

**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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January 9, 2008

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RE: Public Comment on November 1, 2007 Proposal to Revise PMJM Listing

To Whom It May Concern:

Captain James T. Kirk had Trouble with Tribbles and the FWS has a Problem with Preble's. The shy little mouse that spends most of its average one year life span asleep and the rest avoiding predation while trying to eat enough to replicate two or three litters of itself has become a cause celebre' in the debate over common sense vs. save every coal mine canary and the cost thereof. So difficult has been the years-long decision making process over the delisting – or not – of the mouse, the Service even managed to typo a misspelling of the species in the most recent announcement regarding its fate as a threatened (sub) species. The long awaited (in violation of several legally mandated time frames found in the ESA) decision now under consideration was hardly worth the wait to citizens of Colorado who supported a petition to delist the mouse when their state's backing of a similar proposal by Wyoming's government proved less than what might have been wished given the cost in several Colorado counties.

Why Preble's has become the pointy end of frustration over the administration of the Threatened & Endangered Species list, and why so much effort and angst has been spent on what should have been a simple process, is hard to understand. Yet that spear tip has now drawn a line in the sand that happens to coincide with a state boundary that bears little relationship to the range or the mouse or its ability to cross that line. What it does relate to is one state being willing to get the delisting process moving and, when it stalled out, use the threat of legal action to restart or resolve it. It also relates to an agenda more concerned with appearing politically correct under environmental group pressures (more threatened legal action), internal struggles, procedures and policy and, includes the spanking of a Bush administration appointee as a sidebar that had little actual bearing on why the Service couldn't meet it promises regarding deadlines required for action.

To digress for a moment; few people with whom I have discussed the Endangered Species Act have any working knowledge of the scope or effect of the Act. It sounds warm and fuzzy and must be doing some good for endangered species. The statistical facts regarding the actual success in saving species have been extraordinarily low, as noted in the GAO report described below. On top of the current candidates, estimates of potential listing petitions or legal action by environmental groups seeking to add more species is estimated at five hundred additional listings.

“During the 29 years since the Endangered Species Act was enacted, the Fish and Wildlife Service has listed more than 1,200 species in the United States as threatened or endangered. Of these, 32 have since been delisted, 13 as a result of recovery efforts. The other 19 were removed from the threatened or endangered species list because they became extinct (7) or were no longer deemed to be at risk because further scientific analysis found evidence of other information that made listing unnecessary (12). In addition, as of September 30, 2001, the Service was in the process of listing 35 more species and had identified 236 candidate species — species that qualify for listing but for which the listing process has not yet begun because of resource limitations or higher priorities for other species.” (Source GAO report – see also pg. 3)

I suggest that, as currently administered, the law might have better been named the Threatened Fish Act. The Service, in its 2004 Expenditure Report (the most current available) on the species listed, notes openly that of the 1,340 listed species (1,259 reporting), 1.5% received 50% of the funding spent. This translates into the top twenty one having spent 52% of all the non-land acquisition monies spent by federal and state agencies. So those must be the really imperiled poster children species, right? Au contraire, of the top ten, seven are only threatened and often not as a species but as a subspecies or involving limited range DPS/ESU factors. Included (as entities) are six salmon, two steelhead and one trout species with a sea lion being the only mammal included. If shown by totals that include the (six combined) subspecies, population segments or significant units being netted out, you get four salmon that are either endangered or threatened depending on the segment, and an equal three each for actually endangered or merely threatened. Those include the trout, steelhead and aforementioned stellar piniped, a woodpecker, one sturgeon and our second mammal – a whale. Getting to the end of the \$412 billion top twenty one the list funds fourteen fish, two birds and four swimming mammals of which eleven are threatened, nine are endangered and one (bald eagle) has been delisted.

One might assume this gets better soon but such is not the case. The next eight most entitled species are fish, followed by a sea turtle and (huzzah!) the grizzly, the first land animal listed. To get to number forty and 69% of available funding, nearly \$550 billion of the \$793 billion spent on listed species, add five fish, two more birds, a tortoise and another sea turtle. With 68% of the top forty listed species having gills, you should have no doubt as to why it was named FISH & Wildlife Service. The expenditures report also shows that the 1,238 species that didn't make the top twenty split the other half of the funding, but not at all in an equitable manner. At number six hundred thirty, the half way point in the reporting species, less than one half of one percent (.05%) of the funds remained; the top four hundred eighty four (38%) on the list spent 99% of the money allocated, meaning only 1% of funding was available to 62% of those listed. Another way to view this is that only 31% of what was spent went to species 41 through 1260, with thirty one tied at #1214 (getting \$233 each that year) and the last eighty two on the list getting zero. I consider Preble's comparatively well compensated at number 125 on the funding list.

How can this type of financial administration be defended? Why does a fairy shrimp at #103 get \$1mm or \$1.4mm go to #90, the bone cave harvestman spider when there is a plethora of greater societal needs, let alone the many other needs within not only Fish & Wildlife but other DOI agencies such as National Parks? Good intentions gone wild would seem to be the reason.

According to the expenditure report, between 1994 and 2004, federal expenses rose from \$217MM to \$1.15BB (land purchase aside), adding nearly 50% per year to the base line amount. The states burden went from \$9.6MM to \$127MM. Consider these numbers reflect only monies that can be directly attributed to expenditures for the species but do not include the general cost of staffing, office supplies and ancillary costs that are lumped in with day to day operations, and the related costs to state and local government's areas where listed species are thought to reside, critical habitat determinations required and recovery plans mandated.

Costs and the administration of the listing process were the subject of a June, 2002 GAO Report to the Committee On Government Reform regarding the way funding was being handled and the complex hurdles faced by the Service in complying with ESA requirements, as well as what (likely unanticipated volume of listings and litigious actions) made the effort to conform ineffective and costly to other missions dedicated to the Service. It was also a major source of staff frustration within the Service. The following are excerpted examples from the report, the full text is available on line.

“Environmental groups, landowners, federal agencies, and developers have voiced concerns about how the Service has implemented the endangered species program. Areas of concern include the pace of recovery; the Service’s performance in meeting certain of the act’s requirements and the Service’s interpretation of certain aspects of the act related to critical habitat. (This has) increasingly led to litigation and court orders that influenced how the Service does its work. The Congress has concerns about the program and not reauthorized or amended the act since 1988, though more than 50 reauthorizing or amending bills have been introduced since 1995. The Endangered Species Act’s authorization of appropriations expired on October 1, 1992. The act (has) remained in force and funds appropriated to implement the act in each subsequent fiscal year.

This report provides information on (1) how the Service budgets and allocates its endangered species program funds and (2) how field office staff spent their time in the endangered species program in fiscal year 2001. We asked all seven regional offices about their funding allocation methods and workload. We conducted two surveys: (1) supervisors at the 60 field offices that implement the endangered species program and (2) 767 scientific and technical staff (hereafter referred to as field staff) who worked in the field on the program in fiscal year 2001.

We became aware of legal services contracts awarded in a few field offices, funded through the endangered species program. Interior's Solicitor advised us that the Service did not have the authority to enter into these contracts. Use of endangered species program funds for legal services contracts was improper.

Field staff reported spending the majority of their consultation time working with federal agencies on projects for which the Service had to meet statutory requirements and time frames. The staff (had) little discretion over when they needed to respond to requests for consultations and how many requests they received. While recovery is the endangered species program’s ultimate mission and received almost 50 percent of the funds, this priority did not translate to a proportionate amount of time spent on recovery largely because of the requirements and deadlines field staff faced in other program areas.

This disproportionate relationship could also have occurred because the Service allocated some of its recovery funding through grants and contracts to outside partners for such activities as monitoring the status of a listed species. Staff reported spending 10 percent of their time on listing activities, including designation of critical habitat. These latter activities were in response to court orders and legal settlements, many of which criticized the Service for not designating critical habitat for many years when listing species. According to officials in the regions and in Interior’s Office of the Solicitor, staffs now lack sufficient guidance from headquarters on critical habitat designation. Officials stated that without guidance, the Service is vulnerable to litigation because staff does not have a consistent process for determining critical habitat. We recommend the Service expedite its efforts to develop guidance on designating critical habitat to reduce the number of legal challenges to the Service’s designations and be better able to defend those that are brought. Commenting on a draft of this report, the Department agreed with our recommendation but stated that completion of the guidance has been delayed by higher priority activities (including those required by courts).

Our surveys of field office supervisors and their staff highlighted other factors that can affect program implementation. Field office staff reported that a lack of resources and a heavy workload adversely affected their offices’ ability to carry out their endangered species program work. For example, 73 percent of field office supervisors responded that a lack of staff adversely affected their ability to carry out their program responsibilities.

When allocating funds, the Service considers (prioritizes) different types of anticipated listing actions, approved by the director of the Service. At the top are actions required by court orders and settlement agreements, and emergency listings. Other actions, such as preparing final rules for listing species and responding to petitions to list species are of lower priority. In fiscal year 2001, the Service could only fund listing actions responding to specific court orders and settlement agreements. In its fiscal year 2002 budget justification, the Service stated that the listing program will continue to be driven by litigation, largely over missed deadlines and the Service’s “not prudent” determinations for designation of critical habitat for listed

species. The act requires the Service to designate critical habitat at the time of listing or within 12 months if more data about habitat are needed. The Service designates critical habitat when doing so is judged to be “prudent and determinable” and generally declines to designate habitat when doing so provides little or no additional conservation benefits for the species.

Our survey results indicated that consultation, which received less funding than recovery, accounted for more staff time (42 percent) than recovery (28 percent). Fifty-eight percent of field staff reported working full-time on the endangered species program. Staff reported spending more time on consultation largely because they had to meet statutory requirements and mandatory time frames associated with these activities. Staff spent 10 percent of their time on the listing program area, including adding new species to the threatened or endangered species list and designating critical habitat. For these activities, responding to litigation primarily drove the workload. Regional officials cited the need for guidance on designating critical habitat in order to reduce the number of legal challenges to the Service’s critical habitat designations, better defend those that are brought, and spend more time on other listing activities.

The consultation program area comprises two main activities. Section 10 requires landowners who are engaged in activities likely to cause incidental taking (harm to a species or its critical habitat that is incidental to an otherwise lawful act) of a listed species to develop a habitat conservation plan (HCP) and obtain a permit allowing for incidental take. An HCP specifies, among other things, what measures the landowner will take to minimize and mitigate impact on listed species. The field offices assist applicants in preparing the HCP and coordinate with the appropriate regional office in issuing the incidental take permit. While there are no statutory time frames associated with section 10, all applicants expect timely attention.

Fifty seven percent of field office supervisors reported their offices identified species that could be candidates for listing but not yet been listed because of resource limitations or higher priorities, such as responding to litigation and court orders.

Within 90 days of receiving a petition to list (*or delist, ed.*) a species, the Service must determine whether the petition presents substantial scientific or commercial information to indicate that listing may be warranted. If the Service determines the petition presents such information, it reviews the species’ status and must determine whether the petitioned action is warranted. It must make this determination within 12 months of receiving the petition. If the petitioned action is warranted, the Service will then publish a proposed rule for comment in the *Federal Register*. Within a year of publishing the rule for comment, the Service must issue a final rule to implement the listing action or withdraw the proposed rule if the available evidence does not justify the listing action.

Since fiscal year 1998, appropriations language has restricted the amount of program funds that could be used for listing, including adding new species and designating critical habitat. For fiscal year 2001, the listing cap was \$6.3 million. The listing cap keeps other program area funds from being reprogrammed to address the significant backlog of listing activities that have resulted from litigation, court orders, and settlement agreements. The Service has been sued primarily because it has missed statutory listing deadlines and because litigants have challenged the Service’s decisions that it was “not prudent” to designate critical habitat for many listed species because doing so provided little or no additional benefits to the species. The Service has a substantial backlog of listing petitions that it has not had sufficient funds to complete and critical habitat designations now required because court(s) held past “not prudent” determinations invalid.

For FY 2001, staff reported spending 10 percent of total time devoted to the program on listing activities, with 51 percent (of total) on adding new species to the list and 49 percent on designating critical habitats. According to Service officials, all of these (listing) activities resulted from litigation, court orders, or settlement agreements. The Service stated that because listing activities have been driven by court orders and settlements, staff has been unable to focus on listing species at the greatest risk of extinction or to undertake a more balanced listing program.

Seventy three percent of field supervisors responded that a lack of funds and a shortage of staff affected their ability to carry out endangered species activities to a great or very great extent. Officials in all regional offices reported that at least two of the five program areas required more funds than allocated. Officials in four of the regional offices reported that all the program areas were inadequately funded.

Our surveys also indicated that the program’s heavy workload impeded program implementation. Seventy-one percent of field office staff reported that a heavy workload created competing priorities that made their work take longer than normally. One regional official explained that when staff has to complete many high-priority tasks, they often split their time among these tasks and thus may need more time to complete each task because they cannot focus on one task at a time. All regional officials agreed that their regions are faced

with competing priorities in many areas of the endangered species program. (Some) stated that priorities in one program area, such as consultation, often pull staff away from other tasks, such as recovery. In addition, almost 50 percent of the supervisors reported difficulties in retaining field staff and cited heavy workload as the principal reason.

(The GAO report concluded) The endangered species program poses a monumental challenge—identifying all species at risk of extinction and their critical habitat, conducting multiple activities to reduce that risk, and ultimately recovering listed species. According to the Service, a lack of resources and a heavy workload have made it even more difficult to carry out the act’s requirements, but staff have found ways to make their work processes more efficient. Nevertheless, meeting statutory requirements and mandated time frames and responding to litigation largely drive the workload in some program areas.

The unfortunate conclusion to this effort to shed light on the ESA process, not only the financial cost but its affect on the Service in terms of both efficiency and moral, without having significant impact in the protection of species, was strange indeed. The consensus among management level staff was that the report was accurate and changes necessary but impossible to effect because the available funding, limited staff and high workload focused on deflecting legal challenges did not allow for resources to be used to fix the problem. Ironically, most of the litigious quagmire that was slowing species recovery, crashing the system and gutting the spirit of the Service was coming from environmental groups, some of which had more attorneys on the staff or boards than scientists. This became so perverse that a past director of Sierra Club and a founder of Greenpeace wrote articles that suggested the practice be stopped as the backlash from contributors was significantly impacting fundraising. Supporters of the groups thought their money was going to actual conservation efforts and not pleased to find out lawyers were deep in the cookie jar that was allegedly there for critters large and small.

Congress found the ESA was rapidly becoming an embarrassing case of money being tossed at something that was generally getting more problematic and expensive without meeting expectations and sought ways to make improvements in the law and the way it was implemented. After years of rubber stamping continued funding without taking a serious look at the expired act, legislators began to consider amending the existing law. The biggest hurdle was how to be politically correct to the environmental lobby (even if their efforts had resulted in misguided results) and fix the problem, something especially difficult for liberal Democrats facing off on related energy exploration issues with the opposition party. The wrong move could be political suicide, as it was for Richard Pombo, the much vilified chair of the House Resources Committee who had merely put together a bipartisan (and easily passed) bill to reform the ESA but, was then defeated in the 2006 midterms. He was replaced as the committee chair by a democrat from a state that blows the tops off mountains to mine coal.

The senate (where some say good ideas go to die) was more circumspect in their approach. In 2005, Senators Clinton, Crapo, Chafee & Inhofe among others, tasked a Keystone, CO think tank to help come up with a palatable solution that could become the basis for reform of the ESA. As excerpted below (paying especial attention the comment on critical habitat in light of the GOA concerns above) from the February, 2006 preview of the full report, the Keystone group stated:

“The Keystone ESA Working Group on Habitat agrees that the present regulatory approach to habitat protection could be improved to better address the biological needs of species, increase efficiency, and reduce concerns of regulated parties. Although the group is not able to offer a single, comprehensive consensus based approach, significant headway was made in clarifying some central issues regarding the habitat listed species need to recover. The group concurs on a number of ways to strengthen recovery planning and on programs and procedures that can provide additional landowner incentives that, if instituted, promise to the benefit listed species.

Much of the group’s work was dedicated to exploring a new approach to habitat protection that would move away from the current critical habitat framework and build on three interdependent components:

1. Centralize the role of recovery and recovery planning;
2. Significantly boost the role of incentives;
3. Revise the §7 consultation standard.

Although the group did not reach consensus on a comprehensive construct, it generally agreed that, if developed, it would likely need the following elements: new provisions for integrating habitat protection and conservation into the ESA to replace the current critical habitat framework, a greater focus on the function, content, scope, and mechanics of recovery plans, clarification of the §7 standard, more effective incentives for non-federal parties, and new sources of funding for better coordinated and more workable ESA provisions pertaining to habitat.

There was a broad consensus that incentives that go beyond simple compliance with the law are necessary to make imperiled species more abundant, widespread, or secure. The full letter from Keystone, along with the group's final report and recommendations, will offer a number of specific suggestions related to Farm Bill measures, voluntary cooperative agreements, tax incentives and streamlining including:

- Refinements in the selection criteria and re-enrollment considerations for the Conservation Reserve Program (CRP).
- Strengthened focus of Environmental Quality Incentives Program (EQIP) resources on specific wildlife practices for at-risk species.
- Increased funding for the Wildlife Habitat Incentives Program (WHIP) to provide conservation incentives and technical support to landowners.
- Explicit authorization of cooperative conservation agreements between landowners and the federal government for the conservation or improvement of habitat and species under the ESA.

In their discussions, the group consistently underscored the need for the development of scientifically sound, financially reasonable, and politically credible recovery plans. These include the need for an articulated policy on what is meant by "recovery," how to address occupied and unoccupied habitat needs, and how the recovery plan should inform other sections of the ESA.

The group devoted considerable effort toward developing a recommendation aimed at reorienting the §7(a)(2) standard to a focus on species recovery. However, the group did not reach agreement on a specific revised standard. Some of the questions that the group grappled with include:

- Should habitats necessary for recovery continue to be mapped and, if so, should this mapping be integrated with recovery planning?
- Should protection of habitats identified as necessary for recovery receive explicit protection, receive implicit protection in the consultation process, or receive no regulatory protection at all?
- Should the substantive standards of §7(a)(2) refer to expected impacts on recovery, survival, conservation, likelihood of extinction, or something else?
- Should those standard(s) be qualified in some manner?
- In assessing compliance with the standard, what consideration should be given to indirect or cumulative effects of the action under consideration?
- What, if anything, should be said about mitigation in §7(a)(2)?
- Should any change in the standards applicable to federal actions under §7(a)(2) be accompanied by a change in the standard for approval of habitat conservation plans under §10?"

The more complete follow up letter noted:

"In essence, the group believes that it should be possible for you and your Congressional colleagues to take steps that would improve the law's effectiveness for the species at risk, make government activities more efficient, and reduce the concerns of regulated parties. It is the opinion of the group that addressing all three of these issues—the biological needs of the species, the efficiency of government, and the concerns of those most

directly affected by the Act's provisions — is the only practical way to move forward if the goal is to do so in a more consensus-based manner.

The group agreed in short order that the ESA could do a more effective job of protecting and conserving the habitat that species need to recover.

If an objective is to list fewer and delist more species, then it will be important to look beyond the ESA in isolation toward additional conservation measures by state and local governments, private sector efforts, and other regulatory and non-regulatory programs. The ESA in its current form cannot shoulder this burden alone.

Most of the group felt that any concept that had the best prospects for the greatest consensus would likely include the following elements:

- New provisions for integrating habitat protection and conservation into the ESA.
- More effective incentives for non-federal parties.
- New sources of funding for better coordinated and more workable ESA provisions pertaining to habitat.
- A clearer, more effective role for the states.

The working group explored whether it would be possible to replace the current critical habitat provisions with three main elements:

- Increase the extent and effectiveness of incentives.
- Make the recovery plan the “hub” to guide efforts to improve the status of threatened and endangered species, promote down- or delisting when possible, appropriately inform the full spectrum of ESA §6, §7, and §10 decisions with differing standards of their own, and to allocate available incentives.

For many reasons, therefore, critical habitat designations have become a litigation battleground for those who own, use, or wish to influence the use of those particular areas. Some suits challenge the failure to designate critical habitat for particular species. Others challenge particular designations as being too broad or too narrow. Still others have challenged the adequacy of the economic analysis that the Secretaries are required to undertake when considering whether to exclude areas from a critical habitat designation. Both the regulated and conservation communities widely acknowledge that the effect of these lawsuits has, among other things, consumed a portion of the conservation agencies' resources which might otherwise be allocated directly towards species recovery efforts throughout the country.”

At not inconsiderable expense, the Senators convened a brain trust for a four month winter retreat in the Colorado mountains, the results of which focused on section 7. Yet the most confrontational and egregious problems to property owners occur under section 10, involve takings that would violate constitutional rights if not for the coerced volunteering of agreement with HCP mitigation plans and the costs involved therein.

The concept that the government didn't take your land but merely required you to agree to a plan the Service would bless, the option being inability to disturb (improve) your own property, to the possible benefit of an only potentially resident species, is at the heart of the conflict and flirts with the limits of the Fifth Amendment regarding seizure. So onerous did this become that, at one point due to a suit by the Spirit of the Sage Council that was upheld (later remanded for review) the idea that HCP/ITP agreements were not contractual in nature. This led to an announced stoppage of any ITP grants. When restored, the Service asked HCP submitters to place a permanent deed restriction in perpetuity (even with delisted or extirpated species) on the permitted property. Keystone did make note of this in an offhanded manner, suggesting that better incentives for land owners and a more cooperative approach to critical habitat was needed. But in the end, the report stated in essence; this is a broken system, we agree to a greater or lesser degree, but have no clue how to fix it. After the 2006 passage of the ESA reform bill by the House, the Senate ignored it to death and apparently the report's conclusions and carefully hedged recommendations as well. Money well spent?

Dan Berman in *E & E News* (excerpted from comments on the new proposed rule)

“The Fish and Wildlife Service will revise seven rulings that denied endangered species listings or limited critical habitat designations because they were inappropriately influenced by a former Interior Department political appointee.

At issue is the influence of Julie MacDonald, the former deputy assistant secretary for fish, wildlife and parks. FWS began the review of eight ESA decisions it believed MacDonald influenced this July.

MacDonald resigned in May after Interior Inspector General Earl Devaney issued a scathing report that found she violated ethics rules, edited scientific decisions on endangered species issues and passed internal agency information to outside parties suing the department.

"Questions were raised about the integrity of scientific information used and whether the decisions made were consistent with the appropriate legal standards," FWS acting Director Kenneth Stansell said in a letter to House Natural Resources Committee Chairman Nick Rahall (D-W.Va.).

Rahall said the decision to review seven ESA decisions throws the integrity of the entire program under MacDonald into doubt. "This announcement is the latest illustration of the depth of incompetence at the highest levels of management within the Interior Department and breadth of this administration's penchant for torpedoing science," Rahall said in a statement.

The Preble's meadow jumping mouse is a politically sensitive species in the Rocky Mountains where listing and critical habitat designation could have a major impact on oil and gas drilling.* FWS proposed this month delisting the species in Wyoming, while maintaining protections in Colorado. Previously, the agency proposed delisting the mouse based on a study that found no genetic difference between the Preble's mouse and a common meadow mouse. Once a final listing rule for the Preble's mouse is issued, FWS will revise the proposed critical habitat designation, Stansell said.

Environmentalists say the agency is not going far enough. The Center for Biological Diversity has filed six lawsuits claiming Bush administration appointees overrode federal scientists' recommendations on endangered species actions and plans to file 49 more, one for each species it claims was denied protection due to political intervention.”

* (ed) Clarity would be better served if the description of the range indicated that Preble's is thought to be found in riparian areas in the foothills and high plains east of the Rockies in southeast Wyoming and central Colorado to the south side of Ft. Carson military reservation (see FR72/215 – 63021). In several large metropolitan areas included, block waivers have been granted, removing critical habitat designation. One might agree that “politically sensitive” is more accurate a description than “threatened in a significant portion of its range” if the current “Recently Documented Distribution” map, included in the November 7, 2007 Federal Register notice of Proposed Rule to Amend the Listing, is considered. The real issue is not, however, energy development as suggested by the author of the article. The map shows the concentration of mouse populations mirror the I-25 corridor, which in the main is under pressure from development based on human population. Yet, the mouse has apparently thrived in that environment where much of the habitat is already under regulation (and protection) from flood plain, green space and other local requirements. Given the much less known density of the mouse in open land in Wyoming, why not consider that more critical to recover? The Service originally used agricultural land use as one of the threats to PMJM in developing the original listing proposal. Why now reverse their thinking, saying that such pressure to populations is less serious so it won't be a threat if they delist in WY while ignoring the population growth seen in the “threatened by development” areas such as the I-25 corridor where it appears the mouse thrives?

As it took the Service a mere fourteen pages of the Federal Register in 1998 to explain how it came to list Preble's and nearly three times as much space (and an equal number of Regional Directors over the past five years) to defend this split decision in November of 2007, some background is in order. When PMJM was listed in 1998, the Service plainly stated that it was doing so despite evidence found post petition, indicating that Preble's was much more common and in greater populations than thought when first coming under consideration. It was also felt that critical habitat designation was unnecessary and of little value where the mouse was concerned. Litigation to force such designation was the result, covering large areas of stream related areas in WY & CO. In many places (which would remain the case with delisting) those areas were already protected from development due to flood plain restrictions.

Rather than limiting the critical area to 300' from stream center, possibly a reasonable area, the Service began using 300' from the boundary of the flood plain without regard to the situation on the ground. If habitat that was generally unsuited for consideration as riparian fell within the guideline, it remained critical habitat and subject to HCP/ITP rules and process. While the comment by Service staff that a no applications were refused, it begs the question as to at what expense, multiple drafts and consultations and over what (possibly less than reasonable by federal guidelines) period of time. Meanwhile (see FR72/215 – 62999), Preble's is popping up all over, now that someone actually looks for them. Moreover, it is most common in the very corridor that is highly populated by humans. Mice are fairly clever and have lived cheek by jowl with man for centuries. Why live in the land of Goshen (WY) when the land of plenty awaits just to the south?

While my comment stems for personal experience, I mention it with an understanding of the limited staff and budget that the Service has at its disposal. It is, however, unfortunate that the mention of conflicts and vagueness in guidelines (related by Keystone and others) results in independent decisions and Service formal and informal consultations resulting in same story – different answer scenarios. I find FWS staff to be generally helpful and willing to consider options that meet the goal. They are also deluged in paper instead of field work, spend large amounts of time in defending their actions against legal actions and devoting fewer and fewer hours to working the problem, often with a hazy idea of how to interpret the ESA in particular situations without tweaking someone's nose.

That said, the current solution to the Problem with Preble's boggles me, and the thirty some pages of rationalization in the Proposed Rule not as forthcoming as one might wish. Nor is the assertion that a Bush apparatchik (Julie Mac Donald) is now blamed for the do-over on the delisting process that has spent over a year in limbo (and the one prior in purgatory) and multiple failed time frame promises by the Service in the past. The alleged ham fisted fooling around with five or so species in the Service spotlight by the lady now long gone, took place in a time frame unlikely to have left her fingerprints on actions related to PMJM. Even if so, actions by the Service to hinder a delisting that seemed on track, both scientifically and in public and peer comment (about 60/40 favoring), deserves the same scrutiny as she received.

It has been over four years since the petition to delist was accepted, moving through the diligence period timely in ninety days and put into full review in March of 2004. It was generally accepted, even by those in the Service that an answer would be given by year end. It was provided February 2 of 2005 as a proposed rule to delist based on sufficiency of the evidence in the petition. This included taxonomic and population data (already acknowledged in the listing comments) that did not support the threatened status of PMJM. The Service now states that this (agreeing that the conclusion Preble's was not a subspecies) was with some reluctance due to mixed peer review (typical in scientific discussion) and REA having not been published (the work was published in a respected UK science periodical).

They failed to mention public comment was also mixed but both the experts and the concerned agreed, with about one half again as many supporters as nay sayers.

Again I note, the scientists often hedged their bet with the oft seen, “more study is needed”, a phrase that indicates a willingness to accept I a grant to do that study, I suspect. The public comment took place over the normal ninety day period allowed, lasting into May, 2005. Over the elapsed sixteen months of the petition process, many who might have sought an ITP held off for the decision, which now indicated (via the proposed rule) that a time and money consuming formal consultation and HCP would not be necessary.

This reluctance led FWS down an odd path, especially since the rationale above came after the facts now related. The “decision” was to accept the petition as valid and propose delisting. But what was really going on somewhere in the Service hierarchy was a politicized effort to not upset the environmental groups likely to sue over the decision, something that might be considered every bit as much tampering with the evidence as the mud slung at Ms. Bush HENCHPERSON. Rather than following the “best available science” mandated in the ESA, FWS decided that since they agreed with REA they should call for backup. Given the weight they gave the very scanty science (debunked in favor of REA by the biologist responsible) for the initial listing, they really were Boldly Going Where No Man - - - .

The Service took a step out of the bounds of their authority (in terms of allowed process in the ESA language) to covertly (hopefully?) overturn their own decision by seeking to use a rebuttal study that they contracted to a sister agency, the USGS (hardly the home of mammal mavens) which was unlikely to poke fun at the service, or not do what was asked in this case. Late in 2005 (actually too late to do the work on time and with limited resources per comment by Dr. King) FWS selected a biologist (King) from USGS, with mostly marine experience to restudy the mouse with the express goal of challenging the findings of Ramey et al (REA) upon which the petition to delist was based. There was no precedent for the action and it must be considered an odd call to propose the delisting rule, let the public comment period expire and not accept their own decision, then dilly dally for some months before hiring USGS, without disclosure and leaving the public (and the petitioners) scratching their collective head.

There was also no allowed process or precedent to ignore time frames for the process required by law. Since King’s report was not going to be available in time to meet the twelve month findings time frame, preliminary information was justification for unilaterally extending the period of the rule being proposed but not in force for as long as it took King et al (KEA) to do the work. The Service just asked everybody to hold tight and they’d let them know by a *new* year end. That turned out to be January 25, 2006. As expected, there was “serious scientific disagreement” which gave FWS the excuse to opt for the six month extension allowed, to mull some more and open sixty days of public comment for response to KEA. The Service was also sensitive to the fact that if they sided with KEA after agreeing with REA a lawyer was sure to appear.

In fact one did, in the form of petitioner Coloradans for Water Conservation & Development’s attorney Kent Holsinger, who filed a Data Quality Act challenge. Based on the KEA study providing nearly identical results as those of REA while using a different sampling approach, Holsinger pointed out that the Service would be hard pressed to consider Preble’s as either a distinct population segment (DPS) or threatened throughout much of its range. In fact populations were increasingly well known in Colorado. King’s data was also held to lack credence when the Service agreed synopsis was the choice, as REA suggested, and KEA felt a second subspecies should result, despite a less than 1% variance with REA parallel data. DQ challenges are to receive prompt (90 day guideline) response. To date, no reply has come from FWS.

The new public comment didn't vary much from prior in the percent of support, though a few in the scientific community asked to participate and been involved in earlier versions switched sides. At the end of March the service released the KEA study to the public, extending yet again the public comment window, this time until the end of April. While this was taking place, FWS decided to toss the hot potato to a panel of experts. Five were chosen under the auspices of Sustainable Ecosystems Institute (SEI) a NW coast based non profit group mostly known for working with marine species. SEI also lists the Service as a major funding partner, along with several other grant providing flora and fauna based federal and state agencies. In the event, three of those picked for the panel discussion and review appeared. They were, in the main, associate professorial level biologists at modest institutions, only one having related experience with Preble's like mammals. They were tasked with peer reviewing far more published and reviewed scientists with a higher level of professional achievement, a difficult task at best. But the alleged goal was to compare the studies techniques and possible reasons for disagreement, albeit there was only a slight amount of the latter.

SEI stated that they weren't to make statements on, or attempt to effect, public policy or make conclusions outside the mission, such as drawing their own conclusion from the work. They violated that promise (and then cast doubt on their own comments) in the report presented. That was on July 21, 2006. The Service announced no action regarding the report or the still proposed rule to delist and, in September, Wyoming submitted a 60 day notice of intent to sue over that issue. In late January of 2007 Wyoming took action, asking for court review, and on June 22 an agreement to publish either a proposal to withdraw the existing version or a new proposal. This led to Wyoming being considered for being dropped as critical habitat but keeping Colorado's designated areas.

As others have pointed out, when the mice find out they are no longer threatened in Wyoming, what will they do – leave Colorado for Wyoming en masse or head south to where so many more of their friends are doing well? The logic that these populations have no contact or will respect state borders is strange indeed. And according to the information in the proposed rule, the lower populations found in the less riparian habitat in Wyoming would benefit most from a recovery plan that ensures those limited drainages remain friendly to a variety of species. Much of the Colorado corridor is either developed enough to have received block waivers or is in areas where growth is limited by various environmental, water availability, flood plain restrictions or local government efforts to develop regional HCPs, helping guarantee the future for Preble's.

The more serious problem with accepting SEI as the final arbiter in this matter is that the proposed rule uses it as a reason but fails to implement some of their comments or Dr. King's concerns. It also fails the test of doing what they were tasked to do – find areas of serious failures of scientific technique that led to significant discrepancies in REA v. KEA. I am troubled that:

SEI was outside the bounds of their mission in taking sides rather than comparing and contrasting the studies as asked and leaving the information for the Service to interpret.

SEI boldly stating that they were of one mind regarding Preble's definitely being a subspecies vs. King indicating that there might in fact be two subspecies, along the line that the Service is now attempting to provide in the proposed rule, without actually splitting the populations.

The panel discussion and within the report, SEI noted the fact that subspecies were a matter of serious debate among biologists, many feeling that no such definition was valid. Therefore, one might disregard their opinion as being admittedly out of step with the broader scientific community and especially supportive of King and the Service.

That was done without solid basis in fact. Different populations and comparison techniques may have been used but the data provided strikingly similar results (see panel testimony by other scientists, current public comment and prior DQA challenge for CWCD by Holsinger).

No serious flaws were proven in REA methods. True also for KEA but for Dr. Kings comments that his work was hindered by the time frame that caused a rushed work period and insufficient materials to do all the study he wished.

SEI used a definition of subspecies that was in error, according to the most generally accepted dictionary of biologic terms, as regards population/genetic interface when making their statement.

In the end, the appearance of manipulating the story, choosing King and SEI after partly funding and accepting REA and extended foot dragging is much the same as the interference of which Mac Donald was accused. This is in part understandable. The Service is in a no win situation when they know nearly every decision they make will be the source of litigation. But their mandate is to do what they, as the professionals in the government, feel will best benefit the majority of tax payers and the limited number of species that can be funded enough to see likely recovery. In the case of Preble's, I know many who care greatly about our big blue ball but when they hear how much money, time and argument has gone into a mouse that never really seemed in trouble, they find it beyond understanding.

Rather than the current proposal, I suggest that the Service continue on the course set after the delisting petition was found to have merit. Delist PMJM and monitor (federally or locally) the populations known or found to exist for five to ten years. If they are correct about Wyoming, the mouse should see no decline and if riparian areas are encouraged via other means (environmental easements, cooperative conservation etc.), they should prosper. In the habitat now considered critical in Colorado, we may discover that other safeguards in place (local HCPs and green space/wet land requirements in developed areas for example) will do the same.

The proposed rule indicates that PMJM does not meet the definition under the ESA as being threatened throughout much of its range, or part thereof if Wyoming is a separate range now or even in 1998 according to the Service's own comments. The proposal could earmark time frames and qualify positive and negative trend indicators that would automatically return Preble's to its current status if status quo or recovery was found.

Sincerely,

Ken Faux



jackfrice@att.net
11/02/2007 04:07 AM

To FW6_PMJM@fws.gov
cc
bcc
Subject Preble Mouse on endangered species list..you must be
joking

Endangered in Colorado, yet not in Wyoming?

If there are so many in Wyoming why not let them live there in peace and happiness?

Get Colorado back on stream and take them off the endangered species list and allow development to continue.

You are adding an expensive time and dollar cost to every little development and for what? Let the Preble Mouse go the way of the buggy whip, they have little usefulness anyway, maybe carry some diseases. If anybody wants to see one or catch one, send them to Wyoming where the Preble will live on forever.

Your stand on this issue is as wrong as the forest departments wanting to close off forest areas because people use the land for recreation.

Remove the Preble Mouse from the endangered species list.

Thank You,

Jack Rice



"Coleen P. Abeyta"
<Coleen.Abeyta@mosaicinfo.
org>

11/02/2007 08:38 AM

To <FW6_PMJM@fws.gov>

cc

bcc

Subject mouse

Keep the Preble mouse on the endangered list.

Coleen Abeyta Regional Vice President
122 Luxury Lane Colorado Springs Co 80921
719-477-1744 719-477-1473(fax)
Opening doors to extraordinary lives



"Jane" <jane@rrogers.net>
11/02/2007 08:50 AM

To <FW6_PMJM@fws.gov>
cc
bcc
Subject Preble's meadow jumping mouse

I am glad to see our government stand up for endangered and/or threatened species, at least in Colorado. Too often our government caves in to big money developers. Government doing the right thing for the environment....what a concept!

J. Rogers
Colorado Springs, CO



Ron and Mary Kunzelman
<rkunzelman@yahoo.com>

11/02/2007 09:43 AM

To FW6_PMJM@fws.gov

cc

bcc

Subject Mouse

To apply the Endangered Species Act to a rodent is unreasonable. In fact, the Act itself is unreasonable because it allows a small minority group to dictate to the vast majority of our country such unreasonable regulation. Most citizens label rodent protection laughable. Ronald D. Kunzelman Colorado Springs, Colorado 80906

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TCNett@aol.com
11/02/2007 11:14 AM

To FW6_PMJM@fws.gov
cc
bcc
Subject Remove Mouse From List

C'mon folks, it's not like the jumping mouse is anywhere near the top of any food chain. It's a rodent !! While it sounds good to protect the critter, let's take a look at the cost of doing so. **It's simply not worth the cost.** Let's remove the mouse from the threatened species list and let nature take it's course.

Thanks.....Tom Nettles 719-481-4398

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Michael & Claudette Stella
<stellam69@msn.com>

11/02/2007 01:18 PM

To <fw6_pmjm@fws.gov>

cc

bcc

Subject Preebles jumping mouse

Please do NOT take the mouse off the endangered species list. We have lost too many species in the name of development and we should not lose any more.

But remember this, there will be a change of administration on 1-20-09 and if you are the kind of person that kowtows to developers, ie a republican, you will be out of a job. So do your worst, we will reverse it in 09.

Claudette & Michael



"Susan Majors"
<jsmajors481@comcast.net>

11/02/2007 05:18 PM

To <FW6_PMJM@fws.gov>

cc

bcc

Subject Prebles's mouse

History:  This message has been forwarded.

To Whom It May Concern:

I was appalled to see this comment attributed to an conservation advocate in The Denver Post Thursday November 2, 2007: *"Conservation groups support the listing as a way of preserving open space - the mouse's natural habitat - along the Front Range."There is more at stake here than just a mouse," said Jeremy Nichols, a conservation advocate at the Center for Native Ecosystems."*

I consider myself an environmentalist, but taking of private land for open space is wrong. My family owns land along Monument creek that is now unusable because it may be preble mouse habitat. That is, MAY BE. Any development plans we might have are put on hold and have been for years, while scientists debate if the mouse is an endangered species.

If the conservationists would like more open space, they need to raise the money to buy it from the people to whom it rightfully belongs. If scientists haven't been able to come to a consensus, after all this time, about this species, let's give the land in question back to the people who own it.

Sue Majors



"Rata Clarke"
<rataac@gmail.com>
11/03/2007 04:05 PM

To FW6_PMJM@fws.gov
cc
bcc
Subject Preble's Mouse

Thank you for keeping the Preble's Mouse on the Endangered List in Colorado. We, as humans, think if we can make a buck developing land we would sell our souls. We need to preserve animals in their natural habitats. Is there no one who understands how a food chain works and that a chain is only as strong as its weakest link?

Rata Clarke