U.S. Senate Committee on Environment & Public Works
Hearing Statements

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On behalf of the Public Lands Council and the National Cattlemen's Beef Association
Consulting process required by Section 7 of the Endangered Species Act.

Introduction

Good morning, Chairman Crapo and Distinguished Members of this subcommittee, my name is Jim Chilton and I am a rancher from Arivaca, Arizona. My family first started ranching in Arizona in 1888. Arivaca, however, goes back much further than that. Father Keno first founded the town in 1690 when it became a center for grazing cattle he brought with him from Mexico. Today, the town has a population of 1500 people. The largest employer in the town and surrounding area is ranching. My father, brother, and I run approximately 1,250 cattle on 85,000 acres: 48,000 acres of Arizona school trust lands; 35,000 acres of Forest Service land, and 2,000 private deeded acres. I appreciate the opportunity to be here today to provide my story on section 7 consultation of the Endangered Species Act to the Committee on behalf of the sheep and cattle rancher members of the Public Lands Council and the National Cattlemen's Beef Association.

The Public Lands Council (PLC) represents sheep and cattle ranchers in 15 western states whose livelihood and families have depended on federal grazing permits dating back to the beginning of last century. The National Cattlemen's Beef Association (NCBA) is the trade association of America's cattle farmers and ranchers, and the marketing organization for the largest segment of the nation's food and fiber industry. Both PLC and the NCBA strive to create a stable regulatory environment in which our members can thrive.

Ranching out west has been part of the landscape, the economy, and the culture for approximately three centuries. About 214 of the 262 million acres managed by BLM are classified as "rangelands," as are 76 million of the 191 million acres managed by the Forest Service. More than 23,000 permittees, their families, and their employees manage livestock to harvest the annually renewed grass resource grown on this land. Western

ranching operations provide important additional benefits to the Nation by helping to preserve open space and reliable waters for wildlife, by serving as recharge areas for groundwater, and by supporting the economic infrastructure for rural communities. Our policy is to support the multiple use and sustained yield of the resources and services from our public lands which we firmly believe brings the greatest benefit to the largest number of Americans.

My Story

Federal land management agencies so seriously misapplied the Endangered Species Act (ESA) to the land in my federal allotments that I unfortunately was forced to conclude that the Forest Service and the Fish and Wildlife Service (FWS) were using the Act to force me out of the business of ranching on historic grazing lands. The agencies took these actions even though thirty years of data in the Coronado National Forest files, detailed production and utilization studies by nationally recognized range management scientists, and reports by numerous other researchers showed my allotments to be currently in good condition and are on an upward trend in which an exceptional number of high value native climax species have been preserved. This struck me as deeply unfair, and I was not willing to accept the judgment of their actions without a fight.

I have spent hundreds of thousands of dollars on lawyers and litigation and tens of thousands more to have respected range scientists and specialists assemble the best site-specific data possible. We spent countless hours of work with top-ranking consultants, days and weeks of lost time in meetings and legal wrangling, and months assembling a mountain of scientific evidence to show that cattle grazing does not adversely impact the Sonora chub or the lesser long-nosed bat. Even though many other permittees may face similar challenges from the land managing agencies, not all grazing permittees facing similar federal actions are able to mount this kind of elaborate defense which ultimately proved successful.

Section 7 Consultation: What Went Wrong

In 1998, a Forest Service biologist asserted that grazing on my allotment ("the Montana" allotment) was likely to adversely affect the Sonora chub, a listed species. The adverse call was astonishing. In 1997, the Forest Service removed 20 acres from the Montana allotment along the "California Dry Gulch" adjoining the border to protect the chub. The excluded area had lush riparian growth and had been part of a successful experiment-in-progress to demonstrate that rest-rotation grazing could enhance riparian condition. In Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service, 273 F.3d 1229 (9th Cir. 2001), the court considered the very actions addressed today and found, among other things, that the chub "are essentially confined to the California Gulch, an area from which livestock are excluded." The Southwestern Naturalist, June 1990, describes the Sonora chub as abundant in Mexico where the chub dominates its 5,000 square mile watershed and constitutes 99.97% of the total number of fish and 96.9% of the biomass of

the species.

In a similar vein, a Forest Service botanist concluded in 1998 that cattle grazing on the Montana allotment were likely to adversely affect the lesser long-nosed bat, a listed species, even though the bat had never been found on the allotment. One dead bat was found 10 miles east of the allotment in 1959, but that is the extent to which the migratory bat has ever had contact with the Montana allotment. Research has shown that these bats are not food-limited even on the ranches where they have roost caves. No roost sites occur on our allotment.

Relying on his scientists, the Forest Supervisor signed a biological assessment for the Montana allotment in November 1998, asserting that grazing could harm the minnow and bat. Once the consultation process commenced, the Forest Service and FWS refused to allow me or my representatives to participate in meetings or other discussions prior to the issuance of the draft FWS Biological Opinion. We were excluded even though we had applicant status for the consultation. The FWS similarly excluded ranchers from the consultation process in the Sierra Nevada consultation process. Of course, the draft Biological Opinion represents a largely settled judgment by the agency, which may be further adjusted in response to public comments but is rarely ever reversed.

Nevertheless, I had my team of lawyers, range, riparian, soils, and fish experts submit comments on the draft Opinion. The final Biological Opinion issued by the FWS in April 1999 largely ignored my submitted comments in the sense that they did not respond substantively to the points. The conditions included by the FWS in the Opinion to benefit the chub and bat added an estimated $25,000 of expenses annually in managing the allotments. The Forest Service issued a Montana Allotment Management Plan in September 1999 that was based on the Biological Opinion. The plan allowed for my cattle to use 45% of the forage and leave 55% for wildlife and esthetics. The plan also replaced the fixed permit number of 500 cows with a "range" of 400 to 500 cows per year (subject to annual determination). These restrictions decreased the market value of the allotment by approximately $150,000.

A federal district court decision struck down the Biological Opinion in December 2000. Nevertheless, the FWS and Forest Service reinitiated consultation on the chub and bat. A new draft Biological Opinion was issued by the FWS in March 2001 eliminated grazing on 1,200 acres along the California Dry Gulch to protect the chub. I persuaded the FWS Field Supervisor through discussions and the presentation of exhaustive documentation that the Dry Gulch is an intermittent and ephemeral stream, not the perennial stream repeatedly referred to in the draft Biological Opinion. The Supervisor ultimately restored the 1,200 acres that had been withdrawn from grazing. The Ninth Circuit issued the Arizona Cattle Growers' opinion in 2001 holding that the FWS lacks authority to impose conditions in permits for listed species on land where the species had not been found.

Section 7 Consultation: Possible Solutions

1. Sound Science

Perhaps the most obvious failure in the ordeal described above is that the agencies failed to use sound science, which in this case really equates with common sense, when they embarked on consultation for the Sonora chub and the lesser long-nosed bat. These species were never found on my allotments, yet the government was prepared to impose onerous restrictions on my livelihood to help them.

Sound science starts with disinterested evaluation of species listing and delisting proposals by objective scientists utilizing peer review of their work. FWS employees can have their judgment obscured at times by their institutional interest in administering the ESA. Because of the tremendous impact ESA can have on economics, communities, and local land use generally, we believe additional procedures are in order to ensure that no interest is unfairly minimized or excluded prior to a decision. In particular, we would like the ESA to be amended to require the National Academy of Science or some other reputable third party to concur in FWS decisions to list or delist species or in the contents of Biological Opinions.

2. Applicant Status

Another major failure of the consultation process in my instance was the refusal on the parts of the agencies to allow myself, who was legally recognized as having applicant status in the consultation process under FWS regulations, or any members of my legal or scientific team to participate in any Forest Service and/or FWS discussions, meetings, or deliberations prior to the issuance of the draft FWS opinion. Numerous times my lawyers asserted that under the law and under FWS regulations they had the right to participate in the process as applicants—and still we were denied access to the discussions about my allotment. By not allowing me to be there, I feel that decisions were not made based on fact, but instead were based on irrelevant factors.

I would have wanted my oral testimony to be heard and taken into account by agency officials in the Forest Service and the Fish and Wildlife Service as they made decisions concerning the future of my livelihood on the allotment. I would have wanted the agencies to listen to presentations by my experts, and then take the testimony of those experts into consideration. I would have appreciated some responsiveness from the agencies. Instead, we were kept out of the discussion completely during the first consultation. Agency decision making would have benefited tremendously by a more complete illumination of the facts and science affecting the species.

The general issue is that all members of the public who are potentially adversely affected by the results of a consultation under the ESA should be permitted, as a matter of law, to participate fully in the consultation.

3. Mitigating Alternatives

If the Forest Service feels it necessary to remove a permittee from the land pursuant to the terms of a Biological Opinion issued under the ESA, the agency should be required, as a matter of law, to consider alternatives to keep that rancher in business. Public land grazing keeps many ranchers' operations viable, and to be forced off of the land without any rectification could be the kiss of death to many public land ranchers. The Forest Service should have to consider if other, comparable range is available for the public land rancher to graze his cattle on. It is a principle of fairness—if land is to be taken away, the land should be replaced with equally economically viable land.

Conclusion

I want to thank you again for this opportunity to present the views of the cattle industry with respect to section 7 consultation under the ESA. We look forward to working with you to craft legislation that will both respect the need to protect species and be respectful of the ranchers and their families who have worked western lands for so many generations.

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