P.O. Box 216 Klamath Falls, Oregon 97601

Protecting Water for Western Irrigated Agriculture

September 24, 2018

Mr. Craig Aubrey
U.S. Fish and Wildlife Service
Division of Environmental Review
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Public Comments Processing - FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007, FWS-HQ-ES-2018-0009.

Dear Mr. Aubrey:

On behalf of the Family Farm Alliance (Alliance), thank you for this opportunity to comment on revisions to regulations that implement portions of the Endangered Species Act (ESA), proposed jointly by the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS). Specifically, this letter has been prepared to respond to USFWS's and NMFS's (together, the "Services") proposed revisions to regulations that 1) implement section 7 of the Endangered Species Act of 1973; 2) extend most of the prohibitions for activities involving endangered species to threatened species; and 3) implement section 4 of the ESA.

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. The Alliance is focused on one mission: to ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. We are also committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental, and national security reasons – many of which are often overlooked in the context of other national policy decisions. This letter was developed by a team of resources, law, and policy experts familiar with Western water resource management and how this important function is impacted by implementation of federal laws and regulations.

The federal government's significant presence in the West presents unique challenges for Alliance members. This is particularly true with respect to the reach of the ESA. Implementation of the ESA impacts the management of land and water throughout the West. For example, federal water supplies that were originally developed by the Bureau of Reclamation (Reclamation) primarily to support new irrigation projects have, in recent years, been targeted and redirected to other uses. The result is that

these once-certain water supplies – one of the few certainties in Western irrigated agriculture – have now been added to the long list of existing "uncertainties."

Given the nature of water storage and delivery, Alliance members are often directly impacted by the implementation of the ESA and other federal laws. A constant frustration our members experience is the lack of accountability for success or failure for the implementation of these federal laws. There is no empirical measure of the success or failure of mitigation measures (including reasonable and prudent alternatives) or the adjustment of those measures as a result. The ESA has at times been interpreted to empower federal agencies to take action intended to protect listed species without consideration of the societal costs of such action, even when it is not clear that the action taken will actually yield conservation benefits for the particular species. Thus, the Alliance strongly supports efforts to reform the ESA and its implementing regulations to provide clearer direction to the agencies in applying and enforcing the law. Some members of the Alliance will also be providing comments individually, including on issues covered here, and we support your full consideration of those comments, as well.

We have combined our responses to the three dockets into this one document, which will be submitted to each of the three dockets.

Revision of Regulations for Prohibitions to Threatened Wildlife and Plants [**Docket No. FWS-HQ-ES-2018-0007; 4500030113**]

The USFWS proposes to revise the regulations that extend most of the prohibitions for activities involving endangered species to threatened species.[1] The proposed regulations would require the USFWS, pursuant to section 4(d) of the ESA, to determine whether protective regulations are appropriate for species that the USFWS determines to be threatened.

Take Prohibition for Threatened Species.

The Alliance supports this proposal for several reasons. First, the plain language of the Act provides that section 9 take prohibitions only apply to threatened species if determined appropriate, based on a case-by-case review. In particular, Section 4(d) provides that "[w]henever any species is listed as a threatened species" the Secretary of the Interior (Secretary) may adopt protective regulations to prohibit take of the threatened species. The USFWS's current "blanket" rule – applying take prohibitions to all threatened species unless decided otherwise – is the inverse of the structure or logic of the ESA itself. The defect would be cured by this amendment.

The Act contemplates differentiation between endangered and threatened species due to the immediacy of the threat of extinction to these species. The flexibility built into the Act with respect to threatened species has the potential to yield net conservation benefits for such species, as

[1] For species already listed as a threatened species, the proposed regulations would not alter the applicable prohibitions.

practitioners have recognized.[2] While a command-and-control regulatory approach may be necessary for species on the brink of extinction, such an approach should be employed sparingly, consistent with congressional intent and sound public policy.

The proposed rule would also eliminate an inconsistency between the regulations of USFWS and NMFS. Currently, NMFS's approach affords more flexibility – for species, agencies, and the regulated community – by allowing a case-by-case determination. There is only one ESA, and there is no reason that it should apply differently to one species as compared to another based merely on the agency with jurisdiction.

Finally, the proposed rule would help avoid unnecessarily harsh consequences and exposure to liability for the regulated community. Under the current rule, the listing of a species as threatened results in situations where producers and water users who have done nothing wrong can become subject to liability overnight (literally). Although USFWS does currently retain the ability to adopt case-specific rules that afford conditional liability protection, it is often impossible to do so in the time frame required for making a listing decision. Also, to the extent the USFWS determines that the take prohibition should apply to a threatened species, a well-designed, case-specific 4(d) rule providing conditional take protection will be a more efficient use of agency resources.

Overall, these proposed amendments will provide much needed clarifications, a more scientifically based determination, and a policy consistent with the ESA.

Interagency Cooperation [**Docket No. FWS-HQ-ES-2018-0009; FXES11140900000-189-FF09E300000; Docket No. 180207140-8140-01; 4500090023**]

The Services propose to amend portions of regulations that implement section 7 of the ESA. The agencies propose these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent.

<u>Definition of Destruction or Adverse Modification</u>.

The Services propose adding the phrase "as a whole" to the definition and removing unnecessary and confusing language. We support this proposal.

As the Services explain, it is improper to assert that a species may already be "in a status of being 'in jeopardy,' 'in peril,' or 'jeopardized' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for 'jeopardize the continued existence of' or 'destruction or adverse modification.'"[3] Such a position is inconsistent with the plain language of the ESA, which requires a federal agency to insure that "any ***action*** authorized, funded, or carried out by

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[2] P. Henson, R. White, and S.P. Thompson. 2018. *Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense*, BioScience (available at https://doi.org/10.1093/biosci/biy093).
[3] 83 Fed. Reg. at 35,182.

such agency … is not likely to ***jeopardize*** the continued existence of" a listed species (emphasis added).[4]

Congress knew full well that consultation would only occur with respect to species already listed as threatened or endangered and, therefore, already at some risk vis-à-vis their historical status. The notion that any incremental harm to such species attributable to a proposed federal action would jeopardize the species is anathema to the language and structure of the Act. Congress was clear that only a proposed action likely to jeopardize the continued existence of a species (i.e. that will lead to its extinction) should result in a jeopardy determination. In the same vein, an adverse modification determination should be reserved for those rare circumstances where harm to critical habitat is so extensive that it is likely to lead to the species' extinction.

Application of Revised Definition to Designation of Unoccupied Areas.

The Services propose applying "as a whole" in determining whether unoccupied habitat is "essential to the conservation of the species." This evaluation must be based on the totality of the circumstances. We support this proposal.

Definition of Effects of the Action.

The Services propose requiring that an effect be both "but for" and "reasonably certain to occur." We support this proposal while suggesting two modest changes described below. The Services also propose to consolidate the concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into the new definition of "effects of the action." We support this approach, and agree that the proposed amendments will help federal agencies focus on assessing the effects of a proposed action, rather than spending time categorizing the effects of a proposed action.

We believe that this definition would be further improved by making two modest changes. First, we submit that the Services should clarify that to qualify as an effect of the action, the effect must be reasonably foreseeable. Effects that are not reasonably certain to occur and reasonably foreseeable should not be encompassed in the effects analysis. Second, we believe it is critical to clarify that consultation is focused on the actual effects of the agency action on listed species and designated critical habitat, and that those effects are to be differentiated from the environmental baseline. Thus, we propose the following revision:

> *Effects of the action* are all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action. An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is **both** reasonably certain to occur **and reasonably foreseeable**. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action. **Effects of the action shall be clearly differentiated from the environmental baseline.**

[4] 16 U.S.C. § 1536(a)(2).

This adjustment to the definition is particularly important where either Service makes a jeopardy (or adverse modification) determination. This is so because in such circumstances, the Service is obliged to propose a reasonable and prudent alternative to the proposed action that it believes is not likely to jeopardize the species (or result in adverse modification). Absent clear differentiation between the effects of the action and the baseline, the Service cannot fulfill its obligation to propose a reasonable and prudent alternative action that is not likely to jeopardize the species.

Definition of Environmental Baseline.

The Services have identified a potential stand-alone definition of "environmental baseline." The notice goes further, however, and discusses the issue of ongoing agency activities. The notice invites comment as to whether an alternative amendment of the definition is appropriate. The Alliance agrees that further amendment is necessary. The ESA is a prospective limitation on discretionary federal agency actions. It does not, and as a matter of implementation policy should not, punish the federal agency or applicants (or others reliant on the federal agency action) for the mere existence of infrastructure or prior activities. Nor should it require remediation of past impacts or change from already-occurring activities that are not the subject of the consultation.

With that context, the Alliance recommends a definition of "environmental baseline" as follows:

> *Environmental baseline* means the physical, chemical, and biological conditions that will exist in the action area in the absence of the proposed action and includes the past, present, and ongoing impacts in the action area of all past and ongoing Federal and non-Federal activities, the anticipated impacts in the action area of all proposed Federal projects that have already undergone formal or early section 7 consultation, and the impacts in the action area of non-Federal activities that are contemporaneous with the consultation in process or reasonably certain to occur. An activity that is ongoing is one that is already in existence, implementation, or operation, the effects of which already are reflected in the conditions within the action area that will exist in the absence of the proposed action.

This adjustment to the definition is particularly important in circumstances where either Service makes a jeopardy (or adverse modification) determination. In such circumstances, the Service is then obliged to propose a reasonable and prudent alternative to the proposed action that it believes is not likely to jeopardize the species (or result in adverse modification). Absent clear differentiation between the effects of the action and the baseline, the Services cannot fulfill their obligation.

Pre-existing infrastructure (including the then-present operation of that infrastructure) should be part of the environmental baseline. This includes the continuing operation of Reclamation water projects, administration of the National Flood Insurance Program, and implementation of resource management plans by the Forest Service, among other activities.

Definition of Programmatic Consultation.

The proposed definition includes: (1) Programmatic consultations that address multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas ("batched" consultations); and (2) Programmatic consultations that address a proposed program, plan, policy, or regulation providing a framework for future actions (e.g., land management plans). We support this proposal.

Clarifying When Consultation Is Not Required.

The Services inquire as to whether the scope of consultation should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency. The Alliance would agree that such a limitation is appropriate.

In addition, the Alliance requests clarification that consultation is not required for issuance of incidental take permits (ITP) under section 10(a). As you know, section 10(a)(1)(B) requires that an applicant for an incidental take permit submit a conservation plan (aka HCP) that specifies the effects of incidental take from an otherwise-lawful activity and identifies measures to minimize and mitigate the effects of incidental take. Section 10(a)(2) provides:

> (B) **If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that**— (i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and he has received such other assurances as he may require that the plan will be implemented, **the Secretary shall issue the permit**.

Under the Services' current practices, no Section 10 permits are issued without Section 7 consultation. This intra-Service consultation evaluates whether the federal action of issuing a permit would result in a violation of the relevant Service's substantive obligations under Section 7(a)(2). This process is almost universally seen to be redundant "make-work." The Section 10 permit issuance criteria above already provide demanding requirements and protection for the species, and the criterion that the incidental taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild" is equivalent to a determination that the action will not cause jeopardy.[5]

Besides the practical reasons that consultation is unnecessary, it is also not legally required. Under Section 10(a)(2)(B), the Secretary "shall" issue a permit if the specified criteria are met. This means

[5] This terminology is identical to the definition of "jeopardy" in 40 CFR section 402.02.

that the permit is not a discretionary action. Although some of the criteria require the exercise of judgment, such judgment is not sufficient to require consultation.[6]

Additionally, the Services should state that the National Environmental Policy Act (NEPA) does not apply to a section 10(a)(2)(B) permitting decision, for the same legal reason: permit issuance is not discretionary if the permitting criteria are met. In *Pacific Legal Foundation v. Andrus*,[7] the appellate court ruled that the preparation of an Environmental Impact Statement (EIS) under NEPA for the listing of a species under the ESA was a "waste of time" if the Secretary of Interior has no authority to consider the environmental impact of the listing decision *and* the ultimate action was in furtherance of NEPA's environmental protection goals.[8] The action mandated by section 10(a)(2) – ITP issuance upon completion of a Habitat Conservation Plan – is not discretionary; analysis under NEPA would not change that, and the Services would not be able to consider environmental effects or some other angle on the effects to the listed species. The section 10 permit furthers the environmental protection goals of NEPA by authorizing and requiring that the effects of take be minimized and mitigated to the maximum extent practicable.

Consider the challenges facing United Water Conservation District (United), situated in central Ventura County (California), and encompassing the fertile Santa Clara River Valley and Oxnard Coastal Plain. This area receives from 12 to 20 inches of rainfall each year. Year-round agriculture flourishes in the mild, Mediterranean-type climate. United serves as the conservator of groundwater resources for the 214,000-acre district, including supplies that are utilized by the cities of Oxnard, Port Hueneme, Ventura, Santa Paula, and Fillmore, as well as several mutual water districts and numerous farms and individual pumpers. United conserves runoff from all major tributaries of the Santa Clara River within the district, including Piru, Hopper, Sespe, and Santa Paula Creeks by diverting water at its Freeman Diversion for groundwater recharge in high-rate percolation basins. It also provides surface water for agricultural irrigation in areas with especially difficult groundwater challenges. Otherwise, much of this water would simply flow to the sea. In fact, United's diversion and groundwater recharge activities are critical to combatting seawater intrusion into freshwater groundwater aquifers relied upon for highly productive agriculture and municipalities alike. The operation does not have a federal nexus.

United is pursuing a section 10 permit to authorize incidental take of southern California steelhead associated with ongoing operations. As part of this process, United is required to:

- Prepare a habitat conservation plan (cost to date is roughly $7 million for planning, excluding all costs that will be required for implementation when permits are issued, which are estimated as approximately $30 million);*

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[6] *See National Association*, under *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (An agency is exempt from Section 7(a)(2)'s no-jeopardy duty if the "agency is *required* by statute to undertake [an action] once certain specified triggering events" occur.).
[7] 657 F.2d 829 (6th Cir. 1981).
[8] *Id.* at 836.

- Participate in a public review process and NOAA Fisheries evaluation of whether section 10 ITP permitting criteria are met;
- Undertake section 7 consultation;
- Conduct California Environmental Quality Act review of the environmental effects of the HCP;* and
- Develop NEPA review (Environmental Impact Statement) of the environmental effects of issuance of ITP.*

Asterisks (*) reflect activities where United is obliged to hire consulting firms; agencies have required that three separate sets of consultants be hired for the individual tasks. Thus, beyond its own staff time, United is required to pay three different sets of consultants to evaluate steelhead-related issues. Furthermore, NOAA Fisheries will provide its own review and has also indicated that the NEPA process will require about three years. Much of this work is redundant and overlapping, and it can be streamlined if unnecessary federal processes are removed.

In summary, with common-sense clarifications and amendments of regulations and policy, the Services could eliminate redundancy, costs, and delay of regulatory processes, with no adverse consequence to species protection. We encourage the Service to implement these practical improvements, through this rulemaking effort, or via follow-up rulemaking or guidance.

<u>Deadline for Informal Consultation</u>.

The Services are seeking input on whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations. We support this proposal.

<u>The Services' Responsibilities during Formal Consultation</u>.

The Services inquire whether and how the Services should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat. They propose to clarify there is no requirement for such measures to be accompanied by "specific and binding plans" or "a clear, definite commitment of resources." We support this proposal.

<u>Biological Opinions</u>.

The Services propose to be allowed to adopt all or part of a federal agency's initiation package in its biological opinion (adoption or incorporation by reference). They propose a collaborative process to bring the information and expertise of both the federal agency and the Service (and any applicant) into the resulting initiation package. We support this proposal.

<u>Expedited Consultations</u>.

The Services propose a new provision to streamline consultation, particularly for actions that have

minimal adverse effects or predictable effects based on previous consultation experience. We support this proposal.

Reinitiation of Consultation.

The Services propose clarifying that the duty to reinitiate does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA) or National Forest Management Act of 1976 (NFMA) when a new species is listed, or new critical habitat is designated. Only affirmative discretionary actions would be subject to reinitiation.

We suggest three additions. First, specify that "reinitiation" does not require "completion" and that the existing consultation will remain in effect until the reinitiated consultation is complete. Second, specify that "reinitiation" can consist of an amendment to a proposed action and/or amendment to a Biological Opinion, and that reinitiation does not necessarily require a new "full blown" consultation. These additions are consistent with long-standing USFWS practice.

These two recommendations relate to an unsettled legal issue that is increasingly a subject of citizen lawsuits, especially in the Ninth Circuit, which has not necessarily ruled consistently with other jurisdictions. With respect to whether the requirement to reinitiate consultation means (contrary to its language) that a federal action agency is not in compliance unless it both reinitiates and completes consultation, a "gotcha" has been pursued by citizen suit plaintiffs that seeks to put the federal action agency and anyone relying on the federal action agency (such as Reclamation project water users) in legal jeopardy, immediately upon a reinitiation trigger being met. Specifically, where a reinitiation trigger has been met, plaintiffs have argued that the action agency is not in compliance with 40 CFR 402.16 unless the consultation has concluded, and have sought injunctions pending the completion of the reinitiated consultation. This legal tactic has been used twice against the Klamath Irrigation Project, and in one case resulted in reduced and severely delayed availability of water for Project water users this year.[9]

The Alliance does not suggest that citizens should be without any recourse if they come to believe that an agency is out of compliance with its substantive section 7(a)(2) obligations or that a biological opinion is deficient. But the use of the alleged procedural violation of failing to complete the re-consultation, coupled with a request for injunction, allows a plaintiff to dispense with any need to prove the species is not being protected adequately by a concluded consultation.

With respect to the potential range of outcomes resulting from reinitiated consultation, the Alliance believes that focused amendments of a biological assessment or opinion may be all that is realistically necessary. However, it appears that different courts have interpreted the ESA differently on this point.[10]

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[9] See *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F.Supp.3d 1106 (N.D. Cal. 2017)

[10] *Compare Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1076-77 (9th Cir. 2004) (amendments to Biological Opinions (BiOps) are impermissible); *Mayo v. Jarvis*, 177 F.Supp.3d 91, 133 (D.D.C. 2016)

Finally, our third proposed addition is intended to clarify that where a conservation measure is imposed on the action agency, applicant, or a third party to benefit one or more species covered by a biological opinion and/or incidental take statement, but the measure is not having the anticipated benefit, the Services should clarify that reinitiation is warranted. This would address situations where a conservation measure such as a reasonable and prudent alternative, imposes substantial costs but does not have the benefits anticipated at the time of consultation. To address such situations, we propose amending 50 CFR 402.16 to add the following new basis for reinitiation: "If new information reveals that conservation measures, including reasonable and prudent alternatives, reasonable and prudent measures, or other required terms and conditions, are not benefiting the listed species in the manner or to the extent previously expected."

New/Revised Definitions.

Applicant

The ESA states that it is "the policy of Congress that federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."[11] To further the intent of Congress with respect to resolving water resource issues, we request that the Services amend the definition of "applicant." The amendment will ensure that state and/or local water supply agencies that manage supplies that have the potential to be directly impacted by a consultation, for example with the Army Corps of Engineers, the Bureau of Reclamation, or the Federal Energy Regulatory Commission, have a role in the consultation process.

Proposed Definitions:

> Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a federal agency as a prerequisite to conducting the action. State or local agencies that control the management and delivery of water supply shall be afforded applicant status in instances where a consultation is expected to directly impact that water supply.

Best scientific and commercial data available

Standards for scientific and commercial data that are used to make decisions under the ESA must be established. Relatively greater weight should be given to data that have been field-tested or peer-reviewed. The former requirement would help clarify when such things as "personal observations" or mere folklore are considered by the agencies to be reliable enough to make decisions with potentially profound effects. Namely, the data requirements for listing petitions and critical habitat

(holding that there is no authority requiring the Services to produce "a new, full-blown BiOp" upon reinitiation of formal consultation and holding that amendment to existing Incidental Take Statement sufficient).

[11] 16 U.S.C. § 1531(c)(2).

designations should be improved, and federal agencies should ensure that all data is made available to the public.

The phrase "best scientific and commercial data available" is currently undefined, yet is among the most heavily litigated. We therefore recommend that the Services add the definition set forth below to the Proposed Rule.[12]

Proposed Definition:

> *Best scientific and commercial data available* means the best scientific information available at the time of the agency action or determination. To qualify as the best scientific information available, the information must be objectively evaluated in a transparent manner. Furthermore, in determining whether information qualifies as "best available," it is necessary to take into account (i) the reliability of data (including whether they were impartially gathered), analyses, and models and the known or potential sources of error associated with such data, analyses, and models, and (ii) whether the data were gathered, analysis were completed, and models were developed using prevailing principles, methods, tools, and professional standards of scientific practice.

This definition incorporates concepts from the Information Quality Act (IQA) and agency regulations and guidelines adopted to implement the IQA. Importantly, it clarifies the need to consider modeling and other prevailing scientific processes when determining if the standard is met. It also describes procedural obligations with which the agencies must conform.

Reasonable and prudent alternatives

Currently, the term "reasonable and prudent alternatives" does not entirely align with the ESA's legislative history and the Services' Consultation Handbook, which both envision a role for the action agency and applicant in the development of reasonable and prudent alternatives.[13] We therefore recommend that the definition be revised as set forth below. This proposed definition also clarifies that the Services must consider a range of available alternatives. It further clarifies that if there are multiple actions available that will satisfy the requirement to be reasonable and prudent alternatives, the Services should select the one from among them that imposes the fewest costs, consistent with notions of efficiency and sound public policy.

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[12] This definition is consistent with caselaw including *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and scholarship interpreting the term as it is used in the ESA and implementing regulations including D.D. Murphy & P.S. Weiland. 2016. *Guidance on the Use of the Best Available Science under the U.S. Endangered Species Act*, Environmental Management 58: 1-14.

[13] USFWS and NMFS. 1998. Endangered Species Consultation Handbook, p. 4-43 ("The action agency and the applicant (if any) should be given every opportunity to assist in developing the reasonable and prudent alternatives.").

Proposed Amendments:

> Reasonable and prudent alternatives refer to alternative actions identified from among a range of alternatives during formal consultation in collaboration with the action agency and applicant, if any, both (1) that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat, and (2) that, while meeting the foregoing requirements, impose the fewest costs on the action agency, applicant, and/or third parties expected to fund those alternative actions.

Listing Species and Designating Critical Habitat [Docket No. FWS-HQ-ES-2018-0006; Docket No. 180202112-8112-01; 4500030113]

The Services propose to revise portions of regulations to clarify, interpret, and implement portions of the ESA concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat. They also propose to make multiple technical revisions to update existing sections or to refer appropriately to other sections.

<u>Economic Impacts</u>.

The Services propose removing the phrase "without reference to possible economic or other impacts of such determination." Although the listing decisions must be made based "solely on the basis of the best scientific and commercial data available," the ESA does not prohibit the presentation of information on economic and other impacts to the public. Removing this phrase is a positive change. In the past, the agencies have conflated the listing decision (which does not consider economic impacts) and other ESA-related decisions (which may consider economic impacts). The agencies would reject economic impact considerations in the latter category, concluding that all economic impacts were accounted for in the listing decision. This is a frustrating and disingenuous treatment of the processes.

<u>Foreseeable Future</u>.

The Services propose including a framework that sets out how they will determine what constitutes the "foreseeable future" when determining the status of a species. The term extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable, on a case-by-case basis. The Services will avoid speculating as to what is hypothetically possible. We support this proposal.

Factors Considered in Delisting Species.

The Services propose clarifying that they determine whether a species is a threatened species or an endangered species using the same standards regardless of whether a species is or is not listed at the time of that determination. The standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance.

We believe criteria should be explored in this context for determining an "extinction" definition. For example, if there is a clear definition of what constitutes "extinction," such a standard could be used to determine when a Reclamation facility is no longer operating under imposed restrictions. Such a standard would be a positive change in California's Bay-Delta where, even if endangered Delta smelt cannot be found, the Service continues to operate as if they are there.

Not Prudent Determinations for Critical Habitat.

The Services propose adding additional circumstance where critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species that primarily occurs in areas outside of U.S. jurisdiction. We support this proposal.

Designating Unoccupied Areas.

The Services propose restoring the requirement that the Secretary will first evaluate areas occupied by the species. Under the proposed amendments, the Services could only consider unoccupied areas as critical habitat if occupied areas would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. Further, the Secretary must determine that there is a reasonable likelihood that the unoccupied area will contribute to the conservation of the species. The Alliance supports this change.

This could be particularly helpful in determining the range of smelt in the Delta (see above). Currently, there is a dispute among some as to how close the smelt get to the Delta pumps as part of their habitat, and due to turbidity requirements and a lack of clarity over how far the smelt live away from the pumps, the pumping levels are often limited.

This could also help to prevent the reoccurrence in other areas of what happened in Idaho in 2010. That year, the Service proposed to designate several areas in the Boise and Payette basins as critical habitat for Bull Trout, even though the areas in the Payette were uninhabited. Idaho water users submitted comments opposing that proposal. Ultimately, however, the uninhabited area was designated as critical habitat. To date, Idaho water users are unaware of any Bull Trout identified in these designated uninhabited areas.

While it cannot be conclusively stated that anything "bad" has necessarily happened because of that designation (to date), the designation opens up this uninhabited area for potential issues should some litigious activist group decide to raise the matter. The designation has opened these areas to a new,

and different, world of administrative regulation and potential issues. This is unnecessary given that the area remains uninhabited.

Even though we cannot conclude that the Payette would not have been designated under this rule, this new rule would provide a higher threshold for such a designation – a good thing for the regulated community.

Are other changes to ESA implementation necessary?

We are encouraged by the detail and thoughtfulness that the Services put into the three proposed rulemaking efforts that are the focus of this letter. In addition to the above comments, the Alliance provides the following additional observations and recommendations for your consideration. The Family Farm Alliance for decades with our members and leaders to develop specific, practical changes to the ESA that we think will make it work better in the modern era.

Incidental Take Issuance Criteria.

Two of the additional issues have to do with the application of the incidental take issuance criteria (quoted above under "Clarifying When Consultation Is Not Required"). Specifically:

a. The term "maximum extent practicable" is not defined in the ESA. The Alliance believes that concept must consider, and be based on, the ITP applicant's objectives and limitations for the "otherwise lawful activity" under consideration for permitting. Factors such as economics and engineering feasibility should be considered in determining whether a given take avoidance or mitigation measure (or package of measures) is practicable. Similarly, the purpose and any public purpose, and whether a water user or water district can reasonably meet the needs for which a diversion is intended, must be heavy factors in determining practicability.

b. Another important issue is the analysis to determine the "impacts of such [incidental] taking" under section 10(a)(2). This analysis should involve an approach that includes the identification, something akin to the "environmental baseline" to which the impacts of the foreseen incidental take are added. This "baseline" should include existing infrastructure and other features discussed above (Page 5) in regard to environmental baseline.

Consolidation of NMFS' Anadromous Fishery ESA Responsibilities with USFWS.

In his 2011 State of the Union speech, President Obama caught the attention of many of us when he said, "The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. And I hear it gets even more complicated once they're smoked." This moment may have provided the first, wide-spread public awareness of the absurdity of having multiple federal agencies responsible for enforcing the ESA.

We support the Trump Administration's recent proposal to combine the responsibilities of both the NMFS and the USFWS under one federal roof. This would promote more efficient, effective, and coordinated management of all ESA responsibilities for anadromous and freshwater fish in Western watersheds, from the highest reaches of our headwaters to the Pacific Ocean. When the proposal was introduced in June 2018, Secretary of the Interior Ryan Zinke noted, "By merging agencies that handle similar, if not the same, functions, we would be able to greatly improve services to the American people and better protect the land and wildlife under our care."

Many Western irrigators operate in watersheds that provide habitat for threatened and endangered species protected by the ESA. These producers can be significantly impacted by decisions made by the fisheries services. Western watersheds that drain to the Pacific Ocean are home to many species of fish. Some of these species are listed as "endangered" or "threatened" under the ESA. However, within this group, some fall under the responsibility of NMFS and others are overseen by the USFWS. Because they can have different migration patterns or life histories, what can result is duplicative and sometimes overlapping actions by each of the agencies under the ESA.

The scope of similar or identical ESA actions performed by each agency can be extensive: designation of critical habitat, development of species recovery plans and conservation programs, consultation activities, to name a few. These functions would most effectively and efficiently be conducted by one government agency. Instead, as things currently stand, they appear to be arbitrarily split between two different agencies housed in two completely different federal departments. So, up and down the West coast, from the Klamath Project to the Central Valley Project to the Upper Snake River, duplicative bureaucracies are generating ESA plans that sometimes compete with one another.

In the Klamath example, the two federal regulatory agencies each adopted a single-minded and uncoordinated approach of focusing on Klamath Project operations. One sought to artificially create high reservoir levels for endangered suckers. The other called for artificially high reservoir releases for threatened salmon. Unfortunately, both agencies did so independent of one another. Based on those regulatory actions, the Bureau of Reclamation announced in 2001 that – for the first time ever – no water would be available from Upper Klamath Lake to supply Project irrigators or the national wildlife refuges. The combined lake level and outflow regulatory requirements equated to a volume of water that was more than what was available. The resulting impacts to the local community were immediate and far-reaching.

A "Klamath-like" situation with potential dire consequences for Idaho water users exists in the Snake River Basin. The NMFS biological opinion (or, BiOp) for the Upper Snake River Basin Projects requires that water be sent downstream for salmon flow augmentation. The USFWS BiOp for bull trout critical habitat requires "bank full" reservoirs in one of the Upper Snake Projects. When push comes to shove, Idaho water users wonder how they will do both, and still provide water for farms and communities.

Water users served by California's Central Valley Project (or, CVP) face a similar dilemma. Simply put, the Delta smelt BiOp prepared by the USFWS requires flushing flows released from storage to

influence smelt habitat. At the same time, the NMFS BiOp for salmon requires keeping water in storage for temperature control.

A committee convened by the National Research Council (NRC) studied this matter a few years ago. The NRC found that the lack of a systematic, well-framed overall analysis between the two Services is "a serious scientific deficiency, and it likely is related to the ESA's practical limitations as to the scope of actions that can or must be considered in a single biological opinion."

The Trump Administration's proposal to consolidate NMFS within USFWS is a concept echoed and reinforced in legislation (HR 3916, the Federally Integrated Species Health Act – FISH Act) introduced last year by Rep. Ken Calvert. The FISH Act would move all ESA responsibilities for anadromous species and catadromous species to the USFWS. This consolidation of duties would provide greater efficiency, consistency, and accountability. Efficiency would be achieved because the process for ESA consultation would not require completing work and having to match it up between two different agencies. Consistency would result due to a single process for ESA compliance. Finally, accountability would be provided for the difficult decisions that will inevitably result when actions required for one species jeopardize another. This recommendation would be an important step towards reducing wasted time and money and represents a practical, common-sense change to the ESA that our membership strongly supports.

"Safe Harbor" Protections for Neighbors.

The Administration should focus on applying the ESA in a way that fosters collaboration and efficiency of program delivery, and is incentive-driven. For example, there is a need to make it easier to provide safe harbor protections for neighboring landowners. The USFWS does provide safe harbor agreements whereby it agrees to inspect private property and establish a baseline of conditions. The USFWS allows landowners to work to improve conditions and will provide "take" protection for those activities, including ongoing operations. This works for the specific land/facilities that are being improved, but does not address the fact that the improved conditions will now draw more listed species to that property and neighboring properties.

Programmatic safe harbor ("take" protection) should be provided for anyone conducting normal operations within a certain radius (probably species dependent) of proposed projects. The federal government can also enhance wildlife habitat, species protection, and other conservation outcomes through regulatory and voluntary conservation programs by finding ways to streamline the ESA consultation process, which sometimes takes up to a year to initiate. Time limits should be established, and agencies should be forced to comply.

ESA Settlements.

For ESA settlements involving federal environmental agencies, the federal government can provide better oversight and transparency in how attorney fees are awarded and distributed. Measures can be taken to ensure there is complete transparency and reporting on the government's expenditures of taxpayer dollars when attorney fees are awarded. We have advocated for some time that USFWS be

required to track, report to Congress, and make available online: 1) funds expended to respond to ESA lawsuits; 2) the number of employees dedicated to litigation; and 3) attorneys' fees awarded in the course of ESA litigation and settlement agreements.

It is still not clear exactly how much environmental litigation organizations are receiving in legal fees and cost recoveries using taxpayer funds they get as a result of suing the federal government. Thus, we were pleased to see Secretary Zinke earlier this month issue Secretarial Order 3368. This is an important step towards alleviating the concerns we raise herein. This order will give the America people a window into where the money is going and a voice before Interior makes a recommendation to accept or enter into a settlement with large policy or budgetary implications.

Transparency of Decision-Making and Species Recovery.

Alliance members are very concerned about transparency of decision-making and species recovery. We have advocated for the following actions over much of the past decade:

- Require data used by federal agencies for ESA listing decisions to be made publicly available and accessible through the Internet. This would allow the American people to actually see what science and data are being used to make key listing decisions.

- Require the federal government to disclose to affected states all data used prior to any ESA listing decisions and require that the "best available scientific and commercial data" used by the federal government include data provided by affected states, tribes, and local governments.

- Prioritize resources towards species protection by placing reasonable caps on attorneys fees and making the ESA consistent with the Equal Access to Justice Act.

We know the ESA can play an important role in species protection, but it can only successfully do so with increased public input, stakeholder cooperation, and new "outside-the-box" thinking on transparency and accountability. Unfortunately, the manner in which the ESA is being implemented in its current form discourages this sort of approach. Private landowners should be viewed as potential partners in species recovery, not enemies. The recommendations above, if implemented, would better allow implementation of the ESA to help recover and seek to remove species from the list and encourage public engagement and federal agency transparency and accountability.

The Role of Science in the Context of Policy Discretion in Implementing the ESA.

In all of this, it is essential that the role of science be understood in the context of policy discretion in implementing the ESA. Some will argue that "we must let scientists decide" as choices are made regarding the protection of species. This view ignores the significant complexities which give rise to significant uncertainties as to what is "best" for the species. In the end, all decisions related to implementing the law are choices. Policy choices. Policy choices, to be informed by the "best available" scientific understanding. Policy choices to be made by policy makers at the appropriate level of management within the agency. Without question the policymaker must look to his/her

scientists for advice on the possible ecological results of any given decision, but he/she cannot simply ask the scientist what the "right" thing to do is. With that said, in an overarching context, we believe when there is a nexus between the ESA and federal water projects, such that the agencies should continue to review their current regulations to ensure they are doing everything possible to aid in maximizing water delivery and storage while protecting species.

The recommendations above are just a sampling of the ideas the Alliance and others have long proposed in an effort to bring updates and improvements to the ESA. We believe these recommendations would (1) make it easier for landowners, businesses, and other organizations to protect species; (2) respect the needs of private property owners, including vested state-based water rights; and (3) encourage collaborative conservation that ultimately and equally benefit communities, citizens, and species.

Conclusion

We all know of the difficulty in amending the ESA. However, there is considerable discretion in *how* the ESA is implemented. Given the significant scientific uncertainty with many listed species and the ecosystems in which they reside and the failure of the ESA regulators to look at the host of stressors affecting them, the agencies need to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the impacts on people that come with ESA decisions is simply good public policy. To ignore how people are affected is simply bad public policy. This concern and others deserve further consideration from the highest water policy officials.

The Services are taking a measured approach to assessing and making recommendations to ESA implementation. We endorse this approach and many of your recommendations. However, we also think a more robust dialog about the ESA is in order and have offered in Appendix A some more provocative questions that might inspire that discussion. We take no position on the questions posed, but merely offer them as a means of provoking much needed critical discussion.

Thank you for this opportunity to comment. Farmers, ranchers, and some conservation groups know that the best water solutions are unique and come from the local, watershed, and state levels. They know we need policies that encourage agricultural producers, NGOs, and state and federal agencies to work together in a strategic, coordinated fashion. They understand that species recovery and economic growth and activity do not have to be mutually exclusive.

The Family Farm Alliance has developed these recommendations for the Services to help form the basis for solutions to meet the challenges our farmers and ranchers face. It is our hope that you and your agency will embrace the core philosophy previously stated: the best solutions are driven locally by real people with a grasp of "on-the-ground" reality and who are heavily invested in the success of such solutions.

Western irrigated agriculture is a strategic and irreplaceable national resource important to both our food security and our economy. It must be appreciated and protected by the federal government in the 21st Century.

If you have any questions about this letter, please do not hesitate to contact me at 541-892-6244.

Sincerely,

Dan Keppen
Executive Director

APPENDIX A: Topics and Questions for Future Consideration and Discussion

This opportunity to comment has sparked discussion by the membership of the Family Farm Alliance, who have suggested that our elected officials and policymakers may need to consider answering some much tougher questions, ones which may be seen by some as pointed and controversial. That may be the case, but we strongly believe that these topics could benefit from an open discussion:

- Should the ESA, and our approach to species protection, recognize that some species can't and don't really need to be saved? Many more species have gone extinct than now exist; is it possible or even prudent to try and stop extinction of every species out there?
- Should those who suffer economic losses as a result of protecting species or habitat be compensated?
- If saving species is of national importance, should the taxpayers at large pay the associated costs, and should those costs be publicly displayed so the taxpayers can see where their money is being spent?
- Should we be required to consider *all* factors that affect a listed species before developing a recovery plan or imposing restrictions, and not just target one or two?
- Should we focus on protecting ecosystems rather than individual members of a species? We need to carefully define "ecosystem," but focusing on saving each individual member of a species seems ineffective at best.
- Should we have laws that allow for the creation of temporary habitat on the theory that some habitat for any period of time is better than no habitat ever? In other words, should we encourage the creation of habitat by allowing it to be removed rather than incentivize landowners to ensure that no habitat occurs ever, as the law currently does?
- Should we focus on preventing species from getting into trouble rather than trying to save them when they do?
- Do we need a reliable system of safe harbors and "no surprises" so that landowners and others know when they're "done" relative to ESA compliance and can go about their business rather than have uncertainty at all times?
- Should the imposition of restrictions to protect species require a balancing of economic, sociologic, biologic, and other factors, or is the current system that says the only thing that matters is species protection continue?
- Should we set some national policies to which we manage species, or allow species protection to be the de facto policy to which we manage everything else? For example, how would species protection be different if we set the governing national policy to be producing a safe, reliable, plentiful domestic food supply?
- The effective goal of the current ESA is to avoid extinction rather than recover species. Is that appropriate?

We know there are certainly other ideas for reforms. However, these questions are intended to take the constructive findings and recommendations of our comment letter and provoke meaningful discussions and policy changes that lead to positive, targeted improvements that can truly benefit species and people.