



**THE FEDERALIST SOCIETY AND ITS  
ENVIRONMENTAL LAW and PROPERTY RIGHTS PRACTICE GROUP**

PRESENT:

A CONFERENCE ON

Environmental Law, Wetlands Regulation and Reform of the  
Endangered Species Act

***PANEL ONE: PROPOSED REFORM OF THE  
ENDANGERED SPECIES ACT***

Both Houses of Congress are considering the first major overhaul to the Endangered Species Act in over 30 years. The House passed the Endangered Species Recovery Act of 2005 last September. Related legislation has been introduced in the U.S. Senate. Has the ESA properly balanced costs and benefits in the protection of endangered species? Has it been effective in identifying and protecting endangered species, or has it been over inclusive? Has ESA litigation had unintended consequences? What are the costs of ESA to private property ownership? How will the proposed ESA reform measures change the legal landscape?

**PANELISTS:**

**Honorable Richard Pombo (Address)**, U.S. House of Representatives (CA)  
**Mr. Michael Bean**, Environmental Defense Fund  
**Mr. John Kostyack**, National Wildlife Federation  
**Mr. Lawrence Liebesman**, Holland & Knight  
**Mr. Steven Quarles**, Crowell and Moring  
**Hon. Lynn Scarlett**, Deputy Secretary, U.S. Department of the Interior  
(moderator)

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**FEDERALIST SOCIETY**

1  
2           DEP. SECRETARY SCARLETT:     I am Lynn  
3 Scarlett with Department of the Interior, and I'm  
4 going to serve as the moderator for this Endangered  
5 Species Act panel. I want to get right into things  
6 with Congressman Pombo, and I do want to let  
7 everyone know that the Congressman is going to have  
8 to leave after his remarks. I know he would've  
9 loved to be here for all of the dialogue and  
10 debate, but he has many other duties.

11           Many of you, of course, are familiar with  
12 Congressman Pombo and his work and leadership.  
13 He's in his, I believe seventh term in the US House  
14 of Representatives. He represents California's  
15 11th Congressional District and that is, for those  
16 of you who know California, the San Joaquin,  
17 Alameda, Contra Costa, and Santa Clara County  
18 areas; lots of endangered species and lots of  
19 challenges there, so he has paid a lot of attention  
20 to this topic. He is Chairman of the House  
21 Resources Committee, so at Department of the  
22 Interior, we are often partners and in many

1 | discussions in dialogue with Congressman Pombo.

2 |           So without any ado, I want to introduce  
3 | the Congressman. He, of course, has taken a  
4 | significant leadership role in discussions about  
5 | the future of the Endangered Species Act, and  
6 | indeed, had a bill in the House that has moved  
7 | forward, and I'm sure he'll be talking to us about  
8 | that.

9 |           Congressman Pombo.

10 |           CONGRESSMAN POMBO: Well, thank you very  
11 | much, Lynn. It's nice to have an opportunity to be  
12 | here today and talk a little bit about what we have  
13 | done in the House in regards to the Endangered  
14 | Species Act, and the effort that we have made. But  
15 | I think that, to begin with, we need to have a  
16 | little bit of a background on the process that  
17 | we've gone through over the last several years on  
18 | the Endangered Species Act. When I was elected,  
19 | almost 14 years ago now, I introduced a bill to  
20 | rewrite the Endangered Species Act. And over the  
21 | last several years I think I've had an opportunity  
22 | to learn a lot about what has worked and what has

1 | not worked in terms of the implementation of the  
2 | Act.

3 |           If you go back to the original purpose of  
4 | the Act, I don't think anybody could really argue  
5 | that we don't need an Endangered Species Act. It  
6 | has become a value, a moral value, that we as a  
7 | society have supported over the last 30 plus years.  
8 | Mainly because people -- you know, we had a  
9 | situation that had developed because of a lack of  
10 | planning, a lack of attention to certain species,  
11 | and we were in the midst of some of our grand  
12 | species possibly becoming extinct, things like the  
13 | bald eagle and the gray wolf. Things that people  
14 | identified with were on the verge of becoming  
15 | extinct, so Congress responded to that during the  
16 | '50s and '60s, and then into the '70s, with a  
17 | number of different laws to try to save endangered  
18 | species.

19 |           Ultimately, with the passage of the  
20 | Endangered Species Act, the decision was made that  
21 | as a federal government, we would act to try to  
22 | stop species from becoming extinct. That became a

1 | goal of the Department of the Interior and Fish and  
2 | Wildlife Service, to stop species from becoming  
3 | extinct, and recover their populations to a healthy  
4 | limit. Over the years, we've seen the law be  
5 | interpreted in different ways and implemented in  
6 | different ways, and it has caused a number of  
7 | conflicts with private property owners and with the  
8 | desires of people. And that conflict has  
9 | manifested itself mainly throughout the western  
10 | part of the United States, but increasingly in  
11 | other parts of the country.

12 |           The original bill I introduced when I  
13 | came in the Congress dealt a lot with private  
14 | property rights side and changing the  
15 | implementation of the law so we could reduce the  
16 | number of conflicts that we had with private  
17 | property owners. But it became very apparent that  
18 | that was not going to be enough. And getting into  
19 | subsequent bills and learning more about the way  
20 | the law was being implemented, I came to realize  
21 | that not only did we have conflicts with private  
22 | property owners as a result of the way the law was

1 | be implemented, but we weren't doing a very good  
2 | old job of recovering species either.

3 |           Last year or two years ago now, we  
4 | actually sat down and went through all of Fish and  
5 | Wildlife's documentation on the recovery of species  
6 | and the health of the species. It was kind of  
7 | surprising to us, and I think the most people.  
8 | What we found was that the vast majority of species  
9 | that are on the list are either still declining or  
10 | Fish and Wildlife really didn't have any idea what  
11 | their numbers were. The result is that, we aren't  
12 | doing a very good job of recovering species. Out  
13 | of the nearly 1,300 species that have been listed  
14 | on the endangered species list, less than 10 have  
15 | been removed because of recovery. And I would  
16 | argue that of those 10, many of those probably had  
17 | data error when they were originally listed, and it  
18 | was a mistake on their original listing. They may  
19 | not have been an endangered species - they were off  
20 | on their numbers, on the reproduction rates, or  
21 | other important things that are considered as part  
22 | of the determination in a listing.

1                   So, we began to look at the law to figure  
2 out what we had to do to put the focus back on  
3 recovery, to try to get away from all of the  
4 conflicts that had resulted from the implementation  
5 of the law, and reduce those conflicts and at the  
6 same time, put the focus on recovery. What we came  
7 up with was, after several months of negotiating  
8 the bill and trying to move forward on fixing what  
9 had become obvious problems and things that people  
10 from all sides of the debate were talking about, we  
11 came to the conclusion that one of the major  
12 problems we had was with the current critical  
13 habitat process. It dealt more with land use and  
14 controlling land than it did with what was  
15 necessary to recover the species.

16                   So, we came to the conclusion that we  
17 would take away the current process of protecting  
18 habitat under critical habitat and go with  
19 something that we referred to as recovery habitat,  
20 and change the focus of the law so that we would go  
21 from a species being listed as endangered and then  
22 having a statutory deadline on the adoption of

1 | critical habitat, to instead putting the focus on -  
2 | - you list the species as endangered, you figure  
3 | out how you're going to recover it, and then you  
4 | protect the habitat that is necessary to fulfill  
5 | that recovery plan. Almost everybody in the House  
6 | that worked on this bill agreed with that approach,  
7 | and even in the substitute bill that was put  
8 | forward, they took a very similar approach to what  
9 | we did in the bill that ultimately passed the  
10 | House.

11 |           So, putting the focus back on recovery,  
12 | putting the focus on protecting land that is  
13 | necessary to fulfill that recovery plan, became the  
14 | real linchpin of how we would move forward with  
15 | changing the Endangered Species Act, changing the  
16 | way that it is being implemented today.

17 |           We also did a couple of other things in  
18 | the bill. One of those was that under current  
19 | implementation of the law, we have an odd process  
20 | where someone can come in, that's trying to have a  
21 | development or trying to do something with their  
22 | property, and never get an answer back from Fish

1 | and Wildlife Service as to whether or not the  
2 | activity that they're proposing is legal under the  
3 | Act and if they can move forward. Sometimes guys  
4 | spend years trying to move forward and to get an  
5 | answer to figure out how they can move forward.  
6 | And we came to a solution through which, after they  
7 | have entered into the process and they're trying to  
8 | move forward, they can send a letter to the  
9 | Secretary of Interior saying this is the Activity I  
10 | want to conduct on my property, and giving the  
11 | Secretary a deadline to give them an answer - tell  
12 | them yes or no. We don't tell them that you have  
13 | to tell them yes, but you do have to give them a  
14 | definitive answer as to whether or not they can  
15 | move forward from that point.

16 |           And also, we did something in the bill in  
17 | terms of protecting private property. And this has  
18 | obviously become one of the most controversial  
19 | parts of what we did in the House. Under current  
20 | law, the federal government has the ability to step  
21 | in, declare critical habitat, and in effect take  
22 | control of activity that happens on that property

1 | based on it being critical habitat or habitat for  
2 | an endangered species. That has resulted in the  
3 | loss of value, the loss of use, the inability of  
4 | someone to be able to use their land in accordance  
5 | with local law.

6 |           If you look at the way that that has  
7 | operated over the years, it has probably been one  
8 | of the most controversial parts, and one of the  
9 | parts of the law that has caused the greatest  
10 | amount of conflict with private property owners.  
11 | Whether or not it has an impact on them, many  
12 | property owners have a fear that if they are part  
13 | of critical habitat or they do have endangered  
14 | species on their property, they will lose the  
15 | ability to use their land. And as a result of  
16 | that, many property owners manage their land in a  
17 | way to not attract wildlife because they don't want  
18 | to have to fear that someone will come in and tell  
19 | them what they can do with their property. So, it  
20 | has worked contrary to the goal of recovery  
21 | species.

22 |           Something like 90 percent of the species

1 | that are listed, at least part of their habitat is  
2 | a private property. Private properties owners have  
3 | to be part of the solution, they have to be part of  
4 | how we're going to recover a species, because they  
5 | represent so much of the habitat that species need  
6 | to recover. If you have an adversarial  
7 | relationship between Fish and Wildlife Service and  
8 | the property owners, they will never work in a  
9 | cooperative manner to help recover species, and  
10 | they won't do things that are necessary to improve  
11 | habitat and create habitat on their property in  
12 | order to recover species.

13 |           So, we had to figure out a way -- if we  
14 | were going to make this law work, we had to figure  
15 | out a way to protect those private property owners  
16 | so that, if they did have habitat or they created  
17 | habitat on their property, there would not be an  
18 | economic disincentive to have that habitat on their  
19 | property. The solution that we came up with was,  
20 | first, a series of grants and incentives that would  
21 | go to private property owners, that would say if  
22 | you create a habitat, or if you have habitat and

1 | you improve that on your property, we will  
2 | participate with you and give them an economic  
3 | incentive in order to improve that habitat, and  
4 | therefore improve the chances of species recovery.

5 |           Ultimately, we have a provision in there  
6 | that if the Secretary comes and says you can't use  
7 | part of your property; we need that in order to  
8 | recover this endangered species, and you can't use  
9 | part of your property; we've taken away the value  
10 | or the use of that particular piece of property,  
11 | that that point, the property owner can then  
12 | qualified to be compensated for the loss of that  
13 | private property.

14 |           Now, a lot of people have said that  
15 | that's wrong to compensate private property owners,  
16 | if you take part of the value and the use of their  
17 | private property. We've been going through this  
18 | debate for a number of years, and even back into  
19 | the 70s they were debating the same issue. But  
20 | I've always believed that this bill reflects that  
21 | if we, as a society, decide that recovering  
22 | endangered species is a priority and something that

1 | we want to do as a society, as a government, we as  
2 | a society should pay for that priority.

3 |           If we pass a law in Congress that says we  
4 | need to build an interstate highway system, and we  
5 | go across somebody's property in order put a  
6 | highway in, we pay them for it. Even if putting a  
7 | highway across their property increases the value  
8 | of their property, we still pay them for what we  
9 | took from them. But if we declare that property  
10 | necessary to recover an endangered species and take  
11 | away the value of that property, we don't. And I  
12 | think that is wrong. I think that if we are going  
13 | to use someone's private property to recover  
14 | species, then we should pay that individual for  
15 | what we have taken from them. There's no reason  
16 | for a single individual or a small group of  
17 | property owners to have to bear the entire  
18 | financial burden of what we as a society decided  
19 | was important, was a priority to us. So we  
20 | included that in there, as a means of giving  
21 | private property owners the protections that they  
22 | need in order to protect them from losing their

1 | property, but also to remove the financial  
2 | disincentive to participate in the recovery of  
3 | species.

4 |           And I don't believe that the Endangered  
5 | Species Act will ever work in terms of recovering  
6 | species unless you have the cooperative agreement,  
7 | a cooperative relationship, between private  
8 | property owners and those whose charge is to carry  
9 | out the Endangered Species Act. I believe that's  
10 | the only way we'll ever have a successful law that  
11 | we can look back on.

12 |           The law right now has not been full of  
13 | successes. It's not been full a number of species  
14 | that we can point to and say that because of the  
15 | Act, we were able to recover this, and if it were  
16 | not for this, these species would become extinct.  
17 | I know people will tell you that that's the case,  
18 | but the numbers don't bear that out. We put  
19 | together the full report on all of the species that  
20 | are listed on the Act, and the numbers just don't  
21 | bear that out. The law has not worked in its  
22 | current implementation.

1           Again, I will tell you we have to have  
2 some kind of an Endangered Species Act. I don't  
3 believe that we can just get rid of Endangered  
4 Species Act and say that it's going to go away. We  
5 have to have a law. But if we're going to, it  
6 should be a law that's going to work. I believe  
7 that that's extremely important.

8           We were able to put together a bill that  
9 not only passed the Resources Committee with a  
10 majority of the Democrats voting for it - it was a  
11 strong bipartisan vote coming out of the Committee  
12 - but it was also strong bipartisan vote on the  
13 House floor, and it moved with a large majority of  
14 the House of Representatives. It's in the Senate  
15 now. Senator Chafee is the Subcommittee Chairman  
16 on the Senate side; Senator Inhofe is the full  
17 Committee Chairman. They are working on the  
18 process right now. I believe that they will have a  
19 bill that they will put together in the next couple  
20 of months that will be able to pass the Senate, and  
21 we will have an opportunity to sit down and work  
22 out whatever differences there are between what

1 | ultimately the Senate does versus what the House  
2 | has already done. I believe that the more the  
3 | people begin to pay attention to the law and what  
4 | some of the shortcomings have been, the better  
5 | chance we have of getting a law that will actually  
6 | work and be something that can be implemented and  
7 | begin to put its focus back on recovering species.

8 |           I believe that's extremely important.  
9 | It's one of the major issues that the Resources  
10 | Committee and Congress will take up this year. But  
11 | it's also extremely controversial. Any time you  
12 | talk about going in and modernizing or updating any  
13 | of our existing environmental laws, it draws a lot  
14 | of emotion, it draws a lot of controversy. And  
15 | sometimes people yell and shout and scream about  
16 | it, and really not concentrate too much on the  
17 | facts. But you know, when it comes right down to  
18 | it, I think we are moving in the right direction  
19 | and will ultimately have a bill that will do a  
20 | better job than the current law.

21 |           Thank you for giving me the opportunity  
22 | to come in and spend some time with you.

1 | Unfortunately, I'm not going to be able to stay for  
2 | the rest of the panel discussion, but knowing all  
3 | of these folks up here very well, I'm sure that  
4 | they will give you a lively discussion.

5 |           Thank you very much.

6 |           DEP. SECRETARY SCARLETT: Thank you very  
7 | much, Congressman. We're going to have what I hope  
8 | to be a great roundtable discussion preceded by  
9 | some presentations by our four panelists. Before I  
10 | turn to introducing them I want to build upon some  
11 | of the things that Congressman Pombo said and just  
12 | set the stage for us here.

13 |           The Act, as we all know, was passed over  
14 | 30 years ago. It has had its three decade  
15 | anniversary. There are currently some 1,268  
16 | species listed under the Act as threatened or  
17 | endangered, at least as of the end of last year.  
18 | Now, as Congressman Pombo noted, the Act has long  
19 | been a lightning rod for debate. Current debates  
20 | are no exception to several decades of discussion.  
21 | The history is one marked by litigation. Indeed,  
22 | for critical habitat designations, litigation

1 | entirely dominates at the Department of the  
2 | Interior with the Fish and Wildlife Service  
3 | decisionmaking.

4 |           The implementation of the Act, as  
5 | Congressman Pombo alluded, arouses debates over  
6 | science. It ignites the passions, sometimes, of  
7 | property owners. It generates concerns over how  
8 | the current Act affects landowner incentives. Yet  
9 | at the same time, as Congressman Pombo noted, the  
10 | Act is also a symbol, for many, of our commitment  
11 | as a nation to ensuring the rich diversity of  
12 | plants and wildlife, the values to which  
13 | Congressman Pombo alluded. For some, the Act  
14 | offers a backdrop of security; security that  
15 | species protection will in fact hold a place in  
16 | Agency actions and decisions.

17 |           And, of course, amid this debate, some  
18 | point to the work that is getting done in the  
19 | context of all of this controversy, both through  
20 | regulatory and non-regulatory tools within the Act.  
21 | The Fish and Wildlife Service, for example, has  
22 | enrolled some 3.6 million acres under the safe

1 harbor agreements, a recent tool under the Act,  
2 with landowners to protect a variety of species. I  
3 could go on with some of these accomplishments.

4           Now, we have a roundtable of panelists  
5 here to explore the Act, its implementation, and to  
6 focus on the question of whether and how updating  
7 the Act might affect its effectiveness. We'll  
8 explore questions that include the role of the  
9 states in protecting species and enhancing their  
10 well-being; the relevance of critical habitat; the  
11 scope and definition of protections, such as  
12 prohibitions against take of species; issues  
13 pertaining to the listing process and uses of  
14 science; the meaning of critical terms within the  
15 Act such as jeopardy and adverse modification --  
16 all matters of which have been the subject of  
17 litigation, court decisions, and Agency actions.  
18 And then, of course, the final question is whether,  
19 given all of that, there is a case for updating the  
20 Act, reforming the Act, or otherwise altering its  
21 implementation, and in what ways.

22           We're going to start with Michael Bean --

1 Michael, someone I have known for a long time, is a  
2 guru of the Endangered Species Act, some might say.  
3 He is with Environmental Defense. He leads their  
4 legislative policymaking and litigation activities  
5 that pertain to wildlife, and especially and  
6 particularly the Endangered Species Act and issues  
7 related to it. He serves as the consultant to  
8 national and international wildlife conservation  
9 organizations. He's the author of many, many  
10 articles, many of them focused on the Endangered  
11 Species Act. As early as two decades ago he wrote  
12 a book entitled *The Evolution of National Wildlife*  
13 *Law*, something, of course, that has many chapters  
14 since that time to be written. He directed the  
15 Wildlife Program for the Environmental Law  
16 Institute, prior to eventually coming to  
17 Environmental Defense. He is a very creative  
18 thinker, I might add; a graduate of Yale, he was  
19 editor of the *Yale Law Journal* during his tenure at  
20 Yale.

21 Michael.

22 MR. BEAN: Thank you very much, Lynn.

1 | Good morning, everyone. Today in the *Federal*  
2 | *Register*, the Fish and Wildlife Service announced  
3 | the reopening of the public comment period on a  
4 | proposal to remove the bald eagle from the  
5 | Endangered Species List. That proposal was  
6 | originally made on July 6, 1999, and on that day  
7 | some 6-1/2 years ago, there were fewer than 6,000  
8 | pairs of bald eagles in the lower 48 states. And  
9 | the Dow Jones industrial average on that day closed  
10 | at 11,120.

11 | Today, bald eagle numbers have increased  
12 | by roughly 50 percent since that date, while the  
13 | Dow Jones average is roughly 50 points lower than  
14 | it was on that date. If it reflected changes in  
15 | eagle abundance rather than stock prices since  
16 | 1999, the Dow Jones Index would have climbed to  
17 | nearly 17,000 today, rather than remaining flat at  
18 | 11,000.

19 | It's not just bald eagles that have  
20 | outperformed the market, however. If the Dow Jones  
21 | index measured changes in whooping crane abundance  
22 | since 1999, it would be in excess of 13,000 today.

1 | If it measured changes in the abundance of the  
2 | Kirtland's Warbler, an endangered songbird of  
3 | Michigan's Upper Peninsula, it would be nearly  
4 | 19,000. And if it measured changes in the number  
5 | of Kemp's Ridley Sea Turtles nesting along the  
6 | Texas coast, it would stand at around 30,000. So,  
7 | I'm tempted to ask, is James Glassman in the room?  
8 | I could go on for the remainder of this talk and  
9 | use my allotted time with examples like this, but I  
10 | won't because you get the point.

11 |           Yesterday, in a guest opinion column that  
12 | appeared in the *Sacramento Bee*, Representative  
13 | Pombo said again, as he has said many times before,  
14 | that the ESA has had "a stunning record of  
15 | failure". Those were his words in print yesterday.  
16 | He calls the Endangered Species Act a failure  
17 | because only a few species have yet recovered and  
18 | been taken off the Endangered list. Apparently,  
19 | then, the bald eagle is a failure -- and the  
20 | whooping crane, and the Kirtland's Warbler, and the  
21 | California Condor, and the Kemp's Ridley sea  
22 | turtle, and the wolves and grizzly bears in

1 | Yellowstone. All of them are apparently failures,  
2 | in Mr. Pombo's calculation, because none of them  
3 | has yet recovered and been taken off the Endangered  
4 | Species List. But if those were stocks rather than  
5 | species, I don't think I'd be complaining about  
6 | their performance.

7 |           Mr. Pombo's mischaracterization of the  
8 | Endangered Species Act is not new. But what is new  
9 | is his mischaracterization of his own bill, for  
10 | yesterday in that same *Sacramento Bee* guest  
11 | editorial, Mr. Pombo said the following about the  
12 | compensation provisions of his bill, the provisions  
13 | he discussed here this morning. "The amount is  
14 | based only on the value of the land's current use,  
15 | rather than any future increased value. In other  
16 | words, if the land in question is farmland, the  
17 | payment is based on its value as farmland." That  
18 | statement, I will submit, is patently, flatly, and  
19 | undeniably false.

20 |           Contrary to his statement, his bill  
21 | creates a mechanism whereby property owners can  
22 | submit a "proposed use" of their property for

1 | review by the Fish and Wildlife Service. The  
2 | property owner's submission must include "a  
3 | demonstration that the property owner has the means  
4 | to undertake the proposed use". If the Fish and  
5 | Wildlife Service determines that the proposed use  
6 | would not comply with the prohibition against  
7 | taking an endangered species, the property owner  
8 | may agree to forgo the proposed use whereupon he is  
9 | entitled to be paid the fair market value of that  
10 | forgone proposed use. The bill even includes a  
11 | statement that "fair market value shall take into  
12 | account the likelihood that the foregone use would  
13 | be approved under state and local law".

14 |           The Bill's express reference to a  
15 | proposed use that the owner must demonstrate that  
16 | he has the means to undertake and to a fair market  
17 | value that takes into account the likelihood of  
18 | securing state and local approval clearly does not  
19 | limit compensation to current land use. Indeed,  
20 | the plain language of the Pombo Bill is utterly  
21 | irreconcilable with the characterization of it that  
22 | appeared in print yesterday under his name. So I

1 ask, how is it possible to have an intelligent  
2 debate about the merits of legislation in the face  
3 of such clear misrepresentation?

4           What is sad, in my opinion, about this  
5 state of affairs is that the administration of the  
6 Endangered Species Act is in need of intelligent  
7 reform.       Intelligent reform would begin by  
8 recognizing that there is need both for improving  
9 the effectiveness of the Act in conserving  
10 imperiled species and making it less onerous for  
11 those whom it affects. In particular, reform needs  
12 to remove the impediments to beneficial actions by  
13 private landowners and others. To the extent that  
14 progress toward conservation goals can be achieved  
15 through incentive-based strategies, there is that  
16 much less need to rely upon regulatory strategies  
17 to achieve those goals.

18           A lot of these reforms, I believe can be  
19 accomplished within the existing framework of the  
20 current Endangered Species Act, and we've already  
21 seen evidence of that in recent years. When  
22 comparing the "then" of a decade or so ago to the

1 | "now" of today, for example, I might have added  
2 | that then, the idea of a safe harbor was a place  
3 | where you might moor a boat. But today, as Lynn  
4 | has pointed out, it's a mechanism whereby literally  
5 | hundreds of landowners who own literally millions  
6 | of acres of land are managing that land in ways to  
7 | improve its value for endangered species; in effect  
8 | laying out the welcome mat on their land for  
9 | endangered species. It's just one of many  
10 | administratively created innovations that can make  
11 | the Endangered Species Act better for species and  
12 | better for property owners. And that, in my  
13 | opinion, is where the attention of serious  
14 | reformers ought to be focused.

15 |           The House bill, ironically, has probably  
16 | reduced the prospects for legislative reform,  
17 | rather than enhanced them. It is an extreme  
18 | measure, and one that even its chief sponsor won't  
19 | honestly acknowledge.

20 |           Thank you.

21 |           DEP. SECRETARY SCARLETT: Thank you very  
22 | much, Michael.

1           We turn now to Steven Quarles, whom I  
2 believe I first met at the airport. Steve is, like  
3 Michael, well known over many years for his work on  
4 the Endangered Species Act. He is Chair of the  
5 Natural Resources and Environmental Law group with  
6 the law firm of Crowell & Moring here in  
7 Washington. His practice is wide-ranging, but  
8 includes wildlife and endangered species issues,  
9 federal lands issues, water issues, and related  
10 environmental matters. His practice includes  
11 litigation, administrative practice, and a  
12 legislative practice. He represents clients in  
13 federal courts, in all the Federal Circuits and the  
14 Supreme Court -- again, often on environmental  
15 matters, including the Endangered Species Act. His  
16 administrative practice, likewise, includes work on  
17 habitat conservation plans, environmental impact  
18 statements, and other environmental matters. His  
19 legislative practice, too, has a similar focus. He  
20 has held positions in government, including at  
21 Department of the Interior and also with the U.S.  
22 Senate. And like Michael, he is a prolific writer.

1 Many of those writings are law articles pertaining  
2 to the Endangered Species Act.

3 With that, Steve.

4 MR. QUARLES: Thank you. Before I launch  
5 into my short segment, I need to say something  
6 about Michael. His record, unlike mine, can't  
7 possibly be summarized, although Lynn made a very  
8 good effort at it. She mentioned, for example, the  
9 Safe Harbor program, and that many hundreds of  
10 thousands of acres have been protected under it.  
11 Michael is well known as the father of that  
12 program. A skill of Michael's that is not often  
13 recognized was put on a good display today. Michael  
14 is a superb analogist - one example being his  
15 analogy of species restoration to stock prices.

16 My favorite Michael Bean analogy of many  
17 years ago was when he talked about how underfunded  
18 -- is the Endangered Species program -- one place  
19 where conservatives and liberals agree. I remember  
20 that he once said that the entire budget of the  
21 Fish and Wildlife Service for endangered species  
22 was less than the citizens of Washington, DC spend

1 | each year on pizza. I thought that was a classic  
2 | analogy.

3 |           In eight minutes, which is what we're all  
4 | allotted for our remarks -- since most of us are  
5 | also lawyers, that probably means ten -- there's  
6 | not enough time to talk substantive issues in  
7 | depth--or at least not enough time for me to talk  
8 | about - then coherently. I hope we will discuss  
9 | those issues in a serious way in the question-and-  
10 | answer period.

11 |           So, instead, I'm going to try to place  
12 | the Pombo Bill in some kind of context or  
13 | perspective and identify what I think is the most  
14 | significant largely unreported contribution of the  
15 | Pombo Bill and tantalize you with perhaps a hint of  
16 | what I believe to be the explosive unaddressed  
17 | issues in that bill.

18 |           Putting the House action on September 29  
19 | last year -- the passage of H.R. 3824 -- into  
20 | perspective, I want to emphasize how important an  
21 | accomplishment that was, and also emphasize that  
22 | unreported story which is how much consensus, or at

1 | least emerging consensus, there may be. There is  
2 | consensus, I believe, on the importance of ESA and  
3 | its purpose. I believe there also is consensus not  
4 | that the ESA is a failed law but that it is a  
5 | flawed law with identifiable problems. I think  
6 | there's also a consensus -- although both Michael  
7 | and John will quickly add that the devil resides in  
8 | the details -- on solutions to a surprising number  
9 | of those flaws and problems.

10 |           Perspective -- more than a decade and a  
11 | half has passed since comprehensive amendments to  
12 | the ESA were enacted in 1988. In fact, more than a  
13 | decade and a half has passed since comprehensive  
14 | amendments to ESA have passed on the floor of  
15 | either chamber of the Congress. The last try for a  
16 | comprehensive bill was S. 1180 in 1997, the so-  
17 | called Kempthorne-Chafee-Baucus-Reid Bill. That  
18 | bill had everything going for it. It was sponsored  
19 | by the Chairman and the ranking Minority Member of  
20 | the Senate committee of jurisdiction and  
21 | subcommittee of jurisdiction; enjoyed support of  
22 | the Senate leadership; was strong advocated by the

1 | Clinton Administration; and even had modest praise  
2 | from a number of moderate environmentalists. Yet,  
3 | it went nowhere. Environmentalists basically kept  
4 | it from the floor of the Senate. And, when a rump  
5 | conference was created to see if there could be  
6 | agreement on an identified bill that could be  
7 | brought to both the floor of the Senate and the  
8 | floor of the House, western property rights  
9 | advocates killed the effort in the House.

10 |           To the contrary, HR 3824, the first to  
11 | pass on the floor in either chamber in a decade and  
12 | a half, enjoyed none of these favorable conditions.  
13 | H.R. 3824 did have bipartisan support, but to a  
14 | distinctly lesser degree than did S. 1180. If the  
15 | Bush Administration did not manifest total  
16 | indifference toward H.R. 3824, it certainly did not  
17 | lend the vigorous, vocal, and highly visible  
18 | support that the Clinton Administration did to S.  
19 | 1180. In contrast to the Senate when S. 1180 was  
20 | in play, the House leadership was in disarray. The  
21 | vote on H.R. 3824 occurred the day after Mr. Delay  
22 | resigned as Majority Leader. You should have seen

1 | the amount of whipping that was going on in the  
2 | Democratic cloak room. And, a rare occurrence:  
3 | Nancy Pelosi, who knows absolutely nothing about  
4 | the Endangered Species Act, was sent to the floor  
5 | to speak on it. This gives you the feeling that  
6 | the Democrats were as much or more concerned about  
7 | providing the Republicans with their first defeat  
8 | on the House floor after Mr. Delay's resignation,  
9 | than almost anything else. And, of course, unlike  
10 | S. 1180, H.R. 3824 also had the active and very  
11 | stiff opposition of a united environmental  
12 | community.

13 |           I think Chairman Pombo should be  
14 | congratulated -- no matter how you feel about the  
15 | H.R. 3824 -- by the way he went about building that  
16 | bill from the bottom up, with long discussions  
17 | between his staff and the ranking minority member's  
18 | staff on where they could find consensus, and  
19 | drafting provisions that tried to bring landowners  
20 | into a constructive relationship with the ESA --  
21 | not actively opposing it, but actively assisting in  
22 | the recovery of species.

1                   Now some spoilsports or cynics may say,  
2 how can you maintain that H.R. 3824 enjoyed  
3 significant bipartisan support when the alternative  
4 bill, sponsored by very prominent Democrats in  
5 George Miller and John Dingell and some moderate  
6 Republicans, most notably Sherry Boehlert and Mr.  
7 Gilchrest, lost by only 10 votes on the House  
8 floor. And by the cruel mathematics of the  
9 legislative process, that's only five  
10 representatives, although it's ten votes.

11                   The easy answer is that many more  
12 Democrats voted for H.R. 3824 than Republicans  
13 voted for the Miller-Boehlert substitute. But the  
14 better answer is to give the Miller-Boehlert  
15 substitute effort all the credit it deserves and  
16 acknowledge that it is the key to the unreported  
17 story. Sponsors of the Miller-Boehlert substitute  
18 asserted over and over on the House floor that  
19 their bill contained 80 to 90 percent of the  
20 language of H.R. 3824. Now that message was a bit  
21 hyperbolic, but it wasn't that far from the truth.  
22 It does demonstrate how much of a consensus or

1 | emerging consensus, fragile as it is, does exist.  
2 | Now, it's not my intention to gloss over how widely  
3 | divergent or significant are the remaining  
4 | differences. But I do think the story of the House  
5 | action on H.R. 3824 and the Miller-Boehlert  
6 | substitute is that there is a nascent consensus  
7 | building.

8 |           Certainly the big reforms in H.R. 3824  
9 | are well-known: strengthening recovery planning,  
10 | establishing new landowner incentives programs,  
11 | adding more carrots to the sticks, eliminating the  
12 | God Squad, consolidation of implementation in a  
13 | single agency, elimination of critical habitat in  
14 | favor of recovery habitat, compensating loss of  
15 | land use due to ESA implementation. Now a number  
16 | of those ideas have been trumpeted by  
17 | environmentalists, such as improving recovery  
18 | planning, developing more attractive landowner  
19 | incentive packages, and even dropping critical  
20 | habitat, and no environmentalist that I'm aware of  
21 | has ever been in support of the God squad. But of  
22 | course, again, as Michael and John will tell you,

1 | the devil is in the details, and certainly they do  
2 | not support, I am positive, most of the provisions  
3 | with those purposes in H.R. 3824.

4 |           The biggest accomplishment of H.R. 3824  
5 | in my mind is its attempt to reduce the transaction  
6 | costs of many of the ESA processes. I'll give you  
7 | just one example. The greatest accomplishment of  
8 | the last administration was Secretary Babbitt's  
9 | vivifying the Habitat Conservation Plan /  
10 | incidental take permit process, which has now  
11 | protected millions of acres of habitat. But that  
12 | program is now dying a slow death, and some of the  
13 | most prominent companies, that have strong  
14 | environmental ethics, have been most active in  
15 | preparing Habitat Conservation Plans, have  
16 | announced that they are going to disengage from the  
17 | process because the transaction costs are too high.  
18 | And of course, when the transaction costs are too  
19 | high for the regulated, they're also too high for  
20 | the regulators - the woefully underfunded agencies,  
21 | the Fish and Wildlife Service and NOAA Fisheries.  
22 | Those costs reduce the federal dollars available to

1 | be spent on the ground in protecting species and  
2 | habitat.

3 |           Many of H.R. 3824's provisions, whether  
4 | they got it right or wrong, were intended to try to  
5 | streamline many of the decision-making processes so  
6 | as to reduce those transaction costs and allow the  
7 | scarce dollars and funds to be converted to on-the-  
8 | ground activities to conserve species.

9 |           Now my time is almost up, but one thing I  
10 | must tell you is that I don't want you to think  
11 | that the regulated community believes H.R. 3824 is  
12 | any kind of home run that clears ESA base paths of  
13 | all remaining issues. I believe that, even if any  
14 | legislation passed, the ESA will remain the most  
15 | controversial environmental law. I'd be happy to  
16 | tell you why but I've already published an article  
17 | with the reasons why ESA occupies the top rung on  
18 | the ladder of controversy in ELI's *Environmental*  
19 | *Law Report*. But I would also be happy to tell you  
20 | why I think we've only begun to see the most  
21 | critical issues, and what those issues might be.

22 |           Amazingly, 30 years later, I believe that

1 | over the next two or three years the greatest  
2 | amount of ESA litigation is going to go to the  
3 | basic definitions section of the Act, which is  
4 | normally where litigation on any law begins. And,  
5 | the most prominent litigation will be over the  
6 | definitions of "species", the definition of  
7 | "endangered species" and "threatened species" and  
8 | their "significant portion of the range" language,  
9 | and the definition of "critical habitat", (if, as I  
10 | suspect, critical habitat's deletion is not  
11 | supported by the Senate).

12 |           During the question-and-answer period,  
13 | I'd be happy to discuss these forthcoming issues.

14 |           Thank you.

15 |           DEP. SECRETARY SCARLETT:     Thank you,  
16 | Steve. Now to carry on this dialogue, we have next  
17 | John Kostyack, who is Senior Counsel and Director  
18 | of Wildlife Conservation Campaigns in the National  
19 | Wildlife Federation's Washington office. He, too,  
20 | like the other panelists, is an expert on the  
21 | Endangered Species Act. He is responsible for  
22 | overseeing the National Wildlife Federation's

1 | advocacy on endangered species before the Congress,  
2 | before federal agencies, and also before the  
3 | courts. He oversees the National Wildlife  
4 | Federation's work on invasive species and state  
5 | wildlife action plans. John serves as counsel for  
6 | the National Wildlife Federation as well as other  
7 | conservation groups in a variety of legal aid  
8 | initiatives, including, most recently, cases to  
9 | protect the ivory-billed woodpecker in Arkansas,  
10 | the Florida panther in the Everglades, and to  
11 | restore the gray wolf in the northeastern United  
12 | States. John, too, writes often and lectures on  
13 | meeting the challenges of conserving US wildlife.  
14 | He has authored with Professor Reid Ewing of the  
15 | University of Maryland the first national study  
16 | that tries to quantify the impact of sprawl on the  
17 | nation's biological diversity.

18 | John.

19 | MR. KOSTYACK: Thanks a lot, Lynn. It  
20 | was a pleasure to follow Steve and Michael, since  
21 | we have been trapped in a room together now for the  
22 | past four or five months. As so we know each

1 | other's lines and we can finish each other's  
2 | sentences. I'll try to do a little bit of that  
3 | today.

4 |           I'd like to start out by talking a little  
5 | bit about the trends that are facing wildlife in  
6 | this country and abroad because I think it's a key  
7 | premise to any discussion of updating the  
8 | Endangered Species Act to understand the threats  
9 | that are facing wildlife and habitats. I would  
10 | argue that those threats are greater today than  
11 | ever before in human history. Lynn already  
12 | mentioned the work I've done on sprawl. We can  
13 | talk about sprawl. We can talk about invasive  
14 | species.

15 |           But let me elaborate a minute on what I  
16 | see as the biggest threat, and what scientists are  
17 | now saying is the biggest threat, to biodiversity,  
18 | and that is global climate change. In the past  
19 | century, we've already seen a 1°F increase in the  
20 | Earth's temperatures, and scientists are projecting  
21 | in the coming century a 2- to 10° increase in the  
22 | Earth's temperatures. A recent study by the

1 Wildlife Society shows how plants and animals have  
2 already begun to shift, in both elevations and in  
3 latitudes, the locations of their habitats to adapt  
4 to this change in surface temperatures. And the  
5 real question that will face all of us who've been  
6 working for decades on conservation is are all the  
7 good works that we have accomplished and achieved  
8 in the past several decades going to be lost as a  
9 result of global climate change.

10           Now why does this relate to the  
11 Endangered Species Act? Well, when the law was  
12 enacted in 1973, it probably was the most visionary  
13 wildlife law ever enacted. For decades after that  
14 people were saying that, and I think today even you  
15 can say that. But in 1973, Congress was not  
16 talking about global climate change. In fact, they  
17 weren't talking about invasive species and they  
18 weren't talking much about land use patterns in  
19 terms of sprawl, where we've essentially consumed,  
20 per capita, a greater number of acres every single  
21 decades than in the previous decade. So, we have  
22 new challenges to face. Wildlife habitat is still

1 | disappearing at an unprecedented rate, and we're  
2 | facing trends that suggest that it could be  
3 | disappearing even more quickly than in the past in  
4 | the next few decades.

5 |           The Endangered Species Act is our  
6 | nation's most comprehensive tool to address this  
7 | problem. We have challenges that are new, such as  
8 | thinking about buffers and wildlife corridors to  
9 | address global warming, making sure those corridors  
10 | are oriented in a north-south direction to address  
11 | this movement of plants and animals. These are the  
12 | kinds of challenges that I hope to work with. As  
13 | long as I'm here in DC, I'll be working on  
14 | modernizing the Endangered Species Act and  
15 | basically facing some of the most fundamental  
16 | challenges facing humanity, not just plants and  
17 | animals.

18 |           Now, we heard this morning from Mr.  
19 | Pombo. And he is so far the one person who has  
20 | gotten a bill completed on the House and Senate  
21 | floor since 1988. It is unfortunate that this is  
22 | the leader, I have to say, because his leadership

1 | is essentially ignoring the fundamental challenges  
2 | and essentially suggesting that it's time for a  
3 | retreat from this nation's commitment to conserving  
4 | wildlife.

5 |           Now, he did say that his bill is more  
6 | oriented toward recovery, and I'd like to spend a  
7 | moment in following up on Michael Bean's argument  
8 | on why that is essentially a cynical argument. In  
9 | fact, this bill that he got passed through the  
10 | House floor was introduced two weeks before its  
11 | approval by the House of Representatives, so we had  
12 | very little time to debate the fundamental  
13 | question, is the Endangered Species Act a success  
14 | or failure. Michael gave some pretty good  
15 | anecdotes to suggest why it's really one of the  
16 | most powerful laws and has been very successful in  
17 | bringing Endangered Species Act.

18 |           But I'd like to refer to the U.S. Fish  
19 | and Wildlife Service reports that were the  
20 | foundation of the study that Mr. Pombo says is the  
21 | basis for his efforts. It's a biannual study that  
22 | comes out from the U.S. Fish and Wildlife Service,

1 | called "Threatened and Endangered Species Recovery  
2 | Report". If you look at the numbers put forward by  
3 | these official statistics that Mr. Pombo relies  
4 | upon, it not only shows that over 99 percent of the  
5 | species ever protected remain with us today, it  
6 | also directly counters his argument that the law is  
7 | not recovering species. The longer species are  
8 | protected by the Endangered Species Act, the more  
9 | likely species are to be stabilized and recovering.  
10 | That's the fundamental fact you can draw from those  
11 | reports. For species that have been protected for  
12 | five years or more, the majority are stable or  
13 | improving.

14 |           So, where does this argument really come  
15 | from that the ESA is a failure? I would argue that  
16 | it's not based on any meaningful analysis. What  
17 | it's based upon is public relations. Back in the  
18 | 1990s when Mr. Pombo led the charge to weaken the  
19 | Endangered Species Act, it was based upon the  
20 | argument that the Act was interfering with business  
21 | and private property rights. That argument proved  
22 | to be a failure. The American people didn't buy

1 | it. After a relentless PR campaign advancing that  
2 | message for five to ten years, the most recent  
3 | polling shows that the law is as popular as ever.  
4 | 86 percent of the people of this country continue  
5 | to favor a strong Endangered Species Act.

6 |         So, Mr. Pombo has obviously adopted a new  
7 | message to try to achieve its objectives, but the  
8 | underlying goals have not changed. He says the  
9 | bill is for recovery, and yet you can walk through  
10 | each of the key provisions and figure out how the  
11 | bill pushes us in the opposite direction, away from  
12 | achieving species recovery.

13 |         Now, we talked a little bit about what  
14 | might happen in the Senate. What I've been hearing  
15 | from Senate staff, and this isn't just sort of the  
16 | liberals to moderates, we're hearing this from now  
17 | from conservatives as well, that the word "Pombo"  
18 | unfortunately has become a poison pill. There's  
19 | how a new verb that's been adopted in the lexicon  
20 | called the "Pomboization" of the Endangered Species  
21 | Act, a fear that if the Senate moved forward with  
22 | even a responsible bill that would have to be met

1 | in the conference committee with the Pombo Bill,  
2 | and the law would end up being weakened. This has  
3 | taken all the wind out of any efforts to achieve a  
4 | sort of responsible compromise in the Senate.

5 |           Mr. Pombo's recent initiative in December  
6 | to essentially allow a fire sale of millions of the  
7 | acres of public land across the West under the  
8 | guise of the 1872 mining law, further exacerbated  
9 | this problem. We had all of our members, including  
10 | hunters and anglers that are conservative  
11 | Republicans, fired up, going to their members, and  
12 | saying this is an outrage. Our fundamental  
13 | commitments to protecting wildlife habitats in this  
14 | country will essentially disappear as the result of  
15 | this kind of provision. So, this is the context in  
16 | which we're operating. I'm actually not hopeful at  
17 | all in terms of our ability to achieve a solution  
18 | in the Senate in the context we're dealing with  
19 | here.

20 |           On the other hand, I do agree with the  
21 | fundamental point that Steve made, which is that  
22 | there are plenty of opportunities for achieving

1 | consensus. There is sort of a middle ground out  
2 | there that has been identified on a lot of key  
3 | policy issues in the Endangered Species Act, and a  
4 | compromise is waiting to be struck. Let me walk  
5 | through some of what I see as the fundamental  
6 | policy issues that are facing us. I realize my  
7 | time is short, so it's going to be a little bit of  
8 | an oversimplification.

9 |           Private landowner incentive -- this is  
10 | probably one where there is the greatest degree of  
11 | consensus and the greatest amount of hope. There  
12 | are enormous opportunities for getting landowners  
13 | to do positive things on their land. Already there  
14 | are some existing programs, such as the Safe  
15 | Harbor, that are making that happen. To give these  
16 | programs real juice, we have to get the Tax Code  
17 | and other key incentives programs more oriented  
18 | toward providing private landowners with the  
19 | incentives to conserve habitats. There's a long  
20 | list of suggested ways to do that that have broad  
21 | support from the conservation community and the  
22 | regulated side.

1           Now, in the Pombo Bill, and to a lesser  
2 extent the Crapo bill -- let me talk a little bit  
3 about the Crapo bill. This is the only pending  
4 Endangered Species Act bill in the Senate right  
5 now, S 2110. There are references to private  
6 landowner incentives. But a fundamental  
7 distinction between paying landowners to do things  
8 above and beyond what's required by the law and  
9 paying for landowners to take compliance measures  
10 under the law, is missing from both of these bills.  
11 And so, essentially, both create a perverse  
12 incentive.

13           If you're a developer that's trying to  
14 decide whether to construct a development that  
15 steers around endangered species habitat, under  
16 essentially the fundamental dynamic we have now,  
17 you have a great incentive to make essentially a  
18 conservation- oriented development, to work your  
19 way around the habitats and not destroy them. That  
20 incentive disappears under the Pombo Bill because  
21 if you target the endangered species habitat on  
22 your property, then you are entitled to an

1 | automatic paycheck from the federal taxpayers for  
2 | any lost profits that might have been suffered as a  
3 | result of any endangered species restrictions.

4 |           And so this consensus that awaits on  
5 | private property conservation needs to deal with  
6 | this fundamental difference that Mr. Pombo and Mr.  
7 | Crapo's bills highlights, which is that you'll  
8 | never get any consensus on the notion of  
9 | undermining the regulatory program, paying for  
10 | compliance measures, but there's enormous  
11 | opportunity for consensus about management and  
12 | restoration activities above and beyond the law,  
13 | getting the federal government to shift a lot of  
14 | its current spending and tax programs to help those  
15 | programs along.

16 |           Real briefly on critical habitats, we've  
17 | mentioned a few times, you know, there are two  
18 | fundamental safety net provisions of the Act  
19 | dealing with federal agency actions. One is the  
20 | jeopardy protection, and the other is the critical  
21 | habitat protection. Then there's another key  
22 | regulatory provision, known as the take prohibition

1 | for non-federal activities. Of those three,  
2 | critical habitat is the only one that explicitly  
3 | protects habitat. For the other two key  
4 | provisions, we've had a lot of differences in  
5 | implementation around the country, but oftentimes  
6 | it fundamentally comes down to a debate about  
7 | whether or not the species is present there. That  
8 | is not a sufficient amount of habitat to save the  
9 | endangered species. You have to deal with the  
10 | broader habitat needs of the species. Critical  
11 | habitat gets at that fundamental challenge.  
12 | There's broad support for addressing recovery needs  
13 | of species.

14 |           We have a consensus that we want to  
15 | maintain the goal of recovery; we don't want to  
16 | keep species at the brink of extinction. Then the  
17 | real question is how do you go about it? Well,  
18 | this notion of recovery habitat is out there.  
19 | Everybody seems to agree that it would worth while  
20 | to at least have some kind of consensus on mapping  
21 | habitats needed for recovery. Then the big  
22 | challenge is what do you do about it? There are a

1 | range of possible solutions to it, but this notion  
2 | that there is a consensus to get rid of critical  
3 | habitat masks the fact that critical habitat does  
4 | address a very legitimate problem. And, you know,  
5 | the discussions need to continue. Mr. Pombo is  
6 | completely wrong in suggesting that he move forward  
7 | with an idea that had broad support because he  
8 | completely gutted the critical habitat provision.  
9 | He essentially has no responsibility whatsoever for  
10 | protecting these habitats under his bill.

11 |           The jeopardy provision has its own set of  
12 | challenges because of the fact that oftentimes the  
13 | dynamic under the Act is piecemeal loss without a  
14 | look at the big picture of the challenges facing  
15 | species. We have the gradual chipping away that  
16 | leads species closer and closer to extinction.  
17 | That is a problem that we're going to need to deal  
18 | with in any update in the Endangered Species Act to  
19 | essentially find a way to make sure that this  
20 | provision of the Act ensures no net loss of the  
21 | habitat needed for recovery, using mitigation and  
22 | other strategies.

1           Mr. Pombo's bill, again, takes us in the  
2 wrong direction. He essentially says the opposite  
3 of what needs to happen. In his provisions dealing  
4 with the analysis of the baseline condition of the  
5 species, he essentially says you may only look at  
6 the project in isolation. You may not, you are  
7 forbidden -- the Agency is forbidden -- from  
8 looking at the big picture of surrounding actions  
9 and projects that are threatening the species. So  
10 there's another issue we're going to have to solve.

11           Real quickly on state roles and on  
12 science, these are, I would say, the last two  
13 issues that are commonly debated. State roles is  
14 an area, I think, where there's an enormous amount  
15 of consensus that we would like to increase the  
16 role of states in endangered species conservation.  
17 Most of the state wildlife agencies are severely  
18 underfunded. That's one of the first challenges  
19 we'd would have to deal with, and local governments  
20 as well because they're the ones involved in making  
21 so many of the zoning and other key decisions  
22 affecting endangered species.

1           However, oftentimes the notion of  
2 expanding the role of states is used as a Trojan  
3 horse for essentially weakening the Act, and that's  
4 something we cannot support. In the Pombo Bill, as  
5 well as in the Crapo bill, there are massive  
6 authorizations for incidental taking of endangered  
7 species, if you can get your activity somehow  
8 covered by state conservation agreement -- no  
9 requirements whatsoever that you minimize or  
10 mitigate the harmful effects of your activity,  
11 which is currently the way the law operates. So we  
12 can find a way to expand the role of states, but we  
13 can't use it as a way for weakening habitat  
14 protections.

15           Finally on science, obviously the  
16 Endangered Species Act is a success because of the  
17 fact that it does have a strong scientific  
18 foundation. Numerous leading scientists and  
19 scientific societies have made this point over and  
20 over again, that the scientific foundation of the  
21 Endangered Species Act is a strong one; it's a key  
22 to the operation of the law. So the basic standard

1 | we have today, which is to use the best available  
2 | science, is a good one. It means we can adapt to  
3 | the latest information to deal with things on a  
4 | case-specific basis using the experts on that  
5 | species.

6 |           The Pombo Bill essentially says let's  
7 | come up with a new definition of best available  
8 | science, but let's leave that to the Secretary of  
9 | the Interior. We, the Congress, won't even make  
10 | clear what we want to change about the existing  
11 | standard. We'll just turn it over to a political  
12 | official to come up with regulations narrowing and  
13 | defining what science may be used in protecting  
14 | endangered species. This takes us in the exactly  
15 | wrong direction. The times we have had problems  
16 | with science in the Endangered Species Act is when  
17 | it's become politicized. We've seen surveys  
18 | conducted by the Union of Concerned Scientists  
19 | saying there's an increased problem of political  
20 | officials reaching down and telling biologists to  
21 | change their decisions based on nonscientific  
22 | reasons as a way of removing protections for

1 | endangered species. That kind of problem would be  
2 | exacerbated by the Pombo Bill, which essentially  
3 | allows the politicians to say what the best science  
4 | is and not scientists.

5 |           Let me wrap up by saying we've had a lot  
6 | of people around from around the country speaking  
7 | up recently in support of a strong Endangered  
8 | Species Act, sensing the threat that the Pombo Bill  
9 | poses. Leading scientists from around the country,  
10 | hunters and anglers, faith groups, businesses,  
11 | they're all writing to Congress right now saying  
12 | this is a serious concern, and it goes to the  
13 | notion that this is a bedrock conservation law that  
14 | people around the country care passionately about.  
15 | I don't feel badly at all about the passion that  
16 | Mr. Pombo was alluding to. That is the key to  
17 | having saved this law from numerous threats over  
18 | the years; that's actually a good thing.

19 |           But what's missing so far, right now, is  
20 | leadership. We're going to need members of the  
21 | Congress to step forward and be honest in  
22 | confronting the challenges facing species and

1 | habitats across this country, and once we have  
2 | that, I actually think there is the making for a  
3 | lot of consensus and resolution of the  
4 | reauthorization debate.

5 |           Let me close there. Thanks.

6 |           DEP. SECRETARY SCARLETT: Thank you,  
7 | John. As moderator, I'm trying to be just that:  
8 | very neutral in this dialog. But as we've had  
9 | three speakers all celebrate landowner incentives,  
10 | I must add a plug for the Department of the  
11 | Interior and the fact that over the last four years  
12 | we've increased funding for landowner incentives in  
13 | our landowner incentive programs by 53 percent. So  
14 | I will just put a plug in for that.

15 |           Our next speaker is Larry Liebesman, who  
16 | has 30 years of experience as an environmental  
17 | lawyer and litigator. Like his colleagues here,  
18 | his practice emphasizes endangered species; also  
19 | wetlands, water pollution, environmental impact  
20 | assessments, and coastal protection issues. He is  
21 | a nationally recognized expert in wetlands and  
22 | endangered species. Like the others on this panel,

1 | he is the author of a number of works on wetlands  
2 | as well as on endangered species, including the co-  
3 | authoring of an endangered species desk book for  
4 | the Environmental Law Institute. He authored  
5 | Supreme Court *amicus* briefs in *Babbitt v. Sweet*  
6 | *Home*, a very familiar Endangered Species Act case,  
7 | as well as a number of other similar kinds of  
8 | cases. Mr. Liebesman spent two years at the US  
9 | Environmental Protection Agency and 11 years as  
10 | Senior Trial Attorney at the US Department of  
11 | Justice, so he brings both private sector and  
12 | public sector experience. He had a one-year detail  
13 | to the President's Council on Environmental Quality  
14 | during the Carter Administration. Mr. Liebesman is  
15 | a graduate of Rutgers University, and he received  
16 | his law degree from George Washington University  
17 | right here in town.

18 |           With that, Larry.

19 |           MR. LIEBESMAN: Thank you, Lynn. It's a  
20 | pleasure to be here today. I want to give you a  
21 | little different perspective than John just did  
22 | regarding ESA reform. As an attorney representing

1 | public and private sector clients dealing with ESA,  
2 | I've seen all aspects and many sides of the debate.  
3 | I've come to the conclusion that tinkering around  
4 | the edges legislatively is not going to work to  
5 | come up with a meaningful solution to the conundrum  
6 | that we're dealing with under the Act. In my view,  
7 | we must not lose the momentum that came out of HR  
8 | 3824, and this is a golden opportunity to seize the  
9 | moment to try to solve these many problems.

10 |           What I'd like to do today is to try to  
11 | identify what I consider to be the three main sort  
12 | of failed themes of the existing Endangered Species  
13 | Act and comment a little bit on the legislative  
14 | approaches that are now swirling around Congress,  
15 | and give you my sort of view of the future as to  
16 | where we're going. I would lump the major problems  
17 | with ESA, as it is now constituted, into three  
18 | major categories:       (1) flawed science; (2)  
19 | unrealistic deadlines, and priorities; and finally  
20 | (3) inadequate -- I don't say failed -- but  
21 | inadequate incentives for recovery, especially  
22 | dealing with private property owners. And then I'm

1 | going to get into some of the reform proposals.

2 |           We've heard a lot of debate on the flawed  
3 | science aspect of things.     The environmental  
4 | community says science is good and the ESA is  
5 | fundamentally a science based bill. I would submit  
6 | that there are major problems in how scientific  
7 | decisions are made under the ESA --

8 |           [End side A; continued side B]

9 |           MR. LIEBESMAN: (in progress) -- they can  
10 | go into position. Case in point, we were involved  
11 | in challenging the listing of a number of species  
12 | of fairy shrimp; they're little crustaceans that  
13 | live in the Central Valley south of California, up  
14 | and down the spine of California. And while the  
15 | listing of those species was upheld, I would submit  
16 | that the science was indeed very flawed, and it did  
17 | not go through the kind of rigorous peer review  
18 | that is necessary to ensure sound scientific  
19 | decisions. When you're going to make a judgment  
20 | that a particular species is in danger of  
21 | extinction throughout its range, you fundamentally  
22 | have to have good scientific data, analysis, and

1 | have a peer-reviewed in the sunshine, in the public  
2 | view, to make sound decisions. Now we've heard a  
3 | lot of the debates saying well, if you go to peer  
4 | review, if you see the Pombo view and approach of  
5 | regs and going out there in this process, you'll  
6 | never make a decision; it's a recipe for  
7 | extinction. Frankly, I would submit it's not a  
8 | recipe for extinction; it's a recipe for good sound  
9 | decision-making. And that's what the government  
10 | should really be doing.

11 |           The second major area is unrealistic  
12 | deadlines and priorities. We've heard a lot of  
13 | talk about how the courts are running the  
14 | Endangered Species Act. I would submit that  
15 | judicial policing is but a symptom of a deeper  
16 | problem, namely that Congress has created a  
17 | framework here, a patchwork of disconnected  
18 | requirements, deadlines, and priorities. They've  
19 | basically made it impossible for the Department of  
20 | Interior and NOAA Fisheries to ever meet.

21 |           Now, when you look at critical habitat  
22 | which has got so much attention in the courts over

1 | the last couple of years, I think that's sort of a  
2 | prime example. We were involved in the critical  
3 | habitat challenge for the wintering population of  
4 | the piping plover in Cape Hatteras, and also around  
5 | the country. I think that's a case in point where  
6 | that critical habitat designation that really  
7 | covered over 1,500 miles of the American coastline  
8 | -- we were involved in the Cape Hatteras aspect of  
9 | that in the litigation -- was rushed. It was based  
10 | upon a decision that did not have good adequate  
11 | data. It essentially resulted in a redline of a  
12 | lot of properties because of the potential that  
13 | these coastal areas would be habitat in the future  
14 | for wintering populations coming out of the Great  
15 | Lakes and the Great Plains. Judge Lamberth here  
16 | agreed with us in coming out with the very strongly  
17 | worded opinion and pointing out the various laws  
18 | and that process. This is simply one example of  
19 | the extensive amount of litigation that's going out  
20 | in critical habitat. And I would agree with Lynn  
21 | that, you know, you're seeing so many of the  
22 | important resources within the Department being

1 | devoted to dealing with this litigation, but it's a  
2 | symptom of a law that needs to be dealt with.

3 |           When you're representing private clients  
4 | or public-sector clients that are affected by  
5 | critical habitat like we do, sometimes you have no  
6 | choice but to sue when you're looking at the effect  
7 | of critical habitat, which I would submit does not  
8 | really promote recovery but has a disincentive of  
9 | redlining private property and dissuading folks  
10 | from taking proactive measures, property owners, to  
11 | promote recovery, to enhance recovery, to do what's  
12 | right, then I think you got to change the law.  
13 | It's not working. There's a disconnect between  
14 | critical habitat and recovery that the Pombo Bill  
15 | is indeed going to address.

16 |           That leads me to the third major flaw:  
17 | inadequate incentives. I certainly commend the  
18 | Department of Interior for working very strongly in  
19 | enhancing and expanding the various landowner  
20 | incentives that are out there, the cooperative  
21 | agreements, the safe harbor programs, candidate  
22 | conservation agreements. They're all great. You

1 | want to sort of encourage the biodiversity ethic on  
2 | the part of the landowners in encouraging them to  
3 | do the right thing. But that's not enough.

4 |           We live in a market-based economy, and  
5 | unfortunately without having economic incentives  
6 | and without facing disincentives, and getting away  
7 | from disincentives and a positive incentive-based  
8 | approach, property owners are not going to  
9 | cooperate. Fundamentally, we are facing unreality  
10 | if we think that property owners in this country,  
11 | that this market-based economy is going to deal  
12 | with these issues unless you create positive  
13 | economic-based incentives. Unfortunately, the way  
14 | I see the Act right now, it does not promote those  
15 | results. When you're dealing with so many species  
16 | that are on private lands, whether you're dealing  
17 | with -- pygmy owls in Arizona; look at the  
18 | pervasive litigation that's gone around that issue  
19 | -- so many private lands and landowners have to  
20 | deal with that, in many ways they're trying to find  
21 | ways not to not have species on their property or  
22 | to cover up the existence of those species because

1 | they know that it is a disincentive. It's going to  
2 | make it very difficult to make sound land-use  
3 | decisions. It's not going to promote stewardship  
4 | that is really necessary under these circumstances.

5 |           We've seen, in terms of these  
6 | disincentives when you're dealing with the  
7 | Section 7 consultation process, it's very  
8 | interesting -- that's sort of, in many ways, the  
9 | heart and soul of the way the agencies interact  
10 | when you have the federal handle. And many times  
11 | we see in the interagency squabbles in terms of  
12 | Section 7 consultations, whether actions are  
13 | actually going to result in a take of the species.  
14 | A lot of folks want to find a federal handle  
15 | because they think that's a better way of  
16 | approaching things, through Section 7 rather than  
17 | through the habitat conservation process. So  
18 | that's a whole issue that sort of the topic of, you  
19 | might say, another discussion. It's a crazy quilt  
20 | of how you solve the consultation issues and how  
21 | you promote these kinds of incentives.

22 |           It's interesting -- you know, I heard

1 | Mike talk about the recovery of the Kemp's Ridley  
2 | turtle and how that's doing better. I don't know  
3 | whether Mike is aware of it, but a lot of that was  
4 | done through the positive work of landowners. We  
5 | represented a company in Padre Island, Texas, that  
6 | had won the right to explore for oil and gas.  
7 | There was a whole issue dealing with habitat for  
8 | the Kemp's Ridley turtle down in Padre Island,  
9 | Texas, a prime area for habitat for that endangered  
10 | species. Through a cooperative arrangement with  
11 | the Department of Interior and the Park Service, we  
12 | were able through our client to allow for  
13 | reasonable exploration and a stewardship program.  
14 | And the result of that several years ago was the  
15 | best season for Kemp's Ridley production it had in  
16 | years, and no evidence of any kind of impact from  
17 | oil and gas operations in taking these species.  
18 | Our clients went out and really worked very hard in  
19 | the stewardship, and recovering eggs, and promoting  
20 | and working with understaffed Park Service  
21 | officials in promoting recovery, in which there was  
22 | this *quid pro quo* of working out the need for oil

1 | and gas exploration, the right to do that, and the  
2 | ability to promote the recovery of that particular  
3 | species. So, indeed, these opportunities do exist.

4 |           Now commenting on where things are going  
5 | legislatively, I submit that the Pombo Bill is an  
6 | excellent start. It tackles these issues head on.  
7 | This is not an issue of sort of going things at the  
8 | edges. It's really getting to the guts of what  
9 | these problems are that I've tried to articulate  
10 | today. I think it's critical -- a critical element  
11 | is promoting cooperation with states and tribes.  
12 | Unfortunately, unlike a lot of environmental  
13 | lawyers, and I've seen this over 30 years as an  
14 | environmental attorney, the ESA does not really  
15 | promote the cooperative federalism that is at the  
16 | heart of the Clean Water Act and the Clean Air Act.  
17 | It is command-and-control. It is a federally run  
18 | program. When you deal with a lot of state  
19 | agencies, there are very well-meaning and well-  
20 | qualified biologists and state wildlife agencies, a  
21 | lot of data base, a lot of focus on biodiversity --  
22 | we have to promote those kinds of partnerships. We

1 | have to find a way to recognize that states play an  
2 | active role and they should be an interactive  
3 | partner with the federal agencies in promoting  
4 | recovery. The law hasn't worked that way. The  
5 | Pombo Bill will achieve that, if it's done the  
6 | right way.

7 |           I think the whole issue regarding  
8 | sunshine, that's another problem I see the ESA  
9 | today. Many decisions are made behind closed  
10 | doors. Representing clients, it's almost  
11 | impossible to be able to comment on a draft  
12 | biological opinion. Things are done between the  
13 | Action agency and the Fish and Wildlife Service.  
14 | The bill will allow for all public comment from all  
15 | sides, giving folks a chance to deal with those  
16 | kinds of issues. You have to deal with ESA in a  
17 | public arena. You have to get it out there. There  
18 | must be a database. You should be able to log in  
19 | to that database to find that information. That's  
20 | the only way that the Act is really going to  
21 | achieve its lofty goals. Otherwise, it's going to  
22 | be based upon suspicion, innuendo, and fear. And

1 | fear is not way to promote biodiversity and  
2 | recovery. I think the Pombo Bill will help achieve  
3 | that.

4 |           Now I want to comment here -- I know my  
5 | time is sort of running out here, and I'll be happy  
6 | to answer questions later -- on landowner  
7 | compensation issues. You know, in many ways they  
8 | reflect sort of the good and bad. I think the  
9 | fundamental idea about property owners in this  
10 | country being compensated for promoting a public  
11 | use is sound. It's absolutely essential. We have  
12 | to find a way to recognize that property rights  
13 | must be protected. Now whether the Pombo Bill  
14 | achieves it the right way is a big question, quite  
15 | frankly. I think the idea of the foregone use, the  
16 | idea of getting your determination from the  
17 | Interior, may have some problems in terms of  
18 | whether it's going to create misinformation, you  
19 | know, folks who may identify species on their  
20 | property to get highest and best use, if it's not  
21 | the right way. On the other hand, I think it does  
22 | recognize that there must be a balance between

1 | public and private uses. And the government should  
2 | pay and compensate in some way to recognize uses  
3 | that are foregone to protect species.

4 |           I might say that I think the Crapo-  
5 | Lincoln Bill has some very interesting approaches  
6 | that may turn out eventually to be the best  
7 | solution, particularly regarding tax credits and  
8 | conservation banking. How many of you are familiar  
9 | with the wetlands mitigation banking and that whole  
10 | approach? Well, conservation banking is sort of  
11 | the analogue under the ESA. What it does is create  
12 | a market for preserving and protecting habitat.  
13 | It's working in the wetlands context. You see  
14 | markets emerging in Florida, folks buying up  
15 | wetlands that are degraded or areas that are in  
16 | need of restoration. There's a whole  
17 | infrastructure that's been created over the last 10  
18 | years to promote conservation, wetlands mitigation  
19 | banking.

20 |           Why can't that be done in the ESA  
21 | context? When you're going out in parts of the  
22 | country where there are multi-species, where

1 habitat loss is a significant issue, why can't you  
2 promote and encourage folks to create habitat, and  
3 then sell credits, create that incentive, that  
4 market-based approach, to achieve the ends of the  
5 Act? Create those kinds of incentives. We can  
6 look back years in the future, hopefully, and say  
7 we did it right; we created these kinds of markets.  
8 And I think the Crapo-Lincoln Bill will help  
9 achieve that. And that's got to be tied to tax  
10 credits, you know, the idea that if you're going to  
11 go ahead and encourage conservation banking, you  
12 must give a tax break to folks that take that  
13 approach. So I find a lot of those concepts to be  
14 very interesting and may provide an avenue to try  
15 to deal with these very, very difficult issues.

16 Now, the future -- I'm going to wrap up  
17 by saying that we can take the easy path, the Band-  
18 Aid solution, one which nibbles at the edges, that  
19 deals with a couple of these policy issues and  
20 says, well, the Act is working; you know, species  
21 are not going extinct. That's sort of the argument  
22 that we've heard; you know, it's not a failure

1 | because species are not going extinct. Or we could  
2 | recognize the most important issue, and that is  
3 | when the Act was created, its conservation -- it  
4 | was getting species to a point that there were  
5 | sufficient protections there without the ESA  
6 | necessarily in place. It's bringing species to  
7 | that point of recovery. And it seems to be the  
8 | only way you do that is to take the road less  
9 | traveled and tackle these issues head-on. In my  
10 | opinion, that is the only road that will save the  
11 | Act from its own extinction.

12 |           Thank you.

13 |           DEP. SECRETARY SCARLETT: Thanks, Larry.  
14 | What I want to do is throw a couple of questions to  
15 | our panelists first, and then invite you all to  
16 | participate. What I would strive for here is a  
17 | little bit of a dialogue, rather than simply Q&A  
18 | back and forth.

19 |           As I listened to the previous four  
20 | discussants, and certainly their views reflect a  
21 | larger audience that has discussed this issue over  
22 | many years, one of the key areas of tension or

1 | disagreements among those who discuss the Act is in  
2 | this realm of incentives and the place of private  
3 | landowners with respect to species conservation and  
4 | protection. On the one hand, we have concerns that  
5 | the incentives within the Act are perhaps  
6 | inadequate. On the other hand, we have others  
7 | pointing to things like safe harbor in suggesting  
8 | that there are elements within the Act that do give  
9 | elbow room for landowners to, in essence, become  
10 | the citizen stewards that many of us aspire  
11 | towards.

12 |           So, I'd like to get a little bit more  
13 | fleshing out of the perspectives of the panelists  
14 | on whether the Act, which has a combination of, on  
15 | the one hand, regulatory provisions, and on the  
16 | other hand, also has some elbow room for what we at  
17 | Interior call cooperative conservation and  
18 | landowner incentives -- whether the Act strikes  
19 | that right balance; if not, in what ways might that  
20 | balance better be struck?

21 |           Let me turn first to one of the  
22 | individuals here, John, who was supportive of the

1 Act, fairly strongly, and who seemed to suggest  
2 that perhaps that balance is appropriately struck -  
3 - get your views, but then turn to our panelists to  
4 reflect as well.

5 John.

6 MR. KOSTYACK: Well, just to clarify, I  
7 actually think the one area where there is the  
8 greatest amount of consensus about the need to  
9 update the Act is on private landowner incentives.  
10 The reason is because the law was passed in 1973 as  
11 fundamentally regulatory law and did not have many  
12 of the carrots that most people recognize are going  
13 to be necessary to get people doing positive things  
14 on the land.

15 Virtually no one from the conservation  
16 community that I know of argues that the regulatory  
17 tools of the Act should be used to force people to  
18 improve the condition of the land for species. The  
19 regulatory provisions are essentially a safety net  
20 to help ensure that landowners don't send species  
21 to extinction. But we have a fundamental challenge  
22 of getting numbers up and getting habitats restored

1 | and managed, especially with, as I indicated  
2 | before, new challenges such as climate change and  
3 | invasive species. So, National Wildlife  
4 | Federation's fundamental position is that there is  
5 | a host of things we can do under the Farm Bill,  
6 | under the Tax Code, tweaking the candidate  
7 | conservation and HCP programs under the ESA, to get  
8 | landowners doing more positive things.

9 |           But let me make absolutely clear, the  
10 | success stories we have had in cooperative  
11 | conservation over the years, and there have been  
12 | many, have been largely due to the fact that there  
13 | is this fundamental safety net, regulatory  
14 | structure there, bringing people to the table and  
15 | getting them engaged in the conversation. If we  
16 | took away those safety net provisions, as the Pombo  
17 | Bill largely does, then the developer with the  
18 | bulldozer poised in front of pygmy owl habitat, has  
19 | absolutely no reason to approach anyone and engage  
20 | in the discussion. And so, what I'm always  
21 | interested to hear for the people who say, you  
22 | know, they want to take a Pombo approach is all

1 | these wonderful programs you agree are great, safe  
2 | harbor, candidate conservation, etc., how can they  
3 | conceivably work without maintaining the safety net  
4 | provisions of the Act, the regulatory provisions.

5 |           DEP. SECRETARY SCARLETT:   What I'd like  
6 | is some other perspectives on that.   Of course,  
7 | playing devil's advocate here, what some folks from  
8 | the alternative position might say, is that the  
9 | backdrop provisions -- that is, the safety net, as  
10 | you referred to them -- themselves perhaps stand in  
11 | the way of inspiring landowners by, in effect,  
12 | scaring them off.   So I guess I'd like some other  
13 | comments and perspectives on that.   Michael.

14 |           MR. BEAN:   Yes, actually, I think you're  
15 | right about that, Lynn.   The challenge I see is to  
16 | know where and when to use incentives, and where  
17 | and when to use regulatory means.   On the working  
18 | landscape, by which I primarily mean farms, ranches  
19 | and forest lands, I think there is enormous  
20 | potential to use incentives to induce landowners,  
21 | if you will, to go about their farming, their  
22 | ranching, their silviculture, in ways that are most

1 compatible or more compatible with conservation  
2 needs. There, it seems to me the role of the  
3 Endangered Species Act and of the Interior  
4 Department is to reduce the impediments to that  
5 sort of good stewardship by those landowners.

6 I think in the rapidly urbanizing  
7 context, whether it's southern California or  
8 anywhere else where habitat is basically facing a  
9 future of either remaining habitat or becoming  
10 concrete, it is much less clear that there's  
11 anything useful to be done through incentives.  
12 That, it seems to me, is where the regulatory  
13 emphasis has to be placed, if only because there  
14 does not appear to be a workable incentive  
15 mechanism to respond to the market pressures of  
16 development in those contexts. So, I think  
17 recognizing those two different situations,  
18 removing impediments to stewardship in the first  
19 situation and maintaining an effective regulatory  
20 program in the second, is key to making this more  
21 successful.

22 DEP. SECRETARY SCARLETT: Larry, you

1 spoke rather eloquently about concerns with respect  
2 to the disincentives. Do you want to chime in, and  
3 then we'll turn to Steve.

4 MR. LIEBESMAN: Right, I think we're  
5 dealing with a question of degree. I don't think  
6 these issues are black and white. They're not good  
7 or bad, and I think that's one of the problems in  
8 the Washington debate. It's sort of the zero-sum  
9 game; who is going to win and who's not. I think  
10 what I've observed is that the regulatory aspects  
11 of the ESA are going to be there anyway, and I  
12 don't think the Pombo Bill is going to eliminate  
13 that. You're still going to have Section 7  
14 consultation. You're still going to have action  
15 agencies. And you know, to get an Army Corps  
16 permit, you're going to have to deal in  
17 consultation with the Fish and Wildlife Service.

18 The question is can you go through the  
19 extra step. I mean, I wouldn't draw the line  
20 between Eastern and Western or urban and non-urban.  
21 I think if we draw that line and say that we can't  
22 promote, through the combination of regulatory and

1 | other non-regulatory mechanism, better stewardship  
2 | -- I think that's the real path to go. I think  
3 | that when you're looking at a lot of urbanized  
4 | areas, you find multi-species habitat areas,  
5 | whether you're in southern Florida where you have  
6 | multi-species around the Everglades or southern  
7 | California. They're rapidly urbanized, and I think  
8 | you're going to have to encourage folks to come  
9 | into the process and create these incentives. If  
10 | you're saying, well, if you're going to go through  
11 | some kind of Section 7 consultation to get an Army  
12 | Corps permit, you know, can you also couple that  
13 | with mitigation that's associated with that, where  
14 | somebody, for example, goes in and works at  
15 | mitigation measures and has incentives to go beyond  
16 | what they need to do to get a permit to create  
17 | habitat and sell credits. I mean, there are ways  
18 | to do that. I think a lot of the landowners, if  
19 | you educate them the right way, are willing to  
20 | latch onto those approaches.

21 |           Unfortunately, there's the fear right now  
22 | of -- you know, I have a species on my property and

1 | I need to get a permit, and there are not enough  
2 | ways to mesh the two together effectively. And  
3 | that's my perspective. I think the Pombo Bill goes  
4 | a long way towards trying to achieve that better  
5 | balance so that we deal with these issues in the  
6 | right way.

7 |           DEP. SECRETARY SCARLETT: And Steve, you  
8 | wanted to chime in.

9 |           MR. QUARLES: Yes, two things. First I'd  
10 | like to say that I do disagree with John that  
11 | somehow the Pombo bill has removed most of the  
12 | sticks. I would remind the audience that the most  
13 | fundamental stick, the prohibition on "take", is  
14 | unchanged. The jeopardy requirement is unchanged  
15 | for federal agency actions. Recovery planning is  
16 | actually strengthened.

17 |           Both the Pombo bill in the Miller-  
18 | Boehlert bill removed critical habitat, and there  
19 | was a general bipartisan consensus in committee  
20 | that the jeopardy standard, which is one of the  
21 | two-part standards for federal agency actions along  
22 | with adverse modification of critical habitat, had

1 | to be strengthened if you removed critical habitat.  
2 | Unfortunately, after that mark-up was over and the  
3 | reported bill contained the agreed-upon new  
4 | definition of jeopardy, the always fragile  
5 | bipartisan agreement on the new definition began to  
6 | disintegrate. The ultimate bill that went to the  
7 | House floor did not have the jeopardy definition  
8 | language in it. And the Miller-Boehlert bill did  
9 | not have that language in it; it had new, stronger  
10 | language yet that had never been discussed when the  
11 | bipartisan consensus was built before and during  
12 | the H.R. 3824 markup. But other than the critical  
13 | habitat issue, I would argue that there has been no  
14 | significant diminution in the so-called sticks.

15 |           Second, I would like to mention a couple  
16 | things about the incentives. First of all, to say  
17 | that we must realize that we're trying to establish  
18 | incentives, and Environmental Defense has been a  
19 | leader for years in seeking for greater incentives  
20 | for private land owners, at the very worst time  
21 | legislatively in an era of tight budget  
22 | constraints. There are some regulatory things we

1 | can do. You've heard many of them, like Safe  
2 | Harbor Agreements, Candidate Conservation  
3 | Agreements, etc., -- new programs that can be  
4 | squeezed within the four corners of the existing  
5 | ESA. I also believe that there are some regulatory  
6 | incentives that can be accomplished by removing  
7 | process roadblocks and costly aspects of the  
8 | process. But, I still think, ultimately, if we're  
9 | going to have major incentives, they're going to  
10 | have to be legislated.

11 |           It's interesting that Larry focused on  
12 | taxes. There's actually a very practical reason,  
13 | not only because of the budgetary problem but also  
14 | for another geopolitical reason. If you recall, I  
15 | said the most important bill before the Pombo bill  
16 | in the last decade and a half was the Kempthorne-  
17 | Chafee-Baucus-Reid bill in the Senate Environment  
18 | and Public Works Committees. Three of four of  
19 | those Senators -- Kempthorne, Baucus, and Reid --  
20 | were from states that had major ESA problems. One  
21 | of the hurdles for getting any ESA bill through the  
22 | Senate now is, if you look at the makeup of the

1 | Environment and Public Works Committee, there are  
2 | very few members on that committee that have had  
3 | any experience in their home states with an  
4 | endangered species issues. Where are the ESA -  
5 | affected and ESA knowledgeable senators? They're  
6 | in the Finance Committee. And, it's interesting  
7 | that the Crapo-Lincoln bill was written so as to be  
8 | referred to the Finance Committee. I do think that  
9 | there is a real opportunity, not only because of  
10 | budget constraints but because of the makeup in the  
11 | Senate today, to fashion some significant  
12 | incentives through tax credits or other tax  
13 | mechanisms out of the Finance Committee.

14 |           MR. KOSTYACK: Lynn, if I could just  
15 | reply to the point that --

16 |           DEP. SECRETARY SCARLETT: Sure.

17 |           MR. KOSTYACK: -- supposedly the three  
18 | safety net provisions of the Act that have not been  
19 | affected by the Pombo Bill, if I could just explain  
20 | the point that I made. First of all, just to go  
21 | back over, there are three main regulatory  
22 | protections of the Act, the take prohibition

1 | applying to both federal and non-federal, and the  
2 | general jeopardy and the critical habitat, adverse  
3 | modification language.

4 |           On take, that provision of the Act has  
5 | been rendered largely unenforceable as a result of  
6 | the compensation provision. In other words, the  
7 | wildlife agency has a gun put to its head anytime  
8 | it tries to enforce the take prohibition to come up  
9 | with millions of dollars to pay for any lost  
10 | profits. And because the agencies don't have that  
11 | money in their budgets, Section 9 then essentially  
12 | becomes unenforceable.

13 |           On the critical habitat, Steve apparently  
14 | agrees that it was essentially eliminated by the  
15 | Pombo Bill. I guess the only point of disagreement  
16 | is whether the Miller-Boehlert alternative  
17 | eliminates it. And I would argue that it does not.  
18 | It comes up with a new mechanism of protecting  
19 | recovery habitat. The Pombo Bill essentially  
20 | eliminates any protection whatsoever of that kind  
21 | of habitat. And finally on jeopardy, it doesn't  
22 | expressly delete the jeopardy protection, but by

1 | using this provision that essentially forbids a  
2 | cumulative effects analysis, it severely weakens  
3 | the jeopardy provision.

4 |           So, the fundamental safety net provisions  
5 | of the Act that have made the Act effective over  
6 | the past three decades are either eliminated or  
7 | severely weakened.

8 |           DEP. SECRETARY SCARLETT: I want to turn  
9 | to two other questions I want to lob out, and then  
10 | we'll have a little bit of time for your questions  
11 | as well. There has been a lot of discussion, and  
12 | you've alluded to this in the discussion on the  
13 | incentives/disincentives issue, but there's been a  
14 | lot of discussion about recovery and that the  
15 | official Act focused on protecting species that  
16 | were on the brink, if you will, of perishing, and  
17 | therefore the focus was on bringing them back over  
18 | that brink so that they no longer need the  
19 | immediate protections of the Act, with much less  
20 | attention on the longer-term aspirational recovery  
21 | -- do we have flourishing species out there?

22 |           I'd like your observations of whether you

1 | think the Act and/or any of the legislative  
2 | proposals out there really tackle that issue  
3 | adequately. That is, do we have adequate  
4 | mechanisms already on the recovery side and/or in  
5 | any of the legislation? And perhaps you might even  
6 | tie that back to the incentive question as well.

7 |           Michael, do want to take an initial stab  
8 | at that?

9 |           MR. BEAN: Yes. Well, the goal of the  
10 | Act, the meaning of recovery, is to get a species  
11 | in a position where it is no longer in need of the  
12 | special protection that the Endangered Species Act  
13 | provides. So I think, as a practical term, the  
14 | question that the Fish and Wildlife Service has to  
15 | ask itself and is now asking itself with respect to  
16 | the eagle, for example, is if we remove the  
17 | protection of the Endangered Species Act, is this  
18 | species likely to be able to persist on its own  
19 | with the other measures that are in place? In the  
20 | case of that species, there are other federal laws  
21 | and many state laws that protect it. That's  
22 | fundamentally all the Act has as its goal, to get a

1 species in a position where the special measures of  
2 that law are no longer necessary. It's not to turn  
3 back the clock to some pre-Columbian stage or to  
4 target any other particular point in time as the  
5 desired optimum for a species, but is instead more  
6 practically based on getting the species to the  
7 point where it's no longer at risk of extinction,  
8 if we remove these particular protections.

9           That has been a difficult goal to  
10 achieve, largely because most of the species that  
11 the Act has protected have not been protected until  
12 they were very close to that brink you described.  
13 I think, if one asks a group of scientists, what's  
14 the single greatest need for the Endangered Species  
15 Act, they will, almost to a person, tell you to  
16 start conservation attention sooner than we've been  
17 starting it, not wait until the 11th hour when  
18 species are at the brink to begin to provide  
19 conservation efforts for them.

20           DEP. SECRETARY SCARLETT: Do I have any  
21 other observations?

22           MR. LIEBESMAN: Yeah --

1           DEP. SECRETARY SCARLETT: Yes, Larry.

2           MR. LIEBESMAN: I think, quite frankly,  
3 that recovery has been a failure in the existing  
4 Act because of the way the Act has been set up. I  
5 think that because of the timetable that is built-  
6 in and the fact that while recovery plans are out  
7 there, many times they're not given the kind of  
8 effect that they should. They haven't brought  
9 together the consensus of the stakeholders. And a  
10 lot of these recovery plans, I understand, are very  
11 much out of date. You know, you've got a lot of  
12 information that has accumulated over the years  
13 that has not been updated. I was thinking of the  
14 Delmarva Fox (inaudible) which is a case we're  
15 involved in which the recovery plan is at least 10  
16 or 11 years out of date. But there aren't the  
17 incentives to basically bring on stakeholders to  
18 the table to make recovery plans sort of the  
19 paradigm of where you want to go.

20           Now what I think the Pombo Bill does, to  
21 its credit, is to make recovery and developing  
22 these recovery teams the central focus. That's the

1 | vehicle by which you're going to achieve that. And  
2 | while we see criticism of that -- well, it's going  
3 | to eliminate critical habitat -- if the idea of  
4 | critical habitat is to be one of the key vehicles  
5 | to achieve recovery, then elimination of it  
6 | shouldn't bother people if the recovery program is  
7 | done the right way.

8 |           I think the Pombo Bill, with the idea of  
9 | creating stakeholders and doing it in the public  
10 | sunshine and creating these kinds of time periods  
11 | to develop these recovery plans and making it the  
12 | paradigm of the Act, is going to achieve that. It  
13 | still has these special areas which I guess are  
14 | equivalent to critical habitat, but they will still  
15 | be there, and yet it will be meshed to the larger  
16 | question of how you get species off the list.  
17 | That's really essential, and that has got to be  
18 | tied with the kind of incentives that I think are  
19 | built in to bring stakeholders to the table, so  
20 | that everybody that has an interest can sit around  
21 | the table, get best science there, figure out  
22 | whether they've got a plan that's 10 years out of

1 | date. What do we know more about the species now?  
2 | What do we know more about the loss of habitat in  
3 | the last 10 or 15 years? How can we achieve the  
4 | end of getting that species off the list? So, I  
5 | quite frankly think that that has got to be the  
6 | central goal and, you know, we should stand behind  
7 | that. And that's a major benefit of the Pombo  
8 | Bill.

9 |           DEP. SECRETARY SCARLETT: Let me turn to  
10 | one more question that I'd like to lob --

11 |           MR. QUARLES: Could I have just one  
12 | second?

13 |           DEP. SECRETARY SCARLETT: Yes.

14 |           MR. QUARLES: I'd also like to speak to  
15 | the recovery matter just for a second, which is to  
16 | say that I do agree that we ought to address  
17 | species at risk earlier. For all of us up here,  
18 | there is a major issue, which is, as many of you  
19 | know, that the states assert basic authority over  
20 | wildlife within their jurisdictions. Now, the  
21 | Supreme Court has eroded that State authority to a  
22 | major extent, but there will always be political

1 | conflict if we try to move up the survival chain,  
2 | if you will, and try to address species earlier,  
3 | unless we engage the states. One of the really  
4 | underutilized portions of the ESA that, to the  
5 | credit of this Administration, they're looking very  
6 | hard at, is the Section 6 federal-state cooperative  
7 | agreement provisions. These provisions could allow  
8 | the states to take a lead role in trying to protect  
9 | species that are at risk but not yet at the  
10 | threatened or endangered stage.

11 |           The only other thing I would say is that  
12 | recovery plans are not just out of date, they are  
13 | woefully, even ludicrously, inadequate. I'm  
14 | dealing with several where the scientists put  
15 | together a self-serving wish list of research for  
16 | which they expected to receive funding and never  
17 | included anything having to do with goals for  
18 | conservation or recovery. And, if there's one  
19 | thing that every single bill -- the Kempthorne  
20 | bill, the Miller-Boehlert substitute, and the Pombo  
21 | bill - has in common -- it is that they're all in  
22 | fundamental agreement, almost to the letter, on how

1 | to improve recovery planning so that we at least  
2 | know when a species is at the point that it no  
3 | longer needs the protections of the ESA.

4 |           DEP. SECRETARY SCARLETT:     Steve, that  
5 | response is a perfect segue to the third issue I  
6 | want to raise. All of you in one way or another  
7 | have alluded to the relationship of states to  
8 | species protection. I'd like all of you to discuss  
9 | that issue, whether the current Act, again,  
10 | adequately engages the states and whether any of  
11 | the legislative proposals move in a direction that  
12 | might be preferable.

13 |           Let me turn to John first, and then we'll  
14 | see what other people have to say.

15 |           MR. KOSTYACK:     I think the Act could  
16 | certainly be updated to reflect a larger state  
17 | role. In my conversation with many state agency  
18 | folks, as well as with the folks here in town  
19 | representing the states, there isn't a strong  
20 | desire to take over the permitting programs. You  
21 | guys get stuck with it, and you're not going to be  
22 | able to hand it off that easily.

1           It seems to me the fundamental question  
2 is can we get the states more involved in species  
3 recovery. I would agree with all the comments of  
4 the previous panelists; there's a lot more we could  
5 do on recovery. You know, the Fish and Wildlife  
6 Service is not going to have its budget expanded to  
7 any significant extent, as far as I can predict, in  
8 the next few years. The real question is who are  
9 going to be the leaders on all these species  
10 recovery projects. Well, one of the great  
11 possibilities is the state wildlife agencies.  
12 Particularly as the state wildlife action plans are  
13 now in effect, these agencies potentially have new  
14 funding sources and new momentum to actually begin  
15 staffing up on the non-game program. Historically,  
16 most of the state wildlife agencies have been  
17 largely funded by fishing and hunting license fees,  
18 and as a result their staff is oriented toward  
19 those programs. There is a strong desire among all  
20 those agencies to diversify.

21           And so, we're at this historic  
22 opportunity right now where, if everyone can rally

1 | around and get some funding into the hands of these  
2 | agencies, I think it's almost sort of a test phase.  
3 | Get some funding, see what the states can do, and  
4 | you know, create some sort of pilots and some  
5 | models out there. And then maybe Congress can get  
6 | a better idea on exactly how to legislate the  
7 | updated Section 6.

8 |           DEP. SECRETARY SCARLETT: Michael, do you  
9 | have a thought that?

10 |           MR. BEAN: Yes. I do think the states  
11 | could play a more significant role and they do need  
12 | to be brought in as partners. I would note that  
13 | when the Act was passed, Congress intended and  
14 | provided the states would receive federal financial  
15 | assistance for developing parallel programs. By  
16 | and large from the very beginning, that money was  
17 | not forthcoming so those programs never got  
18 | established to the degree that they should have.  
19 | But I think that's a possible thing to do.

20 |           I would make one further point, and here  
21 | I would want to refer to the yardstick that Mr.  
22 | Pombo has used to measure the effectiveness of the

1 | Endangered Species Act. Most states have state  
2 | endangered species laws. Most of the state  
3 | programs protect not only the species that the  
4 | federal law protects but also other species that  
5 | are only protected by the state law. By Mr.  
6 | Pombo's measure, how many species have recovered,  
7 | you would have to find that most of the states have  
8 | been failures, more so than the federal law,  
9 | because in most states not a single species that is  
10 | not federally protected has been recovered. I  
11 | think that's an inappropriate yardstick, but I  
12 | think it's important to point it out since Mr.  
13 | Pombo repeatedly uses that as a measure of the  
14 | federal law.

15 |           DEP. SECRETARY SCARLETT: We have very  
16 | little time, so let me invite all of you -- any  
17 | questions here? Yes.

18 |           AUDIENCE PARTICIPANT: Yes, two brief  
19 | questions. The first is, I wonder in terms of  
20 | worrying about global warming, whether the last Ice  
21 | Age caused plants and animals to adapt and change  
22 | their range rather rapidly. For example, those so-

1 | called ancient forests couldn't possibly have been  
2 | in Oregon and Washington 13,000 or 14,000 years  
3 | ago. In fact, I don't think they were there 5,000  
4 | or 6,000 years ago.

5 |           The second is to Lynn Scarlett. I'm very  
6 | disappointed that President Bush, who ran on  
7 | supporting property rights, and Secretary Norton,  
8 | who at one time was a property rights advocate,  
9 | have only supported the passage of the Pombo Bill  
10 | for those elements that improve the bureaucratic  
11 | process and make life easier for the Department of  
12 | the Interior, and have said nothing about what  
13 | seems to me to be the thing in the Bill that will  
14 | do the most to improve the protection of endangered  
15 | wildlife, namely protecting the rights of American  
16 | citizens.

17 |           DEP. SECRETARY SCARLETT: Let me turn to  
18 | the panelists first on the climate change  
19 | observation, which seemed like an observation  
20 | rather than a question. But, nonetheless, is there  
21 | any reflection? And then, I will respond to the  
22 | question about the Administration position. Are

1 | there any reflections on the comments about climate  
2 | change? I guess your point is that nature is  
3 | dynamic.

4 |           MR. KOSTYACK: Yeah, certainly we had  
5 | mass extinctions in the past when there were major  
6 | climatic shifts. The real question is whether the  
7 | current mass extinction is natural phenomenon. And  
8 | I think the vast, vast majority of climate  
9 | scientists say this major climate shift is not  
10 | natural; that it's human-caused. And the other  
11 | fundamental thing that distinguishes this era from  
12 | the previous ones is that we have fragmented the  
13 | landscape already with human development. And  
14 | therefore, its resilience to change has actually  
15 | already been greatly reduced. And so, in devising  
16 | the updated Endangered Species Act, we're going to  
17 | have to address those kinds of issues about how to  
18 | address habitat fragmentation.

19 |           DEP. SECRETARY SCARLETT: Larry.

20 |           MR. LIEBESMAN: Yes, well I guess,  
21 | briefly. When you're dealing with the whole issue  
22 | of climate change, it's so incredibly complex and

1 | it's so difficult to get a handle on what's the  
2 | baseline? I mean, look to what degree is a  
3 | particular species status been affected by climate  
4 | change and natural evolution versus man-induced  
5 | activities? That sort of creates a conundrum,  
6 | which I'm not sure you're ever going to be able to  
7 | respond or answer effectively. I mean, I think  
8 | we've got to continue the research on climate  
9 | change, but we've sort of got to look, if we're  
10 | going to assess a species status, is what are the  
11 | conditions right now, and what were the conditions  
12 | when it went on the list. And that's sort of like  
13 | your baseline. And then you go from there and you  
14 | look at, you know, whether the habitat has been so  
15 | destroyed that it's likely to lead to the  
16 | extinction of that species once you take action.  
17 | But I think to use climate change as the paradigm  
18 | for this issue, I think is going to be difficult.

19 |           DEP. SECRETARY SCARLETT: And now I'll  
20 | give my brief response. I was hoping as moderator,  
21 | I wouldn't have to give my views at all and avoid  
22 | that. But Secretary Norton remains a strong

1 supporter of property rights, indeed, she views  
2 property rights as one of the central tenets of a  
3 society that is able to prosper and enable people  
4 to pursue their dreams and, in fact, has raised  
5 over the years concerns about some of the  
6 disincentive elements in the Endangered Species Act  
7 as it relates to property owners and implications  
8 that some of the regulatory provisions have on  
9 their ability to utilize their property.

10           We've done many, many things short of  
11 legislation, because, of course, we are not in  
12 control of legislation, to try to strengthen what  
13 we call cooperative conservation, that is  
14 partnerships, voluntary partnerships, with  
15 landowners, in order to achieve conservation goals,  
16 be they species protection or otherwise. And that,  
17 in fact, is why you're seeing -- because one tool  
18 we have for that is budget -- that is why you've  
19 seen our cooperative conservation grants go up 53  
20 percent since 2001.

21           On the other hand, we have not focused on  
22 land acquisition. In 1999, the land acquisition

1 | budget of Department of the Interior was about \$1  
2 | billion. This year, I believe for 2007, the  
3 | proposal is about \$66 million, and that includes  
4 | things like Flight 93 Memorial. So, clearly, I  
5 | think, that expresses that we want to work in  
6 | partnership with landowners. We have worked very  
7 | well and closely with Congressman Pombo. We  
8 | applaud his efforts on the Endangered Species Act,  
9 | strongly applaud them, and we are in constant  
10 | dialog with him.

11 |           The respect for property rights and their  
12 | importance, though, nonetheless begs the question  
13 | of whether we have the details, as we have had  
14 | alluded here, perfectly right in that particular  
15 | instance. And so, in the Administration's  
16 | testimony on the Bill we did indicate a strong  
17 | desire to work with the congressman going forward  
18 | in the future and look at whether those provisions  
19 | have it exactly right. We are concerned from a  
20 | budgetary standpoint as to whether the Bill has it  
21 | just right or whether it would have significant  
22 | financial consequences for the taxpayer that need

1 | to be looked at further.

2 |           So, we very much applaud Congressman  
3 | Pombo's efforts. We are in lockstep with him on  
4 | the importance of property rights. And the  
5 | question is, as the congressional debate and  
6 | discussion over the Endangered Species Act  
7 | proceeds, how do we strike the right chord as it  
8 | relates to those incentives and property rights  
9 | protections?

10 |           But please, direct your comments and  
11 | questions to others because I am intended to be the  
12 | moderator here.

13 |           AUDIENCE PARTICIPANT: I just wanted to  
14 | reflect in my question that it seems a little bit  
15 | disingenuous to look at this law as an enormous  
16 | national commitment in light of the fact that the  
17 | economic effects on private landowners have been so  
18 | geographically and demographically disparate, that  
19 | it's all fine and good to speak of budget  
20 | constraints or of the implicit idea, as John did,  
21 | that a compensation provision would gut the take  
22 | provision because, God forbid, we'd actually have

1 | to pay for it. But I don't think that -- you know,  
2 | that's kind of a process or budgetary argument.  
3 | It's not a principled argument about whether or not  
4 | this is a national commitment we're willing to pay  
5 | for, or somehow we wish to squeeze this under the  
6 | rubric of health and safety regulations.

7 |           When you talk about paying people to obey  
8 | the law, I think that's the most disingenuous thing  
9 | I've ever heard. I think you guys need to get off  
10 | of that rhetoric, or perhaps you have a better  
11 | articulation of it. And that's really my question.

12 |           DEP.       SECRETARY       SCARLETT:       Any  
13 | observations on that remark?

14 |           Steve, I'm going to call on you.

15 |           MR. QUARLES:   No, I have none. I take  
16 | the Fifth.

17 |           DEP.       SECRETARY       SCARLETT:       Any other  
18 | thoughts? Larry.

19 |           MR. LIEBESMAN:   Well, you know, I think  
20 | the fundamental basis of our Constitution is our  
21 | property rights, and I think that's got to be a big  
22 | consideration. I think this is a difficult issue

1 | because I hear what you're saying regarding the  
2 | public fisc and the budget issues. And you know, I  
3 | think one of the things that's got to be looked at  
4 | very closely in this Bill is what the impact is  
5 | going to be. On the other hand, if you brush  
6 | property rights aside and say we're not going to  
7 | think of some kind of financial incentive, some  
8 | kind of mechanism, then we're going against one of  
9 | the fundamental precepts of our constitutional  
10 | system. That's really my last word.

11 |           MR. QUARLES:       Actually, I will say  
12 | something, if I could, which does not go to whether  
13 | Chairman Pombo got it right, whether the  
14 | Administration is getting it right, or anything  
15 | similar. Rather, I think that there is a very  
16 | interesting point here about the disparities in  
17 | geography as to the effect of the Endangered  
18 | Species Act.

19 |           I think you saw this phenomenon on the  
20 | House floor in the tremendous frustration among  
21 | representations of rural communities in witnessing  
22 | how outraged so many of the urban community

1 | representatives were over the Supreme Court *Kelo*  
2 | decision, even though it provided complete  
3 | compensation for the taking of the property. Yet,  
4 | when farmers and woodlot owners and others feel as  
5 | though their ability to use their land has been  
6 | terribly compromised by the ESA (I leave it to the  
7 | courts to decide whether it's a regulatory program  
8 | or regulatory taking), I think you see that extreme  
9 | frustration. It is an issue that we need to  
10 | address. And, to its credit, Environmental  
11 | Defense, in its landowner incentive program, is  
12 | attempting to address it. But it's something we  
13 | need to address more broadly whether or not we end  
14 | up with a compensation package specifically  
15 | attached legislatively to the ESA.

16 |           DEP. SECRETARY SCARLETT: Michael.

17 |           MR. BEAN: I would just say that we've  
18 | been quite careful I think, sensitive to the need  
19 | to work with landowners and help landowners  
20 | overcome regulatory barriers and overcome financial  
21 | obstacles to being good stewards on their land.  
22 | We've worked, for example, with landowners in the

1 East and West. We've worked in New York, North  
2 Carolina, South Carolina, Texas, Utah, California  
3 and elsewhere putting together safe harbor  
4 agreements, putting together conservation banks for  
5 endangered species, which Larry talked about  
6 earlier, with the goal of making endangered species  
7 an asset, rather than a liability for landowners,  
8 or at least removing endangered species as a  
9 liability. I think there's a great deal of room  
10 for further development in that direction.

11 I would not go so far as to say that we  
12 should abandon regulatory controls altogether. I  
13 think there is a need for a base of regulatory  
14 controls, for some of the reasons I described. But  
15 in particular for the working landscape landowners  
16 where the fears Steve described are commonplace,  
17 and also commonly exaggerated in my view,  
18 nevertheless we have to deal with those fears, and  
19 one way to do that is with the sort of assistance  
20 that we're trying to provide to landowners, both  
21 financially and technically in overcoming some of  
22 the regulatory barriers that lead to good

1 | stewardship.

2 |           DEP. SECRETARY SCARLETT: I might just  
3 | conclude on that point by saying, of course, I  
4 | think many of you are familiar with the two  
5 | programs we did create, a landowner incentive  
6 | program and a private stewardship grant program.  
7 | Those really deal with, however, the aspirational  
8 | rather than the regulatory. But on the regulatory  
9 | front, a strong motivation behind our looking at  
10 | the ability to work with states, for example, on  
11 | cooperative agreements and candidate cooperation  
12 | agreements, is precisely because our ability to do  
13 | so can enable us to move forward without having to  
14 | then list a species, which in turn then triggers  
15 | the regulatory provisions that you are describing  
16 | and are concerned about. And so, to the degree  
17 | that we have been successful, for example, in the  
18 | state of Idaho with slick spot peppergrass, as one  
19 | example, in getting some partnership to  
20 | conservation agreements put forward, that enabled  
21 | us to not have to list that species, and therefore  
22 | avoid the whole circumstance that you described in

1 | the first place. So we're looking creatively at  
2 | the suite of things that we can do to better  
3 | utilize partnerships, voluntary action, and the  
4 | momentum that landowners have, in fact, on their  
5 | own to work with us.

6 |           And then, we'll have to wrap up with  
7 | John's comment because I think time is up.

8 |           MR. KOSTYACK: Well, I don't think I  
9 | would have time to respond all the points this  
10 | gentleman made, but I do think that there's a myth  
11 | out there that I would like to respond to, which is  
12 | that the Endangered Species Act is being imposed  
13 | upon this narrow subset of people by this sort of  
14 | urban class that doesn't have to address any of the  
15 | costs of implementing the Act. And that's not been  
16 | my experience.

17 |           In fact, large a percentage of the work  
18 | that I've done on endangered species conservation  
19 | is in urbanized areas. Up and down the West Coast,  
20 | from Seattle to Portland, San Francisco Bay area  
21 | through a whole area of southern California, Las  
22 | Vegas, Austin, the list goes on, and it's in

1 | eastern cities as well, many southern Florida  
2 | cities, and all across the United States we have  
3 | urbanized areas where people have basically rolled  
4 | up their sleeves and found out a way to make the  
5 | Endangered Species Act work. And it does require  
6 | some give-and-take. Nobody can have everything  
7 | they want. So the real question is whether we want  
8 | to continue that give and take approach, where  
9 | there are a lot of reasonable people sitting to the  
10 | table coming up with solutions, or we have sort of  
11 | winner-takes-all approach that I think the Pombo  
12 | Bill represents.

13 |           DEP. SECRETARY SCARLETT: Thank you all.  
14 | I'm sorry, that we're over time. Well, do all of  
15 | you want to take one more question? RJ.

16 |           AUDIENCE PARTICIPANT: Yes, I just have  
17 | a comment for John and Mike. John asks how can we  
18 | (inaudible) the ESA conservation programs  
19 | (inaudible) without the big regulatory stick. And  
20 | I think the answer to that is (inaudible) we follow  
21 | the precepts of probably the most successful  
22 | habitat conservation plan in the country, which is



1 | thought it was a very clever analogy when you talk  
2 | about the ESA being a success story because the  
3 | bald eagle populations have gone from 6,000 and  
4 | 9,000 in the last seven years, while the Dow Jones  
5 | has stayed at 11, 000, and hasn't moved. And yet,  
6 | as I'm sure you know, the Endangered Species Act  
7 | essentially had nothing to do whatsoever with  
8 | recovery of bald eagles. That was solely the  
9 | responsibility of Ruckelshaus and the EPA banning  
10 | DDT before the ESA was passed, and it stopped the  
11 | eggshell thinning syndrome and that was driving  
12 | those for the birds to extinction. So that had  
13 | nothing to do with the essay.

14 |           And then secondly, the recovery in  
15 | various states, where the states' departments of  
16 | fish and game went out and got DDT-free eggs and  
17 | young birds and transferred from other parts of the  
18 | country into states like New York State. Almost  
19 | all of those officials will say that the major  
20 | problem they have is the ESA, and they accomplished  
21 | that in spite of the ESA, not because of the ESA,  
22 | because the feds wouldn't let them move these birds

1 | around in order to recover species.

2 |           DEP. SECRETARY SCARLETT: Thank you, RJ.

3 | Let us conclude. We've gone a little bit over

4 | time. Thank you very much for your attention.

5 | Let's give a hand to our four panelists, who really

6 | did a great job.

7 |           (Panel concluded.)