Unspoken Issues of the Endangered Species Act (ESA)

By Ric Frost, M.S. Agricultural Economics
New Mexico State University
[This is part one of a two-part presentation at the Western Land Use Conference]

Congress created the Endangered Species Act (ESA) in 1973 in response to a yet to be ratified treaty "The Convention on International Trade in Endangered Species of Wild Fauna and Flora", or more simply known as the "Convention" (ratified in 1975). This is made very clear in the large committee report of Congress that contains all of the transcripts documenting the discussions held over a period of months leading to the creation of the ESA. Its purpose was to finally put under one roof three earlier attempts in the 1960's to create such an act that captured the intent of several other treaties going back to the early 1900's dealing with wildlife, that were primarily migratory in behavior (crossing international boundaries) and had commercial or cultural value. This response to the treaties is defined in section 2(b) line 3 of the ESA under "Purposes":

Endangered Species Act (ESA) 1973 Sec. 2(b) Purposes

The basic purposes of this Act are

1) To provide a program for the conservation of such endangered species and threatened species,

2) To provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,

3) To take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

It is important to understand this origin, since the ESA was a response to these treaties (primarily the "Convention"), its authority and power extends from these international treaties. The Constitution set forth three divisions of our government to create laws for the citizens of this country and in dealing with foreign entities. Treaty creation power is one of those three powers. It is also important to understand that the Constitution also restricted the treaty making powers to strictly international dealings and forbid Congress from enacting treaties that had powers over the states. To do so would violate the sovereignty not only of the states, by giving foreign countries the ability to dictate state affairs, but it would also violate the sovereignty of the citizens of this country. The early-formed Constitutional government had enough of foreign powers

dictating the lives and taxation of its declared sovereign people and established this separation of enactment to ensure that would not happen again.

The treaties and conventions that the ESA seeks to **"…achieve the purposes of…"** are listed in the ESA section 2(b)(a) (with the year they were ratified):

Treaties and Conventions of the ESA

(A) Migratory bird treaties with Canada and Mexico (1916, 1937);
(B) The Migratory and Endangered Bird Treaty with Japan (1974);
(C) The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1942);
(D) The International Convention for the Northwest Atlantic Fisheries (1950);
(E) The International Convention for the High Seas Fisheries of the North Pacific Ocean (1953, 1979);
(F) The Convention on International Trade in Endangered Species of Wild Fauna and Flora (1975);
(G) Other international agreements (1978 – Migratory bird treaty with Soviet Union).

It is interesting to note that several of the treaties were ratified after the passage of the 1973 version of the ESA. It is also interesting to note that these treaties have not been significantly modified from their original language and thus carry their unique intents to this day. So just what are the "purposes" of these treaties? Obtaining copies of these treaties and researching their content reveals some rather interesting issues. The **overall gist of these treaties is to protect wildlife and their habitats from extinction due to human reliance on them from which economic and cultural activity is derived.** This is to say that if a species goes extinct, any related economic and cultural interaction there may be will also be negatively impacted. Understanding this aspect, **one can only conclude that these treaties were constructed to protect the human cultures and economies dependent on the natural world.** Summarizing the general intent of these treaties; one finds that they were written to:

- **Protect species that are of great value as a source of food;**
- **Protect species that are of great value in destroying insects which are injurious to forests, forage, crops and a threat to health;**
- **Permit rational utilization of species for sport, food, commerce and industry;**
- **Promote and secure maximum sustained productivity for food.**

Closer scrutiny also reveals that there are exceptions for certain situations in every treaty, as the rational creators of these documents knew that the world is not a perfect place and that there are times when reason must override the generalities of these agreements. They knew they could not create treaties that dealt with every detail of human interaction with nature, so they built in language to deal with such special interactions. In short, they wanted to ensure that the individual countries were able to deal with events that threatened the well being, health, and productivity of its citizens. These exceptions and the year of the treaty that contains this language are as follows:

Exceptions in Treaties

There are prohibitions of the killing (taking) of species except when:

It is permitted during open hunting season (1916, 1937, 1942, 1950, 1953, 1974, 1975, 1978, 1979)

"…(they) become seriously injurious to the agricultural or other interests in any particular community…" Protection of Migratory Birds, Article VII, 1916

"…they become injurious to agriculture and constitute plagues…" Protection of Migratory Birds and Game Mammals, Article II E, 1937
"…hunting, killing, capturing or taking shall be allowed…to further scientific purposes, or when essential for the administration of the area in which the animal or plant is found…" Nature Protection and Wildlife Preservation in the Western Hemisphere, Article VIII, 1942

"…For the purpose of protecting persons and property…" Protection of Birds and Their Environment, Article III (b), 1974;

"…The provisions…shall in no way affect the provisions of any domestic measures…including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields…" International Trade in Endangered Species of Wild Fauna and Flora, Article XIV 2, 1975 (The "Convention")

"…For the purpose of protecting against injury to persons or property…" Conservation of Migratory Birds and Their Environment, Article II (d), 1978

Another interesting point of discussion, found in the committee report on the ESA, is the recognition of other preexisting laws created by Congress and the potential for the conflicts of opposing intents that would come from the ESA. Congress does not intentionally create laws that are diametrically opposed to each other. To do so would create legal chaos. Rather they create laws within the concept of *pari materia*. This means they create laws with the intent of being read with other existing laws. The ESA was not created with the intent of standing alone or to override other exiting laws. This

was dealt with by two very clever concepts built into the ESA. The first would be that **Congress <u>did not declare</u> that the ESA would supersede any existing law. A law cannot override a law unless Congress specifically declares it to do so.** This declaration is not stated in the ESA. The second was a three-line paragraph titled "Coordination With Other Laws", section 11(h). Notice this does not say "Law", it says "Laws" – plural **–** meaning **Congress recognizes there are other laws in existence that the ESA must deal with in *pari materia*.**

<u>ESA 1973 Sec.11(h) Coordination with other Laws.</u>

> **The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306).**
> **Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture.**
> **Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.**

Each of these three sentences has specific independent intent wherein Congress is recognizing other preexisting United States agencies and the laws by which they are directed. It is the second sentence that the following discussion is focused on. This sentence has two parts; the first dealing with commerce and the second deals with other laws not dealing with commerce. Notice the specific language that states the **ESA cannot be "…construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law…"**

dealing with importations. The second part is then linked with the word "**and**" which means this second independent part is also to be recognized as the intent of Congress. This second part states **"…no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture…"** So what are the Acts administered by the Secretary of Agriculture?

Investigation of these other Acts takes us to the origins of the agricultural department of the Animal and Plant Health Inspection Services (known then as APHIS which evolved to Animal Damage Control (ADC) then to Wildlife Services (WS) today). Early in the 1900's, Congress realized the need for an agency to deal with the tribulations causing economic and health impacts to rural cultures by problem animals and plants. In an effort to enhance stability and productivity in rural communities and reduce the threat of injurious species of wildlife, they created Title 7 U.S.C. 426 in 1931. This has been amended over the years, most recently as 2003. [Full text is found in the Appendix] It reads in part, with subparts b and c, as:

Title 7 of the Laws Applicable to the United States Department of Agriculture (1931)

APHIS (7 U.S.C. 426) Predatory and Other Wild Animals; Eradication and Control

•"…The Secretary of Agriculture may conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program …The Secretary of Agriculture is hereby authorized and directed to conduct such investigations, experiments, and tests as he may deem necessary in order to determine, demonstrate, and promulgate the best methods of eradication, suppression, or bringing under control on national forests and other areas of the public domain as well as on State, Territory, or privately owned lands of mountain lions, wolves, coyotes, bobcats, prairie dogs, gophers, ground squirrels, jack rabbits, brown tree snakes, and other animals injurious to agriculture, horticulture, forestry, animal husbandry, wild game animals, furbearing animals, and birds, and for the protection of stock and other domestic animals through the suppression of rabies and tularemia in predatory or other wild animals; and to conduct campaigns for

the destruction or control of such animals: Provided, That in carrying out the provisions of this Act the Secretary of Agriculture may cooperate with States, individuals and public and private agencies, organizations, and institutions."

•7 U.S.C. 426b. Authorization of expenditures for the eradication and control of predatory and other wild animals.

•7 U.S.C. 426c. Control of nuisance mammals and birds and those constituting reservoirs of zoonotic diseases; exception…"

Another act administered by the Department of agriculture is the Granger-Thye Act of 1950. This act specifically deals with the U.S. Forest Service in its dealings with grazing issues and elements that affect range productivity, including destructive species. This act, under Section 12, describes how the range betterment funds (derived from fees charged to the ranchers) are to be used for physical improvements and controlling species found to be destructive to ranchers' private allotments encumbered upon Federal lands. Again, congressional intent was to protect rural economic production.

Granger-Thye Act of 1950

Sec. 12, Use of Grazing Receipts for Range Improvements

"…the Secretary of Agriculture may prescribe, for … (3) control of range destroying rodents …"[Funds protected as separate Treasury account]

It is of interest to note that these funds are specifically deposited into a separate account in the Treasury and are not derived from or mixed with general tax dollars. Congress specifically stated that any use of these funds are not to be considered as **"…a major Federal action…"** and thus are not subject to Environmental Assessments (EA) or National Environmental Policy Act (NEPA) scrutiny. This distinction was reiterated in the Federal Land Policy and Management Act of 1976 (FLMPA):

Federal Land Policy and Management Act of 1976

Title IV, Sec. 401(b)(1): "…Use of range betterment funds…shall not be considered a major Federal action…"

The argument has been raised that since the ESA was passed in 1973 after these two laws were passed (1931 and 1950), the ESA supersedes these laws. Again, if Congress does not specifically state in a new act or law that it specifically supersedes a previous law, then it is rendered *pari materia* and must be read in context with other preexisting laws. Also, if indeed the ESA negates 7 U.S.C. 426, then why did Congress strengthen 7 U.S.C. 426 in 2000 and 2003? Using the earlier argument logic that a new law supersedes an older law would put the ESA inferior to 7 U.S.C. 426, and thus be superseded. The issue of *pari materia* is the only logical conclusion, and thus, ESA 11(h) was constructed to recognize other preexisting acts and laws, and therefore the intent of Congress, to exempt the actions of the Secretary of Agriculture and the Secretary of the Treasury when they are carrying out their obligations under these preexisting laws.

Another intent of Congress built into the ESA, in terms of recognizing Constitutional issues, was the issue of **states rights over wildlife** as asserted by the 10th Amendment. This was through the recognition of resident species. This is found in section 4(d) Protective Regulations. It states:

(ESA) 1973 Sec. 4(d) Protective Regulations

> **"…The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State…"**

To put it simply, for Federal regulations to be implemented concerning the taking of resident wildlife, the state must enter into a voluntary cooperative agreement for that species and only to the extent that such regulations are incorporated into state law. This must be on a case-by-case basis. This is also recognized in the Department of the Interiors' own regulation implemented in October of 2001 recognizing the states' control of resident wildlife within their borders (full text in Appendix).

Prior to the ESA, a Supreme Court opinion in 1920 recognized the states' absolute right to control resident wildlife within its boundaries under the 10th Amendment (underline added for emphasis):

Missouri v. Holland, Supreme Court No. 609, 1920

> **"…Every State possesses the absolute right to deal as it may see fit with property held by it either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the federal legislative or treaty-making power…""…The treaty-making power of the National Government is so limited by other provisions of the Constitution, including the Tenth Amendment, that it cannot divest a State of its police power or of its ownership or control of its wild game…"**

To further emphasize the intent of Congress concerning consideration of the human dimension, the ESA was amended in 1978 to include economic consideration when determining critical habitat (CH). This concern was not in the 1973 version of the ESA and, due to hardships being felt by rural communities, was added to ensure adverse impacts on communities were to be taken into consideration, although in practice, this consideration has still taken a back seat to CH implementation. It is important to understand that this economic consideration is not initiated merely because a species is listed. It is only triggered with CH designation; however, the agency is required to consider all impacts endured by the affected communities from the time of the listing. The baseline from which impacts are measured against is the cultural and economic history established prior to the listing (N. Mex. Cattle Growers Assoc. V. USFWS (10th Cir. 2001)). The sections of the ESA (Sec. 3(5)(A) and Sec. 4(b)(2)) that deal with CH state (underlining added for emphasis):

ESA Sec. 3(5)(A) Critical Habitat

> **"…The specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features:**
>
> **(I) essential to the conservation of the species and**
>
> **(II) which may require special management considerations or protection; and**

(ii) specific areas outside the geographical area occupied by the species at the time it is listed , upon a determination by the Secretary that such areas are essential for the conservation of the species…"

ESA 1973 Sec. 4(b)(2) Basis for Determinations

"…The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned…"

Several Executive Orders (EO) and agency memorandums issued in response to these EOs further enhanced this consideration for human dimension and economic consideration:

Executive Orders

EO 12630 Governmental Actions and Interference With Constitutionally Protected Property Rights (March 15, 1988)

EO 12866 Regulatory Planning and Review (September 30, 1993)

EO 12898 Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994)

US Department of the Interior Compliance Memorandums August 11, 1994; May 30, 1995

EO 12988 Civil Justice Reform (February 7, 1996)

EO 13211 Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001)

This aspect of the human dimension impact studies, and the intent of Congress on this subject, have been supported by several Federal court cases and are explained in the accompanying paper entitled "National Environmental Policy Act (NEPA) and the Human Dimension".

An example of how not conducting a human dimension study can negatively impact rural communities and the health of the environment can be found in the case of Catron County, New Mexico. Due to Mexican Spotted Owl restrictions imposed on Region 3 U.S. Forest Service lands in1987, logging in New Mexico has virtually ceased. Obtaining logging records for Region 3, it was determined that 1.5 billion board feet of timber build up in New Mexico has occurred on Forest Service lands to 1999 (Figure 1). The descending line shows the decline of timber harvests while the inverse ascending line shows the timber fuel load buildup. (While this build up is not the cause of the fire, it is the reason the fire burned as intensely as it did and destroyed thousands of acres of habitat for the owl, including the soil structure.)

One of the hardest hit communities in the state, due to the restrictions, is Catron County. It is approximately 97 per cent Federal lands and the community was very dependent on logging Forest Service lands as a viable means for economic support. No impacts studies were done prior to imposition of the court ordered restrictions stemming from a lawsuit brought by the nonprofit environmental organization, the Center for Biodiversity. The community was told that a study of 5 years was needed to assess the needs of the bird. Contractors were shut down forcing many families out of work. They could not survive the wait, as the remote community had few other economic opportunities for diverse financial viability. So they packed their belongings and moved to better opportunities. Since that time, the infrastructure of the county has detrimentally fallen to serious levels, schools are reduced to 4 days weeks and the threat of catastrophic fire has worsened with each passing year of drought. What was once an economically viable community is a shell of its former self. No impact studies were done to evaluate this outcome and what little economic viability exists is impacted readily with every downturn of the economy due to little diversification of the economic and cultural structure (Personal communication with Adam Polley, Catron County Manager).

Communities in Oregon have seen similar negative impacts due to the Northern Spotted Owl restrictions and Federal agency's failure to conduct proper human dimension studies.

Timber Build Up In New Mexico Since 1987 As A Result Of Imposed Mexican Spotted Owl Logging Restrictions

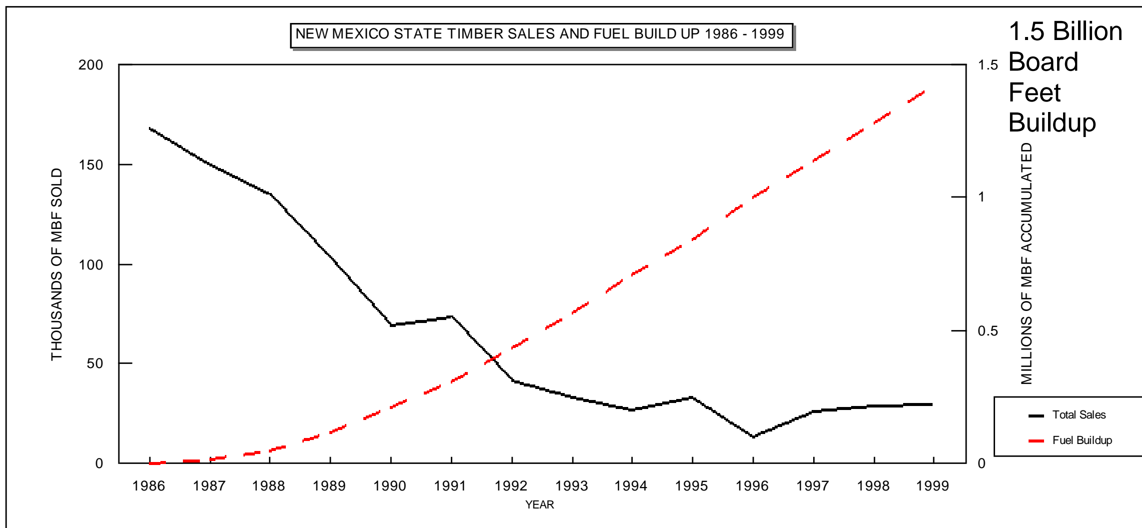


Figure 1. Testimony provided on New Mexico's Forest Fire Situation for the U.S. House of Representative Natural Resources Committee, August 14, 2000

This pattern of harm to the human dimension and failure to conduct proper impacts studies by Federal agencies has repeated itself across this country. As to what end any benefits have been attained is in serious question. A study of the cost effectiveness of the ESA was done by the National Wilderness Institute and published in 1997. The study of over 225,000 U. S. Fish and Wildlife Services (USFWS) Files, determined that:

<u>1997 National Wilderness Institute Study</u>

- **Total Federal and State expenditures by 1993:**
  - **$882,546,498 (Does not reflect community economic impacts)**
- **Conclusions:**
  - **Only 2 species had been upgraded due to efforts relating to the ESA in 25 years. (A goose and a birch)**

–Erroneous listing of 96% of the species resulted from:

- **•Data errors**
- **•Undercounting**
- **•Errors in taxonomic classification due to hybridization and biologist errors**

Conservation Under the Endangered Species Act: A Promise Broken, NWI Resource, Spring 1997, Volume 7, Issue 1

National Environmental Policy Act (NEPA) and the Human Dimension

By Ric Frost, M.S. Agricultural Economics
New Mexico State University

[This is part two of a two-part presentation at the Western Land Use Conference]

To begin this discussion, we need to take a brief moment to understand the distribution of government owned lands across the United States. This map shows the areas controlled by some form of government and the associated agencies as seen by the shaded areas (Figure 1). The bulk of government-controlled lands are found west of the 100th meridian.

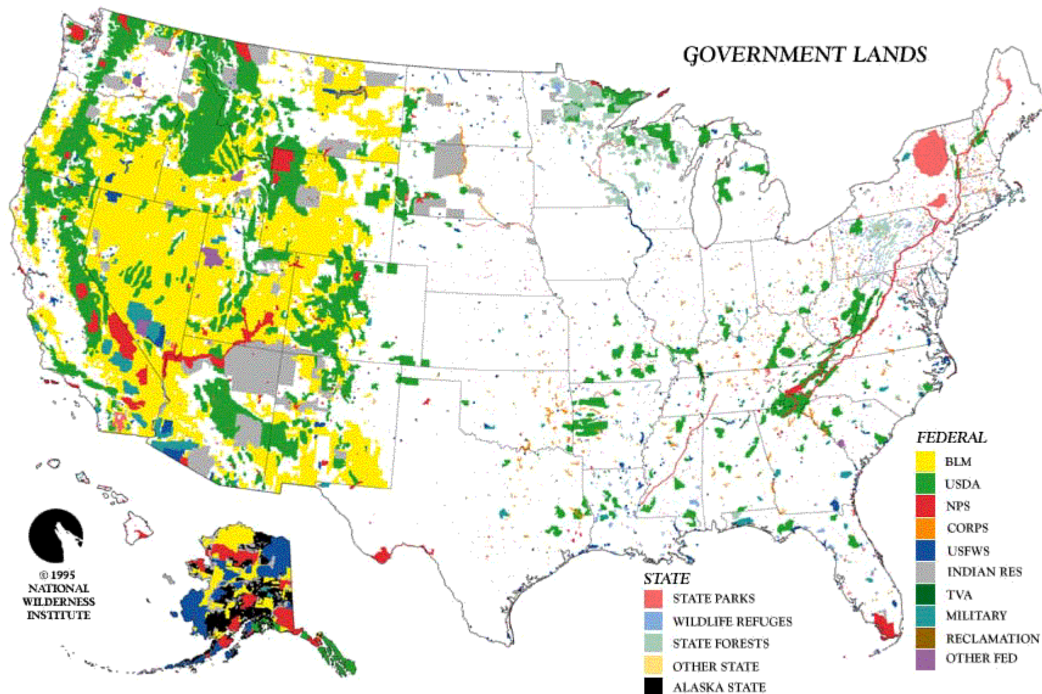
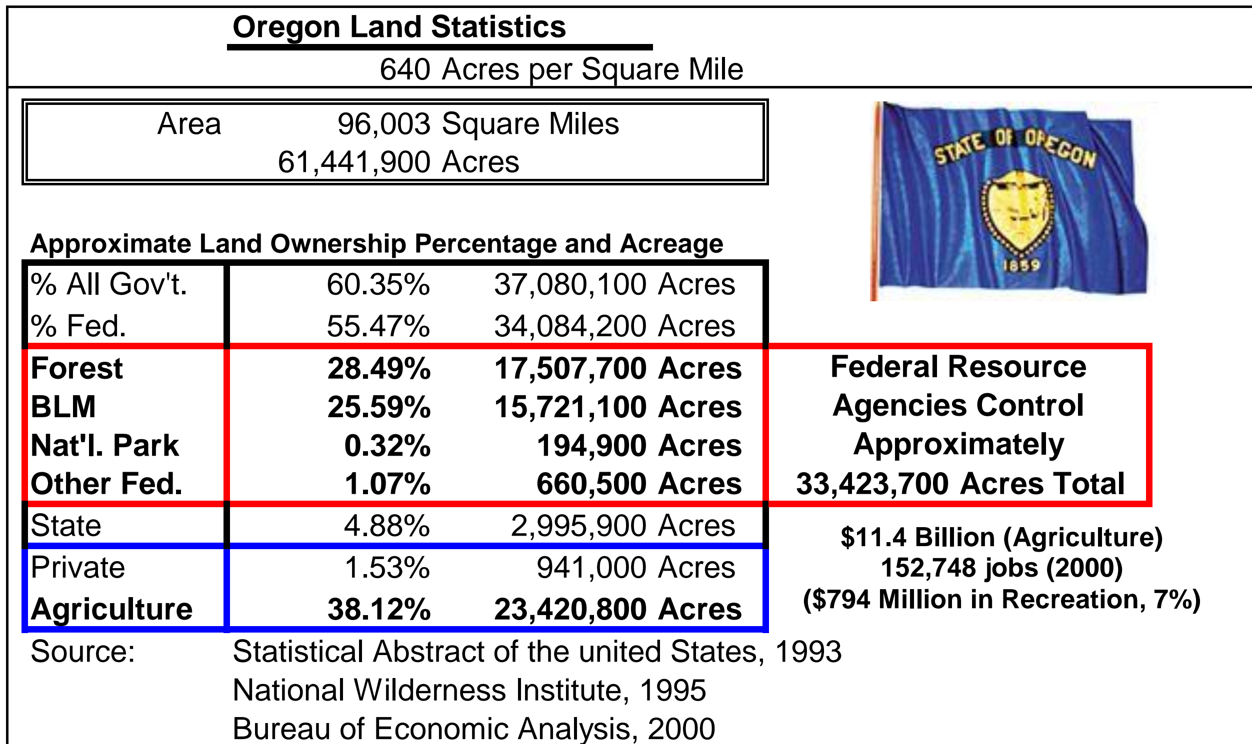


Figure 1 – Government Lands of the United States. - National Wilderness Institute, 1995.

This also indicates private and state properties potentially encumbered by what is known as a Federal Nexus. This means that no management actions or changes can occur without consulting the government agency if any permits or federal expenditures were issued on those lands, especially in cases related to the Endangered Species Act (ESA). According to public land statistics, Oregon has approximately 55.47% of the state under federal administration (Figure 2). Private control of the state is approximately 39.65% and from this is derived the bulk of economic activity. In 1997, private

agricultural enterprise (38.12% of the state) generated $11.4 billion and created 152,748 jobs. This is the contribution agriculture provides to Oregon's economic vitality.

We need to understand that should any private enterprise or state entity accept federal funding or voluntary permit, they are encumbered by a federal nexus and will be required to consult with the issuing agency on management of the now encumbered property. This encumbrance potentially jeopardizes the economic viability of that land.



Oregon Land Statistics

640 Acres per Square Mile

Area 96,003 Square Miles
61,441,900 Acres

STATE OF OREGON
1859

Approximate Land Ownership Percentage and Acreage

% All Gov't.	60.35%	37,080,100 Acres
% Fed.	55.47%	34,084,200 Acres
Forest	**28.49%**	**17,507,700 Acres**
BLM	**25.59%**	**15,721,100 Acres**
Nat'l. Park	**0.32%**	**194,900 Acres**
Other Fed.	**1.07%**	**660,500 Acres**
State	4.88%	2,995,900 Acres
Private	1.53%	941,000 Acres
Agriculture	**38.12%**	**23,420,800 Acres**

Federal Resource Agencies Control Approximately 33,423,700 Acres Total

$11.4 Billion (Agriculture)
152,748 jobs (2000)
($794 Million in Recreation, 7%)

Source: Statistical Abstract of the united States, 1993
National Wilderness Institute, 1995
Bureau of Economic Analysis, 2000

Figure 2. Oregon Land Ownership Statistics

When Congress created the National Environmental Policy Act of 1969 (NEPA) (Public Law 91-190 Sec.2), the intent was to create a structured evaluation system where federal projects could be evaluated for environmental integrity and provide a means whereby the citizens of the United States could participate in providing direction of the outcome. This is best expressed by the rationale as established by Congress:

> **The purposes of this Act are:**
> **" . . . To declare a national policy which will <u>encourage productive</u> and enjoyable harmony <u>between man and his environment</u>;**
> **To promote efforts which will prevent or eliminate damage to the environment and biosphere and <u>stimulate the health and welfare of man</u>;**
> **To enrich the understanding of the ecological systems and natural resources important to the Nation;**
> **To establish a Council on Environmental Quality (CEQ) . . . "**

This was to be the guidance framework from which all federal agencies were to evaluate their actions, including the endangered species act (ESA), and how they interacted with the human element present in the environment. The framework can be illustrated with the NEPA spider web flow diagram in figure 3.

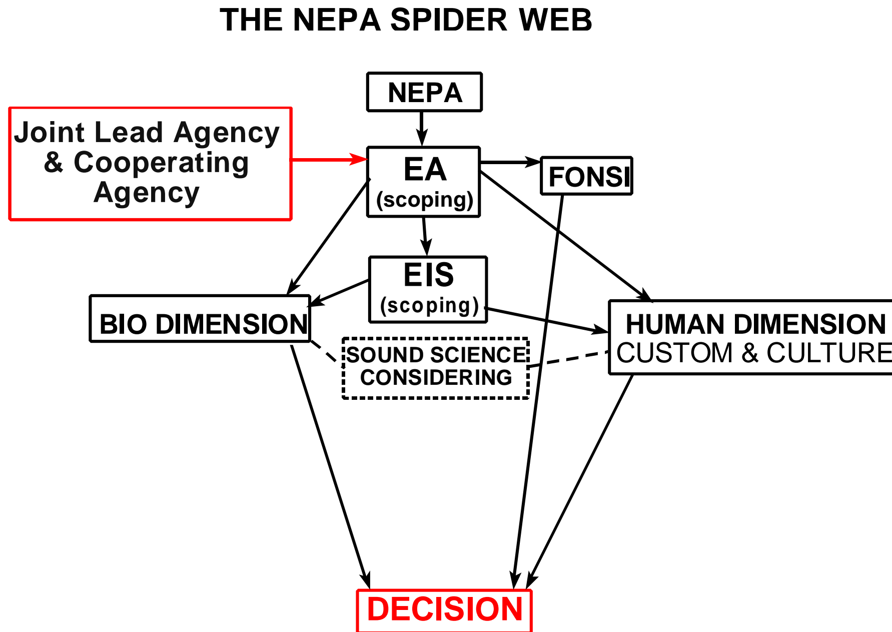


Figure 3. NEPA Spider Web

When a federal project is proposed, this begins a series of events that includes several non-federal entities including the public. The first stage is known as the environmental assessment or EA. At this point, local government entities and industry representatives are supposed to be included at the table as either joint lead agency or cooperating agency. The reason for using state, county and local expertise to evaluate impacts to the communities, rather than out of state personnel, is that local entities have all of the latest data concerning taxes, demographics, economic figures and makeup of the communities in the project area. When the general at large census data is used, as is often the case based on past experience, many factors are left out in the analysis and renders the final evaluation worthless. Recent court cases have pointed to this shortcoming and we will be discussing this later.

During the scoping period, the biodimension and the human dimension are to be evaluated. The biodimension is evaluated to determine the environmental resource

health of the project area. The human dimension is evaluated to assess the custom and culture, including the economic structure, of the communities in the project area. This involves equity analysis, expected potential property takings, civil rights disportionate burden and environmental justice analysis, community social well being and cultural stability analysis. While these are not directly in the NEPA law, they are found in the endangered species act (ESA) for critical habitat evaluation, various executive orders and agency memorandums and have the effect of law.

The public is allowed to make comments on their evaluation of the project during the scoping period (of at least 60 days). If no adverse impacts are expected, then a finding of no significant impact (FONSI) is issued and a final decision is rendered ***provided that*** there is not a challenge brought forth in the court system. It is at this point in the process where the interested public or other interests, such as nonprofit groups, can appeal to the courts as a third party interest for an injunction against the project and demand further studies, thus forcing the process into what is known as an environmental impact study (EIS). An EIS requires a more detailed biodimension and human dimension studies than the EA and can take years to complete. If an injunction is acquired by the litigation, the project will be placed on hold until such time as the studies are completed and a final decision is rendered. If the injunction involves preventing activity of an economic nature, the affected private enterprise may suffer hardship and possibly may not survive the time it takes to complete the studies. This can have a devastating ripple effect through the community especially if it is rural and does not have a diversified economy as large urban areas do.

What experience has shown is that the human dimension is seldom analyzed and if it is, it is done improperly. Thus many of the claims of no significant impacts issued by federal agencies are based on incomplete analysis. When the impacts to rural communities are negated or projects of economic importance are enjoined from an appeal by a non-profit, non-tax paying special interest groups, the results can be devastating. Businesses fail, families are torn apart, those with skilled trades leave in search of survival elsewhere and the tax base of the communities erode. Soon the communities become more dependent on government handouts for survival. This eventually leads to the demise of the infrastructure and inability to provide basic services for emergency purposes as we have witnessed with all the devastating fires of the past

several years. In short, this process can take years, can be extended by third party litigation and can be culturally, socially and economically devastating to the affected landowner, land users and communities!

To illustrate the custom and culture evaluation of a community, let us examine figure 4. Here we have a simplified regional economy where you have the local resource pool. This consists of the environmental supply of land, water, air and minerals. The human dimension side consists of labor, management, technology and capital. Utilizing these together constitutes the customs and cultural practices from which stable, sustainable economies are built.

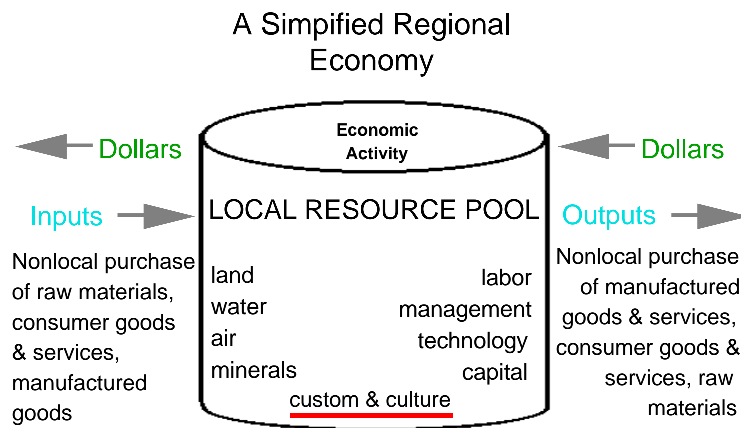


Figure 4. Simplified Regional Economy -Nick Ashcroft, New Mexico IMPLAN Model, 2000

This model is the basic expression of the economic integrity of all human endeavors, which Congress intended for federal agencies to evaluate and consider when they are making decisions for their various projects. Without it, we do not have trade or a viable means to sustain communities, which are the backbone of our culture.

Another illustration of the intents of the executive orders, congressional laws and agency regulations is seen in figure 5. Here we have the basic structure of evaluation broken down to show how the human dimension is evaluated for the interactions of cultural and custom. The point of this evaluation is to determine if the loss of an activity pushes that segment to an irreversible point, which may be supported for a short time

and possibly, restored or will the loss of an activity push the culture to an irretrievable point of no return. The baseline of the efficiency of the macro and the micro economy is evaluated for equity. This is then evaluated to see how the change will impact the demographics and the present social structure. If the change is small, then maybe the effect upon the social structure has minimal impact and can be restored in the future. If the change is significant, then the loss of heritage, shared norms and way of life will be lost and thus the loss of the culture and supporting infrastructure will become irretrievable. When this happens, there will be no restoration in the future.

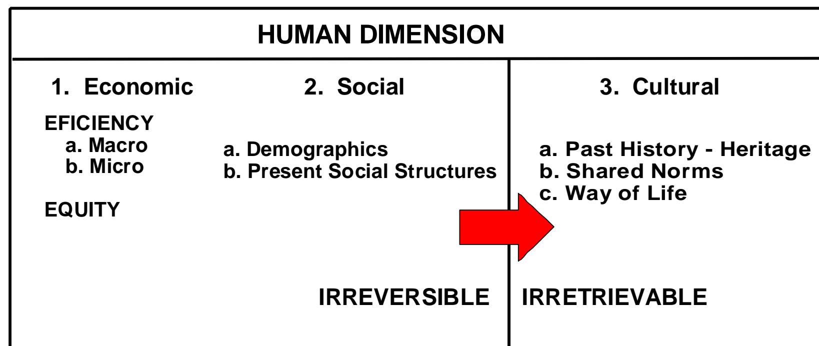


Figure 5. Detecting Impacts to Culture and Community

As an example, using the recent fires, many communities lost their logging culture, infrastructure and ability to manage the forests due to spotted owl restrictions. When the fires broke out, the rural communities had little to no capacity to fight back the fires and homes were lost. Traditionally these loggers were the front line people who were called upon by the forest service to help fight fires. Now when a fire breaks out, firefighters needed in other parts of the country have to be brought in. Many are under trained and do not know the area as did the resident loggers that have left the area in search of work elsewhere, thus the catastrophic fire destruction we are witnessing today.

The executive orders (EO) and memorandums related to this evaluation are:

EO 12630 Governmental Actions and Interference With Constitutionally Protected

Property Rights (March 15, 1988) EO 12866 Regulatory Planning and Review (September 30, 1993)EO 12898 Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994)

US Department of the Interior Compliance Memorandums of

August 11, 1994 and May 30, 1995EO 12988 Civil Justice Reform (February 7, 1996)EO 13211 Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001)

Notice the dates are well after the 1969 date of the creation of NEPA. These executive orders were for the most part responses to the discovered inadequacies and abuses of the federal agencies whose initial missions were assigned by Congress to assist rural communities in maintaining rural community integrity.

Court cases that have evolved from these inadequacies and abuses by federal agencies are also of importance to know and understand. It is interesting that the majority of these cases originated in New Mexico with the final decisions being made in Federal courts. Let us see what the justices have said about these economic studies and the human dimension concerning agency treatment of NEPA and the intent of Congress when they created the ESA:

RELEVANT ESA COURT CASES

Catron County v. USFWS (10th Cir. 1996)

" . . . the fact that the FWS says that no real impact flows from the Critical Habitat Designation does not make it so. . . "

" . . . Congress intended that the Secretary comply with NEPA when designating critical habitat under ESA when such designations significantly affect the quality of the human environment . . . "

Middle Rio Grande Conservation District v. Babbitt (N. Mex. Dist. Ct. 2000)

" . . . completely ignoring human and economic impact directly counters the intent of the Endangered Species Act and is an unacceptable approach to fulfilling ESA responsibilities. . . "

" . . . Bennett v. Spear, supra. The Supreme Court has found designation of critical habitat a primary means of advancing conservation of a species and has viewed economic considerations an essential ingredient of critical habitat determinations . . . "

N. MEX. CATTLE GROWERS ASSOC. v. USFWS (10th Cir. 2001)

" . . . Congress clearly intended that economic factors were to be considered in connection with the Critical Habitat Designation . . . "

" . . . we conclude Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively to other causes. Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA. . . "

ARIZ. CATTLE GROWERS' ASSOC. v. USFWS, BLM, and SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY (9th Cir. 2001)

" . . . there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species . . . "
" . . . it is arbitrary and capricious to issue an Incidental Take Statement . . . when the Fish and Wildlife Service's speculation that the species exists on the property is not supported by the record . . . "

" . . . Where the agency (USFWS) purports to impose conditions on the lawful use of that land without showing that the species exists on it, it acts beyond its authority . . . "

A CONCEPT TO CONSIDER

Based on the laws, regulations and these court cases pointing to the intent of Congress in establishing NEPA and the ESA, it is clear that the human dimension custom and culture requires federal agencies to examine specific elements that are:

(I) Essential to the conservation of the human species and;

(II) Which may require special management considerations or protection.

How is This Determined?

EQUITY ANALYSIS
PROPERTY TAKINGS
CIVIL RIGHTS
DISPORTIONATE BURDEN
ENVIRONMENTAL JUSTICE
SOCIAL WELL BEING
CULTURAL STABILITY

Do not these elements constitute **POTENTIAL HUMAN CRITICAL HABITAT**? If we are to give wildlife such considerations, do not the concepts of equity and justice extend to humans as well? Do not cultures and customs of inhabitants of the land deserve as much due process?

So what can you do? To begin with,

DOCUMENT, DOCUMENT, DOCUMENT!

IF IT'S NOT DOCUMENTED, IT <u>NEVER HAPPENED</u>!!!

Date all documents, field notes, livestock counts, photographs, expenses, etc.

Maintain a daily diary:
- **Record all consultations**
- **All phone conversations**
- **All coordination meetings**
- **All visits**
- **Names, positions and phone numbers of all personnel involved**
- **Demeanor of personnel involved**

Maintain orderly, dated files

Maintain professional and businesslike manners in all personal, written and oral communications

Carefully review all information received

Conduct and document a thorough history search utilizing:
- **County records**
- **Government. records**
- **Whole farm & ranch production records**
- **Utilization maps**
- **Long-term range trend data**
- **Species composition records**

Obtain relevant handbooks and publications:
- **Taylor Grazing Act**
- **BLM H-4160 Handbook**
- **All documents relating to the proposed action**
- **Ask to see:**
  - **Science used for EA and EIS**
  - **List of preparers (you can challenge their credibility)**
- **NEPA / CEQ Regulations**
- **Relevant court cases and decisions**
- **Executive orders and related handbooks**

Mail all documents using <u>certified mail</u> (this creates a legal timeline)
- **Get all your mailings into your file with the agency (Administrative Procedures Act)**

Contact county to promote designation for Rural Historic Landscape (Ranching and Farming is a Culture) [<u>*Not*</u> Conservation Easements!]

Be ready for an Appeal if need be, the culture you save may be your own!

Summary

Given all of the above information on the unspoken issues of the Endangered Species Act and the human dimension element of the National Environmental Policy Act, there is little doubt as to how the original intent of Congress has been misconstrued. It was not the intent to cause irreparable harm and hardship to the human dimension and rural communities. When researching the origins of the ESA, the associated treaties, NEPA and the actual impacts to rural communities, several issues are evident:

- It is clear that the human element was intended to be inclusive when implementing regulations concerning conservation of wildlife;
- It is also clear that by excluding the human dimension, Federal agencies, both from management decisions and nonprofit litigation, have caused irreparable economic harm to rural communities and cultures;
- Several questions are left unanswered:
  - What are the impacts to private landowners and communities from ESA actions?
  - What are the social, cultural and economic impacts resulting from habitat restrictions?
  - Does the valid biology justify and support listing at any level?
  - What is the Long Range Outcome from Listing?
  - According to whom?

And remember, no matter what happens,

Appendix (bolding for emphasis)

Source: UNITED STATES CODE SERVICE, Matthew Bender & Company, Inc., LEXIS Publishing (TM) Company

*** CURRENT THROUGH P.L. 108-3, APPROVED 1/13/03 ***

TITLE 7. AGRICULTURE
CHAPTER 17. MISCELLANEOUS MATTERS

7 USCS § 426 (2003)

§ 426. Predatory and other wild animals

The Secretary of Agriculture may conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program. The Secretary shall administer the program in a manner consistent with all of the wildlife services authorities in effect on the day before the date of the enactment of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 [enacted Oct. 28, 2000].

HISTORY:
(March 2, 1931, ch 370, § 1, 46 Stat. 1468; Dec. 13, 1991, P.L. 102-237, Title X, § 1013(d), 105 Stat. 1901; Oct. 28, 2000, P.L. 106-387, § 1(a), 114 Stat. 1549.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
The amendment made by § 1(a) of Act Oct. 28, 2000, P.L. 106-387, is based on § 767 of Title VII of H.R. 5426 (114 Stat. 1549A-44), as introduced on Oct. 6, 2000, which was enacted into law by such § 1(a).

Amendments:
1991. Act Dec. 13, 1991 (effective on enactment, as provided by § 1101(a) of such Act, which appears as 7 USCS § 1421 note), inserted "brown tree snakes," following "rabbits,".
2000. Act Oct. 28, 2000, substituted this section for one which read:
"Predatory and other wild animals; eradication and control; investigations, experiments, and tests by Secretary of Agriculture; cooperation with other agencies
"The Secretary of Agriculture is hereby authorized and directed to conduct such investigations, experiments, and tests as he may deem necessary in order to determine, demonstrate, and promulgate **the best methods of eradication, suppression, or bringing under control** on national forests and other areas of the public domain as well as on State, Territory, or privately owned lands of mountain lions, wolves, coyotes, bobcats, prairie dogs, gophers, ground squirrels, jack rabbits, brown tree snakes, and other animals injurious to agriculture, horticulture, forestry, animal husbandry, wild game animals, furbearing animals, and birds, **and for the protection of stock and other domestic animals** through the suppression of rabies and tularemia in predatory or other wild animals; and **to conduct campaigns for the destruction or control of such animals:** Provided, That in carrying out the provisions of this Act the

Secretary of Agriculture may cooperate with States, individuals and public and private agencies, organizations, and institutions."

Transfer of functions:
Transfer of functions to Secretary of Interior. Functions of Secretary of Agriculture administered through the Bureau of Biological Survey, relating to conservation of wildlife, game, and migratory birds, were transferred to Secretary of Interior by Reorganization Plan No. II, § 4(f), effective July 1, 1939, set out at 5 USCS § 903 note.
Transfer of authorities to the Secretary of Agriculture. H.R. No. 3037, Title I, incorporated into Act Dec. 19, 1985, P.L. 99-190, § 101(a), 99 Stat. 1185, by Act Dec. 22, 1987, P.L. 100-202, Title I, § 106, 101 Stat. 1329-433, provides: "Effective upon the date of enactment of this Act and notwithstanding any other provision of law, the authorities of the Secretary of Agriculture under the Act of March 2, 1931 (46 Stat. 1468; 7 U.S.C. 426-426b), (transferred to the Secretary of the Interior pursuant to section 4(f) of 1939 Reorganization Plan No. II [5 USCS § 903 note]) and all personnel, property, records, unexpended balances of appropriations, allocations and other funds of the Fish and Wildlife Service, United States Department of the Interior used, held, available or to be made available in connection with the administration of such Act, are hereby **transferred from the Secretary of the Interior to the Secretary of Agriculture**, and this appropriation shall be available to carry out such authorities.".

Other provisions:
Prevention of introduction of brown tree snakes to Hawaii from Guam. Act Dec. 13, 1991, P.L. 102-237, Title X, § 1013, 105 Stat. 1901; Oct. 21, 1998, P.L. 105-277, Div A, § 101(a) [Title VII, § 743], 112 Stat. 2681-31, provides:
"(a) In general. The Secretary of Agriculture shall take such action as may be necessary to prevent the inadvertent introduction of brown tree snakes into other areas of the United States from Guam.
"(b) Introduction into Hawaii. The Secretary shall initiate a program to prevent the introduction of the brown tree snake into Hawaii from Guam. In carrying out this section, the Secretary shall consider the use of sniffer or tracking dogs, snake traps, and other preventative processes or devices at aircraft and vessel loading facilities on Guam, Hawaii, or intermediate sites serving as transportation points that could result in the introduction of brown tree snakes into Hawaii.
"(c) Authority. The Secretary shall use the authority provided under the Federal Plant Pest Act (7 U.S.C. 150aa et seq.) to carry out subsections (a) and (b).".
Act Dec. 5, 1991, P.L. 102-190, Title III, Div. A, § 348, 105 Stat. 1348, provides: "The Secretary of Defense shall take such action as may be necessary to prevent the inadvertent introduction of brown tree snakes from Guam to Hawaii in aircraft and vessels transporting personnel or cargo for the Department of Defense. In carrying out this section, the Secretary shall consider the use of sniffer or tracking dogs, snake traps, and other preventive processes or devices at aircraft and vessel loading facilities in Guam or Hawaii or at intermediate transit points for personnel or cargo transported between Guam and Hawaii.".

NOTES:

CROSS REFERENCES
This section is referred to in 7 USCS § 426b; 16 USCS § 2909.

*** CURRENT THROUGH P.L. 108-3, APPROVED 1/13/03 ***

TITLE 7. AGRICULTURE
CHAPTER 17. MISCELLANEOUS MATTERS

7 USCS § 426b (2003)

§ 426b. Authorization of expenditures for the eradication and control of predatory and other wild animals

The Secretary of Agriculture is authorized to make such expenditures for equipment, supplies, and materials, including the employment of persons and means in the District of Columbia and elsewhere, and **to employ such means as may be necessary to execute the functions imposed upon him by this Act** [7 USCS § 426]**.**

HISTORY:
(March 2, 1931, ch 370, § 3, 46 Stat. 1469.)

NOTES:
CROSS REFERENCES
This section is referred to in 16 USCS § 2909.

*** CURRENT THROUGH P.L. 108-3, APPROVED 1/13/03 ***

TITLE 7. AGRICULTURE
CHAPTER 17. MISCELLANEOUS MATTERS

7 USCS § 426c (2003)

§ 426c. Control of nuisance mammals and birds and those constituting reservoirs of zoonotic diseases**;** exception

The Secretary of Agriculture is authorized, except for urban rodent control, to conduct activities and to enter into agreements with States, local jurisdictions, individuals, and public and private agencies, organizations, and institutions **in the control of nuisance mammals and birds and those mammal and bird species that are reservoirs for** zoonotic diseases**,** and to deposit any money collected under any such agreement into the appropriation accounts that incur the costs to be available immediately and to remain available until expended for Animal Damage Control activities.

HISTORY:
(Dec. 22, 1987, P.L. 100-202, Title I, § 101(k), 101 Stat. 1329-331.)

NOTES:

RESEARCH GUIDE Am Jur: 58 Am Jur 2d, Nuisances § 48.

*** CURRENT THROUGH P.L. 108-3, APPROVED 1/13/03 ***

TITLE 7. AGRICULTURE
CHAPTER 109. ANIMAL HEALTH PROTECTION

7 USCS § 8319 (2003)

§ 8319. Surveillance of zoonotic diseases

The Secretary of Health and Human Services, through the Commissioner of Food and Drugs and the Director of the Centers for Disease Control and Prevention, and **the Secretary of Agriculture shall coordinate the surveillance of** zoonotic diseases.

HISTORY:
(June 12, 2002, P.L. 107-188, Title III, Subtitle A, § 313, 116 Stat. 674.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
This section was enacted as part of Act June 12, 2002, P.L. 107-188, and not as part of Act May 13, 2002, P.L. 107-171, which generally comprises this chapter.

*** CURRENT THROUGH P.L. 108-3, APPROVED 1/13/03 ***

TITLE 16. CONSERVATION
CHAPTER 49. FISH AND WILDLIFE CONSERVATION

16 USCS § 2909 (2003)

§ 2909. Disclaimers

Nothing in this Act [16 USCS §§ 2901 et seq.] shall be construed as affecting--
(1) the authority, jurisdiction, or responsibility of the States to manage, control, or regulate fish and resident wildlife under State law;
(2) any requirement under State law that lands, waters, and interests therein may only be acquired for conservation purposes if the owner thereof is a willing seller; and
(3) the authority of the Secretary of Agriculture under the Act of March 2, 1931 (46 Stat. 1468-1469; 7 U.S.C. 426-426b).

HISTORY:
(Sept. 29, 1980, P.L. 96-366, § 10, 94 Stat. 1329.)

[Code of Federal Regulations]
[Title 40, Volume 24, Parts 790 to END]
[Revised as of July 1, 1999]
From the U.S. Government Printing Office via GPO Access
[CITE: 40CFR1500.1]

[Page 347]

TITLE 40--PROTECTION OF ENVIRONMENT

CHAPTER V--COUNCIL ON ENVIRONMENTAL QUALITY

PART 1500--PURPOSE, POLICY, AND MANDATE--Table of Contents

Sec. 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ``action-forcing'' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, **NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.**

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

[Code of Federal Regulations]
[Title 43, Volume 1]
[Revised as of October 1, 2001]
From the U.S. Government Printing Office via GPO Access
[CITE: 43CFR24]

[Page 444-449]

TITLE 43--PUBLIC LANDS: INTERIOR

PART 24--DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE POLICY: STATE-FEDERAL RELATIONSHIPS

Sec.
24.1 Introduction.
24.2 Purpose.
24.3 General jurisdictional principles.
24.4 Resource management and public activities on Federal lands.
24.5 International agreements.
24.6 Cooperative agreements.
24.7 Exemptions.

Authority: 43 U.S.C. 1201.

Source: 48 FR 11642, Mar. 18, 1983, unless otherwise noted.

Sec. 24.1 Introduction.

(a) In 1970, the Secretary of the Interior developed a policy statement on intergovernmental cooperation in the preservation, use and management of fish and wildlife resources. The purpose of the policy (36 FR 21034, Nov. 3, 1971) was to strengthen and support the missions of the several States and the Department of the Interior respecting fish and wildlife. Since development of the policy, a number of Congressional enactments and court decisions have addressed State and Federal responsibilities for fish and wildlife with the general effect of expanding Federal jurisdiction over certain species and uses of fish and wildlife traditionally managed by the States. In some cases, this expansion of jurisdiction has established overlapping authorities, clouded agency jurisdictions and, due to differing agency interpretations and accountabilities, has contributed to confusion and delays in the implementation of management programs. Nevertheless, Federal authority exists for specified purposes while **State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific, overriding Federal law.**

(b) The Secretary of the Interior reaffirms that fish and wildlife must be maintained for their ecological, cultural, educational, historical, aesthetic, scientific, recreational, economic, and social values to the people of the United States, and that these resources are held in public trust by the Federal and State governments for the benefit of present and future generations of Americans. Because fish and wildlife are fundamentally dependent upon habitats on private and public lands managed or subject to administration by many Federal and State agencies, and because provisions for the protection, maintenance and enhancement of fish and wildlife and the regulation for their use are established in many laws and regulations involving a multitude of Federal and State administrative structures, the effective stewardship of fish and wildlife requires the cooperation of the several States and the Federal Government.

(c) It is the intent of the Secretary to strengthen and support, to the maximum legal extent possible, the missions of the States\1\ and the Department of the Interior to conserve and manage effectively the nation's fish and wildlife. It is, therefore, important that a Department of the Interior Fish and Wildlife Policy be implemented to coordinate and facilitate the efforts of Federal and State agencies in the attainment of this objective.

\1\``States'' refers to all of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, the
Commonwealth of Northern Mariana Islands and other territorial possessions, and the constituent units of government upon which these entities may have conferred authorities related to fish and wildlife matters.

Sec. 24.2 Purpose.

(a) The purpose of the Department of the Interior Fish and Wildlife Policy is to clarify and support the broad authorities and responsibilities of Federal\2\ and State agencies responsible for the management of the nation's fish and wildlife and to identify and promote cooperative agency management relationships which advance scientifically-based resource management programs. **This policy is intended to reaffirm the basic role of the States in fish and resident wildlife management, especially where States have primary authority and responsibility**, and to foster improved conservation of fish and wildlife.

\2\Hereinafter, the Bureau of Reclamation, Bureau of Land Management, Fish and Wildlife Service, and National Park Service will be referred to collectively as ``Federal agencies.''

(b) In developing and implementing this policy, this Department will be furthering the manifest Congressional policy of Federal-State cooperation that pervades statutory enactments in the area of fish and wildlife conservation. Moreover, in recognition of the scope of its activities in managing hundreds of millions of acres of land within the several States, the Department of the Interior will continue to seek new opportunities to foster a ``good neighbor'' policy with the States.

Sec. 24.3 General jurisdictional principles.

(a) In general the **States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State**. Under the Property Clause of the Constitution, **Congress is given the power to ``make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.''** In the exercise of power under the Property Clause, Congress may choose to preempt State management of fish and wildlife on Federal lands and, in circumstances where the exercise of power under the Commerce Clause is available, Congress may choose to establish restrictions on the taking of fish and wildlife whether or not the activity occurs on Federal lands, as well as to establish restrictions on possessing, transporting, importing, or exporting fish and wildlife.
Finally, a third source of Federal constitutional authority for the management of fish and wildlife is the treaty making power. This authority was first recognized in the negotiation of a migratory bird treaty with Great Britain on behalf of Canada in 1916.

(b) The exercise of Congressional power through the enactment of Federal fish and wildlife conservation statutes has generally been associated with the establishment of regulations more restrictive than those of State law. The power of Congress respecting the taking of fish and wildlife has been exercised as a restrictive regulatory power, except in those situations where the taking of these resources is necessary to protect Federal property. With these exceptions, and despite the existence of constitutional power respecting fish and wildlife on Federally owned lands, **Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands.**

(c) Congress has charged the Secretary of the Interior with responsibilities for the management of certain fish and wildlife resources, e.g., endangered and threatened species, migratory birds, certain marine mammals, and certain aspects of the management of some anadromous fish. **However, even in these specific instances, with the limited exception of marine mammals, State jurisdiction remains concurrent with Federal authority.**

Sec. 24.4 Resource management and public activities on Federal lands.

(a) The four major systems of Federal lands administered by the Department of the Interior are lands administered by the Bureau of Reclamation, Bureau of Land Management, units of the National Wildlife
Refuge System and national fish hatcheries, and units of the National Park System.

(b) The Bureau of Reclamation withdraws public lands and acquires non-Federal lands for construction and operation of water resource development projects within the 17 Western States. Recreation and conservation or enhancement of fish and wildlife resources are often designated project purposes. General authority for Reclamation to modify project structures, develop facilities, and acquire lands to accommodate fish and wildlife resources is given to the Fish and Wildlife Coordination Act of 1946, as amended (16 U.S.C. 661-667e). That act further provides that the lands, waters and facilities designated for fish and wildlife management purposes, in most instances, should be made available by cooperative agreement to the agency exercising the administration of these resources of the particular State involved. The Federal Water Project Recreation Act of 1965, as amended, also directs Reclamation to encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement.
Reclamation withdrawal, however, does not enlarge the power of the United States with respect to management of fish and resident wildlife and, except for activities specified in Section III.3 above, **basic authority and responsibility for management of fish and resident wildlife on such lands remains with the State.**

(c) BLM-administered lands comprise in excess of 300 million acres that support significant and diverse populations of fish and wildlife.
Congress in the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) directed that non-wilderness BLM lands be managed by the Secretary under principles of multiple use and sustained yield, and for both wilderness and non-wilderness lands explicitly recognized and **reaffirmed the primary authority and responsibility of the States for management of fish and resident wildlife on such lands.**
Concomitantly, the Secretary of the Interior is charged with the responsibility to manage non-wilderness BLM lands for multiple uses, including fish and wildlife conservation. **However, this authority to manage lands for fish and wildlife values is not a preemption of State jurisdiction over fish and wildlife.** In exercising this responsibility the Secretary is empowered to close areas to hunting, fishing or trapping for specified reasons viz., public safety, administration, or compliance with provisions of applicable law. The closure authority of the Secretary is thus a power to close areas to particular activities for particular reasons and does

not in and of itself constitute a grant of authority to the Secretary to manage wildlife or require or authorize the issuance of hunting and/or fishing permits or licenses.

(d) While the several **States therefore possess primary authority and responsibility for management of fish and resident wildlife on Bureau of Land Management lands,** the Secretary, through the Bureau of Land Management, has custody of the land itself and the habitat upon which fish and resident wildlife are dependent. Management of the habitat is a responsibility of the Federal Government. Nevertheless, Congress in the Sikes Act has directed the Secretary of the Interior to cooperate with the States in developing programs on certain public lands, including those administered by BLM and the Department of Defense, for the conservation and rehabilitation of fish and wildlife including specific habitat improvement projects.

(e) Units of the National Wildlife Refuge System occur in nearly every State and constitute Federally owned or controlled areas set aside primarily as conservation areas for migratory waterfowl and other species of fish or wildlife. Units of the system also provide outdoor enjoyment for millions of visitors annually for the purpose of hunting, fishing and wildlife-associated recreation. In 1962 and 1966, Congress authorized the use of National Wildlife Refuges for outdoor recreation provided that it is compatible with the primary purposes for which the particular refuge was established. In contrast to multiple use public lands, the conservation, enhancement and perpetuation of fish and wildlife is almost invariably the principal reason for the establishment of a unit of the National Wildlife Refuge System. In consequence, Federal activity respecting management of migratory waterfowl and other wildlife residing on units of the National Wildlife Refuge System involves a Federal function specifically authorized by Congress. It is therefore for the Secretary to determine whether units of the System shall be open to public uses, such as hunting and fishing, and on what terms such access shall be granted. However, in recognition of the existing jurisdictional relationship between the States and the Federal Government, Congress, in the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd), has explicitly stated that **nothing therein shall be construed as affecting the authority of the several States to manage fish and resident wildlife found on units of the system.**

Thus, Congress has directed that, to the maximum extent practicable, such public uses shall be consistent with State laws and regulations. Units of the National Wildlife Refuge System, therefore, shall be managed, to the extent practicable and compatible with the purposes for which they were established, in accordance with State laws and regulations, comprehensive plans for fish and wildlife developed by the States, and Regional Resource Plans developed by the Fish and Wildlife Service in cooperation with the States.

(f) Units of the National Park System contain natural, recreation, historic, and cultural values of national significance as designated by Executive and Congressional action. Specific enabling legislation has authorized limited hunting, trapping or fishing activity within certain areas of the system. As a general rule, consumptive resource utilization is prohibited. Those areas, which do legislatively allow hunting, trapping, or fishing, do so in conformance with applicable Federal and State laws. The Superintendent may, in consultation with the appropriate State agency, fix times and locations where such activities will be prohibited. Areas of the National Park System, which permit fishing generally, will do so in accordance with applicable State and Federal Laws.

(g) In areas of exclusive Federal jurisdiction, State laws are not applicable. However, every attempt shall be made to consult with the appropriate States to minimize conflicting and confusing regulations, which may cause undue hardship.

(h) The management of habitat for species of wildlife, populations of wildlife, or individual members of a population shall be in accordance with a Park Service approved Resource Management Plan. The appropriate States shall be consulted prior to the approval of management actions, and memoranda of understanding shall be executed as appropriate to ensure the conduct of programs, which meet mutual objectives.

(i) Federal agencies of the Department of the Interior shall:

(1) Prepare fish and wildlife management plans in cooperation with State fish and wildlife agencies and other Federal (non-Interior) agencies where appropriate. Where such plans are prepared for Federal lands adjoining State or private lands, the agencies shall consult with the State or private landowners to coordinate management objectives;

(2) Within their statutory authority and subject to the management priorities and strategies of such agencies, institute fish and wildlife habitat management practices in cooperation with the States to assist the States in accomplishing their fish and wildlife resource plans;

(3) Provide for public use of Federal lands in accordance with State and Federal laws, and permit public hunting, fishing and trapping within statutory and budgetary limitations and in a manner compatible with the primary objectives for which the lands are administered. The hunting, fishing, and trapping, and the possession and disposition of fish, game, and fur animals, shall be conducted in all other respects within the framework of applicable State and Federal laws, including requirements for the possession of appropriate State licenses or permits.

(4) For those Federal lands that are already open for hunting, fishing, or trapping, closure authority shall not be exercised without prior consultation with the affected States, except in emergency situations. The Bureau of Land Management may, after consultation with the States, close all or any portion of public land under its jurisdiction to public hunting, fishing, or trapping for reasons of public safety, administration, or compliance with provisions of applicable law. The National Park Service and Fish and Wildlife Service may, after consultation with the States, close all or any portion of Federal land under their jurisdictions, or impose such other restrictions as are deemed necessary, for reasons required by the Federal laws governing the management of their areas; and

(5) Consult with the States and comply with State permit requirements in connection with the activities listed below, except in instances where the Secretary of the Interior determines that such compliance would prevent him from carrying out his statutory responsibilities:

(i) In carrying out research programs involving the taking or possession of fish and wildlife or programs involving reintroduction of fish and wildlife;

(ii) For the planned and orderly removal of surplus or harmful populations of fish and wildlife except where emergency situations requiring immediate action make such consultation and compliance with
State regulatory requirements infeasible; and

(iii) In the disposition of fish and wildlife taken under paragraph (i) (5)(i) or (i) (5)(ii) of this section.

Sec. 24.5 International agreements.

(a) International conventions have increasingly been utilized to address fish and wildlife issues having dimensions beyond national boundaries. The authority to enter into such agreements is reserved to the President by and with the advice and consent of the Senate. However, while such agreements may be valuable in the case of other nations, in a Federal system such as ours sophisticated fish and wildlife programs already established at the State level may be weakened or not enhanced.

(b) To ensure that effective fish and wildlife programs already established at the State level are not weakened, the policy of the Department of the Interior shall be to recommend that the United States negotiate and accede to only those international agreements that give strong consideration to established State programs designed to ensure the conservation of fish and wildlife populations.

(c) It shall be the policy of the Department to actively solicit the advice of affected State agencies and to recommend to the U.S. Department of State that representatives of such

agencies be involved before and during negotiation of any new international conventions concerning fish and wildlife.

Sec. 24.6 Cooperative agreements.

(a) By reason of the Congressional policy (e.g., Fish and Wildlife Coordination Act of 1956) of State-Federal cooperation and coordination in the area of fish and wildlife conservation, State and Federal agencies have implemented cooperative agreements for a variety of fish and wildlife programs on Federal lands. This practice shall be continued and encouraged. Appropriate topics for such cooperative agreements include but are not limited to:
(1) Protection, maintenance, and development of fish and wildlife habitat;
(2) Fish and wildlife reintroduction and propagation;
(3) Research and other field study programs including those involving the taking or possession of fish and wildlife;
(4) Fish and wildlife resource inventories and data collection;
(5) Law enforcement;
(6) Educational programs;
(7) Toxicity/mortality investigations and monitoring;
(8) Animal damage management;
(9) Endangered and threatened species;
(10) Habitat preservation;
(11) Joint processing of State and Federal permit applications for activities involving fish, wildlife and plants;
(12) Road management activities affecting fish and wildlife and their habitat;
(13) Management activities involving fish and wildlife; and,
(14) Disposition of fish and wildlife taken in conjunction with the activities listed in this paragraph.
(b) The cooperating parties shall periodically review such cooperative agreements and adjust them to reflect changed circumstances.

Sec. 24.7 Exemptions.

(a) Exempted from this policy are the following:
(1) The control and regulation by the United States, in the area in which an international convention or treaty applies, of the taking of those species and families of fish and wildlife expressly named or otherwise covered under any international treaty or convention to which the United States is a party;
(2) Any species of fish and wildlife, control over which has been ceded or granted to the United States by any State; and
(3) Areas over which the States have ceded exclusive jurisdiction to the United States.
(b) Nothing in this policy shall be construed as affecting in any way the existing authorities of the States to establish annual harvest regulations for fish and resident wildlife on Federal lands where public hunting, fishing or trapping is permitted.

[Code of Federal Regulations]
[Title 50, Volume 1]
[Revised as of October 1, 2001]
From the U.S. Government Printing Office via GPO Access
[CITE: 50CFR81.1]

[Page 1228]

TITLE 50--WILDLIFE AND FISHERIES

CHAPTER I--UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

PART 81--CONSERVATION OF ENDANGERED AND THREATENED SPECIES OF FISH, WILDLIFE, AND PLANTS--COOPERATION WITH THE STATES—

Sec. 81.1 Definitions.

As used in this part, terms shall have the meaning ascribed in this section.

(a) Agreements. Signed documented statements of the actions to be taken by the State(s) and the Secretary in furthering the purposes of the Act. They include:

(1) A Cooperative Agreement entered into pursuant to section 6(c) of the Endangered Species Act of 1973 and Sec. 81.2 of this part.

(2) A Project Agreement which includes a statement as to the actions to be taken in connection with the conservation of endangered or threatened species, benefits derived, cost of actions, and costs to be borne by the Federal Government and by the States.

(b) Conserve, conserving, and conservation. The use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Endangered Species Act of 1973 are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(c) Endangered species. Any species which is in danger of extinction throughout all or a significant portion of its range (other than a species of the Class Insecta as determined by the Secretary to constitute a pest whose protection under the provisions of The Endangered Species Act of 1973 would present an overwhelming and overriding risk to man).

(d) Fish or wildlife. Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(e) Plant. Any member of the plant kingdom, including seeds, roots, and other parts thereof.

(f) Program. A State-developed set of goals, objectives, strategies, action, and funding necessary to be taken to promote the conservation and management of resident endangered or threatened species.

(g) Secretary. The Secretary of the Interior or his authorized representative.

(h) Species. This term includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(i) State. Any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(j) State agency. The State agency or agencies, or other governmental entity or entities which are responsible for the management and conservation of fish or wildlife resources within a State.

(k) Plan. A course of action under which immediate attention will be given to a State's resident species determined to be endangered or threatened.

(l) Threatened species. Any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, as determined by the Secretary.

(m) Project. A plan undertaken to conserve the various species of fish and wildlife or plants facing extinction.

(n) Act. The Endangered Species Act of 1973, Pub. L. 93-205, 16 U.S.C. 1531 et seq.

(o) Project segment. An essential part or a division of a project, usually separated as a period of time, occasionally as a unit of work.

(p) Resident species. For the purposes of the Endangered Species Act of 1973, a species is resident in a State if it exists in the wild in that State during any part of its life.

[40 FR 47509, Oct. 9, 1975, as amended at 44 FR 31580, May 31, 1979; 49 FR 30074, July 26, 1984]

[[Page 1229]]

[Code of Federal Regulations]
[Title 50, Volume 2, Parts 200 to 599]
[Revised as of October 1, 1999]
From the U.S. Government Printing Office via GPO Access
[CITE: 50CFR424.16]

[Page 360-361]

TITLE 50--WILDLIFE AND FISHERIES

CHAPTER IV--JOINT REGULATIONS (UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR AND NATIONAL MARINE FISHERIES SERVICE,

PART 424--LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT--Table of Contents

Subpart B--Revision of the Lists

Sec. 424.16 Proposed rules.

(a) General. Based on the information received through Secs. 424.13, 424.14, 424.15, and 424.21, or through other available avenues, the Secretary may propose revising the lists as described in Sec. 424.10.

(b) Contents. A notice of a proposed rule to carry out one of the actions described in Sec. 424.10 shall contain the complete text of the proposed rule, a summary of the data on which the proposal is based (including, as appropriate, citation of pertinent information sources), and shall show the relationship of such data to the rule proposed. If such a rule designates or revises critical habitat, such summary shall, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat, or may be affected by such designation. Any proposed rule to designate or revise critical habitat shall contain a map of such habitat. Any such notice proposing the listing, delisting, or reclassification of a species or the designation or revision of critical habitat shall also include a summary of factors affecting the species and/or critical habitat.

(c) Procedures--(1) Notifications. In the case of any proposed rule to list, delist, or reclassify a species, or to designate or revise critical habitat, the Secretary shall--

(i) Publish notice of the proposal in the Federal Register;

(ii) Give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction therein in which the species is believed to occur, and invite the comment of each such agency and jurisdiction;

(iii) Give notice of the proposed regulation to any Federal agencies, local authorities, or private individuals or organizations known to be affected by the rule;

(iv) Insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to list, delist, or reclassify a species to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation;

(v) Give notice of the proposed regulation to such professional scientific organizations as the Secretary deems appropriate; and

(vi) Publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur.

(2) Period of public comments. **At least 60 days shall be allowed for public comment** following publication in the Federal Register of a rule proposing the listing, delisting, or reclassification of a species, or the designation or revision of critical habitat. All other proposed rules shall be subject to a comment period of at least 30 days following publication in the Federal Register. The Secretary may extend or reopen the period for public comment on a proposed rule upon a finding that there is good cause to do so. A notice of any such extension or reopening shall be published in the Federal Register, and shall specify the basis for so doing.

(3) Public hearings. **The Secretary shall promptly hold at least one public hearing if any person so requests within 45 days of publication** of a proposed regulation to list, delist, or reclassify a species, or to designate or revise critical habitat. Notice of the location and time of any such hearing shall be published in the Federal Register not less than 15 days before the hearing is held.