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MEMORANDUM

TO: INTERESTED PARTIES

**FROM: KAREN BUDD-FALEN
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**RE: FOREIGN AND DOMESTIC TRAIN WRECK IN THE MAKING -
MORE OF THE ESA**

As the New Year opens, the use and abuse of the Endangered Species Act (“ESA”) continues to provide a significant hardship to private property, private rights, and land use both within this country and even in countries of which most people have probably never heard. Despite President Obama’s proclamation that “America will play a more restrained role on the international stage,” the U.S. Fish and Wildlife Service (“FWS”) does not seem to be restraining from listing species as threatened or endangered, despite the fact that many species on the American list have NEVER traveled to American soil. In fact, by January 3, 2011, the FWS had listed 568 foreign species on the American threatened or endangered species list. These species are from places like China, Mongolia, Kyrgyzstan, Pakistan, Afghanistan, India, Palau, and of course Canada and Mexico. The latest additions were seven birds from Brazil on December 28, 2010.

There are a lot of alleged reasons given that the U.S. should be spending American tax dollars to research, study and list foreign species under the ESA. One of the biggest reasons, so they say, is so that America can stop foreign import of endangered and threatened species. I thought that was fair until I did some simple research online and found out that you can buy some of these listed threatened and endangered species on E-bay. Does any one want to buy a Goliath Frog, from West Africa? It was going for \$150.00 on E-bay on January 20, 2011, despite the fact it was listed on the American ESA list in 1994.

The more shocking research however is that once a foreign species is listed on the U.S. threatened or endangered species list, the ESA gives the American government the authority to buy “land or water or interests therein” in foreign countries. In other words, the ESA gives the U.S. government authority, with the consent of the foreign government, to use foreign currency to buy foreign land in the name of the United States. With the current budget and deficit drowning American workers, why is the U.S. government even thinking of buying foreign land and water? And once we do buy it, who manages it and what does that cost the American taxpayer?

If America is playing a more restrained role internationally, the FWS does not seem to agree. In relation to the December 28, 2010 foreign species ESA listing, the FWS press release states:

All seven species face immediate and significant threats primarily from the threatened destruction and modification of their habitats from conversion of agricultural fields (e.g., soybeans, sugarcane, and corn), plantations (e.g., eucalyptus, pine, coffee, cocoa, rubber, and bananas), livestock pastures, centers of human habitation, and industrial developments (e.g., charcoal production, steel plants, and hydropower reservoirs).

Although there is limited information on the specific nature of potential impacts from climate change to the species included in this final rule, we [FWS] are concerned about projected climate change, particularly the effect of rising temperatures in combination with the potential loss of genetic diversity, and population isolation; and cumulative effects including El Niño events. Furthermore, we have determined that the inadequacy of existing regulatory mechanisms is a contributory risk factor that endangers each of these species' continued existence.

So America is dictating what property in foreign countries can be used for and American businesses have to wait for the completion of ESA section 7 consultation based on “climate change” for birds in Brazil?

And while all this is going on outside the borders of the United States, the American courts are fully engaged in considering listings of species on our own soil. Between June and December, 2010, the federal multi-district litigation panel consolidated 14 cases, all charging that the FWS has failed to timely respond to ESA species listing petitions filed by the Center for Biological Diversity and WildEarth Guardians. Fourteen separate lawsuits were combined, involving 116 species that the environmental groups claim should be listed as threatened or endangered. The list includes the plains bison, 42 species of springsnails, 32 species of mollusks, newts, lizards, many grass species, several pyrg species, the Mexican gray wolf and the gila monster, to name a few. These species are located over thousands of acres of private

and public land and thousands of miles of streams and in private water rights, including those in Texas, Oklahoma, Wyoming, Colorado, Utah, Arizona, New Mexico, North Dakota, Oregon, Washington, Illinois, Indiana, Michigan, Mississippi, Ohio, South Dakota, Wisconsin, Nebraska, Idaho and others. If, according to a 2009 Greenwire Report, each species costs approximately \$85,000 to list (excluding the attorneys fees the federal government will pay to Center for Biological Diversity and WildEarth Guardians for filing the litigation), the cost of listing all 116 species will be approximately almost \$10 million dollars (\$9,860,000).

And we know that these 14 cases are not all the ESA cases currently on the courts' dockets. For example, according to the Center for Biological Diversity ("CBD") website, the group has petitioned the FWS to add 1000 species and critical habitats to the ESA list. One petition, filed in April 2010, was almost 1500 pages and requested listing for 404 Southwest aquatic species including 92 crayfish and other crustaceans, 82 plants, 13 reptiles, four mammals, 15 amphibians, 55 insects and three birds. The WildEarth Guardians boasts of "our ambitious campaign to afford more endangered wildlife and plants the ESA's protections, "and claims that" WildEarth Guardians has petitioned for hundreds of individual species to be listed."

Even more frustrating is the fact that the 14 consolidated cases described above have nothing to do with whether any of these species are, in fact, threatened or endangered. No substance or science will be discussed as part of this case at all. Rather, the only issue is whether the FWS took too long in time to respond to the petitions to list these 116 species and the only thing the Court will do is require the FWS to consider the listing petitions. According to the ESA, once a petition to list is received, the FWS has to respond in 90 days. There is simply no way for the FWS to respond to petitions to list thousands of individual species in 90 days, so the environmental groups then file suit to force consideration of their petitions and get their attorneys fees paid by the American taxpayers. The litigation delays the FWS scientific consideration even more, which results in even more litigation and more attorneys fees. And at the bottom, this vicious cycle does not even ensure that actual plants and animals are protected; the only assurance is that more attorneys fees are paid to environmental groups.

So we have come full circle. Plants and animals, insects and invertebrates, on both American and foreign soil, are petitioned for listing and litigated and taxpayer money spent with no one winning but those who are in court. Is this endless process worth the cost of property rights, American jobs and an ever increasing deficit? It would be one thing to discuss the scientific merits of whether listing is necessary; it is quite another to sue over missed deadlines when the sheer number of petitions filed are causing the missed deadlines. Does any one doubt this is a train wreck in the making?

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