



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

OCT - 9 2015

The Honorable Don Young, Chairman
House Natural Resources Subcommittee on
Indian, Insular and Alaska Native Affairs
Washington, DC 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the Bureau of Indian Affairs in response to questions received following the May 14, 2015, hearing before your Committee regarding "*Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934*"

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Raul Ruiz
Ranking Member

Committee on Natural Resources
Subcommittee on Indian, Insular and Alaska Native Affairs
1334 Longworth House Office Building
May 14, 2015
2:00 p.m.

AGENDA

Oversight Hearing on:

"Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934."

Questions from the Honorable Bruce Westerman

PANEL 1: Assistant Secretary Kevin Washburn – Department of the Interior

1. What is the Department of the Interior's position on tribes attempting to jump state lines, and place land into trust far away from a tribe's current reservation?

The Department's regulations governing land-into-trust permits off-reservation fee-to-trust acquisitions. However, the Department applies greater scrutiny and demands greater justification as the distance between the tribe's reservation and the land to be acquired increases. See 25 CFR 151.11. Moreover, state and local governments are provided notice of both on-and off-reservation applications and have the opportunity to comment. The regulations also require the Department to give greater weight to the concerns of state and local governments as that distance increases.

2. What additional federal resources would be required when lands are placed into trust in a state where there are no existing trust lands, and the tribe's reservation is not in the state?

The regulations governing land-into-trust require the Department to consider whether BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. 25 CFR 151.10 (g). The Department is required to address this issue on a case-by-case basis.



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OCT 27 2015

The Honorable Rob Bishop
Chairman
Committee on Natural Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed are responses prepared by the Department of the Interior to questions submitted following the Committee's July 29, 2015, oversight hearing on "*Federal Agencies' Selective Enforcement of ESA Consultation.*"

Thank you for the opportunity to provide this material to the Committee.

Sincerely,

Christopher P. Salotti
Legislative Counsel
Office of Congressional and Legislative Affairs

Enclosure

cc: The Honorable Raul M. Grijalva
Ranking Member

Committee on Natural Resources
1324 Longworth House Office Building
Wednesday, July 29, 2015
10:00am

Oversight Hearing on
"Federal Agencies' Selective Enforcement of ESA Consultation"

Questions from Chairman Rob Bishop (UT-01) for Mr. Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.

1. The EPA did a regulatory impact analysis (RIA) of its proposed rule for existing plants, and found that about 12% to 19% of all coal-fired capacity projected to be in service in the base case would shut down by 2020 under the range of scenarios analyzed. The RIA goes on to say: "EPA examined whether these projected incremental retirements may adversely impact reserve margins and reliability planning." If EPA could look at coal-fired power plant retirements and determine whether those retirements may adversely affect reliability, why couldn't it also determine whether those retirements would affect listed species?

Response: Federal action agencies are ultimately responsible for determining if their projects may affect threatened or endangered species. In this case, we understand that EPA determined that their rules would have no effect on threatened or endangered species. As mentioned in our April 29, 2015 letter, EPA is the expert agency on the Clean Air Act and is best positioned to understand if its rules may affect listed species or designated habitat.

Though action agencies are responsible for determining whether a proposed action may affect listed species or designated critical habitat, in 2008, the Department of the Interior Solicitor provided agencies with useful guidance on the consultation process through a formal legal opinion. . That guidance notes that in making the threshold "may affect" determination, an action agency must consider both direct and indirect effects of the action. As the Solicitor noted, although "direct effects" are undefined in the regulations, they are commonly understood to refer to "effects that are the immediate and natural consequences of the taking of the proposed action." Indirect effects, on the other hand, are defined in FWS's and NOAA's joint regulations in 50 CFR 402.02 rather narrowly as effects that are both "caused by the proposed action and ... reasonably certain to occur." Where future effects upon listed species or designated critical habitats depend upon subsequent intervening actions, such as actions by states, private interests, or both, the task of distinguishing those effects that are reasonably certain to occur from those that are more uncertain and speculative is often not easy. The judgment reflected in the joint regulations since 1986 is that action agencies are the appropriate entities for making such determinations at the threshold "may affect" stage.

2. The Energy Information Administration (EIA) recently released its analysis of the impacts of EPA's rule for existing power plants. The analysis uses the EIA's Annual Energy Outlook for 2015 as the baseline, and then compares that baseline to a number of other scenarios, including implementation of the EPA rule.

One of the EIA's primary conclusions is that the EPA rule will have a "significant effect on projected retirements and additions of electric generation capacity." Specifically, the EIA found that projected coal plant retirements will more than double if the EPA rule is promulgated.

EPA itself has conducted modeling that shows, down to the generating unit, which power plants are likely to shut down. So if, as EIA and EPA predict, power plants do shut down – could that "affect" listed species like the manatee? (The EPA's modeling indicates units at Big Bend Power Station will be retired as a result of the rule; the plant's owner concurs with the EPA's modeling).

Unsurprisingly for a rule that specifically targets fossil fuel-fired power plants, the EPA's modeling shows a decline in coal capacity and power sector coal use in every model EPA has released to the public thus far. So according to the EPA's available modeling, there is no possible situation where coal-fired generation does not decline. Should EPA consult with FWS on the proposed rule for existing plants, since EPA expects plants whose operations affect manatees will shut down if the rule is implemented?

Response: Federal agencies are ultimately responsible for determining if their proposed actions may affect listed species or designated critical habitat. If they determine that their proposed action will have no effect on listed species or designated critical habitat, no consultation with the U.S. Fish and Wildlife Service (Service) is required. If an agency determines that an action it is proposing may affect listed species or designated critical habitat, it must either formally consult with the Service and/or NOAA Fisheries, or obtain written concurrence that the proposed action is not likely to adversely affect any listed species or critical habitat (i.e., the effects are completely beneficial, insignificant, or discountable).

3. One of this Committee's goals is to create conditions in which our forests are more resilient. To that end the House passed the Resilient Federal Forests Act of 2015. Through this Act, the agencies will be able to streamline their planning processes and accomplish meaningful thinning. They will be able to finish their planning work in one-third to one-half of the time it used to take to conduct the NEPA analysis. However, we are still concerned about delays which could be caused by ESA survey protocols.

For much of the intermountain west, surveys for spotted owls and other birds of prey are required. Often two consecutive years of surveys are required to make sure that the agency didn't miss the presence of the species. However, waiting another full year for a biologist to call for birds just to be sure, rather than initiating the thinning project, seems to make little sense when treatment is needed to prevent the impacts of catastrophic

wildfire in high fire risk forested areas. It is important to note that if these forests burn, so do the nests and the habitat.

In addition, if the Fish and Wildlife Service's protocols require two years of surveys in burned areas, none of the dead trees will be harvested. This is because the wood is only of value until it begins to rot (generally less than a year after the fire). If the agency cannot sell any dead trees, they will not have funding to reforest the burned area, since most of the reforestation funding comes from the sale of the dead trees. The result will be National Brush fields ripe for a new fire instead of new forests.

Given these scenarios, do you think it makes sense to insist on two consecutive years of surveys, irrespective of the potential consequences to the habitat and the forest?

Response: The recovery plan for the northern spotted owl calls for retaining existing spotted owls on the landscape to the greatest possible extent, including in some of the drier portions of the range such as eastern Washington. Low, moderate and even in some cases high-severity fires do maintain habitat conditions conducive for NSO. With that said, the Service and the recovery plan encourage fuels management and thinning projects that reduce ladder fuels (those small trees and shrubs that can carry a ground fire into the canopy resulting in stand-replacing events) but that retain the stand canopies, which are very important to spotted owls. The Service also promotes siting fuel reduction zones in areas where other breaks already occur, such as roads, landings and meadows. This increases the effectiveness of the fuel breaks while reducing the impact to the forest. What would be most beneficial is if fuel reduction zones were placed in non-habitat that is often more dense than spotted owl habitat and at a higher fire risk. This would increase effectiveness while reducing potential impacts to spotted owl conservation.

It is extremely difficult to successfully implement fuel reduction zones strategically such that fire behavior is affected in the short-term (e.g., within one year). Longer-term fuels management planning often involves a series of fuels treatments and thus can often incorporate 2-year owl surveys as well as other longer-term land management priorities. Though we do not require surveys before land management activities begin, surveys are important to identify sites that are occupied by spotted owls and minimize impacts; however, forest management activities that do not modify spotted owl habitat but may result in short term disturbance to spotted owls can be assessed using a one year survey protocol (p.17, Protocol for Surveying Proposed Management Activities that may Impact Northern Spotted Owls, USFWS 2012). In many cases seasonal restrictions can be applied to address the potential for disturbance during the nesting season and can be lifted if surveys show that NSO are not nesting. Salvage and thinning operations occurring in areas that may not be spotted owl habitat can also be assessed using this approach or may not even require surveys.

4. There are other instances where FWS, as well as the consultation process itself, slows the initiation of fire recovery projects that are critical to preventing additional fires in high

fire risk forested areas. In these cases, the Forest Service proposes to remove dead trees and perform other recovery efforts after a large-scale fire, which may impact a small amount of spotted owl and other ESA-listed species habitat in order to protect a much larger habitat area from catastrophic fire. However, FWS often won't agree to this approach and is unwilling to sign off on a project unless it impacts very little or NO habitat whatsoever.

Why is FWS unwilling to sign off on fire recovery projects in high-fire prone forests that affect a small amount of habitat if it means protecting a much larger habitat area from catastrophic fire?

Response: The Service supports using the best science to implement fuels management projects to restore more natural and less catastrophic fire regimes, and this position is described in detail in the spotted owl recovery plan. We also seek to prioritize expediting the completion of emergency fuels management projects over other, non-emergency consultation work. We work closely and collaboratively with the U.S. Forest Service (USFS) and the Bureau of Land Management in evaluating post-fire forest treatments where listed species occur. We follow the requirements of the Endangered Species Act section 7 consultation process, helping our federal partners design and implement projects that meet economic and resource management goals while also conserving listed species. For example, in 2014 we quickly consulted on multiple post-fire salvage projects that permitted harvest to proceed consistent with the ESA and the recommendations of the spotted owl recovery plan. We completed these consultations under established streamlined consultation procedures, taking 30 days for informal consultations and 60 days for formal consultations. Further, if projects are for human safety, we continue to remind the action agencies to use emergency provisions at 50 C.F.R. § 402.05 that allow for expedited informal consultation, with formal consultation initiated after the emergency is under control.

In our experience most post-fire salvage projects tend to be more opportunistic than part of a larger-scale strategic planning effort to reduce fire spread and severity. Such a larger-scale effort could include landscape level considerations for both fuel reduction and strategic fire breaks while incorporating considerations for spotted owls and other land management priorities. Recovery Action 12 in the spotted owl recovery plan recommends retaining post-disturbance legacy structures (such as large, dead trees, whether standing or down) in areas that are managed for spotted owl habitat because these features greatly improve the quality of the habitat as it recovers over time. The Service encourages working with our Federal land management partners prior to large-scale disturbances in designing landscape scale strategies that meet the needs of listed species while reducing fire risk and severity, thereby reducing post-fire conflicts. It is important for action agencies to seek ways to implement important fuel reduction work without overutilizing salvage logging that can severely affect the survival and recovery of natural resources.

5. The Fish and Wildlife Service (Service) has correctly recognized that the data collection methods it utilized to collect whooping crane population information and mortality rates at the Aransas National Wildlife Refuge during the winter of 2008 and 2009 were deficient. To address data collection issues it has now instituted the Whooping Crane Winter Abundance Survey Protocol. What is the Service's official position on whooping crane mortality at the Aransas National Wildlife Refuge during the winter of 2008 and 2009? What is the most current estimate on the whooping crane population at the Aransas National Wildlife Refuge?

Response: In a 2008-2009 publication, the Service's Southwest Region reported what we believed to have been a loss of 23 whooping cranes, using the best information available at that time. Following the retirement of the Service's Whooping Crane Coordinator in 2011, a team of specialists was formed to evaluate our process for estimating the whooping crane population. After an extensive review, the team updated the methodology used for estimating whooping crane abundance. Use of this scientifically sound methodology has improved our knowledge and understanding of this whooping crane population and will aid in conservation planning, future policy decisions and the long-term conservation of this species for the American public. However the Service is unable to confirm the loss of whooping cranes previously reported in 2008-2009, because the data could not be verified using the previous methodology. Therefore the number of whooping cranes that died at the Aransas National Wildlife Refuge during the winter of 2008-2009 remains unknown.

The Aransas-Wood Buffalo population of whooping cranes in the winter of 2014-2015 was estimated at 308 individuals.

Please see the following peer reviewed publications for further details:

<http://ecos.fws.gov/ServCatFiles/reference/holding/28257>

<http://www.sciencedirect.com/science/article/pii/S0006320714003115>

Question from Rep. Bruce Westerman (AR-04) for Mr. Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.

1. The Northern Long-Eared Bat was recently listed as a threatened species. Although the Service acknowledges that the species decline is the predominant, overriding factor leading to the species decline, they've issued a 4(d) rule and, in some cases from some field offices, consultation guidance that would apparently require extensive surveys and avoidance of timber harvest during critical times of the year. The Forest Service manages extensive timber lands within the range of the bat. In general, the agency believes that existing forest plan standards and guidelines should adequately provide for conservation of the species and will prevent jeopardizing its existence. Can you confirm that the listing will not require individual National Forest Units to perform project by project consultation in the range of the NLEB?

Response: A rule under section 4(d) of the Endangered Species Act (ESA) does not remove, or alter in any way, the consultation requirements for Federal agencies under section 7 of the ESA. The U.S. Fish and Wildlife Service (Service) has been working with the U.S. Forest Service (USFS) nationwide to streamline consultations on the northern long-eared bat. For example, Region 4 (Southeast) of the Service completed a formal programmatic section 7 consultation for USFS Land and Resource Management Plans with Region 8 (Southern) of the USFS. In addition, Regions 3 and 5 (Midwest and Northeast) of the Service anticipate completing a similar programmatic consultation with Region 9 (Eastern) of the USFS by mid-October. These programmatic consultations will address the majority of projects within the range of the northern long-eared bat on USFS lands, and will substantially streamline subsequent project coordination and consultation. In the few instances where USFS activities are not covered under a programmatic consultation, the standard regulatory requirement for project-specific consultation would be applicable.

Questions from Rep. Bordallo for Mr. Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior

1. Like my Democratic colleagues, I am also concerned about the funding cuts to the FWS listing program proposed by this year's appropriations bill. I feel these cuts will further exacerbate some of the problems we're discussing today.

However, I want to bring up my concerns over how Fish & Wildlife Service and other cooperating agencies prioritize resourcing ESA consultations. For example, this Administration has made a strategic decision to prioritize the rebalance to the Asia-Pacific region.

Part of that strategic initiative is the realignment of military forces in the region. That has led to numerous environmental impact efforts in the Marianas region. However, these EIS efforts have run into challenges from Fish & Wildlife Service who indicate publicly that they do not have enough resources to get the job done. This has negative implications for an Administration priority.

So, while I understand that Republicans continue to needlessly cut resources, what is the Fish & Wildlife Service doing to prioritize strategic objectives? Are there any legal impediments and do you need any authorities? Where is the flexibility in your agency to be able to prioritize proposed actions that are critical to larger national priorities?

Response: The Service defers to the Department of Defense to prioritize the Service's consultation work on strategic military objectives and addresses these priorities to the maximum extent practicable within our staffing abilities. We continue to work with the Department of Defense to explore how to leverage resources to meet our shared goals; the Department of Defense has arranged for at least one biologist to detail with the Service's Pacific Island Office to assist with workload.

2. As you are aware, legislation passed in last year's Congress that authorized Fish and Wildlife and the Navy to enter into a memorandum of agreement regarding placement of a safety danger zone over the Ritidian Wildlife Refuge on Guam. This effort was to ensure that the military build-up could continue to move forward and to address the concerns of my constituents who didn't want DoD to take additional land.

However, I am concerned about the potential mitigations that may be a part of a future biological opinion for the record of decision on the Marine realignment. Any mitigation plan would be tied to protection of species under the endangered species act on Guam.

I remain concerned that these mitigations would be put in place without a clear plan for meeting the Refuge's mission. Could you please give a quick update about your plan to rehabilitate and reintroduce the species, and progress on that plan? Have any species been reintroduced on Guam?

Response: The Service continues to work with the Navy, Air Force, Guam Division of Aquatic and Wildlife Resources, and other partners to plan for the eventual reintroduction of Guam rail, Guam Micronesian kingfisher, and the Mariana crow on Guam. Our current focus includes advancing research on control of brown tree snake and identifying and restoring adequate habitat to provide for the conservation of the birds, in anticipation of eventual reintroduction efforts. The recent bait drop study on Anderson Air Force Base provided very encouraging results that may lead to effective large-scale control of brown tree snake. In addition, the Navy, through Joint Region Marianas, recently committed to preserving over 5,200 acres of potential kingfisher habitat in a durable conservation status for the benefit of kingfisher and other extirpated species. The Refuge also continues to be a key part of any future reintroduction efforts. The Service and Navy are continuing negotiations to implement the transition of operational responsibility for Guam NWR consistent with the National Defense Authorization Act of FY15.

3. The Final EIS for the Marianas talks about conservation of habitat. Recently, important Chamorro archaeological sites have been found at the Ritidian refuge.

Can I have your agency's assurance that you will work to provide better access to these sites for the public?

Response: The recently discovered historic Chamorro archaeological site is located on the Ritidian Unit of the Guam National Wildlife Refuge and within the designated Surface Danger Zone for the Marine Corps Live Fire Training Range. Accordingly, access to this site will be controlled by the Navy consistent with public safety concerns and the direction provided by Congress in the National Defense Authorization Act for Fiscal Year 2015.

4. There are longstanding issues regarding landlocked landowners whose properties border the Ritidian refuge. Can we get your commitment that you will work with us on these issues?

Response: The U.S. Government will continue to work with neighboring landowners on access issues.