

# Committee on Resources

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## Witness Testimony

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### COALITION OF ARIZONA/NEW MEXICO COUNTIES

### FOR STABLE ECONOMIC GROWTH

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### **WRITTEN STATEMENT OF HOWARD HUTCHINSON, EXECUTIVE DIRECTOR**

### **FOR THE COMMITTEE ON RESOURCES, U.S HOUSE OF REPRESENTATIVES**

### **USE OF THE CITIZEN SUIT PROVISION OF THE ENDANGERED SPECIES ACT**

### **TO TERMINATE GRAZING ON FEDERAL FOREST AND BLM LANDS IN THE SOUTHWEST**

### **BACKGROUND**

#### **Litigate, Legislate, Agitate**

"SKEEN TO CONVENE CONGRESSIONAL PANEL ON 'UNRANCHING ACTIVITIES'-PROPOSES ANOTHER \$400,000 RANCHING SUBSIDY. In a 6-25-98 press release, Representative Joe Skeen (R-NM) announced that a July 15, 1998 congressional hearing 'to discuss secret agreements between the Forest Service and the Southwest Center for Biological Diversity has been tentatively approved.' Both he and Pete Domenici (R-NM) are concerned about recent settlements between the Southwest Center, Forest Guardians and the Forest Service, temporarily removing cattle from National Forest stream sides. Rather than admit they don't like the results, they claim to be concerned about the process. They have inserted language into the Interior Appropriations Bill stating:

'The Committee expresses strong reservations over the process used to obtain a stipulated agreement entered into between the Southwest Center for Biological Diversity and the Forest Service regarding endangered species management issues in the Southwest Region.'

This is ironic since both Domenici and Skeen have fought hard to keep the public out of decisions to graze cattle on public lands. Both want to hand the NM ranching industry a \$400,000 subsidy to build fences and

upland waters to implement our agreements. Remember the argument that public lands ranching fees are cheap because the ranchers pay for all the infrastructure costs?"<sup>(1)</sup>

With the bravado of a school yard bully, Kieran Suckling published the above statement in the Southwest Center for Biological Diversity (SCBD) electronic newsletter (<http://www.sw-center.org>) on June 29, 1998.

SCBD, through litigation and threats of litigation, have terminated wood product extraction from the National Forests in the Southwest Region, delayed the filling of the Roosevelt Lake impoundment on the Salt River and garnered the concession to purchase mitigation lands for potential impacts to Southwestern willow flycatcher habitat inundated by the increased elevation of the lake to increase storage capacity. Like a bull in a china closet, SCBD and like organizations are reshaping Arizona's and New Mexico's social, cultural, economic, physical and biological environments.

Apparently feeling the sting of public reaction to impacts on Northern New Mexico Hispanic communities, Forest Guardians (FG) has ventured south and west to conduct the same type of guerrilla warfare litigation. At the June 12 through 14 conference of FG, Jon Tate, an ally of FG, opined that "consensus sucks." His message was "litigate, legislate, agitate."

SCBD and FG are self proclaimed proponents of the Wildlands Project (WP). Their philosophy is biocentrism and all activities are directed at achieving the goal of preserving large geographic core areas with interconnecting corridors each with defined buffer zones. Within the cores and connecting corridors, little to no human activities are tolerated. In the buffer zones human activities must be compatible with

achieving the biocentric objectives of the cores and corridors.<sup>(2)</sup>

This is but one battle in a war with many fronts. What is being observed in the usage of the citizen suit provision of the ESA by these groups is the defining of the "'umbrella' species."<sup>(3)</sup> In other areas of public policy, law and regulation, growth management, land zoning, species reintroduction, multiple species habitat planning and the purchasing of private property for "conservation and open space" is proceeding at the direction of other organizations and individuals with cross ties with Ski Island Alliance (SIA), FG, Southwest Forest Alliance (SFA), SCBD, 1,000 Friends of New Mexico and other "mainstream moderate" environmental organizations.

### **National Forest and BLM Public Lands Planning Procedure Disruptions**

The legal strategies being employed by the environmental litigants have evolved over two decades. The examples being focused on by this hearing, CV 97 666 and CV 97 2562 (666/2562), are only two cases in a succession of suits. The strategy focuses on the land planning processes contained in the National Forest Management Act (NFMA) and the Federal Lands Management Policy Act (FLPMA). The assertion is that the land and resource management plans (RMPs) created are action-forcing and therefore subject to Section 7 formal consultations under the Endangered Species Act (ESA).

The cases prior to (666/2562) were concluded with stipulated settlements. Attempts at intervention by other affected interests were opposed by both the Justice Department on behalf of the Forest Service (FS) and the plaintiffs. The settlements were granted and signed by the federal Judges before the issue of intervention status was determined on appeal.

Pursuant to the decisions upheld by the 9th Circuit Court of Appeals and under legal and regulatory

interpretation by the U.S. Fish and Wildlife Service (FWS), the land management agencies' argument that the RMPs are merely programmatic and not action-forcing have failed. In a decision handed down by the U.S. Supreme Court on May 18, 1998, forest plans were held to be programmatic and not action-forcing<sup>(4)</sup>.

The Court's decision was unanimous. The following quote describes the reasoning.

"Held: This dispute is not justiciable, because it is not ripe for court review.

(a) In deciding whether an agency decision is ripe, this Court has examined the fitness of the particular issues for judicial decision and the hardship to the parties of withholding review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149. Such an examination in this case reveals that the relevant factors, taken together, foreclose court review. First, withholding review will not cause the plaintiffs significant "hardship." *Ibid.* The challenged Plan provisions do not create adverse effects of a strictly legal kind; for example, they do not establish a legal right to cut trees or abolish any legal authority to object to trees being cut. *Cf. United States v. Los Angeles & Salt Lake R. Co.* 273 U.S. 299, 309-310. Nor would delaying review cause the Sierra Club significant practical harm. Given the procedural requirements the Service must observe before it can permit logging, the Sierra Club need not bring its challenge now, but may await a later time when harm is more imminent and certain, *Cf. Abbott Laboratories*, 387 U.S., at 152 -154. Nor has the Club pointed to any other way in which the Plan could now force it to modify its behavior to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions. *Cf., e.g., id.*, at 152-153. Second, **court review now could interfere with the system that Congress specified for the Forest Service to reach logging decisions. From that agency's perspective, immediate review could hinder its efforts to refine its policies through revision of the Plan or application of the Plan in practice**, *Cf., e.g., id.*, at 149. Here, the possibility that further consideration will actually occur before the Plan is implemented is real, not theoretical."<sup>(5)</sup> (Emphasis added.)

While the Justice Department argued this point at trial and prevailed at the District Court and made the same point on appeal to the 6th Circuit, they did not pursue the appeal to the Supreme Court. Instead, it was the intervener, Ohio Forestry Association that petitioned for Certiorari. In the Southwest Region cases focused on by this hearing, the federal government did not present the above argument. In the previous cases, they presented the argument in brief but agreed to the stipulated settlement contrary to their argument.

The results in 666 and 2562 deviated from the standard settlement procedure in the previous cases due to the presence of interveners New Mexico and Arizona Cattlegrowers organizations. When the interveners refused the stipulations, the District Judge refused to sanction the settlement. The plaintiffs, FG and SCBD and the FS entered into a negotiated agreement. FG and SCBD declared victory and dropped their pursuit of an injunction to remove the livestock, leaving the interveners with an agreement that called for pursuit of immediate amendments of their annual operating plans (AOPs) and amendments to the Region's forest RMPs.

In effect, the agreement has become a defacto significant amendment to the forest plans. Failure to incorporate the provisions of the agreement into the RMPs will bring the plaintiffs back into court for further litigation and time line delays. The result is an effective bar of State, Tribal and local government and public meaningful participation in the RMP amendment process in that there is essentially, through intimidation, a predetermined decision. This is contrary to the provisions of the NFMA and its implementing regulations.

In example of FWS interpretation, the Mexican spotted owl was listed based on the threat created by the language in the Southwest Region's RMPs describing the use of shelterwood harvesting techniques, allowance for steep slope harvesting and harvesting entry into areas meeting the "definition of old growth forests." The listing proceeded forward under the prodding of other suits that were concluded by stipulated settlements. The listing occurred despite comments presented by the FS that what was described in the RMPs did not drive site specific actions taking place on-the-ground.

The primary purpose of the NFMA is the disclosure of planning to the public and Congress that RMPs are supposed to create, along with some degree of predictability for revenue flows and infrastructure needs to non-federal governments and industry. Coupled with the ESA and other federal environmental laws, the NFMA has brought FS activity to a near halt, crippled the Southwestern economy, devastated small rural communities and created a volatile atmosphere ripe for violence against all parties. The same scenario has been played out on the BLM lands as well, defeating the purposes of the FLPMA.

### **National Environmental Policy Act Procedure Disruptions**

There is the pretext of going through the National Environmental Policy Act (NEPA) process to meet the provisions of the 666/2562 agreement. Again, failure to implement the agreement would land the FS before a federal District Judge. The disruption to the NEPA process is even more egregious than the disruption of the NFMA process. Meaningful participation by the public and non-federal governments in the development of alternatives and disclosure of impacts has been tainted by the threat of further litigation.

The record of decision issued following the disclosure will not lend to the Congressional purpose of "encouraging productive and enjoyable harmony between man and his environment." The opposite will instead prevail. The livelihoods of the rural populations in the Southwest Region are being sacrificed on the altar of biocentrism with little assurance of created benefits for the "environment or biosphere."

The process of negotiating an agreement (decision) outside of the disclosures required by the NEPA by employees of an administration that in its deeds and by its own words are in concert with the purposes of the above plaintiffs defeats the Congressional intent and is an abomination to the Constitution.

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### **Perversion of the ESA Intent Through Litigation**

The implementation of the Wildlands Project (WP) has not gone through a rigorous analysis and the impacts have not been disclosed to the public or Congress. The Global Biological Assessment, the implementing document for the Convention on Biodiversity (Agenda 21) holds the WP up as an example of the desired outcome. The President has signed the Convention and systematically promoted its implementation

through the administrative agencies. All without the ratification of the Senate.

The ESA has been used as a vehicle to list species through stipulated settlements to fabricate the "'umbrella' species" necessary to force implementation of the WP in the Southwest and elsewhere. The question begs to be asked: Is the administration's Justice Department providing a suitable defense for its own land management agencies or facilitating implementation of special interest's goals who share complementary or parallel agendas?

The citizen suit provision of the ESA provides for the payment of litigation costs if the plaintiff prevails. The above referenced stipulated settlements contain monetary awards. The attorneys for the plaintiffs serve pro bono during the trial and settlement procedures. Upon settlement they petition for and receive payment for those pro bono services. The FG and SCBD receive funding through private and government grants.

The affected interests and their representative organizations must raise their own legal funds while trying to stay in business. While all

this is going on they are demonized in the press and vilified in the plaintiff's propaganda. Should the elected federal, state or local officials who represent these constituencies attempt to intervene on their behalf, they too have the label of anti-environmentalist, or worse, hung on them.

While the concept of the ESA is noble, it has failed to recover species and crippled the morale of the land management agencies, damaged industry and private property interests, the Southwestern economy and, worse, the citizens' confidence in government. The people of the region are only asking for fairness, due process and justice.

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### **Associated Problems**

A number of federal employees are members, supporters or sympathizers of the organizations litigating biocentrism into being. Other employees are members of the less radical groups. On one hand there is a conflict of interest concern that arises and on another is the prohibition of lobbying. These employees are prohibited from lobbying directly, but by joining an organization, escape detection.

One of the major problems facing the livestock permittees from the settlement agreement is the misrepresentation of the settlement itself. There is a vast difference between a stipulated settlement and a mere agreement. The stipulated settlement should have a basis in law and is court enforceable. The agreement reached in 666/2562 has no basis in law and is not court enforceable. The FG, SCBD and the FS have represented to the press, permittees and public that this is a stipulated settlement and that the FS has no choice but to implement it.

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### **Conclusion and Suggested Remedies**

A great injustice is being inflicted on the rural residents of the Southwest Region. After nearly a century of livestock numbers reductions, many on a voluntary basis, ecological conditions continue to decline. It should have become obvious to someone long ago that merely cutting numbers was not the solution.

Dr. Dave Garrett, former Dean of Northern Arizona University School of Forestry has concluded in a recent study<sup>(6)</sup> that fire suppression is the primary cause for the decline in the grasslands, rangelands, woodlands and conifer zones. According to his report we could expect to see a 400 percent increase in forage production with the proper treatments. These treatments would have the benefits of increasing water yields an average of 30% and improve water quality.

The current buzz words are "riparian restoration." The primary element of riparian environments is water. With an increase in water delivery and dispersal of livestock, vegetation would increase and grazing pressure would decrease. However, I was told by a FS employee in a public meeting that, since they did not have the funds to properly treat the watersheds, their only alternative was to reduce livestock numbers.

Congress should insist that the land management agencies adhere to their missions and governing statutes and quit making scapegoats of the commodity and amenity users for their management failers. Congress should also insist on the disclosure of impacts from settlements and insure that affected interests are assured standing in litigation. Congress needs to also investigate the implementation of the Convention on Biodiversity without Senate ratification and the Wildlands Project.

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### **Appendix 1**

#### **Ski Island Alliance Web Site Information**

<http://www.lobo.net/~skisland/>

#### **Sky Island Alliance**

Isolated mountain ranges surrounded by lowland deserts make up the unique "Sky Islands" ecosystem of southeastern Arizona, southwestern New Mexico, and Northern Mexico. This is one of the most biologically diverse areas in the nation - increasingly threatened by tourism, water development, mining, logging, overgrazing and urban sprawl. The entire project area includes the Sky

Islands, and Gila and Mogollon Highlands to the north and the Sierra Madre to the south. The system has three components: cores, buffers, and habitat corridors.

Cores include designated Wilderness, roadless areas, and National Parks where extractive uses are prohibited and ecological and evolutionary processes maintained. Buffer areas that permit sustainable extractive uses surround and enlarge the cores. Corridors connect the cores, allowing for genetic exchange to occur among wide ranging animals and plants while maintaining migratory pathways in times of environmental change. Recovery areas are the fourth element not yet identified within the draft map of the region where closing roads, replanting streams and other methods are employed to restore native biodiversity.

### **September 1997 Newsletter**

#### **Sky Island / Greater Gila Reserve Design Update**

The Sky Island Alliance reserve design is going along at full-speed as we gear up for two scientific peer reviews this fall and winter. We have recently contracted a biologist from the University of New Mexico to collect data on the focal species of our region, which will be a crucial component of our overall reserve design. We are utilizing a core group of wide-ranging, distinctive species of the region to design a network of cores, corridors, and buffer areas. With this approach we hope to provide protection and connectivity for the majority of the remaining endemic plant and animal species of the region without spending the amount of money and time it would take to study the entire region's plant and animal communities before releasing a draft reserve management plan. The "umbrella" species approach is at the core of the conservation biology theory that, if we design a network based upon the needs of 10-15 species which need the highest quality, variety, and acreage of habitat, most other plant and animal communities will benefit from the effort.

In addition to preparing our reserve design plan for peer review, we are writing proposals for next year's budget fulfillment. Since 1998 will be the year of outreach and education for Sky Island Alliance, we will review the peer review comments and prepare our proposal for release to the public. With that in mind, we are asking funders to support our outreach efforts while we continue the process of collecting and organizing field research data in a Geographic Information System (GIS). We are also designing a brochure with the help of Patagonia's art department starting early next year. The brochure will be designed as a general information and education piece for the public.

While our funders have been extremely supportive of us, we need to boost individual membership in order to: 1) balance the different kinds of revenue we receive in support of the project and 2) to build a greater constituency for our project as the political aspect of the proposal comes into play. If you have not sent in your yearly membership dues, please take a minute to do so now (\$15.00). In addition to your membership, we need volunteers to conduct field research, road surveys, and road-kill data collection. Introduce Sky Island Alliance work to as many friends and colleagues as you can, and ask them for support. We will need all the help we can get, especially when the political machinery begins to wrangle over our proposal for the region.

If you haven't visited our web page yet, check it out! There are many resources available to give you an idea of what a reserve design is and the principles behind conservation biology (address on letterhead above). If you'd like to volunteer for field work anywhere in the region, please call Jack Humphrey at (505) 243-5319. Hiking is more fun when you combine it with work that will inevitably benefit the area you care most about!

### **Reserve Design Progressing**

At our last workshop, held in late April in Kingston, NM, we made major progress toward the completion of our reserve map. Dick Cameron of Forest Guardians has developed a map that includes: land ownership, GAP vegetation analysis, roads and trails, perennial streams, Mexican Spotted Owl and Goshawk territories and old growth forest on National Forest land, protected land, grazing allotments for National Forests. We also chose a number of distinctive, wide-ranging species as indicator or umbrella species. Among them are the Mexican wolf, aplomado falcon, mountain lion, jaguar, black bear, river otter, pronghorn antelope, prairie dog, golden eagle, bison, Bighorn sheep and grizzly bear (yes!). The purpose of conducting a reserve design with a list like this is to make reserve design a practical, a manageable process for a group with very limited funding and volunteer time. We hope that by protecting these species, we will protect the majority of habitat for all remaining plant and animal species in the region. This is obviously a hypothesis that will have to be tested and species may be added or taken off the list as we find out how well the design works.

Our project coordinator, Jack Humphrey, is organizing summer field work to help fill in information we lack for various parts of the reserve. He has developed a detailed field guide with instructions for documenting the information we need. If you'd like to volunteer

for summer field work in either AZ or NM, please contact Jack at our e-mail address, skisland@swcp.com, or at 1315 Coal Ave. S.E., Albuquerque, NM 87106.

### **ENDNOTES**

1. <sup>1</sup> SOUTHWEST BIODIVERSITY ALERT #138, 6-29-98, SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY 2. <sup>2</sup> Appendix 1, Ski Island Web site information, Ski Island description Par. 2 3. <sup>3</sup> Ibid, September 1997 Newsletter, Par. 1 4. <sup>4</sup> OHIO FORESTRY ASSOCIATION, INC. v. SIERRA CLUB ET AL 5. <sup>5</sup> Ibid, Pp. 5-12 6. <sup>6</sup> The Science and Management Basis for Livestock Grazing of Southwestern Public Lands, Dr. Lawrence D. Garrett, Sept. 1997

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