

Written Statement of
Wyoming Attorney General Patrick J. Crank

Before the Committee on Resources
United States House of Representatives

Hearing on “Abuses of the Endangered Species Act: the So-called Preble’s
Meadow Jumping Mouse”
Greeley, Colorado - September 18, 2006

Thank you, Mr. Chairman and members of the Committee, for your invitation to attend today’s hearing on abuses of the Endangered Species Act.

In Wyoming, we have a mythical creature called a Jackalope – an alleged hybrid between a jack rabbit and an antelope that supposedly haunts the hills, mountains, and plains of Wyoming. Numerous mounts of these creatures can be seen in gas stations, hotels, bars, and restaurants across Wyoming, although I must confess I have never seen such a beast in the wild. The Jackalope is a fun creation that no doubt causes some wonderment in those folks who choose to visit our great state.

Unfortunately, we have at least one other mythical creature in Wyoming, that instead of engendering enjoyable imaginative detours, erodes private property rights, forces the wasteful expenditure of precious taxpayer dollars, creates real fear, apprehension, and anxiety for private property owners and businessmen, and prevents the building of affordable housing for our citizens. The mythical creature I refer to is the Preble’s Meadow Jumping Mouse (“Preble’s Mouse”). Unlike the Jackalope, the mythical Preble’s Mouse has the full weight and protection of the United States Fish and Wildlife Service (“Service”) and the federal government protecting its mythical existence in Wyoming.

The fact is that we have a lot of jumping mice in Wyoming and surrounding states. The fallacy is that the Preble’s Mouse is a distinct subspecies requiring Endangered Species Act protection to prevent its extinction.

The history of the Preble’s Mouse is a very real case study of the problems associated with the Endangered Species Act (“ESA”). There are three problems, in my estimation. The incredible discretion given to the Service over ESA decisions by the Act, the accompanying rules and by federal case law interpreting the Act, and the ability under the Act for activists to use it to effectuate politically-motivated agendas that are well beyond its intended purpose. It is likely that any decision rendered by the Service on an

ESA question will be either shielded from federal court review by Article III case or controversy requirements of the federal courts, or by the incredible grants of deference the courts apply to agency decisions under the ESA (so-called *Chevron* deference).

Employees of the Service and other federal regulatory agencies, who are usually far below the appointed level who would be presumably responsive to a particular administration's policy directives, have an almost unfettered ability to thwart the intent of the ESA to protect those species who need protection and implement personal management agendas. We know today that the Preble's Mouse should never have been listed. Both the genetic research and current distribution, abundance, and trends data demonstrate that the Preble's Mouse is not a sub-species and is not in danger of extinction. The Preble's Mouse was listed for political reasons without sufficient research to authenticate the finding. Today, the Preble's Mouse remains on the list of threatened species because some person or persons, presumably within Region 9 of the Service, decided to fund and solicit the opinion of a person within another branch of the federal government who had a known propensity to find that animals with minute genetic differences are separate and distinct subspecies. And those same individuals have done nothing to delist the Preble's Mouse despite eight years of additional study demonstrating that the Preble's Mouse is widely distributed in abundant numbers and clearly not threatened with extinction.

In Wyoming today, reintroduced gray wolves remain protected under the ESA only because Washington, D.C. politicians are worried that Wyoming law, which defined wolves as "predators" in only those portions of the State where there is no habitat or prey base to support wolf populations, is politically unacceptable to the east coast environmentalists—even though it is supported by the best biological science.

The practical effect of the problems associated with the implementation of the ESA is that tens of millions of dollars are wasted on animals that do not need protection. Private property rights of our citizens are profoundly and frequently permanently affected. Species that truly need protection go without because funding, time, and resources are squandered by bureaucrats whose decisions are not subject to review by their superiors, Congress, or the courts.

History of Listing Process Regarding the Preble's Mouse

In 1994, the Biodiversity Foundation petitioned the Service to list the Preble's Mouse based on Biodiversity's claim that there were only two known populations of the mouse in Colorado. By the time the Service published the final rule listing the Preble's Mouse as "threatened" in May 1998, surveys showed that the mouse had been found at 26 sites including seven counties in Colorado and two counties in Wyoming.

On December 17, 2003, Wyoming filed a petition to delist the Preble's Mouse.

The petition to delist presented two arguments:

1. A genetic and morphological study conducted by scientists at the Denver Museum of Natural History showed that the Preble's Mouse was not a distinct subspecies and was genetically indistinguishable from the more common and populous Bear Lodge Meadow Jumping Mouse; and
2. Additional trapping data showed that the Preble's Mouse had been trapped at 126 sites throughout 17 hydrological units (26 sites in 9 counties [7 in Colorado and 2 in Wyoming] at the time of listing).

Based on these facts, Wyoming asserted that the mouse was listed in error and should be removed from the endangered species list.

The Service issued a positive 90-day finding on the petition on March 31, 2004, and on February 2, 2005, the Service issued its 12-month finding and a proposed rule to delist.

Our belief that the Service might actually follow the ESA and the ESA might actually work as originally intended were, however, later dashed when on February 17, 2006, Region_9 published notice that it intended to delay the final decision to delist the Preble's Mouse for six months to study a report issued by Dr. Tim King, a United States Geological Survey scientist who had been asked by Region 9 to look at the earlier Preble's Mouse report prepared by the Denver Museum of Natural History.

The Service could not have picked a better person than Dr. Tim King to insure that the Preble's Mouse continued to receive federal protection regardless of overwhelming scientific data that there was no such beast as a Preble's Mouse. In the scientific world, Dr. King, whose specialty involves the study of fish, is known as a "splitter," a scientist who is biased and frequently concludes that any minute difference between animals at different geographic locations are separate and distinct subspecies, both worthy of protection under the ESA. And, Dr. King, true to form, rendered the opinion the Region 9 wanted and solicited – the Preble's Mouse is a distinct subspecies from other more widely distributed and more populous jumping mice.

And after two and a half years, Region 9 has yet to make any findings on the distribution, abundance and threats data issue presented in Wyoming's Petition, in direct violation of the ESA. Unfortunately, we cannot even challenge the Service's failure to act until some final rule is published. Thus, Region 9 personnel have had the ability to

unduly delay review of the distribution, abundance and threats issue and any decision based on current data because of procedural black holes. When and if the Service issues a final rule, Region 9 will have other procedural cards to play that will delay final rule making for at least another 18 months if not longer, if it chooses to continue to obstruct the process.

As we sit here today, the Service has yet to reach a decision on the petition to delist. Such a decision was due on August 8, 2006, and this deadline has come and gone with no answer from the Service.