

**Written/Fax/E-mail Comments, Public Hearings on
11/7/07 Revised Proposed Rule for the Preble's Meadow
Jumping Mouse**

Updated 2/14/08

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Via e-mail: FW6_PMJM@fws.gov

January 22, 2008

COMMENTS OF THE WHEATLAND IRRIGATION DISTRICT
ON THE REVISED PROPOSED RULE
TO AMEND THE LISTING FOR THE
PREBLE'S MEADOW JUMPING MOUSE
TO SPECIFY OVER WHAT PORTION OF ITS RANGE
THE SUBSPECIES IS THREATENED

The Wheatland Irrigation District ("Wheatland ID") has approximately 825 members that irrigate more than 54,000 acres in Platte County, Wyoming. At the time of listing, the U.S. Fish and Wildlife Service ("FWS"), included the entirety of Platte County as part of the historical range for the Preble's Meadow Jumping Mouse ("Preble's mouse").

The Wheatland ID appreciates the opportunity to submit these comments on the current proposal related to the Preble's mouse. The Wheatland ID Board of Directors made an early decision to play an active role in the Preble's mouse regulatory process by having me, as manager, participate in meetings regarding development of a Recovery Plan for the Preble's mouse.

As you know, the Preble's Recovery Team was formed in 2000 and we completed our work by submitting recommendations in June, 2003. I participated in this effort at great expense, both in time and money, to the Wheatland ID. The Wheatland ID believed it was important, however, to attempt to resolve this issue by participating in the recovery team process. Such participation has required me to attend numerous meetings and review countless documents. To say that I was disappointed that the FWS never approved the Preble's Recovery Plan is an understatement. A tremendous amount of energy and effort went into the development of that plan for seemingly no purpose. The handling of the Recovery Plan has created additional frustration and confusion about the FWS management of the Preble's mouse. While the process has been frustrating and confusing at times, the Wheatland ID decided it was better to be a participant in this process rather than

a bystander. The Wheatland ID can't help but believe that its efforts, along with many others, has brought us to the proposal we comment on today.

The Wheatland ID strongly supports FWS' decision to remove Platte County (and the remainder of Wyoming counties) from the range where the Preble's mouse is likely to become endangered within the foreseeable future. However, the Wheatland ID cannot support the FWS' conclusion that the Preble's mouse is a valid subspecies and therefore should not be delisted based upon taxonomic revision.

After reviewing the current proposed rule, it is apparent that the USFWS did not have the scientific evidence necessary to list the Preble's mouse in May, 1998, let alone designate entire counties in Wyoming as threatened historic range. The lack of data regarding the Preble's mouse has remained a critical issue since that initial decision that has severely impacted the FWS reputation on this, and other species issues. In addition, the lack of data placed land use constraints on five entire counties within Wyoming. While we are pleased that additional data collection has corrected this situation, we encourage the FWS to execute the process in reverse on future listing decisions. That is, collect data first prior to designation of entire counties as critical habitat. Needless to say, the broad designation in Wyoming has unnecessarily limited land use and further negatively impacted the credibility of the FWS to protect truly endangered and threatened species.

It is also unbelievable to the Wheatland ID that enormous amounts of monies have been spent, and development and land use activities limited without a definitive answer to this most basic question of whether or not the Preble's mouse is a separate sub-species. The Wheatland ID continues to believe that this question should have been answered *prior* to listing of the Preble's mouse.

The Wheatland ID stands by the scientific work completed by Ramey et al. Dr. Ramey has suffered tremendous personal and professional costs for stating his scientific conclusion that runs counter to the goals of environmentalists. Dr. Ramey's work was peer reviewed and scientifically accepted. It is obvious that the FWS will always be able to find other scientists to disagree with Dr. Ramey's conclusions. The Wheatland ID is disappointed that the FWS conducted a scientific shopping excursion and did not accept Dr. Ramey's conclusions related to taxonomy.

Every step in the process of "protecting" the Preble's mouse has lacked credibility and defied logic. All of the factors described above contribute to the uneasiness the Wheatland ID has with the entire regulatory process involving the Preble's mouse. The Wheatland ID has remained involved in the issue, participated in recovery efforts and attempted to understand the process. We are elated to learn of FWS' proposal to remove Wyoming as critical habitat for the Preble's mouse. We are disappointed, however, that the FWS has discarded Dr. Ramey's conclusions related to taxonomy.

The Wheatland ID remains committed to working with the FWS on legitimate issues involving endangered and threatened species.

Thank you for your consideration,

A handwritten signature in cursive script, appearing to read "Don Britton". The signature is written in dark ink and is positioned above a horizontal line.

Don Britton, Manager
Wheatland Irrigation District



WYOMING FARM BUREAU FEDERATION

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DEC 10 2007

December 3, 2007

Susan Linner
US Fish and Wildlife Service
CFO Ecological Services
PO Box 25485
MS-65412
Denver Federal Center
Denver, CO 80228

RE: Endangered and Threatened Wildlife and Plants; Revised Proposal to Amend Listing for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) to Specify Over What Portion of Its Range the Subspecies is Threatened.

Dear Ms Linner,

The Wyoming Farm Bureau Federation would like to thank the Service for the proposal to de-list the Preble's Meadow Jumping Mouse across the Wyoming portion of its range.

The Wyoming Farm Bureau Federation is a general agricultural organization which represents food producers throughout the state of Wyoming. Many of our members were affected by the Service's listing decision on the Preble's Meadow Jumping Mouse and are equally interested in the Service's proposed action.

We are disappointed it has taken this long to get to this point but are pleased that the distribution, abundance and threats information has finally been analyzed and acknowledged by the Service. We support the proposed amendment which will remove the Wyoming portion of the range of the subspecies from the listing.

It is unfortunate that the State of Wyoming and others should have to threaten legal action in order to get the Service to follow through on its duty of analyzing the data provided in the petitions or that the Service was not able to analyze the data that has been in its possession since 1999 which demonstrated that not only is the mouse still found in all the historical capture sites it is now found in more locations in Wyoming than ever before. That said we have the following specific comments to the referenced proposal.

Pg. 63017: ***“Trapping efforts to date suggest that the subspecies may remain limited in number and distribution within the Wyoming Portion of the South Platte River basin.”***

For this reason, and the acknowledgement of the lack of future threats to the species in Wyoming, the Service should use the Wyoming/Colorado boarder as the line for demarking the management of the mouse. Even with the anticipated growth of the Cheyenne, WY area the threats to the species in this area are dwarfed by those anticipated along the Colorado Front Range. In addition, there is no information available to suggest the Preble's was ever common in the area.

Pg. 63017: ***“We determine this because distributional data has verified that the subspecies is more widespread in the North Platte River basin of Wyoming than previously known, and we are not aware of any threats that are likely to have significant affects on the long-term conservation status of populations of Preble's meadow jumping mouse in Wyoming.”***

“We believe a lack of present or threatened impacts to the Preble's meadow jumping mouse in Wyoming suggest that this subspecies is neither in danger of extinction, nor likely to become endangered within the foreseeable future.”

“Thus, the Preble's meadow jumping mouse does not merit continued listing as threatened throughout “all” of its range.”

We agree with the Service on the above findings.

Pg. 63018: ***“We believe the Wyoming/Colorado State line is an appropriate delineation for separating the populations in the two States here because the respective threats to the subspecies appear to be significantly different in the two states.”***

“We believe removing protections in the Wyoming portion of the South Platte River basin would be of little biological consequence.”

We agree with the Service that the Wyoming/Colorado boarder is an appropriate line for demarking the management of the mouse biologically and from the perspective of management practicability. As stated above, even with the anticipated growth of the Cheyenne, WY area the threats to the species are not as great as those anticipated along the Colorado Front Range and there is no information available to suggest the Preble's was ever common in the area. This is the area of greatest presumed overlap of Princeps and Preble's based on limited identification of either species in the habitat zones (again) presumed to be inhabited by the two species. Any management benefit to the subspecies would be overwhelmed by the confounding regulatory process if the Wyoming portion of the South Platte River basin continued to be protected.

Pg. 163018: ***“Another possibility to consider is whether smaller units might be appropriate.”***

From the perspective of the continued stability of the subspecies and from the stand point of effectively administering the program and it makes no sense to subdivide the range of the mouse in Colorado into drainages or counties. Trapping data from both Colorado and Wyoming demonstrates the importance of connectivity of areas of suitable habitat within a hydrologic unit to the stability of the subspecies.

“Given the best scientific and commercial information available, we do not believe such subdivisions would result in units that would each meaningfully contribute to the representation, resiliency, or redundancy of the subspecies at a level such that its loss would result in a decrease in the ability to conserve the subspecies.”

We believe the Service intended this statement to read *“Given the best scientific and commercial information available, we do not believe such subdivisions would result in units that would each meaningfully contribute to the representation, resiliency, or redundancy of the subspecies. The loss of the subspecies in these individual units would result in a decrease in the ability to conserve the subspecies.”* This statement is supported by the quote for the draft Recovery Plan found on pg. 63019, “Species well-distributed across their historical range are less susceptible to extinction and more likely to reach recovery than species confined to a small portion of their range. Distributing populations throughout different drainages reduces the risk that a large portion of the range-wide population will be negatively affected by any particular natural or anthropogenic event at any one time.”

Pg. 163019: ***“Therefore, further division of the subspecies’ range within Colorado is either not appropriate or unnecessary.”***

For clarity, the Service should consider re-writing this sentence as follows:
“Therefore, further division of the subspecies’ range within Colorado is neither appropriate nor necessary.”

Pg. 163019: ***“In our view, the cumulative magnitude of threat within Colorado is very high. Immediacy will vary geographically across the range. Some areas will be subject to imminent threats that would, in the absence of the Act’s protections, extirpate populations in the near future. In other areas, direct and indirect impacts, in the absence of the Act’s protections, will not result in extirpation for some time.”***

The above statement describes the difference between the threats to the mouse in Wyoming vs. Colorado and why the state line is an appropriate demarcation for delisting. Contrary to the situation in Wyoming, huge areas of currently occupied Preble's habitat in Colorado are under direct threat from development activity. The loss of these areas would severely limit occupied Preble's habitat in Colorado making the remaining intact habitat even more critical to the continued viability of the subspecies across a significant portion of the subspecies range (Colorado). We agree with the Service (pg. 163019) that "the significant portion of the subspecies' range within Colorado continues to meet the definition of threatened under the Act, and should remain listed."

Pg. 163022: ***"However, this is our first proposal to specify such a portion since issuance of the opinion of the Solicitor's Office on this topic..."***

The Service has proposed a determination of the significant portion of the range in which the Preble's Meadow Jumping Mouse is threatened that makes logical sense based on the presumption that the mouse is threatened in Colorado. We still question the logic of listing a species or subspecies based on a very limited number of historical captures and extremely limited information as was done when the subspecies was listed in 1998. In the State of Colorado, as in the State of Wyoming, trapping effort by private parties, the Colorado Department of Wildlife, the Department of Defense and others has demonstrated the range of the subspecies and the populations to be significantly greater than previously known. If this same level of information had been known when the subspecies was petitioned for listing would the Service have listed it as threatened? If the answer to that question is "no" then the Service should de-list the subspecies in its entirety not just in the Wyoming portion of the range.

Pg. 163022: ***Specifically stated issues:***

(1) "What is the current range of the Preble's meadow jumping mouse? In the absence of ... trapping what information is sufficient ... to determine that ... an area is part of the current range of the subspecies?"

(A) Within the area defined by the Service as the Colorado Significant Portion of the Range (SPR) there are many areas that do not contain suitable habitat and therefore should not be considered part of the current range of the mouse. This said it should be recognized this mouse is adaptable and, as evidenced by the Wyoming capture site habitat characteristics, is found in highly variable riparian habitats.

(B) In those areas within the defined Colorado SPR that appear to contain suitable habitat and are within the suggested elevational range known to provide mouse habitat the lack of presence in any particular year cannot

be used to determine the area is not within the SPR. The literature provides information that this subspecies is highly responsive to drought conditions and may be difficult to capture during these periods. In addition, the PMJM is responsive to the population levels of other small mammals and may be more difficult to trap when *microtus* or *mus* numbers are high. Given that this subspecies is rare or uncommon the mere inability to capture one does not mean they do not exist.

(2) “On how fine or course a scale should we define the portion of the range that we may specify as both significant and threatened?”

The Service has defined the Colorado SPR on a suitable scale (occupied HUCs) given the information known about the subspecies. In addition, alternatives have been provided (pg. 163022) for block clearances or project specific clearances of areas that are within the SPR that may or may not contain suitable habitat. This level of regulatory oversight and flexibility provides the mechanism for fine scale determination of habitat suitability.

(3) “How should the boundaries of the portion of the range at issue be defined?”

The definition of the Colorado SPR provided in the proposal is adequate and provides clarity relative to the portion of the State covered by the proposed rule.

(4) “Is it appropriate to use the Colorado/Wyoming border to divide the range of the subspecies?”

Given the information known about the mouse and the lack of confidence in the data relative to the existence of Preble's in the area adjacent to the Colorado/Wyoming border it is appropriate to use the state line as the boundary between the two significant portions of the range of the Preble's. This is especially appropriate given the retention by the Service of the ability to analyze the impacts of proposed land use projects on the north side of the line (and within the South Platte River HUC) on the mouse population on the south side.

(5) “If we use a relatively course scale to define the current range of the subspecies, how should we address an area with that range if we have information suggesting that the subspecies does not currently occupy or has never actually occupied – that particular area within its overall range?”

Please reference our response to question #2. The intermediate scale definition of the SPR is appropriate for the continued listing of the subspecies in Colorado especially given the administrative procedures in place to provide clearances from the implementation of the rule.

(6) “If we determine to define the portion of the range ... as excluded..., how should we do that?”

A narrative description of such an area could be very difficult to write and to interpret accurately and could change over time resulting in the need to continually update the rule. It is more appropriate for the proponent of a project within the defined SPR to inquire of the Service the status of a particular parcel of land and obtain a no action required letter from the Service. For this process to work a timely response to such inquiries would be required from the Service.

(7) “Is it appropriate to aggregate all of the current range of the Preble’s meadow jumping mouse in Colorado into one portion for the purposes of this analysis? If particular sites within Colorado are not independently significant portions of the range of the PMJM, should they still be considered part of the portion of the range that is collectively significant?”

Yes. It is not logical to consider each individual HUC on its own merits; it is the collective occupied habitat that provides the viability of the subspecies. The statement on page 163018, “Given the best scientific and commercial information available, we do not believe such subdivisions would result in units that would each meaningfully contribute to the representation, resiliency, or redundancy of the subspecies. The loss of the subspecies in these individual units would result in a decrease in the ability to conserve the subspecies,” provides adequate justification for not using smaller analysis units.

We are also concerned about this excerpt from the FWS Preble’s Meadow Jumping Mouse web site Q&A:

Does this proposal change the current status of Preble’s?

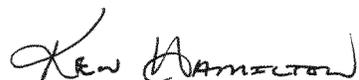
Until a final determination is made, the Preble’s meadow jumping mouse will continue to be protected under the Endangered Species Act throughout its range in Colorado and Wyoming. Likewise, until a final decision is made, the special rule exempting certain ongoing activities (rodent control; agricultural activities; landscape maintenance, and current use of existing water rights) will remain in place as will the critical habitat designations.

Wyoming Farm Bureau Comments
Page 7

We stress the importance of maintaining the current 4(d) rule. This set of exemptions is critical to the agriculture industry and should remain in effect as long as the mouse is listed; the continuation of the agriculture industry in Colorado is critical to the maintenance of Preble's habitat.

Thank you for the opportunity to provide comment on the current proposal.

Sincerely,



Ken Hamilton
Executive Vice President

Cc Board AFBF WWGA WSGA WACD
NER WDA RMFU Congressional Delegation
Renee Taylor

\\Farm Bureau Prebles delisting comments Nov 2007 RT

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JAN 14 2008



January 8, 2008

Field Supervisor
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P.O. Box 25486
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To Whom It May Concern:

The American Forest Resource Council (AFRC) is pleased to provide the following comments on the proposal by the U.S. Fish and Wildlife Service (Service or FWS) to determine under the Endangered Species Act, 16 U.S.C. §1533 that the Preble's meadow jumping mouse is not an endangered or threatened species throughout its range, but that the Colorado population of the subspecies constitutes a significant portion of the range of the subspecies and should be listed as threatened. 72 Fed. Reg. 62992 (November 7, 2007). This proposal represents the first regulatory action based on the Opinion of the Solicitor of Interior dated March 16, 2007 (M-37013) (Opinion) concluding the Service has statutory authority to list part of a "species" (as the term is defined in the ESA) as endangered or threatened if it determines the part is "a significant portion of [the species'] range" (SPR), and that the Service has broad discretion to determine if a part is a significant portion of a species' range. These comments therefore also address the legal validity of the Opinion.

AFRC represents over 90 forest product businesses and forest landowners in twelve western states. Our mission is to create a favorable operating environment for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions that determine or influence the management of all lands. Many of our members have their operations in communities adjacent to lands managed by the federal agencies, and the management on these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities. Since the underlying justification of this listing proposal is based on the Opinion of the Solicitor of Interior, this same justification could be used to list numerous species on federal lands across the west thus dramatically impacting our members.

In addition, to the extent the Service may seek deference from the courts for its interpretation of the ESA relating to partial-species listing authority and the meaning of "significant portion of ... range" based on this regulatory process, AFRC has a further interest in relation to other species affecting AFRC members throughout the country in the event such species become subject to a partial-species listing that will be defended by the Service based on deference arising from this regulatory process.

AFRC's comments will first address the Service's proposed interpretation of "significant portion of ... range" presented in the Federal Register notice.¹ The comments will show that the 1972-73 legislative history and subsequent amendments to the ESA limit permissible interpretation of the SPR phrase in four ways: the term "significant" must be given a biological meaning; the determination of significance must relate to the status of a listable entity (i.e., under current law a species, subspecies or vertebrate DPS) rather than the status of a portion of the listable entity; the SPR phrase permits listing only when the listable entity's "future is in doubt"; and the SPR phrase must be interpreted consistently with and more narrowly than a Distinct Population Segment as described in the Services' Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy). 61 Fed. Reg. 4722 (1996). The comments will show the Service's proposed definition of SPR in the Preble's listing notice is not consistent with these limitations.

AFRC will then address the legal validity of the partial-species listing authority asserted in the Solicitor's Opinion, and demonstrate that the ESA does not give the Service partial-species listing authority.

PART ONE: THE 1972-73 LEGISLATIVE HISTORY AND 1978 DPS AMENDMENT AS INTERPRETED BY THE SERVICE LIMIT THE PERMISSIBLE RANGE OF INTERPRETATION OF THE SPR PHRASE AND PRECLUDE THE INTERPRETATION PROPOSED BY THE SERVICE.

The Solicitor's Opinion concludes that SPR is a "substantive standard" which must be given some meaning, that "the Secretary has broad discretion in defining what portion of a range is 'significant,' and may consider factors other than simply the size of the range portion in defining what is 'significant,'" and the Secretary has "considerable discretion to consider a number of factors when determining whether a species is endangered in any significant portion of its range." Opinion at 3.

The premise for interpreting the meaning of the term "significant portion of its range" is that the term is ambiguous. Courts "only defer ... to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *Immigration & Nat. Serv. v. St. Cyr*, 533 U.S. 289, 320 n. 45 (2001) (citation and quotation omitted). AFRC agrees that the SPR phrase is ambiguous, since "significance" is necessarily determined through reference to a set of circumstances prescribed by the determiner.

To the extent labeling the SPR phrase a "substantive standard" means the Service must give some meaning to those words in the statute, the Opinion is of course correct since those charged with interpreting a Congressional enactment have a "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quotation and citation omitted).

¹ AFRC notes that the Service employed the same SPR interpretation in a recent Federal Register notice addressing the status of the Queen Charlotte goshawk. 72 Fed. Reg. 63128 (November 8, 2007.)

The Opinion does not identify the permissible factors that may inform an SPR listing decision, nor provide any other interpretative assistance to the Service in exercising its “broad discretion.” However, substantial guidance can be drawn from the ESA’s legislative history and subsequent amendments that limits the permissible interpretation of the SPR phrase.

A. Several important inferences are provided by the 1972-73 legislative history of the ESA. The SPR terminology appeared in the President’s message in 1972 announcing his support for new endangered species legislation, which called for a broadened definition of “endangered species”: “The continued existence of such species or subspecies of fish or wildlife, in the judgment of the Secretary, is either presently threatened with extinction or will likely become threatened with extinction, throughout all or a significant portion of its range....” President’s Message to Congress Outlining the 1972 Environmental Program, 8 WEEKLY COMP. PRES. DOC. 223-224 (November 8, 1972).

In subsequent testimony on an early ESA bill based on the Administration’s proposals, Administration representative David Wallace, the Associate Administrator for Marine Resources of the National Oceanic and Atmospheric Administration (the senior official in charge of the National Marine Fisheries Service, which was to co-administer the proposed ESA with the FWS) testified:

...[W]hile retaining the existing category of animals which are presently “threatened with extinction,” the bill adds a new category of animals which “will likely within the foreseeable future become threatened with extinction.” Moreover, it provides that action may be taken if either condition exists within a significant portion of the animal’s range and does not require a finding of worldwide endangerment

He explained:

This last modification recognizes the fact that *a species or subspecies may be threatened because of events taking place in a very small but significant part of its range*. Thus, if a species’ breeding area is being threatened, with the result that *its future is in doubt*, the species could be placed upon the endangered list, regardless of the fact that the breeding ground is geographically small relative to the whole range of the species.

The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the Environment of the Senate Comm. on Commerce, 92d Cong. 132 (1972) (emphasis added).

To the witness, the SPR language would allow a species to be listed when “a species or subspecies may be threatened” and “its future is in doubt.” At the time of the comment, the bill under discussion only permitted listing of a species or subspecies; thus the term “species or subspecies” may reasonably be interpreted to mean any listable entity.

Congressional hearings testimony of Administration representatives is a common and valid basis for statutory interpretation. *U.S. v. Whiting Pools*, 462 U.S. 198, 207 & n. 16 (1983); *Maine People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 294 (1st Cir. 2006) (interpreting statute based on hearings testimony of Assistant Attorney General); *Quinlivan v. Sullivan*, 916 F.2d 524, 527 n.2 (9th Cir. 1990) (interpreting statute based on hearings testimony of head of Social Security Board); *U.S. v. Anaya*, 779 F.2d 532, 537 (9th Cir. 1985) (interpreting statute based on hearings testimony of Attorney General); *Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981) (interpreting statute based on hearings testimony of Justice Department career bureau chief). When administration representatives are “intimately involved in the formulation of the [statute, they] ... must be presumed to have had insight into the legislative intent.” *Weinberger v. Salfi*, 422 U.S. 749, 792 (1975) (Brennan, J., dissenting).

The Administration testimony on the SPR language leads to three conclusions about the Congressional intent of the SPR language: 1) the term “significant” has a biological meaning; 2) the determination of significance relates to the status of “a species or subspecies” (i.e., a listable entity) rather than the status of a portion of a listable entity; and 3) the SPR phrase is intended to permit listing only when the listable entity’s “future is in doubt.”

In 1972, a Senate Report on an early bill with language identical to the Administration’s bill reinforced these conclusions:

Where the Secretary determines that a species or subspecies of fish and wildlife throughout all or a significant portion of its habitat or range is presently threatened with extinction or is likely within the foreseeable future to become threatened with extinction, he may list such species as an endangered species. By providing for the listing of species endangered throughout a significant portion of its range, the Committee recognized the need for maintaining a viable population of species or subspecies where possible in more than just one portion of the world.

S. Rep. 92-1136 at 6 (Sept. 15, 1972).

Consistent with the Administration’s view, the committee indicated that “significant” has a biological meaning that relates to the status of the entire species or subspecies, and the ultimate issue is whether the entire species or subspecies faces a threat of extinction. The report used the term “throughout all or a significant portion of its range” to modify “species or subspecies,” showing the term’s focus on a listable entity.

In 1973, when the two ESA bills (H.R. 37 and S. 1983) were introduced into the House and Senate, the SPR language appeared in the section on endangered and threatened determinations. The SPR language was shifted to definitions of “endangered species” and “threatened species,” which first appeared in the bills that subsequently came out of the respective committees of jurisdiction of the House and Senate. During the House hearings on H.R. 37, the NOAA witness responded to a question by repeating the Administration’s 1972 explanation of the “significant portion of range” language:

Mr. BREAU: As I understand this bill, the Department is allowed to designate areas in which the species is endangered and areas where it is not endangered. How could this effect [*sic*] county lines—where some counties within a State have an endangered species while others do not?

Howard Pollock, Deputy Administrator of NOAA: [T]hat action may be taken if either condition [of endangered or threatened status] exists throughout a significant portion of the animal's range and does not require a finding of worldwide endangerment. This last modification recognizes the fact that a species or subspecies may be threatened because of events taking place in a small but significant part of its range.

Endangered Species: Hearings on H.R. 37 and 4758 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 93d Cong. 207 (1973) at 227.

The important part of this colloquy is the witness's explanation that a "significant portion of range" listing relates to the status of the entire species or subspecies: "the fact that a species or subspecies may be threatened because of events taking place in a small but significant part of its range." The listing results from a threat of extinction to the entire species that happens to arise from "events taking place in a small but significant part of its range." If the species is not threatened with extinction (or endangerment), events in a portion of its range would not give rise to a listing.

There is no explanation of the SPR language in any of the committee reports that accompanied the 1973 Act. The House Report on the 1973 bill simply echoes the Administration's view that the new law "permits protection of animals which are in trouble in any significant portion of their range, rather than threatened with worldwide extinction." H.Rep. 93-412 at 2 (93d Cong., 1st Sess.). The Senate Report merely stated: "Flexibility in regulation is enhanced by a provision which allows for listing if the animal is endangered over a 'substantial [*sic*] portion of its range.'" There was no discussion on the floor of either house of Congress regarding the meaning of the term "significant portion of its range."

Thus, the Administration's 1972 explanation of the SPR phrase, the 1972 Senate Report's supporting reference, and the NOAA witness's confirmatory testimony in 1973 stand as the sole articulation of the meaning of the SPR phrase at the time of its enactment by Congress. Consistent with all three of these sources, the SPR term should therefore be interpreted to mean: 1) the term "significant" has a biological meaning; 2) the determination of significance relates to the status of a listable entity (i.e., under current law a species, subspecies or vertebrate DPS) rather than the status of a portion of the listable entity; and 3) the SPR phrase permits listing only when the listable entity's "future is in doubt."

B. Additional limitation to the meaning of "significant" is provided by Congress' 1978 amendment of the definition of "species" in Section 3(15) limiting below-subspecies listings to "any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature." This amendment must be given meaning. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Pierce Cty. v.*

Guillen, 537 U.S. 129, 145 (2003) (quotation and citation omitted). A “canon of statutory construction require[es] a change in language to be read, if possible, to have some effect.” *Amer. Nat. Red Cross v. S.G.*, 505 U.S. 247, 263 (1992). Thus, the interpretation of “significant” in the SPR term may not nullify the effect of the 1978 amendment of “species.”

The ESA as enacted in 1973 broadly provided that “[t]he term ‘species’ includes any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature,” and the House Report on H.R. 37 boldly stated that “‘species’ is defined broadly enough to include ... any population of such species.”

In 1978 Congress sharply narrowed this definition by replacing the phrase “any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature,” with “any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.”

The 1978 Conference Report explained the change:

S. 2899 redefines the term “species” as it is used in the act. The existing definition of species in the act includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, and distinct populations of vertebrate [*sic*²] “species.” The definition within the conference report would exclude taxonomic categories below subspecies from the definition as well as distinct populations of invertebrates.

H. Rep. 95-1804 (95th Cong. 2d Sess.). As FWS explained in 1996, “[t]his change restricted application of this portion of the definition to vertebrates.” 61 Fed. Reg. 4722.

On February 7, 1996, FWS and NMFS jointly issued their Joint DPS Policy. The stated purpose of the DPS policy is for the two agencies “to clarify their interpretation of the phrase ‘distinct population segment of any species of vertebrate fish or wildlife’ for the purposes of listing, delisting, and reclassifying species under the Endangered Species Act.” *Id.*

The FWS interpretation of DPS has been given deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1142 (9th Cir. 2007), and has been upheld under that deferential standard of review. *Id.* at 1145. The listing of a population of fish or wildlife in violation of the DPS Policy is unlawful. *Nat’l Ass’n of Homebuilders v. Norton*, 340 F.3d 835, 851 (9th Cir. 2003); *Nat’l Wildlife Fed. v. Norton*, 386 F.Supp.2d 553, 565 (D. Vt. 2005).

The DPS Policy requires FWS to consider both the discreteness and the significance of a vertebrate population segment to determine whether it is a listable DPS. FWS must determine discreteness before considering significance: “If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be

² The otherwise identical House Report on the definition used the word “animal” in place of “vertebrate.” H. Rep. 95-1625 (95th Cong. 2d Sess.).

considered.” Significance relates to “the discrete population segments importance to the taxon to which it belongs.” Determining significance includes these factors:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its history range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

The interpretation of “significant” in the SPR phrase must not nullify the DPS language by allowing a population to be listed based on significance alone without the discreteness element of the DPS Policy. If “significant” in the SPR phrase means the same as “significant” in the DPS Policy, the DPS Policy would be meaningless because by definition, any population meeting the DPS Policy’s definition of “significance” would be listable as an SPR regardless of its “discreteness.” As a result, no population would ever be listed as a DPS, impermissibly rendering the statutory DPS clause – as formally interpreted by FWS in the DPS Policy – meaningless. Thus, “significant” in the SPR language must mean something different – and more restricted – than “significant” in the DPS Policy.

The interpretation of “significant” in the SPR phrase must also avoid nullifying the statutory limitation of DPS listings to “vertebrate” species, which was intended to “exclude ... distinct populations of invertebrates.” H. Rep. 95-1804 (95th Cong. 2d Sess. 1978). If “significant” in the SPR language means the same thing as “significant” in the DPS Policy, FWS would have the authority to list any population of an invertebrate or plant species that occupies a “significant portion” of the species’ range, contrary to Congress’s express limitation of population listings to vertebrates.

From the 1978 amendment of “species,” therefore, it can be inferred that “significant” in the SPR language must not only require “importance to the taxon” and consideration of the four factors in the DPS Policy, but must be more narrowly interpreted than in the DPS Policy so that a population meeting the “significance” prong of the DPS Policy does not automatically constitute a listable significant portion of the range. The interpretation of significance under SPR must contain additional limiting factors that are not included in the test for significance in the DPS Policy.

C. The Service’s proposed SPR interpretation in the Preble’s listing notice is not consistent with the 1972-73 legislative history, the 1978 DPS amendment or the 1996 DPS Policy. The proposed interpretation is that to constitute a significant portion of range, the range-portion must be “important to the conservation of the subspecies because it contributes meaningfully to the representation, resiliency, or redundancy of the subspecies. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the subspecies.” 72 Fed. Reg. 63017. The required level of impact for an SPR listing is very small:

The contribution of the range portion must be at a level such that its loss would result in a decrease in the ability to conserve the species. It does not mean however, that if such portion of the range were lost, the species as a whole would be in danger of extinction immediately or in the foreseeable future; rather, that the ability to conserve the species would be compromised.

72 Fed. Reg. 63017. This paragraph articulates two inconsistent standards for a partial-species listing where the species as a whole is not endangered or threatened: “loss would result in a decrease in the ability to conserve the species” and “the ability to conserve the species would be compromised.” The first standard is lower than the second standard (and therefore functionally supersedes the second standard) in that a “decrease in the ability to conserve” the species could justify an SPR listing even if the “decrease” does not “compromise” the ability to conserve the species. Under this definition any decrease in the ability to conserve a species, no matter how small, could justify a partial-species listing. It is difficult to see how any portion of a range would fail this test, since geographical diversity is always considered a risk-reducing factor for any species, and the loss of a species in any portion of its range could be considered a “decrease in the ability to conserve” the species. There is no lower bound to this standard.³

The factors of representation, resiliency and redundancy are not inherently impermissible since each can bear on the species’ risk of extinction and therefore may properly constitute part of a listing decision. However, the very minor impact on these factors that can justify an SPR listing under the proposed interpretation is not tied to the species’ risk of extinction, and therefore may not properly constitute part of a listing decision.

The Federal Register notice demonstrates the low and conclusory threshold the Service has set to determine part of a range to be a “significant portion”:

In conclusion, we believe that loss of the Preble’s meadow jumping mouse within Colorado would result in a decrease in the ability to conserve the subspecies. We have determined that, based on its importance to the conservation of the subspecies and because it contributes meaningfully to Preble’s meadow jumping mouse representation, resiliency, or redundancy, the Colorado portion of the range constitutes a significant portion of the subspecies’ range as described in the Act.

72 Fed. Reg. 63019. The mere fact of an unspecified and unquantified (indeed, undescribed) “decrease in the ability to conserve the subspecies” was viewed as sufficient to make an SPR determination. There is no relationship to the overall status of the subspecies as a whole.

This low standard suffers from a second flaw: it is based on assessing the impact on the ability to conserve a group of organisms that, by statutory definition, cannot be conserved. The

³ Even if the Service believes it can administratively employ a functionally higher standard that would avoid listings based on a very small decrease in conservation ability, history shows that the courts do not accept Service decisions that are not well-explained and well-justified, and the Service cannot get by with decisions based on “because we said so.”

meaning of “conserve” is to bring a species to the point that it is not endangered or threatened, and therefore a species cannot as a matter of law be conserved unless and until it is listed as endangered or threatened. Since a species being considered for an SPR listing is not endangered or threatened (or else it would be listed throughout all of its range), it is not legally possible to use the ESA to “conserve” that species.

Also, rather than judge whether a species currently is endangered or threatened, as the ESA commands for a listing, the Service’s SPR standard requires the Service to make speculative predictions about hypothetical future conditions: first, what would the effect be on the species as a whole if in the future the species completely disappeared from the range-portion under consideration for listing, and second, whether the ability to conserve the species at that hypothetical time in the future would be “decrease[d]” or “compromised” if that occurred. Since the Service states that a range-portion listing can occur even if the complete extirpation of the species from the range portion would not mean “the species as a whole would be in danger of extinction immediately or in the foreseeable future” (i.e., not endangered), the Service must speculate as to the possibility of threatened status at this undetermined time in the future.

This speculative standard is legally deficient and contrary to the ESA because, ironically, it fails to take into account the intervention of the ESA: if the population in the range-portion declines to the point that the entire species is endangered or threatened, the entire species would be listed, and conservation tools could be applied throughout its range – long before the population in the range-portion would disappear. Thus, the speculative future extirpation that must underlie the SPR determination required by the Service would rarely if ever come into being. It seems inconceivable that Congress could have intended for the Service to administer the SPR phrase as if the rest of the ESA did not exist, and to base listing decisions on future hypothetical circumstances that can rarely if ever occur.

In the case of the Preble’s meadow jumping mouse, the Service proposes to find that the species is not threatened throughout all of its range (which constitutes the states of Colorado and Wyoming); that the range within Colorado, which holds the “bulk of the current range,” is a significant portion of its range and should be listed as threatened; and that the Wyoming portion of the species’ range should be delisted. There are no historical or current population estimates for this species.

The Service proposes, for its own “convenience,” to use latitude and longitude coordinates to define the portion of the Preble’s range which is to be listed: “Thus, based on best available data, we have identified the portion of Colorado west of 103 degrees 40 minutes West, north of 38 degrees 30 minutes North, and east of 105 degrees 50 minutes West as the significant portion of the range of the subspecies.” 72 Fed. Reg. 63020. The Service considered omitting certain previously-identified “block clearance zones” within that area but decided against it due to administrative burden.

The Preble’s jumping mouse listing proposal is unlike any listing proposal ever before made by the Service. In its use of latitude and longitude and its consideration of exemptions and omissions, it has the attributes of a critical habitat proposal, where these features are expressly required or permitted. The FWS will literally have to revise its C.F.R. listing template if this

listing occurs because currently there no place in the template to describe a significant portion of range in which a listing is made.

In the case of the Queen Charlotte goshawk, which has a population of 300-400 pairs in Southeast Alaska and 58-115 pairs in British Columbia, the Service announced that it plans to propose a finding that the species is not threatened with extinction throughout all of its range; that Vancouver Island constitutes a significant portion of its range and the species is threatened on Vancouver Island; that the species is divided into two distinct population segments in Alaska and British Columbia; that the Alaska DPS is not threatened throughout all of its range; that the British Columbia DPS is threatened throughout all of its range (as well as that portion on Vancouver Island) and should be listed as threatened, and therefore that it is unnecessary to list Vancouver Island as an SPR.

Together, the two proposals demonstrate the breadth of the SPR listing power created by the Solicitor's Opinion. The Colorado population of the Preble's meadow jumping mouse would be listed because it contains "the bulk of the range," while the Vancouver Island population of the Queen Charlotte goshawk would be listed although it contains just 14-20% of the current population in 27% of current habitat.

Both of these proposals listing wreak havoc with the traditional statutory listing mechanism that has existed since enactment of the ESA. In both cases, the species under consideration is not threatened with extinction or endangerment in the foreseeable future. The species does not qualify as endangered or threatened. Nonetheless, some of its members would be protected under the ESA based on the geographic location in which they are found.

For the Preble's meadow jumping mouse, the effect of the listing decision is to list a population that, while "significant," does not meet the "discreteness" element under the DPS Policy and is therefore not a DPS. The Service acknowledges that the border between Colorado and Wyoming does not divide the two populations, and neither is separate from the other. Neither population can therefore be a DPS. Yet the Service's position is that significance alone, regardless of discreteness, is sufficient to list the Colorado population as an SPR.

It is difficult to see why the Service will ever again conduct the "discreteness" inquiry for a population under the DPS Policy, or why it will ever again consider listing a population as a DPS, if exactly the same protection can be provided to the population under an SPR listing regardless of "discreteness." Nor will the Service be bound by the DPS limitation to "vertebrate species" since non-vertebrates can be equally protected under an SPR listing. The Preble's proposal demonstrates how the Solicitor's Opinion has effectively nullifies the DPS Policy and has effectively repealed the statutory limitation of DPS to "vertebrate" species.

The Queen Charlotte goshawk proposal displays how the Service will further override the DPS Policy by using the Solicitor's Opinion as a basis for listing a portion of a population that does qualify as a DPS. Since 1978 Congress has used the statutory term "distinct population segment" to define the populations below the level of subspecies that are eligible for protection under the ESA. The goshawk proposal shows how the Solicitor's Opinion negates the term

altogether by permitting the listing of a population that represents only a portion of a DPS, and in fact is not “distinct” as the Service has interpreted the word.

PART TWO: THE ENDANGERED SPECIES ACT DOES NOT PERMIT FWS TO LIST ONLY A PORTION OF A “SPECIES” THAT IS ENDANGERED OR THREATENED IN A SIGNIFICANT PORTION OF ITS RANGE.

The Opinion states that if FWS determines a species is endangered in a significant portion of its range but not throughout its range, the Service must list just the imperiled portion of the species as endangered, and “the protections of the ESA [are to be] applied to the species in that portion of its range where it is specified as an ‘endangered species’” because the ESA “require[s] protection for a species only where it is endangered.” The Opinion applies the same principles to a threatened listing.

The premise for finding this implied partial-species listing authority is that the words of the ESA are ambiguous, and therefore in need of interpretation. But the Opinion does not identify any ambiguous statutory terminology that gives rise to its partial-species listing interpretation. If “the statute's text is clear, we need not resort to either the agency's interpretations or the statute's legislative history.” *Reynolds v. Hartford Fin. Serv. Group, Inc.*, 435 F.3d 1081, 1092 (9th Cir. 2006).

Even if an ambiguity existed as to partial-species listing authority, the Solicitor’s Opinion does not merit *Chevron* deference because it was not adopted through notice-and-comment rulemaking or any equivalent formal process. *Christensen v. Harris County*, 529 U.S. 576 (2000). “[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.” *Id.* at 587. Such informal agency expressions are “entitled to respect ... but only to the extent that those interpretations have the power to persuade.” *Christensen v. Harris County*, 529 U.S. at 587 (internal quotation and citation omitted).

The Solicitor’s Opinion notes that the new “substantive standard” and “partial-listing” interpretations reverse the interpretations that the FWS has employed since 2000 if not earlier:

The Department has previously argued that reading the SPR phrase as a substantive standard for determining whether a species is an endangered species would lead to a violation of the listing provisions in section 4 of the Act, and that therefore such a reading of the SPR phrase must be in error. According to the argument, such a reading would be inconsistent with the listing provisions in two ways. First, it would improperly allow the Secretary under section 4(a)(1) to determine that something less than a species as a whole is endangered, and, second, it would improperly allow the Secretary under section 4(c)(1) to list as endangered something less than a species as a whole. For example, a recent brief filed on behalf of the Department argued that “[l]isting a species in only the significant portion [of its range] where it is found to be endangered ... would allow FWS to list a lesser entity than those specified in the ‘species’ definition, which would appear to violate section 4(a)(1).” ...

Because the Solicitor's Opinion reverses an existing interpretation, it has considerably less "power to persuade": "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Immigration & Nat. Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n. 30 (1987) "As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991). While "an agency is not estopped from "changing a view [it] believes to have been grounded upon a mistaken legal interpretation," *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (citations omitted), an agency reversal is entitled to the least deference when it does not arise from a perceived change in policy objectives based on new circumstances, but simply reverses a prior interpretation of a statute with no intervening change in the law. *New York City Health and Hosp. Corp. v. Perales*, 954 F.2d 854, 862 n. 4 (2nd Cir. 1992).

In this case, the Solicitor has offered two reasons for the reversal:

The problem with the [prior interpretation], both with respect to section 4(a)(1) and section 4(c)(1), is that it is a classic case of allowing the tail to wag the dog. Moreover, as discussed in the following section, the argument is inconsistent with the legislative history of the ESA.

Opinion at 14.

If the Department's newly-announced partial-listing interpretation is to be sustained, the explanation in the Opinion must have the "power to persuade" a reviewing court of its validity. It does not. To the contrary, the Department's prior interpretation comports with both the plain language of the ESA and its legislative history, and the new interpretation is at variance with each.

A. The plain meaning of section 4(a)(1) and 4(c)(1) restricts listing determinations to entire "species", and does not permit partial-species listings.

The Department's prior view was that Section 4(a)(1) does not permit "the Secretary under section 4(a)(1) to determine that something less than a species as a whole is endangered ...[or] allow the Secretary under section 4(c)(1) to list as endangered something less than a species as a whole." Opinion at 14. Section 4(a)(1) states: "The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species." A species "includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Section 3(15). Thus, the plain meaning of Section 4(a)(1) is that the Secretary may only determine whether a "species" (as defined by the ESA) should be listed as an endangered species or a threatened species, just as the Department had previously concluded.

The prior interpretation was in line with the judicial precedent on Section 4(a)(1) that the Opinion overlooked:

The ESA “specifically states in the definition of ‘species’ that a ‘species’ may include any subspecies and any distinct population segment (DPS) of any species ... which interbreeds when mature.” 16 U.S.C. § 1532(16); *Southwest Center for Biological Diversity v. Babbitt*, 980 F.Supp. 1080, 1085 (D.Ariz.1997). Listing distinctions below that of subspecies or a DPS of a species are not allowed under the ESA. *Southwest Center*, 980 F.Supp. at 1085.

The distinction between members of the same ESU/DPS is arbitrary and capricious because NMFS may consider listing only an *entire* species, subspecies or distinct population segment (“DPS”) of any species. 16 U.S.C. § 1532(16). Once NMFS determined that hatchery spawned coho and naturally spawned coho were part of the same DPS/ESU, the listing decision should have been made without further distinctions between members of the same DPS/ESU.

Alsea Valley Alliance v. Evans, 161 F.Supp.2d 1154, 1162 (D. Or. 2001), *appeal dismissed*, 358 F. 3d 1181 (9th Cir. 2004). The National Oceanic and Atmospheric Administration has endorsed the *Alsea* decision and substantially reviewed and revised several dozen listings based on that ruling. 69 Fed. Reg. 33101 (June 1, 2004).

The Opinion implies that this plain meaning interpretation is incorrect because it cannot be read “in full harmony” with the Opinion’s new “substantive standard” SPR interpretation:

With respect to section 4(a)(1), the [prior] argument simply assumes a meaning for that section and then uses that meaning to interpret the definition of “endangered species,” instead of settling on a meaning for the definition of “endangered species” and then using that definition when applying section 4(a)(1). The argument assumes that because section 4(a)(1) requires (authorizes) the Secretary to determine whether “any species is an endangered species,” only a species as a whole can be endangered. In other words, it is all or nothing; a species is either endangered in its entirety or it is not endangered. This reading of section 4(a)(1), however, simply begs the question of what it means to be an “endangered species.” Because “endangered species” is a defined term in the Act, one must start with that definition to determine the meaning of section 4(a)(1), rather than vice versa. When the construction of the Act is approached in that manner, section 4(a)(1) can be read in full harmony with a reading of the SPR phrase as a substantive standard.

Yet section 4(a)(1) can be read “in full harmony” with the SPR substantive standard” just as easily without any implied partial-species listing authority. The Service could apply SPR as a substantive standard and then list as endangered or threatened the entire species that is the subject of the SPR finding. Indeed, this approach may be more consistent with the intent of the ESA since it would provide greater conservation protection to the imperiled species than merely protecting a portion of the species.

The Opinion does not acknowledge that this interpretation exists. Rather, it suggests opaquely that limiting listing authority to entire “species” will frustrate compliance with section 4(c)(1). The Opinion asserts it is “[r]eading the Act to require protection for a species only where it is endangered, as specified in section 4(c)(1).” Opinion at 18.

The Opinion describes compliance with section 4(c)(1) as a step in the listing determination process: “[T]he Secretary would then be required to comply with the listing requirements in section 4(c)(1).” Thus, the interpretation appears to view section 4(c)(1) as establishing a substantive rule defining the Secretary’s listing authority. The reasoning seems to be that the Secretary’s duty in section 4(c)(1) to publish lists of endangered species and threatened species that “specify with respect to each such species over what portion of its range it is endangered” means that the legal protections of the ESA can only apply to the organisms that occupy the portion of the range in which the species is endangered, not to an entire “species” as that term is defined in the ESA – i.e., partial-species listing authority:

Applying the requirements of section 4(c)(1) to my example of the American alligator, the Secretary would refer to it by its scientific or common name, specify that portion of its range in which it is endangered as Florida, and specify any critical habitat within its range. In so doing, he would not be listing a “lesser entity than those specified in the ‘species’ definition”; rather, he would be doing exactly what section 4(c)(1) requires—identifying the members of the species that are “endangered species” by specifying the portion of the range in which they are in danger of extinction.

However, the Opinion misses the plain meaning of section 4(c)(1). That subsection describes the information that must be published in the lists of the “species” that have been determined to be “endangered species” or “threatened species” under sections 4(a) and 4(b): “[e]ach list shall ... specify with respect to such species over what portion of its range it is endangered or threatened” Section 4(c)(1) does not prescribe how FWS should determine if a species is an endangered species or a threatened species. It describes the content of the lists FWS must maintain after it has determined which species are endangered species or threatened species. As the Senate Report on the 1973 ESA stated, section 4(c) “sets out the mechanics for listing or removing from a list.” S. Rep. 93-307 at 7. As long as the published lists contain the required information, section 4(c)(1) has been given full force, and no conflict exists with any other provision of the Endangered Species Act.

This plain meaning is also shown by the last sentence of section 4(c)(1) itself, which provides that “[t]he Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).” If section 4(c)(1) contains an implied grant of partial-species listing authority found nowhere else in the ESA, as the Opinion finds, the sentence should refer not only to “subsections (a) and (b)” but also to “and this subsection.” The fact that Congress confined list revisions to decisions “made in accordance with subsections (a) and (b)” but not subsection 4(c)(1) shows that Congress did not view subsection 4(c)(1) as containing any measures affecting listing determinations, but as merely prescribing “the mechanics for listing.” S. Rep. 93-307 at 7.

Likewise, section 4(c)(2), which requires listing determinations following 5-year reviews of listed species, directs that “[e]ach determination under subparagraph (B) shall be made in accordance with the provisions of subsection (a) and (b).” This phrasing also shows Congress did not view subsection (c) as containing any provisions governing listing determinations.

The Opinion supports its conclusion by arguing that the prior interpretation “would render section 4(c)(1) meaningless, or at least relegate its application to delineating the range of distinct population segments and experimental populations, although neither of these terms existed when Congress prescribed the requirements for listing in section 4(c)(1).” *Id.* at 18.

This contention is mistaken for two reasons. Section 4(c)(1) is not “meaningless” as long as FWS Federal Register notices announcing listing determinations for new species “specify with respect to such species over what portion of its range it is endangered or threatened.” Nor would the giving section 4(c)(1) its plain meaning “relegate” the application of that subsection to describing something the statute did not recognize in 1973, as the Opinion asserts. In 1973 the ESA allowed FWS to list not only “species and subspecies” but also “any other group of fish or wildlife species of the same species or smaller taxa in common spatial arrangement that interbreed when mature.” Section 4(c)(1) prescribed the manner in which a listed “group” should be described in the Code of Federal Regulations. While that broad listing power was subsequently replaced by the more narrowly circumscribed DPS language in 1978, the need for a description of the geographic areas containing listed species continues to give vital content to the plain meaning of section 4(c)(1).

As its final interpretative argument, the Opinion contends the absence of partial-species listing authority would produce the “absurd” result of frustrating consideration of a state’s conservation efforts in a listing determination, as called for by section 4(b)(1). Opinion at 18. This claim is backwards: it is the Solicitor’s view that would frustrate that statutory command. Under the plain meaning interpretation limiting listings to entire “species,” the conservation efforts of any state within the species’ range can and must be considered. In contrast, the Solicitor’s partial-species listing interpretation would preclude the Secretary from considering a state’s conservation efforts if those efforts occur outside the area of the proposed SPR listing – even if those conservation efforts are in fact making an important contribution to the health of some populations or the species as a whole.

The plain meanings of sections 4(a)(1) and 4(c)(1) are both given full effect under the Department’s prior position: listing authority is limited to an entire “species” under 4(a)(1), and the lists of species classified as endangered or threatened must contain the information required under 4(c)(1). In contrast, the Opinion’s partial-species listing interpretation departs from the plain meaning of both provisions: it does not give full effect to the plain meaning of 4(a)(1), and it ascribes a meaning to 4(c)(1) that goes far beyond the plain meaning of its words.

B. Interpreting the term “endangered species” to include a portion of the range of a “species” is inconsistent with more than two dozen other ESA provisions

To support its conclusion, the Opinion finds that the word “species” in the term “endangered species” in §3(6) of the ESA does not have the meaning prescribed for the word

“species” in section §3(15) (species, subspecies or distinct vertebrate population segments), but instead is to be read jointly with the word “endangered” to refer only to the portion of the “species” range in which the “species” is endangered. Under this meaning, if the Secretary determines a “species” is only endangered in a “significant portion of its range,” the term “endangered species” refers only to the members of the species resident within that “significant portion” of the range of the species, and the only organisms that can be listed as endangered are those members of the species that are within that “significant portion” of the range. The Opinion offers the same interpretation of “threatened species.” This view is plainly inconsistent with the words of the statute.

Section 4(a)(1) directs the Secretary to determine “whether any species is an endangered species.” Using the definition of species in section §3(15), this means the Secretary is to determine if any “species, subspecies or [vertebrate DPS]” is an endangered species. Section 4(a)(1) does not direct the Secretary to determine whether any “portion” or “subset” or “subdivision” or “segment” or “part” of a species is an endangered species. It directs the determination to be made for “any species.” Congress could have used any of those quoted words or others if it intended that a listable endangered species could encompass less than a species.

The definition of “endangered species” in §3(6) that the Solicitor wishes to define to allow partial-species listings states: “An ‘endangered species’ means any species which is” It does not read that an endangered species means any “portion” or “subset” or “subdivision” or “segment” or “part” of a species. Here, too, Congress could have used any of those quoted words or others if it intended that a listable endangered species could encompass less than a species.

Both §3(6) and §4(a)(1) present equivalence between a “species” and an “endangered species”: “an ‘endangered species’ means any species” and “[the Secretary determines] whether any species is an endangered species.” An endangered species must be a species, and only a species can be an endangered species. Neither term denotes a larger or smaller grouping than the other.

The words “species” and “endangered species” are in fact used equivalently throughout the ESA so often that the Solicitor’s view that an “endangered species” can mean a portion of a “species” renders dozens of its other provisions unintelligible or irrational:

1. Section 3(5)(A)(i)’s definition of critical habitat is “specific areas within the geographical area occupied by the species” If the Solicitor’s view were correct, this should read “occupied by the endangered species,” because under the Solicitor’s view, in the case of a partial-species listing the statute as written inexplicably requires critical habitat to be designated outside the listed portion’s range where by definition the species is not endangered.

2. In the same definition, instead of the actual phrase “essential to the conservation of the species,” the phrase under the Solicitor’s view should be “essential to the conservation of the endangered species” because otherwise critical habitat must nonsensically be defined by what is

essential to conserving a species that by definition (in the case of a partial-species listing) is not endangered.

3. The same problem is presented in §3(5)(A)(ii)'s reference to "area occupied by the species," which should be "area occupied by the endangered species" under the Solicitor's view.

4. Also, §3(5)(B) refers to "species now listed as threatened or endangered species," when under the Solicitor's view it should read "portions of species now listed"

5. Section 3(5)(C) is almost unintelligible under the Solicitor's view not only because it would fail to achieve the plain congressional intent of discouraging broad designations in currently unoccupied areas (since there would paradoxically be no inhibition to designations of unoccupied areas where the species is not endangered), but it would also trigger a biologically incomprehensible inquiry into what areas the endangered portion of the species might in the future be able to occupy that it does not currently occupy, when at a minimum the answer plainly is: everywhere else it is currently found.

6. Section 4(a)(3)(A)(i) would become hopelessly ambiguous in requiring concurrently with a determination that "a species is an endangered species" the designation of critical habitat for "such species." It should read "such endangered species" under the Solicitor's view since here too it would otherwise pointlessly require a designation of critical habitat for the entire species and not just the portion listed as endangered.

7. Section 4(b)(1)(A), which requires listing determinations to be based on "a review of the status of the species," would under the Solicitor's view require a review of an entire species (including the healthy portions) even if the Secretary is only responding to an SPR listing petition, which may or may not be useful.

8. In §4(b)(2), the important limitation on exclusions from critical habitat is that such exclusions can not result in "the extinction of the species." This limitation would be meaningless in the case of a partial-species listing since by definition there is no current risk of extinction to "the species" (including the unlisted portion) and therefore no limit on exclusions.

9. The reference in §4(b)(3) to petitions to "add a species to, or remove a species from" the lists should under the Solicitor's view read "add an endangered or threatened species to, or remove an endangered or threatened species from" the lists since it is not "species" but rather "endangered species" (or "threatened species") that are added to the lists.

10. In §4(b)(3)(B)(iii)(II) the reference to adding "qualified species" to the lists as a reason for a warranted but precluded finding is incorrect under the Solicitor's view and should read "qualified endangered species" since the lists only contain "endangered species" rather than "species."

11. Similarly, in §4(b)(3)(C)(iii) there is no sensible reason Congress would have required the Secretary to monitor all "species" for which a warranted but precluded finding is

made (including the healthy portion of a significant-portion listing), rather than all “endangered species” since doing so would waste scarce resources.

12. In §4(b)(5), there is no reason Congress would require the Secretary to give notice of proposed listing to each state or foreign nation “in which the species is believed to occur”(not the “endangered species”) if the proposed listing might be of just a portion of the species possibly far removed from a state or nation where a healthy population is found that is not subject to the listing. Yet the Solicitor’s view requires this seemingly pointless exercise.

13. In §4(b)(6) the terms “species” and “endangered species” are used interchangeably in a way that makes no possible sense if the words have different meanings as the Solicitor suggests. The requirement to designate critical habitat for “an endangered species” concurrently with determination that “such species is endangered” is unintelligible if “species” refers to a different biological grouping than “endangered species.”

14. In §4(b)(7), the emergency power to prevent “a significant risk to the well-being of any species of fish and wildlife or plants” is irrationally limited under the Solicitor’s view in that it does not convey such power to protect a partially listed “endangered species” because in the case of an SPR listing by definition the well-being of the species as a whole is not at risk even if the well-being of the listed significant portion is at risk. It is not easy to imagine why Congress would have enacted such a strangely delimited power that prevents emergency help for the very populations that, according to the Solicitor’s view, Congress was trying to protect.

15. While the Solicitor appears to have placed principal weight on §4(c)’s direction to specify in the lists of endangered and threatened species “over what portion of its range it is endangered or threatened,” that section itself contains ample evidence that no partial-species listings were intended:

a. Section 4(c)(1) requires “a list of all species” determined to be “endangered species.” Under the Solicitor’s view it should have required “a list of all endangered species” since “endangered species” rather than “species” are what is listed.

b. In §4(c)(2), the Secretary must conduct five year reviews of “all species included in a list,” which under the Solicitor’s view requires a review not just of the listed SPR but also of the healthy unlisted organisms.

c. The requirement in §4(c)(2)(B) to determine whether to remove a “species” from the list based on the five year review also contradicts the Solicitor’s view that the list contains “endangered species” rather than “species.” The final two subsections of that section (providing for changing a “species” from “an endangered species to a threatened species” or vice versa) are incomprehensible if “species” means something different than “endangered species.”

16. In §4(f)(1), the provision that the Secretary shall develop and implement recovery plans “for the conservation and survival of endangered species ... unless ... such a plan will not

promote the conservation of the species” makes no sense if an “endangered species” can be a subset of “species.”

17. In §4(f)(3), the Secretary’s biannual reporting duty on recovery planning for “all species listed” would not apply to recovery planning for SPR listings since those are not under the Solicitor’s view a “species.”

18. In §4(g), following the delisting of an SPR listed species, the Secretary would have to monitor the entire species and not just the delisted portion, a seemingly valueless activity.

19. In §6(c)(1)(A), the Secretary must determine a state’s authority to conserve “resident species” that are determined to be “endangered.” Under the Solicitor’s view the word “endangered” should be followed by the word “species” to be a noun rather an adjective modifying the phrase “resident species.”

20. In §6(c)(1)(D), a state must have programs for “conservation of resident endangered or threatened species of fish or wildlife” in contrast to the required provisions for “resident species” in the other subsections of that section. There is no plausible reason for the shift in terminology in this particular subsection.

21. In §7(a), consultation is required for “any endangered species” but a conference is required for “any species proposed to be listed,” which is would irrationally preclude conferencing for SPR listing proposals since they do not under the Solicitor’s view involve the listing of a “species.”

22. In §7(b), a biological opinion must detail how a proposed action affects “the species,” which is inconsistent with the scope of consultation (for “any endangered species”) if there is a difference between “species” and “endangered species” as the Solicitor believes.

C. The legislative history of the Endangered Species Act does not support partial-species listing authority.

The Opinion asserts that the legislative history of the 1973 Act supports the existence of partial-species listing authority, and contains a lengthy Appendix citing various comments to support that contention. In fact, however, not a single statement anywhere in the legislative history expressly supports the existence of partial-species listing authority. Some of the cited quotes contradict the Opinion’s conclusion; some have nothing to do with SPR at all and instead refer plainly to other new provisions of the ESA such as threatened status and the power (from 1973 to 1978) to list any population of a species; others do not clearly refer to any particular statutory provision. A broader review of ESA enactments between 1973 and 1978 show that at no time did Congress ever believe it had granted partial-species listing authority to FWS. An agency reversal of statutory interpretation based on ambiguous legislative history will not be upheld. *Benov v. Shalala*, 30 F.3d 1057, 1072 n.36 (9th Cir. 1994). A reversal based on a plain misreading of legislative history cannot be sustained.

1. The Appendix (pages A-5--A-6) includes two pages of dialogue in 1972 between Senator Spong and Curtis Bohlen, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior, regarding new powers to be granted in the ESA. Far from supporting partial-species listings, the quoted testimony of Mr. Bohlen shows a clear expectation that an entire species would be listed even if it was endangered or threatened in only a portion of its range. Mr. Bohlen hypothesized a species found in three different countries with three different management regimes, in one of which (Country A) the species was neither threatened nor endangered. He asserted that while this species would not qualify for endangered status under existing law, it could be classified as a threatened species under the proposed law.

Mr. Bohlen then stated: "If that same animal were so classified, regulations could be issued that would: a. Permit the importation into the United States of lawfully taken specimens from country 'A.' b. Prohibit or restrict the importation of specimens which originated in countries 'B' or 'C.'" *The Endangered Species Conservation Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the Environment of the Senate Comm. on Commerce, 92d Cong. 109 (1972).*

This answer undercuts partial-species listing authority. If the hypothetical species were to be listed only in the portion of the range in which it is threatened (Countries B and C), then FWS would have no regulatory authority over the animals in Country A. In that case, it would not be possible for "regulations [to] be issued" that would permit importation from Country A. In order for FWS to have legal authority to issue regulations permitting import of specimens from Country A, FWS would have to list the species as threatened in Country A, and then exercise regulatory take power under Section 4(d) of the ESA. Thus, Mr. Bohlen must have envisioned that the entire species would be listed as threatened even though the threats exist only in a portion of its range.

The same implications arise from Assistant Secretary Reed's statements (A-7, A-9) that the proposed ESA "authorized the Secretary to regulate a species in one part of its range without regulating the species where it is abundant in other parts of its range" and "[t]he administration's bill gives the Secretary the power to allow harvest in areas where the animal is not presently threatened with extinction and protect [it] in areas where [it] is ...likely to become threatened with extinction." The discretion to regulate a species differently "where it is abundant" or to "allow harvest in areas where the animal is not presently threatened with extinction" can exist only if the species is listed "where it is abundant" and "not presently threatened with extinction" – in other words, when the entire species is listed.

The same conclusion can be drawn from Deputy Assistant Secretary Wheeler's comment (A-10) that under the new bill "we could prohibit the taking in that area where the condition of endangerment exists, and not in others." This statement makes sense only if the entire species is listed. The same is also true for FWS witness Earl Baysinger's remark (A-11) that under the bill FWS could "make the finding that this animal is likely to become threatened over a portion of its range, and then apply such techniques as would be needed to prevent it from deteriorating further within that portion of its range."

None of these statements provides any clear support for partial-species listings.

2. When the NOAA witness was asked the same question (quoted at Appendix A-8), he similarly replied: “Where a species is presently threatened with extinction over a significant part of its range, the Secretary will enact measures which, for example, would control the time of taking, the manner of taking, catch limitations, or areas where taking would be prohibited.” This answer also assumes the entire species is listed because otherwise the Secretary could not “enact measures” for the entire species as hypothesized.

3. The colloquy between Rep. Potter and Mr. Bohlen reprinted on Appendix page A-7 also provides no support for partial-species listings. Rep. Potter wondered if the House bill was “sufficiently fine-tuned to let you reach the situation where somebody goes in, say, and wipes out one entire population, even though it may not be a subspecies?” Mr. Bohlen agreed that the “portion of range” clause “gives you the necessary tools to handle discrete populations.” He did not state whether the “tools” would include listing the entire subspecies or just the single imperiled population. His answer would be the same whether or not partial-species listing was authorized. Nor can any meaningful inference be drawn from the comment in the Senate Report that “[f]lexibility in regulation is enhanced by a provision which allows for listing if the animal is endangered over a “substantial portion of its range.” The report does not state whether the “flexibility” includes listing the entire species or just the organisms in a portion of the species’ range. Either alternative would support the quoted statement.

4. The Opinion fails to note the central fact that the ESA as enacted in 1973 expanded listing authority far beyond “species and subspecies” listings that would have been allowed in the 1972 bills, to include “any other group of fish or wildlife species of the same species or smaller taxa in common spatial arrangement that interbreed when mature.” The House Report on H.R. 37 stated that “‘species’ is defined broadly enough to include any subspecies of fish or wildlife or plants, or any population of such species.” (Underlining added.) This expansion of listing authority to “any population” of species or subspecies would be meaningless and unnecessary if partial-species listing authority already implicitly existed in the SPR clause of the 1972 precursor of the ESA, since FWS would already have the authority to list a portion of a species or subspecies. The listing expansion between 1972 and 1973 counters any implied Congressional intent to allow partial-species listings under the SPR clause.

5. Looking at Congressional intent from the perspective of the 1973 Congress, its broadened definition of species allowed FWS to list “any population” of fish or wildlife without any need to determine what constitutes a “significant portion of its range.” Congress therefore had no reason to grant FWS a separate and redundant power to list a “significant portion” of a “group of fish or wildlife ... in common spatial arrangement that interbreed when mature” -- since a significant portion of a “group of fish or wildlife ... in common spatial arrangement that interbreed when mature” is itself a “group of fish or wildlife ... in common spatial arrangement that interbreed when mature,” and therefore could already be listed as a species under the broad 1973 definition.

Thus, the inferred partial-species listing authority would only be meaningful for plants – the very kingdom of species that Congress had chosen to provide narrower listing authority than for fish and wildlife. To interpret the definitions of “endangered species” and “threatened species” to confer an implied partial-listing power that would override an explicit limitation

elsewhere in the same statute contradicts a basic rule of statutory interpretation and is not reasonable.

6. The House Committee's comment (A-9) that the new definition of "endangered species" would permit the "possibility of declaring a species endangered within the United States where its principal range is in another country, such as Canada or Mexico, and members of that species are only found in this country insofar as [it exists] only on the periphery of [its] range" and that the new law "permits protection of animals which are in trouble in any significant portion of their range, rather than threatened with worldwide extinction" also does not provide support for partial-species listing authority since the statements do not reveal what the species' listing status would be in the other country where it may be more plentiful.

7. While the Appendix cites several statements by individual legislators on the floor of the House or Senate to support partial-species listing authority, not one of the quoted passages expressly supports such authority. All the floor debate must be viewed through the prism of the bills passed out of the committees of both houses, which both contained the broadly expanded definition of "species" including "any other group of fish or wildlife species of the same species or smaller taxa in common spatial arrangement that interbreed when mature." Thus, when Senator Tunney described the bill's power for FWS to list the alligator in some states and not list it in other states, he was describing the broadened scope of "species" that allowed a separate listing decision for the population in each state, each of which could be designated a separate "species" under the new definition. There is no indication he was referring to an implied authority to list only a portion of a species.

In the House, both Rep. Goodling and Rep. Young were both expressly discussing the newly-authorized threatened status created in the ESA; neither said anything about a partial-species listing.

8. As discussed above, the 1978 amendment to "species" adding the restrictive DPS language would be meaningless if FWS already had partial-species listing authority under the SPR language, since FWS would be able to list as an SPR any population of any species whether or not it met the new statutory definition of "species." Amendments must be given meaning if possible, and Congress is presumed not to enact meaningless laws. *Pierce County v. Guillen*, 537 U.S. at 145; *Amer. Nat. Red Cross v. S.G.*, 505 U.S. at 263.

9. While neglecting the key 1978 DPS amendment, the Opinion (A-13—A-15, A-17) cites to several failed amendments offered in 1978 that were never brought to a vote in either house of Congress. These failed amendments do not provide a reasonable basis for statutory interpretation:

[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. ... Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

United States v. Craft, 537 U.S. 274, 287 (2002) (citations and quotations omitted).

10. The Opinion's reliance on the 1979 GAO Report and responsive Senate Report to document its partial-species listing power is also unjustified. In fact, the GAO Report, the FWS' reported response to it and the Senate Report all proceed from the premise that a "species" as defined in Section 3(15) must be listed in its entirety even if it is threatened or endangered in only a significant portion of its range.

The GAO Report and the Senate Report both addressed the definition of "species" in Section 3(15), which had been narrowed the previous year to limit below-subspecies listings to distinct vertebrate population segments (DPS). Neither the GAO Report nor the Senate Report addressed the definitions of "endangered species" or "threatened species" in Sections 3(6) or 3(15) that contain the SPR language.

By failing to perceive the context of the 1979 legislative focus, the Opinion fundamentally misunderstands the GAO's use of the phrase "significant portion." The GAO proposed to use the term "significant portion" to define a DPS that could be listed -- in its entirety -- as a species: "Distinct population listings must constitute significant portions of the species' range in terms of"

In that context, the FWS's reported acceptance of this proposed definition of DPS, based on its reported internal draft guidelines, simply presages the DPS policy FWS and NMFS adopted some 18 years later which also embraces "significance" as one essential element of a DPS.

This GAO proposal, the FWS's acceptance of it, and the Senate's response to it, would make absolutely no sense if FWS already independently possessed the power to list a significant portion of a species' range under the "endangered species" and "threatened species" definitions in the Act. There would be no need for legislative action to define a DPS as a "significant portion of the species' range" if FWS already possessed the power to list a "significant portion of the species' range" under the existing SPR clauses because anything that would become listable as a DPS would already be listable under SPR.

The only basis for GAO to propose its new DPS definition using "significant portion" of range, and the only reason the Senate Report would urge FWS to use its new DPS listing authority "sparingly," is if FWS did not already have authority to list a species only in a significant portion of its range. This legislative history therefore contradicts the existence of partial-species listing authority.

Conclusion

The Service must interpret the term "significant portion of ... range" to have a biological meaning that permits listing a species, subspecies or vertebrate DPS only when the entire species', subspecies' or vertebrate DPS's "future is in doubt." The Service's proposed interpretation allowing a partial-range listing for a species, subspecies or vertebrate DPS that is not as a whole at risk of extinction or endangerment is not permissible. The Service's proposed interpretation would improperly result in below-subspecies population listings for invertebrates or plants that would nullify the ESA's express limitation of DPS listings to "vertebrate fish or wildlife." The Service's proposed interpretation would also impermissibly nullify the Service's Joint Policy interpreting the statutory DPS term by allowing below-subspecies listings based on significance alone without the discreteness required by the Joint DPS Policy. These

interpretative limits do not prevent the SPR phrase from serving as a “substantive standard” – they prevent the SPR phrase from subverting or negating other ESA terms.

The ESA also does not permit the Service to list as a portion of the range of a species, subspecies or vertebrate DPS endangered or threatened. Listings are limited to entire species, subspecies or vertebrate DPSs. If the Service determines a species, subspecies or vertebrate DPS is endangered or threatened throughout all or a significant portion of its range, the Service must list the entire species, subspecies or vertebrate DPS as endangered or threatened. Partial-range listings are not permissible.

AFRC appreciates the opportunity to comment on this listing proposal. If you have any questions, please contact Ross Mickey at 541-342-1892.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Partin", with a long horizontal flourish extending to the right.

Tom Partin
President



MOUNTAIN
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January 17, 2008

Ms. Susan Linner, Field Supervisor
Colorado Field Office, Ecological Services
U.S. Fish and Wildlife Service
134 Union Boulevard, Suite 670
Lakewood, Colorado 80228

Re: Revised Proposed Rule to Amend the Listing for the Preble's Meadow Jumping Mouse, 72 *Fed. Reg.* 62,992 (Nov. 7, 2007)

Dear Ms. Linner:

Mountain States Legal Foundation ("MSLF") fully supports any decision to remove the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) from the list of endangered and threatened species in Wyoming. MSLF, however, opposes any continued listing of the Preble's in Colorado. On behalf of itself and its members, MSLF submits the following comments on the proposed partial delisting of the Preble's.

Identity and Interest of MSLF

MSLF is a non-profit, public interest, legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live, own property, and/or work in nearly every State. Most importantly, many MSLF members live, own property, and work in areas of Colorado and Wyoming encumbered by critical habitat designations for the Preble's. These members depend upon the federal and private lands within these states for their livelihoods; thus, they have a significant interest in the removal of the Preble's from the list of endangered and threatened species and the removal of its critical habitat designations.

Abundance Reporting Methodology

In the proposed rule, the United States Fish and Wildlife Service ("FWS") states, "over 80 percent of such trapping efforts throughout Colorado have failed to capture Preble's meadow jumping mice." 72 *Fed. Reg.* at 62,998. It is unclear from the proposed rule, however, what methodology was employed to reach the reported 80 percent negative capture rate. That is, how were mice positively or negatively identified as a Preble's? What, if any, samples were collected for analysis? What, if any, training was given field technicians? Given the range overlaps between purported Preble's and western jumping mice (*Z. princeps*), the identification practices

become critical. Further, how was the 80 percent number reached? Were only confirmed “positive” Preble’s counted towards that number? More importantly, were only confirmed “negative” captures (*i.e.*, only those mice definitively identified as other than Preble’s) included? How are mice that are not confirmed as either Preble’s or western jumping mice accounted?

Current Abundance Estimations

The proposed rule finds “the subspecies’ apparent local extirpation from areas of human development provides useful perspective about the potential impacts of future development within the remaining range of the Preble’s meadow jumping mouse.” 72 *Fed. Reg.* at 63,005. The “local extirpations” noted, however, all occur within the Colorado Front Range urban corridor, the developed corridor extending from Pueblo through Fort Collins, along Interstate 25. Extending the loss of habitat due to this development into the future, however, is misleading.

Moreover, the FWS relies, in part, upon a 1996 unpublished master’s thesis¹ for the proposition that Preble’s populations were in decline. 72 *Fed. Reg.* at 63,005. However, as the FWS acknowledges, “jumping mouse populations in a given year vary significantly from year to year, [and thus] short-term studies may not accurately characterize abundance.” *Id.* at 63,003 (internal citations omitted). While Ryon did not report Preble’s captures in seven of the eight sites attempted, only one contained habitat purportedly no longer suitable for Preble’s. *Id.* at 63,005. Thus, given the high variability of trapping success from year to year and the extent to which habitat sampled remained capable of supporting Preble’s, it is improper to rely upon this study as evidence of anything other than that mice were not captured in the year Ryon sampled the areas.

Thus, when one properly evaluates the current abundance of Preble’s, he finds that, despite the natural year-to-year population fluctuations, populations of the purported subspecies remain viable in virtually every county encompassing its “historic” range. Moreover, as the Draft Recovery Plan acknowledges, “adequate numbers, sizes, and distribution of populations may currently exist to meet recovery criteria.” United States Dep’t of Interior, *Draft Recovery Plan: Preble’s Meadow Jumping Mouse (Zapus hudsonius preblei)* at iv (Nov. 5, 2003).

Human Population Projections and Development Modeling

The proposed rule adopts the projections of the Colorado Demography Office regarding human population increases along the Colorado Front Range, specifically a 1.5 million person increase by 2035. 72 *Fed. Reg.* at 63,007. Further, the FWS has adopted a model reported by the Center for the American West (the “Center”), which purports to predict development patterns into the future. *Id.* (citing William R. Travis, *et al.*, *Western Futures: A Look into the Patterns of Land Use and Future Development in the American West* (Center for the American West, University of Colorado, Boulder 2005)). Reliance upon the Center’s projections, however, is misplaced. According to the Center, its model

¹ T.R. Ryon, *Evaluation of the Historic Capture Sites of the Preble’s Meadow Jumping Mouse in Colorado* (1996) (unpublished M.S. thesis, University of Colorado, Denver).

assumes that all private land that is technically buildable in the West is on the real estate market. [The model] does not know that some owners have placed conservation easements on their land, nor that many ranchers and farmers are not interested in selling, even if the price is right. And [the model] does not know where state or local governments have enacted effective growth limits. . . . The model simply spreads development out across the landscape based on population growth

Travis, *et al.*, *supra* at 2 (emphasis added). Thus, this unsophisticated model is extremely limited in its utility; it does not account for any protection or a limitation placed upon buildable lands, and, in fact, assumes that all buildable land will be developed! If the FWS relies upon a model based upon such questionable assumptions, it unlawfully predetermines the result.

Adequacy of Existing Regulatory Mechanisms

The FWS is required to consider current and likely future regulatory protections that would remain in force should the Preble's be removed from the list of Endangered and Threatened Species. 16 U.S.C. § 1533(a)(1). While the FWS acknowledges that the Preble's remains a State-listed species in Colorado, where the proposed rule would continue federal listing, the FWS concludes that "if [federally] delisted, Colorado could rescind its current State designation of threatened." 72 *Fed. Reg.* at 63,014. This determination exceeds the FWS's mandate under the Endangered Species Act. The FWS is only to evaluate current and likely future regulatory mechanisms that would remain in place upon federal delisting. A determination that Colorado would also delist the Preble's is pure unsubstantiated conjecture. In fact, it is more likely that Colorado would retain its State listing to avoid any potential federal re-listing of the purported subspecies. Moreover, the proposed rule finds that "Wyoming[s] continued classification of the meadow jumping mouse as a 'nongame species' under [State regulation] would protect the Preble's meadow jumping mouse." *Id.* The FWS's arbitrary determination that State listing in Colorado is insufficient, yet mere nongame regulations in Wyoming are adequate, is unsupported.

Conclusion

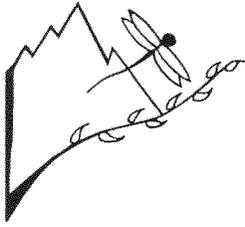
While MSLF supports the delisting of the Preble's meadow jumping mouse in Wyoming, the delisting does not go far enough. Adequate populations of Preble's exist throughout the purported subspecies "historic" range and adequate state regulatory mechanisms exist to prevent destruction or modification of Preble's habitat; thus, MSLF supports the removal of the Preble's from the list of Endangered and Threatened Species in its entirety.

Respectfully Submitted By:

MOUNTAIN STATES LEGAL FOUNDATION



Ronald W. Opsahl
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22 January 2008

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Attn: Preble's meadow jumping mouse

Dear Ms. Linner:

Below please find comments on behalf of Center for Native Ecosystems, Biodiversity Conservation Alliance, Forest Guardians, Center for Biological Diversity, and the Natural Resources Defense Council on the Revised Proposed Rule to Amend the Listing for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) to Specify over What Portion of Its Range the Subspecies Is Threatened (72 Fed. Reg. 62992-63024 (Nov. 7, 2007)). We strongly object to the Service's proposal to remove protections from Preble's mice in Wyoming for several reasons: little is known about status in Wyoming, the Service has not adequately analyzed the threat of overgrazing in Wyoming, the Service has not factored in climate change in this decisionmaking, the Service's application of a new interpretation of "significant portion of the range" to remove protections in Wyoming is flawed, and the choice of the state line to demarcate where protections are appropriate suggests that the agency continues to bow to political pressure. Our organizations have a long history of advocating for the conservation of the Preble's meadow jumping mouse and the Front Range riparian areas upon which it depends. We strongly encourage the Service to retain protections throughout the range of the Preble's meadow jumping mouse, and we stand ready to challenge this decision if it is finalized as proposed.

I. Little is known about status in Wyoming.

The delisting proposal clearly states that little is known about the status of the Preble's meadow jumping mouse in Wyoming. Several of the occupied drainages have only one confirmed museum specimen to document the mouse's presence. The draft recovery plan requires ten years

of monitoring before trends could be assessed, and we are not aware of any Preble's meadow jumping mouse populations in Wyoming for which those data are available.

At the Colorado public hearing, the Service explained that Preble's meadow jumping mice tend to be found at higher elevations than western jumping mice in Wyoming, but in Colorado this trend is reversed, and western jumping mice are found higher. The reason for this difference in niche partitioning is not clear and should be investigated. One explanation could be that western jumping mice are outcompeting Preble's meadow jumping mice in Wyoming and that the Preble's mouse's range has already contracted.

The Service is still just beginning to get a handle on where the Preble's mouse is actually found in Wyoming and has little information on status in that part of its range. Delisting now would likely mean that we will never obtain a reasonably accurate depiction of the mouse's distribution or status in Wyoming. At the Colorado public hearing, the Service explained that since it intends to simply amend the original listing based on data error, it will not require the five years of monitoring that would accompany a delisting based on recovery.

We raised these concerns at a meeting with Service staff in early January and basically were assured that the Service hoped that the Wyoming Game and Fish Department would step up and start monitoring. To date, Game and Fish has neither collected Preble's mouse data nor funded the collection of such - we spoke to staff at both Game and Fish and the Wyoming Natural Diversity Database (WYNDD) to confirm this. WYNDD has received some funding from the Governor's office for its Preble's meadow jumping mouse work, but the Service is well aware that the Governor of Wyoming has been focused on building a case for the removal of protections for Preble's mice in Wyoming. Once this has been accomplished it is highly doubtful that his office would continue to fund Preble's mouse data collection. The Service must not rely on future voluntary conservation actions when making listing decisions. At present there is no monitoring plan in place for Wyoming, and no agency has committed funding toward data collection, to the best of our knowledge. The Service must honestly appraise this situation and acknowledge that delisting in Wyoming will almost certainly mean that the mouse will fall off everyone's to-do list, and populations could crash without anyone taking note.

Futhermore, a bill (see Senate File SF0003) has been introduced in the Wyoming legislature that would provide some general funds for the Wyoming Game and Fish Department to spend on nongame management, but the legislature would have to authorize the use of any of these funds. Again it is unlikely that Wyoming legislators would approve spending funds on Preble's meadow jumping mouse research.

We strongly discourage the Service from removing protections for Preble's meadow jumping mice in Wyoming. However, should the agency elect to do so, it should consider making delisting in Wyoming contingent on the simultaneous issuance of a special rule requiring the collection of 5 years of monitoring data in Wyoming.

II. The Service must fully analyze whether overgrazing may threaten Wyoming populations.

The Service cites Taylor (1999) to support its contention that overgrazing does not threaten Preble's meadow jumping mice in Wyoming. However, it also cites the Wyoming Comprehensive Wildlife Plan's assessment that riparian areas are degraded throughout the state, and it cites several studies showing that overgrazing does negatively impact jumping mice. The Service also recently added the New Mexican meadow jumping mouse to the Candidate list largely due to concerns about overgrazing.

Taylor (1999) reported that 33 *Zapus* spp. were trapped over 6300 trap nights – a 0.005 capture rate. She also discussed problems with overgrazing in at least one occupied site: “On Sybille Creek the vegetation had been grazed heavily by cattle for a number of years; the area was fenced off two years ago and subsequently used by a small number of horses. The habitat was immature and sparse, the mouse captured here was making use of concrete rip-rap and clusters of vegetation including coyote willow, cattail, and rag weed” (p. 4). “There is no shrub component to the vegetation at the water’s edge, all the young willow is set back 6 to 10 feet. The single *Zapus* captured was in a clump of stable vegetation at an ox-bow in the creek. In some places the eroding banks have been stabilized with concrete rip-rap” (p. 21).

Taylor’s survey work was limited to True Ranches property. The conventional wisdom is that ranches with larger holdings (like True Ranches) may be better able to guard against overgrazing by being able to move cattle around the larger landscape more effectively. Therefore, conditions on True Ranches property may not be representative of riparian health within the mouse’s range in Wyoming as a whole, and it is particularly noteworthy that even Taylor’s study, which was commissioned by True Ranches, revealed conflicts between overgrazing and the Preble’s mouse. Taylor’s introduction describes the purpose of the study as follows: “The owners of True Ranches decided to embark upon a trapping effort to demonstrate the compatibility of the mouse with sustained cattle ranching operations” (p. 2); and her conclusion states, “The effort undertaken by True Ranches was to demonstrate that sustained cattle production is NOT detrimental to the survivability of *Zapus*” (p.5).

Clearly the Service is not relying on the best available science here. Renee Taylor is currently making a name for herself challenging well-documented studies on the impacts of oil and gas drilling on sage-grouse. Even if Taylor were a credible source, this document is from 1999, and the 1990s were relatively wet years. Riparian area conditions can change quickly and dramatically when grazing continues under drought stress. We saw this firsthand with Service staff when the agency took us out to Colorado butterfly plant habitat in 2003, and at the first site we visited, all of the riparian vegetation had disappeared, much to the Service's chagrin. Post-2002-drought conditions may be quite different than those Taylor reported, as may Preble's mouse status.

At one point in the delisting proposal, the Service asserts that grazing timing and intensity are appropriate in Wyoming, but it offers no citation. At our meeting with the Service earlier this month we asked whether the agency had reviewed other documents addressing current riparian area health in Preble's mouse habitat in Wyoming, including any Forest Service grazing

allotment monitoring records. The answer was no. Based on GIS data provided by the Service and the Forest Service, it appears that five different Medicine Bow National Forest grazing allotments include confirmed occupied Preble's mouse habitat: Haystack, Eagle Peak, Albany Peak, North Laramie River, and North Pasture. The Service should request the Allotment Management Plans, Annual Operating Instructions, and any photos, notes, reports, or monitoring analyses that the Forest Service possesses for these five allotments. The Service should also do the same for Hutton Lake National Wildlife Refuge. I personally have observed cattle grazing in the riparian areas of the Refuge.

Based on the information cited in the proposal, the best available science indicates that overgrazing may threaten Preble's meadow jumping mice in Wyoming. The mere confirmation of mouse presence does not ensure that populations are secure – this is obvious from several populations in Colorado that have been found in marginal or highly degraded habitat which are not expected to persist.

III. Climate change must factor into the Service's analysis.

The Service must consider both whether climate change threatens Wyoming Preble's meadow jumping mouse populations, and whether the protection of these populations may be essential to recovery given predicted impacts of climate change throughout the species' range.

The Service contends that climate change impacts need not be considered since they occur outside of the "foreseeable future" period it has chosen to analyze for the mouse. However, the agency explains that it considers the foreseeable future to extend to about 2040 because this is as far out as the current human population growth predictions for the region go. Climate change models for the region, on the other hand, extend to at least 2100. For example, see the maps at http://www.geo.arizona.edu/dgesl/research/regional/projected_US_climate_change/projected_US_climate_change.htm which predicts 2100 summer temperatures at least 7°F higher than the 1971-2000 average in southern Wyoming. One can request information on predicted climate change for specific lat/long coordinates from the National Center for Atmospheric Research via their Regional Climate-Change Projections from Multi-Modal Ensembles program. The form is available at: <http://rcpm.ucar.edu/request.html>. Results are available for annual, seasonal, or monthly changes under different emissions scenarios for each decade between 2000 and 2099. The Service should request these data and include them in its analysis of both the security of the Wyoming populations and the importance of the Wyoming populations given potential climate change impacts in Colorado.

NRDC previously provided the following comments on the use of a 100-year time span for assessing extinction threat for the polar bear:

Nor would it be unusual for the Service to use a 100 year time frame to evaluate current threats to the polar bear. In addition to being supported by the best available scientific data, the Service has a long history of using 100 year periods in listing decisions. As the Proposed Rule itself notes, the Service adopted a 100 year definition of "foreseeable future" when analyzing threats to the greater sage grouse. 72 Fed. Reg. at 1070. Similarly, the National Marine Fisheries Service

(“NMFS”) uses 100 year time frames when examining the status of marine mammals under the Endangered Species Act. Thus, when NMFS reclassified the stellar sea lion into two distinct populations, it employed 100 year models to assess the threats to those populations. See “Change in Listing Status of Steller Sea Lions Under the Endangered Species Act,” 72 Fed. Reg. 24345, 24346 (May 5, 1997).

The Service routinely uses 50-year or 100-year timeframes in preparing Biological Opinions and Safe Harbor Agreements (for example, the Aplomado falcon Safe Harbor Agreement lasts 99 years, and the proposed Utah prairie dog Agreement lasts 50 years). In fact, the Service has issued Incidental Take Permits for the Preble’s meadow jumping mouse that last 50 years (for example, the permit accompanying the Leonard HCP). It is arbitrary and capricious for the Service to allow take 50 years into the future and yet not assess threats that far out.

The Intergovernmental Panel on Climate Change has come to consensus on many factors relevant to the potential threat of climate change to the Preble’s mouse, including:

- “Climate change will constrain North America’s over-allocated water resources, increasing competition among agricultural, municipal, industrial and ecological uses (very high confidence).” (Field *et al.* 2007, p. 619)
- “Many North American species have shifted their ranges, typically to the north or to higher elevations (Parmesan and Yohe, 2003).” (Field *et al.* 2007, p.622)
- “Warming, and changes in the form, timing and amount of precipitation, will very likely lead to earlier melting and significant reductions in snowpack in the western mountains by the middle of the 21st century (high confidence) (Loukas et al., 2002; Leung and Qian, 2003; Miller et al., 2003; Mote et al., 2003; Hayhoe et al., 2004). In projections for mountain snowmelt-dominated watersheds, snowmelt runoff advances, winter and early spring flows increase (raising flooding potential), and summer flows decrease substantially (Kim et al., 2002; Loukas et al., 2002; Snyder et al., 2002; Leung and Qian, 2003; Miller et al., 2003; Mote et al., 2003; Christensen et al., 2004; Merritt et al., 2005).” (Field *et al.* 2007, p.627)
- “With global average temperature changes of 2°C above pre-industrial levels, many terrestrial, freshwater and marine species (particularly endemics across the globe) are at a far greater risk of extinction than in the recent geological past (medium confidence)” (Fischlin *et al.* 2007, p. 213)
- “Warming and drying trends are likely to induce substantial species-range shifts, and imply a need for migration rates that will exceed the capacity of many endemic species.” (Fischlin *et al.* 2007, p. 226).
- “In dryland wetlands, changes in precipitation regimes may cause biodiversity loss (Bauder, 2005). Changes in climate and land use will place additional pressures on already-stressed riparian ecosystems along many rivers in the world (Naiman et al., 2005).” (Fischlin *et al.* 2007, p. 234)
- “The likely synergistic impacts of climate change and land-use change on endemic species have been widely confirmed (Hannah et al., 2002a; Hughes, 2003; Leemans and Eickhout, 2004; Thomas et al., 2004a; Lovejoy and Hannah, 2005; Hare, 2006; Malcolm et al., 2006; Warren, 2006), as has over-exploitation of marine systems (Worm et al., 2006; Chapters 5 and 6).” (Fischlin *et al.* 2007, p. 241)

Even without the model data or the IPCC's analysis, common sense should lead one to conclude that global warming threatens the Preble's mouse. As the Service explains in the proposal, the mouse is an Ice Age relict which is only found in cool, moist riparian corridors. Global warming can only make the Preble's mouse's current range more unsuitable as temperatures increase and conditions shift further away from those of the region's Ice Age past.

Preble's mice in Wyoming represent the highest latitude populations, and thus may be essential in conserving the species. Mice in Wyoming extend over 150 miles north of the northern extent of the occupied range in Colorado, according to GIS data provided by the Service. Because the mouse is a habitat specialist relying on linear riparian corridors restricted to a narrow range, it will be challenging for the species to adapt to climate change. Protecting the highest latitude populations in existence now makes good sense to allow for potential shifts further northward or to compensate for range retraction in the southern portion of the current distribution.

In addition, some of the highest elevation populations currently are found in Wyoming. Only 14% of the confirmed Preble's mouse locations included in the GIS data provided by the Service occur in Wyoming, but four of the ten highest elevation Preble's meadow jumping mouse populations are found in Wyoming, including the two highest populations recorded for the subspecies. Therefore, higher elevation populations are overrepresented in the Wyoming data. The mean elevation for Colorado populations is 1881m while the mean for Wyoming populations is 1922m. Conserving the highest elevation populations now makes sense for the same reasons articulated above for higher latitude populations.

Before proceeding with delisting, it is essential that the Service evaluate both whether climate change threatens the mouse in Wyoming, and whether Wyoming's populations may be essential to avoiding extinction throughout the range of the mouse given anticipated climate change impacts.

IV. The Service's application of "significant portion of the range" to remove protections in Wyoming is flawed.

At our meeting with the Service earlier this month, staff reported that they had investigated whether Preble's meadow jumping mice in Colorado could constitute a Distinct Population Segment, and they rejected this option because the Colorado portion of the range did not meet the criteria in the Service's DPS policy.

Relying on a March 16, 2007 Solicitor's Memo on The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range," the FWS has proposed to list the Preble's only in those portions of the species' range in Colorado the agency deems to be significant, but to exclude other portions of its range in Wyoming. This interpretation and application of the term "significant portion of its range" in the ESA's definition of "endangered species" and "threatened species" is contrary to the statute and is otherwise arbitrary and capricious. The ESA only allows the listing of "species" which are defined to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. §1532(15). The only entity below a

“species” or “subspecies” that can qualify for listing is a “distinct population segment.” Accordingly, if a “species” – in this case the subspecies *Zapus hudsonius preblei* – “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” and therefore meets the definition of a “threatened species,” *id.* § 1532(19), the ESA commands that the entire subspecies be listed. A finding that a “species” is biologically endangered or threatened in a significant portion of its range was intended by Congress to have the same effect as finding that it is endangered or threatened in all of its range; the entire “species” must be listed. The only recourse for listing something less than the entire species or subspecies is through the ESA’s authority for listing distinct population segments. Indeed, the Solicitor’s opinion regarding “significant portion of its range” renders the authority to list distinct population segments virtually meaningless which is plainly not what Congress intended. The Act does not permit the listing of entities lesser than DPSes, and the Service’s proposal is therefore in violation of the Act.

The proposal provides a candid review of the intense pressures threatening the mouse in Colorado, and the limited extent to which listing has been able to ameliorate threats there. If Wyoming populations are indeed more secure, they will likely be essential to conserving the species. Indeed, the Service has already repeatedly recognized the important role of the Wyoming populations by prioritizing several for protection in the recovery plan, and by designating critical habitat for several.

The Service acknowledges in the proposal that “regulatory measures in Wyoming do not guarantee protection of these [recovery-goal] populations” (72 *Fed. Reg.* 63015 (Nov. 7, 2007)). Wyoming has no conservation plan in place or under development. It seems that the Service’s position is that the mouse will be conserved in Wyoming through benign neglect alone. However, this conclusion is arbitrary and capricious given the lack of regulatory mechanisms to conserve the subspecies in this portion of its range.

The Service relies on the new Solicitor’s Opinion to assert its ability to delist in Wyoming alone. However, the Solicitor’s Opinion’s appendix on the legislative history of the Act confirms that delisting in particular states has only ever been considered where that state had an effective conservation plan in place. Pages A-5-A-6 contain a most pertinent discussion regarding whether protection is necessary in an area where a species is doing okay but no conservation plan is in place, and the conclusion is that protections must be applied:

[Mr. Curtis Bohlen, Deputy Assistant Secretary for Fish Wildlife and Parks]:
Quite commonly an animal’s status does not deteriorate at the same rate throughout its range. This is especially true for those whose range extends into two or more nations, States, or other political subdivisions. This is so since the well-being of most wildlife now is dependent upon the management and other considerations it receives—or, just as importantly, fails to receive—from the people and governments who control the land upon which it lives.

To more directly answer your question, let’s assume a hypothetical situation involving a commercially valuable animal which occurs in three countries. Let’s assume, after the appropriate reviews, consultations, etc., that it is determined that

-in country "A" - a good management program exists; adequate unthreatened habitat is present; the population is healthy and produces a surplus which is harvested under a carefully regulated system,
-in country "B" - the animal largely is ignored and neither receives special management or protective attention nor is overexploited,
-in country "C" - no management program exists and the animal is being heavily overexploited.

Thus, this animal would be considered to be in good shape over part of its range (country "A"), holding its own in a second portion (country "B"), and in trouble in a third.

Under our present authority, no assistance could be given this animal, since it is not "threatened with extinction." However, it is obvious that unless something acts on behalf of the animal, its extirpation in country "C" is imminent. Once that occurs, the same forces likely would shift their attention to the animal in country "B," thus making the species' continued existence dependent on the welfare of the remnant population in country "A."

This is a "textbook example" of our concept of a candidate for the "likely to become threatened with extinction" category.

If that same animal were so classified, regulations could be issued that would:

- a. Permit the importation into the United States of lawfully taken specimens from country "A."
- b. Prohibit or restrict the importation of specimens which originated in countries "B" or "C." As programs to manage and protect the animal are implemented in country "B" or "C" and as the animal responds, such prohibitions or restrictions could be relaxed accordingly.

There is no country A parallel for Preble's. Wyoming instead at best parallels country B, and the Service clearly understood that without proactive management in place, threats from country C (the Colorado parallel) would simply flow into country B unchecked.

Other portions of the Solicitor's Opinion appendix are consistent with this approach that withholding of protections could only be considered if a combination of secure status and proactive management were in place. For example, the appendix cites a Senate Committee Report around the 1982 amendments stating, "There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status" (p. A-17, *emphais added*).

It also seems relevant that the Act requires the consideration of "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other

conservation practices, within any area under its jurisdiction, or on the high seas” (16 U.S.C. §1533 (b)(1)(A)). The Act does not recognize benign neglect as an adequate response – the States must be actively engaged in conservation efforts.

The Preble’s meadow jumping mouse remains threatened by inadequate regulatory mechanisms in Wyoming and threats from Colorado can reasonably be assumed to eventually make their way into Wyoming if the protections of the Act are removed. Even just the indirect effects of Colorado’s population growth could cause substantial impacts in terms of need for increased water storage, access to aggregate for construction, etc., which could have real consequences for mice in Wyoming.

If the Service were to persist in its attempt to list Preble’s meadow jumping mice in Colorado as a separate entity, the agency has laid out a compelling case for Endangered listing in this proposal, and such an uplisting would preclude the use of the current 4(d) rule. The Service must also carefully think through the potential repercussions of what delisting in Wyoming could mean in terms of jeopardy findings for the listed entity and for recovery needs. The proposal states, “no large populations and few medium populations, as described in the Preliminary Draft Recovery Plan, are known to exist in Colorado on contiguous stream reaches that are secure from development” (72 *Fed. Reg.* 63015 (Nov. 7, 2007)). This suggests that the mouse’s recovery may not be possible without the support of the Wyoming populations. The Service must explain how it would conduct jeopardy determinations and Section 7 consultations if a portion of the range were no longer listed. If the agency considers only the impact to the listed entity, everyone must prepare for many more jeopardy findings.

V. The Service's choice of the state line to demarcate the protected area suggests that the agency continues to bow to political pressure.

The Service’s proposal also violates the ESA’s bedrock requirement that listing decisions are to be made “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Delineating where the Preble’s will be considered a “threatened species” on the basis of a state boundary – i.e., listed in Colorado but not in Wyoming – is political and is not grounded in science or biology. Even the Service’s own policy on the listing of distinct population segments makes clear that the agency cannot rely on political boundaries in making listing determinations. The introduction of political factors into the listing process is something that will invariably lead to arbitrary decisions and less protection for imperiled species.

The Service has for some time now stressed watershed-level management for the Preble’s meadow jumping mouse. The recovery plan states as the first point under its “Guiding Principles”

1. Management by River Drainage

Because Preble’s populations are physically separated in three different drainages, and the threats to the recovery populations differ in type and intensity between these drainages, Preble’s will be most effectively managed by considering each of the following drainages separately:

1. North Platte River (Wyoming)

2. South Platte River (small area in Wyoming, but mainly Colorado)
3. Arkansas River (Colorado) (p. 29)

Despite this longstanding history of management along river drainage, the Service now proposes to manage according to political boundaries. The State of Wyoming has been especially antagonistic toward the Service's attempts at Preble's mouse management and it appears that the agency has finally succumbed to political pressure to let Wyoming off the hook.

The proposal states, "Population density and trends are not well known in Wyoming" (72 *Fed. Reg.* 63003 (Nov. 7, 2007)), and cites the Wyoming Comprehensive Wildlife Strategy. This document from the Wyoming Game and Fish Department also lists as one of the "Problems" faced by the Preble's mouse, "Human encroachment along rivers, streams, and lakes is having an impact on meadow jumping mouse habitat" (p. 180), and the delisting proposal also cites this document's assessment that "the two ecological systems most likely to support the Preble's meadow jumping mouse ranked in the lowest 20 percent in mean habitat quality relative to the State's other ecosystems" (72 *Fed. Reg.* 63006 (Nov. 7, 2007)). Throughout the proposal, the Service extensively cites Pague and Grunau (2000) regarding threats in Colorado. The Wyoming Comprehensive Wildlife Strategy should serve as Wyoming's counterpart, and it concludes that there are problems in Preble's mouse habitat. The delisting proposal also admits that in Wyoming "the subspecies appears uncommon in the South Platte River basin" (72 *Fed. Reg.* 63003 (Nov. 7, 2007)), but the Service persists in proposing the removal of protections for Wyoming mice in the South Platte basin because continued protections there "would be more difficult to administer" (72 *Fed. Reg.* 63018 (Nov. 7, 2007)).

According to the proposal's characterization of known Preble's populations in Wyoming, the recovery plan goals have not been met. The recovery plan designated the following recovery populations in Wyoming which do not seem to have met recovery goals: 3 small in the Middle North Platte drainage, 3 small in the Middle North Platte/Scottsbluff drainage, 3 small in the Crow Creek drainage, 3 small in the Lone Tree drainage, and 3 small in the Upper Lodgepole drainage.

Wyoming populations may also possess unique genetic characteristics making them important to recovery. The USGS study's microsatellite results showed that Wyoming specimens clustered on their own, separate from other Preble's populations.

VI. Conclusion

The proposal also includes a few minor errors including the characterization of *Z.h. campestris* as inhabitat northwestern Wyoming, a questionable account of Ramey's having tested for ecological exchangeability, and what we view as an inaccurate characterization of which reviews supported Ramey's original results. The Service never examines Wyoming populations' significance to Preble's meadow jumping mouse recovery, nor does it consider how the Wyoming populations provide for resilience, representation, and redundancy. We strongly urge the Service to retain protections throughout the range of the Preble's meadow jumping mouse, and to finally get back to work on finalizing and implementing the recovery plan.

Sincerely,



Erin Robertson
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On behalf of

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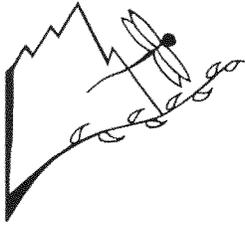
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Attn: Preble's meadow jumping mouse

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of monitoring before trends could be assessed, and we are not aware of any Preble's meadow jumping mouse populations in Wyoming for which those data are available.

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We raised these concerns at a meeting with Service staff in early January and basically were assured that the Service hoped that the Wyoming Game and Fish Department would step up and start monitoring. To date, Game and Fish has neither collected Preble's mouse data nor funded the collection of such - we spoke to staff at both Game and Fish and the Wyoming Natural Diversity Database (WYNDD) to confirm this. WYNDD has received some funding from the Governor's office for its Preble's meadow jumping mouse work, but the Service is well aware that the Governor of Wyoming has been focused on building a case for the removal of protections for Preble's mice in Wyoming. Once this has been accomplished it is highly doubtful that his office would continue to fund Preble's mouse data collection. The Service must not rely on future voluntary conservation actions when making listing decisions. At present there is no monitoring plan in place for Wyoming, and no agency has committed funding toward data collection, to the best of our knowledge. The Service must honestly appraise this situation and acknowledge that delisting in Wyoming will almost certainly mean that the mouse will fall off everyone's to-do list, and populations could crash without anyone taking note.

Futhermore, a bill (see Senate File SF0003) has been introduced in the Wyoming legislature that would provide some general funds for the Wyoming Game and Fish Department to spend on nongame management, but the legislature would have to authorize the use of any of these funds. Again it is unlikely that Wyoming legislators would approve spending funds on Preble's meadow jumping mouse research.

We strongly discourage the Service from removing protections for Preble's meadow jumping mice in Wyoming. However, should the agency elect to do so, it should consider making delisting in Wyoming contingent on the simultaneous issuance of a special rule requiring the collection of 5 years of monitoring data in Wyoming.

II. The Service must fully analyze whether overgrazing may threaten Wyoming populations.

The Service cites Taylor (1999) to support its contention that overgrazing does not threaten Preble's meadow jumping mice in Wyoming. However, it also cites the Wyoming Comprehensive Wildlife Plan's assessment that riparian areas are degraded throughout the state, and it cites several studies showing that overgrazing does negatively impact jumping mice. The Service also recently added the New Mexican meadow jumping mouse to the Candidate list largely due to concerns about overgrazing.

Taylor (1999) reported that 33 *Zapus* spp. were trapped over 6300 trap nights – a 0.005 capture rate. She also discussed problems with overgrazing in at least one occupied site: “On Sybille Creek the vegetation had been grazed heavily by cattle for a number of years; the area was fenced off two years ago and subsequently used by a small number of horses. The habitat was immature and sparse, the mouse captured here was making use of concrete rip-rap and clusters of vegetation including coyote willow, cattail, and rag weed” (p. 4). “There is no shrub component to the vegetation at the water’s edge, all the young willow is set back 6 to 10 feet. The single *Zapus* captured was in a clump of stable vegetation at an ox-bow in the creek. In some places the eroding banks have been stabilized with concrete rip-rap” (p. 21).

Taylor’s survey work was limited to True Ranches property. The conventional wisdom is that ranches with larger holdings (like True Ranches) may be better able to guard against overgrazing by being able to move cattle around the larger landscape more effectively. Therefore, conditions on True Ranches property may not be representative of riparian health within the mouse’s range in Wyoming as a whole, and it is particularly noteworthy that even Taylor’s study, which was commissioned by True Ranches, revealed conflicts between overgrazing and the Preble’s mouse. Taylor’s introduction describes the purpose of the study as follows: “The owners of True Ranches decided to embark upon a trapping effort to demonstrate the compatibility of the mouse with sustained cattle ranching operations” (p. 2); and her conclusion states, “The effort undertaken by True Ranches was to demonstrate that sustained cattle production is NOT detrimental to the survivability of *Zapus*” (p.5).

Clearly the Service is not relying on the best available science here. Renee Taylor is currently making a name for herself challenging well-documented studies on the impacts of oil and gas drilling on sage-grouse. Even if Taylor were a credible source, this document is from 1999, and the 1990s were relatively wet years. Riparian area conditions can change quickly and dramatically when grazing continues under drought stress. We saw this firsthand with Service staff when the agency took us out to Colorado butterfly plant habitat in 2003, and at the first site we visited, all of the riparian vegetation had disappeared, much to the Service's chagrin. Post-2002-drought conditions may be quite different than those Taylor reported, as may Preble's mouse status.

At one point in the delisting proposal, the Service asserts that grazing timing and intensity are appropriate in Wyoming, but it offers no citation. At our meeting with the Service earlier this month we asked whether the agency had reviewed other documents addressing current riparian area health in Preble's mouse habitat in Wyoming, including any Forest Service grazing

allotment monitoring records. The answer was no. Based on GIS data provided by the Service and the Forest Service, it appears that five different Medicine Bow National Forest grazing allotments include confirmed occupied Preble's mouse habitat: Haystack, Eagle Peak, Albany Peak, North Laramie River, and North Pasture. The Service should request the Allotment Management Plans, Annual Operating Instructions, and any photos, notes, reports, or monitoring analyses that the Forest Service possesses for these five allotments. The Service should also do the same for Hutton Lake National Wildlife Refuge. I personally have observed cattle grazing in the riparian areas of the Refuge.

Based on the information cited in the proposal, the best available science indicates that overgrazing may threaten Preble's meadow jumping mice in Wyoming. The mere confirmation of mouse presence does not ensure that populations are secure – this is obvious from several populations in Colorado that have been found in marginal or highly degraded habitat which are not expected to persist.

III. Climate change must factor into the Service's analysis.

The Service must consider both whether climate change threatens Wyoming Preble's meadow jumping mouse populations, and whether the protection of these populations may be essential to recovery given predicted impacts of climate change throughout the species' range.

The Service contends that climate change impacts need not be considered since they occur outside of the "foreseeable future" period it has chosen to analyze for the mouse. However, the agency explains that it considers the foreseeable future to extend to about 2040 because this is as far out as the current human population growth predictions for the region go. Climate change models for the region, on the other hand, extend to at least 2100. For example, see the maps at http://www.geo.arizona.edu/dgesl/research/regional/projected_US_climate_change/projected_US_climate_change.htm which predicts 2100 summer temperatures at least 7°F higher than the 1971-2000 average in southern Wyoming. One can request information on predicted climate change for specific lat/long coordinates from the National Center for Atmospheric Research via their Regional Climate-Change Projections from Multi-Modal Ensembles program. The form is available at: <http://rcpm.ucar.edu/request.html>. Results are available for annual, seasonal, or monthly changes under different emissions scenarios for each decade between 2000 and 2099. The Service should request these data and include them in its analysis of both the security of the Wyoming populations and the importance of the Wyoming populations given potential climate change impacts in Colorado.

NRDC previously provided the following comments on the use of a 100-year time span for assessing extinction threat for the polar bear:

Nor would it be unusual for the Service to use a 100 year time frame to evaluate current threats to the polar bear. In addition to being supported by the best available scientific data, the Service has a long history of using 100 year periods in listing decisions. As the Proposed Rule itself notes, the Service adopted a 100 year definition of "foreseeable future" when analyzing threats to the greater sage grouse. 72 Fed. Reg. at 1070. Similarly, the National Marine Fisheries Service

(“NMFS”) uses 100 year time frames when examining the status of marine mammals under the Endangered Species Act. Thus, when NMFS reclassified the stellar sea lion into two distinct populations, it employed 100 year models to assess the threats to those populations. See “Change in Listing Status of Steller Sea Lions Under the Endangered Species Act,” 72 Fed. Reg. 24345, 24346 (May 5, 1997).

The Service routinely uses 50-year or 100-year timeframes in preparing Biological Opinions and Safe Harbor Agreements (for example, the Aplomado falcon Safe Harbor Agreement lasts 99 years, and the proposed Utah prairie dog Agreement lasts 50 years). In fact, the Service has issued Incidental Take Permits for the Preble’s meadow jumping mouse that last 50 years (for example, the permit accompanying the Leonard HCP). It is arbitrary and capricious for the Service to allow take 50 years into the future and yet not assess threats that far out.

The Intergovernmental Panel on Climate Change has come to consensus on many factors relevant to the potential threat of climate change to the Preble’s mouse, including:

- “Climate change will constrain North America’s over-allocated water resources, increasing competition among agricultural, municipal, industrial and ecological uses (very high confidence).” (Field *et al.* 2007, p. 619)
- “Many North American species have shifted their ranges, typically to the north or to higher elevations (Parmesan and Yohe, 2003).” (Field *et al.* 2007, p.622)
- “Warming, and changes in the form, timing and amount of precipitation, will very likely lead to earlier melting and significant reductions in snowpack in the western mountains by the middle of the 21st century (high confidence) (Loukas et al., 2002; Leung and Qian, 2003; Miller et al., 2003; Mote et al., 2003; Hayhoe et al., 2004). In projections for mountain snowmelt-dominated watersheds, snowmelt runoff advances, winter and early spring flows increase (raising flooding potential), and summer flows decrease substantially (Kim et al., 2002; Loukas et al., 2002; Snyder et al., 2002; Leung and Qian, 2003; Miller et al., 2003; Mote et al., 2003; Christensen et al., 2004; Merritt et al., 2005).” (Field *et al.* 2007, p.627)
- “With global average temperature changes of 2°C above pre-industrial levels, many terrestrial, freshwater and marine species (particularly endemics across the globe) are at a far greater risk of extinction than in the recent geological past (medium confidence)” (Fischlin *et al.* 2007, p. 213)
- “Warming and drying trends are likely to induce substantial species-range shifts, and imply a need for migration rates that will exceed the capacity of many endemic species.” (Fischlin *et al.* 2007, p. 226).
- “In dryland wetlands, changes in precipitation regimes may cause biodiversity loss (Bauder, 2005). Changes in climate and land use will place additional pressures on already-stressed riparian ecosystems along many rivers in the world (Naiman et al., 2005).” (Fischlin *et al.* 2007, p. 234)
- “The likely synergistic impacts of climate change and land-use change on endemic species have been widely confirmed (Hannah et al., 2002a; Hughes, 2003; Leemans and Eickhout, 2004; Thomas et al., 2004a; Lovejoy and Hannah, 2005; Hare, 2006; Malcolm et al., 2006; Warren, 2006), as has over-exploitation of marine systems (Worm et al., 2006; Chapters 5 and 6).” (Fischlin *et al.* 2007, p. 241)

Even without the model data or the IPCC's analysis, common sense should lead one to conclude that global warming threatens the Preble's mouse. As the Service explains in the proposal, the mouse is an Ice Age relict which is only found in cool, moist riparian corridors. Global warming can only make the Preble's mouse's current range more unsuitable as temperatures increase and conditions shift further away from those of the region's Ice Age past.

Preble's mice in Wyoming represent the highest latitude populations, and thus may be essential in conserving the species. Mice in Wyoming extend over 150 miles north of the northern extent of the occupied range in Colorado, according to GIS data provided by the Service. Because the mouse is a habitat specialist relying on linear riparian corridors restricted to a narrow range, it will be challenging for the species to adapt to climate change. Protecting the highest latitude populations in existence now makes good sense to allow for potential shifts further northward or to compensate for range retraction in the southern portion of the current distribution.

In addition, some of the highest elevation populations currently are found in Wyoming. Only 14% of the confirmed Preble's mouse locations included in the GIS data provided by the Service occur in Wyoming, but four of the ten highest elevation Preble's meadow jumping mouse populations are found in Wyoming, including the two highest populations recorded for the subspecies. Therefore, higher elevation populations are overrepresented in the Wyoming data. The mean elevation for Colorado populations is 1881m while the mean for Wyoming populations is 1922m. Conserving the highest elevation populations now makes sense for the same reasons articulated above for higher latitude populations.

Before proceeding with delisting, it is essential that the Service evaluate both whether climate change threatens the mouse in Wyoming, and whether Wyoming's populations may be essential to avoiding extinction throughout the range of the mouse given anticipated climate change impacts.

IV. The Service's application of "significant portion of the range" to remove protections in Wyoming is flawed.

At our meeting with the Service earlier this month, staff reported that they had investigated whether Preble's meadow jumping mice in Colorado could constitute a Distinct Population Segment, and they rejected this option because the Colorado portion of the range did not meet the criteria in the Service's DPS policy.

Relying on a March 16, 2007 Solicitor's Memo on The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range," the FWS has proposed to list the Preble's only in those portions of the species' range in Colorado the agency deems to be significant, but to exclude other portions of its range in Wyoming. This interpretation and application of the term "significant portion of its range" in the ESA's definition of "endangered species" and "threatened species" is contrary to the statute and is otherwise arbitrary and capricious. The ESA only allows the listing of "species" which are defined to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. §1532(15). The only entity below a

“species” or “subspecies” that can qualify for listing is a “distinct population segment.” Accordingly, if a “species” – in this case the subspecies *Zapus hudsonius preblei* – “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” and therefore meets the definition of a “threatened species,” *id.* § 1532(19), the ESA commands that the entire subspecies be listed. A finding that a “species” is biologically endangered or threatened in a significant portion of its range was intended by Congress to have the same effect as finding that it is endangered or threatened in all of its range; the entire “species” must be listed. The only recourse for listing something less than the entire species or subspecies is through the ESA’s authority for listing distinct population segments. Indeed, the Solicitor’s opinion regarding “significant portion of its range” renders the authority to list distinct population segments virtually meaningless which is plainly not what Congress intended. The Act does not permit the listing of entities lesser than DPSes, and the Service’s proposal is therefore in violation of the Act.

The proposal provides a candid review of the intense pressures threatening the mouse in Colorado, and the limited extent to which listing has been able to ameliorate threats there. If Wyoming populations are indeed more secure, they will likely be essential to conserving the species. Indeed, the Service has already repeatedly recognized the important role of the Wyoming populations by prioritizing several for protection in the recovery plan, and by designating critical habitat for several.

The Service acknowledges in the proposal that “regulatory measures in Wyoming do not guarantee protection of these [recovery-goal] populations” (72 *Fed. Reg.* 63015 (Nov. 7, 2007)). Wyoming has no conservation plan in place or under development. It seems that the Service’s position is that the mouse will be conserved in Wyoming through benign neglect alone. However, this conclusion is arbitrary and capricious given the lack of regulatory mechanisms to conserve the subspecies in this portion of its range.

The Service relies on the new Solicitor’s Opinion to assert its ability to delist in Wyoming alone. However, the Solicitor’s Opinion’s appendix on the legislative history of the Act confirms that delisting in particular states has only ever been considered where that state had an effective conservation plan in place. Pages A-5-A-6 contain a most pertinent discussion regarding whether protection is necessary in an area where a species is doing okay but no conservation plan is in place, and the conclusion is that protections must be applied:

[Mr. Curtis Bohlen, Deputy Assistant Secretary for Fish Wildlife and Parks]:
Quite commonly an animal’s status does not deteriorate at the same rate throughout its range. This is especially true for those whose range extends into two or more nations, States, or other political subdivisions. This is so since the well-being of most wildlife now is dependent upon the management and other considerations it receives—or, just as importantly, fails to receive—from the people and governments who control the land upon which it lives.

To more directly answer your question, let’s assume a hypothetical situation involving a commercially valuable animal which occurs in three countries. Let’s assume, after the appropriate reviews, consultations, etc., that it is determined that

–in country “A” - a good management program exists; adequate unthreatened habitat is present; the population is healthy and produces a surplus which is harvested under a carefully regulated system,
–in country “B” - the animal largely is ignored and neither receives special management or protective attention nor is overexploited,
–in country “C” - no management program exists and the animal is being heavily overexploited.

Thus, this animal would be considered to be in good shape over part of its range (country “A”), holding its own in a second portion (country “B”), and in trouble in a third.

Under our present authority, no assistance could be given this animal, since it is not “threatened with extinction.” However, it is obvious that unless something acts on behalf of the animal, its extirpation in country “C” is imminent. Once that occurs, the same forces likely would shift their attention to the animal in country “B,” thus making the species’ continued existence dependent on the welfare of the remnant population in country “A.”

This is a “textbook example” of our concept of a candidate for the “likely to become threatened with extinction” category.

If that same animal were so classified, regulations could be issued that would:

- a. Permit the importation into the United States of lawfully taken specimens from country “A.”
- b. Prohibit or restrict the importation of specimens which originated in countries “B” or “C.” As programs to manage and protect the animal are implemented in country “B” or “C” and as the animal responds, such prohibitions or restrictions could be relaxed accordingly.

There is no country A parallel for Preble’s. Wyoming instead at best parallels country B, and the Service clearly understood that without proactive management in place, threats from country C (the Colorado parallel) would simply flow into country B unchecked.

Other portions of the Solicitor’s Opinion appendix are consistent with this approach that withholding of protections could only be considered if a combination of secure status and proactive management were in place. For example, the appendix cites a Senate Committee Report around the 1982 amendments stating, “There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status” (p. A-17, *emphais added*).

It also seems relevant that the Act requires the consideration of “those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other

conservation practices, within any area under its jurisdiction, or on the high seas” (16 U.S.C. §1533 (b)(1)(A)). The Act does not recognize benign neglect as an adequate response – the States must be actively engaged in conservation efforts.

The Preble’s meadow jumping mouse remains threatened by inadequate regulatory mechanisms in Wyoming and threats from Colorado can reasonably be assumed to eventually make their way into Wyoming if the protections of the Act are removed. Even just the indirect effects of Colorado’s population growth could cause substantial impacts in terms of need for increased water storage, access to aggregate for construction, etc., which could have real consequences for mice in Wyoming.

If the Service were to persist in its attempt to list Preble’s meadow jumping mice in Colorado as a separate entity, the agency has laid out a compelling case for Endangered listing in this proposal, and such an uplisting would preclude the use of the current 4(d) rule. The Service must also carefully think through the potential repercussions of what delisting in Wyoming could mean in terms of jeopardy findings for the listed entity and for recovery needs. The proposal states, “no large populations and few medium populations, as described in the Preliminary Draft Recovery Plan, are known to exist in Colorado on contiguous stream reaches that are secure from development” (72 *Fed. Reg.* 63015 (Nov. 7, 2007)). This suggests that the mouse’s recovery may not be possible without the support of the Wyoming populations. The Service must explain how it would conduct jeopardy determinations and Section 7 consultations if a portion of the range were no longer listed. If the agency considers only the impact to the listed entity, everyone must prepare for many more jeopardy findings.

V. The Service's choice of the state line to demarcate the protected area suggests that the agency continues to bow to political pressure.

The Service’s proposal also violates the ESA’s bedrock requirement that listing decisions are to be made “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). Delineating where the Preble’s will be considered a “threatened species” on the basis of a state boundary – i.e., listed in Colorado but not in Wyoming – is political and is not grounded in science or biology. Even the Service’s own policy on the listing of distinct population segments makes clear that the agency cannot rely on political boundaries in making listing determinations. The introduction of political factors into the listing process is something that will invariably lead to arbitrary decisions and less protection for imperiled species.

The Service has for some time now stressed watershed-level management for the Preble’s meadow jumping mouse. The recovery plan states as the first point under its “Guiding Principles”

1. Management by River Drainage

Because Preble’s populations are physically separated in three different drainages, and the threats to the recovery populations differ in type and intensity between these drainages, Preble’s will be most effectively managed by considering each of the following drainages separately:

1. North Platte River (Wyoming)

2. South Platte River (small area in Wyoming, but mainly Colorado)
3. Arkansas River (Colorado) (p. 29)

Despite this longstanding history of management along river drainage, the Service now proposes to manage according to political boundaries. The State of Wyoming has been especially antagonistic toward the Service's attempts at Preble's mouse management and it appears that the agency has finally succumbed to political pressure to let Wyoming off the hook.

The proposal states, "Population density and trends are not well known in Wyoming" (72 *Fed. Reg.* 63003 (Nov. 7, 2007)), and cites the Wyoming Comprehensive Wildlife Strategy. This document from the Wyoming Game and Fish Department also lists as one of the "Problems" faced by the Preble's mouse, "Human encroachment along rivers, streams, and lakes is having an impact on meadow jumping mouse habitat" (p. 180), and the delisting proposal also cites this document's assessment that "the two ecological systems most likely to support the Preble's meadow jumping mouse ranked in the lowest 20 percent in mean habitat quality relative to the State's other ecosystems" (72 *Fed. Reg.* 63006 (Nov. 7, 2007)). Throughout the proposal, the Service extensively cites Pague and Grunau (2000) regarding threats in Colorado. The Wyoming Comprehensive Wildlife Strategy should serve as Wyoming's counterpart, and it concludes that there are problems in Preble's mouse habitat. The delisting proposal also admits that in Wyoming "the subspecies appears uncommon in the South Platte River basin" (72 *Fed. Reg.* 63003 (Nov. 7, 2007)), but the Service persists in proposing the removal of protections for Wyoming mice in the South Platte basin because continued protections there "would be more difficult to administer" (72 *Fed. Reg.* 63018 (Nov. 7, 2007)).

According to the proposal's characterization of known Preble's populations in Wyoming, the recovery plan goals have not been met. The recovery plan designated the following recovery populations in Wyoming which do not seem to have met recovery goals: 3 small in the Middle North Platte drainage, 3 small in the Middle North Platte/Scottsbluff drainage, 3 small in the Crow Creek drainage, 3 small in the Lone Tree drainage, and 3 small in the Upper Lodgepole drainage.

Wyoming populations may also possess unique genetic characteristics making them important to recovery. The USGS study's microsatellite results showed that Wyoming specimens clustered on their own, separate from other Preble's populations.

VI. Conclusion

The proposal also includes a few minor errors including the characterization of *Z.h. campestris* as inhabitat northwestern Wyoming, a questionable account of Ramey's having tested for ecological exchangeability, and what we view as an inaccurate characterization of which reviews supported Ramey's original results. The Service never examines Wyoming populations' significance to Preble's meadow jumping mouse recovery, nor does it consider how the Wyoming populations provide for resilience, representation, and redundancy. We strongly urge the Service to retain protections throughout the range of the Preble's meadow jumping mouse, and to finally get back to work on finalizing and implementing the recovery plan.

Sincerely,



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On behalf of

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JAN 22 2008

Defenders of Wildlife
Environmental Defense
Natural Resources Defense Council
World Wildlife Fund

January 22, 2008

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RE: RIN 1018-AV64 – Proposed Rule to Amend the Listing for the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*), to Specify Over What Portion of its Range the Subspecies Is Threatened, 72 Fed. Reg. 62,992 (Nov. 7, 2007).

Dear Ms. Linner:

Defenders of Wildlife, Environmental Defense, Natural Resources Defense Council and World Wildlife Fund submit the following comments in response to the U.S. Fish and Wildlife Service's (FWS) proposal to amend the listing for the Preble's meadow jumping mouse. Because FWS has determined that the mouse is threatened throughout a significant portion of its range, our organizations believe that FWS lacks the authority to delist the mouse in Wyoming. We therefore support continued listing of the mouse as a threatened species in Colorado and Wyoming. The delisting proposal is contrary to law and represents a dramatic departure from thirty years of consistent practice listing species under the Endangered Species Act (ESA). Because those Preble's meadow jumping mice found within Colorado do not by themselves constitute a species, subspecies or distinct population segment, they are not a listable entity under the ESA. The species as a whole, however, in its current range of Wyoming and Colorado, should continue to be listed as threatened.

Defenders of Wildlife is a national non-profit conservation organization with more than one million members and supporters nationwide. Headquartered in Washington, D.C., Defenders of Wildlife also maintains a field office in Denver, Colo. We are a science-based advocacy organization focused on conserving and restoring native species and the habitat upon which they depend, and have been involved in such efforts since the organization's establishment in 1947. Defenders of Wildlife is keenly interested in the protection of threatened and endangered species and the effective implementation of the Endangered Species Act.

Environmental Defense is a national non-profit conservation organization with more than half a million members and supporters nationwide. Headquartered in New York, Environmental Defense has long had an office in Boulder, Colorado. Environmental

Defense seeks scientifically and economically sound solutions to environmental problems and has been actively involved in efforts to conserve endangered species since its founding in 1967.

The Natural Resources Defense Council (NRDC) is a non-profit conservation organization that uses law, science, and the support of more than 1.2-million members and online activists, to protect the planet's wildlife and wild places, and to ensure a safe and healthy environment. NRDC is actively involved in protecting imperiled wildlife, including species listed as endangered and threatened under the Endangered Species Act.

The World Wildlife Fund (WWF) is an international non-profit organization with a presence in more than 100 countries throughout the world, and a membership of 1.2 million in the United States and almost 5 million globally. Headquartered in Washington, DC, WWF also maintains a field office in Bozeman, MT that oversees its work on the Northern Great Plains ecoregion. WWF's mission is the conservation of nature -- using the best available scientific knowledge and advancing that knowledge where possible, to preserve the diversity and abundance of life on Earth. WWF has identified 19 terrestrial and marine ecoregions around the world that are top priorities for achieving this goal. One of these 19 is the Northern Great Plains, which includes habitat and populations of the Preble's meadow jumping mouse in Wyoming. WWF maintains an interest in the protection afforded this species and its habitat, and further maintains an interest in the broader question presented here, as it has a bearing on ESA interpretation and ultimately the protection of threatened and endangered species throughout the U.S.

Background

The ESA permits the listing of any species, any subspecies of fish, wildlife or plant, and "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The Act defines an endangered species as one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species, likewise, is one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

Although the statute does not define the phrase "significant portion of its range," for decades the FWS has nearly uniformly interpreted the phrase to mean that if a species, subspecies or distinct population segment (DPS) is threatened either in its entirety or in a significant portion of its range, the entire listable entity would be listed. In other words, a species, subspecies or DPS must be listed in its entirety or not at all.

The FWS has taken a very different approach with the Preble's meadow jumping mouse, proposing to delist the subspecies in Wyoming and retain listing as threatened in Colorado. This proposal is apparently based on a new reading of the ESA outlined in a memorandum released March 16, 2007, by the Solicitor of the Department of the Interior entitled "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of the Range'" (Solicitor's Opinion). For the reasons outlined below, this approach is deeply flawed and should not be adopted.

The Solicitor's Opinion

We believe that the Solicitor's interpretation is incorrect as a matter of law and unwise as a matter of policy. Thus, we believe that the proposal to list the Preble's meadow jumping mouse only in Colorado violates the ESA. Contrary to the Solicitor's position, the ESA forbids listing of entities other than species, subspecies or DPSs. Congress specifically amended the ESA in 1978 to include DPSs in order to "exclude taxonomic categories below subspecies from the definition as well as distinct population segments of invertebrates." H.R. Conf. Rep. No. 95-1804, at 17 (1978). In so doing, Congress narrowed the definition of the term "species" from one that included "any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature" to one that included instead "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16).

By contrast, the Solicitor's interpretation of "significant portion of its range" undoes the effect of the 1978 amendment to the definition of species. First, it renders the term distinct population segment meaningless. It is difficult to imagine a DPS that could not also be listed under the Solicitor's interpretation of "significant portion of its range." Second, it allows protection of populations or groups not only of invertebrate species and subspecies but also of plant species and subspecies, which had always been excluded, and subsets of distinct vertebrate population segments to the extent that such populations or groups constitute a significant portion of the range of the species, subspecies or DPS. While we would welcome expanded protection for plants and invertebrates, the statute does not authorize it. Moreover, such a proliferation of potentially listable entities could expose the Service to a limitless series of petitions and lawsuits over the status of taxa in portions of their ranges. In addition, as discussed below, we believe the Solicitor's interpretation will lead to less, not more, protection for imperiled species, as the current proposal to delist the mouse in Wyoming demonstrates. Further, it will likely narrow the flexibility now found in the ESA to mitigate the impacts of authorized development activities, thereby increasing the costs of those activities, and reducing the prospects for recovering such species.

If Congress understood the term "significant portion of its range" in the manner now advanced by the Solicitor, it surely would not have narrowed the definition of species with the DPS while continuing to allow portions of plant and invertebrate species and subspecies to be listed. It is thus extremely difficult to reconcile the language of the 1979 Senate report regarding the scope and use of this authority to protect populations of vertebrate species and subspecies with the Solicitor's interpretation of "significant portion of its range." S. Rep. No. 96-151, at 6 (1979) (noting that the power to list DPSs should be used "sparingly"). Lastly, there simply is no indication that Congress envisioned listing subsets (significant portions of the range) of distinct vertebrate population segments.

Describing the application of the Solicitor's Opinion, the Preble's proposed rule states that "If the Service determines that a portion of the range is not significant, the Service need not determine whether the subspecies is threatened or endangered there; if the Service determines that the subspecies is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant." 72 Fed. Reg. at 63,018. In practice, such an analysis is highly prone to manipulation; indeed, whether a portion is significant or contains an entity that is threatened or endangered is highly dependent on the

scale of analysis used to identify the portions. That could lead to determinations that a portion is either not significant or that the species is neither threatened nor endangered in a portion even though a species may cumulatively warrant protection. Indeed, we believe that is the case with the Preble's meadow jumping mouse.

In sum, the Solicitor's new approach to analyzing what constitutes a "significant portion of [a species'] range" is deeply problematic and a dramatic departure from the text and history of the ESA. Its application to the Preble's meadow jumping mouse, as detailed below, reveals further practical flaws, is not defensible, and will very likely be challenged in court.

The Preble's Proposal

As explained above, the ESA authorizes the listing of species, subspecies, and distinct vertebrate population segments. The Preble's proposal instead subdivides the subspecies into two groups based on political boundaries without designating a DPS. The ESA simply does not permit designation of populations below the subspecies level without designating a DPS. Since the Colorado portion of the subspecies is not a listable entity as proposed, FWS must either list the entire subspecies or establish a DPS that meets the criteria of its 1996 DPS Policy for discreteness and significance.

Additionally, the proposal does not adequately justify the exclusion of the Wyoming portion of the mouse's range. Although the Preliminary Recovery Plan for the Preble's mouse suggests maintaining at least one recovery population within each drainage (to provide resiliency, representation, and redundancy) in the existing range of the subspecies, the listing proposal does not indicate how maintenance of a population in each of the six drainages in Wyoming will be assured. The Service provides no evidence to support its conclusion that Wyoming is not needed for resiliency, redundancy and representation, particularly given that no regulatory mechanisms are present in Wyoming to protect the mouse if current conditions should change. This is especially baffling when one considers that Wyoming contains one-quarter of the subspecies' recommended large populations, two-fifths of its medium populations, and one-third of its habitat, occupied river basins, and occupied drainages.

The Service maintains it does not need to analyze whether the Wyoming portion is a significant portion of the subspecies' range. Nonetheless, the Service uses the Wyoming populations to find that the subspecies is not endangered throughout all of its range and that, even though threats in Colorado are severe, they are not severe enough to place the entire subspecies in danger of extinction. Again these findings lack evidentiary justification. Absent significant evidence to the contrary— not provided by the Service— it is apparent that the loss of the mouse within Wyoming would result in a decrease in the ability to conserve the subspecies.

The Preble's proposal also states that the Service "readily identified the Colorado portion of the current range of the Preble's meadow jumping mouse as warranting further consideration to determine if it is a significant portion of the range that is threatened or endangered" but fails to identify the basis or criteria by which the Service made this determination. 72 Fed. Reg. at 63,018. Further, the proposal does not identify the basis or

criteria by which the Service concluded “that it was appropriate to consider all of the current range in Colorado as a single portion of the range for the purpose of this analysis.” Id.

The issues of scale and vulnerability to arbitrary decision-making discussed above are further evident in the questions raised by the Service in the Preble’s proposal regarding whether the significant portion of the range it defines should be redefined to exclude areas not currently occupied, and whether the defined portion may be further narrowed by identifying smaller portions and determining whether they on their own are independently significant. The ESA defines an endangered or threatened species as one that is in danger of extinction, or likely to be in the foreseeable future “throughout all or a significant portion of its range.” For the Solicitor’s Opinion on “significant portion of its range” to be consistent, then, an entity must be threatened or endangered throughout the entire portion identified. In other words, there can be no portion within the identified significant portion in which the species is not threatened or endangered. As a result, the Service’s questions demonstrate that it now finds itself engaged in what can only be an endless analysis of range portions within range portions that will gerrymander the lines of protection for the Preble’s meadow jumping mouse to the point at which the listed entity will be so narrowly defined as to be unrecoverable.

Finally, to the extent that there are different threats, or different degrees of threat, to the mouse in the Colorado and Wyoming portions of its range, the FWS has the authority under Section 4(d) of the ESA to take those into account in fashioning regulations necessary for the conservation of the mouse. That is, the conclusion that the mouse must be listed throughout its range if it is deemed threatened in a significant portion of its range does not mean that the same restrictions must be imposed throughout its range. The more secure status of the mouse in Wyoming, for example, might justify lesser restrictions on its taking there than in Colorado. Given that the mouse is listed as threatened, nothing precludes the FWS from using this flexibility of Section 4(d).

Conclusion

The Service’s proposal to delist the Preble’s meadow jumping mouse in Wyoming is based on a legally-flawed reading of the ESA that will certainly be subject to challenge in court. The ESA does not permit the listing of entities below the subspecies level, unless the Service designates a distinct vertebrate population segment. Further, the Service’s analysis supporting listing in Colorado appears to be arbitrary at best as it fails to explain adequately the basis for its conclusions. We urge the Service to reconsider its proposal and continue to list the Preble’s meadow jumping mouse throughout its range in Wyoming and Colorado.

Sincerely,

Wm. Robert Irvin
Senior Vice President for Conservation
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Defenders of Wildlife

Michael J. Bean
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Director, Endangered Species Project
Natural Resources Defense Council

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AUDUBON
SOCIETY
of GREATER DENVER

January 21, 2008

Field Supervisor
Colorado Field Office
Ecological Services
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225

Dear Field Supervisor:

The Audubon Society of Greater Denver would like to submit the following comments on the U. S. Fish and Wildlife Service's proposal to revise the Endangered Species listing for the Preble's Meadow Jumping Mouse. Our Society is a grassroots conservation organization with about 3,000 members in the Denver metro area.

Issue No. 1. The Service's analysis and conclusions regarding the conservation status of the Preble's meadow jumping mouse in Wyoming, and the appropriateness of using the Colorado/Wyoming border to divide the range of the subspecies.

The Federal Register(FR) notice dated November 7, 2007, mentions that recent trapping has revealed the presence of the Preble's mouse in more Wyoming locations than at the initial listing. Nonetheless the recent positive trapping results are widely scattered over four Wyoming counties. We conclude that this more current information indicates Preble's mouse populations in Wyoming may be widely separated and disjunct from each other. The FR notice (p. 63016) cites studies which suggest that such small, isolated populations can be threatened by stochastic or random changes in a wild population's demography or genetics. Until you have more information on Wyoming populations, this would seem to be a substantial problem in Wyoming as well as Colorado. It may not be due to urban/suburban development pressures but rather to the relict nature of these populations, past management practices, water regime changes, etc.

State and local regulations "would do little to conserve the Preble's meadow jumping mouse or its habitat on private lands" (FR notice, p. 63015). Evidently classification of the mouse as a nongame species in Wyoming would protect it from takings and sales (p. 63014) but would not prevent habitat alteration if Endangered Species Act (ESA) protections were lifted.

Invasive, noxious plants "can encroach upon a landscape...and may negatively affect food and cover for the Preble's meadow jumping mouse." (p. 63014). The presence of leafy spurge in many drainages of Colorado and Wyoming is already changing the nature of the vegetation there, and the threat posed by this invasive is certainly as strong in Wyoming as in Colorado. We see no difference between the two states with regard to invasives.

Population density and trends are not well known in Wyoming (FR notice, p. 63003). This is not much different than the situation in Colorado, where "there are a few population estimates but little trend information for Preble's meadow jumping mouse"

(ibid.). Without such data, the secure status of P-mouse populations is uncertain in both Wyoming and Colorado

Preble's populations can be affected by hydrologic changes; the Service references disruption of natural flow regimes downstream of dams, diversions and alluvial wells, water development and management in its various forms, and creation of irrigation reservoirs (FR notice, p. All of these items may at some point in time be a factor in Wyoming as well as Colorado. In the discussion of the possible impacts of climate change (p. 63016) the Service mentions the expectation of decreased snowpack, earlier spring runoff and decreased summer flows. All of these are hydrologic changes that can impact mouse populations in both states.

Under the heading of "Other Natural or Manmade Factors" (FR notice, p. 63015) the Service discusses the impacts of catastrophic fire in headwaters areas of the streams along which the Preble's mouse is found. Such fires can occur in both states, especially if the predictions of reduced snowpack, decreased summer flows and warmer air temperatures due to global warming are borne out.

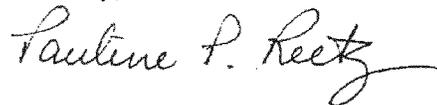
In summary, although the Service succeeds in making the case that intense urban development in the main remaining habitat of the Preble's mouse threatens its survival in Colorado, there is no guarantee that other factors such as invasive plants, water development, hydrologic changes, and lack of State and local protections will not endanger the mouse and obliterate its habitat just as much in Wyoming. In addition, the lack of data on population dynamics is just as scarce in Wyoming as in Colorado. It is our opinion that the state line between Colorado and Wyoming is an insufficient reason to list the species as "Threatened" in Colorado and delist it in Wyoming.

Issue No. 2. Availability of Landowner Aid in Colorado and Wyoming. The US Congress is considering legislation that would make funds available to aid landowners who preserve, restore or improve habitat for endangered and threatened species on their lands. If the species is not listed in Wyoming, such aid would not be available to landowners in that state. Such actions would seem to be extremely helpful to forward the survival of the Preble's mouse on private lands.

Final conclusions: The Preble's mouse will most likely not survive in Colorado without Federal protections, except on federally-owned lands. Therefore we support the listing of the species under the Endangered Species Act in Colorado. The lack of data on populations in Wyoming, and the sufficiency of threats to mouse populations there, demonstrate the need to list the species in that State as well.

Thank you for this opportunity to comment.

Sincerely,



Pauline P. Reetz
Conservation Chairman