AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

HEARING TO REVIEW THE IMPACTS OF ENDANGERED SPECIES ACT AND RELATED LITIGATION ON NATIONAL FOREST SYSTEM MANAGEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

OF THE

COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

MARCH 26, 2013

Serial No. 113–10

Printed for the use of the Committee on Agriculture
agriculture.house.gov

U.S. GOVERNMENT PRINTING OFFICE

87–400 PDF WASHINGTON : 2014

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 AGRICULTURE

FRANK D. LUCAS, Oklahoma, *Chairman*

BOB GOODLATTE, Virginia, *Vice Chairman*
STEVE KING, Iowa
RANDY NEUGEBAUER, Texas
MIKE ROGERS, Alabama
K. MICHAEL CONAWAY, Texas
GLENN THOMPSON, Pennsylvania
BOB GIBBS, Ohio
AUSTIN SCOTT, Georgia
SCOTT R. TIPTON, Colorado
ERIC A. "RICK" CRAWFORD, Arkansas
SCOTT DESJARLAIS, Tennessee
CHRISTOPHER P. GIBSON, New York
VICKY HARTZLER, Missouri
REID J. RIBBLE, Wisconsin
KRISTI L. NOEM, South Dakota
DAN BENISHEK, Michigan
JEFF DENHAM, California
STEPHEN LEE FINCHER, Tennessee
DOUG LAMALFA, California
RICHARD HUDSON, North Carolina
RODNEY DAVIS, Illinois
CHRIS COLLINS, New York
TED S. YOHO, Florida
VANCE M. MCALLISTER, Louisiana

COLLIN C. PETERSON, Minnesota, *Ranking Minority Member*
MIKE MCINTYRE, North Carolina
DAVID SCOTT, Georgia
JIM COSTA, California
TIMOTHY J. WALZ, Minnesota
KURT SCHRADER, Oregon
MARCIA L. FUDGE, Ohio
JAMES P. MCGOVERN, Massachusetts
SUZAN K. DELBENE, Washington
GLORIA NEGRETE MCLEOD, California
FILEMON VELA, Texas
MICHELLE LUJAN GRISHAM, New Mexico
ANN M. KUSTER, New Hampshire
RICHARD M. NOLAN, Minnesota
PETE P. GALLEGO, Texas
WILLIAM L. ENYART, Illinois
JUAN VARGAS, California
CHERI BUSTOS, Illinois
SEAN PATRICK MALONEY, New York
JOE COURTNEY, Connecticut
JOHN GARAMENDI, California

NICOLE SCOTT, *Staff Director*
KEVIN J. KRAMP, *Chief Counsel*
TAMARA HINTON, *Communications Director*
ROBERT L. LAREW, *Minority Staff Director*

SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

GLENN THOMPSON, Pennsylvania, *Chairman*

MIKE ROGERS, Alabama
BOB GIBBS, Ohio
SCOTT R. TIPTON, Colorado
ERIC A. "RICK" CRAWFORD, Arkansas
REID J. RIBBLE, Wisconsin
KRISTI L. NOEM, South Dakota
DAN BENISHEK, Michigan
VANCE M. MCALLISTER, Louisiana

TIMOTHY J. WALZ, Minnesota, *Ranking Minority Member*
GLORIA NEGRETE MCLEOD, California
ANN M. KUSTER, New Hampshire
RICHARD M. NOLAN, Minnesota
MIKE MCINTYRE, North Carolina
KURT SCHRADER, Oregon
SUZAN K. DELBENE, Washington

CONTENTS

	Page
Thompson, Hon. Glenn, a Representative in Congress from Pennsylvania, opening statement	1
Submitted report	52
Walz, Hon. Timothy J., a Representative in Congress from Minnesota, opening statement	3
Prepared statement	4

WITNESSES

Peña, Jim, Associate Deputy Chief, U.S. Forest Service, U.S. Department of Agriculture, Washington, D.C.	5
Prepared statement	6
Supplementary material	51
Larence, Eileen R., Director, Homeland Security and Justice, U.S. Government Accountability Office, Washington, D.C.	8
Prepared statement	10
Hopkins III, Alva J. "Joe", President, Forest Landowners Association, Folkston, GA	20
Prepared statement	22
Schildwachter, Ph.D., Greg, President, Watershed Results, Arlington, VA	24
Prepared statement	26

HEARING TO REVIEW THE IMPACTS OF ENDANGERED SPECIES ACT AND RELATED LITIGATION ON NATIONAL FOREST SYSTEM MANAGEMENT

TUESDAY, MARCH 26, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY,
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 1300 of the Longworth House Office Building, Hon. Glenn Thompson [Chairman of the Subcommittee] presiding.

Members present: Representatives Thompson, Tipton, Crawford, Ribble, Noem, Benishek, McAllister, Walz, Nolan, and Schrader.

Staff present: Brent Blevins, DaNita Murray, Debbie Smith, John Goldberg, Mary Nowak, Nicole Scott, Tamara Hinton, Anne Simmons, Keith Jones, Lisa Shelton, Liz Friedlander, John Konya, and Riley Pagett.

OPENING STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA

The CHAIRMAN. Good morning everyone. This hearing of the Subcommittee on Conservation, Energy, and Forestry to review the impacts of the Endangered Species Act and related litigation on National Forest System management will come to order. I want to thank everybody and want to welcome everyone to today's Subcommittee hearing which will focus on the impacts of litigation stemming from the Endangered Species Act and related laws. This Subcommittee has held several hearings examining ways in which Congress can ensure that the Forest Service is better able to manage our Federal, state and private forests, and today's hearing continues that effort.

Beginning last May, I had the privilege of serving on a Republican Congressional working group led by Chairman Doc Hastings of the Natural Resource Committee and Representative Cynthia Lummis examining a variety of issues concerning the Endangered Species Act. A copy of the final report has been distributed to all Members, and without objection it is going to be included in the record of this hearing.

[The document referred to is located on p. 52.]

The CHAIRMAN. I recognize that this Subcommittee does not have legislative jurisdiction over the Endangered Species Act. The interaction between the law and others within our jurisdiction as well

as the implications of this law for our foresters, our farmers and our private landowners is significant. The ESA was first enacted in 1973 to preserve, protect and recover key domestic species and has certainly enjoyed many successes. Forty years later as we have identified many strengths of the law, we have likewise identified many weaknesses. The working group report details many of these deficiencies and lays out a roadmap for what I am hopeful will be a bipartisan effort to review, to reform and to strengthen the law. Now, while any hearing on the Endangered Species Act could include a laundry list of items, today the panel will just focus its attention on issues related to the cost of litigation. One of the most frequent statutes used for litigation has been the Endangered Species Act. And during several of our hearings on forest management, a recurring theme among witnesses has been how frivolous litigation has delayed needed forest management activities.

Unlike many of our laws, the ESA includes a citizen supervision which authorizes citizens to enforce compliance with any provision of the Act. In a citizen suit, the court may grant an injunction and award attorney fees and litigation costs to any prevailing or partially prevailing party whenever the court determines such an award is appropriate. Now, citizen suits have been and continue to be a useful tool in checking the actions of the Executive Branch. However, these lawsuits can have far-reaching negative consequences when abused. Today we will examine how citizen suits have impacted our private and public forests.

Throughout the 40 year history of the Endangered Species Act, the Forest Service perhaps more than any other Federal land management agency has adopted policies and procedures which have greatly enhanced the scientific approach taken to manage resources under the Service's care. Now likewise, the Forest Service has gone to great lengths to improve the transparency in the public partnership and its decision-making process. Despite these tremendous efforts, the Service continues to be stymied by an increasing number of frivolous lawsuits. A recent study published by the *Journal of Forestry* examined 1,162 lawsuits filed against the Forest Service between 1989 and 2008. Though the Forest Service prevailed in most of these cases, I think we will hear today that neither the Service nor the supporting agency it relies on have any way of tracking the man hours and budgetary resources diverted from essential activities—and I would argue activities to make sure our forests are managed in a healthy way—to defend against these frivolous claims. This resource drain is a flagrant abuse of taxpayer dollars.

We will also hear from private landowners whose day-to-day businesses are negatively impacted by these lawsuits. When this Subcommittee tends to focus on the economic impacts of farmers and foresters, we would be remiss if we didn't also examine the implication of these lawsuits on the species that we are trying to protect. When the Forest Service is prevented from implementing timely management decisions to sustain forest health, how can we assume that we are complying with the goals of the Act to preserve, protect and recover threatened and endangered species?

This is a complex issue. I don't expect us to enact the necessary reforms overnight, but I expect the attention of the Subcommittee

and now look forward to the testimony of the witnesses who will share their expertise on this topic.

Thank you to the panel for taking time to be here today, and I now yield to the Ranking Member for his opening statement.

OPENING STATEMENT OF HON. TIMOTHY J. WALZ, A REPRESENTATIVE IN CONGRESS FROM MINNESOTA

Mr. WALZ. Well, I thank the Chairman, and I want to thank each of you for taking time out in helping us understand this complex issue.

This Committee has a long, storied history of bipartisanship. We have proven we can do it. We got a farm bill done when many didn't think so, and I am proud of that work we have done. But I would be remiss if I didn't say I am a little frustrated with today's hearing. The working group that the Chairman speaks about is an interesting and exciting proposal. But we received no invitation to join that, and there are many Members on this side of the aisle that would have gladly taken that opportunity because we understand the complexity of this issue. We certainly understand the impact and legitimate concerns on private property owners. And with 80 percent of those species being the species that we are talking about being on those private lands, we need partners that we are working hand in hand with. We also respect biological diversity.

And so our frustration is that this is a broad issue. There are jurisdictional issues here. Not being included in this ESA working group puts up unnecessary partisanship where it doesn't need to be. You are going to find sympathetic ears who understand this issue on both sides of this dais. My good colleague from Oregon is an expert on this and a champion of making this work right, and these are folks that want to be included.

So we have been rushed with this hearing. We had witnesses that we wanted to bring on this side and did not have the opportunity to do so. And again, it is not for the sake of trying to create a partisan issue. We simply weren't invited, Mr. Chairman. So hopefully in the future you would know many of us on this side have over the years developed strong, bipartisan credentials and a willingness to solve the issues with ESA.

I will submit my entire opening statement for the record. As we approach this large topic there are things that we can do better. ESA is not perfect, but I also think when I see some of the language coming up that only one percent of species have been delisted, the intent of this law is to not have species go extinct and 99.5 percent that were put on there have not.

So my perspective on this is of trying to strike that balance between private landownership and economic activity which is an absolute legitimate concern. We must make sure there are not onerous burdens put on those landowners but also looking at areas where we have an agreement. Do we wish to have biodiversity and protection of species? That is a legitimate point if you do not believe in the purpose of ESA. But, don't use the guise of saying that it is ineffective because we have delisted because I would offer this up: The Florida Panthers Recovery Plan is 114 years long. I will

probably be long gone before that one is delisted. It doesn't mean it was a failure.

So with that, I look forward to your testimony. I look forward in the future to playing an active role in this. We want to. We need to. My landowners want us to, and I am more than willing to do that. Just ask us, and we will be there. With that, I yield back.

[The prepared statement of Mr. Walz follows:]

PREPARED STATEMENT OF HON. TIMOTHY J. WALZ, A REPRESENTATIVE IN CONGRESS FROM MINNESOTA

I thank the Chairman, and I want to thank each of you for taking time out of your day to testify before this Subcommittee. The Agriculture Committee has a long, storied history of bipartisanship. We've proven we can do it. We got a farm bill done when many didn't think so and I'm proud of the work we've done in the areas of conservation, energy and forestry.

I would be remiss if I didn't say I'm a little frustrated with today's hearing. The working group that the Chairman speaks about is an interesting and exciting proposal, but we received no invitation to join even though there are many Members on this side of the aisle that would have gladly taken that opportunity because we understand the complexity of this issue.

The perspective being presented today is of trying to strike a balance between conservation and private land ownership and economic activity. This is an absolute legitimate concern. We need to make sure there are not onerous burdens put on land owners. But we also have to ask the question; do we wish to have biodiversity and protection of species and to what extent? It's a legitimate point if you do not believe in the need for critical wildlife protection in this context, but it shouldn't be under the guise of trying to say that the law is ineffective because of the percentage of species delisted, because I would offer this up: The Florida Panther's recovery plan is 114 years long. I'll probably be long gone before that one's delisted. It doesn't mean the ESA is a failure. In fact the Center for Biological Diversity performed a study on this very topic and found that 90 percent of species are recovering at the rate specified by their Federal recovery plan. Another metric of importance is the fact that 99% of the species listed on the ESA have not gone extinct. These are species that were on the verge of collapse. This includes the American Bald Eagle which has made a dramatic recovery under the ESA.

We certainly understand the impact and legitimate concerns on private property owners and with 80% of those species being on those private lands, we need partners that we work hand in hand with. We also respect biological diversity and wildlife habitat. The benefits of conserving both are immense. Yearly sportsmen and women spend over $90 billion into the U.S. economy and so our frustration is that this is a broad issue with many competing perspectives that need to be heard. Also, there are jurisdictional issues here. The House Agriculture Committee does not have jurisdiction over the ESA so it is confusing as to why a Committee known for bipartisanship would hold a partisan hearing on a law outside our jurisdiction. At the end of the day, not being included puts up unnecessary partisanship where it doesn't need to be. We can work on these issues together.

You're going to find sympathetic ears, on our side of the aisle, who understand this issue. My good colleague from Oregon is an expert on this and a champion of making this work right, these are folks that want to be included. We have witnesses that we wanted to bring on this side and did not have the opportunity to do so. And again, it's not for the sake of trying to create a partisan issue. We simply weren't invited, Mr. Chairman.

So I hope in the future you'd know many of us on this side have over years developed strong bipartisan credentials and a willingness to discuss the complex issues in good faith. Perhaps instead of arguing over what is the most effective measurement of success under the ESA, we should concentrate our efforts on policies which are designed to ensure that species never need to be listed in the first place. In 2000 Congress created the State and Tribal Wildlife Grants program to assist states and their partners with the conservation of more than 12,000 species of fish and wildlife that are at-risk. This is the only Federal program with the explicit goal of preventing endangered species listings. In February of 2011 the Republican House passed H.R. 1 which would have completely eliminated funding for the SWG program. We fought back with wildlife conservation groups and restored funding to $62 million. Unfortunately, as a 31% cut to the program, it was a bittersweet victory. I find it very disheartening that my friends on the other side of the aisle would cut

funding to the lone program designed to prevent listing and then complain that too many species are being listed. The ESA is far from perfect, but if we wish to engage in a discussion to fix imperfections, this discussion must be broad, bipartisan and fact based. We must take into consideration the entire toolbox of laws at our disposal to conserve habitat while maintaining its economic growth potential. Coming at the problem from a singular point of view only risks calcifying opposition on either side of the debate.

So with that I look forward to your testimony. I look forward in the future to playing an active role in this. We want to, we need to. My landowners want us to, my wildlife advocates and sportsmen want us to and I am more than willing to do that. Just ask us and we'll be there. With that I yield back.

The CHAIRMAN. All right. I thank the gentleman and just note, in terms of our Committee, we have been working on forest health, and this is really our first, within the Agriculture Committee and this Subcommittee, this is really the beginning of this process for us. Any working group that happened in the jurisdiction of another committee just gives us an opportunity to make sure our forests are healthy. So this is the start of the process for us.

The chair would request that other Members submit their opening statements for the record so the witnesses may begin their testimony and to ensure that there is ample time for questions.

And I would like to welcome our panel of witnesses to the table: Mr. Jim Peña, Associate Deputy Chief, U.S. Forest Service, and Ms. Eileen Larence, Director, Homeland Security and Justice, U.S. Government Accountability Office. Mr. Alva Joe Hopkins, President of the Forest Landowners Association from Folkston, Georgia, and Dr. Greg Schildwachter, President of the Watershed Results in Arlington, Virginia.

Written statements from the witnesses will be made part of the record. And Mr. Peña, please begin when you are ready. We have a light system in front of us. You will see as we get—it will be green and kind of give you a heads up when you have about a minute to go and it will turn yellow and red. We just ask that—whatever thoughts you are on—you just smoothly wrap up that thought at that point. Thank you, sir. Go ahead and proceed.

STATEMENT OF JIM PEÑA, ASSOCIATE DEPUTY CHIEF, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.

Mr. PEÑA. Thank you. Good morning, Chairman Thompson, Ranking Member Walz, and Members of the Committee. I appreciate the opportunity to discuss the Forest Service's role in implementing the Endangered Species Act, ESA.

The ESA's purpose is to conserve threatened and endangered species and their habitat. Managing species' habitat including threatened and endangered species is an integral part of the Forest Service mission. About 20 percent of the ESA's listed species have habitat within the 193 million acres of the National Forest and Grasslands that we manage. There are costs associated with protecting and recovering listed species. We have direct costs implementing the ESA and costs associated with litigation. Sometimes there are indirect costs such as project delays or cancellations.

The Forest Service's role in implementing the ESA is ensuring that relevant sections of the Act are integrated into forest plans and project decisions. The Forest Service assists in conserving and recovering listed species under the ESA specifically by undertaking

recovery efforts as defined by the Fish and Wildlife Service and the National Marine Fisheries Service for listed species under Section 4 and consulting on actions where the agency determines that the action may affect a listed species or designate a critical habitat and to lessen the impacts of incidental take under Section 7.

In addition to ESA, the Forest Service operates under many other laws passed by Congress. These laws give us not only the authority to manage our National Forests and Grasslands, they guide us in how we manage them. Within our authorities we manage a wide variety of resources for multiple uses, and sometimes it is difficult to strike a balance. Sometimes litigation results from trying to strike a balance.

According to a recent study by Miner, *et al.* in 2014, the *Journal of Forestry* article, analyzing a 20 year period between 1989 and 2008, the majority of cases filed against the Forest Service concern vegetation management projects alleging violations of many laws. Cases citing ESA violations comprised about 18 percent of all Forest Service land management cases. During this period, the Forest Service prevailed in 52 percent of the cases involving ESA.

The Forest Service measures some costs associated with litigation. For example, we can account for costs associated with the Equal Access to Justice Act which is about $875,000 per year for all land management litigation in the agency. Other costs such as redirecting staff from other priority work and the resulting delays or cancellations of projects are not tracked by the agency.

The Forest Service is committed to managing the National Forests and Grasslands on which many species depend as part of the natural legacy that we leave for future generations.

This concludes my testimony, Mr. Chairman, and I am happy to respond to any questions that you or other Members of the Committee have regarding our implementation of the ESA.

[The prepared statement of Mr. Peña follows:]

PREPARED STATEMENT OF JIM PEÑA, ASSOCIATE DEPUTY CHIEF, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.

Introduction

Good morning, Chairman Thompson, Ranking Member Walz, and Members of the Committee. I am Jim Peña, Associate Deputy Chief of the National Forest System of the U.S. Forest Service, at the Department of Agriculture (Agriculture).

Mr. Chairman, I appreciate the opportunity to discuss the Forest Service's role in implementing the Endangered Species Act (ESA).

December 28, 2013 marked the 40th anniversary of the Endangered Species Act (ESA). The purpose of the ESA is to conserve threatened and endangered species and their habitat. Congress passed the ESA in 1973, recognizing the natural heritage of the United States was of "aesthetic, ecological, educational, recreational, and scientific value to our nation and its people." Over the past 4 decades, the ESA has effectively promoted the recovery of numerous species, such as the Bald Eagle, the grey wolf in the Northern Rocky mountains and the western Great Lakes, the Grizzly bear, and many others. Currently, about 1,500 species and populations in the United States are listed as threatened or endangered under the ESA. A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is listed as threatened if it is determined that it is likely to become endangered in the foreseeable future. About 20 percent of the ESA's listed species have habitat within the 193 million acres of the National Forests and Grasslands that we manage.

The Forest Service's role in implementing the ESA is ensuring that relevant sections of the Act are integrated in our core activities, such as forest plans and projects. Managing habitat for threatened and endangered species is an integral

part of the Forest Service mission. In implementing the ESA, the Forest Service must work with the U.S. Fish and Wild Service (USFWS) and National Oceanic and Atmospheric Administration's (NOAA) Fisheries, sometimes referred to as National Marine Fisheries Service (NMFS), who administer the Act. There are costs associated with protecting and recovering listed species; we have direct costs implementing the ESA in our processes and ancillary costs associated with litigation, and sometimes there are indirect costs, such as project delays or cancellations. I will outline briefly our role in implementing the ESA, some of our experiences with its costs, and close with our commitment to protecting habitat.

Forest Service Role in Implementing the ESA

The Forest Service assists in the conservation and recovery of listed species by: undertaking recovery efforts as defined by USFWS or NMFS for listed species (section 4); and consulting with USFWS or NMFS on actions that the agency determines may affect a listed species or its designated critical habitat, including, as appropriate, how to lessen the impacts of potential take incidental to such actions (section 7).

Land management plans under the National Forest Management Act (NFMA) and proposed management actions utilize extensive environmental analysis to inform our decisions. National Environmental Policy Act (NEPA) documents are prepared by the Forest Service at the programmatic level for forest plans, and at the site-specific level for project decisions. Forest Service environmental analysis and decision-making also involves compliance with several other Federal statutes such as the Clean Air Act, Clean Water Act, and the National Historic Preservation Act. ESA compliance plays an integral role in our NEPA documentation requirements.

ESA is administered by USFWS and NMFS which establish the procedural mechanisms through which ESA's substantive goals are achieved, such as the section 7 consultation process with other Federal agencies. The ESA implementation regulation establishes formal or informal consultation process (section 7) between the Forest Service and USFWS or NMFS to ensure that proposed Forest Service actions do not jeopardize the continued existence of any listed species or its designated critical habitat. The Forest Service makes a determination regarding how a proposed action affects a listed species through completion of a biological evaluation or biological assessment (*e.g.,* "no effect"; "is not likely to adversely affect"; "is likely to adversely affect"), and then the consultation process is initiated if there may be an effect on this species. Consultation occurs on proposed projects, as well as on the issuance of forest plans or plan amendments.

The Forest Service works closely with USFWS, NMFS, and state and local partners when listed species are at issue, particularly when a species occurs over multiple jurisdictions. For example, earlier this year the Oregon chub was the first endangered fish species in the United States to meet its recovery goals under ESA and was delisted by the USFWS. When the Oregon chub was listed in 1993 the population had declined to under 1,000 fish in eight known locations. Now, the Oregon chub's populations have grown to approximately 160,000 fish in 83 locations. This success was due to collaboration among private landowners, nonprofit organizations, and state and Federal agencies. The Forest Service's Willamette National Forest, which manages several populations of Oregon chub in the upper Middle Fork and Coast Fork Willamette River sub-basins has been part of this success story by enhancing and restoring Oregon chub populations, ensuring long-term survival on National Forest System (NFS) lands.

ESA-Related litigation

Forest Service decisions are sometimes challenged by industry, environmental organizations, states, Tribes, local governments, or individual citizens. Only about two percent of all agency decisions are challenged in litigation. About 18 percent of cases filed against the agency allege ESA violations.

According to a recently published study[1] examining a 20 year period from 1989–2008, the Forest Service won completely 53.8 percent of their land management cases (plan and project), losing on some issue in 23.3 percent and settling 22.9 percent. The Forest Service prevailed fully in 51.8 percent of cases involving the ESA.

Direct and Indirect Litigation Costs

The total economic impact of all litigation, and particularly ESA-related litigation, is hard to discern and is not tracked by the agency. Direct and indirect litigation

[1] Miner, A.M., R.W. Malmshiemer, and D.M. Keele. 2014. *Twenty years of Forest Service land management litigation.* JOURNAL OF FORESTRY p.32–40. *Note: This study measured a win for the Forest Service conservatively, counting a case as a loss if there was any issue on which the Forest Service did not prevail.

costs may result from judicial orders requiring payment of attorney fees and costs to a successful litigant. Liability for such costs and fees may arise through either the Equal Access to Justice Act (EAJA) or the ESA. These costs result in part from the EAJA, which allows qualified, prevailing litigants to be reimbursed by the Federal Government for attorney fees and court costs. The ESA authorizes courts to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[2] The agency also incurs costs in defending litigation, such as redirecting staff from other priority work to prepare administrative records and review legal briefs, but figures on such ESA-specific litigation costs are not available. In addition, every lawsuit filed requires the Federal Government to pay for the Department of Justice lawyers, departmental counsel, and the Federal court system necessary to address the case.

Indirect costs associated with changing, delaying, creating new, or canceling projects due to losses in court or reaching settlement might exceed direct litigation costs, but there is no formal accounting of these costs.

Canada Lynx

In 2000, the USFWS added the Canada lynx to the list of threatened species under the ESA. In 2007, the Forest Service added the Northern Rockies Lynx Amendments to the forest plans of 18 National Forests in the Northern Rocky Mountains. The amendments set broad standards for protection of Canada lynx habitat. The Forest Service formally consulted with USFWS on the adoption of the Lynx Amendments, and USFWS issued a Biological Opinion concluding that the Lynx Amendments would not jeopardize the continued existence of the Canada lynx.

In 2009, the USFWS expanded the designated critical habitat for the lynx on lands in Idaho, Montana, and Wyoming. This area encompasses parts of 11 National Forests with plans that include the Lynx Amendments. In 2013, applying 1994 Ninth Circuit precedent, the Federal district court for the District of Montana ruled that the 2009 critical habitat designation requires the Forest Service to re-initiate consultation with USFWS on the amended plans, and ordered the Forest Service to do so. The government has appealed the district court's decision to the Ninth Circuit. On March 11, the Ninth Circuit granted the government's request to stay the district court's order. In separate litigation, Forest Service ecological restoration projects have been enjoined based on the Montana court's ruling.

In contrast, the Tenth Circuit, relying on Supreme Court precedent, held in 2007 that re-initiation of consultation on plans is not required. The conflict between these cases is an example of some of the challenges that the Forest Service faces in implementing ESA.

Conclusion

The Forest Service is committed to making the ESA work for the American people and to carrying out ESA's purpose of conserving threatened and endangered species. Extinctions globally are occurring at a rate that is unprecedented in human history. In passing the ESA, Congress recognized we face an extinction crisis. The Forest Service faces challenges with implementing the ESA and other laws. The agency must weigh the many uses the American people want from NFS lands. Thus, within our authority, we manage a wide variety of habitats for multiple species and multiple uses, in many instances on the same acreage. The Forest Service is committed to carefully managing our National Forests and Grasslands on which many species depend, as part of the natural legacy that we leave for future generations.

That concludes my testimony, Mr. Chairman. I am happy to respond to any questions you and the other Members of the Subcommittee have regarding ESA implementation.

The CHAIRMAN. Thank you, sir. Ms. Larence, you are recognized for 5 minutes.

STATEMENT OF EILEEN R. LARENCE, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, D.C.

Ms. LARENCE. Thank you. Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee, I am pleased to discuss the results from our April 2012 report with some recent updates on attorney fee claims and payments.

[2] 16 U.S.C. 1540(g).

Mr. Chairman, as you know, select laws such as the Endangered Species Act and more generally the Equal Access to Justice Act, in part provide that the Federal Government reimburse parties for attorney fees and costs when the parties win a lawsuit against the government. Payments are made either out of the Treasury Judgment Fund, which is a permanent and indefinite appropriation, or from the respective agency's appropriations.

The intent was to level the playing field, to make sure that individuals or parties are not discouraged from suing agencies for unreasonable program activities for fear of the costs of doing so. However, as you recognize, Mr. Chairman, some in Congress were also concerned that parties such as environmental groups were using taxpayer dollars from agencies' limited funding to sue the government.

We were asked to determine the extent to which the Departments of Agriculture and Interior had information available on attorney fee claims and payments for Fiscal Years 2000 through 2010. My testimony today summarizes our findings in the Agriculture Department.

In a nutshell, all but four of Agriculture's 33 agencies and offices in our review did not track these attorney fees, costs and payments. Therefore, neither we nor Agriculture could comprehensively answer Congress' questions about how many payments parties claimed, how much Agriculture paid out, to whom and under what statute. Agencies said they did not track these data generally because they weren't required to. They didn't have many of these lawsuits, payments were minimal and they did not need the data on payments to manage.

On the other hand, the four entities that did track or compile these data said that doing so increased transparency and accountability and provided these entities with data to develop budget estimates among other things. We know that the Congress has also considered legislative proposals aimed at increasing the transparency and accountability over such fees, costs and payments.

Focusing more specifically now on the four entities that did track or compile these data, even their information was incomplete. These entities did not always know the amount of claims denied, who received payments, the amounts paid, which could differ from the amounts awarded and the authorizing statute.

Nevertheless, we were able to report some limited data. For example, a manager within the Forest Service collected portions of these data in an electronic spreadsheet to help the agency track and assist the claims and payments, such as determining if fee amounts for new claims were reasonable based on past claims. We reported that the Forest Service faced about $16.3 million in attorney fees and costs in 241 environmental cases during the 11 years in our review.

The Forest Service did not track the associated statutes, but representatives surmise that most claims were likely under the National Environmental Policy Act, the National Forest Management Act or the Endangered Species Act. Individual award amounts ranged from $350 to about $500,000, and payments could have come from either of the four services' appropriations or the Judgment Fund.

Beginning in Fiscal Year 2009 in response to an Appropriations Committee request, the Forest Service now uses a unique code within Agriculture's financial management system to attract attorney fee payments under the Equal Access to Justice Act that come from the agency appropriations. The Forest Service in its Fiscal Year 2014 budget justification reported that it had annual payments of about $1.5 million, $½ million, and $1.6 million respectively from Fiscal Years 2011 to 2013 under that Act.

We also reported that over 10 years through September 2010 Treasury made 187 payments totaling about $16.9 million from its Judgment Fund on behalf of Agriculture. The highest payments were about $9 million under the Equal Credit Opportunity Act, $4.4 million under the Civil Rights Act and $1.6 million under the Endangered Species Act.

Finally, we recognize that litigation costs are broader than attorney fees, and they include costs such as damages awarded and hours that agency personnel spend preparing for a case. While these costs were not a focus in our prior review, we have learned that USDA and the Forest Service likewise tracks some but not all of these broader costs.

Mr. Chairman, this concludes my testimony, and I would be happy to answer any questions.

[The prepared statement of Ms. Larence follows:]

PREPARED STATEMENT OF EILEEN R. LARENCE, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, D.C.

USDA Litigation—Limited Data Available on USDA Attorney Fee Claims and Payments

GAO Highlights

Highlights of GAO–14–458T (*http://www.gao.gov/products/GAO-14-458T*), a testimony before the Subcommittee on Conservation, Energy, and Forestry, Committee on Agriculture, House of Representatives

Why GAO Did This Study

In the United States, parties involved in Federal litigation generally pay their own attorney fees. There are many exceptions to this general rule where "fee-shifting" statutes authorize the award of attorney fees to a successful, or prevailing, party. Some of these provisions also apply to the Federal Government when it loses a case. In 1980, Congress passed EAJA to allow parties that prevail in cases against Federal agencies to seek reimbursement from the Federal Government for attorney fees, where doing so was not previously authorized. Although all Federal agencies are generally subject to, and make payments under, attorney fee provisions, some in Congress have expressed concerns about the use of taxpayer funds to make attorney fee payments with agencies' limited funding. These concerns include that environmental organizations are using taxpayer dollars to fund lawsuits against the government, including against USDA.

This statement addresses the extent to which USDA had information available on attorney fee claims and payments made under EAJA and other fee-shifting statutes for Fiscal Years 2000 through 2010. This statement is based on GAO's April 2012 report on USDA and the Department of Interior attorney fee claims and payments and selected updates conducted in March 2014. To conduct the updates, among other things, GAO reviewed Forest Service budget documents for Fiscal Years 2014 and 2105 and interviewed Forest Service officials.

View GAO–14–458T (*http://www.gao.gov/products/GAO-14-458T*). For more information, contact Eileen R. Larence at (202) 512–8777 or *larencee@gao.gov*.

What GAO Found

In April 2012, GAO found that the Department of Agriculture (USDA) did not report any aggregated data on attorney fee claims and payments made under the Equal Access to Justice Act (EAJA) and other fee-shifting statutes for Fiscal Years 2000 through 2010, but USDA and other key departments involved—the Depart-

ments of the Treasury and Justice—maintained certain data on individual cases or payments in several internal agency databases. However, collectively, these data did not capture all claims and payments. USDA officials stated at the time that given the decentralized nature of the department and the absence of an external requirement to track or report on attorney fee information, the information was not centrally tracked and decisions about whether to track attorney fee data and the manner in which to do so were best handled at the agency level. Officials from 29 of the 33 USDA agencies GAO contacted for its April 2012 report stated that they did not track or could not readily provide GAO with this information. The remaining four USDA agencies had mechanisms to track information on attorney fees, were able to compile this information manually, or directed GAO to publicly available information sources. GAO found that the Forest Service was the only program agency within USDA that was able to provide certain attorney fee data across the 11 year period. GAO reported in April 2012 that about $16.3 million in attorney fees and costs in 241 environmental cases from Fiscal Years 2000 through 2010 was awarded against or settled by the Forest Service (see fig. below).

Attorney Fees and Costs Awarded against the Forest Service in Environmental Cases and Number of Cases, Fiscal Years 2000 through 2010

Source: GAO analysis of Forest Service data.
Note: Forest Service data may include attorney fees authorized by underlying statutes, EAJA subsection (b), and EAJA subsection (d); as such, some funds may have been paid by the Judgment Fund, as opposed to agency appropriations.

However, the extent to which the four USDA agencies had attorney fee information available for the 11 year period varied. Given this limitation as well as others, such as inconsistent availability of payment data, GAO concluded that it was difficult to comprehensively determine the total number of claims filed for attorney fees, who received payments, in what amounts, and under what statutes. GAO did not make any recommendations in its April 2012 report.

Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee:

Thank you for the opportunity to discuss our work on attorney fee claims and payments resulting from litigation involving the Department of Agriculture (USDA) and, in particular, the Forest Service. In the United States, parties involved in Federal litigation generally pay their own attorney fees. There are many exceptions to this general rule where statutes authorize the award of attorney fees to a successful, or prevailing, party. Some of these provisions also apply to the Federal Government when it loses a case. In 1980, Congress passed the Equal Access to Justice Act (EAJA) to allow parties that prevail in cases against Federal agencies to seek reimbursement from the Federal Government for attorney fees, where doing so was not previously authorized.[1] The premise of EAJA was to help ensure that decisions to contest governmental actions are based on the merits and not the cost of litigation, and, in enacting the law, Congress found that because of the greater resources and expertise of the Federal Government, the standard for an award of fees against it should be different from the standard governing an award against a private litigant, in certain situations. Although all Federal agencies are generally subject to, and

[1] Pub. L. No. 96–481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412).

make payments under, attorney fee provisions, some in Congress have expressed concerns about the use of taxpayer funds to make attorney fee payments with agencies' limited funding. These concerns include that environmental organizations are using taxpayer dollars to fund lawsuits against the government, particularly against the USDA, the Department of the Interior (Interior), and the Environmental Protection Agency (EPA).[2]

My testimony today addresses the extent to which USDA had information available on attorney fee claims and payments made under EAJA and other fee-shifting statutes for Fiscal Years 2000 through 2010.[3] This statement is based on our April 2012 report on USDA Interior attorney fee claims and payments made under EAJA and other fee-shifting statutes and selected updates conducted in March 2014.[4] To conduct the updates, including assessing the reliability of the updated Forest Service data, we reviewed the Forest Service's Fiscal Years 2014 and 2015 budget justifications to obtain Fiscal Year 2011 though 2013 EAJA data and interviewed Forest Service officials to confirm that the Forest Service continues to use the same methods to track attorney fee payments that we reported in April 2012. In addition, we reviewed an August 2011 GAO report on environmental litigation involving EPA.[5] Information about the scope and methodology of the prior GAO reports is included in the April 2012 and August 2011 reports. We conducted this work in accordance with all sections of GAO's Quality Assurance Framework that were relevant to our objective. The framework requires that we plan and perform the engagement to obtain sufficient and appropriate evidence to meet our stated objectives and to discuss any limitations in our work. We believe that the information and data obtained, and the analysis conducted, provide a reasonable basis for any findings and conclusions in this product.

Background

USDA has a broad and far-reaching mission—including improving farm economies and the nation's nutrition, enhancing agriculture trade, and protecting the nation's natural resource base and environment—and the department may face the prospect of litigation over its regulations and other actions. As with other Federal agencies, where USDA is engaged in judicial litigation—cases brought in a court, including those that are settled—as a plaintiff or a defendant, the Department of Justice (DOJ) generally provides legal representation,[6] and USDA provides technical and subject matter expertise and assists with the case, such as by drafting documents for DOJ to file and conducting research.[7]

The types of actions that involve USDA are varied. For example, lawsuits may involve challenges to certain agency actions—such as under provisions of the Endangered Species Act, which permits parties to file challenges to government actions affecting threatened and endangered species, or under the National Environmental Policy Act, which requires Federal agencies to prepare a statement identifying the environmental effects of major actions they are proposing or ones for which third parties seek Federal approval or funding and that significantly affect the environment. Cases may involve other statutes, such as title VII of the Civil Rights Act, which prohibits discrimination in employment. Additionally, the Administrative Procedure Act authorizes challenges to certain agency actions that are considered final actions, such as rulemakings and decisions on permit applications.

---

[2] See for example, GAO, *Private Attorneys: Selected Attorneys' Fee Awards Against Nine Federal Agencies in 1993 and 1994,* GAO/GGD–96–18 (*http://www.gao.gov/products/GAO/GGD-96-18*) (Washington, D.C.: Oct. 31, 1995), and *Equal Access to Justice Act: Its Use in Selected Agencies,* GAO/HEHS–98–58R (*http://www.gao.gov/products/GAO/HEHS-98-58R*) (Washington, D.C.: Jan. 14, 1998).

[3] A "fee-shifting" statute allows for the payment of attorney fees by a losing party to a prevailing party.

[4] GAO, *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments,* GAO–12–417R (*http://www.gao.gov/products/GAO-12-417R*) (Washington, D.C.: Apr. 12, 2012).

[5] GAO, *Environmental Litigation: Cases against EPA and Associated Costs over Time,* GAO–11–650 (*http://www.gao.gov/products/GAO-11-650*) (Washington, D.C.: Aug. 1, 2011).

[6] According to DOJ officials, three divisions litigate on behalf of USDA: (1) the Environment and Natural Resources Division handles most of the work on environmental litigation cases; (2) the Civil Division handles a broad range of litigation, including commercial, personnel, torts, and consumer protection litigation; and (3) the Executive Office for United States Attorneys liaises with DOJ and the 94 U.S. Attorneys Offices that represent the United States in civil and criminal matters across the nation and its territories. The cases that the Attorneys' Offices handle overlap in some areas of law with those of the other two divisions.

[7] The default rule is that DOJ is responsible for all litigation on behalf of the United States and its administrative agencies. 28 U.S.C. §§ 516, 519; 5 U.S.C. § 3106. There are agencies, however, that have independent litigation authority.

With respect to the payment of attorney fees, in the context of judicial cases, the law generally provides for three ways that prevailing parties can be eligible for the payment of attorney fees by the Federal Government.[8] First, many statutes contain provisions authorizing the award of attorney fees from a losing party to a prevailing party; many of these provisions apply to the Federal Government. Second, where there is a fee-shifting statute that allows for the payment of attorney fees by a losing party to a prevailing party but is not independently applicable to the Federal Government, EAJA provides that the government is liable for reasonable attorney fees to the same extent as a private party (*i.e.,* claims paid under EAJA subsection (b)).[9] Under these first two ways, when a party prevails in litigation against the government and is awarded attorney fees under court order or settlement,[10] the amounts generally are paid from the Department of the Treasury's (Treasury) Judgment Fund (a permanent, indefinite appropriation that pays judgments against Federal agencies that are not otherwise provided for by other appropriations).[11] Third, EAJA provides that in any civil action where there is no fee-shifting statute, prevailing parties generally shall be awarded attorney fees when the government cannot prove that its action was substantially justified (*i.e.,* claims paid under EAJA subsection (d)).[12]

In adversary administrative adjudications—generally, proceedings that are brought in a special agency forum, rather than in a court, and in which the government position is represented—a separate provision of EAJA applies. Specifically, EAJA provides that in adversary adjudications, the government is liable to a prevailing party for reasonable attorney fees when the government cannot prove that its action was substantially justified. These awards or settlements are paid from the losing agency's appropriation.[13] When such fees are awarded or agreed to in a settlement, they are generally paid from the agency's appropriated funds.[14]

In this statement, we refer to attorney fees anytime fees were paid, regardless of the source of law authorizing the payment—independently applicable statutory fee-shifting provisions, EAJA subsections (b) or (d), or EAJA's adversarial adjudication provisions—and whether awarded by a court or administrative forum or provided in a settlement. The payment process differs, however, based on the statute involved and whether the award was made at the administrative level or through the courts, as shown in *Figure 1.*

---

[8] Under 28 U.S.C. § 2414, except as otherwise provided by law, compromise settlements of claims referred to the DOJ for defense of imminent litigation or suits against the United States or its agencies, shall be settled and paid in a manner similar to judgments. Thus, when DOJ settles cases on behalf of a Federal agency, out-of-court and court-approved settlements may provide for payment of attorney fees and costs, depending on the underlying claims.

[9] This provision provides that the United States is liable for such fees and expenses to the same extent that any other party would be liable under the common law or the terms of any statute that specifically provides for such an award. 28 U.S.C. § 2412(b).

[10] For purposes of this statement, we use "awarded" to reflect attorney fees that are awarded by administrative or court decision as well as those provided in settlements.

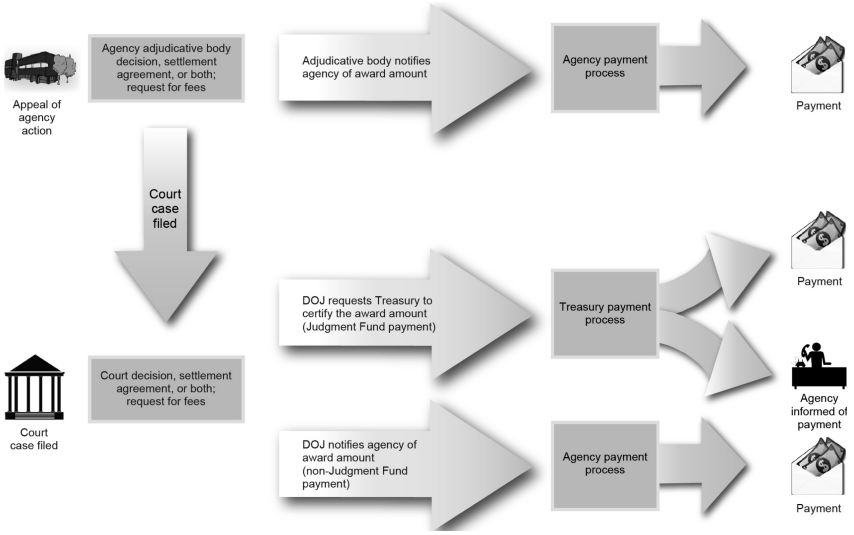
[11] 31 U.S.C. § 1304. Regarding payments of attorney fees under the statutory fee-shifting provisions independently applicable to the Federal Government, these are generally paid from the Judgment Fund unless the statute at issue provides otherwise. Regarding EAJA subsection (b) payments, an exception is that where a court finds an agency acted in bad faith, the payment cannot be made from the Judgment Fund.

[12] In these cases, EAJA limits the prevailing plaintiff's eligibility to receive payment by defining (at the time the lawsuit is filed) an eligible party as either an individual with a net worth of $2 million or below or a business owner or any partnership, corporation, association, local government, or organization with a net worth of $7 million or below and 500 or fewer employees. However, tax-exempt nonprofit organizations and certain agriculture cooperative associations are considered eligible parties regardless of net worth.

[13] 5 U.S.C. § 504(a), (b)(1)(C).

[14] Certain statutes, such as the Small Claims Act, 31 U.S.C. § 3723(c), and Federal Tort Claims Act, 28 U.S.C. § 2672, authorize the payment of administrative claims from the Judgment Fund. However, in our April 2012 report, we did not identify any attorney fee payments that were paid under these statutes.

Figure 1: Typical Process for Administrative and Judicial Cases Resulting in Attorney Fee Payments



Source: GAO analysis of DOJ, Treasury, USDA, and Interior information.
Note: According to the Department of Agriculture, in some instances fees are paid initially out of the Judgment Fund but ultimately out of agency appropriations through a reimbursement to the Judgment Fund.

Most USDA Agencies Did Not Have Readily Available Attorney Fee Information

In April 2012, we found that USDA did not report any aggregated data on attorney fee claims and payments made under EAJA and other fee-shifting statutes for Fiscal Years 2000 through 2010, but USDA and other key departments involved—Treasury and DOJ—maintained certain data on individual cases or payments in several internal agency databases.[15] However, collectively, these data did not capture all claims and payments. USDA officials stated at the time that given the decentralized nature of the department and the absence of an external requirement to track or report on attorney fee information, the information was not centrally tracked and decisions about whether to track attorney fee data and the manner in which to do so were best handled at the agency level.[16]

Accordingly, for our April 2012 report, we contacted 33 agencies within USDA to obtain their available attorney fee information.[17] In response, officials from 29 of the 33 USDA agencies told us that they did not track or could not readily provide us with this information. These officials generally stated that this is because their agencies deal with few or no attorney fee cases, the payment amounts are minimal, another agency within the department tracked this, or the agency did not need this information for internal management purposes. For example, an Acting Director in the USDA Farm Service Agency stated that because so few cases are filed against the agency, there is little value in tracking the data. We reported that the remaining four USDA agencies we contacted either had mechanisms to track information on attorney fees, or were able to compile this information manually using hard copy files, or directed us to publicly available sources where we could obtain the information. These four agencies were: (1) the National Appeals Division (NAD), an agency

[15] GAO–12–417R (*http://www.gao.gov/products/GAO-12-417R*).

[16] From 1981 through 1995, EAJA provided for government-wide reporting on claims paid under EAJA in the form of two annual reports to Congress. In 1995, EAJA reporting requirements were repealed. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104–66, §§ 1091, 3003, 109 Stat. 707, 722, 734. The financial management system for USDA includes information on litigation costs. However, the information in the system does not isolate attorney fees and costs from damages (*i.e.,* payments awarded to prevailing parties as a result of the case, which are not related to attorney fees or costs).

[17] USDA agencies and offices are referred to as agencies for purposes of this statement.

that conducts hearings of administrative appeals of adverse actions by certain USDA agencies; (2) the Office of Assistant Secretary for Civil Rights (OASCR) an agency that adjudicates employee discrimination complaints; (3) USDA's Office of Administrative Law Judges (OALJ);[18] and (4) the Forest Service, which is responsible for managing its lands for various purposes—including recreation, grazing, and timber harvesting—while ensuring that such activities do not impair the lands' long-term productivity. In our April 2012 report, we identified one program agency at USDA—the Forest Service—that maintained attorney fee data. The Forest Service maintained the data in two different information sources: (1) a spreadsheet that tracked the amounts of attorney fees and costs awarded or settled, among other items, for environmental litigation, including cases filed under the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act; and (2) a separate accounting code in the USDA financial database.[19] We discuss these two sources in further detail below. We reported that the attorney information maintained by these four agencies varied with respect to the time frame for which data were available, whether the agency had information on the amount awarded *versus* the amount paid, and the statutes under which the cases were brought, among other information.

Further, in April 2012, we reported that given the differences in attorney fee information available across the four USDA agencies and the limitations identified below, it was difficult to comprehensively determine (1) the total number of claims filed for attorney fees, (2) who received payments, (3) in what amounts, and (4) under which statutes. Specifically, we found:

- **The total number of claims filed for attorney fees could not be determined.** Two USDA agencies—NAD and OALJ—that provided information on attorney fee data did not maintain data about claims for attorney fees that were filed but denied. As a result, we concluded that the number of claims filed may be understated for these agencies.
- **Information on who received the payment was not always recorded.** Payment of attorney fees may be made to one or more parties or directly to the attorney. Agencies that had information on attorney fees sometimes identified a particular party in the case, as opposed to everyone who received payments. For example, we reported that the Forest Service spreadsheet listed 241 cases with attorney fees all of which identified the first-named party in the case, but 46 cases did not identify the payee. Given that attorney fees may be paid to the first named party, to other parties in the case, or to attorneys, we concluded that the first named party may not reliably identify who actually received the attorney fee payment.[20]
- **Data on actual attorney fee payments made were not consistently available.** We also reported that two of the four agencies—NAD and OALJ—provided information on award or settlement amounts rather than attorney fee payment amounts.[21] Amounts awarded reflect the attorney fee award included in a decision or settlement, and amounts paid reflect the actual amount the agency paid. According to DOJ officials at the time, award or settlement amounts may differ from payment amounts because award amounts may increase because of added interest expense before payment is disbursed. Moreover, DOJ and agency officials stated that award or settlement amounts may increase or decrease as a result of subsequent legal proceedings (*e.g.,* a prevailing party could appeal the award amount, and an appeal could change the amount the agency ultimately paid). In addition, decisions and settlement agreements may not separate attorney fees and costs from damages, a fact that prevents agencies and Treasury from knowing exactly how much was allocated

[18] OALJ directed us to publicly available sources on cases.

[19] This is USDA's budget object classification code 4236.

[20] For example, for our April 2012 report, we reviewed 32 attorney fee and cost payments within the Forest Service's financial database. For 22 of the 32 payments, the payee did not match the first named party identified in the Forest Service spreadsheet. We could not make a determination for two payments because the data did not include sufficient information. Another payment was excluded from the analysis because it pertained to an administrative case. In the remaining seven payments, the payee and party matched.

[21] The Forest Service spreadsheet data included award, not payment, amounts. However, the Forest Service also began capturing EAJA attorney fee payment data in the USDA financial database in Fiscal Year 2009. OASCR maintained data on both award or settlement amounts and attorney fee payments during Fiscal Years 2005 through 2010.

for each purpose.[22] We concluded that in these instances, the attorney fee amounts cannot be determined.

- **Statutes under which the case was brought were not always recorded.** Last, we found that the Forest Service did not track information on the statutes underlying the award or payment because the Forest Service financial database does not have a statute field, and according to the official who collected the spreadsheet data, he did not research statute information because of time constraints. However, the Forest Service official estimated that between ⅔ and ¾ of the Forest Service natural resource cases involve challenges under the National Environmental Policy Act, the National Forest Management Act, the Endangered Species Act, or a combination of these Acts.

In our April 2012 report, we found that the Forest Service was the only program agency that was able to provide us with attorney fee data across the 11 year period and gathered information on attorney fees and cost awards associated with cases from three sources—Forest Service regional officials, a Forest Service-commissioned university study, and publicly available court documents. Forest Service officials maintained this information in a spreadsheet that tracked the amounts of attorney fees and costs awarded or settled, among other items, for environmental litigation, including cases filed under the National Environmental Policy Act, National Forest Management Act, and Endangered Species Act. Forest Service officials told us at the time that they undertook the effort to compile information on cases resulting in attorney fee and cost awards to provide internal guidance to Forest Service management. For example, we reported that the information on attorney fee and cost awards helped the agency make informed decisions on whether proposed fees in ongoing cases were reasonable in light of recent cases involving similar challenges. We also reported on several limitations of the data that were identified by the official who developed the spreadsheet. Specifically:

- The list of cases was not intended to be a definitive list of all attorney fee and cost payments and the payments should be considered in totality rather than case by case.
- The data include only environmental cases. Accordingly, non-environmental cases, such as those brought under the Freedom of Information Act (FOIA), Equal Employment Opportunity Act, and other civil rights statutes, were not included.
- Not all of the attorney fees and costs included in the spreadsheet were paid from Forest Service appropriations, as Treasury may have paid some of the attorney fees and costs from its Judgment Fund.[23]
- In some instances, award or settlement amounts may be overstated. Specifically, court documents Forest Service officials reviewed to compile the data do not always break out award amounts to be paid by separate defendants. For example, if a party sued the Forest Service and Interior's U.S. Fish and Wildlife Service and prevailed, both agencies might need to pay attorney fees and costs if they lost, but the court might not specify the amount each agency is to pay. In these instances, the data assumed the Forest Service paid the total amount.

Using the Forest Service's spreadsheet data, we reported that about $16.3 million in attorney fees and costs in 241 environmental cases from Fiscal Years 2000 through 2010 was awarded against or settled by the Forest Service.[24] *Figure 2* shows the amounts of attorney fees awarded and number of cases at the Forest Service by fiscal year.

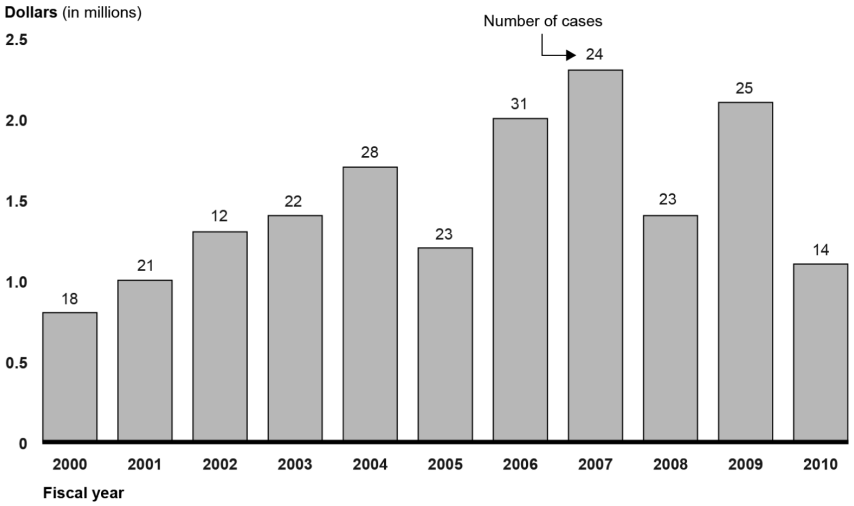
---

[22] Damages are a distinct type of monetary award from attorney fees or costs. Some cases are resolved by settlements or decisions that provide for damages and attorney fees and costs as one lump sum.

[23] Although the Judgment Fund database generally identifies portions of a payment attributed to attorney fees, costs, and other categories, in conducting our review for the April 2012 report, we could not match the Forest Service spreadsheet data with the Judgment Fund in order to isolate attorney fees because the data sets did not have a common identifier. Additionally, the Forest Service spreadsheet did not include the source of the attorney fee payments.

[24] Unless otherwise noted, all figures reported in this statement are in constant 2010 dollars.

Figure 2: Attorney Fees and Costs Awarded Against the Forest Service in Environmental Cases and Number of Cases, Fiscal Years 2000 Through 2010



Source: GAO analysis of Forest Service data.
Note: Forest Service data may include attorney fees authorized by underlying statutes, EAJA subsection (b), and EAJA subsection (d); as such, some funds may have been paid by the Judgment Fund, as opposed to agency appropriations.

Figure 2 shows that the greatest number of cases was concluded in Fiscal Year 2006 (31 cases), and the awards against the Forest Service were greatest in 2007 ($2.3 million). Additionally, we reported that the awards ranged from $350 to about $500,000, and that larger awards may skew the data for the year in which the Forest Service made those awards or settlements. For example, in 2010, one payment accounted for over $400,000 of the $1.1 million (about 36 percent) in total awards.

Our April 2012 report found that in March 2009, the Forest Service began tracking EAJA payments under a separate accounting code in the USDA financial database, in addition to the Excel spreadsheet. These data show that the Forest Service paid about $2.3 million in 32 cases from March 2009 through September 2010.[25] In April 2013, the Forest Service publicly reported information on the agency's EAJA attorney fee payments.[26] Specifically, in its Fiscal Year 2014 budget justification, the Forest Service reported that it had 15 EAJA cases in Fiscal Year 2011 (awarding about $1.5 million) and 11 cases in 2012 (awarding about $565,000). According to the Forest Service's Fiscal Year 2015 budget justification, the agency had 18 EAJA cases in 2013, awarding about $1.6 million.

In April 2012, we also reported that Treasury maintains certain data on some USDA cases involving attorney fee payments. In judicial cases where payments from the Judgment Fund are authorized, DOJ officials submit the payment information to Treasury using standardized forms, and Treasury processes the payment and typically informs relevant agencies when it releases the payment to the payee. Specifically, we found that Treasury made 187 payments totaling $16.9 million on behalf of USDA from March 2001 through September 30, 2010. These payments were most frequently made in connection with litigation brought under the Equal Credit Opportunity Act, Title VII of the Civil Rights Act of 1964, FOIA, or the Endangered

[25] Most payments (29 of 32) in the Forest Service financial database were also included with the 241 cases in the spreadsheet.

[26] The Forest Service began publicly reporting EAJA attorney fee payments in response to the House report accompanying the Department of the Interior, the Environmental Protection Agency, and Related Agencies appropriations bill for Fiscal Year 2012, which directed Forest Service, Interior bureaus, and EPA to provide to the House and Senate Committees on Appropriations and the public specific information related to attorney fee payments made under EAJA. H.R. Rep. No. 112–151, at 8–9 (2011). See also H.R. Rep. 112–331, at 1046 (2011) (Conf. Rep.).

Species Act, as shown in *Table 1.* Treasury made 88 of the 187 payments as a result of a class action lawsuit on behalf of black farmers alleging discrimination.[27]

Table 1: Statute Under Which Case Was Brought, Amount Paid, and Number of Payments Paid by Treasury from the Judgment Fund on Behalf of USDA, March 2001 Through September 2010

Statute under which case was brought [a]	Attorney fees and costs	Number of payments
Equal Credit Opportunity Act, 15 U.S.C. § 1691e	$9,190,168	92
Civil Rights Act Title VII, 42 U.S.C. § 2000e–16	4,444,604	39
Endangered Species Act, 16 U.S.C. § 1540	1,628,215	16
Freedom of Information Act, 5 U.S.C. § 552	449,614	21
Clean Water Act, 33 U.S.C. § 1365	366,992	5
Tucker Act (inverse condemnation & other claims), 28 U.S.C. § 1491	343,687	1
Fair Labor Standards Act, 29 U.S.C. § 216	282,093	1
Payments for which statute could not be determined	93,909	6
Rehabilitation Act (disability discrimination), 29 U.S.C. §§ 791, 794a	51,934	2
Bandelier National Monument Administrative Improvement and Watershed Protection Act of 1998, 16 U.S.C. § 698v–2, 40 U.S.C. § 3114	50,000	1
Tucker Act, 28 U.S.C. § 1346	12,154	1
Back Pay Act, 5 U.S.C. § 5596	6,429	1
Privacy Act, 5 U.S.C. § 552a	6,170	1
Total	**$16,925,969**	**187**

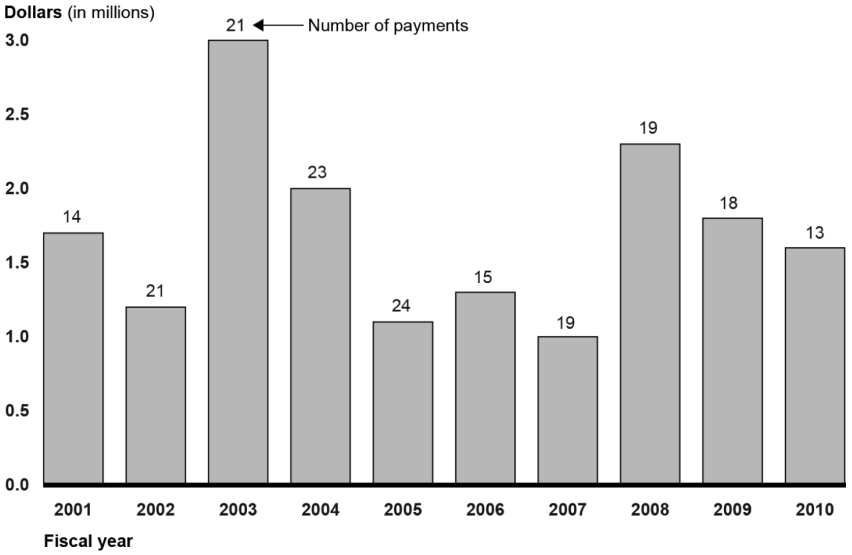
Source: GAO analysis of Treasury data.

[a] Statutes are as reported in Treasury's Judgment Fund Internet Claims System. For payments associated with inverse condemnation claims (an action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings), statutes are as identified in publicly accessible court records.

In April 2012, we also reported on the amount and number of payments Treasury made on behalf of USDA, by fiscal year, as shown in *Figure 3.*

[27] *See Pigford* v. *Glickman,* 185 F.R.D. 82 (D.D.C. 1999), aff'd 206 F.3d 1212 (D.C. Cir. 2000); see also, *Congressional Research Service, The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers* (2011).

Figure 3: USDA Attorney Fees Paid and Number of Payments from Treasury's Judgment Fund, Fiscal Years 2001 Through 2010



Source: GAO analysis of Treasury data.

Specifically, *Figure 3* shows that Treasury made the greatest number of payments on behalf of USDA in Fiscal Year 2005 (24 payments) and Treasury paid the highest amount of attorney fees and costs on behalf of USDA in 2003 ($3 million). We found that the payments ranged from about $175 to about $1.1 million, and that larger payments may skew the data for the year in which Treasury made those payments. For example, in 2008, one payment totaling about $1.1 million accounted for about half of the $2.3 million in total payments. Further, 11 of the 13 Fiscal Year 2010 cases were payments stemming from a class action lawsuit filed by black farmers and made up about $1.5 million of the $1.6 million in payments for that year.[28]

In addition, we found in April 2012 that DOJ maintains certain data on some USDA cases involving attorney fee payments, but DOJ's data are not readily retrievable or complete. In particular, DOJ has internal agency databases that capture information on individual court cases, but officials stated at the time that these databases do not reliably capture attorney fees and costs.[29] For example, we reported that DOJ officials said that their databases were designed for internal management purposes and not for agency-wide statistical tracking. Over time, some EAJA data have been entered into the databases; however, the agency does not have a mechanism for determining what percentage of total EAJA awards is in the database or if the data were entered consistently. According to a senior DOJ official, DOJ is not required to enter EAJA award data into its database. We concluded that because DOJ handled tens of thousands of cases over the 11 year period on behalf of USDA, we could not readily or systematically review all of the case files for our April 2012 review to determine the attorney fee awards.

Litigation costs are broader than attorney fees; they may include damages awarded to the prevailing party, personnel hours that USDA program staff and attorneys spent, and DOJ attorney costs. Our April 2012 report on USDA attorney fee payments did not address the extent to which USDA and DOJ are capturing these broader costs because we focused specifically on attorney fee claims and payments. However, through the course of our review, we found that some information on these broader costs is available. For example, we reported that USDA has an accounting code in its financial database for tracking the costs of litigation. This code (4230) captures information on litigation costs, including attorney fees awards, dam-

[28] *Pigford* v. *Glickman,* 185 F.R.D. 82 (D.D.C. 1999).

[29] Specifically, DOJ officials said at the time that they are not in the best position to collect and report information on attorney fees and costs because they are often not aware of administrative cases.

ages and other costs.[30] Like USDA's code that captures attorney fee payment information described earlier (4236), this code does not differentiate the statute under which agencies made such payments. In March 2014, Forest Service officials confirmed that the agency is using these codes and also stated that the agency does not track other litigation costs, such as the cost or time associated with the support provided to DOJ in preparation for litigation, because the litigation specialists who assist DOJ with these cases are salaried employees. In addition, in August 2011, we reported that DOJ maintains some data on the number of hours attorneys devote to environmental litigation defending EPA.[31] Specifically, the Environment and Natural Resources Division's case management system contains information on the number of hours the division's attorneys spent working on environmental litigation defending EPA. However, we reported that the U.S. Attorneys' Office's database does not contain information on attorney hours worked by case, which meant that in our prior report on EPA litigation, we could not determine the time these attorneys spent on each case.

Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee, this completes my prepared statement. I would be happy to respond to any questions you may have at this time.

Contacts and Acknowledgments

For further information on this statement, please contact Eileen R. Larence at (202) 512–8777 or *larencee@gao.gov*. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this statement include Maria Strudwick (Assistant Director), Paul Hobart, Ron La Due Lake, Jessica Orr, Janet Temko, and Ellen Wolfe.

The CHAIRMAN. Thank you, Ms. Larence. I appreciate it. Mr. Hopkins, you are now recognized for 5 minutes.

STATEMENT OF ALVA J. "JOE" HOPKINS III, PRESIDENT, FOREST LANDOWNERS ASSOCIATION, FOLKSTON, GA

Mr. HOPKINS. Good morning. The Forest Landowners Association are landowners who own and operate over 40 million acres of private land in the United States. I am the manager of our family timberland, some of which have been owned for over 100 years.

As recently as 2 weeks ago, a coalition of prominent activist groups sent letters to 19 forest landowners and timber companies whom the activists believed might be considering the purchase of five parcels of forestland that were for sale. The seven-page letter warns that if you purchase any of these parcels, we intend to commence litigation to obtain an injunction to prevent you from taking any action that would result in harm to or take of a threatened or endangered species. The letter also states that in the event of such litigation, the groups will seek to recover their costs and fees as well as the fees of their expert witness under the citizen enforcement provisions of the ESA.

These threats were made despite the fact that, as the letter concedes, the listed species had not been located on more than ½ the parcels of land. Needless to say, the cost to a private landowner of defending such a lawsuit, let alone facing the prospect of future litigation over the other side's costs and fees is daunting.

Now such tactics will increase in my part of the country is also a real concern to forest landowners. The Southeast Regional Office of U.S. Fish and Wildlife Service has been swamped by lawsuits from activist groups that are designed to trigger the obligation to

[30] Other costs includes court costs, such as filing fees and reporting fees, and attorney expenses, such as the cost for expert witnesses, telephone, postage, travel, copying, and computer research.

[31] GAO–11–650 (*http://www.gao.gov/products/GAO-11-650*).

make the decisions about whether to list a species under the inflexible and very tight time-frames provided for by the ESA. Presently, the Southeast Region is obligated to make decisions regarding whether or not to list more than 400 species in over 12 states in the Southeast. Massive decisions are being faced by the Fish and Wildlife regions across the country. Very little is known or publicly available about many of the species. In fact, in many cases, simply finding and making a proper identification of the species in the wild requires a Ph.D. in biology. Yet, upon the listing of any of these species, the full range of severe civil and criminal penalties provided by the ESA come into play, both for harm to the species itself as well as its critical habitat, even though the species itself is not present in that habitat.

In short, private forest landowners are greatly concerned that the Draconian one-size-fits-all approach of the ESA has resulted in it being used primarily as a powerful tool in the hands of those who would halt land management activities while the actual needs of the species, including humans who inhabit the land, have become secondary.

On a more personal note, in March of 2000 we had a devastating wildfire that destroyed a portion of our family timberland that contained a colony of red-cockaded woodpeckers. Most of the trees were killed that day. The rest will die over the next few months. And the woodpecker cavity trees were killed. I immediately sought help from the Fish and Wildlife Service to determine what I could do to avoid a taking and was able to recover some type of income by selling the dead and dying timber. In response I was sent the recovery guidelines. I explained that recovery was not a possibility since all the trees were either dead or dying. I needed information to prevent me from performing an activity that would cause a taking. Due to the threat of litigation beyond our ability to finance and the risk of Federal prosecution, we harvested what we legally could do, left the remaining timber until it could be established that no woodpeckers remained in the stand, and then we salvaged some of the wood as pulpwood and the rest we pushed up and burned. As a result, my family business suffered great economic loss just beyond the damage from the fire to the tune of several hundred thousand dollars. We currently have RCW clusters on other parts of our property which require management on anywhere from 60 to 300 acres per cluster. Due to the presence of the list of species who now own the timber, we have a loss of timber income on 600 acres of our land that equates to roughly $36,000 a year in annual growth income, plus the cost of the required management services. Although management has been voluntary and self-financed, the Supreme Court has ruled that this is a partial taking and there is no compensation. Anyone including those in this room who has a portion of their income taken away would probably think different.

The ESA process and litigation are not about saving species, it is about land control. Certainty the Federal Government can find a better way to help private forest landowners who provide so many public benefits rather than lining the pockets of environmental groups and their *pro bono* attorneys and spending money on a program that by Federal Government's data is a complete failure.

In closing, no one, including myself, is questioning the importance of protecting endangered species. Indeed, in my particular case, I wound up with colonies of listed woodpeckers on my land that I consider and account for in my management activities without any Federal or state funding. If the ESA cannot be reformed to help ease the concern of litigation placed upon private landowners, then the tsunami of listings and the heavy-handed tactics used by some groups threaten to do real harm to generations of forest landowners who have been and remain good stewards of the land as well as to the species and their habitat. The public good should be financed by the public and not a few——

I will take any questions. Thank you.

[The prepared statement of Mr. Hopkins follows:]

PREPARED STATEMENT OF ALVA J. "JOE" HOPKINS III, PRESIDENT, FOREST LANDOWNERS ASSOCIATION, FOLKSTON, GA

Good morning. I would like to begin my testimony by telling how the Forest Landowners Association, of which I am the current President, was formed. The founder of the Forest Landowners Association was a gentleman by the name of Bill Oettmeier who was a forester in Georgia with a forestry degree from Penn State. He was concerned by the lack of funding for forestry research in the South and traveled to Washington, D.C. to ask Congress for money. They asked him whom he represented and he replied, "I represent myself." Needless to say he didn't get anywhere. So he left Washington and went back to Georgia to organize the Forest Farmers Association in 1941. The 1940s were a time when the best interests of timberland owners were threatened by unfavorable legislative action in Congress. Well, you could say things have not changed much in the last 74 years. And hence the reason I am here speaking to you today.

The Forest Farmers Association, which is now called the Forest Landowners Association, represents family landowners who own and operate more than 40 million acres of forestland in 48 states. The majority of timberland owners in the U.S. have had their property in their family for multiple generations. For more than 100 years my family has owned and been good stewards for private working forests in southern Georgia. Today I am the manager of our family timberland operation.

If one deliberately set out to create a law that would do enormous damage to wildlife and financially punish the landowners who provide the vast majority of their habitat, it would be hard to top the ESA. Over 1,900 species of plants and animals are currently considered by the Federal Government to be in danger of extinction. Once a species is listed, they are subject to a variety of conservation efforts. However, these conservation efforts rarely, if ever, consider the total costs of species recovery to Federal, state or local governments, and especially to private landowners. Of the ESA habitat listed, 78 percent are on private land. And the private landowner is in large part footing the bill for the flawed and failing ESA.

There are many, many, many stories from private forest landowners who have been impacted and in some cases devastated by the Endangered Species Act. This morning, I will share with you my own personnel story and how the ESA has financially impacted my family business.

In March of 2000 we had a devastating wildfire that destroyed a portion of our family timberland. This particular tract of timber contained a colony of red cockaded woodpeckers, which are on the endangered species list. The result of the fire was that most of trees were killed or were dying and the woodpeckers were destroyed.

I immediately sought help from the Fish and Wildlife Service to determine what to do to avoid a taking and to be able to recover some type of income by selling the down timber. In response, the Fish and Wildlife Service sent me the *recovery guidelines.* I explained that recovery on this site was not going to be possible since all of the trees were either dead or dying and I needed information to prevent me from performing an activity that would cause a taking under the Endangered Species Act. We wound up harvesting what we could and leaving the remaining timber until it could be established that no woodpeckers were still in this stand. We salvaged some of the wood as pulpwood and the rest we pushed up and burned. As a result of lack of guidance from the Fish and Wildlife Service in providing clear direction as how to proceed, my family business suffered even greater economic loss beyond the damage from the fire. The economic loss to us as a result of not being able to sell the

wood on the ground while waiting on direction from the Fish and Wildlife Service was $250,000–$300,000.

We currently have active red cockaded woodpeckers clusters on other parts of our property and when you have active clusters, under the ESA, you're required to manage the timber on anywhere from 60 to up to 300 acres per cluster depending on the basal area of the stand. Due to the presence of the listed species, I have a loss of timber income on 600 acres of my land that equates to roughly $36,000 in annual growth rate income. This means I have 600 acres of land that are not only non-income producing, but it is costing me due to the required active management activities that have to be performed under the ESA. This is known as a partial taking.

The U.S. Supreme Court has ruled that a partial taking of your property rights is not to be compensated under the constitutional protection provided to private property ownership. I would suggest that anyone who was told that they were going to have a portion of their annual income taken away would have a different opinion. When a timberland owner has a tract of land that they are not allowed to timber that equates to loss of income. I am sure that no one in this room would like to be told by the government that they are going to have a partial taking of their income go towards the public benefit of endangered species.

To take this scenario even further and demonstrate yet another area of weakness under the ESA, the area of my land that I am not allowed to timber in order to "save" the red cockaded woodpeckers does not have enough breeding pairs to be scientifically viable. A recovery area according to the current science states that it requires 250 active breeding pairs to have a genetically viable population. On our property we will only have a few pairs in a colony, nowhere near the needed 250 pairs. This means that eventually this colony will die off because of the lack of genetic diversity. All I am doing is delineating the cemetery boundary for these particular birds.

In 1996 I began harvesting a tract of mature planted pines adjacent to the Okefenokee National Wildlife Refuge. I received a letter from the Fish and Wildlife Service advising me that although I was an adjacent landowner with known red cockaded woodpecker foraging habitat, the service believed that my timber sale as currently planned would not adversely impact the refuge red cockaded woodpecker groups and I would be allowed to continue my harvest. The birds were not even on my property. This example shows however, that the Fish and Wildlife Service could have deemed my adjacent property to be off limits to timbering activity because a listed species existed adjacent to the property, but not on it.

Unfortunately some of the more radical environmental groups have abused and are currently abusing the Endangered Species Act. They have nominated hundreds of species to be listed, flooding the U.S. Fish and Wildlife Service with applications and then using the sue and settled method to get species listed and habitat protected. It is not about species protection, but rather land control. Some of the species currently being proposed to be listed have extensive habitat ranges in the southern United States, and would devastate the forest economy if listed which could ultimately result in timber owners having to sell their land, yet again resulting in a negative impact on the proposed species rather than helping it.

To summarize, there are three main areas that financially impact landowners:

(1) Uncertainty: ESA processes leads to a tremendous amount of uncertainty for landowners trying to both manage their land prudently and meet the terms of the law. To comply with immunity landowners often must engage a wildlife biologist to help develop safe harbor agreements and habitat conservation plans. The alternatives provided to landowner are both costly and time consuming to obtain; the cost of the process is borne by the landowner without any reimbursement from the government.

(2) Flawed Science coupled with poor or conflicting management options: The problems with the Endangered Species Act have been written about for decades yet the Fish and Wildlife Service is looking to list many new species as a result of several law suites filed against them. In the South many of the terrestrial species that are being considered for listing as threatened or endangered live in fire dependent ecosystems. Yet prescribed burning as a management tool is becoming cost prohibitive in many areas do to the liability that smoke can cause on local highways and near residential areas. This creates a tremendous concern that the Fish and Wildlife Service will rush to list species without adequate research into feasible management strategies for recovery.

(3) No Compensation: When a species is listed it often takes years for the FWS to come up with feasible management strategies. This was certainly the case for the Red Cockaded Woodpecker and the Gopher Tortoise. While the alternatives are being debated the law forces landowners to protect the species po-

tentially causing significant economic harm to their property in the mean time. Neither the cost of compliance nor the loss in economic value because of the loss of potential other uses of the land are paid to the landowner.

No one, myself included, is questioning the importance of protecting endangered species. If our government however is of the opinion and passes laws that determine it is in the public interest to deprive American citizens of the use of their property to perform these functions, then it should compensate them for their loss. A public good should be financed by the public and not by a few unfortunate private landowners. Otherwise it is simply a matter of stealing private property and no matter what the cause, however worthy, that is not justified.

In my particular case I have wound up with colonies of birds that have become *de facto* owners of a portion of my timber. It is no different than me going into the woods and discovering that someone has stolen some of my timber. Actually I would rather the latter be the case since I have at least an opportunity to locate the criminals and get compensated for the timber. There is however no chance of getting paid for the timber that the Endangered Species Act steals. Unfortunately government views one method of taking as a wonderful law and views the other method as a criminal offense.

In response to the ESA's poor record recovering species and to harm caused by the law's penalties, the Fish & Wildlife Service, Congress and others have offered cosmetic reforms to improve the Act's effectiveness. Yet these reforms are tacit admissions that the Act's punitive approach has failed and that new approaches are needed. Unfortunately, these new approaches are largely superficial. They do not remove the ESA's perverse incentives (penalties) that fundamentally undermine the Act. These initiatives include Safe Harbors, Habitat Conservation Plans, Candidate Conservation Agreements, No Surprises, financial incentives, and requirements to use sound science.

While I am here, I would also like to bring to the Committee's attention another issue that greatly impacts private forest landowners ability to maintain and manage their timber. Congress has long recognized that growing forests have unique economic attributes that do not necessarily match easily with general tax principles. It can take between 20 and 80 years before a forest stand is harvestable. This investment in forests ties up large amounts of capital in the land, but the forest owner must also bear substantial annual costs to maintain the forest (including fire prevention, road maintenance and pest control) to improve the growth and productivity of the trees. Additional costs are incurred for replanting after harvest as well as for environmental protections and set-asides for wetlands, protected species and other significant resources. Moreover, healthy forests provide significant societal value by consuming carbon dioxide, curtailing erosion, creating wildlife habitat, sourcing drinking water and maintaining natural open space for human recreation for which the forest owner receives little or no compensation. In response, Congress has crafted specific provisions in the Internal Revenue Code to reflect this unique economic framework and challenge, known as timber tax provisions. These timber tax provisions have well-served the nation, consumers and manufacturers, forest owners and the environment. As Congress examines various options for tax reform, on behalf of more than 11 million private forest landowners, I strongly urge you to consider, as Congress has long recognized, that timber is a long-term investment, decisions to invest in timber were made decades ago, and changing the tax treatment would significantly and negatively impact investments in working forests that contribute to economic growth, environmental quality and diversity of species.

The only substantive way to reform the ESA is to remove the Act's punishing provisions. Common sense and economics indicate that if you want more of something you reward it. At the very least, you don't punish people for providing it.

Thank you.

The CHAIRMAN. Thank you, Mr. Hopkins. Dr. Schildwachter, you are recognized for 5 minutes.

STATEMENT OF GREG SCHILDWACHTER, PH.D., PRESIDENT, WATERSHED RESULTS, ARLINGTON, VA

Dr. SCHILDWACHTER. Thank you, Mr. Chairman, Ranking Member Walz, Members of the Committee, and thank you especially for adding to the renewed attention to this topic, especially Ranking Member Walz, relative to your comments, I am eager to take you up on making this a larger serious, good-faith effort to renew atten-

tion to the Endangered Species Act. In that regard, I also would like to thank Congressman Schrader. He is working with Cynthia Lummis, one of the co-chairs of that House ESA working group on a bill, H.R. 2919, passed by voice vote from the Judiciary Committee that would get us better data on these lawsuits.

But the House ESA working group, as well as some voices from environmentalism, have recently raised ideas that could finally break the gridlock on the Endangered Species Act. Others as well. The Conservation Leadership Council which is made of conservative leaders from across the country from the highest levels of government and advocacy and industry are also reviving the issue in a positive way. On the ground helping to find solution are sportsmen conservation groups like the Boone and Crockett Club, the Wild Sheep Foundation, National Wild Turkey Federation, Appalachian Wildlife Foundation and the Ruffed Grouse Society. These groups are ideal partners for their focus on real results, ecological expertise and appreciation of the risks and trade-offs involved in stewardship, and I ask to submit for the record a recommendation from these and other sportsmen groups from the American Wildlife Conservation Partners.

The CHAIRMAN. Without objection.

Dr. SCHILDWACHTER. These are the experts and advocates who know that better results for wildlife and people come from working things out ahead of a decision instead of litigating them afterwards. The failure to work things out and the routine of litigation shows that central planning doesn't work any better for governing ecosystems than it does for governing economies.

This is the core vulnerability of the Forest Service. It is working under relic laws of old ideas from the last century, and even if we perfected the Endangered Species Act, we would still have to update some of those authorities.

But as today's agenda is on the Endangered Species Act, here are four ideas that could move us all toward working things out on the ground instead of hashing them out in the courtroom. First, because species' listings force the Forest Service to reconsider its plans and policies, there should be a schedule for which species be considered for listing each year, 5 years out. We have a sort of tentative schedule like this now because the Fish and Wildlife Service agreed to one in a settlement agreement. We should have a certain schedule authorized in law, decided in public based on science. This way the Forest Service and everyone else would know what is coming and when and could prepare for it, would not need to sue to push a decision, and this cramming that goes on is under way right now, especially in eastern forests trying to catch up with the long-eared bat. I would note also in this regard a new bill this week from Congressman Neugebauer. It is House Bill 4284 which also presents intriguing ideas for solving this backlog problem.

Second, for similar reason, the achievement of recovery goals should be a cause for delisting, not just a consideration in that. Litigators are raising new issues at delisting now such as we are seeing with the grizzly bear in Yellowstone.

Third, we should remove deterrents and encourage active recovery efforts. Ironically, if the Forest Service or anyone else intends to help a species today, it must go through additional process to get

authority to help over and above what is required to merely avoid harming a species.

And fourth and finally, we need to give states the formal role to coordinate wildlife population management on Federal lands. This is possible under the Sikes Act. Unused provisions of that authority could be brought to bear.

And in closing, I just want to note with regard to the politics again, we need more workable politics. We must be able to address the issues. Some people avoid them by rejecting all improvements. Other people attack flaws without committing to improvements. I think we can do better. I think this hearing is a step in the right direction.

I thank you, and I look forward to your questions.

[The prepared statement of Dr. Schildwachter follows:]

PREPARED STATEMENT OF GREG SCHILDWACHTER, PH.D., PRESIDENT, WATERSHED RESULTS, ARLINGTON, VA

This hearing and other recent attention to the Endangered Species Act (ESA) is important. It can draw together a larger, serious, good-faith examination by focusing on topics that promote improvement without disregarding the purposes of each law. One way to do this appears in the recommendation from the *American Wildlife Conservation Partners* that I submit for the record.

Below are ideas focusing on listing species, delisting species, and, in between those two steps, how the Forest Service could contribute to species recovery.

Forest management itself could stand its own review and should. Creating a more effective ESA would not cure all that ails forest management. Central planning is more pronounced in forest policy than ESA. The planning approach has driven the Forest Service into detailed specialties in planning and process at the same time its traditional field expertise has retired.

"Implications" is a good banner for this hearing, because many of the problems with ESA are in how things work, and not obvious from how they are written. Working from the implications is a good approach both for tracing out the cold policy logic and also for navigating the hot rhetoric. To have a serious review means addressing strong opinions, and means there must be a good-faith effort to acknowledge improvement as a good idea from those who prefer the *status quo* and also, from those who would amend the Act, a commitment to the legitimacy of the goals of the ESA.

Implication on Species Listing

ESA does not say but implies that the Forest Service policy of producing multiple uses is conditional. The intent of ESA is "to halt and reverse the trend toward species extinction, whatever the cost" (*TVA* v. *Hill,* 437 U.S. 153 (1978). ESA does not say this, but implies it, according to the Supreme Court. Therefore, forest policy that says National Forests will produce "multiple use" and "sustained yield" (16 U.S.C. 528–531), and that makes these among the "required assurances" of Forest Service plans (16 U.S.C. § 1604), are, by implication, secondary to species conservation.

A species listing forces the Forest Service to reconsider any settled plan or policy considered harmful to listed species. Right now this revision is underway for the long-eared bat. Known to the Fish and Wildlife Service (FWS) since 1985—almost 30 years ago—as possibly qualifying for protection under ESA, the long-eared bat was one of many species to be put on a schedule for listing as a result of the 2011 court settlement agreement in the U.S. District Court for the District of Columbia. This is also known as the Multi-District Litigation Settlement, or "mega-settlement" involving hundreds of species. FWS proposed listing the bat last Fall, promising to complete that decision in 1 year. During that year, the Forest Service must learn what it can about the bat and revise its own policies accordingly.

These do-overs of forest policy would be better done in a process that did not span 30 years and cram the work in the last of those years.

The schedule for listing decisions now in place (somewhat) under the multi-district litigation settlement was worked out by FWS and litigators behind closed doors. As melting down the system in court produces a schedule, why not skip the melt-down and create a schedule in an open public decision?

There is a reason, which goes back to the intent of Congress as read by the Supreme Court in *TVA* v. *Hill:* because FWS must protect whatever the cost, it cannot set priorities according the limits on their spending. Fixing this will take amending ESA.

An actual schedule developed through public process and standing in place of today's across-the-board deadlines for listing decisions would end the chaos of deadline lawsuits and enable the Forest Service better to know what species to consider as plans are written.

Implication on Delisting

At delisting—the other end of the ESA process—is a similar situation. Lawsuits opposing delisting on procedural grounds have raised new issues forcing changes on Forest Service management.

In the dispute over delisting the Yellowstone grizzly bear, when the population reached recovery goals, lawsuits prompted the addition of habitat goals. Once these were met, more lawsuits followed raising the possibility the Forest Service may be called upon to produce more whitebark pine before the bear is returned to the care of state agencies.

This happens because ESA does not allow FWS to use recovery goals and state conservation plans as causes for delisting, but as considerations only. This is another implication that warrants serious discussion. When deciding a species delisting, FWS must consider the same five factors required during the original listing. None of these gives weight to recovery goals having been met.

Implication for Helping Recovery

Between listing and delisting is the time when the Forest Service could be helping with active species conservation, but is obstructed by a central irony of ESA, which is that by insisting on passive protections, ESA limits active recovery.

This implies that stopping harms is enough to recover species. Attempts to act positively to promote recovery are deterred because the necessary handling of individuals of the species, and managing habitats require more process for approval. This blunts a great potential the Forest Service has in stewardship contracting to produce cash from forest habitat management that can pay for recovering species.

Implication for Another Law: Sikes Act

These issues in listing, delisting, and using stewardship contracts to promote recovery outline a set of ESA ideas for a serious review of that law.

As to other laws with implications for forest management, consider the Sikes Act. This requires a formal arrangement between the Forest Service (and other agencies) and state wildlife agencies to coordinate population and habitat management. This has not been made a practical reality. If it were, the Forest Service could give state wildlife agencies the role of expert on the wildlife issues now used against the Forest Service for political purposes.

As we know from the admission of old-growth advocates that they used the spotted owl as a surrogate to change forest policy (Yaffee, S.L. 1994. The Wisdom of the Spotted Owl. Island Press. pp. 215–216), and as we have seen that approach leave the species in danger to another threat, it would be better to focus species policy on species. State wildlife agencies are species experts responsible for wildlife populations. Activating a formal role as such through the Sikes Act could create more effective coordination with the Forest Service and its habitat management responsibilities.

Closing: Implication of Gridlock

In closing, there is a final implication in the ESA and other laws concerning the politics of gridlock. The problems of ESA and the National Forests are wedged between a central-planning system that serves some people perfectly well on one side and, on another side, a vision for smaller command-and-control government (or even privatization). The implication is that these are our only choices: government or less government, even private ownership. This is a false choice according to what is clear from the many ways people succeed in keeping common-property in agreeable condition. The third way is a way to break gridlock.

Economist Elinor Ostrom and colleagues have found that between wholly-governmental ownership such as a National Forest and a less-regulated or even private ownership there are ways that collaboration can play a formal role if authorized to do so. The main ingredients are information, rules for resolving conflict, incentives for compliance, and infrastructure (Dietz, T. *et al.* 2003. *The Struggle to Govern the Commons.* SCIENCE 302(5652):1907–1912).

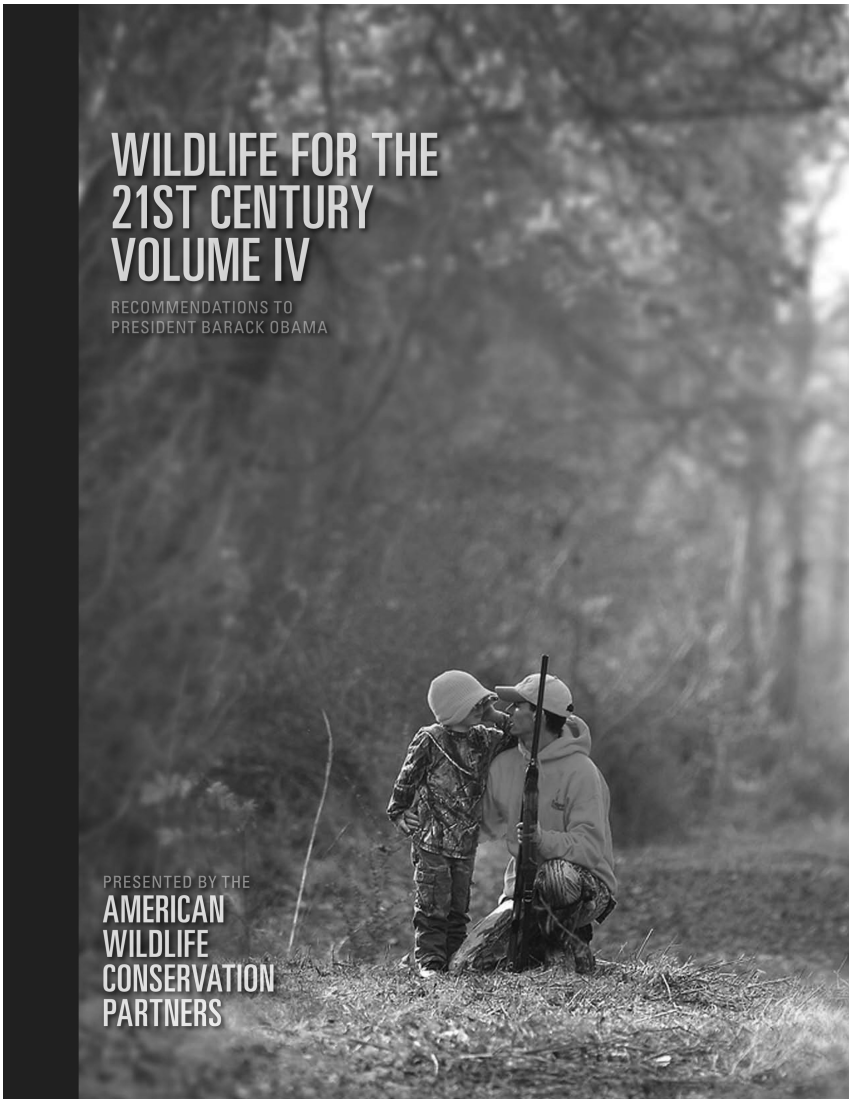
Each of these ingredients is currently available in the central-planning system. They could be broken out and reconfigured to make a real place for state-local gov-

ernance in National Forest Management. It will not necessarily be any simpler than the current situation, but experience shows it will be more effective in supplying more of the demands of more people. In doing so it would be a 21st century contribution to Gifford Pinchot's 100 year old vision for the greatest good for the greatest number over the long term.

I urge Congress to make a serious and good-faith effort to pursue these and other ideas. Escaping gridlock requires good-faith commitment to improvements and to a goal for actual, active species recovery.

Thank you.

ATTACHMENT



Update the Endangered Species Act by enhancing the science basis in the listing/delisting program

The Endangered Species Act (ESA) provides strong protection for any wildlife or plant believed at risk of extinction. It reflects broad understanding that all species are presumed to play an irreplaceable role in the environment.

After 40 years implementing ESA, and nearly 30 years since it was last improved by Congress, there is broad bipartisan agreement that the ESA should be updated to better meet its original intent, and that real and imagined fears of "gutting" the Act are preventing action. Interior officials in successive administrations, representing both major political parties, have publicly expressed support for efforts to update and modernize ESA to enable the US Fish & Wildlife Service to more efficiently identify species needing protection, to promote recovery of species already listed, and promptly return species to state jurisdiction upon meeting recovery goals. Only twice in the last 20 years has an ESA bill reached the floor of the House or Senate. The most notable and widely accepted problem today is the vulnerability of listing and delisting decisions to lawsuits that elevate points of process above the science-based conclusions of the Fish and Wildlife Service.

Therefore, federal agencies – all are affected – should support a proposal focused on scientifically-based, publicly-reviewed schedules and deadlines for listing and delisting.

With the ability to schedule and execute listing and delisting decisions through science-based public decision-making, the Service could regain control of allocating staff and funds required to maintain meaningful lists of threatened and endangered species. This efficiency will free up resources to promote recovery for listed species.

US FISH AND WILDLIFE SERVICE | TERRY TOLLEFSBOL

ACTIONS

The Administration and Congress should convene a panel of legal scholars, wildlife professionals and others with expertise in the Endangered Species Act and its implementation. This panel should identify statutory and regulatory changes that authorize the US Fish & Wildlife Service to:

- **use science-based priorities** to set a schedule for listing and delisting decisions.
- **directly relate the** 5-factor analysis for delisting decisions to information and experience gained from recovery plans and results.
- **give force and** effect to the existing ESA provision accounting for efforts being made by any State, foreign nation, or political subdivision to protect species before a listing is decided, and provide reliable force and effect for formal agreements reached before a listing is decided.

AMERICAN WILDLIFE CONSERVATION PARTNERS

Archery Trade Association/ Bowhunting Preservation Alliance
Jay McAninch ▪ 703-266-4134
jaymcaninch@archerytrade.org

Association of Fish & Wildlife Agencies
Ron Regan ▪ 202-624-7890
rregan@fishwildlife.org

Bear Trust International
Melissa Reynolds-Hogland ▪ 406-523-7779
melissa@beartrust.org

Boone and Crockett Club
Robert Model ▪ 307-587-0040
rrmodel@mooncrest.com

Buckmasters American Deer Foundation
Andy Huggins ▪ 334-387-2647
ahuggins@buckmasters.com

Camp Fire Club of America
Leonard Vallendar ▪ 914-769-5506
lvallen491@aol.com

Catch a Dream Foundation
Jimmy Bullock ▪ 601-529-1144
jbullock@resourcemgt.com

Congressional Sportsmen's Foundation
Jeff Crane ▪ 202-543-6850
jeff@sportsmenslink.org

Conservation Force
John J. Jackson, III ▪ 504-837-1233
jjw-no@att.net

Conservation Fund
Kelly Reed ▪ 703-525-6300
kreed@conservationfund.org

Dallas Safari Club
Ben Carter ▪ 972-980-9800
Ben@biggame.org

Delta Waterfowl Foundation
John L. Devney ▪ 701-222-8857
jdevney@deltawaterfowl.org

Ducks Unlimited
Paul Schmidt ▪ 901-758-3784
pschmidt@ducks.org

Houston Safari Club
Chris Susilovich ▪ 713-562-7223
chris@houstonsafariclub.org

International Hunter Education Association – United States of America
Wayne East ▪ 303-430-7233
exdir@ihea.com

Izaak Walton League of America
Scott Kovarovics ▪ 301-548-0150
skovarovics@iwla.org

Masters of Foxhounds Foundation
Dennis Foster ▪ 540-955-5680
dennis@mfha.com

Mule Deer Foundation
Miles Moretti ▪ 801-973-3940
miles@muledeer.org

National Association of Forest Service Retirees
Darrel L. Kenops ▪ 541-517-6276
dkenops@msn.com

National Rifle Association
Susan Recce ▪ 703-267-1541
srecce@nrahq.org

National Shooting Sports Foundation
Lawrence G. Keane ▪ 203-426-1320
lkeane@nssf.org

National Trappers Association
Jim Curran ▪ 775-867-2239
jcurran@cccomm.net

National Wild Turkey Federation
James Earl Kennemer ▪ 803-637-3106
jkennamer@nwtf.net

North American Bear Foundation
Brian Bachman ▪ 218-746-3774
nabf@brainerd.net

North American Grouse Partnership
Steven P. Riley ▪ 402-786-5547
sriley@grousepartners.org

Orion the Hunter's Institute
Jim Tantillo ▪ 607-387-6414
jimtantillo@huntright.org

Pheasants Forever, Inc. & Quail Forever
Dave Nomsen ▪ 320-491-9163
dnomsen@pheasantsforever.org

Pope and Young Club
Mike Schlegel ▪ 208-630-3001
Mws19410@gmail.com

Public Lands Foundation
Tom Allen ▪ 775-752-2130
tomallenplf@gmail.com

Quality Deer Management Association
Brian Murphy ▪ 800-209-3337
bmurphy@qdma.com

Rocky Mountain Elk Foundation
Blake Henning ▪ 406-523-0273
bhenning@rmef.org

Ruffed Grouse Society
Dan Dessecker ▪ 715-234-8302
rgsdess@chibardun.coop

Safari Club International
Melissa Simpson ▪ 202-543-8733
MSimpson@safariclub.org

Sand County Foundation
Brent Haglund ▪ 608-663-4605
bhaglund@sandcounty.net

Shikar Safari Club
Donald Berg ▪ 214-219-6800
donaldaberg@sbcglobal.net

Texas Wildlife Association
Gary Joiner ▪ 210-826-2904
gjoiner@texas-wildlife.org

The Wildlife Society
Laura Bies ▪ 301-897-9770
laura@wildlife.org

Theodore Roosevelt Conservation Partnership
Thomas M. Franklin ▪ 202-639-8727
tfranklin@trcp.org

TreadLightly!
Lori McCullough ▪ 801-627-0077
lori@treadlightly.org

US Sportsmen's Alliance
Evan Heusinkveld ▪ 614-888-4868
evanh@ussportsmen.org

Whitetails Unlimited
Peter Gerl ▪ 920-743-6777
pgerl@whitetailsunlimited.com

Wild Sheep Foundation
Gray Thornton ▪ 307-527-6261
gthornton@wildsheepfoundation.org

Wildlife Forever
Douglas Grann ▪ 763-253-0222
dgrann@wildlifeforever.org

Wildlife Habitat Council
Margaret O'Gorman ▪ 301-588-4219
mogorman@wildlifehc.org

Wildlife Management Institute
Steve Williams ▪ 717-677-4480
swilliams@wildlifemgt.org

Wildlife Mississippi
James Cummins ▪ 662-686-3375
jcummins@wildlifemiss.org

Wildlife for the 21st Century: Volume IV was published by the American Wildlife Conservation Partners

AMERICAN WILDLIFE CONSERVATION PARTNERS
www.wildlifepartners.org | c/o Boone and Crockett Club | 250 Station Drive | Missoula, MT 59801

The CHAIRMAN. I thank the gentleman. I thank all the witnesses for their testimony and something that I rarely see in a little over the 5 years I have been here, they all had time to spare at the end of the testimony. So that speaks to the fact you have confidence in your written testimony, and we appreciate that, and we will try to follow suit I hope in this next phase.

The chair would like to remind Members that they will be recognized for questioning in the order of seniority for Members who were here at the start of the hearing, and after that, Members will be recognized in order of arrival. And I appreciate Members' understanding.

I want to take the liberty of recognizing myself for the first 5 minutes. Mr. Peña, as the Forest Service has grappled with a long-term increase in the amount of cases that are saddled on land management, especially vegetative and salvaged management, please characterize how any settlements on cases involving the Endangered Species Act may have impacted the decision-making regarding the changes in use of National Forests over the past 20 years.

Mr. PEÑA. I think the way we look at settlements, we aren't going to settle a case if we think we are going to win it. And so if we are going to—if we enter into a settlement, it is because we have evaluated, like in our case, and there is a weakness and that we want to go back and tighten it, so in my view the settlements have resulted in us tightening up our understanding how better to respond to and document, probably more important document, how we are providing for provisions of restoring and maintaining habitat for listed species.

The CHAIRMAN. Thank you. Ms. Larence, though your study focused on reimbursement of attorney's fees, you indicate that you found some information on the broader costs associated with environmental lawsuits. To the extent any of the USDA's agencies were using an accounting code to track other litigation costs, are you able to estimate a total cost to taxpayers?

Ms. LARENCE. We did not have that data in our report, sir, but we do note that USDA has a code in there for natural management system tracking payments, and this code does track some costs in addition to attorney fees such as damages. But it doesn't track all associated litigation costs.

The Forest Service has a separate code that tracks specifically attorney fees and under the Equal Access to Justice Act because the Appropriations Committee requested that. So we did not have an opportunity to report on total litigation costs.

The CHAIRMAN. Okay. Thank you. Mr. Hopkins, you mentioned the challenges you face owning land beside a National Wildlife Refuge in terms of conducting timber sales. Can you relate any stories from your membership about individuals who own land adjoining a National Forest and face related management challenges or even the threat of litigation due to the Endangered Species Act?

Mr. HOPKINS. Since our land adjoins a U.S. Wildlife Refuge, I can tell you in 1996 we were harvesting a stand of 38 year old planted pines, heavy dense planted pines. By all definitions of RCW (red-cockaded woodpecker) foraging, it was not foraging habitat. In the process of the harvest, I received a letter from the U.S. Fish and

Wildlife Service advising me that I would be allowed to continue my harvest because they had determined that the birds that were on their property had sufficient foraging, that I was not damaging the critical habitat. By every definition, it was not critical habitat. That is the uncertainty that scares people like me, that I thought I was doing absolutely nothing wrong. I could have been subject to not only extensive litigation but Federal criminal prosecution. I might be able to survive the financial end, but I am not sure I can do the time.

So there is an economic cost, and there is also the fear of criminal prosecution is a very serious threat to us.

The CHAIRMAN. Thank you. Dr. Schildwachter, to what extent have lawsuits filed against the Forest Service under the guise of protecting endangered species impacted on the ability of the Forest Service to make management decisions designed to recover those species?

Dr. SCHILDWACHTER. Mr. Chairman, as has been mentioned, the Endangered Species Act itself is not really the mainstay of the litigation against the Forest Service. There are lots of causes for action against the Forest Service. But typically what happens is first the Forest Service is forced into revising plans and policies to update them for a new listing. Sometimes then there will be challenges that those revisions are inadequate. Then there will be challenges that the process used to reach those revisions was inadequate, and then there will be challenges claiming that the decision in the end of the process was arbitrary and capricious.

The CHAIRMAN. Thank you. I will yield back and am pleased to recognize my good friend from Oregon, Mr. Schrader, for 5 minutes.

Mr. SCHRADER. Thank you, Mr. Chairman. I appreciate the witnesses' being here today for this very important hearing. Just in listening to the witnesses so far, there seem to be two main thrusts that I can identify. One is the takings issue on private landowners with the Endangered Species Act and the different listings. And then in my neck of the woods, which is mostly Federal land, it is the use of endless litigation to deny the Forest Service the opportunity to do what they are supposed to do which is consider all multiple uses. We rarely, rarely get to a point where there is any ability to do any harvesting in any way, shape or form where I come from.

So the opening question, if I could, Mr. Peña, is would you suggest that the ESA application, as it pertains to U.S. Forest Service and BLM land is broken, and is not working perhaps as well as it should?

Mr. PEÑA. Well, I would be hard pressed to say that it is perfect in its application. I think because of that, the Forest Service is putting a lot of time into working with Fish and Wildlife Service and NPS on how we can more efficiently implement the requirements of the Act together. I think those types of discussions, particularly in Oregon and Washington in Region 6 have resulted in a lot of improvement in implementation of the Act which leads to us having plans that are more effective in responding to the Act and by extension, not quite as vulnerable to litigation.

Mr. SCHRADER. I guess I might disagree——

Mr. PEÑA. The fact that it is not as vulnerable——

Mr. SCHRADER. I might disagree respectfully in terms of being effective. We have a spotted owl issue in my state that has virtually shut down any harvest on Federal forests. It is maybe a 1/10 of what it was 15 or 20 years ago, and we have set aside critical habitat. I haven't heard so much on the private land, but I am going to pay a little closer attention after Mr. Hopkins' testimony. But on Federal land, even that after 10 or 15 years, it has made zero difference. The spotted owl is still decreasing in numbers. Studies in Northern California and other parts of the country have shown that the barred owl is actually preying on the spotted owl, and yet only now are we getting a little opportunity to do some taking, if you will, of the barred owl to prevent the extinction of the spotted owl. And yet, the Forest Service's response to that was to set aside more land that made no difference to begin with. So I don't see where that is working.

We have a seal issue we are trying to fix. Where I come from, salmon or iconic species that we try and recover, not only the salmon broken down by species and subspecies and by geographic rivers they swim up, which as a veterinarian and a scientist, I believe, it has nothing to do with species. That is just a human application and an environmental application. What the original law was about makes it very difficult for recovery, and we now have seals that are actually eating salmon in great numbers in our dam structures that we cannot take out, even though seals are largely recovered.

So I just would respectfully suggest that you look at that again, and the goal of the Forest Service is to encourage multiple uses, not just recovery of species. They have to be balanced. That is the goal, that is the statute, and that is not the case. Way too much time is spent on the Endangered Species Act and basically it has shut down and crippled the rural communities in my state.

I would like to talk with Dr. Schildwachter a little bit on the recovery issues. It would seem to me that, as I have alluded to in a couple of cases, species have been recovered—we have the wolf populations recovered in my state in addition to some others, and yet that is not enough. There is this endless litigation that goes on, and if you could comment on why recovery alone shouldn't be the criteria and what we could do here in Congress to make sure it is the criteria.

Dr. SCHILDWACHTER. Thank you, sir. I agree it should be. I can tell you why it is not, which is that the way the law is written, there are five factors the Service must consider when it is deciding the status of the species, whether that means if it needs to be listed or delisted. None of those five factors gives any binding credibility to recovery goals or a recovery plan. In fact, recovery plans themselves are optional under the law.

So what happens then is the Service basically goes through the same analysis it did when it listed the species, and litigants can raise new issues that had not come up during the recovery process, and that is how they move the goal post as they say. The fix just—I know we are over time here, but the fix would simply be to make regulatory or amendments to the statute that would give recovery goals more weight.

Mr. SCHRADER. Thank you. I yield back. I hope there is another opportunity, Mr. Chairman. Thank you.

The CHAIRMAN. We will have. Thank you, Mr. Schrader. I now recognize the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman. I would like to thank our panel for taking the time to be able to be here. Mr. Peña, I just want to be able to make sure that I have some clarity. When we have had testimony, Chief Tidwell came in, presented his budget, proposed budget to the Natural Resources Committee. The Forest Service does not track costs associated with ESA litigation, is that correct?

Mr. PEÑA. That is correct. We don't have a mechanism to track any specific costs related to any of the litigation.

Mr. TIPTON. I am just a business guy. Would that be a sensible thing to do, to track some of those costs? Because this is certainly diverting resources that are necessary to be able to recover a species under the goal of the Endangered Species Act. Would that be accurate?

Mr. PEÑA. We are having to apply to Resources to respond to litigation, and I guess from our perspective, if we—knowing the amount it is costing us to do litigation isn't going to change the fact we have to respond to litigation.

Mr. TIPTON. But if you can certainly——

Mr. PEÑA. The cost of doing business——

Mr. TIPTON.—get a response out these committees if we know how many dollars, if we want to recover these species. I think we all see the value, knowing how many dollars are being diverted that could actually be used to achieve the goal. That is the point I guess. So you would agree that it would be useful for the Forest Service to actually examine that and find out what the real costs are associated not only with litigation but also with costs associated with manpower that is required to be able to get the information available?

Mr. PEÑA. We would be happy to investigate what it would take to be able to report on the costs.

Mr. TIPTON. You should have it on your books, shouldn't you?

Mr. PEÑA. Excuse me?

Mr. TIPTON. You should have it on your books. Somebody is writing a check.

Mr. PEÑA. Well, the cost of litigation is beyond the payment that we may do for an award.

Mr. TIPTON. But you certainly know what you are directing your people to do.

Mr. PEÑA. The fact that we are directing people to do work, we don't have the ability in our accounting system to finely account for everything a person does throughout the day. It is budgeted, and they do many things. Our employees do multiple things in any given day. And to be able to account for that hourly, we didn't believe and we don't believe would be effective use of our time administratively.

Mr. TIPTON. Interesting perspective. I will tell you, in the private sector, we do that on a regular basis in terms of some of that analysis.

But to the goal of actually being able to achieve recovery of a species, in the State of Colorado right now we have the threatened listing of the Gunnison sage grouse, the greater sage grouse. In our

state, working with our governor, working with local landowners, we have great recovery programs that are in place right now to be able to actually help protect the species, to be able to enhance the habitat that is going on. Wouldn't it be a sensible approach rather than having a one-size-fits-all program going across the West, to be able to encourage these local conservation efforts?

Mr. PEÑA. Well, I believe that we are attempting to do that. I think when we look at what is——

Mr. TIPTON. Actually, the listing is still being threatened by the Federal Government. Why aren't we taking opportunity to be able to have those local conservation efforts, the state efforts, to be preeminent as opposed to the one-size-fits-all coming in from the Federal Government?

Mr. PEÑA. I don't know that that is the case, sir.

Mr. TIPTON. No, it actually is. That is the real threat that is going on.

Mr. PEÑA. My experience with that and sage grouse listing is the Fish and Wildlife Service is taking into account the actions on private land as well as on public land, and they are trying to make a determination on the adequacy of those plans in concert. And so it is, from my understanding, the conservation efforts that are being planned on private land, non-Federal land, does have a bearing and is significantly taken into account by Fish and Wildlife Service on their decisions.

Mr. TIPTON. You know, just on kind of a personal note, when I was listening to Mr. Hopkins, does it concern you when Federal policy is effectively taking land and being able to control that land? We have something called the Fifth Amendment to the Constitution that requires just compensation in the event of taking. We just heard some testimony that that is being impacted. Is there a real concern when we look at the litigation in some of the policy going on that it is an overreach?

Mr. PEÑA. I don't believe I can respond to that because the litigation that we encounter is focused on Federal lands. It is not focused on private lands.

Mr. TIPTON. I think that we are seeing that policy actually impact those private lands. Doctor, maybe you can answer. When we use hatcheries, do those count to recovery goals?

Dr. SCHILDWACHTER. I believe there is a factor for the number of individuals produced with hatcheries, especially—and again, Mr. Schrader knows more about this I think. What I know about it is from his part of the world. But the concern there is that hatchery fish that are released at an older age, then the embryos and hatchling fish that are growing up wild survive differently. So they don't give credit I don't think for all the hatchery fish but for some.

Mr. TIPTON. Thank you. I yield back.

The CHAIRMAN. The gentleman's time has expired. I now recognize the gentleman from Wisconsin, Mr. Ribble, for 5 minutes.

Mr. RIBBLE. Thank you, Mr. Chairman. I want to thank the panel as well for being here. I would like to follow up, Mr. Peña, to some of the conversations that Representative Schrader talked about a little bit. Could you help me understand on the recovery of species? You have had some successes, obviously the American

bald eagle, very popular in Wisconsin, as well as the grey wolf has done really well in Wisconsin.

I live in what I would describe as an exurban and suburban area of Wisconsin along the shores of Lake Winnebago, a relatively robust residential area. And the bald eagle really is pretty active in that area. I can sit at my dining room table and watch them fish in the morning while I am having my coffee.

It seems to me that there is an impression by some of the outside environmental groups that they believe that animals are not able to adapt to any change in circumstances, and yet I will take you right downtown Appleton in the middle of the city of 80,000 people and you can watch the bald eagles fish over the Fox River. And so it seems to me that animals are in fact adaptive. Can you talk a little bit about that and on recovery?

Mr. PEÑA. I wish I could. I don't have that much of a background on the adaptability, but I would say that we have examples of species occurring in habitats that you wouldn't think they would as well as species being more resilient than what common knowledge would indicate. The question I believe comes down to whether or not that is a norm for them being able, across the range, to being able to continue to survive.

I can't defend the instance of bald eagles or any kind of listed species that have to interact with increasing urbanization and how they adapt. I would suspect, like you observe because I have observed similar things, that it happens. To the extent that it happens, how does that relate to continuing existence across the full range is a different question.

Mr. RIBBLE. Yes, to a certain degree it is, and if we look across the range and we pivot from the bald eagle to the grey wolf, Chequamegon-Nicolet National Forest of Northern Wisconsin, they are all over the place now. I mean, it used to be when I was a youngster doing recreation in those forests, you would never see a grey wolf. I hardly can go up there now without seeing them.

And so there has been this recovery inside relatively populated areas, and also out of the National Forests into private managed lands they have recovered quite nicely actually. And my point being, I am wondering how much research is being done because it seems to me that when you look at the spotted owl, you look at some of these other species, recovery is happening in areas where there is a lot of human intrusion, and yet, we are preventing someone like Mr. Hopkins from doing really managed intrusion to think that these animals have no ability with which to adapt and recover in areas that are even closely managed. Mr. Hopkins, can you expound on that just a little bit?

Mr. HOPKINS. Being adjacent to the refuge, of course they do actively manage on their property for them which is they are not managing for timber protection, they are managing for wildlife. That is their task. That is what they should be doing.

In our case, it has caused me to have stands that I cannot do any timbering activity in, again, all at my own personal financial loss because there is no compensation for that.

Mr. RIBBLE. Yes, and without regard to the compensation issue, do you believe that you could manage those areas and also have a robust wildlife environment?

Mr. HOPKINS. Yes.

Mr. RIBBLE. Okay. I want to give you one opportunity because I was struck in your written testimony. You included some information on tax reform or tax policy that you felt would help you continue to manage the forest better. I am going to give you a few seconds here at the end of the questioning to expound on that a little bit because you did talk about it.

Mr. HOPKINS. I guess the best way I could describe that would be that I will take a stand of my timber that has the woodpeckers in it. If it can be thinned down to the standards that they need to have and then tax policy would be such that it would provide money instead of defending litigation, provide money for landowners who are actively managing for these species, it just seems to me that would be a whole lot better expenditure of tax money than to spend it defending lawsuits which wind up with what I have termed regulation by litigation. And to me that is about the worst way you can regulate anything is to regulate it by litigation.

Mr. RIBBLE. And I would agree with you in that regard. Thank you. Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman. I now recognize the gentleman from Arkansas, Mr. Crawford, for 5 minutes.

Mr. CRAWFORD. Thank you, Mr. Chairman. While we were talking to Mr. Hopkins, I have a quick question for you. You mentioned the red-cockaded woodpecker that nests in areas where you harvest timber. I have a question about the downed timber. Is that a viable habitat for woodpecker?

Mr. HOPKINS. Once the timber is on the ground, they can't utilize it anymore. It has to be standing—when I was trying to determine what to do with the burned timber, most of it was still standing. Some of it was on the ground. And the cavity trees, four of the cavity trees actually fell the day of the fire and I had two more that stood. And the answers I got was that they had documented a red-cockaded woodpecker for 435 days in a dead pine tree, dead cavity tree. So I just continued to try to monitor the site as best I could until I finally determined there were no more red-cockaded woodpeckers out there—which I was told to do, and by the time that came, what I had was some beautiful long-leaf hard pine timber that I wound up instead of being sold for paneling and doors and flooring, it wound up going to make paper.

Mr. CRAWFORD. So that wasn't a viable habitat, and yet you waited 435 days you said?

Mr. HOPKINS. I didn't wait that long, but I waited almost a year. I was able to document that the woodpeckers were no longer there.

Mr. CRAWFORD. And you mentioned that you made the determination about whether or not the woodpecker was present or did——

Mr. HOPKINS. Yes. I went out and did daily documentation on them until I could determine that there were no more woodpeckers on the——

Mr. CRAWFORD. And your determination was sufficient? I mean, I am just asking, were they looking over your shoulder and questioning? Could they come back later and fine you if your determination was viewed to be insufficient?

Mr. HOPKINS. I guess they could have. They did not. They did come out and take the cavity trees and cut cavities out of them to use for displace, but other than that, the rest of it was some letter-writing and verbal conversations with the U.S. Fish and Wildlife Service, trying to direct me as to what I could and could not do.

Mr. CRAWFORD. Okay. Thank you. Mr. Peña, I want to go back to visit with you a little bit. Looking at a study over the last 20 years, it looks like, and there has been documentation that shows that the Forest Service has prevailed in roughly about ½ of the lawsuits that you have been involved in. Do you have any mechanism to calculate or have you been able to recoup any of the costs associated with that litigation, any mechanism to track that?

Mr. PEÑA. Recoup costs? No, we haven't recouped any costs of litigation.* If we prevail, there is no mechanism to recoup costs, and obviously if we don't prevail, then we are subject to paying out, well, potentially damages but costs to the plaintiff, according to the statutes that would cover the situation.

[The witness provided clarification for the record, the information is located on p. 51.]

Mr. CRAWFORD. So what you shared with my colleague, Mr. Tipton, you don't have a mechanism in place to track man hours on litigation and now you are saying you don't have any kind of a mechanism to recoup costs or to track any kind of costs? That seems problematic to me, I mean particularly when agencies come and lay out their budget requests and so on and you can't account accurately for the man hours that are spent in given endeavor? Don't you think it would be good to revisit that policy?

Mr. PEÑA. Well, if you characterize the man hours to accomplish the endeavor, the cost of the litigation becomes part of the cost of accomplishing the endeavor. If we have a timber sale that is litigated, to ultimately resolve that, the cost of the appeals—the cost of planning, the cost of layout, the cost of the appeals, the cost of any litigation that may occur is all the cost of that project. And so obviously we are not going out there—well, hopefully it is obvious that we are not going out there to get litigated. We are going out there, and we are planning to implement that project to the best of our ability, to the best of our scientific ability and collaborative ability in order to achieve the objectives of the project. And so for us to say that here is the cost of doing business or because of the litigation, we haven't been able to understand how that changes the overall outcome of what is going on.

Mr. CRAWFORD. Okay. Let me stop you real quick right there. The study, which covered 20 years, shows that you prevailed in roughly ½ or maybe a little more than ½. So over the last 20 years you haven't taken into consideration—as you just said, we are not going out there with the assumption that we are going to be in litigation. But you have a 20 year history of being involved in litigation. So shouldn't you assume that there is going to be litigation going forward?

Mr. PEÑA. So what we——

Mr. CRAWFORD. Are you going to be able to calculate those costs?

Mr. PEÑA. Yes. What we have invested our time in rather than tracking cost is tracking how we can better deal with the issues that were raised in litigation. And so we focused our time more on

how we deal with the science questions that are generally at the root of the non-procedural causes for loss. So questions around the science and then improving our procedurals because we are trying to implement about 82 different laws that guide land management. Each one of those laws have an opportunity for litigation.

And generally, when you look at our litigation, there is a mix of cause for litigation. It is a pretty complex system that we have created, we being the Federal Government. And so it is difficult to make sure we hit the right seam so that it is perfect upon review at a court. And that is what we put our time into.

Mr. CRAWFORD. Thank you. My apologies for the extra time there.

The CHAIRMAN. No problem. The gentleman's time has expired. Now I recognize Mr. McAllister for 5 minutes.

Mr. MCALLISTER. Thank you, Chairman. I am just sitting here thinking. First, I want to thank you all for coming. I am just trying to wrap my head around it. You know, our job up here is, one, to be good stewards of the taxpayers' dollars, and second, protect our taxpayers. And I guess my question to you, Mr. Peña, is I come from business. And I understand you may not be tracking it, but I mean, there are obviously attorney fees, there is scheduling and everything that goes with it. Do you budget for litigation every year? Do you have a certain amount that you put in that you expect to either lose or help to fight against with?

Mr. PEÑA. No.

Mr. MCALLISTER. So over 20 years we have had all these different lawsuits, and obviously you prevailed in over ½ of them. But we have no way to track the costs of what is associated with where our taxpayer dollars are being spent, whether we think it was being wasted or not, over lawsuits whether they be frivolous or not? You are saying we have no mechanism in place for tracking the cost?

Mr. PEÑA. Other than with the Forest Service for the cost of Equal Access to Justice Act, we don't track those other costs.

Mr. MCALLISTER. Okay. You said that, too, when you do win a lawsuit, you have no way of recouping any costs. Is there no—we are not following lawsuits back for recovering costs when we are being found innocent?

Mr. PEÑA. There is no mechanism in statute for us to do that.

Mr. MCALLISTER. Okay. All right. This seems kind of not the way the normal world works. If somebody sues you, for instance, we ought to have some mechanism that we can recoup the costs to stop of these small suits to know that they can't sue for no reason.

I am really frustrated with some of the stuff you are going through, Mr. Hopkins. You sat here and waited all that time, knowing the land was not viable for woodpeckers. But what is the reason you think you are not given a timely answer on what to do? I understand the habitat and all, but it seems to me there would be some kind of working and all that you could do to continuing managing, such as you have said the trees that you had to waste for wood that didn't go for premier timber, which it would have went for paneling and flooring and all that. What do you think the cause for such long delay is? In your opinion, do you think the

agency is worried about litigation on their part if they act too quick?

Mr. HOPKINS. I am not sure that I can answer that question. I know it cost us somewhere in the range of several hundred thousand dollars in lost income on that. I feel like there is a hesitancy on their part to send letters out telling you exactly what you can do because there would be some exposure on their part. And obviously the foraging issue that I mentioned earlier, by definition, my land was not foraging but by U.S. Fish and Wildlife Service's understanding of the definition is it was foraging. So there is a lot of uncertainty, and the sad thing is the damage and the penalties that can occur, and the cost of litigation and getting sued are quite severe for that much uncertainty.

Mr. MCALLISTER. Okay. Yes, I guess what I am having a hard time wrapping around is, I mean, obviously you timber guys are great conservationists and you believe in protecting what is your tool, which is what you make your living by. But how do we go about incentivizing for you not to be aggravated and—it is almost like we set up a system to where you want to circumvent the process because you don't want to deal with the option of losing your land, losing your resources. I don't know, it is pretty frustrating sitting from here just what the bureaucracy has done to the individual taxpayers at the end of the day. It is our job to try to figure out a way to fix that. I would be open to any suggestion that you think would make—you are the guy on the ground. You are the one that is facing it every day, and I believe that you truly don't want to see any species being endangered and lost from planet Earth from here on out and do your part to preserve it. But where do you see the areas that we could really improve to try to make things work for both sides? Because I see a lot of taxpayers' dollars being, I don't want to say wasted, but being spent on costly frivolous lawsuits that if we were managing a little bit more properly, maybe that would not be the case.

Mr. HOPKINS. I just think if the law would incentivize as opposed to punish, that would be a great start in the right direction. If I were to be economically made whole and the woodpeckers that I still have on some of my property that I am having to actually manage for, and if I would just be made economically whole, I would be one of the best woodpecker managers that you would have. But the process is such that when that woodpecker comes in and lights and builds a nest, he takes my timber away from me. The Supreme Court said it is not a taking, it is only partial. And so I have lost income. So landowners have a fear that the better they manage their land, the greater risk they are going to have that a species is going to move onto it. And so it goes contra to even trying to have good forest land management, especially long term. There is a great initiative right now trying to restore a lot of longleaf pine in our area, and some of you may be aware of that. Some landowners have a fear that if they establish some beautiful longleaf wiregrass ecosystem, the next thing they are going to know is it is now going to be occupied by an endangered species and they are going to lose the control of the management of their property.

Mr. MCALLISTER. Well I, sir, appreciate your testimony. And I don't think we want to start having breeders of red-cockaded woodpeckers, but obviously, it needs to go hand in hand and not be so costly to you that it damages you at the end of the day. So I yield back my time, Chairman.

The CHAIRMAN. I thank the gentleman. I now recognize the gentleman from Michigan, Mr. Benishek, for 5 minutes.

Mr. BENISHEK. Thank you, Mr. Chairman. Mr. Peña, would the Forest Service support changes to the Environmental Species Act that would put more emphasis on recovery and limit the ability for all this litigation? Should we address this in Congress? I mean, would you be in favor of that?

Mr. PEÑA. I would have to say that the Administration doesn't support amendments or changes to the ESA. I think the Forest Service would be happy to work with the Committee on ways to make it be more efficient in implementing the Act.

Mr. BENISHEK. Well, it doesn't seem to me to be very efficient. I mean, some of the things that we have brought up here this morning shows a lot of inefficiencies. Number one, regulation by litigation doesn't seem to be a very good way of doing things, especially in view of the fact that these costs are coming out of your budget. I mean, from my understanding it basically comes into the cost of selling the timber.

Mr. PEÑA. Yes, sir.

Mr. BENISHEK. And to my understanding, the Forest Service doesn't really make a profit on timber sales because of the fact that there are all these others costs in there. As a landowner myself, it is hard to imagine someone who didn't have to buy the land not being able to sell the timber to make a profit, or show a return to the American taxpayer because it is the taxpayer's land that you are managing for us.

Mr. PEÑA. Yes.

Mr. BENISHEK. And you can't do it at a profit or a return, so our school districts get a share of the money. I know it is a real problem in my rural district in northern Michigan where there is a lot of Federal land, and school districts depend on a portion of the timber sales to keep their schools open. And yet, you guys can't figure out a way to do it and return money to the school districts. It is really a frustrating process, and it has led to the fact basically that there are not as many timber sales going on in the Federal forests in my district. I mean, most of the contractors that I know have given up even bidding on Federal land because of all the issues dealing with Federal laws and their risk.

So to me, the whole way the Forest Service is managed needs to be reformed in some way so that it is actually doing the job it is supposed to be doing, in other words managing a resource for the people of America which doesn't seem to be working very well right now. So you would be in favor of reforming that in some way? I guess you say the Administration is not in favor of any reforms to the Endangered Species Act, is that correct?

Mr. PEÑA. Yes, sir, and I would say that the comment I made earlier about the Forest Service has about 82 laws that it has to comply with in managing the National Forest. ESA is one of those.

Mr. BENISHEK. Well, it is obviously way too complex to figure it out in a rational fashion.

Mr. Hopkins, let me ask you a question. We have a lot of private timber in my area. I represent the northern half of Michigan. So we have a lot of private landowners as well. We have at least 10,000 jobs directly related to forest and timber. But we have some issues with the Canadian lynx as an endangered species. If an additional species are proposed for listing in our area, what impact do you expect this is going to have on our businesses from your experience?

Mr. HOPKINS. I think it has the potential to be just as devastating as it was in Mr. Schrader's area. There is talk now about listing the eastern diamond back rattlesnake and the gopher tortoise which inhabits almost all the coastal plains of the southeastern United States. If that becomes threatened or critical habitat, then we could be looking at a situation just as serious as the northern spotted owl was for the Pacific Northwest. And it is easy to do the math on the damage it did up there, and I would envision it doing equal damage in our area.

Mr. BENISHEK. To what effect—Mr. Schrader pointed out that the reason for the loss of the owl was not at all what we had thought, you know what I mean? And so that management was occurring with a lack of scientific basis, from what I can understand. Does that tend to happen a lot, Mr. Hopkins, as far as you are concerned?

Mr. HOPKINS. I think a lot of it is based on flawed science, and a good example is the colonies that I have on my property that I have to manage for the sciences, and we need 250 active breeding pairs to have a viable genetic colony. I have about six pair. So all I have done is defined the boundary of the graveyard where those birds are going to die out, whereas what to me would make good sense based on the science would be to come in and take my offspring from these birds for the next 10 years, move them to a recovery site and then tell me I can do with what I want to with my property because I have done something to try to help carry on a viable colony of these woodpeckers. Because when you have the science coming a little late as in the northern spotted owl, unfortunately we decimated the forest industry up there before we found out the true cause of the problem with the northern spotted owl.

Mr. BENISHEK. Thank you. I am out of time.

The CHAIRMAN. I thank the gentleman. Now I recognize the gentlelady from South Dakota, Mrs. Noem, for 5 minutes.

Mrs. NOEM. Thank you, Mr. Chairman, for holding this hearing. I certainly appreciate it. Mr. Peña, could you tell me a little bit about how an animal becomes listed on the Endangered Species Act?

Mr. PEÑA. It is my understanding that there are two ways that it could happen is it can be proposed for listing by the agency, the Fish and Wildlife Service, or it could be petitioned by a member of the public or an organization.

Mrs. NOEM. Is it necessarily—are there qualifications that it has to meet? Is population a consideration?

Mr. PEÑA. Yes.

Mrs. NOEM. Numbers?

Mr. PEÑA. Yes.

Mrs. NOEM. But my understanding based on——

Mr. PEÑA. It is numbers and habitat. If the habitat is at risk, that could be a basis for listing as well.

Mrs. NOEM. Okay. I had read some articles, and it was a little while ago, but it referenced what Mr. Hopkins was talking about with the eastern diamondback rattlesnake, that it was being proposed to be included in ESA because it was considered a threatened species, that because of some of the activities that happened in western states, that not necessarily the population was down, that the numbers weren't being threatened. We weren't worried about it becoming extinct. It was that because of activities that were happening to the areas that the diamondback rattlesnake were included on and where it was living was threatened, maybe even because of some of the western towns having rattlesnake roundups that that was a consideration for putting it on the Endangered Species Act. Are you familiar with that?

Mr. PEÑA. No, ma'am, I am not. I am sorry.

Mrs. NOEM. I will tell you, in western South Dakota, we have a lot of concerns with the grouse as well, the sage grouse, but also looking at that kind of a proposal that could be a picture into our future. They are very concerned that where this could go and where it could lead, that any animal that is perceived by some activity to be harmed or by some outside group to be harmed that it could be listed and therefore change our entire way of life. You know, if you are going to brand a calf, is the calf then able to be listed on the Endangered Species Act? That is really where the conversations go because it really sees no bounds as to what the qualifications are to be included in that Act—Dr. Schildwachter, when he was talking about—you state in your testimony that stopping harms is enough to recover the species, but the lawsuits are designed to prevent management decisions to stop perceived harm. Is that something that you concur with that you testified to as well?

Dr. SCHILDWACHTER. Yes, the point there, Congresswoman, is that for most of the species on the list, simply trying not to get in its way isn't good enough. You have to actively manage a species population just like you got to actively manage a forest if you want it to look like something that it doesn't look like today.

Mrs. NOEM. Well, my concern is that with saying that the Forest Service and the Administration has no recommendations for changes to ESA, that we are saying that the route that we are going down is appropriate, by not putting qualifiers as to the extinction of a species or lowering of the population could allow us to, in the future, have any single animal, no matter how many there are and what use they are to the landowners and people that are utilizing that land, could be drawn in and that could be extremely detrimental to our way of life and even the economies and a lot of the United States.

So for my area, that is extremely concerning that we would say that this is being implemented properly when we are spending millions and millions of dollars fighting these lawsuits and also seeing what is happening to the general population of people trying to make a living off of this land.

I come from South Dakota where we fight the pine beetle epidemic that is going on in the Black Hills, and that has been slowed down, that effort, by lawsuits and by frivolous lawsuits that don't allow us to do our permitting on time, don't allow us to get out there and actively manage the land and make sure that we are protecting the people that live in those hills and allowing the wildlife to really utilize the acres that they need to to really thrive and survive.

Chief Tidwell came out to the Black Hills before we had the farm bill signed into law, and he talked about—we showed him some areas of the Black Hills that we have actively managed. And he talked about what a success story that it was. He also talked about the fact that we needed to look at thousands of acres when we are managing our forests rather than looking at hundreds or even just dozens of acres as we have in the past. We were able in the farm bill to get some categorical exclusions that was a bigger win as far as management practices than what we have had in the past, and Chief Tidwell has told us that it is potentially one of the strongest forestry titles that we have ever seen.

I would hope that in the future when we look at managing these lands and recognizing the value that timber harvest brings into thinning of these areas, not only to the wildlife and how they have benefited from that, but to the local communities, to the people that have the ability to be safe in their homes because they don't have dead and dying timber surrounding them, that that certainly would be a consideration into the future. And when we write policy, when we write legislation that you are working with us to make sure that it is of benefit, not only to the people living there and to the wildlife but to the economy as well.

We used to make money off of our Forest Service land in this country. Now it costs us money, and it costs us millions of millions of dollars to continue on fighting these frivolous lawsuits that many times we are just allowing to happen by looking the other way. Absolutely, I think one of the things we need to look at is having you be a little bit more accountable within the Forest Service and within our government agencies as to how much money we spend on litigation to make sure we write better policy in the future.

With that, I will yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady, and we are going to do just a real quick second round, if there are additional questions. I will recognize my good friend from Oregon, Mr. Schrader for an additional 5 minutes.

Mr. SCHRADER. I appreciate the Chairman's indulgence here, and I don't want to belabor everyone's time. But this is a really, really important issue. It is clear from listening to my colleagues here and to some of the panelists that the ESA, at least as it pertains to forests in this great country, is no longer an Act to help the survival of species. It is meant to shut down forestry. That is the real world, whether it is on private land or whether it is in Federal forests where I come from. That is the goal for some of the extreme environmental communities out there. And that is a shame. They made originally a good law bad, and it begs the point that some Members are raising here to look at ESA and try and put a little

bit of fairness back into it, or at least get it back to its original goal which is to recover species. That really is what it is all about, not shutting down forestry because you have an ideological agenda and don't care about the communities in a big part of the rural areas of our country. I think it is a shame.

There have been comments that the Forest Service doesn't have a plan to change ESA. Well, that certainly shouldn't preclude Congress, which is the legislative-making body, from suggesting some changes to ESA to put a little bit of fairness back into it and frankly get back to the multiple use mandate that we are supposed to have on our forest lands, and I would argue, most of our public land around the country.

And to that end, I guess I would ask Ms. Larence a little bit about the Equal Access to Justice Act. What was the original problem they were trying to cure there, and is there opportunity to have a loser pay for services under certain criteria that might discourage at least some of these frivolous lawsuits? No offense, to Mr. Peña, but the Forest Service has a terrible record of only getting 50 percent of the judgements. That is failure in my school district. But it does indicate that they are winning at least 50, and that might discourage some people from at least the more frivolous lawsuits.

Ms. LARENCE. Yes, sir. It is our understanding that part of the intent of the Equal Access to Justice Act was to level the playing field, in other words, to make sure that individuals or parties weren't discouraged from suing the government for unreasonable actions or decisions. Because they feared the government was so big, they wouldn't be able to afford the cost of litigation. But it is our understanding there aren't provisions to necessarily go the other way if the government wins.

Since I am with the Government Accountability Office, I feel an obligation to say, "We always push agencies to try to track data on the results and impacts of the laws and programs that they are implementing because we think it is important to know what those results are." And sometimes it identifies unintended consequences and its important management data for the agencies and the Congress to have to be able to make decisions about whether or not you need to make changes: has the law played out as Congress intended initially? So I just wanted to make sure and make that point.

Mr. SCHRADER. I appreciate that. I for one am going to look—at as least as it relates to our Forest Service and BLM lands—some sort of equity in the access to lawsuits and who pays at the end of the day. It is fair. I don't want to discourage lawsuits, legitimate lawsuits, any more than the next person but it should be that the loser pays provisions. That would put a little balance back and encourage good lawsuits and discourage bad lawsuits.

I guess I asked Mr. Peña a couple of questions. I know you have made some changes on this. Are you aware of Senator Wyden's bill that talks about getting rid of survey and management criteria, changing standing, maybe formalizing some of the original changes that the Forest Service has done? And, in talking about ecological forestry and how that applies, whether or not you think there is an opportunity for some sufficiency language to get at preserving

species by doing things the right way by using best practices and then calling that sufficient for ESA listing? Because as I listen, Americans and scientists would be hard pressed to have all the answers about what constitutes the exact perfect way. And maybe by leaving portions of the forest intact, let nature take its course, albeit with some assistance from us by practicing good forestry practices.

Mr. PEÑA. So yes, we have been working with the Senator on his bill, and we are trying to work with him so that we can support that, yes.

Mr. SCHRADER. Well, the Senator has a good opportunity for us to balance some of the problems out there. The one thing he doesn't address to a great degree, is ESA, and that is why I asked about the sufficiency language. We were talking about some of the ecological forestry stuff as perhaps being sufficient for dealing with ESA.

Mr. PEÑA. So we would be happy to have some further discussions on that topic. Like I said earlier, the Administration isn't supporting any specific changes, but that doesn't mean we wouldn't want to talk about that and see what could work.

Mr. SCHRADER. I appreciate that, and I will yield back.

The CHAIRMAN. I recognize Mrs. Noem, an additional 5 minutes.

Mrs. NOEM. Mr. Peña, when the Forest Service puts together a Forest Management plan, is the public allowed to make comment and stakeholders in the area?

Mr. PEÑA. Yes, they are encouraged.

Mrs. NOEM. And how long is that comment period generally?

Mr. PEÑA. It varies, anywhere from 30, 45, 60 days, 90 days.

Mrs. NOEM. And what causes that comment period length to vary?

Mr. PEÑA. Complexity of the plan, the stage at which the planning is at.

Mrs. NOEM. Okay. And then Mr. Hopkins and Dr. Schildwachter, are landowners and stakeholders that you are aware of allowed to provide input as well and have you done that in the past?

Mr. HOPKINS. I have not done that, so I can't comment on that.

Dr. SCHILDWACHTER. Many times. The problem, though, is that this is still a central planning exercise. There is no way for the people affected by those plans locally or nationally to deliberate over those plans. You throw in your best comments, you leave it up to the Forest Service and you hope that the experts back in headquarters——

Mrs. NOEM. So in your experience——

Dr. SCHILDWACHTER.—get them.

Mrs. NOEM.—are environmental groups allowed to make comments during this comment time as well?

Dr. SCHILDWACHTER. Yes. The problem is everyone is allowed, but there is no give and take over the tradeoffs or the kind of costs that fall through the cracks of the accounting system, that fall through the cracks of the communities. There is no way to weigh the effects of one forest management strategy *versus* another one as to what it means for the school system. These things are not deliberated. They are simply commented on, and the Forest Service

tries to strike the balance for everyone else. This is central planning. This is why it doesn't work.

Mrs. NOEM. Do you see a better way that could be implemented rather than——

Dr. SCHILDWACHTER. Absolutely. There are examples around the world. A lot of them are in fishery management where there are mixed-governance models. They are not necessarily any simpler in process than what we have now, but there are ways for example that authority could be shared with local government so that there is more of a deliberation between national interests and local interests instead of trying to strike a balance in some sort of expert process.

Mrs. NOEM. Do you believe that we would have less frivolous lawsuits after the fact if we had that process put in place rather than just a comment period?

Dr. SCHILDWACHTER. I think you would, but part of the new process would have to be different rules for how we resolve disputes.

Mrs. NOEM. Okay. Yes, that is good. That is my concern is that some of these same environmental groups that do make comments come in later at different points and file these lawsuits, and then the Forest Service has to use taxpayer dollars to defend those actions in court. And if they win, they lose time, they lose money, you lose dollars, and there are a lot of unintended consequences that happens. But better process to help eliminate that I think would be very helpful. I don't think anybody minds. You know, in our area we certainly run into problems when forest management contracts and plans take a long period of time when you are constantly fighting a disease and insect battle, and you have to make sure that you have something in place far beyond the time period when they are going to fly and spread. But for me the key is to look at bigger contracts, to look at bigger plans. I think we have been very short-sighted and made too small of areas that we are willing to address because of fear of these lawsuits, but we haven't comprehensively looked at how we can stop the lawsuits and better serve and actively manage our forests.

So thank you for that. I certainly appreciate that clarification, and we will see if Congress can weigh in in the future. I appreciate it. Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentlelady. I will take the liberty of 5 additional minutes or hopefully less than that. We will see.

The Endangered Species Act, as you have heard from Members on both sides of the aisle, we all recognize that the original Congressional intent of that, that it is important in terms of recovering species, and that is the right thing to do. Obviously, there is significant concern of how the law has been utilized, I believe anyway. I have concerns with that and the frivolous lawsuits. And at least part of that blame is put on where the Equal Access to Justice Act has been utilized. I have the advantage of having a chief of staff that was actually here at that point and a part of that process.

And so Ms. Larence, you had mentioned a couple things. You used words such as *Congress intended,* and that is always important. You know, Congressional intent gets lost at times. Within your review, within the scope and the ability that you had to review this issue, another word that you used was *reasonable.* And

I have to wonder whether—and also in terms of you identified folks who would use that—my belief that the original intent of Congress was folks with standing, people that had—landowners, specifically, that had to defend themselves against the deep pockets of the Federal Government. And yet, this law seems like it has been hijacked by environmental groups that use it for different purposes. And I don't know if there was anything that you found in terms of any judgments that you have made in terms of what you looked at as it has been utilized. Has it been reasonable? And clearly, who has standing under the practice today compared to perhaps what the original intent of the Equal Access to Justice Act was?

Ms. LARENCE. Sir, we did not answer that question in our prior review, but we think that, sir, if you had data for example, basic data, about who actually got the payments, you could start to look at patterns and trends about who is bringing the litigation, who is getting the bulk of the compensation or reimbursements, and that could give you important information to determine how the law is playing out, and maybe you need to make changes to your strategy.

The CHAIRMAN. I would agree completely. I throw this out to the panel for anybody that wants to respond to it. The Endangered Species Act as originally intended serves an incredibly important purpose. And frivolous lawsuits have resulted, though I believe in making it so that our forests, which is the jurisdiction of this Committee, are not able to be managed in a healthy way, both public and private lands.

And I have to wonder, and I don't know if there were any thoughts on this, that it is to the detriment of many more species because being an outdoorsman, being somebody, a Scoutmaster for 30 years, most species require a diversity of forests. I relate a healthy forest to a healthy church. If I walk into a church and I see everybody with my hairline or gray hair, I know that is not a healthy church. If I go into a forest and it is all mature standing timber that hasn't been actively managed, that is not a healthy forest. And the wrong-headed perhaps interpretation and application of not just the Endangered Species Act but many other Federal regulations and laws have created some real unhealthy forests, and we are talking about few critters, species, to make the Endangered Species List. How many more are we putting on that pathway because we take away their habitat? And that was a long-winded question. I will open it up for a response at this point. Please.

Dr. SCHILDWACHTER. Sir, it is great insight, and I mean, the thing is that we found out 5 years after we passed the Endangered Species Act when the Supreme Court read it for the first time that it implied something that is not expressed in the law which is that the intent of Congress was to protect species, whatever the cost. To some that sounds like a noble sentiment, to some it sounds crazy, but the fact is, it is impossible. There has to be priorities, and the point that you raise is probably the greatest way to make the point, which is if among the species that are on the list, only a fraction have an active recovery program. And if all the money that we spend on recovery goes to a fraction of that, then there are a host of other species that are either getting no attention or haven't even been added to the list yet for lack of an ability to set priorities, which is why something like the scheduling of listing decisions is

so important. We have to embrace the fact that not all these situations are equal, and in order to look at the optimal set of situations, we are going to have to be able to set priorities. But that is going to take a new law.

The CHAIRMAN. Very good. Any other——

Mr. PEÑA. If I could respond also?

The CHAIRMAN. Yes, sir.

Mr. PEÑA. First off, I would like to thank the Chairman and the Committee for the success in passing the farm bill and the forestry section. I think that some of the things that you provided to us in that is going to help us deal with once we do make these decisions related to ESA being able to implement them more effectively.

When I think of the point that you raise, that is the central dilemma that we have when we come to implement ESA on the National Forest. The species mix in any given area is not simple, and the way that we have been driven to this point with ESA is we get driven into single-species management. And that makes it extremely difficult for us to maintain our mandate for ESA let alone NFMS to manage for viable populations across the board.

You have very good insight into the challenge that the implementing agencies have and private landowners have on trying to make the law work as it requires us to protect all species. And it is a dilemma that is difficult. The northern spotted owl, I spent 20 years of my career in Region 6. So I am very familiar with the transition because of the northern spotted owl. We can talk about motives and all of that, but when it comes down to ESA, the challenge is when you have habitat that is going away, there are—and these are more complex questions than what—we always have science to support. And that where the rub hits. When there is uncertainty, that makes it difficult for an agency to be able to cover all the bases and make a decision that isn't going to be viewed as arbitrary and capricious.

So that is not an ESA thing *per se,* but it certainly is triggered by some of the questions that ESA would cause us to raise.

Mr. HOPKINS. Mr. Chairman, I would just say, if you want to have a healthy forest, you have to manage it with multi-faceted management. You can't manage it for one particular species and expect the forest to stay healthy.

The CHAIRMAN. That sounds like a word of wisdom for a good closing there. I want to thank the witnesses and all the Members for this hearing which I think was helpful as we continue our commitment as a Subcommittee toward healthy forests because quite frankly, I probably couldn't live any further away from Mr. Schrader, my home in Pennsylvania, in Oregon. I guess I would really have to move to New Jersey, huh? But the fact is that this is a coast-to-coast issue that we need. We want healthy forests because with healthy forests come healthy rural economies, and everybody wins.

Before we adjourn, I would invite Mr. Schrader to make any closing remarks that he has.

Mr. SCHRADER. I am good, sir. Thank you.

The CHAIRMAN. All right. On closing, I just want to thank the witnesses once again and also just to note that this Subcommittee which is just—I want to thank the Members of the Subcommittee

for the work that it did with the farm bill. I do believe, and I think Mr. Schrader as well, that the forestry title which was designed around healthy forests is probably one of the strongest forestry titles that was written. I think that is just a—it shows you when you have good, bipartisan teamwork, and this would be an issue that we continue to work and look at as a Subcommittee in that fashion.

So under the rules of the Committee, the record of today's hearing will remain open for 10 days to receive additional material and supplementary written responses from the witnesses to any question posed by a Member. This hearing of the Subcommittee of Conservation, Energy, and Forestry is now adjourned.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

SUPPLEMENTARY INFORMATION SUBMITTED BY JIM PEÑA, ASSOCIATE DEPUTY CHIEF, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Mr. CRAWFORD. Okay. Thank you. Mr. Peña, I want to go back to visit with you a little bit. Looking at a study over the last 20 years, it looks like, and there has been documentation that shows that the Forest Service has prevailed in roughly about ½ of the lawsuits that you have been involved in. Do you have any mechanism to calculate or have you been able to recoup any of the costs associated with that litigation, any mechanism to track that?

Mr. PEÑA. Recoup costs? No, we haven't recouped any costs of litigation.* If we prevail, there is no mechanism to recoup costs, and obviously if we don't prevail, then we are subject to paying out, well, potentially damages but costs to the plaintiff, according to the statutes that would cover the situation.

However, certain costs may be taxed in conformity with the provisions of Federal Rules of Civil Procedure Rule 54 and 28 U.S.C. §§ 1920–1923 and such other provisions of law as may be applicable and such directives as the courts may from time to time issue. The Forest Service has on occasion been granted an award of certain taxable costs pursuant to 28 U.S.C. § 1920. The Forest Service does not maintain a record of such court awards.

For the Committee's convenience, a more detailed explanation of "Costs Recoverable by the United States" is maintained online by the Department of Justice in the U.S. Attorneys, *Civil Resource Manual,* Sec. 222, see *attachment* or *http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/civ00222.htm.*

ATTACHMENT

United States Attorneys' Manual

Title 4 Civil Resource Manual

222. Costs Recoverable by the United States

The United States can recover costs in litigation on the same basis as any private party. 28 U.S.C. § 2412(a); *Pine River Logging Co.* v. *United States,* 186 U.S. 279, 296 (1902). Costs are recoverable by the United States as a matter of course, unless the court exercises discretion under 28 U.S.C. § 1923 ("may be taxed") and Fed. R. Civ. P. 54(d) ("unless the court otherwise directs") and denies recovery. See *United States* v. *Bowden,* 182 F.2d 251, 252 (10th Cir. 1950) (remand to permit trial court to consider allowance in exercise of its discretion); see *Farmer* v. *Arabian American Oil Co.,* 379 U.S. 227 (1964). While a government employee may not collect a witness fee when testifying on behalf of the United States, his/her travel and subsistence expenses, provided for in 28 U.S.C. § 1821, may be recovered by the United States as a part of its costs. See *6 Moore's Federal Practice* ¶ 54.77. If adverse counsel multiplies the proceedings, or increases costs unreasonably and vexatiously, the excess costs may be taxed against him/her personally. See 28 U.S.C. § 1927; *Weiss* v. *United States,* 227 F.2d 72, 73 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956); 12 A.L.R.Fed. 910. See F.R.A.P. 30(b); *United States* v. *Deaton,* 207 F.2d 726, 727 (5th Cir. 1953) (as to recovery of the costs of unnecessarily encumbering the record on appeal).

When considering moving for costs as the prevailing defendant in litigation, discretion should be exercised in determining whether a request for the assessment of costs or a reduction in the amount of costs is appropriate. Although it is difficult to establish any set rules for determining under what circumstances costs should not be sought, there may be cases, for example, when the plaintiff's financial situation at the time the litigation was initiated or as a result of the litigation, warrant a request for a reduction in costs or a waiver of costs.

A. Fees of United States Marshal and Clerk, Charges of Court Stenographer, Printing Expenses. The fees of the United States Marshal in effecting service are taxable as costs. 28 U.S.C. § 1920(1). His/her fees for the service of subpoenas are also taxable as costs, as are the United States Marshal's necessary travel expenses. See 28 U.S.C. § 1921. The allowance of the fees of the clerk of the court are specifically covered by 28 U.S.C. § 1920(1).

Section 1920(2) of Title 28 of the *United States Code* permits taxation of the fees of the court reporter for all or any part of the stenographic transcript "necessarily obtained for use in the case." This does not cover the court's ordering a transcript for its own use, since the statutory salary of the reporter compensates him/her for this copy. *Texas City Tort Claims* v. *United States,* 188 F.2d 900, 902 (5th Cir. 1951); *cf. Miller* v. *United States,* 317 U.S. 192 (1942). If opposing counsel orders a copy of the transcript for his/her own use, the cost is not recoverable. See *Firtag* v. *Gendleman,* 152 F. Supp. 226 (D.D.C. 1957).

However, if the court advises counsel that it will be necessary for counsel to furnish a transcript before a decision can be rendered because of the length and complexity of the trial, and certifies that the transcript was "necessarily obtained for use in the case," the costs may be recoverable. *Wax* v. *United States,* 183 F. Supp. 163, 164 (E.D.N.Y. 1960). Printing expenses necessarily incurred may be taxed as costs under 28 U.S.C. § 1920(3).

B. Witness Fees and Expenses, Deposition Expenses, Exemplification of Papers. See 28 U.S.C. § 1821, as to witness fees and expenses. Wages lost by a witness may not be taxed as costs. See *Andresen* v. *Clear Ridge Aviation, Inc.,* 9 F.R.D. 50, 52 (D. Neb. 1949). Nor is the real party in interest entitled to a witness fee for his/her own testimony. Nominal parties or witnesses who have only an incidental interest in the suit are entitled to attendance fees and allowances, and these items may be taxed. See *6 Moore's Federal Practice,* ¶ 55.77(5.-1), p. 54–432 (2d ed. 1987). Witness fees and subsistence may be taxable as costs in some instances in which the witness did not testify, as where last minute admissions made the testimony unnecessary. *Mueller* v. *Powell,* 115 F. Supp. 744, 746 (W.D. Mo. 1953). Witness fees and subsistence are not restricted to the actual day the witness testifies, but are allowable for each day the witness necessarily attends. *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.,* 24 F.R.D. 200, 204 (S.D.N.Y. 1959). Additional sums paid as fees or compensation to expert witnesses, over and above the statutory fees applicable with respect to fact witnesses, may not be recovered. See *Henkel* v. *Chicago, St. Paul, Minn. & Omaha Ry. Co.,* 284 U.S. 444, 447 (1931).

Deposition expenses are not taxable as costs, where the depositions were taken essentially for purposes of investigation or preparation. When the taking of a deposition was reasonably necessary, even though it may not have been actually used at trial, the costs recoverable by the prevailing party may include the reasonable fee of the officer before whom the deposition was taken, the cost of notarial certificate and postage if the deposition was mailed, reasonable stenographic expense in taking and transcribing the deposition (but not the cost of an extra copy), fees and mileage allowances of witnesses, and, in a proper case, an interpreter's fee. See *6 Moore's Federal Practice* ¶ 54.77(4) (2d ed. 1982). The party's attorney's fees in connection with the taking of a deposition are not recoverable. *6 Moore's Federal Practice* ¶ 54.77(2) (2d ed. 1974). The expenses of counsel in attending a deposition at a distant point may be imposed on the opposition as a condition of taking a deposition, rather than as a court cost. See *North Atlantic & Gulf S.S. Co.* v. *United States,* 209 F.2d 487, 489–90 (2d Cir. 1954).

C. Expenses of Investigation, Consultants, *etc.* The expenses of investigation, including trial preparation and travel expenses of counsel, are not chargeable as costs. *6 Moore's Federal Practice,* ¶ 54.77(4), (6), (8) (2d ed. 1982). The same is true with respect to long distance calls, costs of preparing lists of exhibits, and other items of overhead. *Brookside Theatre Corp.* v. *Twentieth Century-Fox Film Corp.,* 11 F.R.D. 259, 265-66 (W.D. Mo. 1951), *modified & aff'd,* 194 F.2d 846 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952). The moving party under *Federal Rules of Civil Procedure* 34, generally must bear that cost of copying or photographing. See 76 A.L.R.2d 953, 972. The expense of using experts as consultants at the trial cannot be charged as costs. *Braun* v. *Hassenstein Steel Co.,* 23 F.R.D. 163, 168 (D.S.D. 1959); *American Steel Works* v. *Hurley Construction Co.,* 46 F.R.D. 465, 468 (D. Minn. 1969). Costs of models are generally not taxable as costs, even though the models are introduced in evidence. See *6 Moore's Federal Practice,* ¶ 54.77(6) (2d ed. 1982).

SUBMITTED REPORT BY HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA

Endangered Species Act Congressional Working Group: Report, Findings, and Recommendation

February 4, 2014

Rep. Doc Hastings (WA–04), Co-Chair
Rep. Cynthia Lummis (WY-At large), Co-Chair
Rep. Mark Amodei (NV–02)
Rep. Rob Bishop (UT–01)
Rep. Doug Collins (GA–09)
Rep. Andy Harris (MD–01)
Rep. Bill Huizenga (MI–02)

Rep. James Lankford (OK–05)
Rep. Blaine Luetkemeyer (MO–03)
Rep. Randy Neugebauer (TX–19)
Rep. Steve Southerland (FL–02)
Rep. Glenn Thompson (PA–05)
Rep. David Valadao (CA–21)

Website: *http://esaworkinggroup.hastings.house.gov*

Executive Summary

Thirteen Members of the House of Representatives from across the United States formed the Endangered Species Act (ESA) Working Group in May 2013 to examine a variety of questions related to ESA implementation.

The ESA has existed for over 40 years, and in light of the fact that ESA has not been updated by Congress in over a quarter century, the Working Group sought to answer questions related to whether the Act has been or will continue to be effective and if the Act reflects scientific advancements and societal needs of the 21st century. Upon answering these and other questions, the Working Group's overall goal was to improve, if necessary, the ESA for both species and people.

In short, the Working Group found that the ESA, while well-intentioned from the beginning, must be updated and modernized to ensure its success where it matters most: outside of the courtroom and on-the-ground. A two percent recovery rate of endangered species is simply not acceptable.

Americans who live near, work on and enjoy our lands, waters and wildlife show a tremendous commitment to conservation that is too often undermined and forgotten by the ESA's litigation-driven model. Species and people should have the right to live and prosper within a 21st century model that recognizes the values of the American people and fosters, not prohibits, a boots on-the-ground conservation philosophy that is working at many state and local levels. The ESA can be modernized to more successfully assist species that are truly in danger. It can be updated so species conservation does not create conflicts with people. All the while, the ESA should promote greater transparency in the way our Federal Government does business.

This Report summarizes the findings of the Working Group and answers key questions related to those findings. The Report acknowledges the continued need for the ESA, but recommends constructive changes in the following categories:

- Ensuring Greater Transparency and Prioritization of ESA with a Focus on Species Recovery and Delisting
- Reducing ESA Litigation and Encouraging Settlement Reform
- Empowering States, Tribes, Local Governments and Private Landowners on ESA Decisions Affecting Them and Their Property
- Requiring More Transparency and Accountability of ESA Data and Science

While there are certainly other ideas for reform, this Report is intended to be a starting point for positive, targeted improvements that can truly benefit species and people.

Statement of the ESA Working Group's Mission and Purpose

The Endangered Species Act (ESA) was created over 40 years ago in 1973 to preserve, protect and recover key domestic species. Since that time, over 1,500 U.S. domestic species and sub-species have been listed. Most species remain on the list and hundreds more could potentially be added within the just the next 2 years. The ESA was last reauthorized in 1988, prompting questions about whether Congress should update and modernize the law.

On May 9, 2013, Members of the House of Representatives, representing a broad geographic range of the United States, announced the creation of the Endangered Species Act (ESA) Working Group. Led by House Natural Resources Committee Chairman Doc Hastings and Western Caucus Co-Chair Cynthia Lummis, the Group included: Representative Mark Amodei (Nevada, 2nd District); Representative Rob Bishop (Utah, 1st District); Representative Doug Collins (Georgia, 9th District); Representative Andy Harris (Maryland 1st District); Representative Bill Huizenga, (Michigan, 2nd District); Representative James Lankford, (Oklahoma, 5th District); Representative Blaine Luetkemeyer (Missouri, 3rd District); Representative Randy Neugebauer (Texas, 19th District); Representative Steve Southerland (Florida, 2nd District); Representative Glenn Thompson (Pennsylvania, 5th District); and Representative David Valadao (California, 21st District).

The Working Group sought to examine the ESA from a variety of viewpoints and angles; receive input on how the ESA was working and being implemented and how

and whether it could be updated to be more effective for both people and species. Despite sometimes intrinsic differences on the means, there appears wide agreement that improvements to the 40 year old ESA are not only possible, but desirable. A few months ago, the Obama Administration's Director of the U.S. Fish and Wildlife declared that the ESA can be improved.[1] We agree.

During its deliberations, the Working Group focused on asking and receiving answers from a variety of perspectives to the following questions:

- *How is ESA success defined?*
- *How do we measure ESA progress?*
- *Is the ESA working to achieve its goals?*
- *Is species recovery effectively prioritized and efficient?*
- *Does the ESA ensure the compatibility of property and water rights and species protection?*
- *Is the ESA transparent, and are decisions open to public engagement and input?*
- *Is litigation driving the ESA? Is litigation helpful in meeting ESA goals?*
- *What is the role of state and local government and landowners in recovering species?*
- *Are changes to the ESA necessary?*

This report analyzes answers to these questions in depth below, summarizes the findings of the Working Group and concludes with several key recommendations to present to the 113th Congress relating to the ESA.

Description of the Activities of the ESA Working Group

The Working Group received hundreds of comments from outside individuals and heard from numerous ESA experts throughout last year. In addition, the Working Group reviewed formal written testimony submitted by more than 50 witnesses appearing at nine full and Subcommittee ESA hearings of the House Natural Resources Committee over the last 3 years.[2]

On October 10, 2013, the Working Group convened a forum titled, "***Reviewing 40 Years of the Endangered Species Act and Seeking Improvement for People and Species.***" The forum featured seventeen witnesses from across the nation representing private landowners, agriculture, sportsmen, electric utilities, timber, labor unions, state and local government, chambers of commerce, research and policy organizations, energy producers, and environmental and conservation groups.[3]

Overview of the Endangered Species Act Since 1973

Congress passed the Endangered Species Act in 1973 with the goal of conserving and recovering animal and plant species facing extinction.[4] Specifically, the conference report described the Act's purposes as: "to provide for the conservation, protection, restoration, and propagation of threatened and endangered species of fish, wildlife, and plants, and for other purposes."[5]

In general, the law provides authority for Federal agencies to list species as either threatened or endangered (section 3), and requires them to use their respective authorities to conserve listed species and avoid actions that may affect listed species or their federally-designated habitat (section 7).[6]

This mandate has been interpreted broadly and affects private entities and individuals by covering Federal "actions" such as funding, permitting, licensing, and the granting of easements and rights-of-ways.[7] The ESA also establishes prohibitions on

---

[1] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, Member, U.S. Fish and Wildlife Service, at 56) (***Editor's Note*** (1)).

[2] Testimony of witnesses and archived video of ESA-related hearings held Dec. 6, 2011; May 21, 2012; June 19, 2012; July 24, 2012; June 6, 2013; Aug. 1, 2013; Sept. 4, 2013; and Dec. 12, 2013 are available from the House Committee on Natural Resources website: *http://naturalresources.house.gov*.

[3] Endangered Species Act Congressional Working Group Forum, U.S. House of Representatives (Oct. 10, 2013) (*http://esaworkinggroup.hastings.house.gov/*).

[4] Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (1973) (*http://www.law.cornell.edu/uscode/text/16/1531*).

[5] 1973 U.S.C.C.A.N, 3001.

[6] *A History of the Endangered Species Act of 1973,* United States Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf*).

[7] 50 CFR 402.02 (most recent regulation defining agency "action" for ESA purposes) (*http://www.nmfs.noaa.gov/pr/pdfs/laws/sec7regs.pdf*).

the taking of listed species (section 9), which applies directly to private individuals without the requirement of a Federal nexus.[8]

Congress' most significant amendments to the ESA occurred in 1978, 1982, and 1988.[9] Despite these targeted changes to the law, the "overall framework of the 1973 Act" has remained "essentially unchanged" according to the U.S. Fish and Wildlife Service (FWS).[10] Under the current framework, the ESA charges the FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) to field petitions to list species as threatened or endangered and to designate critical habitat, using the "best scientific and commercial data available."[11] In addition, ESA requires the implementing Federal agencies to "cooperate to the maximum extent practicable with the States" in implementing ESA, including "consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species." (section 6).[12]

Litigation and threats of litigation on both substantive and procedural grounds have significantly increased in recent years, and legitimate questions are being raised over petitions, listings, the rigid time-frames, and transparency of data supporting decisions regarding the priorities of the two agencies that administer ESA.[13]

In addition, though the Federal Government annually awards attorneys' fees to plaintiffs who file ESA-related lawsuits, the exact amount spent by American taxpayers on ESA litigation and attorneys' fees is unattainable. Even the former Interior Secretary acknowledged at a 2012 budget hearing that he could not identify how much money his agency spent on ESA-related litigation.[14]

The last authorization for Federal appropriations to fund ESA occurred in 1988, with specified appropriation caps for each fiscal year from 1988 through 1992.[15] In each subsequent year since, Congress has appropriated funds for the continued implementation of ESA-related activities despite the expiration of the express statutory authorization.[16]

Questions and Answers Regarding the Endangered Species Act

At the formation of the ESA Working Group, several key questions were posed in relation to the ESA's past and current effectiveness, and to help determine the scope and type of possible improvements that may be needed going forward. The Working Group examines each of these in detail below.

How is ESA "Success" Defined, and How is Progress Measured?

***Working Group Conclusion:* With less than 2% of species removed from the ESA list in 40 years, the ESA's primary goal to recover and protect species has been unsuccessful. Progress needs to be measured not by the number of species listed, especially as a result of litigation, but by recovering and delisting those that are currently listed and working cooperatively on-the-ground to prevent new ones from being listed.**

The Center for Biological Diversity (CBD) alleges that "the ESA is 99.9 percent effective in preventing extinction."[17] A representative from the WildEarth Guardians (WEG) bluntly stated, "Species on the list receive the Act's protections while unlisted species do not," and "increasing the rate of recovery will require more, not

---

[8] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10) (***Editor's Note*** (2)).

[9] *A History of the Endangered Species Act of 1973,* United States Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf*).

[10] *Id.*

[11] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 9) (***Editor's Note*** (2)).

[12] Endangered Species Act of 1973, 16 U.S.C. § 1531–1544 (1973) (*http://www.epw.senate.gov/esa73.pdf*).

[13] *Id.*

[14] *Department of Interior Spending and the President's Fiscal Year 2013 Budget Proposal: Oversight Hearing Before H. Comm. On Natural Resources.* 112th Cong. (2011) (statement of Ken Salazar, Secretary of U.S. Department of the Interior, at 38–39) (***Editor's Note*** (3)).

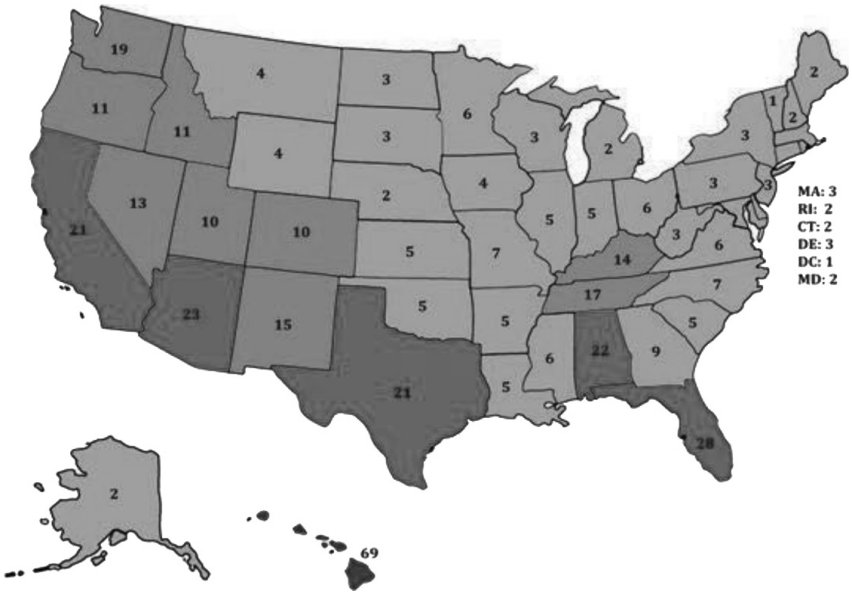
[15] Pub. L. No. 100–478, Title I, § 1009, 102 Stat. 2312 (*http://uscode.house.gov/statutes/1988/1988-100-0478.pdf*).

[16] *Id.*

[17] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Kieran Suckling, Center for Biological Diversity, at 19) (***Editor's Note*** (2)).

less, protective regulations—the type of regulations that have the potential to affect economic activity."[18]

State Species for Listing Under U.S. FWS Settlement Agreements



Source: House Natural Resources Committee derived from data from FWS settlements.

Certain conservation biologists and some environmental groups have extolled a "human-caused extinction crisis," and have opined that without ESA listing, "half of the species on earth" could be lost to global climate change and other forces affecting habitat.[19] WEG opines that an "estimated 6,000 to 9,000 species are at risk and should be granted legal protection," and that "species extinction are ripping a hole in the web of life."[20] Further, because they believe a species "truly is in emergency room status before it can even get on the endangered species list,"[21] these groups have instilled a sense of urgency that delaying listing of species "makes conservation more difficult" and causes species to "go extinct while waiting for status determinations."[22]

It is in this perspective that these groups, taking advantage of strict and unworkable statutory deadlines in the ESA, have filed literally hundreds of ESA lawsuits and thousands of petitions, and in essence, have overtaken the ESA priorities of the FWS and NMFS.

---

[18] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) (written testimony of James Tuchton, WildEarth Guardians, at 32–33) (***Editor's Note*** (2)).

[19] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Patrick Parenteau, Vermont Law School, at 27) (***Editor's Note*** (4)).

[20] Press Release, WildEarth Guardians, *Group Seeks Federal Protection for 475 Southwestern Endangered Species: Largest Listing Petition Filed in Thirty Years* (June 21, 2007) (*http://www.wildearthguardians.org/site/News2?news_iv_ctrl=-1&page=NewsArticle&id=5701#.Utg1c6Mo45s*).

[21] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Brock Evans, Endangered Species Coalition, at 2) (***Editor's Note*** (5)).

[22] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Joe Roman, University of Vermont, at 5) (***Editor's Note*** (6)).

In May and July 2011, the Obama Administration, through the FWS, negotiated and agreed to two litigation settlements involving petitions by two national environmental organizations, the CBD and the WEG to make hundreds of species listings and designate critical habitat decisions under the ESA through more than 85 lawsuits and legal actions.[23] These settlements mandate that over 250 candidate species must be reviewed for final listing as either threatened or endangered within specific deadlines.

The settlements combined thirteen Federal court cases filed in several Federal district courts by either WEG or CBD. Over the last 2 years, FWS has attempted to cast these settlements in a positive light, going so far as to say that the settlements would "enable the agency to systematically, over a period of 6 years, review and address the needs of more than 250 candidate species to determine if they should be added" to the list.[24]

However, the settlements actually include actions impacting *1,053* species. While the FWS claims the settlements don't require that listing will occur, the overwhelming decisions so far have resulted in the vast majority going toward new listings, which is the goal of these groups. In just the past 2 years, over 80 percent (210 of the over 250) decisions involving these species were either listings or proposals to list by the FWS.[25]

Additionally, the settlements do not apply to any other special interest groups that are still free to file lawsuits. Indeed, the settlements do not even limit WEG or CBD from filing additional petitions for any myriad of other species. After these settlements were signed, it did not take the organizations long to start filing additional petitions. In July 2012, CBD touted filing the "Largest Petition Ever" targeting amphibians and reptiles for 53 species in 45 states. The FWS admitted in response that it was "disappointed that [CBD] filed another large, multi-species petition. Fifty-three is a large number, and the species are spread across the country. They have a right to do that; [the settlement] did not give away that right. But the service now has our priorities set through the settlement."[26]

In summary, lawsuits to list species under strict statutory deadlines only end up impeding recovery efforts for truly endangered species. Serial litigation actually makes ESA success even harder to accomplish. More listed species do not necessarily equate to ESA progress.

Is the ESA Working to Achieve its Goals?

Working Group Conclusion: **Current implementation of ESA is focused too much on responding to listing petitions and unattainable statutory deadlines, litigation threats and ESA regulatory mandates, rather than on defensible policies, science or data to recover and delist species. This slows or halts a multitude of public and private activities, even those that would protect species.**

As referenced above, litigation and associated settlements to list species under the ESA's statutory timelines have an impact on the agencies charged with implementing ESA. As a state lands commissioner testified:

> "The FWS is faced with a no-win situation; they are overwhelmed by environmental groups with hundreds of candidate listings that the agency cannot possibly respond to in the statutory timeline specified; they then find themselves in violation of that statute and subsequently sued by these same groups who filed to protect the species. These groups create the problem by purposely overwhelming the agency, knowing that they will be unable to respond and then dictate an outcome because the agency settles rather than being able to follow the

---

[23] *WildEarth Guardians* v. *Salazar* (2011) (*http://www.fws.gov/endangered/improving_esa/joint_motion_re_settlement_approval_filed.pdf*); *Center for Biological Diversity* v. *Salazar* (2011) (*http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf*).

[24] *Endangered Species Program: Improving ESA Implementation,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/improving_ESA/listing_workplan.html*).

[25] 78 CFR 226 70113, 70114 (Nov. 2013) (*http://www.fws.gov/endangered/esa-library/pdf/2013_11_22_CNOR.pdf*); and 77 CFR. No. 225, 7004–7007 (*http://www.gpo.gov/fdsys/pkg/FR-2012-11-21/pdf/2012-28050.pdf*).

[26] Allison Winter, *Petitions for new species protection wobble balance in FWS settlement, agency says,* E&E NEWS, Aug. 7, 2012 (*http://www.eenews.net/login?r=%2Fgreenwire%2F2012%2F08%2F07%2Fstories%2F1059968495*).

appropriate proves, including the study of scientific evidence. Listing a species without adequate scientific data, just to settle a lawsuit is capricious."[27]

One outdoors writer and widely known environmentalist commented that the Federal Government "could recover and delist three dozen species with the resources they spend responding to the CBD's litigation."[28] Recently, WEG declared that since "only" 94 listed species out of the total 2,097 listed species are in the ocean, "a historic imbalance needs to be righted," and, as a result, petitioned NMFS to list 81 new species to "stem the extinction crisis in the world's oceans."[29]

ESA litigation has also increased the Federal Government's inability to control catastrophic wildfires. The four Federal land management agencies (the U.S. Forest Service, Bureau of Land Management, National Park Service, and the FWS) are responsible for managing over 600 million acres of land or nearly ⅓ of the United States. Decades of failed Federal forest management have created unhealthy and overstocked forests, placing 73 million acres of National Forest lands and 397 million acres of forest land nationwide at risk of severe wildfire.[30]

Fires are destroying species habitat and ESA itself is creating obstacles that are counter-productive to fighting wildfires, including use of heavily mechanized equipment, use of aerial retardant and restricted use of water due to concerns about potential impacts to other ESA-listed species, such as salmon.[31] State and tribal lands adjoining Federal forest lands are increasingly at risk of wildfires partly because of ESA.[32]

The Forest Service's self-described "analysis paralysis," excessive appeals on timber sales, ESA-related litigation, statutory and administrative land designations (such as wilderness, roadless areas and critical habitat) all serve to delay or outright block management activities necessary to reduce hazardous fuels and improve forest health and habitat.

For example, in northwestern Montana, the Kootenai National Forest Supervisor approved an Environmental Impact Statement to proceed with the Grizzly Vegetation Management project on 2,360 acres. The proposed activities included timber harvest, fuels reduction, prescribed burning, pre-commercial thinning, wildlife habitat improvement, and watershed rehabilitation. In late 2009, several environmental groups filed suit under the ESA, claiming these activities would harm grizzly bear habitat. A Federal district court judge granted an injunction in 2010, which effectively blocked the management activities, and awarded the plaintiff's attorneys' fees in the amount of $56,000. This area was recently identified by the National Interagency Fire Center as being at a "significant risk of wildfire." Over the past 2 fiscal years alone, 26 lawsuits, notices of lawsuits, and appeals were filed in the Idaho and Montana region of the U.S. Forest Service to block timber thinning and other vegetation management in areas at high risk of wildfire.[33]

Endangered species habitat destruction was a reality last year, when the Arizona Game and Fish Department noted that two major fires resulted in the destruction of 20 percent of Mexican spotted owl nests known to exist in the world.[34] In addition, biologists scrambled last year to protect endangered fish in New Mexico from

---

[27] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Jerry Patterson, State of Texas, at 15) (***Editor's Note*** (7)).

[28] Ted Williams, *Extreme Green,* HIGH COUNTRY NEWS, May 31, 2011 (*http://www.hcn.org/wotr/extreme-green*).

[29] *WildEarth Guardians Launches Major Campaign to Protect Marine Biodiversity,* WildEarth, July 8, 2013 (*http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8679&news_iv_ctrl=1194#.UuF5UrQo671*).

[30] *Fire and Fuels Buildup,* U.S. Forest Service (*http://www.fs.fed.us/publications/policy-analysis/fire-and-fuels-position-paper.pdf*).

[31] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Rick Dice, State of Texas, at 20) (***Editor's Note*** (8)).

[32] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Alison Berry, The Sonoran Institute, at 23) (***Editor's Note*** (8)).

[33] *Vegetation Management Litigation Trends in Region 1,* U.S. Forest Service (*http://naturalresources.house.gov/uploadedfiles/2013_04_07_lit_briefing_memo_r1.pdf*).

[34] Bonnie Stevens, *An era of mega fires,* ARIZONA DAILY SUN, May 15, 2012 (*http://azdailysun.com/news/science/an-era-of-mega-fires/article_a14f3c7d-7a36-5c12-a48e-75a8ea4e3fff.html*).

the Whitewater-Baldy Complex fire, which consumed almost 300,000 acres.[35] Some have pointed out that ESA's regulatory requirements work to hinder other much needed efforts to protect the environment, such as control of aquatic invasive species that threaten the Great Lakes and its local water bodies.[36]

ESA implementation and litigation continue to have tremendous negative impacts on a host of activities that could protect or improve habitat. For example, a rural public utility district sought to construct a wind project on state-owned land and spent $4 million over 5 years in consultation with the FWS to develop an environmental assessment of the potential impacts on the ESA-listed marbled murrelet, purchasing over 260 acres of land as habitat for the bird. Though the analyses determined the project would have negligible impact on endangered species, the utility ultimately withdrew from the project when the FWS insisted on additional peer review and $10 million as additional habitat and other requirements.[37] In addition, the 1998 construction of an elementary school in San Diego was delayed by ESA litigation and FWS mitigation requirements to protect a 2 inch shrimp. Construction is finally slated to go forward as a result of an agreement by the school district to spend $5 million in ESA mitigation expenses, all of which will be passed on to local citizens.[38]

ESA-related surveys can result in significant delays and costly project modifications; for example, surveys may be required for some listed species that are not present for months out of the year, and existing Federal permits, licenses or authorizations could be subject to re-initiation of ESA consultation upon new listings of information.[39]

Discovery of species can hamper activities on lands owned by local entities that have limited resources and must comply with strict seasonal "work windows" to accomplish their activities. For example, because an orchid-like, ESA-listed plant (Uteladies' tresses) was spotted in a small Utah town, Federal regulations require a survey for all "suitable habitat," slowing down development permits in the county for a year.[40] In San Antonio, Texas, despite extensive permits and environmental analyses approved by the FWS and the Federal Highway Administration, after a biologist sited a dime-sized spider not seen in the area for over 30 years, construction of a $15 million highway project was halted.[41] Over a year later, the Texas Department of Transportation has been forced to completely redesign the highway project design and submit it for Federal approval.[42] A few months after its discovery, the same spider halted completion of an $11 million water pipeline project.[43]

In Montana, a mining project that had gone through environmental reviews and received all required permits in 1993 is being required to spend millions of dollars to update environmental impact statements; and the mining company has been told by the FWS that it will need to pay for contractors to help them complete a biological opinion related to grizzly bears, without any assurance the project will be ap-

---

[35] Susan Montoya Bryan, *Raging New Mexico Fire prompts rescue of threatened fish,* SAN JOSE MERCURY NEWS, June 16, 2012 (*http://www.mercurynews.com/ci_20872934/raging-new-mexico-fire-prompts-rescue-threatened-fish*).

[36] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Senator Tom Casperson, Michigan State Senate, at 3) (***Editor's Note*** (9)).

[37] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony of Doug Miller, Public Utility District No. 2 of Pacific County, at 15–18) (***Editor's Note*** (2)).

[38] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of John A. Stokes, San Diego Unified School District, at 19) (***Editor's Note*** (7)).

[39] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 29) (***Editor's Note*** (7)).

[40] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Issa A. Hamud, City of Logan, Utah, at 1–2) (***Editor's Note*** (10)).

[41] Rob Gordon, *GORDON: Little meshweaver brings San Antonio to a screeching stop,* THE WASHINGTON TIMES, Oct. 17, 2012 (*http://www.washingtontimes.com/news/2012/oct/17/gordon-little-meshweaver-brings-san-antonio-to-a-s/*).

[42] Karen Grace, *Drivers frustrated with construction projected to halt endangered spider,* KEN5 San Antonio, Oct. 21, 2013 (*http://www.kens5.com/news/Drivers-frustrated-with-construction-projected-halted-by-endangered-spider-228683431.html*).

[43] Colin McDonald and Vianna Davila, *Rare spider again bites construction,* MY SAN ANTONIO, Feb. 25, 2013 (*http://www.mysanantonio.com/news/environment/article/Rare-spider-again-bites-construction-4307810.php*).

proved.[44] A rural electric cooperative in Utah that sought to construct a power line primarily on private and state-owned lands completed an extensive NEPA process, but was ordered to stop construction when it was determined that 2 acres of Utah Prairie Dog habitat were within a 350 foot buffer of the project's right-of-way. This resulted in a 9 month delay in order for the FWS to conduct a survey and the work was only re-started after the electric co-op agreed to pay $20,000 to the National Wildlife Defense Fund and hire a biologist to monitor the impacts of the project on prairie dogs.[45]

Is Species Recovery Effectively Prioritized and Efficient?

Working Group Conclusion: **Current implementation of ESA does not clearly identify what is needed to recover and delist species, resulting in a lack of incentives, for state and private conservation, costly mandates, and wasted resources even in light of increased Federal funding.**

Listing Species Has Become the Federal Overarching Priority, not Avoiding Listing or Recovery of Species

The legislative history of the ESA stated that its purpose is to provide a mechanism to recover species, not simply put them on a list.[46] Yet, the 2011 "mega-settlements" are exclusively devoted to listing species, rather than more productive goals of developing more current and better data and working cooperatively with states, localities and private landowners to avoid listings.[47]

The FWS states that its ESA recovery program "oversees development and implementation of strategic recovery plans that identify, prioritize, and guide actions designed to reverse the threats that were responsible for species' listing. This allows the species to improve, recover, and ultimately be removed from the ESA's protection (*i.e.,* delisted)."[48] However, even one litigious advocacy group's director acknowledges that the average Federal recovery plan requires 42 years of a species listed under ESA.[49] Another environmental activist acknowledges that some species "could take a century or more, if ever" to be totally delisted.[50]

Despite litigious groups' inflated claims that 90 percent of 110 selectively-chosen endangered species are "advancing toward recovery,"[51] the FWS' own statistics simply don't match this claim. Unfortunately, the FWS acknowledges in its most recent review of its own recovery efforts that less than five percent of the over 1,500 domestic species on the ESA list are improving.[52] NMFS reports that a little over ⅓ of its 70 listed species are improving.[53] This is concerning considering many of the species listed have been on the list for up to 40 years and has cost tens of billions of dollars in direct spending and untold amounts of indirect costs to Americans.

Even when Federal agencies have little or no data, they are defaulting to listing species under ESA, despite other ongoing conservation activities. In 1998, NMFS determined that ongoing state and Federal protective measures undertaken by Atlantic States were sufficient to preclude an ESA listing of the Atlantic sturgeon, an

---

[44] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep. John Duncan, Member, H. Comm. on Natural Resources, at 45) (***Editor's Note*** (7)).

[45] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Carl Albrecht, Garkane Energy, at 1–2) (***Editor's Note*** (6)).

[46] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 6) (***Editor's Note*** (2)).

[47] *Id,* at 6.

[48] *Fiscal Year 2013 Budget Justification,* U.S. Fish and Wildlife Service (*http://www.fws.gov/budget/2013/FY%202013%20FWS%20Greenbook%20Final.pdf*).

[49] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Kieran Suckling, Center for Biological Diversity, at 18) (***Editor's Note*** (2)).

[50] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Patrick Parenteau, Vermont Law School, at 28) (***Editor's Note*** (4)).

[51] Kieran Suckling, Noah Greenwald, and Tierra Curry, *On Time, On Target: How the Endangered Species Act is Saving America's Wildlife,* Center for Biological Diversity, 2012 (*http://www.esasuccess.org/report_2012.html*).

[52] Report to Congress on the Recovery of Threatened and Endangered Species Fiscal Years 2009–2010, U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/Recovery_Report_2010.pdf*).

[53] *Recovering Threatened and Endangered Species FY 2011–2012 Report to Congress,* National Oceanic and Atmospheric Administration Fisheries (*http://www.nmfs.noaa.gov/pr/laws/esa/noaa_esa_report_072213.pdf*).

anadromous species of fish present in 32 rivers in the eastern U.S. from Maine to Florida. However, following a 2009 petition by the Natural Resources Defense Council, NMFS proposed to list five distinct population segments of Atlantic sturgeon, without a single stock assessment or population estimate for any of the "distinct population segments."[54]

Even military budgets and operations have been significantly affected by species conservation activities that ultimately appear to lead to Federal listings anyway. In western Washington, the Department of Defense and other Federal agencies have invested more than $12.6 million to acquire and protect properties designed to mitigate impacts of the settlement-driven, proposed listings of six subspecies of gophers. These costs do not include over $250,000 spent by local entities, school districts, ports and private landowners as part of the FWS listing process and development of a conservation plan.[55]

Biological Opinions and other Measures Required by ESA Force Open-Ended, Expensive and Questionable Measures

Under ESA, anyone can submit unlimited petitions to the FWS or NMFS to list species as "threatened" or "endangered." There is no requirement that the agencies considering these petitions actually count the species populations prior to listing.[56] Thus, there is no real measurable numerical goalpost to justify the agencies' determination that a species deserves to be listed or to justify what would be needed to recover them once they are listed.

One witness' testimony noted that alternative approaches authorized by ESA to recover listed species, such as use of artificial propagation, are often ignored in favor of scapegoating human activity.[57] Another pointed out that agricultural crop protection products that already undergo extensive regulation under one Federal statute must go through consultation with FWS and NMFS, which have little expertise, resulting in consultation delays and litigation.[58]

When Species Should be delisted, the Process is Uncertain and Rare

According to FWS' data, in the 40 years since ESA was enacted, only 30 U.S. and foreign species have been delisted.[59] However, a recent review of this information reveals that more than 30% of all "delisted' species were removed from the ESA list due to data errors, indicating that they should never have been listed in the first place.[60] In one case, a Texas plant was listed on petition information data that 1,500 species remained, when in reality more than four million existed, and it took FWS more than a decade to remove the improperly listed plant from the ESA list.[61]

Two Utah counties and private landowners have been unable to control an influx of prairie dogs that have destroyed private lands because the FWS only counts prairie dogs found on public lands, not private lands, for recovery purposes.[62] This interpretation has cost one rural electric cooperative over $150,000 to airlift transmission

---

[54] *The Atlantic Fisheries Statutes Reauthorization Act of 2012: Hearing on H.R. 6096 Before the S. Comm. on Fisheries, Wildlife, Oceans, and Insular Affairs,* 112th Cong. (2012) (written testimony of Gregory DiDomenico, Garden State Seafood Assoc., at 2) (*http://naturalresources.house.gov/uploadedfiles/didomenicotestimony07-19-12.pdf*).

[55] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (submission for the record of Thurston County, Washington) (*http://naturalresources.house.gov/uploadedfiles/lettertochairman1_14_14.pdf*).

[56] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 9) (***Editor's Note*** (2)).

[57] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (statement of Brandon Middleton, Pacific Legal Foundation, at 67) (***Editor's Note*** (2)).

[58] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Kevin Kolevar, Conservation Leadership Conference, at 1) (***Editor's Note*** (11)).

[59] *Delisting report,* U.S. Fish and Wildlife Service (*http://ecos.fws.gov/tess_public/DelistingReport.do*).

[60] Reed Hopper, *Inflated Endangered Species Act 'success stories' revealed,* Pacific Legal Foundation, June 5, 2012 (*http://blog.pacificlegal.org/2012/inflated-endangered-species-act-success-stories-revealed/*).

[61] 76 *Fed. Reg.* 206 (Oct. 25, 2011) (*http://www.gpo.gov/fdsys/pkg/FR-2011-10-25/pdf/2011-27372.pdf*).

[62] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Chris Stewart, Member, H. Comm. on Natural Resources, at 63) (***Editor's Note*** (1)).

poles around Federal lands that have been designated for Utah prairie dogs, despite private landowners being able to obtain permits to kill them on nearby lands.[63]

The FWS and NMFS rarely act to delist or downlist a species, even when they acknowledge the species merits delisting or downlisting.[64] For example, in 1999, the FWS announced the recovery of the iconic bald eagle and formally proposed to delist it from ESA, yet took 8 years to act, and only acted after having been forced to by court order.[65] Last year, court actions were filed to force the FWS to follow through on its own recommendations to delist or downlist six California species.[66]

The FWS has taken the position that it is not required to act on delisting of a species unless and until an "interested party" petitions for action and then follows up with a lawsuit.[67] Because most citizens do not desire or are not in a position to file petitions or lawsuits against the Federal Government, many species continue to be listed under ESA even when it may not be necessary.

Even when a species has been deemed recovered, certain groups continue litigating to keep the species on the list.[68] A prime example of this is in the State of Wyoming, where gray wolf populations exceeded the FWS' stated recovery goals for twelve consecutive years before it was delisted Thereafter, the agency faced three separate lawsuits filed by fourteen litigious organizations opposing the delisting.[69]

State and tribal representatives have expressed concern that Federal proposed recovery time-frames are too lengthy and lack incentives for local, state and tribal entities to delist species.[70] They also are concerned that Federal ESA recovery goals are being set too high, and that they include objectives unrelated to species, such as greenhouse gas emission targets.[71]

Federal ESA Budgets are Not under-funded, and More Funding Won't Resolve Entrenched Problems of ESA Implementation

Despite frequent claims that ESA would be much more effective if it only received greater funding, the amount of Federal funding has increased for the ESA. FWS and NMFS received in excess of $360 million—an increase compared to the prior Fiscal Year (2013).[72] According to data made available since the beginning of the Obama Administration, Federal and state expenditures have continued to rise steadily, totaling **$6.2 billion** between Fiscal Years 2009 and 2012.[73] These costs do not in-

---

[63] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Carl Albrecht, Garkane Energy, Inc., at 2) (***Editor's Note*** (12)).

[64] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Damien Schiff, Pacific Legal Foundation, at 1) (***Editor's Note*** (13)).

[65] 72 *Fed. Reg.* 37346 (July 9, 2007) (*http://www.gpo.gov/fdsys/granule/FR-2007-07-09/07-4302/content-detail.html*); and *Contoski* v. *Scarlett,* 2006 WL 2331180 (D. Minn. Aug. 10, 2006) (*http://www.gpo.gov/fdsys/pkg/USCOURTS-mnd-0_05-cv-02528/pdf/USCOURTS-mnd-0_05-cv-02528-0.pdf*).

[66] *Petition of Pacific Legal Foundation, et al.* before The U.S. Department of the Interior and the U.S. Fish and Wildlife Service, (Dec. 9, 2011) (*http://www.pacificlegal.org/document.doc?id=761*).

[67] *Coos County Bd. Of County Comm'rs* v. *Kempthorne,* 531 F.3d 792 (9th Cir. 2008) (*http://caselaw.findlaw.com/us-9th-circuit/1103985.html*).

[68] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 7) (***Editor's Note*** (2)).

[69] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 33) (***Editor's Note*** (4)).

[70] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 19) (***Editor's Note*** (4)).

[71] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Doug Vincent-Lang, Alaska Department of Fish and Game, at 3) (***Editor's Note*** (14)).

[72] *Fiscal Year 2014 Budget Justification,* U.S. Fish and Wildlife Service (*http://www.fws.gov/budget/2014/FWS%202014%20Budget%20Justifications.pdf*); and *Fiscal Year 2014 Budget Summary,* National Oceanic and Atmospheric Administration (*http://www.corporateservices.noaa.gov/nbo/fy14_bluebook/FINALnoaaBlueBook_2014_Web_Full.pdf*).

[73] *Fiscal Year 2012 Federal And State Endangered And Threatened Species Expenditures,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/2012.EXP.FINAL.pdf*); *Fiscal Year 2011 Federal And State Endangered And Threatened Species Expenditures,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/2011.EXP.final.pdf*); *Fiscal Year 2010 Federal And State Endangered And Threatened Species*

clude the soaring direct and indirect costs on local governments and the private sector.[74]

The FWS' FY 2013 budget allocated $20.9 million for endangered species listings and critical habitat designations, and it acknowledges that 86 full time employees are devoting their attention to complying with court orders or settlement agreements resulting from litigation.[75]

Some have raised the point that the FWS, the NMFS and other Federal entities are not spending funds wisely relating to ESA recovery. For example, in 2013, as near-record runs of salmon returned, and after more than fifteen years and several billions of taxpayer and electricity ratepayer dollars have been spent on ESA-listed salmon and steelhead recovery in the Pacific Northwest, including extensive habitat, hatchery, and hydropower improvements, NMFS announced plans to spend between $200,000 to $300,000 to conduct interviews aimed at "identifying key challenges facing the recovery effort and helping inform solutions" for listed salmon and steelhead.[76]

Another recent, egregious example is the FWS's handling of the endangered Desert Tortoise, some of which were housed in a $1 million budgeted conservation center at the southern edge of Las Vegas Valley in Nevada. Though the tortoise has been ESA-listed since 1990, when available funds to operate the conservation reserve center decreased, the FWS began plans to actually kill hundreds of tortoises rather than finding other protection methods. "It's the lesser of two evils, but it's still evil," said the FWS program recovery coordinator.[77]

Does the ESA Ensure Property and Water Rights are Compatible with Species Protection?

Working Group Conclusion: **The ESA punishes private property owners and water rights holders and fails to properly account for huge economic and regulatory burdens that also hinder species conservation. The ESA also advances the agendas of groups seeking land and water acquisition and control.**

Private Property Owners Lack Incentives to Conserve under current ESA Implementation

A continuing controversy generated by ESA and related regulations is the conflict between government regulation and private property rights and water rights after a species has been listed. If a property owner has a protected species on their land, the government can limit or ban activities on that land or water source, which may harm the species. Under section 9 of the ESA, individuals are subject to criminal penalties if they "take" or "harm" a threatened or endangered species.[78] The definition of "harm" includes any activity that could "significantly impair essential behav-

---

Expenditures, U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/2011.EXP.final.pdf*); and *Fiscal Year 2009 Federal And State Endangered And Threatened Species Expenditures,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/esa-library/pdf/2009_EXP_Report.pdf*).

[74] John Shadegg and Robert Gordon, *Environmental Conservation: Eight Principles of the American Conservation Ethics,* The Heritage Foundation, 2012 (*http://thf_media.s3.amazonaws.com/2012/EnvironmentalConservation/Chapter6-The-Endangered-Species-Act.pdf*).

[75] *Spending for the National Oceanic and Atmospheric Administration, the Council on Environmental Quality, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2014 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 113th Cong. (2013) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service) ((***Editor's Note*** (15)). See also: *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 4) ((***Editor's Note*** (16)).

[76] *Wash. Congressman Seeks Review Of NOAA Fish Recovery Assessment,* NW FISHLETTER, Feb. 12, 2013 (*http://www.newsdata.com/fishletter/313/9story.html*); and Letter from Rep. Doc Hastings, Chairman, H. Comm. on Natural Resources, to Jane Lubchenco, Administrator, National Oceanic and Atmospheric Administration (Feb. 4, 2013) (*http://hastings.house.gov/uploadedfiles/hastingsltrresalmonassessment02-04-13.pdf*).

[77] Hannah Dreier, *Desert Tortoise Faces Threat From Its Own Refuge,* AP, Aug. 25, 2013 (*http://bigstory.ap.org/article/desert-tortoise-faces-threat-its-own-refuge*).

[78] Endangered Species Act of 1973, 16 U.S.C. § 1538(a) (*http://www.law.cornell.edu/uscode/text/16/1538*), § 1533(d) (*http://www.law.cornell.edu/uscode/text/16/1533*) (1973).

ioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering" of a species.[79]

According to one property rights expert, "the ESA penalizes people for being good stewards of their land. Landowners whose management practices create and preserve habitat for an endangered plant or animal open their land to being regulated under ESA. And contrary to what many environmental pressure groups claim, ESA regulations do not simply prevent development or changes in land use. Customary land uses and practices, such as farming, livestock grazing, and timber production have regularly been prohibited, even when such practices help to maintain the species' habitat."[80]

While the Fifth Amendment to the U.S. Constitution provides that government cannot take private property unless it provides "just compensation" to the owner, many private property rights advocates are concerned that courts have not favorably ruled on the onerous effect of ESA regulations that amount to "regulatory takings" allowing for just compensation to property owners.

One witness remarked that the ESA puts the needs of species over people when describing the impact it had on California farmers and workers.[81] Another testified that it creates a "regulatory straightjacket" and disincentive to landowners, standing in the way of good conservation work, and can actually result in harm to species.[82] Another private landowner testified that the FWS' 2012 proposed expansion of critical habitat for the Northern Spotted Owl would not compensate landowners for use of their private lands to protect public resources.[83]

Aggressive ESA enforcement by Federal officials fuels mistrust both in Federal ESA implementation and the law. For example, the FWS defended trespass of a FWS enforcement officer arriving in plain clothes onto a private landowner's property that was alleged to be in the midst of critical habitat.[84]

In 1982, Congress amended the ESA to authorize Federal approval of "habitat conservation plans," including a new permit process meant to give incentives to non-Federal land managers and private landowners to protect listed and unlisted species, while still allowing for economic development.[85] Unfortunately, this process has proven unduly cumbersome and expensive for some private landowners who are seeking certainty to utilize their land. For example, a private landowner of 45 acres of timber land testified that despite investment of over $4 million and over fifteen years of process, the FWS and NMFS has still not provided written approval of the habitat conservation plan to allow him to harvest timber on the land and protect spotted owl and murrelet habitat.[86]

Critical Habitat Rules/Executive Orders Do Not Adequately Quantify the Significant Economic Impacts to Private Property Owners and Water Rights Holders and Comes too Late in Process

In practice, though Federal officials downplay its significance (for example, the Director of FWS stated "it may likely mean nothing"),[87] designation of critical habitat

---

[79] 50 CFR § 222.102 (NMFS' "harm" rule) (*http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol7/pdf/CFR-2010-title50-vol7-sec222-102.pdf*); see also 50 CFR § 17.3 (FWS' "harm" rule) (*http://www.gpo.gov/fdsys/pkg/CFR-2002-title50-vol1/pdf/CFR-2002-title50-vol1-sec17-3.pdf*).

[80] Myron Ebell, *An Update on Endangered Species Act Reform,* Competitive Enterprise Institute, May 5, 2005 (*http://cei.org/op-eds-and-articles/update-endangered-species-act-reform*).

[81] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (testimony of Brandon Middleton, Pacific Legal Foundation, at 40) ((***Editor's Note*** (2)).

[82] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 27) ((***Editor's Note*** (7)).

[83] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kelly Kreps, Kreps Ranch LLC, at 48) ((***Editor's Note*** (17)).

[84] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 59) ((***Editor's Note*** (1)).

[85] *Endangered Species Act | A History of the Endangered Species Act of 1973 | 1982 ESA Amendment,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/laws-policies/esa-1982.html*).

[86] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Tom Fox, Family Forest Foundation, at 11) ((***Editor's Note*** (17)).

[87] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 59) ((***Editor's Note*** (1)).

can have a significant negative economic impact on property values. For example, the FWS itself estimated the annual economic impact of critical habitat for the California gnatcatcher to be over $113 million.[88]

The Obama Administration has designated new critical habitat, and revised previously designated critical habitat that is increasingly and more directly affecting private property, including areas not even occupied by the listed species the habitat is designed to protect. For example, in 2010, the FWS revised a 2005 designation of critical habitat for ESA-listed bull trout, found in streams in Washington, Oregon, Idaho, Nevada and Montana, expanding the stream habitat by nearly 500%, including additional areas where no bull trout currently exist, and increasing the negative economic impact by $7 million per year.[89]

In April 2013, as part of the 2011 mega-settlement, FWS proposed to list the Sierra Nevada yellow-legged frog as endangered, and proposed to designate over 2.1 million acres as critical habitat for the frog, including over 82,000 acres of private property.[90] The FWS' designation of critical habitat for the elderberry longhorn beetle, native to California's Central Valley, has imposed significant economic and other costs, including $4.2 million in mitigation costs for one local flood control agency that maintains levees along a river where the FWS designated the critical habitat.[91]

Concerns have been raised that ESA does not ensure that economic impacts are fairly quantified at the time of listing, despite at least one circuit court of appeals mandate to this effect.[92] Instead, recent regulations finalized by the Obama Administration will require only that the Federal Government is required to analyze economic impacts of a critical habitat designation rule itself.[93]

Critical habitat designations have also created a litigious atmosphere surrounding the ESA. Even the former Deputy Interior Secretary under the Obama Administration, Mr. David Hayes, declared that critical habitat designations have been "fish in the barrel litigation for folks."[94]

ESA Being used to Forward Extreme Groups' Agendas

An additional concern is that current implementation of ESA is bowing to out-of-the mainstream and unjustified agendas of certain groups. The CBD's 2010 annual report states "where humans multiply extinction follows, and that the planet cannot continue to sustain both an exponentially growing human population and the healthy abundance of other species."[95] One biologist went so far as to defend his statement that "the collective needs of non-human species must take precedence over the needs and desires of humans."[96] Another stated that "humanity threatens to turn the earth into a planet of weeds."[97] These groups and many conservation biologists believe the primary reason for lawsuits is "to hold the government accountable" on forcing habitat protection and acquisition from private landowners for species.[98]

---

[88] 72 *Fed. Reg.* 243, 72010 (2007) (*http://www.gpo.gov/fdsys/pkg/FR-2007-12-19/html/07-6003.htm*).

[89] *Final Bull Trout Critical Habitat Designation,* U.S. Fish and Wildlife Service (*http://www.fws.gov/pacific/bulltrout/FinalCH2010.html*).

[90] 78 *Fed. Reg.* 80, 24516 (2013) (*http://www.gpo.gov/fdsys/pkg/FR-2013-04-25/html/2013-09598.htm*).

[91] *Endangered and Threatened Wildlife and Plants: Removal of the Valley Elderberry Longhorn Beetle from the Federal List of Endangered and Threatened Wildlife,* U.S. Fish and Wildlife Service (*http://www.regulations.gov/#!documentDetail;D=FWS-R8-ES-2011-0063-0029*).

[92] *N.M. Cattlegrower Ass'n* v. *U.S. Fish & Wildlife Serv.,* 248 F.3d 1277 (10th Cir. 2001) (*http://caselaw.findlaw.com/us-10th-circuit/1054225.html*).

[93] *Improving ESA Implementation,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/improving_ESA/CH_Econ.html*).

[94] *Environmental Law & Policy Annual Review,* Vanderbilt Law School, Mar. 22, 2013 (*http://law.vanderbilt.edu/academics/academic-programs/environmental-law/environmental-law-policy-annual-review/*).

[95] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (statement of Rep. Doug Lamborn, Member, H. Comm. on Natural Resources, at 75) ((***Editor's Note*** (2)).

[96] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Raúl Labrador, Member, H. Comm. On Natural Resources, at 74) ((***Editor's Note*** (4)).

[97] *Id.*

[98] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Patrick Parenteau, Vermont Law School, at 28) ((***Editor's Note*** (4)).

In 2009, CBD's Executive Director stated: "*When we stop the same timber sale three or four times running, the timber planners want to tear their hair out. They feel like their careers are being mocked and destroyed—and they are. Psychological warfare is a very underappreciated aspect of environmental campaigning.*"[99]

While certainly heartfelt, these statements foster a contentious atmosphere that creates unnecessary conflicts between humans and species, rather than encouraging cooperative efforts to aid species.

Is the ESA Transparent, and Are Decisions Open to Public Engagement and Input?

***Working Group Conclusion:* The ESA promotes a lack of data transparency and science guiding ESA-related decisions, and there are conflicts of interest and bias in "peer review" of Federal ESA decisions.**

"Best Available Scientific and Commercial Data" Not Clearly Defined, and Not being Implemented as Defined

President Obama directed all Federal agencies in a 2009 Executive Order to "create an unprecedented level of openness."[100] Relating to ESA, this directive has been ignored. Five years later, most of the Federal agencies that administer ESA are unable to make basic and legitimate data used for listings and critical habitat available to the public, and the Obama Administration is more frequently resorting to the use of executive orders and closed-door settlements on ESA.

Concerns have been raised that while the ESA requires decisions to be made solely on the basis of the best available data, the FWS and NMFS base their ESA decisions increasingly upon unpublished reports or professional opinions.[101] In the words of Mr. Dan Ashe, the current FWS Director, "if there is little information available, then often times we go to the experts and we ask experts for their best professional judgment."[102] In the case of the BLM's National Technical Team (NTT) Report for Greater Sage Grouse, this has resulted in concerns that professional opinions are offered first, and then "science" is found to justify the opinions.[103]

Last year, a Federal district court even ruled that data and conclusions included in a 482-page NMFS ESA biological opinion were "arbitrary and capricious," stating, "In sum, the Fisheries Service's November 2008 BiOp relied on a selection of data, tests, and standards that did not always appear to be logical, obvious, or even rational." The Court also noted that NOAA's BiOp lacked required analyses of economic or technological feasibility of its proposed mitigation measures.[104]

Many believe that modern scientific data methods, such as DNA testing, are superior to Federal agencies' reliance on unpublished studies or professional opinions.[105] Federal agencies nevertheless are resistant to using DNA. In one recent example, despite actual DNA results showing one proposed listing of a subspecies of plant was genetically indistinguishable from other similar plants found in three other states, the FWS defended studies that it stated required the plant be listed as a separate subspecies.[106]

An Alaska official raised concerns about the overuse of the "precautionary principle" in listing decisions, use of modeling rather than observational science, and other methods that have the effect of removing species from state jurisdiction and extending the period of "foreseeable future" into the far distant future. In one such example, the NMFS listed the beluga whale as endangered based on modeling that

---

[99] Tony Davis, *Firebrand ways, A visit with one of the founders of the Center for Biological Diversity,* HIGH COUNTRY NEWS, Dec. 21, 2009 (*http://www.hcn.org/issues/41.22/firebrand-ways*).

[100] 74 *Fed. Reg.* 4686 (Jan. 26, 2009) (*http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf*).

[101] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 2) ((***Editor's Note*** (18)).

[102] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service, at 36)(***Editor's Note*** (19)).

[103] *Id.*

[104] *Dow AgroSciences LLC* v. *National Marine Fisheries Service,* 4th Cir., No. 11–2337, (Feb. 2013) (*http://caselaw.findlaw.com/us-4th-circuit/1622864.html*).

[105] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Kent McMullen, Franklin County Natural Resources Advisory Committee, at 32) ((***Editor's Note*** (20)).

[106] Geoff Folsom, *Bladderpod to be listed as protected species on Federal lands,* TRI-CITY HERALD, Dec. 19, 2013 (*http://www.tri-cityherald.com/2013/12/19/2738671/bladderpod-to-be-listed-as-protected.html*).

showed the population had a greater than one percent chance of going extinct beyond 50 years, based on modeled extinction projections to 300 years.[107]

Data Not Used or Available to Increase Confidence in Decisions

The American people pay for data collection and research relating to threatened and endangered species through grants, contracts, cooperative agreements and administration of research permits. Concerns have been raised that despite Federal transparency and data quality guidelines, agencies are not required to make data relating to their ESA decisions publicly accessible, thus eliminating legitimate scientific inquiry and debate and to allow independent parties to reproduce the results.[108]

For example, the 2010 decision by FWS that Greater Sage Grouse warrants ESA listing is based primarily on a 2009 taxpayer-funded FWS study by Edward O. Garton and others. This study was cited 62 times in the FWS' listing decision. Yet, the data used in the Garton study still has not been made publicly available. Another scientist's written requests for the data have been refused.[109]

Counties that questioned the accuracy of a map developed for sage grouse habitat in Colorado have been refused by the FWS in their requests to verify data used by the FWS in its NTT report.[110] In more than one case, a court order has been required to obtain the data from Federal officials, even though the data was obtained through taxpayer-funded studies.[111]

Many reports and studies used to justify ESA decisions have been found to have mathematical errors, missing data, errors of omission, biased sampling, undocumented methods, simulated data in place of more accurate empirical data, discrepancies between reported results and data, inaccurate mapping, selective use of data, subjective interpretation of results, fabricated data substituted for missing data, and even no data at all.[112]

Litigious groups are petitioning for new species that lack even common names or descriptions, citing from a database called NatureServe, which is not reliable as an accurate or complete source of data.[113] Too often, the "science" included in citizen listing petitions is directly relied upon in the 90 day findings and is then codified as "fact" by the time the 12 month review is completed, and 12 month reviews are sometimes subjected to ad hoc and informal peer reviews that may amount to no more than an e-mail distribution of the document with informal comments received.[114]

Lack of transparency can lead to policies that invite further controversy and conflicts. For example, though ESA carefully circumscribes authority to list only species, subspecies and distinct population segments of species,[115] NMFS created and has used a different means to quantify and classify populations of fish. NMFS char-

---

[107] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Doug Vincent-Lang, Alaska Department of Fish and Game, at 2) ((***Editor's Note*** (14)).

[108] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 2) ((***Editor's Note*** (18)).

[109] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dr. Rob Roy Ramey, at 38) ((***Editor's Note*** (1)).

[110] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Tom Jankovsky, Garfield County, Colorado, at 39) ((***Editor's Note*** (4)).

[111] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Dr. Rob Roy Ramey, at 27) ((***Editor's Note*** (1)).

[112] *Id.*

[113] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Kent Holsinger, Holsinger Law, LLC, at 26) ((***Editor's Note*** (7)).

[114] *The Endangered Species Act: Reviewing the Nexus of Science and Policy: Oversight Hearing Before the H. S. Comm. On Investigations and Oversight,* 112th Cong. (2011) (written testimony of Dr. Neal Wilkins, Texas A&M Institute of Renewable Natural Resources, at 5) ((***Editor's Note*** (21)).

[115] 16 U.S.C. § 1532(16) (*http://www.gpo.gov/fdsys/pkg/USCODE-2011-title16/pdf/USCODE-2011-title16-chap35-sec1532.pdf*).

acterizes populations of salmon and steelhead as "evolutionary significant units,"[116] whereas the FWS utilizes "distinct population segments" as defined by ESA under section 4. Some have suggested that FWS and NMFS have used less-than-transparent processes to ensure that they can list a population of species, even though doubts have been raised about the science underlying a listing proposal.[117]

Peer Review Open to Federal Agency Conflicts and Bias

Concerns have been raised that while well-intended, "peer review" of ESA decisions should not be substituted for public access to underlying data. Unfortunately, most peer reviews rarely are provided access to the data that the study was based on, and often peer reviewers miss errors. In addition, they can be biased and subject to financial and ideological conflicts of interest.[118]

To obtain peer reviews, the Federal agencies often turn to individuals who work closely on a specific species and have many others who tend to agree with them, and thus, they have "confirmation bias" for a certain opinion relating to ESA.[119]

In addition to the inherent lack of transparency of ESA data and science, the Obama Administration's use of executive orders and rulemaking relating to ESA is exacerbating concerns about the lack of transparency and implementation by Federal agencies. One example is the policy interpreting "significant portion of the range" of ESA-listed species, which some believe could actually undermine the use of conservation tools and resources invested by states and local entities for species.[120]

In addition, certain environmental groups appear more interested in advancing an anti-development agenda than in supporting policies to ensure the best science or data is used for ESA decisions. In a 2009 interview, the executive director of the CBD, in response to a question of whether he was concerned that his organization hired activists lacking scientific credentials, stated:

> "*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 and come looking for jobs in the environmental movement. They've bought into resource management values and multiple use by the time they graduate. I'm more interested in hiring philosophers, linguists and poets. The core talent of a successful environmental activist is not science and law. It's campaigning instinct. That's not only not taught in the universities, it's discouraged.*"[121]

Such agendas can have real world consequences. A college student doing biological surveys funded by FWS Section ten recovery permits falsely reported seeing an endangered species on privately-owned property in his survey area, but the FWS did not immediately report it. The student later said it was "a joke" but this incident nevertheless resulted in a gravel company having to modify its operations under ESA.[122]

Once an ESA listing or critical habitat decision has been made, there is enormous resistance to utilize new, more accurate information or to reconsider any of the "science" used to support the original decision.[123] According to the FWS and NMFS,

---

[116] 56 *Fed. Reg.* 58612 (1991) (*http://www.nmfs.noaa.gov/pr/pdfs/fr/fr56-58612.pdf*).

[117] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources*, 113th Cong. (2013) (written testimony of Damien Schiff, Pacific Legal Foundation, at 6) ((***Editor's Note*** (13)).

[118] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 4) ((***Editor's Note*** (18)).

[119] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey, at 36–37) ((***Editor's Note*** (1)).

[120] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Steve Ferrell, State of Wyoming, at 37) ((***Editor's Note*** (4)).

[121] David Blackmon, *The Sue and Settle Racket,* FORBES, May 27, 2013 (*http://www.forbes.com/sites/davidblackmon/2013/05/27/the-sue-and-settle-racket/*).

[122] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Rob Bishop, Member, H. Comm. on Natural Resources, at 65) ((***Editor's Note*** (1)).

[123] *The Endangered Species Act: Reviewing the Nexus of Science and Policy: Oversight Hearing Before the H. S. Comm. On Investigations and Oversight,* 112th Cong. (2011) (written testimony

ESA requires them to conduct "status reviews" of each listed species every 5 years.[124] Few of these status reviews result in downlisting or delisting of species.

Is Litigation Driving the ESA? Is Litigation Helpful in Meeting ESA's Goals?

Working Group Conclusion: **ESA is increasingly becoming a tool for litigation and taxpayer-funded attorneys' fees. The Obama Administration's use of closed-door settlements undermines transparency and involvement of affected stakeholders and drives arbitrary mandates and deadlines that do little to recover species.**

Lawsuits and Threats of Litigation & Petitions Proliferate

Many view the ESA as being driven by litigation, or threats of litigation, which in turn distracts from species conservation and recovery. The FWS Director acknowledged that "when the Service is sued for missing deadlines, we have no defense."[125]

Publicly available court documents reveal that ESA litigation has risen dramatically over the past few years. In 2012, the Department of Justice (DOJ) provided the House Committee on Natural Resources case information on 613 total cases. Each of these cases was at least partially devoted to litigating some aspect of the ESA. Of these, 573 (93%) were cases where Federal agencies were sued under the ESA.[126] That amounts to an average of at least three cases a week dealing just with citizen suits under the ESA.[127] In analyzing the data provided by DOJ, some trends were immediately apparent. Organized and well-funded special interest groups (primarily a few prominent environmental organizations) were significantly more likely to file multiple lawsuits than individual citizens, and much more likely to be awarded attorney's fees.

According to the California Forestry Association, environmentalists filed more than 50 appeals in just one county to block thinning projects that sought to protect the Northern Spotted Owl habitat that had been destroyed by fire.[128] In addition, a lawsuit filed by one group led to a Federal court order last year that could block state allocation of existing water rights.[129]

Even efforts by Federal agencies to streamline the ESA consultation process for Federal fire management plans have been challenged by environmentalists. In 2003, the Forest Service, Bureau of Land Management, FWS, the National Park Service, the Bureau of Indian Affairs and NMFS issued joint regulations that would expedite National Fire Plan actions not likely to adversely impact critical habitat.[130] The Defenders of Wildlife and other groups filed suit under ESA, and a Federal district court first upheld the regulations, and then reversed itself.[131]

Furthermore, the number of petitions to list has greatly proliferated from an average of 20 petitions from 1994 to 2006 to more than 1,200 since 2009.[132] While FWS states the mega-settlements have helped them manage the workload, it acknowledged the settlements have not stopped the CBD, WildEarth Guardians or other liti-

---

of Dr. Neal Wilkins, Texas A&M Institute of Renewable Natural Resources, at 3–4) ((***Editor's Note*** (21)).

[124] *Five-Year Status Reviews Under the Endangered Species Act,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/what-we-do/pdf/5-yr_review_factsheet.pdf*).

[125] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dan Ashe, U.S. Fish and Wildlife Service, at 1) ((***Editor's Note*** (19)).

[126] The other 40 cases included criminal cases, defensive cases not within the purview of the Wildlife Section, and six affirmative cases.

[127] Citizen suits are discussed below at section [**Editor's Note:** this footnote was incomplete in the final printed version of this document.]

[128] *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep Jeff Duncan, Member, H. Comm. on Natural Resources, at 32) ((***Editor's Note*** (8)).

[129] *The Aransas Project* v. *Shaw,* 930 F.Supp.2d 716 (5th Cir. 2013) (issuing injunction requiring Texas Commission on Environmental Quality to apply for incidental take permit that would lead to development of Habitat Conservation Plan, potentially abrogating state allocation of water) (*http://law.justia.com/cases/federal/district-courts/texas/txsdce/2:2010cv00075/738780/354*).

[130] 68 *Fed. Reg.* 68254 (2003) (*http://www.endangeredspecieslawandpolicy.com/uploads/file/NFP%20Regs.pdf*).

[131] *Defenders of Wildlife, et al.* v. *Salazar,* Case No. 04–1230, Feb. 6, 2012 (*http://www.endangeredspecieslawandpolicy.com/uploads/file/Kessler%20Opinion.pdf*).

[132] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Chris Stewart, Member, H. Comm. on Natural Resources, at 54) ((***Editor's Note*** (4)).

gious groups from filing even more petitions or ESA lawsuits since the settlements, and indeed they have done just that.[133]

Settlements Not Transparent, Set Arbitrary Deadlines

In response to document requests by both House Members and Senators relating to the mega-settlements, the Department of the Interior has refused to disclose adequate information, claiming that Federal court rules prohibit them from disclosing "any written or oral communication made in connection with or during any mediation session."[134] The Department of Interior also acknowledged that the settlement agreements require the Federal officials to meet annually to review the status of the settlements with the environmental groups, but that these meetings are closed to the public.[135] States have voiced concerns that the Interior Department failed to consult with them prior to entering into ESA settlements with litigious groups, and this hampers their own planning and resource priorities.[136] The Federal courts approving the settlements retain jurisdiction over the process until at least 2018, thereby binding future FWS officials to follow the requirements set by these two settlements. The FWS itself cannot change any of the terms of the settlements (*i.e.,* extending a deadline for rulemaking, amendments due to new information or data) without first obtaining the consent of the litigating plaintiffs.[137]

Some groups deny that "sue and settle" is a problem at all and believe batch listings like those agreed to in the mega-settlement are actually more efficient than listing species one by one, because it helps them work quicker to get them on the list.[138] Yet, in 2011, the FWS Director requested the House Interior Appropriations Subcommittee to cap the amount the FWS could spend to process ESA petitions, acknowledging it would help them manage endangered species more effectively.[139]

Local jurisdictions are concerned that FWS is short-changing transparency and confirming best available science to meet settlement deadlines. In western Washington, the FWS included a deadline of December 2013 to make listing determinations for six sub-species of gophers as part of the settlements, yet is refusing to utilize genetic science and data in another part of the country that led to a decision not to list gopher subspecies.[140] Moreover, the FWS refused a local Chamber of Commerce Freedom of Information Act request to view data and results from a Federal study justifying the western Washington listing decision.[141]

Settling Groups Receive Tax-Payer Funded Attorneys' Fees

According to a 2012 GAO Report of cases brought against the Departments of Agriculture ("USDA") and the Interior between 2000 and 2010, the ESA was the third most expensive and litigious statute for the USDA (costing taxpayers $1.63 million in attorneys' fees and costs), and the most expensive and litigious statute for the

---

[133] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Cynthia Lummis, Member, H. Comm. on Natural Resources, at 39–40) ((***Editor's Note*** (1)).

[134] *Spending for the National Oceanic and Atmospheric Administration, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2013 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 112th Cong. (2012) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service) ((***Editor's Note*** (15)).

[135] *Id.*

[136] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 47) ((***Editor's Note*** (4)).

[137] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 5) ((***Editor's Note*** (16)).

[138] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Patrick Parenteau, Vermont Law School, at 32) ((***Editor's Note*** (4)).

[139] *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Rep. Cynthia Lummis, Member, H. Comm. on Natural Resources, at 39) ((***Editor's Note*** (1)).

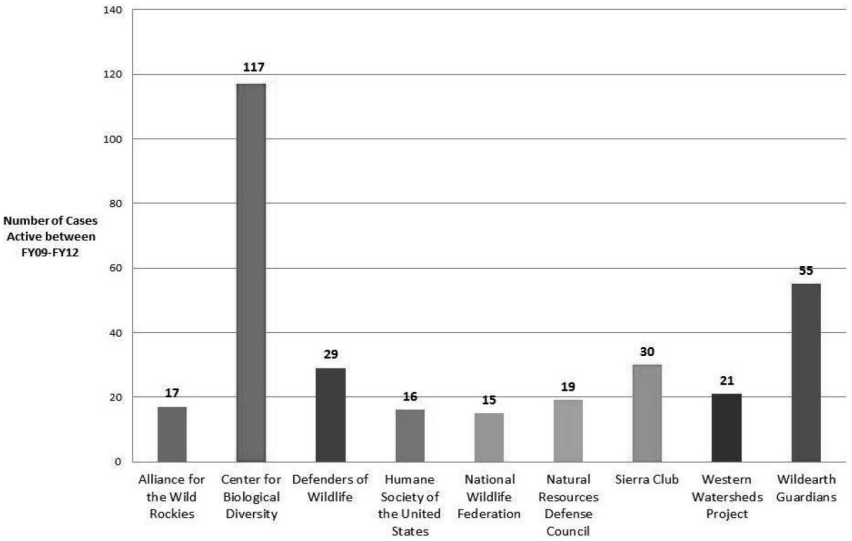
[140] 78 *Fed. Reg*. 220 at 68660 (2013) (*http://www.gpo.gov/fdsys/pkg/FR-2013-11-14/html/2013-27196.htm*).

[141] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (submission for the record of Thurston County, Washington) (*http://naturalresources.house.gov/uploadedfiles/lettertochairman1_14_14.pdf*).

entire Interior Department (costing the taxpayers $22 million in attorneys' fees and costs).[142]

According to information provided by the Justice Department, the CBD was responsible for 117 ESA lawsuits filed against the Federal Government between October 2009 and April 2012.[143] WEG had the second highest with 55 ESA cases, and the Sierra Club and Defenders of Wildlife were fighting for third place with 30 and 29 filed ESA cases, respectively (see *Figure 1*).

Figure 1. Number of Active Federal ESA-Related Cases Brought by Non-Governmental Entities, FY 2009–12



Source: Department of Justice.

For all of these cases, DOJ acknowledged there is no accounting available for the amount of Federal funds spent to pay the DOJ, the Department of the Interior or other Federal agency attorneys assigned as subject matter experts on each of these cases, or the administrative costs associated with engaging in settlement discussions for these cases. Also, according to a 2012 Government Accountability Office (GAO) report, most Federal agencies within the Departments of the Interior and Agriculture do not keep detailed records of the litigation, including the cases where they are required to pay attorneys' fees, or even the type of the cases that involve particular statutes such as the ESA.[144]

Because there is no statutory requirement to maintain this information, the House Natural Resources Committee was told that DOJ and other departments do not keep records of these expenditures. DOJ did track some payments to organizations for attorneys' fees and court costs. A graph representing the top 15 payees of attorney fees for ESA litigation between Fiscal Year 2009 and Fiscal Year 2012 is shown below.

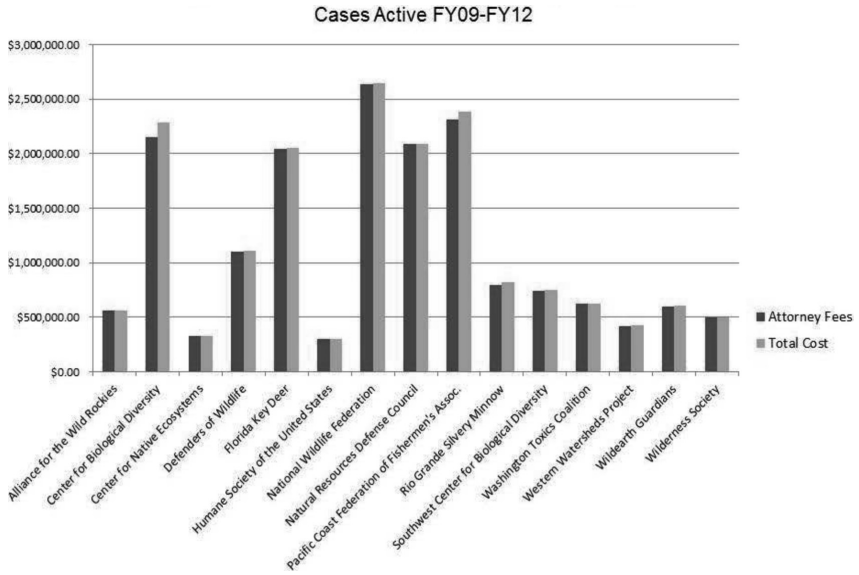
---

[142] GAO–12–417R, *Report to Congressional Requesters; Subject: Limited Data Available on USDA and Interior Attorney Fee Claims and Payments,* U.S. Government Accountability Office, 28–30 (2012) (*http://www.gao.gov/assets/600/590084.pdf*).

[143] This number includes all cases open in DOJ's case management system between October 2009 and April 2012. Some of the cases were opened prior to 2009, and were closed prior to 2012 but the case management system included all cases open in the time range.

[144] GAO–12–417R, *Report to Congressional Requesters; Subject: Limited Data Available on USDA and Interior Attorney Fee Claims and Payments,* U.S. Government Accountability Office, 9 (2012) (*http://www.gao.gov/assets/600/590084.pdf*).

Figure 2. Non-Governmental Entities' Receipts of Federal Attorneys' Fees on ESA-Related Cases, FY 2009–12



Source: Department of Justice.

As *Figure 2* illustrates, several organizations filing "citizen suits" have received millions of dollars in attorneys' fees from the Federal Government. According to DOJ documents, ESA has cost American taxpayers more than $15 million in attorneys' fees alone—in just the past 4 years. These groups—and their lawyers—are making millions of taxpayer dollars by suing the Federal Government, being deemed the "prevailing party" by Federal courts, and being awarded fees either through settlement with DOJ or by courts.

According to the documents provided by DOJ, some attorneys representing non-governmental entities have been reimbursed at rates as much as $500 per hour, and at least two lawyers have each received over $2 million in attorneys' fees from filing ESA cases. With regard to the mega-settlements, according to documents filed in the case, taxpayers are on the hook for $128,158 in attorneys' fees to the CBD[145] and $167,602 to WildEarth Guardians.[146]

An expert who testified before the House Natural Resource Committee calculated the estimated process-related costs to taxpayers associated with the "mega-settlements" using the median administrative cost for the Federal Government to prepare and publish ESA-related rules and notices in the *Federal Register,* would be over $206 million.[147]

FWS acknowledged that these ESA-related attorneys' fees have already been paid from the Judgment Fund, which does not place a cap on the amount of hourly fees that attorneys may receive. The U.S. Chamber of Commerce recently reported that between 2009 and 2012, a total of 71 lawsuits were settled under circumstances that can be categorized as "sue and settle," and have resulted in more than 100 new Fed-

[145] *In Re Endangered Species Act Section 4 Deadline Litigation,* 1:10–mc–00377, Feb. 2, 2012, MDL Dkt. No. 2165, Document 65 (*http://grazingforgrouse.com/sites/default/files/10-cv-377%20Court%20Docket.pdf*).

[146] *In Re Endangered Species Act Section 4 Deadline Litigation,* 1:10–mc–00377, Feb. 2, 2012, MDL Dkt. No. 2165, Document 66 (*http://grazingforgrouse.com/sites/default/files/10-cv-377%20Court%20Docket.pdf*).

[147] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Before the H. Comm. on Natural Resources,* 112th Cong., Dec. 6, 2011 (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., 6) (***Editor's Note*** (22)).

eral rules, many of which are major rules with compliance price tags of more than $100 million annually.[148]

The Equal Access to Justice Act ("EAJA"), enacted in 1980, allows the award of attorneys' fees in suits by or against the United States in two situations: (1) where the prevailing party would be entitled to attorneys' fees under common law, and (2) in all civil actions brought by or against the United States unless the Federal Government proves that its position was "substantially justified," or that special circumstances made an award unjust.[149] EAJA was intended to provide the financial means for individuals and small businesses to seek judicial redress when harmed by the Federal Government. The law set several hurdles to ensure that taxpayer reimbursement of attorneys' fees is kept in check.

For example, the law makes individuals with a net worth of over $2 million, and for profit businesses with a net worth of over $7 million ineligible for EAJA reimbursement. However, the law sets no such cap on nonprofit organizations. The effect is large, deep-pocketed environmental groups with annual revenues well over $100 million are reaping taxpayer reimbursements from a law intended for the "little guy." Additionally, while there is a loose fee cap of $125 per hour embedded in EAJA, environmental attorneys routinely argue that their legal expertise is "specialized" and just as routinely avoid the $125 fee cap. As a result, environmental legal shops can and do charge the taxpayer upwards of $300, $400, even $500 per hour using a law written for those who have no legal shops at all.[150]

Unlike EAJA, the ESA has no restriction that attorneys' fees be paid only to prevailing parties, and no limit to the amount of attorneys' fees that can be awarded. In determining attorney fees for ESA cases, the courts use a lodestar approach in setting the rate of fees—determining the number of hours reasonable expended multiplied by a reasonable hourly rate. Courts have determined that a reasonable hourly rate takes into account "the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[151] This approach allows exorbitant attorneys' fees rates paid by large private sector corporations to be imposed by courts for litigious groups acting in the "public interest," and reimbursed by the taxpayers.

In addition to the lucrative source of federally-funded attorneys' fees, several of the most litigious environmental groups have also been rewarded Federal grants by the very Federal agencies they sue. During the Obama Administration, according to the FWS, the Defenders of Wildlife was awarded three grants totaling $25,000, WEG was awarded two grants totaling $100,000 and the National Wildlife Federation was awarded 11 grants totaling $376,106.[152] Money is fungible, and these organizations, as a result of these Federal taxpayer-funded grants, have been afforded more available resources to target lawsuits against Federal agencies.

Deadline Lawsuits on Process Not Substance

In addition to filing lawsuits, litigious groups have filed increasing numbers of petitions under the ESA, seeking to list species as endangered or threatened under the Act. Under the Act, the FWS or NMFS must make a finding within 90 days of receiving a petition as to whether there is "substantial information" indicating whether the petitioned listing may be warranted.

---

[148] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce, at 4) (***Editor's Note*** (16)).

[149] 5 U.S.C. § 504 (*http://www.gpo.gov/fdsys/granule/USCODE-2011-title5/USCODE-2011-title5-partI-chap5-subchapI-sec504/content-detail.html*) and 28 U.S.C. § 2412(d) (*http://www.gpo.gov/fdsys/pkg/USCODE-2012-title28/pdf/USCODE-2012-title28-partVI-chap161-sec2412.pdf*); *see also* Henry Cohon, *et al.,* Cong. Research Serv., *Awards of Attorneys' Fees by Federal Courts and Federal Agencies,* Order Code 94–970 (2008) (*http://www.fas.org/sgp/crs/misc/94-970.pdf*).

[150] Henry Cohon, *et al.,* Cong. Research Serv., *Awards of Attorneys' Fees by Federal Courts and Federal Agencies,* Order Code 94–970 (2008) (*http://www.fas.org/sgp/crs/misc/94-970.pdf*). *See also:* Lowell E. Baier, *Reforming the Equal Access to Justice Act,* JOURNAL OF LEGISLATION, NOTRE DAME LAW SCHOOL, Vol. 38 (2012).

[151] *Conservation Law Found. of New England, Inc.* v. *Watt,* 654 F. Supp. 706 (D. Mass 1984) (*https://casetext.com/case/conservation-law-found-of-new-england-v-watt-2/*).

[152] *Spending for the National Oceanic and Atmospheric Administration, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2013 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 112th Cong. (2012) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service) (***Editor's Note*** (15)).

After this 90 day finding, there are many statutorily prescribed deadlines and decisions that the agency must make regarding each petition.[153] While the statute may be well-intentioned in formulating a timeline for agency decision making, special interest groups attempting to list hundreds of species at a time was not what was intended and serves only as a vehicle for an award of attorneys' fees, as the deadlines become impossible to meet.

Even proponents of current implementation of ESA will admit that mega-petitions and endless lawsuits do not serve the purpose of the statute. Mr. Gary Frazer, FWS's assistant director for the Endangered Species Program recently conceded that these "mega-petitions" can be problematic. When asked about CBD's July 10, 2012 petition to list 53 amphibians and reptiles, Frazer stated, "[w]e're a field-based organization. The people that have expertise in these species are going to be scattered across the whole country. Just the coordination required within that initial review is a substantial effort."[154] Frazer earlier stated, "[t]hese mega-petitions are putting [the FWS] in a difficult spot, and they're basically going to shut down our ability to list any candidates in the foreseeable future."[155]

These multi-species petitions are filed without regard to the ability of FWS and NMFS to actually complete the task requested. In fact, it appears as though it is precisely because these agencies will be unable to complete the requested task that the suits are filed—thereby guaranteeing a "successful" decision and a likely award of attorneys' fees.

Documents received by the House Natural Resources Committee from the FWS show the incredibly broken system, with environmental groups filing notices of intent to sue if the government does not make species-specific findings on more than 400 species within a 3 month time-frame. In one example, Forest Guardians (the predecessor organization to WEG) submitted a petition to FWS in June 2007 to list 569 species. By October 2007, the Service had "only" listed 94. Forest Guardians threatened a lawsuit if FWS if it did not make the required ESA 90 day finding on their 475-species listing petition within sixty days.[156]

For the 4 years leading up to the mega-settlements, the FWS received petitions to list more than 1,230 species,[157] with dozens of Notices of Intent to sue based on the ESA. These petitions often number thousands of pages in length.

Witnesses have testified that time-frames provided currently under ESA are not feasible, and that groups are litigating not over whether a species ought to be listed, but that the Federal Government can't comply with rigid 90 day or 12 month time-frames set by ESA.[158] As a result of FWS' focus on listings, others have complained that opportunities for public comment and engagement, and accessibility to scientific data supporting significant ESA proposals have been short-changed, often with the Federal agencies citing deadlines from the mega-settlement as the excuse.[159]

---

[153] Decisions to be made include "substantial information" or "not substantial information" that the listing may be warranted, a 12 month finding from the date of the petition or statue review that can either be "not warranted finding," "warranted finding," or "warranted but precluded finding." Depending on the finding, there is an additional timeframe (60 days) for additional decisions to be made whether to list the species, and additional timelines for publishing information in the *Federal Register,* only to then require a decision of whether critical habitat should be designated for the species—which has its one timelines and decision trees.

[154] Helen Thompson, *Citizen provision found beneficial to U.S. Endangered Species Act,* NATURE NEWS BLOG, Aug. 16, 2012 (*http://blogs.nature.com/news/2012/08/citizen-provision-found-beneficial-to-us-endangered-species-act.html*).

[155] Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency,* N.Y. TIMES, Apr. 20, 2011 (*http://www.nytimes.com/2011/04/21/science/earth/21species.html?pagewanted=all&_r=0*).

[156] *A Petition to List All Critically Imperiled or Imperiled Species in the Southwest United States as Threatened or Endangered Under the Endangered Species Act,* Forest Guardians, June 18, 2007 (*http://www.wildearthguardians.org/support_docs/petition_protection-475-species_6-21-07.pdf*).

[157] Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency,* N.Y. TIMES, Apr. 20, 2011 (*http://www.nytimes.com/2011/04/21/science/earth/21species.html?pagewanted=all&_r=0*).

[158] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (statement of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 50) (***Editor's Note*** (2)).

[159] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tom Jankovsky, Garfield County, Colorado, at 59) (***Editor's Note*** (4)).

What are the Roles of State, Tribal and Local Governments and Private Landowners in Recovering Species?

***Working Group Conclusion:* ESA shuts out states, tribes, local governments, and private landowners not only in key ESA decisions but in actual conservation activities to preserve and recover species.**

States and Local Government Not Involved in Decisions to Accept Petitions to List or in Settlements with Litigious Groups

The ESA includes a specific section that was intended to ensure a prominent role for states in species conservation and recovery. Section 6(a) of the ESA contemplates conservation of species that involves a strong Federal-state partnership, and provides that "in carrying out the program authorized by the Act, the Secretary *shall cooperate to the maximum extent practicable* with the States."[160] However, the bipartisan Western Governors' Association, representing 22 states and American Samoa, has raised concerns that states' role of species management under ESA and its current implementation "is largely optional and has been provided by the Federal Government inconsistently."[161]

One state official testified that the FWS' handling of settlements and responses to listing petitions has not been conducive to state participation.[162] Once a Federal listing occurs, states and local entities note that the Federal Government takes over all coordination of the species and related activities.[163] However, even a well-intended cooperative agreement to consolidate two permitting processes into one between a state and the FWS, utilizing section 6 of ESA,[164] was threatened with a 60 day Notice of Intent to sue.[165] Heralded as the "first of its kind" by the Florida Commission's Executive Director and the FWS Regional Director, and viewed as "a positive step forward . . . freeing up resources to better conserve this state's treasured fish and wildlife,"[166] the agreement was targeted for lawsuit by the CBD and the Conservancy of Southwest Florida.[167]

States and Local Governments are often at Odds with Federal Government on Management/Conservation Priorities within their own Borders

Representatives of states have testified on multiple occasions that states are best equipped to manage resources within their own boundaries,[168] and that Federal plans can complicate species conservation because they are often inconsistent with state and local plans.[169] States, tribal and local governments are devoting hundreds of millions of dollars annually in on-the-ground species protection actions, and are leveraging those funds with private conservation efforts. For example, the State of Texas has in place nearly 8,000 wildlife management plans covering 30 million acres

---

[160] *Endangered Species Act | Section 6,* U.S. Fish and Wildlife Service (*http://www.fws.gov/endangered/laws-policies/section-6.html*).

[161] *Endangered Species Act Policy Resolution 13–08,* Western Governors' Association (*http://naturalresources.house.gov/uploadedfiles/westerngovernorsesa.pdf*).

[162] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Jerry Patterson, State of Texas, at 30) (***Editor's Note*** (7)).

[163] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 50) (***Editor's Note*** (4)).

[164] *Cooperative agreement between U.S. Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission,* May 14, 2012 (*http://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20120514_ca_FWS_FWC_2012_S6_CA_signed_web.pdf*).

[165] Letter from Jason Totoiu, General Counsel, Everglades Law Center, to Ken Salazar, Secretary, U.S. Department of the Interior; Dan Ashe, Director, U.S. Fish and Wildlife Service; Cindy Dohner, Southeast Regional Director, U.S. Fish and Wildlife Service (Mar. 28, 2013) (*http://www.biologicaldiversity.org/programs/biodiversity/endangered_species_act/pdfs/2013_03_28_FL_Section_6_Agreement_60-Day_Letter.pdf*).

[166] Nick Wiley and Cindy Dohner, *Column: Joining forces to protect Florida fish, wildlife,* TAMPA BAY TIMES, Apr. 11, 2013 (*http://www.tampabay.com/opinion/columns/column-joining-forces-to-protect-florida-fish-wildlife/2114590*).

[167] Press Release, *Illegal Delegation of Federal Permitting Authority to State Weakens Endangered Species Act in Florida!,* Center for Biological Diversity; Conservancy of Southwest Florida (2013) (*http://www.conservancy.org/document.doc?id=560*).

[168] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 9) (***Editor's Note*** (4)).

[169] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Tyler Powell, State of Oklahoma, at 61) (***Editor's Note*** (4)).

of privately-owned land in the state.[170] At the same time, litigious groups are devoting little to on-the-ground species conservation or recovery.[171]

The goal of these efforts is to manage species at the state level without the need for a Federal ESA listing, and to ensure better cooperation. In June 2012, the FWS reversed its earlier determination to list the Dunes Sagebrush Lizard as endangered, following approval of the Texas-developed State Conservation Plan, which allowed for adaptive management to protect both the lizard and the state's economic activities in an area that produces fourteen percent of the nation's oil, and 47,000 jobs.[172] Not satisfied with this, CBD and Defenders of Wildlife sued the FWS, forcing the State of Texas Comptroller to seek permission in Federal district court to intervene in the lawsuit just to defend the state's own conservation plan and the determination that an ESA listing of the lizard was not warranted.[173]

It would seem that a clear reading of section 6 would lead to promoting examples where states and the Federal Government can effectively manage ESA-listed species cooperatively. However, last year, a state's attempt to negotiate cooperative agreements with the FWS under section 6 to improve species management and streamline permitting processes, resulted in a lawsuit by CBD and other groups.[174] States view this as a "huge chilling effect" for other states and private landowners desiring to enter into agreements for constructive conservation without being sued.[175]

Since states are often developing more current and better data than Federal agencies for species conservation, they also are developing their own defensible recovery goals and plans for species, and in certain cases, doing so because the Federal agencies failed to do it.[176]

Recent appropriations language directed Federal agencies to use state wildlife data and analyses "'as a principle source' to inform their land use, land planning and related natural resource decisions, to not duplicate analysis of raw data previously prepared by the states, and that Federal agencies should provide their data to state wildlife managers to ensure that the most complete data is available to be incorporated into all decision support systems."[177] This action would help address concerns that significant Federal ESA decisions lack sufficient or unjustified data.

In addition to states' concerns about Federal ESA implementation, local counties similarly are legitimately concerned that FWS and NMFS are ignoring clear statutory requirements to coordinate and resolve inconsistencies with counties' plans and ensure public involvement on ESA actions that impact county and tribal land use.

For example, Section 202(c)(9) of the Federal Land Policy Management Act requires the Secretary of the Interior:

> "to coordinate . . . with the land use planning and management programs of . . . the States and local governments" and "shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local

---

[170] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Ross Melinchuk, Texas Parks and Wildlife Department, at 1) ((***Editor's Note*** (23)).

[171] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 68–69) (***Editor's Note*** (4)).

[172] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Roger Marzulla, Marzulla Law LLC, at 7) (***Editor's Note*** (24)); 77 *Fed. Reg.* 26872 (June 2012) (*http://www.gpo.gov/fdsys/pkg/FR-2012-11-02/html/2012-26872.htm*).

[173] Neena Satija, *Judge Allows Comptroller to Intervene in Lizard Lawsuit,* THE TEXAS TRIBUNE, Nov. 7, 2013 (*http://www.texastribune.org/2013/11/07/judge-allows-comptroller-intervene-lizard-lawsuit/*).

[174] Press Release, *Illegal Delegation of Federal Permitting Authority to State Weakens Endangered Species Act in Florida!,* Center for Biological Diversity; Conservancy of Southwest Florida (2013) (*http://www.conservancy.org/document.doc?id=560*).

[175] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 77) (***Editor's Note*** (4)).

[176] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Kent Holsinger, Holsinger Law, LLC, at 42) (***Editor's Note*** (7)).

[177] H.R. Rep. No. 113–, at 13 (*http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2014-interior.pdf*).

government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."[178]

Nine Colorado counties have developed their own local sage grouse habitat plans and have sought the Federal agencies' to coordinate and reconcile their locally-developed maps and data. They remain concerned both that the BLM has refused to resolve clear policy differences between the Federal and local plans, and that ultimately, the FWS will impose a "one size fits all" habitat model that is highly restrictive and does not match their own plan for sage grouse.[179] One county official testified that his rural Washington county was forced to file formally for legal recognition as a "cooperating agency" to ensure the Forest Service and FWS consulted with them on their habitat plans for listed spotted owl.[180]

In an example where the rush to meet mega-settlement deadlines can lead to errors and poor consequences for local governments and private landowners, the FWS failed to properly notify a local county and private landowners on a proposal to list a plant subspecies, including designation of over 400 acres of private irrigated farmland. The FWS was forced to seek permission from the CBD to amend the original settlement deadline to list, and refused to further study DNA data provided to them which completely contradicted the FWS' science in its ESA listing. The FWS nevertheless proceeded to list the plant within the settlement deadline.[181]

Case Studies

The Greater Sage Grouse

Perhaps the most prominent and likely most sweeping potential listing under the mega-settlements is the Greater Sage Grouse (GSG). The GSG is found in Washington, Oregon, Idaho, Montana, North Dakota, California, Nevada, Utah, Colorado, South Dakota and Wyoming. Listing the GSG would directly impact land management, economies and domestic energy supplies and production in these states.

Litigious environmental groups, through numerous lawsuits dating back to 2003, have sought Federal ESA protection for the greater sage-grouse for years.[182] Between 1999 and 2003, environmental groups filed eight petitions to list the GSG. FWS responded with a finding in 2005 that an ESA listing was "not warranted." Five lawsuits against the FWS were filed in multiple courts challenging FWS' determination.[183]

---

[178] 43 U.S.C. 1712, Sect. 202(c)(9) (*http://www.law.cornell.edu/uscode/text/43/1712*).

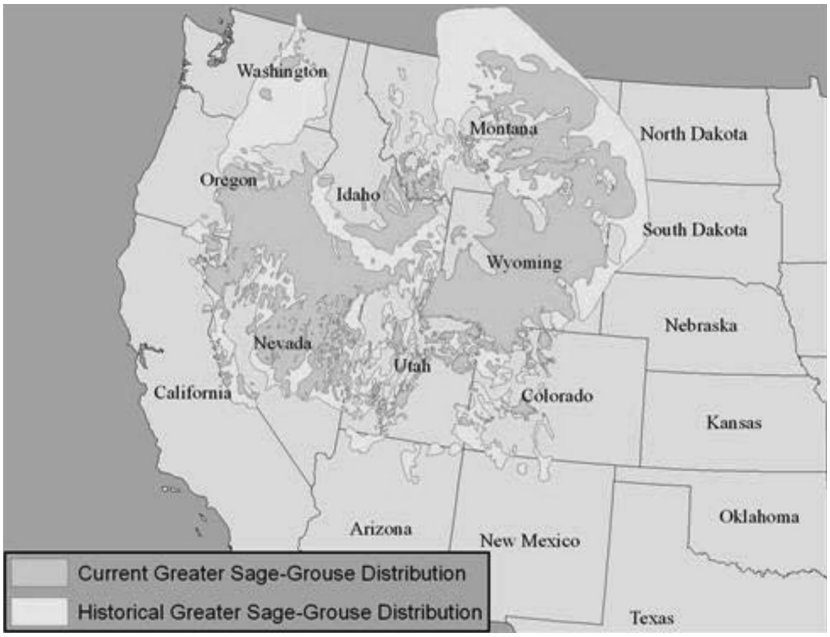
[179] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Tom Jankovsky, Garfield County, Colorado, at 38) (***Editor's Note*** (4)).

[180] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (testimony of Paul Pearce, Skamania County, Washington, at 8) (***Editor's Note*** (17)).

[181] Geoff Folsom, *Bladderpod to be listed as protected species on Federal lands,* TRI-CITY HERALD, Dec. 19, 2013 (*http://www.tri-cityherald.com/2013/12/19/2738671/bladderpod-to-be-listed-as-protected.html*); *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* (***Editor's Note*** (1)) 113th Cong. (2013) (testimony of Kent McMullen, Franklin County Natural Resources Advisory Committee, at 21).

[182] *American Lands Alliance, et al.* v. *Norton, et al.,* 242 F. Supp. 2d 1 (2003) (*http://www.leagle.com/decision/2003243242FSupp2d1_1243.xml/AMERICAN%20LANDS%20ALLIANCE%20v.%20NORTON*).

[183] *Overview of the Greater Sage-Grouse and Endangered Species Act Activities,* U.S. Fish and Wildlife Service (*http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/Primer4SGOverviewESAActivities.pdf*).



Source: Bureau of Land Management.

In 2010, FWS reversed its determination, finding that an ESA listing of sage grouse was "warranted, but precluded" by higher priority species activities. On March 8, 2010, 3 days after the FWS's announcement, the Western Watersheds Project (WWP) filed a lawsuit challenging the government's decision to not list the GSG.[184] On June 28, 2010 the WWP, the CBD and WEG filed an amended complaint to force the agency to promptly publish a proposed ESA listing for the GSG.[185] Then, as part of the May 2011 "mega settlement" with WEG, the FWS agreed to review the ESA status of hundreds of candidate species, including the GSG. The settlement stipulates that FWS review and make a listing determination for the GSG no later than 2015.[186]

A GSG listing would likely harm economies throughout the West. The potential impact of a sage grouse listing is so great that it has caused at least one industry group to refer to it as "the spotted owl on steroids."[187] Most areas where sage grouse have been identified are managed by the BLM, which is required by Federal law to manage these areas for "multiple use and sustained yield".[188] A study by the Policy Analysis Center for Western Public Lands found that, "[p]ublic land is an important seasonal source of forage for western ranches. Thus, eliminating BLM grazing to improve habitat for sage grouse would have a significant impact on the economic viability of affected ranches."[189] Additionally, earlier this year, the BLM an-

---

[184] *Western Watersheds Project* v. *U.S. Fish and Wildlife Service,* No. 06–cv–277–BLW (D. Idaho Mar. 8, 2010) (*http://plf.typepad.com/files/sage-grouse-complaint.pdf*).

[185] *Western Watersheds Project et al.* v. *U.S. Fish and Wildlife Service,* No. 10–cv–229–BLW (D. Idaho June 28, 2010) (*http://www.biologicaldiversity.org/species/birds/Mono_Basin_area_greater_sage_grouse/pdfs/Sage_Grouse_WBP_amended_complaint.pdf*).

[186] *In re Endangered Species Act Section 4 Deadline Litigation, Stipulated Settlement Agreement,* MDL Docket No. 2165 (May.10, 2010) (*http://www.fws.gov/endangered/improving_ESA/exh_1_re_joint_motion_FILED.PDF*).

[187] *Effect of the President's FY 2013 Budget and Legislative Proposals for the Bureau of Land Management and the U.S. Forest Service's Energy and Minerals Programs on Private Sector Job Creation, Domestic Energy and Minerals Production and Deficit Reduction: Hearing Before the Subcomm. on Energy and Mineral Res. Of the H. Comm. on Natural Resources,* 112th Cong., (2012) (written testimony of Laura Skaer, Northwest Mining Association, at 8) (***Editor's Note*** (25)).

[188] Pub. L. No. 94–579 (*http://www.blm.gov/flpma/FLPMA.pdf*).

[189] L. Allen Torell, *Ranch-Level Impacts of Changing Grazing Policies on BLM Land to Protect the Greater Sage-Grouse: Evidence from Idaho, Nevada and Oregon,* Policy Analysis Center for

nounced it was delaying for 2 years a decision whether to approve a wind project that would cross 30,000 acres of BLM-owned land.[190]

In a FWS' press release issued prior to the mega-settlement, Interior Secretary Ken Salazar stated: "we must find common-sense ways of protecting, restoring, and reconnecting the Western lands that are most important to the species' survival while responsibly developing much-needed energy resources. Voluntary conservation agreements, Federal financial and technical assistance and other partnership incentives can play a key role in this effort."[191] Efforts by states to conserve the GSG also predate the mega-settlement and go back as far as 2008.[192] Several western states have subsequently embarked on range-wide efforts to protect sage grouse habitat in an effort to avoid Federal listing.[193] The investment of time and resources at the state level has been considerable and according to one state wildlife manager, amounts to "numbers that we have never seen before in my profession being committed by a State to a single species."[194] Nonetheless, despite former Secretary Salazar's comments and because of the looming "mega-settlement" deadline, these state efforts still face the uncertainty of a listing that could undermine state efforts to conserve the GSG and discourage similar state efforts in the future.[195]

State-led conservation efforts also face uncertainty as the BLM and FWS pursue of GSG-related regulatory actions in anticipation of the mega-settlement deadline. In fact, the BLM issued internal regulatory memoranda that threatened to severely restrict activities through 79 BLM Resource Management Plans affecting nearly 250 million acres.[196] Areas identified as "priority" or "critical" habitat for sage grouse could delay or completely shut down mining, timber, grazing, energy development, and other activities in millions of acres in the interior West.[197] In addition, BLM issued a December 2011 National Technical Team (NTT) report advocating stringent GSG habitat protections throughout its range in the eleven states.[198]

One of the main contributing factors listed by FWS for the decline of GSG populations is wildfire destruction of sagebrush habitat. The BLM has noted that "Wildfires are a leading cause of sagebrush loss."[199] Land managers throughout the west are concerned that habitat loss to wildfire could push a sage-grouse listing. Nevada State Forester Pete Anderson recently stated, "Virtually every time we're getting a fire we're getting some impact to sage-grouse habitat."[200] Ironically, ESA liti-

---

Western Public Lands (*http://www.ag.uidaho.edu/aers/PDF/naturalresource/SagegrouseEcon.pdf*).

[190] Scott Streater, *In Idaho, sage grouse **vs.** major wind project is no contest,* E&E NEWS, Mar. 9, 2012 (*http://www.eenews.net/eenewspm/2012/03/09/1*).

[191] News Release, U.S. Department of the Interior, *Interior Expands Common-Sense Efforts to Conserve Sage Grouse Habitat in the West* (Mar. 5, 2010) (*http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/PressReleaseDOI03052010.pdf*).

[192] *Defining Species Conservation Success: Tribal, State and Local Stewardship **vs.** Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 35) (***Editor's Note*** (4)).

[193] *Id.* at 35–36

[194] *Defining Species Conservation Success: Tribal, State and Local Stewardship **vs.** Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Steve Ferrell, State of Wyoming, at 68) (***Editor's Note*** (4)).

[195] *Defining Species Conservation Success: Tribal, State and Local Stewardship **vs.** Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Steve Ferrell, State of Wyoming, at 36) (***Editor's Note*** (4)).

[196] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 22, 2012) (*http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html*); *See also* Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012) (*http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html*).

[197] *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Kent Holsinger, Holsinger Law, LLC, at 28) (***Editor's Note*** (7)).

[198] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012) (*http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html*).

[199] *BLM Fire and Aviation, Sage-grouse Conservation Efforts,* U.S. Bureau of Land Management (*http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/sage-grouse_planning/documents.Par.25064.File.dat/SageGrouseFire.pdf*).

[200] Jeff DeLong, *Big fire season further threat to Nevada's sage grouse habitat,* RENO GAZETTE JOURNAL, July 6, 2012 (*http://www.rgj.com/apps/pbcs.dll/article?AID=2012307030055&nclick_check=1*).

gation, as noted earlier has, in many cases, contributed to the poor forest health conditions that create greater risk of wildfire.

Recently, the Governor of Colorado, in a letter to the BLM,[201] raised concerns over measures included in the NTT and advocated his own state's plan for conserving GSG over a "one size fits all" approach.[202] The NTT Report has generated criticism, not only from states that have complained the report would "setback to sage grouse conservation,"[203] but from other scientists.[204]

According to peer review of the NTT Report conducted prior to its release, it does not represent the "best available science;" imposes "one-size-fits-all" regulatory prescriptions; and includes a number of invalid assumptions, mischaracterization and misrepresentation of sources; omission of existing programs that benefit GSG, and injection of personal opinion over science; contains unachievable measures; and is inconsistent with agency multiple-use regulations.[205] The NTT Report also fails to adequately address the main threats to GSG: fire and invasive species.[206] One peer reviewer stated the report "seems a strange blend of policy loosely backed by citations, with no analysis of science," and that requirements called for in the report appear not to have any "rational scientific basis."[207] Other industry interests have noted that the NTT Report has been used to justify 4 mile buffers around areas it identifies as "leks," a standard that could shut down access to large swaths of economic and energy activities in the interior west.[208]

Turning to the FWS, the agency created a "Conservation Objectives Team" (COT), made up of Federal and state technical advisors, who released a Report in March 2013 designed to encourage states, local and private landowners "to take conservation action," such as "modifying or amending regulatory frameworks to ensure the long-term conservation of the species by avoiding, minimizing, or mitigating the threats to the species."[209] The COT Report has also drawn criticism from many in that it does not include any independent data or analyses, and omits any accounting for the major causes of decline for the sage grouse, including hunting and drought.[210] In addition, individuals who were tasked with peer reviewing the report received lucrative contracts and grants to study the GSG from the U.S. Geological Service and the FWS, an apparent conflict of interest. Further, the COT Report omitted important scientific studies and failed to use the most current state and local maps.[211]

Despite all of these criticisms, the FWS released proposed rules on October 28, 2013 to list a population of GSG between northwest Nevada and northeast California as threatened, and to designate critical habitat on close to 2 million acres in parts of three California counties and eight Nevada counties. The FWS is seeking

---

[201] John Stroud, *Governor urges consideration of local sage-grouse alternative,* THE POST INDEPENDENT, Jan. 15, 2014 (*http://www.postindependent.com/news/9761689-113/blm-plan-governor-colorado*).

[202] Valerie Richardson, *Colorado governor: Interior bureaucrats biased on species issue,* THE WASHINGTON TIMES, Nov. 25, 2013 (*http://www.washingtontimes.com/blog/inside-politics/2013/nov/25/colo-gov-interior-bureaucrats-biased-species-issue/*).

[203] Letter from James Douglas, President, Western Association of Fish and Wildlife Agencies, to Sally Jewell, Secretary, The Department of the Interior (May 16, 2013) (*http://esawatch.org/wp-content/uploads/2013/05/Scientist-Sign-On-Response-Letter-051613.pdf*).

[204] Dorothy Kosich, *NWMA study challenges BLM sage grouse management report validity,* Mineweb, May 22, 2013 (*http://www.mineweb.com/mineweb/content/en/mineweb-sustainable-mining?oid=190998&sn=Detail*).

[205] Megan Maxwell, *BLM's NTT Report: Is it the Best Available Science or a Tool to Support a Pre-Determined Outcome?,* May 20, 2013 (*http://www.nwma.org/wp-content/uploads/NWMA-Review-of-NTT-Report-May-2013.pdf*).

[206] 75 *Fed. Reg.* 13910 at 13931–4 (*https://www.federalregister.gov/articles/2010/03/23/2010-5132/endangered-and-threatened-wildlife-and-plants-12-month-findings-for-petitions-to-list-the-greater*); and *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Megan Maxwell, at 3) (*http://naturalresources.house.gov/uploadedfiles/maxwelltestimony12-12-13.pdf*).

[207] Megan Maxwell, *BLM's NTT Report: Is it the Best Available Science or a Tool to Support a Pre-Determined Outcome?,* May 20, 2013 (*http://www.nwma.org/wp-content/uploads/NWMA-Review-of-NTT-Report-May-2013.pdf*).

[208] Letter from Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance, to Sally Jewell, Secretary, The Department of the Interior (Nov. 19, 2013) (***Editor's Note:*** (26)).

[209] *Greater Sage-Grouse Conservation Objectives Team Report,* U.S. Fish and Wildlife Service (*http://www.fws.gov/nevada/nv_species/documents/sage_grouse/Greater_Sage-grouse_Fact_Sheet_MPR082312.pdf*).

[210] Letter from Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance, to Sally Jewell, Secretary, The Department of the Interior (Nov. 19, 2013) (***Editor's Note*** (26)).

[211] *Id.*

to finalize a separate population of Gunnison sage grouse found in Utah and Colorado by March 2014.

Meanwhile, the BLM, working jointly with the Forest Service, has the stated goals of preparing Environmental Impact Statements to address the effects of implementing proposed GSG conservation measures for all of the states, issuing draft revised Resource Management Plans in Spring 2014, and finalizing these documents in Fall 2014.[212] BLM acknowledges it has rushed to meet deadlines set by the mega-settlements to avoid listing the GSG. The BLM's website states: "Given the tight time frames in which the FWS must make its listing decision, it's crucial that we get this done right and done quickly."[213]

In summary, the GSG is a case study of how the current implementation of the ESA through litigation is not working well for either species or people. While states, local governments, and other private landowners have invested significant resources to conserve the GSG and ensure its population remains healthy, the Federal Government appears to be reacting to its own ESA settlement deadlines and threats of future litigation, in the meantime basing its decisions on data that has been seriously questioned. The FWS' litigation-driven reversal of its 2005 determination that an ESA listing of GSG was not warranted undermines multiple state and local efforts to protect the sage grouse. In addition, the Federal Government's failure to manage Federal lands at risk of catastrophic wildfires and invasive species that threaten the GSG, is putting the states and their citizens in a 'no win' situation. Further, the GSG is an example of how lack of accessible and transparent data undermines the credibility of Federal ESA efforts.

The Lesser Prairie Chicken

The Lesser Prairie Chicken (LPC), found throughout 62,000 square miles on the prairies of Kansas, Colorado, Oklahoma, Texas and New Mexico, is one of the most sweeping listings included in the 2011 mega-settlements.

State fish and wildlife agencies estimate the population in the five-state region has varied over the past twelve years between 37,000 to 84,000.[214] Of the habitat currently occupied by the LPC, 95 percent of that is on privately-owned lands. The FWS attributes the main causes of prairie chicken decline on "overutilization by domestic livestock, oil and gas development, wind energy development, loss of native rangelands to cropland conversion, herbicide use, fire suppression and drought."[215]

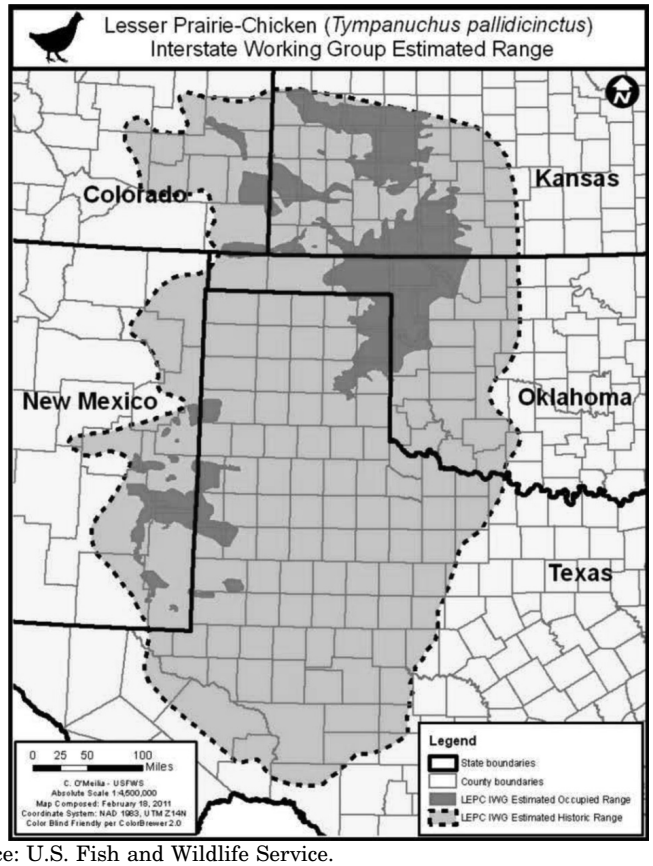
---

[212] News and Information, U.S. Bureau of Land Management (*http://www.blm.gov/wo/st/en/prog/more/sagegrouse/news_and_information.html*).

[213] Memorandum from the Director, U.S. Bureau of Land Management, to All Field Office Officials (Dec. 27, 2012) (*http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html*).

[214] *The Lesser Prairie-Chicken Range-Wide Conservation Plan,* Western Association of Fish and Wildlife Agencies, Oct. 2013 (*http://www.wafwa.org/documents/2013LPC RWPfinalfor4drule12092013.pdf*).

[215] *Questions and Answers for the Lesser-Prairie Chicken,* U.S. Fish and Wildlife Service, July 2012 (*http://www.fws.gov/southwest/es/Documents/R2ES/LPC_FAQ_18July2012.pdf*).



Source: U.S. Fish and Wildlife Service.

In October 1995, the Biodiversity Legal Foundation filed a petition to list the LPC under the ESA, and in 1998, the FWS determined a listing of LPC was "warranted, but precluded by higher priority species."[216] Until 2007, the FWS categorized LPC near the bottom of priority for listing. In 2008, without cooperating with the states, FWS changed the priority status from an "8" (low priority) to a "2" (high priority) due to "increasing and ongoing threats" to the species. In 2010, WEG filed a lawsuit against FWS to force a listing of the LPC, and it was included in the 2011 mega-settlement with provisions requiring FWS to make a determination in Fiscal Year 2012. The FWS subsequently announced a proposal to list the LPC as "threatened" in December 2012, and is slated to make a final determination in March 2014.[217]

A significant amount of resources has already been devoted at the state level for LPC conservation. A 2012 bipartisan letter signed by over 20 House Members and Senators to the FWS advocating that ESA listing was not warranted for the LPC, pointed out that more than $50 million in conservation, research and other activities had been devoted across the five-state region.[218] For example, the State of Oklahoma has spent over $26 million on lesser prairie chicken habitat conservation, research, land acquisition and development of habitat conservation plans. Oklahoma undertook this effort with the philosophy that conservation should be facilitated by

[216] 63 *Fed. Reg.* 110, 31400 (1998) (*http://ecos.fws.gov/docs/federal_register/fr3634.pdf*).

[217] 77 *Fed. Reg.* 238, 72828 (2012) (*http://www.gpo.gov/fdsys/pkg/FR-2012-12-11/pdf/2012-29331.pdf*).

[218] Press Release, *U.S. Senate Comm. On Environment and Public Works, Bipartisan, Bicameral Letter Urges FWS to Make 'Not-Warranted' Decision on Lesser Prairie Chicken* (July 17, 2012) (*http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=96e8b405-802a-23ad-4a8f-ad7669f36b56&Region_id=&Issue_id=87be918e-7e9c-9af9-7bce-c09203f891db*).

the state, but developed in a cooperative fashion with private landowners, and a coalition of state agriculture, oil and gas, wind energy, and transportation industries that all have a stake and that have a common goal of developing a plan allowing both for species conservation and land use and development.[219]

Similarly, in Kansas, thousands of volunteers and 105 conservation districts in every county have enrolled more than 2.3 million acres in the USDA's Conservation Reserve Program, and private landowners are concerned that a listing of the LPC could actually decrease participation in voluntary programs designed to protect the species.[220] In Texas, the state has over 500,000 acres of land voluntarily enrolled in a "candidate conservation agreement with assurances" (CCAA) for the LPC with the goal of keeping it off the list.[221] Other entities in the affected states have spent significant time and resources on CCAAs to avoid listing have raised concerns that the FWS has indicated these voluntary efforts may not even be considered in its decision whether or not to list the LPC.

This raises concerns that the FWS appears to be giving more deference to litigious groups and settlement deadlines than to the state wildlife agencies that have been doing the studies and on-the-ground work.[222]

The states have been concerned that the FWS' approach of proposing a "4(d) rule"—a provision of ESA that authorizes FWS or NMFS to define what activities are prohibited for species listed as "threatened" under ESA[223]—is premature, since the rule was proposed months before FWS has stated it must make a final decision. Many believe the FWS' proposed 4(d) rule indicates that the FWS has already made up its mind to list the LPC.[224] The states are also concerned that a listing of LPC would result in a loss of the trust relationships they have built with private landowners. A coalition of 32 Kansas counties affected by the potential listing of LPC prepared its own plan and submitted it to the FWS. These counties have objected to the FWS' settlement-driven deadlines to list species without proper coordination with county governments where proposed ESA listings occur.[225]

On October 28, 2013, the FWS "endorsed" the five-state plan, stating the plan "provides a model for State leadership in conservation of a species proposed for listing under the ESA."[226] While some were encouraged that the FWS endorsement could lead to a decision not to list the LPC, the FWS publicly has stated the endorsement "is not a decision . . . that implementing the plan will preclude the need to protect the lesser prairie chicken under the ESA."[227]

In short, this is another example of the FWS' mega-settlement deadlines driving a sweeping potential listing decision over multiple states' and landowners' good faith efforts to develop data and protect species while also protecting other important economic and private property interests. The FWS' escalating the priority of an LPC listing this year raises questions about how states and private property owners could ever prevent species listings.

---

[219] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 8) (***Editor's Note*** (4)).

[220] *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Greg Foley, Kansas Department of Agriculture, at 3) (***Editor's Note*** (27)).

[221] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Ross Melinchuk, Texas Parks and Wildlife Department, at 2) (***Editor's Note*** (23)).

[222] *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Roger Kelley, Continental Resources, at 3) (*http://hastings.house.gov/uploadedfiles/kelleytestimony10-10-2013.pdf*).

[223] *Questions and Answers: Revised Proposed Special Rule for the Lesser-Prairie Chicken,* U.S. Fish and Wildlife Service, Dec. 10, 2013 (*https://www.fws.gov/southwest/es/Documents/R2ES/LPC_rev_4d_FAQs_FINAL_12-10-2013.pdf*).

[224] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (testimony of Tyler Powell, State of Oklahoma, at 9) (***Editor's Note*** (4)).

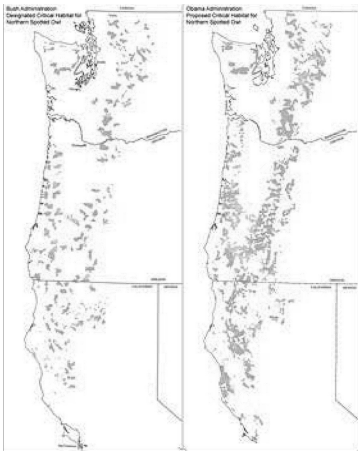
[225] Mike Corn, *Counties set to talk chickens,* THE HAYS DAILY NEWS, Nov. 1, 2013 (*http://hdnews.net/outdoors/LEPC-KNRC110113*).

[226] Press Release, U.S. Fish and Wildlife Service, *U.S. Fish and Wildlife Service Endorses Western Association of Fish and Wildlife Agencies Lesser Prairie-Chicken Range-Wide Conservation Plan* (Oct. 23, 2013) (*http://www.fws.gov/news/ShowNews.cfm?ID=E6267BFC-E38A-E402-8295AE3A5FD77DF1*).

[227] *Id.*

The Northern Spotted Owl

The history of the Spotted Owl in the Northwest is a poster child for ESA litigation crippling forest management, costing jobs, and harming communities and species habitat. The Northern Spotted Owl was listed as threatened under ESA on June 26, 1990.[228] This listing and a number of subsequent lawsuits led to mass shutdown of timber harvesting activity in the Pacific Northwest. More than 30 timber sales by the Forest Service and the BLM in Washington and Oregon were blocked shortly after the Northwest Forest Plan became law due to management of the spotted owl.[229]



Comparison of Northern Spotted Owl critical habitat, 2005 *vs.* 2012.
Source: U.S. Fish & Wildlife Service.

> *"The Northern Spotted Owl is the wildlife species of choice to act as a surrogate for old-growth protection, and I've often thought that thank goodness the spotted owl evolved in the Northwest, for it hadn't, we'd have to genetically engineer it. It's the perfect species to use as a surrogate."*[230]

Shortly following the listing, the Federal Government, through the Clinton Administration's Northwest Forest Plan, administratively withdrew nearly 24 million acres of Federal land[231]—resulting in no access to nearly 85% of the area available for timber harvest—from active management and restricted harvest levels.[232] As a result, over 400 lumber mills have closed across Oregon, Washington, Idaho, Montana, and California, terminating over 35,000 direct jobs and countless more indirect jobs[233] (timber harvest activity results in approximately 29 indirect jobs for every million board feet of timber harvested). This shift in Federal forest management policy directly impacted rural timber-dependent counties and communities that had previously been utilizing timber receipts for schools and roads for decades.

In February 2012, as a result of ongoing litigation, the FWS announced a proposal to revise an earlier agency decision and designate nearly 14 million acres in Oregon, Washington and northern California as "critical habitat" for the Northern Spotted Owl. The proposal would increase areas designated for Northern Spotted Owl habi-

---

[228] *Northern Spotted Owl,* U.S. Fish and Wildlife Service (*http://www.fws.gov/arcata/es/birds/NSO/ns_owl.html*).

[229] *Oregon Natural Resources Council* v. *U.S. Forest Service,* 59 F.Supp. 2d. 1085 (W.D. Wash. 1999), the court granted an injunction against 9 timber sales (*https://casetext.com/case/oregon-natural-resources-council-v-us-forest/*).

[230] Brian E. Gray, *The Endangered Species Act: Reform or Refutation?,* p. 7, 13 Hastings W.—NW. J. ENVTL. L. & POL'Y 1 (2007) (*http://repository.uchastings.edu/faculty_scholarship/178*).

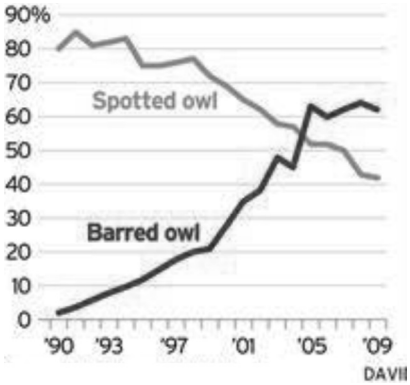
[231] 59 *Fed. Reg.* 76, (1994) (*http://www.gpo.gov/fdsys/pkg/FR-1994-04-20/html/94-9511.htm*).

[232] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Tom Nelson, Sierra Pacific Industries, at 52) (***Editor's Note*** (17)).

[233] Paul F. Ehinger & Associates, *Summary Description of Mill Closure Data from 1990–2010,* Dec. 15, 2010 (*http://www.amforest.org/images/pdfs/Mill_Closures.pdf*).

tat by 62% over that designated in the FWS' plan issued in 2008.[234] The entire boundary of one Oregon county is included within the expanded critical habitat designation, yet FWS declined the county's request to enter into a coordination agreement with the Federal Government on managing the owl.[235]

Percentage of Sites Where Owls Were Found



Source: U.S. Fish & Wildlife Service.

Ironically, not only has the Northern Spotted Owl populations continued to decline (estimates range the decline as high as 40 percent since 1990), but the Pacific Northwest has also witnessed a dramatic decline in overall forest health. In fire-prone forests, unabated fuel accumulation leads to uncharacteristic wildfires that can ultimately harm listed species, habitat and water quality.

Catastrophic wildfire has now become the major threat to the spotted owl, consuming 87% of habitat lost between 1994 and 2004, while timber harvest attributed to less than 2/10 of 1 percent. However, the amount of old growth habitat increased by approximately 2% each year over that same timeframe, including all losses. In addition, even the Federal Government acknowledges that the continued declines in spotted owl populations are not due to forest habitat loss, but rather, the invasion of a larger, predatory species—the Barred Owl.[236]

It would seem that after 20 years, efforts to better manage and reduce fuel build-up in the Northwest's Federal forests would be non-controversial given the risk to the Northern Spotted Owl's habitat. However, environmental groups have continued to file lawsuits to block expansions of ski resorts,[237] mining activities,[238] closure of recreational trails,[239] and Federal forest management timber thinning projects and sales, including projects designed to reduce the risk of catastrophic wildfires that would destroy spotted owl habitat.[240] According to experts that track Federal ESA

---

[234] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (written testimony of Stephen Mealey, Boone and Crockett Club, at 25) (***Editor's Note*** (17)).

[235] Letter from Don Skundrick, Chair of the Jackson County, Oregon Board of Commissioners, to U.S. Department of the Interior (Aug. 17, 2012) (*http://naturalresources.house.gov/uploadedfiles/jacksoncountyltr.pdf*).

[236] *Revised Recovery Plan for the Northern Spotted Owl, I–8,* U.S. Fish and Wildlife Service, June 28, 2011 (*http://www.fws.gov/arcata/es/birds/NSO/documents/USFWS2011RevisedRecoveryPlanNorthernSpottedOwl.pdf*).

[237] *Oregon Natural Resources Council* v. *Goodman,* 505 F.3d 884 (2007) (*http://www.leagle.com/decision/20071389505F3d884_11386*).

[238] *Karuk Tribe of California* v. *U.S. Forest Service,* 681 F.3d 1006 (2012) (*http://scholar.google.com/scholar_case?case=11771938237862345250&hl=en&as_sdt=6&as_vis=1&oi=scholarr*).

[239] Letter from Chris Horgan, Executive Director, Stewards of the Sequoia, to the ESA Working Group (May 9, 2013) (*http://esaworkinggroup.hastings.house.gov/uploadedfiles/stewardsofthesequoialtr05-09-13.pdf*).

[240] See *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Service,* 378 F.3d 1059 (2004) (*http://caselaw.findlaw.com/us-9th-circuit/1105214.html*); *Earth Island Institute* v. *U.S. Forest Service,* 442 F.3d 1147 (2006) (post-fire restoration projects would "have significant negative effects on California spotted owl") (*http://www.leagle.com/decision/20061589442F3d1147_11589.xml/EARTH%20ISLAND%20INST.%20v.%20U.S.%20FOREST%20SERVICE*); *Oregon Natural Resources Council* v. *Allen,* 476 F.3d 1031 (2007) (incidental take

Continued

litigation, at least 69 timber or salvage sales were challenged in Federal court just between 2008 and 2010.[241]

These lawsuits have also resulted in hundreds of thousands of dollars of attorneys' fees awarded to environmental groups either by court order or through settlement with the Federal Government. For example, after several years of public process, the BLM released forest management plans in 2008 for western Oregon that would allow for reasonable timber harvests in overgrown areas and areas that are at high risk of catastrophic wildfire. In 2009, more than a dozen environmental groups filed four separate lawsuits to block implementation of the BLM's plans under the ESA and NEPA.[242] The Oregon Federal district court, approving the Justice Department's 2009 settlement with the environmental plaintiffs, awarded the plaintiffs $12,500 in attorneys' fees under the Judgment Fund.

The U.S. Forest Service estimates that 60 percent of all National Forests in Washington, Oregon, and California have been placed off-limits to harvests as a result of policies relating to the Northern Spotted Owl.[243] This is due largely from litigation and threats of litigation. The trend of paralysis has only intensified under the Obama Administration. Recently, despite a court upholding a Forest Service timber sale in the Gifford Pinchot National Forest, the Forest Service failed to defend the sale when appealed by environmentalists.[244] Timber companies have been forced to turn to states, private lands and even outside of the U.S. for timber supply as a result of the Federal forests' small harvests. Though states are managing much smaller amounts of forest lands, they are producing significantly more in receipts than the Federal Government.[245]

Pacific Salmon and Steelhead

Another example of how ESA has become a cottage industry for attorneys and an unclear goalpost is NMFS' salmon and steelhead listings. Since 1991, NMFS has listed 28 populations of salmon as endangered in Washington, Oregon, Idaho and California.[246] These listings impact 176,000 square miles—about 61% of the land mass of Washington and 49% of Oregon's—they also impact significant portions of California and Idaho. Because of these listings, NMFS conducted over 1,000 major consultations on a host of projects and activities, which impose significant direct and indirect costs to private entities, and local and state taxpayers.[247]

---

permit for 75 timber sales on 64,006 acres in Rogue River Basin rendered invalid) (*http://www.leagle.com/decision/20071507476F3d1031_11506*); *Oregon Natural Resources Council* v. *Brong,* 492 F.3d 1120 (2007) (BLM timber salvage logging project after forest fire violated NEPA and FLPMA) (*http://www.leagle.com/decision/20071612492F3d1120_11601.xml/OREGON%20NATURAL%20RESOURCES%20COUNCIL%20FUND%20v.%20BRONG*); *Wildlands* v. *U.S. Forest Service,* 791 F.Supp.2d 979 (Dist. Ct. Ore. 2011) (*https://www.casetext.com/case/wildlands-v-united-states-forest-serv/*).

[241] *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (written testimony attachment of Karen Budd-Falen, Budd-Falen Law Offices, LLC) (*http://naturalresources.house.gov/UploadedFiles/Budd_Falen_case_type_chart.pdf*).

[242] *Oregon Wild, et al.* v. *Shepard, et al.,* (Cause No. 03:09–cv–00060–PK, Dist. Ct. Ore 2009) (*http://law.justia.com/cases/federal/district-courts/oregon/ordce/3:2011cv00442/102221/72*).

[243] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Kent Connaughton, U.S. Forest Service, at 54) (***Editor's Note*** (17)).

[244] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (statement of Rep. Herrera Beutler, Member, H. Comm. on Natural Resources, at 55) (***Editor's Note*** (17)).

[245] *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,*112th Cong. (2012) (statement of Rep. Doc Hastings, Chairman, H. Comm. on Natural Resources, at 58) (***Editor's Note*** (17)). For example, Region 6 of the U.S. Forest Service holds in excess of 52 million acres of forest lands, compared to the Washington Department of Natural Resources' 2 million, and sold 575 million board feet to Washington's 550 million board feet.

[246] *West Coast Salmon and Steelhead Listings,* National Oceanic and Atmospheric Administration (*http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_steelhead_listings/salmon_and_steelhead_listings.html*).

[247] *Public Consultation Tracking System,* National Oceanic and Atmospheric Administration (*https://pcts.nmfs.noaa.gov/pcts-web/homepage.pcts*).

Land Area Affected by Endangered Species Act Listings of Salmon & Steelhead

Source: National Oceanic and Atmospheric Administration.

Despite near-record and record numbers of returning salmon in many areas over the past few years,[248] and even with NMFS' own recent report to Congress that the status of ⅔ of the listed salmon runs are either "stable" or "increasing,"[249] the agency has approved only 9 out of 28 salmon recovery plans.[250] NMFS' most recent required status review of the listings made no changes to downlist or delist any of the 28 species.[251]

Nevertheless, litigious groups have continued filing or threatening lawsuits and appeals relating to ESA salmon implementation, from challenging permitted activities that occur in rivers or adjacent lands to blocking use of salmon hatcheries designed to actually recover them, to Federal agencies' failure to properly consult on registration of crop protection products, to removing or breaching dams.

Most prominent of these is litigation, beginning in 1998, governing the operation of several Federal hydropower dams on the Columbia and Snake Rivers.[252] The Columbia River basin is North America's fourth largest, draining about 250,000 square miles and extending throughout the Pacific Northwest and into Canada. There are

---

[248] AP, *Fall Chinook salmon run on Columbia River largest in decades,* THE OREGONIAN, Sep. 14, 2013 (*http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/09/fall_chinook_salmon_run_on_col.html*); Quinton Smith, *Sockeye salmon run sets record for Columbia River,* THE OREGONIAN, Aug. 1, 2010 (*http://www.oregonlive.com/outdoors/index.ssf/2010/08/sockeye_salmon_run_sets_record.html*); Ben Romans, *Record Numbers Of Chinook Salmon Are Running Up The Columbia River,* FIELD AND STREAM, Oct. 10, 2013 (*http://www.fieldandstream.com/blogs/field-notes/2013/10/record-numbers-chinook-salmon-are-running-columbia-river*); Adam Spencer, *Record Salmon Run Expected,* DEL NORTE TRIPLICATE, Aug. 15, 2012 (*http://www.triplicate.com/News/Local-News/Record-salmon-run-expected*).

[249] *ESA Biennial Report to Congress,* National Oceanic and Atmospheric Administration (*http://www.nmfs.noaa.gov/pr/laws/esa/biennial.htm*).

[250] *Salmon Recovery Plans and Supporting Documents,* National Oceanic and Atmospheric Administration—West Coast Region (*http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/recovery_planning_and_implementation/recovery_plans_supporting_documents.html*).

[251] National Oceanic and Atmospheric Administration—West Coast Region (*http://www.nwr.noaa.gov/ESA-Salmon-Listings/5-yr-sums.cfm*).

[252] *NWF, et al.* v. *NMFS,* 254 F. Supp. 2d 1196 (D. Or. 2003) (*http://caselaw.findlaw.com/us-9th-circuit/1225228.html*); *NWF* v. *NMFS,* 524 F.3d 917 (9th Cir. 2008) (*http://caselaw.findlaw.com/us-9th-circuit/1157444.html*); *NWF* v. *NMFS,* 41 ELR 20247, No. 01–00640, (D. Or., 08/02/2011) (*http://www.critfc.org/tribal-treaty-fishing-rights/policy-support/public-documents/*).

more than 250 reservoirs and about 150 hydroelectric projects in the basin, including 18 mainstem dams on the Columbia and Snake Rivers.[253]

These lawsuits and the resulting Federal ESA mitigation actions have taken a significant toll on Northwest energy output, and have provided encouragement to certain groups that seek to remove four Federal dams in the lower Snake River. According to some Northwest power customers, over an average of 1,000 megawatts (or enough electricity for one million homes) has been lost due to ESA lawsuits and mitigation. Over the past decade, Northwest electricity ratepayers have paid an average of $750 million per year in indirect and direct costs associated with complying with endangered salmon requirements. In the coming year, the Bonneville Power Administration's fish and wildlife program, which is largely driven by ESA compliance, will account for approximately ⅓ of Federal wholesale electricity rates in the FCRPS system.[254]

In addition, to satisfy ESA requirements for salmon, non-Federal utilities with dams have paid millions over several years to obtain and implement habitat conservation plans and long-time certainty necessary to license and operate their dams.[255] Meanwhile, the environmental plaintiffs have been awarded close to $2 million in taxpayer and ratepayer funding for their legal fees.[256]

Aside from the litigation involving the Northwest hydropower system, the lack of clarity of the ESA and how it relates to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in the regulation of these products has posed a significant threat to economically vital industries such as agriculture in the Pacific Northwest, California and the rest of the nation. It also has been the subject of continual lawsuits, including one filed by the CBD seeking to eliminate 380 agricultural, forestry, and mosquito-controlling pesticides and crop protection products used in 49 states on more than 112 million acres.[257]

In 2008, NMFS concluded in biological opinions that all 28 populations of salmon would be jeopardized by continued use of these products, long registered and labeled by the EPA. NMFS' requirements included nearly a ¼ mile buffer around water bodies that would affect as much as 60 percent of agricultural lands in Washington alone, and according to an estimate by the Department of Agriculture, could result in lost revenues of over $580 million.[258] These measures were strongly questioned by state agriculture agencies who were concerned that NMFS failed to utilize current state data and information and to allow transparency and review and revise to ensure the best available science.[259] The former director of the EPA office with authority and responsibility for scientific review of hundreds of pesticides found over 14 significant flaws in NMFS' biological opinions.[260]

Last year, a Federal district court ruled that data and conclusions used in NMFS pesticide/ESA biological opinion were "arbitrary and capricious," failed to rely on logical or rational data, and lacked analyses of the economic or technological feasibility of its proposed measures.[261] In 2013, the NAS issued a report that rec-

---

[253] Svend Brandt-Erichsen, *Close, but No Cigar: More Work Needed on Salmon and the Columbia Hydro System,* MARTEN LAW, Aug. 9, 2011 (*http://www.martenlaw.com/newsletter/20110809-salmon-and-columbia-hydro-system#sthash.5Rp286mm.dpuf*).

[254] *Electricity Prices and Salmon: Finding a Balance: Oversight Field Hearing Before the H. Subcomm. on Water and Power of the H. Comm. On Resources,* 109th Cong. (2006) (written testimony of Stephen Wright, Administrator, Bonneville Power Administration, at 47) (*http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg28557/pdf/CHRG-109hhrg28557.pdf*).

[255] *Chelan PUD Says HCP Working At 10-Year Check-In,* NW FISHLETTER, Mar. 7, 2013 (*http://www.newsdata.com/fishletter/314/7story.html*).

[256] *Federal Hydro System Biological Opinion Ruling and Implementation,* Northwest RiverPartners, Mar. 2012 (*http://nwriverpartners.org/images/stories/BiOp_ruling_and_implementation-3-2012.pdf*).

[257] Press Release, *Center for Biological Diversity, Landmark Lawsuit Re-filed Against EPA to Protect Dozens of Endangered Species From Pesticides* (June 2, 2013) (*http://www.biologicaldiversity.org/news/press_releases/2013/pesticides-06-06-2013.html*).

[258] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture,* 112th Cong. (2011) (written testimony of Joseph Glauber, U.S. Department of Agriculture, at 15) (***Editor's Note*** (28)).

[259] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture,* 112th Cong. (2011) (statement of Dan Newhouse, Washington State Department of Agriculture, at 146) (***Editor's Note*** (28)).

[260] *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture,* 112th Cong. (2011) (written testimony of Dr. Debra Edwards, Exponent Engineer and Scientific Consulting, at 118–120). (***Editor's Note*** (28))

[261] *Dow AgroSciences LLC* v. *National Marine Fisheries Service,* 4th Cir., No. 11–2337, (Feb. 2013) (*http://www.leagle.com/decision/In%20FCO%2020130221091*).

ommended changes to how NMFS' and the FWS evaluate risks to salmon species in its pesticide consultation process.[262] However, the report failed to address several important questions relating to the lack of peer review of the biological opinions themselves, the use of available scientific data, and analyses of the economic and technological feasibility of NMFS' biological opinions, and a bipartisan group of 30 members of Congress wrote to House appropriators in 2011 supporting language to compel the National Academy of Sciences to study these specific issues.

While an improvement over the previous modeling that was used, there is still no clarity within the law on the nexus between Section 7 of ESA and FIFRA in regulating these products. In addition, the Federal agencies refused to revisit the biological opinions that have already been released and are still threatening implementation of the measures questioned in the first place.

Another source of litigation has been the use of salmon hatcheries to recover ESA-listed salmon populations. Though tribal hatchery managers have successfully utilized hatchery supplementation to enhance salmon and steelhead recovery for several years, NOAA and other environmental activists continue to oppose any efforts to utilize hatcheries as a means to count and seek delisting of ESA-listed salmon and steelhead. The Snake River fall Chinook run, for example, has rebounded to record levels with the hatchery programs, expanding from 500 adult fish in 1975 to more than 41,000 in 2010.[263]

According to tribal officials, the only way hatchery and naturally-spawning salmon can be distinguished is through a clip on the adipose fin, and the progeny of hatchery fish are virtually indistinguishable from naturally spawning fish, leading some to question why hatchery fish are not counted for purposes of ESA recovery goals.[264] Though a court ordered the NMFS in 2001 that it must consider hatchery salmon in populations proposed for ESA listing, the agency issued a revised policy that emphasized the "negative impacts" of hatchery fish on naturally spawning fish, but ignored the positive benefits that hatchery fish clearly are having on recovering salmon in the Northwest.[265]

The Gray Wolf

The gray wolf was one of the first species listed as "endangered" under ESA, and was originally listed by FWS in the entire lower 48 states.[266] Since then, the status of the wolf has shifted from: conservation in the 1970's and 1980's; reintroduction of "experimental populations" to three parts of the U.S. in the early 1990's; to breaking the wolf into separate populations, reclassifying and delisting wolves where they have surged in recent years.[267] In general, the gray wolf's recovery has succeeded and the species is currently in the classification of "least concern" globally for risk of extinction, according to a prominent international scientific group of experts.[268]

---

[262] National Research Council. *Assessing Risks to Endangered and Threatened Species from Pesticides.* Washington, D.C.: The National Academies Press, 2013.

[263] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 17) (***Editor's Note*** (4)).

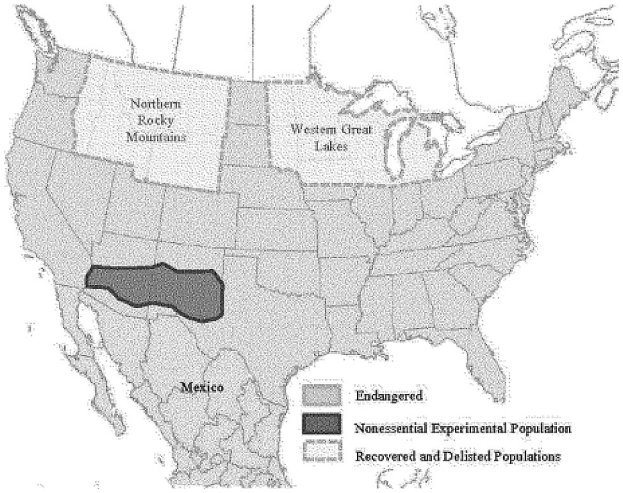
[264] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of N. Kathryn Brigham, Columbia River Inter-Tribal Fish Commission, at 66) (***Editor's Note*** (4)).

[265] *Trout Unlimited* v. *Lohn,* 559 F.3d 946 (9th Cir. 2009) (*https://www.casetext.com/case/trout-unlimited-v-lohn*); 70 *Fed. Reg.* 37204 (*http://www.nmfs.noaa.gov/pr/pdfs/fr/fr70-37204.pdf*).

[266] 39 *Fed. Reg.* 3, 1171 (1974) (*http://www.fws.gov/mountain-prairie/species/mammals/wolf/FR01041974.pdf*).

[267] *Gray Wolf Species Profile,* U.S. Fish and Wildlife Service (*http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A00D*).

[268] *Canis lupus,* The IUCN Red List of Threatened Species (*http://www.iucnredlist.org/details/3746/0*).

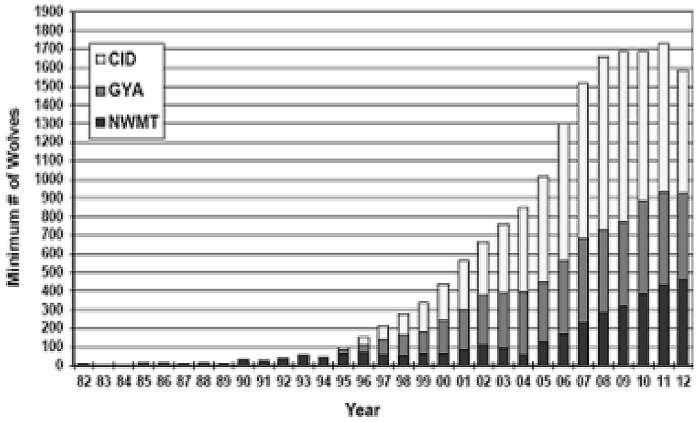


Source: U.S. Fish and Wildlife Service.

Nonetheless, at every juncture that the FWS has sought to change the wolf's ESA status, environmental groups have filed lawsuits opposing state management and seeking to enforce Federal ESA listings. Take, for example, the 1996 reintroduction of wolves as an experimental population into the northern Rocky Mountain Region. A total of 31 wolves were introduced with the recovery goal of 300 wolves and 30 breeding pairs between Idaho, Montana and Wyoming.[269] Wolves in the northern Rocky Mountains increased rapidly and dispersed well beyond the original recovery area, meeting Federal delisting criteria in 2002. Yet continual lawsuits and threats of lawsuits delayed FWS action to delist the wolf until 2012.[270]

Figure 6a. Northern Rocky Mountain Wolf Population Trends by Recovery Area, 1982–2012

(Excludes Oregon and Washington)



Source: U.S. Fish and Wildlife Service.

[269] *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Steve Ferrell, State of Wyoming, at 35) (***Editor's Note:*** (4)).

[270] *Wolves in Wyoming,* Wyoming Game and Fish Department (*http://gf.state.wy.us/web2011/wildlife-1000380.aspx*).

In the meantime, as a result of inconsistent Federal court rulings of the wolf's ESA status, Congress included a provision in the enacted Fiscal Year 2011 Continuing Resolution to delist the wolf in Montana, Idaho, and parts of eastern Washington, eastern Oregon and north-central Utah.[271] In December 2011, the FWS delisted wolves in the Western Great Lakes area. On September 30, 2012, wolves in Wyoming were delisted by the FWS, but only after twelve consecutive years of exceeding recovery goals. The Wyoming delisting process included thorough review by the FWS and was peer reviewed two times by independent wolf scientists.[272]

Similar to FWS-approved plans for the States of Montana and Idaho, Wyoming's post-delisting management framework seeks to maintain at least 150 wolves and fifteen breeding pairs within the state's borders. The Service expects the Greater Yellowstone Area wolf population to maintain a long-term average of around 300 wolves, while the entire Northern Rocky Mountains Distinct Population Segment is expected to achieve a long-term average of around 1,000 wolves.[273]

The most recent official minimum wolf population estimate shows that the northern Rocky Mountain wolf population contains more than 1,774 adult wolves and more than 109 breeding pairs. Most of the suitable habitat across this region is now occupied and likely at, or above, long-term carrying capacity. This population has exceeded recovery goals for twelve consecutive years. At the end of 2011, an estimated 328 wolves were in Wyoming, including 48 packs and 27 breeding pairs.[274]

Shortly after the Wyoming delisting was final, four environmental groups (the Defenders of Wildlife, the CBD, the Sierra Club and the Natural Resources Defense Council) filed suit against FWS seeking to have the delisting reversed, claiming Wyoming's wolf management plan "is too aggressive and does not protect wolves in 85 percent of the state."[275]

FWS' overall review of gray wolf populations in 2012 found few gray wolves outside of the delisted areas, leading to a proposal in 2013 to delist the species nationwide. This determination has also become the target of litigation. Recently, six environmental groups (the Defenders of Wildlife, CBD, Earthjustice, Endangered Species Coalition, Natural Resources Defense Council and the Sierra Club) sent a letter to Interior Secretary Sally Jewell asking her to reconsider its proposal to delist the wolf nationwide.[276] Moreover, while the FWS has proposed delisting the wolf nationwide, they have refused to delist the Mexican wolf, which the agency considers to be a still-endangered subspecies.

The gray wolf saga under the ESA demonstrates the tremendous lack of certainty on what is necessary to actually delist species once they are recovered and no longer threatened with extinction. In the twelve years since gray wolf recovery, states and private property owners dealt with serious impacts of the wolf's unfettered expansion beyond the recovery area, including harm to livestock and populations of big game animals. That delisting has been held hostage to litigation and forced Congress to legislate narrow delistings. This has resulted in a disjointed gray wolf policy where the entire species has recovered, yet the only difference between a listed gray wolf or a delisted gray wolf is separation by highways or imaginary state or international boundaries (See Map above). This is particularly true as the FWS in its most recent management rule notes there is no distinctive genetic or behavioral difference between wolves found in Canada and the western delisted regions of the U.S.[277]

374 Mussel and Aquatic Species in the Midwest and Gulf Coast

The 2011 mega-settlements have led to other potential listings and habitat designations of literally hundreds of aquatic species in several Midwest and Gulf states,

---

[271] P.L. 112–10, Sect. 1713 (*http://www.congress.gov/cgi-lis/bdquery/R?d112:FLD002:@1(112+10)*).

[272] *Gray Wolves in the Northern Rocky Mountains,* U.S. Fish and Wildlife Service (*http://www.fws.gov/mountain-prairie/species/mammals/wolf/FR01041974.pdf*).

[273] News Release, *U.S. Fish and Wildlife Service, Service Declares Wyoming Gray Wolf Recovered Under the Endangered Species Act and Returns Management Authority to the State* (Aug. 31, 2012) (*http://www.fws.gov/mountain-prairie/pressrel/2012/08312012_Wyoming_Wolf.html*).

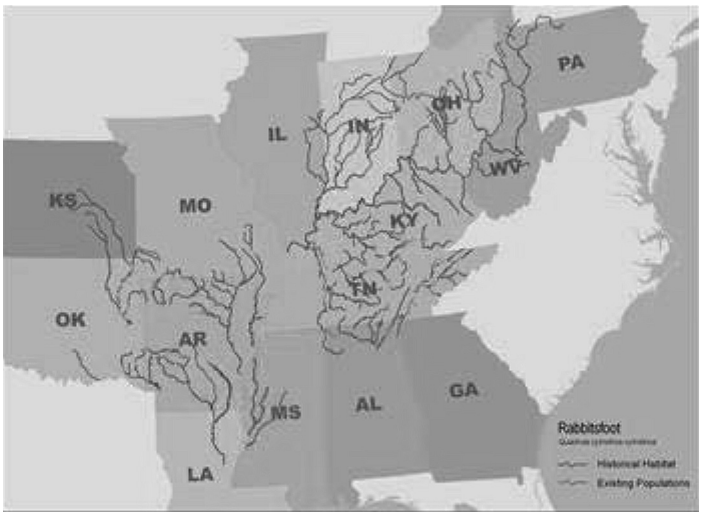
[274] *Wyoming Wolf FAQs,* Wyoming Game and Fish Department (*http://gf.state.wy.us/web2011/news-1001287.aspx*).

[275] Press Release, *Defenders of Wildlife, Suit Filed Against Wyoming's Kill-at-Will Wolf Policy* (Nov. 13, 2012) (*http://www.defenders.org/press-release/suit-filed-against-wyoming's-kill-at-will-wolf-policy*).

[276] Letter from Kieran Suckling, Executive Director, Center for Biological Diversity, to Sally Jewell, Secretary, The Department of the Interior (May 9, 2013) (*http://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/CEO-Letter-Opposing-National-Wolf-Delisting-to-Secretary-Jewel-5-9-13.pdf*).

[277] 50 CFR Part 17 (*http://www.regulations.gov/#!documentDetail;D=FWS-HQ-ES-2013-0073-0001*).

such as the Rabbitsfoot Mussel (listed as threatened), and the Neosho Mucket, (listed as endangered).[278] In an unprecedented move the FWS in September 2011 announced that it was reviewing the status of 374 aquatic species that in its view "may warrant" listing under ESA. This followed petitions and threats of lawsuits from CBD, which launched a new campaign to address the "southeast freshwater extinction crisis."[279] The proposal drew an outcry because of the size and scope of the proposal, that it could undermine public involvement and result in a legally deficient administrative record, and would require the FWS to review all 374 listing determinations in twelve months.[280]



Rabbitsfoot Mussel Range Map
Source: U.S. Fish and Wildlife Service.

The flood of hundreds of listing petitions at one time has undermined FWS' ability to conduct a rational science-driven process for prioritizing listing decisions. FWS itself has acknowledged that due to the large number of species involved, stating it is "only able to conduct cursory reviews of the information in our files and the literature cited in the petition. For many of the narrowly endemic species included in the 374 species, we had no additional information in our files and relied solely on the information provided in the petition and provided through NatureServe."[281]

As part of its settlement deadlines, in October 2012, FWS proposed 2,138 river miles as critical habitat for the mussels in twelve Midwest and Southeast states,[282] including 42% of Arkansas' geographical area, spanning 31 counties and 769 river miles (see Map). The FWS also issued an economic impact analysis of its critical habitat designation.[283]

---

[278] Press Release, *Center for Biological Diversity, Two Midwest and Southeast Mussels for Endangered Species Act Protection With 2,000 Protected River Miles* (Oct. 15, 2012) (*http://www.biologicaldiversity.org/news/press_releases/2012/2-mussels-5-fish-10-15-2012.html*).

[279] News Release, *U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Finds 374 Aquatic-dependent Species May Warrant Endangered Species Act Protection* (Sep. 26, 2011) (*http://www.fws.gov/southeast/news/2011/11-063.html*); and *The Southeast Freshwater Extinction Crisis,* Center for Biological Diversity (*http://www.biologicaldiversity.org/programs/biodiversity/1000_species/the_southeast_freshwater_extinction_crisis/*).

[280] Letter from Leslie James, Chair, NESARC, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Nov. 8, 2011) (*http://nesarc.org/nesarc-files-extension-request-with-fws-for-review-of-southeastern-species*).

[281] 76 *Fed. Reg.* 187, 59836–59862 (*http://www.gpo.gov/fdsys/pkg/FR-2011-09-27/html/2011-24633.htm*).

[282] Press Release, Center for Biological Diversity, *Two Midwest and Southeast Mussels for Endangered Species Act Protection With 2,000 Protected River Miles* (Oct. 15, 2012) (*http://www.biologicaldiversity.org/news/press_releases/2012/2-mussels-5-fish-10-15-2012.html*).

[283] News Release, U.S. Fish and Wildlife Service, *U.S. Fish and Wildlife Service Lists Neosho Mucket as Endangered and Rabbitsfoot as Threatened* (Sep. 16, 2013) (*http://www.fws.gov/southeast/news/2013/061.html*).

After originally allowing just 30 days for the public to comment on these sweeping regulations, the FWS was forced to re-open the comment period for another 60 days.[284] The Arkansas Governor, Attorney General and Arkansas Legislature, local counties and private landowners raised concerns that in addition to under-valuing the true economic impact of the designation, the proposed critical habitat would have widespread impacts to rural portions of Arkansas, potentially impacting farmers, ranchers, timber producers, oil and gas producers, utility providers, county and municipal governments, school districts, irrigation districts and small businesses. Every Member of the Arkansas Congressional Delegation released statements condemning the proposed critical habitat,[285] and a letter that called into question the lack of transparency and science, the closed-door nature of the settlements that resulted in these actions, the flawed process, and called on the FWS to reconsider the critical habitat designations, based upon a flawed process.[286]

These designations resulted in the creation of a coalition, spearheaded by the Association of Arkansas Counties, that proposed decreasing critical habitat designations by approximately 38% to 477 miles of river. The FWS dismissed concerns as exaggerated, and that "for most landowners, the designation of critical habitat will have no impact," and that the designations "will not prohibit a farmer from allowing cattle to cool down in a river, or from driving a vehicle through a stream on their property."[287] However, FWS acknowledged that critical habitat could impact property in some cases. Without further action, FWS will finalize the critical habitat designations for the Rabbitsfoot Mussel and Neosho Mucket by March 2014.

Recommendations for Improving ESA and Removing Impediments to Recovery

The main goal of the ESA is to recover species. This is a laudable and worthy goal. However, as has been demonstrated in this report, the ESA, Federal implementation of it, and seemingly never-ending litigation are creating increasing impediments towards reaching that goal. Only by removing these impediments can the ESA be improved for the benefit of saving species.

After more than 40 years, sensible, targeted reforms would not only improve the eroding credibility of the Act, but would ensure it is implemented more effectively for species and people. The Working Group heard several common themes on areas for improvement that fall into four categories: (1) greater transparency and prioritization of ESA implementation to ensure more focus on species recovery and delisting; (2) ESA litigation and settlement reforms; (3) empowering states, local, tribes and private landowners on ESA; and (4) improving transparency and accountability of ESA scientific data.

1. Ensure Greater Transparency and Prioritization of ESA Decisions: More Focus on Species Recovery and Delisting than Listing

The Working Group received many comments that raised serious concerns about Federal implementation of the ESA, the lack of prioritization of resources, and a seeming-fixation with listing species *versus* ensuring species recovery and compatibility to other vital economic and private property priorities. Some areas of improvement could include:

- ***Ensure Prioritization of Species Protection.*** Rather than listing hundreds or thousands of new subspecies of plants, animals and fish, the focus and priority of the Federal Government should be protecting those species most imperiled or found to be at the brink of extinction.
- ***Require Numerical Goals Needed for Species Recovery—Upfront.*** Federal agencies that implement ESA should not list species unless and until they are able to identify actual recovery and numerical goals for healthy species populations upfront—before, or at the time of any proposed rule involving listing a species. Recovery plans should be drafted and completed and approved *before*

---

[284] News Release, U.S. Fish and Wildlife Service, *Service Re-opens Review of Draft Economic Analysis for the Proposed Critical Habitat Designation for Two Freshwater Mussels* (Aug. 26, 2013) (*http://www.fws.gov/southeast/news/2013/051.html*).

[285] Press Release, Association of Arkansas Counties, *Entire Arkansas Congressional delegation members release statements regarding U.S. Fish and Wildlife Services proposed critical habitat designations in Arkansas* (Nov. 8 2013) (*http://www.arcounties.org/news/55/entire-ark-congressional-delegation-releases-statement-on-esa*).

[286] Letter from Arkansas Congressional Delegation, to Dan Ashe, Director, U.S. Fish and Wildlife Service (Jan. 9, 2014) (*http://www.pryor.senate.gov/public/_cache/files/e17413cf-6ff8-4f91-a4a2-b55eb3a5ce5e/ESA%20Critical%20Habitat%20Designation%20Letter.pdf*).

[287] AP, *Arkansas' congressional delegation opposes mussel plan,* ARKANSAS ONLINE, Jan. 10, 2014 (*http://www.arkansasonline.com/news/2014/jan/10/arkansas-congressional-delegation-opposes-mussel-p/*).

listing or critical habitat is designated, not as an afterthought, years later, or not at all.

- ***Require ESA Listing and delisting Petitions to be based on Actual, Accessible Data.*** Rather than basing decisions on vague trends showing decline or improvement or "professional opinions," ESA listing/delisting petitions should not be accepted by Federal ESA implementing agencies unless they are based upon actual data relating to the species' condition. Data used for listing and delisting decisions should be made publicly available, especially if the data and related studies are being financed by the American taxpayer.
- ***Require delisting and Downlisting as Data Supports.*** Instead of having to guess when (or even whether) the Federal Government will make decisions to remove species from the ESA list that are healthy or have met required recovery goals, Federal agencies should be required to issue actual rules to delist and remove or downlist species from the ESA list where supported by data.
- ***Authorize Flexibility of ESA Statutory Deadlines.*** Federal agencies should have discretion to extend 12 month or 90 day deadlines relating to species listing or critical habitat determinations, without fear of spurious litigation. Rather than force Federal agencies to accept every petition with equal weight no matter how lacking the science and data, agencies should be allowed to incorporate the best and most current data to allow for better prioritization. The ESA must keep its eye on those species at the brink of extinction or most imperiled. Agencies' Listing Priority Guidance (48 *Fed. Reg.* 43098) should supersede any conflicting 12 month or 90 day deadline set by rule, settlement or other action.
- ***Codify Policy for Evaluating Conservation Efforts (PECE).*** To ensure ongoing species conservation efforts are given proper authority and consideration under the law, the Policy for Evaluating Conservation Efforts (PECE) (found at 68 *Fed. Reg.* 15100) should be codified.
- ***Clarify and Define ESA Terms to Ensure Consistency.*** Several terms in the law have become magnets for misinterpretation, conflicting interpretations, or even litigation, and should be clarified, including, for example: "**foreseeable future**"; "**significant portion of the range,**" "**jeopardy**" to a species, the technological and economic feasibility of "**reasonable and prudent alternatives/measures,**" and "**maximum extent practicable**" relating to mitigation.

2. ESA Litigation and Settlement Reform

The Working Group received many comments that ESA decisions need to be made less susceptible to litigation, which has served to be a significant hurdle in prioritizing the recovery of truly endangered species and created rush to judgments that lack transparency. In times of tight fiscal budgets and escalating national debt, the first priority of the Federal Government's endangered species protection and recovery programs should be on species—not lawyers or prepping biologists for court.

Moreover, the Federal Government should not be rewarding those that have made a business out of suing the Federal Government on ESA to receive taxpayer-funded Federal grants or funding through other programs. Here are three areas the Working Group recommends ESA should be addressed:

- ***Transparency and Flexibility of Closed-Door Settlements/Deadlines.*** ESA listing and habitat designation deadlines (agreed to by the Department of the Interior in its 2011 "mega-settlements" with two litigious groups, the WildEarth Guardians and the Center for Biological Diversity), should not supersede the Federal Government's ESA responsibilities to American private property owners, states, tribes and local governments, or further incentivize these and other groups to litigate and settle. Federal agencies should be required to disclose all details of consent decrees to Congress and an appropriate NEPA process should be applied for settlements to ensure public input in ESA decisions, and to ensure they include best scientific data.
- ***ESA Litigation Transparency and Reform.*** Litigious groups and plaintiffs should be discouraged from filing procedural challenges against agencies simply because they do not agree with the agency's decisions, (such as delisting determinations, findings of species listing not warranted). Litigants should be required to pay their own way to curb repeated litigation and foster court cases only on substantive matters. To discourage forum shopping by frequent ESA-litigation-plaintiffs, ESA lawsuits should not be permitted in Federal courts other than in a state a species is primarily located.

Federal agencies, (including the Departments of Justice, Interior, Forest Service, and NOAA), should be required to maintain and make publicly available and report to Congress on the complete and accurate records of Federal funds spent annually

for ESA-related litigation, payment of attorneys' fees, settlements, and consent decrees for the Judgment Fund and the Equal Access to Justice Act.

- ***Curbing Excessive Taxpayer Funding of ESA Attorneys' Fees.*** Hourly fees paid by the Federal Government to litigious attorneys for ESA litigation should be capped like other Federal statutes to prevent lucrative payment of attorneys' fees. Courts should no longer view "settling" parties as "prevailing" or entitled to taxpayer-funded attorneys' fees. Parties that engage in settlement negotiations and settlements should bear their own costs. In addition, non-governmental organizations or individuals that file ESA-related lawsuits against the Federal Government should be barred from receiving Federal taxpayer-funded grants. Since money is fungible, litigation should not be subsidized by taxpayers.

3. Empower States, Tribes, Local Governments and Private Landowners on ESA Decisions Affecting Them and Their Property

The Working Group has found both the capability and willingness of states, tribes, localities and private landowners to conserve and recover species. Multiple parties have identified impediments and deficiencies in Federal ESA implementation, including misguided priorities and fear of litigation, which undermines species protection and conservation while simultaneously ensuring multiple use, protection of economies, private property and water rights. In this regard, several areas are recommended:

- ***Strengthen States' Authority and Role in ESA Policy.*** Section 6(a) should be strengthened to ensure that states' roles in ESA policy provisions have meaning and are enforceable. Agreements to delegate authority between the Federal Government and states for management of activities involving listed species should not be subject to excessive litigation. States that have approved species conservation plans and agreements should be given presumption by Federal agencies that ESA listing is not warranted.
- ***Require State, Tribe, and Local Approval of ESA Settlements.*** In addition, states (as well as tribes and other local governments) should be afforded legal standing and be consulted with on Federal ESA-related court settlements impacting their jurisdictional borders. The ESA should provide local, tribal and state governments a voice in closed-door settlements where such settlements impact their land.
- ***Require Involvement of State, Tribe, Local Data and Peer Reviews.*** States, tribes, local governments, private landowners and other entities, in many cases, have more current and accurate data, which should be given the highest consideration and presumption in ESA decisions. No ESA petition or listing determination should be approved without incorporating and analyzing data provided by states, tribes, local governments and private landowners. In addition, Federal ESA agencies should be directed to include states, tribes and local governments in the design, selection and scope of peer reviews of major ESA-related decisions.
- ***Strengthen and Simplify HCPs and CCAAs and Exempt them from Critical Habitat.*** To encourage and give validity to voluntary Habitat Conservation Plans or Candidate Conservation Agreements with Assurances, these agreements should be exempt from critical habitat designations. In addition, the process to obtain such HCPs and CCAAs, which now can be cumbersome, expensive and out of reach, should be simplified and codified to incentivize individuals undertaking voluntary conservation efforts.
- ***Authorize Reconsideration of Listing/Critical Habitat Decisions that Significantly Harm Private Landowners.*** Property owners have no recourse in certain cases where their property is significantly devalued or subject to regulatory taking. The Secretaries of the Interior and Commerce should be authorized in certain circumstances to reconsider and reevaluate, without judicial review, any critical habitat or listing decision where evidence shows significant economic harm or other justification warrants it.
- ***Require Real Economic Analyses Up Front for ESA.*** The Obama Administration's finalization last year of a rule changing the way ESA economic impact analyses are conducted to only include "baseline" costs should be replaced with a rule that codifies a 10th Cir. Court of Appeals ruling requiring agencies to analyze *all* economic costs of an ESA listing. Moreover, critical habitat economic analyses should be required at the time of any proposed listing, making it publicly available.

- ***Authorize Private Funding of ESA Permit Processing.*** To improve processing of Federal ESA consultations, non-Federal contractors should be authorized to privately funded by an ESA permit applicant to prepare biological opinions, similar to documents now authorized under NEPA by third-party contractors. In addition, "action agencies" should be permitted to prepare a biological opinion subject to review and approval by FWS and NMFS.

4. Transparency and Accountability of ESA Data and Science

Finally, the Working Group heard from a number of experts and witnesses on the need to ensure that ESA science and data are transparent, publicly available, and not driven by individuals with conflicts of interests. The Working Group recommends improvements could be made to this area as follows:

- ***Modernize and Clarify "Best Available Scientific and Commercial Data".*** Data, including DNA, should be preferred to support ESA determinations over unpublished reports or professional opinions. ESA-related data should be required to meet Data Quality Act guidelines. In addition, Federal agencies should be required to justify why data relied upon for ESA decision is the "best available" and why such data is deemed "accurate" and "reliable."
- ***Transparency and Accessibility of Data in Federal ESA Decisions.*** Data used by Federal agencies for ESA decisions should be made publicly available and, when possible, reviewable through online access on the Internet. This includes data or information that may be contrary to Federal agencies' own data. A public repository of data should be required for all ESA decisions.
- ***Reform, Transparency and Accountability of ESA-related Peer Reviews.*** To ensure accountability, ESA-related peer reviews that do not comply with the Data Quality Act should be deemed "arbitrary and capricious," and all ESA-related peer reviews should be made publicly available and available online on the Internet. In addition, peer reviewers selected should not have a financial or other conflict of interest. FWS and NMFS should be required to consult with the National Academy of Sciences and affected states, tribes and local governments, to develop list of qualified peer reviewers on each controversial ESA action.

Editor's Notes

In order to maximize the printed space the hyperlinks for the following publications will be listed here:

(1) *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (*http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82446/pdf/CHRG-113hhrg82446.pdf*)

(2) *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2011) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg71642/pdf/CHRG-112hhrg71642.pdf*).

(3) *Department of Interior Spending and the President's Fiscal Year 2013 Budget Proposal: Oversight Hearing Before H. Comm. On Natural Resources.* 112th Cong. (2011) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72938/pdf/CHRG-112hhrg72938.pdf*).

(4) *Defining Species Conservation Success: Tribal, State and Local Stewardship* ***vs.*** *Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (*http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81318/pdf/CHRG-113hhrg81318.pdf*).

(5) *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Brock Evans, Endangered Species Coalition) (*http://naturalresources.house.gov/uploadedfiles/evanstestimony12-12-13.pdf*).

(6) *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Joe Roman, University of Vermont) (*http://naturalresources.house.gov/uploadedfiles/romantestimony12-12-13.pdf*)

(7) *Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools: Oversight Hearing Before the H. Comm. On Natural Resources,*

112th Cong. (2012) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg74665/pdf/CHRG-112hhrg74665.pdf*).

(8) *The Impact of Catastrophic Forest Fires and Litigation on People and Endangered Species: Time for Rational Management of our Nation's Forests: Oversight Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75279/pdf/CHRG-112hhrg75279.pdf*).

(9) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Senator Tom Casperson, Michigan State Senate) (*http://hastings.house.gov/uploadedfiles/capersontestimony10-10-2013.pdf*).

(10) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Issa A. Hamud, City of Logan, Utah) (*http://hastings.house.gov/uploadedfiles/hamudtestimony10-10-2013.pdf*).

(11) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Kevin Kolevar, Conservation Leadership Conference) (*http://hastings.house.gov/uploadedfiles/kolevartestimony10-10-2013.pdf*).

(12) *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Carl Albrecht, Garkane Energy, Inc.) (*http://naturalresources.house.gov/uploadedfiles/albrechttestimony12-12-13.pdf*).

(13) *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Damien Schiff, Pacific Legal Foundation) (*http://naturalresources.house.gov/uploadedfiles/schifftestimony08-02-13.pdf*).

(14) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Doug Vincent-Lang, Alaska Department of Fish and Game) (*http://hastings.house.gov/uploadedfiles/vincent-langtestimony-10-10-13.pdf*).

(15) *Spending for the National Oceanic and Atmospheric Administration, the Council on Environmental Quality, the Office of Insular Affairs, the U.S. Fish and Wildlife Service and the President's Fiscal Year 2014 Budget Request for these Agencies: Oversight Hearing Before the H. Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources,* 113th Cong. (2013) (question for the record response of Dan Ashe, U.S. Fish and Wildlife Service) (*http://naturalresources.house.gov/uploadedfiles/house_nrsc_fy_2014_budget_qfrs_final.pdf*).

(16) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Matthew Hite, U.S. Chamber of Commerce) (*http://hastings.house.gov/uploadedfiles/hitetestimony10-10-2013.pdf*).

(17) *Failed Federal Forest Policies: Endangering Jobs, Forests and Species: Oversight Field Hearing Before the H. Comm. On Natural Resources,* 112th Cong. (2012) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg74531/pdf/CHRG-112hhrg74531.pdf*).

(18) *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Dr. Rob Roy Ramey) (*http://naturalresources.house.gov/uploadedfiles/rameytestimony08-02-13.pdf*).

(19) *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Dan Ashe, U.S. Fish and Wildlife Service) (*http://naturalresources.house.gov/uploadedfiles/ashetestimony08-02-13.pdf*).

(20) *Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (statement of Kent McMullen, Franklin County Natural Resources Advisory Committee) (*http://naturalresources.house.gov/uploadedfiles/mcmullentestimony08-02-13.pdf*).

(21) *The Endangered Species Act: Reviewing the Nexus of Science and Policy: Oversight Hearing Before the H. S. Comm. On Investigations and Oversight,* 112th Cong. (2011) (written testimony of Dr. Neal Wilkins, Texas A&M Institute of Renewable Natural Resources) (*http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/101311_Wilkins.pdf*).

(22) *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Before the H. Comm. on Natural Resources,* 112th Cong., Dec. 6, 2011 (written testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC.) (*http://naturalresources.house.gov/uploadedfiles/buddfalentestimony 12.06.11.pdf*).

(23) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Ross Melinchuk, Texas Parks and Wildlife Department) (*http://hastings.house.gov/uploadedfiles/melinchuktestimony10-10-2013.pdf*).

(24) *Endangered Species Act Congressional Working Group Forum: Forum Before the Endangered Species Act Working Group,* 113th Cong. (2013) (written testimony of Roger Marzulla, Marzulla Law LLC) (*http://hastings.house.gov/uploadedfiles/marzullatestimony10-10-2013.pdf*)

(25) *Effect of the President's FY 2013 Budget and Legislative Proposals for the Bureau of Land Management and the U.S. Forest Service's Energy and Minerals Programs on Private Sector Job Creation, Domestic Energy and Minerals Production and Deficit Reduction: Hearing Before the Subcomm. on Energy and Mineral Res. Of the H. Comm. on Natural Resources,* 112th Cong., (2012) (written testimony of Laura Skaer, Northwest Mining Association) (*http://naturalresources.house.gov/uploadedfiles/skaertestimony03.20.12.pdf*).

(26) Letter from Kathleen Sgamma, Vice President of Government and Public Affairs, Western Energy Alliance, to Sally Jewell, Secretary, The Department of the Interior (Nov. 19, 2013) (*file:///C:/Users/Dell/Desktop/Western-Energy-Alliance-Letter-to-Sec-Jewell-on-GSG-11-19-13*.) [This is the hyperlink used in the final document.]

(27) *ESA Decisions by Closed-Door Settlement: Short-Changing Science, Transparency, Private Property, and State & Local Economies: Oversight Hearing Before the H. Comm. On Natural Resources,* 113th Cong. (2013) (written testimony of Greg Foley, Kansas Department of Agriculture) (*http://naturalresources.house.gov/uploadedfiles/foleytestimony12-12-13.pdf*).

(28) *At Risk: American Jobs, Agriculture, Health and Species: The Costs of Federal Regulatory Dysfunction: Joint Oversight Field Hearing Before the H. Comm. On Natural Resources and H. Comm. On Agriculture,* 112th Cong. (2011) (*http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66204/pdf/CHRG-112hhrg66204.pdf*).

○