WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR DALE SCHULTZ

FROM: Laura Rose, Deputy Director

RE: Background on Patients Compensation Fund, Description of Budget Proposal, and Discussion of Constitutional Issues Surrounding the Budget Proposal

DATE: March 14, 2003

This memorandum, prepared at your request, provides information on the Patients Compensation Fund (PCF). This memorandum provides background on the creation of the PCF and major changes to the fund that have occurred since its creation; describes the structure and operation of the PCF; describes the proposal in 2003 Senate Bill 44 (the 2003-05 Biennial Budget Bill) to create a new subchapter in ch. 655 for health care provider access and availability and to transfer $200 million from PCF to the newly created program; and discusses possible constitutional issues surrounding the proposal in Senate Bill 44.

BACKGROUND

1975 Legislation

In the 1975 Legislative Session, the Legislature enacted comprehensive malpractice legislation that contained the following provisions:

- Created a mandatory health care liability risk-sharing plan under s. 619.04, Stats., known as the Wisconsin Health Care Liability Insurance Plan (WHCLIP). The WHCLIP provides professional liability insurance for physicians, hospitals, and nurse anesthetists, if such insurance was not readily available in the voluntary market.

- Required all physicians, hospitals, and nurse anesthetists to be insured in the amount of at least $100,000 per claim and $300,000 ($100,000/$300,000) per year in total claims and limited the maximum liability for malpractice for these health care providers who obtain such coverage to $200,000 per claim and $600,000 ($200,000/$600,000) per year in total claims. (These dollar amounts have been periodically revised and are now set at $1,000,000/$3,000,000.)

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- Created the PCF to pay any settlement or award which exceeded $200,000 or which, when added to previous claims paid during the year by the health care provider's insurer, caused a total of such claims against the provider to exceed $600,000. (These dollar amounts have been periodically revised and are now set at $1,000,000/$3,000,000.)

- Restricted attorney contingency fees and required an attorney to offer to charge a client on a per diem or per hour basis, instead of a contingency basis, at the time the attorney was retained.

- Required amounts for future medical expenses in excess of $25,000 in any settlement or award for a malpractice claim to be paid into the PCF and paid out periodically to the patient, as needed. (These dollar amounts have been periodically revised and are now set at $100,000.)

- Established "informal" PCF panels to review malpractice claims for $10,000 or less and formal PCF panels to review claims for more than $10,000. The cost of the panels was financed by annual fees imposed on physicians and hospitals.

1985 Wisconsin Act 340

1985 Wisconsin Act 340, the product of the Legislative Council's Special Committee on Medical Malpractice, addressed the operations and solvency of the PCF and the WHCLIP; examined the legal doctrines and professional standards relating to the determination of professional liability of health care providers; and examined the operations and effectiveness of the patient compensation panels.

Act 340 contained the following major provisions:

- Limited the total recovery for noneconomic damages for any single occurrence of medical malpractice against all health care providers covered by ch. 655 to $1 million for awards made between June 14, 1986 and December 31, 1990.

- Raised the threshold at which the fund assumed liability for payment.

- Abolished the patient compensation panels and created a malpractice mediation system. Act 340 imposed a mediation participation requirement for all parties to a medical malpractice case filed after September 1, 1986.

- Required the fund fees for physicians to be established as a four-category fee structure and placed a limit on fees set by the PCF Board of Governors for a particular fiscal year. It also required the PCF Board of Governors, in setting rates for the fund, to consider the loss and expense experience of an individual health care provider which resulted in payments from the fund or other sources.

- Removed podiatrists from the fund effective July 1, 1986; expanded the range of corporations covered by the fund and the WHCLIP; expanded the coverage of hospitals by the fund under the WHCLIP; clarified that the fund provides coverage for actions brought against health care providers or their employees acting within the scope of their employment.

- Made various changes to the health care provider discipline provisions in ch. 448 and also created a statutory presumption of good faith on the part of any person participating in peer review activities. The fund also was expanded to provide coverage for a liability relating to peer review activities of health care providers covered by the fund.

1995 Wisconsin Act 10

1995 Wisconsin Act 10 made several changes to the medical malpractice laws, as follows:

- Recreated a provision relating to the periodic payment of future medical expenses, which was part of the original medical malpractice law of 1975, and was sunset by 1985 Wisconsin Act 340.

- Created a new limitation on noneconomic damages for all health care providers that applies to acts or omissions occurring on or after the effective date of 1995 Wisconsin Act 10. This limit, originally established as $1 million in 1985 Wisconsin Act 340, was reduced to $350,000 and indexed for inflation.

- Reinstated a periodic payment provision for fund liability of $1 million or more applicable to acts or omissions occurring on or after May 25, 1995.

- Provided that damages recoverable in a wrongful death action against a health care provider and employees of health care providers are subject to the provisions of s. 895.04 (4), Stats., the $150,000 wrongful death limit for loss of society and companionship (the limit is now $500,000 in the case of a deceased minor and $350,000 for a deceased adult). Further, if damages in excess of the limit are found, the court must make any necessary reductions for contributory negligence and award the lesser of the reduced amount or the limit under s. 895.04 (4), Stats.

DESCRIPTION OF THE PCF

Board of Governors

Subchapter IV of Chapter 655, Stats., governs the PCF. The PCF Board of Governors consists of 13 members: three representatives of the insurance industry appointed and serving at the pleasure of the Commissioner of Insurance; a person named by the Wisconsin Bar Association; a person named by the Wisconsin Academy of Trial Lawyers; two persons named by the Wisconsin Medical Society; a person named by the Wisconsin Hospital Association; the Commissioner of Insurance or designee employed by the Office of the Commissioner; and four public members, at least two of whom are not attorneys or physicians and are not professionally affiliated with any hospital or insurance company, appointed by the Governor for staggered three-year terms. The Commissioner of Insurance is the chairperson of the Board of Governors. The Board of Governors governs the PCF, as well as the WHCLIP under s. 619.04, Stats.

Participating Providers

Participation in the PCF and in the WHCLIP is mandatory among the following classes of health care providers:

- Physicians and osteopaths licensed under ch. 448, Stats.;
- Registered nurses licensed under ch. 441, Stats., who are certified nurse anesthetists;
- Corporations or partnerships comprised of physicians or nurse anesthetists organized and operating in Wisconsin for the primary purpose of providing medical services of physicians or nurse anesthetists;
- A cooperative sickness care association;
- An ambulatory surgery center operating in Wisconsin;
- A hospital operating in Wisconsin;
- An entity operating in this state that is an affiliate of a hospital and that provides diagnosis or treatment of, or care for, patients at the hospital; and
- A nursing home whose operations are combined as a single entity with a hospital, whether or not the nursing home operations are physically separate from the operations.

Employees of health care providers are also covered by the PCF.

Mandatory Malpractice Coverage

Health care providers covered by ch. 655 must insure their liability by a health care liability policy in the amounts of $1 million for each occurrence and $3 million for all occurrences in any one policy year for occurrence coverage; or $1 million for each claim arising for an occurrence and $3 million for all claims in any one recording year for claims-made coverage. (Insurance on an occurrence basis covers all claims that arise out of ***services provided*** during the year in which insurance coverage is provided; claims-made coverage covers ***claims that are filed*** during a year in which coverage is provided.) A provider may also self-insure for those same amounts. Health care providers covered under ch. 655 must comply with these requirements before being permitted to operate under their licenses.

PCF Assessments

The purpose of the PCF is to pay that portion of a medical malpractice claim which is in excess of these limits or the maximum liability for which a health care provider is insured, whichever limit is greater. The fund provides occurrence coverage for claims against health care providers and against employees of those health care providers, reasonable and necessary expenses incurred in payment of claims, and PCF administrative expenses.

Each health care provider participating in the fund must pay an annual assessment. The assessments are deposited into the fund to pay claims and to pay the costs of the PCF Peer Review Council. The assessments are based on:

- Past and prospective loss and expense experience in different types of practice;
- Past and prospective loss and expense experience of the fund;
- The loss and expense experience of the individual health care provider which resulted in the payment of money, from the fund or other sources, for damages arising out of the rendering of medical care by the health care provider or an employee of the health care provider. An adjustment to a health care provider's fees may not be made under this provision prior to the receipt of the recommendation of the PCF Peer Review Council, the expiration of the time period for the health care provider to comment on the recommendations, or prior to the expiration of the time period under s. 655.275, Stats.;
- Risk factors for persons who are semi-retired or part-time professionals; and
- For corporations or partnerships of physicians and nurse anesthetists, and cooperative sickness care associations, risk factors and past and prospective loss and expense experience attributable to employees of that health care provider other than employees licensed as a physician or nurse anesthetist.

The fees are set by the Commissioner of Insurance by administrative rule. The fees are divided into four payment classifications based on the amount of surgery performed in the risk of diagnostic and therapeutic services provided or procedures performed.

Automatic increases in a health care provider's fees are provided for if the loss and expense experience of the fund and other sources with respect to the health care provider or a health care provider's employee exceed either a number or dollar volume of claims paid threshold. Both of these thresholds are established by rule. The fees assessed by rule may not exceed the greatest of the following:

- The estimated total dollar amount of claims to be paid during that particular fiscal year.
- The fees assessed for the fiscal year preceding that particular fiscal year, adjusted by the Commissioner of Insurance to reflect changes in the Consumer Price Index for the medical care group.
- 200% of the total dollar amount disbursed for claims during the calendar year preceding that particular fiscal year.

Use of PCF Moneys; Payment of Claims

The statutes provide that the PCF shall be held in trust for the purposes of ch. 655 and may not be used for purposes other than those of ch. 655.

Any patient or patient's representative having a claim, or any spouse, parent, minor sibling, or child of a patient having a derivative claim for injury or death on account of malpractice is bound by ch. 655. Any person filing a claim may recover from the PCF only if the health care provider or employee of the health care provider has coverage under the PCF, the PCF is named as a party in the action and the action against the PCF is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced. If, after reviewing the facts of the claim or action, it appears probable that damages paid will exceed the $1 million/$3 million limits, the PCF may appear and actively defend itself when named as a party in an action against a provider covered under the PCF. The PCF is also permitted to retain counsel and pay attorneys fees out of the fund.

Moneys may be withdrawn from the fund by the Commissioner only upon vouchers approved and authorized by the Board of Governors. The Board of Governors must furnish an annual financial report to the Commissioner. (A copy of the most recent report of the Commissioner on the PCF is attached to this memorandum.) The report must be prepared in accordance with accepted accounting procedures and must include the present value of all claim reserves including those for incurred but not reported claims as determined by accepted actuarial principles and such other information as may be required by the Commissioner. The State Investment Board is required to invest the moneys held in the PCF in investments with maturities and liquidity that are appropriate for the needs of the fund as reported by the Board of Governors in its quarterly report. All income derived from these investments are credited to the PCF.

The person who has recovered a final judgment or settlement approved by the Board of Governors against a health care provider or an employee of a health care provider that has coverage under the PCF may file a claim with the Board of Governors to recover that portion of the judgment that exceeds the $1 million/$3 million limits or the maximum liability limit for which the health care provider is insured, whichever limit is greater.

Peer Review Council; Mediation

Chapter 655 sets up the PCF Peer Review Council. The purpose of this council is to review, within one year of the date of the first payment on a claim, each claim that is paid by the fund, by the WHCLIP, a private health care liability insurer, or a self-insurer for damages arising out of the rendering of medical care by a health care provider or a provider's employee. The Peer Review Council also makes recommendations regarding PCF fee adjustments to the Commissioner of Insurance and the PCF Board of Governors, as well as for premiums assessed against a physician under the WHCLIP and premiums assessed by a private health care liability insurer against a physician covered by private insurance.

Chapter 655 also establishes a mediation system in which participation is mandatory prior to court action. The statute of limitations for filing a medical malpractice cause of action is tolled during the period of time in which mediation is occurring.

DESCRIPTION OF BUDGET PROPOSAL

2003 Senate Bill 44, introduced by Governor Doyle, on February 20, 2003, makes the following changes to the PCF:

- Creates subch. VIII of ch. 655, the health care provider availability and cost control fund. The purposes of the fund are to assist in the education and training of health care providers; ensure that Medical Assistance health care providers and providers for other health care programs established by this state receive sufficient reimbursement rates to retain their participation in the programs; and defray the cost of other health-related programs that the Secretary of Health and Family Services determines are effective in ensuring the availability of health care providers in this state, and controlling the cost of health care services.

- Funds the health care availability and cost control fund with the transfer of $200 million in fiscal year 2003-04 from the PCF to the health care provider availability and cost control fund.

- Establishes a sum-sufficient appropriation for the payment of any portion of a claim for damages arising out of the rendering of health care services that the PCF is required to pay under ch. 655 but that the PCF is unable to pay because of insufficient moneys.

- Provides for the administration of the health care availability and cost control fund by the State Investment Board.

POSSIBLE CONSTITUTIONAL ISSUES SURROUNDING THE PCF PROPOSAL

Two possible constitutional issues may be raised with respect to the proposal in 2003 Senate Bill 44, relating to transfer of funds from the PCF reserves to the newly created health care provider availability and cost control fund: the taking of property without just compensation and impairment of contracts. It should be noted that it is beyond the scope of the memorandum to speculate on the effects of the Senate Bill 44 proposal on fees paid by participating PCF providers or on the PCF's ability to pay claims. This information may be a factor in evaluating these legal arguments.

Taking of Property

The U.S. Constitution, Amendment Five, provides in part: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor."

In *Wisconsin Professional Police Association, Inc. v. Lightbourn*, 243 Wis. 2d 512, 627 N.W.2d 807 (S. Ct. Wis. 2001), Justice Prosser set forth the initial steps in analyzing a taking claim: whether a private property interest exists, and whether the private property has been taken. If private property is shown to have been taken, the next steps are to determine whether the property is taken for a valid public use, and whether just compensation is provided therefore. *Wisconsin Retired Teachers Assn. v. Employee Trust Funds Board*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997).

Property Interest

An accrued claim for medical malpractice is a property interest. *Aicher v. Wisconsin Patients Compensation Fund*, 237 Wis. 2d 99, at 143 (S. Ct. 2000). An individual who receives a malpractice award has a property right in having their claim paid by the PCF if it exceeds the limits for which the liable health care provider is insured. If the Senate Bill 44 proposal jeopardized the payment of a claimant's award by the PCF, it could be seen as a taking of property without due process of law.

It might also be possible to assert that participating PCF providers, if required to pay higher fees as a result of the Senate Bill 44 proposal, had their property taken because they did not agree to fund the health care provider availability and cost control fund created in Senate Bill 44 with their PCF fees.

It could be argued, however, that the cash reserves in the PCF are ***not*** private property. In *Great Lakes Higher Education Corporation v. U.S. Department of Education*, 911 F. 2d 10 (7th Cir. 1990), the cash reserves of the Great Lakes Higher Education Corporation (GLHEC), a private, nonprofit, corporation providing student loan guarantees, were found not to be "private property" for the purposes of the Fifth Amendment to the U.S. Constitution. 911 F. 2d 10 at 14. In that case, the U.S. Department of Education (DOE), after amendments to the statutes governing the agreements between student loan guarantee agencies such as GLHEC and DOE, recouped cash reserves from these agencies that it determined were excessive. The court said this recoupment of reserves was not a taking:

> The purpose and legal structure of Great Lakes places it in that borderline between the wholly public and wholly private instrumentality. The extensive federal regulation of the agency suggests its highly public nature . . . . In essence, Great Lakes is an intermediary between the United States and the lender of the student loan. The United States is the loan guarantor of last resort. Great Lakes assists the United States in performing that function. It cannot be compelled to perform that function, nor can it insist that its compensation for that service be irrevocably fixed. We, therefore, conclude that the reserve fund excess is not "private property" for purposes of the Fifth Amendment. 911 F. 2d 10, at 13-14.

Taking of a Property Interest

If it is determined that private property interests exist, the next question is whether: (1) the proposal in 2003 Senate Bill 44 to create a new fund in ch. 655 and transfer $200,000,000 from the PCF reserves jeopardizes the payment of any accrued claims under the PCF; or (2) the proposal will result in an increase in PCF provider fees, and those fees are taken for a use not contemplated by Assembly Bill 655.

A component of the proposal is to create a sum-sufficient general purpose revenue fund in the Office of the Commissioner of Insurance under s. 20.145 (2) (a). SECTION 299 of Senate Bill 44 provides as follows:

> 20.145 **(2)** (a) Claims payable by patients compensation fund. A sum sufficient for paying any portion of a claim for damages arising out of the rendering of health care services that the patients compensation fund under

> s. 655.27 is required to pay under ch. 655 but that the patients compensation fund is unable to pay because of insufficient moneys.

This provision indicates intent to ensure that malpractice claims brought against the PCF are paid in full. Because this appropriation is drafted as a sum-sufficient fund, this ensures that funds will be available to pay claims if the PCF determines that the $200,000,000 transfer leaves it with insufficient moneys to pay claims.

Several Wisconsin Supreme Court cases examined transfer of funds from state trust funds to other funds. A recent case, *Wisconsin Professional Police Association, supra*, held that legislation which authorized the transfer of funds from the one account in the Wisconsin Retirement System (the transaction amortization account or TAA) to the reserves and accounts in the fixed trust, which resulted in more benefits to some classes of fund participants over others, did not constitute a taking.

Another transfer at issue in this case involved a distribution of $200,000,000 from the employer reserve to employers as a credit for employers against unfunded liabilities. The court stated that this was not an unconstitutional taking of property, nor was it an unconstitutional impairment of contract:

> The size of the employer reserve balance does not increase or in any way determine the contractual benefit to be received by participants. At best, the balance in the employer reserve may heighten the possibility of an increase in the formula multiplier or the benefit caps in a future vote by the state legislature.... No one in this litigation suggests that Act 11 abrogates the statutory and constitutional obligation of employers to fulfill benefit commitments to participants. These "benefits accrued" for "service rendered" are the essence of the property right enjoyed by participants. There is no taking of property or impairment of contract when everyone concedes that accrued benefits must be paid.... 243 Wis. 2d 512, at 602-603.

This case would appear to support the position that the Senate Bill 44 proposal does not constitute a taking, since the proposal attempts to ensure payment of claims if the PCF runs out of money.

Other cases that have found an unconstitutional taking upon transfer from vested retirement funds. In *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549 (S. Ct. Wis. 1996), the court determined that it was an unconstitutional taking to give retirement service credits to district attorneys transferred from the Milwaukee County system to the state system and fund the transferred credits by transferring moneys out of the county pension fund, instead of paying for the credits with state moneys. This case can be distinguished from the Senate Bill 44 proposal. It appears that the funds transferred out of the PCF are intended to be replaced with state general purpose revenue to the extent that the fund is left with insufficient moneys to pay claims once the transfer is made.

An unconstitutional taking was found in *Wisconsin Retired Teachers Association, Inc. v. ETF Board*, 207 Wis. 2d 1 (S. Ct. Wis. 1997). In that case, a transfer from the retirement fund was authorized by the passage of a law that superseded the role of the ETF in making such transfers. In that case, 25% of annuitants received a special investment performance dividend as part of a $230 million

distribution from the TAA, while 75% of annuitants received no dividend. This distribution violated many of the statutory provisions in ch. 40, and superseded the statutory role of the Employee Trust Fund in making these distributions.

That case may also be distinguished from the budget proposal in Senate Bill 44, in that the proposal amends provisions in ch. 655 to permit the $200 million transfer to the newly created fund. The purposes of ch. 655 are expanded in Senate Bill 44 to encompass this new purpose: the funding, through the PCF, of the health care provider availability and cost control fund.

The proponents of the Senate Bill 44 proposal also appear to be arguing that ch. 655 included the purposes of ensuring health care provider affordability and cost control even before the proposed expansion of the chapter in Senate Bill 44. The *Budget in Brief*, pp. 58-59, attempts to support this assertion by citing *Patients Compensation Fund v. Lutheran Hospital*, 223 Wis. 2d 439 (S. Ct. 1999) and *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491 (S. Ct. 1978).

However, it could also be argued that ch. 655 did not encompass these purposes at the time the reserves were accumulated, and to require PCF participating providers to finance these new purposes violates ch. 655 and constitutes a taking.

Impairment of Contract

Article I, Section 10 of the U.S. Constitution provides, in part, as follows: "No state shall...pass any...law impairing the obligations of contracts...."

Article I, Section 12 of the Wisconsin Constitution, provides, in part, as follows: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed...."

The Wisconsin Supreme Court, in *Wisconsin Professional Police Association, supra*, stated that it usually follows a three-step methodology developed by the U.S. Supreme Court in analyzing impairment of contract claims: first, to inquire whether the challenged statute has operated as a substantial impairment of a contractual relationship; second, if the legislation is found to substantially impair a contractual relationship, whether there exists a significant and legitimate public purpose behind the legislation; and third, if such a public purpose exists, whether the challenged legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *Wisconsin Professional Police Association*, 234 Wis. 2d 512, at 593-594.

In this case, health care providers required to participate in the PCF could claim a contractual relationship with the state through the PCF: in return for payment of the mandated fees, the participating providers receive malpractice coverage for claims which exceed the amounts covered by their private malpractice insurance policies. By creating a new purpose for ch. 655 after the establishment of the initial contractual relationship, these providers could assert that they did not agree to have their fees used for this broader statutory purpose.

If this proposal were to be enacted into law and subsequently challenged in court, the court would first analyze whether this change in the purpose of ch. 655 operated as a significant impairment of contract. In *Great Lakes Higher Education Corporation v. U.S. Department of Education, supra*, the court found no impairment of contract when the agreement between GLHEC and the U.S. DOE was

altered by statutory amendments to permit the recoupment of cash reserves. However, in that case, the original enabling legislation specifically stated that GLHEC agreed to conform both to the existing federal statutes and regulations and to new obligations that Congress or the Secretary of Education might impose in the future. GLHEC consented to these terms in the insurance program agreement. 911 F. 2d 10, at 12. In this case, the statutes governing the PCF do not mention that the health care providers participating in the PCF agree to be bound by new obligations that the Legislature might impose on the fund in the future. Of course, the Legislature is free to amend the purpose of the PCF at any time. However, it could be questioned whether reserves that were established under current law may be bound by the new purposes proposed in Senate Bill 44.

As noted earlier, the Governor's explanation of the proposal in the *Budget in Brief*, 2003-05, pp. 58-59, however, seems to assert that the PCF could already be used for these purposes even prior to the addition of subch. VIII to ch. 655 in Senate Bill 44.

If a court found an impairment of contract, a court would then examine whether there is a significant and legitimate public purpose behind the legislation that allegedly gave rise to the impairment. The proponents would likely assert that using PCF reserves to maintain and increase Medical Assistance reimbursement rates is essential to maintaining the participation of health care providers in the Medical Assistance program and to ensure the availability of health care providers to serve low-income persons in this state. Alternatively, if the transfer of funds were to somehow result in an unacceptable fee increase for participating providers that served to lessen the supply of providers, it could be argued that the proposal does not serve a significant and legitimate public purpose. However, it is beyond the scope of this memorandum to speculate on the effect of the proposal on PCF fees.

Finally, if an impairment of contract was found, but was justified by a legitimate public purpose, a court would examine whether the legislation is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. A court would probably examine whether the establishment of the sum-sufficient fund to ensure payment of claims if the PCF might be unable to pay is a reasonable condition. It might also examine whether it is reasonable and appropriate to require mandatory PCF participants to supplement Medical Assistance provider rates with their fees and to have their fees fund the other purposes established under the health care provider availability and cost control fund.

If you have any questions or need additional information, please contact me directly at the Legislative Council staff offices.

LR:rv:tlu:jal:ksm;wu;tlu

Attachment

Question TO Milliman 3-17-02

Quest TO WI AG

Can moneys collected TO date be utilized under Broadband Language in SB-44 which opened up The PCF Fund -?

Committee Meeting Attendance Sheet

Committee on Agriculture, Financial Institutions and Insurance

Date: March 17th, 2003 **Meeting Type:** Public Informational Joint

Location: ROOM 411 SOUTH STATE CAPITOL

Committee Member	Present	Absent	Excused
Senator Dale Schultz	☑	☐	☐
Senator Ronald Brown	☑	☐	☐
Senator Neal Kedzie	☑	☐	☐
Senator Judith Robson	☐	☑	☐
Senator David Hansen	☑	☐	☐
Totals:	_____	_____	_____

(1)

PATIENTS COMPENSATION Fund -

3-~~17~~17-02

Sen. Schultz — Millman NOT Present MILLIMAN USA -

Robson — FISCAL RESPONSIBILITY + ACCOUNTING ACTUARIAL

Subject MATTER -

Schultz — OPEN RECORD REQUEST TO OCI & DOA - ON CONTACTS IN PAST 30 DAYS

Gomez — PCF ORDERED Millman TO DO AUDIT -

Randy Bloomer - DO WE HAVE RIGHTS TO PCI BOARD

— — DOES NOT KNOW MUST LOOK AT CONTRACT

Roessler - OCI ANTICIPATING ACTUARIAL REPORT from MILLIMAN

When — BOARD ASKED for LEGAL OPINION - then ACTUARIAL

Michael Best & Friedrich ~~Q~~ outside legal copy

— — GET COPY TO Members of Both Committee

Covey — Client - Lawyer OPINION MAY be Confidential

Gomez SAYS (—

Vauch

Question — WHAT IS CONDITION OF Fund - How quickly Can Fund be ANALYZED

Audit Report RAISED question

Current Condition, EFFECT, WHAT WAS LAST DATA

Sept 30, 2002

655.27 - GAAP principle

ASSESS would EXCEED LIABILITY on June 30

of - $255,000.00 - DEFICIT

BOND, STOCK, . ASSETS & RATE TO PAY

expected Claims & Ongoing Claims

Governs Budget ~~Surplus~~ ALLOWS FOR payment by State

if Fund runs Short.

X

(2)

PATIENTS COMPENSATION FUND HEARING 3-17-02

RE TO STATE GUARANTEE,

Jauch — WHO TOLD OCI THAT 200 mil WAS OK

OCI — NUMBER WAS DEFINED BY GOV. Q WHAT WAS IMPACT DOA

DAVID Reimer - DOA Budget -
RANDY Bhoomer - WOULD - HAVE been in PLACE

Schultz — WAS BTS SET UP TO FUND

Did THEY DOA ASK FOR ANALYSIS BY OCI
Bloomer — NO -

Gomez — STATE IS GUARANTEEING MONEY - FUND will STAY Fbaird, if RECEIPTS remain the SAME as - it has been for 15 - 20 years

CHVALA — WANTS TO TAKE more - $100,000

DANGER is CATOSTROPHIC EVENTS
Gomez - — TAKING more THAN 200. mil is dangerous -

Roessler — Q's AT WHAT POINT does GPR BACKUP SUM SUFFICIENT

JAUCH — Q Can $200 be TAKEN From fund
INCREASE TO PROVIDER - PCF HAS AGREED TO 5% increase

(3)

Patients Compensation Fund. 3-17-02

Bloomer — PCF Board
5% Premium Increase why ~~was~~ was it Raised

Choal — Any Formula why 200 100 150 or Any Formula For arriving at this #

Gomy — No Precise Formula.

Andrew Ravenscroft —

Roessler — - Comfort level Comes From Bkelkop GPR)
If we take 2m out rely on GPR. How will Reinsurer feel. -
They would not run on insurer Company or Not principle

Jauch — Quest to Ravenscroft on Position should have been directed To Banking Co-

Schultz — To DR. Chair of Board
Did Board make decision To move fund in more Actually Reponsible fund.

A — Cap Did help
Fund was to Cover Abused To Begin With

Jauch — To Dr. Mority
Taking 200 mil will Result in Provider Increase — Next year or Two would go up
Will there be an immediate increase

↓

(4)

3-17-02

Patients Comp Fund Hearing

Dr. Moritz — Will have a profound effect on the trust of the Fund

Sawyer — Looking for additional language in STATUTE

MORITZ — NOT The Fund manager-

DR. PAUL JACOBS – WI Medical Society
This is A PATIENTS Comp Fund
If you TAKE OUT 200 mil 14 mil.
is out income rates by 15% will?
STATE back up earned ~~interest~~ income?

Will STATE Pay Back all including the earned income

Next year we will need another 5% premium increase

90% of $ in Fund ~~goes~~ comes From Drs. 80% is paid out TO HOSPITALS

DAN Swartzer - WI Assn Health Underwriters
OPPOSSED TO 200 m. or ~~a~~ Any proposal TO raise in prem

PATRICK Downey – Tony Driess
Fund PROTECTS The PATIENTS ALL 130 Attorneys
OPPOSSED T RAIDING of Fund-

(5)

MARK ADAM Gen Co WI Med. Society
member PCE -
Med Soc understands Concern - TAKING of
200 will Result in 280 mil Deficit
Physicians PAY 80% of Fund Rates will
go up -
Fund Fees will HAVE TO Increase
by 50% in 25 years. & for 25 years -

Sen Braun -
Looking at Claim
Snapshot of 1 or 2 years Can give no
Confidence
Fund is strictly where Actuarials say
fund should be

Schultz Would 50% increase precipitate Medical
Malpractice Crisis - MANY Physicians - NPAs
WILL Retire or Limit Practice or leave
the STATE

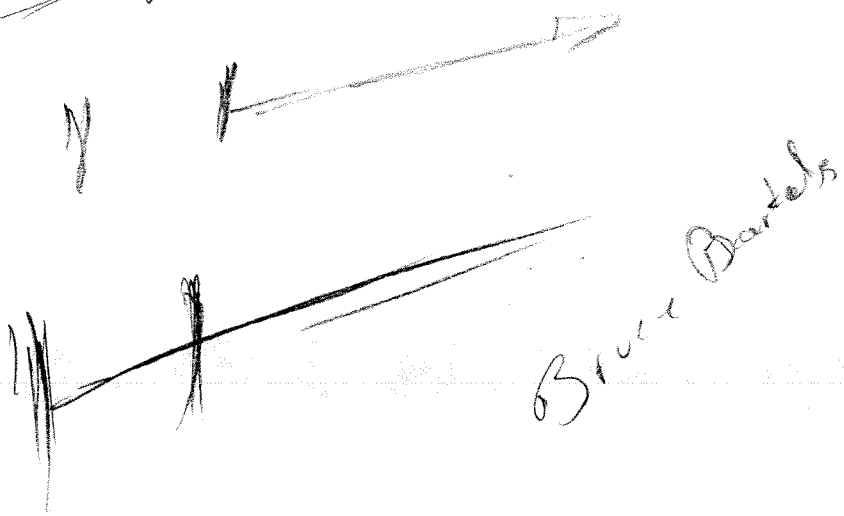
Schultz When would Problem first Crop up
Inner City - rural -

What do you mean by good track record

PCF Stability

- moving towards stability -

- equity between providers -



Suggested Questions: Senate Joint Hearing re: PCF

For Commissioner-designee Gomez (or OCI's Blumer or Wedekind should Gomez choose not to reply):

1) The PCF's outside actuary – Milliman USA – says the PCF currently has sufficient assets to cover current and future liabilities, in large part because the PCF is allowed to assume certain future investment income. What is your professional opinion regarding the possible effects a $200 million reduction to the PCF fund would have on Wisconsin's medical liability insurance environment?

2) What is your professional recommendation on how to keep the PCF fiscally sound on a going-forward basis?

3) Wisconsin is one of only six states (CA, CO, Indiana, LA and NM are the others) whose medical liability insurance system is NOT considered by the American Medical Association to be in either "crisis" or "near-crisis" modes. In your professional opinion, do you believe the current WI medical liability insurance system is working well? Are there any suggested changes or improvements to the system you would recommend for possible consideration?

4) How is the PCF different from other insurance companies who are required to carry reserves? Would the Fund have enough in reserves ~~next year~~ if $200 million were taken, and will additional assessments be necessary to keep the fund in compliance with state law?

5) What would prevent the State from requiring fund participants to make up any PCF shortfall that the State may be liable for under the Governor's budget proposal?

For Pete Wick, Milliman USA:

1) Please compare Wisconsin's PCF against what other states do re: medical liability insurance.

2) What kind of actuarial stability can Wisconsin expect in the future without increasing assessments on physicians (who make up 90 percent of PCF payments)?

For Andrew Ravenscroft, PIC-Wisconsin:

1) With questions regarding PCF solvency, how will a $200 million reduction in assets affect the reinsurance market for medial liability insurance companies doing business in WI?

For Mark Adams, WI Medical Society and PCF Board member:

1) You have served on the PCF Board of Governors for many years as a representative of the Wisconsin Medical Society. In your opinion, do you as a Board member believe a taking of $200 million from the PCF assets will have any effect on the medical liability insurance environment in this state?

2) What is the PCF Board's charge in the state statutes? What are the consequences for the Board (and therein those who contribute to the fund) if $200 million is claimed?

3) How does the recent Legislative Audit Bureau's audit of the PCF (No. 01-11) – and its statement that deficits are not allowed – affect a potential fund fee increase?

4) Can you comment on one statement said about the fund: that the fund's actuaries are too conservative in assessing how much assets are required for stability?

For Dr. Walter Moritz and/or Dr. Paul Jacobs:

1) Historical background needed: please describe the reasons for the PCF's creation back in 1975, what the purpose is for collecting fees from health care providers and your thoughts on the proposal to take $200 million from the PCF.

2) Do you believe the Legislature ever intended that PCF assets be used for anything besides what the statute says: paying medical liability claims beyond the required primary insurance limits?

3) Is Wisconsin's current medical liability insurance environment attractive to doctors in other states?

WISCONSIN ASSOCIATION OF
HEALTH UNDERWRITERS
Wisconsin's Benefit Specialists

Senate Committee on Agriculture, Financial Institutions & Insurance

&

Senate Committee on Health Children, Families, Aging & Long Term Care

March 17, 2003

Written Testimony of

Wisconsin Association of Health Underwriters

We would like to thank both the Senate Committee on Agriculture, Financial Institutions & Insurance, and the Senate Committee on Health, Children, Families, Aging & Long Term Care for this opportunity to provide testimony today. We are submitting this testimony on behalf of Wisconsin Association of Health Underwriters. As a chapter of The National Association of Health Underwriters, we are insurance professionals involved in the sale and service of health insurance, long-term care insurance, and other related products, serving the health plan needs of over 100 million Americans. We have almost 18,000 members around the country, and over 500 members right here in Wisconsin. With the combined force of our membership and their respective agencies and corporations, our membership represents literally millions of Wisconsin health insurance consumers.

Our membership is primarily made up of insurance agents that work directly for and with the consumers of health care. Since our number one concern is our customers, we consider ourselves to be consumer advocates and look at how any legislation will affect those customers.

The Wisconsin Association of Health Underwriters strongly opposes Governor Doyle's proposal to take $200 Million from the Patients Compensation Fund. We oppose this because of the effect it will have on Wisconsin's Health Care Consumers.

Our comments will not attempt to address the technical reasons on how this proposal will affect the fund or the fees it charges to physicians. The Fund will have experts and actuaries that will describe these details to you. Quite frankly, we agree with their rationale. As insurance experts, we understand the purpose of Reserve Requirements and the concepts of claims that have been incurred, but not paid. Just like any health insurance company, if proper reserve requirements are not met, there will not be enough money to pay future claims. This is a

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concept that the executive branch should understand, as it is the responsibility of the Office of the Commissioner of Insurance to enforce that all insurance companies have proper reserves for future claims.

Our comments will also not address the affect this will have on physicians. The Medical Community will describe for you in detail how this will affect their practices and how it will affect Medical Malpractice in Wisconsin. We do not disagree that this will have an effect on the fund and consequently, the physicians.

However, while we understand the concern of the fund and the physicians, in all reality and with all due respect, they are not the ones who will ultimately be hurt by this idea. By raiding $200 million from the fund, in order to remain solvent, the fund will simply increase their fees charged to the physicians. This is nothing more than a pass through. Then, the physicians will simply increase their fees charged to insurance companies. This is also another pass through. And finally, the insurance companies will simply increase their premiums charged to our customers. That is truly where the buck stops.

So while we all discuss another proposal and how it will negatively effect insurance companies and providers, the cold hard truth is that the ones who really will be affected are the consumers who will once again bear the brunt of a misguided legislative proposal.

We have seen a massive expansion of the BadgerCare program. The legislation behind BadgerCare was well intended – providing financial assistance for health care coverage. Yet, at the end of the day, our customers have seen an increase in their premiums because of this expansion of a government program. Physicians get squeezed because of the reimbursements they receive for BadgerCare recipients, and they simply cost shift those losses to insurance companies in the private sector. The insurance companies then raise their premiums to our customers to cover the increased costs that were shifted from the providers. The result is the consumer pays more. The medical community has complained for some time that they don't get paid enough from Medicare participants. We do not disagree, but at the end of the day, it's our customers that pay higher premiums because the federal government doesn't pay fair reimbursements.

Example after example, the health care consumer is the one getting squeezed. The fact is, consumers just can't afford one more dollar in any increase to the cost of their premiums. Health care coverage has reached the point of being unaffordable and our agents continue to talk about an increase in the number of employers simply dropping their group health coverage.

Its hard to image that we are debating any proposal that will add costs to an insurance policy in a time where things are so bad that people are actually thinking that Universal Health Care is the answer. It doesn't matter whether we're talking about another insurance mandate that will increase premiums by 1% or 2 %, or whether we're talking about this idea to raid the Patient

Compensation Fund, the pass through eventually reaches the end of the line, and the end of the line is the consumers. For some time now, the consumers have made it clear that they simply can't afford it. The Wisconsin Association of Health Underwriters will continue to strongly oppose any idea that will increase costs even one more dollar, and I urge your Committees to do the same. Please oppose this idea of taking $200 million from the Patients Compensation Fund, as it will only increase the costs of premiums for Wisconsin consumers.

Thank you for the opportunity to testify and if we can answer any other questions, provide any additional material, or help out in any way, please do not hesitate to contact us.

Patients Compensation Fund Hearing
Monday, March 17, 1:00 pm
Room 411 South

Invited Speakers:

1) Jorge Gomez, Commissioner of Insurance
2) Randy Blumer, Deputy Commissioner of Insurance
3) Theresa Wedekind, Patients Compensation Fund Administrator
4) Andrew Ravenscroft, PIC Wisconsin
5) Walter Moritz, MD, Member of the PCF Board and current Chair of the Actuarial Committee of the PCF Board
6) Dr. Paul Jacobs, Wisconsin Medical Society representative on the Actuarial Committee of the PCF Board
7) Dan Schwartzer, Registered Lobbyist, Wisconsin Association of Health Underwriters
8) Patrick Downey, President – Wisconsin Association of Nurse Anesthetists
9) Mark Adams, General Counsel, Wisconsin Medical Society, Member of the PCF Board, Chair of the Claims and Risk Management Committee and member of the Legal Committee

January 23, 2003
Senate Committee on Agriculture, Financial institutions, and Insurance Hearing
Department of Natural Resources
Nonpoint Performance Standard Rules

DNR established the performance standards (what), DATCP established agricultural technical standards (how)

Core DNR Performance Standard Rule – NR 151

- Agricultural Performance Standards and Prohibitions
  - Croplands must meet tolerable soil loss ("T")
  - Clean Water Diversions required in Water Quality Management Areas (WQMA)
  - A WQMA is 300 feet from a stream, 1,000 feet from a lake or an area susceptible to groundwater contamination.
  - Manure storage structures, if built (they are not required), must minimize the risk of structural failure and leakage and be designed with adequate capacity to contain a 25-year 24-hour storm.
  - Crop and livestock producers must apply manure and other nutrients in accordance with a nutrient management plan. (Delayed implementation: 2005 in ORW, ERW and impaired water areas and 2008 for the rest of the state.)
  - Manure Management Prohibitions
    - No direct runoff from a feedlot or stored manure into waters of the state
    - No unconfined manure piles in a WQMA
    - No overflow of manure storage facilities
    - No unlimited access of livestock to waters of the state where maintenance of adequate sod cover is prevented.
- Non-Agricultural and Transportation Facility Performance Standards

Construction Erosion Control and Storm Water Management model Ordinances – NR 152

Targeted Runoff Management Grant Program – NR 153

Best Management Practices and Cost-Share Conditions – NR 154

- Agricultural technical standards are cross-referenced to ATCP 50
- Some differences in cost-share rates and conditions between NR 154 and ATCP 50

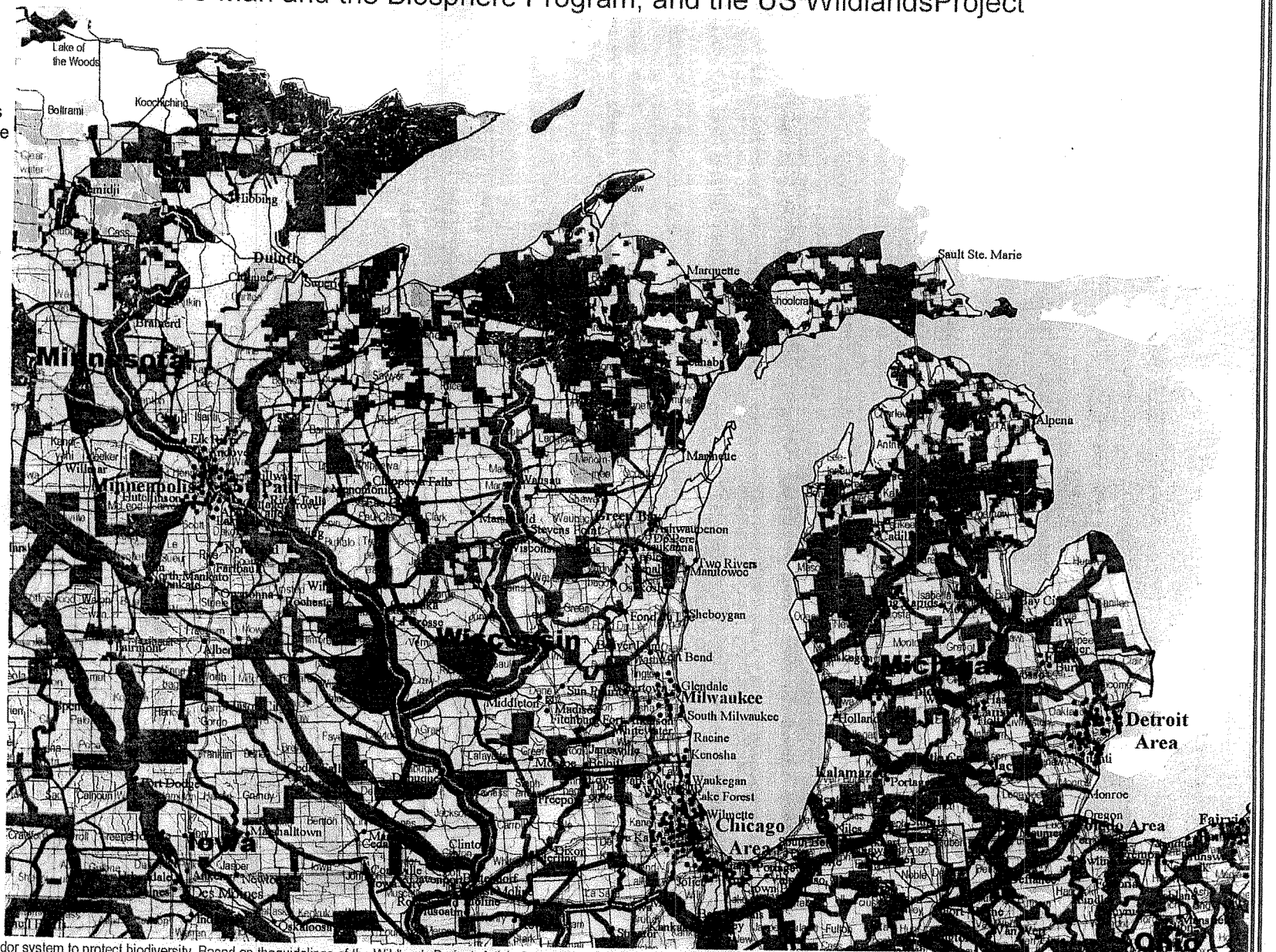
Urban Nonpoint Source Water Pollution Abatement and Storm Water Management Grant Program – NR 155

Revisions to three other rules:

- NR 120 – Priority Watershed and Priority Lake Program
- NR 216 - Storm Water Discharge Permits
- NR 243 – Animal Feeding Operations

SIMULATION OF THE PLAN TO PROTECT BIODIVERSITY

As Defined by the Convention On Biological Diversity, the UN GlobalBiodiversity Assessment, the UN/US Man and the Biosphere Program, and the US WildlandsProject



Simulation of a reserve and corridor system to protect biodiversity. Based on theguidelines of the Wildlands Project, Article 8a-e of the Convention on Biological DiversityTreaty, Section 13.4.2.2.3 of the United Nations Global Biodiversity Assessment, and "TheWildlands Project", Wild Earth, December, 1992. Also see Science, "The High Cost ofBiodiversity", June, 1993, Vol 260:1868-1871. Not for real estate purposes.

EXPLANATION OF THE BIODIVERSITY TREATY AND THE WILDLANDS PROJECT

This map is based on the strategy and procedures laid out in what is known as the *Wildlands Project* and the UN/US *Man and the Biosphere Program* (MAB). Both are based on the need of protecting biological diversity using core wilderness reserves which are surrounded by buffer zones that variably regulate human activity to protect the attributes of the core reserves (see below). Areas not included in core reserves or buffer zones are *zones of cooperation* where regulations are designed to favor biodiversity and ecosystems.

The Statutory Framework of the World Network of Biosphere Reserves, The Seville Agreement for the MAB Program, and the Strategic Plan for the USMAB all state the MAB Program is designed to help implement the *Convention on Biological Diversity,* a treaty currently before the US Senate for ratification. Likewise, Section 13.4.2.2.3 of the United Nations Global Biodiversity Assessment defines the Wildlands Project as the basis for preserving biodiversity for the *Convention on Biological Diversity*. The Wildlands Project is based on the science of *conservation biology* and was developed by Dr. Michael Soulé, co-founder and first president of the *Society for Conservation Biology*; Dr. Reed Noss, current editor for the journal of *Conservation Biology*; and David Foreman, co-founder and long-time leader of *Earth First!*

The science of conservation biology was largely created by the IUCN (International Union for Conservation of Nature). The IUCN is an accredited UN advisor and is comprised of government agencies and NGOs (non-governmental organizations). These include the EPA, US Forest Service, US National Park Service, US Fish and Wildlife Service, The Sierra Club, National Wildlife Federation, Natural Resources Defense Council, The Nature Conservancy, Society for Conservation Biology, and many others. The IUCN is also one of the primary promoters and developers of the Convention on Biological Diversity. This perhaps explains why the US Government and environmental organizations appear to be working in concert to implement the Wildlands Project and Biodiversity Treaty even though the treaty has not been ratified.

This map is drawn under the supervision of a Ph.D. in Ecology, and follows instructions provided by the Wildlands Project, the UN/US MAB, and the rapidly increasing control within US counties through the UN/US Heritage programs. This is especially true for counties having federal land, particularly in the Western US. The map incorporates, when available, actual maps as well as a multitude of government and environmental literature demanding various reserves or national parks interconnected with corridors.

MAGNITUDE OF THE WILDLANDS PROJECT

"Conservation must be practiced on a truly grand scale," claims Reed Noss. And grand it is. Taken from the article "The Wildlands Project: Land Conservation Strategy" in the 1992 special issue of *Wild Earth*, Noss provides the whopping dimensions of this effort.

Core reserves are wilderness areas that supposedly allow biodiversity to flourish. "It is estimated," claims Noss, "that large carnivores and ungulates require reserves on the scale of ***2.5 to 25 million acres***. . . . For a minimum viable population of 1000 [large mammals], the figures would be ***242 million acres for grizzly bears, 200 million acres for wolverines, and 100 million acres for wolves.*** Core reserves should be managed as roadless areas (wilderness). All roads should be permanently closed."

Corridors are "extensions of reserves. . . . *Multiple* corridors interconnecting a network of core reserves provide functional redundancy and mitigate against disturbance. . . . Corridors several miles wide are needed if the objective is to maintain resident populations of large carnivores."

Buffer zones should have two or more zones "so that a gradation of use intensity exists from the core reserve to the developed landscape. Inner zones should have low road density (no more than 0.5 mile/square mile) and low-intensity use such as. . .hiking, cross-country skiing, birding, primitive camping, wilderness hunting and fishing, and low-intensity silviculture (light selective cutting)."

WHAT DO RESERVES AND CORRIDORS REALLY MEAN?

While this effort has a noble mission, the implications are staggering. As noted in the June 25, 1993 issue of *Science*, it "*is nothing less than the transformation of America to an archipelago of human-inhabited islands surrounded by natural areas.*"

According to the Wildlands Project, "***One half of the land area of the 48 conterminous*** [united] states be encompassed in core [wilderyness] reserves and inner corridor zones (essentially extensions of core reserves) within the ***next few decades.... Half of a region in wilderness*** is a reasonable guess of what it will take to restore viable populations of large carnivores and natural disturbance regimes, ***assuming that most of the other 50 percent is managed intelligently as buffer zone.***" (Noss, 1992) If fully implemented, the Convention On Biological Diversity would have to ***displace millions of people*** through unacceptable regulations, nationalization of private land, and forcing people to move out of core reserve areas and inner buffer zones. It would seriously reduce the production of agriculture, forest, and mining products. In the process, millions of Americans could lose their jobs. In turn, the resulting scarce resources means the rest of us are going to pay double and triple for these products.

This may sound insane, but it's either being planned or implemented right now across America. Land is being condemned or zoned in reserves, corridors or buffer zones under a variety of names to reestablish or protect biodiversity and/or specific species. Should these quasi-religious theories and pseudo-science determine our future?

RESERVES & CORRIDORS DO NOT WORK

What science is really showing is that there is no clear evidence that reserves and corridors work or are even needed. Rather, good forest management, including the use of clearcutting, enhances biodiversity and sustainability:

- "The theory has *not* been properly validated and the practical value of biogeographic principles for conservation remains unknown. . . . The theory *provides **no special insights*** relevant to conservation." Zimmerman, B.L. and R.O. Bierregaard. 1986. *Journal of Biogeography* 13:133-143.
- The theory behind the need for reserves and corridors is being "increasingly heavily criticized. . .as inapplicable to most of nature, largely because *local population extinction was not demonstrated.*" Simberloff, D. J. Farr, J. Cox, and D. Mehlman. 1992. "Movement Corridors: Conservation Bargains or Poor Investment?" Conservation Biology 6(4):495.
- "***No*** unified theory combines genetic, demographic, and other forces threatening small populations, ***nor*** is their accord on the relative importance of these threats." Ibid.
- "There are still few data, and many widely cited reports are ***unconvincing***. . . . [The theory that reserves and corridors] "facilitate movement *is now almost an **article of faith***." Ibid.
- "Studies that have been frequently cited as illustrating corridor use for faunal movement, ***do not***, in fact, provide clear evidence." Of those that do support the need for corridors, wooded fence rows are adequate for many species, while only a few require well vegetated strips. Hobbs, R.J. 1992. "The Role of Corridors in Conservation: Solution or Bandwagon?" Tree 7(11):389.

The science used in the Convention on Biological Diversity does not work and may actually reduce biodiversity. The implications of this treaty are enormous and must be thoroughly reviewed before it is considered for ratification.

Why Value-Added Agriculture?

Statistics provided by the U.S. Department of Agriculture, Economic Research Service, illustrate how the value added to agricultural products beyond the farm gate has greatly outpaced the value of raw agricultural goods since 1950.