making Under the Endangered Species Act

The remainder of my testimony will focus on actions that have been undertaken to ensure the integrity of the Service's scientific decisions under the ESA. Since becoming Director, I have made scientific integrity my top priority. Having been a scientist with the Service for 29 years, I am acutely aware of the importance of science in the Service's activities and decisions.

Shortly after I was confirmed as Director in October 2005, I began to examine the process for reviewing ESA decisions in Washington. I identified problems with the division of responsibilities for ESA decisions between the Service's headquarters and the Office of the Assistant Secretary for Fish and Wildlife and Parks. The apparent lack of a clear delineation between the roles of the Service and of the Office of the Assistant Secretary for Fish and Wildlife and Parks concerned me. As a result, I began a series of discussions with the Deputy Secretary to address and correct the situation. On February 3, 2006, with the concurrence of the Deputy Secretary, I issued a memorandum detailing

my views on how science should be used in making recommendations and decisions, as well as the process by which science would be reviewed in a policy and legal context. A copy of this memorandum is enclosed with my written statement (Attachment 1).

In addition, I held several meetings with then-Acting Assistant Secretary Matt Hogan and his staff to discuss how the division of responsibilities for ESA reviews and decisions should be implemented. A copy of an email on these responsibilities is also included with my written testimony (Attachment 2).

In sum, we agreed that the formulation of science would be the responsibility of the Service, while discussions between the Director's office and Assistant Secretary's office would focus on policy decision-making. With the Deputy Secretary's concurrence, we also agreed that there would be no requests for information from the Assistant Secretary's office to the Service's regional and field offices while ESA packages were being formulated, a practice that had occurred in the past. I instructed the Regions and Washington office staff that this review process had been established to ensure the integrity and credibility of ESA decisions and asked them to let me personally know of instances where the process was not honored.

Secretary Dirk Kempthorne was confirmed by the Senate in May 2006, and I have been impressed by his strong emphasis on ethical and scientific integrity. As you know, on March 29, 2007, the Department's Inspector General released a report on the Deputy Assistant Secretary's involvement in ESA decisions. This Committee held a hearing on May 9, 2007, where Deputy Secretary Lynn Scarlett committed to conducting a review of ESA decisions that may have been inappropriately influenced by Ms. MacDonald.

On May 16, 2007, I visited the Service's California-Nevada Operations Office (CNO) to meet with CNO Manager Steve Thompson and his key field office leaders about the course of action for reevaluating certain ESA decisions from 2002 to May 2007. This discussion was informed by insightful input from the field, as the CNO Manager had previously initiated a discussion with Regional leadership on this topic.

Immediately following my discussions with CNO, I received a memorandum dated May 22, 2007, from Deputy Secretary Lynn Scarlett requesting that the Service review all work products that had been produced by the Service and reviewed by the Deputy Assistant Secretary in order to determine if any of this material required revisions based upon her involvement. This memorandum is also being submitted with my testimony (Attachment 3).

I then directed each of the Service's Regional Directors to engage the appropriate field and regional staff in identifying what, if any, ESA decisions may have been influenced by the Deputy Assistant Secretary. My directive to the Regional Directors recognized that policy formulations and interpretations were the proper responsibilities of the Office of the Assistant Secretary. I instructed the Regions to identify only those decisions that may have involved the improper modification of science, which would have resulted in undermining species conservation. The Service reviewed hundreds of actions, and the

Regional Directors each submitted a memorandum to me outlining the results of their reviews. These memoranda are enclosed with my testimony (Attachment 4). The Regions recommended that 11 ESA actions warranted further review.

On July 11, 2007, prior to submitting the results of the review to the Deputy Secretary, I held a conference call to have a final discussion with all of the Service's Regional Directors to discuss each ESA decision. As the Regions discussed their recommendations, it became apparent that, in one case, the Mexican garter snake, the Southwest Region had recommended a review of this package based on my directions; however, it was determined instead that the Washington Office of Endangered Species had questioned the decision. Therefore, the Mexican garter snake was removed from the list of species to be re-evaluated.

I also want to point out that during our discussion, the Regional Directors indicated that on a number of occasions they were successful in explaining the Service's recommendations, with the result being that the Deputy Assistant Secretary's comments were not included or did not affect the Service's recommendations or decisions. By the end of the call, the Regional Directors had identified 10 ESA decisions that should be re-examined in order to ensure that the decisions comport with the best available science and appropriate legal standards. The next day, I submitted a memorandum to Deputy Secretary Scarlett summarizing the results of our review and recommending that we re-evaluate these decisions. That memorandum is also enclosed with my written testimony (Attachment 5).

On July 19, 2007, Pacific Northwest Regional Director Ren Lohofener informed me that two decisions that were initially recommended to be re-evaluated were based upon an interpretation of policy, which is appropriately the responsibility of the Assistant Secretary's office. These two decisions, the 5-year review for the marbled murrelet and critical habitat designation for the bull trout, were withdrawn from our list at his request. The July 19 memorandum from Ren Lohofener is being submitted with my written statement (Attachment 6). Following this action, I sent a memorandum to the Deputy Secretary amending the earlier list (Attachment 7).

In sum, the Service determined that the following eight ESA decisions warrant re-evaluation: 1) Arroyo toad critical habitat, 2) California red-legged frog critical habitat, 3) 12 species of picture wing flies critical habitat, 4) White-tailed prairie dog 90-day finding, 5) Canada lynx critical habitat, 6) Preble's meadow jumping mouse 12-month finding/proposed delisting, 7) Preble's meadow jumping mouse critical habitat, and 8) Southwestern willow flycatcher critical habitat.

Reevaluation has already commenced for three decisions, the Preble's meadow jumping mouse 12-month finding/proposed delisting; the White-tailed prairie dog, where we are working on the 12-month finding; and the 12 species of picture wing flies, where we are working on a rule to re-propose critical habitat.

Conclusion

In conclusion, I would like to emphasize my personal commitment to ensuring the scientific rigor, validity, and integrity of the Service's decisions under the ESA. The reevaluation of the eight ESA decisions is emblematic of this commitment. Neither I nor the Department will tolerate instances in which scientific soundness and integrity have been compromised, and I am confident that scientific excellence will continue to guide our agency's work.

Mr. Chairman, I thank you for the opportunity to appear before you today, and I would be pleased to respond to any questions that you or other Members of the Committee might have.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

IN REPLY REFER TO:

February 3, 2006

MEMORANDUM

To: FWS Directorate

From: Director *A. Dale Hall*

Subject: Maintaining Integrity in Our Scientific Decision-Making Process

The question of "sound science" is omnipresent in all we do. It is our responsibility to bring clarity to the science we use and require honest evaluations of its strength. Science begins as data collected and they represent only a starting point. Even in peer reviewed scientific publications, there exists the possibility that the data represent only the beginning phase of scientific understanding. Science progresses along three steps in its evolution: basic data that evolve into information, and information that evolves into knowledge. In work we undertake, we may well find ourselves at any one of these steps as we sort out "best available science and information". Our draft documents must always present all legitimate information we have, but there must also be an honest evaluation of the strength of the information. In my experience, we normally consider the information at hand as one of three value bases: 1) we don't know what the information indicates; 2) we think we know, but aren't sure, or; 3) we are very confident we have achieved a level of "knowledge" based on the information. It is imperative that we address two evaluations to ensure the quality of our information. First, the strength of the science (data, information or knowledge) and, second, the confidence we propose to place on the science (don't know, might know, know). If we are to have sound policy discussions on the application of science, we simply must have these assessments. I will ask our Service Science Team to prepare recommendations relative to implementing these assessments.

Premature release of drafts, scientific information or briefings can significantly undermine the confidence in the process by the public (through the Administrative Record) as well as our ability to have free and open debate on data interpretation. Failure to maintain a culture of "in Service scientific debate" prior to forming conclusions can significantly undermine the credibility placed with the science as we and the Department engage in policy or decision-making discussions. In order to ensure the integrity of this process, it is imperative that all documents, assessments and drafts remain inside the Service, except for discussions as appropriate with your recognized federal and state peers. Any requests for such release or premature briefings should be forwarded to this office for appropriate action.

We need to be constantly vigilant that we are providing the foundation for finding solutions, not necessarily the solutions themselves. Through the interpretation and application of science we provide the beginning point for policy level discussions on many contentious and difficult issues.

Finally, it is critical that all draft documents reach Headquarters on schedule to allow time for adequate review and policy level discussions. It reduces our ability to effectively formulate policy decisions when we do not have timely information.

I greatly appreciate all your continuing efforts to provide the best available information for decision-making. I believe this guidance and the philosophy behind it will enhance our ability to maintain our high standard of excellence.

Dale Hall [REDACTED] To FWS Directorate & Deputies
02/08/2006 07:57 AM cc
bcc
Subject Fw: Operational Discussion

The discussion on the phone call today will include this email and the February 3 memo I sent you.

Dale

----- Forwarded by Dale Hall [REDACTED] on 02/08/2006 07:54 AM -----

Dale Hall/ARL/R9/FWS/DOI

Dale Hall [REDACTED] To Matt Hogan, David Smith, Hoffman, Paul, Julie McDonald,
02/07/2006 07:42 AM Marshall Jones, Renne Lohofener, Margaret
Hopkins [REDACTED]
cc
Subject Operational Discussion

Thanks everyone for the good discussion last night. If we are all going to be able to handle the heavy workload, discussions like this are going to be very important in ensuring a smooth process. Here are the key points I think we agreed on. Please let me know (with copy to everyone else) if I missed anything.

- 1) All science will be formulated in the Service. It's our (the Service) responsibility to include all pertinent science and information, give an accurate estimate of the reliability of the science (how strong it is relative to the question at hand), and cite any literature in the Administrative Record used in any way to help make a decision. We'll ensure that all pertinent literature at our disposal is included and referenced using established bibliography citation protocol. We believe our obligation is to accurately reflect the science, not to try and "build a case".
- 2) The drafts coming in for my review will ensure there is a valid assessment of the scientific stage of reliability of the information (data, information, knowledge) and the strength of the science relative to its ability to help us in making policy determinations. Under normal circumstances, this will give us the ability to discuss policy determinations, or to establish positions, within a range supported by the science. There is almost never one clear answer to ESA, FERC or other questions, and our objective is to ensure we have as clear of an understanding of the range of options as we can have.
- 3) No drafts or other documents will come over to the A/S corridor until I have seen them or given my concurrence that they represent the views of the Service. I will withhold my signature on documents until we have all had a chance to discuss what has been forwarded as draft. Review of the draft will occur concurrently within a set time frame (I think we agreed on 10 days) and then we will discuss all recommendations together and make agreed upon changes. If literature cited in the document is in electronic form in the field office, that will be forwarded with the draft. If not, we agreed that an intern could be assigned to find the citations and either print them off or put them in electronic form.
- 4) We will receive a written briefing just at the point the field is beginning to write the document. We expect this will be in the form of a two page or so briefing document accompanied by a conference call. This is an excellent opportunity for us all to become aware of what the field is thinking and the basis of the thought. The real value here is to give advice and suggestions to the field so they can assist in providing

information in the draft to answer expected questions. We assume this will occur approximately six months prior to the due date for publication of proposed/final rules and about a month before we would receive a 90-day finding. In either case, it will occur before writing has begun in earnest. We agreed there will be no requests to the region or field for information during the formulation process, and post formulation requests will be given to me.

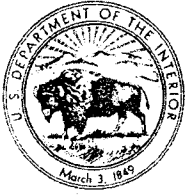
5) All drafts will be provided to the A/S corridor at least two weeks prior to publication date. I will work within the Service to ensure that occurs.

6) The discussions between you in the A/S office and me will focus on policy direction or policy decision-making. Identification of other weaknesses in the draft are welcomed, but will be given to me as the responsible person in the Service to make necessary corrections or improvements. If I am not in town, Marshall or Ken will serve in my stead as I try to engage by phone. This will be tricky until we get better at it, but we will keep working it until a solid process emerges.

I want to thank you all for understanding the work load on our staff and giving them the breathing room to get their cut at the assignment done. The Regional Directors will be actively engaged to help me ensure the drafts and finals are at the quality we all want. Let me know if I have missed anything.

Tks

Dale



THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

MAY 22 2007

Memorandum

To: H. Dale Hall
Director, Fish and Wildlife Service

From: P. Lynn Scarlett
Deputy Secretary

Subject: ESA Projects

Based on the questions that have been raised about Julie MacDonald's alleged involvement in certain projects and listing packages that were prepared by the Fish and Wildlife Service, please review all work products that were produced by the Service and reviewed by Ms. MacDonald and determine if any of those packages require any revision based on her involvement. Please provide the list of those needing attention by June 21, 2007. I look forward to the results of your review and your recommendations.



United States Department of the Interior



FISH AND WILDLIFE SERVICE

California/Nevada Operations Office
2800 Cottage Way, Suite W-2606
Sacramento, CA 95825

JUN 29 2007

To: Director

From: Manager, California-Nevada Operations Office

Subject: Review of Service Decisions under the Endangered Species Act Involving the Deputy Assistant Secretary, Fish, Wildlife, and Parks, in California and Nevada, 2001 - 2006

On May 17, 2007, you asked CNO Ecological Services (ES) project leaders to evaluate the involvement of the Deputy Assistant Secretary, Fish, Wildlife, and Parks (DAS) in the important Endangered Species Act (Act) decisions made by the Service in CNO during the years 2001 through 2006. Specifically, you asked us to evaluate past Service decisions to determine if the DAS, in her oversight capacity as a high-ranking Departmental official, influenced or modified our position on the scientific basis for our final actions or decisions.

This request was discussed with CNO regional staff and field office project leaders (PLs). The Assistant Manager (AM) had follow up conference calls with PLs on May 31, 2007, and on June 6, 2007, and he received responses from all CNO ES field stations. This memorandum summarizes the results of this review, and the source documents are on file in CNO.

Summary of Findings and Recommendations

Consistent with the findings of the Inspector General, we found that the DAS did actively attempt to influence our scientific rationale and conclusions on multiple occasions. But we found in the majority of cases that the DAS input did not lead to inappropriate changes to our scientific conclusions or recommendations. We made the following specific findings and recommendations:

- The DAS influenced the application of science in the following critical habitat rules: arroyo toad and California red-legged frog. *We recommend reevaluating arroyo toad and California red-legged frog critical habitat designations as appropriate.*
- The DAS may have influenced the application of science in the bull trout and southwestern willow flycatcher critical habitat rules. *We recommend coordinating with Regions 1 and 6 on bull trout critical habitat, and with Region 2 on southwestern willow flycatcher critical habitat, to make a determination if revisiting CH is necessary and appropriate for these species.*
- The DAS was heavily engaged in two biological opinion processes at the Carlsbad Fish and Wildlife Office (CFWO) in 2001-2003. Although she intervened from the perspective of the applicant to reduce the level of impact avoidance or conservation ultimately required as part of

the action, she did not unduly influence the final biological opinion of the Service. *Therefore, we do not recommend revisiting these biological opinions.*

In contrast to her involvement in scientific issues, the DAS's involvement did lead to many changes in draft critical habitat rules due to her application of Department policies and Secretarial discretion, especially section 3(5)(a) and 4(b)(2) exclusions and interpretations of statute language (e.g., "occupied at the time of listing"). However, the Service conducted the statutorily required "extinction analysis" for any critical habitat rules that contained such exclusions, and all were found to be consistent with the requirements of the Act.

It is our understanding that these exclusion policies and other interpretations are, for the most part, still current policy within the Department. Therefore, we do not recommend revisiting any of these critical habitat decisions unless the Department formally revises these policy positions and directs us to reevaluate previously completed critical habitat rules.

Conclusion

As the above summary indicated, we believe it is necessary to distinguish between Service work products that may have been influenced by the DAS due to her scientific opinion on a particular issue, compared to those Service work products that were changed due to the DAS's interpretation of policy or statute. Our review revealed that Service employees did a good job in considering the DAS's scientific, legal, and policy input during the rule-making and biological opinion processes. With the few exceptions noted above, the vast majority of any modifications made to Service work products were made as a consequence of the Department's policy discretion and not as a result of the Service deferring to the scientific opinion of the DAS.

Thank you for the opportunity to conduct this review.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

IN REPLY REFER TO

July 12, 2007

MEMORANDUM

To: Deputy Secretary of the Interior

From: Director, U.S. Fish and Wildlife Service

Subject: Review of Documents Under the Endangered Species Act

As a result of inquiries regarding the inappropriate influence of Deputy Assistant Secretary (DAS) Julie MacDonald on Endangered Species Act (ESA) work products, you asked me to expand the request I had made of California and Nevada Operations Office Director Steve Thompson to all Fish and Wildlife Service (Service) Regions. I apologize for the tardiness of this response, but as you might imagine, there have been a lot of Federal Register notices, Section 7 consultations and other actions transpire since the arrival of DAS MacDonald in the Department of the Interior.

Before I relay the results of the review, I'd like to outline what was requested and how the review ensued. The roles and responsibilities of the Assistant Secretary's office include review of documents to ensure conformance with established policy, and the authority to examine current policies and execute changes to those policies based on legal interpretations. The gathering and analysis of any science used is the responsibility of the Director of the FWS, working through the career scientists in the bureau. A clear line of separation of duties is imperative if we are to maintain scientific credibility and the trust of the American people.

When I arrived as the Director in October, 2005, I began to examine how ESA packages were reviewed in Washington, both in the FWS and by DAS MacDonald on behalf of the Assistant Secretary. I became troubled by the apparent lack of clarity in the division of responsibilities and had several meetings with the Assistant Secretary and his DAS staff. You were confirmed and appointed to the position of Deputy Secretary very shortly after my arrival, and we began to discuss ways to clarify and improve both the quality of ESA documents and the review process for publication.

With your concurrence, on February 3, 2006, I sent a memorandum to the Directorate of the FWS explaining my views on how science should be used in making recommendations and decisions regarding ESA actions, as well as the process we would use in review and comment as the science was examined from a policy and legal perspective (Attachment 1). On February 7, 2006, I met with Acting Assistant Secretary Hogan and DAS's MacDonald, Smith and Hoffman to discuss how the division

of responsibilities should be carried out. The results of that meeting were successful from both a team concept and integrity of science approach. My email of February 8, 2006 (Attachment 2), documented the agreements made and reiterated my thanks for the cooperative manner in which the subjects of science and policy were fostered and appreciated. I also want to thank you for your support and involvement to bring better working relationships within the Department of the Interior on very important issues under the ESA.

In May, 2007, I visited California and had discussions with CNO Director Steve Thompson and his key field office leaders regarding next steps in re-evaluating any ESA packages that might have been inappropriately modified by DAS MacDonald, as had been discussed with you prior to my visit. Director Thompson had already begun discussions with his Regional leadership on this topic, so our discussions were informed by good input from the field. You subsequently asked me to embark on a full review of documents under the ESA subsequent to DAS MacDonald's arrival. I directed each Regional Director to involve their field office leadership to determine what, if any, ESA **decisions** had been modified or changed by DAS MacDonald inappropriately. This directive recognized two important points: 1) while there may have been inappropriate actions by DAS MacDonald in her interface with our career employees, the most important question to answer rests with decisions that were changed and the health of species that may have been undermined; and 2) the directive recognized that the Office of the Assistant Secretary **does** have the authority and privilege to be involved in policy interpretation and implementation. Policies established at the Assistant Secretary level that involve interpretation of law are both appropriate and legitimate in the operations of the Department of the Interior.

The nationwide review performed by the Regions identified ten decision actions that, in the opinion of the Regions, should be re-examined to ensure a final decision that is clear and comports with best available science. My discussions with the Regional Directors also revealed that on several occasions the Regional Director defended the FWS proposal and resisted changes that might have been inappropriate. I held a conference call on July 11, 2007, to have a final discussion with all Regional Directors prior to my transmittal of this memorandum. Each recommendation was discussed with the appropriate Regional Director to ensure they supported their recommendations and that no other packages should be added. It was agreed by all that the list below represents a comprehensive review and the final recommendations of ESA actions that should be re-evaluated.

CALIFORNIA/NEVADA OPERATIONS OFFICE

- Arroyo toad Critical Habitat
- California red-legged frog Critical Habitat

PACIFIC REGION

- Marbled murrelet 5-year review
- Bull trout Critical Habitat
- 12 species of picture wing flies Critical Habitat

ROCKY MOUNTAIN REGION

- White-tailed prairie dog 90-day finding
- Lynx Critical Habitat
- Preble's meadow jumping mouse 12-month finding/proposed delisting
- Preble's meadow jumping mouse Critical Habitat

SOUTHWEST REGION

- Southwest willow flycatcher Critical Habitat

This constitutes my report to you in answer to your assignment to review ESA packages completed under the tenure of DAS MacDonald. My intent is to instruct the Regions to, within a reasonable time, re-evaluate the questions posed under each of these actions. The exact timeline will depend on appropriations, court decisions and other factors that affect workload. I do, however, expect these efforts to receive as high priority as can be given.

I hope this fulfils your request for a review and meets your expectations. I want to thank the employees of the Service for due diligence in completing this assignment, and also to you for your professional approach and support of the ESA. I am available to discuss this with you at your convenience.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

911 NE. 11th Avenue
Portland, Oregon 97232-4181

IN REPLY REFER TO:

FWS/R1/RD

JUL 1 9 2007

Memorandum

To: Director, Fish and Wildlife Service
Washington, DC

From: Regional Director, Pacific Region
Portland, Oregon

Subject: Review of Service Decisions under the Endangered Species Act,
Clarification

Subsequent to the recent telephone conversation to clarify possible concerns the Service may have with involvement of a former Deputy Assistant Secretary in important Endangered Species Act decisions made by the Pacific Region during the years 2001 through 2006, I have reviewed our June 28, 2007, submission. I note that in our memorandum we state "change in science that may compromise action taken in the future, or where the Service's recommendation/decision was based on a policy interpretation made by the DAS."

As you clarified during the conversation, a Deputy Assistant Secretary for Fish, Wildlife, and Parks has the responsibility to make policy interpretations. As we noted in the June 28, 2007, memorandum, our reservations regarding decisions made for both marbled murrelet and bull trout were in regard to policy decisions. Our reservations concerning the bull trout final rule that designated critical habitat concerned policy decisions regarding the exclusion of Federal lands from designation of critical habitat. Our reservations regarding the interpretation of the five-year status review for the marbled murrelet involved a policy call on the use of an international border as a test for whether or not a population is distinct as a distinct population segment. Neither of these decisions should have been included in the Pacific Region's recommendations as neither decision involved the inappropriate use of science.

Therefore, the Pacific Region only wishes to recommend revisiting the proposed designation of critical habitat for the 12 species of picture wing flies as actions that need reconsideration in the Pacific Region. I sincerely apologize for the confusion our earlier submission may cause. Please call me if you have any questions regarding our clarification and again, my apology.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



July 20, 2007

MEMORANDUM

To: Deputy Secretary

From: Director, U.S. Fish and Wildlife Service

Subject: Review of Service Decisions under the Endangered Species Act,
Clarification

This memorandum is to revise the July 12, 2007, memorandum I sent you on the subject of the review of documents under the Endangered Species Act. Yesterday, July 19, Regional Director Ren Lohofener, Pacific Region, sent me a memorandum stating that two species from the Pacific Region were included in the July 12, 2007, memorandum in error; the marbled murrelet and the bull trout. In his recommendation to me on June 28, 2007, the Regional Director concluded that the determinations for the marbled murrelet and the bull trout were based on the interpretation of policy by the Deputy Assistant Secretary. He went on to say in his July 19 memorandum that "Neither of these decisions should have been included in the Pacific Region's recommendations as neither decision involved the inappropriate use of science." Therefore, the recommendation of the Pacific Region is now modified to only include the proposed designation of critical habitat for the 12 species of picture wing flies as actions that need to be re-evaluated.

I have allowed the inclusion or exclusion of all actions based solely on the review by the Regional Directors and their regional and field leadership. As such, my report to you is modified to remove the marbled murrelet and bull trout actions previously identified from the list to be re-evaluated.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

911 NE. 11th Avenue
Portland, Oregon 97232-4181

IN REPLY REFER TO:

FWS/R1/AES

JUN 28 2007

To: Director, Fish and Wildlife Service
Washington, DC

From: *Acting* Regional Director, Region 1
Portland, Oregon

Subject: Review of Service Decisions under the Endangered Species Act Involving the Deputy Assistant Secretary, Fish and Wildlife and Parks, in Region 1 (2001-2006)

As requested, we have evaluated the involvement of Julie MacDonald, former Deputy Assistant Secretary (DAS) for Fish and Wildlife and Parks, in important decisions made by the U.S. Fish and Wildlife Service (Service) in Region 1 during the years 2001 to 2006. Specifically, we evaluated past Service decisions to determine if the DAS, in her oversight capacity as a Departmental official, modified the science and/or the Service's recommendation/position on final actions or decisions.

We focused on the important and controversial issues and decisions of 2001 through 2006. During that time period, the DAS had a wide range of oversight and reviewed and commented on numerous issues; however, we limited our review to identify only those actions where the DAS oversight resulted in an inappropriate change in science that may compromise actions taken in the future, or where the Service's recommendation/decision was changed based on a policy interpretation made by the DAS.

During the time period of this review, Region 1 began implementing structured decision making, particularly on the more controversial issues in the Region. We held panels with recognized experts and Service managers to develop sound, fully-informed decisions using the best science available. We used objective criteria to determine scientific expertise, and documented the panel's discussions in order to write recommendations that were sound and transparent. Assistant Secretary Manson was supportive of this approach, and we benefited from its application when defending our use of the science and our conclusions with the DAS.

The following represents a list of those actions where the Region believes the DAS oversight changed the Service's position.

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Marbled Murrelet (*Brachyramphus marmoratus*)

The Service conducted a 5-year review on this species in 2004. We used structured decision making for the 5-year review, working with experts on the marbled murrelet, and making a recommendation that fully considered the risks and uncertainties. The Service recommended that the listing status remain the same, and supported the listing as a distinct population segment (DPS). The Assistant Secretary and the DAS subsequently reversed Region 1's DPS determination, stating that the marbled murrelet in the lower 48 was not a DPS, because it did not satisfy the DPS policy's discreteness criteria, and thus was not a listable entity. Since this was based upon an interpretation of the DPS policy made by the Department, the Regional Director signed the 5-year review in support of the Department's position. The Office of the Solicitor review of the proposed delisting rule suggested that the conclusion reached by the Department on the 5-year review was based on an incorrect "discreteness" analysis under the DPS policy, as it compared current levels of legal protection in the United States (Endangered Species Act) and Canada (Species at Risk Act), rather than comparing the levels that would exist if the species were not listed in the United States.

Bull Trout (*Salvelinus confluentus*)

The Service voluntarily remanded a final rule designating critical habitat because of extensive exclusions made by the DAS, with little or no justification in the administrative record supporting those exclusions. On remand, the Service provided to the Department a rule that proposed a number of exclusions; however, we did not propose to exclude any Federal lands. The DAS became heavily involved, directing an approach that involved reviewing the existing management of Federal lands in support of the bull trout. Where special management for bull trout was practiced, we excluded those Federal lands based on a very small margin of benefits associated with the saving of administrative costs of conducting adverse modification analysis in future consultations. Provided the Department will continue to utilize this approach to critical habitat, we don't recommend redoing this rule. In addition, the rule is being litigated, and a decision is expected from the courts relatively soon and we expect exclusions of Federal lands to be addressed. Should the courts not support the approach to exclusions, this would have ramifications for future critical habitat rules, including marbled murrelet and northern spotted owl.

12 Species of Picture Wing Flies

The DAS gave direction that the critical habitat rule for these species consist of no more than 1 acre per species. The Service published the proposed rule based on that direction. We received numerous peer review comments questioning our methodology and lack of explanation for the approach. The DAS also provided comments on the rule, supporting the peer review comments and directing that we provide an adequate response to those comments in the final rule. Instead, we have chosen to re-propose the designation rule using scientifically based criteria prior to finalizing the rule.

Thank you for the opportunity to comment on this matter. If you have any questions, please contact Terry Rabot at 503-231-6151.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

P.O. Box 1306
Albuquerque, New Mexico 87103
<http://ifw2es.fws.gov>

In Reply Refer To:
R2/ES-TE/031911

JUN 28 2007

Memorandum

To: Director

From: **ACTING** Regional Director, Region 2

Subject: Region 2 Decisions Influenced by Julie MacDonald

We are providing the following assessment in response to your request for a review of all Region 2 decisions in which former Deputy Assistant Secretary (DAS) Julie MacDonald was involved. Specifically, we were asked to evaluate past decisions for instances where the DAS may have influenced the scientific analysis resulting in a change in the outcome of the decision. We developed a list of all rules and findings made in this Region between 2001 and 2007 and, in consultation with our Field Offices, examined the record to determine which actions may have been influenced by the DAS and the nature of her influence. We then reviewed all actions with substantial intervention by the DAS with two criteria in mind: (1) the administrative record shows that there was a definitively different outcome because of intervention by the DAS contradicting the science; and/or (2) whether the change in outcome resulted in a substantial change to the conservation of the species.

We have identified the following action that may meet the criteria detailed above:

Mexican Garter Snake; Not Warranted 12-Month Finding (September 26, 2006; 71 FR 56228)

Background: The administrative record documents that the Arizona Field Office drafted a 12-month finding that the species warranted listing, but that listing was precluded by higher listing priorities. The Regional Office agreed with that determination and sent a draft finding of warranted, but precluded to the Washington Office. It is clear from the administrative record that the DAS was involved in changes to drafts of the finding and that the determination was changed to being not warranted. However, the magnitude of her involvement in changing the outcome is not clear.

The significant portion of the range analysis in the finding was published before the Solicitor issued a memorandum opinion explaining the legal interpretation of what the term significant portion of the range means with respect to the Endangered Species Act (Act). The analysis in the finding does not comply with the Service's current position.

Recommendation: Because the definitively different outcome may have been due to intervention by the DAS contradicting the science and the significant portion of the range discussion is now inconsistent with the Solicitor's opinion, we recommend that the Service voluntarily revisit our determination of not warranted.

Other Decisions Reviewed

For the actions listed below, we believe that the administrative record shows that the DAS provided input or direction with respect to policy or economic issues. However, the change in outcome did not result in a substantial change to the conservation of the species. Further, remanding the actions would not be an efficient use of staff time and resources as it would not benefit the conservation of the species.

Comal Springs invertebrates proposed designation of critical habitat. The DAS made a policy decision to eliminate subterranean waters from critical habitat designation because they lacked the primary constituent elements necessary for the species. That action removed approximately 400 acres from critical habitat designation that were in the draft proposed rule. However, activities with a federal nexus that are conducted in areas outside the designated critical habitat may still affect critical habitat, subject to consultation requirements under section 7 of the Act, including actions that may occur within the Edwards Aquifer.

Southwestern willow flycatcher proposed designation of critical habitat. Scientific information indicates that almost all southwestern willow flycatchers return to re-establish breeding territories in habitat within 25 miles from their previous breeding or nascent location. The DAS made a policy decision to define dispersal distance as the maximum distance the majority of individual birds disperse and directed the Service to apply that definition in designating critical habitat. As a consequence, the Service reduced the extent of critical habitat from within 25 miles to within 18 miles of large breeding populations. We do not believe that this has affected recovery efforts for the bird.

Spikedace and loach minnow proposed designation of critical habitat. The DAS made a policy decision to define occupied habitat for the two fish as occupied within the previous ten years, which reduced the area of critical habitat that was proposed and eventually designated. We do not believe that this has affected our recovery efforts for the fish.

To: Director

From: Regional Director, Region 3

Re: Review of Endangered Species Act Actions

Date: July 3, 2007

At the end of the Regional Director conference call with Regional Director on May 30, 2007, you asked that each RD send you a memo documenting our opinions/eterminations regarding whether any ESA action from the region during the past several years merits re-examination based on the outcome being altered by the Department of the Interior in a manner that may not reflect the best available science. Region 3 reviewed our records and we do not have any ESA actions that merit re-examination in this situation. We informed your office of this determination on June 5, 2007, and are memorializing it in this memorandum.

/s/ Robyn Thorson
Regional Director, Midwest Region
U.S. Fish and Wildlife Service



United States Department of the Interior

FISH AND WILDLIFE SERVICE


1875 Century Boulevard
Atlanta, Georgia 30345

In Reply Refer To:
FWS/R4/ES/031506

JUN 29 2007

Memorandum

To: Director (D)

From:  Regional Director, Southeast Region

Subject: Review of Past Endangered Species Act Actions

We were requested by the Director to evaluate the involvement of the Deputy Assistant Secretary for Fish and Wildlife and Parks (DAS) in the important Endangered Species Act (ESA) decisions made by the Fish and Wildlife Service in the Southeast Region during the years 2001 through 2007. We evaluated the administrative records of past Service decisions to determine if the DAS was involved in or commented on our final actions or decisions and whether the DAS modified our position on the scientific basis for final actions or decisions. We found two ESA actions in which there was DAS involvement.

In the first ESA action, the DAS requested changes that modified the ultimate outcome of the action. This action was the designation of critical habitat for the Gulf sturgeon. The DAS requested the exclusion of major shipping channels from the final designation based on economic and other impacts. Units 2, 8, and 9 were affected by the exclusion (68 FR 13369, March 19, 2003). The Gulf sturgeon has joint jurisdiction between the Service and the National Marine Fisheries Service. Unit 2 is under the Service's jurisdiction and Units 8 and 9 are under the National Marine Fisheries Service's jurisdiction. The shipping channels undergo regular dredging and are not expected to maintain the primary constituent elements originally identified in them. Therefore, we do not believe that the exclusion of these areas resulted in a meaningful impact to the conservation of the Gulf sturgeon and we do not find it necessary to revisit this critical habitat designation.

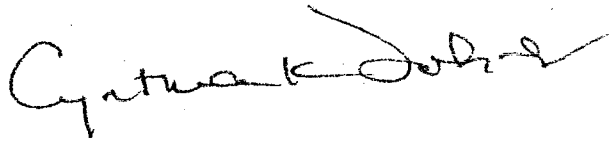
In another case, the DAS had some involvement in an informal consultation between the Service and Navy on the Navy's proposed Outlying Landing Field in North Carolina. The DAS was apparently contacted by the Navy regarding communications ongoing between our Raleigh Field Office and the Navy. During those communications, the Service had provided to the Navy our thoughts on potential, future "Reasonable and Prudent Measures" (RPMs) that might be included in a future biological opinion on red wolves. At this point, formal consultation had not even been initiated. However, the Navy apparently contacted the DAS and raised objections to these potential RPMs. The DAS requested a meeting with the Regional Director which occurred during February of 2007. During the meeting, the DAS indicated that the Navy alleged: 1) the

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Field Office was not responsive to them; 2) the Field Office was communicating with the press instead of the Navy; 3) the Service had previously concurred with a "not likely to adversely affect" determination and there should be no need for a formal consultation; and 4) the draft RPMs under discussion were unreasonable. We explained the history of the informal consultation, the new information on red wolves that no longer allowed us to concur with a not likely to adversely affect determination, and the progress we had made regarding agreement with the Navy on potential, future RPMs (i.e., our contacts in the Navy were no longer objecting to the proposed RPMs). The DAS indicated she would have the Navy contact the Regional Director if further questions arose. The final outcome of this consultation was not modified by the DAS and therefore no action is recommended.

It is our understanding that legal, economic, procedural, and policy interpretations and Departmental positions regarding listing and critical habitat remain in place. Therefore, consistent with the discretion afforded the Secretary of the Interior under the ESA, we do not recommend revisiting any of the Southeast Region's other listing and critical habitat designations at this time unless the Department conducts a formal policy review and issues guidance that modifies current practice.

If you have any questions regarding our submission, please contact Noreen Walsh, Assistant Regional Director, Ecological Services, at 404/679-7085.

A handwritten signature in black ink, appearing to read "Cynthia Walsh", is written in a cursive style across the lower right portion of the page.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

300 Westgate Center Drive
Hadley, MA 01035-9589



In Reply Refer To:
FWS/R5/ES/SEN003178

JUN 28 2007

Memorandum

To: Director

From: Regional Director, Region 5

Subject: Request for List of Actions Influenced by Julie MacDonald

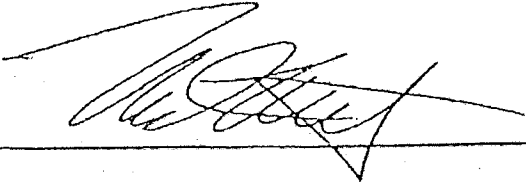
This is in response to your request for a list of Region 5 (Region) Endangered Species actions since 2002 that were influenced by Julie MacDonald, former Deputy Assistant Secretary, Fish and Wildlife and Parks. Region 5 has identified no decisions or recommended decisions that were changed as a result of direction, interest, or other involvement by Ms. MacDonald. Below is a description of the involvement by Ms. MacDonald in Region 5 Endangered Species actions since 2002.

- **Atlantic Salmon Aquaculture Biological Opinion (BO):** A BO covering impacts to endangered Atlantic salmon from commercial salmon aquaculture operations in Maine was submitted to Ms. MacDonald for clearance in the fall of 2003. Ms. MacDonald questioned the BO in depth, but never prescribed any particular outcome. However, she did not allow the Region to sign the final joint agency BO along with the National Marine Fisheries Service (NMFS), which has joint jurisdiction over Atlantic salmon. NMFS eventually signed and issued the BO on their own in November 2003.
- **Massey Energy BO:** In 2004 to 2005, the Region prepared a draft jeopardy BO covering the impacts to the endangered Indiana bat from two mountaintop mining projects in West Virginia. Ms. MacDonald and others voiced concerns about the scientific and policy support for the draft jeopardy conclusion. As a result, the Region convened a panel of Indiana bat experts to obtain individual, independent input. Additionally, new information was obtained about the existing, degraded habitat site conditions. As a result of the expert panel workshop and the new information, the Region revised the draft opinion to a non-jeopardy BO.
- **American Eel 12-Month Petition Finding:** A negative 12-month finding on a petition to list the American eel was forwarded to Ms. MacDonald in late 2006. In late January, shortly before the settlement agreement deadline for publication, Ms. MacDonald strongly objected to the negative finding and complained that she was not informed earlier of the deadline.

Acknowledging that there was not enough time to revise the negative finding to a positive finding, she forwarded the document to the Executive Secretariat with an attached memorandum expressing her objection and advised that the finding be revisited after publication. The Region submitted a response to Ms. MacDonald's memorandum explaining that all of the issues identified in the memorandum were fully addressed in the finding. The negative finding was published, and the Region received no direction to revisit it.

Although we understand Ms. MacDonald was involved in development of general policy guidance that may have influenced Endangered Species decisions, we cannot establish that any Region 5 decisions would have been different under previous policy guidance. The accounts described above are supported by information in the administrative records for these decisions.

If you have any questions, please contact Michael G. Thabault, Assistant Regional Director-Ecological Services, at 413-253-8304, or Martin Miller, Chief, Division of Endangered Species, at 413-253-8615.





United States Department of the Interior



FISH AND WILDLIFE SERVICE Mountain-Prairie Region

IN REPLY REFER TO:

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FR-ES

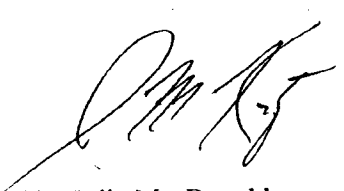
MAILING ADDRESS:
P.O. Box 25486, DFC
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Boulevard
Lakewood, Colorado 80228-1807

JUN 21 2007

Memorandum

To: Director

From: Regional Director, Region 6 

Subject: Region 6 Decisions Influenced by Julie MacDonald

In response to your request for a review of all decisions that may have been affected by former Deputy Assistant Secretary Julie MacDonald, I have consulted with our field and regional staff to develop the following assessment for Region 6:

WHITE-TAILED PRAIRIE DOG; 90-DAY FINDING, NOT SUBSTANTIAL (NOVEMBER 2004)

Field Office Input - The Utah Field Office drafted a 90-day finding on this petition that concluded that the information presented by the petitioners was substantial and warranted further review of the species' status. On October 26, 2004, the Field Office received comments and questions on the finding from Ms. MacDonald (via Washington Office and Regional Office email). We responded to comments from Ms. MacDonald by email and conference call on October 29, 2004. In that conference call, the Utah Field Office responded to a series of specific questions from Ms. MacDonald and defended the positive finding of substantial information. During the course of that call the Field Office did not suggest or support modification of the finding to "not substantial." Subsequently, we received an email from the Regional Office dated November 1, 2004, advising the Field Office that Ms. MacDonald and the Department wanted to go with a not substantial 90-day finding. Ms. MacDonald "suggested" we go with her version of the document sent to us the previous week. In accordance with Department direction, the Washington Office revised the final draft document and finalized it for *Federal Register* publication, incorporating Ms. MacDonald's edits.

Regional Office Input - The finding was surmised as "substantial" by the Field Office, Regional Office, and Washington Office. The change to not substantial only occurred at Ms. MacDonald's direction.

Recommended Corrective Action - A Notice of Intent to sue on the "not substantial" 90-day finding has been filed. We recommend settling to do a 12-month finding.

LYNX; FINAL CRITICAL HABITAT DESIGNATION (NOVEMBER 2005)

Field Office Input - Despite early briefings and approval of our intended approach for proposing critical habitat for the lynx, 4 days before the court-ordered deadline (November 1, 2005) for the proposed critical habitat designation for the lynx, Ms. MacDonald ordered all U.S. Forest Service lands to be removed from the proposed designation. This significant change substantially reduced the size of the areas proposed for designation. As a result, the proposed rule contained errors that were published in the *Federal Register* because we did not have time to make all the necessary corrections to conform to Ms. MacDonald's direction before the court deadline.

In 2006, while we were developing the final critical habitat rule for the lynx, Ms. MacDonald met with representatives of Plum Creek Timber Company, the Maine Forest Products Council, and members of Maine's congressional delegation regarding the designation. Plum Creek and the Maine Forest Products Council were opposed to any designation on their properties. Presumably anticipating that Ms. MacDonald would not want Plum Creek lands designated as critical habitat, the Washington Office verbally directed that critical habitat would not be designated on Plum Creek properties. Because of the inequity that would result if the only private commercial forest land excluded from the designation was Plum Creek property, we determined that all private commercial forest lands should be excluded thereby maintaining cooperative working relationships with landowners.

Additionally, the GIS Specialist in our North Dakota Field Office provided mapping support for lynx critical habitat. The Specialist participated in a conference call with the team and Ms. MacDonald at the proposal stage of the process, and after maps had been prepared. On a pre-call, the team discussed their anxiety that Ms. MacDonald would not be happy with the large area being proposed. This employee's perception was that the project team felt that to continue to move the package forward and meet court ordered deadlines, that Ms. MacDonald would want to hear that areas of habitat mapped and proposed as critical could be removed later if suitable lynx management plans were developed, and this is what she was told during the call.

As this package was being developed, large tracts of critical habitat were removed from what was initially mapped. Although there were legitimate reasons for some modifications, the North Dakota Field Office employee had the impression that if a large landowner (whether private or governmental) felt that Canada lynx critical habitat designation would adversely impact their current land use, a verbal promise to manage for Canada lynx was enough to have their land removed from designation and mapping.

Regional Office Input - We concur with the Field Office's characterization. The Department of the Interior has wide latitude under section 4(b)(2) of the Act to exclude areas from critical habitat if the costs outweigh the benefits, provided the exclusion would not result in extinction. However, the majority of acres (Forest Service and BLM lands) were excluded under 3(5)(A) of the Act with little justification (i.e., did not show that special management was supported by existing finalized plans) and thus did not conform to the statutory definition of critical habitat.

Recommended Corrective Action - A complaint on the critical habitat designation has been added to existing lynx litigation in Judge Kessler's court. We may want to consider remanding the critical habitat designation.

LYNX CONSERVATION AGREEMENT BETWEEN FISH AND WILDLIFE SERVICE AND FOREST SERVICE

Field Office Input - In 2005, Ms. MacDonald and her counterpart in the Department of Agriculture, Mr. Dave Tenney, became interested in the Lynx Conservation Agreement, which provided guidance on where the Forest Service would apply the Lynx Conservation Assessment and Strategy (LCAS). Ms. MacDonald and Mr. Tenney wanted to ensure that the LCAS was only applied on National Forest lands that had strong evidence of being "occupied" by lynx. On conference calls, Ms. MacDonald first stated that a team of biologists would be allowed to define what occupied habitat meant for lynx, the team was not allowed to finalize the definition until it was narrowed substantially. The narrow definition of "occupied" substantially reduced the amount of National Forest lands on which the LCAS would be applied by considering some areas to be unoccupied when thorough surveys had not been conducted or a long time had intervened since surveys were last conducted. Because lynx can move large distances, expand into new suitable habitat, and can be difficult to detect, the narrow definition may result in adverse effects or take of lynx occurring in lands no longer considered to be occupied.

Regional Office Input - Concur with Field Office characterization.

Recommended Corrective Action - We recommend working with the Forest Service to revisit the definition of occupied lynx habitat.

PREBLE'S MEADOW JUMPING MOUSE; 12-MONTH FINDING, RESULTING IN PROPOSAL TO DELIST (FEBRUARY 2005)

Field Office Input - Ms. MacDonald was involved in the decision to move forward with a proposal to delist the Preble's meadow jumping mouse based on a preliminary genetics report from Dr. Rob Ramey. At the time of the proposal, the report had not been accepted for publication and peer-reviews had identified major issues with the report. This led Region 6 to commission an independent genetics study by Dr. Tim King. Dr. King's results proved contrary to Dr. Ramey's and were subsequently upheld by an expert panel.

Regional Office Input - Concur with Field Office characterization.

Recommended Corrective Action - We have proposed settlement dates to Wyoming to either re-propose delisting or withdraw the proposed delisting based on the outcome of our threats assessment and significant portion of the range analysis by fall 2007. This process should allow for a scientifically based assessment of the status of the mouse.

PREBLE'S MEADOW JUMPING MOUSE; FINAL CRITICAL HABITAT DESIGNATION (JUNE 2003)

Field Office Input - Days before the final rule was due at the *Federal Register*, Ms. MacDonald and Judge Manson reviewed the rule and directed the Washington Office to remove all critical habitat from three Counties in Colorado (with the exception of Federal lands in Douglas County within the South Platte critical habitat unit) that were in the process of developing Habitat Conservation Plans (HCPs). Due to the lateness of the timing, the final rule contained many inconsistencies regarding critical habitat in Boulder, El Paso, and Douglas Counties. In the 4 years since the critical habitat rule was published, only Douglas County has completed an HCP, and their final HCP does not cover any private party actions.

Regional Office Input - The Department of the Interior has wide latitude under section 4(b)(2) of the Act to exclude areas from critical habitat if the costs outweigh the benefits, provided the exclusion would not result in extinction. However, several counties were also excluded under 3(5)(A) of the Act because they were planning on developing County-wide HCPs. The fact that these HCPs have not been developed four years later shows that the exclusions had little justification (i.e., did not show that special management was supported by existing finalized plans) and thus did not conform to the statutory definition of critical habitat.

Recommended Corrective Action - None required, pending the outcome of our threats assessment. If our threats assessment determines that the mouse should remain listed, we should revisit our critical habitat designation at that time.

OTHER DECISIONS REVIEWED

In addition to the above, I reviewed the following decisions that Ms. MacDonald was involved in or was alleged to be involved in, and determined that despite her input, the final decision was made by the Service. We have documented these projects in more detail in a memorandum to the file, which is available at your request.

Involved, Did Not Affect Outcome:

- Gunnison Prairie-Dog 90-day "not substantial" finding
- Salt Creek tiger beetle proposed critical habitat
- Arctic grayling distinct population segment determination
- Greater sage-grouse 12-month not warranted finding
- Black-tailed prairie dog candidate removal
- Gunnison sage-grouse 12-month not warranted finding

No Involvement:

- Topeka shiner critical habitat designation
- Boreal toad withdrawal from candidate list
- Wolverine "not substantial" 90-day finding
- Mountain plover withdrawal from candidate list

The Washington Office Endangered Species Division also may add some valuable insights to this report. Please do not hesitate to contact me with any questions you may have.



IN REPLY REFER TO:

United States Department of the Interior

FISH AND WILDLIFE SERVICE

1011 E. Tudor Rd.

Anchorage, Alaska 99503-6199

FWS/RD

JUL 3 2007

Memorandum

To: Acting Assistant Director – Endangered Species

From: Regional Director – Region 7 *James O. Wilson*

Subject: Endangered Special Act Decisions Review Results

Region 7 has reviewed our ESA decisions made over the time period specified, and we found no decisions requiring re-examination. Decisions reviewed included the sea otter (southwest DPS) listing; yellow-billed loon and long-tailed duck petition findings; polar bear 12 month finding and proposal; designation of Kittlitz murrelett as a candidate species and evaluation of its LPN; and other ESA consultation and recovery decisions.