United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 18 2020

The Honorable John Barrasso
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Barrasso:

Enclosed are responses to the follow-up questions from the February 5, 2020, oversight hearing entitled "Oversight of the U.S. Fish and Wildlife Service" before your Committee. These responses were prepared by the U.S. Fish and Wildlife Service.

Thank you for the opportunity to respond to you on this matter.

Sincerely,

Cole Rojewski
Director
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Thomas R. Carper
Ranking Member

Questions for the Record
Senate Committee on Environment and Public Works
Oversight Hearing entitled, "Oversight of the U.S. Fish and Wildlife Service"
February 5, 2020

Question from Chairman Barrasso

Question 1: What impact do ESA listing decisions made by lawyers and the federal courts and not by scientists and other experts, have on the implementation of the ESA and the successful recovery of endangered and threatened species?

Response: The U.S. Fish and Wildlife Service (Service) expends a substantial amount of time and money in court defending itself from alleged procedural violations of the ESA. The time and money spent on procedural litigation is certainly time and energy that should be spent on working to recovery of species. Additionally, the ESA's citizen's suit provision contains an attorney fee shifting provision so that successful litigation on any procedural issue, no matter how minor, including ones that make no difference in the substance of species recovery, can subject the federal government to using taxpayer dollars to paying attorney's fees and costs to litigants. All of this forces the Service to focus on the procedural form over substance of protecting and more importantly recovering truly threatened or endangered species.

Questions from Ranking Member Carper

Question 2: As I mentioned at our hearing, the Fish and Wildlife Service has delayed finalization of an important candidate conservation agreement for the monarch butterfly for more than six months. Proponents of this agreement believe that stakeholder needs have been accommodated to the extent practicable, and there are no outstanding legal issues that would hinder the agreement's effectiveness. I asked: "what precludes the Service from finalizing this agreement now and working with agricultural stakeholders separately to develop an additional agreement for their continued engagement?" You replied that you would need to get back with me. Would you provide a response?

Response: The candidate conservation agreement was delayed at the time of the hearing to work with the Farm Bureau to consider private landowner inclusion as part of the energy and transportation Candidate Conservation Agreement and Assurances (CCAA). Those discussions were successful and culminated in the completion of a historic agreement on April 8, 2020, between the Service and the University of Illinois-Chicago to conserve the monarch butterfly. In addition to the habitat provided within the rights-of-way, landowners adjacent to the enrolled rights-of-way can enroll additional property if they agree to certain conservation measures. The agreement encourages transportation and energy partners to participate in monarch conservation by providing and maintaining habitat on potentially millions of acres of rights-of-way and associated lands. The agreement provides regulatory certainty for industry participants and adjacent landowners while addressing the conservation needs of our most at-risk species.

Under the monarch agreement, more than 45 companies in the energy and transportation sectors and private landowners will provide habitat for the species along energy and transportation rights-of-way corridors on public and private lands across the country. Participants will carry out conservation measures to reduce or remove threats to the species and create and maintain habitat annually. Although this agreement specifically focuses on monarch habitat, the conservation measures will also benefit several other species, especially other pollinating insects.

The Service is now working with the Farm Bureau to complete an additional CCAA to include the voluntary conservation of those private lands that are not adjacent to transportations rights-of-way but whose owners are interested in conserving monarch habitat.

Question 3: I also asked about the Fish and Wildlife Service's proposed rule regarding the Duck Stamp program and how this rule would increase participation in the program. You stated that this rule was in response to hunting declines in the United States. However, duck hunters are required to purchase Duck Stamps, and I have a hard time believing that the design on the Duck Stamp is what determines whether or not a duck hunter decides to hunt. Alternatively, birders are not required to purchase Duck Stamps but often do, and I am concerned that the proposed rule, which excludes these participants from the art contest, will deter their purchases. Did the Fish and Wildlife Service conduct any research

to support the notion that limiting the scope of the duck stamp art contest will increase sales and user participation?

Response: On May 8, 2020, the Service published a final rule governing the annual Duck Stamp Contest with the theme of "celebrating our waterfowl hunting heritage," and it will be mandatory that each art contest entry include an appropriate waterfowl hunting scene and/or accessory. The contest is open to all U.S. citizens, nationals and resident aliens who are at least 18 years of age by June 1, 2021. Final contest rules will be posted to https://www.fws.gov/birds/get-involved/duck-stamp/duck-stamp-contest-and-event-information.php.

Question 4: At our hearing, you offered to have Fish and Wildlife Service staff brief EPW staff on the status of the $12.3 million for international wildlife conservation activities that the Department has frozen. To date, my staff has not been able to get such a briefing scheduled. Would you please ensure that this briefing is scheduled as soon as possible?

Response: The Department of the Interior and the Service take the allegations of human rights violations very seriously. We continue to review the $12.3 million in pending grants and are working to develop appropriate safeguards and processes to minimize the risk of U.S. taxpayer funds being used for illegal activities. We are committed to briefing you and your staff as soon as we have a decision and a path forward.

Question 5: Restoration activities at Prime Hook National Wildlife Refuge provide an excellent example of how investing in natural infrastructure can help both wildlife and people become more resilient to climate change. The 4,000-acre barrier beach and wetland restoration effort improved habitat for fish and migratory birds, including threatened piping plovers. It has also helped mitigate flooding in the surrounding community, buffering the effects of sea level rise and extreme weather on coastal properties. Do you see any opportunities for the Fish and Wildlife Service to scale up similar efforts elsewhere in the Refuge System? How could Congress better enable these efforts?

Response: The National Wildlife Refuge System (NWRS) not only benefits wildlife, but also contributes to mitigating the effects of floods, hurricanes and other natural disasters. Wetland, prairie, and floodplain restoration reduce flooding from snow melt and major extended rain events across the United States. Beach dunes and coastal wetland restorations protect communities, businesses and major energy infrastructure at Prime Hook, San Francisco Bay, McFadden, Texas Point, and other coastal Refuges. Prescribed fire on forest, prairie and wetland habitats reduce fuels and reduce the spread and impact of wildfires.

Proactively maintaining the Department of the Interior's infrastructure will reduce the probability of failure during extreme weather events, as well as reducing costs for the American taxpayer across all public lands. The 2020 budget includes $107.5 million for the Fish and

Wildlife Service's planning and consultation activities, including reviews required under Section 7 of the Endangered Species Act to prevent delays in federal infrastructure projects. In continuing to support such efforts, Congress should consider further streamlining environmental and permitting reviews for activities to support our natural infrastructure.

Question 6: I have been very encouraged to hear about the Fish and Wildlife Service's participation and leadership in the "Conservation without Conflict" Initiative. As you know, this initiative leverages resources and engages private landowners, farmers and ranchers, hunters and anglers, conservationists and state and federal agencies in collaborative conservation. The goal is to prevent species from requiring protections under the Endangered Species Act, which creates a win-win for wildlife and land users alike. One of the budget line items that supports this initiative is the science support program, yet the administration has continuously proposed to eliminate this small but important stream of funding. Would you confirm that the administration intends to continue participating in Conservation without Conflict? Given elimination of the science support line item, how does the Fiscal Year 2021 budget support Conservation without Conflict? How can Congress best bolster this successful initiative?

Response: The Service is a partner in the Conservation without Conflict coalition, which includes more than 40 entities representing the interests of government, conservation, industry, landowners and recreation, all working on a collaborative approach to support working lands and conservation of at-risk and listed species. The Service will continue to support and be an active partner in the Conservation without Conflict coalition and build upon this collaborative approach to conservation. Many other programs contribute to this effort, including our Endangered Species, Partners for Fish and Wildlife, and Fisheries and Aquatic Conservation programs. The Service appreciates Congress' continued support for this coalition and broader efforts to conserve at-risk species.

Question 7: In January 2018, 17 former Interior officials from every administration since the early 1970s wrote to the Department of the Interior expressing serious concerns regarding the administration's Migratory Bird Treaty Act M-Opinion. The Central, Atlantic and Mississippi Flyway Councils sent similar letters to the Department, asking to suspend the M-Opinion and convene a broad group of stakeholders to determine a better path forward. Yet the Department has ignored these concerns and is moving forward with its rule to codify the legal opinion. Have you reviewed the concerns by Flyway Councils, states, and former officials? How will you take these concerns into account as the rule moves forward?

Response: The Service has reviewed the concerns by the Flyway Councils, states, former DOI officials, and other segments of the American public. The Service will appropriately consider all comments on the proposed rule as it continues to prepare a final rule.

Question 8: In addition to overseeing the implementation of United States laws, the Fish and Wildlife Service must carry out international treaty obligations, including for our migratory birds. How will you consider treaty obligations and the views of our treaty partners during the Migratory Bird Treaty Act rulemaking process?

Response: None of the four bilateral, migratory bird treaties that the U.S. holds with Canada, Mexico, Japan, and Russia explicitly mentions prohibitions of take that is not fully intentional. Each treaty prohibits the deliberate take of protected birds and describes a closed season, during which such take may not occur. The Migratory Bird Treaty Act of 1918, which is the United States' implementing legislation for these four treaties, does not explicitly include incidental take nor explicitly exclude it from the list of prohibited acts in 16 U.S.C. 703. However, the Service has made presentations to our treaty partners regarding our intention to undertake a rule-making process. The Service and the Department of State will honor requests for consultation or discussion from our Treaty partners.

Question 9: The Fish and Wildlife Service website currently reaffirms a 2015 commitment regarding sage grouse: "The Service has committed to monitoring all of the continuing efforts and population trends, as well as to evaluate the status of the species in five years." The Fish and Wildlife Service is supposed to undertake this review this year – in 2020. Would you confirm that the Fish and Wildlife Service will in fact be doing so?

Response: The Service is continuing to work with partners to support greater sage-grouse conservation. The Service continues to provide technical support to western states through the Western Association of Fish and Wildlife Agencies (WAFWA) in order to document conservation actions and their effectiveness for the greater sage-grouse. WAFWA is leading the effort to assess the range-wide status of the species. In light of the WAFWA effort supported by the Service, and because the species is neither federally managed nor petitioned for listing, the Service does not plan to conduct a separate status review for the species at this time.

Question 10: Earlier this year, the Fish and Wildlife Service took the first of what it said would be several actions to "modernize" its wetlands easements program. I am concerned that attempts to make changes to the easement program will go beyond modernizing mapping for older easements and will leave wetlands vulnerable to conversion to farmlands or oil fields. Would you explain specifically what additional actions the Fish and Wildlife Service is considering and how you will ensure these changes will not make valuable wetlands vulnerable?

Response: The Service is committed to being a good neighbor and remains committed to the wetland easement program, which represents a long-standing covenant between duck hunters, other conservationists, and the Service, to preserve waterfowl habitat using their duck stamp investment dollars. The Service is taking several steps to modernize and provide clarity to its

wetland easement program in order to deliver better government services for the American people. To further that goal, the Service has clarified how drain tile setback recommendations are calculated and how and when the Service will pursue legal action in the case of setback violations. The Service also clarified how it will initiate contact with landowners and how landowners can appeal alleged violations.

The Service has a statutory obligation to ensure that the United States' property rights are maintained for the purposes for which they are acquired. The actions to modernize the wetland easement program will not compromise this statutory obligation. The continued success of the wetland easement program requires the Service to diligently monitor easements for compliance while working with landowners to provide certainty, transparency, and understanding of the wetland easement program.

Question 11: I understand that National Wildlife Refuge law enforcement officers have been and are still being deployed to our southern border to conduct law enforcement activities outside the scope of their job responsibilities. At the same time, the Coastal Delaware Refuge Complex does not have a fulltime law enforcement officer. I am very concerned about this trend. Would you provide detailed information on how many law enforcement officers have been relocated to the southern border, from where each has been deployed, and what activities these officers are conducting?

Response: The Service supports Executive Order 13767, Border Security and Immigration Enforcement Improvements, and the Secretary of the Interior's priority of safety and security for visitors to public lands.

The Service has provided additional Federal Wildlife Officers (FWO) to the Southwest border ranging from 5 to 16 employees per rotation based on the level of illegal trafficking activity at these sites. Since 2018, 220 of the 261 FWOs have deployed on 37 total rotations to date.

The enhanced border efforts carried out by FWOs are consistent with the Service's organic legislation, the National Wildlife Refuge System Administration Act of 1966, as amended by the Refuge Improvement Act of 1997. The humanitarian efforts being carried out and the criminal activities being addressed by these efforts are in direct support of the protection of the visitors and staff at refuges on the U.S.-Mexico border, and are in furtherance of the Service's conservation mission. These efforts have resulted in over 21,000 human trafficking encounters, 101 narcotics smuggling interdictions, over 1,500 wildlife cases, and approximately 650 public safety cases. The diversity of these activities reflects the diversity of threats to National Wildlife Refuges across the country.

Question 12: A report about the National Wildlife Refuge System that the Fish and Wildlife Service released in 2019 highlighted the economic benefits of increasing refuge tourism for local communities. These benefits were calculated to be $3.2 billion in Fiscal Year 2017, a significant increase from the $2.4 billion estimated in Fiscal Year 2011, and this spending supported over 41,000 jobs and generated about $1.1 billion in employment income. Non-consumptive activities such as hiking, bird watching, and photography account for the overwhelming majority (81%) of refuge visits, and about 86% of total recreation-related expenditures are generated by non-consumptive activities on refuges. What, if anything, is the Fish and Wildlife Service doing to enhance and encourage access for these increasingly popular and economically beneficial non-consumptive activities on refuges?

Response: Improving public access to hunting, fishing and other outdoor recreation on national wildlife refuges and fish hatcheries has been a key focus of the Department of the Interior under this Administration. The Service improves access to public lands by constructing and maintaining recreation infrastructure such as roads, trails, parking areas, observation decks, and boat ramps. During the current administration, the Department has opened over 4 million acres of land and water to new or additional outdoor recreation opportunities — the single largest expansion on Service-managed lands in recent history. We are committed to continuing expanding the availability of these unique and magnificent places for wildlife dependent recreation for the benefit of the American people.

On March 12, 2019, President Trump signed into law the John D. Dingell Jr. Conservation, Management, and Recreation Act (S.47, the Dingell Act), which directs the Service and other federal land management agencies to develop a priority list of lands that have significantly restricted public access, or no public access, where that access could be improved. The public is encouraged to identify national wildlife refuges, fish hatcheries, and other lands managed by the Service that meet the complete criteria. On February 10, 2020, the Service announced that it is seeking the public's assistance to develop a list of its managed lands that would benefit from new or increased access routes.

In addition, the Service provides programs that encourage recreation activities. For example, the Urban Wildlife Conservation Program provides opportunities for refuge neighbors and local communities to enjoy lands and waters as places to visit with friends and family. Urban refuges offer expanded programming to attract new visitors, such as art-based activities and hosting local cultural events.

The Service is also piloting outdoor skills centers on select refuges. Outdoor Skills Centers will provide opportunities to try new recreation activities – from snowshoeing to wildlife photography.

Question 13: Habitat Conservation Plans (HCPs), which are developed considering section 10(a)(1)(B) of the Endangered Species Act, provide a voluntary pathway for streamlined permitting for the economic activities covered by a plan while addressing the conservation actions needed to ensure long-term survival of listed species likely to be affected by the proposed project. Because HCPs take a landscape-scale conservation approach, these plans typically benefit many other species as well. HCPs are a collaborative tool used to bring competing interests, including developers and conservationists, to the table to provide long-term certainty for all parties. How is the US Fish and Wildlife Service promoting the use of Habitat Conservation Plans under section 10(a)(1)(B) of the Endangered Species Act?

Response: Habitat Conservation Plans (HCPs) are a valuable tool under the ESA to help balance listed species conservation with important economic development activities. The Service provides a number of resources to assist the public and partners with the development and implementation of HCPs. The Service works closely with local and nationally organized coalitions of HCP permit holders, applicants, practitioners, and consultants whose purpose is to further promote the use, effectiveness, and support for large-scale HCPs as local solutions to facilitate economic development and the conservation of listed species and their habitats. The Service also provides grant funding to assist states and local communities to develop HCPs through the HCP Planning Assistance grants under the Cooperative Endangered Species Conservation Fund (CESCF).

The Service also provides significant information for use by the public and our partners through our HCP national website (https://www.fws.gov/endangered/what-we-do/hcp-overview.html). This site contains useful information and resources about HCPs, including the online version of the 2016 HCP Handbook, which provides the most current recommendations to Service staff and others working on HCPs.

Question 14: For which fiscal years that Congress has provided funding for the Cooperative Endangered Species Conservation Fund has the Fish and Wildlife Service not yet issued a Notice of Funding Opportunity, selected awardees, and/or distributed funding? If funds from any fiscal year other than 2020 are noted in response, would you provide the Committee with a date by which awardees will be selected and notified?

Response: The Service has completed the awarding of funds for FY 2018 and FY 2019 CESCF Traditional funding. The Service posted the FY 2020 CESCF Traditional funding (F20AS00070) on April 3, 2020 and it closed on July 3, 2020.

The Service announced awardees for FY 2018 and FY 2019 CESCF non-Traditional funding in March 2020 and has distributed funds to selected States and Territories. A Notice of Funding Opportunity for FY 2020 CESCF Non-Traditional funding is being drafted and will be posted this summer.

Question 15: The Freedom of Information Act (FOIA) is a key tool in ensuring citizens have access to important government documents and communications so that they can meaningfully participate in decision making processes. Please provide a list of all outstanding FOIA requests, along with the date on which the request was received, the subject of the request, the expected date of complete response, and whether the request is currently subject to FOIA litigation.

Response: The Department takes its responsibilities under the Freedom of Information Act (FOIA) very seriously.

Questions from Senator Booker

Question 16: A study released in the journal Science last September found that North America's bird population has declined by 3 billion birds since 1970, representing a loss of more than 1 in 4 birds on the continent. And a report from October by the National Audubon Society found that two-thirds of North America's birds are threatened by climate change. Yet the Fish and Wildlife Service (FWS) recently proposed a rule to codify the 2017 Solicitor's Opinion on the Migratory Bird Treaty Act, reversing decades of bipartisan policy by ending protections for birds from avoidable industrial hazards by exempting all incidental take, including major oil spills.

Current Council on Environmental Quality regulations require that an Environmental Impact Statement (EIS) "be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 CFR §1502.5. It is also expected that the draft EIS accompany the proposed rule during the informal rulemaking process. However, in this instance it appears that the comment deadline for the proposed rule ends at the same time as the deadline for the EIS notice of intent.

a. Can you please explain what scientific analysis the FWS conducted prior to the release of this proposed rule to assess the proposed rule's impact on bird populations?

Response: In the proposed rule, the Service requested information from the American public, which aided in the environmental analyses undertaken pursuant to the National Environmental Policy Act. Analyses of management alternatives are presented in the draft Environmental Impact Statement (EIS).

b. What is the anticipated timeline for the EIS?

Response: The Department is currently evaluating its options for next steps. As noted below, on July 20, 2020, the 45-day public comment period closed for the Draft EIS.

c. At what stages of the EIS process will the FWS allow for public comment?

Response: The public had opportunities to comment on the Notice of Intent to prepare an Environmental Impact Statement (EIS) and on the draft.

d. Will additional public comment on the proposed rule be allowed by the FWS upon completion of the EIS?

Response: There was a public comment period on the proposed rule that closed on March 19, 2020. On July 20, 2020, the 45-day public comment period closed for the Draft EIS. All public comment periods are now closed.

Question 17: Congress provided $1 million to the FWS in FY2020 for the Theodore Roosevelt Genius Prizes to address issues such as non-lethal management and protection of endangered species. You mentioned in your testimony that FWS is diligently working on implementing this new authority.

a. What is the status of FWS outreach to the National Fish and Wildlife Foundation related to implementation of these grants?

Response: The John D. Dingell, Jr. Conservation, Management, and Recreation Act (Pub. L. 116-9) states, "The Secretary shall offer to enter into an agreement under which the National Fish and Wildlife Foundation (NFWF) shall administer the prize competition." The Service continues to work with NFWF on an agreement to implement the Theodore Roosevelt Genius Prize Competition in FY 2020.

b. What is the anticipated timeline for FY2020 grant applications and awards?

Response: The Service plans to enter into a cooperative agreement with the NFWF in FY 2020. That agreement will transfer prize funds to NFWF and include the responsibilities of both the NFWF and the Service. The call for nominations for the Theodore Roosevelt Genius Prize Advisory Council and Advisory Boards has been published in the Federal Register and closed on June 11. Once the Advisory Councils and Boards are established, they will begin determining problem statements and accepting applications. We anticipate prize selections in 2021.

Question 18: The FWS has initiated a 5-year status review of the Grizzly bear in the lower-48 states. Grizzlies residing in the Northern Continental Divided Ecosystem (which includes Glacier National Park) and the Greater Yellowstone Ecosystem (which includes Yellowstone and Grand Teton national parks) will be considered as part of the review as both populations are protected under the Endangered Species Act. The potential genetic linkage between these two grizzly populations is of increasing interest due to the Federal District Court ruling (*Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018)) which found that, "The Service's determination that it need not provide for either natural connectivity or translocation is contrary to the best available science".

a. Will the FWS address the necessary habitat and population (mortality) management needed to connect the Northern Continental Divided Ecosystem and the Greater Yellowstone Ecosystem as part of the 5-year status review?

Response: Five-year status reviews assess each threatened and endangered species to determine whether its status has changed since the time of its listing or its last status review, and whether it should be classified differently or delisted. In order to make this status recommendation for grizzly bears, the Service will take into consideration the best available scientific and commercial data on grizzly bears across the lower-48 states to ensure the species' listing classification is accurate. This includes an examination of threat status, threat trends, and conservation measures that have benefited the species, including any threats related to genetic introgression or reduced reproductive fitness. Genetic health or population connectivity will be addressed in any separate determinations to delist or reclassify one or more grizzly populations.

Question 19: Lands along the border under the jurisdiction of the FWS are slated for construction of new border wall. In some cases, this construction has already started. I am very concerned about the short-term and long-term impacts the construction and wall will have on the public lands that the agency is entrusted with protecting, as well as the wildlife and communities that call the border region home. For the lands under your jurisdiction, including the Lower Rio Grande National Wildlife Refuge, the San Bernandino National Wildlife Refuge, and the Cabeza Prieta National Wildlife Refuge:

a. Has the FWS played any role in the construction process? Did the agency or individual units submit official comments? If yes, can you please provide me with a copy of the comments?

Response: The Service is in regular communication with the Department of Homeland Security (DHS) through U.S. Customs and Border Protection (CBP) on barrier construction occurring at national wildlife refuges along the United States-Mexico border.

b. Has the FWS performed any analysis of the direct or indirect impacts on plant and animal habitat, such as area (acres) of habitat and numbers of species impacted, by this construction of new border wall? If yes, can you please provide me with a copy of this analysis?

Response: Infrastructure construction on federal lands requires either completion of environmental reviews to assess and minimize impacts to wildlife and their habitats or a waiver of such reviews through appropriate authorities. Pursuant to Public Law 102-408, the Secretary of Homeland Security issued a series of environmental waivers for various environmental laws to expedite construction of border infrastructure on the southwest international border with Mexico, including endangered plants in Texas and Arizona.

The Service has worked with CBP to identify potential impacts and conservation recommendations to avoid, minimize and offset these potential impacts to trust species.

Prior to the waiver, the Service engaged in formal consultation under section 7 of the ESA for border projects. The associated documents are all available on the Arizona Ecological Services Field Office website: https://www.fws.gov/southwest/es/arizona/Biological.htm.

c. Has the FWS performed any analysis of the direct or indirect impacts on wildlife movement, and how those impacts impede recovery of Endangered Species Act-listed species? If yes, can you please provide me with a copy of this analysis?

Response: In Arizona, the Service has performed several analyses specific to the jaguar. Biologically, jaguars can be considered a surrogate for other larger carnivores, including the endangered ocelot. The jaguar critical habitat rule, https://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/Jaguar/2014-03485_Fed_Reg_Jag_fCH_2014-3-5.pdf, includes information regarding the impacts of destroying or modifying critical habitat, including severing connectivity of habitat, for the species.

In 2008, the Service completed a short study in Texas on bobcats to see how border wall construction may impact endangered species like the ocelot prior to original wall sections being constructed. The study is attached.

d. Has the FWS performed any analysis of the direct or indirect impacts on hydrology, and the consequences for wildlife including ESA listed species, of this construction of new border wall? If yes, can you please provide me with a copy of this analysis?

Response: In Arizona, five listed aquatic species - beautiful shiner, Yaqui chub, Yaqui catfish, Yaqui/Gila topminnow, and San Bernardino springsnail – are dependent on deep aquifer water at San Bernardino National Wildlife Refuge. The CBP and the U.S. Army Corps of Engineers are working with the construction contractor on estimated water usage requirements for barrier construction as well as with San Bernardino National Wildlife Refuge to mitigate the impacts of groundwater use for the project.

The Service has expressed concerns about predictable flooding and the sustainability of border wall construction across arroyo drainages in Arizona and Texas. The Service is coordinating with CBP to address potential impacts to wildlife trapped behind the fence during high water events. Hydrological analysis has not been conducted in Texas.

e. Has the FWS performed any analysis of the direct or indirect impacts that new lighting associated with the new border wall will have on wildlife including ESA listed species? If yes, can you please provide me with a copy of this analysis?

Response: No, the Service has not performed an analysis on these impacts. In Texas, the Service asked CBP to analyze lighting impacts for the endangered ocelot and jaguarundi and were informed that CBP's analysis will be used in the wall design.

f. Has the FWS performed any analysis of the direct or indirect impacts that new infrastructure associated with the border wall, such as power substations, will have on wildlife including ESA listed species? If yes, can you please provide me with a copy of this analysis?

Response: No analysis has been conducted on Texas or Arizona national wildlife refuges.

g. Has the FWS performed any analysis of the direct or indirect impacts of the new border wall on past Service investments in the refuges, including both border infrastructure such as vehicle barriers and investments in wildlife habitat restoration, acquisition and management? If yes, can you please provide me with a copy of this analysis?

Response: The Service has not done an analysis of this issue.

h. Has the FWS performed any analysis of the direct or indirect impacts of the new border wall on the experience of visitors to the refuges? If yes, can you please provide me with a copy of this analysis?

Response: No analysis has been conducted in Texas. However, the Service has provided CBP information regarding potential impacts to visitor use. Additional information on this issue can be found in the August 12, 2019, attached response. No similar review has been conducted for Arizona refuges.

Questions from Senator Cramer

Director's Order

Question 20: According to the Director's Order on January 3rd, throughout 2020 the FWS will be sending updated, modern maps to landowners who have pre-1976 easements. These maps will be accompanied by the first-ever appeals process so landowners can make sure the maps are done right. Please describe the quality of the pre-1976 maps and briefly explain why they need to be replaced?

Response: The pre-1976 maps did not clearly identify the location of protected wetlands. The updated maps now clearly depict the protected wetland areas, overlaid on a high-quality aerial image, and list the acreage of each wetland area that is subject to the wetland easement.

Question 21: Why is it important to indicate the acreage limits on the maps you will be releasing?

Response: Clearly identifying acreage limits on the maps will provide certainty to the landowner concerning the location of protected wetlands as well as the size of each covered wetland.

Question 22: Will the listed acreage in the new maps be limited to the easement summary acreage consistent with the 1996 Johansen case?

Response: Yes.

Question 23: The December 23, 2019 Director's Order says the new maps and appeal instructions will be delivered by certified mail. Once a landowner signs for the package, they have 40 days to reach out to the FWS. Is it accurate to state even the simplest or most basic question to the FWS would stop the 40-day shot clock and the FWS would be obligated to work with them toward a resolution?

Response: Yes, the Service is committed to working with landowners to resolve questions they may have in a timely, fair manner.

Question 24: If a landowner brings comparative wetland documentation from the NRCS or a hydrologist for example, will the FWS take a comprehensive approach and look at all the available documentation to reach an informed decision that aligns with the original easement contract?

Response: Yes, the Service will consider all relevant data when making easement determinations.

Question 25: If a landowner accidentally misses a deadline or the FWS misses their inquiry, the FWS will not use the appeal process deadline as an excuse to not work with property owners?

Response: The Service is committed to working with landowners to resolve any issues in a timely, fair manner.

Question 26: Further, the appeals process is more about reaching consensus than enforcing a deadline?

Response: The appeals process provides an objective, fair forum for all parties to work toward resolution.

Question 27: Should a landowner file an appeal and the refuge manager, regional director, or director does not make a decision within the time allotted to them, will the agency defer to the landowner or will it automatically progress to the next stage in the appeal process or otherwise?

Response: The Service is committed to meeting established timelines in a fair manner.

Question 28: Please confirm that the final decision of the Service Director will be considered a final agency action and therefore judicially reviewable under the Administrative Procedure Act?

Response: We believe a final decision by the Director of the Service would be considered a final agency action and therefore eligible to be reviewed by a federal court pursuant to the Administrative Procedure Act.

Question 29: Regarding the timing of the release of the new maps and appeals process, will they be released as soon as all the maps are completed for each landowner or will they be released on a more regional basis or otherwise?

Response: To facilitate a timely release, maps will be sent to landowners on an individual basis.

Question 30: Further, if there are instances where the FWS and/or the landowner could utilize these updated maps in a current legal dispute or other imminent situation, would the FWS be able to expedite those maps?

Response: Yes, maps can be expedited upon request.

J. Clark Salyer National Wildlife Refuge

Question 31: The FWS has a policy to allow for grazing on lands at the J. Clark Salyer National Wildlife Refuge. It's my understanding that historically, the FWS would simply contact ranchers in the area they believed would be interested and capable of grazing the land. More recently, the FWS has instituted an open, competitive process where local ranchers apply and are awarded the opportunity to receive a five-year grazing permit. However, the first two questions on the scored application seem skewed to those already grazing and participating in FWS refuge management. The questions are as follows: "Question 1: Within the last year, have you participated in the planning, infrastructure maintenance, or grazing management of this refuge unit? Question 2: Within the last three years, have you been the permittee of record on other FWS lands?" The FWS has stated these questions "help gauge the potential cooperator's familiarity with the refuge and the FWS; [they're] aimed to help streamline the application process and identify potential cooperators that might be suitable for the refuge's grazing program based on experience with refuge lands and/or other Service lands." Service policy (620 FW 2 Cooperative Agricultural Use) outlines objective criteria that may be used in a cooperative agriculture and use application which includes experience in the type of agricultural (i.e. grazing) opportunity posted, especially personal experience on National Wildlife Refuge System lands or comparable land. However, this approach provides preference for those who have prior experience while potentially barring those who are trying to get approved for the first time. Would you agree that these scored questions can disadvantage many ranchers who may otherwise be just as capable of meeting objective grazing criteria?

Response: The cooperative grazing program is designed to support the Service's habitat management objectives while also providing benefits to the ranching community. The Cooperative Agricultural Use policy provides objective criteria by which we evaluate applications for grazing privileges, and prior experience is only one of ten criteria used during the selection process; it does not prevent other capable ranchers from meeting the criteria.

Question 32: Will you commit to reviewing and revising these questions, even removing them, for future applications to ensure a fair, open, and competitive process?

Response: Yes, the Service commits to reviewing and revising the grazing program scoring sheet as appropriate. We will also complete our commitments to current cooperators who hold special use permits.

CARPE

Question 33: The Central African Regional Program for the Environment (CARPE) has provided U.S. government funds to protect wildlife throughout the Congo Basin since 1995. On September 30, 2019, the Department of the Interior (DOI) placed a hold on $12.3 million in obligated funds that were transferred to the U.S. Fish and Wildlife Service (FWS) by the U.S. Agency for International Development (USAID) to implement CARPE. DOI cited a lack of internal controls, the need for a substantial program audit, and a delay in receiving the funds from the USAID as reasons for the hold on the funds. What is the status of the audit, timing for implementation of internal controls and expected timeframe for the release of the hold on these funds?

Response: The Department and the Service take the allegations of human rights violations very seriously. We continue to review the $12.3 million in pending grants and are working to develop appropriate safeguards and processes to minimize the risk of U.S. taxpayer funds being used for illegal activities.

Question 34: On May 6, 2019, House Natural Resources Committee Chairman Grijalva and Ranking Member requested the Government Accountability Office (GAO) review whether federal funding of anti-poaching efforts has supported human rights abuses following reports that rangers raped and tortured villagers inside the DRC's Salonga National Park. What is the status of the GAO report, is FWS fully complying with the investigation and does the FWS plan to release the funding before the GAO report and recommendations are completed?

Response: The Service and the Department are cooperating fully with the Government Accountability Office (GAO) on their investigation. The Department's entrance conference was held on October 9, 2019. The Department is reviewing pending grants and developing appropriate safeguards and processes concurrently with the GAO investigation.

Question 35: FWS delivers wildlife protection funds as a grant or cooperative agreement recipients outside the FWS organization. Other than the original notice of award that outlines terms and conditions, is it possible to verify taxpayer dollars are not misused by recipients and subrecipients for human rights violations?

Response: All awards with funds appropriated under the Foreign Assistance Act via the transfer from USAID to implement CARPE are subject to Leahy Vetting and sanctions related to the Trafficking Victims Protection Act, which guard against the risk of human rights violations. In addition, the Service conducts compliance monitoring for awards, such as evaluation of technical and financial reports, site-based monitoring to ground truth reports and verify indicators of compliance/noncompliance, and third-party project evaluations. Should grantees be found to be out of compliance with our terms and conditions, including legal violations, the Service can withhold payments, and initiate suspension or debarment proceedings. Other remedies are available as well. Additionally, the Department and the Service are working to develop additional, appropriate safeguards and processes to minimize the risk of U.S. taxpayer funds being used for illegal activities, including human rights violations.

Question 36: Both the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2020 and the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2020 direct the Department of State, DOI, and USAID to implement policies and procedures designed to protect human rights and indigenous communities in order to utilize the obligated funds transferred between the departments for implementation of CARPE. The report language for the bill also requires that the agencies report to the Committees within 45 days on the status of these policies and procedures. What is the status of implementing these policies and procedures?

Response: The Department is coordinating with USAID to discuss safeguards and potential regulatory changes.

Perpetual Conservation Easements

Question 37: Last year, President Trump signed S. 47 into law, the John D. Dingell, Jr. Conservation, Management, and Recreation Act. Included in this law is a section to create a conservation incentives landowner education program, which requires the U.S. Fish and Wildlife Service (FWS) to disclose to landowners all Federal conservation options available to them on their property, not only perpetual easements. Unfortunately, the FWS only offers perpetual easements, while only USDA offers termed conservation easement options. Currently, landowners interested in taking an easement out on their property are only offered perpetual easement agreements that permanently limit the land's production practices, even when ownership changes hands. Does FWS have the authority to offer termed easements?

Response: The Service has periodically tested short-term wetland easement projects and concluded that generally, short-term easements merely delayed drainage of wetlands and thus are of limited value for securing a stable habitat base over the long term. Repeatedly paying for the same habitat conservation through short-term easements would not allow the Service to achieve the long-term habitat goals and objectives needed to sustain healthy migratory bird populations and would not be a prudent expenditure of taxpayer funds. Several less-than-perpetual conservation options are available through other Federal and State programs and conservation partners, so landowners can pursue a full suite of easement options.

Question 38: Would you consider developing a FWS termed-easement option, similar to USDA conservation programs?

Response: Several less-than-perpetual conservation easement options are already available to landowners through other Federal and State programs and conservation partners. The purpose of the Service's perpetual easements is to provide long-term landscape-scale protection as authorized by 16 U.S.C. §718d. Short-term easements would not allow the Service to achieve the long-term habitat goals of sustaining healthy migratory bird populations. In addition, a continual backlog of approximately 900 landowners interested in the Service's perpetual easements demonstrates the ongoing support for the use of perpetual easements.

Question 39: What is the status of the development of the conservation incentives landowner education program?

Response: The Service is continuing to develop conservation incentives landowner education program materials per the requirements of the Dingell Act.

Question 40: Will the conservation incentives landowner education program include termed USDA conservation easements as viable options for landowners to consider?

Response: Yes, the Service's conservation incentives landowner education program materials plan to reference conservation programs offered by the U.S. Department of Agriculture.

Question 41: Will the conservation incentives landowner education program include any preferred options for landowners or will all options be presented in an equal fashion?

Response: All options will be presented in an equal fashion in the Service's conservation incentives landowner education program materials.

Question 42: Other than FWS perpetual easement, what other Federal easements will be covered in the conservation incentives landowner education program?

Response: The Service's conservation incentives landowner education program materials will include information on other Service programs that provide technical and financial assistance to private landowners. The materials will also reference conservation programs offered by the U.S. Department of Agriculture.

Questions from Senator Duckworth

Question 43: The U.S. Fish and Wildlife Service plays a critical role in protecting and enhancing wildlife and their habitats for the benefit of the American people. However, many Americans are not able to use public lands due to a lack of infrastructure or programming that would create accessibility in the National Wildlife Refuge System. I am interested in what the Fish and Wildlife Service has done to help individuals with disabilities access nature.

a. **How are differently abled individuals taken into account for allocation of funding for programming and infrastructure to create accessibility in the National Wildlife Refuge System?**

Response: The Service incorporates Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) with all major infrastructure renovation and new construction projects. The Service is committed to making information available to all audiences. We continue to revise our websites and social media platforms to be compliant with Section 508 of the ADA. Exhibit designers use Smithsonian Guidelines for accessible exhibits. We are piloting orientation signage that addresses needs for people with low English proficiency.

The most effective interpretation and education programs involve approaches to reach the largest number of participants. We welcome all individuals on Service lands and try to meet individual needs to our best ability – from providing sleds for students with disabilities to participate in snow-based activities at Fergus Falls Wetland Management District in Minnesota to working with the National Park Service to provide beach-accessible wheelchairs on Chincoteague National Wildlife Refuge.

b. **Will you report back to my Subcommittee Fisheries, Water and Wildlife with specific steps the Fish and Wildlife Service will take to expand accessibility infrastructure and programming?**

Response: Yes.

Questions from Senator Markey

Question 44: In a letter sent to you and Fish and Wildlife Service Director Aurelia Skipwith on January 23, 2020, I asked you to fulfill the commitments you made to me to meet with the Town of Chatham to discuss the management of the Monomoy National Wildlife Refuge. I have not received a response to this letter or to my previous inquiries as to your plans to schedule this meeting, which is important to state interests. Director Skipwith reportedly visited the refuge in September 2019 as part of a trash clean-up event—unfortunately, neither my office nor town officials were notified about this visit, and no meeting on the Monomoy National Wildlife Refuge took place. Will you fulfill your commitment and schedule a meeting with the Town of Chatham in Massachusetts before March 1, 2020?

Response: Director Aurelia Skipwith and I remain fully committed to fulfilling the promises we made to you during our confirmation hearings. In the meantime, refuge staff will continue to work with the Town of Chatham on projects of mutual benefit to ensure a quality experience for visitors and management of resources.

Question 45: The Department of Interior has discounted the concerns of U.S. Fish and Wildlife Service officials on how oil and gas leasing will affect polar bears in the Arctic National Wildlife Refuge. This is reflective of a broader overall trend in which the Department of the Interior does not always give the Fish and Wildlife Service a seat at the table when discussing public land management proposals, even when those proposals have clear Endangered Species Act implications.

a. As Assistant Secretary for Fish, Wildlife and Parks, what steps have you taken to ensure that the science produced by Service employees is given proper consideration in public land management decisions that involve multiple Department of the Interior agencies?

Response: Science plays a vital role in the Department's mission, and the Service's science related to fish, wildlife, and habitat plays an important role in land management decisions. The Service's regulatory analyses to fulfill statutory responsibilities—including those related to the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act—rely on the best available scientific information. I have supported and will continue to support a full and open analysis of proposed activities and the use of the best available scientific information to avoid, minimize and mitigate impacts to ensure we meet our statutory mandates.

Question 46: In a February 2018 memo, the U.S. Fish and Wildlife Service identified "Priority Information Needs for the Arctic National Wildlife Refuge 1002 Area," identifying a studies needed to inform the Bureau of Land Management's Environmental Impact Statement. Among its priority information needs, the Service included FY 2018 activities related to studying Human-Polar Bear Interactions and Polar Bear Den Detection and Monitoring, the latter of which can be used to assess the effectiveness of den detection survey methods.

a. Have these studies been conducted?

Response: The Service continues making progress in addressing the priority research needs, including those related to human-polar bear interactions. A study was recently published in the peer-reviewed Journal of Wildlife Management (https://doi.org/10.1002/jwmg.21800) that identifies how seismic surveys can be designed to minimize impacts to denning polar bears, considering regions of high density polar bear denning habitat in the 1002 Area. The Service is also currently evaluating existing mitigation measures and considering potential new ones that can be applied to polar bears in the 1002 Area. The USGS has an ongoing study to understand movement patterns of polar bears around industrial facilities based on existing movement data.

The Service has also made significant progress in developing new science to inform the issue of monitoring and detecting polar bear dens. The Service and USGS conducted a re-analysis of data on the efficacy of aerial survey methods for detecting dens, and that re-analysis was recently published in the same article in the Journal of Wildlife Management described above. The Service is also collaborating with other Federal, state, and industry partners on an additional study designed to determine how effective new aerial infrared equipment is at identifying polar bear dens and factors affecting detection (e.g., snow depth, weather conditions). This study was conducted in the winter of 2019/2020, and data analysis is currently ongoing.

b. If not, why not or by when will they be conducted? If yes, what were the main conclusions of these studies?

Response: The study evaluating the relative impact of seismic survey designs on denning polar bears found that seismic surveys that provide explicit temporal and spatial information on their activities and explicitly consider avoiding areas with the highest density of polar bear dens until late in the denning season significantly reduced potential disturbance to denning bears. There are currently no results available for the den detection study conducted this winter because those data are still being analyzed. Similarly, the work to assess mitigation measures has just begun so no results are available yet.

Questions from Senator Merkley

Question 47: We see the impacts of climate chaos all around us. The recent floods in the heartland, drought in other areas, wildfires in my home state of Oregon, and on and on. Meanwhile, greenhouse gas emissions in the United States continue to rise.

a. Do you believe it is important to quickly address and mitigate the underlying factors driving climate chaos?

Response: The Department's role is to follow the law in carrying out our responsibilities using the best science. Congress has not directed us to regulate carbon emissions. The laws governing Interior require us to manage our onshore federal resources on the basis of multiple use and sustained yield, which includes energy development. We are carrying out that statutory mission and will do so until Congress directs us differently. The Service has energy efficiency programs to reduce energy usage in vehicles and buildings and employs management actions such as tree planting and water management that create and restore wildlife habitats with the additional benefit of reducing carbon in the atmosphere.

b. Do you think that the Department of the Interior's choice to pivot away from addressing climate chaos puts our lands, waters, and wildlife further at risk?

Response: The Service is working to safeguard the lands, waters, and wildlife under its jurisdiction for the American people and the communities that depend on them, in a changing climate. The Service works through many partnerships to guide adaptation on National Wildlife Refuges and other lands across the country. We are working to safeguard coastal Refuges from sea level rise and extreme weather and working with private landowners to restore streams and wetlands that reduce flood impacts. We work hand-in-hand with the USGS Climate Adaptation Science Centers, which are fully integrated with both the Service and States across the country.

Question 48: Under this Administration (since January 20, 2017), has there been any direction from any political appointees within the Department of the Interior to remove the words "climate change" from any U.S. Fish and Wildlife Service documents including, but not limited to, the Service Manual?

a. If so, please indicate the specific documents from which those words were removed, and provide the rationale for their removal.

Response: The Service has not been directed to remove the words "climate change" from any documents, including the Service Manual.

Question 49: In your testimony, you stated: "Fish, wildlife, plants, and their habitats face many stressors and threats across the nation and around the globe, including habitat loss, invasive species, wildlife disease, wildlife trafficking, and a changing planet."

a. When you use the phrase "a changing planet," do you also acknowledge that the vast majority of scientists across the globe believe humans, and particularly fossil fuels, are the major drivers behind that change?

Response: Yes, I acknowledge that the climate is changing, and man is contributing to that change.

b. How is that fact informing your decision-making in your role as Assistant Secretary for Fish and Wildlife and Parks?

Response: Fish, wildlife, and plants and their habitats provide jobs, food, clean water, storm protection, and many other benefits to people, communities and economies across the nation. The Service and the Department are working to safeguard these valuable natural resources for the American people and the communities that depend on them, in a changing climate.

Question 50: Climate chaos is leading to the destruction of enormous swaths of key wildlife habitat, both around the globe and here in the United States. This scale of destruction, and the likelihood that we will continue to see similar events due to our changing climate, should be a wake-up call that we must proactively preserve as much habitat as possible for imperiled species.

a. **How do you reconcile this increasingly urgent imperative with the Department of the Interior's recent regulatory changes that greatly restrict the amount of critical habitat that can be designated for an ESA-listed species?**

Response: The recent regulatory changes do not greatly restrict the amount of critical habitat that can be designated for listed species. As the Act requires, we designate critical habitat based on the best scientific data, after taking into consideration the economic impact, the impact on national security, and any other relevant impacts. The recently revised regulations did not change the process for designating occupied critical habitat. For unoccupied critical habitat as required by the ESA, we designate unoccupied areas when they are essential to the conservation of the species. In circumstances where the best scientific data available indicate that a species may be threatened by climate change, we will consider this information in determining what areas meet the definition of "critical habitat."

Question 51: We know that sage grouse populations are increasingly threatened by both human and non-human changes to their environments, including the ever-present threat of uncharacteristic fires.

a. How does the Department of the Interior view those threats and how has the agency prepared to preserve sage grouse populations and their habitats?

Response: Working with our partners across the West, we seek to preserve rangeland integrity for the benefit of wildlife and people, which includes addressing the threat of invasive annual grasses and the resulting wildfires on the sagebrush landscape. The Department of the Interior's Sagebrush Ecosystem Science Framework includes guiding principles to address multiple threats to sagebrush and sage-grouse, including wildland fire.

Question 52: Being from a coastal state, marine issues are vital to the economy and well-being of my state and others.

a. How is the Department of the Interior contributing to any new or ongoing efforts to protect marine and coastal areas?

Response: The Service's Coastal Program works with communities to voluntarily restore and protect habitats that benefit fish, wildlife and people. Often collaborating with other federal and state agencies and conservation partners, we primarily provide technical assistance to communities to protect marine and coastal habitats.

Since 2015, the Service has helped local communities in Oregon to protect nearly 880 acres of coastal habitats. For example, Service worked with The Wetlands Conservancy to protect salt marshes in the Poole Slough in Lincoln County, Oregon. These marshes have a high conservation priority due in part to the loss of 70% of this habitat.

The Service worked with the Hawaii Department of Land and Natural Resources to help a local community on Kaua'i to develop a management plan and train residents to oversee and manage the Hā'ena Community-Based Subsistence Fishing Area. The first of its kind in Hawaii, this community-managed fishing area serves as a model for other local communities to co-manage their marine resources with their state governments.

The Service also participates in inter-governmental working groups, allowing each agency to contribute within their mandates to benefit the coastal environment. Some examples of this collaboration are the Marine Protected Area Center, Coral Reef Task Force, and inter-agency working groups on biodiversity, coastal wetlands, marine debris, ocean acidification, and harmful algal blooms.

The Service also administers the John H. Chafee Coastal Barrier Resources System (CBRS), which Congress established in 1982 through the Coastal Barrier Resources Congress Act. This non-regulatory, map-based program identifies undeveloped coastal barriers and removes federal incentives to build in these fragile areas that are subject to hurricanes and erosion. These important ecosystems are not only home to vital natural resources such as coastal wetlands, diverse wildlife, and flyways for migratory birds; they also protect public safety and the substantial investments within coastal communities that are vulnerable to intense storms and hurricanes.

Questions from Senator Rounds

Question 54: Mr. Wallace, in March 2019, President Trump signed into law the John D. Dingell, Jr. Conservation, Management, and Recreation Act, which permanently authorized the Land and Water Conservation Fund.

Included in this law is a provision to create a conservation incentives landowner education program, which requires the U.S. Fish and Wildlife Service to disclose to landowners all conservation options available to them on their property, not only perpetual easements.

Unfortunately, the U.S. Fish and Wildlife Service does not offer any termed easement options to landowners interested in participating in conservation practices. Currently, landowners interested in taking an easement out on their property are only offered perpetual easement agreements that permanently limit the land's production practices, even when ownership changes hands.

Would you consider developing additional conservation options for landowners who do not want to permanently take land out of production—such as a termed-easement of 20 or 30 years?

a. If so, what would you suggest be the ideal term of such easement?

Response: The Service has determined that repeatedly paying for the same habitat conservation through short-term easements would not allow the Service to achieve the long-term habitat goals and objectives needed to sustain healthy migratory bird populations.

b. Conversely, if you oppose developing a termed easement as an option for landowners, could you expand on your concerns?

Response: Several less-than-perpetual conservation easement options are already available to landowners through other Federal and State programs and conservation partners. The purpose of the Service's perpetual easements is to provide long-term landscape-scale protection as authorized by 16 U.S.C. §718d. Short-term easements would not allow the Service to achieve the long-term habitat goals of sustaining healthy migratory bird populations.

Questions from Senator Sullivan

Question 55: Despite the listing of the polar bear under the ESA, the State of Alaska retains a trust responsibility over polar bears and their habitats. Despite this, the State of Alaska has been excluded for participating in discussions regarding the incidental take application for seismic work in the Arctic National Wildlife Refuge. This ensures that information and expertise the State has is not incorporated into the decision processes the Service is making regarding polar bears. What steps will you take to ensure a more cooperative engagement occurs between your agency and the State of Alaska?

Response: The Service views the State of Alaska as an important partner and welcomes information from them that could inform the promulgation of regulations under discussion. The promulgation of incidental take regulations for seismic operations in the Arctic National Wildlife Refuge was put on hold at the request of the applicant. However, the Service's staff met with the State several times to discuss the analytical approach for considering the potential impact of the proposed seismic operation on polar bears.

The Service is currently working with the Alaska Oil and Gas Association on development of a new set of five-year Incidental Take Regulations for the Southern Beaufort Sea, which the State of Alaska has joined. Additionally, Service staff are looking for ways to help the State of Alaska conduct a priority project that would inform future regulatory decisions involving polar bears in the Southern Beaufort Sea. I will support and encourage the Service's continued cooperation and collaboration with the State of Alaska on these and other issues.

Question 56: The global population of polar bears are listed under the Endangered Species Act as threatened. Under this act the threat of extinction is the appropriate measure for recovery. Yet the recovery plan developed by the U.S. Fish and Wildlife Service calls not for the removal of the threat of extinction, but for recovery to an optimal population number, which is much higher than required to remove the risk of extinction. Can you explain how this recovery goal was established and how it is being used as a factor in determining allowed takes?

Response: The Polar Bear Conservation Management Plan was developed by a wide group of stakeholders, including the State of Alaska, Alaska Nanuuq Commission, the North Slope Borough, the Service, USGS, the Marine Mammal Commission, conservation organizations, and representatives from the oil and gas industry. Because polar bears are managed under the Marine Mammal Protection Act (MMPA) and also listed under the Endangered Species Act (ESA), the Conservation Plan addresses the requirements and criteria of both laws. The Plan contains ESA recovery criteria for delisting that are distinct from the management actions under the MMPA. Under the ESA, anticipated levels of incidental take are evaluated for their impact on survival and recovery of the listed species. Under the MMPA, anticipated levels of incidental take are evaluated to determine if they will impact more than small numbers of marine mammals in a

stock or have more than a negligible impact on that stock of marine mammals.

Question 57: Why if polar bears were listed under the Endangered Species Act as a "global population" is the Service discretionally managing takes assuming there are 19 subpopulations? Wouldn't a better approach be to manage takes at the listing level?

Response: Because polar bears are protected under both the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), they are subject to the requirement of both acts. Under the ESA, polar bears are listed as a single species and are managed accordingly. Under the MMPA, the two U.S. subpopulations are identified as stocks for management purposes under that law. While both laws use the term "take," the term is applied at the appropriate spatial scale based on the act in question. Management actions and associated "take" determinations are made under the ESA at the listed entity level (i.e. globally) while "take" determinations made under Marine Mammal Protection Act are made at the stock level (i.e. subpopulations).

Question 58: In Southeast Alaska, we have a growing problem of Sea Otters impacting fisheries. The sea otter population in Southeast has been growing exponentially and is not threatened or endangered under the ESA. I have worked with the FWS to discuss potential management options as well as current data gaps regarding the population, which make using existing authorities difficult to utilize. In particular, the Service seems to not have enough data to set the optimal sustainable population under the Marine Mammal Protection Act to authorize more intensive management by the FWS or the State of Alaska of the Southeast otter population. What funding and mandate from Congress does the Service need to close these data gaps?

Response: As you stated, sea otters are protected under the Marine Mammal Protection Act (MMPA). The MMPA sets a management goal of maintaining marine mammal stocks within their Optimal Sustainable Population (OSP) range. A recent analysis of sea otter survey data collected from Southeast Alaska between 1960 and 2011 suggests that the population had grown substantially over this time frame but had not yet reached the lower threshold of its OSP range. The current population size is unknown, but a new survey of this population is being planned for 2021 or 2022, contingent upon funding.

The Service understands concerns about the recolonization of sea otters across Southeast Alaska and the resulting conflicts with commercial and subsistence shell fisheries. In November 2019, the Service convened a workshop in Juneau to solicit ideas from affected stakeholder groups about how best to address fisheries conflict issues while still providing for the continued protection of sea otters under the MMPA. The Service received many recommendations from stakeholders and will be capturing those in a forthcoming report.

The Service uses marine mammal conservation funds provided by Congress to address needs related to the polar bears, sea otters, and Pacific walrus. The Service allocates available funds to obtain information on population status, implement incidental take provisions of the ESA and MMPA, and provide for co-management of subsistence use by Alaska Natives.

Question 59: Back in April of 2008, 40 hunters were on the ice in northern Canada legally hunting polar bear. These hunters wanted to experience and enjoy one of the world's few remaining adventures—a dog-sled hunt north of the Arctic Circle. Besides the adventure, these hunters knew that their participation in this hunt would help conserve the bear population and provide sorely needed funds and food to the Inuit people. While on the ice in Canada and completely out of communication, the Fish and Wildlife Service moved forward and listed the polar bear as "threatened." Unbeknownst to the 40 hunters was that this ruling was enforced immediately—making the importation of their legally harvested bear impossible. There was no typical 30, 60- or 90-day period before the rule was enforced. The Canadian government still issues permits for polar bear. With no monetary value attached to them, the native population will have little incentive to take only mature males, as is common practice. The hunting will be solely for subsistence, younger bears and females will be taken more often. This issue is not about hunting. It's a simple matter of returning property that was effectively taken by regulatory action. It makes no sense with regards to conservation or science. What can be done at the Fish and Wildlife Service to correct this problem? Does the Fish and Wildlife Service support an effort to lift the importation restriction for these 41 polar bears?

Response: In addition to being threatened under the Endangered Species Act (ESA), the polar bear is a marine mammal species protected under the U.S. Marine Mammal Protection Act (MMPA). With the listing of the polar bear under the ESA in 2008, the status of the polar bear under the MMPA was automatically changed to "depleted". As such, otherwise prohibited activities under the MMPA, such as importation, can be authorized by permit for only the purposes of enhancement or scientific research. Under the MMPA the U.S. Fish and Wildlife Service may not issue permits for importation of hunted "depleted" species, including hunted polar bears, for personal purposes. Should Congress consider legislation to address this issue, we welcome the opportunity to work with you.

Questions from Senator Wicker

Question 60: Farmers and landowners are required to obtain an annual depredation permit from the U.S. Fish and Wildlife Service (USFWS) in order to remove black vultures, a predatory bird, from their property. USFWS is in the process of evaluating the success of statewide black vulture depredation permits administered by organizations in Kentucky and Tennessee. What is the status of this evaluation, and does the agency plan to expand statewide depredation permits to other areas impacted by the black vulture?

Response: The Service is currently in the process of reviewing a final evaluation of the pilot permitting programs in Kentucky and Tennessee established in 2016. Under this pilot program, the Service issued depredation permits to the Kentucky and Tennessee Farm Bureaus, which designated livestock producers as sub-permittees for take of up to three vultures per producer without any additional permit fee. The Service is currently evaluating the possible expansion of the pilot program to other states. The Service is also completing a programmatic Environmental Assessment (EA) for the issuance of black vulture depredation permits, which we understand would provide a strong biological and legal basis for increasing the lethal take of black vultures.

Question 61: Double-crested cormorants, black vultures, and Canada geese continue to be a serious problem for production agriculture. These birds are protected under the Migratory Bird Treaty Act, but they are not migrating as frequently. There are significant populations of resident double-crested cormorants that roost in nearby wetlands and cause losses to aquaculture producers. Resident black vultures attack livestock and cause significant damage to houses, buildings, and communication towers. What is USFWS's plan to address migratory birds that have adapted to an area and are no longer migratory?

Response: The Service is actively working on multiple conflict issues with migratory birds, such as double-crested cormorants and black vultures. To respond to these conflicts, the Service is identifying management options that could be implemented to resolve conflicts, including identifying whether lethal take is necessary, and, if so, to identify the appropriate level of lethal take to reduce the conflict. We have regular contact—via workshops, phone calls, face-to-face meetings—with stakeholders including private property owners, farmers, states, tribes and federal partners with the goal of collecting data and information. The process is designed to be biologically defensible and to promote efficiency, effectiveness, and transparency in finding solutions to these conflicts.

For black vultures, the Service is currently in the process of reviewing a final evaluation of the pilot permitting programs in Kentucky and Tennessee established in 2016. Under this pilot program, the Service issued depredation permits to the Kentucky and Tennessee Farm Bureaus, which designated livestock producers as sub-permittees for take of up to three vultures per producer without any additional permit fee. The Service is also completing a programmatic Environmental Assessment (EA) for the issuance of black vulture depredation permits, which we

understand would provide a strong biological and legal basis for increasing the lethal take of black vultures.

For cormorants, the Department has recently taken the following actions to address depredation of both aquaculture and wild fish stocks. In December 2019, the Department submitted a Federal Register Notice informing the public that Service is increasing the amount of lethal take authorized for managing cormorant conflicts, using the existing 2017 Environmental Assessment as the basis for the change. On June 5, 2020, the Service published a proposed rule and associated draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act to consider comprehensive alternatives to managing cormorant conflicts. The proposed rule was a formal invitation to participate in shaping the final rule and EIS. Any interested individuals and/or groups could respond to the proposed rule by submitting comments aimed at developing and improving the draft proposal, recommending additional management alternatives, or by recommending against issuing a rule. The proposed rule comment period ended on July 20, 2020. These actions are also in accordance with Executive Order 13921, Promoting American Seafood Competitiveness and Economy Security, which establishes the policy of the Federal government to "identify and remove unnecessary regulatory barriers restricting American fishermen and aquaculture producers."

Question 62: USFWS recently published an advanced notice of proposed rulemaking regarding management options for double-crested cormorants. The agency proposed for consideration a national aquaculture depredation order to address the significant damages producers face from these predatory birds. In addition, USFWS proposed a permit for state wildlife agencies to address cormorant management issues on public resources. However, USFWS did not include for consideration a national depredation order specifically for public resources. Why did USFWS choose not to seek comments on issuing a new national depredation order for public resources?

Response: On June 5, the Service published a proposed rule and associated draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act. The proposed rule was a formal invitation to participate in shaping the final rule and EIS. Any interested individuals and/or groups could respond to the proposed rule by submitting comments aimed at developing and improving the draft proposal, recommending additional management alternatives including a national depredation order, or by recommending against issuing a rule. The proposed rule comment period ended on July 20, 2020. The Service is committed to ensuring that any management alterative is biologically defensible and will help achieve desired objectives.

Question 63: In 2014, USFWS issued a memo banning the use of genetically engineered crops on national wildlife refuges, which severely limited the ability of producers to farm on these lands. Although this memo was withdrawn in 2018, farmers were unable to plant their crops on national wildlife refuge land in 2019. With the 2020 planting season quickly approaching, what action is USFWS taking to ensure that farmers can plant genetically modified crops on national wildlife refuges this year?

Response: To provide adequate forage for migratory birds, many refuges maintain farming practices that produce a variety of crops to support wildlife, and genetically modified (GM) crops have proven effective in contributing to the maximization of crop production. In August 2018, former Principal Deputy Director Greg Sheehan signed a memo directing the Service to determine the appropriateness of use of GM crops on a case-by-case basis in compliance with all relevant legal authorities, existing court orders and settlements, NEPA, and Service policies. A programmatic environmental assessment was completed in June 2020 and a final decision was issued to allow the use of APHIS evaluated and deregulated GM crops on wildlife refuges.

GENERAL INFORMATION

Conservation Action Title: Texas Land Acquisition

Bureau: U.S. Fish and Wildlife Service

Project Manager(s): Mitch Sternberg, Zone Biologist, South Texas Gulf Coast

Project Location: South Texas Refuge Complex

Initial Budget: $110,371

PROJECT DESCRIPTION

200K-Texas Land Acquisition: We proposed an additional task to expend remaining funds that had been intended for land acquisition in South Texas for the endangered ocelot. We proposed a project to evaluate the effects of Tactical Infrastructure (TI) on bobcats (as a surrogate for ocelots), using GPS radio-telemetry collars and sensor-cameras in the Lower Rio Grande Valley of Texas.

DESCRIPTION / DISCUSSION OF ACCOMPLISHMENTS / IMPLEMENTATIONS

We monitored movements of bobcats on lands managed by Lower Rio Grande Valley National Wildlife Refuge (LRGVNWR) in proximity to TI, and movements of ocelots on Laguna Atascosa National Wildlife Refuge (LANWR). Work on LRGVNWR was to inform us of the movements of wild cats relative to native habitats and TI. Work on LANWR assisted in assessing the size of the ocelot population, and movements of ocelots relative to wildlife corridors and large areas of thornscrub.

Task 1. Assess wild cat use of habitat in relation to TI

Background

Development of border security infrastructure has the potential to interrupt natural wildlife movement and dispersal of wildlife (Flesch *et al.* 2009) and the Border Fence/Wall, hereafter referred to as Tactical Infrastructure (TI), has already begun to do just that (Abhat 2011). Monitoring the movements of wildlife prior to the completion (i.e., complete closure; installation of gates across all roads) of the TI is vital for pre- and post-construction comparison. The study of bobcat (*Lynx rufus*) movement is especially useful, as bobcats can serve as surrogates for studies intending to investigate the implications of development and habitat fragmentation on the endangered ocelot (*Leopardus pardalis)*, which is found in the U.S only in Texas (41 individuals [Hilary Swarts, USFWS, pers. comm.]) and in Arizona (5 individuals recorded since 2009 [Erin Fernandez, USFWS, pers.comm.]).

To monitor wildlife movement with respect to existing wildlife habitat and the TI in south Texas, trapping for bobcats was conducted on a tract of the Lower Rio Grande Valley National Wildlife Refuge that contains a segment of border fence. Within this segment of TI, there are currently four road openings that are planned to be closed when large gates are installed which would further deteriorate the connectivity of the wildlife populations in the area.

Our objectives were to: 1) determine locations where bobcats cross the alignment of the TI, and 2) monitor bobcat use of any wildlife corridors.

Methods

Wildlife monitoring along the border fence infrastructure was implemented on a U.S. Fish and Wildlife Service tract of land known as La Coma Tract, located south of Highway 281 in Hidalgo County, Texas. La Coma tract is part of the Lower Rio Grande Valley Wildlife Refuge (LRGVNWR). The tract provides a variety of open to dense woodland habitat (Sternberg 2003).

La Coma tract is bordered on the north by Highway 281 and on the south by the Rio Grande, and surrounded on the east and west by private land developed for agricultural use. The tract is bisected by a 5.21 km segment of incomplete TI and associated concrete flood-retention wall in a segment of infrastructure known as "Segment O-08". Segment O-08 consists of about 6 m tall steel bollard-style fencing with 12 cm gaps between each bollard. The fence sits atop a concrete levee wall with a sheer 4-4.5 m tall concrete face along the south side. Each landowner/roadway opening is roughly 12 m wide, two of which lie within habitat patches used by an abundance of wildlife near the Refuge and therefore are relevant to the current study.

Live-trapping was implemented from 10 December 2014 to 17 December 2014 using standardized USFWS protocols. Seven Tomahawk box-traps attached to live-animal bait-cages containing Eurasian collared doves were deployed along likely bobcat travel routes. Traps were checked at 0800h each morning, closed for the day, and reopened at approximately 1600h. USFWS staff and volunteers were responsible for all chemical immobilizations and handling of trapped bobcats. An intramuscular injection of a combination of Ketamine, Dexmedetomidine and Butorphanol was used for sedation. Sedated bobcats were weighed, sexed, aged, and examined for condition of coat, body, and dental condition. Each bobcat was fitted with a Tellus Ultralight GPS collar. Atipamezole and Naltrexone were used to reverse the initial injection following a period of at least 30 minutes to allow Ketamine to metabolize. Following the reversal injection, bobcats were placed inside an animal carrier and monitored for at least one hour prior to release to ensure a full recovery from anesthesia.

Tellus Ultralight GPS Collars were initially programmed to take a GPS location every three hours; collars would email GPS locations daily. Collars data were monitored daily and

Figure 1. Trapping locations for the three bobcats captured on La Coma tract of Lower Rio Grande Valley National Wildlife Refuge, near Runn, Hidalgo County, Texas, in December 2014.

occasionally remote updates were sent to the collars altering the GPS schedule when a collared animal came in proximity with the TI, to facilitate a fine-scale understanding of bobcat movement around the fence. Collars were, at times, altered to fix a GPS location every 15 minutes at the cost of expending more of the battery. Consecutive locations that crossed the TI were determined to be crossing events, and crossing events that occurred within an hour were used to assign a likelihood of where the TI was crossed by the bobcats.

Results

In December 2014, we conducted a total of 31 trap-nights on La Coma tract of LRGVNWR. Three bobcats were captured, collared and released in the same area (Figure 1). Bobcat trapping success was 9.6% and total trapping success was 42%. A total of 8,150 GPS locations were recorded for all three bobcats. Bobcat female 01 (BF01) provided 2,488 locations. Bobcat male 02 (BM02) provided 3,325 locations. Bobcat female 03 (BF03) provided 2,337 locations.

BF01 was trapped and collared 12 December 2014 near the edge of mesquite thorn scrub and agricultural land north of the TI and levee wall, and south of State Highway 281. After 193 days the collar was triggered to drop-off by technicians remotely, due to signaling to us that it had a low battery and it was recovered shortly thereafter. BF01 crossed the TI 111 times. Within the hourly limit that we applied, she is suspected of crossing in roadway openings 5 times and around the eastern end of the TI 21 times, and across State Highway (SH) 281 a total of 14 times (Figure 2).

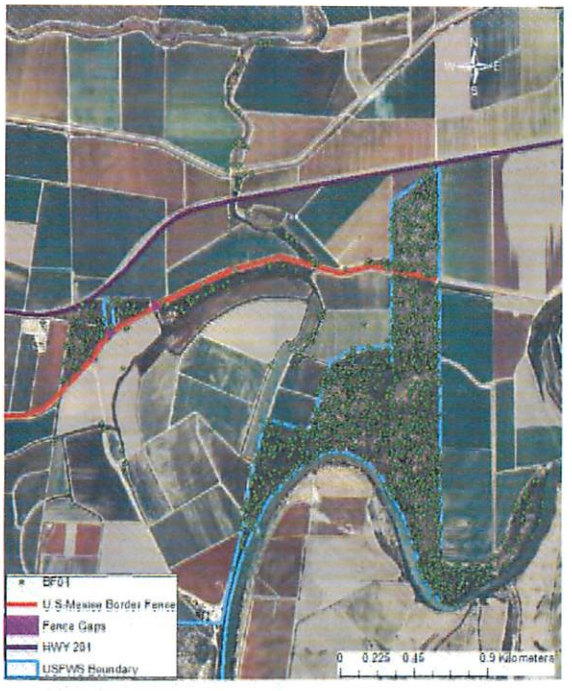

Figure 2. Locations of adult female bobcat BF01 from December 2014 to June 2015 with respect to the Tactical Infrastructure, near Runn, Hidalgo County, Texas.

BM02 was trapped and collared 16 December 2014 along a road created by U.S. Border Patrol, on the Refuge, south of the TI. After 165 days the collar was intentionally dropped remotely due to low battery and successfully recovered shortly thereafter. The collar recorded a total of 3,325 locations (Figure 3), many of which were north of the border fence on Las Palomas Wildlife Management Area, managed by the Texas Parks and Wildlife Department. BM02 crossed into Mexico on 4 January 2015 between the hours of 1700-2000h and returned to the U.S. on 7 January 2015 between the hours of 0500-0800h. BM02 crossed the TI 45 times. Within the hourly limit that we applied, he was suspected of crossing in roadway openings 24 times and around the eastern end of the TI 3 times, and across State Highway (SH) 281 a total of 33 times (Figure 2). BM01 moved across a larger area and often at a greater pace than the females, so his collar was programmed to provide additional GPS location data when he was near the TI, which provided very fine-scale evidence (i.e., 15-minute intervals) of use of two of the roadway openings.

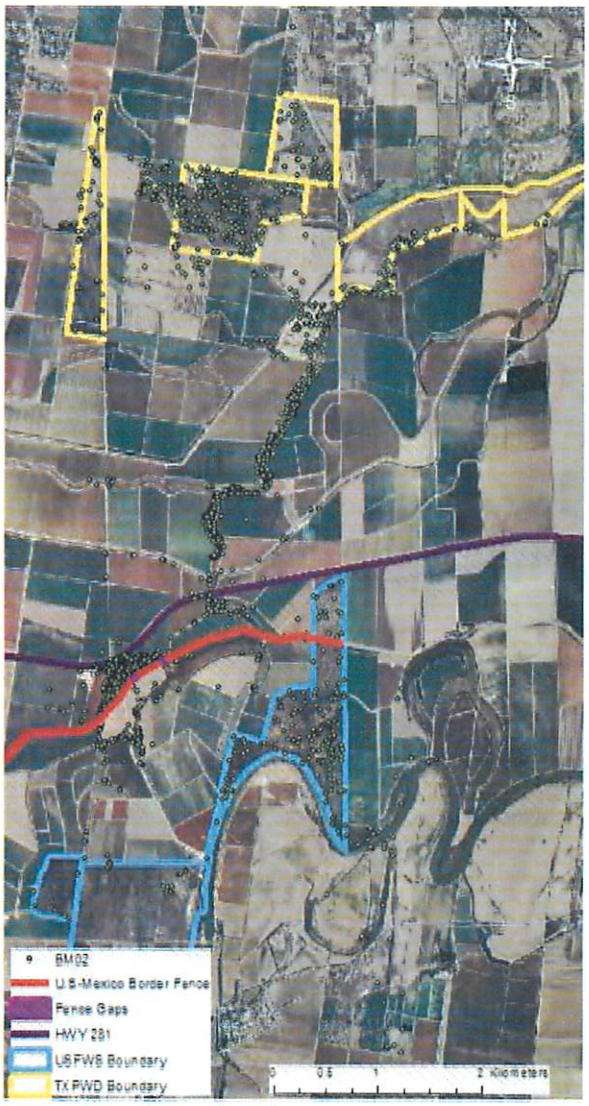

Figure 3. Locations of adult male bobcat BM02 from December 2014 to May 2015 with respect to the border wall infrastructure, near Runn, Hidalgo County, Texas.

BF03 was trapped and collared 16 December 2014 along the east side of the property south of the border infrastructure. After 179 days the collar was intentionally dropped remotely due to low battery and successfully recovered shortly thereafter. The collar recorded a total of 2,337 locations (Figure 4). BF03 crossed the TI 137 times; at least four times at roadway openings and at least 25 times around the eastern end of the TI. BF03 also crossed SH 281 30 times, including following the same route, but not quite arriving at the same Wildlife Management Area, as did BM02 on numerous occasions.

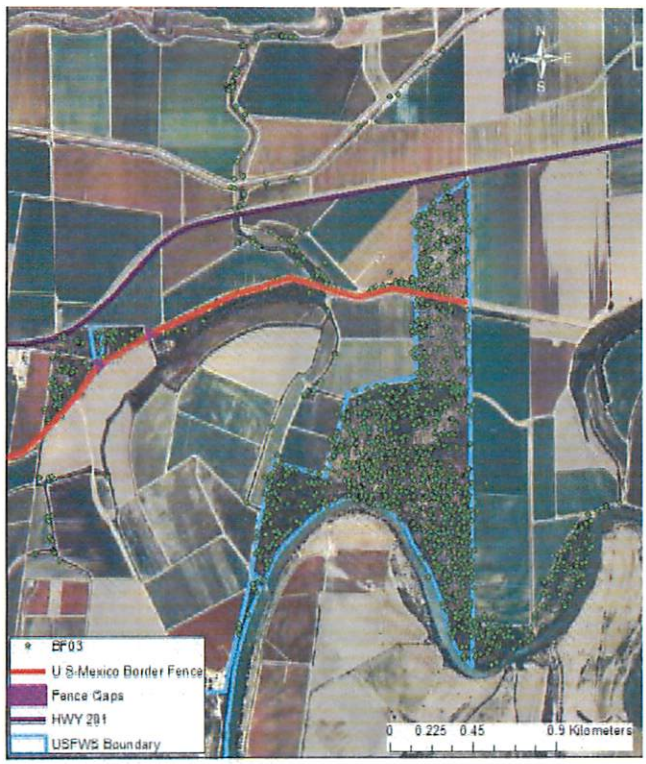

Figure 4. Locations of adult female bobcat BF03 from December 2014 to June 2015 with respect to the border wall infrastructure, near Runn, Hidalgo County, Texas.

Discussion

Like much of the remaining natural landscape in the Lower Rio Grande Valley, the La Coma tract is a stand of viable habitat segmented and isolated by roads, development, and other barriers. The likelihood of the closure of all openings in the Tactical Infrastructure to additionally fragment and degrade the use of the remaining habitat for wildlife, especially in areas used by the endangered ocelot, makes it important to study the impacts of the fence infrastructure on wildlife movement before, during, and following completion of the TI (Abhat 2011).

The preservation of wildlife corridors and critical habitat patches along the border fence is essential for preserving viable habitat for wildlife, including the endangered ocelot (Grigione and Myrkalo, 2004). The three collared bobcats in our study often crossed the TI at roadway openings on the levee. The home ranges of the females centered on the larger patch of habitat on the eastern portion of the Refuge and therefore they did not cross at the roadway openings often. This aligns with previous findings that female bobcats tend to remain within a single fragment while males more often range between multiple fragments (Tigas *et. al.* 2002). The same movement patterns are found in ocelots (Laack 1991), highlighting the need for large, connected patches of habitat.

The roadway opening to the west (1.08 km from the closest thornscrub patch) was never used by the bobcats, likely as it was so far removed from any significant patch of habitat. The movements of BM02 and BF03 between the USFWS Refuge tract and the TPWD Wildlife Management Area, as well as findings in Abhat (2011), are direct evidence of the need to protect wildlife corridors to maintain connectivity between larger tracts of preserved habitat for the benefit of wildlife. Specific to the current study, roadway openings in the TI near habitat remain critical to maintaining wildlife connectivity.

Other Lessons Learned

Theft of FWS game cameras on nearby refuge tracts, presumably by traffickers of illegal goods or undocumented immigrants, did affect our decision to place game cameras in more useful locations for ocelot monitoring (i.e., at LANWR). Trapping of bobcats was very successful and provided valuable input regarding wild cat movement relative to TI. Based on input we received during the monthly inter-agency conference calls, we re-aligned our efforts to more directly impact ocelot conservation and recovery by applying more of our resources towards actions on LANWR than along the Rio Grande. Through the Borderlands Management Taskforce, the Refuge has begun reviewing photos from the Texas Department of Transportation's cameras in the Drawbridge Program for wildlife occurrences in these areas along the Rio Grande. The GPS collars will be reused repeatedly for ocelot conservation. The battery and drop-off mechanism will be replaced at the Refuge's cost and they will be used for ocelot or bobcat monitoring in subsequent years.

Task 2. Assess the size of the population of ocelots and their movements on LANWR

Background

The endangered ocelot (*Leopardus pardalis*) is found in the U.S only in Texas (41 ocelots [Hilary Swarts, USFWS, pers. comm.]) and in Arizona (5 individuals recorded since 2009 [Erin Fernandez, USFWS, pers. comm.]). The final rule listing the ocelot as endangered in the U.S. (47 FR 31670, July 21, 1982) stated that the present or threatened destruction, modification, or curtailment of its habitat or range posed the greatest threat to the survival of the ocelot in the U.S. The ocelot's range and distribution in the U.S. have been drastically reduced in the last two centuries. Over 90% of the dense thornscrub habitat that supported the ocelot in the Lower Rio Grande Valley of Texas has been altered for agricultural and urban development (Jahrsdoerfer and Leslie 1988, Tremblay *et al.* 2005).

Our objectives were to: 1) determine the size of the ocelot population on and around LANWR, and 2) document ocelot use of any wildlife corridors, specifically those crossing roadways.

Methods

To assess the ocelot population status as well as their movements on and around LANWR, ocelots were live-trapped, as well as photographed using remote game cameras. IAA funds were used to accomplish the monitoring of ocelots from December 2014 to September 2015. Live-trapping was implemented from December 2014 to June 2015 using standardized USFWS protocols as described briefly under Task 1 above. All larger adult ocelots were fitted with a Tellus Ultralight GPS collar, or an Advanced Telemetry Systems VHF radiocollar, if a juvenile ocelot. GPS data was provided by email or downloaded from the field, as per bobcats under Task 1.

Results

We live-trapped for a total of 2,344 trap-nights from December to June 2015 and captured six ocelots, some multiple times (Figure 5). Significantly more VHF-tracking was needed by staff as smaller, juvenile ocelots are not appropriate carriers for the larger GPS collars, although several GPS collars were used on ocelots (Figure 6). Staff collected 148 VHF locations for three ocelots, and 3,059 GPS locations for three ocelots.

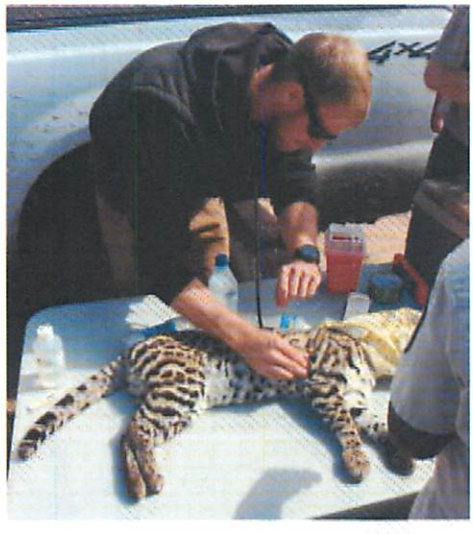

Figure 5. Ocelot that was live-trapped in January 2015 as part of the population monitoring conducted each year at Laguna Atascosa National Wildlife Refuge, Cameron County, Texas. Refuge Intern is observing heartrate as part of health-monitoring during sedation of the ocelot. Photo credit, Eric Hope for USFWS.

During the fall trapping season, the known ocelots varied from month to month, from 11-14 individuals, depending on newly-discovered (young) ocelots and the death of some ocelots, most of the latter, while crossing roadways. Game cameras were used to identify and monitor the movements of 14 ocelots during the season, including cameras funded through the current project, as well as cameras funded by Refuges and partners. Cameras photographed numerous

ocelots during the season and greatly assisted us in efficiently targeting where to trap for certain ocelots, and cameras provided data about the status of some more elusive ocelots that we had not been able to trap previously.

Figure 6. Male ocelot 263 photographed by a game camera within the hog-proof pen of a rainwater catchment at Laguna Atascosa National Wildlife Refuge, Cameron County, Texas. Note the black GPS collar that was attached to the ocelot during population monitoring in 2014-15.

Discussion

The accuracy of GPS collar data is important for the monitoring of wild cats for many reasons. One reason is that we are lacking specific information about ocelot denning and kitten survival. GPS collar data provide the added ability of resource managers to accurately depict when and where a female ocelot may have kittens based on the limited movement seen typically around a den. A second reason is the added ability to recognize and map areas where ocelots traverse the landscape of linear habitat (i.e., corridors) and roadways, sometimes successfully. This example is best illustrated by the movements of a (typically) young male ocelot when it leaves LANWR and begins exploring the area, looking for a new territory. Similar movements have been noted for female ocelots in the 1990s when the population was slightly larger (USFWS unpubl. data). These ocelot movement data are analyzed and form the basis for USFWS assisting state and federal departments of transportation in maintaining wildlife connectivity in the area for ocelots.

These movements inform us as to what habitat conditions ocelots are able and willing to use to traverse in a mostly unfriendly landscape on their way to establish a new territory of their own as an adult. The GPS data for all of these ocelots will be the basis for a model being developed by USFWS Region 2 Biologists in FY16 that will predict movements of ocelots across the landscape, and modelling ocelot recovery based on their predicted movements of ocelots across the landscape, as well as soils that can or currently do sustain ocelot habitat, and a strategic land acquisition and landowner partnership plan.

Discovery of three new (young) ocelots, some observed by cameras previously, and then by trapping, demonstrated that the LANWR ocelot population is still reproducing, and given previous years' estimates of ocelots on LANWR, the population is relatively stable. This does not diminish the fact that ocelots are at extreme risk of extinction in Texas in the next 50 years (Haines *et al.* 2006) given that the vast majority of habitat formerly used by ocelots has been converted or severely fragmented (Tremblay *et al.* 2005) and that vehicles strikes are the major factor in the death of ocelots in Texas still today (Haines *et al.* 2005; Hilary Swarts, USFWS, pers. comm.). USFWS and its partners need to cooperatively manage, acquire, protect, and restore areas that are or could be used by ocelots, and corridors between Texas populations, and between populations in Texas and Mexico (Grigione *et al.* 2009, Abhat 2011), however highly fragmented, must be functional if the ocelot is ever to be removed from the Endangered Species List.

Funds Expended

Living stipends for Refuge Interns	$12,070.40
Field supplies	$15,604.45
Game cameras and camera supplies	$23,549.40
Tellus Ultralight GPS collars	$59,146.75
Total funding expended	$110,371.00

ACKNOWLEDGEMENTS

Thank you to Dave Kuhn and Greta Schmidt for significant contributions to data analysis and the report. We thank Ondina Diaz, Roy Reyna, Boyd Blihovde, Bryan Winton, and Jonathan Moczygemba for supporting this project on the National Wildlife Refuges. Thanks also to Heather Frederick, Eric Hope, Becca Thomas-Kuzilik, Pat McGovern, and Hilary Swarts for incorporating this project into the ocelot population monitoring work. Thanks to those responsible for the Inter-agency Agreement that made this study possible; namely, Mary Anderson, Larisa Ford, Grant Harris, Rob Jess, Kelly McDowell, John Petrilla, Ernesto Reyes, Liz Trujillo, and Customs and Border Protection.

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United States Department of the Interior

FISH AND WILDLIFE SERVICE

Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/NWRS/070578

AUG 12 2019

Mr. Paul Enriquez
U.S. Customs and Border Protection
U.S. Border Patrol Headquarters
1300 Pennsylvania Ave. 6.5E Mail Stop 1039
Washington, DC 20229-1100

Dear Mr. Enriquez:

This is in response to your letter dated June 27, 2019, in which U.S. Customs and Border Protection (CBP) requested U.S. Fish and Wildlife Service (Service) input on the proposed construction of a levee/border wall system in Rio Grande Valley, Texas. The proposed project involves the construction of approximately 95 miles of new border and levee wall system in the Lower Rio Grande Valley to consist of 19 miles in Cameron County, 52 miles in Hidalgo County, and 52 miles in Starr County. This project may also include associated impacts such as a 150-foot "enforcement zone" adjacent to the constructed border walls. The Service's concerns and recommendations are outlined below.

Federally and State Listed T&E species and other Species of Concern

The Lower Rio Grande Valley National Wildlife Refuge (LRGV NWR, Refuge) was established in 1979 to conserve the biodiversity of the Lower Rio Grande Valley of Texas (Valley). The Refuge also protects, manages for, and provides important habitat for federally-listed species and those listed as threatened, endangered, or species of concern by the Texas Parks and Wildlife Department (TPWD). Enclosure A identifies the Federally-listed species, particularly endangered plants, that may occur within the some of the areas of proposed fencing/wall construction.

As the proposed alignments, particularly in Starr County, will result in habitat destruction, the Service recommends CBP utilize a botanist(s) knowledgeable of local plant communities to conduct surveys for federally-listed endangered plants to avoid impacts to these species.

The border wall/barrier and associated infrastructure will result in a reduction of habitat connectivity in portions of the natural wildlife corridor that exists along the Rio Grande. This will adversely affect wildlife movement north and south of the proposed fencing/walls that would include federally-listed species such as the ocelot. Adverse effects include inhibiting access to traditional water sources, ability to move about in response to prey, intra or inter-specific competition, floods, finding

mates/loss of genetic diversity, or simply colonizing additional habitat which ultimately can result in a reduction of long-term population trends.

One of the primary purposes of the LRGV NWR, is to create a corridor for wildlife along the Rio Grande. The Service has long envisioned contiguous forested areas along the Rio Grande in support of endangered species and bird conservation and management. Unfortunately, as a result of development, numerous ports of entry, and border wall/fence infrastructure, the concept of a functioning wildlife corridor along the Rio Grande River is compromised. Without connections, the fragmented nature of remaining habitats along the river may act as sinks or traps for such species as ocelots. This is a particular concern for all wildlife that depend on the Rio Grande itself as a water source. Overall, a total of 37 LRGV NWR river tracts are affected; 8,839 acres (36 km^2) to be separated (on north side) by proposed border wall route. This eliminates access by wildlife on the north side to the adjacent brush and water sources at the river. Attachment B further defines the Service's concerns and recommendations.

Socioeconomics and Recreational Activities

One of the largest and fastest growing industries is tourism, particularly nature-based or ecotourism (Mathis and Matisoff 2004). Ecotourism in the Lower Rio Grande Valley generates between $100 million and $170 million annually, and creates several thousand jobs (Mathis and Matisoff 2004, *after* Chapa 2004). In fact, the Valley is considered one of the top bird-watching destinations in North America (TX A&M 2012). National wildlife refuges in the Valley protect most of the unique biodiversity and wildlife habitats that attract thousands of visitors annually engaged in ecotourism.

Approximately 6,000 acres of LRGV NWR are open to public hunting; however, the Service has not made many of the areas behind the current border wall/fence available to the public for hunting and fishing due to concerns for visitor safety. Additional border wall and/or barrier construction could further limit future opportunities to open these areas to hunting and fishing and other public uses. This is particularly apparent at La Casita East tract, as this area is proposed for opening to dove hunting but may be bisected by the proposed alignment.

Therefore, continued cumulative direct and indirect impacts from border construction activities on refuge habitats involving fragmentation, degradation, or alteration likewise directly impact the health of wildlife and their numbers which in turn will negatively impact the Valley's ecotourism economy. Therefore, consideration must be given to ensure that development is tempered by an adequate concern for protection of the Valley's unique wildlife and habitats. We recommend continued early and close coordination with the Service to help reduce or eliminate adverse impacts to important fish and wildlife resources here.

Cultural Resources

The LRGV NWR includes many parcels along the Rio Grande extending to western Starr County with identified cultural resource sites. These sites include an early historic rancho, a road associated with the Mexican-American War, historic military camps, twentieth-century residences, a shipwreck, prehistoric burned rock scatters and middens, burned rock "hearth" features, lithic quarries, deeply stratified sites along terraces of the Rio Grande, surficial artifacts scatters, and a unique rock art site (USFWS 2018). For example, an archeological reconnaissance along the Rio Grande resulted in the discovery of an historic site, identified as the "Yankee site" in 1976 on the northeastern portion of the Refuge's Las Ruinas tract, on a terrace. At least three structures and evidence of a fourth site occur here (O' Malley 1976) which were used as a trading post between the Spanish and Native Americans (USFWS 2018). These are sandstone dwellings that indicate it was inhabited around 1820 and in the

1840s to 1850s (O' Malley 1976). Due to the location along the Rio Grande, many of the lands on LRGVNWR were used during the Civil War battles (1861-1865), particularly in/adjacent to Palmito Ranch tract and Boca Chica tracts. Many artifacts and historic battle sites remain. The Palmito Battlefield historic district is bounded by State Highway 4 to the north and the Rio Grande to the south extending to Boca Chica Beach (USFWS 2018).

Therefore, before any construction and earth moving activities are planned, appropriate cultural resources surveys should be conducted (both on and off the Refuge) to ensure these and unknown cultural resources are not impacted by the proposed activities.

Studies and Data Available on Environment Impacts

Very little data is available about construction of a physical barrier across the landscape. We know of few examples of such an action in modern times. There are text books written on the value of connectivity and the science and practice and importance of linking landscapes for biodiversity (Hilty et al. 2006)

Currently, the Service manages 79 forested parcels along the river, totaling 130 km². The border wall will isolate or separate 37 properties (about half of all major parcels), totaling 36 km² (Table 2). Research shows that forested areas must reach at least 1 km² to support breeding birds at decadal scales, while areas of >10 km² support breeding birds at century scales. (Ferraz et al. 2003, Burke and Nol 2000).

The USGS publication titled, *An international borderland of concern: Conservation of biodiversity in the Lower Rio Grande Valley*, can be found at the following website: https://pubs.er.usgs.gov/publication/sir20165078. This publication has a number of appropriate citations to use for habitat fragmentation, barriers to wildlife movement, and biogeographical comprehensive assessment of risk to species. Additionally, the draft Environmental Impact Statement for Construction, Maintenance, and Operation of Tactical Infrastructure prepared in 2007, particularly a table on page 538, outlines all the environmental impacts. Enclosure C provides further references for review.

Thank you for the excellent communication and information sharing that has occurred through our existing relationship with the Rio Grande Valley Sector. We appreciate your efforts to engage stakeholders and look forward to continuing to work together to minimize the proposed projects' potential impacts to trust species and the LRGV NWR. If you have any questions or concerns, please contact me at 505-248-6282.

Sincerely,

Regional Director

Enclosures

Attachment A.

Species descriptions for Federally and State listed threatened and endangered species and other species of concern within the area of border wall/barrier construction on Lower Rio Grande Valley NWR tracts.

This attachment identifies the Federally-listed species, particularly endangered plants, within the Rio Grande riparian areas and uplands within the area of border wall/barrier construction on LRGV NWR tracts.

Table 1. Federally and State listed T&E species and other species of concern* proposed border wall/barrier construction on LRGV NWR tracts**

Common Name	Scientific Name	Fed/State Status
Ocelot	*Leopardus pardalis*	FSE
Jaguarundi	*Herpailurus yaguarondi*	FSE
Zapata bladderpod	*Lesquerella thamnophila*	FSE
Walker's manioc	*Manihot walkerae*	FSE
Texas Ayenia	*Ayenia limitaris*	FSE
Gray Hawk	*Asturina nitida*	ST, RD
Northern beardless tyrannulet	*Camptostoma imberbe*	ST, RD
Tropical parula	*Parula pitiayumi*	ST, RD
Black-spotted newt	*Notophthalmus meridionalis*	ST
Texas horned lizard	*Phrynosoma cornutum*	ST
Texas tortoise	*Gopherus berlandieri*	ST

* List based on the presence of appropriate habitat, species survey info, and/or refuge staff knowledge. Included are state-listed species that regularly occur on the refuge. Species that occur accidentally or could occur are not included for the purposes of this document. See species descriptions below.

** ST = State Threatened, SE = State Endangered, FSE=Federally and State Endangered, RD=Riparian Habitat Dependent. *Source: FWS CCESFO County List 2017; TPWD Annotated County Lists of Rare Species, 2016.*

The **ocelot** (*Leopardus pardalis*) is a medium-sized spotted cat that ranges from southern Texas to northern Argentina occurring in humid tropical and subtropical forests, coastal mangroves, swampy savannas, and semi-arid thornscrub (USFWS 1990). The ocelot was listed as endangered (without critical habitat designation) in 1972 due primarily to over-collection for the fur trade and habitat loss (37 FR 2589). These primarily nocturnal cats usually feed on small mammals and birds and require large home ranges. The ocelot prefers dense thornscrub or brush occurring along riparian areas,

Rare ocelot in South Texas

drainages, lomas, and other uplands, but it has also been found in other dense habitats such as live oak forest with brushy understory. Optimal habitat consists of dense thornscrub with 95 percent or more canopy cover (USFWS 1990). Currently, road kills are the primary cause of direct mortality to the remaining ocelot population as urbanization, road construction, and other development in the Valley has recently increased. Habitat loss and fragmentation was and still is a major reason for their endangered status. Long-term survival of this species depends not only on the protection of large densely-vegetated brushlands or other suitable habitats and safe wildlife corridors between them, but also on addressing the small population sizes, population isolation, and loss of genetic diversity.

The **Gulf Coast Jaguarundi** (*Herpailurus yagouaroundi cacomitli*) is a small, exceedingly rare wildcat in the United States weighing between 8 and 16 pounds, with a relatively long tail and short legs. Coloration is widely variable ranging from blackish to brownish-gray or reddish-yellow to chestnut (Hall, 1981). The last known record of a jaguarundi in the United States was along State Highway 4, just east of Brownsville, Texas, when one was found road-killed in 1986 near an old resaca or river channel crossing. There have been several reported sightings of jaguarundis in the Valley in recent years but despite recent efforts to document the existence of these cats, researchers have so far been unable to photograph or trap one. It is now estimated that less than 15 cats may possibly exist in South Texas (Klepper 2005). Just like the ocelot, brush clearing activities in the Valley have eliminated much of their habitat leading to their endangered status. Efforts aimed at preserving and restoring native brush are necessary in order to support any remaining cats, particularly along watercourses such as resacas and the Rio Grande.

Since the 1920s, more than 95 percent of the original native brushland in the Valley has been converted to agricultural or urban use (Jahrsdoerfer and Leslie, 1988). The remaining native habitat and narrow connecting corridors or brushlines are therefore extremely important for the continued existence of species such as the ocelot and jaguarundi. Ocelots and jaguarundis are area-sensitive species which occur in dense shrubland habitat, but will move between adjacent brush tracts along canals, drainages, fencelines, natural watercourses, or other areas containing native vegetation as protected corridors of travel. Jaguarundis also occur in dense grasslands associated near dense brush (Caso 1994).

The **Gray Hawk** (*Asturina nitidia*) is state threatened and is considered rare to locally uncommon occurring in and nesting in riparian habitats along the lower Rio Grande River (Oberholser 1974).

Northern beardless tyrannulet (*Camptostoma imberbe*) is a state threatened species and one of the rarest breeders in Texas, limited to the Valley. These birds breed within the riparian forests along the Rio Grande building nests almost exclusively of ball or Spanish moss.

The **tropical parula** (*Parula pitiayumi*) is a state threatened species whose breeding range in the U.S. is limited to extreme southern Texas. This small bird is found in the riparian forest. It makes its nest from such epiphytes as Spanish moss.

The **Black-spotted Newt** (*Notophthalmus meridionalis*) is one of three salamander species native to Gulf Coast prairies of Texas and Mexico, with respective state and Federal protections (Bare 2018). This state threatened species "has been neglected by the scientific community despite concerns of dramatic population declines and a globally endangered status" (Bare 2018).

Typically found in the vicinity of resacas (historic channels of the Rio Grande) or ephemeral ponds, black-spotted newts are associated with thick vegetation, especially Chara algae, but have also been described as residents of " lagoons, and swampy areas" (Conant & Collins, 1998, after Bare 2018). This species may become considered for federal protection in the future. Activities affecting the hydrology or filling of wetland in and near the Rio Grande and in the resaca systems in Cameron County may adversely affect this species.

The **Texas horned lizard** (*Phrynosoma cornutum*) is a rare, state threatened species occurring within loose sand or loamy soils both within and outside of the Rio Grande riparian corridor. They are uncommon and susceptible to land clearing and development activities.

The **Texas tortoise** (Gopherus berlandieri) is a state threatened species occurring both within and outside of the Rio Grande riparian corridor. Texas tortoises occur in open brush habitats with a grass understory and tend to avoid open areas. The Texas Tortoise may be adversely affected by border barriers since this would restrict the species' movements related to breeding, feeding, and sheltering.

Texas Ayenia
Photo: Chris Best

Texas ayenia (*Ayenia limitaris*) is a thornless shrub about two to five feet tall with teardrop (cordate) leaves with small green, pink, or cream colored flowers and prickly five-celled globose fruits. The species was known from a single population in Hidalgo County when it was listed as endangered in 1994. Texas ayenia has now been documented at five sites in Hidalgo, Cameron, and Willacy counties, as well as a separate meta-population in the Municipio of Soto la Marina, Tamaulipas, Mexico. The known populations occur in a range of sandy to clayey alluvial soils in association with native trees and shrubs; however, the species appears to reproduce effectively where it is not completely shaded. The species occurs on the Phillips Banco tract of the LRGV NWR.

Walker's manioc (*Manihot walkerae*) is a perennial, many-branched, reclining to erect herb from the Spurge family, reaching up to five feet in height. Walker's manioc, which grows from a carrot-like root, flowers from April to September following rains but above-ground vegetation can disappear during drought. Walker's manioc was listed as endangered in 1991 has been documented at nine locations in Hidalgo and Starr counties, including three LRGV NWR tracts (La Puerta, Yturria Brush, and Chicharra Banco. Threats to the species primarily include habitat loss from developments such as road building, oil and gas pad site development, caliche mining, or other habitat destruction within western Hidalgo and Starr counties, as well as competition from buffelgrass. Herbicide use in areas where the species occurs may also pose a threat.

Walker's manioc Photo: Chris Best

The 1991 recovery plan criteria for downlisting are to establish or maintain 15 distinct, self-sustaining populations of Walker's manioc in the U.S. Each population should consist of at least 100 reproductive individuals and have an age class structure reflecting that

which exists in the natural population. The 1991 plan also recommends, but is not limited to: 1) protecting existing populations of Walker's manioc from destruction of individual plants as well as habitat loss or degradation; 2) conducting studies to gather biological information needed for effective management and recovery; 3) search for new populations; 4) establishing a botanical garden and seed bank; and 5) conducting a reintroduction program on the LRGV NWR.

Zapata bladderpod (*Lesquerella thamnophila*) is a silvery-green herbaceous perennial with sprawling stems up to 34 inches long (although usually much shorter). The species occurs on sandy or gravelly loams of the Zapata-Maverick soil associations in Starr and Zapata counties. More specifically, this species occurs at or below the interface areas where sandstone strata are overlain by Eocene marine deposits (fossil oyster shell) and where there is high gypsum content. These are highly erodible soils, usually yellowish to orange in color. On the Refuge, this species currently occurs on the Cuellar, Arroyo Ramirez, and Arroyo Morteros tracts. Threats to the species include habitat destruction, modification, and subsequent invasion by non-native grasses such as buffelgrass and soil erosion.

Zapata bladderpod Photo: Chris Best

Recovery plan downlisting criteria call for maintaining or establishing 12 fully-protected, geographically distinct, self-sustaining populations. The recommended population size is a minimum of 2,000 plants at each site. Action items called for in the recovery plan include, but are not limited to, protecting known Zapata bladderpod populations in the U.S., searching for new populations, conducting studies to gather information about management and recovery, establishing a botanical garden and seed bank, and establishing new populations to meet downlisting criteria. The following LRGV NWR tracts that may serve as re-introduction sites include: Cuellar, Arroyo Ramirez, Arroyo Morteros, Los Negros Creek, Chapeño, and Las Ruinas tracts.

Attachment B.
Wildlife and Habitat Concerns and Recommendations

To address fragmentation issues and to retain the integrity of the natural hydrological patterns of water drainage into and away from the Rio Grande, design gaps or crossings and/or areas that permit flood flows along natural watercourses may allow wildlife to move north and south of the fencing/walls. This may alleviate some of Service's concerns related to wildlife movement while addressing the needs of border security. Additionally, the Service strives to protect relatively un-fragmented acreages of forested habitat for many species of neotropical migratory birds. Currently, the Service manages 79 forested parcels along the river, totaling 130 km^2. The border wall will isolate or separate 37 properties (about half of all major parcels), totaling 36 km^2 (Table 2). Research shows that forested areas must reach at least 1 km^2 to support breeding birds at decadal scales, while areas of >10 km^2 support breeding birds at century scales.

Table 2. LRGV NWR River Tracts from East to West by County; Severed Acreage to the North Bisected by Currently and Proposed Border Wall/Fence Infrastructure Based on proposed CPB Border Wall System alignment (As of 2019).

Cameron County	Bisect Acreage Remaining on North Side (approx.)
Southmost	177
Boscaje de La Palma	52
Jeronimo Banco	39
Phillips Banco	309
Palo Blanco	1
Garza-Cavazos	260
Tahuachal Banco	86
Ranchito	3810
La Gloria	123
Total Tracts	**Total Ac.**
9	**4,857**

Hidalgo County	Bisect Acreage Remaining on North Side (approx.)
Santa Maria	1
Rosario Banco	12
La Coma	36
Champion Bend WMA	2
Monterrey Banco	2
Marinoff	100
Pharr Settling Basin (Mgt Agr.)	11
Tortuga Banco	17
El Morillo Banco	73
La Parida Banco	166
Kiskadee WMA	1
Peñitas	4
La Joya	445
Havana North	45
Havana South	27

Sam Fordyce North	129
Sam Fordyce South	111
Los Ebanos	266
Cuevitas	200
Total Tracts	**Total Ac.**
19	**1,648**

Starr County	Bisect Acreage Remaining on North Side (approx.)
Chicharra Banco	249
San Francisco Banco	714
La Casita East	678
Los Velas	400
Los Velas West	9
Los Negros Creek	99
Arroyo Ramirez	57
Las Ruinas	78
Arroyo Morteros	50
Total Tracts	**Total Ac.**
9	**2,334**

The construction of the cleared enforcement zones will directly remove wildlife habitat. The enforcement zones will also create barriers and restrict wildlife movements especially for species like ocelots, which require dense brush to travel through. As a result, we recommend reduction of the proposed 150-foot enforcement zones in areas with brush and on refuge lands to the minimum distance necessary to maintain a road. We also recommend CBP reduce the 150-foot wide enforcement zone when the fence alignment is near the river bank and leave a minimum 33-foot wide corridor on top of the river bank. This will provide a corridor for wildlife and will reduce erosion. Once the enforcement zones are established, a bollard-cable type fence should be installed to replace refuge fencing originally designed to prevent vehicular access into the tract itself. We recommend CBP construct a border barrier with additional openings so that ocelots and other wildlife may move through the border barrier to maintain their connection across the landscape. We recommend CBP replace all cleared brush by restoring brush in un-impacted areas on protected lands to eliminate the net loss of valuable thornscrub habitat. We recommend that wildlife openings matching the width of a gate opening, be maintained in an open condition 24 hours per day with brush corridors leading to openings. We specifically recommend openings on LRGV NWR at Ranchito Tract (Tahuachal Gap negotiated in 2007) in Cameron County, Chicharro Banco in Starr County, La Parida Banco, and Madero Tract in Hidalgo County, and on Bentsen Rio Grande Valley State Park in Hidalgo County. Also, in Starr County, the current proposed alignment appears to begin halfway through the Los Negros Creek unit of LRGV NWR. This alignment would pass through a million-year-old oyster bed geological feature and through designated critical habitat for the Zapata bladderpod. This area also regularly floods and has very unstable soils. We recommend beginning the alignment to the east of the Los Negros Creek tract or aligning on the north end of the unit with a gap at the arroyo.

The proposed alignment in Hidalgo County appears to run through the Sam Fordyce South and La Joya Tracts creating another road south of Old Military Hwy 281 and an abandoned railroad. This alignment will significantly fragment over 5000-acres of thornscrub habitat by adding another road and fence to the existing roads and right-of-ways. We propose that the alignment follow south of the Old Military Highway 281 and railroad right-of-way to reduce fragmentation impacts. We also request there be gap through these segments so these large tract of refuge and private thronscrub remain intact.

A massive flooding event occurred in the Valley in July 2010, along with a release of floodwaters from Falcon Dam due to hurricane-induced rain in Mexico. Floodwaters overtopped the existing Rio Grande levees both at Santa Ana NWR and LRGV NWR as well as on neighboring State and private lands. Approximately 16,850 acres were flooded on LRGV NWR alone impacting numerous native and reforested areas. Floods reached as high as 20 feet above the river bank at Santa Ana NWR and the impounded water remained for about six months before receding. The Service is concerned the total existing and proposed levee wall (up to 52 miles) in Hidalgo County will exacerbate such catastrophic events in the future and leave terrestrial wildlife trapped behind levee walls/fencing. This project is likely to result in loss of life and wildlife during floods since approximately 85percent of Refuge lands are along the Rio Grande, south of the International Boundary and Water Commission levee. We recommend that all gates be open during any significant flooding events and propose construction of elevated berms with associated pads or ramps containing 4:1 slopes around roads and gate gaps south of the levee to allow terrestrial animals to retreat from rising waters during catastrophic flooding events.

Additional CBP activities, particularly dragging tires on roads to check for footprints, contribute to erosion and direct loss of wildlife, particularly reptiles, as well as the establishment of exotic grass species, salt cedar, and other invasive plant species. The proposed enforcement zone includes an improved all-weather road capable of high speed use that would pose a concern for public safety and increased wildlife mortality. Vehicle traffic and especially dragging roads will increase dust impacts on visitors, wildlife, and impacts to vegetation along the enforcement zone. Tactical infrastructure lighting also impacts nighttime wildlife activity, causing habitat to be unusable by ocelot and other nocturnal species. In this case, the Service recommends lighting be focused away from habitats, using motion sensors, and only illuminating the enforcement zone. We recommend the CBP coordinate with the Service to address localized impacts of roads, lights, dragging, and other activities.

To prevent entrapment of wildlife species (particularly birds) during placement of vertical posts/bollards; all vertical fence posts/bollards that are hollow (i.e., those that will be filled with a reinforcing material such as concrete), should be covered to prevent wildlife from becoming trapped inside. Caps should be installed on the posts or hollow bollards when they are erected and remain until they are filled with reinforcing material. Additionally, all construction activities involving vegetation clearing should avoid the general bird nesting season extending from March through August to avoid impacting resident and migratory birds protected under the Migratory Bird Treaty Act.

Attachment C.
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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 18 2020

The Honorable John Hoeven
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Chairman Hoeven:

Enclosed are responses to the follow-up questions from the June 24, 2020, legislative hearing to receive testimony on S. 2165, S. 2716, S. 2912, S. 3019, S. 3099, and S. 3100 before your Committee. These responses were prepared by the Secretary's Indian Water Rights Office, the Bureau of Reclamation and the U.S. Fish & Wildlife Service.

Thank you for the opportunity to respond to you on this matter.

Sincerely,

Cole Rojewski
Director
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Tom Udall
Vice Chairman

Questions for the Record
Senate Committee on Indian Affairs
Legislative hearing on S. 2165, S. 2716, S. 2912, S. 3019, S. 3099, and S. 3100
June 24, 2020

Questions from Vice-Chairman Udall

Question 1: Your testimony noted, "[w]e have reached agreement with the Confederated Salish and Kootenai Tribes (Tribes) on a redline amendment for the underlying bill. If that language were to be adopted, the Department could support the bill". The use of the word "could" suggests there may be additional caveats that would preclude the Administration from supporting the redline amendment. To clarify, does the Administration support the redline amendment?

Response: The Administration supports the redline amendment.

Question 2: During the hearing you were asked, "would the Reclamation Water Settlement Fund be a useful resource to fund Indian water rights settlements, and why would extending the fund benefit all water users?" Your response was:

> **I think the Indian Water Rights at Department of Interior is a set structure, because it is a partnership for so many of the different bureaus within the Department of Interior. Just as I am here with a colleague from Interior, within the Bureau of Indian Affairs, it is a partnership with the Bureau of Indian Affairs, with Fish and Wildlife Service, with even obviously Bureau of Reclamation. We have different aspects with the Bureau of Land Management, and even Park Service components. So, having it within that Indian Water Rights Settlement would really be a useful tool for the Secretary to utilize with the different bureaus who have those specific interests with how that gets engaged.**

Please clarify whether the Reclamation Water Settlement Fund, as enacted, is a useful resource to fund Indian water rights settlements and whether extending the fund would benefit all water users.

Response: The Reclamation Water Settlement Fund as enacted is proving to be a useful resource to the Department of the Interior in budgeting the funds necessary to implement Indian water rights settlements. The Department's views on extending the Fund are set forth in the attached testimony dated July 18, 2018, on S.3168 and April 4, 2019, on H.R. 1904.

Question 3: I am concerned about the Department of the Interior's reluctance to provide Congress with a better understanding of what activities of enacted Indian water rights settlements are eligible for the Reclamation Water Settlement Fund, beyond the priority settlements listed in section 10501(c)(3) of P.L. 111-11.

On March 11, 2019, Bureau of Reclamation Commissioner Brenda Burman appeared before the Senate Committee on Appropriations, Subcommittee on Water and Power to

discuss the President's budget request. The following exchange took place:

> **Senator Udall: Can you explain whether there are sufficient authorized activities to use the entire reclamation water settlement fund, and will you commit to work with us to provide that information to Congress so that we can unlock the settlement fund for future settlements?**
>
> **Commissioner Burman: Senator, Reclamation believes there are more than enough activities to use the entire fund, as currently laid out. We would be happy to work with you and with the committee to clarify any questions or to bring information.**

In follow-up questions for the record, I requested the Bureau of Reclamation provide information on how there "are more than enough activities to use the entire fund". Yet in the Department's response, it indicated it was unwilling to provide Congress with the details on how it arrived at this conclusion. This is critical information for our Committee to consider in authorizing future Indian water rights settlements.

Please provide a list of enacted Indian water rights settlements that are eligible for funding under the Reclamation Water Settlement Fund and specify how much funding would be available for each.

Response: As noted, P.L. 111-11 Section 10503 (c)(3) established tiered funding priorities for seven Indian water rights settlements. Under current law, the Reclamation Water Settlement Fund is expected to receive deposits of up to $120 million per year for 10 years, or $1.2 billion. The priority for each settlement is conditioned on Congress enacting legislation authorizing the settlement by December 31, 2019. The list of the five enacted water rights settlements specified as priorities that are eligible to receive this funding, per PL 111-11, is as follows:

- Navajo-Gallup Water Supply Project ($500 million).
- Other New Mexico Settlements, which includes both the Aamodt adjudication and the Abeyta (Taos) adjudication ($250 million).
- Montana Settlements, which includes the Blackfeet Tribe and Crow Tribe ($350 million).

Two settlements designated as priorities in P.L. 111-11 – Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation (Montana) and the Navajo Nation Lower Colorado (Arizona) – were not enacted by December 31, 2019. Therefore, these two settlements no longer retain the priority designation.

The decision on the allocation of funds from the Reclamation Water Settlements Fund is made annually based on the priorities in P.L. 111-11, funding requirements for each of the settlements, and circumstances at the time. Most of the settlements designated in

P.L. 111-11 have settlement deadlines in FY 2024 through FY 2025 and will require the full amounts available in the Reclamation Water Settlements Fund for at least the first five years.

In addition to funding settlements designated as priorities in P.L. 111-11, if funds are available from the Reclamation Water Settlements Fund -- after ensuring there are sufficient funds for the priorities establish in P.L.111-11 -- there are a number of other enacted water rights settlements that could be considered. This could include funds to implement the Gila River Indian Community Water Rights Settlement, San Carlos Apache Water Right Settlement, Southern Arizona Water Rights Settlement, White Mountain Apache Tribe Water Rights Quantification, or Ak-Chin Water Rights Settlement in Arizona; and Nez Perce in Idaho.

Question 4: Describe the financial impacts on Lake and Sanders Counties that would stem from conveying the National Bison Range to the United States to be held in trust for the benefit of the Tribes, along with estimated costs per activity.

Response: There would be no negative financial impacts on Lake and Sanders Counties as a result of the legislation restoring the National Bison Range to federal trust ownership for the Tribes. Section 12(k)(1)(A) of S. 3019, as introduced, would continue the existing level of payments that the Counties receive from the U.S. Fish & Wildlife Service under the Refuge Revenue Sharing fund. Section 12(k)(2) requires those payments to be equal to the amount the Counties would have received if the legislation had not been enacted. *For amounts of such funding, see response to question #6.*

Question 5: Please provide a list of authorized Indian water rights settlements that have included a direct payment to surrounding communities, along with citations, to compensate for impacts associated with a settlement.

Response: It is unusual, but not unprecedented, for Indian water rights settlement to include direct payments to surrounding communities. Section 5(b) of the Snake River Water Rights Settlement Act of 2004, P.L. 108-447; Div. J; Title X, 118 Stat. 3431, 3433, provides:

> (b) MITIGATION FOR CHANGE OF USE OF WATER.-
> (1) AUTHORIZATION OF APPROPRIATIONS.-There is authorized to be appropriated to the Secretary $2,000,000 for a 1- time payment to local governments to mitigate for the change of use of water acquired by the Bureau of Reclamation under section III.C.6 of the Agreement.
> (2) DISTRIBUTION OF FUNDS.-Funds made available under paragraph (1) shall be distributed by the Secretary to local governments in accordance with a plan provided to the Secretary by the State.

(3) PAYMENTS.-Payments by the Secretary shall be made on a pro rata basis as water rights are acquired by the Bureau of Reclamation.

Question 6: What are the amounts and sources of payments that Lake and Sanders Counties "would have received" if Section 12(k) were not enacted? How was that figure calculated?

Response: Under the Refuge Revenue Sharing Act (16 U.S.C. § 715s), the U.S. Fish and Wildlife Service (USFWS) makes annual payments to counties for tax-exempt USFWS-managed lands to offset tax losses. The funding is derived from net income the USFWS receives from the sale of products or privileges on refuges, such as from timber sales and grazing leases, and direct Congressional appropriations. Per the Refuge Revenue Sharing Act, the calculations for payments to counties and other units of local government for land purchased by or donated to USFWS is based on the greater of: (a) 3/4 of 1 percent of the market value; (b) 25 percent of the net receipts; (c) 75 cents per acre. Historically, the payments for National Bison Range lands have been based on the market value calculation.

When there is not enough revenue funding to cover the payments, Congress is authorized to appropriate money to make up the difference. If the amount Congress appropriates is not enough, the payments the Service distributes to counties and other local governments is based on a pro-rata share.

The amount varies each year; in FY 2020, for lands associated with the National Bison Range, Lake County received $9,652 and Sanders County received $11,257.

Question 7: What are the estimated number of jobs that would be created in Lake and Sanders Counties if the settlement were enacted and fully implemented?

Response: In the Department's testimony before the Senate Committee on Indian Affairs, Assistant Secretary Petty highlighted that funding authorized under S. 3019 would create significant economic activity in the region on and near the Reservation, which includes Lake and Sanders Counties. The Department's analysis concluded that the economic activity would support direct, indirect, and induced jobs in the region, including approximately 520 permanent jobs (of which approximately half are seasonal), and approximately 4,650 temporary construction and restoration jobs through rehabilitating and modernizing FIIP and restoring natural resources damaged by FIIP operations.

Question 8: Senator Daines noted that decommissioning the Flathead Indian Irrigation Project "would devastate the economies of Lake and Sanders Counties". What are the economic impacts to Lake and Sanders Counties if this settlement was not authorized and the Flathead Indian Irrigation Project were to be decommissioned? What are the benefits?

Response: The Department has not analyzed the economic impacts of the potential decommissioning of FIIP on Lake and Sanders Counties specifically. However, the Department has analyzed the effects on total economic activity in the State of Montana if the United States and Tribes were to succeed on their instream flow claims, and a range of irrigated agriculture acreage was converted to dryland farming. Depending on the amount of irrigation water supply curtailed, the effects on total State of Montana economic activity are estimated to range from a reduction in labor income of $12.9 million to $34.7 million per year and a reduction in employment of between 110 to 310 jobs. The majority of the income effect and at least half of the employment effect would likely be felt in Lake and Sanders Counties. (All direct impacts to farm income and farm jobs would be in Lake and Sanders Counties.) Given that over two thirds of Lake County's lands lie within the Flathead Reservation, it is reasonable to expect that the majority of On-Reservation impacts would be felt by Lake County residents. The impacts would likely be less in Sanders County. Apart from benefits related to instream flows and fish habitat, the Department has not identified any economic benefits to Lake and Sanders Counties if FIIP were to be decommissioned.

Question 9: Section 9106 of P.L. 111-11 required the Secretary to submit a report to Congress no later than March 30, 2011, to conduct a study of Pueblo irrigation infrastructure and develop a list of projects that are recommended to be implemented to repair, rehabilitate, or reconstruct Pueblo irrigation infrastructure. Please provide an update to the Committee on the status of the report.

Response: The Department has completed a draft Study Report pursuant to Section 9106 of P.L. 111-11 that includes surveys of the existing irrigation infrastructure at each Pueblo, a list of Pueblo irrigation improvement projects recommended for implementation, as well as the other items provided for in subsection (c)(4). The draft is currently being edited to address reviewer comments.

Questions from Senator Steve Daines

Question 1: Where in the CSKT Compact are the damages to be paid to the 3500 irrigators who lost their irrigation rights to the tribe and had their traditional amount of irrigation water cut in half?

Response: This question was answered in the attached letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress, Section B.2 (Nov. 18, 2019).

Question 2: How do you avoid the Winters Doctrine which established compacts and the procedure to get water to meet the purpose of the reservations to make them productive?

Response: This question was answered in the attached letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress, Section B.2 (Nov. 18, 2019).

Question 3: Why is the Tribe given the authority to manage all of the water on the open CSKT Reservation when the Montana Department of Natural Resources DNRC was formed to treat everyone the same?

Response: This question was answered in the attached letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress, Section B.2 (Nov. 18, 2019).

Question 4: Why is the Hell gate Treaty and Federal and state constitutions avoided in issues of land and water, off the CSKT Reservation?

Response: This question was answered in the attached letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress, Section B.2 (Nov. 18, 2019).

Question 5: Why are the required studies not made available such as legal, economic, and environmental?

Response: The relevant legal, economic, and environmental studies undertaken in the development of the Compact were provided to and considered by all parties.

Question 6: Would you provide examples of how you intend to implement this legislation, when it's in clear violation of Fifth Amendment "taking" clause?

Response: The legislation will be implemented as provided in the legislation and the Compact consistent with the Fifth Amendment of the United States Constitution. *See* Letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress (Nov. 18, 2019).

Questions 7 and 8: Would you provide examples of how you intend to implement this legislation, when it's in clear violation of Fourteenth Amendment Equal Protection clause?

Response: The legislation will be implemented as provided in the legislation and the Compact consistent with the Fourteenth Amendment of the United States Constitution. *See* Letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress (Nov. 18, 2019).

Question 9: Why do you need such a drastic change in centuries of water law in America?

Response: This settlement is consistent with established water law in America. *See* Letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress, Sections A & B.1 (Nov. 18, 2019).

Question 10: Do you have a plan to deal with every tribe in America who will then want what only this tribe has if you pass this: off reservation water right, with a time immemorial seniority date on any area they may have once ever fished?

Response: Every settlement of federal Indian reserved water rights is based on the unique circumstances, history, and claims of the Tribe or Tribes involved.

Question 11: How will you then be able to violate all those State constitutions, as you will have done to Montana?

Response: This settlement is consistent with the Constitution of the United States and the State of Montana's constitution. *See* Letter from David L. Bernhardt, Secretary, Dep't of the Interior, to the Honorable Steve Daines, Senator, United States Congress (Nov. 18, 2019).

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H.R. 1904

A bill to amend the Omnibus Public Land Management Act of 2009 to make the Reclamation Water Settlements Fund permanent

Statement of Alan Mikkelsen
Senior Advisor to the Secretary
Water and Western Resources Issues
Chair, Working Group on Indian Water Settlements
U.S. Department of the Interior
Before the

House Natural Resources Committee
U.S. House of Representatives

On H.R.1904, the Indian Water Rights Settlement Extension Act.

April 4, 2019

Chairman Grijalva, Ranking Member Bishop, and Members of the committee, I am Alan Mikkelsen, and I am the Senior Advisor to Acting Secretary Bernhardt and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to discuss H.R. 1904, a bill to amend the Omnibus Public Land Management Act of 2009 (Title X, Part II of Public Law 111-11) to make the Reclamation Water Settlements Fund permanent.

As stated in the Administration's testimony in the 115th Congress on similar legislation introduced in the Senate, the Administration remains committed to implementing and adequately funding enacted settlements, and has ensured adequate funding to implement all authorized settlements through the annual Budget process.

The Department continues to strongly support Indian water rights settlements that adhere to the principles outlined in the Department's 1990 Criteria and Procedures that are grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. Negotiated settlements allow tribes, states, and local water users to achieve finality on difficult issues of title to water, freeing up surrounding communities to make critical management and development decisions. Settlements allow the parties to develop creative solutions to overarching water resources issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and non-Indian communities, and to creating water certainty and economic-development opportunities in the West, has been funding. Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes. Settlements provide opportunities for local solutions, and because they have federal and local cost-share requirements, the settling parties share in the burdens, as well as the benefits, that can arise from investments in infrastructure. The FY 2020 Budget requests $178.5 million for the implementation of Indian water rights settlements.

Background

To date, Congress has enacted 32 Indian water settlements, addressing the need for reliable water supplies in Indian country. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and the Department continues to see an increase in requests from tribes and states to enter into water rights settlement negotiations. Many of these tribes need: clean, reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure to bring economic development to reservations. States increasingly seek settlement of Indian water rights to provide certainty for holders

of State-based water rights, clarify authority to manage water resources, and plan for the future.

Indian water rights settlements can however be costly, and costs have increased over the years. Within the last ten years, the Omnibus Public Lands Management Act of 2009 (P.L. 111-11), the Claims Resolution Act of 2010 (P.L. 111-291) and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322) authorized seven new settlements that call for total Federal expenditures totally approximately $2.5 billion. Although some mandatory funding was provided with the Claims Resolution Act, substantial discretionary funding is needed to meet the statutory settlement obligations. Each of these settlements contain deadlines by which funding must be completed or the settlement fails and long standing, expensive, and disruptive litigation resumes. In addition to the statutory requirements to fund these settlements within prescribed timeframes, the availability of funding has implications for economic development in Indian and non-Indian communities and raises other human considerations and equity concerns. For example, the availability of potable water can affect economic development, tribal health and welfare. Stalled funding would also delay the receipt of the economic benefits that are associated with settlements, which is why the Budget provides sufficient resources to implement enacted settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Construction funding also provides short-term economic stimulus to localities or regions which is important given the high unemployment levels in Indian country.

The Department currently has 2 Federal Assessment Teams, 21 Federal Negotiation Teams that are working with tribes to achieve additional settlements, and 23 teams working on implementing enacted settlements. Two of the settlements included as priorities for the Settlement fund, Navajo Lower Colorado Basin and Fort Belknap, have not been enacted, and the Federal contributions to these settlements may approach a billion dollars based on similar enacted settlements. While allocation of funding among the priority settlements identified in the Settlements Fund is complicated by construction schedules and other matters and cannot be fully predicted, at this time it appears there will be little, if any, funding in the Settlement

Fund for settlements not specifically listed as priorities. The Department has always given priority to funding settlements in the annual Budget.

Reclamation Water Settlements Fund

In 2009, Congress created the Reclamation Water Settlements Fund, which authorizes the deposit of funds that would otherwise be deposited into the Reclamation Fund, into a separate account within the U.S. Treasury. Currently, the Secretary of the Interior is authorized to expend from the Reclamation Water Settlements Fund, without further appropriation, up to $120 million a year of the amounts deposited through FY 2029, plus accrued interest, in each of the years from FY 2020 to FY 2034. The Secretary may use money in the Reclamation Water Settlements Fund to implement congressionally approved water rights settlements, if the settlement requires the Bureau of Reclamation to provide financial assistance, or to plan, design or construct water supply infrastructure. In addition, the currently authorized Reclamation Water Settlements Fund establishes certain funding priorities for settlements in the states of New Mexico, Montana, and Arizona.

Finally, the law includes a reversion clause providing that if any settlement identified in the above funding priority is not approved by an act of Congress by December 31, 2019, the Secretary has the discretion to use the reserved funds for any authorized use.

H.R.1904

H.R. 1904 would make the Reclamation Water Settlements Fund permanent and would not prioritize settlements other than those currently prioritized. While the current Reclamation Water Settlement Fund will become available for expenditures in 2020, much of it is already committed to existing, enacted settlements. The Department looks forward to working with the Committee to determine the best approach for authorizing future settlements.
The Department takes into consideration the effects of growing populations and related water demands, widespread drought in the West, and the need for new infrastructure and water storage in many locations. These factors are certain to drive an increase in the demand for water settlements.

I want to underscore the importance of these settlements, and recognize the aim of the bill sponsor and this Committee in considering H.R. 1904. Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they provide opportunities for economic development, produce critical benefits for tribes and non-Indian parties, and bring together communities to improve water management practices in some of the most stressed water basins in the country. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

As noted above, the Department supports Indian water rights settlements grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. The Department looks forward to working with the Committee and discussing the best means of achieving future settlements.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

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S. 3168

Indian Water Rights Settlement Extension Act

Statement of Alan Mikkelsen
Senior Advisor to the Secretary
Water and Western Resources Issues
Chair, Working Group on Indian Water Settlements
U.S. Department of the Interior
Before the

Committee on Indian Affairs
U.S. Senate

On S. 3168, to amend the Omnibus Public Land Management Act of 2009 to make
Reclamation Water Settlements Fund permanent.
July 18, 2018

Chairman Hoeven, Vice Chairman Udall, and Members of the committee, I am Alan Mikkelsen, and I am the Senior Advisor to Secretary Zinke and Chair of the Working Group on Indian Water Settlements at the U.S. Department of the Interior (Department). Thank you for the opportunity to discuss S. 3168, a bill to amend the Omnibus Public Land Management Act of 2009 (Title X, Part II of Public Law 111-11) to make the Reclamation Water Settlements Fund permanent. The Administration remains committed to implementing and adequately funding enacted settlements,

and has ensured adequate funding to implement all authorized settlements through the annual Budget process.

The Department continues to strongly support Indian water rights settlements that adhere to the principles outlined in the Department's 1990 Criteria and Procedures that are grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. Negotiated settlements allow tribes, states, and local water users to achieve finality on difficult issues of title to water, freeing up surrounding communities to make critical management and development decisions. Settlements allow the parties to develop creative solutions to overarching water resources issues. One of the key factors in making settlements meaningful to the health and welfare of tribes and non-Indian communities, and to creating water certainty and economic-development opportunities in the West, has been funding. Funding is needed to secure new water supplies, build or rehabilitate infrastructure required to deliver water, and protect resources such as treaty fishing rights that are of critical importance to tribes. Settlements provide opportunities for local solutions, and because they have federal and local cost-share requirements, the settling parties share in the burdens, as well as the benefits, that can arise from investments in infrastructure. The FY 2019 Budget requests $173 million for the implementation of Indian water rights settlements.

Background

To date, Congress has enacted 32 Indian water settlements, addressing the need for reliable water supplies in Indian country. There are over 280 federally recognized tribes in the West alone (excluding Alaska), and the Department continues to see an increase in requests from tribes and states to enter into water rights settlement negotiations. Many of these tribes need: clean, reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure to bring economic development to reservations. States increasingly seek settlement of Indian water rights to provide certainty for holders of State-based water rights, clarify authority to manage water resources, and plan for the future.

Indian water rights settlements can however be costly, and costs have increased over the years. Within the last ten years, the Omnibus Public Lands Management

Act of 2009 (P.L. 111-11), the Claims Resolution Act of 2010 (P.L. 111-291) and the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. 114-322) authorized seven new settlements that call for total Federal expenditures totally approximately $2.5 billion. Although some mandatory funding was provided with the Claims Resolution Act, substantial discretionary funding is needed to meet the statutory settlement obligations. Each of these settlements contain deadlines by which funding must be completed or the settlement fails and long standing, expensive, and disruptive litigation resumes. In addition to the statutory requirements to fund these settlements within prescribed timeframes, the availability of funding has implications for economic development in Indian and non-Indian communities and raises other human considerations and equity concerns. For example, the availability of potable water can affect economic development, tribal health and welfare. Stalled funding would also delay the receipt of the economic benefits that are associated with settlements, which is why the Budget provides sufficient resources to implement enacted settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Construction funding also provides short-term economic stimulus to localities or regions which is important given the high unemployment levels in Indian country.

The Department currently has 21 Federal negotiation teams working with tribes to achieve additional settlements, and 23 teams working on implementing enacted settlements. Two of the settlements included as priorities for the Settlement fund, Navajo Lower Colorado Basin and Fort Belknap, have not been enacted, and the Federal contributions to these settlements may approach a billion dollars based on similar enacted settlements. While allocation of funding among the priority settlements identified in the Settlements Fund is complicated by construction schedules and other matters and cannot be fully predicted, at this time it appears there will be little, if any, funding in the Settlement Fund for settlements not specifically listed as priorities. The Department has always given priority to funding settlements in the annual Budget.

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Reclamation Fund, into a separate account within the U.S. Treasury. Currently, the Secretary of the Interior is authorized to expend from the Reclamation Water Settlements Fund, without further appropriation, up to $120 million a year of the amounts deposited through FY 2029, plus accrued interest, in each of the years from FY 2020 to FY 2034. The Secretary may use money in the Reclamation Water Settlements Fund to implement congressionally approved water rights settlements, if the settlement requires the Bureau of Reclamation to provide financial assistance, or to plan, design or construct water supply infrastructure. In addition, the currently authorized Reclamation Water Settlements Fund establishes certain funding priorities for settlements in the states of New Mexico, Montana, and Arizona.

Finally, the law includes a reversion clause providing that if any settlement identified in the above funding priority is not approved by an act of Congress by December 31, 2019, the Secretary has the discretion to use the reserved funds for any authorized use.

S. 3168

S. 3168 would make the Reclamation Water Settlements Fund permanent and would not prioritize settlements other than those currently prioritized. While the current Reclamation Water Settlement Fund will become available for expenditures in 2020, much of it is already committed to existing, enacted settlements. The Department looks forward to working with the Committee to determine the best approach for authorizing future settlements.

The Department takes into consideration the effects of growing populations and related water demands, widespread drought in the West, and the need for new infrastructure and water storage in many locations. These factors are certain to drive an increase in the demand for water settlements.

I want to underscore the importance of these settlements, and recognize the aim of the bill sponsor and this Committee in considering S. 3168. Disputes over Indian water rights can be expensive and divisive. In many instances, these disputes last for decades, represent a tangible barrier to progress for tribes, and significantly hinder the rational and beneficial management of water resources. Indian water rights settlements can break down these barriers and help create conditions that

improve water resources management by providing finality and certainty for all affected water users. When settlements can be reached, they provide opportunities for economic development, produce critical benefits for tribes and non-Indian parties, and bring together communities to improve water management practices in some of the most stressed water basins in the country. Successful settlements are also consistent with the Federal trust responsibility to American Indians and with Federal policy promoting Indian self-determination and economic self-sufficiency.

As noted above, the Department supports Indian water rights settlements grounded in the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation as a means of resolving water rights disputes. The Department looks forward to working with the Committee and discussing the best means of achieving future settlements.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

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THE SECRETARY OF THE INTERIOR
WASHINGTON

NOV 18 2019

The Honorable Steve Daines
United States Senate
Washington, DC 20510

Dear Senator Daines:

I have received your correspondence regarding the proposed settlement of the reserved water right claims of the Confederated Salish and Kootenai Tribes (CSKT or Tribes). Although I did not participate in the negotiation of this proposed settlement, I have evaluated the matter. In sharing my perspective, it may be useful to know that I have been involved with the negotiation and approval of other water rights settlements over the last two and a half decades.

I understand that following nearly a decade of negotiations, negotiators for the Tribes, the State of Montana (State), and the United States submitted to their respective principals a proposed settlement of the Tribes' reserved water right claims known as the CSKT Water Rights Compact or CSKT Compact. The Compact, approved by the Montana legislature in 2015, is currently proceeding through the appropriate Federal review and approval processes.

As a general policy matter, for more than 30 years, the United States has supported resolving Indian reserved water right claims through negotiations rather than protracted and divisive litigation. I am informed that during the course of negotiating and reviewing the CSKT Compact, concerns and objections were raised about whether proposed Compact terms appropriately resolved the Tribes' claims and about the perceived impacts that the Compact could have on non-Indian water right holders. These concerns are important, and it is my understanding that these concerns were considered and evaluated during the negotiations, in the context of potential risks and liabilities resulting from non-settlement.

Given your commitment to resolving longstanding issues and avoiding needless litigation, you have asked for the Department of the Interior's (Department) views on these concerns. I would like to provide our perspective at this time on how I understand that these concerns have been addressed.

A. Background on the CSKT Reserved Water Right Claims

Historically, the Federal Government, when called upon to file reserved water right claims as trustee for a Tribe and its members, files claims that it determines are legally justified under Federal law, including under the Tribe's treaty or other documents creating the Tribe's reservation, and that are consistent with State and Federal court decisions interpreting the *Winters* reserved water rights doctrine. These initial filings by the United States tend to be broad in scope, based on credible claims that can be supported with competent expert testimony.

In 2015, using this framework, the United States and CSKT filed in the Montana Water Court several categories of reserved right claims, including these that relate to the concerns discussed below:

- Instream flows to support the fisheries, both on- and off-Reservation, based on language in the CSKT Hellgate Treaty expressly reserving Tribal fishing rights.
- The irrigation water supply for the Bureau of Indian Affairs (BIA) Flathead Indian Irrigation Project (FIIP or Project) to serve all lands within the Project, both Indian and non-Indian.
- Future irrigation water for the CSKT, consistent with U.S. Supreme Court precedent.

When parties propose settlement of a Tribe's reserved claims, the United States traditionally evaluates the agreement from various perspectives, including:

- Does the proposed settlement secure adequate Tribal water resources to meet the purposes of the reservation?
- Are the Tribe's water rights legally protected and enforceable?
- Would the settlement resolve all of the Tribe's reserved water right claims?
- If a BIA irrigation project is involved, are the water rights for the project properly resolved?
- Are proposals to address how water rights on the reservation would be administered and enforced acceptable?

B. Discussion of CSKT Compact Concerns

It is my understanding that the primary concerns about the Compact raised to date tend to fall into three main themes:

- Objections to the inclusion of reserved rights for off-Reservation instream flows.
- Objections to how the Compact resolves the water rights for FIIP in conjunction with the CSKT reserved rights for on-Reservation instream flows.
- Assertions that the Compact's approach to administering and enforcing water rights on the Reservation is unconstitutional, primarily under Montana law.

I address each of these three themes below.

1. Reserved Rights for Off-Reservation Instream Flows

Concerns have been raised about whether there is a legal basis for the off-Reservation flow rights CSKT would obtain under the Compact. These concerns are understandable. Although there is extensive experience with reserved off-reservation flow claims elsewhere in the Northwest, fewer such claims have been addressed in Montana. That said, similar claims were confirmed in the legislation approving the Blackfeet Water Rights Compact. The CSKT Compact, however, is the first time that claims based on a treaty reserving off-Reservation fishing rights have been addressed in Montana.

The United States and CSKT filed off-Reservation reserved instream flow claims premised on the Hellgate Treaty and its promise in article III that Tribal members may fish off the Reservation at "all usual and accustomed places, in common with citizens of the Territory." These claims are intended to protect Tribal members' ability to fish in the rivers and streams where Tribal members fished at the time of the Treaty in order to provide a meaningful fishery. This language is virtually the same as clauses found in several Indian treaties in the Pacific Northwest known as "Stevens Treaties," which were negotiated in 1854-55 with Washington Territory Governor Isaac Stevens. Generally, the legal premise is that in the Stevens Treaties, when Tribes expressly reserved off-Reservation fishing rights, they impliedly reserved the water rights necessary to support the fishing purpose. This theory follows the holdings in *Winters* and *Winans* that Tribes may reserve aboriginal rights when entering into treaties establishing reservations. (*See Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905).)

To illustrate, Federal and State courts have considered the water rights of the Yakama Nation, a Stevens Treaty Tribe with treaty language equivalent to the Hellgate Treaty language. Federal courts have ordered that water be released from a Federal reservoir to protect spawning flows needed to support the Yakama Nation's off-Reservation fishing right more than 50 miles upstream of the Yakama Reservation. (*Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-35 (9th Cir. 1985).) Washington trial and appellate State courts also have made extensive rulings finding and clarifying the Nation's rights to off-Reservation flows for fisheries throughout the Yakima River basin. The Yakama Nation's adjudicated water rights extend throughout the Yakima basin, even though the Reservation only occupies the southwestern portion of the basin. Further, courts have found that these rights have a priority date of time immemorial.

Another illustrative case is *United States v. Adair*, where the Federal courts concluded that the Klamath Tribes' treaty recognized the Tribes' aboriginal title in the reservation lands and natural resources and confirmed to the Tribes "a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation." (723 F.2d. 1394, 1413-14 (9th Cir. 1984).) These courts held that the Klamath Tribes therefore enjoyed water rights sufficient to support their treaty fishing, hunting, and gathering rights with a "time immemorial" priority. The *Adair* decision also defined how to quantify the Klamath Tribes' instream rights, recognizing the Tribes' water right included the right to prevent other appropriators from depleting the streams' waters below a protected level in any area where the non-consumptive right applies. Subsequently, Phase I of the State of Oregon's Klamath Basin Adjudication resulted in a Final Order of Determination issued in 2013 that quantified the Tribes' instream flow right.

The Department determined that the case law, the history of the Tribes, and the Hellgate Treaty supported off-Reservation flow claims for CSKT in the Montana adjudication. It found that it was appropriate to address these claims as part of the Compact. These reserved rights are Tribal property rights, but they do not provide for Tribal jurisdiction off the Reservation. Resolution of the Nez Perce Tribe's reserved water right claims for flows in the Snake River Basin Adjudication in Idaho does not change our conclusion. In that case, a State trial judge found the Nez Perce Tribe (which has a Stevens Treaty) was not entitled to off-Reservation instream flows. However, the State trial court's decision is not binding, and, in any event, the Tribe agreed in

that litigation to settle its off-Reservation flow claims for extensive instream flow protections under State law that they can enforce. As with the CSKT claims, the Federal Government found these settlement proposals to be an appropriate resolution to the Indian reserved claims at issue.

2. Resolution of the Water Rights for FIIP in Conjunction with the CSKT Reserved Rights for On-Reservation Instream Flows

I understand that a central concern is that the Compact may deprive water users served by FIIP of their entitlements to Project water. In fact, it appears that one of the most contentious issues during the negotiation was how to address the FIIP irrigation water right claims. Further, because the FIIP water rights and the Tribes' on-Reservation reserved flow rights often compete for the same water supply, addressing in tandem these two rights was critical for reaching a successful settlement.

The United States filed comprehensive water right claims for the entire FIIP irrigation water supply to serve all lands in the project, both Indian and non-Indian. It appears that one of the Department's primary goals during the negotiations was to preserve the historical irrigation water use on lands served by FIIP. This position comports with the Federal Government's past practice in general stream adjudications to claim the entire water supply of Federal irrigation projects. Also, as detailed below, Federal courts have confirmed the Tribes' entitlement to on-Reservation reserved instream flow right and these rights have a priority date of time immemorial and thus are senior to the FIIP water rights. (*See Joint Board of Control v. United States,* 832 F.2d 1127 (9th Cir. 1987); *Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States,* 862 F.2d 195 (9th Cir. 1988).) The Federal courts left to the Montana Water Court the job of quantifying the amount of flow required to satisfy these rights; if these claims cannot be settled, the Water Court will proceed with that task.

Concerns remain that the Compact would permanently reduce the FIIP water supply. I understand that this concern was a central one in the negotiations, and the Compact protects the net FIIP water supplies needed to irrigate crops. Tribal, State and Federal negotiators employed technical studies to determine that historical net irrigation supplies could be maintained and protected while project improvements were made to save water for instream flows. To this end, diversions under the Compact initially remain the same as historical amounts. As FIIP improvements and water conservation measures are implemented, the saved water is left instream to help meet flow rights. In turn, FIIP diversions would be reduced by a commensurate amount while ensuring that net crop demands continue to be met. As a safeguard, the Compact provides that, during implementation, irrigation diversions "shall be evaluated to ensure their adequacy to meet Historic Farm Deliveries." (Compact, Article IV.D.1.e.) If water in excess of those deliveries is needed, it will be provided by increasing water pumped from Flathead Lake. (Compact, Article IV.D.1.e.ii.)

There are additional terms that would further safeguard FIIP water use. The CSKT and the State committed in the Compact to seek Federal legislation to provide funds from power revenues on the Reservation to improve FIIP operations and water supplies. (Compact, Article IV.H.3.) They also agreed to several provisions in the Compact that protect the FIIP water supply in times of shortage, including sharing between instream flows and irrigation diversions. In dry years

when "water supplies are inadequate to simultaneously satisfy" instream flows and irrigation diversions, the Compact sets out several measures that can be taken to augment irrigation water. (Compact, Article IV.E.1.3.)

The negotiators also addressed assertions that the Compact takes legal title to the FIIP water rights away from landowners served by FIIP and places it with CSKT. There is little precedent, however, supporting third-party party claims to legal title to BIA project water rights held in trust for Tribes. In contrast, Indian settlements in Montana and Idaho placed title to BIA irrigation project water rights in the name of the United States in trust for the Tribe, even for BIA projects that serve both Indian and non-Indian irrigators on a reservation. We also note that Washington State courts adjudicated the water rights for the BIA irrigation project on the Yakama Reservation, which serves extensive non-Indian lands, to be properly held by the United States in trust for the Yakama Nation.

However, the Department also recognizes that all landowners served by a BIA irrigation project, whether Indian or non-Indian, are entitled to continue to receive project irrigation water to the extent the water is physically and legally available and assessments have been paid. The CSKT Compact includes protections for FIIP water users' entitlements to Project water. (*See* Compact, Article III.C.1.a (expansive definition of FIIP service area); Compact, Article IV.D.2 (recognition of entitlement through a "delivery entitlement statement").)

Finally, I note the obvious risks that FIIP water users would face if the quantification of CSKT's on-Reservation instream flow rights cannot be settled. As noted above, Federal courts in the 1980s recognized CSKT's entitlement to on-Reservation instream flow rights throughout the Reservation with a time-immemorial priority date that is senior to FIIP. Under this legal precedent, water would not be shared between FIIP and the instream flows; rather, instream flows would be met first to the full extent of their legal entitlement. The one question that the Federal courts left for the Montana courts was the quantification of CSKT's on-Reservation flow rights. Currently, Federal claims seek instream flow rights for the majority of water even in wetter years; if the courts were to confirm this claim, water for FIIP diversions would be available only in the wetter years and only to the extent not needed to meet the instream flow right. Even if the Water Court were to quantify the right at a lower median range, the Department's assessments show a likelihood that insufficient water will remain for viable FIIP irrigation diversions. Some objectors to the Compact argue that the "interim instream flows" established by BIA in the late 1980s should be the permanent quantification of the Tribes' flow rights. In my view, this position faces significant risk because the interim flows are not quantified and they do not appear biologically sufficient. The Compact, in contrast, ensures water for FIIP that otherwise might not be available if these claims were litigated.

For these reasons, the Department concluded that the Compact would appropriately resolve both the FIIP irrigation and the CSKT flow rights.

3. Administration of Water Rights on the Flathead Reservation under the Compact

Concerns have been raised about the Compact's terms for on-Reservation administration and enforcement of water rights after entry of a decree. This is set forth in the "Unitary

Administration and Management Ordinance" (UMO), and administered by the joint State-Tribal "Flathead Reservation Water Management Board" (Board) of water rights post-decree. Montana State government entities are best positioned to respond to assertions that these terms violate the Montana Constitution. The State—under the auspices of the Montana Reserved Rights Commission, the Attorney General's Office, and legal counsel for the Montana legislature—has analyzed the matter and concluded that the UMO is constitutional. The Montana Supreme Court has also confirmed that the legislature's approval of the Compact, including the UMO, complied with State law.

As noted above, it is my experience that, during the entirety of my professional career, the Federal Government has consistently supported efforts in Tribal water right negotiations to address how water rights on the reservation will be administered and enforced once a settlement is reached. In this negotiation, given the vast number of commingled Tribal and non-Tribal water uses on the Reservation, the parties explored proposals to create a single Tribal-State administrative body to administer on-Reservation rights, rather than a system of dual administration by the State and the Tribes. The single administrative body, the Board, consists of five voting members. CSKT and Montana would each appoint two board members. A fifth board member is then to be selected by the four appointees, or, if they cannot agree, alternative provisions exist for the appointment of the fifth board member. There are also provisions for local county commissioners' involvement in the selection of the State representatives. (Compact, Article IV.I.1.2.) The jurisdiction of the Board is limited to approving new rights, authorizing changes in use, and enforcing existing rights as set forth by the Compact. (Compact, Article IV.I.4.)

The Department did an extensive review of the UMO and concluded that, while the administration of on-Reservation rights through a single management board is novel, the terms of the Compact establish a workable and appropriate administration regime, provided that the Board and UMO are authorized by the State legislature, the Tribes, and Congress.

The Department's review of the UMO focused on whether the UMO properly recognized and protected the water entitlements of the Tribes and Indian allottees on the Flathead Reservation; improperly placed the management and administration of the water rights of non-Indian residents on the Reservation under Tribal jurisdiction; and provided basic due process protections to all water rights holders. First, with respect to the Federal reserved water rights of the Tribes and Indian allottees, which fall within Congress' restrictions against alienation and the unique protections for allottee water rights, the Department concluded that the Board, as governed by the UMO and the Compact, provided ample protections. Second, the State concluded that the UMO did not place non-Indian residents on the Reservation under Tribal jurisdiction. The Department concurs in that conclusion. The Board has been approved by the Montana legislature (as well as by the Tribes and the United States). Therefore, the Board's activities with regard to non-Indians constitute an exercise of State jurisdiction.

Finally, the UMO accords those appearing before the Board the same substantive standards and procedures available to others in the State. The Compact makes clear that the Board lacks the authority to amend the UMO, preventing changes to these procedures. (Compact, Article IV.J.) ("No amendment by the Tribes or the State of the Law of Administration shall be effective

unless and until the other makes an analogous amendment.") The Compact further provides the opportunity for judicial review of decisions made by the Board in a court of competent jurisdiction. (Compact, Article IV.I.6.) Although parties may argue whether that review lies in State or Federal court, nothing in the Compact extends Tribal court jurisdiction over non-Indian water rights holders. The Department ultimately agreed with the State's conclusion that the UMO procedures that govern the Board in conjunction with the opportunity to seek judicial review of the Board's decision protect the due process rights of both non-Indian and Indian water rights holders.

C. Conclusion

Through its negotiation team, the Federal Government actively participated in the CSKT reserved water right negotiations. Once negotiations were completed, the Federal team brought the proposed CSKT Compact to the Interior and Justice Departments for review and consideration whether to support the Compact. The Department of the Interior has evaluated the core concerns and criticisms that have been raised with respect to the Compact and found that these concerns were addressed in the negotiations.

I look forward to working with you as you work to resolve this important issue in Congress.

Sincerely,

Secretary of the Interior

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 20 2020

The Honorable Ruben Gallego
Chairman, Subcommittee for Indigenous Peoples
of the United States
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Gallego:

Enclosed are responses prepared by the Bureau of Indian Affairs to the questions for the record submitted following the September 19, 2019, legislative hearing on H.R. 1312, S. 216, H.R. 3846 and H.R. 4153 before your Subcommittee.

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

Sincerely,

Cole Rojewski
Director
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Paul Cook
Ranking Member

Questions for the Record
House Natural Resources
Subcommittee for Indigenous Peoples of the United States
Legislative Hearing on H.R. 1312, S. 216, H.R. 3846 and H.R. 4153
September 19, 2019

Questions from Rep. Ruben Gallego

You mention the informal interagency working group that already exists at the Department and how the STOP Act's creation of a formal interagency working group would thus be duplicative.

Question 1: Do tribal nations/Native Hawaiian organizations currently have access to this informal working group?

Response: The Department of the Interior (Department) shares information about international repatriation assistance, including working group members who serve as points of contact for Tribal representatives/Native Hawaiian organizations, on the following websites: https://www.doi.gov/intl/-international-repatriation-assistance and https://www.doi.gov/hawaiian/international/guidance.

Question 2: Will the information exchanged in this internal group ever be shared with the broader public or Members of Congress?

Response: The Department has posted information about this working group on its public website. The working group has reported activities and outcomes of its international repatriation assistance to the U.S. Government Accountability Office and to the public, as appropriate. However, information exchanged may be sensitive, particularly when it pertains to specific cultural items. In each case, the Department defers to the affected Tribes and Native Hawaiian organizations to determine what information, if any, should be shared with the broader public about specific international repatriation requests.

Additionally, members of this working group have participated in the Tribal listening sessions and consultations regarding international repatriation. Summaries of these consultations will be posted online through the Bureau of Indian Affairs' Consultations website: https://www.bia.gov/as-ia/raca/regulations-development-andor-under-review/international-repatriation.

Question 3: Would you oppose the formalization—instead of the mere duplication—of this informal working group? If so, why?

Response: The working group functions to share information for general awareness, and so that relevant offices or staff can be informed of an item that may require their attention and coordinate flexibly on whatever action may be appropriate. Formalizing the working group is likely to divert limited staff resources to administrative tasks and reduce the efficiency of the

informal working group structure. The Department also has concerns that formalization could add layers of review that slow down response times.

You acknowledge that Tribal nations and Native Hawaiian organizations can request for the Department to aid them in repatriation requests at any time and maintain that the STOP Act's establishment of a Tribal working group would add an unnecessary layer of bureaucracy to this process.

Question 4: Generally, how long does it take for the Department to respond to these requests? Further, how long does it take for a repatriation request to be "completed?"

Response: The Department's publicly designated working group points of contact strive to reply to incoming requests within one business day. However, a full resolution of the initial inquiry often involves a longer discussion and exchange of information between the federal government and the Tribe or Native Hawaiian organization. The "completion" of the repatriation request is generally beyond the control of the federal government, and indeed the Tribe, as it depends on cooperation and consent of the foreign entity that is holding the cultural item.

Question 5: Are there offices or staff members currently at the Department that work specifically on these requests?

Response: The Department's international repatriation assistance website (https://www.doi.gov/intl/-international-repatriation-assistance) identifies the publicly designated working group points of contact for international repatriation requests. Requests are typically coordinated by the Department's Office of International Affairs and the Office of the Assistant Secretary-Indian Affairs, and are often supported by experts from across the Department, including the Office of the Solicitor, the National Native American Graves Protection and Repatriation Act (NAGPRA) Program at National Park Service, and the Office of Native Hawaiian Relations, among others. These offices coordinate outside of the Department with the Departments of State and Justice.

Questions for the Record
House Natural Resources
Subcommittee for Indigenous Peoples of the United States
Legislative Hearing on H.R. 1312, S. 216, H.R. 3846 and H.R. 4153
September 19, 2019

Questions from Rep. Raul Grijalva

Question 1: From your testimony, it appears as if the Department is in favor of an export declaration requirement. Would this export declaration requirement be in lieu of the export certification requirement, as outlined by the STOP Act?

Response: An export declaration would not be in lieu of an export certification, but a supplement to it. It would apply not only to items subject to the protections of NAGPRA, the Archaeological Resources Protection Act, and the Antiquities Act subject to the export certification requirement, but also to a broader category of Native American art and craft works not subject to the certification requirement.

Question 2: If so, what oversight mechanisms would exist in this export declaration requirement that could prevent individuals from withholding details about how he/she acquired the specific Tribal object? (Essentially, how does a self-submitted form prevent individuals from lying? Under the STOP Act, a certification system would.)

Response: As stated above, an export declaration would not be in lieu of an export certification, but a supplement to it. Anyone seeking to export Tribal objects from the United States would have to submit a written declaration in advance of the planned export describing the objects and their provenances.

By way of analogy, the commercial import or export of specimens of most wildlife species – including but not limited to federally protected species – requires the presentation of a declaration (Fish and Wildlife Service Form 3-177). The failure to fill out this form can be grounds for denying entry or exit of a wildlife shipment or seizing or detaining such a shipment for purposes of investigation. Knowingly filling it out with false information is a criminal offense and the declaration contains an attestation clause requiring the person to certify under penalty of perjury that the information provided is true and correct.

Question 3: If an export declaration form reveals that a Tribal cultural object had been obtained illegally, how would the Department or a specific Tribal nation go about "blocking" its illicit export?

Response: The declaration form data could be added to a database accessible to agencies and Tribes/Native Hawaiian organizations, who would be able to communicate to the Department and/or other relevant federal agencies, such as U.S. Customs and Border Protection (which would be authorized to enforce the export certification requirement under H.R. 3846) when they recognize an item that should be prohibited from exportation. The Department would then coordinate with other relevant federal agencies and the exporter to notify them of the status of

the item. This coordination could potentially stop illegal transports. Any effort or attempt to export an object within the defined category without submitting a declaration, would be a violation in and of itself that could trigger inspection and seizure at the border, providing an opportunity for investigation.

Question 3a: How much time would the Department or specific Tribal nation/Native Hawaiian organization have to successfully accomplish this?

Response: Resources would be required to design and distribute the declaration form, and to collect, store, and analyze the data. Ideally, potential exporters would be required to submit the declaration within a reasonable timeframe before the expected date of exportation. The Department and Tribes/Native Hawaiian organizations would know to regularly check the exportation declaration database. Over time, this type of collaboration could lead to Department officials becoming familiar with certain types of items that regularly trigger Tribal review and could lead to Department officials proactively contacting relevant Tribes or Native Hawaiian organizations. If adequate resources and staffing are available for this type of program, the time between entering an export declaration into the database and the Department notifying relevant Department of Homeland Security officials of the status of an item to be exported could be a few days to a week.

Question 3b: What resources would be available to Tribal nations/Native Hawaiian organizations to block illegally-obtained objects under the export declaration system?

Response: *See* response to Question 3 above.

Question 4: You mention that an export declaration requirement would help analysts discern the market patterns of illegally-obtained Tribal objects and thus help prevent future problematic exports. Would it not be better to halt illegal exports before they occur, rather than after the fact?

Response: The patterns of auction sales abroad suggest that the markets for trafficked cultural items have significant geographical overlap with the markets for legitimate Native American artworks produced for commercial sale. Thus, a declaration requirement would improve the transparency of markets relevant to trafficking, by providing information on the location and size of the larger flows of Native American cultural products in which such trafficking takes place, and trends and changes in those flows. This information could be used to inform allocation of enforcement resources and other governmental efforts to prevent illegal exports.

Questions for the Record
House Natural Resources
Subcommittee for Indigenous Peoples of the United States
Legislative Hearing on H.R. 1312, S. 216, H.R. 3846 and H.R. 4153
September 19, 2019

Questions from Rep. Rob Bishop

Question 1: Does the 2006 cooperative management agreement, confirmed and authorized under section 5(e)(4), facilitate the removal of dams on the Klamath River?

Response: No.

Question 2: If the Department has already recognized a tribe's governing documents, what additional benefit does Congress ratifying these documents provide?

Response: In *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) (en banc), the United States Court of Appeals for the Ninth Circuit held that depending on the content of a tribe's governing documents, Congressional 'ratification' of those documents can result in the tribe acquiring otherwise-unavailable authority to regulate nonmember conduct on fee land located within the tribe's reservation. *Bugenig* was specific to the manner in which congressional ratification of Hoopa Valley Tribe's constitution in the Hoopa-Yurok Settlement Act affected Tribal civil jurisdiction. Additional analysis would be necessary to consider the manner in which congressional ratification of a tribe's governing documents potentially could affect the rights of any other Indian tribe.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 2 0 2020

The Honorable John Hoeven
Chairman, Committee on Indian Affairs
United States Senate
Washington, DC 20510

Dear Chairman Hoeven:

Enclosed are responses prepared by the Bureau of Indian Affairs to the questions for the record submitted following the September 23, 2020, legislative hearing on S. 3126, S. 3264, S. 3937, S. 4079 and S. 4556 before your Committee.

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

Sincerely,

Cole Rojewski
Director
Office of Congressional
and Legislative Affairs

Enclosure

cc: The Honorable Tom Udall
Vice Chairman

Questions for the Record
Senate Committee on Indian Affairs
Legislative Hearing to receive testimony
on S. 3126, S. 3264, S. 3937, S. 4079 & S. 4556
September 23, 2020

Questions from Vice-Chairman Udall

Question 1: How many Tribes, if any, have used HEARTH Act authority for broadband deployment? If so, has the BIA determined that such authority has resulted in acceleration of broadband in those Tribal communities?

Response: HEARTH Act authority is only for business leases and does not include rights-of-way (ROWs) or grants of easement, which is the primary transaction type utilized for broadband activities. However, there are 50 tribes with approved HEARTH Act regulations for business lease purposes. In November 2020, Indian Affairs approved its 60th HEARTH Act application.

The BIA does not have necessary data, such as the number of homes served by HEARTH Act decisions, to determine if HEARTH Act authority has resulted in acceleration of broadband in tribal communities.

Question 2: Does the BIA currently gather data on barriers to rights-of-way approvals on Tribal lands? If so, please explain.

Response: No. ROW information in the Trust Asset and Accounting Management System (TAAMS) includes information on when ROWs were entered, approved, pending, cancelled, or withdrawn. Data on barriers to ROW approval is not collected in TAAMS.

However, the Office of Indian Energy and Economic Development and the Assistant Secretary-Indian Affairs' Management Division are currently working on identifying barriers to broadband infrastructure development beyond rights-of-way approvals.

Question 3: What protections are in place, or should be, to ensure that trust land and resources are protected in broadband deployment on Tribal lands?

Response: The BIA and other federal agencies have regulatory enforcement mechanisms to protect and ensure that trust lands and resources are protected when processing ROWs or leases. The BIA regulatory requirements for Indian landowner consent, determination of fair market value, surveys, and posting of a bond, among other requirements inherent in the ROW or lease process protect trust land and resources and afford the Indian landowners an opportunity to agree or disagree to the proposed use.

Questions for the Record
Senate Committee on Indian Affairs
Legislative Hearing to receive testimony
on S. 3126, S. 3264, S. 3937, S. 4079 & S. 4556
September 23, 2020

Questions from Senator John Hoeven

On Wednesday, September 23, 2020, the Senate Committee on Indian Affairs held a legislative hearing on S. 4079, a bill which would allow for the Seminole Tribe of Florida (tribe) to lease, sell, convey, warrant, or otherwise transfer all or part of the Tribe's real property that is not held in trust by the United States without further approval, ratification, or authorization by the United States. At the hearing, the Tribe's Chairman testified that the Non-Intercourse Act prevented the Tribe from granting and insuring mortgages on commercial real estate investments. Ultimately, the Non-Intercourse act caused the Tribe's economic venture to fail. This is not the first time a tribe has had to come to Congress due to the broad restrictions of the Non-Intercourse Act, similar bills were passed into law in the 115th, 114th, 113th, 110th, and 106th Congress.

Question 1: Can the Department of the Interior identify other tribes who may be similarly impacted by the Non-Intercourse Act?

Response: Because this is an issue affecting tribally owned lands that are not held in trust or restricted fee, the Department does not keep records of title or transfer of ownership for such lands. However, it is an issue of interpretation that originates from outside the federal government, therefore it is fair to conclude that any tribe lacking specific legislation regarding the Non-Intercourse Act could be similarly impacted.

Question 2: The Department of the Interior's written testimony supports a more general fix to the Non-Intercourse Act. Can the Department provide examples of legislative language that would broadly address the issue?

Response: Should a standalone bill be proposed to more broadly address the issue, we would recommend that such proposed legislation include, at a minimum, language similar to the Acts referenced in the question above. We would also recommend that the legislation specifically define the Indian tribal entities to which it applies. We would further recommend that such legislation should only apply to interests in real property that is not either: (1) held in trust by the United States for the benefit of such Indian tribal entity, or (2) held in restricted fee status for the benefit of such Indian tribal entity.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV 2 0 2020

The Honorable Steve Daines
Chairman
Subcommittee on National Parks
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Chairman Daines:

Enclosed are responses to questions received following the March 4, 2020, legislative hearing before your subcommittee. These responses were prepared by the National Park Service.

Thank you for the opportunity to respond to the subcommittee on these matters.

Sincerely,

Cole Rojewski
Director
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Angus King
Ranking Member

Questions for the Record
Legislative Hearing Held on March 4, 2020

Witness: Shawn Benge
Acting Deputy Director, Operations, National Park Service

Subcommittee on National Parks
U.S. Senate Committee on Energy and Natural Resources

Questions from Ranking Member Angus S. King, Jr.

1. **Senator McSally's Casa Grande bill (S. 3119) contains a provision enabling the Secretary to convey "any Federal land, any interest in Federal land, or any other Federal asset of equal value located in the State." This seems to be a much broader authority than is typical for boundary adjustment or land acquisition legislation.**

   a. **Have there been other Park Service land acquisitions or exchanges with similar language?**

      Response: We are not aware of any other legislation providing for National Park Service land acquisition or land exchanges that allows the Secretary of the Interior to convey "any other asset of equal value" located in the relevant state.

   b. **What would be eligible for exchange as "any interest in Federal land" clause? Would this include subsurface rights, mineral estates, or other energy and mining interests?**

      Response: The term "any interest in Federal land" would include subsurface rights, water rights, mineral estates, other recorded mineral interests, and development rights.

   c. **What would be eligible for exchange as "any other Federal asset of equal value" clause? Would this include vehicles, equipment, or other Federal assets?**

      Response: In the context of a bill providing for changes in land ownership for one or more Federal land management agencies, as is the case with S. 3119, the term "any other Federal asset of equal value" would likely be interpreted by the agencies to mean Federal real estate assets. However amending the bill to remove the phrase "any other Federal asset" would provide clarification.

   d. **Are there any particular aspects of Casa Grande that make this unique asset transfer provision necessary?**

      Response: We are unaware of the reason for including the term "any other Federal asset" in S. 3119.

2. **In your testimony, you stated that the Park Service is currently focusing resources on reducing the National Parks Service's deferred maintenance backlog and does not see a compelling reason to extend the authorization of the Cape Cod National Seashore Advisory Commission.**

   a. **How much did the Cape Cod National Seashore Advisory Commission cost on a yearly basis?**

      Response: The direct financial cost for the Cape Cod National Seashore Advisory Commission averaged approximately $4,676 over the last five years. The indirect costs include National Park Service staff time required for working with the Commission.

   b. **What percentage of the National Park Maintenance backlog is due to the Commission's costs?**

      Response: The direct financial cost for the Commission is equivalent to a very small fraction of the National Park Service's maintenance backlog. However, any National Park Service resources that are used for purposes other than operations and maintenance divert funds that could potentially otherwise be used to support reducing the maintenance backlog.

3. **In your testimony, you recommended removing the Commission's statutory role to advise the superintendent on permits for the commercial or industrial use of property located within the seashore.**

   a. **Does the Cape Cod National Advisory Commission have the statutory authority to supersede any decision made by the Superintendent on these permits?**

      Response: No, the Commission does not have the statutory authority to supersede the park superintendent's decisions.

   b. **If not, why would the National Park Service want to limit public input that only advises the Superintendent?**

      Response: The provision referred to in the question states, "No permit for the commercial or industrial use of property located within the seashore shall be issued, nor shall any public use area for recreational activity be established within the seashore, without the advice of the Commission, if such advice is submitted within a reasonable time after it is sought." This is very unusual statutory authority for an advisory panel. Our concern is that has it potential to delay management decisions, while waiting for the Commission to meet and agree on a recommendation. It is also a requirement that is open to disagreement, since the term "reasonable time" is disputable.