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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

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STATEMENT OF
HENRY ESCHWEGE, DIRECTOR
COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION
UNITED STATES GENERAL ACCOUNTING OFFICE

BEFORE THE
SUBCOMMITTEE ON RESOURCE PROTECTION
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ON

THE [ENDANGERED SPECIES PROGRAM]

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

WE ARE HERE TODAY AT YOUR INVITATION TO DISCUSS THE
ENDANGERED SPECIES ACT. OUR COMMENTS ARE BASED ON ISSUES
PRESENTED IN OUR DRAFT REPORT ENTITLED "MAJOR CHANGES
NEEDED TO MAKE THE ENDANGERED SPECIES PROGRAM WORKABLE."
COPIES OF THE DRAFT WERE PROVIDED TO THE SECRETARY OF THE
INTERIOR ON MARCH 12, 1979, FOR REVIEW AND WRITTEN COMMENT.
HIS RESPONSE IS DUE BY APRIL 11, AND WE SHOULD ISSUE THE
FINAL REPORT IN MAY. MY STATEMENT HERE TODAY WILL HIGH-
LIGHT THOSE ISSUES IN OUR DRAFT REPORT REQUIRING CONGRES-
SIONAL ACTION.

LEGISLATIVE STATUS OF THE ENDANGERED SPECIES PROGRAM

A COMPLEX, EMOTIONAL ENVIRONMENTAL ISSUE, DELIBERATED
AND ACTED ON BY THE 95TH CONGRESS, INVOLVED HOW THE BENE-
FITS OF NATIONAL ECONOMIC GROWTH AND DEVELOPMENT SHOULD

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BE WEIGHED AGAINST THE IMPORTANCE OF PROTECTING ENDANGERED AND THREATENED SPECIES. THE ENDANGERED SPECIES ACT AMENDMENTS OF 1978 ESTABLISHED A HIGH-LEVEL ENDANGERED SPECIES COMMITTEE AUTHORIZED TO GRANT EXEMPTIONS FROM THE PROTECTIVE PROVISIONS OF THE ENDANGERED SPECIES ACT. THE 1978 AMENDMENTS ALSO EXTENDED THE AUTHORIZATION FOR APPROPRIATIONS UNDER THE ACT THROUGH MARCH 31, 1980.

SUMMARIZATION OF DEFICIENCIES IDENTIFIED

OUR REVIEW SHOWED THAT, WHILE ADDITIONAL LEGISLATIVE CHANGES ARE NEEDED, THE DEPARTMENT OF THE INTERIOR MUST MAKE MAJOR PROGRAM MANAGEMENT IMPROVEMENTS TO PROVIDE GREATER PROTECTION TO ENDANGERED AND THREATENED SPECIES WHILE MINIMIZING THEIR IMPACT ON FEDERAL, STATE, AND PRIVATE PROJECTS AND PROGRAMS. WE IDENTIFIED SERIOUS MANAGEMENT DEFICIENCIES IN THE THREE PROCESSES USED BY INTERIOR TO PREVENT THE ENDANGERMENT AND EXTINCTION OF PLANTS AND ANIMALS CAUSED BY MAN'S INFLUENCE. THESE PROCESSES ARE (1) LISTING SPECIES AS ENDANGERED OR THREATENED, (2) CONSULTING WITH OTHER FEDERAL AGENCIES, AND (3) RECOVERING LISTED SPECIES. DEFICIENCIES IN THESE PROCESSES HAVE JEOPARDIZED THE EXISTENCE OF SOME ENDANGERED AND THREATENED SPECIES AND RESULTED IN THE POSSIBLE SELECTIVE EXTINCTION OF OTHERS; CREATED UNNECESSARY CONFLICTS BETWEEN ENDANGERED AND THREATENED SPECIES AND FEDERAL, STATE, AND PRIVATE PROJECTS AND PROGRAMS; DELAYED CONSULTATIONS WITH OTHER

FEDERAL AGENCIES TO RESOLVE CONFLICTS, INCREASING PROJECT COSTS; AND HINDERED EFFORTS TO PROTECT AND RECOVER ENDANGERED AND THREATENED SPECIES.

SINCE INTERIOR IS IN THE PROCESS OF COMMENTING ON OUR DRAFT REPORT, WE HAVE NOT YET FINALIZED OUR RECOMMENDATIONS. HOWEVER, AT YOUR REQUEST, WE WOULD LIKE TO HIGHLIGHT OUR RECOMMENDATIONS FOR AMENDING THE ENDANGERED SPECIES ACT WHICH WE BELIEVE WOULD PROVIDE ADEQUATE PROTECTION TO ENDANGERED AND THREATENED SPECIES WHILE MINIMIZING THEIR IMPACT ON FEDERAL, STATE, AND PRIVATE PROJECTS AND PROGRAMS. SPECIES SHOULD BE LISTED AS ENDANGERED OR THREATENED THROUGHOUT THEIR EXISTING RANGES

OUR FIRST RECOMMENDATION WOULD LIMIT LISTINGS TO SPECIES WHICH ARE ENDANGERED OR THREATENED THROUGHOUT ALL OR A SIGNIFICANT PORTION OF THEIR EXISTING RANGES, THAT IS, IN AREAS WHERE THEY ARE NOW LIVING. WE FOUND THAT INTERIOR'S FISH AND WILDLIFE SERVICE IS LISTING POPULATIONS OF SPECIES IN LIMITED GEOGRAPHICAL AREAS AS ENDANGERED OR THREATENED INSTEAD OF LISTING THE ENTIRE SPECIES. THIS HAS OCCURRED BECAUSE THE SERVICE HAS INTERPRETED THE DEFINITION OF "SPECIES" TO INCLUDE POPULATIONS, REGARDLESS OF THEIR SIZE, LOCATION, OR TOTAL NUMBERS. USING THE SERVICE'S INTERPRETATION OF THE TERM, SQUIRRELS IN A SPECIFIC CITY PARK COULD BE LISTED AS ENDANGERED EVEN THOUGH THERE IS AN

ABUNDANCE OF SQUIRRELS IN OTHER PARKS IN THE SAME CITY AND ELSEWHERE. SUCH LISTINGS HAD INCREASED THE NUMBER OF POTENTIAL CONFLICTS BETWEEN ENDANGERED AND THREATENED SPECIES AND FEDERAL, STATE, AND PRIVATE PROJECTS AND PROGRAMS.

THE SERVICE BEGAN USING THE SPECIES DEFINITION IN 1967 TO LIST POPULATIONS IN BROAD GEOGRAPHICAL AREAS AS ENDANGERED OR THREATENED AND TO LIST SPECIES AS ENDANGERED IN SOME AREAS AND THREATENED IN OTHERS. THESE TYPES OF LISTING ARE USED BY THE SERVICE TO PROVIDE DIFFERENT DEGREES OF PROTECTION TO SPECIES BASED ON THEIR STATUSES WITHIN GIVEN GEOGRAPHICAL AREAS. FOR EXAMPLE, THE GRIZZLY BEAR POPULATION IN THE 48 CONTERMINOUS STATES WAS LISTED AS THREATENED IN JULY 1975, WHILE THE ALASKAN POPULATION WAS LEFT UNPROTECTED BY THE ACT. THE SERVICE THEN PUBLISHED REGULATIONS WHICH PERMIT THE GRIZZLY TO BE TAKEN ONLY FOR APPROVED SCIENTIFIC AND CONSERVATION PURPOSES IN WYOMING AND IDAHO, BUT PERMIT SPORT HUNTING OF THE SPECIES IN NORTHWESTERN MONTANA.

IN FISCAL YEAR 1978, THE SERVICE BEGAN LISTING OR PROPOSING FOR LISTING MORE GEOGRAPHICALLY LIMITED POPULATIONS. FOR EXAMPLE, THE FLORIDA POPULATION OF THE PINE BARRENS TREE FROG WAS LISTED AS ENDANGERED IN NOVEMBER 1977, WHEN ITS OVERALL STATUS IN THE FOUR STATES IN WHICH IT EXISTS WAS NOT KNOWN. THE LISTING MAY CONFLICT WITH LAND DEVELOPMENT AND AGRICULTURE IN WESTERN FLORIDA. ALSO, IN AUGUST 1978, THE BEAVER DAM SLOPE POPULATION OF THE DESERT TORTOISE IN UTAH WAS PROPOSED FOR LISTING AS ENDANGERED

BEFORE A SURVEY TO DETERMINE THE OVERALL STATUS OF THE SPECIES WAS BEGUN. IF THE BEAVER DAM SLOPE POPULATION IS LISTED IT COULD ELIMINATE OR MODIFY BUREAU OF LAND MANAGEMENT LIVESTOCK GRAZING ACTIVITIES IN THE AREA.

THE 1978 AMENDMENTS TO THE ACT REDEFINE THE TERM "SPECIES" TO EXCLUDE DISTINCT POPULATIONS OF INVERTEBRATES, SUCH AS, SNAILS AND INSECTS. HOWEVER, THE NEW DEFINITION WILL NOT AFFECT THE LISTING OF GEOGRAPHICALLY DISTINCT POPULATIONS OF VERTEBRATES, SUCH AS THE TREE FROG AND DESERT TORTOISE. THEREFORE, WE ARE RECOMMENDING THAT THE CONGRESS REDEFINE THE TERM "SPECIES" TO EXCLUDE ALL DISTINCT POPULATIONS. THIS WOULD LIMIT LISTINGS TO ENTIRE SPECIES, RATHER THAN LIMITED GEOGRAPHICAL POPULATIONS.

PERMANENT EXEMPTIONS SHOULD COVER
ONGOING CONSTRUCTION PROJECTS

OUR SECOND RECOMMENDATION WOULD AMEND SECTION 7 OF THE ACT TO MAKE IT CLEAR THAT THE ENDANGERED SPECIES COMMITTEE IS AUTHORIZED TO GRANT A PERMANENT EXEMPTION TO ANY FEDERAL PROJECT. THE 1978 AMENDMENTS TO SECTION 7 MAY NOT PROVIDE FOR THE TIMELY RESOLUTION OF ALL CONFLICTS BECAUSE THEY MAY BE READ TO EXCLUDE PERMANENT EXEMPTIONS FOR THOSE FEDERAL PROJECTS WHICH HAD BEEN COMMITTED TO OR WERE UNDER CONSTRUCTION AT THE TIME THE 1978 AMENDMENTS WERE ENACTED. FOR THESE PROJECTS, THE LENGTHY CONSULTATION PROCESS MAY HAVE TO BE INITIATED AND THE PROJECT STOPPED EACH TIME AN AFFECTED SPECIES IS LISTED AND A POTENTIAL CONFLICT IS IDENTIFIED.

AN EXAMPLE OF A FEDERAL PROJECT FOR WHICH THE 1978 AMENDMENTS DO NOT MAKE CLEAR WHETHER A PERMANENT EXEMPTION MAY BE GRANTED IS THE COLUMBIA DAM PROJECT ON THE DUCK RIVER IN TENNESSEE, WHICH HAS BEEN STOPPED BECAUSE THREE SPECIES OF MUSSELS WERE LISTED AS ENDANGERED AND A JEOPARDY BIOLOGICAL OPINION WAS RENDERED. CONSTRUCTION, ESTIMATED TO COST OVER \$142 MILLION WHEN COMPLETED, HAS BEEN HALTED WITH THE PROJECT ABOUT 55 PERCENT COMPLETE AND MAY NOT START AGAIN UNLESS THE CONFLICT CONCERNING THE ENDANGERED SPECIES IS RESOLVED OR AN EXEMPTION IS GRANTED. EVEN IF PROJECT CONSTRUCTION IS RESUMED, OTHER SPECIES IN THE DAM AREA MAY BE LISTED LATER. THIS IN TURN MAY TRIGGER ANOTHER PROJECT STOPPAGE AND FURTHER LENGTHY CONSULTATIONS.

THE NUMBER OF POTENTIAL CONFLICTS BETWEEN FEDERAL PROJECTS AND PROGRAMS AND ENDANGERED AND THREATENED SPECIES WILL INCREASE IN THE YEARS AHEAD AS MORE SPECIES ARE LISTED AND AS THEIR CRITICAL HABITATS ARE SPECIFIED. THE SERVICE ESTIMATES THAT BETWEEN 50 AND 100 FEDERAL AGENCIES COULD EVENTUALLY BE AFFECTED. THERE WILL INEVITABLY BE CONFLICTS INVOLVING PROJECTS COMMITTED TO OR UNDER CONSTRUCTION AT THE TIME THE 1978 AMENDMENTS WERE ENACTED. WE ARE RECOMMENDING THAT THE ACT BE AMENDED TO MAKE IT CLEAR THAT THE ENDANGERED SPECIES COMMITTEE IS AUTHORIZED TO GRANT PERMANENT EXEMPTIONS TO FEDERAL PROJECTS COMMITTED TO OR UNDER CONSTRUCTION AT THE TIME THE 1978 AMENDMENTS WERE ENACTED.

OF COURSE, THE ACT WOULD CONTINUE TO REQUIRE THAT THE COMMITTEE RECONSIDER ANY PERMANENT EXEMPTION WHICH WOULD RESULT IN THE EXTINCTION OF A SPECIES. FINALLY, NEITHER THE ACT NOR OUR PROPOSED AMENDMENT PRECLUDE THE CONGRESS FROM EXEMPTING A SPECIFIC PROJECT OR PROGRAM AFTER WEIGHING ITS COSTS AND POTENTIAL BENEFITS AGAINST THE IMPORTANCE OF CONSERVING A SPECIES.

PROTECTION TO SPECIES SHOULD BE INCREASED

OUR FINAL LEGISLATIVE RECOMMENDATION WOULD REQUIRE FEDERAL AGENCIES TO ADEQUATELY CONSIDER THE IMPACT THEIR PROJECTS AND PROGRAMS WILL HAVE ON SPECIES FOR WHICH NOTICES OF INTENT TO REVIEW OR PROPOSED LISTING REGULATIONS HAVE BEEN PUBLISHED IN THE FEDERAL REGISTER.

THE ENDANGERED SPECIES ACT REQUIRES FEDERAL AGENCIES TO CONSULT WITH THE SERVICE WHENEVER AN ACTION MAY AFFECT A LISTED SPECIES OR ITS CRITICAL HABITAT AND TO CONDUCT A BIOLOGICAL ASSESSMENT TO IDENTIFY ANY LISTED OR PROPOSED SPECIES WHICH IS LIKELY TO BE AFFECTED BY AN ACTION. AS OF OCTOBER 1, 1978, 236 U.S. SPECIES HAD BEEN LISTED BY THE SERVICE AS ENDANGERED OR THREATENED. AT THE SAME TIME, THERE WERE OVER 600 SPECIES IDENTIFIED FOR LISTING, INCLUDING ABOUT 45 SPECIES FOR WHICH THE SERVICE WAS DEVELOPING PROPOSED LISTING REGULATIONS. HOWEVER, BY LIMITING SECTION 7 CONSULTATIONS TO LISTED SPECIES AND BY NOT

REQUIRING THAT BIOLOGICAL ASSESSMENTS INCLUDE SPECIES FOR WHICH NOTICES OF REVIEW HAVE BEEN PUBLISHED, THE ACT PERMITS FEDERAL PROJECTS AND PROGRAMS TO CONTINUE WHICH MAY JEOPARDIZE THE SURVIVAL OF SPECIES IDENTIFIED FOR LISTING BY THE SERVICE.

FOR EXAMPLE, A CORPS OF ENGINEERS PROJECT IN THE SACRAMENTO RIVER, CALIFORNIA, CONTINUES TO DISPOSE OF DREDGE SPOILS ON THE CRITICAL HABITAT OF A PROPOSED ENDANGERED BEETLE. (THE SACRAMENTO ANTHICID BEETLE.) A PETITION TO LIST THE SPECIES WAS ACCEPTED BY THE SERVICE IN APRIL 1976, AND A PROPOSAL TO LIST THE BEETLE AS ENDANGERED AND SPECIFY ITS CRITICAL HABITAT WAS PUBLISHED IN THE FEDERAL REGISTER IN AUGUST 1978.

WE ARE RECOMMENDING THAT SECTION 7 OF THE ACT BE AMENDED TO ALLOW PERMANENT EXEMPTIONS ONLY AFTER BIOLOGICAL ASSESSMENTS HAVE BEEN CONDUCTED THAT INCLUDE SPECIES FOR WHICH NOTICES OF REVIEW OR PROPOSED LISTING REGULATIONS HAVE BEEN PUBLISHED IN THE FEDERAL REGISTER AND THAT CONSULTATIONS ALSO INCLUDE THESE SPECIES.

MR. CHAIRMAN, ATTACHED TO MY STATEMENT IS A DRAFT OF PROPOSED LEGISLATIVE LANGUAGE TO IMPLEMENT OUR RECOMMENDATIONS. (ATTACHMENT I.) THIS CONCLUDES MY PREPARED STATEMENT. WE SHALL BE GLAD TO RESPOND TO ANY QUESTIONS.

AMENDMENTS TO THE ENDANGERED SPECIES ACT OF 1973,
AS AMENDED, TO INCORPORATE GAO RECOMMENDATIONS

Section 3 (16 U.S.C. 1532) should be amended -

(1) by striking out paragraph (16), and inserting in lieu thereof the following:

(16) The term "species" includes any subspecies of fish, wildlife, or plants.

(2) by inserting the following new paragraphs:

The term "listed species" means any species which has been determined by the Secretary of the Interior or the Secretary of Commerce to be an endangered species or a threatened species and such determination has been published in the Federal Register as a final regulation.

The term "proposed species" means any species for which the Secretary of the Interior or the Secretary of Commerce has published a regulation in the Federal Register proposing that the species be added to the list of species determined to be endangered or to the list of species determined to be threatened.

The term "candidate species" means any species for which the Secretary of the Interior or the Secretary of Commerce has found that substantial evidence has been presented which in his judgment warrants a review of the species for the purpose of adding it to either the list of endangered species or the list of threatened species and such a finding has been published in the Federal Register.

Section 7 (16 U.S.C. 1536) should be amended -
(1) by inserting and striking out the following:

INTERAGENCY COOPERATION

Section 7.(a) CONSULTATION. - The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act. Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') does not jeopardize the continued existence of any listed, proposed, or candidate [endangered species or threatened] species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section.

(b) SECRETARY'S OPINION. - Consultation under subsection (a) with respect to any agency action shall be concluded within 90 days after the date on which initiated or within such other period of time as is mutually agreeable to the Federal agency and the Secretary. Promptly after the conclusion of consultation, the Secretary shall provide to the Federal agency concerned a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. The Secretary shall suggest those reasonable and prudent alternatives which he believes would avoid jeopardizing the continued existence of any listed, proposed, or candidate [endangered or threatened] species or adversely modifying the critical habitat of such species, and which can be taken by the Federal agency or the permit or license applicant in implementing the agency action.

(c) BIOLOGICAL ASSESSMENT. - To facilitate compliance with the requirements of subsection (a), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any listed,

proposed, or candidate species [which is listed or proposed to be listed] may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any listed, proposed, or candidate [endangered species or threatened] species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(d) LIMITATION ON COMMITMENT OF RESOURCES. - After initiation of consultation required under subsection (a), neither the Federal agency nor [and] the permit or license applicant shall [not] make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative

measures which would avoid jeopardizing the continued existence of any listed, proposed, or candidate [endangered or threatened] species or adversely modifying or destroying the critical habitat of any such species.

(g) APPLICATION FOR EXEMPTION AND CONSIDERATION BY REVIEW BOARD. - (1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a), the Secretary's opinion under subsection (b) indicates that the agency action may jeopardize the continued existence of any listed, proposed, or candidate [endangered or threatened] species or destroy or adversely modify the critical habitat of such species. An application for an exemption shall be considered initially by a review board in the manner provided in this subsection, and shall be considered by the Endangered Species Committee for a final determination under subsection (h) after a report is made by the review board. The applicant for an exemption shall be referred to as the 'exemption applicant' in this section.

(5) It shall be the duty of a review board appointed under paragraph (3) to make a full review of the consultation carried out under subsection (a), and within 60 days

after its appointment or within such longer time as is mutually agreed upon between the exemption applicant and the Secretary, to make a determination, by a majority vote, (1) whether an irresolvable conflict exists and (2) whether such exemption applicant has -

(A) carried out its consultation responsibilities as described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which will avoid jeopardizing the continued existence of listed, proposed, or candidate [endangered or threatened] species or result in the adverse modification or destruction of a critical habitat;

(B) conducted any biological assessment required of it by subsection (c); and

(C) refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

Any determination by the review board that an irresolvable conflict does not exist or that the exemption applicant has not met the requirements of subparagraph (A), (B), or (C) shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(h) EXEMPTION. - (1) The Committee shall make a final determination whether or not to grant an exemption within 90 days of receiving the report of the review board under section (g)(7). The Committee shall grant an exemption from the requirements of subsection (a) for an agency action if, by a vote of not less than five of its members voting in person -

(A) it determines on the record, based on the report of the review board and on such other testimony or evidence as it may receive, that -

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; and

(iii) the action is of regional or national significance; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the listed, proposed, or candidate [endangered species, threatened] species, or critical habitat concerned.

Any financial determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under subsection (h) shall constitute a permanent exemption with respect to all listed, proposed, or candidate [endangered or threatened] species for the purposes of completing such agency action: Provided, That a biological assessment has been conducted as required by [under] subsection (c) or voluntarily conducted in accordance with subsection (c).

(B) An exemption shall not be permanent under subparagraph (A) if the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of the species. If the Secretary so finds, the Committee shall determine within 30 days after such finding whether to grant an exemption for the agency action notwithstanding the Secretary's finding.