Committee on Resources

Witness Testimony

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Mr. Chairman, I am pleased to testify today regarding citizen suits brought under the Endangered Species Act and other natural resources statutes, particularly in the Southwestern United States. As I will discuss, the federal agencies' actions in Southwest Center for Biological Diversity v. United States Forest Service avoided the kinds of broad injunctions that had previously been entered in a number of cases around the country. Unlike those situations, which I will also describe briefly, there has been no regionwide shutdown: grazing on federal lands in the Southwest has continued despite litigation against the Forest Service and the Bureau of Land Management.

My testimony will also discuss other citizen litigation in the Southwest and elsewhere, in which we have had a number of significant legal victories.

Let me note at the outset that the specific cases you have asked me to discuss today are pending in federal court, and therefore the Department's pending matter policy applies to discussion of them. Pursuant to that policy, I will be happy to discuss matters that are in the public record.

The Southwest Center litigation

I would first like to turn to a discussion of the recent grazing cases about which you have inquired. According to the Forest Service, there are over 1,000 grazing allotments in the twelve National Forests in the Southwest Region, of which upwards of 700 contain species that are listed under the Endangered Species Act (ESA). The ESA requires that the Forest Service consult with the Fish and Wildlife Service on the effects of activities that the Forest Service authorizes (such as grazing) that may affect listed species. The ESA also prohibits, pending completion of consultation, any irreversible or irretrievable commitment of resources by the Forest Service, or by any permit holder that would foreclose the formulation of reasonable and prudent alternatives to jeopardy to listed species.

In 1996 and 1997, the Forest Service consulted with the Fish and Wildlife Service on the effects of grazing in the Southwest as authorized in its forest plans. But this regionwide consultation, which concluded in December 1997, did not include an analysis of the effects of grazing on individual allotments within each forest. At the time the Southwest Center suit was filed in October 1997, therefore, the Forest Service had not specifically consulted with the Fish and Wildlife Service on the vast majority of these 700 grazing allotments. For this reason, the Forest Service was arguably out of compliance with its obligations under the ESA.

The Southwest Center lawsuit was consolidated with a related suit filed by Forest Guardians in December 1997. These actions were filed under the citizen suit provision of the ESA and together named over 150

individual grazing allotments for which consultation was lacking. The complaints in both cases sought, among other things, a declaration that the Forest Service was in violation of the ESA and an injunction against grazing on all of these allotments pending completion of consultation.

In recognition of the need for compliance with the ESA's consultation requirements and in order to avoid any injunctions that would prohibit grazing in the interim, in February 1998 the Forest Service and the Fish and Wildlife Service entered into an agreement that set an ambitious but feasible timeframe for completing consultation on all these allotments, as well as any others that the agencies were capable of including in the process. The deadline set was July 15, 1998. The agencies determined that grazing permittees on allotments where grazing was deemed likely to adversely affect listed species would be provided an opportunity to participate in the consultation through submission of comments on the Fish and Wildlife Service's draft biological opinion. The July 15 date has since been extended until late August at the request of permittees.

The agencies also determined that, during the consultation period, currently permitted grazing would continue, and would be administered through permit provisions and annual operating plans, taking into consideration resource protection needs. They anticipated that the annual operating plans would continue to be prepared with permittee participation and that the need might arise to amend the plans during the course of the consultation as new information on the effects on listed species became available.

Shortly after both suits were filed, both the Arizona Cattlegrowers' Association and the New Mexico Cattlegrowers' Association moved to intervene and were granted status as intervenor-defendants in the two cases. In early March 1998, the Forest Service and the Fish and Wildlife Service, as well as Department of Justice representatives, convened a conference call among all the parties to the suit to explain the consultation agreement and the process for getting the consultation completed. I should point out that among those participating on this informational conference call were representatives of both the Arizona Cattlegrowers Association and the New Mexico Cattlegrowers Association.

Soon after this discussion, the Forest Guardians and the Southwest Center each moved the court for a preliminary injunction against grazing. Each group requested a broad injunction against grazing on all the allotments identified in the two complaints, and Forest Guardians also requested a more specific injunction against grazing in riparian areas on the allotments identified in the Forest Guardians' complaint, pending completion of consultation. The groups argued that, as a matter of law, grazing in riparian areas during the pendency of consultation constituted an irreversible and irretrievable commitment of resources that had to be enjoined entirely pending completion of consultation. They further argued that, as a factual matter, the Forest Service was in violation of its own management direction on these allotments (and therefore also was violating the ESA) because the agency had failed to implement resource protection measures that had been adopted in the earlier consultation on the regionwide, plan-level biological opinion.

The Department defended the agencies against the request for an injunction, arguing that the groups were not entitled to an injunction as a matter of law. We also argued that the Forest Service was in compliance with its own management direction -- direction that had been in place for months before the suits had been filed and that, as implemented, ensured against any irreversible or irretrievable commitment of resources at the allotment level caused by grazing during the remainder of the consultation process. In particular, the Forest Service pointed out that, for the vast majority of the allotments identified in the Forest Guardians' motion, over 99% of the riparian habitat of the species identified had already been excluded from grazing and that, for the remainder, grazing in riparian areas would be excluded in the near future. These changes had been and were being made as a result of the Forest Service's implementation of its own management direction.

It then became apparent to all of the parties that the Forest Service was already excluding grazing in riparian areas on the majority of the allotments. A few days prior to the scheduled preliminary injunction hearing, all of the parties, including the intervenors, began discussions to determine whether the need for the hearing could be obviated. Initially, counsel for the Cattlegrowers participated in these discussions. Before discussions were concluded, however, the Cattlegrowers' representatives voluntarily withdrew from participation.

Ultimately, the plaintiffs and federal defendants agreed to and signed a stipulation under which the Forest Service agreed to maintain the status quo pending completion of the consultation.(1) The stipulation included a description of the administrative process that the Forest Service would follow when livestock were found in areas from which they were supposed to be excluded. This process tracks the administrative process contained in the Forest Service grazing regulations, and includes timeframes that are consistent with those set out in the regulations and could reasonably be implemented by the Forest Service with adequate notice and participation by the permittees. In exchange, plaintiffs withdrew their motions requesting a broad injunction against all grazing on a larger number of allotments. Later, the Forest Service entered a similar stipulation with the Southwest Center only, and addressed allotments not addressed in the first stipulation.

I want to emphasize that the stipulations in effect memorialized the management practices that were already being implemented by the Forest Service. By entering into the stipulations, however, the Forest Service and the Fish and Wildlife Service were able to proceed, undistracted by continuing active litigation, towards timely completion of the ongoing consultation. At the same time, the threat of a sweeping preliminary injunction against all grazing had been eliminated.

Shortly after the first stipulation was signed, the Cattlegrowers, as was their right, tried to block its implementation by filing their own motion. The Cattlegrowers argued that the Forest Service could not legally make the management changes embodied in the agreement, and if implemented, such changes would cause economic hardship. The district court, after a hearing on the Cattlegrowers' motion, denied the Cattlegrowers' motion to block the agreement. The court found that the Forest Service had the authority to make the changes necessary to effect its management direction, and that the permittees would have the ability to participate in these changes and had retained their right to contest them. The court further found that the economic hardship suffered by the Cattlegrowers as a result of the implementation of these changes did not outweigh the potentially irreparable harm to threatened and endangered species if the Forest Service did not carry through with its direction.

In practice, the stipulation has proven successful. The Forest Service has received excellent cooperation to date from the permittees in keeping livestock on these allotments, but out of the areas where they could cause harm. Furthermore, the consultation has been progressing on schedule, and a draft biological opinion was issued last month. The final biological opinion was due to be issued today, but the Forest Service granted a request by several permittees to extend the comment period on the draft. A final biological opinion is now anticipated in late August, and with this opinion, consultation will be concluded, and the terms of the stipulation will automatically expire.

It is worth noting that, by virtue of the stipulation and the fact that the agencies were not otherwise consumed by defense of this litigation over the last few months, the agencies have been able to include all 700 grazing allotments with threatened and endangered species in their consultation.

Other Experiences

Our response to the grazing lawsuits was controlled and considered, and allowed the agencies to avoid a broad injunction while proceeding with their work. I would now like to describe some of our experiences in similar cases where we have pursued litigation rather than settlement, and found courts to be quite unsympathetic in the face of agency non-compliance with various environmental requirements, including those imposed by the ESA. In some of these cases courts have imposed severe restrictions on land management, with mandatory injunctions that remain in place for many years; in some cases the courts have continued to act in an oversight capacity regarding much of the particular agency's activities on the federal lands, requiring frequent reports and appearances by the federal agency involved, and limiting the agency's discretion. Let me give you a few specific examples.

1. Texas National Forests

Litigation that began in 1985 over Forest Service management of the Texas National Forests has resulted in an injunction that was entered in 1988 and has remained in effect until the present day. Plaintiffs in this case sought to stop all even-age harvesting, in particular clear-cutting, on the grounds that it harmed the endangered Red-Cockaded Woodpecker. We defended against this broad injunction request even though there was clear evidence that the woodpecker was in decline in these forests, at least in part because the Forest Service was unable to carry through on promised activities to improve the bird's habitat. We contended that the court should not enjoin timber harvesting in light of the Forest Service's aggressive efforts to correct the situation.

The court rejected these arguments and enjoined clear cutting and other even-aged timber management practices in the forests, and has continued its jurisdiction over much of the forest's everyday management. Today these forests continue under injunction. When new management protections for these species complete the administrative amendment process we will return yet again, ten years later, to ask the court to lift the injunction and return the forests to Forest Service control.

2. The Pacific Northwest

Broad injunctions were also issued by courts in Washington and Oregon in 1989-1992 as a result of challenges by environmental organizations to management of Forest Service and Bureau of Land Management land in the Pacific Northwest for the habitat needs of the northern spotted owl. The claims arose under the National Forest Management Act, the National Environmental Policy Act and the ESA. While the federal government vigorously defended all of these cases, our defenses were unsuccessful. The resulting injunctions essentially shut down all harvesting on Forest Service and BLM lands in the Pacific Northwest for four years until the agencies produced the Northwest Forest Plan, which was also attacked by environmental groups and timber industry organizations and which we vigorously, and successfully, defended. The defense of this litigation through the years from 1989-1994 was extremely time and resource consuming, both for the Justice Department and for the land management agencies.

3. Southwest Forests

My final example brings us back to the Southwest, where we have experienced the same kind of broad judicial response to a situation where the district court found that the Forest Service had not fully complied with all ESA requirements. In various proceedings commenced in 1994, a coalition of environmental organizations and individuals sued the Forest Service and the Bureau of Indian Affairs, charging various violations of the consultation and take prohibitions of the ESA. We proceeded to litigate the case despite

negative precedent in the Ninth Circuit. The court granted plaintiffs' request for injunctive relief, and enjoined all timber harvest until consultations on amended Land and Resource Management Plans (LRMPs) were completed. While the Forest Service immediately initiated informal consultation, sought clarification of certain aspects of the order, and provided to the Court a list of "no effect" activities, the process of obtaining court approval of particular activities was time consuming and cumbersome. In fact, the Court responded by ordering the parties to agree to a list of activities that could continue pending consultation.

Consultations on the LRMPs were not concluded until July of 1996, at which time the plaintiffs filed a motion for an order finding that consultation on the existing forest plans was not complete. Litigation over the adequacy of the consultations continued, as did the injunction, until December 6, 1996, for a total of sixteen months.

We believe these results -- lengthy litigation, diversion of agency resources, and broad, long-term injunctions -- are to be avoided. So far they have been avoided with respect to grazing in the Southwest.

Citizen Suits in the Southwest

Finally, I would like to respond to your request for information about other suits brought by selected plaintiffs in the Southwest. As you can see from the information we provided, a number of cases, including ESA actions and Administrative Procedure Act challenges under other statutes, have been brought by the organizations and individuals identified in your letter. Other actions, including many involving grazing matters, have been brought by ranchers and others whose activities are regulated by federal law. In Endangered Species Act citizen suits in which the plaintiff, whether a conservation organization or a member of a regulated community, prevails, the law generally requires the government to pay attorneys fees and costs; a similar standard applies to cases brought under the National Environmental Policy Act, the National Forest Management Act, and other natural resource statutes.

As with any actions filed against our client agencies, in determining the best way to resolve litigation, we evaluate each case on its individual merits. The facts and law associated with each case are unique. The Department of Justice, in close consultation with the agencies that it is defending, takes into account a variety of factual and legal considerations including litigation risk, and ultimately we take positions in litigation that we believe best serve the interests of the United States. Very often, we vigorously defend actions brought against us, and we have been largely successful in these cases.

1. Lake Mead Litigation

In May 1998, the Ninth Circuit Court of Appeals upheld a 1997 biological opinion challenged by the Southwest Center for Biological Diversity. At issue was the water level in Lake Mead and the possible lowering of the water level, a matter of much concern to a number of states. During a series of dry water years in the late 1980s and early 1990s, the water level of the lake had fallen and a community of willow trees had grown on 1400 acres comprising the Lake Mead delta below the Grand Canyon National Park. With the return of normal water regimes in the mid- 1990s, the water level of the lake had risen to cover the roots of these willow trees and the trees were dying. Nevertheless, in 1996, several nests of an endangered bird, the southwestern willow flycatcher, were observed in the willow trees on the delta.

The biological opinion, issued by the Fish and Wildlife Service, found that the operations of the Bureau of Reclamation on the Lower Colorado River were likely to jeopardize the continued existence of the southwestern willow flycatcher; however, the Fish and Wildlife Service set forth a Reasonable and Prudent

Alternative (RPA) to avoid jeopardy. The RPA did not require Reclamation to alter the level of Lake Mead to save the delta habitat. The federal government worked closely with the states to successfully defend this litigation in the district court and court of appeals.

2. Other Cases

There have been a large number of cases in the Southwest challenging alleged failures by the Fish and Wildlife Service to meet mandatory statutory deadlines set out in Section 4 of the Endangered Species Act, including decisions whether to list a species as threatened or endangered or whether to designate critical habitat for such species. Given a lack of financial resources to carry out all of its Section 4 responsibilities, the Fish and Wildlife Service has not in fact been able to meet all of its statutory obligations. Nevertheless, we have staunchly defended on legal and equitable grounds the agency's decisions as to which duties to address in which order, given the limited resources available to it. Our efforts, though not universally successful, have for the most part preserved the operation of the agency's Listing Priority Guidance. Just two weeks ago, on June 29, 1998, the Tenth Circuit Court of Appeals upheld the Fish and Wildlife Service's implementation of the Listing Priority Guidance in a case in which the Biodiversity Legal Foundation had challenged the Service's failure to make a 90-day finding on a petition to list the sharp-tail grouse.

Conclusion

While we have had these recent litigation victories in the Southwest, we have lost some cases, and settled a number of others. We have participated with the other agencies in a collaborative process to address natural resource issues in the Southwest, a process that we believe is contributing in a positive way to avoiding litigation in the region. This concludes my testimony. I would be pleased to answer any questions the Committee may have.

ENDNOTES

1. Initially, the plaintiffs and federal defendants had submitted the stipulation to the court for its approval. During the course of the preliminary injunction hearing, the court indicated it would not sign the stipulation if the Cattlegrowers had not also signed off.

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