TESTIMONY OF JULIE MACDONALD, SPECIAL ASSISTANT TO THE ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, SENATE COMMITTEE ON ARMED SERVICES, REGARDING IMPLEMENTATION OF ENVIRONMENTAL AND NATURAL RESOURCE LAWS AND MILITARY READINESS ISSUES

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Mr. Chairman and members of the Subcommittee, I am Julie MacDonald, Special Assistant to the Assistant Secretary for Fish and Wildlife and Parks in the Department of the Interior (Department). I am pleased to appear before you today to discuss the role of the Department of the Interior in implementing federal natural resource laws and our continuing working relationship with the Department of Defense (DoD) on natural resource issues. My statement will address the Fish and Wildlife Service's responsibilities and authorities under the Endangered Species Act (ESA), the Sikes Act, and the Marine Mammal Protection Act (MMPA). These laws reflect our Nation's long-standing commitment to the conservation of our natural resources for the benefit of future generations.

The Department interacts with Department of Defense activities through its bureaus, including the U.S. Fish and Wildlife Service, the Bureau of Land Management, and the National Park Service. The Fish and Wildlife Service strives to insure flexibility in meeting our joint responsibilities under the various natural resource laws without impacting the military's ability to train its personnel. I believe that the Fish and Wildlife Service and the military have done a commendable job at

working together to strike a balance between our legal responsibilities and the Armed Forces' duty to be both protectors of our National Security and stewards of our natural heritage. I also acknowledge that more can be done. I will address both our successes and challenges as I discuss issues associated with the applicable laws.

Endangered Species Act

The ESA was passed in 1973 to conserve vulnerable plant and animal species that, despite other conservation laws, were in danger of extinction.

DoD has a critically important role to play in the conservation of many rare plants and animals. At least 300 species listed as threatened or endangered occur on DoD-managed lands. DoD manages approximately 25 million acres on more than 425 major military installations throughout the United States. Access limitations due to security considerations and the need for safety buffer zones have sheltered many military lands from development pressures and large-scale habitat loss. As a result, some of the finest remaining examples of rare wildlife habitats exist on military lands.

The Fish and Wildlife Service has strived to establish good relationships with DoD that enable the military to carry out its mission of protecting our country while also ensuring the conservation of ESA-listed species on land it manages. Some outstanding examples of these partnerships are included at the end of my testimony.

Candidate Conservation

Conserving species before they need protection under the ESA is easier, more efficient, and poses fewer challenges to federal agencies, including the military. In partnership with DoD and NatureServe, the Fish and Wildlife Service is developing a list of all at risk, non-federally listed species that may be found on or near military lands. This partnership project was developed by the military agencies, and demonstrates their interest in working with the Fish and Wildlife Service to benefit species.

The term "species at risk" is a term used by NatureServe for a native species that is either a candidate for listing or is considered by NatureServe and the Network of Natural Heritage Programs to be "imperiled" or "critically imperiled." In NatureServe's use of the term, "Species at risk" refers to species that are presumed extinct, historical, critically imperiled, imperiled, and vulnerable (GX, GH, G1, G2, G3 ranks, respectively). Although the Fish and Wildlife Service generally means the same thing when we use the term "species at risk," we use the term as a descriptive, illustrative term for those species that may warrant conservation to prevent the need to list under the ESA. A ranking of G1, G2, or G3 indicates those kind of species. "Imperiled" and "critically imperiled" are defined by NatureServe as terms referring to G1 and G2 ranked species.

Once a species at risk is identified based on a mutual priority between the DoD installation and

the FWS office, the Fish and Wildlife Service works with DoD to develop and implement conservation recommendations for the relevant activity. DOD working on a particular "species at risk" is based on a mutual priority between the DOD installation and FWS office.

In addition to this local and regional cooperation, Fish and Wildlife Service and DoD personnel have been meeting quarterly for several years in an "Endangered Species Roundtable." This informal session allows for open discussion and can lead to the referral of particularly difficult issues to headquarters for guidance or resolution. The group also reviews the Sikes Act and Integrated Natural Resource Management Plan (INRMP) development and implementation as they pertain to endangered species management.

Challenges

Even with these successful partnerships, we acknowledge that there have been challenges in resolving endangered species conservation and the military mission at some DoD bases and facilities. For example, 18 threatened or endangered species occur on Camp Pendleton, a Marine Corps Base in California. For some of these species, like the tidewater goby, the base harbors the only known remaining populations. Preventing potential conflicts between endangered species conservation and Camp Pendleton's primary military mission continually challenges the creativity of both the Fish and Wildlife Service and the base leadership.

Section 7(j) of the ESA provides a national security exemption that DoD can invoke in cases

where National Security would be unacceptably compromised by conservation responsibilities. This exemption has never been invoked by DoD, a fact that speaks very well to the creativity of our military and natural resource professionals. However, it is apparent that we must avoid penalizing the military for having done positive things for conservation of species and we must not unfairly shift the burden of species protection to the military. Additionally, in some cases, issues arise because of differing perceptions between our respective agencies about the effects of the provisions of the ESA. Finally, I must note that many of the challenges presented to the military under the ESA are similarly faced by other federal agencies and private landowners. We look forward to continuing to work with the DoD to clarify these issues and build upon the relationship we have established.

Recent Court Decision on Definitional Exclusions from Critical Habitat

Integrated Natural Resource Management Plans (INRMPs) are planning documents that allow the military to implement landscape-level management of its natural resources while coordinating with various stakeholders. The Department of the Interior initiated a policy in the previous Administration, which we have continued, to exclude military facilities from critical habitat if there was an approved INRMP for that facility which addressed the species in question. However, a recent court case has cast doubt on our ability to continue this practice.

The policy is based on the definition of critical habitat which states, in part:

> . . . the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features – (I) essential to the conservation of the species and (II) which may require special management considerations or protection;

The exclusion policy was based on a decision that military lands with an approved INRMP, and other types of land with approved management policies, did not require special management consideration because they already had adequate management and, thus, by definition would not be considered critical habitat.

However, the U.S. District Court in Arizona has ruled, in a case relating to Forest Service lands (*Center for Biological Diversity v Norton*), that this interpretation is wrong, and the fact that lands require special management necessitates their inclusion in, not exclusion from, critical habitat. The Court went on to say that the government's interpretation amounted to our inserting the word "additional" into the statute (between "require" and "management"), and that only Congress can so revise the definition.

While the implications of this decision go far beyond military lands, we felt it important to advise the Committee of it and the cloud it casts over our continued ability to exclude military lands with approved INRMPs from critical habitat. We believe this adds additional weight to the Administration's proposal for a statutory exclusion.

To avoid possible confusion in light of the Court's ruling, we would suggest striking the words "provides the 'special management considerations or protection' required under the Endangered Species Act (16 U.S.C. 1532(5)(A)) and" from the proposed new section 2017(a). While that phrase is consistent with our interpretation of the law, it could cause future litigation problems

due to the Court's ruling that the necessity for "special management considerations or protection" requires that land to be included, not excluded, from critical habitat. This change would leave the section with an unambiguous statement that completion of an INRMP for the species in question precludes designation of critical habitat at that facility.

Recent Critical Habitat Actions

The ESA portion of the Administration's proposal addresses critical habitat designations. The Department has been able to address a number of DoD concerns over critical habitat designations.

Critical habitat proposed for the purple amole, a plant, in California included significant portions of Camp Roberts and Fort Hunter Liggett. Camp Roberts had a completed INRMP which addressed conservation of this plant, and we excluded it from the critical habitat designation on this basis.

While Fort Hunter Liggett was developing an INRMP to address the plant, it did not have the plan completed at the time we had to make the decision on the critical habitat designation. However, the Department of Defense had provided us with detailed comments on the adverse impacts to military readiness that would result from the proposed designation, and these justified removing the Fort from the critical habitat under section 4(b)(2) of the ESA. We determined that the benefits of excluding the area exceeded the benefits of inclusion, in that the adverse impacts to national defense exceeded the benefits that would result from designating the area as critical

habitat.

Although not the basis for our decision, the fact that Fort Hunter Liggett had a statutory obligation to complete its INRMP, and to include the plant within that plan, provided us with an additional comfort level for that exclusion.

Sikes Act and Integrated Natural Resource Management Plans

In fiscal year 2002, the Fish and Wildlife Service and state fish and wildlife agencies assisted in development, review, and/or implementation of INRMPs for 225 military installations in the United States.

INRMPs serve as an effective vehicle through which DoD and the Military Services can comprehensively plan for conservation of fish and wildlife species. This planning has the potential to address important needs for resident endangered species, including the protection of habitat.

We are committed to improving and expanding our existing partnerships with DoD, the Army, the Navy, the Air Force, and the Marine Corps. We look forward to opportunities to increase the utility of INRMPs as tools to maximize the potential benefits of DoD lands to fish and wildlife conservation while ensuring effective training of our troops.

Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972 established a federal responsibility, shared by the Secretaries of the Interior and Commerce, for the management and conservation of marine mammals. The Department of the Interior is responsible for sea otters, walrus, polar bears, dugongs, and manatees, while the Department of Commerce is responsible for cetaceans and pinnipeds, other than walrus, including seals, whales and dolphins. In 1994, Congress enacted a number of amendments to the statute. One of the provisions, with broad applicability throughout the Act, added the definition of "harassment" as an element of the Act's take provisions.

Over the last several years, the Fish and Wildlife Service has worked diligently with the National Marine Fisheries Service (NMFS), the Marine Mammal Commission (MMC), the United States Navy, and Alaska Natives to develop proposals that enhance marine mammal conservation, and provide greater certainty to the regulated public regarding certain areas of the existing law. During this process, revisions to the definition of harassment were considered to address a number of concerns, including those expressed by the Navy. The text of this proposed amendment to the definition of harassment is contained in Administration's Range Readiness and Preservation initiative in a way that only applies to DoD military readiness activities.
We note that this same language applying to all entities, in addition to other important proposals related to the MMPA, are contained in the Administration's comprehensive legislative proposal to reauthorize and amend the Marine Mammal Protection Act. This MMPA reauthorization proposal was transmitted to Congress at the end of last month. The Department strongly supports enacting this comprehensive legislative proposal, which will address the concerns of the

Navy regarding harassment.

The Administration's Range Readiness and Preservation initiative contains two other provisions an incidental take provision related to military readiness activities, and a national defense exemption. Because the Department of Commerce has the most interaction with DoD regarding these particular MMPA issues, we will defer to their comments on these provisions.

Conclusion

In closing, Mr. Chairman, I believe both the Department of the Interior and DoD have acted cooperatively to implement natural resource conservation laws passed by Congress. We are aware of the challenges that have arisen during this endeavor. The Department is prepared to explore and craft creative solutions to balance our conservation mandates with military readiness. We look forward to continue work with the Department of Defense on this vitally important matter.

This concludes my testimony. I appreciate the opportunity to appear today before the Committee, and I would be pleased to answer any questions you have.

EXAMPLES: FWS-DOI COOPERATION IN ENDANGERED SPECIES CONSERVATION

United States Air Force Academy, Colorado The U.S. Air Force Academy recognized the value of long-range planning when it commissioned a baseline study of small mammals in 1994. The survey aided the Air Force in identifying the presence of the Preble's meadow jumping mouse, which at the time was a candidate for listing. A species receives protection under the ESA when it is listed as endangered or threatened. In order to help DOD agencies plan their activities, the Fish and Wildlife Service shares information on listing candidates and upcoming listing actions. As a result, the Academy entered into a partnership with the Colorado Natural Heritage Program to study the mouse and provide information for management and conservation strategies.

When the jumping mouse was listed as threatened in 1998, the Fish and Wildlife Service took steps to ensure that the Academy would be a full partner in the species' management and recovery. The Academy's natural resources manager is a member of the Science Advisory Team, a group of scientists and managers dedicated to compiling the best science available to support the conservation of the mouse throughout its range. An Academy representative also holds a position on the executive committee for a habitat conservation plan (HCP) under development for El Paso County, Colorado. Through the HCP process, the Academy will coordinate with non-federal entities in the development of regional conservation strategies for the mouse. In addition, at the request of the Fish and Wildlife Service, the Academy's natural resources manager is representing the Air Force on the Preble's Meadow Jumping Mouse Recovery Team, which is charged with developing a plan to restore the species to a secure status. The Air Force also initiated a programmatic formal consultation under section 7 of the ESA for its Preble's meadow jumping mouse conservation management plan and conservation agreement. The biological opinion provided by the Fish and Wildlife Service on the Academy's conservation management plan significantly reduced the regulatory burden on both the Academy and the Fish and Wildlife Service by removing the need for section 7 consultations for each instance of regular maintenance.

Camp Pendleton, California In 1999, substantial areas of Camp Pendleton were included in proposed designations of critical habitat for 5 of the 18 listed species that are present on the base. The Fish and Wildlife Service was able to work within the provisions of the ESA to avoid designating critical habitat on the training areas within Camp Pendleton.

The ESA requires the Fish and Wildlife Service to determine whether designation of critical habitat is prudent and determinable. Under sections 4(b)(2) of the ESA, the Secretary of the Interior can exclude areas from critical habitat designations when economic or policy interests outweigh the expected benefits of designation. The Fish and Wildlife Service has used military readiness as a reason to exclude training areas from critical habitat designations many times now.

For example, the 1999 proposals for critical habitat on Camp Pendleton would have designated over 50 percent of the base as critical habitat for listed species, including the California gnatcatcher, the Tidewater goby, the Riverside fairy shrimp, the San Diego fairy shrimp, and the arroyo toad. As a result of the exclusion process discussed above, the Fish and Wildlife Service was able to exclude most of Camp Pendleton from the designated critical habitat due to Marine Corps concerns about the effects the designations could have on military training critical to national security. The land area currently designated as critical habitat on Camp Pendleton encompasses less than four percent of the 125,000 acre, over half of which is located on land leased by the State, rather than the base proper.

Fort Hood, Texas Under the section 7(a)(2) of the ESA, federal agencies are required to consult with the Fish and Wildlife Service to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitats. A good example of this process occurred recently at Fort Hood. As one of the largest heavy artillery training sites in the country, it conducts live weapons fire and aviation training and houses more than 500 tanks. Much of the 220,000-acre base resembles barren, scorched battlefields with ruts as deep as trenches. However, it also contains essential nesting habitat for two endangered songbirds, the golden-cheeked warbler and black-capped vireo. Fort Hood is balancing its military mission with environmental stewardship.

As part of its responsibility under the ESA, the post manages 66,000 acres, more than 25 percent of the land on base, for the recovery of these two endangered species. The post also provides a haven to wintering bald eagles, occasional visiting whooping cranes, peregrine falcons, and other rare plant and animal species.

The Army entered into an interagency consultation with the Fish and Wildlife Service under section 7 of the ESA. In 1993, the Fish and Wildlife Service issued a "no jeopardy" Biological Opinion (BO). Following the issuance of the BO, Fort Hood contracted with the Nature Conservancy of Texas for further research and monitoring of the birds. In conjunction with Fish and Wildlife Service and Army biologists, Conservancy researchers are compiling the most comprehensive body of information on the birds to date. Fort Hood has followed the requirements of the 1993 BO (including a version amended in 2000) and has funded valuable research and management strategies that can be applied to warbler and vireo issues range-wide. The birds are benefiting from our partnership with the Garrison Commander and base natural resources staff.

Fort Bragg, North Carolina For listed species, recovery is the ultimate goal. Section 7(a)(1) of the ESA directs federal agencies to use their statutory authorities to fulfill this goal. The Sandhills region of North and South Carolina supports the largest population of red-cockaded woodpeckers (RCW) in the United States. Fort Bragg is the only federal authority managing lands in that region for the recovery of RCW's. The area around Fort Bragg is being rapidly developed, and if

critical tracts are not protected soon, they will be lost to the woodpecker. Loss of these lands due to development also would limit Fort Bragg's ability to sustain current and future military training. In response, the Army launched a Private Lands Initiative with The Nature Conservancy and other partners to purchase land or conservation easements from willing sellers. The lands will not only become available for red-cockaded woodpecker recovery, but also for compatible military training activities and recreation.

Fort McCoy, Wisconsin Fort McCoy encompasses 59,750 acres and is home to a diversity of vegetation, including wild lupine, which is the only known food plant for larvae of the endangered Karner blue butterfly. Since 1990, when the installation discovered Karner blues on its land, military training and the butterflies have coexisted and thrived. Fort McCoy officials began coordinating with the Fish and Wildlife Service on the impact of both military and non-military activities affecting the Karner blue butterfly in 1992. In early 1994, the Fish and Wildlife Service issued Fort McCoy a no-jeopardy BO that included "reasonable and prudent measures" and "terms and conditions," both as provided under the ESA. As part of an effort to fulfill those terms, Fort McCoy submitted a draft Karner Blue Butterfly Conservation Plan to the Fish and Wildlife Service in 1995. The plan outlined the direction Fort McCoy would take to manage its lands for the butterfly while allowing for the successful completion of the installation's military training mission. The final conservation plan was completed in 1997. Fort McCoy has been able to comply with the ESA while having only minimal impact on military training.

Pearl Harbor, Hawaii A Navy team recently created some critical mudflat habitats for endangered waterbirds on the shores of Pearl Harbor. These mudflats are home to a number of Hawaiian waterbirds, including four endangered species and a variety of migratory birds. The site is a small pond within a unit of the Pearl Harbor National Wildlife Refuge. While the underlying land and water is owned by the Navy, the refuge is managed by the Fish and Wildlife Service. Over the years, the pond has provided decreasing value to waterbirds because of the increasing growth of invasive plants and weeds. Fish and Wildlife Service staff had attempted to create clear spaces by changing the water levels, but it wasn't enough to make the area suitable habitat for waterbirds. Additional work with heavy equipment was needed to create conditions favorable for wildlife.

In August 2000, a Navy Seabee unit answered the Refuge Manager's request for help and at the same time benefited from some real-life training. Two Seabee heavy equipment operators maneuvered a bulldozer and grader to sculpt the bottom of the pond. Putting their Navy engineering skills to work in this training exercise, they reshaped mudflats for endangered Hawaiian stilts and constructed a drainage system according to a refuge restoration plan. This project was just one example of the Navy's strong partnership with the Fish and Wildlife Service's national wildlife refuge in Pearl Harbor. For years, sailors and their families also have volunteered numerous weekend hours creating new habitats and clearing away trash and excess vegetation at the refuge.

Air Force in Alaska and Peregrine Falcon Recovery Since the early 1980s, the Air Force has

worked with the Fish and Wildlife Service to minimize or eliminate impacts of Air Force activities on peregrine falcons in Alaska. Through the section 7 consultation process, the Air Force and the Fish and Wildlife Service identified major peregrine nesting areas in proposed Air Force training locations. Much of this training involves very low-level and high-speed flights, a combination with the potential to disturb many wildlife species, including nesting peregrine falcons. The Air Force agreed to a protective "no-fly" zone of 2 miles horizontal distance and 2,000 feet above the nest level in these dense nesting areas. Additionally, the Air Force is monitoring several nearby peregrine populations that fall outside the protected areas. This monitoring effort, which has continued since 1995, shows that the protective zones appear to provide adequate protection in the densest nesting areas and that the incidental loss of nestlings outside these zones is below the levels originally anticipated. Rather than making a minimal effort to comply with the ESA, the Air Force actively pursued programs to promote peregrine recovery, which helped make it possible to remove this magnificent bird from the threatened and endangered species list in 1999.