AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

DEFINING SPECIES CONSERVATION SUCCESS: TRIBAL, STATE AND LOCAL STEWARDSHIP VS. FEDERAL COURTROOM BATTLES AND SUE-AND-SETTLE PRACTICES

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

Tuesday, June 4, 2013

Serial No. 113–22

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

81–318 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
EDWARD J. MARKEY, MA, *Ranking Democratic Member*

Don Young, AK
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Tom McClintock, CA
Glenn Thompson, PA
Cynthia M. Lummis, WY
Dan Benishek, MI
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Steve Southerland, II, FL
Bill Flores, TX
Jon Runyan, NJ
Mark E. Amodei, NV
Markwayne Mullin, OK
Chris Stewart, UT
Steve Daines, MT
Kevin Cramer, ND
Doug LaMalfa, CA
Vacancy

Peter A. DeFazio, OR
Eni F. H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Gregorio Kilili Camacho Sablan, CNMI
Niki Tsongas, MA
Pedro R. Pierluisi, PR
Colleen W. Hanabusa, HI
Tony Cárdenas, CA
Steven A. Horsford, NV
Jared Huffman, CA
Raul Ruiz, CA
Carol Shea-Porter, NH
Alan S. Lowenthal, CA
Joe Garcia, FL
Matt Cartwright, PA

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Legislative Counsel*
Jeffrey Duncan, *Democratic Staff Director*
David Watkins, *Democratic Chief Counsel*

CONTENTS

	Page
Hearing held on Tuesday, June 4, 2013	1
Statement of Members:	
Bordallo, Hon. Madeleine Z., a Delegate in Congress from the Territory of Guam	4
Prepared statement of	5
Hastings, Hon. Doc, a Representative in Congress from the State of Washington	1
Prepared statement of	3
Markey, Hon. Edward J., a Representative in Congress from the Commonwealth of Massachusetts, Prepared statement of	82
Statement of Witnesses:	
Brigham, Hon. N. Kathryn, Chairwoman, Columbia River Inter-Tribal Fish Commission	13
Prepared statement of	15
Report submitted for the record web address	14
Ferrell, Steve, Wildlife and Endangered Species Policy Advisor, State of Wyoming, Cody, Wyoming	33
Prepared statement of	35
Jankovsky, Tom, Commissioner, Garfield County, Glenwood Springs, Colorado	38
Prepared statement of	39
Noss, Dr. Reed F., Professor of Biology, University of Central Florida, Orlando, Florida	20
Prepared statement of	22
Parenteau, Patrick, Professor of Law, Vermont Law School, South Royalton, Vermont	27
Prepared statement of	29
Powell, Tyler, Deputy Secretary of Environment, Office of the Secretary of Environment, State of Oklahoma	7
Prepared statement of	9

OVERSIGHT HEARING ON "DEFINING SPECIES CONSERVATION SUCCESS: TRIBAL, STATE AND LOCAL STEWARDSHIP VS. FEDERAL COURTROOM BATTLES AND SUE-AND-SETTLE PRACTICES."

Tuesday, June 4, 2013
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.

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

Present: Representatives Hastings, Gohmert, Bishop, Lamborn, MClintock, Lummis, Duncan, Tipton, Labrador, Southerland, Flores, Mullin, Stewart, Daines, LaMalfa, DeFazio, Bordallo, Costa, Cárdenas, Horsford, Huffman, Shea-Porter, Lowenthal, and Garcia.

The CHAIRMAN. The Committee will come to order, and the Chair announces the presence of a quorum, which, under our rules, is two Members, and we have exceeded that by two-and-a-half times, so I am very pleased with that.

The Committee on Natural Resources is meeting today to hear testimony on an oversight hearing on "Defining Species Conservation Success: Tribal, State, and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices."

Under Committee Rule 4(f), opening statements are limited to the Chairman and Ranking Member. However, I ask unanimous consent that if any Member wants to submit a statement for the record, that they submit that by the close of the day.

[No response.]

The CHAIRMAN. And without objection, so ordered.

I will now recognize myself for 5 minutes for my opening statement.

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

The CHAIRMAN. Today the Committee continues its important oversight of the Endangered Species Act, or ESA, a law that has not been reauthorized for 25 years. The intent of today's hearing is to highlight specific examples of how species benefit from the work of State, local, and tribal entities, often in spite of, rather than because of, the ESA listings or habitat designations.

During the last Congress, this Committee held several hearings that demonstrate how the ESA has been used as a tool for litigation, and how skillful lawyers are benefiting much more than species. Ironically, the same litigious groups that routinely criticize the Federal Government's failure to meet ESA listing or critical habitat deadlines are the same groups that are quick to claim that the sta-

tus quo ESA successful protects species by keeping the vast majority, which, by the way, is over 98 percent, from ever getting off the list.

Closed-door settlements between the Interior Department and these litigious groups has set specific court-approved deadlines to force hundreds of species listings and habitat designations over the next few years. These settlement deadlines, and agencies' reactions to the threats of litigation, are dominating Federal agencies' use of resources and how they prioritize endangered species activities, often to the detriment of species.

The map that is listed up there shows how the Interior settlements with the Center for Biological Diversity and the WildEarth Guardians impact nearly every State in the Union. That is the number of listings in the settlement. While Section A of ESA requires the Interior Department to cooperate with States and I quote "to the maximum extent practical," including consultation before major ESA Federal actions affecting land or water within the States' borders, Interior settlements were negotiated and signed without State and local input, and with little regard for ongoing conservation efforts.

Fortunately, State, local, and tribal governments, and many private land owners not only care about species conservation, but they are doing it now, and in a manner that responsibly respects local economic activities, private property, and other uses. This is occurring despite the ever-growing litigation industry involving Federal implementation of ESA.

In the Pacific Northwest, where I am from, hatchery programs run by the Columbia River Tribes have resulted in several notable successes, yielding record runs of ESA-listed salmon in several areas not seen in decades, and developing science that demonstrates well-run hatcheries can move salmon to a goal of delisting. Some Federal bureaucrats and litigious groups, however, have sought to block use of hatcheries, despite clear support for their use under ESA.

Two other prominent species issues featured today, the Lesser Prairie Chicken, affecting largely private property in portions of 5 States, and the Greater Sage Grouse, affecting important energy and grazing areas in part of 13 Western States, have become urgent issues now. But it is not because they face imminent extinction. Rather, the settlements now set deadlines that require the Interior Department to determine whether or not to list both candidate bird species soon.

In both cases, State and local governments oppose a Federal listing. And yet, have taken comprehensive and proactive steps to develop data to prioritize species management, and plans to manage them at the State and local level, while at the same time protecting their local economies.

So, I look forward to hearing more from our witnesses today about how successfully managing species is possible without Federal ESA listings, and that delisting is and should be a definition of success for ESA.

In my view, successful State, local, and tribal species conservation efforts need to be encouraged, not threatened by lawsuits. Allowing the fate of species to be increasingly decided by Federal bu-

reaucrats, lawyers, or Federal judges is not working, and it undercuts the true purpose, in my view, of the ESA.

[The prepared statement of Mr. Hastings follows:]

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

Today the Committee continues its important oversight of the Endangered Species Act (ESA), a law that has not been reauthorized by Congress for 25 years. The intent of today's hearing is to highlight specific examples of how species benefit from the work of state, local and tribal entities, often in spite of—rather than because of—Endangered Species Act listings or habitat designations.

During the last Congress, this Committee held several hearings that demonstrated how the ESA has been used as a tool for litigation and how skillful lawyers are benefitting much more than species. Ironically, the same litigious groups that routinely criticize the federal government's failure to meet ESA listing or critical habitat deadlines are the same groups that are quick to claim that the status quo ESA successfully protects species by keeping the vast majority (over 98 percent) from ever getting off the list.

Closed-door settlements between the Interior Department and these litigious groups have set specific, court-approved deadlines to force hundreds of species listings and habitat designations over the next few years. These settlement deadlines, and agencies' reactions to the threats of litigation, are dominating federal agencies' use of resources and how they prioritize endangered species activities, often to the detriment of species.

This map over here shows how the Interior settlements with CBD and WEG impact nearly every state in the union.

While Section 6(a) of the ESA requires the Interior Department to cooperate with States "to the maximum extent practicable," including consultation before major ESA federal actions affecting land or water within states' borders, Interior's settlements were negotiated and signed without state or local input, and with little regard for ongoing their conservation efforts.

Fortunately, state, local, and tribal governments, and many private landowners not only care about species conservation, they're doing it now, and in a manner that responsibly respects local economic activities, private property, and other uses. This is occurring despite the ever-growing litigation industry involving federal implementation of the Endangered Species Act.

In the Pacific Northwest, hatchery programs run by Columbia River tribes have resulted in several notable successes—yielding record runs of ESA listed salmon in several areas not seen in decades, and developing science that demonstrates well-run hatcheries can move salmon toward a goal of de-listing them. Some federal bureaucrats and litigious groups, however, have sought to block use of hatcheries, despite clear support for their use under ESA.

Two other prominent species issues featured today—the Lesser Prairie Chicken, affecting largely private property on portions of five states, and the Greater Sage Grouse, affecting important energy and grazing areas in parts of thirteen western states—have become urgent issues now, not because they face imminent extinction.

Rather, the settlements set deadlines that require the Interior Department to determine whether or not to list both "candidate" bird species soon. In both cases, states and local governments oppose a federal listing, yet have taken comprehensive and proactive steps to develop data to prioritize species management and plans to manage them at the state and local level while protecting their economies.

I look forward to hearing more from our witnesses today about how successfully managing species is possible *without* federal ESA listings, and that de-listing is and should be the definition of "success" for ESA.

In my view, successful state, local and tribal species conservation efforts need to be encouraged, not threatened by lawsuits. Allowing the fate of species to be increasingly decided by federal bureaucrats, lawyers or federal judges is not working and undercuts the true purpose of ESA.

The CHAIRMAN. With that, I will yield back my time, and recognize the gentlelady from Guam.

STATEMENT OF THE HON. MADELEINE Z. BORDALLO, A DELEGATE IN CONGRESS FROM THE TERRITORY OF GUAM

Ms. BORDALLO. Thank you, Mr. Chairman. Last June this Committee held an oversight hearing on the Endangered Species Act entitled, "Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs, and Schools." A year later, the name has changed. But, unfortunately, the song remains the same. The Majority is trotting out the same tired arguments and roundly debunked myths questioning the legitimacy and the effectiveness of the law.

The Endangered Species Act is one of the most important, popular, and effective conservation laws, not just in the history of the United States, but in the history of the world. Since it became law in 1973, U.S. GDP has increased nearly threefold, and per capita income has increased by half. Clearly, this law has not brought about the economic disaster that its detractors like to claim.

The ESA's near-perfect record of achieving species survival and its numerous species recovery successes, like the bald eagle, American alligator, and the gray whale, even in the face of continued population growth, land conversion, and pressure on ocean and coastal resources, show that the law has been a true success.

The success of the Endangered Species Act comes from the cooperation of the Federal Government with the State and local governments, along with businesses and private land owners, the Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration are working diligently with the States, localities, land owners, and other Federal agencies to find cooperative solutions to protecting and recovering threatened and endangered species, and prevent others from becoming imperiled.

The fact that neither of the agencies tasked with implementing the ESA were invited to appear at the June 2012 hearing or in today's rerun reflects the continuation of a troubling Republican strategy of fear-mongering, rather than a fair oversight effort. Republicans on this Committee know that Americans value biodiversity, conservation, and want economic development to be compatible with ecosystem health. They know that the ESA contains significant flexibility to allow projects to proceed after taking into account the national interest in the preservation of species and their habitats. And they know that the ESA has prevented the extinctions of 99 percent of species that have received protection under the law.

Rather than admit this, the Majority is pursuing a radical agenda by casting doubt on a perfectly open and legitimate public participation process, ignoring the fact that citizen suits are brought on behalf of thousands of individual members of the plaintiff groups, and pointing to slow recovery rates as proof of failure, without providing the context of fundamentally altered and fragmented landscapes, insufficient conservation budgets, and global climate change.

Moreover, the Majority ignores that Congress, under a Democratic and Republican leadership, have given agencies flexibility to avoid costly litigation. Case in point, we have empowered the Department of Defense to comply with ESA's requirements and avoid litigation by entering into partnerships with private land owners.

It would behoove us to look at this matter in a more constructive manner, rather than a visceral hate of a successful law.

Maybe most troubling is the fiction the Majority and its allies are trying to create around the use of so-called sue-and-settle tactics under the ESA. It is said that imitation is the sincerest form of flattery. Now we have the Chamber of Commerce and the Republicans accusing the Obama Administration of making an end run around the regulatory process, just as environmental groups and Democrats accused the Bush Administration.

I think we can reach bipartisan agreement that sue-and-settle is a catchy phrase. However, the fact that the Majority is using it as an excuse to shut down the right of people to protect the actions of their government is inappropriate, and runs counter to its own Tea Party principles. It also does nothing to promote species recovery, a goal to which Republicans are willing to spend time talking about, but are not willing to spend funds to actually achieve.

I thank you, and I look forward to hearing from our witnesses.

[The prepared statement of Ms. Bordallo follows:]

Statement of The Honorable Madeleine Z. Bordallo, a Delegate in Congress from the Territory of Guam

Last June this Committee held an oversight hearing on the Endangered Species Act entitled: *"Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools."* A year later the name has changed, but unfortunately the song remains the same. The Majority is trotting out the same tired arguments and roundly debunked myths questioning the legitimacy and effectiveness of the law.

The Endangered Species Act is one of the most important, popular, and effective conservation laws not just in the history of the United States, but in the history of the world. Since it became law in 1973, U.S. G–D–P has increased nearly threefold, and per capita income has increased by half. Clearly this law has not brought about the economic disaster that its detractors like to claim. The E–S–A's near perfect record of achieving species survival, and its numerous species recovery successes like the bald eagle, American alligator, and gray whale—even in the face of continued population growth, land conversion, and pressure on ocean and coastal resources—show that the law has been a true success.

The success of the Endangered Species Act comes from the cooperation of the federal government with state and local governments along with businesses and private landowners. The Fish and Wildlife Service and the National Oceanic and Atmospheric Administration are working diligently with states, localities, landowners, and other federal agencies to find cooperative solutions to protecting and recovering threatened and endangered species, and prevent others from becoming imperiled. The fact that neither of the agencies tasked with implementing the E–S–A were invited to appear at the June 2012 hearing or in today's rerun reflects the continuation of a troubling Republican strategy of fear mongering rather than a fair oversight effort.

Republicans on this Committee know that Americans value biodiversity conservation and want economic development to be compatible with ecosystem health. They know that the E–S–A contains significant flexibility to allow projects to proceed after taking into account the national interest in the preservation of species and their habitats. And they know that the E–S–A has prevented the extinction of 99 percent of species that have received protection under the law.

Rather than admit this, the Majority is pursuing a radical agenda by casting doubt on a perfectly open and legitimate public participation process; ignoring the fact that citizen suits are brought on behalf of thousands of individual members of the plaintiff groups; and pointing to slow recovery rates as proof of failure without providing the context of fundamentally altered and fragmented landscapes, insufficient conservation budgets, and global climate change.

Moreover, the Majority ignores that Congress, under Democratic and Republican leadership, have given agencies flexibility to avoid costly litigation. Case in point, we have empowered the Department of Defense to comply with E–S–A's requirements and avoid litigation by entering in partnerships with private landowners. It would behoove us to look at this matter in a more constructive manner rather than a visceral hate of a successful law.

Maybe most troubling is the fiction the Majority and its allies are trying to create around the use of so-called "sue-and-settle" tactics under the E–S–A. It is said that imitation is the sincerest form of flattery. Now we have the Chamber of Commerce and Republicans accusing the Obama administration of making an end run around the regulatory process, just as environmental groups and Democrats accused the Bush administration. I think we can reach bipartisan agreement that "sue-and-settle" is a catchy phrase. However, the fact that the Majority is using it as an excuse to shut down the right of people to protest the actions of their government is inappropriate, and runs counter to its own Tea Party principles. It also does nothing to promote species recovery, a goal to which Republicans are willing to spend time talking about but are not willing to spend funds to actually achieve.

Thank you and I look forward to hearing from our witnesses.

The CHAIRMAN. I thank the gentlelady for her opening statement, and I want to welcome the panel here. And for the purpose of introduction, I will yield to the gentleman from Oklahoma to introduce the first witness. Mr. Mullin?

Mr. MULLIN. Thank you, Mr. Chairman. It is my pleasure to introduce a fellow Oklahoman to this Committee. I would like to introduce Mr. Tyler Powell, a native of Guthrie, Oklahoma, who currently serves our State as the Deputy Secretary of Environment at the Office of Secretary of Environment. In the role of his services as the Secretary of Environment's chief policy advisor—and he works to coordinate the State's environmental cabinet agencies, including the Oklahoma Water Resource Board, the Oklahoma Department of Wildlife Conservation, and the Oklahoma Department of Environment Quality.

Tyler is a graduate of Oklahoma State University and prior to joining the Secretary of Environment's office, he served as a field representative for one of our own colleagues, Congressman Tom Cole. And I would encourage my colleagues not to underestimate this young man. He is extremely knowledgeable in what he does. I have a tremendous amount of respect for his knowledge. I have sat down and had extensive conversations with him, and I tell you he is quite an impressive man.

So, Mr. Tyler Powell, I welcome you to this Committee, and thank you for making this long trip from God's country.

The CHAIRMAN. I thank the gentleman for his introduction.

We also have Ms. Kathryn Brigham, who is the Chairwoman of the Columbia River Intertribal Fish Commission out of Portland, Oregon; Mr. Reed Noss, Professor of the Biology at the University of Central Florida, out of Orlando, Florida; Mr. Patrick Parenteau, Professor at Vermont Law School in South Royalton, Vermont.

And I will yield to the gentlelady from Wyoming to make the introduction of the next witness. The gentlelady is recognized for the purpose of introduction.

Mrs. LUMMIS. Thank you, Mr. Chairman. Well, it is my pleasure to introduce Steve Ferrell to the Committee today. He is a longtime public servant in the West, running several State-managed State wildlife agencies. He spent 30 years with the Arizona Game and Fish before finally seeing the error of his ways and coming to Wyoming. From 2008 to 2011 Steve Ferrell served as Director of the Wyoming Game and Fish Department, where he addressed issues such as wolves, grizzly bears, sage grouse conservation, wildlife diseases, and invasive species. Steve now serves Wyoming's

Governor, Matt Mead, as a lead policy advisor on wildlife and endangered species.

I should note that Steve's son is a combat veteran who is still deployed as a civilian in Afghanistan today.

Steve, thank you so much for being here. Thanks for your long service. Thanks for your son's service, your entire family's sacrifices to our country. I look forward to your testimony today.

Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentlelady. And our last witness is Mr. Tom Jankovsky—I hope I said that correctly—who is the Commissioner of Garfield County in Colorado. I think that is in Mr. Tipton's district, if I am not mistaken.

Well, I want to welcome all of you here. Let me kind of give you the ground rules. All of you are asked to submit a prepared statement for the record, and that will appear in the record. For your oral remarks, though, if you could confine that to 5 minutes, we would very much appreciate it, because we obviously have Members that want to ask questions in the follow-up. And the way that works, you have the light in front of you. When the green light is on, it means you are doing very, very well. When the yellow light comes on, it means there is 1 minute left. And then, when the red light comes on—well, we just won't go there, OK?

[Laughter.]

The CHAIRMAN. But if you could wrap up your remarks in that timeframe, and that way we can get through it. Keep in mind your full statement will be part of the record.

So, Mr. Powell, we will start with you, and you are recognized for 5 minutes.

STATEMENT OF TYLER POWELL, DEPUTY SECRETARY OF ENVIRONMENT, STATE OF OKLAHOMA, OKLAHOMA CITY, OKLAHOMA

Mr. POWELL. Good morning, Mr. Chairman, members of the Committee. My name is Tyler Powell, and I serve as Oklahoma's Deputy Secretary of Environment. I want to thank you for the invitation to testify on the success of State stewardship of species, and our efforts in working to conserve the Lesser Prairie Chicken.

Currently, Oklahoma has 32 species subject to an endangered species listing determination by the U.S. Fish and Wildlife Service as part of a multi-district litigation settlement that was entered into. Of specific interest for Oklahoma was the Lesser Prairie Chicken, a grouse found across the Southern Great Plains, with a current range that includes parts of Colorado, Kansas, New Mexico, Texas, as well as a 12-county area in Western Oklahoma. The settlement the Service entered into requires that they make a listing determination on the Lesser Prairie Chicken by December 30, 2012. This deadline was extended as a result of an action the Service undertook. And on November 30, 2012, the Service announced a proposed threatened listing.

While we realize that this is a positive sign and can possibly avoid some of the most burdensome regulations, if they had chosen an endangered listing, it is still not an ideal outcome. The State of Oklahoma has been working to conserve the Lesser Prairie Chicken since a petition to add the species to the Endangered Species list

was submitted in 1995. Our Department of Wildlife Conservation has now spent over $26 million on habitat conservation, research, land acquisition, and development of habitat conservation plans. This amount does not include the work that has been undertaken by private land owners, energy, and transmission companies.

We also believe that State management of this species, by working directly with stakeholders to allow for responsible conservation is in the best interest of the Lesser Prairie Chicken. Beginning in 2011, Governor Fallin and our State legislature asked our office to work with any and all stakeholders to develop a plan to ensure appropriate management of the Lesser Prairie Chicken, and preclude the need for a listing in Federal protection.

We took a philosophy that the plan should be facilitated by the State, but developed in a cooperative fashion with private land owners, and a coalition of our State's agriculture, oil and gas, transmission, wind energy, and transportation industries, who all have a stake in the potential listing of this bird, with a common goal of developing a plan that can serve the species and allows for responsible land use and development.

After over a year of work, the Oklahoma Lesser Prairie Chicken Conservation Plan was released last October. Before the ink was dry, we began an unprecedented aerial survey and additional research on the ground, as required by the plan. The other four States with Lesser Prairie Chickens began to take notice of what Oklahoma was undertaking. Working through a group of wildlife biologists employed by the five State wildlife agencies, also known as the Lesser Prairie Chicken Interstate Working Group, the Western Governors' Association, and the Western Association of Fish and Wildlife Agencies, the State wildlife directors of Colorado, Kansas, New Mexico, Texas, and Oklahoma are currently working with industry, Federal agencies, and other stakeholders to take the Oklahoma conservation framework to a range-wide plan.

Our goal with a range-wide plan is to convince the Service that the five States have management of the species under control, and that Federal protection is not warranted. This plan includes prioritization of habitat conservation, a metric system that can be used to assess conservation practices, and to provide for a voluntary mitigation framework for development of otherwise impacted areas.

This plan allows for responsible industry development, and allows for our State's two leading industries of agriculture and energy to continue in a way that minimizes the impacts to the Lesser Prairie Chicken. We feel that this effort can have a greater outcome than any possible outcome provided through the Endangered Species Act, due to the unique role that the five States provide.

While the range-wide plan is still under development, the Service began to take notice of our efforts. The five States submitted a draft plan to the Service on April 1st. On May 6th, the Service announced that they would reopen the comment period for the proposed listing, and begin to take comments on the range-wide plan, while also taking comments on a draft 4(d) rule. While we see this as a positive sign, we have great concerns with the Service putting forward a 4(d) rule.

While it is helpful to what see the possible threatened listing would look like, and that it would allow any practices under the range-wide plan to continue, it seems premature and assumes that the Service may have already made up their final listing determination. A 6-month extension for scientific disagreement with statements in the Service's proposed listing is needed to address issues within the listing documents, as well as to allow research underway to be used in a final listing decision.

My boss, Secretary Gary Sherrer, made this request to Director Dan Ashe that has neither been acted upon or denied. As it stands today, the U.S.—or the Endangered Species Act does not adequately assess the work that States are providing, and provides little or no role for the States after a listing of the species. State wildlife agencies have built a trust with land owners and stakeholders that continue to benefit the Lesser Prairie Chicken and other species. We believe that this trust is lost when the Service takes over all management of a species under the ESA.

As seen in other areas, States are best equipped to manage resources within their boundaries, and the Lesser Prairie Chicken is no different. Our goal is to have Oklahoma's work on the Lesser Prairie Chicken be an example of how species of greatest conservation need should be managed.

Thank you for the opportunity to be before you today, Mr. Chairman and members of the Committee. I look forward to taking any questions.

[The prepared statement of Mr. Powell follows:]

Statement of Tyler Powell, Deputy Secretary of Environment, Office of the Secretary of Environment, State of Oklahoma

Good morning, Mr. Chairman, Members of the Committee. My name is Tyler Powell and I serve as the Deputy Secretary of Environment for the Oklahoma Secretary of Environment's office. I want to thank you for the invitation and opportunity to testify on successes of state stewardship of species and our efforts in working to conserve the Lesser Prairie Chicken.

The Office of the Secretary of Environment serves at the pleasure of Governor Mary Fallin and advises her on environment and natural resource issues (Okla. Stat. tit. 27A, § 1–2–101). We are also responsible for coordination of the state's environmental agencies, including the Oklahoma Department of Wildlife Conservation. As the date for publication of a final listing determination for the Lesser Prairie Chicken draws nearer, we feel compelled to highlight the successes of state stewardship of Candidate species and the continuing efforts of the states, working both individually and collectively, to conserve the Lesser Prairie Chicken, which are increasingly important, and must be given appropriate consideration in the final listing determination.

Currently, Oklahoma has thirty-two petitioned species and an additional five candidate species, three of which have had proposed listing rules published (for a full list see *Appendix A*), which are subject to an endangered species listing determination by the U.S. Fish and Wildlife Service (Service) as part of a multidistrict litigation settlement that was entered into in 2011 (U.S. Fish and Wildlife Service Multi-Year ESA Listing Work Plan). A species of particular interest for Oklahoma is the Lesser Prairie Chicken, an endemic grouse found across the southern Great Plains, with a current range that includes parts of Colorado, Kansas, New Mexico and Texas, as well as a twelve county area in western Oklahoma.

The settlement the Service entered into required that they publish a proposed listing rule for the Lesser Prairie Chicken by September 30, 2012. This deadline was extended as a result of an action undertaken by the Service, and on November 30, 2012 the Service announced a proposed threatened listing (Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie Chicken as a Threatened Species, 77 Fed. Reg. 738282, 73888 (Dec. 11, 2012)). While we realize this is a positive sign and could possibly avoid some of the most burdensome regulations if they had chosen an endangered listing, it is still not an ideal outcome.

The State of Oklahoma has been working to conserve the Lesser Prairie Chicken since a petition to add the species to the Endangered Species List was submitted in 1995. Our Department of Wildlife Conservation has now spent over $26 million on habitat conservation, research, land acquisition and development of habitat management plans. This amount spent does not include the work that has been undertaken by private landowners, energy and transmission companies. We also believe that state management of this species, working directly with stakeholders to allow for responsible land use and development and conservation, is in the best interest of the Lesser Prairie Chicken.

The Oklahoma Department of Wildlife Conservation (ODWC) has recently purchased over 17,660 acres for Lesser Prairie Chicken habitat improvement and protection, and entered into a long-term lease agreement with the Oklahoma Commissioners of the Land Office to protect another 3,270 acres of Lesser Prairie Chicken habitat adjacent to Oklahoma's Beaver River Wildlife Management Area. In addition, ODWC has entered into management agreements with private landowners to enhance and protect an additional 28,000+ acres of Lesser Prairie Chicken habitat on private land in Oklahoma.

Beginning in 2011, Governor Fallin and the state legislature asked our office to work with any and all stakeholders to develop a plan to ensure appropriate management of Lesser Prairie Chickens and thus preclude the need for a listing. We took a philosophy that a plan should be facilitated by the state, but developed in a cooperative fashion with private landowners and a coalition of our state's agriculture, oil and gas, transmission, wind energy, and transportation industries who all have a stake in a potential listing of the bird, with a common goal of developing a plan that conserves the species and allows for responsible land use and development. After over a year of work, the Oklahoma Lesser Prairie Chicken Conservation Plan (OLEPCCP) was released on October 23, 2012 (Available at http://www.wildlifedepartment.com/wildlifemgmt/lepc/cons_plan.htm). Before the ink was dry, we began to implement this plan with an unprecedented aerial survey and additional research and management on the ground. The first year of aerial surveys were hampered by poor weather and logistic difficulty, but we were able to survey areas that had never been surveyed before, and documented previously unknown Lesser Prairie Chicken leks. Additional Lesser Prairie Chicken research was contracted with researchers from both Oklahoma State University (ODWC Research Project LPC–OSU–12, Impacts of Fragmentation and Heterogeneity, Resource Selection, Survival and Recruitment of LEPC in Oklahoma) and the University of Oklahoma (ODCW Research Project LPC_OU–12, Population Ecology and Conservation of the Lesser Prairie Chicken and Its Ecosystem). We also identified 15 Core Areas (For a full list see *Appendix B*) for implementing substantial conservation efforts for the Lesser Prairie Chicken with a goal, towards which we are currently working, of each at least 70% of each Core Area consisting of high quality Lesser Prairie Chicken habitat.

The ODWC, in meeting another objective of the OLEPCCP, developed an approved Candidate Conservation Agreement with Assurances (CCAA) for Lesser Prairie Chickens on Agricultural Lands in Oklahoma (up to 200,000 acres) (Final Candidate Conservation Agreement With Assurances, Final Environmental Assessment, and Finding of No Significant Impact; Lesser Prairie Chicken, Oklahoma, 78 Fed. Reg. 14111, 14114 (March 4, 2013)). We immediately began preparing Lesser Prairie Chicken Wildlife Habitat Management Plans (WHMP) and issuing Certificates of Inclusion to interested landowners. Landowners who have an approved WHMP are provided assurance, that, as long as they continue to implement the management practices prescribed in their WHMP, they will face no additional regulatory action or requirements and are also provided incidental take coverage if the Lesser Prairie Chicken becomes listed. To date, we have received applications from over forty landowners representing nearly 170,000 acres. We have also asked the Service for an additional 200,000 acres to be allowed in the enrollment, which would bring the total acreage eligible for CCAA in Oklahoma to 400,000 acres.

The other four states within the Lesser Prairie Chicken's range began to take notice of what Oklahoma was undertaking. Working as a group, wildlife biologists employed by the five state wildlife agencies (Lesser Prairie Chicken Interstate Working Group), the Western Governor's Association, and the Western Association of Fish and Wildlife Agencies, the state wildlife agency directors from Colorado, Kansas, New Mexico, Texas and Oklahoma are currently working with industry, federal agencies, and other stakeholders to take the Oklahoma framework to a range wide plan. Our goal for the range-wide plan is to convince the Service that the five states have management of the species under control and that federal protection is not warranted. This plan includes prioritization of habitat conservation, a metrics system that can be used to assess conservation practices and to provide a voluntary

mitigation framework for developed or otherwise impacted areas. The plan allows for responsible industry development and allows for our state's two biggest industries of agriculture and energy to continue, in a way that minimizes impacts to the Lesser Prairie Chicken. We feel that this effort can affect a greater and much more positive outcome than any possible outcome provided through the Endangered Species Act due to the unique role that the five states play, and the Lesser Prairie Chicken management knowledge and experience that they bring to the table.

While this range wide plan is still under development, the Service has taken notice of the effort. The five states submitted the draft plan to the Service on April 1st. On May 6th the Service announced that they would reopen the comment period for the proposed listing rule and began taking comments on the five state plan, while also taking comments on a draft 4(d) rule (Endangered and Threatened Wildlife and Plants; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 Fed. Reg. 26302, 26308 (May 6, 2013). While we see this as a positive sign, we have concerns with the Service putting forward a 4(d) rule. While it is helpful to see what a possible threatened listing would look like and that a listing appears to allow any practices delineated under the range wide plan to continue, it seems premature and assumes the Service may have already made their decision on a final listing rule. A six-month extension for scientific disagreement with statements made in the Service's proposed listing rule is needed to address issues within the listing document as well as to allow research currently underway to be used in a final listing determination. Oklahoma Secretary of Environment, Gary Sherrer, made this request on December 17, 2012 (Regulations.gov Document ID: FWS–R2–ES–2012–0071). This request to Director Dan Ashe of the US Fish and Wildlife Service has still not been accepted or denied.

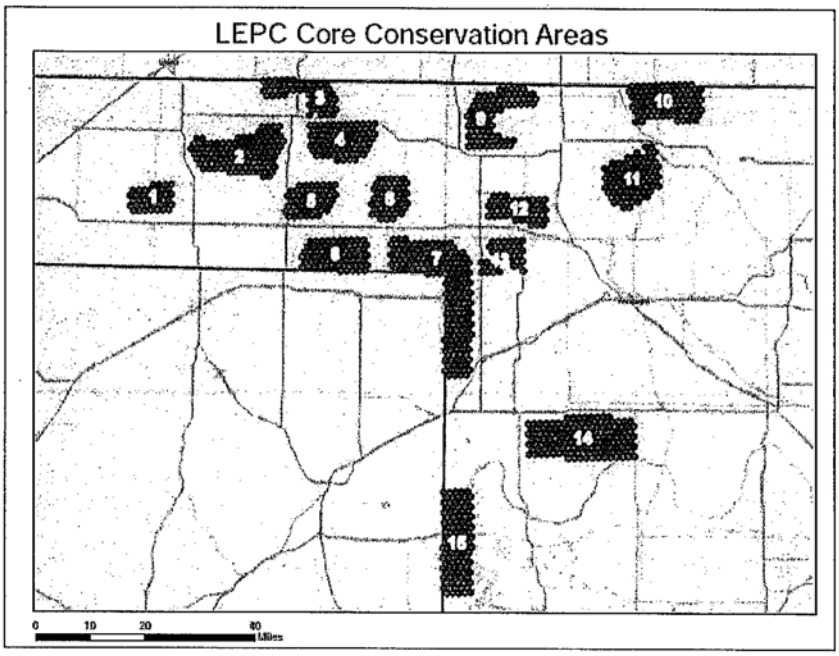
As it stands today the Endangered Species Act does not adequately assess the work that states are undertaking and provides little or no role for the states after listing of a species. State wildlife agencies have built trust with landowners and a stakeholder that continues to benefit the Lesser Prairie Chicken and other species. We believe, and have seen in past listings, that this trust is lost when the Service takes over all management of a species. As also seen in other areas, states are best equipped to manage resources within their boundaries. Our goal remains to have Oklahoma's work on the Lesser Prairie Chicken be an example of how species of greatest conservation need should be managed.

Thank you for the opportunity to be before you today, Mr. Chairman and Members of the Committee. I look forward to answering any questions you may have.

Appendix A. Oklahoma Species subject to Multi-district Litigation Settlement Action

Species Petitioned for Federal Listing Since 2007		
Common Name	Scientific Name	Federal Register Citation
Texas Heelsplitter	*Potamilus amphichaenus*	74:66260, 12-15-2009
Arkansas River Speckled Chub	*Macrhybopsis tetranema*	74:66866, 12-16-2009
Southern Purple Lilliput	*Toxolasma corvunculus*	74:66866, 12-16-2009
Delaware County Cave Crayfish	*Cambarus subterraneus*	74:66866, 12-16-2009
Oklahoma Cave Crayfish	*Cambarus tartarus*	74:66866, 12-16-2009
Kiamichi Crayfish	*Cambarus saxatilus*	74:66866, 12-16-2009
Rattlesnake-master Borer Moth	*Papaipema eryngii*	74:66866, 12-16-2009
Texas Kangaroo Rat	*Dipodomys elator*	76:59836, 3-8-2011
Prairie Speckled Chub	*Macrhybopsis australis*	76:20911, 4-14-2011
Eastern Small-footed Bat	*Myotis leibii*	76: 38095, 6-29-2011
Northern Long-eared Bat	*Myotis septentrionalis*	76:38095, 6-29-2011
Black Rail	*Laterallus jamaicensis*	76:59836, 9-27-2011
Western Chicken Turtle	*Deirochelys reticularia miaria*	76:59836, 9-27-2011
Oklahoma Salamander	*Eurycea tynerensis*	76:59836, 9-27-2011
Blue-headed Shiner	*Pteronotropis hubbsi*	76:59836, 9-27-2011
Long-nosed Darter	*Percina nasuta*	76:59836, 9-27-2011
Peppered Shiner	*Notropis perpallidus*	76:59836, 9-27-2011
Rocky Shiner	*Notropis suttkusi*	76:59836, 9-27-2011
Alabama Hickorynut	*Obovaria unicolor*	76:59836, 9-27-2011
Purple Lilliput	*Toxolasma lividus*	76:59836, 9-27-2011
Pyramid Pigtoe	*Pleurobema rubrum*	76:59836, 9-27-2011
Western Fanshell	*Cyprogenia alberti*	76:59836, 9-27-2011
Linda's Roadside Skipper	*Amblyscirtes linda*	76:59836, 9-27-2011
Ozark Emerald	*Somatochlora ozarkensis*	76:59836, 9-27-2011
Three-toothed Caddisfly	*Triaenodes tridontus*	76:59836, 9-27-2011
Seaside Alder (plant)	*Alnus maritima*	76:59836, 9-27-2011
Hall's Bulrush (plant)	*Schoenoplectus hallii*	76:59836, 9-27-2011
Arcuate Rivergrass (plant)	*Calamovilfa arcuata*	76:59836, 9-27-2011
Small-headed Pipewort (plant)	*Eriocaulon koernickianum*	76:59836, 9-27-2011
American Eel	*Anguilla rostrata*	76:60431, 9-29-2011
Plains Eastern Spotted Skunk	*Spilogale putorius interrupta*	12-4-2013
Prairie Gray Fox	*Urocyon cinereoargenteus ocythous*	12-4-2013
Candidate Species		
Arkansas Darter	*Etheostoma cragini*	1989
Sprague's Pipit 2010	*Anthus spragueii*	2010
Species Petitioned but Listing Determined to be Not Warranted		
Ozark Chinquapin (plant)	*Castanea pumila ozarkensis*	76:37706, 6-28-2011
Oklahoma Grass Pink (plant)	*Calapogon oklahomensis*	76:61307, 10-4-2011
Proposed Species		
Lesser Prairie Chicken (PT)	*Tympanuchus pallidicinctus*	2012
Rabbitsfoot (PT)	*Quadrula cylindrica*	2012
Neosho Mucket (PE)	*Lampsilis rafinesqueana*	2012

Appendix B. OLEPCCP Core Conservation Areas



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

And now I am pleased to welcome Chairwoman Brigham, who is the Chairwoman of the Columbia River Intertribal Fish Commission. And, Ms. Brigham, you are recognized for 5 minutes.

STATEMENT OF THE HON. N. KATHRYN BRIGHAM, CHAIRWOMAN, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, PORTLAND, OREGON

Ms. BRIGHAM. Good morning, Chairman Hastings and Committee members. I am a member of the Confederated Tribes of the Umatilla Indian Reservation, Board of Trustees Secretary, and the Chair of the Columbia River Intertribal Fish Commission. It is my pleasure to address you this morning and share the Yakama, Nez Perce, Umatilla tribal fishery program successes where we have succeeded in rebuilding salmon stock that have been depleted or gone extinct in the Columbia River. And I will identify some institutional barriers to our success, and make recommendations on how they may be overcome.

As a tribal leader, I have been involved in salmon management since 1976, CRITFC commissioner and a U.S. tribal representative to the Pacific Salmon Commission. CRITFC and our member Tribes have conducted a comprehensive treaty rights implementation program intended to maintain compliance with court orders, regional intergovernmental agreements and international salmon treaties.

We are leaders in fisheries management and working in collaboration with 5 States, 11 Federal agencies, and private entities.

To achieve our goal, we emphasize the highest level of scientific rigor and cost-effective management strategies. While many of the Pacific Coast salmon stocks remain in distress, our Tribes are building Columbia Basin success, acre by acre, tributary by tributary, and stock by stock. I would like to briefly highlight just a few of these successes, two reintroduction programs.

The first is the Mid-Columbia Coho. Yakama designed an innovative supplementation approach when, within a few years of inception, returns were sufficient to transition to solely in-basin brood stock with recent adult returns as high as 32,000.

The second is the Umatilla spring chinook reintroduction program in the Walla Walla River. This demonstrating how, when given an opportunity, adult fish will return, spawn, and rear in available habitat.

The supplementation program, the Snake River chinook restoration is perhaps our most significant achievement, and we have a graph up there that shows that in 1995 the Nez Perce began a supplementation program. And then in 1998 things were returning. It also shows how hatcheries and wild fish are rebuilding in the Snake River Basin. It is a forum for both wild and natural hatcheries.

I also have a bunch of success stories with details on this that I would like to enter for the record, and let you know that our Tribes are the forefront of research and innovation on hatchery supplementation in a region that is led to believe that wild fish are good and hatchery fish are bad. We are proving that is not the case. The data result shows that hatcheries can assist in rebuilding naturally spawning populations. So does new peer-reviewed science. The Nez Perce Tribe's Johnson Creek Artificial Production Enhancement Project, a 13-year study, used DNA from returning adults to track parents and offspring to determine how successful hatchery fish are mating in the wild when compared to wild fish. This shows that hatcheries can be used to rebuild naturally spawning fish.

I would like to request that this report be entered into the record for one reason, mainly, and that is that this is on the record, and it is not varied. We have very high concerns that this report is going to be ignored.

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

[Note: The report submitted for the record has been retained in the Committee's official files and can be found at: http://naturalresources.house.gov/uploadedfiles/johnson creek_brigham.pdf:]

Ms. BRIGHAM. Thank you. I would like to identify a few barriers in recovery restorations and recommendations for the 12 ESA Columbia River stocks.

In 2005 NOAA clarified their policy that allows production under the Endangered Species Act. Due to anti-hatchery philosophies by some NOAA staff, NOAA fisheries are under-utilizing the hatchery tool. The result is a 100-year work backlog and recovery timeframes. These timeframes are unacceptable, socially and biologically.

We would like to create incentives for the Federal Government. We would like to have the gridlock goal and timeframe created. We would like cross-budgeting established. We would like to eliminate—oh, the other one is mass marketing. This is a 30-year record of expensive, failed practice without any conservation benefits. We would like to eliminate that and use this funding for restoration and allow co-managers to manage this on a case-by-case basis.

And then, the ESA Migratory Bird Act and Marine Mammal Protection Act, they are not compatible with each other. We need to figure out how to make that work. Thank you.

[The prepared statement of Ms. Brigham follows:]

Statement of The Honorable N. Kathryn Brigham, Chairwoman, Columbia River Inter-Tribal Fish Commission

Chairman Hastings and members of the Committee, the Columbia River Inter-Tribal Fish Commission (CRITFC) is pleased to share our views on the Endangered Species Act as it relates to Columbia River salmon. Our testimony will highlight: tribal restoration successes; institutional barriers to building abundance and; recommendations to overcome these barriers.

CRITFC was founded in 1977 by the four Columbia River treaty tribes: Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes and Bands of the Yakama Nation, and Nez Perce Tribe. CRITFC provides coordination and technical assistance to these tribes in regional, national and international efforts to protect and restore our shared salmon resource and the habitat upon which it depends.

Our collective ancestral homeland covers nearly one-third of the entire Columbia River Basin in the United States. In 1855, the United States entered into treaties with the four tribes whereupon we ceded 40 million acres of our homelands to the United States. In return, the U.S. pledged to honor our ancestral rights, including the right to fish. Unfortunately, a perilous history brought the salmon resource to the edge of extinction and now 12 salmon and steelhead populations in the Columbia Basin are listed under the Endangered Species Act (ESA).

Today, the CRITFC tribes are leaders in fisheries restoration and management working with state, federal and private entities. CRITFC's member tribes are principals in the region's efforts to halt the decline of salmonid, lamprey and sturgeon populations and rebuild them to levels that support ceremonial, subsistence and commercial harvests. To achieve these objectives, the tribes' actions emphasize 'gravel-to-gravel' management including supplementation of natural stocks, healthy watersheds and collaborative efforts.

Columbia River Fisheries Management—A New Era of Collaboration

The Columbia Basin is in the greatest era of collaboration in our lifetimes. In 2008 lengthy negotiations involving CRITFC and its member tribes resulted in three landmark agreements: 1) the 2008–2017 *United States v. Oregon* Management Plan with federal, tribal and state parties that sets forth collaborative fishery arrangements and specific artificial production commitments, and which is also an order of the federal court for the District of Oregon, and; 2) the Columbia Basin Fish Accords with federal action agencies overseeing the federal hydro system in the Columbia Basin, and; 3) a new Chinook Chapter of the Pacific Salmon Treaty. These agreements establish regional and international commitments on harvest and fish production efforts, commitments to critical investments in habitat restoration, and resolving contentious issues by seeking balance of the many demands within the Columbia River basin. Our tribes have committed to substantial on-the-ground projects to fulfill these agreements. Tribal propagation programs are an important part of these commitments and their successes.

Tribal Successes—Stream by Stream, Stock by Stock

This section highlights just a sampling of the numerous successes our tribes have forged in the Columbia Basin. These include success through both re-introduction and recovery projects.

Methow and Wenatchee River Coho

Prior to the 20th century, an estimated 120,000 to 165,000 coho returned annually to mid-Columbia tributaries—the Yakima, Wenatchee, Entiat, Methow, and Spokane. Impassable dams, overfishing, unscreened irrigation diversions, habitat deg-

radation, and hatchery policies all contributed to the virtual disappearance of coho in these tributaries.

Responding to the losses the Yakama Nation began an aggressive suite of actions beginning with reintroduction of coho to the Methow River in 1997 and the Wenatchee River in 1999. Using the only coho stock available, an early-run, lower river coho, the Yakama Nation designed an innovative supplementation approach which acclimates juvenile fish to spawning areas. Within a few years of inception, returns were sufficient to transition to solely in-basin broodstock.

Since the program's inception, total adult coho returns to the two basins have ranged from 1,751 to 30,341 with a 10-year average of 8,576 fish. Significantly, adult returns in 2009 were at a record high (since the mid-1900s) and deemed sufficient to open a limited tribal and non-tribal fishery in Icicle Creek, a Wenatchee tributary. It was the first fishery in over half a century. Another record return—nearly twice that of the 2009 record—occurred in 2011.

Partnerships with Grant County and Chelan Public Utility Districts and the Methow Salmon Recovery Foundation have helped make this restoration project possible. Sportsfishers, tribal members, and non-tribal commercial fisheries are now sharing in the benefits.

Similar coho reintroduction and restoration have occurred in the Yakima and Clearwater river basins. Both the Yakama Nation's Yakima River Coho Re-Introduction Study and the Nez Perce Tribe's Clearwater Coho Restoration Project are successful with results comparable to the Wenatchee/Methow program. Despite starting with out-of-basin hatchery stock, the Clearwater, Yakima, Wenatchee, and Methow rivers are seeing increasing returns of natural origin coho—fish that are adapting to their new environment and establishing spawning populations in new habitat areas.

Walla Walla River Spring Chinook

The Walla Walla subbasin is in the SE corner of Washington State within the northeast portion of the aboriginal title lands of the Confederated Tribes of the Umatilla Indian Reservation. Spring chinook were extirpated from the Walla Walla River for more than 80 years.

The construction of the Nine Mile (Reese) Dam in 1905 preceded the disappearance of spring chinook and caused the Walla Walla River to run dry each summer for nearly 100 years.

Then, in 2001, thanks to an agreement among three irrigation districts, the Umatilla Tribes, and federal agencies, the Walla Walla River started flowing all year long. This agreement supplemented earlier tribal, state, and landowner partnerships to improve fish passage and habitat. The tribe began its spring chinook reintroduction program because the species is critical to the Walla Walla River's ecological health consistent with the tribes' River Vision, and spring chinook are integral to the tribal cultural, spiritual and economic life.

To initiate the program, the Umatilla Tribes released surplus Umatilla and Ringold adult spring chinook into the South Fork of the Walla Walla River. Needing additional broodstock, the Umatilla tribe was able to acquire an additional 250,000 spring chinook smolts from Carson National Fish Hatchery in Carson, Washington and successfully reprogrammed these fish for release into the South Fork Walla Walla.

The Umatilla tribe's spring chinook reintroduction in the Walla Walla River is demonstrating how, when given the opportunity, adult fish will return, spawn, and rear in available habitat. Since the program began, adult spring chinook returns to the upper Walla Walla River and Mill Creek have increased from 200 fish in 2004 (the first year of returns) to 1,135 in 2009. The tribal goal is 5,500 adults to the river mouth. Due to the program's success, the tribe was able to open a tribal fishery on the Walla Walla in 2010, the first time in nearly a century.

Snake River Fall Chinook

Snake River fall chinook have been brought back from the brink of extinction. Listed as threatened under the Endangered Species Act, the estimated return of naturally-spawning Snake River fall chinook averaged 328 adults from 1986–1992. In 1994, fewer than 2,000 Snake River fall chinook returned to the Columbia River Basin.

The construction of dams on the Snake River, beginning with Swan Falls in 1901 and continuing with the Hells Canyon Dam Complex in the 1950's and Lower Snake River dams in later years, eliminated or severely degraded 530 miles—or 80%—of the historical habitat. The most productive of that habitat was upriver from the site of Hells Canyon Dam, which has no fish passage. A precipitous decline of Snake

River fall chinook followed with only 78 wild adults observed at Lower Granite Dam in 1990.

Today the Nez Perce Tribe uses a cutting-edge hatchery program that supplements natural chinook populations with hatchery-reared fish of the same stock. The details of the Snake River Fall Chinook Program were refined through *U.S. v. Oregon* processes, and since 1995 the parties have included commitments for a Snake River Fall Chinook supplementation program. The development of numerous rearing and acclimation facilities in the Snake River Basin as well as the Nez Perce Tribal Hatchery is essential to the implementation of the program. The tribes secured the initial funding for the program through the U.S. Congress. In 1996, Congress instructed the U.S. Army Corps of Engineers to construct acclimation facilities under the Lower Snake River Compensation Plan. Today the Nez Perce Tribe operates and maintains three acclimation facilities in addition to the Nez Perce Tribal Hatchery.

Together, the Nez Perce facilities release approximately 450,000 yearling and 2.8 million sub-yearling fall chinook smolts each year into the Clearwater and Snake rivers. These releases have dramatically increased the number of natural and hatchery origin adult fall chinook returning above Lower Granite Dam.

Total adult fall chinook salmon returns have increased from less than 500 adults to Lower Granite Dam annually from 1975–1995 to a record count of more than 41,000 in 2010. The natural origin adult return in 2012 was just under 13,000 fish, which was a record since the construction of Lower Granite Dam in 1975.

Utilizing Salmon Hatcheries for Natural Stock Recovery

The Columbia River treaty tribes' approach to salmon recovery is to put fish back into the rivers and protect the watersheds where fish live. We employ supplementation and propagation to improve abundance, productivity, distribution and diversity to increase naturally spawning populations of salmon using biologically appropriate hatchery fish.

CRITFC endeavors to secure a unified hatchery strategy among tribal, federal and state co-managers. To that end, we seek to design hatchery programs using the best available science and supported by adequate, efficient budgets.

Best Available Science: Significant New Findings on Supplementation

Significant new research on hatchery and wild fish interaction, conducted by the Columbia River Inter-Tribal Fish Commission, was published in the journal Molecular Ecology in October, 2012. The study, *"Supportive breeding boosts natural population abundance with minimal negative impacts on fitness of a wild population of chinook salmon,"* found that hatchery-reared salmon that spawned with wild salmon had the same reproductive success as salmon left to spawn in the wild, a result that refutes earlier perceptions that interbreeding of hatchery-reared fish with wild fish will always decrease productivity and fitness of the wild populations.

The study focused on a population of summer chinook whose natal stream is located in central Idaho, almost 700 miles upstream of the Pacific Ocean and the subject of the Nez Perce Tribe's Johnson Creek Artificial Propagation Enhancement Project (JCAPE).

The Nez Perce Tribe began the JCAPE Project in 1998 after tribal biologists observed critically low numbers of returning adult chinook to Johnson Creek, a tributary to the South Fork of the Salmon River in central Idaho, and upstream of eight large dams. By 1995 the number of spawning fish pairs in Johnson Creek had been reduced to five.

Adult return numbers are now consistently meeting the Johnson Creek project's short-term abundance goal of 350 returning adults, with the project already returning more than 1,000 summer chinook adults in some years. A limited harvest will be allowed when the tribe reaches a goal of 6,900 adults returning to Johnson Creek. The long-term ecological return or escapement goal is 19,000 summer chinook. The Nez Perce Tribe believes that by continuing the careful work of the JCAPE Project these goals stand a good chance of being met.

Supplementation Did Not Reduce Fitness of Wild Fish The Johnson Creek research demonstrates two things: first, hatcheries don't inherently change salmon genetics. Second, well managed supplementation programs can increase population abundance while minimizing the genetic impacts to wild fish populations.

The study used DNA from all returning adults collected over a 13-year period to track parents and their offspring and to determine how successful hatchery fish were at mating in the wild when compared to wild fish. The study showed a clear boost to the number of adult salmon returning to the population from supplementation: Fish taken into the hatchery produced an average of nearly 5 times the number of returning adults compared to the fish that were left in the wild to spawn. A key finding of the Johnson Creek study was that a hatchery-origin fish spawning

naturally with a wild fish had the equivalent reproductive success as two wild fish, suggesting that chinook salmon reared for a single generation in the hatchery did not reduce the fitness of the wild fish. Similarly, productivity of two hatchery fish spawning naturally was not significantly lower than for two wild fish.

Identifying the Institutional Barriers to Recovery

The Law and Policy provides, but the Regulators do not

ESA listing of salmon populations in the Columbia River has a complex and contentious history. While the Endangered Species Act explicitly provides for the use of artificial propagation in the conservation of listed species the role of propagation has not evaded this tension. Section 2(b) of the ESA (16 U.S.C. 1531(b)) calls for recovery of the species in the wild, while section 3(3) explicitly authorizes the use of propagation in the conservation of listed species. To resolve this legal tension, the National Marine Fisheries Service and U.S. Fish and Wildlife Service have adopted formal policies regarding controlled propagation following notice and comment rulemaking procedures. Joint NMFS–USFWS Policy on the Controlled Propagation of Species Listed under the ESA (65 FR 56916, September 20, 2000); and NMFS Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead (70 FR 123, June 28, 2005). The central tenet of the hatchery policy is the conservation of naturally spawning salmon populations and the ecosystems upon which they depend, recognizing the contribution that properly managed hatchery programs may provide. Hatchery fish will be included in assessing an ESU's status in the context of their contributions to conserving natural self-sustaining populations.

Section 4 of the NMFS policy reads as follows:

> Status determinations for Pacific salmon and steelhead ESUs generally consider four key attributes: abundance; productivity; genetic diversity; and spatial distribution. The effects of hatchery fish on the status of an ESU will depend on which of the four key attributes are currently limiting the ESU, and how the hatchery fish within the ESU affect each of the attributes. The presence of hatchery fish within the ESU can positively affect the overall status of the ESU, and thereby affect a listing determination, by contributing to increasing abundance and productivity of the natural populations in the ESU, by improving spatial distribution, by serving as a source population for repopulating unoccupied habitat, and by conserving genetic resources of depressed natural populations in the ESU. Conversely, a hatchery program managed without adequate consideration of its conservation effects can affect a listing determination by reducing adaptive genetic diversity of the ESU, and by reducing the reproductive fitness and productivity of the ESU. In evaluating the effect of hatchery fish on the status of an ESU, the presence of a long-term hatchery monitoring and evaluation program is an important consideration.

We believe the law and policies are clear—carefully-managed propagation should have an important role to play in conserving salmon listed under the ESA. However, regulators are typically dogmatic and contrary to these possibilities.

The Mass-Marking Requirement

Mass marking of salmon started in the early 1980s as a management tool for recreational fisheries to access healthy hatchery returns while theoretically minimizing harvest impacts on naturally spawning returns. The practice of mass marking hatchery fish began to spread to salmon in the Columbia Basin after the ESA listings in early 1990s and culminated in 2004 with federal appropriations language requiring mass marking at facilities receiving federal funding.

The experience in the Columbia Basin for steelhead indicates that mass marking and the implementation of mark selective fisheries are not conservation measures. Naturally spawning steelhead in the Upper Columbia and Snake rivers were listed for protection under the ESA despite over a decade of mass marking and mark selective fishing. Money spent on mass marking and mark selective fishing could be reallocated to other actions that have a higher likelihood of contributing to recovery of naturally spawning populations.

Mass-marking is detrimental to ocean fisheries monitoring. Harvest arrangements under the Pacific Salmon Treaty are based on coded wire tag (CWT) information. The Treaty includes a MOA that requires both countries to maintain a CWT database. Mass marking affects ocean fisheries sampling because the fin clip no longer indicates the presence of a CWT. A large number of samples with no tags will be

sent to the tag labs, increasing the costs for the tag lab and complicating the data analysis, making it more difficult to assess ocean harvest impacts.

Our tribes have requested that Congress reconsider the never-authorized requirement, delivered through prior appropriations language, to visibly mark all salmon produced in federally funded hatcheries. We have requested that federal mass-marking requirements be waived in the Columbia River Basin in favor of local managers to ensure compatibility with our overall objective of ESA delisting and with prevailing laws and agreements: *US v Oregon,* Pacific Salmon Treaty and the Columbia Basin Fish Accords.

Incompatible Conservation Statutes

All Columbia Basin salmon stocks suffer from predation. Predation is a naturally occurring source of mortality though the degree of that mortality may not be. Species laws like ESA, the Marine Mammal Protection Act and the Migratory Bird Act are all well intentioned, but poorly reconciled with one another. Predation amplified by species imbalance has become a significant source of mortality for salmon. Combined, protected marine pinnipeds and shore birds constitute the majority of predation on ESA stocks. Co-managers' ability to affect these interactions are extremely limited.

Our tribes are encouraged by the recent efforts by Congress to amend the Marine Mammal Protection Act through the *Endangered Salmon and Fisheries Predation Prevention Act.* This Act would provide clarity and flexibility to co-managers to manage and balance "hot-spots" of pinniped predation on salmon and other sensitive species. It would also provide tribes equitable access to management tools.

Recommendations to Overcome Institutional Barriers:

1) Incentivize de-listing for federal agencies—100-year recovery timeframes are unacceptable socially and biologically. Tribes and States and local governments have inherent incentives to de-list and fully recover species. Federal regulatory agencies do not. Creation of incentives and targets for de-listing could synchronize activities of co-managers with regulators.

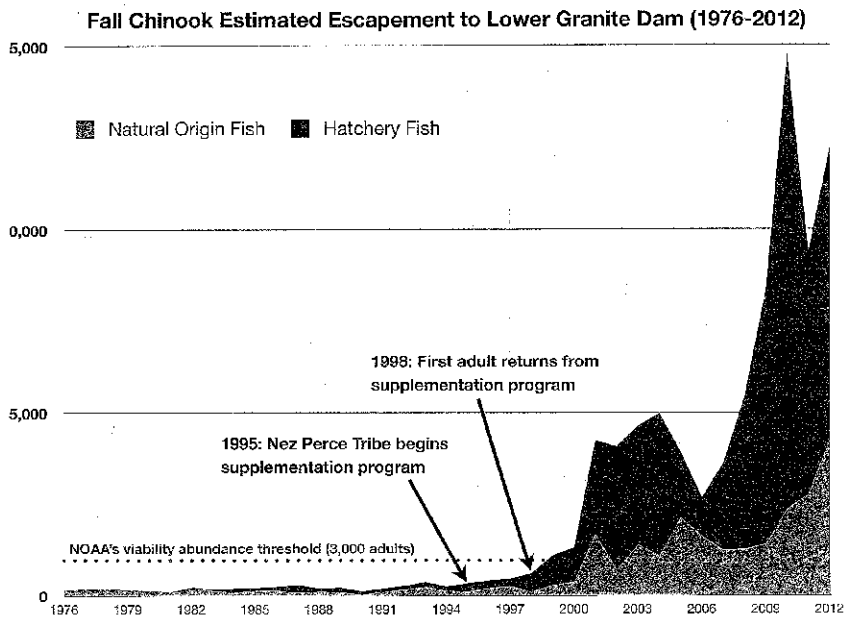
2) Resolve Scientific Gridlock through goal-driven management—We must ask the proper questions: Not "how does poor propagation management inhibit recovery," but rather "how can propagation be integrated with and support recovery."

3) Eliminate Salmon Mass-Marking Requirements—repeal the mass-marking requirement for Columbia Basin salmon hatcheries and allow the practice to occur only with the concurrence of local co-managers. Salmon managers should be provided the latitude to make case-by-case decisions whether to mark fish and, if so, in the appropriate percentages.

4) Cross-cut budgeting—NOAA Fisheries budget documents are nearly incomprehensible. The problem is not NOAA's alone. Eleven separate federal agencies receive federal funds to address some aspect of salmon management. NOAA Fisheries resources should be directed to supporting the types of hatchery actions the tribes are taking. To do so, NOAA Fisheries must issue the necessary research permits in a timely fashion. NOAA Fisheries' must find efficiencies in the preparation of biological opinions for hatchery genetic management plans

5) Balance species interaction through greater flexibility of the Marine Mammal Protection Act and the Migratory Bird Act.

In summary, through combined efforts of the four tribes supported by a staff of experts, we are proven natural resource managers. Our activities benefit the region while also essential to the U.S. obligation under treaties, federal trust responsibility, federal statutes, and court orders. The Endangered Species Act is at its best when it provides beneficial coordination and resources. It is at its worst when it creates delay, bureaucracy and limits the tools co-managers need to restore abundance. We welcome fresh eyes and where necessary, new oversight from this Committee.



The CHAIRMAN. Thank you very much for your testimony, Ms. Brigham.

And next we have Mr. Reed Noss, who is a Professor of Biology at the University of Central Florida in Orlando. And, Dr. Noss, you are recognized for 5 minutes.

STATEMENT OF DR. REED F. NOSS, PROFESSOR OF BIOLOGY, UNIVERSITY OF CENTRAL FLORIDA, ORLANDO, FLORIDA

Dr. NOSS. Thank you very much, Chairman Hastings, Representative Bordallo, and other members of the Committee. My name is Dr. Reed Noss, I am a Professor of Biology at the University of Central Florida. I have worked as a biologist for four decades, which happens to coincide precisely with the venerable history of the U.S. Endangered Species Act of 1973.

I want to begin by reminding us why we have an Endangered Species Act. Well, the short answer is extinction. Americans were concerned in 1973, and they remain concerned today, about the extinction of species. As President Nixon said in signing the Act, "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed." Americans overwhelmingly hold the value that wildlife and nature are good and ought to be preserved.

For example, in a 2006 national survey, 81 percent of respondents agreed that taking good care of nature is part of our duty to God.

The first stated goal of the ESA, which I think sometimes we forget, is to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.

But because Congress never provided clear direction for how to conserve ecosystems, we are basically stuck with trying to protect and recover most species on an individual basis. This is not the most cost-efficient means to protect our national heritage.

However, lacking broader legislation, such as an endangered ecosystems act, the ESA is the best we have to work with. And, given the challenges and complexities of protecting and recovering species, the ESA has worked remarkably well.

Preventing extinction means that we will still have the opportunity to benefit from nature in countless ways, from medical science and industry, for recreation, spirituality, and for the services such as the protection of—or provision of clean water, buffering of storm surge and flooding in coastal areas and otherwise, pollination of crops, production of multiple natural resources.

One critical goal of the ESA, of course, is to recovery species to population sizes and distributions that will ensure their persistence in the long run, and where they can be delisted. It is important to understand that species recovery is extremely challenging today because the threats that led to species being listed in the first place have generally not subsided. In fact, many threats, such as population growth, resource consumption, urban sprawl, and climate change are only getting worse.

Nevertheless, despite these continuing threats, the record of ESA is not so bad at all. As of December 2009, last time there was a complete listing figured, 25 previously listed species had been recovered. A high-profile example, which, of course, as Representative Bordallo mentioned, is the bald eagle, one of the first listed species, and our national symbol, by 2007 the bald eagle had recovered to the point where it was removed from the endangered species list. And I am lucky in Florida to see bald eagles literally every day, and it is a wonderful experience.

Recent studies show that, in fact, most species, most listed species, have improved in status over time. Still, maintenance of viable populations of many listed species will continue—will require continuing species-specific interventions over the long term. Otherwise, they will go extinct. This finding should not be surprising. Human activity has made life tough for these species. Now they need our help to survive. It is really a very simple problem.

In my written testimony I provide some information about a species I know well, the Florida Grasshopper Sparrow, which was listed under the ESA as endangered in 1986. Now, granted, the Florida Grasshopper Sparrow is no bald eagle, in terms of charisma. But if you look at this picture, I hope you will agree with me that it is actually a very attractive bird. Much more, it is also the flagship species of the Florida dry prairie—next slide—which is an ecosystem type only found in South Central Florida, nowhere else in the world. Now, the Florida Grasshopper Sparrow is declining abruptly—if I can have the next slide—it declined over 90 percent, due to conversion of its primary habitat to agriculture, especially improved pasture. But over the last decade, for reasons we don't understand, it has declined another 80 percent. And we don't really know why it is declining so rapidly.

The U.S. Fish and Wildlife Service, due to funding limitations and probably some politics, has repeatedly refused to fund the nec-

essary research to determine the cause of the decline. The likely extinction of the Florida Grasshopper Sparrow within the next few years does not represent a failure of the Endangered Species Act. It represents a failure of the U.S. Fish and Wildlife Service to obtain the necessary scientific knowledge to stop the population decline and achieve recovery. And this, in turn, is a result of limitations in funding and other problems.

I discuss some other things in my written testimony, but I am out of time. So thank you very much for your attention.

[The prepared statement of Dr. Noss follows:]

Statement of Dr. Reed F. Noss Professor of Biology, University of Central Florida, Orlando, Florida

Good morning, Chairman Hastings, Representative Bordallo, and the other members of the Committee on Natural Resources. My name is Dr. Reed Noss. I am the Provost's Distinguished Research Professor of Biology at the University of Central Florida. I have served as President of the Society for Conservation Biology and Editor-in-Chief of its scientific journal, *Conservation Biology.* I am an Elected Fellow of the American Association for the Advancement of Science.

I have worked in the fields of ecology and conservation biology for four decades, coinciding precisely with the venerable history of the U.S. Endangered Species Act of 1973. I teach conservation biology, ecosystems of Florida, ornithology, and history of ecology. My current research centers on the vulnerability of species and ecosystems to land-use change, climate change, and sea-level rise, and what we might do to address those threats. I have nearly 300 publications, including seven books, and am rated as one of the 500 most highly cited authors in all fields.

I am honored to address this committee during the 40th anniversary year of the U.S. Endangered Species Act, passed by Congress with nearly unanimous support and signed by President Richard Nixon in 1973. This Act is nothing less than one the most important and influential pieces of conservation legislation in the history of the world.

Americans' concern about extinction

I want to begin by reminding us why we have an Endangered Species Act (ESA). The short answer is extinction. The American people value their wildlife. They were concerned in 1973 and remain concerned today about the extinction of species. *Extinction is forever;* that is a cliché, but it is no less true.

As President Nixon said in signing the Act, "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans. I congratulate the 93rd Congress for taking this important step toward protecting a heritage which we hold in trust to countless future generations of our fellow citizens. Their lives will be richer, and America will be more beautiful in the years ahead, thanks to the measure that I have the pleasure of signing into law today."

Americans remain concerned about extinction. According to a February 2013 survey of 657 registered voters conducted by Public Policy Polling, 61% of Americans are "concerned about the rate that wildlife is disappearing" (http://phys.org/news/2013-03-population-growth-threat-species-poll.html). With continued human population growth, conversion of natural areas to human uses, climate change, and sea-level rise, the Endangered Species Act is needed much more today than when President Nixon signed the Act into law in 1973.

Section 2 of the ESA states a clear purpose for the Act: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in . . . this section."

Because Congress never provided clear direction for the first stated goal of the Act—to conserve ecosystems—we are stuck with trying to protect and recover most species on an individual basis or in relatively small groups. This is probably not the most cost-efficient means to protect biological diversity and the integrity of America's ecosystems. However, lacking broader legislation, such as an Endangered Ecosystems Act, the Endangered Species Act (ESA) is the best we have to work with.

And, given the challenges and complexities of conserving species, it works remarkably well.

The value of species and nature

An implicit assumption of the Endangered Species Act is that every species has value. This, in fact, is a dominant ethical norm of most religious and philosophical traditions around the world. In the United States, most people who belong to mainstream religions believe that God created all species and saw them as good. For example, Deuteronomy 11:12: "A land which the LORD thy God careth for: the eyes of the LORD thy God are always upon it, from the beginning of the year even unto the end of the year. " Furthermore, the Bible suggests that it is our duty as humans to care for and steward God's creation. In a 2006 American Values Survey, 81% of respondents agreed that "Taking good care of nature is part of our duty to God" (http://ecoamerica.typepad.com/blog/files/ecoAmerica_AEVS_Report.pdf).

A foundational principle of modern environmental ethics is that species have value in and of themselves, a view that is shared by a majority of Americans. A 1993 national poll conducted by Washington State University, Utah State University, and Oregon State University, and based on 1,300 phone interviews, found that 71% of respondents agreed with the statement, "wildlife, plants, and humans have equal rights to live and develop on the earth;" 89% agreed that "humans have an ethical obligation to protect plant and animal species" (http://ir.library.oregonstate.edu/xmlui/bitstream/handle/1957/24967/EMNO8562.pdf?sequence=1).

A 2010 poll conducted for The Nature Conservancy by the Republican polling firm, Public Opinion Strategies, and the Democratic polling firm, Fairbank, Maslin, Maullin, Metz & Associates, found that "roughly equal proportions of American voters believe that the *best* reason to conserve nature is for its own sake (42%) and for the benefits it provides to people (45%)" (http://www.conservationgateway.org/Files/Pages/key-findings-recent-natio.aspx).

Besides intrinsic value, species have utilitarian or instrumental value. Individual species, for instance, may possess chemicals or structures in their bodies useful to medicine or industry, and there are many examples of such discoveries. Preventing extinction means that we still have the opportunity to make new such discoveries. Species also have value in terms of their role in ecosystems. It is now well established scientifically that the diversity of species in an ecosystem contributes to its "resilience," which is the ability to maintain or rapidly recover essential functions after disturbance. Ecosystem resilience is vitally important to human society because it assures the continuation of essential ecosystem services such as the provision of clean water, buffering of storm surges in coastal areas, pollination of crops, production of timber and other resources, and other benefits.

It is a bit tricky to determine the contribution of each individual species to ecosystem resilience, mostly because the vast majority of species are poorly studied scientifically. Some species clearly play more pivotal roles than others. As noted in a recent review, "The presence of one or a handful of species, rather than the overall diversity of an ecosystem, is often the determinant of stability against different perturbations . . . depending on the types of stability and perturbation, different species may play key roles" (Ives and Carpenter 2007). A synthesis of grassland biodiversity experiments shows that high plant species richness is needed to maintain ecosystem services: "Although species may appear functionally redundant when one function is considered under one set of environmental conditions, many species are needed to maintain multiple functions at multiple times and places in a changing world" (Isbell et al. 2011).

Given continued uncertainty about the ecological role of individual species, it is sensible to prevent the human-caused extinction of any species. As wildlife biologist (turned philosopher) Aldo Leopold stated decades ago, "To keep every cog and wheel is the first precaution of intelligent tinkering."

Americans are not ambivalent about the value of nature. The 2010 poll referred to above, conducted for The Nature Conservancy, found that 90% of registered voters in the U.S. believe that "Nature's benefits for people" are "extremely important" or "very important." The margin of error in this poll was plus or minus 3.5%.

Listing and recovering species

One key step for preventing extinctions is to list species that meet the criteria for listing under the ESA. Many highly imperiled species are not currently protected under the Act. A recent study compared the coverage of species under the ESA with the international IUCN Red List of Threatened Species. The authors found, for example, that 40% of IUCN-listed birds in the U.S. are not listed under the ESA. Altogether, a nearly 10-fold increase in listing would be required for the ESA to protect

all IUCN-listed species found in the U.S. (Harris et al. 2011). It is also important to list declining species expeditiously. Currently, the prospects for many listed species are dim because they were already severely imperiled at the time they received protection under the Act.

Another critical goal of the ESA is to recover listed species to population sizes and distributions that will assure their persistence over the long run, in which case they can be delisted under the Act. One concern of people who question the efficacy of the Endangered Species Act is that species are not recovering in a timely manner. By definition under the ESA, a species is recovered when it is neither "in danger of extinction throughout all or a significant portion of its range" (ESA sec 3(6)) nor likely to become so "within the foreseeable future" (ESA sec. 3(20)). Therefore, to be legally considered recovered, a species must be sufficiently abundant and the threats it faces eliminated or managed such that delisting the species does not set off another round of decline (Neel et al. 2012).

It is important to understand that species recovery is extremely challenging today because the threats that led to species being listed in the first place have generally not subsided. Many, such as human population growth, resource consumption, urban sprawl, and climate change, are only getting worse.

Nevertheless, despite these continuing threats to species, the record of the ESA for species recovery is not so bad. As of December 2009, 25 previously listed species had been delisted and considered recovered. A high-profile example is the Bald Eagle, designated our national symbol by the Second Continental Congress in 1782 and one of the first species to be placed on the endangered species list. For the Bald Eagle, the ESA clearly worked. By 2007, the eagle population had recovered sufficiently to be removed from the list. I see Bald Eagles virtually every day where I live in Florida, and it's always a wonderful experience.

A 2005 study found that 52% of species listed under the ESA either showed improvements in status or were not declining over the time period 1988–2002. The status of listed species generally has improved over time, with only 35% still declining 13 years or more after protection under the ESA (Male and Bean 2005).

Other researchers have noted improvements in recovery planning in recent years. For example, in comparison with plans completed prior to previous reviews in the early 1990s, Neel and colleagues found that "a larger proportion of species in later plans have the potential to be delisted, more have at least one quantitative recovery criterion, the overall numbers of populations and individuals required for recovery would increase, and these numbers would exceed the numbers when the recovery plan was written for more species" (Neel et al. 2012).

Still, too many species listed as Threatened or Endangered are unlikely to recover. Delisting may not be possible for many species, even when a recovery plan is fully implemented. The U.S. Fish and Wildlife Service and National Marine Fisheries Service estimate that delisting may be possible for only 73% of listed species. Neel et al. (2012) note that "delisting objectives for abundance remain on the lower end of the continuum of viability, with 68%–91% falling below published thresholds for the minimum numbers of individuals. In addition, 144 species could be considered recovered with even fewer populations than existed when the recovery plan was written." These facts suggest that the best available science is not always applied to delisting decisions.

We must acknowledge the need to continue and strengthen conservation efforts for imperiled species, even after their formal recovery goals have been met. A recent study determined that maintenance of viable populations of many species will require continuing, species-specific intervention over the long term. The authors termed such species "conservation reliant" and determined 84% of the species listed under the ESA are conservation reliant and will require "continuing, long-term management investments" (Scott et al. 2010). This finding should not be surprising. Human activity has made life tough for these species. Now it is our responsibility to help them survive.

The Florida Grasshopper Sparrow

I'd like to give you an example of a species I know well, and have studied in the field, a species which is declining to extinction despite being listed under the ESA as Endangered in 1986. This species is the Florida Grasshopper Sparrow. This bird occurs only in the unique dry prairie ecosystem of south-central Florida, some 90% of which has been converted to improved pasture, agriculture, and recently, urban sprawl.

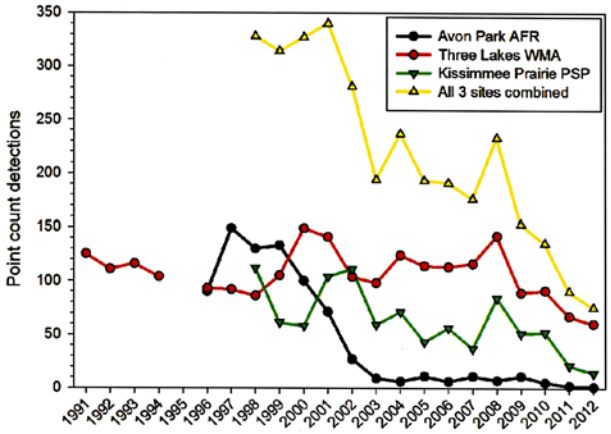
This sparrow is admittedly no Bald Eagle in terms of public charisma, but it means a lot to many of us in Florida. Close-up, it's really quite attractive (see photo below) and it is the flagship species of the Florida dry prairie, an ecosystem found

nowhere else on earth (see photo below). Given that the first stated goal of the ESA is to conserve ecosystems, this sparrow potentially plays a very valuable role.

The Florida Grasshopper Sparrow
(*Ammodramus savannarum floridanus*)

The Florida dry prairie ecosystem
(Kissimmee Prairie Preserve State Park)

After declining at least 90% from habitat loss during the 20th century, the Florida Grasshopper Sparrow has declined another 80% just over the past decade (see figure below), and it is now probably the most highly imperiled bird in the continental United States.



Decline of Florida Grasshopper Sparrows at survey points within the last three sites that held significant populations, 1991-2012, and for all three sites combined.

We don't know exactly why the Florida Grasshopper Sparrow has declined so abruptly over recent years. Although we have some promising hypotheses, the U.S. Fish and Wildlife Service has repeatedly refused to fund the necessary field research

to determine the cause, or causes, of decline. I am a founding member and former chair of the Florida Grasshopper Sparrow Working Group, an interagency group of scientists and managers, which serves as the de facto recovery team for the sparrow. We advise the U.S. Fish and Wildlife Service regarding protection, recovery, and management strategies and actions. Over the past few years we have submitted several proposals for field research on the Florida Grasshopper Sparrow to determine the causes of decline and what might be done to reverse the decline and recover the species. The local (Vero Beach) Field Office of the U.S. Fish and Wildlife Service has avidly encouraged and solicited our research proposals and sent them up the line, where they are uniformly and perhaps arbitrarily rejected by the Regional or National Offices of the Service.

The point is, we cannot recover species if we don't understand the causes of decline and the basic biology of the species. The likely extinction of the Florida Grasshopper Sparrow within the next few years does not represent a failure of the Endangered Species Act. It represents a failure of the U.S. Fish and Wildlife Service to obtain, through research, the scientific knowledge needed to stop the population decline and achieve recovery—and then act on that information. This failure, in turn, reflects at least in part the insufficient budget given to the Endangered Species Program of the Service by Congress and the Administration.

Endangered species or private property rights?

Finally, I will address briefly the perceived conflict between endangered species protection and private property rights. Conflicts between non-Federal landowners and the welfare of imperiled species are inevitable because, according to the U.S. General Accounting Office (1994), more than half of the species listed under the ESA have 81% of more of their habitat on private or other non-Federal lands. Species distributions seldom conform to political boundaries, so the states, tribes, and local jurisdictions are generally not well suited to oversee protection and recovery of species listed under the ESA. This is a federal—and in some cases an international—responsibility.

Our country has mechanisms to resolve conflicts between endangered species protection and private property rights. For instance, in the 1982 amendments to the ESA, Section 10(a) authorizes the U.S. Fish and Wildlife Service and National Marine Fisheries Service to issue to non-Federal entities a permit for the "incidental take" of endangered and threatened species on their lands. An incidental take permit allows a landowner to proceed with an activity that is legal in all other respects, but which results in the "incidental" taking of a listed species.

A number of incentives exist for non-Federal landowners who have listed species or species proposed for listing on their properties to pursue incidental take permits. The most significant requirement of Section 10(a) is that an application for an incidental take permit must include a habitat conservation plan (HCP) for any and all listed species that might be subject to take under the proposed activity. The purpose of an HCP is to minimize and mitigate the effects of the permitted action (for example, new housing development) on listed species. HCPs are intended to accomplish this objective through the protection, restoration, and management of habitat for the species covered by the plan.

A general benefit for private landowners, counties, and local jurisdictions who engage in the Section 10(a) permitting and the habitat conservation planning process is that a well-developed and defensible HCP, especially one that addresses the needs of multiple species and ecosystems, streamlines the permitting process and results in reduced costs to landowners and government in the long term. Some landowners who have multiple listed species on their properties have described HCPs enthusiastically as "one-stop shopping," i.e., a single permit allows them to address all listed species concerns simultaneously for the specified period of the incidental take permit (generally from several years to 75 years).

In reality some HCPs have been of high quality and successful in meeting conservation objectives (so far), whereas others have been dismal failures. It all comes down to the quality of the science underlying the HCP, the moral commitment of the landowners and the agencies to follow the best available science for the benefit of the species concerned, and the reliability of long-term funding to implement the plan and to make adjustments to the plan (what we call "adaptive management") as conditions change and new knowledge about the species and their ecosystems is obtained.

Our responsibility

To conclude, when President Nixon signed the ESA into law in December 1973, it was not a partisan issue. The bill was written by Republicans and Democrats, and it passed the House by a vote of 355 to 4. Respect for life and prevention of

extinction is a universal ethical value. As Americans, we should be proud to have a powerful law that reflects this ethical value, and we should do everything we can to assure its successful implementation. I trust that this committee will take this responsibility seriously.

Thank you for the opportunity to testify before this esteemed committee.

Literature Cited in this Testimony:

General Accounting Office, U.S. 1994. Endangered Species Act: information on species protection on nonfederal lands. GAO/RCED–95–16 . http://www.gao.gov/assets/230/220827.pdf.

Harris, J.B.C. Harris, J.L. Reid, B.R. Scheffers, T.C. Wanger, N. S. Sodhi, D.A. Fordham, and B.W. Brook. 2012. Conserving imperiled species: a comparison of the IUCN Red List and U.S. Endangered Species Act. Conservation Letters 5:64–72.

Isbell, F., V. Calcagno, A. Hector, et al. 2011. High plant diversity is needed to maintain ecosystem services. Nature 477:199–202.

Ives, A.R., and S.R. Carpenter. 2007. Stability and diversity of ecosystems. Science 317:58–62.

Male, T.D., and M.J. Bean. 2005. Measuring progress in US endangered species conservation. Ecology Letters 8:986–992.

Neel, M.C., A.K. Leidner, A. Haines, D.D. Goble, and J.M. Scott. 2012. By the numbers: How is recovery defined by the US Endangered Species Act? BioScience 62:646–657.

Scott, J.M, D.D. Goble, A.M. Haines, J.A. Wiens, and M.C. Neel. 2010. Conservation-reliant species and the future of conservation. Conservation Letters 3:91–97.

The CHAIRMAN. Thank you very much, Dr. Noss.

We now have Mr. Patrick Parenteau, who is a Professor at the Vermont Law School in South Royalton, Vermont. You are recognized for 5 minutes.

STATEMENT OF PATRICK PARENTEAU, PROFESSOR OF LAW, VERMONT LAW SCHOOL, SOUTH ROYALTON, VERMONT

Mr. PARENTEAU. Thank you, Chairman Hastings and Representative Bordallo, for the opportunity to appear here. My career, like Dr. Noss, has also spanned about 40 years in tracking the Endangered Species Act. And the ESA has occupied a major focus of my work over those years. And I have seen the Act from every perspective you can imagine. I have been on both sides of the cases. I have represented plaintiffs, I have represented defendants, I have represented the Federal Government, I have represented the State governments. So I believe I have some perspectives that might be of some value to the Committee. At least I hope so.

Make no mistake about it. We are facing an extinction crisis. Human-caused extinction rates are 100 to 1,000 times background rates of extinction, according to Dr. E.O. Wilson, Dr. Reed Noss, and many other distinguished conservation biologists. And at the rate we are going, we are looking at rates of 10,000 times background rates. We are looking at the prospect of losing half of the species on earth in some of the worst case analyses of global climate change and other forces that are affecting habitat and ecosystems upon which these species depend.

We do have an ethical obligation to do something about that. Much of what is happening can be avoided. Much of what is happening with the resources that are being lost is waste. There are alternatives that can be used to avoid some of these consequences. It is to human benefit to do so. The ecosystem services that Reed Noss has mentioned amount to trillions of dollars annually on a global basis. So we are talking about economic assets, as well as

we are talking about natural values, intrinsic values of species and ecosystems.

The ESA is a vital safety net for these species. There is no question but hundreds of species would have gone extinct by now but for the Endangered Species Act, some of which are very well-known species: the eagle, the alligator, the condor, the whooping crane. But many of which are not. They are at the bottom of the food chain. But as E.O. Wilson properly points out, it is the little things that run the world. Those are the parts of the ecosystem we have to be paying attention to because those are the things that provide the pollination and other services that Dr. Noss talks about.

So, the ESA is an absolutely vital piece of the puzzle, but it is a tiny piece of the puzzle, in terms of the challenges that we are facing if we are going to turn this situation around, try to preserve some of the earth's magnificent biological diversity. The irony of the moment is the earth has the richest composition of biological diversity in its geologic history, and yet we are losing it at the most rapid rate we have seen in many, many millions of years.

Why does recovery take so long under the Endangered Species Act? That is what everyone wants to know. Well, if you look at the data, 85 percent of the species that are listed under the ESA are there because of habitat loss. In some cases, catastrophic habitat loss. Over 95 of habitat has been lost, in the case of many of these species. By the time they are listed, the window of opportunity to save them is very narrow. The longer it takes to list them, the longer it takes to designate critical habitat, the longer it takes to implement recovery plans, the longer it takes to spend the money to conserve the habitat that remains, the less chance they have for survival, the greater the conflict, and the less cost-effective the measures that you have at your disposal. So, it is absolutely critical that species get listed, and that these other mechanisms get implemented.

Again, why is recovery so difficult? It is not possible to turn around that catastrophic loss of habitat that has taken hundreds of years to accumulate in a matter of decades, even. For some of these species, we are probably talking about a century or more, if ever, some of these species can be totally delisted. The whooping crane may be a perpetual care species, simply because of the limited capability for it to reproduce, and so on. So, those are some of the reasons.

What about the role of litigation? The primary reason for the citizen suit provision of the Endangered Species Act and so many other environmental statutes is to hold the government accountable. The cases that we are talking about are situations where courts have found repeatedly that the government has deliberately and repeatedly violated mandates, non-discretionary duties. That is why we have litigation.

Why do we have so many violations? Because the agencies are not properly staffed, they are not properly funded. The courts have found this over and over again. The courts have said, "Either change the law, or fund the law, but don't come to court and say, 'We need more time, we are not going to obey the mandates of the statute.' Courts don't exist to condone violations of the law." If we want a rule of law in this country, we need litigation to hold the

government accountable. That is the primary reason for these lawsuits.

Finally, some of the flexibility mechanisms that the law provides: safe harbors, no surprises, candidate conservation agreements, conservation banks, 4(d) rules, habitat conservation plans, recovery credits, tax deductions, many, many market-based solutions. Everybody that is at this table—tribal, State, local, nonprofit, profit, forprofit groups—everybody has a role to play.

And everything that is being done so far is fine, but we need to do much more, if we are going to turn this situation around. Thank you, Mr. Chairman.

[The prepared statement of Mr. Parenteau follows:]

Statement of Patrick Parenteau, Professor of Law, Vermont Law School, South Royalton, Vermont

My name is Patrick Parenteau. I am professor of law and senior counsel to the Environmental and Natural Resources Law Clinic at Vermont Law School. I have been actively involved in the practice of environmental law for almost forty years. My career spans every facet of environmental law. I have held senior positions in the non-profit sector with the National Wildlife Federation, in the federal government as general counsel with EPA Region One, in state government as Commissioner of the Vermont Department of Environmental Conservation, in the private sector as of counsel with the law firm of Perkins Coie, and in academia as director of the environmental law program at VLS. I have substantial experience with the subject matter of this hearing. I was involved in some of the earliest and most important cases under the Endangered Species Act; I testified in the legislative hearings on the amendments to the Act in 1978, 1979, and 1982; I have appeared in all four proceedings before the endangered species exemption committee created by the 1978 amendments; I served as special counsel to the U.S. Fish and Wildlife Service in the northern spotted owl exemption proceedings; I have commented on a number of rulemaking sunder he Act and have published numerous articles on its successes as well as its shortcomings.

I would like to thank Chairman Hastings and Representative Bardallo for providing me this opportunity to share the following observations on the subject of today's hearing.

I. THE EXTINCTION CRISIS IS REAL AND THE COOPERATION AND COMMITMENT OF ALL PARTIES—PUBLIC AND PRIVATE, FOR PROFIT AND NOT FOR PROFIT—IS REQUIRED TO MEET THE CHALLENGE.

The consensus of the scientists who study species and ecosystems is that we are in the midst of the sixth great extinction rivaling the five mass extinction events in earth's history.[1] A poll by the American Museum of Natural History found that 7 in 10 biologists believe that mass extinction poses a colossal threat to human existence, a more serious environmental problem than even its contributor, global warming, and that the dangers of mass extinction are woefully underestimated by most everyone outside of science. Professor EO Wilson (*The Diversity of Life*) has calculated that human caused extinction rates are between 100 and 1,000 times the natural background rate of extinction and could climb as high as 10,000 times in a few decades. According to the latest IUCN "Red Book," of the 40,168 species that the 10,000 scientists in the World Conservation Union have assessed, 1 in 4 mammals, 1 in 8 birds, 1 in 3 amphibians, and 1 in 3 conifers are at risk of extinction. The peril faced by other classes of organisms is less thoroughly analyzed, but fully 40 percent of the examined species on the planet are in danger, including up to 51 percent of reptiles, 52 percent of insects, and 73 percent of flowering plants. Here in the U.S. the number of species listed under the ESA has grown to over 2000, and hundreds, perhaps thousands more are candidates for listing.

The causes of this dramatic loss of biological diversity are well known: habitat loss; invasive species; pollution; unsustainable harvests of marine life; and, looming

[1] See Millennium Ecosystem Assessment, Ch. 4 Biodiversity, 3 (2005); available at http://www.unep.org/maweb/en/Index.aspx. The study found that over the past few hundred years humans may have increased the species extinction rate by as much as three orders of magnitude. The study also found that 60 percent of the world's ecosystem services assessed have been degraded or are being used unsustainably.

ever larger, climate disruption. The truth is that humans exert a profound effect on the earth's ecosystems and evolutionary processes. The good news is that humans can change the way they use land and water and other natural resources and thereby reduce their impact on natural systems. However it will take an unprecedented level of cooperation and commitment among all levels of government and all stakeholders in order to halt and reverse the march towards extinction.

As the title of this hearing indicates tribal, state and local governments all have important roles to play in species conservation. So does the federal government and so do the other nations of the world. It is not either/or; it is all of the above. There are many examples of how each level of government contributes to conservation. The Nez Perce Tribe assumed management of the gray wolf recovery process in Idaho. The Columbia River Intertribal Fish Commission has been working for decades to restore the depleted runs of Pacific salmon. The Yurok Tribe has been studying ways of reintroducing the California condor to their lands. The list goes on.

There are many examples of what states are doing as well: The California Natural Communities Conservation Program; the Oregon salmon management plan;[2] the network of state natural heritage programs in every region of the country;[3] the many statewide habitat conservation plans adopted under the ESA; and the fact that all but four states have adopted state endangered species acts modeled on the ESA;[4]

Local governments also have a key role to play in promoting smart growth, preventing sprawl, investing in green infrastructure through proper management and protection of floodplains, wetlands and open space. The very first habitat conservation plan was created in San Bruno County California to conserve the habitat of the San Bruno blue butterfly. Volusia County in Florida developed a comprehensive beech lighting program to protect nesting sea turtles. Austin Texas created one of the first multi-species HCPs to balance development and conservation goals. I am sure there are many more examples of local success stories that unfortunately do not get as much attention as the controversies that periodically erupt when development collides with the needs of species.

II. THE ESA IS AN INDISPENSABLE TOOL IN THE SPECIES AND ECOSYSTEM CONSERVATION EFFORT

2013 marks the 40th anniversary of the ESA. To say that the Act has led a tumultuous life would be an understatement. A law first proposed by President Nixon and passed overwhelmingly in both the House and Senate has become a lightning rod for political attack. Too often these attacks have shed more heat than light on the issues and the genuine problems that do exist. The ESA is not a perfect law; nor are any of the other laws passed by Congress. But the flaws have more to do with how the law is implemented than how it is written. A full discussion of all the ways in which the administration of the Act could be improved as well as what amendments could actually strengthen the Act is beyond the scope of this presentation. Suffice to say I welcome the day when there can be a sober and objective analysis of ways in which the threats to species can be reduced and the ecosystems on which they depend can be better conserved while enhancing sustainable development and job creation goals.

For now however, it is clear that but for the ESA many more species would have gone extinct and many more would be doomed to that fate. According to the National Research Council, the ESA has saved hundreds of species from extinction.[5] Some of the more charismatic species rescued from the brink include the whooping crane, bald eagle, peregrine falcon, gray and red wolf, grizzly bear, and gray whale. A study published in the Annual Review of Ecological Systematics calculated that 172 species would potentially have gone extinct during the period from 1973 to 1998 if Endangered Species Act protections had not been implemented.[6] According to the U.S. Fish and Wildlife Service, of the listed species whose condition is known, 68 percent are stable or improving, and 32 percent are declining. The longer a species enjoys the ESA's protection, the more likely it is that its condition will stabilize or improve. The law has also helped to preserve millions of acres of forests, beaches, wetlands and wild places that serve as critical habitat for these species.

The point is that a national law is needed to deal with a problem as all-encompassing as extinction. Tribes, states and local governments have done a lot and

[2] Oregon Department of Fish and Wildlife http://www.dfw.state.or.us/mrp/salmon/.

[3] NaturServ http://www.natureerve.org/visitLocal/.

[4] American bar Association, Endangered Species Act: Law Policy and Perspective, 2d ed. Ch. 11 (2010).

[5] National Academies Press, *Science and the Endangered Species Act,* 4 (1995).

[6] Mark W. Schwartz, "The Performance of the Endangered Species Act," Annual Review of Ecology, Evolution, and Systematics Vol. 39: 279–299 (2008).

could do much more but they cannot do everything necessary to manage wide ranging species like wolves and bears, let alone global species like turtles and whales. The threats to these species are increasingly global such as climate disruption. The response to these threats must be ecosystem based and occur on a landscape scale. As species and ecosystems cross political boundaries so too must the solutions. Species must a have a floor of protection to survive. Leaving protection to the uncertainties of a piecemeal approach and the geo-political differences that exist in the country will not work. A good example of this problem is the Dead Zone in the Gulf. It is caused by the runoff of nutrients form the vast Mississippi River watershed. No one state can fix the problem. The upstream states lack the incentive to incur the costs of controlling the runoff from their farms for the benefit of the downstream states and their fishing industry. The Clean Water Act provides a mechanism to address this kind of trans-boundary problem. Without a federal law little progress would be possible. The same is true is species conservation, perhaps even more so. It is difficult to judge the worth of individual species some with obscure names and no known commercial value. It is always easy to justify one more project that takes one more acre of shrinking habitat. Yet this whittling away of habitat, an acre at a time, is responsible for 85% of the species on the ESA list.[7] The larger the list grows and the longer it takes to implement real recovery efforts the greater the costs and disruption and the less chance there is for a promt recovery.

Having a central repository of information and expertise about species and the efficacy of various recovery techniques is also beneficial and facilitates efforts by tribes, states and local agencies that wish to participate in conservation efforts. Of course this is a two way street. Federal agencies have much to learn from those who are closest to the resources and activities affected by the ESA.

III. "SUE AND SETTLE" IS A RED HERRING THAT DISTRACTS FROM THE CRITICAL NEED TO STRENGTHEN THE ESA'S RECOVERY MECHANISMS

I have read the Chamber of Commerce report "Sue and Settle: Regulating behind Closed Doors." While it makes for entertaining reading I find it badly misrepresents what actually happens in these cases.

First, "sue and settle" is an old story, and it has more to do with politics than reality. Not so long ago the George W. Bush administration was accused of entering into sweetheart deals with industry. My colleague Michael Blumm wrote a law review article documenting a number of these deals including one that sought to relinquish federal rights on public lands and extinguish wilderness study areas without conferring with congress as required by law.[8]

The Chamber report states:

> "Sue and settle occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups that effectively dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

Almost nothing in that statement is accurate. First, most of the cases cited involve actions seeking to enforce mandatory duties imposed by statute. In the case of the ESA nearly all of the cases involve citizen suits to enforce statutory deadlines such as the deadline for making decisions on whether to list a species or designate critical habitat. Where discretion is involved suits are brought under the Administrative Procedure Act (APA) and are subject to a standard of review that is highly deferential to the agency. In no case of which I am aware has an agency "intentionally relinquished its statutory discretion." Agencies may choose not to raise arguments they may have on jurisdictional or procedural grounds but that is not the same as relinquishing discretionary authority. Since the days of Attorney General Edwin Meese the Department of Justice has had a policy that explicitly forbids entering into agreements that either cede statutory authority or bind future administrations or congressional appropriations.[9] Every consent decree I've ever seen has

---

[7] Wilcove et al, "Quantifying Threats to Imperiled Species in the United States," Vol. 48, No. 8 (Aug., 1998), pp. 607–615.

[8] Blumm, "The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands," Environmental Law Reporter, Vol. 34, p. 10397, May 2004.

[9] AUTHORITY OF THE UNITED STATES TO ENTER SETTLEMENTS LIMITING THE FUTURE EXERCISE OF EXECUTIVE BRANCH DISCRETION June 15, 1999 http://www.justice.gov/olc/consent_decrees2.htm.

a boilerplate provision explicitly stating that the agency retains all of its statutory discretion.

Second, though it is certainly true that settlement negotiations occur "behind closed doors," which is the only way cases can be settled, proposed consent decrees under the ESA and other environmental statutes must be published in the Federal Register, the public and affected parties are allowed to comment, and the judge must make a finding that the consent decree is in the public interest and is not contrary to law. I am aware of instances, including one case in which I was involved, where as a result of public comment a judge has declined to enter a decree and ordered the parties back to the negotiation table. Addition the DOJ has the statutory right to comment on ever consent decree in a citizen suit and object to agreements that compromiser federal interests. Courts pay particular attention to the views of DOJ in such cases.

Third, settlements like the ones in the "mega listing" cases cited by the Chamber do not "dictate the priorities and duties of the agency." Rather these cases enforce duties already embodied in the statute. Indeed if there was no duty there would be no lawsuit and no settlement. Moreover, the listing settlements do not dictate what the ultimate decision must be as to any particular species. Rather the settlements establish a reasonable timetable for making decisions that in some case are long past the statutory deadline.[10] Again if conservation is the goal the sooner a species gets listed the better the chances of recovery and the less costly and disruptive it will be for everyone.

Fourth, contrary to the arguments of some, is little evidence that ESA citizen suits distort agency priorities and actually impede recovery efforts. In one of the few empirical studies done on this question the authors actually concluded that the citizen suits targeted species facing higher threats than those identified by FWS as deserving of higher priority for listing.[11] The authors stated: "Among species in conflict with development citizen initiated species are significantly more threatened than FWS-initiated species."

Fifth, batch listings like those agreed to in the mega listing cases are actually more efficient than listing species one by one. Having a definite timetable with a cease fire agreement to allow the agencies to work through the backlog makes sense. The settlements in the listing cases have given the agencies more control over the process than they had before when they were constantly being sued for violating the law. The courts cannot simply condone statutory violations brought to their attention.

The Chamber report also alleges:

> "This process also allows agencies to avoid the normal protections built into the rulemaking process—review by the Office of Management and Budget and the public, and compliance with executive orders—at the critical moment when the agency's new obligation is created."

This is simply not true. Agencies must comply with the law as written by Congress, including the requirements for notice and comment rulemaking provided in the APA (5 U.S.C. § 553). Courts must reverse agency actions that are contrary to law or undertaken without observance of legally required procedures (5 U.S.C. § 706). While agencies can commit to a schedule for performing their mandatory duties, they cannot settle litigation by making commitments concerning the substance of final regulations they will issue. Agencies have inherent authority to reconsider prior regulatory decisions so long as they have a reasoned basis for doing so. *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile In. Co.,* 463 U.S. 29, 56–57 (1983).

Courts do not simply rubber stamp these agreements. A good example is *Conservation Northwest v Harris,* No. 11–35729 (April 25, 2013), where the Ninth Circuit recently rejected a consent decree on the ground that it made a substantive change to the Survey and Management Standard of a the Northwest Forest Plan without going through the proper rulemaking process for making such a change.

IV. CONCLUSION

Congress has included citizen suits in a large number of environmental statutes including the ESA. Experience has shown that such suits are a critical component of the implementation of these laws.[12] These suits hold agencies accountable to the

---

[10] See FWS Listing Workplan to implement the settlements in CBD v FWS and WildEarth Guardians v FWS http://www.fws.gov/endangered/improving_esa/listing_workplan.html.

[11] Barry J. Brosi and Eric G.N. Biber, "Citizen Involvement in the U.S. Endangered Species Act," Vol. 337 **Science** (August 17, 2012).

[12] Robert L. Glicksman, "The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties," 10 Widener L. Rev. 353 (2004).

rule of law and to the will of congress. There is no merit to the charge that such suits are collusive. There are many safeguards built into the judicial process including the requirement that plaintiffs prove standing to even bring the case, the requirement that courts must approve settlements after taking public comments into account, and the requirements of the APA regarding rulemaking procedures such as notice and comment and reasoned explanations for changes in policy.

The success of the ESA depends on many things starting with adequate funding. As many commentators have noted, Congress needs to provide greater incentives to encourage habitat conservation. The agencies responsible for administering the Act, FWS and NOAA, have created a number of opportunities for tribes, states, local authorities and private parties to participate in the process. These include safe harbor agreements, no surprises guarantees, candidate conservation agreements, recovery credits and tax deductions, and conservation banking opportunities.[13] Those who genuinely want to engage in conservation can find many ways of doing so. There may well be disagreements over what is actually needed for any particular species but decisions must ultimately be based on the best available science.

Thank you. I would be happy to answer any questions.

The CHAIRMAN. Thank you very much for your testimony.

And next I will recognize Mr. Steve Ferrell, who is the wildlife and endangered species policy advisor to the Wyoming Governor, Matt Mead. You are recognized.

STATEMENT OF STEVE FERRELL, WILDLIFE AND ENDANGERED SPECIES POLICY ADVISOR, STATE OF WYOMING, CODY, WYOMING

Mr. FERRELL. Thank you, Mr. Chairman, members of the Committee. Before I start, Governor Mead asked that I share with you his appreciation for the efforts of former Secretary Salazar and Fish and Wildlife Director, Dan Ashe, for their efforts in helping to delist wolves in Wyoming. Now, to my testimony.

States are unquestionably qualified to be partners in implementing the ESA. States have extensive expertise in science-based wildlife management principles and the application of public policy. Further, States are significantly affected by the ESA, including their ability to maintain their economies and the natural resources. To highlight our expertise, I will describe two success stories in Wyoming.

First, wolves. By the end of this year, the wolf population in Wyoming will have exceeded all recovery goals for 12 consecutive years. By anyone's standards, that should be a success story. Yet today, Wyoming remains involved in litigation contesting the delisting of wolves. Since delisting in Wyoming 9 months ago, 3 separate lawsuits have been filed from a total of 14 organizations. Litigation has been a constant occurrence regarding wolves since their first delisting in 2008.

To achieve our most recent delisting, Wyoming revised its regulatory framework. Among other features, our plan commits to enhanced population goals, facilitates natural dispersal, improves certainty in protecting wolves, and commits to genetic connectivity. The latter feature is unique to Wyoming's plan. It includes extensive genetic monitoring and commits to further plan revisions if State management is not achieving its goal.

Next, the Sage Grouse Task Force. Wyoming is a leader in sage grouse conservation. Since 2008, our core area strategy established

[13] See FWS Endangered Species Program http://www.fws.gov/endangered/.

by three executive orders has twice been endorsed by the Service as a sound framework to avoid listing sage grouse. The task force is the product of a meeting co-chaired by Governor Mead and Secretary Salazar in 2011. It is comprised of Governors' representatives of the 11 sage grouse States and the executives of 4 Federal agencies. The task force is charged with developing a near-term management plan with a primary focus on policy.

The task force represents a new model that is heralded by many as a unique approach to the conservation of a candidate species. The combined effort of the 11 States and 4 Federal agencies is impressive. When leveraged back at home with the contributions of industries, NGO's, and land owners, the combined effort is staggering. Time will tell whether it will be successful.

For State and private contributors, success will be measured by the attainment of its goal: a not-warranted finding for sage grouse in 2015. States and industries need certainty that this model has a chance to succeed to invest so heavily in it. If this effort fails to achieve its goal, and sage grouse are listed in spite of the conservation taking place, I wonder if this model will be attempted again.

In my written testimony I offer ideas on how Federal statutes and policies could be changed to improve the implementation of the ESA. I want to touch briefly on two.

One of the most urgent needs is to make the ESA decisions less susceptible to litigation. Changes to the ESA and the Equal Access to Justice Act that reduce the financial incentive to litigate would make the ESA implementation more efficient and transparent. In Wyoming, reduced incentives to litigate would have improved the effectiveness of implementing the ESA for wolves, grizzly bears, and others. Despite these amazing success stories, litigation continues with no finality. These subjects are repeatedly litigated and filed simultaneously in multiple jurisdictions, making them costly to defend. Legislation that requires wealthy litigants to pay their own way would help limit litigation to cases involving species in jeopardy, and not ones where litigants merely disagree with the delisting decision.

Last, climate change. Climate change is increasingly cited as a factor to list species using models to predict the effect of climate change on a species status. It is reasonable to expect that the accuracy of these models diminish the further into the future that they are applied. There are examples where species are proposed for listing, only because of predictions made by climate change models. In these examples, the species is currently robust in number and distribution, and no other threats affect their status. This begs the question of how far into the future predictive models should be applied beyond the listing decision, and how much consideration should be given to current conditions in making those decisions now.

Is it reasonable to remove a species from State trust status 10, 50, or even 100 years prior to its showing the predicted effect of climate change? Federal policy needs to define foreseeable future and develop criteria to consider the uncertainty of climate change models. Thank you, Mr. Chairman.

[The prepared statement of Mr. Ferrell follows:]

Statement of Steve Ferrell, Wildlife and Endangered Species Policy Advisor, State of Wyoming, Cody, Wyoming

Mr. Chairman, Members of the Committee, my name is Steve Ferrell. I am a Policy Advisor to Governor Mead in Wyoming. My primary responsibility is wildlife and endangered species issues. It is an honor to offer you my thoughts on the topic of today's hearing and answer your questions. I intend to focus on state led conservation opportunities relative to the Endangered Species Act (ESA), offer suggestions for improving implementation of the ESA, and report on a promising ongoing effort regarding the topic.

States should be considered full and equal partners in implementing the ESA. Listing decisions under the ESA typically result in transferring the management jurisdiction for a species between state and federal authority. Full state involvement should be expected since the states either were the managers prior to the listing decision or will become the managers after the delisting decision. States are unquestionably qualified to be effective partners in the implementation of the ESA. States have extensive experience and expertise in science based wildlife management principles and the application of public policy in managing wildlife as a public asset. States are significantly affected by the ESA including their ability to develop and maintain their economies and natural resources. States should be afforded every opportunity to provide input to laws, regulations and policies in implementing the ESA.

To highlight this expertise, let me briefly describe two success stories in Wyoming.

Wolves in Wyoming

I am proud to say that wolves in Wyoming have exceeded their recovery goals for 11 consecutive years.

Wolves were likely eradicated from the lower 48 states by 1930. In 1974 gray wolves in the lower 48 states were listed as endangered. For the 50 years preceding 1986 there had been no detection of wolf reproduction in the U.S. portion of the Rocky Mountains. In 1986 a den was discovered near the Canadian border in Glacier National Park. In 1987 the wolf recovery plan for the Northern Rocky Mountain Region established a recovery goal of 300 wolves and 30 breeding pairs to be equally allocated among the states of Wyoming, Idaho and Montana. In 1995 and 1996 a total of 31 wolves were reintroduced to Yellowstone National Park. Three years later Yellowstone supported 112 wolves and 6 packs. In 2001, just 6 years after reintroduction, the wolf population in the Northern Rocky Mountains exceeded recovery goals.

By the end of 2013 the wolf population in Wyoming will have exceeded the numerical, distributional, and temporal recovery goals for 12 consecutive years. By anyone's standards that should be a success story. Yet today Wyoming remains embroiled in litigation contesting the delisting of wolves. Since delisting in Wyoming nine months ago, three separate lawsuits have been filed by a total of 14 organizations. Litigation has been a constant occurrence since the first delisting rule in 2008. At that time the wolf population in the Northern Rockies exceeded the recovery goal for total numbers by more than 5 times and for breeding pairs by more than 3 times. Wolves have been delisted in Wyoming twice since 2008 and both delisting decisions have been challenged in court.

In 2011 Wyoming began the process of revising its statutes, rules and management plan addressing wolves. Among other features our revised regulatory mechanisms commit to enhanced population goals, add protections to facilitate natural dispersal of wolves, delete features from previous regulations to improve certainty in protecting wolves, and commit to successful genetic interchange between wolf populations. The latter feature is unique to Wyoming's plan. It includes extensive genetic monitoring and commits to further plan revisions if state management is a factor in not meeting genetic connectivity goals. Wyoming's plan was twice subjected to peer review with favorable results. Wolves were removed from the protections of the ESA in September 2012.

The Sage-grouse Task Force

Wyoming is a recognized leader in sage-grouse conservation. In 2008 then-Governor Freudenthal issued an executive order establishing the core area strategy for sage-grouse conservation in the state. The U.S. Fish and Wildlife Service (the Service) endorsed the executive order as a sound framework for a policy to conserve sage-grouse populations and achieve the goal to preclude listing sage-grouse. In 2011 Governor Mead issued an updated version of the executive order which has been similarly endorsed by the Service.

In December 2011 Governor Mead and then-Secretary Salazar co-hosted a meeting in Cheyenne among the Governors' representatives of the 11 sage-grouse states

and the executives of four federal agencies (the Service, the Bureau of Land Management, the Forest Service and the Natural Resources Conservation Service) to discuss a coordinated effort that might ensure sage-grouse would not require the protections of the ESA by 2015. The Sage-Grouse Task Force is a product of that meeting. Co-chaired by the Governors of Wyoming and Colorado, and the Director of the Bureau of Land Management (BLM), the Task Force is charged with developing a near-term comprehensive management plan with a primary focus on policy. The Task Force has served as a support group for state planning efforts across the species range to improve regulatory mechanisms. It also serves as a coordination forum for BLM and Forest Service sage-grouse planning efforts, and the remarkable achievements of the Natural Resource Conservation Service's (NRCS) Sage Grouse Initiative. The Task Force has investigated opportunities for improvement in federal fire policy, invasive species policy, and state and privately led conservation efforts. The group is presently developing a list of metrics that best quantify the conservation value of management efforts and a database to document those efforts.

The Task Force represents a new model that is heralded by many as a unique approach to the range-wide conservation of a candidate species. The combined effort of the 11 sage-grouse states and four federal agencies with jurisdiction for sage-grouse is impressive. When these efforts are leveraged back at home with the contributions of industries, NGOs, and landowners the combined effort is staggering.

Time will tell if the efforts will be successful. For state and private contributors, success will be measured by the attainment of the goal—a "not warranted" finding for sage-grouse in 2015. States and industry need certainty that this model has a chance at succeeding to invest so heavily in it. If this effort fails to achieve its goal and sage-grouse are listed in spite of the range-wide conservation taking place, I wonder if this model will be attempted again. The amount of time and resources invested by Wyoming and other states on species conservation is tremendous, but our incentive to do so is harmed by the uncertainty created by an outdated ESA, and repeated litigation that places arbitrary deadlines on listing decisions. One thing is certain, the federal government absolutely needs the states' active involvement in species conservation, but we are travelling a path that will eventually back states into a corner, and leave the federal government to fend for itself for a program that is already overwhelming.

Improving implementation of the ESA through Legislation.

The states recognize that comprehensive reform of the ESA is not a likely outcome in the near future. However, that does not mean that implementation of the ESA cannot be improved in ways that benefit species and people. Some updates to the ESA itself, agency practices, and other related laws ought to be addressed.

One of the most urgent needs is to make ESA-related decisions less susceptible to litigation. Changes to the ESA and the Equal Access to Justice Act would cause significant improvement in ESA implementation. For example, litigation appears to be a business model for some organizations today. Changing these laws to reduce the financial incentive to litigate would make the implementation of the ESA more efficient, and more transparent. States and other interested stakeholders need and deserve a seat at the table when it comes to ESA management. Litigation moves these decisions out of the public realm, and into the very private confines of a courtroom.

In Wyoming, reduced incentives to litigate would have addressed the ineffectiveness of implementing the ESA for wolves, grizzly bears, and others. Despite the amazing recovery success story for these animals, litigation continues and allows no finality in managing these species. These subjects are repeatedly litigated and filed simultaneously in multiple jurisdictions making them very costly to defend.

The most active litigants (states and non-government organizations) have the resources to litigate without the financial incentives caused by awarding attorney fees to the prevailing party. Legislation that requires wealthy litigants to pay their own way would help limit the onslaught of litigation to only the most substantive and deserving cases where real harm to species is shown, not ones where the litigants merely disagree with the decisions of the Service.

Another example for improving ESA implementation would be requiring ESA litigation to be filed initially in the federal court of appeals in the circuit that is home to the Service's Regional Office that has primacy for the species in question. This would speed up litigation by removing the federal district courts from the process, reduce "forum shopping" by plaintiffs, and allow the decision to be made in the home circuit.

Increased scrutiny of the process and outcomes of litigation and the suggested changes to these laws would have a positive effect on the implementation of the ESA.

Opportunities for Policy Revisions.

There are several policy revisions that could improve the implementation of the ESA. Some of these may benefit from changes in the statute. Some may require new statutory authority to enable new policies or make them more defensible in litigation. Most would not require changes in statutes.

Recovery goals. Federal policy should require the identification of recovery goals in final rulemaking. The recovery criteria should include a clear description of the required population size, population trend, or other relevant criteria describing recovery. States should play an active role in developing the recovery goals.

Delegation of authority. Federal policy should enhance the delegation of authority for the management of listed species to willing state partners. There are several examples where states have voluntarily accepted this role. Shared authority could also be enhanced through formal agreements, which spell out a larger role for states in coordinating ESA implementation.

Peer Reviews. The ESA requires that the Service base decisions on the best science. Yet wildlife is regarded by the states as a public trust asset. Accordingly, states manage species under their jurisdiction with broad public participation, considering socio-economic objectives as well as the scientific principles of wildlife management. As such, wildlife management under state jurisdiction includes science and public policy. The Service has as a matter of policy made extensive use of scientific peer reviews in developing management plans. The agency's response to these reviews can create unrealistic consequences. The states should be equal partners in designing peer reviews, selecting reviewers, choosing the scope of the review, and formulating a response. Reviews should be broadened to include public policy issues as well as scientific merit. This would result in management decisions that balance public policy needs with species recovery needs.

Define Significant Portion of the Range (SPR). It is important to recognize that regulatory mechanisms are the product of states and counties and may vary across jurisdictional boundaries. Favorable listing decisions, experimental, nonessential population designations and 4d rules have provided significant incentives for a regulatory jurisdiction to implement conservation measures.

A common argument in ESA litigation is that the inadequacy of existing regulatory mechanisms requires a listing or relisting. Some court cases have held that differing degrees of protection cannot be based on jurisdictional boundaries. In response to these cases, in 2011 the Service withdrew its existing policy interpreting the term "significant portion of the range" and published a new draft policy. The new draft eliminates several important incentives for the conservation of listed species. Listing decisions must be determined based on the collective effect of regulatory mechanisms across a species' range. This diminishes the certainty for reward if a regulatory authority invests in conservation.

The draft SPR policy requires a species to be listed as endangered range-wide if conditions warrant endangered status in a significant portion of the range. This is true even if evidence simultaneously supports a determination that the species is **only threatened** throughout its entire range. Consequently, the draft prevents the use of conservation tools commonly used to recover threatened species such as experimental nonessential (10j) designations and special (4d) rules which cannot be applied to the recovery of endangered species.

The final policy interpreting SPR needs to preserve the rewards that states and counties currently realize for investing in conservation. Further, the final policy should not assign endangered status to portions of the range where the population is threatened so that conservation tools that are only available for managing threatened populations are not lost. If these provisions are not restored the conservation of imperiled species may be diminished.

Climate Change and Foreseeable Future. Climate change is increasingly cited as a factor in deciding to list species under the ESA. Status reviews use models to predict the effect of climate change on a species' status. It is reasonable to expect that the accuracy of these models diminish the farther into the future that they are applied. There are examples where species are proposed for listing only because of long-term predictions made by climate change models. In these examples the species is currently considered robust in number and distribution and there are no other current threats that affect the species' status well into the future. Listing these species takes them from state trust status and places them in federal jurisdiction. This begs the questions of how far into the future predictive models should be applied beyond the listing decision, and how much consideration should be given to current conditions in making those decisions now? Is it reasonable to remove a species from state trust status 5, 10, 50 or 100 years prior to their status showing the predicted effect of climate change? Federal policy needs to define "foreseeable future" and de-

velop criteria that consider the uncertainty of climate change models at various times into the future.

Thank you for the opportunity to share my thoughts on this important subject.

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

And for purposes of more of an introduction, I recognize the gentleman from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. I would like to be able to introduce a friend of mine, Tom Jankovsky, a commissioner out of Garfield County in Colorado, for being here today to be able to testify. We could have, I guess, gotten a carpool and come back. We were together just a few days ago.

I appreciate him traveling from Colorado to be able to provide a local perspective on the work being done to locally conserve and protect endangered species, and that unique perspective out of Garfield County.

Tom, thank you for being here in regards to dealing with the sage grouse issues which are impacting the greater West.

Thank you, Mr. Chairman, I yield back.

The CHAIRMAN. Mr. Jankovsky, you are recognized for 5 minutes.

STATEMENT OF TOM JANKOVSKY, COMMISSIONER, GARFIELD COUNTY, GLENWOOD SPRINGS, COLORADO

Mr. JANKOVSKY. Thank you, Mr. Chairman and honorable members of the Committee. I am from Garfield County, Colorado. And also with me today is Dr. Rob Ramey, President of Wildlife Science International, and a member of the Garfield County Sage Grouse Team. I am here to discuss why local plans are more effective for endangered species conservation, through our county's experience, with the potential listing of the Greater Sage Grouse and the litigious nature of the ESA.

Garfield County worked with the BLM on the Northwest Colorado Sage Grouse EIS as a cooperating agency, and is one of nine Colorado counties that have sage grouse habitat managed by five local plans. In these cooperating agency meetings, we realize local plans are not being considered. Because we have a local plan, we engage the BLM in the coordination process. Congress set forth the coordination process through FLPMA, whereby the Secretary shall "keep apprised of local plans, give consideration to those plans, meaningfully involve local governments, resolve inconsistencies, and make Federal plans consistent with local plans."

Our first two coordination meetings covered the significant differences between our local plan and the policies being directed through the BLM national technical team report. Our primary concern is that the policies the BLM is attempting to put into place do not fit our unique topography, and will fail, and will harm our local economy. The studies for the NTT report were primarily from Central Wyoming, with miles of rolling sage brush, while our topography and vegetation is quite unique, characterized by high plateaus with sage brush at the ridge tops, steep drops to drainages in valley floors, with a patchwork of sage brush, conifer, aspen, and pinyon juniper forests.

The map used in the EIS covers 220,000 acres of private and Federal lands in our county. We questioned this map, and were told the mapping was not the responsibility of the BLM, but was provided by Colorado Parks and Wildlife, and that our plan was not acceptable, because it was voluntary, with no regulatory assurance. We met with CPW, who stated the map was prepared at the 50,000-foot view. And that was concerning, since this map is the foundation for the policies being developed in the EIS. We then hired Dr. Ramey and mapping experts to evaluate the basis of the science used in the NTT report, and for the creation of the CPW habitat map. We found the map was not reproducible. Lost my place, here.

The net result reduced the suitable habitat from 220,000 acres to 28,000 acres. With the refined mapping and the best-available science, we adopted the Garfield County Greater Sage Grouse Conservation Plan that provides private and public land owners with policies that are fit to the county's unique landscape. The plan retains regulatory assurance by mandating our policies on Federal land. It places the county at the center of decision making through coordination. This allows all the different Federal, State, and local interests to come together through one comprehensive plan, in the spirit of cooperation, thereby avoiding legal conflict.

In our third coordination meeting with the BLM, U.S. Fish and Wildlife Service, and CPW, we presented our plan to discuss and resolve inconsistencies with the NTT report. Last, we met with CPW to validate our habitat mapping, which revealed a high correlation of accuracy. The intent is to work with CPW to amend this CPW map that will ultimately be used in the final BLM EIS.

I would like to take this opportunity to request assistance from this Committee. First, the Service has withheld valuable data that supports a warranted listing. We only wish to verify their data, as required under the Information Quality Act. We would appreciate this Committee's interceding on our behalf to obtain this data.

Second, we would request that the BLM abide by FLPMA, their own statutes and regulations, to resolve policy conflicts at the local level. Then, not only would litigation be avoided, but solutions would be put in place that truly benefit the sage grouse.

Thank you for your time and assistance in this matter, and I would be happy to answer any questions. Thank you.

[The prepared statement of Mr. Jankovsky follows:]

Statement of Tom Jankovsky, Commissioner, Garfield County, Colorado

Thank you Mr. Chairman and members of the committee.

My name is Tom Jankovsky, County Commissioner from Garfield County, Colorado. Also with me today is Dr. Rob Ramey, President of Wildlife Science International and a member of the Garfield County Greater Sage Grouse team.

I am here to discuss why local plans are more effective for endangered species conservation through our County's experience with the potential listing of the Greater Sage Grouse and its habitat.

Garfield County worked with the BLM on the NW Colorado Greater Sage Grouse Environmental Impact Statement (EIS) as a cooperating agency as one of nine counties that have Sage Grouse habitat managed by five local plans.

In these cooperating agency meetings we realized local plans were not being considered. Because we have a local plan, we engaged the BLM in the Coordination process. Congress set forth the coordination process through the Federal Land Policy Management Act (FLPMA) whereby the Secretary of the Interior shall: keep apprised of local plans; give consideration to those plans; meaningfully involve local

governments; resolve inconsistencies; and, make Federal plans consistent with local plans.

Our first two Coordination meetings covered the Coordination process and significant differences between our local plan and the policies being directed through the BLM's National Technical Team (NTT) Report. Our primary concern is that the policies the BLM is attempting to put in place do not fit our unique topography and will fail, destroy our local economy and create the need for litigation.

The studies for the NTT Report were primarily from central Wyoming with miles of rolling sage brush while our topography and vegetation is quite unique characterized by high plateaus with sage brush at the ridge tops, steep drops to drainages and valley floors, with a patchwork of sage brush, conifer, aspen and pinion-juniper forests. *(See Attachment 1: Topography Differences)* As a result, conservation measures must adapt to the unique habitat through our local plan.

The map used in the EIS covers 220,000 acres of private and federal lands in our county. We questioned this map and were told that the mapping was not the responsibility of the BLM, but was provided by Colorado Parks & Wildlife (CPW) and that our plan was not acceptable because it was voluntary with no regulatory assurance.

We met with CPW who stated the map was prepared at a 50,000 ft. view. That was concerning since the map is the foundation for the policies being developed in the EIS.

We then hired Dr. Ramey and mapping experts to evaluate the basis of the science used in the NTT Report and for the creation of the CPW habitat map. We found the map was based on very coarse vegetation data, a subjective occupied range map, and a four-mile lek buffer that assumes large expanses of intact habitat.

Ultimately, this map was not reproducible. So we prepared our own map based on CPW criteria and highly accurate vegetation data. The net result reduced suitable habitat from 220,000 acres to 28,000 acres. *(See Attachment 2: Suitable Habitat Mapping Differences)*

With the refined mapping and best available science, we adopted the Garfield County GSG Conservation Plan that provides private and public land owners with land management principles, policies and BMPs that are tailor-fit to the County's unique landscape and habitat characteristics.

This plan retains regulatory assurance by mandating our policies on federal land. It is designed with an adaptive management approach and places the County at the center of decision making through Coordination. (*See Attachment 3: Coordination Diagram*) This allows all of the different federal, state and local interests to come together through one comprehensive plan in the spirit of cooperation thereby avoiding legal conflict. It is critical that agency plans be consistent with local plans.

In our third Coordination meeting with the BLM, U.S. Fish & Wildlife Service (the Service), and CPW, we presented our plan to specifically discuss and resolve inconsistencies with the NTT Report. Lastly, we met with CPW to validate our habitat mapping which revealed a high correlation of accuracy. The intent is to work with CPW to amend the CPW map that will ultimately be used in the final BLM EIS.

Garfield County supports the Secretary's specific direction to the BLM that requires them to address "local ecological site variability" for regional/sub-regional plans. *(See Attachment 4: Instructional memorandum 2012–044)* Additionally, FLPMA requires the BLM to coordinate their efforts with local plans.

I would like to take this opportunity to request assistance from this Committee. First, the Service has withheld valuable data that supports a warranted listing. We only wish to verify their data as required under the Information Quality Act. We would appreciate this Committee's interceding on our behalf to obtain this data as soon as possible.

Second, we ask that you direct the Secretary of Interior to coordinate fully with local governments to ensure consistency between local and federal plans, more specifically local sage-grouse plans. Finally, we simply request the BLM abide by FLPMA and their own statutes and regulations to resolve policy conflicts at the local level. Then, not only would litigation be avoided, but solutions would be put in place that truly benefit the sage-grouse.

Thank you for your time and assistance in this matter. We appreciate this opportunity and would be more than happy to answer any questions this Committee may have.

Attachment 1: Topography Differences

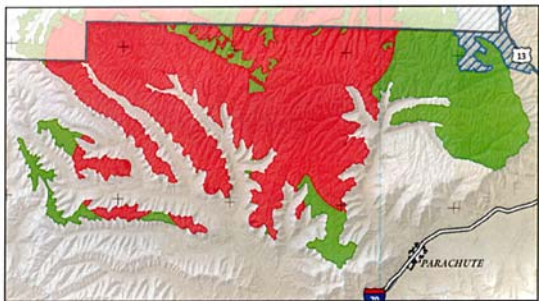
Pinedale, Wyoming Region & primary basis for science in NTT Report →

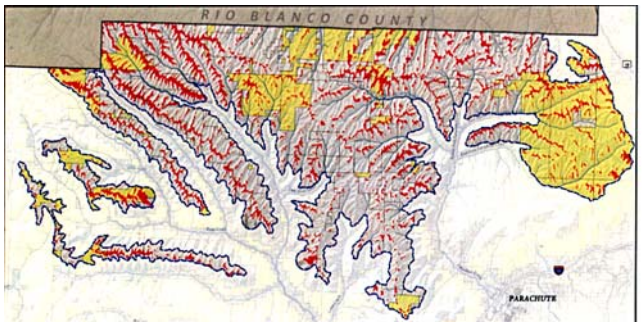
Typical topography and vegetation in Garfield County, CO in the Plan Area of the Greater Sage-Grouse Conservation Plan

←

Attachment 2: Suitable Habitat Mapping Differences

Colorado Parks & Wildlife Map: 220,000 acres of Greater Sage-Grouse Habitat (PPH & PGH) →

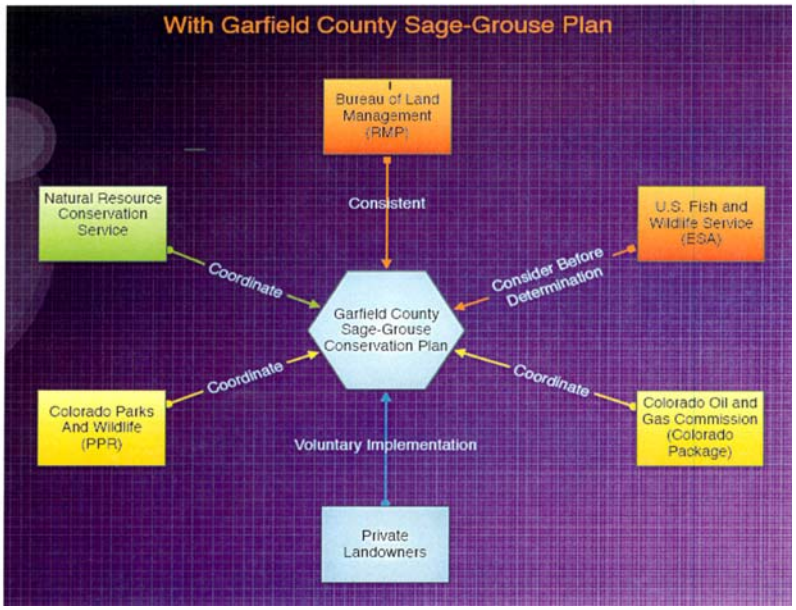




Garfield County Map: 28,000 acres of Greater Sage-Grouse Suitable Habitat

←

Attachment 3: Coordination Diagram



Attachment 4: BLM Instructional Memorandum 2012–044

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
http://www.blm.gov/
December 27, 2011

In Reply Refer To:
1110 (230/300) P
EMS TRANSMISSION 12/27/2011
Instruction Memorandum No. 2012–044 Expires: 09/30/2013

To: All Field Officials
From: Director
Subject: BLM National Greater Sage-Grouse Land Use Planning Strategy
Program Areas: All Programs.

Purpose: This Instruction Memorandum (IM) provides direction to the Bureau of Land Management (BLM) for considering Greater Sage-Grouse conservation measures identified in the Sage-Grouse National Technical Team's—*A Report on National Greater Sage-Grouse Conservation Measures* (Attachment 1) during the land use planning process that is now underway in accordance with the 2011 *National Greater Sage-Grouse Planning Strategy* (Attachment 2).

This IM supplements direction for Greater Sage-Grouse contained in WO IM No. 2010–071 (*Gunnison and Greater Sage-Grouse Management Guidelines for Energy Development*), the BLM's 2004 *National Sage-Grouse Habitat Conservation Strategy* and is a component of the 2011 *National Greater Sage-Grouse Planning Strategy* (Attachment 2). It is also consistent with WO IM No. 2011–138 (*Sage-Grouse Conservation Related to Wildland Fire and Fuels Management*).

In March 2010, the U.S. Fish and Wildlife Service (FWS) published its decision on the petition to list the Greater Sage-Grouse as "Warranted but Precluded." 75 Fed. Reg. 13910 (March 23, 2010). Over 50 percent of the Greater Sage-Grouse habitat is located on BLM-managed lands. In its "warranted but precluded" listing decision, FWS concluded that existing regulatory mechanisms, defined as 'specific direction regarding sage-grouse habitat, conservation, or management' in the BLM's

Land Use Plans (LUPs), were inadequate to protect the species. The FWS is scheduled to make a new listing decision in Fiscal Year (FY) 2015.

The BLM has 68 land use planning units which contain Greater Sage-Grouse habitat. Based on the identified threats to the Greater Sage-Grouse and the FWS timeline for making a listing decision on this species, the BLM needs to incorporate explicit objectives and desired habitat conditions, management actions, and area-wide use restrictions into LUPs by the end of FY 2014. The BLM's objective is to conserve sage-grouse and its habitat and potentially avoid an ESA listing.

In August 2011, the BLM convened the Sage-Grouse National Technical Team (NTT), which brought together resource specialists and scientists from the BLM, State Fish and Wildlife Agencies, the FWS, the Natural Resources Conservation Service (NRCS), and the U.S. Geological Survey (USGS). The NTT met in Denver, Colorado in August and September 2011, and in Phoenix, Arizona in December 2011, and developed a series of science-based conservation measures to be considered and analyzed through the land use planning process. This IM provides direction to the BLM on how to consider these conservation measures in the land use planning process.

In order to be effective in our ability to conserve Greater Sage-Grouse and their habitat, the BLM will continue to work with its partners including: the Western Association of Fish and Wildlife Agencies (WAFWA), FWS, USGS, NRCS, U.S. Forest Service (USFS), and Farm Services Agency (FSA) within the framework of the Sagebrush Memorandum of Understanding (2008) and the *Greater Sage-Grouse Comprehensive Conservation Strategy* (2006).

Policy/Action: The BLM must consider all applicable conservation measures when revising or amending its RMPs in Greater Sage Grouse habitat. The conservation measures developed by the NTT and contained in Attachment 1 must be considered and analyzed, as appropriate, through the land use planning process by all BLM State and Field Offices that contain occupied Greater Sage-Grouse habitat. While these conservation measures are range-wide in scale, it is expected that at the regional and sub-regional planning scales there may be some adjustments of these conservation measures in order to address local ecological site variability. Regardless, these conservation measures must be subjected to a hard look analysis as part of the planning and NEPA processes.

This means that a reasonable range of conservation measures must be considered in the land use planning alternatives. As appropriate, the conservation measures must be considered and incorporated into at least one alternative in the land use planning process. Records of Decision (ROD) are expected to be completed for all such plans by the end of FY 2014. This is necessary to ensure the BLM has adequate regulatory mechanisms in its land use plans for consideration by FWS as part of its anticipated 2015 listing decision.

When considering the conservation measures in Attachment 1 through the land use planning process, BLM offices should ensure that implementation of any of the measures is consistent with applicable statute and regulation. Where inconsistencies arise, BLM offices should consider the conservation measure(s) to the fullest extent consistent with such statute and regulation.

The NTT-developed conservation measures were derived from goals and objectives developed by the NTT and included in Attachment 1. These goals and objectives are a guiding philosophy that should inform the goals and objectives developed for individual land use plans. However, it is anticipated that individual plans may develop goals and objectives that differ and are specific to individual planning areas.

Through the land use planning process, the BLM will refine Preliminary Priority Habitat and Preliminary General Habitat data (defined below) to: (1) identify Priority Habitat and analyze actions within Priority Habitat Areas to conserve Greater Sage-Grouse habitat functionality, or where possible, improve habitat functionality, and (2) identify General Habitat Areas and analyze actions within General Habitat Areas that provide for major life history function (e.g., breeding, migration, or winter survival) in order to maintain genetic diversity needed for sustainable Greater Sage-Grouse populations. Any adjustments to the NTT recommended conservation measures at the local level are still expected to meet the criteria for Priority and General Habitat Areas.

Preliminary Priority Habitat (PPH): Areas that have been identified as having the highest conservation value to maintaining sustainable Greater Sage-Grouse populations. These areas would include breeding, late brood-rearing, and winter concentration areas. These areas have been/are being identified by the BLM in coordination with respective state wildlife agencies.

Preliminary General Habitat (PGH): Areas of occupied seasonal or year-round habitat outside of priority habitat. These areas have been/are being identified by the BLM in coordination with respective state wildlife agencies.

PPH and PGH data and maps have been/are being developed by the BLM through a collaborative effort between the BLM and the respective state wildlife agency, and are stored at the National Operations Center (NOC). These science-based maps were developed using the best available data and may change as new information becomes available. Such changes would be science-based and coordinated with the state wildlife agencies so that the resulting delimitation of PPH and PGH provides for sustainable populations. In those instances where the BLM State Offices have not completed this delineation, the Breeding Bird Density maps developed by Doherty 2010[1] As LUPs are amended or revised, the BLM State Offices will be responsible for coordinating with the NOC to use the newest delineation of PPH and PGH. To access the PPH and PGH data, please use the following link: //blm/dfs/loc/EGIS/OC/Wildlife/Transfers/GREATER_SAGE_GROUSE_GIS_DATA. will be used. The NOC will establish the process for updating files to include the latest PPH and PGH delineations for each state. This information will assist in applying the conservation measures identified in Attachment 1 below.

Timeframe: This IM is effective immediately and will remain in effect until LUPs are revised or amended by the end of FY 2014.

Budget Impact: This IM will result in additional costs for coordination, NEPA review, planning, implementation, and monitoring.

Background: Following a full status review in 2005, the FWS determined that the Greater Sage Grouse was "not warranted" for protection. Decision documents in support of that determination noted the need to continue and/or expand all efforts to conserve sage-grouse and their habitats. As a result of litigation challenging the 2005 determination, the FWS revisited the determination and concluded in March 2010 that the listing of the Greater Sage-Grouse is warranted but precluded by higher priority listing actions.

In November 2004, the BLM published the *National Sage-Grouse Habitat Conservation Strategy*. The BLM National Strategy emphasizes partnerships in conserving Greater Sage-Grouse habitat through consultation, cooperation, and communication with WAFWA, FWS, NRCS, USFS, USGS, state fish and wildlife agencies, local sage-grouse working groups, and various other public and private partners. In addition, the *Strategy* set goals and objectives, assembled guidance and resource materials, and provided comprehensive management direction for the BLM's contributions to the ongoing multi-state sage-grouse conservation effort.

In July 2011, the BLM announced its *National Greater Sage-Grouse Planning Strategy* (Attachment 2). The goal of the *Strategy* and this IM is to review existing regulatory mechanisms and to implement new or revised regulatory mechanisms through the land use planning process to conserve and restore the Greater Sage-Grouse and their habitat. The Gunnison Sage-Grouse, bi-state population in California and Nevada and the Washington State distinct population segments of the Greater Sage-Grouse will be addressed through other policies and planning efforts.

Manual/Handbook Sections Affected: None.

Coordination: This IM was coordinated with the office of National Landscape Conservation System and Community Partnership (WO–170), Assistant Director, Renewable Resources and Planning, (WO–200), Minerals and Realty Management (WO–300), Fire and Aviation (WO–400), BLM State Offices, FWS and state fish and wildlife agencies.

Contact: State Directors may direct questions or concerns to Edwin Roberson, Assistant Director, Renewable Resources and Planning (WO–200) at 202–208–4896 or edwin_roberson@blm.gov; and Michael D. Nedd, Assistant Director, Minerals and Realty Management (WO–300) at 202–208–4201 or mike_nedd@blm.gov.

Signed by: Authenticated by:

Mike Pool Ambyr Fowler

Acting, Director Division of IRM Governance, WO–560

Attachment 5: Key differences that make the Garfield County Greater Sage Grouse Plan a more effective conservation tool than those proposed by federal agencies.

High-resolution habitat mapping

The habitat mapping provided by State and Federal agencies in 2012 for Greater Sage-Grouse in the Plan Area was at a landscape level that did not accurately address the unique topography of the Roan Plateau, or provide planning information at resolution accurate enough for County to use in the Plan, and for relevant land-use planning activities potentially occurring within the Plan area, including protection of sage grouse habitat. Because of the significant implications on land use and ongoing land management, the Board of County Commissioners deemed that most accurate delineation of habitat was deemed necessary. This habitat mapping process

followed the latest and most relevant peer-reviewed habitat mapping process available for mapping large and diverse areas, using the highest resolution data available (with a two-meter resolution, as compared to the one kilometer, landscape-level resolution used by the agencies).

The sage-grouse habitat in Garfield County is naturally fragmented, as a result of topography and the patchy nature of sagebrush, non-sagebrush shrubs, meadows, aspen, and conifers in the Plan area. Expanses of contiguous sagebrush, necessary to support a large stable population (as described by the Fish and Wildlife Service in their 2010 candidate determination notice), do not exist in Garfield County. Additionally, the sage-grouse population inhabiting Garfield County is a peripheral population located on the far southeastern edge of the species range. As a result, the stewardship of the population requires detailed knowledge of local conditions, including accurate mapping of its habitat.

Conservation measures are tailored to local circumstances

Rather than rely on one-size-fits-all regulatory prescriptions, such as four mile buffers and three percent anthropogenic disturbance thresholds proposed by the BLM's National Technical Team (NTT), the County has taken a more effective approach: tailoring conservation measures to address specific threats to sage grouse and local circumstances that are unique to Garfield County (i.e. predation and a naturally fragmented habitat). The significance of this strategy to sage grouse conservation is that it allows for a more efficient allocation of conservation effort by focusing on threats that matter most in *this* sage grouse population.

Voluntary conservation efforts on private land

In contrast to the NTT report, where the proposed conservation measures assume that private land management is inferior to federal land management, and requires a regulatory "command and control" approach, the Garfield County Plan recognizes and builds upon the importance of voluntary conservation by private landowners. The importance of voluntary conservation on private land is recognized by many scholars of the Endangered Species Act, including the current Deputy Assistant Secretary of Fish and Wildlife and Parks, Michael Bean, who has authored multiple papers on the subject.

Annual Review and adaptive management

Recognizing that local governments can be more nimble than federal agencies, the Garfield County Plan includes a required annual coordination review with the federal and state agencies that have habitat or species responsibilities within the Plan Area. (A review may also be initiated based on important new information.) This review process will evaluate the availability and condition of habitats, direct and indirect impacts, conservation measures, policies and best management practices being implemented by each agency for their effectiveness and applicability to the Plan Area. Also incorporated in this coordination review is any new scientific information and, if warranted, modifications to the best management practices, policies, and conservation incentives within the Plan. The County will also initiate meetings with private property owners in the Plan Area for the purpose of analyzing their conservation efforts and effectiveness, as well as any new scientific data. The annual coordination review will ensure that Plan updates are timely, adaptive, and based on the best available scientific and commercial data.

Consistency with the Information Quality Act

The Garfield County Plan ensures that sage-grouse habitat management decisions shall be made based on the best available scientific information that is applicable to sage-grouse habitat in Garfield County. The scientific information used will be consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity), as determined by the County. In contrast to the interpretation of the Act by some federal agencies, this means that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the County.

The Garfield County Plan acknowledges that many of the purported "universal" negative impacts of fluid mineral development, an important economic activity on the Roan Plateau and Piceance Basin, are based upon outdated information and/or overstated. In fact, none of the studies cited in the NTT report can definitively point to an actual population decline rather than temporary displacement of sage grouse from areas immediately affected by current fluid mineral development. Instead, the extraction of fluid minerals in Garfield County (and increasingly elsewhere) is accomplished using increasingly advanced technologies, more efficient operations, avoidance of important habitat, more effective mitigation measures, and interim habitat restoration, than in the past. As a result, surface disturbances that poten-

tially affect sage grouse tend to be minimal and temporary in nature. The fast pace of these technological developments and more efficient operations has meant that the primary literature on the impacts of fluid mineral extraction on sage grouse in Wyoming is inconsistent with current practices used in Garfield County. It is anticipated that the more advanced technologies under development will continue to allow the efficient extraction of resources while further avoiding or minimizing impacts to sage grouse and other species.

A balance of harms approach ensures responsible stewardship of natural and human resources in Garfield County

In contrast to the approach proposed in the NTT report, that focuses solely on the welfare of sage grouse, the Garfield County Plan requires that the balance of impacts to other species and to human welfare must be weighed prior to approval and implementation.

The CHAIRMAN. Thank you very much, Commissioner Jankovsky, for your testimony. And I just want to note for the record that—and I want to thank all of you for your testimony. But, for the record, I did not hear anybody testify that they wanted to see a species go extinct. I think that ought to be well said. I think the issue that we are looking at is how best to preserve species.

I will recognize myself for 5 minutes.

And, Chairman Brigham, thank you very much for your testimony, and for that impressive showing of how hatchery fish work. However, in your testimony you point out that in Section 3 of the ESA, ESA specifically authorizes propagation as a means to conserve species. That is specifically in the Act. Yet there are some Federal bureaucrats and litigious groups that oppose any use of hatcheries. And you reference that in your testimony—and thank you for that.

But what I want you to do specifically is to respond to the claim that I have heard, and I know you have heard, that hatchery fish are inferior, specifically in the Columbia and Snake River Basins. Could you respond to that?

Ms. BRIGHAM. Well, thank you, Mr. Chairman. I think, you know, hatcheries are supposed to be there to mitigate for lost fish. And when we have raised the hatcheries in a way to put the fish back, they are not inferior. They are rebuilding the natural spawning stocks. And I will give you one example.

In the late eighties or nineties we were putting fish back into the Umatilla River. And at that point in time we were doing a number of things at the same time. We were putting fish back into the Umatilla River, but we didn't have enough water to attract the stocks back into the Umatilla River. And so, these stocks went all the way up to the Snake River. And it was always amazing to me that NOAA said—and Washington, basically, said—that these fish were inferior. And if these fish were inferior, I wondered why they traveled 200 miles further than they needed to go? So——

The CHAIRMAN. Thank you. You know, I am very much aware of when the Umatilla River was way down, and the difference of going up the Umatilla River and the Snake River is—it is eons difference. I agree with that.

Because of my time, Mr. Powell, I want to ask you a question. In the appendix of your testimony, you say that there were more than three dozen species that were part of this large settlement. Did Interior consult with your State before agreeing to this settlement with these groups?

Mr. POWELL. The Department of the Interior failed to go through and consult with neither our office, the State, nor our Department of Wildlife Conservation.

The CHAIRMAN. Because of that, how will this affect some of your other programs that you have in place, as far as this is concerned?

Mr. POWELL. Thank you, Mr. Chairman. Because of the timeframes that are set out as part of the master settlement, there is no giving resources. So we will have multiple instances of species coming up at the same time, and other times we will have lulls. So it is hard for us to allocate resources, both from a biological standpoint and from a policy standpoint, to go be able to deal with these individual situations.

The CHAIRMAN. Good. Dr. Noss and Mr. Parenteau, I know that conservation biologists—and both of you identified yourselves as that—tend to oppose hatcheries to conserve species. Do you support any hatchery programs at all, Dr. Noss?

Dr. NOSS. In my case, I do, actually. I think conservation is so complex that we need all the tools in the toolbox. And in certain cases, hatcheries can be important in helping to restock depleted fisheries.

Now, the important thing to recognize—and it is—the paper that Ms. Brigham brought up, I would like to call your attention to this—the important thing to recognize is that most studies of hatchery fish have found them inferior in their productivity in the wild.

The CHAIRMAN. Well, but Dr. Noss, I am asking if you support hatchery fish. Now, I know that there is—there may be a disagreement on that, but I think Ms. Brigham pointed out very well in this instance that is contrary.

Mr. Parenteau, I want you to respond to that.

Mr. PARENTEAU. I think captive breeding is a key tool, and I——

The CHAIRMAN. Is a key tool?

Mr. PARENTEAU. Key tool. And it was very instrumental in bringing back the condor, the whooping crane, the black-footed ferret. It absolutely has a place to play in the arsenal of tools that we have. But Dr. Noss, being the scientist, would also be quick to point out it is all about the details: which species, under what circumstances, what is the risk of capture and propagation in one case, what is the risk of hatchery out-competing wild fish in another case. Each site-specific analysis, based on sound science, but it is definitely a tool that needs to be looked at.

The CHAIRMAN. Well, let me just make this observation. The first hatcheries on the Columbia and Snake River systems go way back to the early 1900s. There were no records kept. And so, we don't know—if the life cycle of a salmon is roughly 5 years, which would be, then, well over 20 generations, we have no idea if hatchery fish and wild fish went together. We just have no records of that at all.

And then a final point I would make is prior to the Endangered Species Act being implemented, now 40 years ago, the buffalo was going extinct. The buffalo is not extinct. I would just suggest to you that the buffalo is a hatchery product. That is why we have so many buffalo.

With that, I will recognize Ms. Bordallo.

Ms. BORDALLO. Thank you, Mr. Chairman. Mr. Parenteau, in your testimony you pointed out flaws in a recent U.S. Chamber of Commerce report on so-called sue-and-settle tactics. Can you discuss briefly how the claims of government agencies giving up their authority in settlements creating new obligations outside the law are inaccurate?

Mr. PARENTEAU. The only way that these cases are settled is by means of a consent decree. Consent decrees have to be approved by—judges will not approve a consent decree unless it is in the public interest and fully compliant with all of the rules and all laws, including the requirement that agencies go through rulemaking with public notice and comment and full transparency.

The allegation that these are secret deals that bind the agency and substantive decisions is factually and legally wrong. Absolutely, uncategorically wrong. That does not happen in the American judicial system. I have been involved in negotiating these agreements, I have been involved in watching courts review these agreements.

There was a recent ninth circuit decision in a case in which the ninth circuit threw out the consent decree because it didn't ensure that all of the proper rulemaking procedures would be followed, that the public would be given an opportunity to comment on this. The suggestion that our courts are there to rubber-stamp collusive agreements is insulting to our judiciary. They do not do that, Madam.

Ms. BORDALLO. Thank you. Thank you, Doctor. Another question for you. The Majority argues that litigation that seeks compliance with the Endangered Species Act impedes recovery. Now, can you explain how litigation can ultimately lead to collaborative species recovery?

Mr. PARENTEAU. Unless the species is listed, there is no recovery. So the first step in the process is if the date by which listing is to have occurred has passed—and in some cases it has passed by years, not just months, but many, many years have passed beyond which decisions about listing should have been made—this mega-listing case that people are talking about, this CBD case and the other WildEarth Guardians case, those are schedules. They make no substantive decisions whatsoever. Those are timetables to make decisions. Unless those decisions are made, the recovery process cannot even begin.

Understand something, the Endangered Species Act itself does not mandate recovery. That is a fundamental flaw in the statute. There is no mandate for recovery in the statute. There is no timetable for recovery in the statute. There is no dedicated fund for recovery in the statute. There is no mechanism in the statute by which recovery is to occur by any specific date. That is a fundamental flaw in the statute.

Ms. BORDALLO. Thank you. Dr. Noss.

Dr. NOSS. Yes?

Ms. BORDALLO. This Committee's majority believes the ESA is a failure because many listed species have not recovered to the point that they can be removed from the list. Given increased pressures facing species, is that an accurate measure of the Act's success? If you could, just briefly answer that.

Dr. NOSS. I don't believe it is an accurate measure, because, as I noted in my testimony, the threats that led to those species being listed have not abated and they have only worsened. The greatest ultimate threat to the survival of a species is human population growth.

When the Endangered Species Act was passed in 1973, we had 212 million people in the United States. Today we have 315 million people. OK? So human population has been increased by a third. And, depending on what happens with immigration reform, some people are estimating up to 600 million people within the next few decades in the United States. This is going to put extreme pressures—already is putting extreme pressures—on species. It is amazing to me that any species at all have recovered, given these pressures.

Now, human population growth, the ultimate threat. But that leads directly, then, to the leading proximate threat, which, as Mr. Parenteau pointed out, is habitat loss and modification. And that is why we are seeing this continuing trend.

Ms. BORDALLO. Doctor, I have another question for you, my last question here. Dr. Parenteau mentions in his testimony that we are in the midst of a sixth great global extinction brought on by human activity. Now, can you describe why the ESA is of such great importance to balancing economic activity with the ecosystems that sustain human life?

Dr. NOSS. That is a huge question. The ESA is simply one reminder that we have to take care of the environment while pursuing economic health. And economic health and economic growth are not necessarily equivalent. And it is curious that only since the mid-20th century have those two been found to be equivalent through using a GDP, for example, to measure economic health.

But the ESA does not stop economic activity. It simply guides economic activity toward those sectors that are greener, that do least harm in their activities.

Ms. BORDALLO. Thank you very much, and I yield back.

The CHAIRMAN. Will the gentlelady yield to me real quickly?

Mr. Parenteau, if you said that the ESA does not call for the recovery of species, why do environmental groups not want to reauthorize the Endangered Species Act, if that fundamental part is not part of ESA?

Mr. PARENTEAU. I think a lot of environmental groups would like to see the Endangered Species Act reauthorized. As Dr. Noss pointed out, the process takes too long. By the time——

The CHAIRMAN. Wait, wait, wait, wait. Now, what process takes too long?

Mr. PARENTEAU. The entire process: the listing process, critical habitat, recovery, the whole process.

The CHAIRMAN. OK. I am way over my time, but you made that statement and yet I hear constantly that environmental groups do not want to come to the table and discuss what needs to be updated in the Endangered Species Act.

Mr. PARENTEAU. I think they do. I think they do.

The CHAIRMAN. Well, I would welcome them——

Mr. PARENTEAU. All of them.

The CHAIRMAN. I would welcome them to certainly tell this Committee that they would like to do that. Because I hear, frankly, the contrary to that. I welcome your statement, I really do. But I wish you would communicate with your brethren out there that opposes that, so we can have a discussion on this.

And I am way over my time on that. I would now like to recognize Mr. Mullin from Oklahoma.

Mr. MULLIN. Thank you, Mr. Chairman. Mr. Powell, thanks again for coming before this Committee today, and thank you for your service to our great State of Oklahoma.

Can you tell me what role you play if a listing is done and finalized at the Federal level by the Fish and Wildlife Service on the Lesser Prairie Chicken and American—what I call the dung beetle, because around my part of the country you can kick over any pile of whatever, you can find these dung beetles. And what concerns do you have if your role is diminished going forward on this species recovery?

Mr. POWELL. What we worry about from a State standpoint is the State really has no purpose once a listing is done. The Federal Government comes in, takes over all coordination of the species. The State can serve as just a general commenter, just like any other individual, but that is probably not enough when we have a—at least in Oklahoma, our Department of Wildlife Conservation has a constitutional duty to oversee fish and game and wildlife in the State, and make sure that the resources of the State are protected.

Mr. MULLIN. What resources do the State's wildlife agencies possess that the fish and wildlife services don't?

Mr. POWELL. Probably the biggest resource, Congressman, as you know, is just the trust, the relationships. Most Oklahomans like getting out and recreating. They like hunting, they like fishing. They have relationships with their game wardens. They have relationships with their biologists. They have relationships with individuals who are working to go through and help what they want to do. That's lost. The Federal Government is not out there. They are not out there in the fields. They are not out there working with Oklahomans to go through and try to go through and figure out how we can improve habitat, how we can improve species. That is the biggest issue that is lost.

Mr. MULLIN. You know, and just being from Oklahoma, obviously, relationship is everything. I mean I bring this point up all the time, that there isn't anybody that wants to take care of our land better than we do. My children are the fourth generation on the land that I grew up on. And we want our wildlife to be there. We want things to be there. But we want to have a working partner. And every time, it seems like, that we allow some agency to get involved, that doesn't have the relationship, that doesn't have the personal connection to our land, it just seems like they take common sense and throw it completely out the window, and they start enforcing things that don't seem to fit.

One size doesn't fit all. If we can allow the States to sit back and do their job—now, if the States aren't taking care of it, fine. There is a role there. There is a constitutional role there. But if the States are taking care of it, and we are seeing that the numbers are improving, we are seeing that we are doing our due diligence

to do what we can, then the Federal Government should stay out of our business. And I think that is basically what you are saying. I am adding a little bit more to it.

But anyways, Mr. Powell, it is my understanding that the State officials have repeatedly asked the Fish and Wildlife Service to explain why the Service drastically changed the Lesser Prairie Chicken listing from a priority number of eight down to two. And is that correct?

Mr. POWELL. That is correct.

Mr. MULLIN. Have you got any feedback? Have you been told why? I mean considering that our numbers have been swinging back up, have we got any explanation from them?

Mr. POWELL. We did ask that question, and I believe that there has also been a number of congressional letters that have asked that question. The response that is received back from the Fish and Wildlife Service essentially said that there continue to be threats to the habitat.

Mr. MULLIN. Have they been out there with you? Have you been in contact with them? Have they been out there and looked at it themselves?

Mr. POWELL. We have been in fairly regular contact with the Fish and Wildlife Service, but they have failed to specify exactly what the threats are, and what exactly could be done, where States look for a creative solution to go through and try to solve these problems.

Mr. MULLIN. So, just so I am not confused on this, you haven't gone out in the field with him. They haven't worked with you on this. This is just something they came up with themselves and said they were going to list it, drop it from eight to two, which is a huge drop.

Mr. POWELL. It is a huge drop. It takes us from a position that historically the Service might not have gotten to, to essentially the next in line.

The Service has gone through at some point, I am sure, at a biologist and at a low staff level been out in the field. But most of the people who are making the key decisions have not been out in the fields with our biologists, with our Department of Wildlife personnel.

Mr. MULLIN. Last question is what is the state in the industry—you guys are working together. What have you done that benefits the Lesser Prairie Chicken?

Mr. POWELL. Probably the biggest thing that has happened is when the wind energy industry was beginning in Oklahoma in the early 2000's, our State's largest utility, Oklahoma Gas and Electric Company, came to the State and said, "We want to go through and proactively protect the Lesser Prairie Chicken and other species that these wind farms, that these transmission lines may go through and harm."

OG&E, just out of the generosity of their heart, went through and provided $9 million as offset to be used for land acquisition for additional research to go through and be used for habitat conservation, to go through and be used for other purposes, all to help protect the Lesser Prairie Chicken. That was no mandate of the State, that was no mandate of the Federal Government.

Mr. MULLIN. That was just industry and the State working together?

Mr. POWELL. Yes.

Mr. MULLIN. Mr. Powell, thank you. Mr. Chairman, I will yield back.

The CHAIRMAN. I thank the gentleman. The Chair recognizes the gentleman from California, Mr. Huffman.

Mr. HUFFMAN. Thank you very much, Mr. Chair. Thank you for this hearing, and thank you especially for the spirit of your statement earlier that this is focusing on strategies to save and avoid extinction and bring about recovery, rather than whether we should do these things.

And in that regard, I wanted to devote my time to this distinction between extinction avoidance and recovery that a couple of the witnesses, at least, have talked about. We have lots of cases in California where years have been spent and millions and millions of dollars wrangling around biological opinions and take issues. But we also have some success stories where people in State and local government have partnered with their Federal Government partners on recovery plans.

And so, I wondered if the two witnesses—the scientist and the environmental attorney who have spoken to this issue a little bit—could speak to some of the tools that are available under the Endangered Species Act to bring in State government partners, local government partners, even private land owners, with a bigger, longer-term recovery strategy in mind.

Dr. NOSS. OK. I will begin. You know, the main, primary question of this hearing really surprises me, to some extent. Because I think this perceived conflict between the Federal Government and its activities and the States and the Tribes and the local governments on the other hand is being blown out of proportion, and may even be a red herring. Because everywhere I have worked in my 40-year career I have seen, generally, really good cooperation between the Federal agencies and State, tribal, and local agencies.

I have worked in Ohio, Oregon, California, and now most of my career recently in Florida. And in all those cases there are Section 6 cooperative agreements in place that on, literally, a daily basis, the Federal and the State biologists sit down and work on species recovery. They don't work on listing plans together; the States usually have their separate listing process. And, you know, California's Endangered Species Act is stronger than the Federal Endangered Species Act.

But they work together on things like habitat conservation plans under Section 10(a) of the Endangered Species Act. And California, again, has a stronger law: the Natural Communities Conservation Act. And I have worked on 15 of those. I was on a panel appointed by Governor Wilson back in the early 1990s. And these things work.

I mean it has always been very productive, and I have been pleased to see that cooperation between Federal and State.

Mr. HUFFMAN. Can you speak perhaps to the greater certainty and regulatory assurance that you can get? Because economic disruption has been brought up when we get into critical habitat designations and things like that. But I often hear from people who

have entered into these HCPs and NCCPs in California that what they get in return—it is a lot of work, and it is a lot of collaboration, but what they get in return is much greater economic certainty than——

Dr. NOSS. Exactly.

Mr. HUFFMAN [continuing]. Sort of fighting over take permits.

Dr. NOSS. It has been called one-stop-shopping by a lot of large land owners. They can get an HCP, NCCP, and take care of all of their permitting needs for, say, 50 years, rather than to have to come back to the table for every endangered species individually, and develop a new plan. So it has worked.

I would like to turn over, if you don't mind, to Mr. Parenteau——

Mr. HUFFMAN. Yes, please.

Dr. NOSS [continuing]. Because he has, I am sure, a lot more to say about that issue.

Mr. PARENTEAU. Well, you know, the model for the habitat conservation planning program of the Nation was started in San Bruno with the San Bruno Blue Butterfly, and that is the model that we have all followed. There are now 30 million acres under habitat conservation plans across the country.

In some States like South Carolina—the entire State has a Statewide habitat conservation plan for the Red Cockaded Woodpecker. In Michigan they have one for Kirtlands Warbler. So, those are a couple of the mechanisms that are there.

I think where the real tensions come are the hard cases, like the Delta Smelt. I mean that is a tough case, because you are talking about a—I don't have to tell you—the massive agricultural industry dependant on water, and a tiny fish representative of an entire estuarine ecosystem also dependant on water. That is a tough conflict. That is not going to get resolved very easily. And so we shouldn't be surprised if there is tension and conflict and litigation over that. That just goes with the territory.

But I think there are more examples of quiet diplomacy and things getting worked out than people are aware of. I think there are more success stories out there that don't get nearly as much attention as the controversies, and that is too bad.

Mr. HUFFMAN. Thank you both. I yield back, Mr. Chair.

The CHAIRMAN. I thank the gentleman. Next I will recognize the gentleman from Utah, Mr. Stewart.

Mr. STEWART. Thank you, Mr. Chairman. Before I begin my questions, a comment or two, if I could.

Mr. Parenteau I appreciate you have given a very passionate defense of the decisions of the courts. And I have to say that if you believe the courts are infallible with some of their decisions or applications of law regarding ESA, or really regarding any area of the law, that you may be the only person in this room who would take that position.

In fact, I am really quite surprised with a bit of your comment, when you said it was insulting to question some of these decisions. And being a professor of the law, I am surprised that you would take such a position, and I am suggesting that that is probably not a position you would teach your students, nor is it a position that you would take if it was an area of the law which you disagreed with the court's decision.

Dr. Noss, you mentioned—and I appreciated the fact that you talked about President Nixon being the one who initiated this process, and also that the vast majority of Americans agree with this. And I think that is worth reinforcing. And, Mr. Chairman, you made this point, as well. The vast majority of Americans want to see this be successful, including the vast majority of Republicans, including all of the members of this Committee. We want to see species protected. Certainly we don't want to see species extinction. And we are all trying to accomplish the same thing. The only question is, again, as the Chairman indicated, what is the best way and, in some cases, the most efficient way, that we can do that?

And in that regard I would like to then focus my comments and my questions regarding some of the unintended consequences that may result from excessive litigation, or how these petitions to lead—particularly these petitions to list—can lead to excessive litigation. Let me quote a statistic and then ask a question from that. Between 1994 and 2006 there were an average of 20 petitions to list that the Fish and Wildlife Service received.

Dr. Noss, I will start with you. Do you have any idea how many they have received in the last few years, over the last 4 years?

Dr. NOSS. I know it is a lot.

Mr. STEWART. It is a lot.

Dr. NOSS. Believe me, I am no friend of litigation in a general sense. I am no fan of courtroom science——

Mr. STEWART. Yes.

Dr. NOSS [continuing]. Where talking heads come in and hire guns and give one side of the story without being objective. It bothers me.

Mr. STEWART. You know——

Dr. NOSS. I have been one of those. But I try to be as honest as possible.

Mr. STEWART. And I appreciate that, and I get that sense from your testimony, that that is kind of your attitude toward that.

Mr. Parenteau, do you have any idea how many petitions that Fish and Wildlife has received over the last 4 years, compared to the 20 before?

Mr. PARENTEAU. Well, I don't have the specific number. I know they have increased. And the reason that they have increased is because——

Mr. STEWART. Well, we——

Mr. PARENTEAU [continuing]. Congress has put a moratorium on listing. The Bush Administration——

Mr. STEWART. You know how much——

Mr. PARENTEAU [continuing]. Stopped listing. There is a backlog of listing that has occurred over the last decades.

Mr. STEWART. Wait, that is not——

Mr. PARENTEAU. That is the reason.

Mr. STEWART. But that wasn't my question, nor my comment. Do you have any idea how much they have increased?

Mr. PARENTEAU. I don't know the exact number.

Mr. STEWART. They have gone from about——

Mr. PARENTEAU. I know it has increased, and I know the reason that it has increased.

Mr. STEWART. They have gone from about 20 to more than 1,200.

Mr. PARENTEAU. And the reason is because of the backlog of listing because the program hasn't been funded, because——

Mr. STEWART. Once again, sir——

Mr. PARENTEAU [continuing]. The agencies haven't done what the law requires, sir.

Mr. STEWART. Mr. Parenteau, I haven't asked you a question, and that is not the area of my questioning or my interest right now. My point is that they have gone up by an extraordinary amount.

Now, I would like to quote——

Mr. PARENTEAU. You should ask why.

Mr. STEWART. I know why, and I think we are—I think we have a disagreement on opinions as to——

Mr. PARENTEAU. All right.

Mr. STEWART. Now, let me ask you. Would you agree with the current Administration's position—this is from the Deputy Secretary Hayes—when he says, "My major concern is the fact that this has been fish-in-the-barrel litigation for folks who—because there is a deadline and we miss these deadlines, and so we have been spending a huge amount of time, in my mind, relatively unproductive time."

And once again, this isn't a Republican administration, this is the current Administration saying, "relatively unproductive time" fending off lawsuits in this arena.

Mr. Noss, again, I would like to come back to you and ask you to respond to that, if you would.

Dr. NOSS. Well, the reason the agencies are getting sued is that they are not following the law. And the main reason they are not following the law is they don't have the budget to do it.

There is also political interference, and I have witnessed some of that myself. As Congressman DeFazio may be aware, the biological knowledge to list the Northern Spotted Owl as endangered or threatened existed many, many years before the listing actually took place. And people were scared to death about what might happen if that bird were listed. In the end, of course, it wasn't the Endangered Species Act that caused a court injunction against logging in the Northwest, it was a violation of the National Environmental Policy Act and National Forest Management Act.

Mr. STEWART. I would suggest that you may be right on that. In some cases they are sued because they may not be following the law. But I would also suggest—and this is very obvious to anyone who is honest about this—it is very clear that in many cases they are suing because it is a revenue source for them.

In the last 4 years, 570 lawsuits the Justice Department has had to defend that have led to an outcome of more than $15 million allocated to different environmental groups. And it would be, I just think, dishonest to not recognize that is a very clear financial incentive——

Dr. NOSS. If that is happening, I deplore it. Believe me.

Mr. STEWART. Yes, thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from New Hampshire.

Ms. BORDALLO. Mr. Chairman, I ask unanimous consent to add an article to the record in which Fish and Wildlife Director Dan

Ashe states on the scale of the challenges that we face implementing the Endangered Species Act. Litigation doesn't even show up on the radar screen.

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

[**Note:** The article submitted for the record by Ms. Bordallo has been retained in the Committee's official files and can be found at http://www.fws.gov/endangered/media/ TheWildlifeProfessionalSpring2013-DansEditorial.pdf.]

The CHAIRMAN. The Chair recognizes the gentlelady from New Hampshire, Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you, Mr. Chairman. I am very concerned about the tone of this hearing, and I would ask that we not pit ourselves against one another or unjustly attack the men and the women who have come to talk to us and give us their best knowledge and opinion.

Some of this, I think, is larger than the people right here. Comments such as, "Every time we allow some agency to get involved," and then going on about how the Federal Government should stay out of our business if we are not doing it right, and then I took a look at some of the testimony again, and Mr. Parenteau wrote, "Federal agencies have much to learn from those who are closest to the resources and activities affected by the ESA." And so I thank you for that comment.

And I would say that we shouldn't be pitted against each other here. At the very beginning the Chairman said this is what we all agree on, that we want to protect these resources. And so, yes, we may have some disagreement here. But I think what we have been hearing today has been particularly unproductive.

So, having said that, I will move on to Dr. Noss. Mr. Parenteau referenced a study that estimated more than 170 species would have gone extinct in ESA's first 25 years, if not for the law's protections. Given the fact that so many species have not been listed until they are on the brink of extinction, can you explain the importance of that achievement and what it says about the future?

Dr. NOSS. Well, again, I find it amazing that the Endangered Species Act has been as effective as it has been, given all the hurdles and the continuing trends of ecosystem degradation. But as far as the future, we have to understand that biologists recognize a phenomenon we call the "extinction debt." What it means is that the number of species you see out on the landscape at any given time includes a number of species that are basically committed to extinction because of habitat loss over time. They may have lost 95 percent of their habitat. And they are still around, but they are in populations so small that they are going to go extinct over the next few decades, or maybe a century or two. But the only way to bring them back would be massive habitat restoration, as well as protection.

And so, we have, really, a backlog of extinction. Some people have called these species the walking dead. They are out there, walking around, but they are not really alive, because they are not going to last long. I mean those are the kind of species I really worry about.

And the Endangered Species Act needs to do a better job, I think, of prioritizing species for protection, to following its first stated

goal, to conserve the ecosystems upon which these species depend, and do so in a broad way, rather than species by species, site by site, threat by threat. I think that is how we will make progress.

Ms. SHEA-PORTER. OK. Thank you for that. And the other question I had was there was some testimony about how you can't use climate change models going out, 10 years, 50 years, 100 years. And aren't those models pretty accurate at this point?

Dr. NOSS. They are getting better all the time. They always carry some uncertainty, and all the authors of those papers about future climate envelopes for species have acknowledged the uncertainty. They are getting better. The main questions arise about are species actually able to move across the landscape to where their predicted new habitat is located, or are we going to have to move them ourselves? And what does that mean? What kind of threats come along with that?

So, there are all kinds of questions of that sort. The point is that the landscapes of today are heavily fragmented. And so, when climate changed in the past, sometimes just as rapidly as it is changing now—and it is really a falsehood that climate change is more rapid today than at any time in the past; there has been periods in the past that were every bit as rapid or more than what we can expect over the next century. But then, the landscape was connected. It was a natural landscape. Today we have cities, we have highways, we have huge agricultural fields in the way. That is where the biggest question about the impacts of climate change lie, in my opinion.

Ms. SHEA-PORTER. All right. And then I have one more question. How many years, decades of experience do you have?

Dr. NOSS. About four.

Ms. SHEA-PORTER. OK, four decades of experience.

Dr. NOSS. Plus school.

Ms. SHEA-PORTER. Are we where you thought we would be when you first started in this field? Has it been better or worse, or kind of what you thought was going to happen, taking a long view, four decades ago?

Dr. NOSS. That is a good question. I think the environmental awareness, and at least excitement in my generation in the 1960s and 1970s has waned somewhat. You don't see it, even among my generation and among young people, as strongly today. And so I am disappointed in that.

Things have gotten worse. I actually did not think that the population would continue to grow at the rate it has been growing, in the United States or globally, because population was a huge issue in the 1970s. Today it is taboo. People don't want to talk about population, and especially immigration, it is not politically correct. So, there I am disappointed.

But, on the other hand, the science has actually progressed faster than I might have predicted. We now have a pretty good understanding about what—at least those species that we have studied, what they need and what their ecosystems need to persist over the long term. And so I am excited by that.

Ms. SHEA-PORTER. And you feel good about the science.

The CHAIRMAN. The time of the gentlelady——

Ms. SHEA-PORTER. Thank you very much, I yield back.

The CHAIRMAN. The time of the gentlelady has expired. I recognize the gentleman from Montana, Mr. Daines.

Mr. DAINES. Thank you, Mr. Chairman. Mr. Ferrell, I was struck by your testimony that suggested that back in 1996, when the wolves were reintroduced there into the Northern Rockies—and I come from the State of Montana, I am an avid outdoorsman, I am a fifth-generation Montanan, I have spent more time above 10,000 feet backpacking in wilderness than most Sierra Club members have, and so I am an avid conservationist and I love my State, and I love the part of the country I come from.

In 1996, the wolves were reintroduced. And in 5 years, your testimony said, they exceeded the target goal. Yet it took us 12 years to move through the process of moving them off the endangered species list. Can you elaborate more on what the single biggest challenge was, in terms of it was 5 years to hit the goal, which we are grateful—we have the wolves, the goal they wanted—but 12 years to get them off the list.

Mr. FERRELL. Well, thank you for the question. The testimony, I think, actually reflects it has been 6 years. But still, I think what the point there is it is a prolific species. Once it was given protections in Yellowstone National Park, it expanded rapidly, and it continues to do that.

And so, unlike other species that aren't quite as reproductive, wolves are. And the challenges have been trying to actually get them delisted—have really nothing to do with the numbers, in my opinion. I mean they have—we have been at—like I said in my testimony, our recovery goal has been—all recovery goals have been met now for the twelfth consecutive year. And yet we are still facing more litigation on that delisting 9 months ago.

Mr. DAINES. I think many of us realize that the wolves didn't know where the boundary of Yellowstone National Park was. They tend to move. And I see them a lot. In fact, I have a wolf tag in my pocket from 2011 that was unused.

Commissioner Jankovsky, a question. In your testimony you mentioned the necessity of the Department of the Interior to use accurate and viable data to support the warranted lifting.

Second, you mentioned the importance of the Secretary of the Interior to work with local governments in their decisionmaking. And you come from Garfield County. We have a Garfield County in Montana, as well, out in the eastern part of our State. I can tell you, listening to what you had to say there, I couldn't tell the difference. Whether you are from Garfield County in Montana or Garfield County in Colorado, we have the same challenges with the Department there in my home State.

The Department has released three resource management plans for their Billings, Mile City, Hi-Line offices. These plans—especially their Greater Sage Grouse planning—are a supreme concern to county commissioners, ranchers, farmers, oil and gas developers, and other land users in Montana. And these plan parameters are established for priority-protected habitat for sage grouse, areas of critical environmental concern. And, by the way, the wolves are moving into sage grouse country as well, now, which is just another dynamic as we think about working with balancing the species, because wolves do need to eat.

The comment period for these plans end abruptly this month, without the possibility of an extension. The reasoning the BLM mentioned for the refusal to extend these comment periods is due to the mega-settlement reached between the Department, the U.S. Fish and Wildlife Service, and groups like the Center for Biological Diversity referenced in this hearing.

In your opinion, since the settlement was negotiated amongst the Department, the U.S. Fish and Wildlife Service, and the groups to conserve the Greater Sage Grouse, is it possible for the Department and BLM to extend comment periods for resource management plans in order to assure adequate data is considered?

Mr. JANKOVSKY. Yes, in my opinion, this covers 11 States, it covers 69 different planning units within the BLM. And I believe if counties were to ask for an extension, that is possible. But the problem is—and what I have heard as a cooperating agency—is we are under the gun, we are under a timeframe, where we have to get this done by 2014 for habitat management, so the bird will not be listed in 2015.

Mr. DAINES. Is another good reason for extension so that local Montanans can have sufficient opportunity to digest the proposed plans, evaluate impacts, and then comment on them?

Mr. JANKOVSKY. Well, I agree with that. We are one county with a very different topography, as I mentioned, from where the studies were done for the NTT report. And I think when you cover 11 States in the Western United States, you are going to find many counties with very diverse topography, very diverse uses of their land, and this is a big issue that I think actually has been misused to some extent.

Mr. DAINES. Quickly, as we are running out of time, can you expand on this uncertainty a declaration of priority habitat creates for neighboring ranchers, private property owners, and resource development?

Mr. JANKOVSKY. Well, I think, first of all, that the best science hasn't been used. There are studies out now that grazing actually works well with the sage grouse and improves the habitat. And it does not state that in the NTT report.

Mr. DAINES. Thank you.

The CHAIRMAN. The time of the gentleman has expired. I recognize the gentleman from Oregon, Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman. Dr. Noss, you talked at some length about ecosystems, rather than individual species. And that would essentially require a refocusing and potentially a change in the Endangered Species Act, would it not?

Dr. NOSS. Well, it was the first stated goal, but it was not mentioned in the original Act. It is mentioned again—I think it was in the 1982 amendments but, again, with no clear direction to Congress for how to accomplish that goal.

Mr. DEFAZIO. Right. And——

Dr. NOSS. So, yes, I think there needs, personally, to be a new law.

Now, it is interesting, the Province of Manitoba, just last month, renewed their Endangered Species Act, but now it is the Endangered Species and Endangered Ecosystems Act, and they are especially designating tall grass prairies, calcareous prairies, and other

ecosystems within the province that have declined greatly. And the point is, when ecosystems decline, so do the species associated with them.

So, for many decades I have championed an ecosystem conservation as a proactive, cost-effective way to take care of a number of these species, rather than to have to deal with them all individually.

Mr. DEFAZIO. Right. In the last couple of years, as we have been trying to work through management of the forests in Oregon, I was out with someone from Fish and Wildlife, a top official. And there was some controversy over a proposed management prescription which would have removed some rather large fir trees in a ponderosa pine area. And he said, "Look. What is good for the forest is good for"—not just the owl, but the other species, also.

Dr. NOSS. I agree.

Mr. DEFAZIO. So, somehow we have to kind of move from that rifle shot to something that is a little broader, generally.

Dr. NOSS. I agree. But, at the same time, I think we have to recognize that even if we really implemented ecosystem conservation in the best possible way, there will still be those species, those conservation-reliant species, those walking dead species, that are going to need individual attention for quite a while until the ecosystems are once again healthy enough to sustain them.

Mr. DEFAZIO. Right. And then HCPs would have to play a big role in that, right, since this is not exclusively taking place on Federal land.

Dr. NOSS. Exactly right. And the best HCPs that I have seen consider the ecosystem and ecological processes, as well as the individual species. HCPs, of course, are all over the block. Some of them are excellent, at least so far; others are pretty dismal failures. But HCP is one way we can accomplish ecosystem conservation, if done right.

Mr. DEFAZIO. And then, the issue of excluding States, I don't believe States should be sort of just a bystander in the process.

Dr. NOSS. I agree.

Mr. DEFAZIO. You mentioned the Oregon salmon management plan as a success. Do you think we need somehow to change the status of States as interveners in the Act, or cooperators, or give them some enhanced status?

Dr. NOSS. I think a well-developed conservation or cooperative agreement under Section 6 is really all we need. That is what that section was written for. And in many States, such as Florida, the States and the Feds are cooperating completely. And, in fact, some of the environmental groups are upset that the State now has a lot more authority about management of species than they did in the past. So some of those details remain to be worked out, but I think we have the mechanism right there.

Mr. DEFAZIO. Mr. Parenteau, would you comment on that? What do you feel about the role of the States in this?

Mr. PARENTEAU. Well, I think it varies from State to State, but I think there are some outstanding examples of where States have done tremendous things. We have already talked about the California NCCP program. I point out the multi-species habitat conservation plan in South Florida, the multi-species habitat conserva-

tion plan around Austin for two species of birds and a variety of invertebrate species in caves around Austin that settled a long-running dispute over how development was going to occur in a very economically high——

Mr. DEFAZIO. Well, what are the barriers, then? Why doesn't this take place more——

Mr. PARENTEAU. Money and staff is a big part of it. It always comes back to that. If you give the States the responsibility, are you also going to give them the means to carry out that responsibility? If you give the Fish and Wildlife Service the mandate to go out and work with the States, are you going to give them the money and the staff to do that? If you want these plans to be based on sound science, are you going to fund the kinds of studies that are needed?

If you are talking about ecosystem approaches, you are talking about crossing boundaries, not just county boundaries, State boundaries, but international boundaries. For some of these species you are talking continental ecosystems.

So it is fine to talk about the goal of raising the bar to ecosystem level. But to operationalize that in a legal sense, to make it more than philosophy, to make it law, that has been the stumbling block. It is not easy to conceptualize the kinds of standards—the lawyers have been at this in my field forever. And in the Academy the literature is as big as this room on how would you construct a law that had metrics of measurement and standards to actually make ecosystem management work on the ground. That is the challenge.

Mr. DEFAZIO. OK, thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Yes, the time of the gentleman has expired. I recognize the gentleman from Texas, Mr. Flores.

Mr. FLORES. Thank you, Mr. Chairman. Just a question for Mr. Powell, Mr. Ferrell, and Mr. Jankovsky. Each of you has talked about the positive things going on at your State and local levels. And, I guess, Ms. Brigham, you as well. You have talked about the things going at State, local, and tribal levels. You have also talked about the lack of coordination between the Federal Government with respect to endangered species. And one of the messages I think I heard from you—and I just need you to confirm this—is that there is not a consistency between Federal plans and State and local plans. Am I correct in my understanding?

Mr. POWELL. That is correct.

Mr. FLORES. OK. Ms. Brigham? Mr. Ferrell? Mr. Jankovsky? OK.

In light of that, what could the Federal Government learn from your experiences when it comes to identifying and protecting and recovering species? Mr. Powell, you first.

Mr. POWELL. At least from Oklahoma's standpoint, what we are emphasizing is a voluntary framework through both our State conservation plan with the Lesser Prairie Chicken, and now the five-State range-wide plan, a plan that, in the event that a listing does not go forward, that they do find a not-warranted result, which is the goal of all five of the States, that the mechanisms, that the mitigation, everything would still exist in the future as a voluntary resource. Obviously, we would not go through and force folks to do it. There are a lot of folks, especially in our oil and gas industry and in our energy industry that are going to continue to do it, and

have told us that, simply because they worry about a future listing coming down if they fail to do it.

Mr. FLORES. OK. Ms. Brigham?

Ms. BRIGHAM. Thank you. I think if the NOAA and the U.S. Fish and Wildlife Service would focus on the priority of delisting and developing plans to do that, we could accomplish a lot. But they seem to be growing their science departments and not focusing on rebuilding or delisting.

Mr. FLORES. OK. Mr. Ferrell?

Mr. FERRELL. The voluntary framework certainly is important for us in Wyoming, as well. But a good example of where I think we have taken a leading role is in our executive order for sage grouse conservation. Essentially, that is designed on a core area concept, where 80 percent of the birds actually exist on less than 30 percent of the landscape in Wyoming. So you can provide a regulatory mechanism that protects those, but still allows some leeway for industry to continue to develop their goals, as well.

Mr. FLORES. OK. Mr. Jankovsky?

Mr. JANKOVSKY. Yes. In our case, we became the center of all the agencies. We talked to the Federal Government, and they referred us back to the State government. We had to go back to the State government and then take that back to the Federal Government. And then we had coordination meetings that not only had all three governments there together, but allowed the public and environmental groups and large land owners to listen and participate, as well.

Mr. FLORES. OK. The subject of this hearing today was about the sue-and-settle practices that have gone on at the FWS. And one of the things I have tried to do to deal with that is to introduce H.R. 1314, and it applies to the ESA citizen suits, where the Department of the Interior allegedly fails to perform a non-discretionary act such as missing a deadline in the listing process. This kind of suit is driving much of the litigation, and enabling plaintiffs to dictate terms to the FWS.

What this legislation does is it gives local government and stakeholders—and that is the four of you at the table—a say in the settlements, enhancing the ability of parties affected by potential regulation to intervene in the lawsuit. Furthermore, it would prevent a judge from approving a settlement if States and counties to the plan object.

It doesn't change ESA in a way that limits the FWS's regulatory authority, or prevents it from litigating a case to resolution. H.R. 1314 maintains FWS's ability to reach a settlement, provided that the States, the counties, and the stakeholders, are given a seat at the table.

So, Mr. Powell, in my limited time, would that be helpful to you?

Mr. POWELL. It would be extremely helpful. As we have seen with the mass resettlement, it would allow us to at least see and maybe have a part in helping to prioritize when listing decisions would be needed.

Mr. FLORES. Ms. Brigham?

Ms. BRIGHAM. Same thing.

Mr. FLORES. OK. Mr. Ferrell?

Mr. FERRELL. Absolutely.

Mr. FLORES. Mr. Jankovsky?

Mr. JANKOVSKY. Yes.

Mr. FLORES. Thank you. I yield back.

The CHAIRMAN. The gentleman yields back his time. The Chair recognizes the gentleman from California, Mr. Cárdenas.

Mr. CÁRDENAS. Thank you very much. I would like to allow you, Mr. Parenteau, to elaborate on something that maybe one of my colleagues wasn't very interested in your answer, but I certainly am. It is about environmental groups and how, in my opinion, environmental groups are not monolithic in their thoughts or efforts. Just like, for example, the congressional species that just gathers in this room, a lot of times we might disagree on a 22-to-18 basis ongoing very often. So we are not monolithic either, even though we may have the same titles and, at the end of the day, may even have the same goals.

So, what do you think would lead to less lawsuits? Because that was the discussion earlier, and it was about lawsuits and the attack on—that environmental groups are of a certain nature and that that leads to lawsuits.

Mr. PARENTEAU. I think batch listing is the way to go.

Mr. CÁRDENAS. What is that?

Mr. PARENTEAU. Batch listing, which is happening. The mega-settlements that we are talking about, one of the advantages of them is that is going to require that more than one species be listed at a time.

I am fully in agreement that process ought to be open to those who want to comment on it. I don't have any argument about that. And my point is that before any consent decree is entered by a Federal district judge there is the opportunity for comment. Now, whether people took advantage of it or not, I can't say.

But I can say, as a matter of law, those decrees have to be noticed in the Federal Register, there is an opportunity to comment, there is an opportunity to tell the judge why the decree is wrong, how people are prejudiced by it, how it is going to have adverse effects on the public interest, so all the people at this table who don't like these multi-settlement agreements, in my view, missed an opportunity when those settlements were entered. They had the opportunity to weigh in if they wanted to so they could take advantage of that.

If something more needs to be done, I would be one of those to say it is better to have people's problems with agreements registered earlier, rather than later. So, the more the process can be transparent and opened up to people to say, "Wait a minute, this is not the right thing to do, this is going to have this adverse effect that you may not have thought about," that is a good thing to do.

But the fundamental problem of why we have so many lawsuits is because there are so many violations. And the reason that we have so many violations is because the Agency is not performing non-discretionary duties. And the reason they are not doing that is they don't have the staff, they don't have the funding, they have political interference, they have other things they want to do. Whatever the reasons are, it is no secret. It is not rocket science. There are violations of law, and the courts are saying that is what is happening, and it has to stop.

If you want to change the law, if you want to structure a new process that avoids the one-by-one listings, fine. I think there are some environmental groups out there who would be willing to entertain that conversation, so long as the goal is strengthening the recovery process, not weakening it. If that can be the agenda, I would think there would be people who would be willing to pursue that.

Mr. CÁRDENAS. Mr. Noss, when it comes to the science behind this whole discussion why we are where we are, why the United States even has these laws on the books, or what have you, can you please remind us why we—the connection between the purpose for protecting species and the connection between the human species?

Dr. NOSS. Well, the Endangered Species Act, again, was the response of the American public talking to its legislatures about their concern that wildlife was disappearing, was declining. And there were many species of especially charismatic——

Mr. CÁRDENAS. But let's get past that. The reason why I asked this question is because a lot of people say, "So what if a butterfly is gone? So what?" Or, if a particular wolf is no longer around, so what? Or a particular rabbit, or a particular lizard——

Dr. NOSS. OK.

Mr. CÁRDENAS. That is my point.

Dr. NOSS. OK——

Mr. CÁRDENAS. I mean a lot of people don't understand—or maybe you are wrong in your answer. I don't—I——

Dr. NOSS. Well, I actually—I was getting to that. Because originally, the——

Mr. CÁRDENAS. But we have an element of time, so——

Dr. NOSS [continuing]. Focus was on big, charismatic—what?

Mr. CÁRDENAS. If you could condense it.

Dr. NOSS. OK. The original focus was on the big, charismatic species. Science has progressed to the point that we now recognize the role of these smaller, to most people less charismatic species that are absolutely critical to the function of that ecosystem, that contain chemicals and structures in their body that have proven very useful for industry, for medical science, and so on.

And also, this ecosystem functions best when the full suite of species is maintained. And we can't predict, in many cases, exactly what will happen to the ecosystem if we lose a given species, because there is some kinds of redundancy built into the system. But because we can't predict, to keep every cog and wheel is the best intelligent tinkering, as Aldo Leopold pointed out years ago. So it is a precautionary approach.

We know that these species play valuable roles. It is hard to say exactly what those are, because there hasn't been money to study them sufficiently, but they do play roles that the American people depend on, both directly through products and chemicals, and indirectly through the services provided by ecosystems.

Mr. CÁRDENAS. So there is, without question, a connection.

The CHAIRMAN. The time of the gentleman——

Dr. NOSS. Without question, it is very well substantiated.

The CHAIRMAN. The time of the gentleman has expired——

Mr. CÁRDENAS. Thank you very much, Mr. Chairman. I yield back.

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

Mr. MCCLINTOCK. Thank you, Mr. Chairman. As I listen to the acting Ranking Member, on behalf of the Democratic Minority, one would think that the ESA was this magnificent success to the environment that has had no cost to our economy. This is sheer fantasy.

You know, as to the former claim, I direct her attention to the Pacific Legal Foundation study that utterly debunked the notion that this has been such a fabulous success. The PLF documented that more than 30 percent of all of the delisted species noted by the Center for Biological Diversity were because of Federal data error. In other words, they shouldn't have been listed in the first place.

And as to the latter claim that this has come with no economic cost, I would certainly invite her to come to California's Central Valley, where the ESA has required the diversion, literally, of billions of gallons of water from the Central Valley agriculture that has destroyed literally hundreds of thousands of acres of some of the most fertile and productive farm land in America that has thrown thousands of farm-working families into unemployment, that has raised grocery prices for us all, all in the name of the three-inch delta smelt.

Currently, Fish and Wildlife proposes to declare about 2 million acres of the Sierra Nevada as critical habitat to protect the Mountain Yellow-Legged Frog. That is essentially the entire Sierra Nevada. That means severe restrictions or outright prohibitions on grazing, on timber harvest that are already down 86 percent from 1980 levels, fire management, recreation, including hiking and rafting and camping. This in an area that has already been economically devastated by Federal regulations, is threatened by catastrophic forest fires, and is heavily dependant on both resources and tourism for its economy.

This bespeaks a complete lack of balance in addressing the issue, and an ideological extremism that is utterly breathtaking in its scope and utter disdain for the welfare of millions of American families who are affected by these policies.

You know, as the Chairman said, no one wants to see a species go extinct. We want a super-abundance of these species, which, it seems to me, we can produce at far lower cost than the extensive and expensive measures required by ESA, which brings me to Ms. Brigham and her experience with fish hatcheries on the Columbia. It reminded me of my experience on the Klamath, where this Administration is seeking to spend over a half-a-billion dollars of taxpayer money to tear down four perfectly good hydroelectric dams that are producing—or capable of producing—155 megawatts of the cleanest and cheapest electricity on the planet. The excuse is because of a catastrophic decline in the salmon population on the Klamath.

When I first visited there and was told of this, I said, "Well, why doesn't somebody build a fish hatchery?" Well, it finds out somebody did build a fish hatchery at the Iron Gate Dam. It produces 5 million salmon smolts a year. Seventeen thousand of those smolts return as fully grown adults to spawn in the Klamath every year.

The problem is they are not allowed to be included in the population counts.

Ms. Brigham, we are told that, well, they are just not the same, hatchery fish and wild-born fish. But it seems to me the only difference between a hatchery fish and a wild-born fish is the difference between a baby born at home and a baby born at the hospital. Have you discerned any differences between the hatchery fish and the wild born fish?

Ms. BRIGHAM. On the Columbia River, the only way we can identify the difference is the mass marking that occurs on the Columbia River. If it doesn't have an adipose clip, it is a wild fish. If it has an adipose clip, it is a hatchery fish. If it has its clip or fin adipose, then it is a wild fish, and that is the only way you can tell the difference.

Mr. MCCLINTOCK. Well, after a hatchery smolt has gone into the ocean, survived 5 years in the open ocean, and returned as a fully grown adult to spawn, hasn't it already demonstrated that it is just as hale and hearty as a wild-born fish?

Ms. BRIGHAM. It is all due to management, yes.

Mr. MCCLINTOCK. And don't the same laws of natural selection in the wild apply equally to hatchery fish and wild-born fish during those 5 years that they are in the open ocean?

Ms. BRIGHAM. Yes.

Mr. MCCLINTOCK. Well, then, it seems to me we ought to just count the damn hatchery fish.

Captive breeding of the broad-backed California condor brought them back from the brink of extinction, it seems to me that we should be encouraging that practice. It is also dramatically cheaper than measures that are otherwise required by the ESA.

Mr. Jankovsky, if we assured the product of captive breeding programs were included in assessing population counts and mitigation measures, what effect would that have on the issues that you are dealing with?

Mr. JANKOVSKY. Well, on sage grouse it is a little bit different, but there is one recent study showing that eggs that were produced in a hatchery, so to speak, or an incubator, have been successful.

Mr. MCCLINTOCK. My time has expired, but I would also be interested in thoughts of any of the other Members who are testifying.

The CHAIRMAN. If they could respond, I would appreciate it. Thank you.

Ms. BRIGHAM. I have a quick——

The CHAIRMAN. The Chair recognizes the gentleman from Nevada, Mr. Horsford.

Mr. HORSFORD. The mic isn't working. I guess when you get to the end, it doesn't work as well.

[Laughter.]

Mr. HORSFORD. Thank you, Mr. Chairman, members of the Committee, for testifying today. I am from Nevada. I represent both the rural and urban part of 52,000 square miles in Nevada. And we are working on the recovery of sage grouse in our State. And we don't know yet if sage grouse will need to be listed, but our Governor is working with State, local, and Federal agencies to help recover species now, so we can be proactive.

So, I would like to ask what might be the implications for species if Congress modifies the Act, or if outside advocates are not allowed to petition for species protection. Mr. Noss.

Dr. NOSS. The rate of listing has been so slow that without the petitioning process to bring species to the attention of the Fish and Wildlife Service, I think we would have a lot of species sinking into the brink of extinction before they are noticed.

Many of the species that have been petitioned for listing of course still don't get listed. They have been put into this warranted-but-precluded category, where listing is found to be warranted, based on the best available scientific information, but then they sit in limbo for up to decades. So there, the citizen petition process has failed. But it is primarily because, at least from what the Fish and Wildlife Service says, it is because of high-priority listing actions taking precedence over those considered of lower priority, which is often a political decision.

But the bottom line is they don't have enough money to list all the species that are petitioned.

Mr. HORSFORD. So, to that point, I wanted—that was a follow-up question that I had. So, in the event that there is a delay in listing, what does that do to the actual eventual recovery? Does that make that easier or more difficult?

Dr. NOSS. If the delay results in continuing population decline of the species, which, in most cases, it does, without the protection of the Act, then recovery is going to be more difficult. The smaller and more precarious the population at the time that recovery kicks in, the more difficult it is to ever get that species off the Act.

Mr. HORSFORD. So then can you or anyone else identify or comment on any early intervention—best practices to intervention recovery?

Dr. NOSS. In some cases the States are doing that. There is one species that I petitioned for listing back in 1987, in Florida, the Sherman's Fox Squirrel. It is still in warranted precluded category with Fish and Wildlife Service after all those decades. But the State now is undertaking extensive surveys and studies of this species, and has an action plan in draft form that I just reviewed the other day.

So, that is an example where a State has stepped in where the Federal Government was basically not at the door, and done what was necessary at least to try to get the information to figure out how to recover this species. So it is still listed by the State, even though the Feds have refused to list it so far.

Mr. HORSFORD. OK. And is it correct that environmental groups aren't the only ones who can recover under the ESA's citizen suit provision? Is that correct?

Mr. PARENTEAU. That is correct.

Mr. HORSFORD. So, instead, a broad spectrum of people, including those who do not want species to receive ESA protections frequently file suits under this provision?

Mr. PARENTEAU. Absolutely right.

Mr. HORSFORD. And so, would you care to address, then, some of the remarks during this hearing about the ESA is a failure because so few species have recovered?

Dr. NOSS. Well, as I think several people have commented now, it is amazing that any species have recovered, given the increasing threats to these species existence that can be linked to human population growth and increasing habitat destruction. So it is really no surprise that recovery has been so slow. Even with lots of money dedicated to the recovery of these species, we would still have severe problems recovering many of them, because their habitat just isn't there.

Mr. HORSFORD. OK. Well, thank you, Mr. Chairman, and I will conclude there. I would again just ask, as we are trying to do in our State, my objective of being on this Committee is finding best practices to solve problems. And sage grouse is a big problem. We know it is a problem in other places. There are strategies that we can implement now proactively, and I would like to work cooperatively with my colleagues on the other side to figure out ways to do that, so that we can prevent these type of species being listed, thereby avoiding delay in development and growing our economy. So I appreciate you very much.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from Wyoming, Mrs. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman, and thank you, one and all, for attending today.

Mr. Ferrell, a question for you. About how much money and manpower has the State of Wyoming put into on-the-ground conservation and wildlife management?

Mr. FERRELL. Thank you for the question, Congresswoman. Well, just annually, for example, the Game and Fish's budget is about $60 million a year. All of that is essentially going toward conservation. The Wyoming Wildlife and Natural Resources trust fund has put a tremendous amount of money in just sage grouse alone. In the last 3 years, I think the number is over $100 million between matched money by the private sector in the State of Wyoming and, for example, the Natural Resource Conservation Service's sage grouse initiative.

So, we are talking numbers that we have never seen before in my profession being committed by a State to a single species.

Mrs. LUMMIS. And how much money, roughly, is in the Wyoming Wildlife and Natural Resources trust fund?

Mr. FERRELL. Oh——

Mrs. LUMMIS. That is—I will get that from you later.

Mr. FERRELL. I could get that for you later.

Mrs. LUMMIS. OK. What about other stewardship conservation groups and volunteer organizations? Do they add anything to the effort?

Mr. FERRELL. Absolutely.

Mrs. LUMMIS. Let me ask you about some of those, if I could, sort of yes or no. Does the Rocky Mountain Elk Foundation do on-the-ground conservation?

Mr. FERRELL. Absolutely.

Mrs. LUMMIS. And do they help you, in your capacity as Wyoming's Endangered Species Act coordinator with on-the-ground recovery?

Mr. FERRELL. They do. They are primarily focused on elk, but they are looking at landscape-scale projects that help endangered species, as well.

Mrs. LUMMIS. What about the Conservation Fund?

Mr. FERRELL. They do, as well. They help fund some of those conservation easements that I have spoken about regarding sage grouse.

Mrs. LUMMIS. What about the Wyoming Stock Growers Land Trust?

Mr. FERRELL. Very, very active in conservation. Also in the sage grouse arena.

Mrs. LUMMIS. Do you know if the Montana Land Reliance, the Colorado Cattlemen's Ag Land Trust, the California Range Land Trust participate in conserving species, along with ecosystem efforts?

Mr. FERRELL. I am not familiar with what those groups are doing.

Mrs. LUMMIS. OK. What about the Center for Biological Diversity? Has it done actual conservation work on the ground in our State?

Mr. FERRELL. Not to my knowledge.

Mrs. LUMMIS. What about the Natural Resources Defense Fund, the NRDC?

Mr. FERRELL. Again, not to my knowledge.

Mrs. LUMMIS. How about WildEarth Guardians?

Mr. FERRELL. Same.

Mrs. LUMMIS. No on-the-ground conservation work?

Mr. FERRELL. Not that I know of.

Mrs. LUMMIS. In our State. Do you know if they have done—did they do any in Arizona, when you were in Arizona?

Mr. FERRELL. No.

Mrs. LUMMIS. I have a question about grizzly bears. Was the grizzly bear at one time—first of all, is it listed as an endangered species?

Mr. FERRELL. It is listed as threatened.

Mrs. LUMMIS. Threatened. At one time was it considered recovered under the initial breeding pair per land area recovery criteria?

Mr. FERRELL. It was delisted in 2007 and put back on the list through litigation in 2008.

Mrs. LUMMIS. And was it under a different set of criteria? Why, when it was recovered under initial criteria, was it subsequently put back on a lesser level of listing, but nevertheless a listing level?

Mr. FERRELL. The downlisting from endangered to threatened I believe happened a long, long time ago. I couldn't comment on that.

Mrs. LUMMIS. You mentioned seven suggestions that you had for this Committee in your testimony. You also discussed two of them, litigation and climate change modeling—you went into some detail on those. Could you give us a couple more examples that you would like to highlight of those seven suggestions in your testimony?

Mr. FERRELL. I would be happy to. One of the things is this definition of significant portion of the range. It is kind of a technical analysis, but what had happened in 2011, there were two court decisions primarily that said you can't delist on administrative boundaries any more. The frustration with that is that administra-

tive boundaries is where regulatory mechanisms come from. That is the source of a regulatory mechanism. And yet, regulatory mechanisms are often cited, including those cases, as what is being inadequate, causing the relisting of a delisted species.

But aside from that, the current draft definition of SPR doesn't allow one to use some of the tools that are most important to us in conserving threatened species, those being 10(j) designations and 4(d) rules.

Mrs. LUMMIS. So 10(j)—my time has expired. If we go into a second round, I would like to explore non-essential experimental populations. Thank you.

The CHAIRMAN. Or we will get a written answer to those remarks.

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

Mr. COSTA. Thank you very much, Mr. Chairman. I have a lot of questions, can't cover it all, I will submit them for the record.

I want to talk first about 50,000 feet, and then maybe a little more specifically to some California issues. When I was here earlier in the hearing there was some discussion about recommendations that the environmental community has provided to reform the Endangered Species Act. Did either of our two professors here provide a listing of what those recommendations are?

Mr. PARENTEAU. I think the most extensive discussion was during Senator Kempthorne's tenure. That is the last time that I recall that there was a serious effort——

Mr. COSTA. Do you have a series of recommendations?

Mr. PARENTEAU. For how the Act should be changed?

Mr. COSTA. Yes.

Mr. PARENTEAU. Yes. It needs a recovery mandate, it needs a dedicated fund for recovery. It needs to do multiple species listings. It needs to explore—because I don't think we are ready to write a law yet—how you would get to an ecosystem level approach to conservation and get away from this one-species-at-a-time approach. I don't think we are ready to write a law——

Mr. COSTA. Well, it has been a criticism for a long time, one species at a time. And now, looking at the entire ecosystem, certainly places that I am familiar with in California, and I think that is a result of—let me drill down a little further.

We have arguments all the time about best use of science. And I don't know, if some others of you would like to opine, please chime in. The science is always changing. We get better at it. And, of course, there are different interpretations of the science that are used by folks of various philosophical persuasions. So how do you determine what, in fact, is the best science, when it is continuing to evolve, and we learn more? Dr. Noss?

Dr. NOSS. The weight that the approach that scientists themselves use is evidence-based research. Basically, it is the weight of evidence. Science does keep changing, but at any moment in time there is not necessarily a consensus in the pure sense of that word, but there is weight of evidence favoring one point of view over the other. This does change through time, but it changes relatively slowly. I think that recovery plans should be revised when the weight of evidence for a new approach changes.

Mr. COSTA. Yes, but in terms of the practical application of that, then we get muddled into lawsuits, which are very lengthy, very costly, and, at the end of the day, I don't think do much to resolve the restoration of any particular species.

Dr. NOSS. I think it depends on defensibility of the change. If the change is arbitrary and capricious, that is one thing. But if the change is based on the best available science at that time, on the weight of evidence——

Mr. COSTA. What do you think about the——

Dr. NOSS [continuing]. To not change is irresponsible.

Mr. COSTA [continuing]. When you are trying to evaluate best science, and we talk about reasonable and prudent alternatives and the application of reasonable and prudent alternatives to create flexibility, when there are differences as it relates to the science?

Dr. NOSS. Science seldom points to one option as the only option that might succeed. There is generally options that might——

Mr. COSTA. I concur with you, but we have—in projects that my colleague, Mr. McClintock, was talking about, we have a—there are—I concur with you, there are a lot of knobs here that you can turn to try to——

Dr. NOSS. Exactly.

Mr. COSTA [continuing]. Impact an ecosystem. But in these water fights that we handle, we continue to use one knob and ignore all the other factors that are impacting the ecosystem and particular species. But it is done for a particular agenda, and for a purpose. And then it makes it very, very difficult to get folks to agree.

Let me ask you another question, because, I mean, we understand how the game is played. But a noted environmentalist was making reference to the Keystone Pipeline, about mitigation for the Keystone Pipeline. And I thought he was very forthcoming in his comment. He says, "There is no mitigation that can be done for the Keystone Pipeline," which, by the way, I support. And he says, "We just don't believe we ought to continue to foster any enhancement of fossil fuel. And so, if we don't build the Keystone Pipeline, it will have that, we hope, that effect, and therefore, no mitigation is acceptable."

I mean my view is we have hundreds and thousands of miles of pipelines in this country, and if we can't build that, gee, safely, we ought to give up, because you can mitigate for it. Now, at least if the agenda is we don't want any fossil fuel, and we want to discourage it, then let's not talk about mitigation, because that is not the issue.

Let me ask you one last question before my time runs out here. Restoration versus extinction. Species have been going extinct for hundreds and millions of years. But now, of course, it is man's impact on it. When do we make an ethical judgment as to what the contributions are that man is contributing to an extinction versus the natural course of evolution?

Dr. NOSS. There are species that are on their way out naturally, but that is a very slow pace. As Mr. Parenteau mentioned, science is overwhelming in support of the idea that extinction rates today are hundreds to thousands of time the natural rate, which are referred to as the background rates.

So, yes, there are some species that, if we did nothing either for them or against them, they would slip away over periods of decades, centuries, millennia. But the kind of extinction rate we have now, thousands of species going extinct every year, is way out of the ballpark. We haven't seen anything like it for 65 million years.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman, and I would like to thank our panel for taking the time to be here.

Mr. Jankovsky, I would like to ask a couple of questions out of our area. You have raised concern over the technical team report on the Greater Sage Grouse. How does that model that they are putting forward out of the BLM, how does that fit the topography of Garfield County in Colorado?

Mr. JANKOVSKY. Well, as far as topography, it doesn't fit at all. The technical team report was done and the studies were done primarily in Central Wyoming, where you have miles and miles of rolling sage brush. And in our part of the State we have high plateaus with the sage brush on top, with valleys with a mixture of aspen, conifer, juniper, pinyon forest. So it is more of a patchwork.

Mr. TIPTON. So, essentially, your—Mr. Daines had talked about up in Montana we have very different topography, but apparently the BLM is trying to institute a policy of one size fits all.

Mr. JANKOVSKY. The BLM is trying to institute a policy of one size fits all. That is correct.

Mr. TIPTON. Now, one thing that concerns me, as part of your testimony you talked about some data that has been withheld. By the way, how much money has Garfield County spent? Not Federal money, but Garfield County money residents spent.

Mr. JANKOVSKY. Compared to the State's, it is not a lot. But we have a five-member team, besides myself, working on sage grouse. We have our director of community develop as the quarterback, so to speak, of that team. We have hired four——

Mr. TIPTON. And what is the dollar amount of the——

Mr. JANKOVSKY. About $200,000.

Mr. TIPTON. That is a pretty big number in Western Colorado, isn't it?

Mr. JANKOVSKY. That is a significant amount of money, yes.

Mr. TIPTON. OK. So you are putting forward local people's money to be able to try and address a national agenda that is being put forward. And you have requested additional data to actually try and help move the ball forward. What data have you not received? Why are they not trying to help you achieve that goal?

Mr. JANKOVSKY. Well, we have asked Fish and Wildlife for the historical count data from 1965 to 2007, so we can get an idea of how many sage grouse are actually out there, and how they were counted. The latest number we had from—I think it was 2007 was 535,000 sage grouse, which is a lot of birds. And also, between 2001 and 2005, I believe, 200,000 birds were harvested through hunting. So, I guess I am concerned that this may be a little bit of an abuse of——

Mr. TIPTON. Let's understand this. The Federal Government is going to be listing the sage grouse and is issuing hunting permits.

Mr. JANKOVSKY. Well, the States are issuing hunting permits.

Mr. TIPTON. And States are issuing the hunting permits.

Mr. JANKOVSKY. Yes.

Mr. TIPTON. A little bit of a conflict in terms of some of the policy that is going to be there.

Let's look at this from maybe that little broader view. Western Colorado, approximately 70 percent of the land is either Federal, State, or tribal lands right now. Some of the critical habitat that is going to be proposed, does that encroach onto private lands, as well?

Mr. JANKOVSKY. Yes. In our county there are 220,000 acres. And of that, 80,000 is Federal land and about another 40,000 is private lands with Federal minerals. So it is about 50/50 in our county.

Mr. TIPTON. So when that private land is moved into potential critical habitat, is that going to impact the ability of struggling farmers and ranchers to be able to grow crops, to be able to raise animals?

Mr. JANKOVSKY. Yes, it will.

Mr. TIPTON. It will. What was the impact when we reintroduced some of the predators—riparian, wolves, and the like—in terms of impact on the sage grouse species? Any idea?

Mr. JANKOVSKY. Well, the impact for us is not so much reintroduction as it is primarily ravens and coyotes, they are the primary predators in our area.

Mr. TIPTON. Here is one of the issues I think I have with the broad brush stroke coming out of the BLM. You talked about some of the numbers that are going to be over in Garfield County. Let's take 100,000 birds, just as a theoretical example. That would be recovery, let's say, in Garfield County. You get 110,000. Based on the current BLM policy, are you still going to be restricted?

Mr. JANKOVSKY. If——

Mr. TIPTON. You would be, wouldn't you?

Mr. JANKOVSKY. If the policy goes through as it is through the NTT report, we would be restricted.

Mr. TIPTON. So, effectively, what we are doing is we are creating a policy where we can't win, even when we win. They will not be delisted in Wyoming or in Montana or in portions of Colorado, once we have actually achieved recovery. Is that accurate?

Mr. JANKOVSKY. That is accurate, yes.

Mr. TIPTON. Does that provide a real challenge for you, when you are trying to be able to provide for your county, and particularly when we see some of the unemployment rates in our area?

Mr. JANKOVSKY. Yes, it does. If the NTT report went through, or if the bird was listed, it would harm our county's economy, and we would lose jobs, we would lose tax revenues and royalties, as well.

Mr. TIPTON. Is BLM trying to do anything to help resolve these conflicts with you?

Mr. JANKOVSKY. It has taken a while, because we have been so persistent. They have actually started to listen to us, to some extent. So we are working through the system.

Mr. TIPTON. I yield back, Mr. Chairman.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman. Dr. Noss, you have mentioned several times today that it has been amazing that the

ESA has been as successful as it has been. Why do you keep repeating that? Can you further elucidate us on what you mean by that?

Dr. NOSS. What I mean is very simply that the threats that led to those species being listed in the first place have not abated. And most of them have actually gotten worse since the Endangered Species Act was passed and those species were listed.

So, the other part of the question is that we haven't had the money given to the Fish and Wildlife Service and the National Marine Fisheries Service to recover species as the Act at least intends in spirit.

Mr. LABRADOR. So——

Dr. NOSS. It doesn't give clear guidance, as Mr. Parenteau mentioned.

Mr. LABRADOR. So you are asking for more money. Could the answer just be that nature takes care of itself, that maybe we don't know more than nature does?

You know, your answer is to come from up on top, telling nature what it needs to do and telling humans what they need to do, as opposed to just realizing—and like Mr. Costa just asked—that some species are going to go and some species are going to stay, and that is just a regular evolutionary process. And you don't know more than everybody else——

Dr. NOSS. This is way out of the ballpark of natural evolution.

Mr. LABRADOR. Yes.

Dr. NOSS. It is basically—you know, nature is still out there, but it has been overwhelmed by the human population and our consumption.

Mr. LABRADOR. OK. You said, "According to the"——

Dr. NOSS. They are not——

Mr. LABRADOR.—"Society"—you made a statement on June 19, 2004 that, "The collective needs of non-human species must take precedence over the needs and desires of humans." Do you still stand by that?

Dr. NOSS. I do.

Mr. LABRADOR. Mr. Parenteau, in 1998, a William and Mary Law Review article entitled, "Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction," you wrote that, "Humanity threatens to turn the earth into a planet of weeds." Do you still stand by that statement?

Mr. PARENTEAU. That is what the science suggests.

Mr. LABRADOR. That is what the science suggests? And have either of you received or represented plaintiffs that have received attorneys fees paid for by the Federal Government?

Mr. PARENTEAU. I have.

Dr. NOSS. Have I received what kind——

Mr. LABRADOR. Payments or represented plaintiffs that have received attorneys fees from the Federal Government.

Dr. NOSS. No.

Mr. LABRADOR. How many ESA lawsuits have you personally been party to, Mr. Parenteau?

Mr. PARENTEAU. Representing interests?

Mr. LABRADOR. Yes.

Mr. PARENTEAU. Didn't do a calculation before I came here, but——

Mr. LABRADOR. Approximately.

Mr. PARENTEAU. Over 40 years? My goodness. Twenty?

Mr. LABRADOR. OK, Mr. Parenteau, will the Center for Biological Diversity or any other groups you represented endorse any legislation that would require public disclosure the amount of money it receives from taxpayers through EG and the judgment fund?

Mr. PARENTEAU. That was for me?

Mr. LABRADOR. Yes.

Mr. PARENTEAU. I didn't get the question. Do they have to report it? Yes. It is 501(c)(3) 1099 form.

Mr. LABRADOR. And they report currently how much money they receive from the Federal Government?

Mr. PARENTEAU. Yes, they do.

Mr. LABRADOR. OK. In 2004 you authored an article for the Duke Environmental Law Policy Forum entitled, "Anything Industry Wants: Environmental Policy Under Bush II," in which you lamented that the Bush Administration was using sweetheart deals routinely to make major policy decisions without public participation and congressional review. You remember that article, I assume.

Mr. PARENTEAU. I certainly do.

Mr. LABRADOR. You say as much in your testimony about sue-and-settle. But today you are saying that sue-and-settle is an old story. Yet I am wondering why you decry this tactic in one instance and you defend it in another instance.

Mr. PARENTEAU. I decry it in both. And some of the sweetheart deals in the Bush Administration were turned aside by the courts. So that was my reason for saying that I don't think you can charge the courts with an act of collusion in these cases.

One case in particular involving wilderness study areas in Utah comes to mind. And there was a sweetheart deal, there was no public participation. And the Bush Administration was about to cede Federal rights to millions of acres of land in an agreement that was about to be entered by the court. Environmental groups got wind of it, intervened, and stopped it.

So, I am consistent in saying I don't think the courts are handmaidens in implementing sweetheart deals engineered by interest groups on either side, whether it is industry or environmental groups. I don't think the court is doing that——

Mr. LABRADOR. Shouldn't the States and citizens that will actually have to bear the burden of these litigations and these listings have an opportunity to weigh in on these decisions?

Mr. PARENTEAU. They have that opportunity.

Mr. LABRADOR. Now, do you feel that this Administration is—going back to the Utah example that you just raised, do you feel that this Administration's Interior settlements with CBD and WEG, without any public involvement, are similarly outrageous, or that they constitute the camel's nose under a tent, as you have said about the Bush Administration?

Mr. PARENTEAU. No, because those agreements set a time table for decisionmaking. They make no decisions whatsoever about whether species will be listed or not. There will be ample oppor-

tunity for public review and comment in the rulemaking process that has to be done for each and every one of the species——

Mr. LABRADOR. So when the ultimate decision isn't in accordance with your stated views, then it is OK. But when it is not in accordance with your stated views, then it is not OK. Thank you.

Mr. PARENTEAU. Well, that is a misrepresentation of what I said.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. And I appreciate the witnesses being here. Having been a former judge, having been to conferences with hundreds and hundreds of judges, having both Federal and State judge friends, I find it interesting somebody could be involved in the litigation process and, like under Bush, be concerned about the sue-and-settle process, even though some of the litigation or the proposed judgments might be turned back, and be just indignant that it is an insult to our judges to say that they would rubber-stamp what the parties propose.

I would go through proposed judgments, but I had so many judges, both State and Federal, who would say, "If the parties agree, then sign the judgment and let it go." And obviously, I am glad Dr. Parenteau is here so that he could find out that there are many judges that feel that way. If the parties agree, sign the judgment, let it go. I am glad that in your 20 cases you have not been exposed to that, but I can tell you it does happen.

And then also, I love hearing such optimism, those who want to preserve species are open to reform of the Endangered Species Act. And I thought that was the case too, until I became a freshman in Congress in 2005 and 2006, and I saw our Chairman, Richard Pombo, doing everything he could to reach out on both sides of the aisle to people on both sides of issues, more than two sides, "Give us your input," and he tried to take that, and we tried to craft an Endangered Species Act reform that everybody could be happy with. But some of us were concerned that we had only been able to delist less than 1 percent of those that we were charged with trying to preserve, and that surely there is a better way.

And when we had information from land owners who said, "You will take my land and never give me a dime in return, you take it by saying I can never use it again once a species is listed as endangered," so we thought, OK, a good thing here, maybe a good compromise, let's pay the land owner so they wouldn't be tempted to what we heard was a shoot, shovel, and shut-up type of approach to the endangered species that, if somebody was going to go broke if an endangered species was found on their land, they would rather kill the endangered species, bury it, and keep their mouth shut than lose their livelihood and their family go broke and their local community have no tax income coming in.

So, we thought, gosh, maybe—all right. This would be a great way to reach out. Let's have the Federal Government pay people for their land, because it sure seems like a taking. I was shocked, as I am sure you would have been, if you had been trying to reach out on both sides of the aisle, as I tried to help Chairman Pombo. He had me come over to his office. "Let's call people. Let's see what we can work out." And there were people who did not want a reform whatsoever.

And on the night before the vote, really trying to reform, people we had reached out to, we had included their amendments trying to work out, they crafted a new deal, and were proposing that, and said, "This would be much better." It was a slap in the face. And not only that, the Sierra Club and all these other groups moved into his district and started crafting lies about the man so they could defeat him for having the nerve to try to reach some kind of agreement on endangered species reform.

We have preserved some species, but I would tell you we can do so much better than we have if people would get off their ideological horses and get down on the ground with the rest of the local people and the local government. Not just State and Federal that do some sweet deal, but the local land owners.

And don't think that we can do so much better if we never have private property again. I am telling you this—maybe I should have testified, because obviously I have more experience with this than people that have been in the courtroom or—and not known how judges actually work things, or not known what it was to actually craft a deal, Mr. Chairman. But I saw a good man destroyed because he reached out and he tried to reform the Endangered Species. And I hope it doesn't happen here, because we need to preserve better.

And this final comment, Mr. Chairman. I am struck by how many people, liberal luminaries, say they believe in evolution and then spend the rest of their life trying to prevent it. Thank you, I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Florida, Mr. Southerland.

Mr. SOUTHERLAND. Thank you, Mr. Chairman. I know that we have heard a lot today regarding the partnerships. I know, Dr. Noss, you have talked about those and have been in favor of those, and say that there are many of those partnerships between Federal and State governments working well in the implementation of the Endangered Species Act.

I know that—I wanted just to ask a question that I have written down here. You mentioned the need to allow States to voluntarily manage listed species. This is to Mr. Ferrell. You mentioned the need to allow States to voluntarily manage listed species. This management is going on right now between the Fish and Wildlife Service of Florida and the Wildlife Conservation Commission. In fact, in a recent joint column authored by individuals from both agencies, it was called the first of its kind.

However, the Center for Biological Diversity recently filed its intent to sue over this arrangement. When a Republican Governor and the Obama Administration can agree on such an approach, yet is sued by an entity whose headquarters are not even in Florida, doesn't that speak volumes to others who want to try to engage these partnerships that obviously Dr. Noss has agreed with are so beneficial?

Mr. FERRELL. Absolutely. I mean there is a huge chilling effect for the rest of us, if we can't enter into agreements that are providing constructive conservation without being sued.

Mr. SOUTHERLAND. Dr. Noss, you are familiar with this. I mean, obviously, you are from Florida.

Dr. NOSS. Yes.

Mr. SOUTHERLAND. So, I mean, you are familiar with this agreement. Do you approve of this agreement?

Dr. NOSS. I have read the agreement. It has been a few months. There are some parts in it that I am worried about.

You have to remember, the Center for Biological Diversity—for one thing, I don't agree with everything that they do, but they have played an extremely valuable role. There is a watchdog. And I think, in the Florida case, those few elements of the cooperative agreement that they see as opening up too many loopholes, they are concerned about those. And I would gather that is why they have sued, although I have not talked to anybody in that group about——

Mr. SOUTHERLAND. But, I mean, are you in favor of the—I mean——

Dr. NOSS. I am in—definitely, in principle, in favor of the cooperative agreement. And most of it that I have read I think is beneficial, yes.

Mr. SOUTHERLAND. I know that—I would like to ask Mr. Parenteau. I know you are an advisory board member to the Center of Biological Diversity. And I know that Mr. Labrador questioned you on your history of lawsuits and so forth. Did you, in your capacity as a board member, did you advise the Center for Biological Diversity, to pursue this litigation that obviously Dr. Noss seems to agree with?

Mr. PARENTEAU. No, I did not.

Mr. SOUTHERLAND. So you didn't have any—you didn't weigh in on this at all.

Mr. PARENTEAU. No, my role is very limited to the climate work they do.

Mr. SOUTHERLAND. OK, OK. I know that it appears to me to be almost litigation thuggery when you have an opportunity to—there are so many limited resources, both at the Federal and the State level. I know, Mr. Parenteau, you mentioned that we need more resources. I think the American people would say that the Department of Justice and the IRS and HHS have had plenty of resources, that resources aren't their problem. It seems to be an integrity issue.

I am amazed, as I sit here in this Committee and we talk about the Forest Service and all the money they have, and all the lands they have, and yet we have more timber rotting in the national forests than we harvest. And as a result, every year we see homes, hundreds upon hundreds of homes, go up in flames because of mismanagement.

We see NOAA move $300 million out of research to put a satellite into space—obviously, with no guarantee that we can even get it there, and then come back and ask for more research dollars, and saying that we don't have good data.

And yet, artificial reefs planted in the Gulf of Mexico that reef fish call home are not counted in fish surveys because they are not considered natural habitat. However, when you bring that fish over your transom, that fish is automatically counted for sure against your bag limit.

You look at the GSA and you look at the billions of square foot of buildings that are mismanaged or vacant and crumbling and turning areas into blight.

You know, I don't see the money problem here. What I see is a Federal Government that, in every area you look at, is too large. It cannot be managed. And I would agree that it can't be managed, no matter who is in charge. It is too big. And yet, you know, we have opportunities for partnerships that make sense. And yet we have organizations like the one, sir, that you sit on as an advisory committee, that want to continue to make sure that we don't take advantage of these kind of partnerships.

I have to tell you, it is very difficult to consider some of the things you say, when I know you have been a part of these lawsuits. I mean it is amazing. If the money we have is limited, then clearly, to gum up the system through the litigation thuggery, as I made reference to, is not productive. Unless, obviously, your vision is different than common sense and efficiency. So——

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from California, Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. You know, I come here as a freshman from a background in farming in Northern California, and our family has been at it for about 82, 83 years now. And so our deal is that we preserve our assets, we preserve the land. And we use it well and wisely, and it has been successful all this time.

So, we like the species, we take care of them. If there is a gopher snake going across our dirt road, you stop and wait for it to go across, because he has a part in the ecology, too. There is a mother mallard going across the county road there—for some reason the water on the other side of the road is better on this side, she wants to take her baby ducklings and amble across the road—you stop your truck so she can get across, maybe flag other people down so they don't run over the baby ducks. So, we are part of this whole ecology there, and we do like to care for and preserve it, as farmers. It is smart, and it is the right thing.

But we get hit with all the different agencies and all the different groups coming after us all the time, suing. My district is very rural, so we have timber, we have mining, we have agriculture, farming and ranching. They are good people, they just want to figure out how to get along and comply. People have been farming and ranching 160 years in some of these areas. And all they get is yet another alphabet soup of regulators coming in and changing the rules on them. They put in fish screens, they re-engineer their waterways. They put up fences along creeks to keep the cattle out. They do all these things, and it is never good enough.

So, what you have here is a trust problem. You have an issue where they see yet another agency showing up with a badge and a gun, trying to have a dialog with them, and all they get is more regulations and even threats. When I see something like this here that says maybe we need to do a mega-listing at one time, you know, 21 species in Texas, 30 in Florida, 24 in California, 69 in Hawaii—we might as well just write off Hawaii, as far as human activity—that sort of stuff makes people shudder, as to the idea that

they are going to continue doing any kind of human activity. The United States of Habitat Preservation, the way it goes.

And then let's look at the Endangered Species Act success for 40 years now. When you have a less-than-3 percent—perhaps even 1 percent recovery after all the tens of billion dollars spent by government, and probably the hundreds of billions of dollars, maybe trillions, of economic activity that has been lost over that 40 years, do we call that a success? Because there is always a balance between cost and effect, cost and benefit ratio. You might say, well, any species can't be lost, because that is too high a cost.

Well, we were talking about the natural inclination things a while ago, and a gentleman mentioned over 65 million years. I don't know how we can track data of 65 million years of species recovery and loss when, at best, we have really only been doing this to the intensity we have for maybe for 40 or 50 years with data—questionable data in a lot of cases, at that. How in the world are we supposed to really know what the trends are for more than the last 30 to 40, 50 years of species increase or decrease, as opposed to thousands of years, since Europeans have only been in North America for a couple hundred years.

Has anybody really kept track of this? Do we really know? But we can do the best we can. And so, if we work with the stewards of the land, the farmers, the ranchers, the timber people, the miners—for products people still need and are still going to have to come from somewhere, we are not using any less paper and wood products yet. The forests are practically shut down in the Western States, in California. We would rather watch them burn, I guess. And then, when you have a burn, you have a catastrophe that, as they are so overloaded with growth that they become moonscapes afterwards with the erosion, all the species are out there dying in the fire. Is that successful? Are we getting there with what we are doing? We need to take a really big relook at how we do business here.

And so, we have folks like—I can go to an article that was just published in Forbes a couple days ago. If I am being redundant with this, please forgive me, I was in an ag meeting. But it was in Forbes on the 27th about the Center for Biological Diversity. And if you don't mind, I am just going to quote a little bit here.

The quote is by a gentleman named Mr. Kieran Suckling from the CBD in talking about organizations' hiring of activities who lack science degrees. Does that hurt the CBD's effectiveness, he is asked. He says, "No. It was a key to our success. I think the professionalization of the environmental movement has injured it greatly. These kids get degrees in environmental conservation and wildlife management, come looking for jobs in environmental movement. They have bought into resource management values and multiple use by the time they graduate. I am more interested in hiring philosophers, linguists, and poets. The core talent of a successful environmental activist is not science and law, it is campaigning instinct, which makes it more successful in the battle against people that produce."

So, it isn't really a scientific-based thing. They don't want the scientists. They want people that can campaign and fight against

what we are talking about with the people in rural America. And I can go on and on about that.

But we to—just a big shift in the way we are thinking about that. Because if people in rural America that are the producers, they don't trust you all any more in the environmental movement, or a lot in the agency movement. We want to be able to help and be cooperative, but we can't under these rules.

The CHAIRMAN. The time of the gentleman has expired. I want to thank the panelists for being here for this hearing, these 2½ hours, and I want to thank all of the Members on both sides of the aisle for their participation.

I just want to give you my impression of what I heard today. First of all, I heard, as I stated earlier, nobody here wants to see a species go extinct. That stands to reason. But what apparently the issue is in how you attain that. And what we heard on this panel is a number of ways it is being done on the local level, whether you are talking about the State level, the county level, or the tribal level, there is an effort in order to make sure that species do not go extinct.

And even, we found in cross examination, or some questioning, particularly from the gentlelady from Wyoming, about groups that are involved with that. And the irony, at least as it relates to Wyoming with the questioning that Mrs. Lummis had, was there are private groups that are involved with this. But the groups that are involved in the litigation that we see, especially this major, major settlement case, they are not involved in recovery. At least there is no evidence, at least in Wyoming, with the testimony we heard. And yet, that seems to be a problem.

Now, on the other hand, I'm very pleased to hear that the Act is basically flawed because there is no recovery aspect to it, said in testimony of Mr. Parenteau. I am very pleased to hear that. Now, the Act hasn't been reauthorized for 25 years. That is a quarter of a century. My impression—Mr. Gohmert, I think, said it in a different way, but I certainly agree with his remarks—is that this is politically driven. And I will say the environmental left does not want to sit down.

So, Mr. Parenteau, I am going to give you some homework. You stated in testimony here that you think there are some environmental groups that would be willing to sit down and look at the recovery aspect and some of the other things that you mentioned. I think there is probably some common ground. We heard that from the other side of the aisle, certainly from our side of the aisle. So my homework to you, Mr. Parenteau, within the next 30 days, would you give me a list of those environmental groups that would be willing to sit down?

Mr. PARENTEAU. With the precondition that the Act as it is is not up for weakening.

The CHAIRMAN. Listen.

Mr. PARENTEAU. Strengthening, that is the key.

The CHAIRMAN. Listen, the——

Mr. PARENTEAU. Strengthening.

The CHAIRMAN. Well, the idea is—see, this is the thing that bugs me. All the sudden there is a precondition, and all I am asking you, really, is to say which environmental groups will want to sit down.

Mr. PARENTEAU. I will.

The CHAIRMAN. And you already—and so you have to have a precondition before we even agree on something as basic as that?

Mr. PARENTEAU. Yes——

The CHAIRMAN. There is a problem.

Mr. PARENTEAU [continuing]. Because they don't trust this Committee to do what is needed for recovery. That is why.

The CHAIRMAN. Wait a minute, wait a minute. The premise that we said and what we heard all the way through is nobody wants to see a species go extinct. We want to recover a species. Who is opposed to that?

Mr. PARENTEAU. It is not what we say, Mr. Chairman, it is what we do. And what we are doing is driving species——

The CHAIRMAN. Mr. Parenteau, I have the gavel here, and I am giving you homework. And if you want to respond to that, that is fine. That is fine. In fact, I welcome it. But to suggest, when I am just simply asking you for the group that would want to talk, and you come up with conditions, and then accuse this Committee of not wanting to—or of lack of trust, defies logic to me.

I was in the Congress—not on this Committee at the time—when Mr. Pombo went through this. And I know Mr. Pombo very, very well. He got annihilated in the political process. Nobody can deny that.

All I want from you is, within 30 days, you give me a list of environmental groups that would be willing to sit down and talk. And maybe, maybe, in the near future we can reauthorize this Act to focus on recovery, because that is what the intent, in my view, was of the Endangered Species Act right from the get-go.

Again, I want to thank all of you, particularly those that came, and particularly those from the Northwest, Ms. Brigham, especially testifying on the record here of your efforts to recover species and doing it with collaboration with people that are affected by that.

With that, if there is no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 12:36 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

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

The title of this hearing suggests that state and local governments have forever been successful stewards of species, and that federal protection of biodiversity under the Endangered Species Act has only produced protracted litigation. Nothing could be farther from the truth.

Before the ESA granted federal protection to imperiled fauna and flora, state wildlife management policies had pushed species like the American alligator, gray wolf, and grizzly bear to the brink of extinction. Now, because of the ESA, those species and many others have either recovered, or are on that path.

All Americans, no matter if they live in Springfield, Massachusetts or Springfield, Missouri; Portland, Maine or Portland, Oregon, have a stake in conserving biodiversity. From this bank of genetic material we can draw cures for diseases, industrial innovations, and improvements to agriculture to enhance our economy and our quality of life.

The ESA guards this bank, and ensures that rather than drawing down our principle, we will accrue interest by making economic development compatible with the survival and restoration of species. Under the ESA, state and local governments can assist in, and even lead these efforts within their borders.

However, animals and plants do not recognize political boundaries: we need the ESA because we need assurance that when a species moves from one state to an-

other it receives a consistently high level of protection and not disparate treatment that harms its chances for survival. States lack the ability to address wildlife conservation outside their borders, as well as the ability to appropriately account for the legitimate species conservation interests of people who live in other states.

The ESA is one of the most effective and popular environmental laws not only in our country, but in the world. Even in the face of massive and ongoing loss of habitat to haphazard development, 99 percent of species afforded the Act's protections over the past 40 years are still surviving today. Scientists estimate that more than 170 species would have gone extinct over that period if not for the ESA. We need to keep the ESA strong and give appropriate support to the federal agencies that are working diligently with states to facilitate development projects while accounting for biodiversity conservation.

○