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TAXPAYER-FUNDED LITIGATION: BENEFITTING LAWYERS AND HARMING SPECIES, JOBS AND SCHOOLS

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

Tuesday, June 19, 2012

Serial No. 112-116

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PRINTING OFFICE

74-665 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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OVERSIGHT HEARING ON "TAXPAYER-FUNDED LITIGATION: BENEFITTING LAWYERS AND HARMING SPECIES, JOBS AND SCHOOLS."

Tuesday, June 19, 2012
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

The Committee met, pursuant to notice, at 10:01, in Room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Duncan of Tennessee, Gohmert, Lamborn, Coffman, McClintock, Tipton, Labrador, Noem, Flores, Harris, and Amodei; Markey, Kildee, Napolitano, Holt, Costa, and Sablan.

Also Present: Representative Bilbray.

The CHAIRMAN. The Committee will come to order, and the Chair notes the presence of a quorum.

The Committee on Natural Resources meets today to hear testimony on taxpayer-funded litigation benefitting lawyers and harming species, jobs, and schools. I ask unanimous consent that Mr. Bilbray from California be allowed to participate in the hearing. He had expressed an interest in doing so. And without objection, so ordered.

We will now begin, and I will recognize myself for five minutes for my opening statement.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

The CHAIRMAN. The Endangered Species Act was last renewed in 1988, when the price of a movie ticket was $3.50 and a cell phone, if you had one, was the size of a brick. A lot has changed since then. Nearly 25 years later, we have a responsibility to ensure this decades-old expired law reflects changes and reality so it can be more effective going forward for both species and for people. That is what this hearing and future hearings will be about.

Today we will more closely look at one of the greatest weaknesses of the ESA, how excessive and costly litigation is distorting the ESA's goals. To quote Jamie Clark, the Clinton Government-era Fish and Wildlife Service Director, ESA litigation has become an "industry."

The original purpose of the ESA was to help recover endangered species and remove them from the list, not force taxpayers to reward an army of environmental lawyers to exploit vague definitions and deadlines that realistically cannot be met.

The dramatic proliferation of lawsuits has serious consequences for both the species' recovery and for our economy. First, endless litigation diverts valuable time and resources away from actual

recovery efforts. Agency personnel, the States, communities, and private enterprise are forced to react to lawsuits, thereby affecting the real efforts to conserve and recover species.

Second, these lawsuits over the past four years have numbered more than 500 and have cost taxpayers millions of dollars, dollars that go straight to the pockets of special interest lawyers. As an example, the Department of Justice noted that two lawyers received over $2 million each in attorney fees from ESA cases.

Third, there is an apparent lack of transparency and accountability to taxpayers when ESA settlements are being negotiated behind closed doors by attorneys that receive taxpayer-funded fees from Federal agencies.

According to information the Committee has obtained from the Justice Department, over $21 million has been paid out in attorney fees in recent years. And that is just what we know. And as seen by this map up here, the costs of the ESA litigation are high throughout the country, but much worse in the Western part of the United States.

Not surprisingly, the majority of ESA lawsuits are filed by the same handful of organizations, with the Center for Biological Diversity and WildEarth Guardians leading the pack. According to one report, attorneys' fees and Federal grants accounted for 41 percent of WildEarth Guardians' revenue in 2010. So apparently, it does "pay to play." It is clearly appropriate to ask, in these tight fiscal times, whether taxpayers should subsidize groups that sue taxpayers in return.

While a few environmental lawyers rake in the Federal cash at hundreds of dollars per hour, the needs of truly endangered species suffer. More seriously, American jobs are lost and people are hurt.

Today, in a later panel, we will hear how ESA lawsuits have blocked the construction of a San Diego elementary school since 2006. The school district created habitat for the fairy shrimp, and for the past six years it has been caught in endless red tape to complete the school that obviously was intended to educate our children. Ironically, another witness here today was himself deeply involved in that litigation—litigation that paid him attorneys' fees and blocked the school from being built.

Before I conclude, there has been much discussion lately on how best to define success regarding the Endangered Species Act. I have noted that of the 1,391 domestic animal and plant species listed under the Act, only 20 have been removed. This represents just less than a 1-1/2 percent recovery rate, and I do not think anybody should be proud of that.

A recent Center for Biological Diversity report claims that the ESA is sufficiently recovering species. CBD claimed success by using data for only 110 of those listed species that have recovery plans. This cherry-picking is less than 10 percent recovery, and that is hardly anything to shout about. We need to move beyond a system where species are added to the list, but never come off.

Increasing the number of ESA species should not be the primary goal. It should be to recover species and get them taken off the list. Litigation that blocks economic activity and public needs, such as building schools, not only impedes recovery, but it diminishes trust of taxpayers who are subsidizing that litigation.

[The prepared statement of Mr. Hastings follows:]

Statement of The Honorable Doc Hastings, Chairman, Committee on Natural Resources

The Endangered Species Act was last renewed in 1988, when the price of a movie ticket was $3.50 and a cell phone, if you had one, was the size of a brick. The world has changed a lot since then.

Nearly 25 years later, we have a responsibility to ensure this decades-old, expired law reflects changes and reality so that it can be more effective going forward for both species and people. That's what this hearing and future hearings will be about.

Today, we will more closely look at one of the greatest weaknesses of the ESA—how excessive and costly litigation is distorting the ESA's goals. To quote Jamie Clark, the Clinton government-era Fish and Wildlife Service Director, ESA litigation has become an "industry."

The original purpose of the ESA was to help recover endangered species and remove them from the list, not force taxpayers to reward an army of environmental lawyers to exploit vague definitions and deadlines that realistically cannot be met.

The dramatic proliferation of lawsuits has serious consequences for both species recovery and our economy.

First, endless litigation diverts valuable time and resources away from actual recovery efforts. Agency personnel, states, communities and private enterprise are forced to react to lawsuits, thereby affecting real efforts to conserve and recover species.

Second, these lawsuits, over the past four years numbered more than 500, and cost taxpayers millions of dollars—dollars that go straight to the pockets of special interest lawyers. As an example, the Justice Department (DOJ) noted two lawyers received over $2 million each in attorney fees from ESA cases.

Third, there's an apparent lack of transparency and accountability to taxpayers when ESA settlements are being negotiated behind closed doors by attorneys that receive taxpayer-funded fees from federal agencies.

According to information the Committee obtained from the Justice Department, over $21 million has been paid out in attorney fees in recent years. And that's just what we know. As seen on this map, the costs of the ESA litigation are high throughout the country, but much worse in the West.

Not surprisingly, the majority of ESA lawsuits are filed by the same handful of organizations—with the Center for Biological Diversity and WildEarth Guardians leading the pack.

According to the one report, attorneys' fees and federal grants accounted for 41% of WildEarth Guardians's revenue in 2010. Apparently, it "pays to play." It is clearly appropriate to ask in these tight fiscal times, whether taxpayers should subsidize groups that sue taxpayers in return.

While a few environmental lawyers rake in the federal cash at hundreds of dollars per hour, the needs of truly endangered species suffer. More seriously, American jobs are lost and people are hurt.

Today, we will hear how ESA lawsuits have blocked the construction of a San Diego elementary school since 2006. The school district created habitat for fairy shrimp and for the past six years has been caught in endless red tape to complete a school intended to educate hundreds of children. Ironically, another witness here today was himself deeply involved in that litigation—litigation that paid him attorneys' fees and blocked the school from being built.

Before I conclude—there's been much discussion lately on how best to define success regarding ESA. I've noted that of the 1,391 domestic animal and plant species listed under the Act, only 20 have ever been removed from the list—this represents just a 1 percent recovery rate that no one should be proud of.

A recent Center for Biological Diversity report claims that the ESA is sufficiently recovering species. CBD claimed success by using data for only 110 of the listed species that have federally-approved recovery plans. This "cherry picking" less than 10 percent of the total listed species data seriously diminishes their report's credibility.

We need to move beyond a system where species are added to the list, but never come off. Increasing the number of ESA species shouldn't be the primary goal. It should be to recover species and get them taken off the list. Litigation that blocks economic activity and public needs, such as building schools, not only impedes recovery, it diminishes trust of taxpayers who are subsidizing that litigation.

The CHAIRMAN. And with that, I will recognize the distinguished Ranking Member of the Committee, Mr. Markey of Massachusetts.

STATEMENT OF THE HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. MARKEY. Thank you, Mr. Chairman, very much.

This week on the House Floor, Republicans are pursuing their great American giveaway. Two omnibus Republican bills would hand out millions of acres of land to oil and gas companies, handpick old growth forests for logging interests, and trample on the rights of Americans living, working, or traveling within 100 miles of our borders.

Today's hearing on the Endangered Species Act is another example of the great American giveaway. In addition to selling off our public lands to Big Oil and relinquishing our constitutional rights to Big Brother, Republicans are questioning the right of Americans to challenge Government actions in the courts.

They are attacking the ability of citizens to bring suits against the Federal Government when it fails to follow the law. Without this check, the oil, mining, and timber industries can maximize their influence on Government actions without any serious check from the public.

According to the Majority's original May analysis of information provided by the Department of Justice, the Federal Government has reimbursed almost $13 million in attorneys' fees since 2009 in cases involving the Endangered Species Act. That works out to an average of $3.7 million per year.

In comparison, last year House Republicans proposed to cut money for endangered species programs $72 million per year below the President's Fiscal Year 2012 request. These proposed cuts to resources for recovering was almost 20 times more than the average attorneys' fees paid per year. If the Republican Majority really wanted to help species recover, they would be adding funds for endangered species restoration, not subtracting them.

Since 1988, the bald eagle is now off the list. Grey wolves are now off the list in Montana and Washington State and Oregon. But the list still contains grizzly bears, right whales, the Pacific yew tree, where we derive Taxol to fight cancer, and so far very successfully.

The Majority has also raised questions about individual Endangered Species Act cases with large payment of attorney's fees. These, too, should be put in perspective.

For example, in 2006, the Bush Administration paid out $18.7 million in a single telecommunication case that the Government lost. One case. Since 2009, $8.7 billion has been paid out of the Judgment Fund.

Attorney's fees for cases involving Endangered Species Act are less than two-tenths of one percent of that total. Of course, the Judgment Fund is part of the Treasury Department. Awards made from it do not come from funds appropriated to agencies.

The Republican argument that litigation somehow hinders the recovery if endangered species just does not add up. The cost of such litigation makes up a tiny fraction of all of the cases successfully brought against the Federal Government each year.

In reality, dealing with litigation is just a small part of the work done by the Federal Government to protect endangered species.

The vast majority of the Government's time and effort is spent on conservation.

Just last week an historic agreement between the Fish and Wildlife Service and the States of Texas and New Mexico protected critical habitat of the dunes sagebrush lizard, and kept it from being added to the Threatened Species List. Even Congressman Steve Pearce called these plans some of the most successful ever.

Around the country, Government scientists are working with States, counties, cities, and individual land owners to develop science-based solutions that work for people and protected species.

Contrary to the claims of some, the Endangered Species Act has done exactly what it was intended to do, help wildlife and plants and fish survive. Since its enactment in 1973, only two species on the endangered list have gone extinct, an over 99 percent success rate in avoiding extinction.

Recovery of species is also on track. A recent analysis found that 90 percent of species are recovering at the rate specified their Federal recovery plans. No one can call that a failure, either.

Extinction is forever. It is the ultimate giveaway. We will never know the benefits that might have come from species that have disappeared from the earth. That is why the vast majority of Americans of all ages, ethnicities, and education, both Democrat and Republican, strongly support the Endangered Species Act.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Markey follows:]

Statement of The Honorable Edward J. Markey, Ranking Member, Committee on Natural Resources

This week on the House floor Republicans are pursuing their 'Great American Giveaway.' Two omnibus Republican bills would hand out millions of acres of land to oil and gas companies, hand pick old-growth forests for logging interests, and trample on the rights of Americans living, working or traveling within 100 miles of our borders.

Today's hearing on the Endangered Species Act is another example of the Great American giveaway. In addition to selling off our public lands to Big Oil and relinquishing our Constitutional rights to Big Brother, Republicans are questioning the rights of Americans to challenge government actions in the courts. They are attacking the ability of citizens to bring suits against the federal government when it fails to follow the law. Without this check, the oil, mining and timber industries can maximize their influence on government actions without any serious check from the public.

According to the Majority's analysis of information provided by the Department of Justice, the federal government has reimbursed almost $13 million in attorneys' fees since 2009 in cases involving the Endangered Species Act. That works out to an average of $3.7 million per year. In comparison, last year House Republicans proposed to cut money for endangered species programs $72 million below the president's fiscal year 2012 request. These proposed cuts to resources for recovering species was almost 20 times more than the average attorney fees paid per year. If the Republican majority really wanted to help species recover, they would be adding funds for endangered species restoration, not subtracting them.

The Majority has also raised questions about individual Endangered Species Act cases with large payment of attorneys' fees. Those too should be put in perspective. For example, in 2006, the Bush administration paid out $18.7 million in a single telecommunication case that the government lost. One case! Since 2009, $8.7 billion has been paid out of the Judgment Fund. Attorneys' fees for cases involving the Endangered Species Act are less than two-tenths of one percent of that total. Of course the Judgment Fund is part of the Treasury Department. Awards made from it don't come from funds appropriated to agencies. The Republican argument that litigation somehow hinders the recovery of endangered species just doesn't add up. The cost of such litigation makes up a tiny fraction of all of the cases successfully brought against the federal government each year.

In reality, dealing with litigation is just a small part of the work done by the federal government to protect endangered species. The vast majority of the government's time and effort is spent on conservation. Just last week an historic agreement between the Fish and Wildlife Service and the states of Texas and New Mexico protected critical habitat of the Dunes Sagebrush lizard and kept it from being added to the threatened species list. Even Congressman Steve Pearce called these plans "some of the most successful ever." Around the country, government scientists are working with states, counties, cities and individual land owners to develop science-based solutions that work for people and protected species.

Contrary to the claims of some, the Endangered Species Act has done exactly what it was intended to do: help wildlife, plants, and fish survive. Since its enactment in 1973, only 2 species on the endangered list have gone extinct—an over 99 percent success rate in avoiding extinction. Recovery of species is also on track. A recent analysis found that 90 percent of species are recovering at the rate specified by their federal recovery plans. No one can call that failure.

Extinction is forever. It is the ultimate giveaway. We will never know the benefits that might have come from species that have disappeared from the Earth. That's why the vast majority of Americans, of all ages, ethnicities, and education, both Democrats and Republicans, strongly support the Endangered Species Act.

The CHAIRMAN. I thank the gentleman for his statement. And I am very pleased, our first panel, to have The Honorable Jeff Sessions from the great State of Alabama, more specifically Mobile, Alabama; and a former colleague on this Committee, Congresswoman Cynthia Lummis from the great State of Wyoming, more specifically Cheyenne, Wyoming.

So in our invitation, we mentioned that your full statement will appear in the record. But we have the five-minute rule over here. And so with that, Senator Sessions, you are recognized for five minutes.

STATEMENT OF HON. JEFF SESSIONS, A UNITED STATES SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman, and Ranking Member Markey, and distinguished Members of the panel. It is an honor to be with you.

I served for 12 years as United States Attorney and two years as Attorney General of Alabama, some years as an Assistant United States Attorney, and I have an appreciation for one of the problems I believe our legal system faces today. I will offer my statement for the record and just share a few thoughts with you.

There is a development in our country in recent years by which lawsuits are filed by advocacy groups—they can be conservative, liberal, Republican, or Democrat—to seek to advance an agenda that they have. And too often, we have seen an erosion of a classical principle that we United States Attorneys and an Assistant, as I once was, were taught.

And that principle is, you should defend the rules and regulations of the United States even if you do not agree with them, even if your President does not agree with them, even if it is not popular, because they were the duly elected, duly selected, passed law of the United States. And to erode that law by not defending it effectively in a District Court somewhere in America is to erode law in America, to erode the principles of our country.

One of the most dramatic examples of that, and my predecessor as Attorney General agreed, to add two new Justices to the Alabama Supreme Court in response to a lawsuit challenging the

elected process of justices in Alabama—amending the Constitution and violating the Constitution of Alabama, the laws of Alabama, never asking the Legislature if they were willing to pay two more judges.

I got elected, and we appealed, and the Federal Court overruled that and said that was wrong. The Alabama Constitution should not have been overridden so lightly. But this was an example of a lawyer meeting with the other side, agreeing to a statement, and the district judge approving the settlement. The trial judge approved the settlement because normally the parties in agreement before a judge, the judge approves the settlement they enter into.

Well, we have seen a great deal of that happening, I believe, with the Endangered Species Act. Maybe some good settlements and maybe some bad settlements, but my sense is that often, that the people involved, committed to protection of endangered species, unable to get Congress to pass laws or expend monies to do as they would like to see the process be done, are not too eager to defend aggressively against a lawsuit asking that they be required to do that.

And this lack of clear defense and lack of principled approach, I think, does endanger the rule of law in America. And it causes Americans to wake up and say, how did this happen? How did multi-million-dollar, hundreds of millions of dollars, in requirements, environmental or otherwise, get imposed on us? How did it occur?

And it occurred somewhere in court, where you have an unelected Federal judge with a lifetime appointment. Attorneys are part of the bureaucracy. And people just say, well, that is what the judge ruled, you know? We are bound by it. That is the right thing. You cannot have anything to do about it, American people. It has been decided by a court of law. And a judge issues a judgment. And that judgment is in many ways more difficult to deal with than a Federal regulation, and it becomes a judgment of law.

So I think, Mr. Chairman, you are on the right track to be asking these questions in a principled way, in a long-term way, that will protect endangered species. I believe in that. I know we all do. I had a great visit on a river this weekend. Walked into Tennessee. And we have an extraordinary number of endangered species in that stream. I was shocked how many.

Alabama is number three in the Nation in endangered species, and we want to protect them. But we need to do it in a lawful way, an effective way, that is in accord with our principles. And we need to know how these decisions are reached, who is making these settlements, and if we could come up with a better way to have oversight over that, I think the people of the United States would be better able to affix responsibility for the burdens that gets imposed on them.

So it is an honor to be with you. I think you are serving history, and you are serving the Constitution. And I appreciate this opportunity.

[The prepared statement of Mr. Sessions follows:]

Statement of The Honorable Jeff Sessions,
a U.S. Senator from the State of Alabama

Mr. Chairman, Ranking Member Markey, and other members of this Committee:

I am honored to be with you today to discuss an issue that is critical to the rule of law in America. The situation arises when a litigant or advocacy group sues the government and demands some sort of policy relief. You are rightly focusing on the large number of cases under the Endangered Species Act, but the problem is pervasive.

From the days years ago when I was an Assistant U.S. Attorney and U.S. Attorney, the principle to be followed by the government attorneys was to vigorously defend the duly enacted rule or law of the United States no matter what the lawyer or the presidential administration then in power, and for whom you worked, publicly or privately thought about it.

The regulation or law being duly enacted became the law of the United States until it was changed. The government attorney's clear duty in such cases was to defend it against all efforts to alter or weaken it. The lawyers defended it dutifully because it is your job and there was no one else.

As you can imagine, this principle is non-partisan. Some days it may work to the benefit of one party, one special interest, one ideology and another day, against. But, this is the core idea of a lawful society.

Now in recent decades, a dangerous trend has emerged. Advocacy lawsuits have more and more been used as a tool to advance an agenda. This abuse of law is particularly insidious when government attorneys, for political or policy reasons, fail to do their duty.

Let me give you a dramatic example. A lawsuit was filed by certain civil rights groups supported by certain plaintiff lawyer interests against the method of selecting Alabama Supreme Court justices. Our Justices are elected. They contended the system was discriminatory in results. The Attorney General then in office agreed to settle the case. The settlement called for adding two justices to the Alabama Supreme Court, and he agreed that the new justices would, in effect, be selected by a committee of the plaintiffs, and not elected. All of this was in violation of the Alabama constitution, and Alabama law, and all without appropriations from the legislature to pay for the new justices. The settlement was approved by the Federal District Judge. I was elected Attorney General later that year, appealed the case, defended Alabama law, and won it in the Court of Appeals.

During this period, a series of education lawsuits, referred to as "equity funding" cases arose. Advocates for more education funding and taxes, attacked the unequal results of local education taxes. Supported by powerful education interests, the cases resulted in "settlements" all over the country, changing the duly enacted funding policies of many states. Many of these cases were an overreach. Often the attorneys representing the states caved to political pressure rather than defending the law of the state.

A Democratic Attorney General in Tennessee fought the lawsuit in Tennessee, as was his duty, and won. But many other Attorneys General cut a deal and, I believe, improperly undermined the legislature and law of their state. Some of these lawsuits were not adversarial as the system contemplates—but collusive.

Now, it works like this in environmental law cases. An agency, state or federal, desirous of more stringent laws, more funding, and more power, has their wishes rebuffed by the legislature. Then a lawsuit is filed demanding the Agency take the action favored by the Agency. Then the case is "settled" by the state or federal attorneys to the benefit of the plaintiff and to the satisfaction of the Agency or the President. The judge, after being informed that the United States or the State agree with the settlement, normally approves the settlement. The result is that law and regulations are expanded, altered, and violated, often far beyond their intent or plain meaning.

Thus, the power to legislate—that is given in our system to the elected legislative branch—is defeated and altered in a way that is not obvious to the people. This unhealthy process is further advanced by the requirement that, in certain cases, the U.S. government must pay the private attorneys if they win. From 2001 to 2010, the Interior Department made over 230 attorney fee payments "as a result of Endangered Species Act litigation", totaling more than $21 million. This practice appears to be accelerating. GAO has found that the number of Interior Department attorney fee and cost payments increased by 76% from 2008 to 2010 (from 21 to 37 payments). GAO even identified one payment in 2010 that exceeded $5.6 million.

Unfortunately, the Interior Department does not seem to have a good grasp of the full costs. Due to discrepancies in how the agency tracks the information, GAO found that "the data may not be complete over the identified timeframe" and that

Interior Department "officials were not sure that they had provided the complete universe of cases." Senator Inhofe and I wrote the Administration, once in November and again last month, asking for copies of correspondence between the agency and the plaintiffs related to two of these settlements. To date, the Administration has refused to provide the requested documents on the basis that they are protected from disclosure because they relate to "mediation."

Please remember that, while the Department of Interior can urge their legal views to the Department of Justice, ultimately it is the Justice Department attorneys who represent the United States in court and who are responsible for defending the rule of law. I am frankly worried that they have not fulfilled their duties faithfully.

I am a strong believer in protecting endangered species. Only California and Hawaii have more threatened or endangered species than our beautiful and environmentally diverse state. Just this weekend, I hiked to the Walls of Jericho preserve where the river and streams are brimming with life.

But, lawyers, courts and bureaucrats do not get to make policy in this country. In the long run, we will all be better served if the nation's governing principles are followed. Indeed, disaster will result if we depart from our great heritage of law.

Your hearing, Mr. Chairman, is very important. I believe there is too much secrecy in these settlements. There is too often collusion. There is too much politics. The "sue and settle" actions can quickly become anti-democratic, leaving the American people unable to fix responsibility for policies being imposed with which they disagree.

Dig into this situation. It is important. History and the Constitution will salute you for it.

The CHAIRMAN. Well, thank you very much, Senator Sessions. Appreciate your remarks. And as I mentioned in my opening statement and, as a matter of fact, the first hearings we had, we feel—at least, I feel—that this litigation is something that needs to be addressed in an open and transparent way. So thank you very much for your remarks.

I will now recognize the gentlelady from Wyoming, Mrs. Lummis, who is a former Member of this Committee. And you know the rules because you have been on this Committee, so you are recognized for five minutes.

STATEMENT OF THE HON. CYNTHIA LUMMIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mrs. LUMMIS. Well, thank you, Mr. Chairman, Mr. Ranking Member, Members of the Committee. This is the third time today I have missed being on this Committee, and this is only my third meeting of the day. So thanks very much for allowing me the opportunity to speak today.

After listening with great interest to your committee discuss litigation as part of your hearing on the Endangered Species Act a few months ago, and especially now, after the Senator from Alabama has delivered forceful remarks on the need to update and modernize the Endangered Species Act, I thought it important to share with you what I have learned on taxpayer-funded litigation.

Understanding the types of litigation and the source of taxpayer funds for each is critical first step to fixing any problems associated with litigation. So with your indulgence, I want to use my time today to help set the stage for your important deliberations.

Title 16, Section 1540(g) of the U.S. Code is the law that authorizes citizen suits in the Endangered Species Act. Suits filed pursuant to this section of law are awarded fees and expenses through the Judgment Fund, a permanently appropriately bottomless pot of

money established for the purpose of paying judgments in suits against the Federal Government.

These citizen suits, and decisions about when and how much taxpayers should be on the hook to pay for them, fall squarely in this Committee's lap. It is critical that you take up this issue because I strongly believe that the court is not the right venue for ensuring successful species conservation.

But regardless of what you decide to do or not do about ESA-authorized litigation, the fact remains that Congress has clearly spoken about what types of litigation are appropriate under the ESA. Now, that is a fact that is important to distinguish the ESA litigation from Equal Access to Justice Act, or EAJA, litigation, as it is known.

At its core, EAJA is a social safety net program, not an environmental one. It is designed to reimburse individuals or small businesses the cost for attorneys that sue the Federal Government when no other law provides for that. The Congressional Record on EAJA's development and passage is crystal clear. Congress intended that it serve as a way to help veterans, retirees, and small businesses combat the Federal Government in court when they felt they had been personally wronged.

Unfortunately, the law throws up difficult roadblocks for these legitimate users to recoup their costs. Those roadblocks are virtually nonexistent in environmental litigation because of the difference in the types of cases brought to court. There is ample document that EAJA awards in environmental cases are exponentially larger than in cases involving our Nation's veterans or retirees.

I want to refer you to scholarly journals from Virginia Tech and Notre Dame, reports from the Government Accountability Office, and review of tax records and open court documents to confirm this. All these reports show that despite Congress' clear intent, EAJA has been used to reimburse groups for environmental lawsuits, and no one in Government is keeping track.

Contrary to lawsuits filed pursuant to the ESA, EAJA-reimbursed lawsuits that touch on ESA decisions are not related to actual environmental violations. Now, let me say that in a different way because it is a critical point. In every single EAJA—EAJA, as opposed to ESA—related cases, litigious environmental groups are paid not because they found an environmental violation but because they dispute the paperwork or procedure by which the Government reached a decision the environmental group opposed.

In essence, these groups use EAJA as a taxpayer-funded back door approach to protesting agency decisions and altering the ESA's operation without ever having to prove a violation of environmental law. Litigious environmental groups like to say that EAJA reimbursements are a small part of their budget. If that is true, then they will not miss the subsidy when it is gone. But either is a weak argument for the point.

Environmental laws exist for environmentalists. EAJA is for seniors, veterans, and small businesses in need. Because EAJA payments are supposed to come from agency budgets, every single dollar paid to support court battles over procedural grievances is a dollar not spent on actual recovery. We have lost sight of that, and

we have let litigious environmental groups exploit our lack of vigilance.

Mr. Chairman, I would refer you to my additional remarks in writing. And I deeply appreciate this Committee's time and indulgence to understand the distinction between ESA litigation and EAJA litigation this morning. Thank you.

[The prepared statement of Mrs. Lummis follows:]

Statement of The Honorable Cynthia M. Lummis, the Representative in Congress for All Wyoming

Thank you Mr. Chairman for this opportunity to speak with you today.

After listening with great interest to your committee discuss litigation as part of your hearing on the Endangered Species Act a few months ago, and especially now after the Senator from Alabama has delivered forceful remarks on the need to update and modernize the Endangered Species Act, I thought it important to share with you what I have learned on tax-payer funded litigation.

Understanding the types of litigation and the source of tax-payer funds for each is a critical first step to fixing any problems associated with litigation.

So with your indulgence, I want to use my time to help set the stage for your important deliberations today.

Title 16, Section 1540(g) of the United States Code is the law that authorizes so-called "citizen suits" in the Endangered Species Act. Suits filed pursuant to this section of the law are awarded fees and expenses through the Judgment Fund—a permanently appropriated bottomless pot of money established for the purpose of paying judgments in suits against the federal government.

These citizen suits, and the decisions about when, and how much tax-payers should be on the hook to pay for them fall squarely in this committee's lap.

It is critical that you take up this issue, because I strongly believe that the court is not the right venue for ensuring successful species conservation. But regardless of what you decide to do or not do about ESA authorized litigation, the fact remains that Congress has clearly spoken about what types of litigation are appropriate under the Endangered Species Act.

That is a very important distinction that separates ESA litigation from the Equal Access to Justice Act—or EAJA, as it's affectionately known.

At its core, EAJA is a social safety net program—not an environmental one. It is designed to reimburse individuals or small businesses the cost of attorneys for suing the federal government when **no other law provides for that**.

The Congressional Record on the bill's development and passage is crystal clear. Congress intended that EAJA serve as a way to help veterans, retirees and small businesses combat the federal government in court when they felt they had been personally wronged. Unfortunately, the law throws up difficult roadblocks for these legitimate users to recoup their costs.

Scholarly journals from Virginia Tech and Notre Dame, reports from the Government Accountability Office, and reviews of tax records and open court documents all show that despite Congress' clear intent, EAJA has been used to reimburse groups for environmental lawsuits—and no one is keeping track.

Contrary to lawsuits filed pursuant to the Endangered Species Act itself, EAJA reimbursed lawsuits that touch on ESA decisions are not related to actual violations of that law.

Let me say that in a different way because this is a critical point. In every single EAJA related case, litigious environmental groups are paid not because they have found an environmental violation, but because they dispute the paperwork or procedure by which the government reached a decision the environmental group opposed.

In essence, these groups use EAJA as a tax-payer funded, backdoor approach to protesting agency decisions, and altering the ESA's operation without ever having to prove a violation of the ESA itself.

Litigious environmental groups like to say that EAJA reimbursements are a small part of their budget. If that is true then they won't miss the subsidy when it's gone, but either way that weak argument entirely misses the point.

Environmental laws exist for environmentalists; EAJA is for seniors and veterans in need.

Because EAJA payments are supposed to come from agency budgets, every single dollar paid to support procedural grievances is a dollar not spent on actual species recovery. We have lost sight of that, and we have let litigious environmental groups exploit our lack of vigilance.

Those of us who live in the west will likely always deal with a higher volume of environmental litigation; it is a fact of life. The trick is getting the incentives right.

We need to push court battles toward legitimate environmental violations instead of spending tax-payer dollars to support rope-a-dope procedural protests when a group is simply dissatisfied with an outcome.

That is why my bill, the Government Litigation Savings Act, is so important in tandem with your hearing today.

If my bill becomes law, the litigious environmentalists can still litigate over procedures and paperwork, they simply cannot expect the tax-payer to pay them to do it any longer. Instead, they can only be reimbursed for substantive suits they win under the terms laid out for them in the Endangered Species Act.

While I may not always agree with the outcome of an open and public process for species conservation, I prefer that process any day of the week to the very private and privileged decision-making process of the courts.

In the Federalist #78, Alexander Hamilton wrote that the judicial branch is the weakest branch of the federal government; saying that the court has "no influence over either the sword or the purse."

Mr. Hamilton could never have envisioned what is now the norm. In the realm of species conservation, the court is much more than an equal partner with congress and the executive; it is the driving force behind the purse, and the policy.

I commend you for taking up this issue, and I urge you to work with your counterparts at the Judiciary Committee to advance the Government Litigation Savings Act. I am eager to hear the discussion today on ways we can properly manage litigation for the benefit of species recovery.

I yield back.

The CHAIRMAN. Thank you very much for your testimony. Thank both of you for your testimony. Obviously, this is going to be an ongoing process, as I mentioned in my opening remarks, and I very much appreciate your input. So with that, we will dismiss the first panel.

I would like to call now the second panel to the table. We have The Honorable Jerry Patterson, who is the Commissioner of the Texas General Land Office, from Austin, Texas; Mr. John Stokes, the Facilities Development Project Coordinator from the San Diego Unified School District from San Diego, California; Mr. Daniel Rohlf, Professor at Lewis and Clark Law School and the Pacific Environmental Advocacy Center, from Portland, Oregon; and Mr. Kent Holsinger, attorney at Holsinger Law Firm from Denver, Colorado.

I want to just tell you the rules. As I mentioned earlier, your full statement that you submitted will be a part of the record, and I would ask you to confine your remarks to five minutes. The way that timing light works, when the green light is on, you are doing very, very well. And when the yellow light comes on, that means you are down to one minute. And when the red light comes on, it means that your time is expired. So just keep that in mind.

I would now like to recognize the gentleman from Texas, Mr. Gohmert, for the purposes of introduction of the first witness.

Mr. GOHMERT. Thank you, Mr. Chairman. It is a great privilege of mine to introduce a friend and just a fantastic elected official from Texas. He never loses because people appreciate who he is.

And before I get into that, Mr. Chairman, I would ask unanimous consent to submit the written testimony of Todd Staples, Texas Agricultural Commission, and also comments by Susan Combs, the Texas Comptroller of Public Accounts.

The CHAIRMAN. Without objection, they will be part of the record.

[The statements submitted for the record by Mr. Gohmert have been retained in the Committee's official files.]

Mr. GOHMERT. And back to Jerry. Jerry Patterson was born in Houston, Texas on November 15, 1946. He graduated from one of the greatest academic institutions in America, Texas A&M University. It is obvious that the concentration there is on academics, and never more clearly than last football season.

[Laughter.]

Mr. GOHMERT. After volunteering for duty in Vietnam, Jerry Patterson was designated as a Naval Flight Officer and served in Marine fighter squadrons until his retirement from the Marine Corps Reserve as a Lieutenant Colonel in 1993. Five consecutive generations of his family have served our Nation in time of war.

From 1993 to 1999, he was a State Senator from District 11. His most significant legislative successes include passage of the historic Concealed Handgun Law, a constitutional amendment allowing home equity lending, the Texas Coastal Management Plan, and the creation of the Texas State Veterans Home program.

He is a tireless advocate for fellow veterans. He chaired the first Veterans Affairs Committee in the Texas Senate. In 2002, he was elected as our Land Commissioner in Texas and reelected to a third term in 2010. He was named Texan of the Year for his outstanding work in promoting Texas history education, strengthening Texan Independence Day, and in 2011 the Sons of the Republic of Texas named him a Knight of San Jacinto for his efforts to preserve Texas history.

He resides in Austin and has four children, and those are Samantha, Cole, Emily, and Travis. It is really an honor to have Jerry here. He is such a great American, a great Texan. Jerry Patterson.

The CHAIRMAN. I thank the gentleman for his introduction. And I would just simply say if a measurement of academic achievement is measured on the football field or lack thereof, Washington State qualifies.

[Laughter.]

The CHAIRMAN. Mr. Patterson, you are recognized for five minutes.

STATEMENT OF JERRY PATTERSON, COMMISSIONER, TEXAS GENERAL LAND OFFICE, AUSTIN, TEXAS

Mr. PATTERSON. Thank you, Mr. Chairman and Members, Congressman Gohmert for that introduction, some of which was actually true. I did cram the normal four-year course of study into only five years at A&M, and graduated in the top 75 percent of my class there.

[Laughter.]

Mr. PATTERSON. I am honored to speak to you about an issue that has become particularly important in Texas. As my role as Texas Land Commissioner, I manage approximately 13 million acres. All the revenues from that 13 million acres is dedicated, by Constitution, to public ed and to higher ed. It cannot be spent in any other manner, so making money off of the resources of Texas mineral, real property resources is extremely important.

I would submit to you that the Endangered Species Act, as originally drafted and passed in 1973, has evolved to a circumstance where it is categorically and clearly broken. I am not sure it serves

the purpose of the environment or the species, and it certainly, with great frequency, does not serve the purpose in my fiduciary duty to the permanent school fund and the permanent university fund.

The question before the Committee today is the litigation aspect and how this has evolved into a process that is driven by litigation, not by science. I think that is clearly evident in the recent controversy and ongoing controversy about the dunes sagebrush lizard.

I think in my written testimony I have cited testimony—or, actually, a statement made on the Floor of the Senate, the U.S. Senate, on 21 September 1970, by Senator Roman Hruska from Nebraska in which he lamented that Section 304, the citizens suit provision in the Clean Air Act, was predicated, and I quote:

"On the erroneous assumption that officials of the Executive Branch of the U.S. Government will not perform and carry out their responsibilities and duties under the Clean Air Act. Never before in the history of the United States has Congress proceeded on the assumption that the Executive Branch will not carry out the congressional mandate. Hence, private citizens shall be given specific statutory authority to compel such officials to do so."

I think he also continued to say, "I might add that the agency might not be at fault if it does not act promptly or does not enforce the Act," and I think that is clearly in the situation we have today with the U.S. Fish and Wildlife Service and also the National Marine Fisheries Service. They are not the problem.

Senator Hruska went on to say, "Notwithstanding the lack of capability to enforce this Act, suit after suit after suit could be brought. The functioning of the Department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the Act."

Today, 42 years later, we find ourselves in a circumstance in which the prediction of Senator Hruska in 1970 has come true. It is clear that the number of lawsuits is not necessarily about species preservation. It is clear that we are not living up to the original intention and objective of the Act.

In Texas, we kind of consider this to be the recent controversy on the dunes sagebrush lizard. We consider it to kind of being charged with capital murder. You know you were not even at the scene of the crime, but you pled down to manslaughter because the alternative was pretty bad.

So, similarly, we have entered into an agreement, or some folks have entered into an agreement, called the Texas Conservation Plan in which companies are going to be spending money as a result of all of this litigation. It is going to impact their operations, and at some point could have an impact on whether we continue to produce oil and gas, all because of a lizard that there is no one that can tell you today that it was endangered, that it is endangered.

There is no scientific basis, but nonetheless we suffer an ill. And that is another thing to do before we can continue the exploration of natural resources and production of those natural resources in Texas.

Another analogy, I guess, would come from the former football coach at the University of Texas, where he said, "A tie is kind of like kissing your sister." Well, that is essentially what we have done by entering into this Texas Conservation Plan that was essentially a coercion over about a six-month period to get something done to avoid a listing of a species that there is no scientific basis for listing.

The problem today is the Act is not working, and it needs to be revised. And later I may have some suggestions for that. Thank you, Mr. Chairman.

[The prepared statement of Mr. Patterson follows:]

Statement of Jerry E. Patterson, Commissioner, Texas General Land Office, State of Texas

Chairman Hastings and Committee members, I am Jerry Patterson, the 27th commissioner of the Texas General Land Office. The General Land Office (GLO) was created in 1836 when Texas was an independent Republic. The General Land Office is the oldest state agency in Texas and I have been elected by the people of Texas to oversee it since 2003.

As Commissioner, I am entrusted by the people of Texas to oversee millions of acres of land and mineral rights on behalf of the school children of Texas. I take this fiduciary role very seriously. As chairman of the School Land Board, I help govern the real estate portfolio of the Permanent School Fund (PSF), a $26 billion trust that benefits every child in Texas.

It is my responsibility to the PSF that brings me here today. I am here to discuss what I see as an exploitation of a loophole and the fleecing of tax payer dollars by a few radical environmental groups.

To be brief and to the point: the U.S. Fish and Wildlife Service is faced with a no-win situation. They are overwhelmed by environmental groups with hundreds of candidate listings that the agency cannot possibly respond to in the statutory timeline specified. They then find themselves in violation of that statute and subsequently sued by these same groups who filed to protect the species. These groups create the problem by purposely overwhelming the agency, knowing that they will be unable to respond, and then dictate an outcome because the agency settles rather than being able to follow the appropriate process, including the study of scientific evidence.

The Endangered Species Act is one of a dozen or more laws passed in the 1970's designed to protect critically imperiled species from extinction as a "consequence of economic growth and development untempered by adequate concern and conservation." It is now being used by a few radical environmental groups to stop economic growth and development without the scientific proof that a species and or its habitat is being harmed or threatened. The statute worked well for more than 30 years until a few years ago. So why are we discussing this today?

A lesson in history is a good place to start. On September 21, 1970, Senator Roman Hruska, Neb., took to the floor of the United States Senate to address what he perceived as an issue. The Nebraska Senator pointed out that in S. 4358—The Clean Air Act, Section 304 "Citizen Suits":

> "was predicated on the erroneous assumption that officials of the Executive Branch of the United States Government will not perform and carry out their responsibilities and duties under the Clean Air Act. Never before in the history of the United States has the Congress proceeded on the assumption that the Executive Branch will not carry out the Congressional mandate, hence, private citizens shall be given specific statutory authority to compel such officials to do so. The Hearings of the Public Works Committee do not provide either a factual or legal basis which would justify the adoption of this far-reaching and novel procedure wherein private citizens may challenge virtually every decision made by the officials of the Executive Branch in the carrying out of the numerous complex duties and responsibilities imposed by the Clean Air Act. Mr. President, that involves not only every decision but also every lack of a decision, which the secretary may engage in for the purpose of implementing this Act.
>
> Mr. President, I might add that the agency might not be at fault if it does not Act promptly or does not enforce the Act as comprehensively and as thoroughly as it would like to do. Some of its capabilities depend on the

> wisdom of the appropriations process of this Congress. Notwithstanding the lack of capability to enforce this Act, suit after suit after suit could be brought. The functioning of the department could be interfered with, and its time and resources frittered away by responding to these lawsuits. The limited resources we can afford will be needed for the actual implementation of the Act."
>
> The public interest is not served by subjecting officials of the Executive Branch to harassing litigation. How can they perform the complex administrative and enforcement functions required under the Clean Air Act while simultaneously participating as defendants and/or witnesses in litigation? Instead of forcing such officials to act more effectively the institution of the Citizens Suits will more likely lead to paralysis within the regulatory agency. (Congressional Record, page 32925, September 21, 1970)

We find ourselves some 42 years later seeing the wisdom in Senator Hruska's words and how he predicted where we are today. It should be noted that section 304 "Citizen Suits" of the Clean Air Act, also applies to the Endangered Species Act.

Amazingly, these environmental groups are able to afford these suits by exploiting the Equal Access to Justice Act to get their attorneys fees paid. Since 2008, nineteen radical environmental groups have received in excess of $15 million in attorney's fees under this provision. As crazy as it sounds, these same groups that are suing over a missed deadline are also receiving grants from the agency. Pretty good gig if you can get it!

Listing a species, without adequate scientific data, just to settle a lawsuit is capricious. The impacts of such decision making can be vast. Had the dunes sagebrush lizard been listed, production in the Permian Basin—which provides the US with more than 20% of the daily oil and gas produced in this country—could be hamstrung, particularly if the price per barrel of oil continues to decline, making margins closer to the break even point. The Permanent School Fund—with oil and gas revenues of more than $4 billion—could see revenue drop by 25 percent or more.

As for the impact to the Texas economy in the area targeted by environmental groups as critical habitat without the benefit of science, encompasses the Permian Basin which provides the US with more than 20% of the daily oil and gas consumed in this country. The mining section is responsible for some 27,000 jobs in counties targeted by environmental groups. And in 2010, the earnings for this sector of the economy accounted for more than $1.75 billion dollars and accounts for 37% of the regions total. Severance taxes from oil and gas production in the area for the same period are $265.9 million, more than 22% of the state's total severance taxes for 2010.

On Wednesday, June 13th, the US Fish and Wildlife Service announced a land mark decision to not list the dune sage brush lizard (DSL) as an endangered species. It was heralded as an unprecedented conservation agreement between Texas, New Mexico and the agency. While I applaud the agency for working with stakeholders to come up with a creative solution, this completely overshadows the real issue. Oil and gas operators will be paying fees into a fund to mitigate the impact to habitat of the dunes sage brush lizard, but there is no proof that it is threatened or endangered.

Let me be very clear, I am the first to stand up to save a species that is truly endangered or threatened. But only after a thorough scientific review of the data proving that a threat exists. Trying to satisfy an environmental group's threat of a lawsuit is a waste of energy, time and resources. The FWS should be spending their time doing what they do, evaluating candidate listing requests. I believe that FWS should be given the adequate resources to perform their mission and given the time they need in order to render a complete and thorough decision based on science.

It is interesting to point out that my office also is responsible for our beaches and wetlands along the gulf coast. It takes longer to get a permit from the U.S. Army Corps of Engineers, anywhere from 18 to 36 months to do restoration work on habitat, than it does for the Fish and Wildlife service to render a definitive decision to list a species. Why is that?

Science and real data are vital to saving any species. But proposing such listings simply to settle lawsuits can cost Texas billions and have a lasting impact on future income for funding public education in Texas. It is my recommendation that this committee address the statute, specifically section 304 as Senator Hruska recommended years ago, that is causing this fleecing of our tax dollars and robbing the agencies of their resources to actually do the work they are supposed to do for the people of this great country.

Thank you.

The CHAIRMAN. Thank you very much, Commissioner Patterson, for your testimony.

Now I would like to recognize Mr. John Stokes, who is the Facilities Development Project Coordinator for the San Diego Unified School District. Mr. Stokes, you are recognized for five minutes.

STATEMENT OF JOHN STOKES, FACILITIES DEVELOPMENT PROJECT COORDINATOR, SAN DIEGO UNIFIED SCHOOL DISTRICT, SAN DIEGO, CALIFORNIA

Mr. STOKES. Thank you, Mr. Hastings and distinguished Members, for the opportunity to come here and present this testimony to you today.

The project to be described in this brief testimony is the history of the Salk Elementary School, which is named in honor of Dr. Jonas Salk. The issues that I will present are not the fault of Congress, but we believe that they can be fixed.

The San Diego Unified School District acquired the Salk property as a graded, developable 13.7-acre site by Pardee Construction in 1979. This was required as part of the plan unit development for Mira Mesa housing developments. However, due to the effects of the California Prop 13 initiative which was passed by the voters in 1978, funds were not available to design or construct a school. The property sat undeveloped until the need was identified for a new school as part of the Proposition MM school bond initiative which was passed by the voters in 1998.

In 1997, just prior to the bond's passage, an environmental assessment was performed at the Salk site and the San Diego fairy shrimp were identified in non-native depressions at the site which formed due to settlement, foot, and unauthorized vehicle traffic.

In between 2003 and 2005, The District Board of Education certified the final Environmental Impact Report which identified onsite mitigation. However, the U.S. Fish and Wildlife Service began to raise concerns at that time regarding the onsite mitigation.

Further, in 2005 after additional study, the District's biological consultant and crustacean expert, Dr. Marie Simovich, concurred with the Service and identified that there were two species of shrimp at the site. One was the Federally protected San Diego fairy shrimp, and the other being the Lindahl's shrimp, a non-protected and aggressive species.

It was further determined that the shrimp and vernal pool habitat quality at Salk was undesirable as it was not indigenous, but formed in the settlement, foot, and vehicle traffic depressions. Regardless of this, the District was still required to look at offsite mitigation options.

In late 2005, the District began negotiations with the City of San Diego to develop a mitigation plan at the nearby McAuliffe Park open space site.

In late 2006, as a sidebar action, an injunction was filed in Federal court by 14 environmental groups, including the Southwest Center for Biological Diversity, against the Service, challenging a decision to issue an Incidental Take Permit to the City of San Diego based on its conservation plan regarding property in the vicinity of the Salk school site.

The then-City of San Diego leadership mistakenly added the Salk property into this injunction, which then was filed in the Federal court system. This essentially shut down the District's ability to construct the Salk school until the District was removed from the injunction in late 2010.

The District was advised that it was highly probable that it would be removed from the injunction, but it would have to be filtered through the Federal court system and it would be safe to proceed with school site planning, but at a slowed pace. This four-year action was a major delay to this project.

Going back to the school planning, In early 2008, the Service issued a letter to the District concurring with the design direction, which included the use of the McAuliffe site for mitigation.

In late 2009, the District and City of San Diego entered into and approved a Memorandum of Understanding which identified a trade of 6.1 acres of the Salk school site property for the 12.7-acre McAuliffe open space site. The land swap also included fees of approximately $2.7 million to be paid to the City of San Diego, which would encompass the development of the 6.1-acre Salk property.

In mid-2010, the District released the revised Environmental Impact Report for public review which included the McAuliffe mitigation site. However, in late 2010, the Service approached the District and stated that they deemed all the vernal pools on the Salk site to be actively occupied with San Diego fairy shrimp, and that there did not appear to be enough vernal pool mitigation acreage at the McAuliffe site.

The District protested, but to prove otherwise, several years of additional delays and additional funds would be required to perform wet and dry season testing of the pools. This decision then required the District to seek additional mitigation land at the City of San Diego's Carroll Canyon site, which caused an additional one-year time delay and consulting fees and community frustration.

The Service then supported the District's use of the Carroll Canyon site and opened multiple dialogues with the City of San Diego on the District's behalf to secure the use of the site for mitigation purposes. In late 2011, the City of San Diego informed the District in support of the use of the Carroll Canyon site for vernal pool restoration.

Due to no design requirements being issued and continual agency sequencing and review issues, the process has taken much longer than anticipated and added millions of dollars in additional costs, as well as affected local job creation and quality of education. Again, this process is not the fault of Congress, but we do believe that it can be fixed.

Thank you for your time.

[The prepared statement of Mr. Stokes follows:]

Statement of John A. Stokes, Facilities Development Project Coordinator, San Diego Unified School District/Facilities Planning and Construction

Good morning. Thank you for the opportunity to come here and present this testimony to you today.

The project to be described in this brief testimony is the history of the Salk Elementary School which is named in honor of Jonas Salk.

The San Diego Unified School District (District) acquired the Salk property as a graded developable 13.7 acre pad by Pardee construction in 1979. This was required as part of the PUD for Mira Mesa housing developments. However, due to the ef-

fects of the California Proposition 13 initiative which was passed by the voters in 1978, funds were not available to design or construct a school. The property sat undeveloped until the need was identified for a new school as part of the Proposition MM school bond initiative which was passed by the voters in 1998.

In 1997, just prior to the bond's passage, an environmental assessment was performed at the Salk site and San Diego Fairy Shrimp were identified in non native depressions which formed due to settlement, foot and unauthorized vehicle traffic.

Between 2003 and 2005, The District Board of Education certified the final Environmental Impact Report (EIR) which identified on-site mitigation. However, the US Fish and Wildlife Service (Service) began to raise concerns regarding the on-site mitigation. Further, in 2005 after additional study, the District's biological consultant/crustacean expert, Dr. Marie Simovich concurred with the Service and identified that there were two species of shrimp at the site. One was the Federally protected San Diego Fairy shrimp, and the other being the Lindahls shrimp, a non protected and aggressive species. It was further determined that the shrimp and vernal pool habitat quality at Salk was undesirable as it was not indigenous, but formed in settlement, foot and vehicle traffic depressions. Regardless of this, the District was still required to look at off-site mitigation options.

In late 2005, the District began negotiations with the City of San Diego to develop a mitigation plan at the nearby McAuliffe Park open space site.

In late 2006, as a sidebar action, an injunction was filed in federal court by fourteen environmental groups against the Service challenging a decision to issue an Incidental Take Permit to the City of San Diego based on it's conservation plan regarding property in the vicinity of the Salk school site. The then City of San Diego leadership mistakenly added the Salk property into this injunction which then was filed in the federal court system. This essentially shut down the District's ability to construct the Salk school until the District was removed from the injunction in late 2010. The District was advised that it highly probable that it would be removed from the injunction, but it would have to be filtered through the Federal court system and it would be safe to proceed with school site planning, but at a slowed pace. This 4 year action was a major delay to this project.

Going back to the school planning, In early 2008, the Service issued a letter to the District concurring with the design direction which included the use of the McAuliffe site for mitigation.

In late 2009, the District and City of San Diego entered into and approved a Memorandum of Understanding (MOU) which identified a trade of 6.1 acres of the Salk school site property for the 12.7 acre McAuliffe open space site. The land swap also included fees of approximately 2.7million dollars to be paid to the City of San Diego which would encompass the development of the 6.1 acres of the Salk Property.

In mid 2010, the District released the revised EIR for public review which included the McAuliffe mitigation site. However, in late 2010, the Service approached the District and stated that they deemed all the vernal pools on the Salk site to be actively occupied with San Diego Fairy shrimp, and that there didn't appear to be enough vernal pool mitigation acreage at the McAuliffe site. The District protested, but to prove otherwise, several years of additional delays and additional funds would be required to perform wet and dry season testing of the pools. This decision then required the District to seek additional mitigation land at the City of San Diego's Carroll Canyon site which caused an additional 1 year time delay and consultants fees and community frustration.

The Service then supported the District's use of the Carroll Canyon site and opened multiple dialogues with the City of San Diego to secure the use of the site for mitigation purposes. In late 2011, the City of San Diego informed the District in support of the use of the Carroll Canyon site for vernal pool restoration.

Due to no design requirements being issued and continual agency sequencing and review issues, the process has taken much longer than anticipated and added millions of dollars in additional costs as well as affected local job creation and the quality of education

Currently, the District has completed the final Habitat Conservation Plan (HCP) and Environmental Assessment (EA) process and is awaiting them being entered into the Federal Register for public review sometime within the next 30 days. It is hoped that necessary permits will be issued to the District by the end of September, 2012 and that actual construction can begin by no later than mid 2013.

The CHAIRMAN. Thank you very much, Mr. Stokes, for your testimony.

I will now recognize Mr. Daniel Rohlf, Professor at the Lewis and Clark Law School and the Pacific Environmental Advocacy Center from Portland, Oregon. Now, Lewis and Clark is not in Portland itself, is it? It is in a suburb?

Mr. ROHLF. Lewis and Clark is in the City of Portland.

The CHAIRMAN. It is in the City of Portland? OK. Well, I will not hold that against you. I just wanted clarification.

[Laughter.]

Mr. ROHLF. Thank you, Mr. Chair.

The CHAIRMAN. You are recognized for five minutes, Mr. Rohlf.

STATEMENT OF DANIEL ROHLF, PROFESSOR, LEWIS AND CLARK LAW SCHOOL AND THE PACIFIC ENVIRONMENTAL ADVOCACY CENTER, PORTLAND, OREGON

Mr. ROHLF. Thank you, Chairman Hastings and Ranking Member Markey.

In addition to my teaching and academic work on the Endangered Species Act, I am a co-founder of the Pacific Environmental Advocacy Center at Lewis and Clark Law School, our domestic environmental law clinic.

PEAC provides free legal representation to people and organizations that work to clean up our air and water and protect our Nation's wildlife. Most of our clients are small local groups.

For example, with the help of PEAC's attorneys, one such citizen group collected more water pollution fines in Oregon than the entire staff of the State's Department of Environmental Quality between 2004 and 2006. Oregon's water is clear as a result, benefitting both fish and people. These are precisely the results Congress intended when it provided for attorney fee awards for successful litigants in environmental cases.

As the title of this hearing suggests, taxpayer-funded attorney fee awards do benefit lawyers, though perhaps in different ways than I think this Committee meant to imply. Fee awards help our clinic provide hands-on legal training to students, who go on to work for a wide variety of clients, including the Federal Government, private property owners, and this very Committee.

Litigation does not harm species, jobs, or schools. Indeed, quite the opposite is true. For example, through my work with PEAC, I have worked on litigation that has significantly improved a Federal agency's operation of hydroelectric dams on the Columbia and Snake Rivers.

When I first became involved in salmon conservation efforts, one could literally count on one hand the number of returning Snake River sockeye. That is it. However, I am happy to say that today, "Lonely Larry," the nickname given to the single salmon who returned to Idaho's Redfish Lake in the early 1990s, has given way to increasing runs of salmon that pump hundreds of millions of dollars into the economies of Northwest communities.

For example, one recent study estimated that recreational fishers spend over $900 for each Chinook salmon they land, a figure that I can say is entirely accurate given my many years of fishing with my father-in-law.

But Mr. Chairman, you are correct. Another of PEAC's successful cases was in fact designed to harm species—specifically, invasive

species that threaten native wildlife, our farmers' crops, and even our own back yards. These invaders are an environmental and economic disaster of staggering proportions. The Federal Government, States, and private industry incur over $140 billion, with a B, each year in control costs and damage stemming from invasive species.

As a result of over a decade of PEAC's work and success in court, EPA closed a regulatory loophole in the Clean Water Act and now more carefully regulates discharges of ballast water from ships, one of the primary ways that aquatic invasive species hitch a ride to this country.

The Federal Government's modest fees for PEAC work bought ongoing reductions in the risk of extinction for countless aquatic species and helped prevent significant economic damage to local communities.

So why does recovery of listed species sometimes lag behind what we would like to see? Unfortunately, current levels of appropriations for recovery measures are only about one-fifth of the level needed to do the job. Therefore, the single most effective step that can be taken to recover threatened and endangered species, and thereby increase the pace of delistings, is to support more funding for recovery efforts.

Such investments in species and ecosystem recovery provide enormous returns. For example, hunting, fishing, and wildlife watching together account for over $120 billion in annual revenue, equivalent to the seventh largest corporation in America.

Finally, it is important to remember that attorney's fees to plaintiffs are only awarded when a court finds that the conduct of the Federal Government was way out of line. For example, I was involved in a recent ESA case where the court found that high-level Fish and Wildlife Service managers in Washington, D.C. overruled the scientific findings of the agency's local biologist for political purposes, issuing what one agency biologist, in the record, characterized as "marching orders" for a negative decision.

This case provides two important lessons. First, it is vital to have outside watchdogs to make sure Federal agencies follow the law and take steps it prescribes to protect imperiled species. Second, it would have been simple for Fish and Wildlife Service to avoid paying PEAC's attorney's fees, and indeed avoid litigation altogether, if the agency had simply complied with the ESA in the first instance.

The attorneys and students at PEAC do not do the work we do because it is lucrative—which it is not. We do it because it is vitally important. I am proud of the work we have done and continue to do. It has helped recover species, and it has made our air and water cleaner.

Our Nation's wildlife represents one of our country's greatest national assets, and biodiversity is a continuing source of economic prosperity. The small investment of providing fees to groups like PEAC to enforce the law has helped to ensure that these treasures will continue to exist for generations to come.

[The prepared statement of Mr. Rohlf follows:]

Statement of Professor Daniel J. Rohlf,
Pacific Environmental Advocacy Center, Lewis and Clark Law School

Thank you Chairman Hastings, Ranking Member Markey; I appreciate your invitation to speak to the Committee today.

I am a Professor of Law at Lewis and Clark Law School in Portland, Oregon. I am also the co-founder of the Pacific Environmental Advocacy Center (PEAC), Lewis and Clark's environmental law clinic. PEAC provides free legal representation to organizations and citizen groups that work to clean up pollution of our air and water and protect our nation's wildlife. Most of our clients are small local non-profit groups. For example, our clinic pursues actions to protect water quality on behalf of the Northwest Environmental Defense Center, an organization run by volunteer Lewis and Clark Law School students and alums. With the help of PEAC's attorneys, between 2004 and 2006 NEDC clean water enforcement actions collected more water pollution fines in Oregon than the entire staff of the state's Department of Environmental Quality. Spurred by press reports of this disparity, Oregon DEQ has finally begun to issue more substantial fines to polluters. As a result, Oregon's water is cleaner, which in turn has benefited salmon and steelhead as well as the people of Oregon. PEAC and NEDC's work is made possible in part by the availability of fee awards to successful plaintiffs. These are precisely the results Congress intended when it provided for attorney fee awards for successful litigants in environmental cases.

My work at PEAC and Lewis and Clark focuses primarily on federal litigation on behalf of public interest organizations that involves the federal Endangered Species Act (ESA). For over two decades, I have taught law school courses on wildlife law, authored one book and numerous articles on the ESA. During this time, I have worked with law students in our environmental law clinic to litigate many ESA cases, including matters dealing with salmon conservation in the Columbia River Basin, grizzly bear recovery in the northern Rocky Mountains, and protection of fairy shrimp in southern California.

As do my clinical colleagues at Lewis and Clark, I draw a clear distinction between my academic and clinical work. In my classes, my goal is to simply provide an accurate picture of how the law works—I leave my personal views outside the academic classroom. On the other hand, as we stress as part of our clinic's legal ethics instruction, PEAC staff attorneys and student clerks have an obligation to represent zealously the interests of our clients, which include many environmental organizations. However, Lewis and Clark also offers opportunities for students interested in gaining real-world experience by representing ranchers, farmers, and miners. Many Lewis and Clark students thus receive law school credit through their litigation work with the Western Resources Law Center, an organization co-founded by the law school's former dean. WRLC's staff attorney is also an adjunct law professor at Lewis and Clark. Without WRLC, many of family and small-scale ranchers, farmers, and miners would not be able to have their interests represented in court, just as many citizen groups and non-profit environmental organizations could not retain expert attorneys without PEAC.

As the title of this hearing suggests, tax-payer funded attorney fee awards do benefit lawyers, though in different ways than this Committee meant to imply. Fee awards help our clinic provide hands-on legal training for students who will be the future elected officials, attorneys, managers, and others working to resolve society's many environmental challenges. Lewis and Clark graduates who participate in PEAC now work at U.S. Department of Justice and federal agencies, state and local government, law firms, and non-profit organizations. One of PEAC's recent alums worked as a fellow with the staff of this Committee, so it is not a stretch to say that this very body gained an employee with invaluable real-world experience in environmental law as a result of the hands-on experience made possible by PEAC and the attorneys fees that help fund our clinic. Attorney fee awards when it prevails in litigation also help the Western Resources Law Center to provide its students with valuable experience in environmental law.

Even with the availability of fee awards, working for an environmental non-profit organization does not make for a lucrative career. The annual salaries of PEAC staff attorneys are far less than first-year associates in Washington, D.C. law firms. Many of our graduates fortunate enough to land highly sought-after positions with public interest organizations must rely in part on the law school's Loan Repayment Assistance Program to meet their monthly student loan payments. From over two decades experience, I can assure you that it is not a paycheck but rather strong personal convictions and a desire to benefit society—to make our water and air cleaner and to save species from extinction—serve as the motivations for PEAC students

and staff attorneys. I see the same sorts of commitments to public service and financial sacrifices in attorneys I work with throughout the environmental community.

Litigation does not harm species, jobs, or schools; indeed, quite the opposite is true. Through my work with PEAC, I have worked for more than 20 years on litigation challenging federal agencies' operation of hydroelectric dams in the Columbia and Snake Rivers, a major reason that many salmon and steelhead runs are on the lists of endangered and threatened species. When I first became involved in salmon conservation efforts, one could literally count on one hand the number of returning Snake River sockeye. However, I'm happy to say that today "Lonely Larry"—the nickname for the single Snake River sockeye salmon that made it to Idaho's Redfish Lake in the early 1990s—has given way to hundreds of sockeye that now follow their ancient migration from the ocean to the mountains. The picture is also now much brighter for many other Columbia Basin runs.

Courts' enforcement of Endangered Species Act protections for salmon has been a major factor in increasing salmon survival. One of the first ESA lawsuits to improve salmon survival was brought not by environmentalists, but by the State of Idaho. In his ruling on that case in 1994, Judge Malcolm Marsh concluded that federal hydro managers had "focused their attention on what the establishment is capable of handling with minimal disruption," and emphasized that in order to restore salmon in the Columbia Basin "the situation literally cries out for a major overhaul." [1]

Unfortunately, that overhaul is still not complete. Scientists have repeatedly pointed out relatively modest modifications to dam operations could significantly improve salmon survival. However, these changes to the status quo have often met with stiff resistance. PEAC and Earthjustice, representing a broad coalition of environmental groups, sport and commercial fishermen, and local businesses, have followed in Idaho's footsteps to enforce the ESA's protections for salmon in court. Indian tribes and the state of Oregon have collaborated in these legal efforts. Both district courts and the Ninth Circuit Court of Appeals have found repeatedly that dam managers have failed to live up to the ESA's requirements for increasing salmon survival. These legal victories have compelled the National Marine Fisheries Service to improve its plans for salmon recovery, and have spurred wide investment in habitat restoration that will not only benefit salmon and steelhead, but will help restore aquatic ecosystems throughout the Columbia Basin. As new recovery plans are written, the courts have ordered more spill over the dams to increase survival of baby salmon on their way to the sea.

Fee awards from successful litigation have enabled PEAC and Earthjustice to devote the huge amounts of time and effort necessary to enforce the requirements of the ESA and complete the overhaul of dam operations envisioned by Judge Marsh nearly two decades ago. Data from many sources show that these awards have been a very sound investment in terms of both the environmental and economic well-being of the Northwest. Court-ordered spill has increased the survival of out-migrating salmon by as much as 95 percent, stabilizing many declining populations. Since much of growth in salmon numbers consists of hatchery fish available for harvest, this increase in salmon populations is delivering benefits to river and coastal communities by protecting and creating jobs in the salmon economy. Recreational fishing for salmon and steelhead in the Columbia-Snake River Basin currently generates approximately $562 million per year for fishers businesses, and communities, with commercial fishing adding $60 million more. When excellent ocean conditions allowed Idaho to open a salmon fishing season in 2001—at that time a very rare occurrence—independent economists calculated that economic activity in the state increased by $90 million; the fishing season accounted for nearly a quarter of the annual sales of businesses in one small town on the Snake River. A 2009 study estimated that recreational fishers spend over $900 for each chinook salmon they land, a figure that I can say is entirely accurate from my many fishing trips with my father-in-law.[2]

As the title of this hearing suggests, one of PEAC's successful cases was in fact designed to harm species—specifically the invasive species that represent a huge threat to native wildlife, plants, and crops, and which inflict significant damage on the national economy. Over a decade ago, a PEAC student aware of the dangers posed by invasive species grew angry that the very law designed to prevent such damage was unable to do so. At the time, regulations implementing the Clean Water Act exempted from the law the discharge of ballast water from ships. These discharges are one of the primary causes of introductions of invasive aquatic species

[1] *Idaho Dept of Fish and Game v. NMFS,* 850 F.Supp. 886, 900 (D. Ore. 1994).

[2] *Potential Economic Contributions of Spring and Summer Chinook Had SAFE For Salmon Been In Effect,* Southwick Associates, Inc. April 24, 2009 pg 27, Appendix C.

into the waters of the United States. Invasive species, which often out-compete and displace native and endangered species, have become a huge environmental and economic disaster. For example, over half of the fish and most of the bottom-dwelling creatures living in San Francisco Bay are not native, making the Bay the world's most invaded body of water. Invasive species are now the second-leading cause of species becoming endangered, behind only habitat destruction. But what is truly staggering is the price tag for efforts to control invasive species and mitigate the damage they cause to crops, infrastructure, and businesses. The federal government, states, and private industry incur over $140 *billion* in costs each year stemming from damage caused by—as well as efforts to control—invasive species. Water intake pipes and hydroelectric turbines clogged with invasive mussels, fishing communities devastated by loss of commercial species to competition from invaders, entire ecological systems facing an uncertain future—the harms caused by invasive species are very real and very expensive.

After the EPA refused PEAC's petition to close the Clean Water Act's regulatory loophole for ballast water, PEAC was forced to sue the agency. The Ninth Circuit Court of Appeals sided with PEAC's clients, and today EPA and the Coast Guard are implementing a general permit regulating ballast water discharges from ships that advances efforts to eliminate introductions of invasive species throughout the United States. PEAC's work has thus helped to make our waters cleaner, slowed the spread of invasive species, reduced the risk of extinction of countless aquatic species, and prevented significant economic damage to local economies. The long fight legal to gain these protections would not have been possible without the attorney fees that our clinic received for its successful work.

Overall, investment in implementing the ESA—including attorney fee payments for successful citizen enforcement of the statute—provides the American public with significant environmental and economic returns.

The ESA has proven to be very effective at halting and reversing imperiled species' decline toward extinction—at least those species that make it through the listing process and on to the list of threatened or endangered species. According to the U.S. Fish and Wildlife Service, 99% of the species on the ESA's protected lists have been saved from extinction.[3] Given the complex and challenging threats facing many species, recovery can take many years. However, a peer-reviewed study concluded that the longer a species has been listed, the more likely it is to be improving.[4] Perhaps not surprisingly, another study found that species' chances of recovery also went up with increased spending for recovery measures, but it also noted that current levels of appropriations for recovery measure are only about one-fifth of the level needed to do the job.[5] Therefore, the single most effective step that can be taken to recover threatened and endangered species—and thereby increase the pace of delistings—is to support more funding for recovery efforts.

Protecting endangered and threatened species and the ecosystems upon which they depend provides critical ecosystem services that all creatures depend upon—including us. Functioning ecosystems supply us with cold clean water, purify our air and remove wastes from rivers and streams, pollinate our crops, provide sources of medicine and raw materials, and give an increasingly crowded world open space and places to recreate and enjoy wildlife.

The dollar value of biodiversity and the ecosystem services it provides is immense. For example, hunting, fishing, and wildlife watching together account for $120 billion in annual revenue, equivalent to the 7th largest corporation in America.[6] As the Fourth Circuit Court of Appeals noted, the reintroduction and protection of red wolves was constitutional under the Commerce Clause because red wolf recovery had the potential to increase local receipts from wildlife-related tourism by up to $183 million annually in North Carolina, and by up to $354 million per year in Great Smokey National Park.[7] Similarly, a recent estimate put the value of healthy salmon runs in the Sacramento River system at $5.7 billion, representing 94,000 jobs.[8]

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[3] U.S. Fish and Wildlife Serv., Endangered Species Program, *Why Save Endangered Species,* at 4 (2005).

[4] M. Taylor, K. Suckling, and J. Rachlinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis,* 55.4 BioScience, 360, 366 (2005).

[5] Miller JK, Scott JM, Miller CR, Waits, *The Endangered Species Act: Dollars and Sense?* 52 BioScience 163–168 (2002).

[6] U.S. Fish and Wildlife Serv., Div. of Econ., Rep. 2006–1, *Wildlife Watching in the U.S.: The Economic Impacts on National and State Economies in 2006,* at 3 (2008).

[7] *Gibbs v. Babbitt,* 214 F.3d 483, 493 (4th Cir. 2000).

[8] American Sportfishing Association press release, August 7, 2009 (citing information developed by Southwick Associates, and economic research firm).

As you have noted Mr. Chairman, and I suspect nearly all of us would agree, Congress has an obligation to the American public to ensure that the Executive branch's policies and actions fully implement the laws enacted by the people's representatives. When it passed the Endangered Species Act, Congress recognized that the vast scope and complexity of protecting species across the country from extinction made it important to enlist citizens in ensuring effective enforcement of the law. In light of the enormous environmental as well as financial payoffs from endangered species protection and recovery, the federal government's investment in attorney fee awards for successful citizen enforcement of the ESA is extremely modest.

Finally, it is important to remember that these fee awards are only available when plaintiffs are able to prove that the Executive branch substantially violated the law to the extent that a judge considers an agency's actions to be "arbitrary and capricious." One of my recent cases—ironically involved bald eagles, our nation's symbol of truth and justice—involved high-level FWS mangers overruling the findings of the agency's endangered species biologists for political purposes. Disregarding the ESA's express requirement that decisions about species listings be based solely on the best science available, FWS' Washington, D.C. office issued what a local FWS biologist characterized as "marching orders" to turn down a petition to list the isolated population of eagles in Arizona's Sonora Desert—despite recommendations to the contrary from the agency's local experts. [9] This prompted another agency scientist to comment that "[w]e've been given an answer now we need to find an analysis that works." This is obviously not the way science is done. The court ruled that FWS had acted unlawfully, finding its actions to "exemplify an arbitrary and capricious agency action." It awarded PEAC attorney fees for its role in reversing the agency's arbitrary decision.

This case provides two important lessons. First, it is vital to have outside watchdogs to make sure that federal agencies are following the law and taking the steps needed to protect imperiled species. Second, it would have been simple for FWS to avoid paying PEAC's attorney fees—and avoid litigation altogether—if the agency had simply complied with the ESA in the first instance.

The attorneys and students at PEAC do not do the work we do because it lucrative (which it isn't); we do it because it is vitally important. I have spent countless nights my office with my students hurriedly finishing briefs before a filing deadline, long after all the other faculty and students left the law school campus for the day. All the PEAC staff and students often work on cases for many hours a day, sometimes to the detriment of their other classes, because they believe that stopping pollution and protecting our wildlife are the most important things they do. I'm proud of the work we've done and continue to do. It has helped recover species, and it has made our air and water cleaner. Our nation's wildlife represents one of our country's greatest natural assets, and biodiversity is a continuing source of economic prosperity. The small investment of providing fees to groups like PEAC to help enforce the law has helped to ensure that these treasures will continue to exist for generations to come.

The CHAIRMAN. Thank you very much, Mr. Rohlf, for your testimony.

Now I will recognize Mr. Kent Holsinger, attorney at the Holsinger Law Firm in Denver, Colorado. You are recognized for five minutes.

STATEMENT OF KENT HOLSINGER, ATTORNEY, HOLSINGER LAW, DENVER, COLORADO

Mr. HOLSINGER. Thank you, Mr. Chairman, Members of the Committee. I appreciate the opportunity to be here today for this important topic.

Mr. Chairman, Members of the Committee, I believe the Endangered Species Act has become the Nation's most abused environmental law. It has evolved from Congress passed in 1973 into a leviathan, driven by litigation by activist groups, a small cadre of attorneys.

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[9] *Center for Biological Diversity v. Kempthorne,* 2008 WL 659822 at 11 (D. Ariz. 2008).

The United States is the greatest Nation on earth, typified by our freedoms, our liberty, and our "can do" spirit. But I fear as a result of the Endangered Species Act and these abuses, it has evolved into a "cannot do" nation.

Agriculture we cannot do for mountain plover. Electricity we cannot do for razorback sucker or for salmon. Mining, the pallid snail. Domestic energy production, the greater sage grouse.

The greater sage grouse has not been listed. It is a candidate for listing. Nonetheless, it is seriously impacting activities in the West. As an example, the BLM, which administers over 250 million acres in the West, is signaling by all accounts that it is closed for business, that activities can no longer go forth from resource management plan revisions that are approaching 2,000 pages, 50 pages of new restrictions, 5 pages of acronyms and abbreviations, going so far as to purport to regulate private lands in the name of species like greater sage grouse.

But what can we do when conservation efforts are proposed, be they for a permit to approve some activity? The answer is, sorry, you cannot do that without additional NEPA compliance—NEPA compliance, understand, for the conservation measures to actually do benefit to the species.

Contrary to what we have heard and from reports like the Center for Biological Diversity, a 10 percent compliance rate with recovery documents is hardly a 90 percent success rate under the Endangered Species Act. In fact, fewer than 1-1/2 percent of species have ever recovered to the point of delisting.

Now, Center for Biological Diversity and other activist groups have petitioned to list hundreds and hundreds of species in the West. As an example, from their effort that culminated in a settlement agreement, they petitioned to list Arctia species 1, a moth in the West; Heterocampa rufinans, a moth in Colorado; Fibi ellisebra, an ant (phonetic).

Many of these lack even common names or descriptions. And the material cited by petitioners and later litigants was from a database called NatureServe. With NatureServe comes an important disclaimer: All documents or information provided are as-is, without warranty as to currentness, completeness, or accuracy of any specific data.

How can the Fish and Wildlife Service purport to comply with the best available science standard under the Act when their listing budget has doubled? And by budget, I mean the number of species that they will be considering per year. Now, 757 species that they have to consider for listing out of a total of less than 1200 on the Act today.

The ESA has been an incredible success for groups like Center for Biological Diversity. Since 1999, they have been a party to over 835 Federal lawsuits. Two new lawsuits announced since I prepared my testimony for today on Saturday.

They are collecting millions in taxpayer-funded attorney fees, including over $125,000 simply for this settlement alone. In one case we were involved in, attorney fees awarded to environmental plaintiffs amounted to $650,000 in one single case.

But more money for the Fish and Wildlife Service is not the answer. In fact, the Endangered Species Act has been cited as a hin-

drance to good conservation efforts. The BLM and the Forest Service have recognized that the ESA creates a complex maze that is regularly an obstacle to conservation work. Even the Fish and Wildlife Service has noted that it supports voluntary conservation efforts as the most effective means to protect species and their habitats.

There have been tremendous success stories. They are in spite of the ESA, not because of it. To fix these problem, we should allocate our scarce resources to full species—no more nonsense with subspecies and population segments. Take away the litigation incentives, recognize mitigation, and streamline the process for it to occur. Recognize the benefits that accrue from voluntary work and on private lands. And thank you again for the opportunity to be here today.

[The prepared statement of Mr. Holsinger follows:]

Statement of Kent Holsinger, Manager, Holsinger Law, LLC

Thank you for the opportunity to testify. Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the impacts the Endangered Species Act (ESA) has had on many of our clients such as individual landowners, agricultural entities, water providers and energy producers.

I. Drowning in Petitions and Flooding with Lawsuits

Over the past several years, a small cadre of environmental groups has buried the U.S. Fish and Wildlife Service (FWS) with listing petitions under the ESA. WildEarth Guardians alone has petitioned to list more than 681 plant and animal species.

Such efforts could blanket the West with ESA listings. A single listing could have dramatic impacts to the regulated community: agriculture, water, utilities, industry and others. Federal agencies impose onerous restrictions even for candidate and special status species such as greater sage grouse.

Listings and litigation are unlikely to go away. According to the Western Legacy Alliance, from 2000 to 2009 the Center for Biological Diversity (CBD) filed 409 lawsuits; followed by 180 lawsuits filed by WildEarth Guardians (WEG) and 91 filed by Western Watersheds Project, among many others. These activist groups can collect millions in taxpayer-funded attorney fees from procedural victories or even settlement agreements with the United States.

Accordingly to our research, from 1999 to 2012, CBD has been a party to a staggering 835 lawsuits! WEG has been a party to 145 lawsuits (123 of which it initiated) between 2008 and 2011. Of the WEG cases, 95% have been brought against the federal government. In 2010, WEG filed more than one new lawsuit per week. Most of these have been brought against the U.S. Department of the Interior (DOI). Most have raised claims related to the ESA.

CBD and WEG entered into settlement agreements with DOI In May and July of 2011 over petitions to list over 775 species under the ESA through a myriad of lawsuits and petitions. Currently, there are 1,1,38 species listed under the ESA. How can the FWS process these petitions while adhering to the "best available science" standard under the ESA?

These groups collected over $125,000 in taxpayer-funded attorney fees as a result. Despite the settlement agreements, CBD has boasted of filing new ESA petitions and lawsuits as recently as June 8 and June 11, 2012.

II. The ESA Stands in the Way of Good Conservation Efforts

Because the regulatory straightjacket of the ESA creates a disincentive to landowners, listing often stands in the way of good conservation work. Even the FWS expressed that it "supports voluntary conservation as the most effective method to protect species and their habitats." *See* 70 Fed. Reg. 2245. And the FWS does "recognize that listing may affect local planning efforts, due to its effect on voluntary conservation efforts." *Id.* at 2246.

Listings often restrict the ability to manage for species and could even result in harm to the species. *See* Amara Brook, Michaela Zint, Raymond De Young, *Landowners' Responses to an Endangered Species Act Listing and Implications for Encouraging Conservation,* 17 Conservation Biology 1473, 1638 (Dec. 2003) (Where an

extensive survey of landowners showed that many managed their land so as to avoid the presence of a listed species). Many landowners managed their forest lands to avoid the nesting of federally-listed red-cockaded woodpeckers. For example:

> Ben Cone of North Carolina managed 7,200 acres of timberland with 70–80 year harvest rotations, small cuts, and controlled burns, which...created habitat for the red-cockaded woodpecker. When the endangered woodpecker took up residence on Cone's land, more than 1,500 acres were placed under the control of the U.S. Fish and Wildlife Service (see Stroup 1997). In response, Cone began a harvest rotation of 40 years on the rest of his land in order to eliminate the mature pines favored by the woodpecker and also remove any possibility that the federal government would take control of his remaining land.
>
> Ben Cone's experience is not an isolated incident, as a study by economists Dean Lueck and Jeffrey Michael (1999) confirms. Using data from hundreds of forest plots in North Carolina, they found that the more red-cockaded woodpeckers in the vicinity, the more likely the landowners were to harvest younger trees....(Lueck and Michael 1999, 36). The landowners' incentive for using this shorter rotation was to ensure the birds did not move onto their property, possibly leading to land-use restrictions. Clearly, the ESA is creating perverse incentives. Holly Lippke Fretwell, Forests: Do we get what we pay for? Available at http://www.perc.org/publications/landreports/report2.php#tale.
>
> According to Bureau of Land Management (BLM) and U.S. Forest Service officials, the ESA creates "...a complex maze of processes and procedures, which field biologists and managers must attempt to negotiate on a daily basis in order to implement on-the-ground projects." USFS and BLM, Improving the Efficiency and Effectiveness of the Endangered Species Act, (Dec. 15, 2003). In regards to the peregrine falcon, leading experts concluded, "despite having the authority for implementing the ESA, and a number of their biologists contributing importantly to the recovery program, as an agency the FWS had a limited role, and its law enforcement division, which was in charge of issuing permits as well as enforcing regulation, was regularly an obstacle to recovery actions." (Burnham and Cade 2003b) (emphasis added).

III. Greater Sage Grouse: Are BLM Lands Closed for Business?

Federal lands comprise over one-third of the State of Colorado. Over 8 million acres are managed by the BLM. While Congress has mandated that these lands be managed for multiple uses, the BLM is issuing new draft Resource Management Plan (RMPs) that signal BLM lands could be closed for business. New restrictions for sage grouse and other sensitive species could threaten scores of communities in the West.

RMPs guide and define management actions, future land use decisions and project-specific analyses on some 250 million acres of BLM lands in the West. BLM justifies the significant revisions to its existing RMPs due to "new issues and higher levels of controversy" since the original plans were prepared. More than 15 RMPs are currently under revision in Alaska, Arizona, California, Colorado, Idaho, Nevada and Wyoming.

In Colorado, BLM has issued new drafts for its Colorado River Valley and Kremmling Field Offices. Some of these RMPs approach 2,000 pages with 50 pages of new restrictions and 5 pages of acronyms and abbreviations.

The drafts would include: less land available for mineral leasing; significantly increased buffers around sage grouse habitat; de facto wilderness; significantly increased buffers around raptors and eagles; new restrictions for prairie dogs, amphibians, fish and recreation; buffers around streams and water supplies; timing limitations for stream crossings; new cultural restrictions and tribal consultation requirements; onerous air quality standards and severe restrictions on mechanized travel and right-of-ways.

Some BLM wildlife restrictions go far beyond the legal standards required. For example, there are now restrictions for sensitive fish species that occur only downstream and outside of the planning areas. Timing limitations for in-channel work (ie road crossings, pipelines or culverts) are proposed for "native fish" and "important sport fish." BLM intends to "designate" lands with wilderness characteristics and, much like EPA's controversial guidance on wetlands, proposes to regulate activities in and around riparian areas and even intermittent streams.

Even more disturbing are BLM's proposed restrictions on access to public lands. BLM now mandates areas open to cross-country travel or "Open to Existing Routes" should instead be "Limited to Designated Routes." This simple change places mil-

lions of acres off limits to mechanized travel. For example, in the Kremmling draft, BLM cross-country travel would be slashed from 307,300 acres to only 200 acres. Thousands of acres would also be designated Right-of-way Avoidance Areas and Right-of-way Exclusion Areas. No Surface Occupancy stipulations would increase tenfold and Controlled Surface Use constraints would double.

Citing impacts from agriculture and energy development, environmental groups have been pushing to list the sage grouse under the ESA for years. Despite over 300 documented conservation efforts in place, DOI determined listing the greater sage grouse was warranted but precluded in 2010. Ironically, in some of the RMPs, BLM recognizes that sagebrush habitat is largely intact and that there is little threat of fragmentation. They also recognize significant increases in moose, antelope, mule deer and elk populations since the last RMP revisions. Adding fuel to the fire, the BLM, and several other federal agencies, are now intruding on Colorado and proposing to regulate oil and gas despite decades of successful state regulation.

The draft RMPs are incredibly complex and onerous. In some cases, they lack significant information and failed to include key documents, descriptions and data necessary for informed public review and comment. Where BLM analyzed economics, its figures were inconsistent and contradictory. As a result, BLM has created a jigsaw puzzle of conflicting regulations and contradictory assumptions. The underlying theme implies BLM lands will be closed for business due to sage grouse and other issues.

IV. Opportunities for Mitigation and Wildlife Protection

For listed species, activities that require federal permits, licenses or authorizations require consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the ESA. This can result in significant delays and costly project modifications. For example, surveys may be required for some listed species that are not present for significant months out of the year. And existing federal permits, licenses or authorizations could be subject to reinitiation of consultation upon new listings or information. Finally, some actions on public or private lands could be construed to "take" listed species or their habitat under Section 9 of the ESA. Violations of the ESA are subject to substantial civil and criminal penalties.

A common thread in dealing with these issues is the need to mitigate impacts for regulatory compliance. But, incredibly, agencies like the BLM are requiring permitting and red-tape even for projects that improve or enhance habitat. National Environmental Policy Act (NEPA) compliance, along with the ESA, is stifling conservation work.

But there are opportunities for improvement. For example, Partners for Western Conservation (Partners) is a 501(c)(3) designed to facilitate on-the-ground conservation work. It was established by the Colorado Cattlemen's Association, Environmental Defense and industry representatives.

Private landowners contribute up to 95% of the habitat for listed and at-risk species. With close ties to statewide agricultural organizations, environmental groups and natural resource agencies, Partners could help bridge the gap between the needs of the regulated community and the restoration, improvement and protection of valuable wildlife habitat on public and private lands. Companies or entities that need mitigation could solicit, and choose from, proposals from landowners to do real, on-the-ground conservation work. Besides introducing competition, and reduced costs, Partners could facilitate contracts between the regulated and the applicable landowner as well as quantification and monitoring of habitat benefits.

The system could work much like wetlands banking. Wetlands banking has become so successful that the Army Corps of Engineers now urges the regulated look first to wetlands banks to mitigate impacts. Wildlife credits or habitat banking through entities like Partners could eventually help break the cycle of listings and litigation in favor of real, quantifiable conservation work that benefits landowners, the regulated and the environment. But until Congress directs the agencies to refocus away from red-tape and simply saying "no," there is little incentive for such proactive habitat work.

V. Conclusion

Now is hardly the time for "business as usual" under the ESA. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. People and wildlife would benefit from improvements to the ESA, NEPA and other federal laws. Congress and the Administration should be working to reduce frivolous litigation, streamline permitting to promote on-the-ground conservation efforts, alleviate economic burdens and promote jobs. Thank you again for the opportunity to testify.

The CHAIRMAN. Thank you very much for your testimony. I want to thank all of you for your testimony. We will now start the process of questions from the Committee, and I will recognize myself for five minutes.

My first question goes to Commissioner Patterson. You mentioned the settlement that is being negotiated. I assume it is not totally promulgated on the dunes lizard yet, but it is a work in progress. But that is a settlement on an individual species.

Let me ask you a question from your perspective. Given your testimony and your experience with this individual settlement, do you think these mega-settlements that we have seen here in the last several years are a good idea? And if so, why? And if not, why not?

Mr. PATTERSON. Well, I think this settlement was the best that could be done for the folks who are concerned with continuing to produce oil and gas in the Permian Basin. It was not a settlement that they sought. It was not a settlement that they were enamored of. But again, the alternative was a listing.

But we still have a circumstance in which there is no scientific evidence that this species is——

The CHAIRMAN. I understand that. I understand it, and I was down there, and I heard that firsthand from people.

Mr. PATTERSON. Right.

The CHAIRMAN. My question is, what are your views on the mega-settlements?

Mr. PATTERSON. Oh, yes. Mega-settlements—the ecosystem settlements, yes. That just is a way of lumping together species which may not be justified for an endangered status and trying to move it through the process in kind of a sale process. I do not support that, absolutely not. And of course, this was not one, and the——

The CHAIRMAN. I understand. But I wanted your views on that.

Mr. PATTERSON. Yes. That takes anyway science and just makes it as an expeditious manner to list a bunch of species.

The CHAIRMAN. Right. Getting back, then, to that individual settlement, do you think that the way, say, it is written right now, that there is adequate flexibility for States to enter into agreements that would be beneficial to both the species and to your States? Or is there a hindrance in the law as it is written right now to allow that to happen?

Mr. PATTERSON. U.S. Fish and Wildlife has a statutory 12 months, 90-day prior to that time. And that drives us as well. So the answer is no. It is not conducive to State participation in the process, for the same reasons that U.S. Fish and Wildlife cannot respond in a timely manner with that statutory requirement.

The CHAIRMAN. Yes. Thank you very much.

My next question is for Mr. Holsinger. You mentioned in your written testimony, and you alluded to it toward the end of your oral testimony, that there have been successes, but those successes are in spite of. Would you elaborate on that?

Mr. HOLSINGER. Yes, Mr. Chairman. One example that we can cite is in Colorado. The Colorado Farm Bureau and their members partnered with the Rocky Mountain Bird Observatory over mountain plover. Remarkable voluntary conservation efforts, where farmers would call the bird observatory before they plowed their

fields, so that they would actually invite people onto their private lands to flag plover nests so the farms would not till over them.

The efforts were award-winning from the Department of the Interior. Unfortunately, they were rewarded ultimately with, yet again, litigation over the listed status of mountain plovers.

So I think the old adage—if you have a rare mineral on your property, it is more valuable; if you have a rare species, it becomes valueless—is very true.

The CHAIRMAN. And just real briefly, in your written testimony you suggested that there may be harm to endangered species the way this is working out. Just briefly, would you elaborate real quickly on that?

Mr. HOLSINGER. Yes, Mr. Chairman. In the peregrine falcon recovery, the U.S. Forest Service and the BLM experts actually concluded that the ESA was a hindrance to doing good things for the species and not a help.

Similar things have been studied for the Preble's meadow jumping mouse in Colorado and Wyoming, and the red cockaded woodpecker, where landowners are actively managing to avoid further presence of these species because they recognize the terrible regulatory impacts that could affect them if they are indeed present. And that is a terrible perverse incentive.

The CHAIRMAN. I see instances of that in my district.

Mr. Rohlf, in your testimony, oral testimony, you mentioned the success of the sockeye salmon on the Snake River. That was largely recovered because of a hatchery program. Do you support hatcheries?

Mr. ROHLF. In the instance of Snake River sockeye, that was kind of a last gasp.

The CHAIRMAN. No. My question is, do you support the hatchery program to recover a species?

Mr. ROHLF. They have a place in instances like the Columbia River.

The CHAIRMAN. That implies that there is not a place. Tell me where there is not a place, then.

Mr. ROHLF. In many of the runs, hatchery practices actually harm wild runs rather than help them.

The CHAIRMAN. My time is up, but I wonder how one can come to that conclusion when the hatchery programs on the Snake River and the Columbia River system started at the turn of the 1900s. There was no marking at that time. And if the lifespan of a salmon is five years, how would you possibly know that offspring in the 1990s, 2000, would not be the offspring from hatchery fish? That defies logic, in my mind.

My time is expired. I recognize the gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you.

Mr. Rohlf, we have heard a lot about the Judgment Fund this morning, and I hope that you can clarify the confusion about it.

The Judgment fund was established in order to pay awards and attorney fees in cases where judges find that the Federal Government has violated the law, any law. Now, the Republicans argue thought payments in Endangered Species Act cases are depleting the fund.

Since 2009, the Judgment Fund has paid out $8.7 billion. The Majority's analysis claims that 21 million has been paid for attorney's fees in cases involving the Endangered Species Act in that same period of time.

Now, 21 million is two-tenths of 1 percent of 8.7 billion. Now, I know that you are a law professor and not a math professor. But does two-tenths of 1 percent of the entire Judgment Fund seem excessive to you?

Mr. ROHLF. I think that is a very small percentage for a very wise investment. A lot of benefit.

Mr. MARKEY. Yes. Two-tenths of 1 percent seems very small to me as well. I await clarification by the Majority, perhaps, in their questioning as to how that can be a significant amount of money.

Now, Mr. Rohlf, according to a study by the University of Vermont, industry lawsuits opposing critical habitat designations now account for over 80 percent of all of the active cases related to the critical habitat under the Endangered Species Act.

Do you believe that we should limit the ability of businesses, like oil and gas producers, from challenging agency actions under the Endangered Species Act so that we do not have the courts cluttered with these cases? Because they do represent 80 percent of all the cases that are brought. Do you think we should find a way of limiting their ability to bring cases?

Mr. ROHLF. Representative Markey, I think the rule of law is one of the things that makes this country great, and access to the courts is very important. And I think the Equal Access to Justice Act, as well as the citizen suit provisions of the Endangered Species Act and other environmental laws, have provided that equal access to the courts for all. And so I would not support limiting access to our courts by anyone.

Mr. MARKEY. I agree with you. Even though they are oil and gas companies, and even though it is 80 percent of all the cases brought under the Endangered Species Act, I do not think we should be limiting them. I think we have to stand up for those oil and gas companies and their right to have access to the courts.

Now, Mr. Rohlf, the Majority argues that litigation that seeks compliance with the Endangered Species Act impedes recovery. Do not delays in listing species play a bigger role in hampering their recovery? And cannot litigation lead to collaborative species' recovery?

Mr. ROHLF. Well, Representative Markey, there are over 250 species on a list under the ESA that have been determined to warrant protection under the statute, and they have not been listed. And so they just languish on this list with no protection whatsoever.

Now the Fish and Wildlife Service has agreed to go through that list and consider listing those species, and that will be the most important thing to get them on the road to recovery. So listings put species on the road to recovery.

Mr. MARKEY. Now, Mr. Rohlf, businesses or individuals who are sued often settle their disputes out of court rather than engage in litigation. They do this to save time and money in addition to avoiding the chance for an adverse ruling.

Do you think the Federal Government should be allowed to save taxpayers' money by settling cases that would otherwise result in additional litigation costs?

Mr. ROHLF. I think that is very important.

Mr. MARKEY. Do you agree with that, Mr. Holsinger?

Mr. HOLSINGER. Mr. Chairman [sic], I think what is lacking is real on-the-ground conservation work. And none of this litigation results in that.

Mr. MARKEY. We agree with that. Would you support an increase in funding for on-the-ground conservation work, Mr. Holsinger, in the Federal budget?

Mr. HOLSINGER. To the States?

Mr. MARKEY. From the Federal Government to——

Mr. HOLSINGER. From the Federal Government to the States?

Mr. MARKEY. To the States.

Mr. HOLSINGER. Yes. I think that would be a good step. Funding for State conservation efforts are where those activities can best occur.

Mr. MARKEY. Would each of you agree that there should be an increase in conservation funding? Mr. Rohlf?

Mr. ROHLF. Yes. I think that would benefit endangered species and people.

Mr. MARKEY. Mr. Stokes?

Mr. STOKES. I do as well.

Mr. MARKEY. And Mr. Patterson?

Mr. PATTERSON. Yes, sir. I think more money going to the States without the oversight and strings that make it difficult to administer would be a very good idea.

Mr. MARKEY. You think the funding is too low right now?

Mr. PATTERSON. I think any additional funding should go to the States. Yes, sir.

Mr. MARKEY. Thank you. And I appreciate that.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman.

The Chair recognizes the gentleman from Texas, Mr. Gohmert, for five minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I am curious. My colleague, Mr. Markey, mentioned 80 percent of lawsuits are industry-based. Mr. Holsinger, do you have any comment about that?

Mr. HOLSINGER. I am stunned to hear such a figure. I have a hard time understanding where it could come from. I have a tremendous amount of comfort and knowledge in the data that environmental groups are bringing hundreds and hundreds of lawsuits. No such knowledge of industry suits to the contrary.

Mr. GOHMERT. To my friend Jerry Patterson, we have not talked about this particular question. But I am curious: Have you ever heard the term, "Shoot, shovel, and shut up"?

Mr. PATTERSON. That is exactly what occurs when you have a statute that does not encourage participation in the process. When you have people fearful of having—I think that is where you are going with this——

Mr. GOHMERT. Yes. Go ahead. Please explain.

Mr. PATTERSON. When you have folks fearful of what may happen if a certain species is located on their property, you are going to have exactly as you described.

And I make it analogous to I am also responsible for oil spilled along the Texas Coast. We have tremendous voluntary cooperation because they know that we are cooperative, and it is not a penalty-based system. You report; you get it cleaned up; there is no penalty.

If you have folks who will self-report because they have confidence in the system, you will have much more cooperation, and in this case, much more conservation.

Mr. GOHMERT. Well, actually, we had an effort in 2005 and 2006, the 109th Congress, to improve the Endangered Species Act. And I was shocked at the resistance we got to improving the Act and improving the rate of saving the species simply by paying landowners if the Federal Government stepped in and declared your land was an endangered species habitat.

Clearly, when the Federal Government does that, it seemed to me that was a taking. You cannot use your property like you wanted to. And I was shocked at the resistance we got over that because it seemed like that would help eliminate some poor farmer out there that is just scraping by, and he finds an endangered species.

And he knows that if that part of his land is taken up—and I know you do not advocate this policy, but you hear poor landowners struggling to get by that say, look. If they declare an endangered species habitat on my land, I am out of business. My family is broke. We have nothing. And I cannot sell the land because it is an endangered species habitat.

It seemed like a fair thing to do, and that it would encourage, as you have, people to self-report when there is pollution or problems. And I know nobody knows Texas land better than you. You have been in the job and been all over the State doing that.

But you do think that would be a better improvement to the ESA than some of the other ideas that have been proposed?

Mr. PATTERSON. I think so. And there are several ways to improve the ESA. One of them is to get rid of the 1-month statutory deadline, which is a technique and a tactic in the litigation to drive the train rather than actually do an evaluation of species.

Providing financial incentives for landowners to participate, self-report, create habitat on their own without having an overbearing agency, be it State or Federal, looking over their shoulder, that would all be positive.

Mr. GOHMERT. And of course, since that revenue from State land funds our education system in Texas, that would be good for all the little children that we want to educate. I know you have pushed that strongly, and I appreciated that in your opening comments.

Mr. Stokes, do you have anything further to suggest based on the discussion thus far that we could do to help improve the ESA?

Mr. STOKES. At this point, from our level, we are more of an end user of this whole thing. And where we have had the difficulty—and let me answer that question this way. Where we have had the difficulty is in the—when we have requested—when this school was in the—when I took it over almost four years ago, I sat down with Fish and Wildlife up in Carlsbad and specifically asked them, what

are the legal requirements? What are you guys looking for so we can do this correctly?

And I am still waiting for an answer to that. So when I say, help us, we need——

Mr. GOHMERT. Oh, but you did not put a time limit on when you wanted an answer. I think that——

Mr. STOKES. We did, sir.

Mr. GOHMERT. Oh, you did? OK.

Mr. STOKES. Yes, we did. We had——

Mr. GOHMERT. Yes. Do not leave the Federal Government an open-ended question.

Mr. STOKES. Right.

Mr. GOHMERT. The answer will stay open.

Mr. STOKES. Sure. We shared the project's timeline. We went through that to say, what can we do to help you move this along? What can we do to do this? Because we have to serve the students. The project is running late as it is.

So we went through all of that. And it was just one thing after another. That just seemed to us to be open interpretation because we had no standards in front of us by which to gauge any kind of a dialogue or a discussion. I mean, we have the Building Code that we can flip through and look through that. But this is something completely different.

So I would say we need some help in that arena.

Mr. GOHMERT. Thank you. I yield back.

The CHAIRMAN. The time of the gentleman has expired.

The Chair recognizes the gentleman from New Jersey, Mr. Holt.

Mr. HOLT. Thank you, Mr. Chairman.

You know, with the Endangered Species Act, it is easy to ridicule a particular listing, some jumping mouse or spotted owl or some small creature. And instead, we often turn to the grandeur of the streams teeming with salmon or steelhead, or the magnificent grizzly or grey wolves or the really magnificent Atlantic sturgeon, many of which are older than most of the people in this room. And we see maybe why it is important to prevent extinction.

But I think the greater significance of the Endangered Species Act is what it means for the web of life, more than these grand species. It is not nice to disrespect Mother Nature. And there are things that we are learning about the web of life that go far beyond our really poor understanding up to now of how these things are tied together—not just whether we will find Taxol in yew trees or other things, but what it will say about our ability to live on this Earth.

Mr. Rohlf, you had spoken about the success of the Endangered Species Act. I am not quite sure how to measure it, whether it is recovery and delisting of species, or prevention of extinction. Just in quick summary, how would you describe the degree of success of the ESA so far?

Mr. ROHLF. Well, if you go back to the late 1960s and early 1970s when the Department of the Interior was first compiling a list of species facing extinction, that list was growing longer every day. Nearly 40 years later, after enacting one of the most comprehensive protections for biodiversity of any country, we see many efforts

throughout the country to combine economic development as well as protection of endangered species.

And that is having a great deal of success. I mentioned efforts to restore salmon in the Pacific Northwest. Restores ecosystems, provides jobs, supports the local economy, and protects that web of life.

And if you look all around the country, similar efforts are going on. And rather than biodiversity being in decline throughout the country, in many places we are making enormous strides to protect biodiversity and provide for the benefits of that for both people and the environment.

Mr. HOLT. Thank you. Further, Mr. Rohlf, I would like to ask you about citizen enforcement, citizen watchdogs. How important is this in not just the Endangered Species Act but Clean Air Act, Clean Water Act, toxic statutes, and so forth?

Mr. ROHLF. Well, it is incredibly important. As I mentioned, a small group of volunteer law students and alums of our law school that we represent garnered more penalties for enforcing the Clean Water Act than the entire State environmental enforcement agency of Oregon for three years. So without those citizen watchdogs, without citizen enforcement of environmental laws, including the Endangered Species Act, we would be in a lot of trouble.

Mr. HOLT. Mr. Holsinger, you commented about how many lawsuits have been filed by one organization in particular. What limit should be placed on the number of lawsuits that a citizen or citizen organization should be able to file?

Mr. HOLSINGER. Well, Congressman, I think it is just an indication of how broken the law has become that we even need to ask the question.

Mr. HOLT. Yes. But were you suggesting that there should be a limit?

Mr. HOLSINGER. I am suggesting the law is broken and has led to a significant and tremendous amount of frivolous litigation.

Mr. HOLT. So some of those should be limited because you think they are frivolous?

Mr. HOLSINGER. I think the law should be amended to take away the incentive.

Mr. HOLT. That is not my question.

Let me ask another question. What would be a satisfactory number of species to be listed? You talked about a proliferation of the number of species. Should there be a congressionally imposed—should Congress substitute our scientific judgment for that of scientists of how many species should be listed?

Mr. HOLSINGER. Well, I think the standard under the Act is clear. It is the best available science. But when you have such a——

Mr. HOLT. And would you put a limit on that?

Mr. HOLSINGER. A limit on the best of——

Mr. HOLT. The number of species?

Mr. HOLSINGER. On the number of species?

Mr. HOLT. Yes. I mean, why do you raise that point about the number of species unless you are saying that it is too many? And so then I am asking you to define too many.

Mr. HOLSINGER. Well, I will give you a wonderful reason why I mentioned that. The Endangered Species Act provides that a species may be petitioned for listing. These groups are petitioning to list hundreds of species. I do not think that is consistent with the letter of the law.

Mr. HOLT. And that is, in your opinion, too many? Well, thank you. My time is expired.

The CHAIRMAN. The time of the gentleman has expired.

The Chair recognizes the gentleman from California, Mr. McClintock.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Mr. Holsinger, what other fields of law do we provide for citizen prosecutors? I know we do that for the ADA. That has been a nightmare to the citizens of my District, where we are watching a horrendous proliferation of predatory lawsuits being undertaken by these citizen prosecutors. Are we seeing the same thing with the ESA?

Mr. HOLSINGER. Absolutely. The group, WildEarth Guardians, just in the past three years, has filed over 145 cases. I mentioned Center for Biological Diversity. There are a handful of other actors that are doing similarly.

Mr. MCCLINTOCK. And how are these settlements arrived at?

Mr. HOLSINGER. Often, as Mr. Patterson testified, these are the result of missed deadlines. If the agency misses their 12-month finding or their 90-day finding, these groups can litigate. The agency says, gosh, we are overwhelmed with litigation. We missed a deadline here. We will agree to consider this within so many——

Mr. MCCLINTOCK. And these are generally findings in, well, cases like the San Diego school project, for example?

Mr. HOLSINGER. Yes. So if the agency——

Mr. MCCLINTOCK. But when these settlements are arranged between the Government and the citizen prosecutors, what role do victims like the San Diego Schools play in the settlement discussion?

Mr. HOLSINGER. I can tell you: None.

Mr. MCCLINTOCK. Are there any other fields of law other than the ADA where we allow this kind of rampant abuse of our legal system by self-appointed citizen prosecutors?

Mr. HOLSINGER. Not that I am aware of.

Mr. MCCLINTOCK. Is it something we ought to repeal in its entirety?

Mr. HOLSINGER. You know, I think the Act serves a good purpose. The citizen suit provision is clearly one of the areas that is ripe for a second look.

Mr. MCCLINTOCK. We were told that this has helped enormously with the salmon populations. But we have held a number of hearings on at this in the Pacific Northwest, and what we found is most of this is specific to caudal oscillation, a naturally occurring ocean current that shifts its pattern about every decade or so.

For the last decade, it was favoring Alaskan waters, where they were seeing record salmon runs, while we were watching declining salmon populations in the Pacific Northwest from Washington down to California. Now we have seen the current shift back. You

are seeing declining runs in Alaska, but burgeoning runs in the Pacific Northwest.

Is the ESA really helping in this respect?

Mr. HOLSINGER. I think in many cases it stands much more in the way of good conservation work. As the agency folks that I referenced have testified, it is often a hindrance.

Mr. MCCLINTOCK. Has anyone tried to quantify the economic cost to this Nation of this lunacy?

Mr. HOLSINGER. Congressman, this very Committee a few years back did a report that estimated the cost of the ESA approached $3 billion to landowners, local governments, and the like each year.

Mr. MCCLINTOCK. How much did it just cost the San Diego City Schools? How was the economy helped by the ESA litigation that caused the disruptions in your planning?

Mr. STOKES. Well, so far, our costs that we have incurred as a result of the injection have been approximately $5.8 million of additional fees.

Mr. MCCLINTOCK. And so $5.8 million that was supposed to go for school construction instead went into the pockets of lawyers like the fellow sitting next to you.

Mr. STOKES. It went into the pockets of lawyers paying our consultants. And again, we have two attorneys working on this, just trying to move it along.

And if I might, Mr. McClintock, the process is such that if we do not comply with what is coming back to us as comments, then we cannot obtain our incidental take permits. We cannot obtain these things. So we really, to a point, have no recourse. Even if our attorneys get involved, we have no recourse to resolve this except to do what we are being told to do.

Mr. MCCLINTOCK. Mr. Patterson, what recommendations could you make? I would start by suggesting that we ought to count the damn hatchery fish. On the Klamath, we were told we have to tear down four perfectly good hydroelectric dams because of a catastrophic decline in salmon. And I said, well, why does somebody not build a fish hatchery?

And they said, well, we have a fish hatchery at Iron Gate. It produces 5 million salmon smolts a year. 17,000 return every year as fully grown adults to spawn. But they will not let us include them in the ESA counts.

Mr. PATTERSON. I think we need to—there is a public policy question. Do we assume a burden to preserve every species that exists today when we know that there are tens of thousands of species that became extinct long before man ever set foot on this planet?

The standard that is inherent in the opposition, or in the Center for Biological Diversity, et cetera, is that every single species must be preserved. There are some that are going to naturally, even absent man's presence, go away. But we have created a burden that is not achievable.

How do we make that triage? I do not know, to answer the question from the gentleman from New Jersey. I do not know, but something. What we have now is created to fail.

The CHAIRMAN. The time of the gentleman has expired.

The Chair recognizes the gentlelady from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

A question that I have for all of you, and I think all of you more or less agree, from what I am hearing, is that there is not adequate funding to be able to get some of the assistance to the areas. Am I correct? You are talking about funding to the agency to be able to help, whether it is permitting or getting your caseload down?

Mr. HOLSINGER. Congresswoman, that question was first addressed to me. I will take a first stab at a response.

I do not think funding for the agency is the issue. My query was whether that was additional funding for the States because the States have primacy over wildlife.

Mrs. NAPOLITANO. Correct. That is the idea, is to be able to allow more funding for the States to be able to help the Agencies locally.

Mr. HOLSINGER. Not if it is funding that goes to Fish and Wildlife Service. But if it is funding to promote State conservation or private conservation, I think that is absolutely a good thing.

Mrs. NAPOLITANO. Anybody else?

Mr. ROHLF. Representative, part of the reason that it takes so long to list many species is that Congress continually limits the listing budget of the Agencies needed to go through the listings.

And so rather than those artificial caps on money that the Fish and Wildlife Service can spend in going through its backlog of listing species, this Committee could increase the listing budget and allow species to get on the path of recovery much sooner.

Additionally, as I mentioned, recovery funds, funds that actually fund on-the-ground recovery and restoration efforts for listed species, are woefully inadequate. So additional funds to both the Agencies and the States for recovery would be a great step.

Mrs. NAPOLITANO. Thank you. Short answers because my time is running out sir. I am sorry.

Mr. STOKES. Thank you. I think funding is only part of the issue. I think if you just throw money at it——

Mrs. NAPOLITANO. Fine. No, I understand.

Mr. PATTERSON. Time is money and money is time. If you increase the time available to the U.S. Fish and Wildlife to do their job, you will have fewer lawsuits because that is what is triggering lawsuits, is that 12-month period.

If you increase that period of time, you have fewer lawsuits. If you have fewer lawsuits, you will have more staff time dedicated toward doing the research as opposed to responding to litigation.

Mrs. NAPOLITANO. Thank you.

Professor Rohlf, there are lots of claims that the nonprofit environmental organizations make a significant portion of their income, or, quote, "get rich," from bringing ESA-related lawsuits against the Government. Is that accurate?

Mr. ROHLF. Well, sometimes I wish it was. But unfortunately, that is not the case. The Center for Biological Diversity, for example, that many people have raised, gets perhaps 2 percent or less of its budget from attorney fee awards. And nobody is getting rich off of this.

Our clinic employs some of the best lawyers in the Pacific Northwest—not just environmental lawyers, but the best lawyers in the

Northwest. And we pay them; we can afford to pay them about half of what somebody fresh out of law school makes at a big firm here in D.C.

Mrs. NAPOLITANO. Thank you. But why does it take so long for the recovery of some species? And I must add, I keep telling people endangered species, yes, there are some that have been extinct for many, many years. But guess what, guys? We are also a species, man. So we need to protect others so that we can protect ourselves.

Professor, what factors most aid listed species' recovery?

Mr. ROHLF. Well, you cannot regrow an ancient forest in a couple of years. You cannot restore an aquatic ecosystem that humans have completely re-plumbed, like the Columbia and Snake Rivers, overnight. And so many of these species declined over decades, and to think that we can put them on a list and, in a couple of years say, everything is great, and take them off, is simply impossible.

However, most species are recovering. The Endangered Species Act is working, according to the timeline of those recovery plans.

Mrs. NAPOLITANO. Thank you. And while you are at it, would you be able to comment on whether or not ESA did or did not play a role in the recovery of the salmon in the West Coast and the economic benefit to not only the fishermen but the Nation as a whole? Because that brings money into our pot.

Mr. ROHLF. In my view, the Endangered Species Act has played a huge role in salmon recovery throughout the Northwest. As a result of a court decision, for example, dam managers now have to spill more water through the dams to protect juvenile salmon that are migrating down to the sea, and that has increased the survival of both hatchery as well as wild runs up to 95 percent.

Mrs. NAPOLITANO. Thank you. And the biomedical industry has show protected species can be the source of lifesaving medicines such as the revolutionary cancer drug Taxol, derived from the bark of the Pacific yew tree, a species native to Oregon, Washington, and Alaska.

Does protecting biodiversity have other tangible benefits to the human health and our economy?

Mr. ROHLF. Well, it has huge benefits, Representative. Just to give you—I see we are almost out of time. But just to give you something I thought of on the way over, I saw a slogan on a taxi that said, "West Virginia, Wild and Wonderful." I guess they rejected, "West Virginia, Paved and Pretty Good." So I think that sort of instinctively shows the value that we place on biodiversity.

The CHAIRMAN. The time——

Mrs. NAPOLITANO. Thank you. Thank you, sir.

The CHAIRMAN. The time of the gentlelady has expired.

The Chair recognizes the gentlelady from South Dakota, Mrs. Noem.

Mrs. NOEM. Thank you, Mr. Chairman.

Professor Rohlf, I have a question for you. What are the qualifications for placing a species on the Endangered Species List?

Mr. ROHLF. The U.S. Fish and Wildlife Service and the National Marine Fisheries Service must determine, based on the best science available, that the species meets the definition of "threatened" or "endangered" under the statute.

Mrs. NOEM. So I recently read an article, and I wish now that I would have copied it and kept the information with me. But it was on the Eastern diamondback rattlesnake that was being considered for placement on the list, and it was specifically because it was being harassed by individuals and people—not because there was not a plethora of them available throughout the areas where they live, but because of how they were being treated by humans.

Is this a qualification that will allow a species to be listed on the list?

Mr. ROHLF. Well, to the extent that human activities are harassing or harming the species such that they face potential extinction, yes. It is a factor that should be considered.

Mrs. NOEM. Anyone else on this panel would like to weigh in on a topic like that, where a decision can be made on activities in an area that can add a new species to the list? Mr. Holsinger?

Mr. HOLSINGER. The best available science, as a standard, has received a great deal of scrutiny. We have seen many cases where we believe the agency is making decisions that are actually contrary to the best available science, and listings in our State—the Preble's meadow jumping mouse is a great example—there, the agency biologists say that no one can tell the Preble's meadow jumping mouse from another meadow jumping mouse unless you actually kill it and measure the inside of its cranium.

So we have gotten to levels of absurdity with these things, and it is time to set that right.

Mrs. NOEM. Yes. That was how I felt after reading that article. Well, thank you for your clarification on that.

Commissioner, I have a question for you. I understand that the Western States Land Commissioners Association, which includes Texas and 22 other States, including my home State of South Dakota, passed a resolution earlier this year that will raise concerns about the mega-settlements between Fish and Wildlife and—would you please explain that resolution and the goals?

Mr. PATTERSON. Well, there are 23 states that—we have a convention every summer and every fall, 23 States. And by the way, the president, I think, the current president is Jerry Johnson, the elected Commissioner of Public Lands from the great State of South Dakota.

And the concern was across the board. Even those who considered themselves green—you know, the Commissioner from New Mexico, the commissioners from other States who are of a different party than I—we have all realized that what we have today, it is not working. And we, I think, unanimously passed a resolution to have someone take a look at the ESA and how it is working because it is not.

Mrs. NOEM. Do you think a group such as this could make much better decisions for their local States and areas than people at the Federal Government level that are looking at it from a much more distant perspective?

Mr. PATTERSON. Absolutely. And I do not fault the Federal Government, folks. I do not fault the folks at Fish and Wildlife, or NMFS, or Secretary Salazar, or Under Secretary—they are trying the best they can. But they are hamstrung by a statute that is in functional failure at the present time.

Mrs. NOEM. Thank you. I appreciate that.

And with that, Mr. Chairman, I will yield back.

The CHAIRMAN. With the gentlelady yield to me?

Mrs. NOEM. Certainly.

The CHAIRMAN. I want to just make an observation, since I have some time. The issue has been brought up about recovering species, and there have been several references to my part of the country. And I mentioned that the life cycle of a salmon is roughly five years. It may vary a year or two on either end. And the salmon runs coming back into the Columbia and Snake River systems are greater than they have been since we started keeping records in 1938.

So Mr. Holsinger, I would like to ask you a question since you deal with this in the law. At what point, if you are having tremendous salmon runs coming back on a consistent basis, do you say, OK, I think we have recovered them? Essentially if the life span of a particular species is five years?

Mr. HOLSINGER. Mr. Chairman, a great question, and one that, again, is mired in this question of science. When you are counting the DNA of a salmon that, for all intents and purposes, a salmon is a salmon in the Northwest or the Northeast—but when you are listing based on different tributaries and these minute differences in DNA that probably do not rise to the level beyond differences in individuals like you and I, something has gone horribly wrong.

And in our case in Colorado, under State leadership, we crafted our own recovery goals because the Feds did not for our listed fish on the Colorado River. But it took tremendous effort and tremendous pressure by the State to say, no. Let's set a goal and let's meet it.

The CHAIRMAN. For the record, the statement was made that there has been a tremendous success in recovering because of the Endangered Species Act. I would just point out, for the record, that there is a spill that was called for on the Snake River—or on the Columbia River, a summer spill to save species of fish.

And data shows that it saved—it cost something like $70 million in lost revenue to the power agencies to save 24 fish. That is hardly economic success, in my view.

The Chair recognizes the gentleman from the Northern Marianas, Mr. Sablan. And I thank the gentlelady for yielding to me.

Mr. SABLAN. Thank you very much, Mr. Chairman.

Good morning. Mr. Rohlf, Mr. Patterson suggested that we should increase the amount of time Federal Agencies have to respond to petitions under the ESA. But are not many species running out of time?

Mr. ROHLF. Yes, they are.

Mr. SABLAN. I know that because I come from the islands, where we have species that are seriously in danger, and whether that is on land or on ocean.

Mr. ROHLF. Oftentimes Agencies cannot get to those listing decisions simply because they do not have the budget to do so.

Mr. SABLAN. And so my question is—and you noted also earlier, too, like a question to my colleague from California. You noted that funding has not been sufficient to fully do the job of getting all species on the path to recovery.

Many species went through years if not decades of decline prior to their listing under ESA. So is it realistic that recovery can just occur overnight, especially if there are insufficient funds in Federal agency budgets, for them to do their job?

Mr. ROHLF. No, it is certainly not. And even though we are making significant strides and recovering many species, that does take time, just as it took time to get them to that point that we need to protect them.

Mr. SABLAN. All right. Mr. Holsinger, good morning, sir. I am not a lawyer, so please help me understand this.

You said that you know that environment groups are bringing hundreds and hundreds of lawsuits over the ESA. Yet the Federal court system claims that there were just 240 lawsuits, 240 lawsuits filed against the Federal Government in all environmental matters, in the 12 months ending June 30, 2011.

So where is this flood of ESA suits by environmental groups?

Mr. HOLSINGER. Thank you, Congressman. The research that we did was based on environmental groups that filed claims against the Federal Government over the past several years in the Federal courts, and raising Endangered Species Act cases.

What we found, again, is that hundreds of cases have been filed, the majority of which are against Agencies—the Department of the Interior, for example—and the majority of which raise ESA as claims.

Mr. SABLAN. So you are saying—because what I have here is that there were 240 filed in 2011. So you are saying since time immemorial. And now, of course, we can always say, you know, hundreds of thousands, tens of thousands. But we are talking here about current events.

Could you provide your analysis to the Committee for the record, please? We would really like to see that.

Mr. HOLSINGER. Yes, I would be happy to.

Mr. SABLAN. All right. So one more question, if I may. The United States Constitution States that, "Congress shall make no law abridging the freedom to petition the Government for a redress of grievances."

When a suit is brought against the Federal Government under ESA or any other Federal law, the plaintiff is seeking that redress. Do you believe the First Amendment should be changed to only apply to some people's grievances, Mr. Holsinger?

Mr. HOLSINGER. No. I believe the Endangered Species Act should be changed.

Mr. SABLAN. So we should change the Endangered Species Act so only a selected or a certain number of people would file grievances or petitions against our Government?

Mr. HOLSINGER. There is no doubt that the citizen suit provision should be changed.

Mr. SABLAN. But are you talking about citizens' groups? So environmental groups are not the only ones who can recover under ESA's citizen suit provisions. Correct?

Mr. HOLSINGER. I suppose that is correct, but the majority of litigation is certainly——

Mr. SABLAN. Instead, a broad spectrum of people, including farmers and ranchers, can also file suit under this provision. Is that also correct?

Mr. HOLSINGER. I know of perhaps one case where that has occurred. Perhaps.

Mr. SABLAN. But it is a fact that farmers and ranchers can also file grievances under this provision. Right?

Mr. HOLSINGER. But they never—virtually never recover.

Mr. SABLAN. But it does not matter whether they did or they did not. It is just they can.

Mr. HOLSINGER. I think it is very relevant that they have not.

Mr. SABLAN. Professor Rohlf, do you agree with his statement?

Mr. ROHLF. Actually not. Industry groups, property owners, routinely file lawsuits under the ESA's citizen suit provision as well as the Equal Access to Justice Act. As we have heard already, the vast majority of lawsuits challenging critical habitat decisions by the U.S. Fish and Wildlife Service are filed by property owners and industry, and oftentimes those groups recover attorney's fees as well.

So many of the attorney fee payments that go out under EAJA or the Endangered Species Act that involve endangered species issues actually go to lawyers like Mr. Holsinger for industry and property owners.

Mr. SABLAN. Thank you.

The CHAIRMAN. The time of the gentleman has expired.

The Chair recognizes the gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN OF TENNESSEE. Thank you very much, Mr. Chairman. This is a very important hearing. It is important to my State of Tennessee, which ranks fifth on the endangered species—on the number of endangered species listed.

Our briefing paper says that there were 570 ESA-related lawsuits filed in just the last four years, not counting the hundreds of other environmental-type lawsuits. It is almost impossible to calculate the costs of these lawsuits to the courts, to Federal, State, and local Agencies, and especially to businesses.

One thing I do know, we have sent many millions of good jobs to other countries for the last 40 or more years, and we have driven up costs for everyone on everything. We have destroyed millions of jobs, in large part, or at least a very high percentage, based on the environmental laws.

And I have noticed over the years that most of the environmental radicals seem to come from very wealthy or very upper income families. Perhaps they do not realize how many poor and lower-income and working people have been hurt by destroying all these jobs and driving up all these costs, but it has certainly happened.

In fact, Patrick Moore, a founding member of Greenpeace, once said in an interview, "The environmental movement abandoned science and logic somewhere in the mid-1980s just as mainstream society was adopting all of the more reasonable items on the environmental agenda. To stay in an adversarial role, those people had to adopt ever-more extreme positions because all the reasonable ones were being adopted."

And I read with great interest this portion of our briefing paper that says, "Even the threat of lawsuits influences Federal agencies' actions or lack thereof on citizens' entities. They go through the proper environmental permitting processes required by the law. It often delays projects for years."

In Montana, for example, a mining project that had gone through environmental reviews and received all required permits in 1993 now has to spend millions of dollars on updating environmental impact statements. The mining company has been told by the FWS that it will need to pay for contractors to help them complete a biological opinion related to grizzly bears, but will have no assurance that the project will move forward.

A couple of months ago, I had the head of CSX Railroad who came to see me and told me that they had tried for seven and a half years to get permits to mine phosphate in Florida on property that they had owned for many years. They finally gave up and went down to Peru, went to Peru and got approval in just a few months' time. Hundreds of jobs, all that money, and there are so many examples that is it really sad what we are doing to our own people.

When I graduated from the University of Tennessee in 1969, people with just a bachelor's degree could find good jobs managing factories or businesses. Then we started sending all those jobs to these other countries. And so all these people decided that they had to go to graduate school.

Many, many hundreds of thousands, unfortunately, went to law school. I am a lawyer and a judge, but I can tell you just yesterday there was an article in the paper about that there are far too many lawyers out there. And in spite of the fact that we have far too many lawyers, these courts are approving these fees of $400 and $500 an hour as if we had a shortage of lawyers. It is just ridiculous, and it is really said what has happened because of the ESA and some of these other Acts.

I heard this lawyer, a woman lawyer, brag about how that she specialized in these government-type lawsuits like this. But she was saying this as justification for settlement, that she had never had a client who received nearly as much as she had in legal fees. I think that is sad, and I am very glad that I can say that I have never had a client that did not receive a whole lot more than I ever received.

But this law needs some drastic changes or we are going to continue to hurt a lot of poor and lower-income and working people in this country. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

And the Chair recognizes the gentleman from California, Mr. Costa, for five minutes.

Mr. COSTA. Thank you very much, Mr. Chairman.

A number of Endangered Species Act decisions out of the District of Columbia and Federal courts have characterized their roles as hyper-deferential.

And we know, as a result of the first inaction of the Endangered Species Act, going back to the 1970s, based upon a lot of—various court decisions, the application of the law certainly has changed; at

least, it is my view it has changed, and I think many others concur with that view.

Is it appropriate—and I am not sure which gentleman to respond to—for a Federal agency to defer decisions, even when an agency may have ignored data or failed to use the tools available to a practicing scientist, or one that acted contrary to prevailing norms relevant to the fields of the scientific inquiry? Who would like to try to respond to that? Mr. Holsinger? Do you want to take a stab at that?

Mr. HOLSINGER. Thank you, Congressman.

Mr. COSTA. Briefly, because there are a couple of other questions I want to get to.

Mr. HOLSINGER. You bet. The issue of agency deference has evolved considerably due to the huge number of cases over the Endangered Species Act. Professor Rohlf testified as to the notion of political interference with decisions.

I can tell you, from scouring thousands of pages of administrative records, the political interference that I saw was merely asking scientists, "What is your support for this? What is your authority for this proposition?"

So I think it is critical that there be a thorough and transparent vetting of listing decisions, and sticking to the letter of that best available science.

Mr. COSTA. But the science, as we know, changes also as we learn more.

Mr. HOLSINGER. Absolutely. And that is——

Mr. COSTA. Go ahead.

Mr. HOLSINGER. That is one of the reasons I think it is so critical to focus our scarce resources on species. These debates over genetics and taxonomy and subspecies and distinct populations, we are spending our scarce conservation dollars unwisely.

Mr. COSTA. I want to get there, but if some of you others want to weigh in, please do. That raises the question of—and I have seen it in a host of different areas; Kern County that I represent has, I think, perhaps the highest amount of listed endangered species in the State of California.

We have had some habitat conservation plans that have had some success. But it seems to me treating those as a totality of an ecosystem is far more effective than on a species-by-species basis. Would you concur or not?

Mr. HOLSINGER. I think land conservation that takes into account multiple species under mechanisms like HCPs, CCAAs, are definitely steps in the right direction.

Mr. COSTA. We have had problems with a host of issues on water-related cases, where it seems to me that has not been the case. We look at one of the stress factors in the case of the Sacramento-San Joaquin delta system, and we determine, ah-hah, that is the only one we can really control, i.e., the export of water, when we ignore invasive species, when we ignore other impacts of ammonia in the water, discharges, other—and it seems to me that, as a matter of fact, the National Academy of Science at this particular instance has come down very hard on this.

How do you treat a species if you only look at one stress factor that has been listed?

Mr. HOLSINGER. Well, the Act requires consideration of several different factors, including adequacy of regulatory mechanisms, other threats to the species. So I think part of the process the agency goes through is to examine many different factors.

Mr. COSTA. But in practice, that is not the case, in the experiences that I have had to deal with.

Let me ask one other question to any of you. Should the social implementations be taken into account, whether it is a school district in San Diego or whether it is land use decisions in Texas, as to the impact of a listing that has harm to both the social well-being and the economics of a given area?

Mr. PATTERSON. I think if you talk social, if you, say, substitute economic, then absolutely the answer is yes, in my opinion. And I think there may be provisions for that in the Act—someone who knows the Act better than I do.

But you have to look at a balance. I mean, this is a constant tension. There are thousands of species that expired long before we were here, and to presume that we have to protect all of them may be creating bar that is too high to cross.

Mr. ROHLF. Mr. Representative, I think the best policy is back in 1973, this House recognized that species represent potentially invaluable resources. And we never know what benefits they can provide. And so simply throwing some away because we do not see those benefits now is squandering investments that we need for our future.

Mr. COSTA. My time is expired. I do not think I said that. I asked whether or not they should be weighed in as a part of the consideration. You took it to the extreme. Thank you.

The CHAIRMAN. Thank you, Mr. Costa.

At this time the Chair recognizes the gentleman from Colorado, Mr. Coffman, for five minutes.

Mr. COFFMAN. Thank you, Mr. Chairman. Thank you, Mr. Chairman, for taking the lead on this very important issue of modernizing the Endangered Species Act. Although the intent of this Act was to save species from extinction, it has devolved into a tool for litigation at the expense of thousands of proposed economic development projects.

The ESA was not meant to create jobs for trial lawyers. Rather, it was meant to help and protect plants and animals. However, the recovery rate of species listed under the ESA is 1 percent since the bill's inception in 1973.

Further, there have been billions of dollars in lost opportunity for economic development and job creation because of the endless litigation arising from the ESA. The result is that, currently, we are not saving species, and the ESA incentives for lawsuits are antagonistic to economic development. Clearly, the system is not working.

For this reason, it is imperative that we look at how to modernize the ESA to make it more effective in its mission of savings species from extinction. I want to thank the witnesses that are here today, and I have a few questions.

Mr. Kent Holsinger, I know you are familiar with the Preble's meadow jumping mouse. Many believe that the listing of the Preble's meadow jumping mouse was motivated by the environ-

mentalists' desire to stop economic development and growth in Colorado, not actually protected species.

For example, water managers in my district were forced to spend hundreds of thousands of dollars to construct mouse tunnels for the Preble's jumping mouse. What are your thoughts on advocacy groups using ESA as a tool to stop economic development and growth?

Mr. HOLSINGER. Thank you, Congressman. It is no doubt that these activist groups, their attorneys, the consultants that are hired, have a vested interest. In many cases, academia does as well. If they publish papers on a species that is listed under the ESA, that is a huge deal for them They receive funding to study these species. It can make or break careers in academia.

What we saw with the Preble's mouse, the most active opponents of delisting were the consultants that companies and entities and agencies and landowners were forced to hire to go look for the mice as a result of a consultation with the U.S. Fish and Wildlife Service.

So again, if you follow the dollars, the motivations of many of these things can be quite clear.

Mr. COFFMAN. I know you commented on this some, but in Colorado under the Owens Administration, there was a program, an effort, to help endangered species in order to get them delisted.

And I know you referenced that in earlier testimony, but I wonder if you can go into a little bit more detail on that and whether or not you think that is a good example for the country going forward.

Mr. HOLSINGER. Yes. This is some years back, when I was at the Department of Natural Resources. We made it a State priority to recover and work toward delisting of species.

And again, the States are where wildlife management occurs. That is where we are closest to the ground, closest to the landowners, and that is where these conservation efforts, these conservation dollars, should be occurring.

The Federal law, again, has devolved into this endless array of litigation. But good things can be done at the State and local levels. We see local sage grouse working groups, for example, coming together, trying to figure out how to do good things for the species and for the habitat. So there are very good things occurring at the State and local level.

Mr. COFFMAN. Can you give me an example of one specific species that you worked with that you had success on during those years under the Owens Administration?

Mr. HOLSINGER. Greenback cutthroat trout was an interesting example, state efforts to recover and delist that. Were it not for the 2002 drought, we had reached population numbers where we were about ready to get off of the Federal list, again due to Federal delegation of authority under the ESA to the States so the States could do these things.

Mr. COFFMAN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. All right. Thank you. The gentleman yields back.

At this time we recognize the gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman.

Professor Rohlf, the biomedical industry has shown that the protected species can be the source of lifesaving medicines such as the revolutionary cancer drug Taxol, derived from the bark of the Pacific yew tree, a species native to Oregon, Washington, and Alaska.

Does protecting biodiversity have other tangible benefits for human health and the economy?

Mr. ROHLF. It certainly does, Mr. Representative. As I mentioned, in the Pacific Northwest, efforts to restore salmon have brought hundreds of millions of dollars in economic benefits to local communities. Another good example I would raise comes from my hometown of Portland, Oregon.

The City of Portland basically takes water out of a stream and pumps it into the homes of hundreds of thousands of its water customers. It does not have any expensive treatment facilities or fancy equipment. It just pumps that water right to our homes.

That water comes from a protected ecosystem on the flanks of Mount Hood that is also home to spotted owls and salmon. Basically, what that ecosystem does for us is collect water, clean it, and deliver it right to us. So that is the type of example of the benefit of ecosystem services that directly benefits me, because I drink it, and the City of Portland, which essentially gets clean water for free.

Mr. KILDEE. Thank you very much. Another part of that—the zebra mussel was unintentional introduced into the Great Lakes, upon which I live. And that species, are there other species that could be introduced into the Great Lakes that would have an enhancing effect upon the Great Lakes?

Mr. ROHLF. It is possible, Mr. Representative. However, introduced species, as you mentioned, oftentimes put ecosystems and jobs and our economy at huge risk. Zebra mussels, for example, if they get into the Columbia River ecosystem, we are in for some serious economic devastation.

So that is why a lawsuit that my environmental law clinic brought to help control invasive species will provide tremendous economic benefits to our society by preventing those sorts of introductions of invasive species.

Mr. KILDEE. We right now in Michigan, of course, and in Canada, the streets around the Great Lakes are worried about the Asian carp, which may have already left some of its DNA in the lower part of the water there.

When I was in the State Legislature in the late 1960s/ early 1970s, we introduced the salmon, Coho and Chinook salmon, which probably, Mr. Holsinger, are maybe cousins to the salmon out in the Northwest.

Is there any danger when one introduces even a similar species, even though the DNA may be—I will address this to both of you, maybe Mr. Holsinger first—the DNA may be very similar or almost exact. But is there any danger of introducing some disease by introducing fish of the same species from another area into the, say, Great Lakes?

Mr. HOLSINGER. Congressman, I am not sure that I have heard of such an instance. I do know that recovery efforts with the listed fish in Colorado that we have, hatcheries have been integral to those. So I would hate to see limits on the ability to do such things.

Mr. KILDEE. Well, I can recall voting for the introduction of the Coho and the Chinook, and it seems to have been a successful thing. I do worry about to make sure that we thoroughly examine the possibilities because aside from the DNA being basically the same, we know, within our human species, one cousin may have the Huntington gene and the other may not, yet their DNA basically is that of the human.

So how far should we go in trying to determine whether we may be inadvertently introducing something that could be harmful?

Mr. HOLSINGER. Congressman, it is a good question. I am not sure I have an answer.

Mr. KILDEE. OK. Thank you very much. Thank you.

The CHAIRMAN. Thank you, Mr. Kildee.

At this time we recognize the gentleman from Idaho, Mr. Labrador, for five minutes.

Mr. LABRADOR. Thank you, Mr. Chairman.

Mr. Stokes, this question may have already been asked, but I am just really curious about—thinking about the state of the economy right now, thinking about our school districts. You know, we struggle in Idaho, as I am sure you struggle in California, with having enough money for building schools and helping our children.

I believe it is about $7,000 per pupil that you spend each year in California. Is that correct?

Mr. STOKES. Approximately. That is my understanding as well.

Mr. LABRADOR. What was the amount of money that was budgeted for construction of your school?

Mr. STOKES. I believe the original—because it was so long ago—the original construction amount that was originally budgeted out of the bond was $20 million. Then as things began to progress with this, that budget was increased to $30.8 million.

Mr. LABRADOR. And how much has been spent on litigation?

Mr. STOKES. That I do not have an exact answer for you, but I would estimate right now, under my tenure as the program manager for that, between $100,000 and $200,000 to date, in the last three and a half years.

Mr. LABRADOR. And what I think is missed sometimes is, you know, we are talking about the cost of attorney's fees and whether somebody should get 120 or 400, which both of them are high.

But really, it is the opportunity cost. That really is the biggest cost to the community. Can you estimate what your opportunity cost has been in this process?

Mr. STOKES. Can you go back and then explain that, by the opportunity cost?

Mr. LABRADOR. Well, what could you have been doing instead of wasting all your time on this litigation and wasting all your energies on trying to figure out if a little shrimp is going to be saved or not? What could you have been doing during this time in your school district?

Mr. STOKES. Well, let me go back and answer that a little different way. If the lawsuit was not filed, the injunction was not filed, the school would be constructed and would have be populated in September of 2008. We would have had several—well, literally hundreds and hundreds of kids go through the school already.

We would have had kindergartners; this would be their fifth or sixth grade graduating class as of this year. We would have been able to depopulate overcrowded schools that are in the close vicinity. We have three immediate schools that we would have depopulated immediately and put into Salk to populate them, thus reducing the class size at the overpopulated schools, or the schools that are at capacity right now, which is a real challenge for the district, considering the economics and the quality of education.

We are actually looking at increasing class sizes due to the budget, and construction of the school would take the pressure off of that in that community.

Mr. LABRADOR. So in a time that you are actually thinking about increasing class sizes, and the science—there are different debates about whether that is a good thing or a bad thing——

Mr. STOKES. Right.

Mr. LABRADOR [continuing]. But the reality is that you had the money allocated for this particular school.

Mr. STOKES. We did.

Mr. LABRADOR. This is something that was actually approved by the voters of the area.

Mr. STOKES. That is correct. Correct, sir.

Mr. LABRADOR. Correct. In spite of having some financial difficulties, the people decided that they wanted another school. And now, because of just a simple lawsuit, you are not able to provide the services that you want to provide.

Mr. STOKES. That is correct. Just a quick story on that. One of the neighbors directly across from the Salk school site, when the school was originally promised to them, I believe his daughters were in upper elementary school. They now both have their PhDs. They were evidently on a fast track, but according to him, they both have their PhDs now. So a long delay.

Mr. LABRADOR. Amazing.

Mr. Rohlf, the current Federal statute for the Equal Access to Justice Act and the Judgment Fund provide that attorney's fees cannot exceed $125 per hour unless the court determines that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee.

Why is this statutory rate of $125 per hour not adequate compensation, in your opinion?

Mr. ROHLF. Well, actually, if you look at the time and effort spent on a case, many, many of the hours that one spends on a case are not compensable. An average law firm working for a large corporation on endangered species issues charges about $400 or $500 an hour.

Mr. LABRADOR. But are they charging the Federal Government for that?

Mr. ROHLF. No. They are charging private entities.

Mr. LABRADOR. So they are actually charging the private sector. You are charging the Government. Why is that not adequate?

Mr. ROHLF. Well, because although those costs might sound high, it is actually very expensive to provide legal expertise to a client. And that is why a private firm charges the rates that it does.

Equal Access to Justice Act awards are generally much less per hour, and I am not really sure why environmental plaintiffs should—or environmental attorneys should expect to provide services at far less than the cost charged by the private sector.

Mr. LABRADOR. Probably because you are getting your money from the public sector, and you are also stopping schools, like the San Diego School District, from actually doing the job that the voters want them to do. But thank you for your time.

Mr. GOHMERT [presiding]. Thank you, Mr. Labrador.

At this time we will recognize the gentleman from California, Mr. Bilbray, for five minutes.

Mr. BILBRAY. Thank you, Mr. Chairman. You know, Mr. Chairman, as somebody who has spent 18 years as an environmental regulator, $460 an hour and saving the planet, I think, is a pretty good compensation for your efforts. I know, as a member of the California Coastal Commission or a member of the Air Resources Board, there was no way I was charging $460 to save the planet.

But I want to thank you for a chance for me to be here today. I really want to talk specifically about an item that I think everybody should agree is an example of the system not working. And as somebody who has been involved in the environmental movement before most—in fact, I would challenge anybody to say that they were involved in the environmental movement in 1970 like I have been.

But I think all of us recognize the intention of the Act has been changed dramatically in implementation. And I guess that is what it really comes down to. Consultation has become dictation. Mr. Holt talked about the web of life. It is based on balance, and checks and balances in Nature.

Frankly, as someone who has worked with the Act, there are not any checks and balances. It is to the point to where the absurd is able to be pushed to extreme. And I was actually watching President Obama give a speech where he said, "The Federal Government ought to be building more schools." And all I thought was, Mr. President, the Federal Government does not have to build more schools, but it needs to allow local communities to build schools. Give the permit for the school.

I am talking about just the Jonas Salk School, which hopefully, if we address this issue, can be built by the time to celebrate the 100th anniversary of this great scientist. We are talking about, as the President learned, shovel-ready does not mean you can build it. Shovel-ready means you have six to eight years of litigation before you. And even the President pointed out the shock of what a huge gap it is between the perception of what is OK to be done and what it takes to finally get the permits.

The fact is, I do not think anyone, when they passed the Endangered Species Act, expected a community, a multi-ethnic committee like Mira Mesa, to have to wait over a decade just for the Federal bureaucrat to say, "OK, you can start construction on a school."

And let me tell you, this is a location that I would challenge anybody who claims to be an environmentalist to talk about. In 1978, this site was graded, graded for the slab. It was built in an area where, for 30 years, every environmental study that has been done

on vernal pools and the fairy shrimp has said that constructive wetlands is impossible. Cannot happen.

Thirty years of the best scientists in the world saying that the private sector cannot build constructive wetlands in lieu of disturbed habitat because the science was not there. And now the school is being told, for over a decade, "Oh, it is a miracle. We have a constructive wetland that happened accidentally on a site that has been graded, and your kids cannot build the school."

Let me remind you, at a time that the President is talking about, let's get out there and create jobs, this regulatory roadblock is blocking 500 construction jobs, and how many thousands of kids from being able to be educated in their neighborhood. No one who voted for the Act in 1973 expected this type of absurdity and extremism to be applied.

Now, I think, though, Mr. Chairman, we can recognize that both sides could look at: How do we address these issues? And I think first we have to admit, this is not about trashing the environment.

This is not about the fact of it is either save every plant or make every kid—and accept that kids cannot be educated. It is about reasonable application, as those of us who have done that. The trouble is, the reasonableness has gone to extremes because there are no checks and balances. When somebody goes before a Planning Commission, they get some review. You do not get that review except in courts.

And let me point out that we have a project that says, Fish and Wildlife, let's make a decision a decision within 90 days. Do not switch people who come in with new conditions. Do not add in new conditions after you have already looked at it for ten years. And let's build this school, let's create the jobs, and let's move forward.

And hopefully, we will recognize that if this can happen with a school, what about the small business that is trying to go over? And I will just say to those who say about the health research and the health breakthroughs, the UC Cancer Center was being held up for the gnatcatcher. How many lives might have been saved if that permit and that expansion and that cancer research facility had gone in there?

There is a cost of over-regulatory activity as much as there is a cost to under-regulatory. And so it is the balance we are talking about. And Mr. Chairman, I hope that this Committee will take a look at the CURED Act. Hopefully Democrats and Republicans, those who are active in the environmental movement and those who are active in the educational institution, can get together and say, "Maybe we can learn from Jonas Salk one more time, and Jonas Salk School will be the prototype of how we can finally get this law to implement as intended."

And I yield back.

Mr. GOHMERT. Thank you. The gentleman had yield back.

At this point, I would like to thank our panel of witnesses for your valuable testimony and for your time in being here. Obviously, you are not here because of the great pay that you get from the Committee for being here. So we do appreciate your interest and your input.

Members of the Committee may have additional questions for the witnesses, and if so, we would ask that you respond within ten business days.

If there is no further business, then without objection, the Committee stands adjourned.

[Whereupon, at 12:08 p.m., the Committee was adjourned.]

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