

**THE ENDANGERED SPECIES ACT:
HOW LITIGATION IS COSTING JOBS
AND IMPEDING TRUE RECOVERY
EFFORTS**

OVERSIGHT HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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OVERSIGHT HEARING ON “THE ENDANGERED SPECIES ACT: HOW LITIGATION IS COSTING JOBS AND IMPEDING TRUE RECOVERY EFFORTS.”

**Tuesday, December 6, 2011
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.**

The Committee met, pursuant to call, at 10:05 a.m. in Room 1324, Longworth House Office Building, The Honorable Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Young, Gohmert, Lamborn, Fleming, McClintock, Benishek, Rivera, Duncan of South Carolina, Tipton, Gosar, Labrador, Flores, Harris, Runyan, Amodei, Markey, Kildee, Napolitano, Holt, Bordallo, Costa, Sablan, Garamendi, and Hanabusa.

The CHAIRMAN. The Committee on Natural Resources will come to order. The Committee on Natural Resources meets today to hear testimony on “The Endangered Species Act: How Litigation Is Costing Jobs and Impeding True Recovery Efforts.”

As usual, the opening statements are for the Chairman and the Ranking Member. However, I ask unanimous consent if any Member wishes to submit a statement for the record, they submit it before close of business today. Without objection, so ordered.

I will now recognize myself for my opening statement.

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

The CHAIRMAN. Today’s hearing is the first of several this Committee will hold over the next year to examine and review the Endangered Species Act. Enacted in 1973 and last reauthorized in 1988, the ESA’s fundamental goal is to preserve, protect and recover domestic key species. This is an objective that I believe we can all support.

However, it has been 23 years since Congress has reviewed or updated the ESA. I believe it is the responsibility of this Committee and Congress to ask questions and examine if the original intent of this law is being carried out two decades later. The intent of this hearing and those to follow is to have an honest conversation about both the strengths and weaknesses of the ESA and consider if there are ways to update the law to make it work better for both species and for people.

The purpose of the ESA is to recover endangered species, yet this is where the current law is failing and failing badly. Of the species listed under ESA in the past 38 years, only 20 have been declared recovered. That is a 1 percent recovery rate, and I firmly believe that we can do better. In my opinion, one of the greatest obstacles

to the success of the ESA is the way in which it has become a tool for excessive litigation.

Instead of focusing on recovering endangered species, there are groups that use ESA as a way to bring lawsuits against the government and thus sometimes block job opportunities. These groups have filed hundreds of lawsuits against the Fish and Wildlife Service and the National Marine Fisheries Service. In fact, in July the Interior Department agreed to a settlement that covered 779 species in 85 lawsuits in legal actions. Information provided to us over the past few months from these agencies indicates they have a combined total of over 180 pending ESA-related lawsuits. These lawsuits direct valuable resources away from real recovery efforts.

Last May, the Department of the Interior stated, and I quote, "The Fish and Wildlife Service's highest priority is to make implementation of the ESA less complex, less contentious and more effective." While I applaud this goal and look forward to hearing the Service's progress, I am concerned that the Interior Department's real approach to addressing the growing docket of ESA cases appears limited to settling lawsuits with a few litigant groups. These settlements reward the groups by having the taxpayers pay their attorney fees and increase the already large list of species the Department is struggling to recover.

American tax dollars and government biologists and personnel should be focused on helping to save species from extinction, not responding to hundreds of lawsuits. The litigation mindset that is consuming the Endangered Species Act has had significant job and economic impacts throughout the West, unnecessarily pitting people against species. During these challenging economic times, America cannot afford runaway regulations and endless lawsuits.

In the Pacific Northwest, my area, the ESA-related litigation touches nearly everyone, be it through Federal judges determining the fate of irrigated agriculture and clean renewable hydrodams, the impact of the listed spotted owl on timber communities and jobs, the fear of litigation that has blocked renewable wind projects or uncertainty of whether predatory wolves are endangered on one side of the highway, but not on the other side of that same highway.

I hope to hear more from our witnesses today about how litigation is impacting species projection, job creation and economic development across the country. We are also looking for an explanation of why the Obama Administration settled these lawsuits and how much time and resources litigation takes away from real recovery efforts.

By strengthening and updating the Endangered Species Act, improvements can be made so it is no longer abused through lawsuits and instead can remain focused on fulfilling its true and original goal of species recovery.

[The prepared statement of Mr. Hastings follows:]

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

Today's hearing is the first of several this Committee will hold over the next year to examine and review the Endangered Species Act. Enacted in 1973 and last reauthorized in 1988, the ESA's fundamental goal is to preserve, protect and recover key domestic species. This is an objective I believe we all can support.

However, it's been 23 years since Congress has reviewed or updated the ESA. I believe it's the responsibility of this Committee and Congress to ask questions and examine if the original intent of this law is still being carried out two decades later.

The intent of this hearing and those to follow is to have an honest conversation about both the strengths and weaknesses of the ESA and consider if there are ways to update the law to make it work better for both species and people.

The purpose of the ESA is to recover endangered species—yet this is where the current law is failing—and failing badly. Of the species listed under the ESA in the past 38 years, only 20 have been declared recovered. That's a 1 percent recovery rate. I firmly believe that we can do better.

In my opinion, one of the greatest obstacles to the success of the ESA is the way in which it has become a tool for excessive litigation. Instead of focusing on recovering endangered species, there are groups that use the ESA as a way to bring lawsuits against the government and block job-creating projects.

These groups have filed hundreds of lawsuits against the Fish and Wildlife Services and the National Marine Fisheries Service. In fact, in July the Interior Department agreed to a settlement that covered 779 species in 85 lawsuits and legal actions. Information provided to us over the past few months from these agencies indicates they have a combined total of over 180 pending ESA-related lawsuits.

These lawsuits direct valuable resources away from real recovery efforts. Last May, the Department of Interior stated: "The Fish and Wildlife Service's highest priority is to make implementation of the ESA less complex, less contentious, and more effective." While I applaud this goal and look forward to hearing the Service's progress, I am concerned, that the Interior Department's real approach to addressing the growing docket of ESA cases appears limited to settling lawsuits with a few litigious groups. These settlements reward the groups by having the taxpayers pay their attorneys' fees and increase the already large list of species the Department is struggling to recover.

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By strengthening and updating the Endangered Species Act, improvements can be made so it's no longer abused through lawsuits and instead can remain focused on fulfilling its true and original goal of species recovery.

The CHAIRMAN. With that, I am pleased to recognize the distinguished Ranking Member, Mr. Markey.

**STATEMENT OF THE HON. EDWARD MARKEY, A
REPRESENTATIVE FROM THE STATE OF MASSACHUSETTS**

Mr. MARKEY. Thank you, Mr. Chairman.

It is hard to believe that it was almost 50 years ago that Rachel Carson warned us of the potential for a "Silent Spring." At that time bird populations, including our national symbol, the bald eagle, were decimated. Bears and wolves, icons of the western wilderness, were on the verge of extermination. Whales that had once been plentiful in the ocean were rare, although whale oil brings to mind the era of Herman Melville in "Moby Dick". The auto industry was still using it as a lubricant in 1970.

In response to these palpable losses, Congress passed the Endangered Species Act in 1973 to save species and their habitats. The law has been extremely successful at preventing extinction and in setting species on a path to recovery. In fact, only two species have gone extinct after receiving protection by the law.

Much like the animals it is bound to protect, the Endangered Species Act is that rarest of laws that has become a victim of its own success. We struggle to recall the dire circumstances that led to its creation in the first place. Preventing extinction and recovering species is not just the right thing to do, it is the economically sensible thing to do. Biodiversity of plants, fish and wildlife provide us with important benefits, from life-saving drugs to clean drinking water. Nature has been producing cures for millions of years, including aspirin from the willow tree and high blood pressure medications from the pit viper. Imagine that, a weeping tree that solves pain and snake oil that actually soothes the heart.

Hunting, fishing and wildlife watching produces \$120 billion in annual revenues and employs more than 2.6 million people. In 2008 alone, tourists spent more than \$125 million to travel and visit Stellwagen Bank National Marine Sanctuary off the coast of my home state of Massachusetts. The Endangered Species Act also continues to receive strong support across state and party lines. The vast majority of Americans, both Democrats and Republicans of all ages, ethnicities and education strongly support the Endangered Species Act.

Americans also agree that decisions about wildlife protection should be made by scientists and not by politicians, as the law requires, and yet the majority through legislative proposals, reductions in appropriations and funding limitations continue to demonstrate their predilection for extinction.

If we want to recover endangered species, we must first work to provide adequate funds to implement the Act. The Endangered Species Act has been chronically underfunded. Our Republican counterparts have cut the Fish and Wildlife Service's endangered species budget for next year by \$44 million and the National Oceanic and Atmospheric Administration's budget for protected species by \$28 million.

Today we will hear from the Majority that litigation is hindering the recovery of endangered species, but the majority of activities that occur because of the Endangered Species Act take place without litigation. For example, on the Lower Colorado River, a long-term program is in place to balance the interests of water users with the conservation of endangered species, all without litigation.

When appropriate litigation is used by industry and environmental groups alike to ensure that the government follows the rule of law, litigation gives citizens the ability to challenge the decisions of the government when they believe that they have been wronged. It is as fundamental to our rights as freedom of speech or the right to vote.

Captain Ahab is famously known for fixating all of his anger and blame on Moby Dick. Similarly, the Majority's white whale is the litigants who are striving to ensure that the Endangered Species Act is implemented in accordance with the law. This whale of a tale only serves to distract us from preventing extinction and recov-

ering species for our own benefit and for the benefit of future generations.

I yield back the balance of my time.

[The prepared statement of Mr. Markey follows:]

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

Thank you, Mr. Chairman.

It is hard to believe that it was almost fifty years ago that Rachel Carson warned us of the potential for a silent spring. At that time bird populations—including our national symbol, the Bald Eagle—were decimated. Bears and wolves, icons of the western wilderness, were on the verge of extermination. Whales that had once been plentiful in the ocean were rare. Although whale oil brings to mind the era of Herman Melville and Moby Dick, the auto industry was still using it as a lubricant in 1970.

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Yet Republicans, through legislative proposals, reductions in appropriations, and funding limitations, continue to demonstrate their predilection for extinction.

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The CHAIRMAN. I thank the gentleman for his statement and for his colorful metaphors that we always look forward to.

I want to welcome our first panel. We have with us Ms. Karen Budd-Falen, Attorney for the Budd-Falen Law Offices in Cheyenne,

Wyoming; Mr. Doug Miller, General Manager of the PUD District No. 2 in Raymond, Washington, the other side of the state from where I reside, but I am very familiar with PUDs; Mr. Kieran Suckling, the Executive Director for the Center for Biological Diversity in Tucson, Arizona; Mr. Jay Tutchton, General Counsel, WildEarth Guardians from Santa Fe, New Mexico; Mr. John Leshy, Professor at U.C. Hastings, very good name, College of the Law in San Francisco; and Mr. Brandon Middleton, Attorney for the Pacific Legal Foundation in Sacramento, California.

Your full statement will appear in the record and that little five-minute light in front of you, let me explain for those of you who are not familiar with it. When the green light goes on that means you have the full five minutes. When the yellow light goes on you have one minute remaining, and when the red light goes on that means that your five minutes have expired, and if you could quickly end your remarks at that time and keep your remarks within the five-minute time period, I would very, very much appreciate it.

So, with that, we will start with testimony from our panel and we will start with Ms. Karen Budd-Falen. You are recognized for five minutes. Would you get closer to that and turn on the microphone? I forgot to mention that.

Ms. BUDD-FALEN. OK. Is it the red button?

The CHAIRMAN. You are on now, yes.

Ms. BUDD-FALEN. All right. Thank you.

The CHAIRMAN. You bet.

**STATEMENT OF KAREN BUDD-FALEN, ATTORNEY,
BUDD-FALEN LAW OFFICES, CHEYENNE, WYOMING**

Ms. BUDD-FALEN. Chairman Hastings, Ranking Member Markey, and Members of the Committee, thank you for the honor of presenting testimony to you today. My name is Karen Budd-Falen. I am a fifth-generation rancher from a family owned ranch in Big Piney, Wyoming, and an attorney and owner of the Budd-Falen Law Office in Cheyenne, Wyoming.

My law firm engages in a significant amount of Federal court litigation both against the Federal government and intervening in litigation on behalf of the Federal government when it is sued by radical environmental groups who are seeking to eliminate the livelihoods of farmers, ranchers and private property owners as well as the stability of rural communities.

The question today is whether litigation is costing jobs and impeding true recovery of listed species. I do not believe that Congress envisioned that this Act would become a mechanism to put every species imaginable on some list while taking less than 2 percent off the list. The legislative history of the ESA stated that its purpose was to provide a mechanism to recover species, not to just simply put them on a list.

On July 12, 2011, the Fish and Wildlife Service announced two settlement agreements with the Center for Biological Diversity and WildEarth Guardians that will require the Fish and Wildlife Service and NOAA to consider the listing of critical habitat designation for 1,053 species in the next four years. That is a huge undertaking. The ESA has been in place for 30 years and today there are

approximately 1,069 listed American species and 590 foreign species on that list.

The CBD and WEG sued because of missed deadlines. While it is true that the agency missed the deadlines, Congress should be asking whether these settlements actually help further the purpose of the ESA. Specifically, if FWS and NOAA are spending all of their time putting species or habitat on a list, what time do they have in taking species off of that list? Instead of focusing on the recovery of species through the development of habitat conservation plans or conservation agreements the settlement simply focuses on adding more species to the list, which kills jobs because it stops private, state and Federal property and water use because of producers' fears of the significant fines and possible prison time for harming a species or modifying its habitat.

On top of this, the agencies didn't seem to save themselves a lot of trouble with these agreements. The petitions filed by other groups still have to be considered under the mandatory ESA timeframes, and even the settlement agreement still allowed the CBD and WEG to continue to file listing petitions, albeit a limited number, and to litigate over a whole host of other ESA issues, not just the timeline issue.

So the settlement agreements have not stopped litigation, and once a species is listed it can certainly take an act of Congress to remove it. Opponents to ESA reform claim that species are not removed from the list because they would simply have had not enough time to recover. However, the Rocky Mountain gray wolf is a perfect example that even when a species has met its recovery goals these groups continue to litigate to keep the species on the list.

Finally, I believe that the driving force behind this endless stream of litigation is the Federal government's payment of attorneys' fees. Since 1995, there has been no accounting of this money. Congress and the taxpayers should know how much money is being spent to reimburse attorneys in ESA and other litigation. Some of my own clients have received reimbursement of attorneys' fees. While I believe that the facts show that environmental groups receive a significantly higher amount and percentage of attorneys' fees than do individuals or industry groups, there is only one way to disprove my hypothesis: through accountability and transparency. My clients and I are willing to undergo that scrutiny. I would argue that those who are against transparency and accountability have something to hide.

I do not advocate the repeal of the ESA, but we are being told that Americans have to make some choice between species protection, private property rights, a clean environment, rural community and jobs. I would argue that these things are not mutually exclusive and that this type of fear-mongering is only for those who want to raise money based on fear. The ESA should be promoting conservation and incentive-based recovery plans, not adding more species to the list and becoming a bigger threat to American jobs.

Thank you for allowing me to testify. I would be happy to answer any questions.

[The prepared statement of Ms. Budd-Falen follows:]

**Statement of Karen Budd-Falen, Owner/Partner,
Budd-Falen Law Offices, L.L.C.**

My name is Karen Budd Falen. I am a fifth generation rancher in Wyoming and an attorney specializing in protecting private property rights and rural counties and communities. I offer this testimony to provide legal and factual information and to voice my concern over the current interpretation and implementation of the Endangered Species Act ("ESA") and the role federal court litigation has taken in driving decisions under the ESA.

Contrary to some belief, the implementation of the ESA has real impacts on real landowners, ranchers, farmers, businesses, employers and others who are a vital part of America's present and future. Rather than saving species and conserving their habitats, the ESA is used as a sword to tear down the American economy, drive up food, energy and housing costs and wear down and take out rural communities and counties. The purpose of the ESA was NOT just to put domestic and foreign species on an ever-growing list and tie up land and land use with habitat designations, but to recover species and remove them from the list. According to a November 29, 211 U.S. Fish and Wildlife Service ("FWS") report, there are currently 165 American and 59 foreign species on the ESA list, 25 candidate species, 44 critical habitat designations and 12 recovery plans. See http://ecos.fws.gov/tess_public/SpeciesReport. On the delisting side, the same website shows that a total of 51 species have been removed from the list, 18 of the 51 species because of a listing error, 1 because the species were determined to be extinct and 23 because the ESA worked and the species was recovered. See http://ecos.fws.gov/tess_public/DelistingReport. In other words, since 1979, the ESA has worked as intended in 2 percent of the cases.

While I do not advocate the complete repeal of the ESA, and neither do the landowners, families and communities I represent, this Act is a threat to private property use, working ranch families and resource and job providers. Consider just one example. Charlie Lyons owns the Percy Ranch located in Mountain Home, Idaho. Eighty percent of the ranch consists of federally managed and state owned lands. Ted Hoffman is also from Mountain Home, Idaho, and owns a ranch named the Broken Circle Cattle Company. In 21, an environmental group, the Western Watersheds Project ("WWP") sued the FWS to list the Slickspot peppergrass which grows, or has the potential to grow, on these ranches. The 21 WWP litigation only involved whether the FWS had to make a decision regarding whether to list the grass species under the ESA, not whether the grass was scientifically threatened or endangered. In this litigation, the Court determined that the FWS had violated the mandatory time deadline for making a listing decision and remanded the matter to the FWS who ultimately decided against listing the Slickspot peppergrass. However, because the Court determined that the FWS had to make a decision regarding listing of the species, the FWS agreed to pay the WWP \$26,663 in "reimbursement" for attorneys fees and costs. See *Committee for Idaho's High Desert v. Badgley*, 1-cv-1641 (D.Or. 21).

After this first round of litigation, a number of local ranchers including Lyons and Hoffman came together with the State of Idaho and created a Candidate Conservation Agreement ("CCA") which was approved by the FWS under the ESA. This was a pro-active Agreement that required certain on-the-ground measures be taken to improve the species. Also, through this Agreement, a great deal of research was dedicated to the status of the Slickspot peppergrass. In a report in 29, the Slickspot peppergrass had the highest recorded population numbers since they started counting plants.

Following the decision of the FWS to not list the Slickspot peppergrass and despite the CCA, the WWP sued the FWS again in 24 seeking a court order to list the species. The affected ranchers, including Lyons and Hoffman, intervened. However, WWP was successful in their attempt to force the FWS to list the Slickspot peppergrass. The total amount of money the ranchers spent on participating in the litigation was approximately \$3. WWP was awarded \$86,5 in attorneys fees, plus another \$15, to enforce the judgment, for a total award of \$11,5. See *Western Watersheds Project v. Foss*, 4-cv-168, (D.Id. 24).

In 2007, the FWS withdrew the 24 listing decision based upon the fact that the Slickspot peppergrass was already well protected by the implementation of the CCA. However, the WWP disagreed and sued the FWS over the Slickspot peppergrass again. WWP won and received an award in attorneys fees of \$11, See *Western Watersheds Project v. Kempthorne*, 7-cv-161, (D.Id. 29). The FWS has now prepared its draft designation of critical habitat for the plant. The comment period closes on December 12, 211. Thus far, the total attorneys fees paid related to the ESA listing of the Slickspot peppergrass is \$238,163..

According to these ranchers, WWP's objective in litigating over the Slickspot peppergrass is to run ranchers off the land in the spring. According to Mr. Lyons, if the WWP is successful in their efforts, it would mean a death sentence to the Slickspot peppergrass and ruination of our ranches. These ranchers would have to sell their cattle and in some cases that money would not cover the mortgage on the ranch. The plant would ultimately burn. These ranches are located in one of the highest frequency fire areas in the country. The FWS admits that fire plays a major role in the survival of the Slickspot peppergrass. Ranchers play a major role in putting out the fires because they are on the land almost every day and can call and tell the federal and state agencies when a fire starts. Once there is no economic value and reason for the ranchers to be on the land, the fire suppression efforts will be greatly diminished. Additionally, if these ranchers have to limit their grazing and sell their livestock, they will be left with no choice but to subdivide their private land. Housing subdivisions do not make good plant and animal species habitat.

Additionally according to the Natural Resources Conservation Service, "[n]o large ungulates, either domestic or wild use the [Slickspot peppergrass] plant (USDI, 29). This species has no known agricultural, economic or other human uses at this time." St. John, L. and D.G. Ogle. Plant Guide for Slickspot peppergrass (*Lepidium papilliferum*). USDA Natural Resources Conservation Service, Plant Materials Center, Aberdeen, Id. The CCA, which the landowners signed to protect the plant is useless and the faith and hard work that the landowners put into management for the plant is down the drain. No one can show that this plant is any better protected by an ESA paper designation than it was by true on-the-ground management. Under this scenario, the ranchers have lost, the plant has lost and the public has lost.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted." See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 18 (1978). The goal of the Act is "to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction." *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1231 (11th Cir. 2), citing S. Rep. No. 93-37, at 1 (1973) and 16 U.S.C. § 1531(b). Under the ESA, a threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range, see 16 U.S.C. § 1532 (2), and an endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).

Anyone can petition the FWS or the National Oceanic and Atmospheric Administration—Fisheries Division ("NOAA") to have a species listed as threatened or endangered. 16 U.S.C. § 1533. Listing decisions are to be based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). However, there is no requirement that the federal government actually count the species populations prior to listing. Additionally, although species that present an "overriding risk to man" are not to be listed, there are no economic considerations included as part of the listing of a threatened or endangered species.

Once a species is listed as threatened or endangered, prohibitions against "take" apply. 16 U.S.C. § 154. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19). "Harm" within the definition of "take" means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 5 C.F.R. § 17.3. Harass in the definition of "take" means intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 5 C.F.R. § 17.3. "Take" may include critical habitat modification, if such modification results in the death of a listed species. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). If convicted of "take," a person can be liable for civil penalties of \$1, per day and possible prison time. 16 U.S.C. § 154(a), (b).

Once a species is listed as threatened or endangered, the FWS or NOAA must "to the maximum extent prudent and determinable," concurrently with making a listing determination, designate any habitat of such species to be critical habitat. *Id.* at § 1533(a)(3). By definition, critical habitat ("CH") are "specific areas" see 16 U.S.C. § 1532(5)(A) and must be "defined by specific limits using reference points and lines found on standard topographic maps of the area." 5 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map). For "specific areas within the geographical area occupied by the [listed] species," the FWS may designate CH, provided such habitat includes 1) "physical or biological features;" 2) which are "essen-

tial to the conservation of the species;" and 3) "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(I); 5 C.F.R. § 424.12(b).

CH must also be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. *New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 21) (specifically rejecting the "baseline" approach to economic analyses). CH may not be designated when information sufficient to perform the required analysis of the impacts of the designation is lacking. 5 C.F.R. § 424.12(a)(2). The FWS may exclude any area from CH if it determines that the benefits of such exclusion outweigh the benefits, unless it determines that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2).

Once a species is listed, for actions with a federal nexus, ESA section 7 consultation applies. Section 7 of the ESA provides that "[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical" 16 U.S.C. § 1536(a)(2). The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. 5 C.F.R. § 42.12(c-d). If the FWS or NOAA determines that no species or CH exists, the consultation is complete, otherwise, the FWS must approve the species or habitat list. *Id.* Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation ("BA"). *Id.* The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the action on the listed species and critical habitat and determine whether there are likely to be adverse effects by the proposed action. *Id.* at § 42.12(a, f). In doing so, the action agency must use the best available scientific evidence. 5 C.F.R. § 42.14(d); 16 U.S.C. § 1536(a)(2). Once complete, the action agency submits the BA to the FWS or NOAA. The FWS or NOAA uses the BA to determine whether "formal" consultation is necessary. 5 C.F.R. § 42.12(k). The action agency may also request formal consultation at the same time it submits the BA to the FWS. *Id.* at § 42.12(j-k). During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential effects of the proposed action on the listed species or CH, and to report these findings in its biological opinion ("BO"). 5 C.F.R. § 42.14(g-f). Unless extended, the FWS or NOAA must conclude formal consultation within 9 days, and must issue the BO within 45 days. *Id.* at § 42.14(e); 16 U.S.C. § 1536(b)(1)(A).

If the BO concludes that the proposed action will jeopardize any listed species or adversely modify critical habitat, the FWS' BO will take the form of a "jeopardy opinion" and must include any reasonable and prudent alternatives which would avoid this consequence. 16 U.S.C. § 1536(b)(3)(A); 5 C.F.R. § 42.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. 16 U.S.C. § 1536(a)(2). If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4); 5 C.F.R. § 42.14(i). The ITS describes the amount or extent of potential "take" of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. *Id.*; see *Bennett v. Spear*, 52 U.S. 154, 17 (1997).

Once a species is listed, ESA section 1 also applies on private land, even if there is no federal nexus. In order to avoid the penalties for "take" of a species, and still allow the use and development of private land, the ESA also authorizes the FWS to issue ITSs to private land owners upon the fulfillment of certain conditions, specifically the development and implementation of habitat conservation plans ("HCPs"). 16 U.S.C. § 1539. A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A). Once a HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include (a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciably reduce the survival and re-

covery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B). As a practical matter, mitigation means that the applicant will either fund programs supporting the listed species or will provide or set aside land.

Although the legal ESA requirements sound fairly benign, that is not how the ESA is being used and interpreted by either the Courts or the federal agencies and why oversight by the Congress is needed. Consider the following examples:

A. *Multi-District Litigation Settlement Agreement*

On July 12, 211, the Justice Department and the FWS announced “an historic agreement” which will require the American taxpayers to pay approximately \$26,98,92 to just process the paperwork deciding whether to include 153 species under various categories under the ESA. See *In Re Endangered Species Act Section 4 Deadline Litigation*, 1-mc-377 (D.D.C. 21). These two settlement agreements are the culmination of what is known as the ESA multi-district litigation. This case was formed in 21 by combining 13 federal court cases filed by either the WildEarth Guardians (“WEG”) or the Center for Biological Diversity (“CBD”) regarding 113 species. On May 1, 211, the FWS announced its settlement agreement with the WEG with the promise that the agreement would help the FWS “prioritize its workload.” That settlement agreement was opposed by the CBD who wanted other species added to the list. The Justice Department obliged the requests of the CBD and on July 12, 211 filed the second settlement agreement. These agreements require the FWS to make 121 decisions on proposed listing, listing and critical habitat designations for 153 species. See Exhibits 1, 2.

Since part of this Oversight Hearing is to discuss the costs of litigation related to the ESA, this settlement agreement provides a good case study. According to a November 1, 21 FWS *Federal Register* Notice, the median cost for the federal government to prepare and publish an ESA 9-day finding is \$39,276; for a 12-month finding, \$1,69; for a proposed listing rule with a critical habitat designation, \$345; and for a final species listing rule with a critical habitat designation, the median cost is \$35. See 75 Fed. Reg. 69,222, 69,23 (Nov. 1, 21). The Multi-district ESA settlement agreements discuss which ESA actions have to be taken for which species, so by simply multiplying the number of species with the median cost per individual action, the cost to the American taxpayers for implementation of this settlement agreement is \$26,98,92. Those costs do not include any costs related to completing recovery plans, habitat conservation agreements, incidental take statements, section 7 consultation requirements or any on-the-ground measures for protection of currently listed or proposed newly listed species. This \$2,, cost is simply to complete paperwork related to species that the CBD and WEG believe should be considered by the FWS for ESA inclusion.

This \$26,98,92 figure also does not include the amount of money that the Justice Department has agreed it will pay in attorneys fee reimbursement to the CBD and WEG. The Justice Department and the environmental plaintiffs have petitioned the court for additional time to discuss settlement of the attorneys fees claim. The Court has granted the parties request and according to the court docket sheet, the CBD/WEG are to file their attorneys fee petition or a settlement agreement by December 8, 211. With regard to payment of attorneys fees, the Justice Department has already agreed that the CBD and WEG are “prevailing parties;” so the only remaining question is how much money will be paid to these groups.

There is also a question of how the number of species in the settlement agreement grew exponentially from the number of species in the original litigation. According to the combined complaints before the multi-district panel, the FWS was in alleged violation of the ESA by failing to timely respond to the CBD and WEG petitions for 113 species. However, the settlement agreements expanded the number of species to 153. It is not clear how the environmental plaintiffs convinced the Justice Department to expand the workload of the FWS envisioned by the original Complaints. Relatedly as stated above, there are currently 169 species on the list since the passage of the Act in 1979 (a period of 3 years) and these settlement agreements require consideration for 153 more species in just four years. If the FWS and NOAA cannot complete all required recovery actions for the species already on the list, how can the agencies continue that work if the list is approximately double in size?

Additionally, although the FWS has claimed that these settlement agreements will help it prioritize its workload, although the settlement agreement limits the number of additional ESA listing petitions that can be filed by the CBD and WWP, those are the only two groups impacted by the agreements. Thus, other environmental groups such as National Wildlife Federation, Western Watersheds Project, Sierra Club, the Humane Society of the U.S. or other groups can continue to file listing petitions to which the FWS and NOAA have 9 days to respond. If the federal

government violates this timeline with relation to a listing petition filed by any other group, more ESA litigation will occur. Species will be added to the list, but no equal action is taken to get species off the list. I do not believe that simply adding species to the list and tying up land for habitat is the goal of the ESA.

B. Changes in Interpretation of Areas Designated as Critical Habitat

Additionally, the FWS appears to have expanded its determination of the area to be included in critical habitat designations. Under prior determinations, CH was interpreted as the area specifically occupied by the species. The ESA defines critical habitat as including “the specific areas within the geographical area occupied by the species, at the time it is listed . . . and . . . specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. 1532(5)(a)(I), (ii). The key issue for the FWS therefore is what areas are “occupied” by the species. Under past interpretations, the term “occupied” included only those areas that were actually inhabited by the species. Now, however, that definition seems to be expanding to also include areas that are used only intermittently by the listed species. The courts, such as the Ninth Circuit Court of Appeals, have held that they will defer to the FWS determination that CH can include areas used only intermittently by a species. See e.g. *Arizona Cattle Growers Association v. Salazar*, 66 F.3d 116 (9th Cir. 21). Recent CH designations have shown that the FWS expansion of the term “occupied” are more commonplace. See e.g. 75 Fed.Reg. 7686 (Dec. 7, 21) (polar bear CH designation); 76 Fed.Reg. 3226 (June 2, 21) (Hawaiian monk seal CH designation); 75 Fed.Reg. 77962 (Dec. 14 21) (Santa ana sucker CH designation).

C. Foreign Species Listings

Although the United States has no jurisdiction over land use in foreign countries, the ESA allows species in foreign nations to be listed as threatened or endangered. In fact, as of November 28, 211, there were 59 foreign species listed on the United States threatened or endangered species list. <http://ecos.fws.gov/tess.public>. Foreign countries who have species on the American list include but are not limited to China, Mongolia, Kyrgyzstan, Pakistan, Afghanistan, India, Palau, Canada and Mexico.

With regard to the reasons for listing, recent FWS releases include concerns about private land use in these foreign countries and climate change. For example, a December 28, 21 FWS foreign species press release states:

All seven species face immediate and significant threats primarily from the threatened destruction and modification of their habitats from conversion of agricultural fields (e.g., soybeans, sugarcane, and corn), plantations (e.g., eucalyptus, pine, coffee, cocoa, rubber, and bananas), livestock pastures, centers of human habitation, and industrial developments (e.g., charcoal production, steel plants, and hydropower reservoirs).

Although there is limited information on the specific nature of potential impacts from climate change to the species included in this final rule, we [FWS] are concerned about projected climate change, particularly the effect of rising temperatures in combination with the potential loss of genetic diversity, and population isolation; and cumulative effects including El Niño events. Furthermore, we have determined that the inadequacy of existing regulatory mechanisms is a contributory risk factor that endangers each of these species’ continued existence.

See Exhibit 3.

Additionally, once a foreign species is listed on the U.S. threatened or endangered species list, the ESA gives the American government the authority to buy “land or water or interests therein” in foreign countries. 16 U.S.C. § 1537.

D. Payment of Attorney Fees with No Transparency or Accountability

The final issue I would raise with the Committee is the accountability and transparency of the amount of attorneys fees paid out of the U.S. Treasury for ESA (and other cases). The waiver of sovereign immunity of the federal government allowing litigation against the FWS and NOAA for alleged violations of the failure to list species or designate critical habitat is authorized under section 9 of the ESA. 16 U.S.C. § 154(g). Because the ESA contains its own “citizen suit” provision, any awarded attorneys fees come from the Judgment Fund. The Judgment Fund is a permanent indefinite Congressional authorization. 31 U.S.C. § 134. ESA awards paid by the Judgment Fund allows “reimbursement” of attorneys to the “prevailing party.” 16 U.S.C. § 154(g)(4).

Although environmental groups claim that they recover attorneys fees only when they have proven that the government was not following the law, that does not seem to be the case. Based upon data collected from the PACER National Case Locator federal court data base, in 21 percent of the cases filed by 14 environmental groups, attorneys fees were paid in cases where there was no federal court decision, let alone a decision that the plaintiff was a prevailing party. See e.g. *Center for Biological Diversity v. Norton*, Docket No. 5-341 (D. Az. 25). This data search was only conducted in 19 states and the District of Columbia, so I believe it is only the tip of the iceberg. With specific consideration of the ESA, if the federal government fails to respond to a petition to list a species within the 9 day time period mandated by the ESA, an environmental group can sue and almost always get attorneys fees paid. See e.g. *WildEarth Guardians v. Kempthorne*, Docket No. 8-443 (D.D.C. 28). In these cases, the court is not ruling that the species is in fact threatened or endangered, but only that a deadline was missed by the FWS.

Additionally concerning is that in 1.5% of the same cases reviewed through the PACER data base, the court docket sheets revealed that attorneys fees were paid, but no amount was given. See Exhibit 5. The expenditure of public funds for attorneys fees should be available to the public.

Finally, while not directly related to ESA cases, there are attorneys fees "settlements" that are not well explained. Consider the case of *WildEarth Guardians v. U.S. Forest Service*, Docket No. 7-143-JB (N.M. 21). In that case, litigated in the U.S. District Court for the District of New Mexico, the WildEarth Guardians lost on all counts and claims before the federal district judge. The WildEarth Guardians appealed the case to the Tenth Circuit Court of Appeals, and even though there was NO ruling by a court on the merits overturning the federal district judge's written decision, the WildEarth Guardians and the Forest Service jointly petitioned the federal district court to allow the Justice Department to voluntarily settle the case, including a payment of attorneys fees. The WildEarth Guardians lost their case; the Justice Department settled and paid attorneys fees.

In conclusion, while neither I nor the people I represent want to repeal the entire Act, this testimony illustrates that there are significant flaws in the Act and loopholes that should be closed. The use of the Act now appears to be more to produce paper, than implement on-the-ground species and habitat improvement. American landowners can be important and vital partners in protecting species and the habitats in which they live and the American taxpayer money should be spent on habitat improvement rather than attorneys fees and litigation.

Thank you.

The CHAIRMAN. Thank you very much, and I apologize for mispronouncing your name. I made it long instead of short and I apologize for that.

Ms. BUDD-FALEN. It is not a problem.

The CHAIRMAN. I recognize Mr. Doug Miller, the Manager of the Pacific County PUD, for five minutes.

STATEMENT OF DOUG MILLER, GENERAL MANAGER, PUBLIC UTILITY DISTRICT NO. 2 OF PACIFIC COUNTY, RAYMOND, WASHINGTON

Mr. MILLER. Good morning, Chairman Hastings, Ranking Member Markey, and Distinguished Members of the Committee. My name is Doug Miller and I am the General Manager of Public Utility District No. 2 of Pacific County in Washington State, testifying on behalf of Energy Northwest and four public utility districts concerning the Radar Ridge wind project.

I am pleased to have this opportunity to provide brief remarks concerning the project. With me today is Jim Lynch, Project Attorney, who will respond to any legal questions you may have. Jim is here behind me.

Four public utility districts joined together to develop a wind energy project on Radar Ridge, located in Pacific County, Washington. These four project participants are members of Energy

Northwest, a joint operating agency or JOA formed under the laws of the State of Washington. Energy Northwest provided project management and oversight for the development of the Radar Ridge wind project.

The utilities pursued this project on Radar Ridge because, one, it was an economically attractive winter peaking wind energy resource; two, it would have been located in western Washington, avoiding further taxing of heavily loaded transmission lines that cross the Cascade Mountain Range; and, three, it would have been located on State Department of Natural Resources land managed for and containing existing industrial activities such as telecommunications towers, an active gravel quarry and logging operations. Another attractive aspect of the project was favorable financing sources obtained by Energy Northwest.

The utilities applied for and were granted authority to use over \$200 million in clean renewable energy bonds or CREBs to finance project construction. Energy Northwest worked closely with state fish and wildlife agencies and the U.S. Fish and Wildlife Service to conduct studies and evaluate the effects of the project on wildlife in the project area. The studies concluded that the project was not likely to have a significant adverse impact on any wildlife.

To address concerns expressed by Fish and Wildlife Service regarding marbled murrelet, a species listed under the Endangered Species Act, Energy Northwest agreed to develop an incidental take permit in collaboration with Fish and Wildlife Service. The permit would have contained measures to minimize and mitigate the effects of the project on listed marbled murrelets over the life of the project. Energy Northwest spent considerable time developing a permit application over a span of two years in collaboration with the Service and thought it had captured the Agency's concerns.

During the development of the ESA permit application Fish and Wildlife Service expressed a desire for Energy Northwest to sponsor the development of an environmental impact statement, or EIS, to analyze the potential impacts of the project on the environment. Energy Northwest agreed to this more lengthy environmental review process only after Fish and Wildlife Service committed to a schedule to complete the permitting process by December 31, 2011, over three years after the permitting process was first initiated.

This date was important because it would have enabled the utilities to make use of the CREBs' financing. This schedule and the parties' agreement to work together on these matters is reflected in a Memorandum of Understanding executed in 2009 by Energy Northwest, Fish and Wildlife Service and the Bonneville Power Administration.

In early 2011, it became apparent that Fish and Wildlife Service would be unable to complete the EIS and issue the permit according to the schedule contemplated in the MOU. The reasons for this delay by Fish and Wildlife Service were severalfold but included the Service's delays in securing contracts with a NEPA contractor and peer reviewers.

In late 2011, after more than three years of interactions, Fish and Wildlife Service outlined a new project permitting alternative which would have rendered the project uneconomic if adopted. The

addition of this new alternative would have required significant additional time to analyze, further delaying the process.

In conclusion, it is highly unfortunate that the project could not proceed despite the best efforts of the many parties involved. The decision to abandon this project resulted in a loss of about \$4 million in project development costs contributed by the utilities and the return of \$200 million in CREBs to the Federal government.

Thank you for the opportunity to provide these remarks, and I would be happy to answer any questions you may have about this project.

[The prepared statement of Mr. Miller follows:]

**Statement of Doug Miller, General Manager,
Public Utility District No. 2 of Pacific County**

Good morning Chairman Hastings, Ranking Member Markey and distinguished Members of the Committee. My name is Doug Miller, and I am the General Manager of Public Utility District No. 2 of Pacific County in Washington State, testifying on behalf of Energy Northwest and four public utility districts. I am pleased to have this opportunity to provide these brief remarks regarding the permitting process surrounding the Radar Ridge Wind Energy Project.

I am here today to tell you about an unfortunate (and expensive) sequence of events affecting a well-intentioned renewable energy project we attempted to build. My hope is that my testimony will help bring attention to the overly-burdensome regulatory process preventing construction of renewable energy projects, and lessen the risk that others who simply want to do the right thing for their communities suffer a similar fate.

Background of the Public Utilities

Before speaking directly about the Project, I would like to provide you with a brief background on my Utility and the other participants in the Radar Ridge Wind Project. P.U.D. No. 2 of Pacific County is a medium-sized public utility in southwest Washington providing electricity service to just over 17,000 customers. Our P.U.D. offers a “green power” retail product for our customers and therefore must purchase enough of a renewable wholesale product to cover our “green power” purchases. Historically, the District has purchased a majority of our wholesale power, depending on the contract period, from the Bonneville Power Administration (“BPA”), of which greater than 75% comes from hydroelectricity, a resource that is not recognized as renewable. Therefore, our Utility was looking at the Radar Ridge Wind Project for two reasons, to: (1) meet the renewable needs of our green power retail customers, and (2) provide an economic boost to Pacific County since the Project would have been constructed in our County near the community of Naselle.

The other three participating utilities—Clallam, Grays Harbor, and Mason #3 County P.U.D.—were interested in developing the Project because they each have more than 25,000 customers and thus are required under Washington State’s renewable energy standard to have 15 percent of their wholesale power portfolio consist of renewable sources by 2020.

All four Project participants are members of Energy Northwest, a Joint Operating Agency (“JOA”) formed under the laws of the State of Washington. Energy Northwest has 28 members, either public utility districts or municipal utilities within the State. The JOA is a wholesale electric utility that operates the Columbia Generating Station and explores and develops, with member interest, other generating projects such as the Nine Canyon Wind Project, and White Bluffs Solar Station. Energy Northwest provided project management for the Radar Ridge Wind Project with input from the four participants.

Overview of the Radar Ridge Project

Energy Northwest continually prospects for potential generating sites and in 2006, contracted with my Utility to place a wind monitoring device on our communication tower atop Radar Ridge, located in Southwest Washington. The initial monitoring results from this location were encouraging—enough so that Energy Northwest asked its members if anyone would be interested in exploring the development of a wind project on Radar Ridge. The four P.U.D.’s became involved in this Project, and the five entities have worked for the past five years on a range of studies to evaluate and permit the Project, including wind monitoring, avian and wildlife studies, transmission connection agreements with the Bonneville Power Administration,

a site lease with the Washington Department of Natural Resources (“WDNR”), and a range of environmental permitting documents.

Based on the initial studies and analyses developed by Energy Northwest, the utilities elected to pursue the Radar Ridge Wind Project because:

- (1) Radar Ridge possesses an economically attractive, winter-peaking wind resource that would serve the time of year during the period of highest customer load;
- (2) The Project would be located in western Washington, closer to our customer loads, and would avoid further taxing heavily loaded transmission lines that cross the Cascade Range;
- (3) The Project would be located near an existing BPA Substation that could be accessed via construction of a relatively short, three mile transmission line;
- (4) The Project would be located on State Department of Natural Resources land already used for industrial purposes, and containing existing telecommunications facilities, an active gravel quarry, and active logging operations. Money from the State lease for Project land would benefit Washington schools as well as the local community in which the Project exists; and

Clean Renewable Energy Bonds

During the development of permitting documents for the Project, the Utilities, with assistance from Energy Northwest, applied to the U.S. Treasury Department and were granted authority to use Clean Renewable Energy Bonds or “CREBs” to finance Project construction. The Utilities ultimately received authority to use over \$200 million in CREBs to finance this and one other project; however, the CREBs expire in the first quarter of 2013, and must be issued in advance of this deadline. Energy Northwest developed a Project schedule in collaboration with FWS and BPA to obtain Project permits by December 31, 2011, to allow use of the CREBs.

Development of the Project Permit Application

As a condition of Energy Northwest’s lease with the WDNR, Energy Northwest studied the potential effects of Project construction and operation on marbled murrelets, a species listed under the Endangered Species Act (“ESA”). Energy Northwest worked closely with State fish and wildlife agencies, and the U.S. Fish and Wildlife Service over a period of several years to evaluate the effects of the Project on this species and other wildlife species in the Project area. The results from the Environmental Assessment were extensively peer reviewed. The studies concluded that the Project was not likely to have a significant adverse impact on marbled murrelets or other sensitive species.

To address concerns expressed by FWS, Energy Northwest agreed to pursue an Incidental Take Permit (“ITP”) under the ESA. The permit would have contained measures to minimize and mitigate the impacts of the Project on listed marbled murrelets, and it would have authorized any potential take of listed marbled murrelets that could occur over the life of the Project. Energy Northwest engaged in a multi-year process with FWS to develop an acceptable application for an ITP, including numerous meetings, and technical workshops with the Service, the State, and environmental organizations. In addition, FWS performed an independent scientific peer review at its own expense evaluating scientific information contained in permit application documents. The level of study and peer review associated with this process remains unprecedented, and far exceeds any published agency policies.

During this process of engagement, Energy Northwest worked closely with FWS, State wildlife agencies, and environmental organizations to identify Project proposals that would address environmental concerns. As an example, in response to suggestions from FWS, Energy Northwest secured an option to purchase 261 acres of murrelet habitat from a nearby timber company as mitigation for the Project. Energy Northwest developed Project proposals in an open, collaborative manner, with substantial opportunity provided for public comment, resulting in the development of an ESA permit application that was submitted to FWS in 2011 consistent with the parties agreed schedule. FWS and the State wildlife agencies provided substantial input into the ESA permit application, and Energy Northwest believed that the application incorporated the agencies’ comments.

Environmental Review Process

During the development of the ESA permit application, FWS expressed a desire for Energy Northwest to sponsor the development of an Environmental Impact Statement (EIS) to analyze the potential impacts of the Project on the environment. Energy Northwest had previously concluded that the Project would have no significant environmental impacts, and submitted a draft EA to FWS for its use in the

National Environmental Policy Act process. However, in the interest of collaborating with FWS, Energy Northwest agreed to support the development of an Environmental Impact Statement (“EIS”). Energy Northwest agreed to this more lengthy environmental review process only after FWS and the Bonneville Power Administration (“BPA”) agreed to complete the permitting process by December 31, 2011. This schedule, and the parties’ agreements to work together on these matters, are reflected in a Memorandum of Understanding (“MOU”) executed in 2009. This permitting schedule would have enabled the Utilities to make use of the CREBs.

After executing the MOU, FWS sought bids from contractors to prepare an EIS. FWS retained a consulting firm to develop the EIS; however, the process to retain the NEPA contractor took longer than expected, and was longer than the process contemplated in the MOU. Nonetheless, Energy Northwest agreed to continue to fund EIS development based upon the assurances provided to it by FWS that FWS would continue to honor agreements contained in the MOU.

Breakdown of the Process

In early 2011, it became apparent that development of the EIS was significantly delayed for several reasons. First, FWS requested another peer review of available scientific information. The process to solicit and secure a contract with a qualified firm took longer than FWS expected. In addition, development of the EIS with the NEPA contractor was delayed, and deviated substantially from the schedule contained in the MOU. Energy Northwest tried on several occasions, working through BPA, to bring the Project back on schedule; however, these attempts were unsuccessful. At several junctures, BPA expressed frustration with the lack of progress on the EIS, and unresponsiveness of FWS during development of the draft EIS.

In late 2011, Energy Northwest attempted to expedite completion of a draft EIS for public review and comment to salvage the Project and the CREBs. During this period, FWS indicated its intent to develop an alternative to the proposed permit application for inclusion in the EIS. After months of work, FWS outlined a new Project alternative that would have rendered the Project uneconomic if adopted. A comparison of the mitigation proposed by Energy Northwest based on the science and that of FWS under this new alternative is depicted below:

	<u>Energy Northwest</u>	<u>FWS</u>
Curtailment of Project year	90 minutes around dawn during murrelet breeding season	varies totaling 4 months each
Monitoring Equipment	Not proposed	on each turbine
Habitat Development	\$1 million	\$10 million
Term of Permit extensions	25 years	5 years with potential

Also, the addition of this new alternative would have required significant additional time to analyze in the EIS, making it highly unlikely that a final ESA permit would be issued on the schedule contemplated in the MOU. Energy Northwest communicated these concerns to FWS and BPA on several occasions; however, Energy Northwest was unable to resolve this situation. As a result, Energy Northwest was left with no choice but to abandon the Project, and relinquish its CREB allocation.

Conclusion

In conclusion, it is highly unfortunate that the Radar Ridge Wind Project could not proceed despite the best efforts of the many parties involved, including FWS, BPA, State agencies, environmental organizations, and the Utilities. The decision to abandon this Project, resulting in the loss of \$4 million in Project development costs contributed by the Utilities, and the return \$200 million in CREBs to the federal government, is not something the Utilities take lightly. The decision to abandon this Project was reached after careful deliberation, and after years of attempting in good faith to make the process work.

The Project had, and continues to have, overwhelming support in Pacific County, and would have provided substantial economic and environmental benefits to the State of Washington. A unique aspect of this Project was that it was located on

State trust lands, and money generated under the State lease would have benefited public schools in the State of Washington as well as Pacific County through revenue sharing agreements. The Project would have also generated 250–300 temporary jobs and 9 permanent positions in Pacific County, along with indirect benefits to local businesses serving this workforce. Pacific County has been particularly hard-hit by the economic down turn, and these jobs and related tax revenues will be sorely missed by our local citizens.

I am here today not simply to explain to you the unfortunate history of Radar Ridge, but as a public official, I am also here to help sort out how we avoid repeating these types of situations in Washington, and other similar communities. A lesson I would take away from this experience is that a more transparent, reliable permitting process is needed under the ESA to permit renewable energy projects. I would also say that more formal oversight by Congress of the permitting process is needed to insure that waste of public resources can be avoided. Finally, I would say a need exists for independent review of FWS decisions, short of litigation, to insure that the agency makes its decisions without delay, and on the basis of the best available scientific information.

Thank you for the opportunity to provide these remarks.

The CHAIRMAN. Thank you very much, Mr. Miller.

Next I will recognize Mr. Kieran Suckling, the Executive Director of the Center for Biological Diversity in Tucson. You are recognized, Mr. Suckling.

**STATEMENT OF KIERAN SUCKLING, EXECUTIVE DIRECTOR,
CENTER FOR BIOLOGICAL DIVERSITY, TUCSON, ARIZONA**

Mr. SUCKLING. Thank you for inviting me, Mr. Chairman. I have a PowerPoint presentation here. If we could go to the next slide.

Yes, we have heard that the Endangered Species Act is not successful because only 1 percent of species have been removed from the Act. This is a critique we have been hearing for a decade or more, but it really begs the question how many should have been removed by now, and it presumes without any evidence whatsoever that hundreds or all of them should have been removed by now. This question has been looked at by the GAO recently, by scientists, and what they have all concluded is that the work of recovering species takes many decades. That work is outlined in Federal recovery plans. Of all the species on the endangered species list today, on average, they have been on the list for 21 years. The Federal recovery plans on average require 42 years for listing, so these species are only halfway through the government's recovery program.

So to assert that somehow they have failed because they did not recover twice as fast as the scientific plan to recover them says really doesn't make any sense. It is a lot like someone starting a 10-day course of antibiotics and declaring on day one the antibiotics don't work, I'm going to stop taking them.

So I want to go through a few slides to show the recovery trend of species versus their recovery time. If we can go to the next slide. This is the whooping crane. It was listed as an endangered species in 1967. Its Federal recovery plan says it will take 83 years to recover the species. It will recover in 2050. During that time it has increased from 54 pairs to 599. This is an endangered species success story, not a failure, and it is on the road to recovery.

Next slide. This is the nene or the Hawaiian goose. It was listed in 1967. Its recovery plan says it will be listed in 2034. That is 67

years. Meanwhile it has increased from 875 birds to over 1,700 birds. It is on its way to recovery. It is another success.

We have another slide, please. Florida panther, its recovery plan says it is going to take 116 years to recover the Florida panther listed in 1967. It is not slated to come off the list until 2083. After a very rocky start, it is on a steady upward swing right now. Much, much too early to declare the Endangered Species Act a failure for this species.

Could we have the next slide? This is actually a picture of the Chairman and the Ranking Member discussing the Endangered Species Act.

[Laughter.]

Could we have the next slide? No, it is actually the Utah prairie dog. This is a territorial display. These guys actually fight each other and bump heads like big horn sheep, only much more exciting. So it was put on the endangered species list in 1973. Its recovery plan says it is going to take 67 years, and as you can see, it is on an upward trajectory. There is over 11,000 of them now, growing from about 3,000 back in 1973.

Next slide. Shortnose sturgeon in the Hudson River. Its recovery plan says it is going to take 57 years from its listing in 1967 to recover. It is well on its way, increasing from 12,000 fish to 56,000 fish. This species will actually probably be recovered in advance of its slated recovery date.

Could we go to the next slide? So, when we look about how to measure the success of the Endangered Species Act, asking species to recover before the recovery plan say they should is not a good measure. What we should be asking is are we preventing extinction? Are we putting species on the road to recovery? And are they recovering in the right speed that we expect them to in relationship to their recovery plans?

So can we go to the next slide, please? So, in terms of extinction, 10 species have been removed from the list due to extinction. Only two of those went extinct after they were listed. The ESA is 99.9 percent effective in preventing extinction.

The next slide, please. To determine whether species are moving toward recovery at the proper rate, we examined every single native species in the eight northeast states. What we found was that 93 percent of all of those species are on a path toward recovery, the populations are increasing, and 82 percent were downlisted or delisted in the timeframe set out by the recovery plans, so in fact the ESA has been very successful in doing what it is supposed to do. It is far from a failure.

Could I have the next slide, please? Next. I guess we are done there.

Then I want to mention one more thing finally in response to the settlement agreement that the Department of the Interior recently signed with the Center and with WildEarth Guardians. Karen Budd-Falen said it would require the designation of 1,053 critical habitats. That is entirely incorrect. The agreement covers I think about 10 critical habitats, not 1,053.

The agreement primarily requires the Agency to make final listing decisions on 251 species on its priority list. These are the priority identified by the U.S. Fish and Wildlife Service.

The CHAIRMAN. Mr. Suckling, could you please—
 Mr. SUCKLING. I will be done in one second, and the settlement simply allows them to finish their own priorities, sir.
 [The prepared statement of Mr. Suckling follows:]

**Statement of Kieran Suckling, Executive Director,
 Center for Biological Diversity**

The effectiveness of the Endangered Species Act cannot be measured by the number of delisted species because the vast majority of species have not yet reached their scheduled recovery date.

“Evaluating success as a measure of how many species are delisted is a non-informative metric.”

The Performance of the Endangered Species Act—Schwartz (2008)

“The recovery plans we reviewed indicated that species were not likely to be recovered for up to 50 years. Therefore, simply counting the number of extinct and recovered species periodically or over time, without considering the recovery prospects of listed species, provides limited insight into the overall success of the services’ recovery programs.”

Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown—Government Accountability Office (2006)

Critics of the Endangered Species Act often complain that the law is failing because only 1% of endangered species have recovered and been removed from the list. These critics, however, have never explained *why* they think more species should have recovered by now. They conspicuously fail to provide scientific support for the contention. They fail because the claim is illogical and contrary to scientific expectations. As quoted above, scientists and the U.S. GAO have examined the critique and declared it meaningless.

It is meaningless because the timeline and action blueprint for recovery of endangered species is established in federal recovery plans and those plans stipulate that few species should have been recovered by now. There are currently 1,396 species protected under the Endangered Species Act. On average, they have been on the list 21 years. Their federal recovery plans, however, expect that on average they will take 42 years from listing to be recovered. To complain that a species did not recover 21 years prior to the conservation timeline established in its recovery plan is like declaring an antibiotic to be a failure because it did not cure an infection on the first day of a ten day course.

Hundreds of listed species have strong recovery trends but, as per their federal recovery plans, will not reach full recovery for several decades. Their progress is indicative of the Endangered Species Act’s effectiveness despite the fact they are not yet recovered. Here are just a few examples:

Whooping Crane. The whooping crane was listed as an endangered species in 1967. Its recovery plan anticipated downlisting to threatened status in 2035, *68 years from listing*. Full delisting would likely take until at least 2050, *83 years from listing*. The population has grown from 54 birds (48 wild and 6 captive) at the time of listing in 1967 to 599 in 2011.

Shortnose Sturgeon. The shortnose sturgeon was listed as an endangered species in 1967. Its recovery plan anticipates delisting in 2024, *57 years from listing*. Most of the sturgeon’s 19 distinct populations have increased. The majority of fish occur in the Hudson River population, which increased from 12,669 fish in 1979 to 56,708 in 1994–1996.

Hawaiian Goose. The Hawaiian goose was listed as endangered in 1967. Its recovery plan anticipates delisting in 2034, *67 years from listing*. The population increased from 300 birds in 1980 to 1,744 in 2006.

Florida Panther. The Florida panther was listed as endangered in 1967. Its recovery plan anticipates delisting in 2083, *116 years from listing*. Panthers increased substantially from about 30–40 individuals in the 1980s to 87 in 2003 and 130 in 2010.

Utah Prairie Dog. The Utah prairie dog was listed as endangered in 1973 and downlisted to threatened in 1984. Its recovery plan anticipates delisting in 2040, *67 years from listing*. The number of prairie dogs increased from 3,300 in 1973 to 11,296 in 2010.

Measured by its three goals, the Endangered Species Act is remarkably effective.

“Critics, on the other hand, counter that it is an indication of the act’s failure that only 17 of these species have “recovered,” or improved to the point that they no longer need the act’s protection. However, we believe that these numbers, by themselves, are not a good gauge of the act’s success or failure; additional information on when, if at all, a species can be expected to fully recover and be removed from the list would provide needed context for a fair evaluation of the act’s performance.”

Endangered Species: Time and Costs Required to Recover Species Are Largely Unknown—Government Accountability Office (2006)

The Endangered Species Act is designed to prevent declining species from going extinct, turn their populations around so they increase toward recovery, and achieve recovery on the timeline set out in their federal recovery plans. As described below in greater detail, the Endangered Species Act has been remarkably effective on these three fronts:

- Prevention of extinction: 99.9 percent effective
- Population growth toward recovery goals: 93 percent effective
- Recovery within the time frame established by federal recovery plans: 82 percent effective

Goal 1: Extinction Prevention

Ten species have been delisted because of extinction. Eight of these were extinct *before* being protected under the Endangered Species Act. Two went extinct while listed. Thus the Act has 99.9-percent success rate in preventing the extinction of the 1,445 species placed on the domestic threatened and endangered lists.

Ten Species Delisted Due to Extinction

Delisting Year	Species	Status
2008	West Indian monk seal	Extinct before listing
2004	Guam broadbill	Extinct before listing
2004	Marianna mallard	Extinct after listing
1990	Dusky seaside sparrow	Extinct after listing
1987	Amistad gambusia	Extinct before listing
1984	Wabash riffleshell	Extinct before listing
1983	Blue pike	Extinct before listing
1983	Santa Barbara song sparrow	Extinct before listing
1983	Longjaw cisco	Extinct before listing
1982	Tecopa pupfish	Extinct before listing

It should be noted that even without protection, not all 1,445 species would have become extinct by 2011. The polar bear, for example, is projected to be extirpated from the United States by 2050 and become completely extinct by the turn of the century if its habitat is not stabilized. To determine how many species would likely have gone extinct by now, U.S. Geological Survey scientist Michael Scott compared the actual and projected extinction rate of listed species, finding that Endangered Species Act prevented the extinction of 227 species (Scott and Goble 2006).

Goal 2: Moving Species Toward Recovery

On a biennial basis, the U.S. Fish and Wildlife Service scores all listed species as *improving, stable, declining* or *unknown*. Sixty-eight percent of species listed for at least six years with a known score were stable or declining (U.S. Fish and Wildlife Service 2005). This is impressive, given that most species are declining and at very low population numbers at the time they are listed (Wilcove *et al.* 1993). It must be noted, however, that these trend scores only reflect a brief two-year period; they don’t cover the trend since listing. The data are also limited because they include threat assessments, rather than being limited to population-size trends. This is not to say the data are erroneous or in any way wanting, they are simply not designed to reveal long-term, quantitative species population trends.

The largest study to quantitatively examine changes in population size since species were listed is *Measuring the Success of the Endangered Species Act: Recovery*

Trends in the Northeastern United States (Suckling 2007). It examined the population trend and federal recovery plan expectations of all threatened and endangered species in the eight Northeast states: Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York and New Jersey. It found that:

- None of the species went extinct after being listed.
- 93 percent increased in population size or remained stable since being listed.

Goal 3: Recovery Within the Time Frame Established by Federal Recovery Plans

The Northeast species were listed for an average of 24 years, while their federal recovery plans established recovery processes averaging 42 years. Thus not surprisingly, the recovery plans only expected 11 of the species to have been delisted. In fact, nine had been delisted, downlisted or proposed for such action. That the actual recovery trend is so close to that expected by recovery plans (=82 percent) is promising, given that the vast majority of the recovery plans were substantially underfunded.

Litigation has aided recovery efforts

Listing under the Endangered Species Act, the length of time listed, and the existence of critical habitat are correlated with positive recovery trends (Suckling *et al.* 2004, Taylor *et al.* 2007). Unlisted species have a much higher extinction rate than listed species. Species are more likely to be improving the longer they are listed. Species are twice as likely to be improving if they have critical habitat than if they do not.

A large percent (possibly the majority) of environmental lawsuits have sought to place species on the endangered species list and designate critical habitat for those already on the list. Environmental litigation has thus consciously sought to maximize actions known to improve species recovery status. The vast majority of these lawsuits have succeeded, causing the rate of species listings, the length of species listings and the designation of critical habitat designation to increase (Taylor *et al.* 2007, Greenwald *et al.* 2006, Parenteau 2005).

The third most common type of environmental litigation has been to ensure that federal agencies consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service when they conduct actions which may jeopardize the existence of endangered species. These consultations rarely stop projects from occurring, but often result in their negative impacts being reduced and/or mitigation measures being increase.

An example of this type of litigation is a suit by the Center for Biological Diversity forcing the Bureau of Reclamation to consult with the U.S. Fish and Wildlife Service over its plan to increase the height of Roosevelt Dam on the Salt and Tonto Rivers in central Arizona. The consultation allowed the project to occur, but required the Bureau to expend \$4 million purchasing and managing riparian habitat for the Southwestern willow flycatcher on the San Pedro River. The riparian habitat on that area has been restored, its flycatcher population has increased in size, and is the species is closer to meeting its recovery goal.

Another example is litigation by the Center for Biological Diversity forcing the Bureau of Land Management to consult with the U.S. Fish and Wildlife over the impact is grazing, mining, and road building programs were having on 24 threatened and endangered species within the 24 million acre California Desert Conservation Area. Most of the activities were allowed to continue with mitigation measures and safeguards, some grazing allotments were purchased to eliminate sheep grazing, and some portions of some roads were closed. These actions have greatly benefited endangered species there, contributing to the population growth of the desert bighorn sheep and other listed plants and animals.

Expenses associated with Endangered Species Act litigation are a very small portion of the U.S. Fish and Wildlife Service's budget

In a September 11, 2011 letter to the Association of Fish and Wildlife Agencies (see Attachment A), the U.S. Fish and Wildlife Service disclosed that in 2010 it spent \$1.24 million to “manage, coordinate, track, and support ESA litigation” brought by environmental and industry groups. This amounts to one half of one percent of the endangered species budget, which was over \$275 million in 2010. According to the letter, the amount the Service spent on litigation has remained relatively constant over the last ten years, meaning 2010 was a typical year in terms of the very small percentage of the endangered species budget that is spent managing litigation.

A large percent of Endangered Species Act litigation is brought by industry groups

Industry groups, lobbyists and lawyers—and many in Congress closely associated with them—have complained that environmental groups file too many Endangered Species Act lawsuits. These groups, however, have never complained about lawsuits filed by industry groups. Nor have they provided evidence that environmentalists file more lawsuits—or more expensive lawsuits—than industry interests.

In fact, 80% of all active critical habitat litigation in 2005 was filed by industry groups (Parenteau 2006).

Similarly, the U.S. Government Accountability Office (USGAO 2011) recently found that industry groups filed 48% of lawsuits against the Environmental Protection Agency while environmental groups filed 30%.

The Center for Biological Diversity receives little income from federal litigation fee and cost recovery

Despite wildly erroneous and highly exaggerated claims by Karen Budd-Falen and other industry funded “researchers”, the Center for Biological Diversity receives little money from recovery of fees and costs in federal litigation, and even less under the Equal Access to Justice Act:

	Federal Litigation Fees & Costs Retained	Federal Litigation Fees & Costs Retained as % Organizational Income	EAJA Fees & Costs Retained	EAJA Fees & Costs Retained as % of Organizational Income
2001	2,295	n/a	0	n/a
2002	49,125	3.1%	0	0.0%
2003	93,096	3.1%	0	0.0%
2004	111,768	5.0%	0	0.0%
2005	307,537	8.6%	45,000	1.3%
2006	43,512	1.1%	0	0.0%
2007	460,004	7.6%	10,143	0.2%
2008	365,477	4.0%	145,444	1.6%
2009	341,676	4.4%	7,570	0.1%
2010	249,475	3.1%	7,505	0.1%

Budd-Falen’s complaints and calls for disclosure of environmental group fee awards are extraordinarily hypocritical in that her law firm receives substantial income from fee returns, yet she has never disclose the amount. Indeed in 2001, Budd-Falen received \$100,000 from a *single* lawsuit fee return, dwarfing retained federal fees from *all* Center for Biological Diversity suits in that year (\$2,295).

Another example this hypocrisy is the Pacific Legal Foundation. While railing against environmental groups for recovering litigation fees and costs, it often recovers much greater sums than the Center for Biological Diversity. In 2008, for example, the Pacific Legal Foundation recovered \$1,400,577 in fees, dwarfing the Center’s retention of just \$365,477 in federal fees and costs. In 2009, the Pacific Legal Foundation recovered \$793,358, while the Center retained just \$341,676.

Note the Center is not complaining about Budd-Falen or the Pacific Legal Foundation recovering legal fees and costs. Such awards are a proper and integral part of our legal system. They level the playing field so that all Americans have equal access to justice.

Our complaint is that such groups and their Congressional allies hypocritically ignore all industry suits and fee recoveries, while complaining bitterly about environmental suits. It is clear that their interest is not all about litigation or fee recovery in general, it is only about litigation they believe hinders the access of their industry allies to public resources.

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Attachment A



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/049428

SEP 9 2011

Mr. Paul J. Conry
Chairperson, AFWA Threatened and
Endangered Species Policy Committee
Division of Forestry and Wildlife
1151 Punchbowl Street, Room 325
Honolulu, Hawaii 96813

Dear Mr. Conry:

Thank you for your August 23, 2011, letter requesting information on Endangered Species Act (ESA) related litigation costs expended by the Fish and Wildlife Service (Service). We are pleased to provide the following information.

Nationwide, the Service spent roughly \$1.24 million in FY 2010 to manage, coordinate, track and support ESA litigation filed against the Service pursuant to the citizens suit provision of the ESA (section 11(g)) and the Administrative Procedure Act. The Pacific Region, Pacific Southwest Region, Southwest Region, and Mountain-Prairie Region each support one full-time litigation coordinator to track, coordinate, and manage ESA litigation. The Washington Office supports two full-time litigation coordinators. Some regional coordinators work solely on listing and critical habitat litigation, while others, including the two Washington Office coordinators, manage all ESA litigation and Freedom of Information Act requests. The Service does not track the field office staff time needed to prepare administrative records to support litigation. In addition, the Service paid \$87,306 in attorney fees in FY 2010.

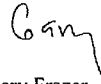
Concerning court orders received by our agency and the number of species affected by settlement agreements, the Service currently has commitments under 23 active court orders involving 47 species. With the exception of one court-approved settlement agreement that commits to make listing determinations for 12 foreign species, these active court orders all concern deadlines for making petition findings or designating critical habitat.

The Multidistrict Litigation (MDL) settlement agreements, which have not yet been approved by the court, encompass 878 species, with commitments to make listing determinations for 255 species and petition findings for 623 species. As I mentioned at our meeting in Kansas City, the MDL settlement agreements relieve us from deadline-related litigation and allow us to focus on listing determinations for existing candidate species that urgently need the ESA's protection.

It is important to note that the listing program litigation does not draw upon Endangered Species Program resources devoted to State grants (section 6), candidate conservation, recovery, habitat conservation planning, and consultation under section 7 of the ESA. These and other components of the Program are funded under separate line items in the Federal budget. In addition, the costs of implementing our listing program function have in recent years been capped through our Appropriations bill language to help ensure that the other ESA functions are not compromised by litigation-driven commitments that are beyond our control.

Please let me know if you need any additional information. I look forward to seeing you next week in Omaha.

Sincerely,



Gary Frazer
Assistant Director for
Endangered Species

The CHAIRMAN. Thank you very much. Next we will hear from Mr. Jay Tutchton, who is General Counsel for WildEarth Guardians in Santa Fe. Mr. Tutchton.

**STATEMENT OF JAY TUTCHTON, GENERAL COUNSEL,
WILDEARTH GUARDIANS, SANTA FE, NEW MEXICO**

Mr. TUTCHTON. Thank you, Chairman Hastings. Jay Tutchton, General Counsel, WildEarth Guardians. I am testifying on behalf of the organization. I am also an adjunct professor of law at the University of Denver. I previously helped run the Environmental Law Clinic at the University of Denver and at the University of Colorado. I have probably been counsel in over 100 Endangered Species Act cases.

The CHAIRMAN. Could you move the microphone a little bit closer to you?

Mr. TUTCHTON. Is that better?

The CHAIRMAN. That is better, much better. Thank you.

Mr. TUTCHTON. I was saying I have probably been counsel in approximately 100 Endangered Species Act cases. I am afraid I am one of the lawyers that you directed your opening comments at.

There is some evident controversy over the Endangered Species Act here in D.C. However, across the Nation it is broadly supported. In 1999, it was strongly supported or supported by 84 percent of the American public in all regions of the country. In February of this year, an identical 84 percent of the American public supported the Endangered Species Act. Cuts across party lines, 93 percent of Democrats support the Endangered Species Act and 74 percent of Republicans.

The Act is popular, but to paraphrase Martin Luther King, "Vanity asks the question is something popular, conscience asks the question is it right." As I tried to present in my written testimony, it is also right. Scientists agree we are in the midst of an extinction crisis. Scientists agree this extinction crisis is human-caused. There is obviously a moral dimension to protecting endangered species.

There is also a self-interest in protecting endangered species. It is prudent and conservative for a committee charged with natural resources conservation to want to protect biodiversity just as it is to protect timber or other Federal resources.

Losing species to extinction is like burning the books in nature's library. We will never know their benefits or their values if we lose them before we have even read them. The Endangered Species Act comes in for criticism for protecting bugs and weeds. I think this is a wrong-headed criticism. Much of the focus is on the big guys, the wolves, the bears, the eagles, the alligators. It is the little guys, the 99 percent if you will that actually run the world. These are the plants that give us our drugs. These are the insects that pollinate our crops and maintain our soil. The major species inspire and delight us. It is the minor species that actually keep us alive.

As Mr. Suckling testified, the Endangered Species Act is working. I would like to turn my testimony to the issue of attorneys' fees since that has come up.

Now there is two claims out there, that we are filing frivolous lawsuits and that we are getting paid too much for doing so. Both cannot be true. If we file a frivolous lawsuit, we do not get paid. In fact, we should have to pay the other side's attorneys' fees, and it would be unethical to do so. As to the charge that we are doing this for money, it is the Equal Access to Justice Act signed by President Reagan to ensure that citizens had a chance against the Federal government in court. It has been used by my clients. It has been used by Ms. Budd-Falen's clients. It is equal access. It is not exclusive to either side.

To recover fees under this Act, you have to both win your case against the Federal government and prove that the government's defense was not substantially justified. That is a hard standard to meet. Once you make those two findings of proof, that gets you entitlement to fees but not the amount. The amount is then decided by a Federal judge who reviews it for reasonableness. The Federal judges appointed and confirmed by Congress are by and large very reasonable and prudent people who view these settlements and do not willingly hand away Federal resources.

The vast majority of cases that WildEarth Guardians have filed have dealt with enforcing deadlines when Congress has provided the agency a deadline to do something and the agency has failed to meet that deadline. Before we can file any of these lawsuits under the Endangered Species Act we must write what is called a 60-day notice letter pointing out to the agency the specific violation of law of which we are going to accuse them, asking them to change their mind and come into compliance with the law, and only after the failure of that 60-day notice letter to deter the illegal agency conduct can we file any lawsuit.

In my last 30 seconds I would just like to give you the actual numbers to put the scope of what you feel is a problem in perspective, to address the white whale as the Ranking Member indicated. In 2008, WildEarth Guardians recovered \$10,000 in attorneys' fees from the Federal government. In 2009, we recovered \$94,000. In 2010, we recovered \$163,000. In all of those years it was less than 10 percent of our budget. We do not do this for the money. We do this to protect the species. Thank you.

[The prepared statement of Mr. Tutchton follows:]

Statement of James J. Tutchton, General Counsel, WildEarth Guardians

Introduction

The Endangered Species Act is our nation's primary wildlife conservation statute designed to protect biological diversity. It grew out of an emerging consensus that the protection of both charismatic animals and other lesser-known species, once deemed valueless, is necessary if we are to succeed in protecting not only the species we find charismatic, but also the ecosystems on which they, and ultimately we, depend. As human understanding has grown, we have learned that ecosystems, not unlike a woven sweater, can begin to unravel when even a single thread is pulled out. When many threads are pulled, holes develop, and what was once a warm and protective sweater no longer exists. The same is true for an ecosystem that loses its parts, even those that may at first blush seem minor. For example, scientists have recently learned that a species as imposing as the grizzly bear, monarch of the Yellowstone ecosystem, relies on a species as little noticed as the white-bark pine for its survival—and that protecting the bear alone without the pine is inadequate, for the bear would have little to eat at certain times of year. The Endangered Species Act encompasses this scientific understanding of the interconnection between species, protecting both greater species and the smaller ones that allow the great creatures to survive. In the end, by protecting the full range of the tangled, and still poorly understood, web of life the Act ultimately protects humanity itself.

Because the Act protects species, as it must, wherever they are found, regardless of land ownership, and because it protects all species great and small, regardless of their popularity or immediately perceived value to humanity, it has engendered a continuing level of controversy. However, this controversy neither indicates that the task of protecting biodiversity is unimportant or unpopular, nor that the Endangered Species Act is not working as intended.

There are two false assumptions imbedded in the title of this hearing. First, that litigation directed at enforcing the Endangered Species Act is costing jobs. Second, that litigation enforcing the Act is impeding true recovery efforts. Both of these misguided charges obscure more meaningful inquiry into the source of the problems some members of this Committee apparently perceive.

Litigation is a tool to enforce the law. Congress writes our laws, but it generally must rely on the executive branch to enforce them. However, at times, especially when Congress is concerned about whether the executive branch is willing or able to enforce a particular law, Congress has enacted provisions encouraging private citizens to enforce, or compel the executive branch to follow, the law. These "citizen-suit" provisions, found in most environmental and civil rights statutes, represent a bedrock principle of our democracy: the idea that citizen oversight can make our government institutions better. They are most useful in situations where the volume of legal enforcement necessary to fully implement a law may outgrow the capacity of federal agencies, where the desire of private litigants to enforce the law may exceed that of federal officials, or when a law places obligations, such as deadlines for action, on federal agencies and Congress desires outside help to ensure that these federal agencies comply with the law. The citizen-suit provision in the Endangered Species Act serves all three of these functions.

Accordingly, because litigation, whether conducted solely by government prosecutors or by private citizens, is merely a tool to increase compliance with the law, a charge that litigation is costing jobs is, at base, a charge that enforcing the law is costing jobs. There is little difference between having a law that is unenforced or unenforceable, and having no law at all. Thus, to the extent some members of this Committee perceive a conflict between enforcement of the Endangered Species Act and economic activity, this Committee should be not be considering whether it wants the law Congress has passed enforced via litigation, but whether it likes the law it has written or believes it should be amended. The question of whether the Endangered Species Act should be enforced is only a component of the larger issue: what does Congress think of the Act itself?

Similarly, the second false assumption imbedded in the title of this hearing, that litigation to enforce the Endangered Species Act is impeding the recovery of species, also serves to obscure the fundamental inquiry. The clearly stated goal of the Endangered Species Act is to recover species from the edge of extinction. Congress drafted the various provisions of the Act to achieve this end. Thus, if members of this Committee perceive a conflict between enforcing the Endangered Species Act through litigation and achieving the Act's goal of recovering species, the source of the perceived problem is not with the enforcement of the Act, but with the Act's efficacy. Enforcement is simply implementation. The Committee's concern should be

with whether the law works when enforced, not with limiting enforcement. Unenforced laws are worse than meaningless because they engender disrespect for both the rule of law and the legal system.

In short, the two assumptions contained in the title of this hearing hide more fundamental questions that should be explored. The basic inquiry here is not, and should not be, whether litigation directed at enforcing the Endangered Species Act is a problem, but whether Congress wants the Endangered Species Act enforced as written and believes it is effective in meeting its goals. To focus on the litigation enforcing the law as the source of the problems some members of this Committee perceive masks the actual conflict. Simply put, if this Committee does not want the Endangered Species Act enforced—it does not want the Act. This Committee should openly acknowledge and debate the root cause of the problems some of its members perceive. Unfortunately, the title of this hearing indicates this Committee may be inappropriately focused on shooting the messenger, those who litigate to enforce the Endangered Species Act, rather than examining the questions behind the message: Are endangered species worth saving, does this nation remain committed to the saving them, and is the Endangered Species Act an effective means to achieve this end? As discussed below, the answer to these questions is clearly—yes.

I. The Endangered Species Act is Needed

A. The Endangered Species Act Protects Valuable Natural Resources

The vast variety of species with which humans share this planet are of incalculable value to us. As stated by Representative Evans on the House floor in 1982:

[I]t is important to understand that the contribution of wild species to the welfare of mankind in agriculture, medicine, industry, and science have been of incalculable value. These contributions will continue only if we protect our storehouse of biological diversity. . . . [O]ur wild plants and animals are not only uplifting to the human spirit, but they are absolutely essential—as a practical matter—to our continued healthy existence.

128 Cong. Rec. 26,189 (1982) (Statement of Rep. Evans of Delaware).

As Americans, we have celebrated the comeback of the bald eagle, the very symbol of our country, from a low of 487 nesting pairs in the continental United States to more than 9,000 nesting pairs. In large part, the Endangered Species Act is responsible for the eagle's recovery. Similarly, we now enjoy the company of approximately 3 million American alligators, a species we almost lost before it was protected under the Act and quickly recovered. The whooping crane, a symbol of wisdom, fidelity, and long life in many cultures, has also benefited from protection under the Endangered Species Act, rebounding from a low of 16 individuals to approximately 400. However, though the Act has prevented the extinction of this species, the Whooper is not yet ready to graduate from the Act's protection. Such charismatic creatures the Act has pulled back from the brink of extinction are frequently invoked in hearings on the Endangered Species Act. The law, however, does not deny its protective shield to creatures whose pictures may never grace a wildlife calendar.

While some have criticized the Endangered Species Act for protecting "bugs and weeds," these invertebrates and plants are frequently of the most utilitarian value to humans. As expressed by Harvard professor E. O. Wilson, if we do not protect the little things that run the world:

New sources of scientific information will be lost. Vast potential biological wealth will be destroyed. Still undeveloped medicines, crops, pharmaceuticals, timber, fibers, pulp, soil-restoring vegetation, petroleum substitutes, and other products and amenities will never come to light. . . . it is also easy to overlook the services that ecosystems provide humanity. They enrich the soil and create the very air we breathe. Without these amenities, the remaining tenure of the human race would be nasty and brief. The life-sustaining matrix is built of green plants with legions of microorganisms and mostly small, obscure animals—in other words, weeds and bugs.

The Diversity of Life at 346–47.

On a global scale, 25 to 40 percent of pharmaceutical products come from wild plants and animals. Kellert, Stephen R., *The Value of Life: Biological Diversity and Human Society* (1996). A full 70 percent of pharmaceutical products are modeled on a native species, despite only 0.1% of plant species having been examined for their medicinal value. Dobson, Andrew P. *Conservation and Biodiversity*, Scientific American Library (1996). Invertebrate pollinators are also of high value to humanity. A variety of pollinators, such as some butterflies and bats, are currently protected by the Endangered Species Act, although others are not. The loss of pollinators threatens ecological and economic systems across the country. Committee of the Status of Pollinators in North America, National Research Council, *Status of Pollinators in North America*, National Academies Press (2006).

One of the Endangered Species Act's explicit purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1532(b). This vision of ecosystem protection appears frequently throughout the Act's legislative history. Rosmarino, Nicole J., *Endangered Species Act Under Fire: Controversies, Science, Values & the Law*, University of Colorado (2002) The economic benefits healthy ecosystems provide humanity dwarf even our national debt. Economists estimate the global value of "ecosystem services" at \$33 trillion annually and in the U.S. alone at \$300 billion annually. Pimentel, David, et al., *Economic and Environmental Benefits of Biodiversity*, *BioScience* 47(11) (1997) at 747–57; Costanza, R. et al., *The Value of the World's Ecosystem Services and Natural Capital*, *Nature* 387 (1997) at 253–260. Even these dramatic estimates are conservative, as the value of ecosystems ultimately equates to the value of everything—as without ecosystems humans could not survive. Leakey, Richard et al., *The Sixth Extinction: Patterns of Life and the Future of Humankind* (1995). Moreover, most of the services, currently provided to us for free by ecosystems, are so intricate and provided on such a massive scale that it would not be feasible to replicate them at any cost even if scientists possessed the knowledge to do so. The tremendous value of ecosystems is placed at risk by the continued erosion of the biodiversity. Ehrlich, Paul R. and Wilson, E.O., *Biodiversity Studies: Science and Policy*, *Science* 253 (1991) at 758–62.

Additionally, endangered species are of great aesthetic, symbolic, and recreational value. Animals and nature are ubiquitous in our children's fairy tales and stories, which inform social codes of conduct. Continued destructiveness towards nature may consequently impact human cognition and social relations. "The more we know of other forms of life, the more we enjoy and respect ourselves. Humanity is exalted not because we are so far above other living creatures, but because knowing them well elevates the very concept of life." Wilson, Edward O. *Biophilia: The Human Bond with Other Species*, Harvard University Press (1984) at 115. The recreational value of wildlife is also very significant. The U.S. Fish and Wildlife Service has determined that approximately 87 million adult Americans, or 38 percent of the adult population, spend more than \$120 billion in the course of wildlife-related recreation annually. These expenditures support hundreds of thousands of jobs. U.S. Department of the Interior, *2006 National Survey of Fish, Hunting, and Wildlife-Associated Recreation*. These jobs are every bit as valuable to those who hold them as are the jobs the Committee perceives at risk from enforcement of the Endangered Species Act. In short, the protection of biodiversity appears well worth the effort. Just as a nation should not squander its fiscal resources, it should not squander its natural ones. The Endangered Species Act is central to our national effort to conserve our irreplaceable natural resources.

B. The Present Rate of the Loss of Species Is Alarming

The current rate of species' extinction worldwide is estimated at 1,000 times the natural rate of extinction and is increasing. The impact of seven billion humans on species diversity is comparable to that of the asteroid that wiped out most life on Earth 65 million years ago. Like geologists do today, future intelligent beings, should there be any, will be able to mark the current human-caused extinction epoch by observing the number and diversity of fossils preserved in future rock layers. Unless these trends are reversed, by the year 2020 up to 20 percent of all extant species will no longer exist. Wilson, Edward O., *The Diversity of Life* at 346. According to the International Union for the Conservation of Nature, one in every four mammals is facing a high risk of extinction in the near future. Almost half of all tortoises and freshwater turtles are threatened. More than one-fifth of the world's birds face extinction according to Birdlife International. One third of the world's amphibians are also vanishing. Stokstad, E., *Global Survey Documents Puzzling Decline of Amphibians*, *Science* 306: 391 (2004). At least two out of every five species on earth will go extinct due to human-caused climate change if greenhouse gas emissions are not promptly curtailed. Flannery, Tim, *The Weather Makers*, Atlantic Monthly Press (2005) at 183.

Moreover, there is a trickle-down effect from species' extinction as the loss of one species leads to the loss of other dependent species. For example, researchers recently calculated that the extinction of nearly 6,300 plants listed as threatened or endangered by the International Union for the Conservation of Nature would also result in the loss of nearly 4,700 species of beetles and 136 types of butterflies. Lian Pin Koh, et al., *Species Coextinctions and the Biodiversity Crisis*, *Science* 305 (2004) at 1632–34.

In sum, there should be no legitimate debate over whether or not our planet's biodiversity is rapidly diminishing. There should also be little debate that this loss is attributable to human activities and dramatic human population increases:

Human demographic success has brought the world to this crisis of biodiversity. Human beings—mammals of the 50-kilogram weight class and members of a group, the primates, otherwise noted for scarcity—have become a hundred times more numerous than any other land animal of comparable size in the history of life. By every conceivable measure, humanity is ecologically abnormal. Our species appropriates between 20 and 40 percent of the solar energy captured in organic material by land plants. There is no way that we can draw upon the resources of the planet to such a degree without drastically reducing the state of most other species.

Wilson, Edward O., *The Diversity of Life* at 272. Over ninety-nine percent of scientists agree that a serious, world-wide loss of biodiversity is likely, very likely, or virtually certain. Rudd, Murray A., *Scientists' Opinions on the Global Status and Management of Biological Diversity*, *Conservation Biology* 25(6) (2011) at 1165–1175. There is also strong scientific consensus that humans are responsible for this extinction crisis. *Id.* Indeed, last year the United Nations marked the first ever International Year of Biodiversity to call attention and spur action to address this problem. The United States Endangered Species Act serves as a model for many other nations and exhibits our national commitment to the international effort to save the diversity of life on Earth.

II. The Endangered Species Act Enjoys Widespread Public Support

As a remedy to stem the tide of extinction and protect species for the use and enjoyment of future generations the Endangered Species Act enjoys widespread public support. Passed almost unanimously by Congress and signed into law by President Nixon in 1973, the Endangered Species Act has consistently remained popular. In 1999, university researchers concluded that 84 percent of the American public supported the current Endangered Species Act, or an even stronger version of the law. Czech, Brian and Krausman, Paul R. *Public Opinion of Endangered Species Conservation and Policy*, *Society and Natural Resources* 12(5) (1999) at 469–79. A poll commissioned by the Endangered Species Coalition and conducted by Harris Interactive between February 16–20 of this year, found that despite the ensuing decade of attacks on the Act since 1999 and the controversies over its implementation and enforcement, an identical 84 percent of Americans adjusted for age, sex, race/ethnicity, education, region of the country, number of adults in the household, and number of phone lines in the household, supported or strongly supported the Endangered Species Act. While support was strongest among Democrats (93%), the majority of Republicans (74%) also supported or strongly supported the Act. The majority of Americans of both political parties (64%) also believe that the Act is a safety net providing balanced solutions to save wildlife and plants at risk of extinction. In short, the protection of endangered species is a broadly supported American value. Extinction is not.

III. The Endangered Species Act Is Effective

Not unlike the biblical Noah, checking off the animals boarding his Ark, two by two, the Endangered Species Act operates based on a list. Species on the list receive the Act's protections while unlisted species do not. The leading cause of species imperilment in the U.S. is habitat destruction. Wilcove, David S. et al., *Quantifying Threats to Imperiled Species in the United States*, *Bioscience* 48(8) (1998) at 607–15. The protective provisions of the Endangered Species Act, particularly those that protect a listed species' designated critical habitat, are effective at stemming habitat destruction and recovering species. Listed species with a designated critical habitat are twice as likely to be recovering as those without designated critical habitat. Suckling, Kieran F. and Taylor, Martin, *Critical Habitat and Recovery*, in *The Endangered Species Act at Thirty* (2006) at 86.

Additionally, research shows that as of 2006 the Endangered Species Act had prevented the extinction of at least 227 species. Scott, Michael J., et al. *By the Numbers*, in *The Endangered Species Act at Thirty*, Island Press (2006) Vol. 1 at 16–35. Accordingly to the U.S. Fish and Wildlife Service, only nine of the approximately 1,445 domestic species ever added to the Endangered Species Act list have been declared extinct. Seven of these were mostly likely extinct before they received the Act's protection. Thus, the Act has only failed two species: a success rate in preventing extinction of over 99 percent. Conversely, protection under the Act has successfully recovered at least 22 species. Accordingly, the Endangered Species Act is succeeding in recovering species at least twice as often as it is has failed. Indeed, if the seven species that were likely extinct before they were listed under the Act are discounted, the Endangered Species Act is succeeding in recovering species at a rate more than 10 times that at which it fails.

IV. Enforcement through Litigation has Increased the Effectiveness of the Endangered Species Act

While the Endangered Species Act has been over 99 percent successful in preventing extinction, it is still criticized by some because 1,397 species remain on the domestic protected species list, while only 22 have been finally recovered. However, this criticism is misplaced. The task of recovering species from the edge of extinction is difficult. The Endangered Species Act has been on the job for 38 years. However, many of the species currently protected by the Act, have not been listed nearly so long, but were added more recently. Moreover, pursuant to the requirements of the Act, the U.S. Fish and Wildlife Service has estimated the costs of, and planned for, the recovery of many endangered species on long time lines often exceeding 50 years. Government Accountability Office, *Endangered Species: Time and Costs Required to Recover Species are Largely Unknown* (2006).

Perhaps more importantly for purposes of the Committee's inquiry into conflicts between the Endangered Species Act and economic activity, one must recognize that the timeline for species recovery is dependent on the resources devoted to recovery—and the strength of the protective regulations implemented to achieve recovery. Thus, increasing the rate of recovery will require additional resources and more, not less, protective regulations—the type of regulations that have the potential to affect economic activity. Any criticism of the rate of species recovery must recognize that this rate can only be increased by greater, not reduced, effort and thus calls for more effective enforcement of, or strengthening of, the Endangered Species Act.

Additionally, the rate of species recovery is also dependent on how close to the abyss of extinction species are when they are first offered the protections of the Act. For example, seven species were likely already extinct before they were first listed. Many others have been listed only when their populations have fallen to incredibly low levels. The size of a vertebrate population at the time of listing is often so low that only the establishment of captive breeding populations will avoid extinction. Wilcove, David S., et al., *What Exactly is an Endangered Species? An analysis of the U.S. Endangered Species List: 1985–1991*, *Conservation Biology* 7(1) (1993) at 87–93. This occurred in the well-known cases of the Mexican wolf, the black-footed ferret, and the California condor whose protection came only after each had dwindled to fewer than two dozen individuals.

The majority of the cases filed by WildEarth Guardians pursuant to the citizen-suit provision of the Endangered Species Act have involved efforts to compel the federal agencies responsible for administering the Act to meet the deadlines prescribed by Congress for making listing decisions. This effort to protect all deserving species under the Act sooner rather than later increases their chances for recovery and also serves to shorten the timeline needed to recover a species. Importantly, for this Committee's inquiry into perceived conflicts between the Endangered Species Act and economic activity, adding species to the list before they are at the verge of extinction allows greater flexibility and accommodation of activities that might conflict with recovery through the Act's regulatory mechanisms.

Having an accurate and complete list of endangered species protected by the Act benefits those trying to save species, by allowing them to begin protecting and recovering deserving species sooner. It also benefits those engaged in planning economic activities that may be affected by a species listing by allowing them to modify their plans or activities to accommodate the needs of endangered species before devoting significant resources to those plans. An incomplete or inaccurate list of endangered species benefits no one. Thus, litigation directed at listing species that need the protection of the Endangered Species Act—to make the list complete and accurate—is beneficial to all parties concerned.

In short, the debate should not focus on diagnosis (listing), but on the course of treatment (protection and recovery) we apply to listed species. Diagnosis is simply information upon which future decisions can be made. We understand this when it comes to visiting the doctor's office. Accurate and timely diagnosis of disease is critical. Only once the diagnosis is made do we begin to discuss our treatment options with our doctor, with choices spanning the spectrum from intensive intervention to doing nothing. Our understanding of the Endangered Species Act, the law under which we provide emergency room care to species in need, should be no different. Accordingly, the Act provides that listing decisions must be based solely on the best available science and not account for economic impacts. The perceived conflict between economic activities and protecting endangered species should not influence listing decisions, but may be appropriately debated when we decide how to recover listed species and what level of economic dislocation we will tolerate in those efforts.

However, because this Committee appears concerned that litigation conducted by WildEarth Guardians and others is somehow interfering with species recovery, it is important to note that both Guardians and the Center for Biological Diversity have

recently entered into separate, but overlapping, settlement agreements with the U.S. Fish and Wildlife Service. In *Re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS) (U.S. District Court for the District of Columbia). For those concerned that the process of listing species under the Act is overly litigious, these settlement agreements are good news. In its separate settlement, Guardians has agreed not to file litigation enforcing the Act's listing deadlines for the next five years. In return, the U.S. Fish and Wildlife Service has agreed to make final listing decisions for all the species the Agency had previously concluded warranted the protection of the Act, but for which the Service had not made final listing decisions in its 2010 Candidate Notice of Review. Thus, the Service will be making final decisions for the species which it has preliminarily concluded are most deserving of the Act's protections. Neither agreement requires the Service to list any particular species, but only to complete its analysis and make a final decision. Most of the species that will receive final listing decisions under these settlement agreements have been waiting for more than two decades for action. The agreements promise an end to this waiting and will result in a more accurate and complete endangered species list upon which future decisions can be made. Recovery efforts for the species the Service ultimately concludes deserve listing will begin sooner, and with this head start, recovery efforts should also be both more efficient and less disruptive to economic activity than if these species are allowed to continue declining without legal protection while waiting for action.

These settlement agreements would not have come to pass without litigation to enforce the Act's deadlines. In that sense, the litigation that led to the agreements benefitted both the enforcement of the Endangered Species Act and the quicker recovery of species which should in turn reduce the economic impacts of species protection. Any contrary conclusion is unwarranted.

V. There are Actions that could Increase the Rate of Species Recovery

A. Listing Decisions should be made Promptly and in Keeping with the Endangered Species Act's Deadlines

Finally, in response to this Committee's apparent concern that species are not recovering rapidly or efficiently, there are actions Congress could take to increase the rate of recovery. As discussed above, the difficulty of recovery is proportional to the degree of imperilment a species faces when it is first added to the endangered species list. The Endangered Species Act provides a two to two-and-one-half year timeline for making a decision as to whether or not to add a species to the endangered species list once it has been petitioned for listing. The Act also provides that the responsible agencies may add a species to the list on their own initiative. In practice, Congress has failed to fund the U.S. Fish and Wildlife Service listing program at levels sufficient for it to timely address either the number of citizen petitions it receives or the number of species sliding towards extinction. Nor has the Service requested adequate funding for these tasks. Thus, the Service has been in chronic violation of the listing deadlines that Congress provided in the Act to compel agency action. These delays have caused WildEarth Guardians and others to litigate to enforce Congressional mandates and spur prompter action. Species continue to decline while the agency delays addressing their status and deciding whether or not they deserve the Act's protections, thereby rendering recovery efforts more difficult. Accordingly, if the goal of Congress is to increase the rate and potential success of recovery efforts, the first step is to fund the listing program at levels that will allow the U.S. Fish and Wildlife Service to avoid breaking the law. Identification of the problem (prompt listing action) is the first step to its resolution (quicker recovery).

Funding the Service at a rate sufficient for it to comply with the settlement agreements it recently entered with WildEarth Guardians and the Center for Biological Diversity will not only increase the recovery prospect for the species that receive final listing decisions by forcing action more promptly, but will avoid a return to litigation as the only means available to Guardians, the Center, and others to enforce the Act's deadlines.

B. Critical Habitat Designation should be Required for All Listed Species

As a related matter, Congress amended the Endangered Species Act in 1978 to require the Fish and Wildlife Service to designate critical habitat for a species, to the extent determinable and prudent, at the time of listing. As discussed above, listed species with a designated, and thus protected, critical habitat are twice as likely to be recovering as those without designated critical habitat. Suckling, Kieran F. and Taylor, Martin, *Critical Habitat and Recovery*, in *The Endangered Species Act at Thirty* (2006) at 86. Accordingly, to increase the rate of recovery, Congress should also fund the Service at levels sufficient to allow the Agency to designate critical habitat for species at the time they are first listed. As an additional benefit, the

prompt designation of critical habitat supports better planning by those entities whose economic activities might need to be modified to protect listed species. Additionally, because Congress applied the requirement to designate critical habitat only to species designated after 1978, if Congress desires to increase the rate of species' recovery it should remove the exemption for species listed prior to 1978 and require the designation of critical habitat, to the extent prudent and determinable, for all listed species, including those that have been on the list the longest.

C. Deadlines for the Preparation of Recovery Plans should be Established, Recovery Plans should be Made Enforceable, and Recovery Plans should be Fully Funded.

Lastly, and again if the concern is with increasing the rate of species' recovery, Congress should focus on Section 4(f) of the Endangered Species Act, 16 U.S.C. § 1533(f), the provision that requires the preparation of recovery plans for listed species. Unlike the other provisions of Section 4, the recovery planning provision contains no deadlines. Thus, this most important task of planning for species recovery may linger incomplete for many years. The responsible agencies have developed a goal of preparing a recovery plan for each listed species within two and one-half years of listing. However, in practice this timeline is not always followed. For example, the National Marine Fisheries Service failed to prepare recovery plans for the Sperm, Fin, and Sei Whales for more than 30 years until compelled to do so by a lawsuit filed by WildEarth Guardians. Accordingly, if Congress desires recovery to occur more rapidly, it should establish deadlines requiring prompt recovery planning.

Furthermore, recovery plans are generally not enforceable by citizens. Thus, the actions the responsible agencies determine are necessary to recover species are undertaken solely at the pleasure of the agencies. Again, the agencies do not always implement the recovery plans they have prepared or delay their implementation. Accordingly, to compel agencies to carry out the tasks they have determined are necessary to recover listed species, Congress should consider making the development and implementation of recovery plans more enforceable by citizens. An unenforceable or unimplemented plan that simply gathers dust in an agency's file cabinet is of little utility. Thus, conversely, the problem this Committee perceives with delayed recovery efforts is not caused by too much litigation, but by the inability of citizens to force federal agencies to do what they said they should and would do—through litigation forcing the implementation of recovery plans.

Section 4(f) does require the responsible agencies to prepare timelines and estimate the costs of recovery actions. The success of these plans and the adherence to their timelines for action thus hinge on the amount of funding available. Accordingly, if this Committee desires to increase the rate of species recovery, Congress can drive that effort through funding, and it should take steps to insure both that the agencies request sufficient funding to meet their recovery plans and that Congress provides it.

CONCLUSION

The Endangered Species Act is this nation's commitment that the tragic and irreparable extinctions of species that occurred prior to the Act's passage will not be repeated. In passing the Act, Congress not only recognized that sharing this world with the vast variety of species on it increases human joy and well-being, but is, in the end, essential to human life. Existence without our fellow companions on this planet would not only be lonely, it would be impossible. The protection of fragile and unique species is not without cost. Frequently, these species have been driven to the edge of the abyss by untempered human expansion and monopolization of resources. Allowing for their survival requires a measure of restraint on our part. However, the perception that saving species from extinction costs jobs is shortsighted. Saving species is not only of substantial economic benefit, it allows for sustainable economic development by preserving resources so that they may be enjoyed and used by future generations. Our children will not forgive us if they are able only to learn of the wolf's howl, the prairie chicken's dance, or the bear's roar in museums. More importantly, our descendants will not survive, or will survive only in a more hostile and unforgiving world, without all the little things, the bugs and weeds, that drive our ecosystems and allow the larger forms of life to thrive. Humans cannot pollinate their crops without the assistance of beetles, bees, butterflies, and bats. And humans will suffer if the mysterious storehouse of adaptations and unique properties found in plants and animals are thrown away without understanding. Driving species to extinction is not unlike burning a library. Driving species to extinction before we even begin to understand them is like burning the library without once reading the books.

Fortunately, extinction is not an American value. Since its passage, and despite numerous controversies, the American people have consistently and overwhelmingly supported the Endangered Species Act. This support cuts across all lines that might otherwise divide us. The Act is working, and will work even better with increased enforcement and renewed effort. Litigation, the focus of this hearing, is nothing more than a means to enforce the Act. More importantly, litigation has shown success in ensuring the Act is implemented as Congress intended. Though litigation is adversarial, such disagreements in a civil society are necessary to promote change, force action, and reach resolution. Congress recognized as much when it provided mechanisms for, and requested citizens to help, the government implement the Act and meet the obligations it placed on itself. It is inappropriate to denigrate successful litigation, brought by citizens, that has forced the government and others to follow the law. To do so, is to attack the law itself. If Congress does not want a law enforced it should not have such a law. WildEarth Guardians does not believe that this nation wants to abandon the Endangered Species Act, and it is proud of its efforts to enforce our bedrock national commitment to never again drive a species to extinction. Rather, Guardians believes this nation is committed to insuring our rich flora and fauna, and the ecosystems on which they depend, survive and flourish for future generations.

The CHAIRMAN. Thank you very much, Mr. Tuthton.

Next we will recognize Mr. John Leshy, Professor at U.C. Hastings College of the Law in San Francisco. Mr. Leshy, you are recognized.

**STATEMENT OF JOHN LESHY, PROFESSOR, U.C. HASTINGS
COLLEGE OF THE LAW, SAN FRANCISCO, CALIFORNIA**

Mr. LESHY. Mr. Chairman, Members of the Committee, thank you very much for the opportunity to appear here today. I am appearing as a private citizen representing nobody, expressing my own views.

I had extensive experience in the government, about 12 years working on endangered species issues, and I have also taught in this area for quite a long time, so I am speaking mostly from my government experience.

The purpose of the Endangered Species Act is of course to protect the diversity of life on earth in the tradition of Noah and the ark, and as Mr. Tuthton pointed out, it has a moral dimension, but it also really has a very practical dimension. It is very much in our self-interest narrowly defined. Economists run the numbers on the value of so-called ecosystem services, the things that nature provides us and it runs into the trillions of dollars.

The title of today's hearing I respectfully submit paints a very misleading picture of the Endangered Species Act, implying that litigation is a dominant part of how the Act is implemented, that it is costly to the economy and that it and the Act itself are ineffective at protecting species. Each of these implications is based on my experience in working with the Act erroneously.

First litigation, the media and the public love a good fight. A number of high-profile court cases gather a lot of attention and fuel this impression that the Act is all about litigation, but in my experience the truth is otherwise. Across the Nation every day in countless settings the Endangered Species Act is being successfully implemented with only rare resort to the courts. It puts endangered species concerns directly on the table when decisions about projects are made, but in the vast majority of situations those concerns are

accommodated with modest adjustments, little disruption and really almost no litigation.

In many thousands of formal and informal consultations, which is the central procedural requirement of the Act that take place every year, almost all either allow the project to proceed with little change or result in modest changes, and many of these changes make the projects better from an economic as well as an environmental perspective. Only a relative handful are challenged in court.

The Endangered Species Act has been there for 40 years. Most project planners now take it into account from the very beginning and that is a very good thing. In almost all the court cases the government is the principal defendant, and the opportunity, as Mr. Tutchton pointed out, it is an equal opportunity for all sides, the people who think the Act is overregulating can challenge in court, the people who think the Act is underregulating can challenge the government in court. Most of the time the government wins and I believe that is as it should be because I think the Executive Branch does a reasonably conscientious job of implementing the Act, but not always, and that too is as it should be.

We live in an imperfect world where for a variety of reasons governments sometimes make mistakes, so the availability of judicial review is a good thing, giving all sides the opportunity to have a neutral decisionmaker, an independent judge, decide on the government's compliance.

Now let me address the contention that the Endangered Species Act costs jobs and reeks economic havoc. Here too a number of high profile court injunctions have tended to grab the attention and skew public perception, but headlines should not obscure the truth, which is that the Endangered Species Act has many times protected economic health and saved jobs. Indeed, from a larger perspective and longer view, that is more often the result than not.

A concrete example I have given in my written statement at some length is the Edwards Aquifer in Texas. It is a large groundwater basin in the southcentral part of the state. It is a vital regional water supply. It supports thousands, hundreds of thousands of jobs. San Antonio, the seventh largest nation's city, is wholly dependent on the Edwards Aquifer. Texas, frankly, was doing nothing to manage or safeguard the water supply of the aquifer. It did just the opposite actually. It treated it like a big soda, so anybody can suck the water out in unlimited quantities.

And then the Endangered Species Act came along because by a quirk of fate the aquifer fed some springs where some listed endangered species were found, and after litigation and much negotiation, Texas for the first time began to manage the Edwards Aquifer to provide for the long term and to sustain the jobs and the regional economy and the millions of people who depend upon it. This was a real success story in the Endangered Species Act protecting the economic future of a large region of Texas. It is not the only example.

Finally, in my remaining time let me just mention two quick things. I agree with Mr. Suckling that the recovery of species has to be measured over the long term because the Act, and this is kind of an unfortunate way the Act is administered, but it has this sort of emergency room atmosphere. Species don't get listed until they

are really in very dire peril, and it obviously takes a long time, as Mr. Suckling's slides show, for a species to work out of that.

I think the administration of this Endangered Species Act has been successful overall. It is also getting better and I think as the Committee moves forward there are many success stories that it can focus on to help improve the Act and its administration. Thank you very much for the opportunity to testify.

[The prepared statement of Mr. Leshy follows:]

Statement of Professor John D. Leshy, Harry D. Sunderland Distinguished Professor, U.C. Hastings College of the Law

I appreciate your invitation to testify today. I am a law professor at the University of California, Hastings College of the Law (on leave this semester as a visiting professor at Harvard Law School). I appear today as a private citizen, expressing my own views.

I have dealt with the Endangered Species Act in a variety of settings in and out of government practically since it was enacted. During almost a dozen years of government service, I helped administer the statute and advised agencies regarding compliance. Many times I helped defend government agencies who were being sued for violating the Act. I have also taught the Endangered Species Act to many law students in dozens of courses over the years, and have written about it in two law casebooks I co-authored (dealing with water law and with public lands & resources law) as well as in articles and book chapters.

I believe, based on this extensive experience, I am well-qualified to comment on how the Act has worked in practice, and the role litigation has played in its administration.

The Endangered Species Act has a clear and overriding purpose—to protect the diversity of life on earth, in the tradition of Noah and the Ark. Its objective is important. Famed naturalist E.O. Wilson has said that to fail to take strong action to stem the loss of species diversity would be the “folly” our descendants are “least likely to forgive.”

Nature's loss is our own. Preserving as much of creation as possible has a moral dimension, but it is also very much in our self-interest, more narrowly defined. Economists put the value of “ecosystem services”—the many ways that the natural world and its biodiversity support and protect the quality of human life on earth, from providing medicines and foodstuffs to pollinating crops to cleansing water—in the trillions of dollars.

The title of today's hearing, I respectfully submit, paints a very misleading picture about the Endangered Species Act. It implies that litigation is a dominant part of the Act's implementation, that it is costly to the economy, and that it, and the Act itself, are ineffective at protecting species. Each of these implications is, based on my experience working with the Act, erroneous.

The media and the public love a good fight. A small number of high-profile court cases garner a lot of attention and fuel the impression that the Act is all about litigation.

In my experience, the truth is otherwise. Across the nation, in countless settings, the Endangered Species Act is being successfully implemented with only rare resort to the courts. While the Act puts endangered species concerns squarely on the table when decisions about projects that could affect them are made, in the vast majority of situations, those concerns are accommodated with modest adjustments, little disruption, and no litigation. Of the many thousands of formal and informal “consultations”—the Act's central procedural requirement—that take place every year, almost all either allow the project to proceed with little change (because it has been planned with the Act in view), or result in modest changes. Often these changes make projects better, from an economic as well as environmental perspective. Only a relative handful are ever challenged in court. As this suggests, with nearly forty years of operation, the Endangered Species Act has become embedded in project planning and resource management, and that is a good thing.

In almost all of the court cases brought under the Endangered Species Act, the government is the principal defendant, charged with inadequately complying with the Act. The opportunity to challenge the government is as available to those who think the government is over-regulating, as it is to those who think the government is under-regulating. Litigation, in other words, gives all sides equal opportunity to persuade a neutral decision-maker—a court—that the government is not doing its job.

In my experience, about as many Endangered Species Act cases are brought by those claiming over-regulation as by those claiming under-regulation. Furthermore, my fairly regular canvass of court opinions persuades me that those claiming over-regulation win just about as often as those claiming under-regulation.

Most of the time, though, the government wins. And that is, I believe, as it should be. In my experience, the executive branch usually does a reasonably conscientious job implementing the Act, and deserves and usually receives some deference from the courts.

But not always. And that, too, is as it should be. We live in an imperfect world where, for a variety of reasons, government sometimes makes mistakes. So the availability of judicial review is a good thing, giving all sides—those who want more regulation and those who want less—a tool to make sure the executive branch is faithfully implementing the laws that Congress enacts. The American people have long been united on the value of judicial review, for litigation challenging government policy and performance has been a standard feature of American life almost since the beginning of the Republic. Our founders, by creating an independent judicial branch, understood the need to provide a check to hold other branches of government accountable.

Next, I will address the contention that Endangered Species Act regulation costs many jobs and wreaks economic havoc. Here too, a handful of high-profile court injunctions have tended to grab attention and skew public perception. But headlines should not obscure the truth, which is that many times the Endangered Species Act has protected economic health and saved jobs. Indeed, from a larger perspective and longer view, that is more often the result than not.

Here is a concrete example. The Edwards Aquifer in Texas, a large groundwater basin in the south-central part of the state, is a vital regional water supply for farms, industries and municipalities. One of the latter is San Antonio, the nation's seventh largest city, and one of the largest cities in the world solely dependent on groundwater.

Being so important to the health, welfare and economic livelihood of such a large population, one might expect that Texas would have been carefully managing the Edwards. Not so. Until the Endangered Species Act was brought to bear, Texas did just the opposite. It treated the Edwards Aquifer like a big soda, in which anyone could insert a straw and suck out unlimited quantities of water. If your straw was big enough, everyone else might suck air.

Texas law purported to give landowners "property rights" in the Edwards (and other aquifers in the state), through the so-called "capture" doctrine. But these so-called "property rights" were hollow—they did not give their "owners" any ability to prevent others with bigger pumps and deeper wells from taking "their" water. The ugly truth was, the Texas capture doctrine gave landowners no real property rights at all in the water in the aquifer. Instead, it created a perfectly legal race to the bottom of the aquifer. (A Texas water lawyer once told me how, after he explained Texas groundwater law to his client, a large landowner and former prominent state politician, the client said, "Gee, I was all for the capture doctrine, until I understood it!")

The capture doctrine had a predictable result: The Edwards Aquifer was in big trouble. And so was San Antonio and the regional economy. Many thousands of jobs were at risk.

Enter the Endangered Species Act. By a quirk of fate, the Edwards Aquifer fed some springs. Rare species of fish, found nowhere else, were living in waters fed by those springs. The race to the bottom of the aquifer threatened to dry up the springs, which would have wiped out the species.

Now perhaps only a few people would have genuinely grieved if these obscure species were erased from the face of the earth. They had no known value in the commercial marketplace. Their going extinct might have had no more impact than the popping of a single tiny rivet on the wing of a giant commercial airliner.

But the more rivets that pop, the more danger to the plane. If the springs and the species died, how far behind might be the institutions and economy and culture and jobs that also depended on the Edwards Aquifer?

Joseph Wood Krutch once wrote that "it is not a sentimental but a grimly literal fact that, unless we share the planet with creatures other than ourselves, we shall not be able to live on it for long." It was that "grimly literal" fact led the Congress in 1973 to enact the Endangered Species Act (without almost no dissenting votes), and led President Nixon to proudly sign it into law with the words, "[n]othing is more priceless and more worthy of preservation" than the "rich array" of life on earth.

The U.S. Fish & Wildlife Service added the obscure species dependent on the Edwards Aquifer to the endangered species list, and the machinery of the Endangered Species Act was brought to bear on the problem.

After years of litigation and negotiation, the state of Texas created a management authority and gave it marching orders to safeguard the aquifer for the long term. This put the region's water supply, and the jobs and economic activity dependent on it, on a much sounder footing for the long term.

Was the road to a resolution at Edwards bumpy? Yes. Was there headline-grabbing litigation and controversy? Yes. Are some people unhappy about the management scheme the legislature devised? Yes. Is the problem completely solved? No.

But there is no denying that the economically vital Edwards Aquifer is being much better taken care of, and is much more likely to sustain the regional economy over the longer term, than it was before the Endangered Species Act—and litigation to enforce it—entered the picture. This is, to my mind, a clear example where the Endangered Species Act protected jobs, economic livelihood and human health of a large region. It is scarcely the only example.

The Endangered Species Act has also been successful at its most immediate task, saving species from extinction and recovering them. One of the problematic aspects of how the Act is administered is that species tend not to be listed and brought under the Act's protective umbrella until they are in dire peril of blinking out. This gives the Act a kind of desperate, emergency-room focus, and means that by the time a species is listed, it may be so far gone that recovering it to a healthy population may take many years. For this reason, the Act's success cannot be measured by recovery in the short term.

Happily, over the last couple of decades, steps have been taken administratively to allow the needs of species declining toward listing to be met before they get to the emergency room. In fact, a substantial consensus has emerged among states, major players in the regulated community, federal agencies and others to support such efforts, through such devices as habitat conservation plans that deal with unlisted species that are likely candidates for future listing if nothing is done, as well as listed species. Focusing on ways to promote these positive developments is, in my judgment, a far more productive exercise for helping species, and those at risk of being regulated by the Act, than focusing on the role of litigation in the Act's administration.

Finally, another very useful step to take in the short run is to provide the federal agencies more funding to administer the Act. Chronic under-funding has helped engender the kind of emergency-room-triage atmosphere that makes things more, not less, difficult for those who are regulated by the Act. Relatively small amounts of money, in the tens of millions of dollars, could make the Act work measurably better for them, and everybody else.

Thank you for the opportunity to testify. I am of course happy to answer questions.

The CHAIRMAN. Thank you very much for your testimony.

And last we will recognize Mr. Brandon Middleton, Attorney for the Pacific Legal Foundation in Sacramento. Mr. Middleton.

**STATEMENT OF BRANDON MIDDLETON, ATTORNEY,
PACIFIC LEGAL FOUNDATION, SACRAMENTO, CALIFORNIA**

Mr. MIDDLETON. Thank you, Mr. Chairman and Members of the Committee. As an attorney with Pacific Legal Foundation, a non-profit organization dedicated to the protection of private property rights and individual rights, I thank you for this opportunity to express my views on ESA litigation.

Perhaps the biggest reason why the ESA provides such a strong incentive for environmental groups to stop economic progress is because the ESA literally places the importance of endangered species above human well-being. I have had the pleasure of representing three California farmers in their fight to stop ESA from being used to take away their irrigation water. A misguided effort to protect the Delta smelt has resulted in my clients fowling of

their fields and has prevented them from hiring more workers and helping to alleviate rampant unemployment.

Now, although progress has been made in their fight to stop the Delta smelt regulatory drought, my clients' long-term water supply prospects remain grim, and this is because the ESA places the needs of the Delta smelt before people. This backwards prioritization is a result of the infamous 1978 Supreme Court decision *TVA v. Hill*, and in *TVA* the Supreme Court enjoined a Federal dam project from going forward because the operation of the dam would lead to the eradication of the nearly extinct snail darter fish species. But in terms of ESA litigation, *TVA*'s devastating impact is found not in the result it reached but in the precedent it set.

By suggesting a legislative intent that is found nowhere in the text of the statute, the Supreme Court provided a gift for environmentalists that has been exploited for three decades. According to the Supreme Court, Congress's intent in enacting the Endangered Species Act was to "halt and reverse the trend toward species extinction whatever the cost." The Supreme Court also suggested that Congress made it clear that the balance has been struck in favor of affording endangered species the highest of priorities.

TVA's draconian language provides ammunition for environmental groups to use the ESA to deprive property owners and resource users of their rights while at the same time preventing courts from considering the hardship resulting from such an unbalanced approach. The reality is that there is nothing in the Endangered Species Act that prevents courts from placing human beings at least at the same level as endangered species. But the Supreme Court's decision in *TVA* allows environmental groups to enjoin even so-called green projects without concern for the costs of ordering a business to cease all operations.

In the Delta smelt litigation, Judge Wanger offered a more balanced approach to the ESA. He ruled that in certain circumstances it is appropriate for courts to balance human hardship against needs of protected species. While Judge Wanger allowed water users to at least have an equal voice in the Delta smelt proceedings, the Natural Resources Defense Council and Earth Justice have appealed and they have claimed that Judge Wanger's view of *TVA v. Hill* is wrong and that the District Court improperly balanced the water supply impacts of ESA regulation against Delta smelt habitat concerns.

This protest of even the slightest limitation of *TVA* demonstrates how environmental groups depend on *TVA*'s troubling precedent in cases where they seek to forestall economic development and human progress.

If Congress were to determine that the Supreme Court's interpretation of priorities under the Endangered Species Act is actually incorrect and that the human species is in fact entitled to at least as much priority as our animal species, then ESA litigation will shift to a more balanced approach that at least gives property owners and resource users an equal voice in the courtroom.

Abandoning the "whatever the cost" approach would deprive the environmental community of one of the greatest litigation weapons. Moreover, allowing for a full balancing of harms and a consider-

ation of the public interest would not preclude environmental groups from obtaining an injunction in all ESA cases but would instead enable a more balanced approach that better comports with traditional notions of equity and fairness.

I wish to thank the Committee for this opportunity to provide this testimony and hope it will assist the Committee as it deliberates improvements to the Act.

[The prepared statement of Mr. Middleton follows:]

**Statement of Brandon M. Middleton, Staff Attorney,
Pacific Legal Foundation, Environmental Section, Sacramento, California**

Mr. Chairman, members of the House Committee on Natural Resources, thank you for this opportunity to express my views on Endangered Species Act litigation.

The flaws behind the Endangered Species Act are numerous and well-known. Rather than provide incentives for conservation and environmental stewardship, the Endangered Species Act punishes those whose property contains land that might be used as habitat by endangered and threatened species. The statute's success rate is dismal, at best—few species that are classified as endangered or threatened ever return to recovered, healthy populations. Further, expansive and inflexible Endangered Species Act regulation by federal agencies often frustrates innovative local and state conservation efforts, with the result being greater conflict and less compromise.

These structural defects raise serious concerns over the Endangered Species Act's efficacy as a conservation statute and demonstrate that the statute provides little meaningful benefit to endangered and threatened species.

However, the statute's structural defects that victimize Americans in environmental litigation are particularly troubling. The Endangered Species Act elevates species protection above human well-being, benefitting extreme environmentalists and encouraging them to seek low-cost court victories at the expense of individual Americans as well as federal agencies throughout the country.

Specifically, environmental groups take full advantage of the Endangered Species Act's lenient citizen plaintiff standard. "Any person" may sue under the statute, a broad provision which has led to what the U.S. Fish and Wildlife Service has recognized as a litigation crisis.

Once environmental groups enter the courtroom, they enjoy precedent that stacks the deck in their favor. It is not difficult to win an Endangered Species Act lawsuit, but of equal concern is that courts often impose draconian and unhelpful remedies that harm businesses and property owners. The disturbing logic here is that the Endangered Species Act requires such results, no matter the costs. The fact that the Endangered Species Act generously authorizes attorneys' fees to prevailing parties further encourages environmental groups to take an overly aggressive approach to litigation without regard for the costs imposed on public and private parties.

With these structural defects in place, environmental groups would be foolish not to exploit them. Considering the state of the Nation's economy and the continuing onslaught of Endangered Species Act litigation, these defects certainly deserve the attention of the American people.

The Endangered Species Act's Lenient Standard for Becoming a Citizen Plaintiff

Numerous environmental groups thrive on bringing repeated Endangered Species Act cases to federal courtrooms. The Endangered Species Act is especially appealing to serial litigants because it provides that "any person may commence a civil suit" under the statute. 16 U.S.C. § 1540(g)(1). Justice Scalia has criticized this expansive citizen suit provision as "an authorization of remarkable breadth when compared with the language Congress ordinarily uses," noting that in other environmental statutes, Congress has used more restrictive tests for citizen plaintiffs. *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997). Some courts have gone so far as to rule that the Endangered Species Act authorizes animals themselves to sue in their own right. See *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995) ("[A] protected species under the Endangered Species Act. . . has standing to sue 'in its own right'" to enforce provisions of the Act.).

To be sure, courts still demand that plaintiffs satisfy Article III of the Constitution by requiring a "case or controversy" before adjudicating a case. But the Endangered Species Act's otherwise minimal pleading requirements have resulted in what the U.S. Fish and Wildlife Service has described as a "cycle of litigation" that is

“endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.” 71 Fed. Reg. 58,176, 58,176 (Oct. 2, 2006).

Indeed, in its October 2006 critical habitat designation for the Alameda whipsnake, the Service noted that such designations generally are “the subject of excessive litigation,” and that “[a]s a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.” *Id.* The Service was clear that excessive Endangered Species Act litigation has compromised the integrity of the statute:

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service’s own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

Id.

More recently, the Service has asked Congress to set a limit on the number of species it is authorized to consider under the Endangered Species Act petition process. Without any such limit, the tactic for environmental groups appears to be “the more, the merrier” when it comes to Endangered Species Act listing petitions. After all, given the statute’s expansive citizen suit provision, multi-species petitions make sense because the Service’s inability to manage an overload of documents means only that the petitions will be settled in court, with the attendant attorney’s fees. As Gary Frazer, the Service’s assistant director for endangered species, has noted, “[t]hese megapetitions are putting us in a difficult spot, and they’re basically going to shut down our ability to list any candidates in the foreseeable future.” Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, April 20, 2011, at A1. Mr. Frazer likewise recognized that if “all our resources are used responding to petitions, we don’t have the resources to put species on the endangered species list. It’s not a happy situation.” *Id.*

The consequences of the Endangered Species Act’s friendly citizen suit provision are thus clear, albeit counter-productive. Citizen plaintiffs’ easy access to courts has come at the cost of meaningful recovery and environmental progress.

Endangered Species Act Litigation Can Bring Handsome Rewards

The Endangered Species Act’s attorney’s fees provision defies common sense because it allows an environmental group to obtain attorney’s fees even when a lawsuit is brought over a recovered and healthy species that has been recommended by the Service for delisting. In most litigation, “parties are ordinarily required to bear their own attorney’s fees—the prevailing party is not entitled to collect from the loser.” *Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001) (citation omitted). Federal courts “follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority.” *Id.* (citation and quotation omitted).

The Endangered Species Act, however, provides that courts “may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” 16 U.S.C. § 1540(g). This is an extremely charitable provision, especially considering that environmental plaintiffs need not fear an award of attorney’s fees to the opposing party in the

event they do not prevail. See *Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004) (“Under the ESA, defendants are not entitled to costs and fees unless the plaintiff’s litigation was frivolous.”) (citation omitted).

The Endangered Species Act attorney’s fees provision leads to absurd results. In *Center for Biological Diversity v. Marina Point Development Co.*, a California business currently faces the prospect of paying the Center for Biological Diversity and another environmental group more than \$1 million in fees and costs without proof of harm to any species. In that case, the anti-development plaintiffs sought and received an injunction to stop a commercial project based on claims the project would harm listed bald eagles. However, the U.S. Fish and Wildlife Service had already determined that bald eagles were fully recovered and should be delisted and that the challenged project would have no effect on the species. And, in fact, while the case was on appeal in the Ninth Circuit, the case became moot when the Service removed bald eagles from the list of threatened and endangered species altogether. But, while the Ninth Circuit recognized that the property owners activities did not violate the Endangered Species Act, it nonetheless ruled that the Center was entitled to fees under the statute, since the delisting of the bald eagle occurred while the Center’s dubious district court victory was on appeal. See *Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794 (9th Cir. 2009).

This suit provided no benefit to any species but imposed enormous costs on a private company without any proof of violation. Common sense dictates that the property owner should not have to pay for a statutory violation that it did not commit, but the Endangered Species Act’s attorney’s fees provision has enabled precisely this result. Surely, this is not what Congress intended.

Did Congress really intend for the Endangered Species Act to be imposed “whatever the cost”?

Thanks in part to the Endangered Species Act’s litigation incentives discussed above, the Natural Resources Defense Council (NRDC), Earthjustice, and other environmental groups sued in 2005 to shut down critical California water projects in order to supposedly protect an insignificant fish called the delta smelt, a species that until then had generated little interest outside the extreme environmental community. NRDC and Earthjustice won their lawsuit, leading to an unprecedented water supply crisis for the San Joaquin Valley and Southern California. See *NRDC v. Kempthorne*, No. 1:05-cv-1207–OWW–GSA, 2007 U.S. Dist. LEXIS 91968 (E.D. Cal. Dec. 14, 2007) (findings of fact and conclusions of law re: interim remedies).

Yet, just a few years later, after the U.S. Fish and Wildlife Service capitulated to the environmental community and issued a formal delta smelt management regime that caused still more water supply uncertainty, the same federal judge who had previously ruled in favor of NRDC and Earthjustice ruled against them and the government, holding that the U.S. Fish and Wildlife Service had gone too far in its misguided effort to protect the delta smelt, and finding that federal staffers engaged in bad faith in attempting to defend delta smelt Endangered Species Act restrictions. See *Delta Smelt Consol. Cases v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010) (invalidating 2008 Delta smelt Biological Opinion), and *San Luis & Delta-Mendota Water Authority v. Salazar*, No. 1:09-cv-407–OWW, Reporter’s Transcript of Proceedings (Sept. 16, 2011) (finding agency bad faith), available at <http://plf.typepad.com/files/9-16-11-motion-to-stay-final-1.pdf> (last visited Dec. 1, 2011).

But what caught legal scholars’ attention was Judge Wanger’s remedy for the U.S. Fish and Wildlife Service’s Endangered Species Act violations. Despite the protests of NRDC and Earthjustice, Judge Wanger took a common sense approach and considered the harm that would result from allowing the illegal delta smelt regulations to go forward. In his August 31, 2011, decision to enjoin delta smelt-based water restrictions, Judge Wanger ruled that where the imposition of flawed ESA regulations would “affirmatively harm human communities through the reduction of water supplies and by reducing water supply security in future years,” it is appropriate for courts to balance this human hardship against the needs of protected species. As Judge Wanger wrote, “[i]f such harms cannot be considered in the balance in an ESA case, it is difficult to envision how a resource-dependent [party] would ever” prevail on an injunctive relief motion in an Endangered Species Act case. In *re Consol. Delta Smelt Cases*, No. 1:09-cv-407–OWW, 2011 U.S. Dist. LEXIS 98300, at *178 (E.D. Cal. Aug. 31, 2011).

While Judge Wanger’s decision to consider human hardship in the delta smelt case deserves praise, it may seem remarkable that there was ever a question over the court’s authority to consider the human costs of ill-advised Endangered Species Act regulation. Unfortunately, Judge Wanger’s decision to balance the hardships and consider the public interest in natural resources is the exception in Endangered

Species Act cases, not the rule. More often than not, courts give the benefit of the doubt to environmental groups and the hundreds of species they represent, regardless of the circumstances. The deck is stacked such that environmental groups have an incentive to sue even when there would be little to no benefit to a species from litigation, and even though the harm and financial toll of such litigation may be great.

One may ask, then, how this came to be—how are environmental groups able to argue with almost universal success that courts should consider the consequences their decisions have on endangered species, but at the same time claim that courts have no authority to consider the effects their decisions will have on those who actually bear the brunt of the Endangered Species Act, *i.e.*, landowners and natural resource users?

The answer stems from the Supreme Court's notorious 1978 Supreme Court decision, *TVA v. Hill*. *TVA* concerned whether the Tennessee Valley Authority could proceed with the opening and operation of the nearly complete Tellico Dam project, notwithstanding the fact that the dam's operation would either eradicate the nearly extinct snail darter species or at the very least destroy the fish species' critical habitat. Although environmental groups contended that the Endangered Species Act required the injunction of the Tellico Dam, the district court declined to do so due to the amount of public money that had already been spent on the project, noting that "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result." *Hill v. TVA*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977) (citation omitted).

The Supreme Court, however, did not agree with the district court and enjoined the Tellico Dam project from going forward. Despite recognizing that "[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million," the Court concluded that "Endangered Species Act require[d] precisely that result." *TVA v. Hill*, 437 U.S. 153, 172–73 (1978).

TVA's long-term impact, however, is found not in the result it reached, but in the precedent it set. In his majority opinion, Chief Justice Burger purported to discern Congress's will in enacting the Endangered Species Act by suggesting a legislative intent that is found nowhere in the text of the statute: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. Similarly, "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" *Id.* at 187.

Even more starkly, Chief Justice Burger suggested that Congress divested federal courts of their traditional equitable discretion in Endangered Species Act cases. According to the Court, there was no "mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . ." *Id.* at 194.

TVA's draconian language provided ammunition for environmental groups to use the Endangered Species Act to deprive property owners and resource users of their rights, while at the same time preventing courts from considering the hardship resulting from such an unbalanced approach. According to this view, *TVA* represents Congress's intent that the Endangered Species Act restricted federal courts' traditional equity jurisdiction. Yet in actuality, Congress did no such thing, even though it was fully capable of including an explicit provision that mandates the restriction of federal courts' traditional equity jurisdiction. See generally Brandon M. Middleton, *Restoring Tradition: The Inapplicability of TVA v. Hill's Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors*, 17 Mo. Envtl. L & Pol'y Rev. 318, 351 (2010).

Indeed, *TVA's* precedent has led environmental groups to routinely argue that the economic impacts of an Endangered Species Act injunction are irrelevant, and that courts are forbidden from considering economic hardship when fashioning injunctive relief. See *id.* at 322. The effort to exploit *TVA* has largely been successful. The Ninth Circuit, for example, holds that Congress "removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. The 'language, history, and structure' of the ESA demonstrates that Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species." *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510–11 (9th Cir. 1994) (citing *TVA*, 437 U.S. at 174 and citation omitted).

Similarly, in the First Circuit, courts hold that “[a]lthough it is generally true that in the preliminary injunction context that the district court is required to weigh and balance the relative harms to the non-movant if the injunction is granted and to the movant if it is not,” that is not the case in Endangered Species Act litigation, as “that balancing has been answered by Congress’ determination that the ‘balance of hardships and the public interest tips heavily in favor of protected species.’” *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997) (quoting *Burlington N. R.R.*, 23 F.3d at 1510).

Today, a primary reason for costly Endangered Species Act litigation and the injunction even of “green” energy projects can be found in TVA’s instruction that Congress placed endangered species above all other concerns, including humans. When a federal court stopped the development of a wind energy project in West Virginia two years ago due to alleged threats to the endangered Indiana bat, it repeatedly cited TVA and opined that “Congress, in enacting the ESA, has unequivocally stated that endangered species must be afforded the highest priority.” *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009). In California, the same attorneys who forced the injunction of the West Virginia wind project are now attempting to prevent the City of San Francisco from engaging in flood control efforts at a municipal golf course, supposedly because flood control harms the California reg-legged frog. Of course, the environmental attorneys’ argument is based largely on TVA, as they claim that TVA prevents the district court from balancing the hardships of increased flooding against the needs of a local amphibian. See Plaintiffs’ Reply in Support of Motion for a Preliminary Injunction at 22 n.21, *Wild Equity Inst. v. City & County of San Francisco*, No. 3:11-cv-000958-SI (N.D. Cal. Nov. 4, 2011).

Based on the environmentalists “species protection whatever the costs” approach to the Endangered Species Act, it should come as no surprise that Judge Wanger’s recent limitation of the TVA rule has found disfavor with the environmental community. While Judge Wanger allowed water users to at least have an equal voice in the delta smelt proceedings, NRDC and Earthjustice have appealed, arguing that the “district court’s view of *TVA v. Hill* is wrong,” and that the court “improperly balanced” the water supply impacts of Endangered Species Act regulation against delta smelt habitat concerns. See Appellants’ Opening Brief at 18–19, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 11–17143 (9th Cir. Oct. 19, 2011).

Keeping in mind Judge Wanger’s admonition that, in the context of delta smelt water supply impacts, “[i]f such harms cannot be considered in the balance in an ESA case, it is difficult to envision how a resource-dependent [party] would ever” prevail on an injunctive relief motion in an Endangered Species Act case, the environmental community’s protest of even the slightest limitation of TVA demonstrates just how much they depend on the decision’s troubling precedent in cases where they seek to forestall economic development and human needs. Courts, in general, recognize the extreme viewpoint of environmentalists, but all too often they punt on engaging in a balanced approach to the Endangered Species Act. Instead, the blame for the harsh realities of Endangered Species Act litigation is placed on the legislative branch, as it was Congress who purportedly ordered that endangered species be afforded “the highest of priorities,” no matter the costs.

It is misplaced, of course, for courts to blame Congress on an approach to injunctive relief never imagined or sanctioned by the legislative branch. But although the harms resulting from the “whatever the cost” approach are all too real for property owners and resource users faced with an Endangered Species Act lawsuit, addressing the problem is fortunately not difficult. As the Supreme Court itself recognized in *TVA*, “[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.” *TVA*, 437 U.S. at 194.

Thus, if Congress were to determine that the Supreme Court’s interpretation of the order of priorities under the Endangered Species Act is incorrect, and that the human species is entitled to at least as much priority as allocated to any other animal species, then litigation will shift more towards a balanced approach that at least gives property owners and resources users an equal voice in the courtroom. Abandoning the “whatever the cost” mandate would deprive the environmental community of one of their greatest litigation weapons, and would result in less of a perverse incentive for regulated parties to protect endangered species. Moreover, allowing for a full balancing of harms and consideration of the public interest would not preclude environmental groups from obtaining an injunction in all Endangered Species Act cases, but would instead enable a more balanced approach to the statute that better comports with traditional notions of equity and fairness.

Conclusion

Incentives matter. Unfortunately, when it comes to the Endangered Species Act, the incentives favor the environmental community without providing a meaningful benefit to the species that the statute seeks to protect.

This is especially so in the context of Endangered Species Act litigation. Numerous environmental groups enjoy successful practices that depend on Endangered Species Act restrictions of property owners, natural resource users, and government agencies alike. This is a testament to how much the statute encourages and fosters Endangered Species Act lawsuits.

Unless lawsuits become more difficult to bring and draconian injunctions more difficult to obtain, the disturbing trend of endless and ongoing Endangered Species Act litigation is likely to continue.

I wish to thank the committee for the opportunity to provide this testimony and hope this analysis will assist the committee as it deliberates improvements to the Endangered Species Act.

The CHAIRMAN. Thank you very much, Mr. Middleton. I want to thank all the panelists for their testimony. We will start the question period, and I recognize myself for five minutes.

Let me just ask one question to all of you, and I think a one-word answer would be sufficient. I alluded to this in my opening statement, but do you agree that the purpose of ESA is to recover species? Mrs. Budd-Falen?

Ms. BUDD-FALEN. Yes, I do.

The CHAIRMAN. Mr. Miller?

Mr. MILLER. Yes, I do.

Mr. SUCKLING. Yes, I do.

Mr. TUTCHTON. Yes.

Mr. LESHY. Yes.

Mr. MIDDLETON. Yes.

The CHAIRMAN. Good, we are unanimous. The meeting will be adjourned.

[Laughter.]

The CHAIRMAN. One of the frustrations that we have, however, is that process and all of us particularly in the West have parochial issues. One of the issues that we are dealing with a great deal in my part of the country, and I alluded to it in my opening statement, is the fish runs in the Columbia River system. Since records have been kept the fish runs right now are at their greatest than they have ever been, yet we are still subjected to a judge holding up a biological opinion in that part.

Let me ask Mr. Suckling, and I will ask you first and then Mr. Middleton, do you believe that hatchery fish should be part of the fish count when we count fish coming back? Because the runs are not counting hatchery fish. Do you believe the hatchery fish should be part of that?

Mr. SUCKLING. The hatchery fish should not be considered part of the endangered species fish count.

The CHAIRMAN. They should not. Mr. Middleton, do you believe they ought to be?

Mr. MIDDLETON. I do.

The CHAIRMAN. OK. So we have a difference right there. In that regard, I find it a little interesting because, Mr. Suckling, again in your opening you listed a couple of the species that were listed prior to ESA being in place. Was the buffalo ever part of a listing to your knowledge?

Mr. SUCKLING. No, sir.

The CHAIRMAN. Mr. Middleton, do you know if it was at all?

Mr. MIDDLETON. I don't believe so.

The CHAIRMAN. I don't believe it was either, and the reason I say that is because we recognize in our history how important the buffalo was. Buffalo roamed the plains. We heard a great deal about that. And yet right now buffalo is a commercial commodity, and it has recovered to where we don't say that they are endangered. Yet the way that they recovered a purist would say would not be to run the Great Plains like they did. In fact, they recovered through a method that is very similar to farming or perhaps a hatchery process. In fact, you could say probably that the recovery of the salmon was because we counted hatchery buffalo even though they were never listed.

And so I have a hard time trying to reconcile why we shouldn't count hatchery salmon. The first hatcheries that were built on the Columbia River system were roughly in 1900. Now it varies maybe 10 years one side of that. And if we take 1900 and say that the average lifespan of a salmon is roughly five years, I know it varies a little bit, but one year going out, three years in the ocean and one year coming back, that would be 22 generations of hatchery.

Do we believe that every wild fish that we count coming back through the system that is not marked, is it logical to assume that part of them is the offspring of those hatchery salmon 22 generations ago? Does anybody want to refute that or anybody want to support that?

[No response.]

The CHAIRMAN. Well, you know, to me, it is a very interesting observation, and yet we somehow believe that the only fish that we can count as far as recovery in the Columbia River system is fish that has been marked, and do we believe that we mark 100 percent of them?

See, this is the frustration when we look at what happens, and to kind of tie the knot on this, the bi-op or the management plan for the Columbia River system is 10 years in the making, virtually all, virtually all, not all, but virtually all of the stakeholders on both sides of the argument have agreed that the bi-op that is pending is something that is workable. Yet, because of litigation, it has been tied up in court, and I don't think that does the Northwest very well, and when you look at common sense, fish runs are coming back at their largest ever even though hatchery is not part of it, yet we seem to have this frustration.

So, when we talk about litigation, I think there certainly is a—if there is one example of that, it's the Northwest and the runs of salmon.

Thank you very much. I recognize Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. Miller, as I understand it, your project was in line to receive \$200 million in Federal bonding assistance, is that correct?

Mr. MILLER. Yes, clean renewable energy bonds, that is correct, yes.

Mr. MARKEY. And the State of Washington has a 15 percent renewable electricity standard by the year 2020?

Mr. MILLER. That is correct, yes.

Mr. MARKEY. Without those two government policies, would you even have been able to consider this project?

Mr. MILLER. I can't speak for the other three public utility districts. They were covered under the renewable energy standard from the State of Washington.

Mr. MARKEY. Without the \$200 million in Federal assistance, would you have been able to consider the project?

Mr. MILLER. Yes, my utility, Pacific County, would have considered, yes.

Mr. MARKEY. OK. And what would your funding have been?

Mr. MILLER. Probably tax-exempt bonding.

Mr. MARKEY. Interesting. Mr. Leshy, is there a misunderstanding about the Endangered Species Act to the extent to which according to your testimony it's used about half the time by plaintiffs claiming there is not enough regulation and about half the time by plaintiffs claiming there is too much regulation. So it comes from both sides using this mechanism, is that correct, almost in equal measure? What's the impact in terms of the relationship between the government and ordinary citizens if we remove this ability to have access to the courts?

Mr. LESHY. Well, I think it would be problematic, Mr. Markey. It is an equal access to justice situation. It is also very common not only in environmental laws but all kinds of other regulatory laws where people can challenge the government's compliance in court if they think there is too much regulation or not enough, and that is the reason we have an independent judiciary. This really goes back to the founding of the country. And in my experience actually the government under the Endangered Species Act gets sued about the same amount by both sides and actually I think both sides win about the same amount of time, although the government wins most of the time as I said, and I think that is about right, and I think it would be a terrible mistake actually to take the courts out of it, and I think it would be a terrible mistake for people who are regulated as well as people who think there is not enough regulation.

Mr. MARKEY. So it wins in equal measure, the government against either side? Whether it is this side bringing a case or this side bringing a case, the government wins most of the time?

Mr. LESHY. I think that is right. I mean, I don't have any hard statistics, but I read the court opinions when they come out, and that—

Mr. MARKEY. And about half the time the cases come from one side and half the time the cases come from the other side?

Mr. LESHY. I think in general that is true.

Mr. MARKEY. Can we move just quickly to job creation, whether it is Pacific salmon country or Greater Yellowstone area or Florida Keys? How does the Endangered Species Act help in job creation?

Mr. LESHY. I am sorry. Are you asking me?

Mr. MARKEY. Yes, please.

Mr. LESHY. Well, as the Edwards Aquifer example shows, I think if you take the broad picture about does the Endangered Species Act make the administration of natural resources and the management of natural resources in this country better, more sustainable for the long term, and we depend upon those resources for all kinds

of economic activity, I think the answer is clearly yes, it does make it better. Edwards Aquifer, I mean, the jobs, the thousands of jobs that are dependent upon that are more secure, absolutely more secure because of the Endangered Species Act.

Mr. MARKEY. Mr. Suckling, could you take on that question, please?

Mr. SUCKLING. There was a recent study by some economists at MIT to try to answer the question of whether environmental regulations were hurting the economy or not, so they ranked every state in the country based on the strictness of its environmental laws, and then they ranked every state based on its economic health, and they found that the states with the strongest environmental laws were the states with the strongest environmental health as well, and that really is a good indicator of what I think we all know in some degree, which is that protecting the environment is good for the economy.

Mr. MARKEY. OK. And Mr. Tuthton, again, the big charge here is that many of these are just frivolous lawsuits encouraged by the fact that there is an Endangered Species Act. How much money do you make when you bring a frivolous lawsuit?

Mr. TUTCHTON. Zero. You could be sanctioned by the court and you could have to pay the other side's fees. It is unethical to file a frivolous lawsuit.

Mr. MARKEY. OK. So we are really not talking about frivolous lawsuits then.

Mr. TUTCHTON. No. I think the criticism is actually directed at successful lawsuits where the plaintiffs have proven the government behaved in an unjustified manner.

Mr. MARKEY. And if your organization defended the rights of veterans or small businesses, brought a substantial lawsuit, would the courts award attorneys' fees?

Mr. TUTCHTON. Well, we have to meet three criteria at least. We have to win. We have to convince the court that the government's position was substantially unjustified, and then we have to convince the court that the amount of fees we sought is reasonable, and if we can do all three of those, we could get recovery.

Mr. MARKEY. OK. So there is a test that has to be met and only then are you compensated for the case which you have won?

Mr. TUTCHTON. Yes. In a typical case we never receive what we ask for, and it is not a productive way to make a living.

Mr. MARKEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Thank the gentleman. Next we will go to the gentleman from Michigan, Mr. Benishek.

Dr. BENISHEK. Thank you, Mr. Chairman.

Ms. Budd-Falen, in your testimony you mention that the implementation of the ESA has real impacts on ranchers and farmers and other working people, and I tend to agree with you. It is certainly true in my northern Michigan district. We often hear from farmers frustrated over the gray wolf. You know, it is still listed as an endangered species in the Great Lakes area, and really I think that the gray wolf has been a remarkable success and a testament to the fact that we can recover a species. I mean, at one point there was less than 20 gray wolves with a recovery goal of 200, but now we have about 800 wolves. Farmers in my area are

bringing me carcasses showing me, you know, their cattle are being killed by the wolf, and I think it is a problem that the Michigan Department of Natural Resources can't help control the wolf population because of its inability to get the wolf delisted from the endangered species list.

What in your opinion would be the one thing that we could do to help the Endangered Species Act be more effective in its ability to actually control and help endangered species? I mean, to me, this environment of litigation does not allow the agency to spend its money most wisely. What do you think that we as a Congress should do to make that work better?

Ms. BUDD-FALEN. I think that the most effective thing that we can do with regard to endangered species is for one thing change the timeframes. Part of the litigation problem is that these groups are not litigating over whether a species ought to be listed or not. They are litigating over the fact that the Federal government can't comply with a 90-day timeframe or a 12-month timeframe when environmental groups have admitted that they are filing thousands of petitions that are simply going to crash the system. The Federal government can't comply with those timeframes, so I think that is one problem.

I think another problem is that when the government is spending so much time in litigation it doesn't have time to look at recovery plans. It doesn't have time to look at conservation agreements. I have worked with a group of landowners in Idaho where they had a conservation agreement for a plan. The Western Watersheds Project decided to file a petition with the court to force the listing anyway, and so all of that work and time and money that these landowners both at the state and Federal government did to create a conservation plan is totally out the window.

I think that once a species gets recovered to the point of the wolves they need to come off the list. Taking a species off the list doesn't mean all of a sudden that we are going to start going out and shooting every wolf or that we are going to do something to harm the species, but you could certainly turn the management back over to the states, allow the states to have more control, allow the landowners to participate instead of just simply saying the species is on the list, the habitat is designated, and you face Federal prison and substantial fines if you harm, harass or take a species.

Dr. BENISHEK. Thank you. I will yield back the remainder of my time.

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

Mr. HOLT. Thank you, Mr. Chairman, and I thank the witnesses for fact-based testimony. Thank you.

Mr. Leshy, would you care to comment on Mr. Middleton's comment that the Endangered Species Act puts animal species above humans?

Mr. LESHY. Yes, I am actually happy to debate whether the Supreme Court got it right in *TVA v. Hill*. The line that was quoted about whatever the cost actually came out of a report of a House committee that was debating the Endangered Species Act back in 1973, and it does say in the tradition of Noah and the Ark that you

really have to do everything you can to protect endangered species. It has a very clear objective.

Now how it gets there actually has a lot of flexibility and I think that flexibility has been shown over time, and the administration of the Act is getting better in that respect. For example, as I mention in my testimony, part of the problem with how the Act has been administered is the species actually don't get on the list until they are really in very grave danger, which makes it very hard to provide for their needs. If you can get out in front of that process and if you can manage ecosystems more broadly to protect species that are sliding toward the list but not there yet, you can do a much more predictable job from the standpoint of the regulated community, and that is exactly what has happened.

If you look in the last 20 years big so-called multispecies habitat conservation plans have become quite popular because the regulated community has joined with the government and conservationists to say we can get out in front of these problems and be more effective at it, and that is frankly the place I think that this Committee could have the most utility is to look at how those plans have been formulated and operated and are there ways we can improve the Act in that regard.

Mr. HOLT. Mr. Suckling, following along that line, Mr. Leshy had talked about an ER triage approach that is necessary because species are listed so late in their decline. Do you see any ways of changing it, changing the law to improve that and to bringing more science-based thinking into it?

Mr. SUCKLING. I think we can improve the speed at which we put species on the endangered species list, get them on there earlier so they can recover faster without changing the law at all. We can improve that simply by funding that program to do all it needs to do.

Similarly, in the past we had a problem with species not having Federal recovery plans even if they got listed. That problem through funding has largely disappeared. The Agency has really remarkably improved the number that have recovery plans. So, in many regards, adequately funding the current Act and the government is all that is needed to improve species.

Mr. HOLT. Thanks. That is good to know.

This is going over ground that has been plowed a little bit this morning, but since it deals with the title of the hearing I think we really ought to maybe put to rest any misconceptions. Mr. Suckling, would you care to address again the contention of Ms. Budd-Falen that it is a failure because so few species have recovered?

Mr. SUCKLING. Yes, the issue here is, you know, it took us hundreds of years to get these species to their imperiled state. I will give you an example. The right whale, it was called the right whale because it was the right whale to hunt to get oil from, that is why it is the right whale. We hunted the right whale to the very edge of extinction over a period of 1,000 years. That is how long it took to endanger that species. We got it on the endangered species list in 1967. Its Federal recovery plan says just to downlist it to threatened state is going to take 150 years. We don't even know how long it will take to get it off the list.

And so to say that it is going to take 150 years to fix a problem that was 1,000 years in the making is a very reasonable approach,

and it would just be incorrect to complain that in fact we have failed because that species has not yet recovered. It is going to take decades. We have Federal scientific recovery plans telling us what to do, how long to do it. The average is 42 years. The species on average have only been protected for 21. We have decades to go, and that is how it should be, but we are on track is the good news.

Mr. HOLT. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman. The Chair recognizes the gentleman from South Carolina, Mr. Duncan.

Mr. DUNCAN OF SOUTH CAROLINA. Thank you, Mr. Chairman.

First off, I would like to ask the Chairman to address at some future hearing the Equal Access to Justice Act because I think we need some more transparency in the whole process of this lose or pay system. I know in most states where you have lose or pay it deals with paying for the court cost, the cost of litigation, but not necessarily attorneys' fees, and I understand the taxpayer dollars are going to pay the attorneys that are litigating against the U.S. Government, so just a request, and I know it is something that interests this Committee.

The CHAIRMAN. It does interest us and that is part of what we are talking about today.

Mr. DUNCAN OF SOUTH CAROLINA. Yes, sir. Thank you.

My brother-in-law lives in northwest Montana, and I have been traveling out there since the 1980s, and I watch the timber industry being decimated because of the spotted owl, and we later learned that the spotted owl didn't just need old growth forest, old growth stands, it could really reproduce and nest in things as simple as a K-Mart sign, so we have seen examples where the Endangered Species Act has decimated an industry.

We witnessed recently, I think the gentleman from California mentioned the snail darter and the irrigation issue in California which really drove commodity prices and fruits and vegetable prices up. I am concerned about how the ESA is used to keep us from securing our southern border areas where fencing could be put in place and take care of the sovereignty of this nation. I think that is important.

I have witnessed in South Carolina where the Federal Energy Regulatory Commission or FERC has halted a permit for a hydroelectric project, basically reissuing a permit because of a sturgeon that once resided in these waters but hadn't been seen in this river since the late 1800s. So we think that just by denying an energy permit for a hydroelectric project that this sturgeon is going to magically reappear in South Carolina rivers. I think this whole Act needs to be revisited.

The gentleman, Mr. Suckling, mentioned if you take an antibiotic for a day and it doesn't work, then it won't work if you have that mindset I guess, but if you take it for 30 years and then decide it won't work, maybe you should have changed earlier. Maybe you should have changed the whole process earlier if it is still not working. So I am glad we are revisiting this. I hope we will rewrite this.

I would like to ask Mr. Suckling a question because it deals with the Southeast and species, going back to that sturgeon example in 2011. In July, you stated that the CBD's petition to list 404 South-

east species took over a year to develop and involved the work by at least three scientists. How was this work funded?

Mr. SUCKLING. The Center has 43,000 members who provide 75 percent of our funding, so they funded that work. I would also like to say for the record no spotted owl has ever nested in a K-Mart sign anywhere.

Mr. DUNCAN OF SOUTH CAROLINA. Is there a way I can get a list of those 404 Southeast species? Can you provide that?

Mr. SUCKLING. Yes. The list of those species is on our website if you go on there, and you will see a section about our settlement and all the species are on there.

Mr. DUNCAN OF SOUTH CAROLINA. OK. I have nothing further, Mr. Chairman. I yield back.

The CHAIRMAN. Would the gentleman yield to me? Before he yields back, would you yield to me?

You mentioned a spotted owl in the Northwest in it was the old growth, and when you talk about economic impact there has been an huge economic impact because the timber industry in the Northwest is simply not there now. It is roughly 20 percent of what it was in the late 1980s. But what is also interesting is there is another study that came out that said in fact it was not the old growth that caused the demise of the spotted owl, it was actually a predator called the barred owl, which is a little bit larger species and it was more aggressive than the spotted owl.

Now unfortunately that has become public, but nothing is still done. We still cling to the idea that only old growth can support the spotted owl, and I have personally by the way seen non-old growth where the spotted owl has in fact nested, so I thank the gentleman for bringing that up from your brother-in-laws's perspective, but I just wanted to add one more part to that, that there is a study that says in fact it wasn't old growth or lack of old growth, it was the barred owl, so I thank the gentleman for yielding.

I will recognize the gentlelady from Guam, Ms. Bordallo is recognized.

Ms. BORDALLO. Thank you very much, Mr. Chairman. My first question is to Mr. Tutchton and Mr. Suckling.

Your organizations have been accused of using lawsuits as a way to generate income. The Pacific Legal Foundation, who Mr. Middleton is testifying on behalf of today, lists income from court-awarded attorney fees as approximately \$1.44 million on their 2008 audited financial statement. This is almost a quarter of the foundation's income for 2008. Have court-awarded attorney fees ever approached this percentage of income for your organizations? And I would like just a short answer.

Mr. TUTCHTON. No.

Mr. SUCKLING. Now our Federal income fee is about 3 to 4 percent per year. In 2008, when the Pacific Law Foundation got \$1.4 million, the Center got \$356,000 in retained legal fees. Very often the Pacific Legal Foundation gets far more money than Center each year.

Mr. TUTCHTON. That is true for us as well, Ms. Congressman. We got \$10,000 in 2008. I did want to say we did believe in full transparency. These numbers are reported on our 990s. They are reported in court-approved settlements signed by Federal judges

available to anyone. In 2008, that was less than 1 percent of our income

Ms. BORDALLO. So I take it then that the answer is no in both cases.

My second question, Mr. Tutchtton, why is the settlement that your organization entered into with the Fish and Wildlife Service a good deal?

Mr. TUTCHTON. Well, it is a very good deal if the purpose of this Committee is to reduce litigation. The settlement is a vast litigation reduction device which will also allow the Service to begin working first on the species they say are their highest priorities, so it will allow an entirely science-driven process where the Service will pick the species or they have already picked them, 250 of them that they will work on, and what the settlement does is actually force them to finish their work, and that is in everyone's interest to get the list correct so that we can make future decisions based on an accurate list of species we are trying to protect.

Ms. BORDALLO. So, for the record then, you are saying that it reduces litigation and allows science to drive the listing process?

Mr. TUTCHTON. Yes.

Ms. BORDALLO. Mr. Tutchtton, I have another question for you. Could you respond to Ms. Budd-Falen's comments on litigation for the purpose of meeting a deadline versus recovering an endanger species? Now how could a species recover if it is not listed?

Mr. TUTCHTON. It cannot most of the time, 90 percent of the time. Deadlines are a method to force recovery. So, if the desire is to increase the rate of recovery, we need the Federal agencies to pay attention to deadlines. It is the chronic disregard of deadlines that has kept some species from people being able to work on their recovery sooner, so the sooner we can identify the correct species, get them on the list, the sooner we can begin working to get them off the list, and that is what deadline litigation accomplishes.

Mr. SUCKLING. And if I may add, the Congress provides separate budgets for the U.S. Fish and Wildlife Service for their listing program and for their recovery program. So, regardless if they list fast or slow or not at all in the listing program has zero effect on the dollars available in the recovery program. So listing species does not in any way impede the recovery budget or the recovery work.

Ms. BORDALLO. Thank you.

Mr. Chairman, I would like to have a clarification of something here. I have listened to all the witnesses here and there has never been a mention—always the states. I represent the U.S. territory of Guam. My colleague here, Mr. Sablan, represents the Northern Marianas Islands. Now are we included in your statistics or are we not?

Mr. TUTCHTON. Yes, you are. In fact, some of the species that are in the settlement reside in your territories, and you are fully included on equal footing with the states

Ms. BORDALLO. Mr. Chairman, you know, I am always listening for this and really out of the territories that are part of this Congress we represent 4.5 million Americans, so I think we do deserve mention now and then.

Mr. SUCKLING. And if I may, there is a way in which you are not represented, which is this. The majority of imperiled species that

are the most imperiled occur on those islands, but yet they are funded at a much lower level than the mainland. In fact, we have a very serious problem with the Endangered Species Act of the Pacific Islands not receiving funding in proportion to the number of species they have.

Ms. BORDALLO. Thank you. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentlelady. Recognize the gentleman from Nevada, Mr. Amodei.

Mr. AMODEI. Thank you, Mr. Chairman.

Mr. Suckling, you and—I am sorry, I am kind of new at this, the gentleman next to you.

Mr. TUTCHTON. Mr. Tuthton.

Mr. AMODEI. My colleague from Guam just talked about funds that had been awarded based on litigation compared to the Pacific Legal Foundation. It is my understanding that those funds are court-ordered based on results in specific litigation. Is that accurate?

Mr. TUTCHTON. Yes. I mean, they are court-ordered. It depends on how many hours you spent to achieve the result.

Mr. AMODEI. Well, I understand that, but if the Pacific Legal Foundation happened to have gotten a million something versus several hundred thousand, is it a true general statement to say they must have been more successful in the litigation that they chose to be involved in than the folks on the other side?

Mr. TUTCHTON. It is a statement the Pacific Legal Foundation prevailed in its case against the Federal government. I would not say they are more successful than our litigation. I would say our litigation is more efficient. We did the same amount of work much less expensively.

Mr. AMODEI. OK. So you would say that they prevailed in a much less efficient manner than you did and therefore they are getting four times more the funds awarded?

Mr. TUTCHTON. Yes.

Mr. AMODEI. That is a great answer. Thank you very much. Now let me ask you this. Also the fact that it is a larger part of the percentage of their budget, is that an indication on your success in fundraising outside the litigation process as opposed to theirs?

Mr. TUTCHTON. Well, I think the issue here is that industry is complaining about funds.

Mr. AMODEI. Excuse me. I get to form the question if I can, Mr. Suckling, so if you think it is a bad question, please feel free to say that, but the fact that it is a larger percentage of their budget is a function of how much money they raise as well as how much money they get awarded in court proceedings. Is that an accurate thing to say?

Mr. SUCKLING. No, sir.

Mr. AMODEI. OK. Then tell me where I have missed that in about 30 seconds or less, please.

Mr. SUCKLING. We get our money from a very large membership base. They get money from a few corporations and foundations.

Mr. AMODEI. Oh, I am not asking where they got their money from. I am asking how much they raised compared to you. Do you

have any idea what your budget is compared to the Pacific Legal Foundation?

Mr. SUCKLING. I do not know their budget, sir.

Mr. AMODEI. Thank you for your honesty. Sir?

Mr. TUTCHTON. Our budget is much smaller. Our budget is about \$1.5 million in total. So, if \$1.4 million is 25 percent of theirs, they are four times our size.

Mr. AMODEI. OK. And how much did you say—I think you mentioned you had recovered \$300,000 or something in a year that you were talking about. So is it a quarter of your budget, the \$300,000?

Mr. TUTCHTON. The figure for WildEarth Guardians is \$10,000 in 2008.

Mr. AMODEI. OK.

Mr. TUTCHTON. That is about 1 percent, less than 1 percent.

Mr. AMODEI. Thank you. Now is it my understanding, and if it is not, just correct me bluntly, this is an oversight hearing, so after looking at how the law has worked over the years it is like so whatever the powers that be have decided they want to revisit how this is working and hear from various stakeholders, obviously what you folks are, are you opposed to oversight and revisiting these issues, or do you think everything is just great the way it is and we ought to leave it alone, stay out of your business?

Mr. SUCKLING. No, oversight is excellent. It helps bring out the facts that we have seen here today.

Mr. AMODEI. OK. Final question. I am new, which is on abundant display at the moment I am sure. I have heard testimony about how long it takes for these recovery times and I have also seen information that you have put up about how we track numbers of species. Is there anything in the existing regulations or statutes which talk about revisiting Federal recovery plans based upon how numbers of, for instance, breeding pairs have risen or fallen? Do we revisit those or once that Federal recovery plan is in process is it a pretty hard thing to change even if it says, maybe rightly so, 150 years? Is there any reference to numbers in those two?

Mr. SUCKLING. Yes, they are revisited in three ways. Every two years the Fish and Wildlife Service does sort of a quick and dirty study on species recovery trends of each species. Every five years it does a much more substantial review of the status of the species, including asking the question does the recovery plan need to be updated or amended or not, and then finally for many, many species they amend the recovery plan after seven or 10 years, so it is a constant revision process.

Mr. AMODEI. And can you give me a general statement if you are able that indicates that as a result of the existing revisiting process of those plans how many species have had either their chronological timeframe reduced or their numbers reduced or you know?

Mr. SUCKLING. Oh, I see. I can't give you the number of them, but I can say that when new recovery plans are put out there that are amended they sometimes reduce the time they think will be needed to recover. They sometimes expand it depending on what the science at that time says.

Mr. AMODEI. Do you have a sense of, because I don't obviously, that is why I am asking the question, do you have a sense of

whether that recovery period is good, recovery period needs to be shortened or it needs to be increased? Has anybody tracked that?

Mr. SUCKLING. Yes, they don't I think track it as sort of a general statistical issue, but if you look at the rate at which species factually have recovered and you compare that to what the recovery plans say should happen, they match pretty well in about 82 percent, and so I think that is an indication that things are generally on track.

Mr. AMODEI. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Time of the gentleman has expired. The Chair recognizes the gentlelady from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

Mr. Leshy, the Majority argues that the litigation that seeks compliance with the Endangered Species Act impedes recovery. Was the Department engaged in ESA-related litigation during your tenure as Solicitor of the Department of Interior, and did active litigation prevent Fish and Wildlife Service from recovery efforts, and is it possible the litigation can ultimately lead to collaborative species recovery? All in one breath.

Mr. LESHY. Excuse me, Mrs. Napolitano. I think the answer is yes to all of that. We were sued a lot when I was in the government, again as I said by all sides. Sued on listing issues, also sued on compliance issues in terms of biological opinions and the adequacy of them and that sort of thing, and I don't think the listing litigation really had any effect on the recovery exercise because, as was pointed out, the budget process is separate. There is a listing budget and then there is the rest of the Act administration budget, so they are really compartmentalized and segregated, and so there is really no interference there I think in terms of litigation.

Mrs. NAPOLITANO. But can this litigation ultimately lead to the species recovery?

Mr. LESHY. Well, sure. I mean, you know, the full machinery of the Act does not come into play until species are listed, and so a species that is sliding toward extinction cannot go extinct unless it is listed because it is not really protected until it is listed. So the listing process is a very important process, getting species on the list, and it is really a science-driven process. I mean, the species is either in peril or it is not. That determination is made. If the answer is yes, then it is listed and then the rest of the Act machinery comes into play.

Mrs. NAPOLITANO. One of my wild questions I have always asked is do you ever think there will be the human species listing?

Mr. LESHY. I hope not. That would be—

Mrs. NAPOLITANO. We are a species, are we not?

Mr. LESHY. Yes, we are.

Mrs. NAPOLITANO. Thank you. Mr. Leshy, also in Mr. Middleton's testimony he mentions the consolidated smelt cases and the court's findings. The same judge recently has been in the headlines in California of course, and who has retained him as counsel, Judge Wanger?

Mr. LESHY. Sorry, I missed that question.

Mrs. NAPOLITANO. The same judge that was mentioned in the consolidation of the smelt cases.

Mr. LESHY. Right.

Mrs. NAPOLITANO. Is recently retired from the bench and is now working for?

Mr. LESHY. You know, I have been away from California the last six months, so if this has happened recently, I don't know.

Mrs. NAPOLITANO. I will tell you, Westlands.

Mr. LESHY. Oh. Well, that is interesting. Well, Judge Wanger has been involved in many cases out there involving the——

Mrs. NAPOLITANO. Right.

Mr. LESHY.—Endangered Species Act and other things and of course there is a Court of Appeals that sits to review decisions of District Court judges.

Mrs. NAPOLITANO. Well, I am sure you have read his last ruling, right, DX-2, and could you tell briefly in your opinion who benefited from it?

Mr. LESHY. I haven't read that ruling, so I must decline.

Mrs. NAPOLITANO. OK. Well, my understanding is again Westlands' district.

Now I sat next to Judge Wanger, he was invited to address some Southern California elected officials and water agencies, and I did ask him because in his presentation to that group he never mentioned Westlands, and my importance to that of course is the Southern California water, and I was very surprised that he did not actually make mention of that because he went through his whole career, including his current renderings, which he said, and I quote, "I have a difference of opinion, but I have to follow the law."

So I am very concerned of course as to what could happen, and that is just my personal opinion because to us we also feel like Mr. Suckling mentioning that protecting the environment is good for the economy. California is one of the most environmental protected and great on the economy and that could hurt both, so with that, thank you.

Mr. LESHY. If I could just comment briefly. On the Delta smelt litigation and also on the Pacific salmon litigation, at heart really in the short term as well as the long term this is sort of a jobs versus jobs issue. That is, we have a declining resource and there are people fighting over it, but there are as many people dependent upon a healthy salmon population for jobs in the Pacific Northwest as are regulated by the Endangered Species Act, and that is an important thing to keep in mind.

Mrs. NAPOLITANO. Well, salmon, the endangered salmon was prohibited from fishing in California for three years, so a lot of the fishermen lost all their business and the economy in that area went down to nil. They are finally able to do some fishing, although it is a little bit less than they expected, but it did work and they are all happy and it is helping the economy, so with that, thank you, Mr. Chair, for your indulgence.

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

Mr. LABRADOR. Thank you, Mr. Chairman. I guess we just heard news here that California's economy is actually doing well. I didn't realize that, and I am sure the environmental movement has helped a lot with that recovery. But, Mr. Middleton, I don't really know the facts about your organization, how much money you guys

make from lawsuits versus how much you get from donors, but how many organizations like yours, like the Pacific Legal Foundation are there?

Mr. MIDDLETON. Well, there are quite a few organizations in the country like our organizations, and I would also add I think that Mr. Suckling's comments on our fees are misleading because we don't strictly do environmental litigation as opposed to CBD. We also litigate for the protection of civil rights and freedom of speech, for example, and that particular statistic used by Mr. Suckling, I don't believe much, if any, of those fees were generated from environmental litigation. They were for the protection of civil rights.

And so, to the extent that Mr. Suckling is equating fees generated in environmental litigation with fees that are generated through the protection of civil rights, I think that says a lot about where the priorities of the environmental movement are.

Mr. LABRADOR. I am shocked that Mr. Suckling would try to mislead this panel in any way.

Mr. Suckling, what is your educational background? You know, you gave us a lot of science. Are you a scientist?

Mr. SUCKLING. I am not, sir.

Mr. LABRADOR. You are a doctor, right? You are a Ph.D.?

Mr. SUCKLING. I am not, sir, no.

Mr. LABRADOR. But you were studying for a Ph.D.?

Mr. SUCKLING. I was studying for a Ph.D., correct.

Mr. LABRADOR. OK. And that was not in science?

Mr. SUCKLING. No, it was in philosophy.

Mr. LABRADOR. In philosophy. And you have indicated that one of your biggest goals is to see a lot of litigation so we can stop a lot of development in the future, isn't that correct?

Mr. SUCKLING. No, that is incorrect, sir. My goal is to protect the native species and the habitats they rely on.

Mr. LABRADOR. Yes, let us talk about that. You gave us a lot of science today, again knowing that you are not a scientist, but I will still ask for your opinion. You said on average it takes 21 years—most species have been 21 years on a list and it takes 42 years for their recovery. And then you gave us a bunch of data on, you know, 80 plus years for the whooping crane, you know, blah-blah-blah-blah.

Can you tell us who determined what the recovery programs should be for all these species?

Mr. SUCKLING. The U.S. Fish and Wildlife Service assembles a recovery team for each species on the list. The recovery team typically has Federal biologists of the Fish and Wildlife Service, state biologists from their state's game and fish program, and academic scientists from that state and that team of people develop the recovery plan.

Mr. LABRADOR. OK. And who was this team of people? These were scientists?

Mr. SUCKLING. Yes. Yes, sir.

Mr. LABRADOR. OK. And the science never changes, so you never get to a point that you think, you know, something is actually recovering, so maybe we should shorten the time that the species should be on the list?

Mr. SUCKLING. No, sir, the science always changes, which is one reason why the recovery plans are revisited every five years and updated.

Mr. LABRADOR. OK. So when they are changed why do we keep extending the—I mean, you showed us some pretty impressive charts that show that these species are all recovering. We have had the experience of wolves in Idaho where they recovered actually beyond the plan, and we still have environmentalists telling us that we need to have the wolves still on the list.

Mr. SUCKLING. Well, you know, that is a very interesting example because when we say that the wolf met the recovery plan objectives that was a recovery plan written in 1980, and one of the objections we had to it is that the plan was very much out of date, did not reflect the new science. It should have been updated.

Mr. LABRADOR. So as long as it doesn't agree with your agenda, then you disagree with it, but as soon as we see recovery we don't have any kind of movement toward delisting any of these species, is that correct?

Mr. SUCKLING. No, the Fish and Wildlife Service is in the process of proposing and delisting many species, so yes, they are in that process.

Mr. LABRADOR. And how long have they been in that process?

Mr. SUCKLING. Well, they have been delisting species since I think probably the Reagan Administration was the first species delisting and each administration since then has delisted species.

Mr. LABRADOR. OK. And can you tell me what statute the Endangered Species Act gives the Fish and Wildlife the authority to regulate species that only exist within one single state?

Mr. SUCKLING. Yes, sir. The Endangered Species Act gives them that authority.

Mr. LABRADOR. Just within one single state?

Mr. SUCKLING. Correct.

Mr. LABRADOR. OK. And where is that within the Endangered Species Act?

Mr. SUCKLING. The Endangered Species Act says that every endangered species, every imperiled species rather, should eventually be listed as endangered regardless of whether it is in one or many states, and in fact the majority of them occur in a single state.

Mr. LABRADOR. OK. And we have been confronted in Idaho with a potential listing of the slick shot pepper grass, which only exists within the State of Idaho.

Mr. SUCKLING. Right.

Mr. LABRADOR. Ms., is it Budd—

Ms. BUDD-FALEN. Falen.

Mr. LABRADOR.—Falen, can you explain? You have had some experience with that, have you not?

Ms. BUDD-FALEN. Yes, sir.

Mr. LABRADOR. Can you explain what you think about that?

Ms. BUDD-FALEN. I think it is actually—

The CHAIRMAN. Turn on the microphone if you would.

Ms. BUDD-FALEN. Oh.

The CHAIRMAN. And real briefly.

Ms. BUDD-FALEN. I think it is actually disappointing because the Fish and Wildlife Service has been up and down on whether it

should be listed or not listed depending on who litigates against it at the time. There was a CCA in place though in which the Fish and Wildlife Service signed off on with the landowners, with the state, with all interested parties, and now because of the latest litigation it is going to be listed, and it cost the Federal government over \$200,000 for those three cases to fight over whether the listing ought to be. That is just in attorneys' fees.

Mr. LABRADOR. So that was just one agreement in place and just because one group decided they didn't like the agreement we don't have the agreement, right?

Ms. BUDD-FALEN. Yes, sir.

Mr. LABRADOR. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentlelady from Hawaii, Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chair.

Professor Leshy, in reading your testimony you basically said that you have dealt with the Endangered Species Act which was first passed in 1973 in various settings, and you made a reference to the fact that you also did it in government service. Can you tell me what kind of government service and for how long you were doing that?

Mr. LESHY. I worked in the Carter Administration, that will date me, for almost the entire time, and I was in the Clinton Administration from day one until the last day.

Ms. HANABUSA. And what role did you play in terms of working with the Endangered Species Act?

Mr. LESHY. In the Carter Administration, I think my title was Associate Solicitor of the Interior Department for Energy and Resources, and in the Clinton Administration I was Solicitor. That is the fancy word for the head legal officer.

Ms. HANABUSA. So I see why you said that you are probably more than qualified to testify about this.

You spent a good deal of time in your testimony talking about the Edwards Aquifer in Texas, and it brings to mind something regarding state law as well as Endangered Species Act, and, first of all, I assume from your written testimony that there is nothing considered like some kind of riparian water rights in Texas law that would give landowners downstream or someone else the right to actually use the water source. Am I correct in that?

Mr. LESHY. Well, yes. The issue in Edwards was the Texas law that applies to groundwater, water underneath the ground, and Texas basically had and still has outside the Edwards Aquifer I think no law. I mean, the law is anybody can stick a straw down, drill a well and pump out as much water as they want for any purpose, and the kind of cruel irony here is that Texas law actually tells landowners that they have property rights in the water underneath their land, but they have no right to keep anybody else from sucking that water out from under them, so it is not really a property right at all. It is called the capture doctrine, and it basically means that there is absolutely no thought to managing this water source for the future.

And what happened at Edwards was because of this quirk that there were endangered species threatened by it, Texas had to start managing the Edwards Aquifer to look to the long term, to sustain

it over the long term and all those jobs and all that economic activity and all those people, millions of people living over the Edwards Aquifer depending upon it. So the Endangered Species Act resulted in a huge improvement, and I think most people who understand this in Texas would actually agree with that.

Ms. HANABUSA. So I guess the other part of my question would be that in a situation like that, if you didn't have the Endangered Species Act and intervention of the feds, that in essence you could have no aquifer left today?

Mr. LESHY. Absolutely. I mean, this was a race to the bottom of the aquifer. That was what Texas was engaging in, and it was presumably going to dry up the aquifer before anything happened had the Endangered Species Act not been there.

Ms. HANABUSA. Do you have any other examples? I know that you pointed out the Texas situation. So, in the time from the Carter Administration and the Clinton Administration and the role as the Solicitor, were there any other examples of actual intervention on a state level to ensure the preservation of an aquifer or water source?

Mr. LESHY. Well, sure. I mean, there are a lot of rivers, for example, in the west that are being managed in part to protect endangered species. Almost all of these rivers are basically regulated, controlled by dams, usually Federal dams, and the Endangered Species Act is affecting how those reservoirs are operated, and in many cases, and I have referenced this already, there have been major successful efforts at these multispecies habitat conservation plans that apply to these river systems that have resulted in protecting the water supply for people but also protecting the species. There has been quite a success story, and they have involved intensive cooperation between state water authorities and Federal agencies.

I mean, this is not a top down Federal exercise. This is really a cooperative exercise. And I think if you ask most water managers in the west are we managing water better because the Endangered Species Act is there, I think most of them would say yes.

Ms. HANABUSA. So being a devil's advocate, would you say that one of the concerns that people who are adverse to the Endangered Species Act is the fact that you could use that Act and actually step in and control, for example, a state's water system?

Mr. LESHY. Well, you know, the net effect at Edwards was the Federal law told the state you had to do something about managing this. The mechanics of what they did, and that system is a state law system, it was passed by the Texas legislature, it is reviewed by the Texas courts. I mean, so the Federal government sort of and the Endangered Species Act sort of provides the club, but the mechanics and the decisions about how that management is going to take place was entirely state.

Ms. HANABUSA. Thank you. Thank you, Mr. Chair.

The CHAIRMAN. The time of the gentlelady has expired. The gentleman from Louisiana, Mr. Fleming.

Dr. FLEMING. Thank you, Mr. Chairman.

I have been listening intently to the panel. I thank you today. So I want to see if I have this straight. The Endangered Species Act fails to require agencies to use sound science in their decisions

and to examine the economic consequences of their actions. The ESA allows the Federal government to prohibit landowners from making adjustments to their own property because the land could provide habitat to some endangered species. The ESA's negative incentives encourage private landowners to clear their land of endangered species and suitable habitat. The ESA has cost hard-working taxpayers hundreds of millions of dollars, with some of this money being spent on countless lawsuits by environmental groups. And on top of that, ESA has only a 1 percent recovery rate.

Ms. Budd-Falen, in your expert opinion, do I have this right?

Ms. BUDD-FALEN. I believe that some of your statements are correct, and I respectfully disagree with some.

Dr. FLEMING. OK. Go ahead and elaborate.

Ms. BUDD-FALEN. The Endangered Species Act requires that the listing of a species be based on the best scientific evidence available, and so while the determination of what the best scientific evidence is is certainly up for debate and certainly up for litigation, that is the standard the Fish and Wildlife Service is supposed to follow. Now they don't necessarily have to actually go out and count the number of species now and compare it to some number in the past, but you do have the scientific element.

Economic impacts are not considered at all in the listing process. The only time economic impacts come in is in the designation of critical habitat, and there is actually a split in the court decisions about how those economic impacts are considered, whether they are considered only "for listing", which is the baseline analysis, or whether they include impacts—I mean, only designation of critical habitat or whether they include some of the impacts from listing because, quite honestly, it is really hard to separate whether a dollar sign comes from just the fact that the animal is there or the fact that it is designated critical habitat.

So those are the two "scientific processes". The Agency has got very strict timelines to comply with those. Quite frankly, they never or very rarely do comply with those timeframes for whatever reason.

Dr. FLEMING. How close do they stick to following through the scientific requirements?

Ms. BUDD-FALEN. I can tell you that I have never initiated litigation against them for the "failure of best scientific information". I have litigated on critical habitat designations because in my experience and based on my clients' needs they severely underestimate the economic impacts or damage from a critical habitat designation on private property rights, landowner rights, land use.

Dr. FLEMING. OK. So it sounds like that you are seeing somewhat of a consideration of the science, but virtually none on the economics.

Ms. BUDD-FALEN. In my opinion, that is correct.

Dr. FLEMING. OK. Mr. Tuthton, same question to you. Do you agree with the list or do you disagree and if so, with what?

Mr. TUTCHTON. Well, I disagree with the list respectfully. Let me give you a good example from your home state. I once represented the Louisiana Crawfish Producers Association that begged our environmental law clinic to sue to get critical habitat for the Louisiana black bear to protect their livelihoods by protecting the

Atchafalaya Basin, and so that is an example, as Mr. Leshy said, where it is not jobs versus species. It is jobs versus jobs. The bear could affect some jobs in the timber industry, but it was going to support jobs in the crawfish industry. So these things are not cut or dried either way.

Dr. FLEMING. OK. While I have you, how many lawyers are in your organization?

Mr. TUTCHTON. Three including myself.

Dr. FLEMING. OK. And besides suing the Federal government in various Federal courts, appellate courts, et cetera, what other work do you and your colleagues engage in?

Mr. TUTCHTON. Just the lawyers or the entire organization?

Dr. FLEMING. Well, in terms of litigation, yes.

Mr. TUTCHTON. We do sue the Federal government quite a bit. We sue Interior, Agriculture, EPA, National Marine Fisheries Service. We have sued private defendants, public utilities, coal-fired power plants, people who pollute rivers, sewers, the discharge of raw sewage.

Dr. FLEMING. OK. And one final question. I am running out of time. Do you believe the public has a right to know how much taxpayer money is paid to your organization each year?

Mr. TUTCHTON. Yes, I do.

Dr. FLEMING. Can you give us that amount?

Mr. TUTCHTON. In terms of attorneys' fees, last year it was \$163,000. In terms of grants from Federal agencies, it was approximately \$600,000, primarily to restore streams by planting trees.

Dr. FLEMING. OK, thank you. I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Michigan, Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman.

Mr. Leshy, you have had the opportunity to work with the Endangered Species Act on both the side of the government and as a private citizen. This hearing today has focused on litigation, but it also merits a discussion on the Act itself. What would be the effect on endangered and threatened species if the Endangered Species Act was never enacted or was completely abolished? And to get to the point of this hearing, in your opinion, is there any other mechanism that could reasonably replace the citizen suit provision of the Act and continue to be effective to the same degree, Mr. Leshy?

Mr. LESHY. Well, first of all, thank you, Mr. Kildee. If the Endangered Species Act were repealed, I think we would have quite a lot more extinctions. I think we would do a much worse job of managing natural resources. The Edwards Aquifer, for example, I think would be in a lot more peril and the people who depend upon the Edwards if the Endangered Species Act were repealed.

I don't think the problem would go away. Many states have Endangered Species Act. California actually has one that is in some respects tougher than the Federal law, so there would be a state safety net in some places but not in all, and so I think it would be really a terrible mistake to repeal the Endangered Species Act.

It passed this Congress in 1973 with almost no dissenting votes, and when President Nixon signed it into law he said nothing is more priceless or worthy of preservation than the rich array of life

on earth. This was a tremendously popular Act and I think it really does touch something deep in the core of the American populace and I hope that it remains in place.

In terms of the litigation tool, the Endangered Species Act is not unique in having a citizen suit provision and it is certainly not unique to have lawsuits filed against the government for failing to live up to laws. We have had that tool in place in this country virtually since the founding of the republic, and it is I think a useful tool. It is a tool that basically holds the government accountable, and it is really a tool that frankly serves the congressional interests, which is why I think Congress tends to put citizen suits in these acts. It is because it is a way for Congress to control the Executive Branch, to basically tell the courts help us make sure the Executive Branch complies with the law. That is exactly what citizen suits are supposed to do, and they provide equal access to the courts for anybody who thinks the government is not doing its job.

And so, when a court orders the Executive Branch in one of these lawsuits to comply with the Endangered Species Act, the court is basically saying Congress has told you to do certain things and you are not doing them, we are going to help the Congress to see that these laws are carried out. So I think that is why citizen suits have actually remained I think relatively popular.

Sure, in individual examples, they can create controversy and that sort of thing, but on the whole I think they have been a part of the American tradition for a long time, using the courts as an independent sounding board to hold the government accountable.

Mr. KILDEE. Thank you very much.

You know, back in 1973, it was generally considered an honorable, decent, appropriate, proper, progressive thing to assure that the endangered species would be less endangered. Now the country is so divided and this Congress is so divided you think that you had committed some mortal sin or something if you take one side or the other.

Would it be possible for you and Mr. Middleton and some of your colleagues to get together for say a couple months and agree on something that might satisfy your perception of the needs of protecting or looking at the endangered species? Either one of you may answer.

Mr. MIDDLETON. Well, I appreciate the question and, you know, we at Pacific Legal Foundation are certainly willing to work with others, including environmentalists, to get to the right approach. I think one of the real problems is there is a notion that has been advanced today that this litigation controversy is really nothing more than jobs versus jobs, and I think that is a laughable talking point. You know, I sympathize with people like the salmon fishermen in California or the folks in Louisiana that Mr. Tutchton represented, but the reality is when they engage environmentalists to represent them in litigation those environmentalists use the Endangered Species Act to dictate whatever the cost that ESA must be imposed. That is a stacked deck in their favor, and that I think is really why we have gotten to this point where we are today.

The CHAIRMAN. The time of the gentleman has expired.

Mr. KILDEE. Thank you, Mr. Chairman.

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

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

To continue on that very line of questioning, there seems to be a lack of reasonableness in the application of these laws. We all support the Endangered Species Act and its objectives. Nobody wants to see any species go extinct, particularly when it can be saved. But like most movements I think the environmental movement arose over legitimate concerns over the quality of our environment, but like most movements, once it had achieved its legitimate goals, it began to attract a self-interested and self-serving constituency that has taken us from legitimate and sensible measures to the realm of political extremism and outright plunder, and I think that is what this hearing is about.

The Chairman raised the issue earlier about the importance of captive breeding. I represent a portion of the Klamath Valley in northern California where the ESA is being used to justify the destruction of four perfectly good hydroelectric dams on the Klamath River because of what they describe as a catastrophic decline in salmon population. I asked how many salmon are we talking about? Oh, just a few hundred left. I then asked, well, why doesn't somebody build a fish hatchery? And the answer is we have a fish hatchery at the Iron Gate Dam. That hatchery produces 5 million salmon smolts every year, 17,000 of those smolts return as fully grown adults to spawn in the Klamath every year, but they won't let us include them in the ESA count, and to add insult to insanity, when they tear down the Iron Gate Dam the Iron Gate Fish Hatchery goes with it, and then we do have a catastrophic decline of the salmon population.

Mr. Middleton, why don't we include hatchery fish in these population counts? Why don't we recognize the importance of captive breeding? The Chairman pointed out the buffalo were brought back from the brink of absolute extinction because of captive breeding. California condor today, the African elephant, why don't we include such a simple cost-effective and productive method of restoring these populations?

Mr. MIDDLETON. Right, and I think they should be included in the counts, and what it shows is that oftentimes alternative approaches to recovering species are put aside, and the answer seems to be in many circumstances to restrict development or to restrict energy use, and that I think leads to a counterproductive discussion because the people who are actually burdened by those restrictions really have no place at the table. And if we were able to offer alternative approaches that could satisfy both environmental concerns and natural resource users, I think that would be the better approach.

Mr. MCCLINTOCK. And to what extent are we confusing natural phenomenon with manmade phenomenon? For example, the salmon in the Pacific Northwest coast, California, Oregon, Washington, we have watched a decline in salmon runs over the past decade as the same salmon runs in Alaska have absolutely exploded under exactly the same Federal regulations. The question is what is going on there. Well, it turns out there is a phenomenon called the Pacific decadal oscillation, which is a 10-year cycle of cold water cur-

rents that for the past 10 years has been favoring Alaskan waters and has now shifted back toward the Pacific Northwest. As the Chairman pointed out, we are now seeing dramatically increased salmon runs in the Pacific Northwest following that cold water current just as we are watching significant declines in Alaskan waters, and yet we find that that is somehow justification for massive regulations that are shutting down entire sectors of our economy.

To what extent are we distorting or are we confusing natural processes with man-caused phenomenon?

Mr. MIDDLETON. I think there is a great extent of that, and what oftentimes happens is human activity is scapegoated as the primary cause for species decline when in reality there are a variety of circumstances that should be examined. So, for example, with the Delta smelt litigation the environmentalists have really been pressing to get these pumps shut off in California, and it is true, you know, certain times when the Delta smelt go through the pumps they are killed, but that in no way includes the other factors that go into the species concerned.

Mr. MCCLINTOCK. Couldn't the Delta smelt be brought back by captive breeding?

Mr. MIDDLETON. It is possible that it could.

Mr. MCCLINTOCK. Building a fish hatchery would be a fraction of the cost and far more productive than all the costly measures that are currently being imposed by misapplication of the ESA. You ask somebody in the environmental left, well, why don't you include these fish in the count, they say, well, they are just not the same. And you say, well, what is the genetic difference? Well, there is none. The biologists I have talked to have pointed out that the difference between a fish born in a hatchery and a fish born in the wild is the same difference as a baby born at a hospital and a baby born at home. And to the extent that you are increasing the genetic diversity of the gene pool you are giving more and more variations for the forces of natural selection to work. It seems to me that it is a sensible approach and yet it is one that the ESA is being used to totally obstruct.

Mr. MIDDLETON. That is my understanding as well, and I do think that there really is a problem when it comes to the Endangered Species Act in terms of looking at alternative approaches rather than simply scapegoating human activity.

The CHAIRMAN. The time of the gentleman has expired. The gentleman from the Northern Marianas, Mr. Sablan.

Mr. SABLAN. Thank you very much. First, I would like to associate myself with the earlier comments from my colleague from Guam. I am from the Northern Mariana Islands, one of the territories on the Islands. Let me also say that I think nobody said the administration of ESA was going to be easy, but I also think it is because of many of the difficulties that has made it successful by preventing extinction and setting species on a path to recovery.

But, Mr. Leshy, I have a little confusion because Mr. Middleton earlier made a distinction between his organization's work on civil rights and environmental issues. Does the Equal Access to Justice Act distinguish the types of litigation, or is it a mechanism to ensure that individuals and small businesses can have their voices

heard when they feel like they have been wronged by their government?

Mr. LESHY. The latter, sir. It applies across a broad array of Federal programs, not just environment. In fact, I think the environmental recovery fees and environmental actions is actually a small proportion of it.

Mr. SABLAN. So that means trade associations, small businesses and other types of nonprofits can and have recovered fees using the Equal Access to Justice Act and the judgment fund.

Mr. LESHY. Yes.

Mr. SABLAN. Thank you. Mr. Suckling, let me because you are not a scientist, but do you employ scientists in your organization? I'm assuming because—

Mr. SUCKLING. Yes, I do, sir.

Mr. SABLAN.—you said biological diversity. How many scientists do you have in your organization?

Mr. SUCKLING. We have approximately 25 scientists on staff.

Mr. SABLAN. So when you made the statement earlier stating the science you have people who can back this?

Mr. SUCKLING. Absolutely, yes.

Mr. SABLAN. I just wanted to make that clear.

And, Mr. Suckling, what percentage of ESA lawsuits that your organization, what percentage do you win?

Mr. SUCKLING. We win 93 percent, sir.

Mr. SABLAN. And what are some of these lawsuits?

Mr. SUCKLING. Many of them are to speed up the listing process for species that are not yet protected but should be put onto the list. Other suits are to get specific habitat areas mapped out and protected for them. Another group of suits we do is to get recovery plans for those species. One of the reasons why we tend to focus on those three kinds of suits is there have been numerous scientific studies that have been done that have said species are more likely to recover the earlier they are listed and the longer they are listed. They are more likely to recover if they have critical habitat areas. They are more likely to recover if they have recovery plans. So we tend to target our suits toward those things we know recover species.

Mr. SABLAN. Thank you. I don't want you to get me wrong here because we have our own issues, you know, with our government, especially in the application of the law in the Northern Marianas, but let me ask this to you, Mr. Tutchton. Did I say that right, sir?

Mr. TUTCHTON. Tutchton.

Mr. SABLAN. Tutchton, yes, sir, and also Mr. Suckling maybe. There are some who believe that the ability to recover attorneys' fees from the judgment fund and under the Equal Access to Justice Act fund acts as an incentive for groups to continue to bring lawsuits or litigation against Federal agencies. Do you believe this is the case?

Mr. TUTCHTON. No, I don't. The folks I represent feel compelled to protect these species from a sense of moral obligation and a sense of turning over the future in a better condition to their descendants, and so they would do this regardless of where the money came from.

Mr. SUCKLING. And if I may answer. There was actual a study put out this year in the Journal of Forestry which looked at all Equal Access to Justice Act payments, and one of the questions it asked is are these providing an incentive for more litigation. They concluded that it was not the case.

For my group, we can look at the numbers and see. I have a budget of approximately \$8 million. Last year I received \$7,500 from the Equal Access to Justice Act. In the year before, my budget was about \$7 million. Again I received \$7,500 from the Equal Access to Justice Act. So the numbers are minuscule. They are just minuscule, one-tenth of 1 percent of my budget. They are not an incentive to do anything.

Mr. SABLAN. Thank you. I have one last question. Mr. Tutchton, I was reading with some interest Ms. Karen Budd-Falen's testimony. Do you have any comments on her analysis of the Equal Access to Justice Act and the Endangered Species Act specifically, specifically that plaintiffs can recover legal fees under the Equal Access to Justice Act even if they lose?

Mr. TUTCHTON. Yes, I have a few comments very briefly. Plaintiffs cannot recover attorneys' fees if they lose outright. Plaintiffs can recover attorneys' fees in a settlement where the Federal government capitulates because it did not feel it had reasonable grounds upon which to continue the litigation. Those settlements actually save the Federal government money because if they had continued to fight the case and they eventually lost anyway, they would have owed more for dragging out the litigation, so they are a prudent response when the Federal government's position is substantially unjustified.

The CHAIRMAN. The time of the gentleman has expired.

Mr. SABLAN. Thank you.

The CHAIRMAN. The gentleman from Arizona, Mr. Gosar.

Dr. GOSAR. Mr. Suckling, I am going to quote to you and I just want to make sure that you agree or disagree with this quote of yours: "Yes, we are destroying a way of life that goes back 100 years, but it is a way of life that is one of the most destructive in our country. Ranching is one of the most nihilistic lifestyles that the planet has ever seen. It should end. Good riddance."

Do you agree with that statement?

Mr. SUCKLING. I do not. I was caught up in the rhetorical heat of the moment, sir.

Dr. GOSAR. How would you say that you changed? Is it something that you can work with ranchers?

Mr. SUCKLING. We do work with ranchers on occasion, yes, sir.

Dr. GOSAR. OK. Let me ask you another question. Give me a grade A through F, typically like we see in school, in regard to our forest health, especially in Arizona? Can you give me a grade?

Mr. SUCKLING. It is down around D, approaching F.

Dr. GOSAR. How about let us say F?

Mr. SUCKLING. OK.

Dr. GOSAR. I agree. We have problems.

Mr. SUCKLING. We have real problems, yes, sir.

Dr. GOSAR. Thank you. I know you are a supporter of the "Four Forest Restoration Initiative (4FRI)", OK, and this is very impor-

tant to us because as scientists, and I am a dentist and we have to acknowledge successes and failures, right?

Mr. SUCKLING. Yes.

Dr. GOSAR. OK. Well, in the recent Wallow fire experience we lost over half of the spotted owl nests. Tell me who won in that interchange.

Mr. SUCKLING. Well, I have to disagree that we lost over half of the owl territories.

Dr. GOSAR. Wait a minute, no, no, no. What they have said according to—I mean, this is to the science that said over half of the nesting sites in the State of Arizona were lost in the Wallow fire, I mean statistically. Do you disagree with those?

Mr. SUCKLING. The fire burned through areas with half the nests, correct. However, spotted owls are known to come back and nest in burned areas. So, in terms of what is the impact on the spotted owl, we do not know yet, but—

Dr. GOSAR. It was huge. I mean, the numbers—

Mr. SUCKLING. Well, we do not know yet if the owls are going to return and how many will nest there. My prediction is there will be a decrease in owls. It will not nearly be a 50 percent decrease.

Dr. GOSAR. But that is speculative.

Mr. SUCKLING. Excuse me?

Dr. GOSAR. That is still speculative.

Mr. SUCKLING. Well, it is based on what we know how spotted owls live in fire areas and many forests.

Dr. GOSAR. I like owls too, but it is speculative, OK? My whole point is that regardless of what happened with our forests before, what we have to do is go forward in a process that we don't have this happen again, not just to the people of Springerville and the eastern Arizona, the Apaches, but we need to have some standardization on how we look at our forests. Would you agree?

Mr. SUCKLING. Yes, sir.

Dr. GOSAR. Do you think that delays actually have a cost on industry?

Mr. SUCKLING. Delays of what?

Dr. GOSAR. Like saying 30 days or 60 days or 90 days delays with injunctions when we are talking about forest thinning?

Mr. SUCKLING. No, 30, 60, 90 days have very little effect, sir.

Dr. GOSAR. They have no effect?

Mr. SUCKLING. Very little effect, yes.

Dr. GOSAR. Oh, I disagree because there is always a cost for a delay because if you are going through a thinning process and you could actually in those 90 days take care of let us say 200 acres, it is 200 acres that less would burn, wouldn't you say?

Mr. SUCKLING. The planning of a timber sale is typically two to three years in length, so delaying 30 days at the end, no, it's inconsequential.

Dr. GOSAR. OK, so let me ask you, so you want to be more efficient, right?

Mr. SUCKLING. Yes, sir.

Dr. GOSAR. So you would be a proponent to start at looking at wide swaths proactively before the bid process in "4FRI", particularly in Arizona so that we could have no further delays? Would you agree to that?

Mr. SUCKLING. I am not exactly sure how to answer.

Dr. GOSAR. I want the environment, I want to see your group being part of the solution process for the forests. Would you agree?

Mr. SUCKLING. Well, we very much are a part, as you know.

Dr. GOSAR. But I also—

Mr. SUCKLING. The “4FRI” agreement is one that the Center has been advocating.

Dr. GOSAR. I understand, but I also want a template on how we actually do that so that we don’t have the consequences of this fire again.

Mr. SUCKLING. Absolutely, and we have prepared a template for the issues that we are concerned about.

Dr. GOSAR. And you are going to be prepared so that when this contract is awarded then we would go forward with that? Yes or no.

Mr. SUCKLING. We can go forward with a contract if it obeys the laws, not if it violates the laws.

Dr. GOSAR. The status that I am here is working with people, working with industry. Are you prepared to work with industry?

Mr. SUCKLING. We work with both the industry and with the U.S. Forest Service.

Dr. GOSAR. OK. I have one last question. Ms. Karen Budd-Falen, last year the Center for Biological Diversity was forced to pay the Chilton family of Arizona over \$600,000 in damages relating to false claims against a ranching family. The Chilton family took on the Center for Biological Diversity after the organization accused them of poor ranch management that would impact different courts, but the CBD kept on appealing. The Western Farm Press indicated that CBD contemplated appealing to the Supreme Court. The Center for Biological Diversity said it would drop the appeal if the Chiltons paid them \$35,000 for settling the case. They said no. Sadly, however, the Chiltons paid more in legal fees than they collected, but they still won. Is this kind of intimidation, is this common?

Ms. BUDD-FALEN. In my personal experience, I believe this kind of intimidation is common. It is very painful for a producer, particularly the livestock industry, to have to have a project delayed 30 days or 60 days, or a lot of times we see groups coming into court and saying you can’t turn out your cattle for another 30 days or 60 days because of an administrative appeal based on a term permit renewal. That is real money to real families, and that kind of intimidation is very, very difficult to deal with both financially when they have to hire me to intervene in the case as well as mentally and personally when your entire livelihood is on the line.

Dr. GOSAR. I believe in common sense, but this is extortion. It is a form of extortion, and we need some common sense solutions all the way across the board. Thank you very much.

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

Mr. FLORES. Thank you, Mr. Chairman. Mr. Chairman, thank you for calling this oversight hearing, and I want to remind everybody it is an oversight hearing, and I haven’t heard anybody in the conversations today advocate doing away with ESA. But in connection with any oversight hearing, it is good government to try to

look at the laws that are passed and to make sure they are being properly administered and interpreted, and so I am glad we are doing that today.

Let me go into some other things. First of all, Mr. Leshy, your comments regarding Texas management of water rights are incorrect. I would suggest you go ahead and get updated as to where we are. We have some very protected water rights that even in some cases unfortunately trump private property rights, so I would encourage you to go get up to speed on that.

I keep hearing this jobs versus jobs comment. I am a little troubled by that. Mr. Middleton, how many jobs were lost over the Delta smelt?

Mr. MIDDLETON. Well, I think the latest figures——

Mr. FLORES. Just quick answers for everyone.

Mr. MIDDLETON. Quick answer is several thousand.

Mr. FLORES. OK. And then were any new jobs created as a result of that? Did we just magically create several thousand new jobs to offset those jobs?

Mr. MIDDLETON. No.

Mr. FLORES. OK. I didn't think so. Same thing for you, Mr. Miller. Your project could have created some jobs, but I guess it didn't. How many jobs have you estimated were lost because of the aggressive use of ESA?

Mr. MILLER. We anticipated 250 to 300 during a six-to-nine-month period of construction and then after that eight to nine permanent positions.

Mr. FLORES. OK. And did some other jobs magically appear when your project got inhibited?

Mr. MILLER. We just terminated it, so no, not at this point.

Mr. FLORES. OK. So it is not a job versus job. These are real jobs by humans, and somewhere down the road I would like to see us talk about not only enhancing the use of the best scientific and commercial data in the ESA to also looking at the benefit of the physical and sociological and economic health of the human species. I think that would be an important change to look at.

Now to my questions. Ms. Budd-Falen, one of the questions you were asked was about improvements that we could make to the ESA and one of them you said had to do with the listing timing I think. Any others just in a few seconds that you could list off, any improvements to the ESA?

Ms. BUDD-FALEN. I think one great improvement would be using incentives to protect landowners and ranch owners to give them a benefit to having endangered species on their property rather than having endangered species on their private property seen as a detriment simply because they will be regulated to death.

Mr. FLORES. OK. Anything else?

Ms. BUDD-FALEN. I would like to see changes in the way the timeframes are issued or in limiting the number of petitions. When you have the Center for Biological Diversity boasting that it is going to present 1,000 listing petitions in a year, there is no way the Fish and Wildlife Service can deal with those in 90 days or a year.

Mr. FLORES. OK. Could I request you to submit your recommendations in writing following this hearing?

Ms. BUDD-FALEN. Absolutely.

Mr. FLORES. OK, so we can look at those.

One of the other subjects that has come up is the Equal Access to Justice Act. What improvements can we make to that law? I am pretty sure we don't have jurisdiction over that, but I would like to know what those are so that we can look at this too.

Ms. BUDD-FALEN. Actually the discussion today has not been exactly correct on attorneys' fees litigating under the ESA. Most of the attorneys' fees we are talking about for citizen suit provisions, whether it is a listing challenge or a critical habitat challenge, come from the judgment fund. The judgment fund only requires "prevailing parties". It doesn't have anything to do with whether the government was substantially justified. It doesn't have any of the other protections in the Equal Access to Justice Act. The judgment fund is a permanently continuing appropriation from the Congress and money checks are just written from it.

Mr. FLORES. Could I ask you to submit your recommendations on how that ought to be administered as well?

Ms. BUDD-FALEN. Yes, I would be happy to.

Mr. FLORES. OK. All right. That would be great.

And then, Mr. Middleton, any comments that you may have in terms of improvements to ESA or the use of government funds for litigation?

Mr. MIDDLETON. Well, I would agree with the comments that have just been submitted. One other way that Congress may wish to address this issue is through making it more difficult to bring lawsuits in the first place. The Endangered Species Act, as has been recognized by Justice Scalia, "Its citizens supervision is an authorization of remarkable breadth when compared with the language Congress ordinarily uses."

So, if you look at statutes like the Clean Water Act, the Surface Mining and Control and Reclamation Act, those statutes and provisions make it more difficult I think to bring lawsuits, and that may be one way to do that.

Mr. FLORES. OK. Thank you all for your time today. I yield back.

The CHAIRMAN. The time of the gentleman has expired. The gentleman from California, Mr. Costa.

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

I know that we covered a number of the issues while I was gone on the situation involving the Sacramento-San Joaquin Delta area and the biological opinions. I guess Mr., is it Middleton, who else considers themselves to have some expertise in that area? OK, Mr. Suckling.

After the two recent court decisions this year do you agree whether or not the—as some of us have suggested—that the two biological opinions on salmonid and smelt should be combined as they go back and attempt to address the rulings of the court? Mr. Middleton?

Mr. MIDDLETON. I think that is one way of possibly looking at that, yes. I mean, in terms of combining the biological opinions, I do know that there have been ongoing discussions in terms of that, but it would be I think a more efficient way in terms of addressing species concerns rather than spending much time on each particular biological opinion.

Mr. COSTA. Especially when a lot of the conclusions seem to be in conflict from various outside scientific panels, whether it be the National Academy of Sciences or other workshops that have taken place at the California Water Institute at Fresno State.

Mr. Suckling, what is your view on that?

Mr. SUCKLING. Yes, I am not sure if in the future we do them separately or bring them together. I am not sure what changes there are.

Mr. COSTA. All right, you are not sure. OK.

Who here is familiar with the—the Chairman indicated the issue with regard to the Columbia River and the challenges they have had on the biological opinion. Who is the expert here on the panel on that? Mr. Suckling again.

How many years has it taken to reset the various biological opinions on the Columbia River?

Mr. SUCKLING. They have been continually sent back over a period of 10 years.

Mr. COSTA. That is what I understand. I also have been told, I do not know if you would concur with this, that over \$2 billion has been spent in attempting to reset these biological opinions.

Mr. SUCKLING. I don't have the exact number. It would not surprise me if it was that much. They keep getting it wrong and it costs money to go back and try to get it right the next time.

The CHAIRMAN. Will the gentleman yield?

Mr. COSTA. Yes, I will yield.

The CHAIRMAN. It is in excess of billions of dollars when you put it all together.

Mr. COSTA. Yes, and in the Columbia case they have a lot of water comparatively to the Sacramento-San Joaquin system, and they have money, i.e., WAPA, to fund these continuation to try to get it right, which I think one of the things that frustrates me to no end is the lack of a comparative analogy between different efforts on different water systems in the west. It seems like every time we are trying to reinvent the wheel, and for most of the scientists I listen to it just does not make a lot of sense, especially when you take into account, as Mr. McClintock suggested, the outside factors that also impact the fisheries in these instances, and they seem to be left on the sideline as we are attempting to deal with this.

Mr. Suckling, your organization filed what some say is the mother of all Endangered Species Act lawsuits against the EPA with regard to pesticides, not just for one species but over 200, is that correct?

Mr. SUCKLING. Yes, sir.

Mr. COSTA. Over 400 active ingredients, more than 27,000 pesticide combinations for consultations. What was the strategy or the agenda on this lawsuit as it relates to harm of any species or active ingredients?

Mr. SUCKLING. Pesticide applications particularly as it is directly into waterways or working its way into the waterways.

Mr. COSTA. And how much do you think it will cost the taxpayers to perform all of these consultations? How long do you think it will take?

Mr. SUCKLING. I don't think it will be much expense to the taxpayer at all in the consultation. I think that if certain of these pesticides are either limited in their use or taken off the market there could be some cost to the pesticide manufacturers.

Mr. COSTA. Do you believe in a notion of no risk? On risk assessment, risk management, is your goal zero risk?

Mr. SUCKLING. No, sir. You can never get to zero risk.

Mr. COSTA. So it has been extended, my understanding, the lawsuit, to 2012. When do you expect the case to be settled?

Mr. SUCKLING. I don't know if it will settle at all. We are in ongoing discussions.

Mr. COSTA. Are you seeking buffer zones?

Mr. SUCKLING. Excuse me?

Mr. COSTA. Are you seeking buffer zones on restriction of affected use?

Mr. SUCKLING. Well, if I were able to say how I think this should resolve ultimately, I think for some pesticides buffer zones should work. I think for other pesticides such as Atrazine—

Mr. COSTA. Are you seeking a ban or a restriction on restricted materials?

Mr. SUCKLING. Some as a buffer, some should be banned.

Mr. COSTA. And do you have any idea of the consequences or the cost to America's food supply or food security?

Mr. SUCKLING. I don't believe it would jeopardize America's food security at all, sir.

The CHAIRMAN. The time of the gentleman has expired except under that logical extension there will be less farmers growing food it would seem to me.

Mr. COSTA. Well, obviously the witness and I disagree on the impacts.

The CHAIRMAN. Yes.

Mr. COSTA. Because I think it would have an effect.

The CHAIRMAN. I think it would too.

Mr. COSTA. And I think we need to look at this carefully. Mr. Chairman, I thank you for taking the time to do this and look forward to working with you on this effort.

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

Mr. LAMBORN. Thank you, Mr. Chairman, and thank you for having this hearing.

Mr. Suckling, I have a couple questions for you. Your annual report for 2010 states, "Where humans multiply extinction follows. The fact is as human numbers approach the 7 billion mark in 2011 the planet cannot continue to sustain both an exponentially growing human population and the healthy abundance of other species. We need to keep our world livable for decades. Until the Center stepped into the discussion the environmental community has retreated from what it perceives to be the touchy politics of the overpopulation problem."

Mr. SUCKLING. Yes.

Mr. LAMBORN. And you also put out a newsletter supporting policies that limit human population. Do you believe human zero population growth or even a reduction in the number of human beings

would be an effective way of protecting thousands of species that you are working on behalf of?

Mr. SUCKLING. I do think that as we are eating up more and more land with development for more and more humans there is less and less space. So I do think, yes, human overpopulation is a significant environmental problem.

Mr. LAMBORN. OK. Changing the subject, what do you think about efforts by states such as Colorado to breed endangered species under controlled conditions and then releasing them into the wild?

Mr. SUCKLING. Captive breeding programs have been a very important and long-term part of an industry's conservation, so they are generally good, sir.

Mr. LAMBORN. So you don't have any problem with that?

Mr. SUCKLING. Well, it depends what the program is, but it is a well-known common tool that is used all the time to helpful purposes, yes.

Mr. LAMBORN. OK. Well, I am glad to hear that. Does anyone else here have a problem with that type of program?

Mr. SUCKLING. If you want, I could address the genetic fish issue, which is different.

Mr. LAMBORN. No. If I had more than five minutes, I would.

OK. And then would you agree with me—changing subjects entirely—that sometimes the classification of a species as a distinct species as opposed to a subspecies is a political decision rather than a scientific decision?

Mr. SUCKLING. No, sir, I do not.

Mr. LAMBORN. Are you familiar with the Preble's Meadow jumping mouse—

Mr. SUCKLING. Yes, I am.

Mr. LAMBORN.—versus the Bear Meadow jumping mouse, Bear Lodge?

Mr. SUCKLING. I am, sir.

Mr. LAMBORN. And the irony is that Wyoming fought the decision more vociferously than Colorado, so as you go north in Colorado you hit the Wyoming state line, and all of a sudden that species is no longer threatened. It is threatened one foot south of the state line, one mile south, but one mile north it is not threatened. To me, that is a political decision.

Mr. SUCKLING. That is a political decision and it is one I believe that will soon be erased.

Mr. LAMBORN. Oh, can you elaborate on that?

Mr. SUCKLING. Yes. First I should say that decision was not based on a difference of the species. It was based on a policy that said we can choose to protect a species in one place, Colorado, but not another, Wyoming, so it really wasn't really a taxonomic issue, that policy.

Mr. LAMBORN. What is this controversy over the taxonomy of that?

Mr. SUCKLING. It was studied by scientists broadly and they broadly agreed with the taxonomy of it.

Mr. LAMBORN. No, no, the science was divided on that. There was no consensus.

Mr. SUCKLING. There was a single scientist who opposed it whose results were studied by the National Academy of Sciences and found to be lacking, so I think the science is clear on that.

Mr. LAMBORN. I would disagree on that, but please continue with what you were saying.

Mr. SUCKLING. Yes. So the point there is there was a policy decision that said we can choose to protect in some area, not other areas. That is what you are looking at with the difference between Wyoming and Colorado. That policy has been withdrawn by the U.S. Fish and Wildlife Service. It is no longer being used. And I think with that happening I suspect that the Preble's Meadow mouse will be reviewed without that policy and will likely be listed throughout its range. That is my personal opinion. Fish and Wildlife Service will have to make its decision.

Mr. LAMBORN. As opposed to being delisted throughout its range.

Mr. SUCKLING. Oh, absolutely. It is a very imperiled species. I see no threat of it being delisted.

Mr. LAMBORN. What if it is actually just a subspecies of the Bear Lodge Meadow jumping mouse?

Mr. SUCKLING. It is not, sir. It has been well studied.

Mr. LAMBORN. I totally disagree with you on that.

Mr. SUCKLING. I understand, sir.

Mr. LAMBORN. Do you see any irony in the fact that sometimes a species is threatened inside the United States, we talked about states having these arbitrary borders, what I consider arbitrary, but international borders can be the same way. The polar bear, the spotted lynx, they are thriving in Canada but not in the U.S. In fact, maybe sometimes these are marginal populations. I am thinking the farther south you go the less established they ever were no matter how far back you go, but to reintroduce them in the marginal areas is the goal of some people or shutting down development in those areas may be the goal of some people, and yet the farther north you go, especially when you cross into Canada, these same species are thriving. Do you see any inconsistency there?

Mr. SUCKLING. Most of the declining populations of polar bears are in Canada. Polar bears are really not thriving in Canada, so I don't see a problem there.

Mr. LAMBORN. Or the spotted lynx?

Mr. SUCKLING. However, let us assume an example of a species that is somewhere out, let us take that example. I think that we Americans want the responsibility to protect wildlife in our nation, and I think that we would be greatly harming to generations if we said we are going to drive the wolf extinct in America because it is doing well in Canada.

Mr. LAMBORN. But isn't the purpose—

Mr. SUCKLING. That would not be looked well upon.

The CHAIRMAN. The time of the gentleman has expired.

Mr. LAMBORN. Can I follow up with written questions for the record?

The CHAIRMAN. Absolutely. I was going to make that announcement afterwards because I have several questions here that have come up that I want to follow up on. I know the time constraints. We want to give everyone an opportunity.

Mr. LAMBORN. Thank you.

The CHAIRMAN. The Chair recognizes the gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and appreciate the witnesses all being here today. It looks like most of the witnesses haven't been talking all that much, but there was an article published in High Country News yesterday by Ted Williams, and I think it bears consideration. This is Ted Williams, "It has taken me decades to be recognized as an environmental extremist. My attack on Alaska Republican Representative Don Young and National Rifle Association board member in Sierra Magazine fomented a mass exodus from Outdoor Riders Association of America, including 79 members and 22 supporting organizations. I serve on two foundations that award major grants to groups defending wildland from developers and I ride a muckraking column for Audubon called Insight. Actually I am an extremist only as defined by people who perceive fish and wildlife as basically in the way. For those folks all environmentalists are extremists. But radical green groups do exist, and they are engaged in an industry whose waste products are fish and wildlife. You and I are a major source of revenue for that industry. The Interior Department must respond within 90 days to petitions to list species under the Endangered Species Act. Otherwise petitioners like the Center for Biological Diversity get to sue and collect attorneys' fees from the Justice Department. The Center also shakes down taxpayers directly from Interior Department funds under the Equal Access to Justice Act and from missed deadlines when the agency can't keep up with the broad side of Freedom of Information Act requests. The Center for Biological Diversity has two imitators: WildEarth Guardians and Western Watersheds Projects. Kieran Suckling, who directs and helped found the Tucson, Arizona, based center, boasts that he engages in psychological warfare by causing stress to already stressed public servants. 'They feel like their careers are being mocked and destroyed and they are', he told High Country News, 'so they become much more willing to play by our rules.'

"Those rules include bending the truth like pretzel dough. For example, after the Center posted photos on its website depicting what it claimed was Arizona Rancher Jim Chilton's cow denuded grazing allotment Chilton sued. When Chilton produced evidence the photos showed a campsite and a parking lot the court awarded him \$600,000 in damages. Apparently this was the first successful libel suit against an environmental group, yet the case went virtually ignored by the media. 'Ranching should end', proclaimed Suckling, 'good riddance', but the only problem with ranching is that it is not always done right, and even when it is done wrong it saves land from development.

"Amos Eno runs the hugely successful Yarmouth, Maine, based Resources First Foundation, an outfit that among other things assists ranchers who want to restore native ecosystems. Earlier he worked at the Interior's endangered species office crafting amendments to strengthen the law, then went on to direct the National Fish and Wildlife Foundation. Eno figures the feds could 'recover and delist three dozen species' with the resources they spend responding to the Center for Biological Diversity's litigation. A senior Obama official had this to say: 'CBD has probably sued Interior

more than all other groups combined. They have divested that agency of any control over Endangered Species Act priorities and caused a huge drain on any resources.”

Then the article goes on. It is very telling. Anyway, “Eno apparently said, ‘The amount of money CBD makes suing is just obscene. They are one of the reasons the Endangered Species Act has become so dysfunctional.’”

And I know in my first term here we were going to reform the Endangered Species Act because we had saved so few species, and so we worked so hard, and we had hearings like this, and we heard not just from one person on a panel but all kinds of sources, how can we save more species? And it appeared one of the things to end this unwritten policy that landowners, many of them have, of shoot, shovel and shut up was to stop taking their land and saying you can never use it again but pay them if the Federal government found a species that was endangered so they would have incentives to report them instead of killing them, and I couldn’t believe the onslaught that we took for trying to do that.

So, by the end of it, the thing I wanted to get in the record, Mr. Chairman, it became clear that the assault on that effort to pay landowners for land we had taken away was not about saving species, it was an assault on private property rights, and I see my time has expired, so I yield.

The CHAIRMAN. Well, I thank the gentleman for getting that on the record. There was some discussion on that issue with some of the other witnesses.

The Chair recognizes the gentleman from Florida, Mr. Rivera.

Mr. RIVERA. I yield back my time.

The CHAIRMAN. Would you yield to me?

Mr. RIVERA. Certainly.

The CHAIRMAN. All right. I have just a couple of observations since I have some time. Mr. Miller, you responded to Mr. Flores’ I think inquiry about the number of jobs that would be lost with this project. Pacific County and Grays Harbor County are right in the middle of timber country. How many jobs were lost with the spotted owl in your county? Do you know right off the top of your head?

Mr. MILLER. I do not have that information, although I believe in our general area the spotted owl was not as big an issue as in other parts of the State of Washington.

The CHAIRMAN. But you did have mills though.

Mr. MILLER. Yes, we did.

The CHAIRMAN. And how many mills have been closed which would have—well, if you don’t have that right off the top of your head, that would be good to know.

Mr. MILLER. Yes, sorry, I do not have that information.

The CHAIRMAN. OK. Mr. Suckling, you mentioned I think to an inquiry by Mrs. Bordallo what your win percentage is and you said 93 percent, is that correct?

Mr. SUCKLING. Correct, sir.

The CHAIRMAN. Is that 93 percent in court?

Mr. SUCKLING. Yes, sir.

The CHAIRMAN. So 93 percent, not settlements, only in court?

Mr. SUCKLING. Well, no, including settlements and court cases.

The CHAIRMAN. Well, there is a distinction there. There is a huge distinction it seems to me. What is the win percentage in court as opposed to settlements?

Mr. SUCKLING. If you just look at court orders, it is probably on the order of 80 percent, something like that.

The CHAIRMAN. Eighty percent on settlements?

Mr. SUCKLING. No, in court orders you just asked. I am sorry, sir.

The CHAIRMAN. Court orders?

Mr. SUCKLING. Yes.

The CHAIRMAN. All right. We want to pursue that a little bit more closely and I will have some followup questions in that regard.

To follow up on the line of questioning Mr. Amodei had about the recovery plans and whether they get revisited. Revisiting, is that subject to litigation?

Mr. SUCKLING. Very rarely, sir.

The CHAIRMAN. Is it subject to litigation?

Mr. SUCKLING. It is an area that very few rules apply. There have been in the whole 30-year history of the ESA I am guessing 10 or 12 lawsuits total.

The CHAIRMAN. But it is subject to litigation then? Whether it has been exercised or not is a different issue. The question is, is it subject to litigation?

Mr. SUCKLING. Anything in the Act is subject to anyone making a claim. Whether they can win or not is up to them.

The CHAIRMAN. OK. All right. Well, with that, I want to thank very much the panel for being here for the length of time that you took, and clearly there is a great deal of interest on this issue. As I said at the outset, this is the first of a series of hearings we are going to have.

As normally applies, and I alluded to this, and Mr. Lamborn alluded to this also, there are always followup inquiries that we would like to have of all of you. For example, Ms. Budd-Falen, Mr. Flores asked you to respond to him. If you would respond to the full Committee, I would appreciate that. We will see that Mr. Flores gets that information.

But what I would really like to ask all of you, and that is, if there is an inquiry that comes from us, we would like to have a very, very timely response. Can you all assure me that—when I say timely I am looking at roughly 30 days. I know there may be some complexities, but can you assure me that any inquiry that comes from any of us you try to respond within a 30-day time period? Anybody that can't?

[No response.]

The CHAIRMAN. OK, I will assume that as all affirmative. With that—I gladly yield to the gentleman.

Mr. SABLAN. Thank you very much, Mr. Chairman. Mr. Suckling had a response to the article that Dr. Gohmert quoted. That was also published in the High Country News?

Mr. SUCKLING. Correct, sir.

Mr. SABLAN. I would also ask that this response be included in the record.

The CHAIRMAN. That would be fine. Without objection.

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

[The article submitted for the record by Mr. Suckling follows:]

High Country News

Suckling responds: Cashing in? Nope, just saving species every day

by Kieran Suckling

July 25, 2011

Note: This is a response to a Writers on the Range column by Ted Williams, headlined "Extreme Green."

Industry-funded zealots are angling to prevent nonprofits from protecting veterans, children, workers and the environment. With the absurd argument that nonprofits are getting rich by making the government follow its own laws, they want to ensure that only the truly rich are able to take the government to court.

Even those who should know better are drinking the Kool-Aid on this one, including outdoor writer Ted Williams, whose recent essay in *High Country News*, "Writers on the Range accused the Center for Biological Diversity of 'shaking down taxpayers.'" Cribbing from the Internet like a Fox News intern, Williams serves up industry propaganda with a side of his own trademark use of "anonymous" sources and dubious quotations.

Laws to make working conditions safe, ensure our water is clean, and protect the rights of veterans and children only work when they are enforced. But often they are not because of industry pressure. Witness the complete dominance of the U.S. Department of Interior's Minerals Management Service by the oil industry in the run-up to BP's catastrophic oil spill in the Gulf of Mexico.

American democracy guards against corruption by allowing citizens to sue the government. Now, taking on the government isn't cheap. You have to go up against the entire Department of Justice. That's easy for the oil industry, Wal-Mart and developers who have money to burn. Not so easy for the rest of us.

To level the playing field, the federal government pays the legal fees of individuals, small businesses and nonprofit groups—but only if they win. If they lose, they pay their own way.

In its campaign to revoke this essential equalizer, industry has launched a public relations war hinged on the big lie that nonprofits—especially environmental groups—are getting rich by ensuring that environmental laws are followed.

The current darling of the propaganda machine is Ted Williams, who accuses the Center for Biological Diversity of filing petitions to protect hundreds of endangered species and then suing the government when it inevitably fails to rule on the petitions within 90 days. In Williams' tightly scripted anti-environmental message, it's a racket producing "a major source of revenue" for the Center.

Nonsense. Between 2008 and 2011, the Center received legal fee reimbursements for an average of one case per year challenging the government's failure to process endangered species protection petitions within 90 days. The average yearly total was \$3,867; much less than the Center spent bringing the cases. Not exactly a get-rich quick scheme.

Rush to court? Every one of these suits was filed after the government missed its 90-day protection deadline by months, and in some cases by over a year. I would submit that spending \$3,867 of the federal government's money to save the Mexican gray wolf, walrus and right whale from extinction is a bargain and a half.

Williams dives completely into the propaganda sewer when he quotes an "anonymous" government official complaining of a Center petition to protect 404 rare southeastern plants and animals. The alleged "anonymous" source is allegedly outraged that the Center will file a slam-dunk nuisance lawsuit because the government can't possibly study all 404 species in 90 days.

In fact, the Center didn't sue, even after the government missed its deadline by 420 days. Instead we developed a plan with the U.S. Fish and Wildlife Service to ensure all these rare species get reviewed for protection in a reasonable amount of time.

The 1,145-page petition, by the way, was written by three Center ecologists with contributions by a dozen academic scientists and scientific societies specializing in aquatic ecology. The \$75,000 research project took a year of hard work and set the standard for state-of-the-art regional biodiversity assessments. Far from a nuisance, it is a massive contribution of critical scientific information to be used by state and federal wildlife agencies.

Without providing any supporting data—not even an "anonymous" source this time—Williams goes on to charge that the Center is raking in the cash by suing "for missed deadlines when the agency can't keep up with the broadside of Freedom of Information Act requests."

Hmm. In the past four years, the Center received legal reimbursements for exactly one Freedom of Information Act deadline suit and the amount we received (\$3,031) was far less than we spent forcing the Department of the Interior to come clean with the public over its offshore oil leasing program in the wake of the Gulf of Mexico disaster.

The Center for Biological Diversity will keep expending vastly more resources ensuring the government follows its own wildlife protection laws than we'll ever recoup. That's fine with us, because making sure bald eagles, wolves, wolverines and owls have a place to live and grow is more important than money.

It's why we do what we do.

Kieran Suckling is executive director of the Center for Biological Diversity, a national environmental group based in Tucson, Ariz., advocating for endangered species and the wild places they live.

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The CHAIRMAN. With that, I would like to dismiss this panel and thank you very, very much for your patience and for your testimony. We look forward perhaps in the future to having all or some of you back on other issues. With that the panel is dismissed. And while I am dismissing the panel I would like the second panel to come forward: Mr. Dan Ashe, Director of U.S. Fish and Wildlife, and Mr. Eric Schwaab, the Assistant Administrator for Fisheries for NOAA.

[Pause.]

The CHAIRMAN. The Committee will come back to order and I want to welcome the second panel to this hearing. I want to thank Mr. Dan Ashe, who is the Director of U.S. Fish and Wildlife Service, for being here, and Mr. Eric Schwaab, who is Assistant Administrator for Fisheries for NOAA, for being here.

You heard before your full testimony will appear in the record, and when the green light is on you are doing very, very well. When the yellow light comes on it means you have a minute left, and when the red light comes on it means that your time has expired and I would like you to summarize. So, with that, I am pleased to recognize Mr. Dan Ashe for five minutes. You are recognized, sir.

**STATEMENT OF THE HON. DAN ASHE, DIRECTOR,
U.S. FISH AND WILDLIFE SERVICE, WASHINGTON, D.C.**

Mr. ASHE. Thank you, Mr. Chairman, and good afternoon now I guess it is. The Committee has my official statement, so I will use my time to make two general points today.

First, regarding litigation, I think as you heard before, in the panel before, the U.S. Fish and Wildlife Service is an equal opportunity target. We are challenged frequently by industry, environmental and conservation organizations, states, tribes, local governments and individual citizens, obviously including several of the witnesses that have been testifying here today.

For somebody in my position it is a source of frustration for sure. It can cause us to be too timid in embracing innovations. It can cause delay. But let me say with clarity that litigation is not our principal challenge in effectively implementing this important law. In fact, it is not even close. Our principal challenge is the escalating loss and conversion of habitat that is driven by growing human occupation of the planet. It is the expansion of exotic species invasions driven by globalizing trade and a paucity of resources to monitor its impact. It is the warming of the atmosphere

and the ocean that is changing the planet's climate system and driving large-scale ecological disruption.

We are challenged in accessing and applying state-of-the-art scientific information, and this is why we have requested funding to build a network of partner-managed landscape conservation cooperatives, and I am grateful for the support that we have received in this effort from both the Administration and the Congress.

We are challenged by the escalation of political rhetoric around the Endangered Species Act. Certainly we can and we will improve this law's implementation, but allegations that the law is broken and characterizations of good men and women who carry it out as zealots or worse is neither correct nor helpful in this endeavor.

I believe that Congress enacted the law's citizens suit provisions to ensure that we are held to the highest possible standard in its implementation, and they have generally served that purpose well. I would take one exception. The torrent of deadline-related cases over the past decade has had the unfortunate effect of distorting and delaying our biological priorities. However, I believe that we have addressed this in the recent multidistrict litigation settlement and with our requests to the Congress for a cap, an appropriations subcap on petition findings.

My second point pertains to allegations that the Endangered Species Act and its attendant regulations result in job losses. Of course, by its very nature, the business of fish and wildlife conservation is about restraint and a desire to save some of what we have for the benefit of future generations. If we do great harm to the environment in pursuing our ambitions for wealth today, then we run the risk of impoverishing our children and grandchildren tomorrow. So, in its wisdom, Congress enacted laws like the Endangered Species Act which ask us to consult, to contemplate consequences and consider restraint. It asks us to make choices which are often very difficult but which in balance have proven healthy for the Nation and its economy.

Today in the Mojave Desert construction is proceeding on the Ivanpah Project, the world's largest solar facility. During construction an average of 650 Americans will be employed annually. When complete, 392 megawatts of American made clean, reliable, renewable energy will be produced. It is located within some of the highest quality habitat for the threatened desert tortoise. As the parent company raced to meet very hard financing deadlines for that project, our biologists stepped up. They worked nonstop, weekend upon weekend until the job was done.

They are considering currently to list the dune sagebrush lizard as endangered, raising much concern in the Permian Basin oil fields of Texas and New Mexico which produce 17 percent of our domestic oil. Once again our employees are rolling up their sleeves in partnership with the states, the oil industry, the Bureau of Land Management and private landowners. They are developing candidate conservation agreements and candidate conservation agreements with assurances, and today we are approaching 2 million acres signed up in these voluntary conservation agreements, helping assure a healthy ecology for the lizard and healthy economy for west Texas, eastern New Mexico and the nation.

Mr. Chairman, these women and men are not job-killers. They are good Americans and exceptional public servants who bring a sense of patriotism, duty and professionalism to everything they do. They represent the very best in public service, and their examples are not anomalies. They reflect the dedication of all U.S. Fish and Wildlife Service employees who do outstanding jobs in carrying out important laws like the Endangered Species Act.

Thank you for the opportunity to testify today, and I look forward to answering your questions.

[The prepared statement of Mr. Ashe follows:]

**Statement of Dan Ashe, Director,
U.S. Fish and Wildlife Service, U.S. Department of the Interior**

Good morning Chairman Hastings, Ranking Member Markey and members of the Committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service).

Mr. Chairman, I appreciate this opportunity to discuss how the Service carries out its duties related to the Endangered Species Act (ESA), the challenges associated with carrying out those duties, and the benefits associated with the Service's conservation mission. Our procedures, some prescribed by statute and others by agency regulations or policies, are all focused upon ensuring that our decisions are objective and based on the best available science. In addition, our listing and recovery plan decisions are made in the open with peer review and public participation throughout. The Service is committed to making the ESA work in the eyes of the public, the Congress, and the courts so as to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend.

This job has never been easy, and it grows more difficult and complex every day. We are facing an extinction crisis. With the pace and extent of environmental change threatening the continued existence of more and more of our Nation's biological wealth, we must manage limited resources to carry out our mission. The unprecedented challenge of climate change and its broad, complex impacts on species and habitat make it even more imperative to have an effective, collaborative approach to conserving imperiled species. The nature of this work often results in strongly held views on all sides and frequent challenges to our decisions through the administrative, judicial, and political process. In the face of all these factors, we are confident our agency does an excellent job of making decisions that are scientifically sound, legally correct, transparent, and capable of withstanding challenge.

Benefits of Conservation

The health of threatened and endangered species is strongly linked to our own well-being. Millions of Americans depend on habitat that sustains these species—for clean air and water, recreational opportunities and for their livelihoods. By taking action to protect imperiled native fish, wildlife and plants, we can ensure a healthy future for our community. Our Nation's history is deeply rooted in the conservation of our landscapes, and their value to the American people and our economy is clear. For example, the *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, a Department of the Interior and Department of Commerce document, found that 87.5 million U.S. residents participated in wildlife-related recreation. During the survey's period of review, 30 million people fished, 12.5 million hunted, and 71.1 million participated in at least one type of wildlife-watching activity such as wildlife observation and photography in the United States. These 87.5 million people spent \$122.3 billion on their activities. Of that, \$37.4 billion was trip-related, \$64.1 billion was spent on equipment, and \$20.7 billion was spent on other items such as licenses and land leasing and ownership. Maintaining biological diversity, by protecting our nation's threatened and endangered species, provides ecological, scientific, aesthetic, recreational, commercial, subsistence, social, cultural, and economic benefits to society.

Success in the Endangered Species Act

The ESA provides a critical safety net for America's native fish, wildlife, and plants. And we know it can deliver remarkable successes. Since Congress passed this landmark conservation law in 1973, the ESA has prevented the extinction of hundreds of imperiled species across the nation and has promoted the recovery of many others—like the bald eagle, the very symbol of our Nation's strength. Well-known examples include the recovery of the American alligator and brown pelican.

Likewise, in August of this year, the Service delisted the Tennessee purple coneflower. This was the culmination of another Service-facilitated alliance of multiple diverse partners coming together to achieve the unified goal of recovery for an endangered plant species.

Success under the ESA is not only defined by removal of species from the list of endangered and threatened species. The fact that relatively few observed extinctions have occurred in the United States during the last four decades represents a significant benchmark of success of the ESA. The law has been successful in stabilizing endangered and threatened species by promoting conservation programs that are designed for their recovery. For instance, the Service and Eglin Air Force Base have worked together to address threats to a small native stream fish on the base, the Okaloosa darter, and this year the Service was able to downlist the fish from endangered to threatened. Partnerships with the States, Tribes, and the agricultural community are supporting the ongoing recovery of the black-footed ferret, once believed to be extinct but re-discovered 30 years ago and now reestablished in 10 experimental populations. A less familiar but equally impressive example is that of the Kemp's ridley sea turtle, increasing from fewer than 300 females nesting in 1985 to more than 6,000 females nesting in recent years.

Our Nation's rich diversity of fish, wildlife, and plant resources symbolizes America's richness and promise. The ESA represents a firm commitment to safeguard our natural heritage for future generations out of a deeply held understanding of the direct link between the health of our ecosystems, the services they provide and our own well-being.

ESA Consultation and Habitat Conservation Planning

Science is the foundation of our consultation and recovery activities under the ESA. One of the most important and effective tools available to recover endangered and threatened species is the consultation process prescribed by section 7 of the ESA. We engage in consultation with other Federal agencies to assist them in meeting their obligation to avoid taking any action that would be likely to jeopardize the continued existence of a listed species or that would destroy or adversely modify their critical habitat.

Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the ESA provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed species depend, ultimately contributing to their recovery. HCPs are planning documents required as part of an application for an incidental take permit. HCPs provide the conservation benefits of proactive landscape planning, combining private land development planning with species ecosystem conservation planning. Working in partnership is foundational for the Endangered Species program, because the conservation of the Nation's biological heritage cannot be achieved by any single agency or organization. Essential partners include other Federal agencies, States, Tribes, non-governmental organizations, industry, academia, private landowners, and other Service programs and partners. Our collaboration with these partners foster solutions providing a balance between wildlife, energy, and other economic development.

In recent years we have worked closely with energy developers to site pipelines, solar projects, and wind projects that will reduce our reliance on foreign energy sources and create jobs, while avoiding or minimizing impacts to threatened and endangered species. For example the NiSource pipeline HCP in the eastern U.S. is a partnership with 17 States and other stakeholders to develop a landscape level, multi-species HCP to avoid and minimize impacts to endangered and threatened species associated with construction, operation, and maintenance of its natural gas transmission lines and ancillary facilities running from Louisiana to Indiana, and Ohio throughout the northeast to Maine. This 15,500-mile planning area and associated one-mile corridor covers 6.4 million acres of land and has the potential to affect 74 federally listed species.

Another example is the Ruby Pipeline Natural Gas Project in Wyoming, Utah, Nevada, and Oregon. In the case of the Ruby Pipeline Project, the Service worked with the project proponent (Ruby Pipeline LLC), the Bureau of Land Management, the Forest Service, and State wildlife agencies to develop an ESA Conservation Action Plan, a Migratory Bird Conservation Plan, and various State mitigation plans to avoid, minimize, and mitigate adverse project impacts to listed and candidate species, species of concern, migratory birds, and other State species and habitats of concern. Ruby Pipeline LLC has committed about \$1.7M, \$2.8M, and \$17M, respectively, to implement these plans. About \$11M of that funding commitment is intended to address the conservation needs of the greater sage grouse to ensure the project does not contribute to the need to list this candidate species.

Using the ESA consultation process, we also worked with the Bureau of Land Management on 12 approved high-priority renewable energy projects (solar and

wind) in 2010, and we have assisted in the approval of 11 high-priority renewable energy projects to date in 2011 (4 others are close to being approved). The Service is also implementing an action plan for supporting ESA compliance for renewable energy projects on private lands. This plan takes a 3-pronged approach to developing additional staff capacity so that the Service can provide support to private developers for renewable energy projects with HCP permit decisions completed in a timely manner.

An integral component of this partnership is the increases in base-funding in FY 2010 and FY 2011 that we obtained and the President's 2012 budget requested an additional \$2 million to support renewable energy projects. These resources provided the Service with much needed capacity to help guide energy projects through the permitting process, clearly showing that wildlife conservation, economic development, and job creation can occur simultaneously. For example, the California Habitat Conservation Planning Coalition estimated that regional HCPs in California alone will conserve almost 1.5 million acres of land, while permitting projects with a cumulative value of \$1.6 trillion.

Multi-District Litigation Settlements for the Listing Program

The nature of ESA work often results in challenges to our decisions through the administrative, judicial, and political process. Overall, we believe the Service does an excellent job of making decisions that are scientifically sound, legally correct, transparent, and capable of withstanding challenge. Recently, questions have been raised about the costs of litigation.

In an effort to reduce litigation and shift litigation-related resources to improving implementation of the ESA, the Service recently developed a 6-year work plan for the Listing Program through mediated settlement agreements of cases in Multi-District Litigation (MDL) with two of the Service's most frequent plaintiffs, the Center for Biological Diversity and WildEarth Guardians. These cases are discussed in further detail below. As a result of those settlements, we now expect to be able to address the backlog of species awaiting final determinations for protection under the Act, and for the first time in years, the wildlife professionals at the Service will have the opportunity to use our objective listing priority system to extend the safety net to those species most in need of protection, rather than having our work priorities driven by the courts.

The Service will systematically, over a period of 6 years, review and address the needs of more than 250 species now on the list of candidates for protection under the ESA, to determine if they should be added to the Federal Lists of Endangered and Threatened Wildlife and Plants. All of these species were previously determined by the Service to warrant being proposed for listing, but action was deferred because of the need to allocate resources for other higher priority listing actions. The Service will make listing determinations for each species, carefully reviewing scientific information and public comments before determining whether listing is still warranted and, if so, whether to designate the species as threatened or endangered. Each and every listing proposal will be subject to public review and comment.

The listing work plan will also provide predictability and certainty to landowners and State, Tribal and local governments, providing time for States and landowners to engage in conservation programs and for agencies to develop management plans. The Service has developed a variety of tools and programs to encourage conservation efforts for listed and candidate species that are compatible with the objectives and needs of landowners with listed and candidate species on their lands. These tools include Habitat Conservation Plans, Safe Harbor Agreements, and Candidate Conservation Agreements that provide regulatory assurance; technical assistance; and a grants program that funds conservation projects by private landowners, States, and territories. In five of the states represented on this committee, Florida, Georgia, Louisiana, South Carolina, and Texas, roughly 240 private landowners have enrolled nearly 2.5 million acres of private forest lands in Safe Harbor agreements to aid the recovery of the endangered red-cockaded woodpecker.

Litigation Costs

We fully agree with the concern that our resources are better spent on implementing the ESA than on litigation. This was our intent in settling the Multi-District Litigation. With the work plan in place, WildEarth Guardians and the Center for Biological Diversity agreed to dismiss their pending lawsuits and agreed to provisions that should have the effect of limiting the number of new petitions and/or deadline lawsuits they would file during the same time period. The work plan allows the Service to reclaim a greater measure of control over our listing activities, to resolve our backlog of listing actions in a timely and cost-effective manner, and to focus our limited resources on the species most in need of ESA protection.

The two settlement agreements resolved 13 separate lawsuits that were consolidated in these MDL proceedings, and the parties are currently attempting to settle the fees-related claims for all of these lawsuits. Because the parties' fees-related negotiations are complex and ongoing, it is not possible to estimate the amount of any fee award at this time. If the parties are unable to agree on the amount of fee awards, the court will determine the appropriate amount.

Nationwide, in FY 2011, the Service spent approximately \$1.24 million to manage, coordinate, track, and support ESA litigation. This does not include staff time and resources to prepare administrative records and other administrative expenses, nor does it include salaries and expenses related to litigation for the Department of the Interior's Office of the Solicitor. Although we do not generally track this information, we identified approximately \$134,156 paid out of Service funds for attorneys' fees in FY 2010 and \$15,833 in FY 2011. Our FY 2011 resource management allocation for listing and critical habitat was \$20.9 million, of which we spent at least \$15.8 million taking substantive actions required by court orders or settlement agreements resulting from litigation. For recovery and habitat conservation, which includes section 7 consultation, our resource management allocation was \$143.1 million.

Improving Implementation of the ESA

We are committed to continually improving the ESA's implementation in close collaboration with our partners. In addition to the 6-year work plan for the Listing Program, the Service and the NOAA Fisheries are working to improve implementation of the ESA by considering appropriate changes to our practices, guidance, policies, or regulations to enhance conservation of listed species. Our priority is to make implementation of the ESA less complex, less contentious and more effective by ensuring that key operational aspects of the ESA are current, transparent, and results oriented.

We seek to accelerate recovery of threatened and endangered species across the nation while making it easier for people to coexist with these species. To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA Fisheries have begun a renewed effort to identify areas where changes in ESA implementing regulations and policies may reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort is guided by the following objectives, which conform with the principles espoused in President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" and the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective conservation partnerships with other Federal agencies, the States, Tribes, conservation organizations, and private landowners;
- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

The Service and NOAA Fisheries seek to be open and transparent in our efforts to improve ESA implementation through ESA regulatory reform and meet the goals of promoting public participation, promoting innovation, increasing flexibility where possible, ensuring scientific integrity, and continuing our analysis of existing rules as set forth in Executive Order 13563.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to all of us, and ensuring the health of imperiled species is a shared responsibility. We are working to actively engage conservation partners and the public in the search for improved and innovative ways to conserve and recover imperiled species. I would like to emphasize the importance the Service places upon having a science-driven, transparent decision-making process in which the affected public can meaningfully participate.

The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

The CHAIRMAN. Thank you, Director Ashe.
And I recognize Mr. Schwaab from NOAA. You are recognized for five minutes.

STATEMENT OF ERIC SCHWAAB, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, WASHINGTON, D.C.

Mr. SCHWAAB. Chairman Hastings, Ranking Member Sablan, and Members of the Committee, thank you for the opportunity to testify today. I am Eric Schwaab and I serve as the Assistant Administrator for Fisheries at NOAA.

The ESA requires the listing and protection of species that are determined to be endangered or threatened. Protecting and recovering ESA-listed species such as salmon and sea turtles are crucial to ensuring functioning marine ecosystems and providing recreational and economic opportunities for the public. At the same time, effectively executing mandates under the ESA through listing decisions, critical habitat designations, recovery planning and consultation is critical to the conduct of important business enterprises around the country.

The National Marine Fisheries Service shares jurisdiction over the ESA with the U.S. Fish and Wildlife Service. We manage most marine species, including anadromous species such as salmon, and we currently manage 82 listed species and have proposed an additional 12 species for listing.

Listings, delistings and changes in status to listed species may be initiated by our agency or by petition from any interested person. We make listing decisions solely on the basis of the best available scientific and commercial data available. We are also bound to follow, as you know, strict statutory timelines.

Once a species is listed we are required to designate critical habitat for that species, promulgate protective regulations for threatened species and develop recovery plans that identify conservation measures to recover listed species. We work closely with other Federal agencies, state and local governments, territories, tribes and private entities to develop and implement conservation measures.

The ESA also requires that Federal agencies proposing actions that may affect listed species consult with the National Marine Fisheries Service or the Fish and Wildlife Service to ensure their proposed actions are not likely to jeopardize the continued existence of the species or adversely modify critical habitat. This consultation process often concludes when we issue a biological opinion, which presents our best assessment of how the proposed actions would affect listed species and offers measures to minimize, take reasonable and prudent alternatives to avoid species jeopardy or adverse modification of critical habitat.

The ESA does permit citizen suits, allowing any person to begin a civil suit on his or her own behalf. Much of the ESA litigation against NMFS to date has been focused on listings and listing-related decisions, the designation of critical habitat and on Section 7 interagency consultations. Since 2008, there have been approximately 61 cases filed challenging listings, critical habitat actions and Section 7 consultations. Cases have been filed by nonprofit environmental organizations, state and local jurisdictions, industry

groups, tribes and private citizens. While litigation poses many challenges, it can also serve as a useful tool in surfacing concerns and bringing parties together.

The ESA has been instrumental in preventing species from going extinct and facilitating steps toward conservation and recovery of listed species. Two examples I would highlight in our jurisdiction are the Kemp's Ridley sea turtle and Pacific salmonids.

Listed under the ESA since the law's inception, the endangered Kemp's Ridley has gone from fewer than 300 nesting females in 1985 to more than 6,000 nesting females, and it is close to meeting one of the major recovery criteria for downlisting. Cooperative efforts with U.S. commercial fishermen through the development of turtle excluded devices has been instrumental in addressing major threats to the species.

Currently 28 populations of Pacific salmon and steelhead are listed as threatened or endangered. Long-term habitat restoration and protection activities have begun to pay off, and now, with the exception of Puget Sound Steelhead and Central California Coast Coho, all populations with 10 or more years of abundance data are currently stable or increasing.

Although we have made significant progress in recovering some species, we recognize the need to make ESA implementation more effective and efficient. We have been working closely in cooperation with the Fish and Wildlife Service to improve the clarity, consistency and transparency of various components of our regulations such as those pertaining to incidental take statements and critical habitat. We have placed particular emphasis on making the process for designating critical habitat more efficient and developing additional incentives for voluntary conservation actions.

Additionally, in recognition of the special and unique relationships states play in protecting and managing listed species, we have created a joint Federal/state task force which has been working to address a number of policy issues.

Mr. Chairman, I want to again acknowledge appreciation for the opportunity to be with you today. I would be happy to answer any questions you might have.

[The prepared statement of Mr. Schwaab follows:]

Statement of Eric Schwaab, Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

Chairman Hastings, Ranking Member Markey, and Members of the Committee, thank you for the opportunity to testify before you today on the Endangered Species Act (ESA). My name is Eric Schwaab and I am the Assistant Administrator for Fisheries, within the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. NOAA's National Marine Fisheries Service (NMFS) is dedicated to the stewardship of living marine resources and the promotion of healthy ecosystems, through science-based conservation and management. As a steward, NMFS conserves, protects, and manages living marine resources, including those that are listed under the ESA, to ensure functioning marine ecosystems and recreational and economic opportunities for the American public.

NMFS's Role in Implementing the ESA

The ESA (16 U.S.C. 1531-1543; P.L. 93-205, as amended) requires NMFS and the U.S. Fish and Wildlife Service (FWS) to list species that are determined to be endangered or threatened, and to subsequently protect those species and their habitats. Pursuant to a 1974 Memorandum of Understanding between the two agencies, FWS has management authority for terrestrial and freshwater species, while NMFS

manages most marine species, including anadromous species that spend most of their life cycles in the ocean. NMFS currently manages 82 listed species. We have proposed an additional 12 species to be listed and are evaluating the status of 94 candidate species for potential listing under the ESA, including 82 species of coral.

Section 4(a) requires NMFS to determine whether a species should be placed on, or removed from, the federal list of endangered or threatened species. Listings, delistings, and changes in status to listed species may be initiated by NMFS or by petition from any interested person. Once a petition is received, NMFS must, to the maximum extent practicable, determine within ninety days whether the petition presents substantial information that the petitioned action may be warranted. If NMFS determines the petition presents such information, we initiate a review of the species' status and must determine whether to list the species within one year of receiving the petition. Should NMFS formally propose listing a species, we must make a final listing determination within one year of the proposal. Listing determinations are based on a rigorous status review. At the end of the status review, NMFS determines whether the species meets the threshold for listing. Listing decisions must be made solely on the basis of the best available scientific and commercial data available and follow a strict statutory timeline.

Once a species is listed, we are required to designate critical habitat for that species, promulgate protective regulations for threatened species, and develop recovery plans that identify conservation measures to recover listed species. NMFS works with other federal agencies, state and local governments, tribes, and private entities to develop and implement measures in these plans. These plans allow NMFS to prepare better informed analyses, inform other federal agencies on how to use their authorities, and guide cooperation with states and other interested parties.

The ESA also requires, through Section 7, that federal agencies proposing actions that may affect listed species consult with NMFS or FWS to ensure their proposed actions are not likely to jeopardize the continued existence of the species or adversely modify its critical habitat. This consultation process often concludes when NMFS issues a biological opinion, which presents NMFS's assessment of how the proposed actions would affect listed species and offers measures to minimize take or reasonable alternatives that will not jeopardize the continued existence of the species or result in adverse modification to critical habitat.

The ESA also permits "citizen suits," allowing any person to begin a civil suit on his own behalf:

- (A) to enjoin any person, including the United States and any governmental entity or agency of the United States who is alleged to be violating any provision of the ESA or regulations issued pursuant to the ESA;
- (B) to compel the Secretary of Commerce or the Interior (the Secretary) to apply take prohibitions with respect to the taking of any resident endangered or threatened species within any State; or
- (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under Section 4 which is not discretionary.

Much of the ESA litigation has been focused on: listing and listing-related decisions such as findings on petitions to list; whether and how to list a species; the designation of critical habitat; and Section 7 interagency consultations, including whether a consultation is required and the outcome of consultation.

Since 2008, there have been approximately 61 cases filed challenging NMFS's Section 4 listing and critical habitat actions and Section 7 consultations. The majority of the cases have been filed by non-profit environmental organizations, while others have been brought by state and local jurisdictions, industry groups, tribes, and private citizens. For those cases in which a final decision has been issued and the timeframe for appeal has expired, NMFS has prevailed fully in the majority of its Section 7 cases (8 wins, 1 loss, and 6 settlements). Likewise, NMFS has prevailed fully in most of its Section 4 cases (3 wins and 1 loss) and has also settled 5 cases involving a failure to meet the ESA's statutory deadlines. The remaining cases are still pending in federal court.

While litigation poses inherent challenges, in some circumstances it has served as a useful tool in bringing diverse interests to the table. Ultimately, in moving beyond litigation and bringing parties together toward implementation of recovery objectives, NMFS has seen great potential for species recovery.

Improving the Prospects for Recovery of Species

The ESA has been instrumental in preventing species from going extinct and facilitating progress in recovering listed species. Recovery plans, a requirement for all ESA-listed species, provide a roadmap for actions and funding priorities needed to remove the species from the list and ESA protections. While we still face a number

of challenges, we have begun to see the benefits of sustained conservation efforts for some of our species.

Kemp's Ridley Sea Turtles

Once described as the most imperiled of all marine turtles, by the 1960's the Kemp's ridley sea turtle had plunged to less than one percent of its historical population. Intense exploitation of turtle eggs and drowning of adult turtles in shrimp trawls were primarily responsible for the decline. Mexico established conservation programs in the 1960s to protect nesting females and their nests. In the United States, the Kemp's ridley has been listed and protected as an endangered species since the inception of the ESA. NMFS and FWS have worked cooperatively with Mexico, and with U.S. commercial fishermen through the development of turtle excluder devices, to address the threats that caused the decline of Kemp's Ridley sea turtles. The joint United States and Mexico recovery planning and conservation efforts have yielded benefits for the species. In recent years, we have observed an approximate 15 percent increase in Kemp's ridley nests per year at the species' main nesting beaches along the northeast coast of Mexico. In 1985, there were fewer than 300 females nesting each year. Today there are more than 6,000 nesting females. Currently, the Kemp's ridley is close to meeting one of the major recovery criteria for downlisting to threatened.

Pacific Salmon

Pacific salmonid populations are described as Evolutionarily Significant Units (ESU) for salmon and Distinct Population Segments (DPS) for steelhead. Seventeen ESUs and 11 DPSs of Pacific salmon and steelhead are currently listed as threatened or endangered under the ESA. While populations may vary from year-to-year, the long-term habitat restoration and protection activities of NMFS's conservation and recovery efforts have assisted in sustaining the species through changing conditions by addressing major limiting factors for each ESU and DPS. With the exception of Puget Sound steelhead and Central California Coast coho, all ESUs and DPSs with ten or more years of abundance data are currently stable or increasing.

NMFS has placed great emphasis on the recovery of Pacific salmon and recognizes the cultural, ecological, and economic significance that salmon play throughout the west coast. In the past several years, threats to Pacific salmon resulted in a consecutive three-year closure (2008–2010) of the once-thriving Pacific salmon fishery off the state of California. While this was a Magnuson-Stevens Conservation and Management Act closure, former Governor Arnold Schwarzenegger's Administration estimated that the closure of the salmon fishery in California in 2008 and 2009 resulted in the loss of more than \$500 million and cost nearly 5000 jobs, demonstrating the value of healthy salmon fisheries.

NMFS has achieved substantial recovery benefits for Pacific salmon through grant expenditures made under the Pacific Coastal Salmon Recovery Fund (PCSRF), established by Congress in fiscal year 2000 to protect, restore, and conserve Pacific salmonids and their habitats, and to address the impacts of the Pacific Salmon Treaty Agreement between the United States and Canada. Under PCSRF, NMFS provides funding to states and tribes of the Pacific Coast region (California, Nevada, Oregon, Washington, Idaho, and Alaska) to implement habitat restoration and conservation projects focused on improving the status of salmonid populations. Over the past decade, the PCSRF has had a positive impact on both salmon recovery and local economies. A 2009 study by the Ecosystem Workforce Program of the University of Oregon, entitled "A Preliminary Estimate of Economic Impact and Job Creation from the Oregon Watershed Enhancement Board's Restoration Investments" assessed the potential economic and employment impacts for watershed restoration activities proposed by the Oregon Watershed Enhancement Board. That study found that its proposed \$40 million investment in watershed restoration projects would create or retain nearly 600 jobs and generate over \$72 million in total economic activity in Oregon and leveraging additional funding could create or retain an additional 570 to 885 jobs and \$71 to \$110 million in additional total economic activity.¹ An extrapolation of these figures indicates that every \$1million invested in watershed restoration results in the creation of 29–37 jobs and a total economic impact of \$3.6–4.5 million.

Key accomplishments for PCSRF funded activities include:

- PCSRF projects have restored, protected, and made accessible nearly 870,000 acres of habitat. Degraded habitat is considered a major limiting factor in all areas where salmonid populations are listed along the Pacific Coast.

¹ <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10791/bp13.pdf?sequence=1>.

- Over 5,300 miles of stream have been opened by PCSRF projects since FY 2000.
- Nearly 240,000,000 fish have been marked supporting efforts to gather data for improved stock identification, more accurate fish abundance estimates, and more effective management of selective fisheries on hatchery fish. These markings improve harvest opportunities and provide economic benefits to communities throughout the region.

Next Steps: Improving the Implementation of the ESA

Regulatory Improvements. Although we have made significant progress in recovering some species, NMFS and FWS recognize that we can make implementation of the ESA more effective and efficient. In that regard, NMFS and FWS have been working cooperatively to improve the implementation of the ESA. In 2009, the NMFS and FWS sought public comment on potential changes to the Section 7 inter-agency consultation joint regulations. In response to these comments, to reflect lessons learned since these regulations were last updated in 1986, and as part of the Department of the Interior and the Department of Commerce's implementation of Executive Order 13563, "Improving Regulation and Regulatory Review," NMFS and FWS are developing joint regulations to update the ESA Section 7 implementing regulations. Specifically, we are working to define "destruction or adverse modification of critical habitat," which is used to evaluate whether and how federal activities can occur in critical habitat, and clarify the scope and content of the incidental take statements that are developed following a formal Section 7 consultation. These regulatory changes would make the Section 7 consultation process more consistent. In addition, clarifying the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult, will provide greater flexibility in the quantification of anticipated incidental taking. Ultimately, this could reduce the burden of developing and implementing biological opinions without any loss of conservation benefits.

The regulatory component of this initiative also includes updating the regulations governing the process for designating critical habitat for listed species to design a more efficient, defensible, and consistent process and developing additional incentives for voluntary conservation actions under the ESA.

Increased Cooperation with the States. Section 6 of the ESA recognizes the unique role States play in wildlife conservation. In recognition of the special and unique relationship among the States, FWS, and NMFS in protecting and managing fish, wildlife and plants, the NMFS and FWS have created a Joint Federal/State Task Force on Endangered Species Act Policy. The Task Force serves as a forum to cooperatively identify and address issues of national significance and to jointly develop recommendations concerning those issues in implementing the ESA. As part of this Task Force's activities, the NMFS and FWS have reaffirmed the statement of joint policy, "Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities" (Federal Register, July 1, 1994, vol. 59, page 34275), which outlines the process for cooperating with, and seeking the input of the States in prelisting conservation activities, listing decisions, interagency consultations, and habitat conservation planning.

Increased Public Involvement. NMFS also recognizes that some species recovery activities are particularly controversial to the public and has taken steps in these circumstances to increase outreach to affected communities to explain our underlying conclusions about activities' impacts on protected species. Additionally, while all our decisions are guided by the best available science, we understand that the science related to many of our decisions evolves rapidly and as such have engaged external scientists in review of some of our broader-reaching consultations or decisions. In short, we understand that, by engaging affected communities/industries in our decision-making, we can achieve enduring species recovery success.

Conclusion

In conclusion, it is important to note that the ESA should not be evaluated solely by the number of species that have fully recovered and been removed from the list of threatened and endangered species. The ESA has been successful in stabilizing endangered and threatened species by addressing threats that caused their decline and promoting conservation programs that are designed for their recovery. By strengthening partnerships with states and others and maintaining our research and management efforts, we are best suited to promote the ecological, cultural, and economic benefits inherent in many of our listed species.

Thank you again for the opportunity to testify today. I would be happy to answer any questions.

The CHAIRMAN. Thank you, and I particularly thank your last sentence there, and the reason I say that, I stated at the outset this is going to be the first of a number of hearings, and I just want to tell you that in all likelihood you will have another opportunity in the future, and I look forward to that as much as, Mr. Schwaab, you said you look forward to it very cheerfully.

I have a question for both of you, and the issue as you know of this hearing was the litigation aspect of it. We will pursue other areas in the future. But the WildEarth Guardians' 2010 annual report lists the U.S. Fish and Wildlife Service and the U.S. Forest Service and the EPA and sources of grants that they use for their programs. Other organizations, including Trout Unlimited, have received funding directly or indirectly from NOAA.

Can each of you describe the amount of grants that your agency distributes each year to entities that ultimately file ESA-related lawsuits against the Federal government? And if you do not have that right now, give me a general idea and pursue that. Mr. Ashe.

Mr. ASHE. Mr. Chairman, we can get that information for you for the record. I cannot even put an estimate on it, but I would say that people that sue us include environmental organizations, it includes states, and we give over a billion dollars a year in grants to our state partners and they too are among the people who take us to court on occasion. And so, as I said, that would reach just about the entire breadth and depth of our partners in conservation if we looked at litigation as a potential consideration in our grant-making.

The CHAIRMAN. Mr. Schwaab?

Mr. SCHWAAB. Mr. Chairman, I am in exactly the same position as Mr. Ashe, and we would have to provide you some information for the record.

The CHAIRMAN. Well, let me make an editorial. I am not asking you, because this is a policy question, but it strikes me, recognizing that tax dollars that go to grantees is fungible, and so on the one hand, in many respects, you could argue, and I think very logically, that grant money is used to bite the hand that feeds it so to speak, and I just think if you were to walk out into any main street in America and say do you think it is right to give grants to entities that turn around and sue the Federal government regardless of what that percentage is, do you think that is correct, and I think that probably in most cases you would not get an affirmative answer that that is the correct thing to do, yet that is where we are. So that information that you give us would be very, very helpful I think in that regard regarding the way that I see this and probably most Americans see it.

One issue, we heard about the gray wolf and of course we amended the Endangered Species Act as it relates to the gray wolf, and when that recovery act was put in place all of Washington and Oregon were listed together. Now Washington, well, I know Washington, I can't specifically say Oregon, but I know Washington now that area is separated by a highway. Now, if it is so hard to make a delisting in a larger area, how is it going to be easier to make a delisting now when we are separating those areas by highways?

Mr. ASHE. Mr. Chairman, we made a delisting determination based upon the distinct population segment that we had listed, and

so when we delisted the wolf we delisted those portions of Oregon and Washington that were within that distinct population segment, and so that leaves, as you know, the western two-thirds of the state wolves potentially in a listed status.

We are currently doing a status review for that area and so what we would do is again look at the question of whether that constitutes a separate and distinct population unto itself, and if not, whether we should consider delisting the wolf in that portion of the state. The State of Washington has just developed a very strong wolf management plan for the wolves in Washington, so we are very much encouraged by the professionalism of the state.

The CHAIRMAN. Would that action that you just described be subject to litigation?

Mr. ASHE. It would be.

The CHAIRMAN. It would be subject to litigation.

Just to follow up, and I will make an editorial comment, and this follows the line of questioning of Mr. Lamborn in the last panel. The gray wolf, as you know, is thriving in two other states, and presumably it is of the same species. You talked about subspecies. I might have a philosophical argument with that. But again, if you walk down the street of anybody in America and say the gray wolf, which resides in the Pacific Northwest, is that part of a larger same species, I think you would probably in more cases than not get an affirmative answer that it is.

So my time has expired. I recognize the gentleman from the Northern Marianas, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman, and good afternoon, gentlemen.

I have a question for you and I will go directly to Mr. Schwaab actually, and thank you what you do, sir. I met with your deputy regional director yesterday. I met one of your staff from Oregon, yes, from Fish and Wildlife, and I asked him for something. I would appreciate a response to that eventually.

But Mr. Middleton, one of our earlier witnesses who is a lawyer, said earlier that hatchery and wild salmon should be counted together. So, if the salmon population, for example, were composed completely of hatchery fish, wouldn't it be more vulnerable to collapse, causing these devastating impacts to fishermen and to the coastal communities?

Mr. SCHWAAB. Thank you, Mr. Sablan. If I could just expand a little bit on some of what was discussed. I mean, the short answer to your question is yes, hatchery fish without the genetic diversity that naturally occurs could lead to increased vulnerability and risk, particularly given the kinds of natural variability and oscillations that occur over periods of time that we heard referenced earlier.

I would say that we do in many cases and have over the years worked very closely with hatchery operations to improve the rearing methods with respect to the kinds of genetic diversity that you seek that would allow and does allow in many cases hatchery fish to be counted in some of these listing and recovery decisions. So the situation is not quite as cut and dried as hatchery fish don't count. Appropriately reared and appropriately diverse genetically fish do count in many cases for the kind of work that we are talking about here today.

Mr. SABLAN. All right, thank you.

Let me ask you, Mr. Schwaab and then Mr. Ashe, the same question. Is there a direct relationship between your budgets and your ability to protect species? If you were provided with more funding, for example, would you be able to do more to recover species and work with the states and the territories and stakeholders to implement the goals of ESA?

Mr. SCHWAAB. Yes, sir. In addition to of course the listing and recovery planning discussions that have been much in front of the Committee here today, we work extensively both directly and with partner organizations, including states, tribes and territories too, to foster habitat recovery, habitat restoration and protection that is sort of the underlying foundation on which all of these species protection and recovery efforts depend. We have worked very hard and frankly struggled to provide the kind of funding necessary, particularly to support partners in some of those habitat restoration efforts.

Mr. SABLAN. Thank you. Mr. Ashe?

Mr. ASHE. I would agree, and I would point you to the President's proposed 2012 budget, and I think in the President's budget we proposed increases across the fabric of our programs that would support endangered and threatened species recovery both within our endangered and threatened species program but also in areas like the state and tribal wildlife grants. The President proposed \$95 million for the state and tribal wildlife grants so that it would help continue to support and expand capacity within our state and territorial partners and also full funding for the land and water conservation fund so we would have the ability to go into great landscapes like the Rocky Mountain Front in Montana and work with the ranching community there to put easements on top of their property so they can continue a way of life, but we can also work with them in the conservation of species like the grizzly bear and the bull trout.

Mr. SABLAN. Yes. My time is running out, so let me, Mr. Ashe, let me continue with you. Mr. Miller earlier, who was seated in the chair right next to you, with the Public Utility District No. 2, Pacific County in Washington State, he earlier said that hoping to avoid repeating what happened with the Radar Ridge Energy Project, is the Radar Ridge the exception or the rule, and do you have any examples of how consultation processes on renewable energy projects went smoothly?

Mr. ASHE. I do believe Radar Ridge is quite the exception. I think we had a situation there where we had a project proponent who proposed a project in absolutely the worst location they could propose it in from the standpoint of marbled murrelets and then presented us with a timeframe with which we simply could not work within and asked us to do a categorical exclusion under the National Environmental Policy Act which we could not support administratively. And so I think that does represent the exception.

In my testimony we make reference to the Ruby Pipeline, which will employ more than 5,000, is employing more than 5,000 Americans now in the construction of that project. That is an example of where an applicant came to us early, worked with us diligently and got the approvals that were necessary to put that project on the

ground. In my oral statement, I mentioned the Ivanpah Project, solar project, which was another example of a very difficult project but which we were able to get across the finish line because we had an applicant who was willing to work with us and do what was necessary.

The CHAIRMAN. The time of the gentleman has expired. Maybe we ought to throw the Keystone Pipeline in there since we are talking about pipelines. The gentleman from Nevada, Mr. Amodei.

Mr. AMODEI. Thank you, Mr. Chairman.

Mr. Schwaab, coming from a state without a coastline, you can go ahead and relax for the next five minutes, OK?

Mr. Ashe, thank you for coming today. I was reviewing your statement and I want to thank you for including the benefits of conservation, talking about some economic data in there, and you had some stuff talking about folks who fished, folks who hunted, that sort of thing, but I didn't see any tie in there to Federal lands. Was that just generic data for the U.S. or was there a tie to Federal lands in there?

And let me tell you why I ask the question, and it is not going to come as a surprise to you, but as a district that is 85 percent owned by the Federal government, many of your partners on the Federal side, I just wanted to see if there had been a look at what the impact was, especially in a jurisdiction like that district which is so pervasively under Federal ownership.

Mr. ASHE. The data that was referenced is the survey, five-year survey on fishing and hunting, and that is all lands across the country.

Mr. AMODEI. OK. Thank you. And I want to thank you for mentioning that what us old folks in Nevada call the sage hen, but I believe back here it is known as the sage grouse, for your continuing work on that and look forward to continuing that with you.

There was some discussion earlier about conservation plans, and these are my words, nobody else's, but how living of a piece of your management tools they are, and I will do my own homework, won't take this time, but how much of what you do in conservation plans is a result of existing statute in terms of the ESA, or is that pretty much handled by regulation or local policy, or what is the basis for when you revisit, if there are triggers for revisitation, just how that process works.

Mr. ASHE. You mean if we delist a species?

Mr. AMODEI. I am just talking about modifying the plan because we had a lot of discussion earlier about listing. It is a 150-year timeframe, and that is what it is. We didn't get there overnight and that sort of stuff. So if somebody was interested in saying, hey, congratulations, and by the way I was gratified to see that at least for the examples it is like those were meeting mission if you will, whether there is any sort of automatic trigger or what the appropriate mechanism is, if it exists in statute, for saying, hey, Mr. Director, can we take a look at the XYZ species based on the information we believe is available at the moment.

Mr. ASHE. Well, with regard to species, we do five-year status assessments, so we look at the status of a species every five years. With regard to conservation agreements, so when we are working with private landowners or companies and we put together a can-

didate conservation agreement with assurances the important part is the “with assurances” part, and that is that if that species is listed, so say sage grouse, if we were to list the sage grouse and we had a candidate conservation agreement with assurances with a landowner, then they have assurance that what they are doing in the context of their agreement is good for the duration. We don’t come back to them at a later point in time and do a reassessment and ask them to do more.

Mr. AMODEI. OK. And finally you had mentioned in your earlier testimony how important it is the timing of somebody showing up to you with a potential project in terms of working from the inception. Is that something that just happens to be folks who are plugged in appropriately that show up early in your offices out there, or is there anything, or would it be helpful I guess to have a tool that requires a preapplication, whatever the right nomenclature meaning is, to get on the radar screen if you will early as opposed to you want it bad, you get it bad?

Mr. ASHE. Right. It is always better to have better information, and I think the tragedy in the Radar Ridge case is we had that information, so it was clear that that project was being proposed in an area that had been identified in the state’s habitat conservation plan as an area of high importance for the marbled murrelet. But where we have that information, that is the most important thing. If we can get a project sited properly at the get-go, we are much more successful at getting the project across the finish line.

I mentioned landscape conservation cooperatives. That is one of the tools that we have proposed to pull together states or data, working with our state and other partners so that we will have better capacity in the future to do just that and start, as Bob Abbey in the BLM says, be smart from the start.

Mr. AMODEI. Thank you.

The CHAIRMAN. Will the gentleman yield the final minutes?

Mr. AMODEI. Yes.

The CHAIRMAN. Director Ashe, you said that that was a badly placed project here, and as a condition of Energy Northwest siting that project, they had to do extensive review with the Washington State Department of Natural Resources specifically on how it would interact with ESA and the marbled murrelet, and the results of that environmental assessment that was peer-reviewed I might add, peer-reviewed, the studies concluded that the project was not likely, not likely to have a significant adverse impact on the marbled murrelets or other sensitive species, and that was a peer-reviewed study.

So I just want to make that part of the record because your testimony suggested exactly the opposite, and this was a condition by which Energy Northwest had to proceed forward on the siting of this project.

The Chair recognizes the gentlelady from Hawaii, Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chair. Thank you both for being here.

In Administrator Schwaab’s position statement, he says that the NMFS and the U.S. Fish and Wildlife Services are to list species and to determine them to be endangered or threatened and to sub-

sequently protect those species and their habitats, and that is a mandate for both of your departments.

Now, in that light, when I reviewed Director Ashe's statement, Director Ashe, you talk about habitat conservation plans under the ESA, and then you also mention ESA conservation action plans with the Bureau of Land Management and various other parts of the Department. I am just curious as to whether these are specific terms of art and they refer to different kinds of conservation plans.

Mr. ASHE. A habitat conservation plan is a statutory term of art, so in Section 10 of the law where we are authorized to issue permits for incidental take associated with otherwise lawful activities, so if you are a private party and were undertaking an activity that was otherwise lawful and would take endangered species, we can authorize you to do that if you develop a habitat conservation plan to minimize the effects of that take.

And a candidate conservation agreement is an administratively created instrument that allows us to work with a Federal agency or another party to promote conservation of a candidate species before it gets on the list, so it is a way that we try to get ahead of the curve and try to deal with species conservation issues early.

Ms. HANABUSA. So when we hear the words "endangered habitat area", is that different from the habitat conservation plan when it is designated endangered habitat in other words?

Mr. ASHE. Critical habitat.

Ms. HANABUSA. Critical habitat, right.

Mr. ASHE. Critical habitat is another function of the law. When we list a species the law asks us to identify the critical habitat for that species, and generally the law commands us to do that. There are some cases in which we can decline to if we determine it is not prudent to determine critical habitat, but in general the law asks us to define critical habitat.

Critical habitat is not a protected area. It doesn't set up a refuge or a reserve of any kind. It simply is an indication of what are the physical attributes of habitat that are important for the survival and recovery of the species, and there are restrictions against Federal agencies for adversely modifying or destroying critical habitat, so it doesn't apply to private landowners unless they are applying to the Federal government for some form of assistance or authorization.

Ms. HANABUSA. So, in Administrator Schwaab's statement, he talks about the ESA and 16 U.S.C. § 1531 through 1543 that requires the list and then their habitat. So that is what you are talking about now, the endangered habitat. I mean the critical habitat. So now we have critical habitats which are just a designation, and then we have habitat conservation plans, and there is this ESA conservation action plan that you also referenced. So out of all of those, which is the most restrictive plan that one could be subjected to?

Mr. ASHE. I don't think it is—I mean, they are all actually—habitat conservation plan is a permissive plan, so when you develop a habitat conservation plan, it allows you to take, to do something that is otherwise unlawful to take an endangered species, so it is not a restrictive plan, it is a permissive plan.

A critical habitat is not a plan at all. It is simply a factual identification of habitat that is critical to the survival and recovery of the species, so it is not a plan, it is an identification.

A candidate conservation agreement I would say again is not a plan. It is an agreement between two parties, the U.S. Fish and Wildlife Service and the Bureau of Land Management or the U.S. Fish and Wildlife Service and a private landowner, and so those are voluntary agreements.

Ms. HANABUSA. Thank you. Mr. Chairman, my time is up, but could I request that they sort of give us a chart that I can easily follow?

The CHAIRMAN. Absolutely. I think that would be very, very helpful and I would ask you to provide that again for the full Committee, and we will certainly see that you all get it. That is a good suggestion.

Ms. HANABUSA. Thank you very much.

The CHAIRMAN. The gentleman from California, Mr. McClintock.

Mr. MCCLINTOCK. Thank you, Mr. Chairman.

Mr. Schwaab, I am sorry I wasn't here for your testimony, but I understand you are one of those folks who believes that fish hatcheries are a really bad idea because of the effect on natural selection. Would you elaborate on that?

Mr. SCHWAAB. Thank you, Congressman. Actually what I said a few minutes ago is that contrary to some of the earlier testimony there are a number of circumstances under which hatchery-reared fish can be and are included in listing and recovery decisions.

Mr. MCCLINTOCK. Well, that is certainly not true in my neck of the woods. Everything from the Klamath to the Sacramento Delta has been severely impacted by regulatory restrictions that could easily be met if we simply in the case of the Klamath, simply recognize the 5 million salmon smelts that are being produced every year at the Iron Gate Fish Hatchery, 17,000 of which are returning as fully grown adults to spawn, presumably after years of the laws of natural selection working on them, provides a much larger genetic pool for those forces to work upon, which is the very essence of natural selection.

Mr. SCHWAAB. So we have worked very closely with hatchery operators to improve the use of hatchery operation in a way that—

Mr. MCCLINTOCK. You are trying to tear down the Iron Gate Fish Hatchery in the name of declining salmon populations. That is what will cause the catastrophic decline in the salmon population.

Let me ask you this. What is the genetic difference between a hatchery fish and a fish born in the wild?

Mr. SCHWAAB. So you mentioned earlier, sir, some of the Pacific oscillations and the decadal cycles that we see at play, and I think one of the important things to recognize is that salmon species, in particular across the West Coast, have evolved over thousands and thousands of years under those kinds of oscillations and have developed genetic mechanisms and the kind of genetic diversity that allows them to rebound and recover as those changes occur.

Mr. MCCLINTOCK. Which are repeated in the genetic composition of the hatchery fish. I will put the question to you again. Is there

any genetic difference between a hatchery fish and a fish born in the wild?

Mr. SCHWAAB. There absolutely can be. It depends upon the percentage.

Mr. MCCLINTOCK. And then depends upon the laws of natural selection working on those genetic differences to improve the species. I mean, that is the whole essence of evolution.

Mr. SCHWAAB. But if you constrain that population down to where it largely emerges from a small set of parents, then you have naturally eliminated a lot of that genetic—that has evolved.

Mr. MCCLINTOCK. Would you then recommend that we destroy a fish hatchery such as I have just described in favor of improving the lot of salmon populations on the Klamath?

Mr. SCHWAAB. So I would recommend that where we are using hatchery-based fish to enhance natural populations that we do that in a genetically appropriate and responsible manner, and where we are using hatchery fish solely to enhance commercial fishing opportunity or recreational fishing opportunity that we recognize the limitations that those fish face in dealing with the kind of long-term declines that you referenced.

Mr. MCCLINTOCK. Well, there is no commercial attractiveness of the Delta smelt, and yet meeting ESA requirements in the Sacramento Delta have absolutely decimated Central Valley agriculture. I am sure you are aware of that. Instead of imposing all of these extraordinarily expensive restrictions, which have by the way had little or no effect on the Delta smelt population, simply providing the fish hatcheries necessary to enhance that population would assure an abundance of this species with the genetic diversity necessary for the laws of natural selection to apply.

Mr. SCHWAAB. I think you have the potential in the use of hatcheries for restoration if you are attentive to those genetic diversity challenges.

Mr. MCCLINTOCK. I think here is the nub of the problem. There is a certain lack of reasonableness, a certain lack of flexibility and absolutism to the point of political extremism with which these laws are being applied that are devastating our economy and doing little, if anything, to improve the populations which we have within our power to improve simply by doing what we did to bring back the buffalo population, the California condors, African elephants. You can go through a long, long litany I suppose dating back to the earlier testimony involving Noah's ark. Noah did bring those animals into his care, brought them into captivity. I don't recall anything specifically in the text about it, but I have to assume since there was two of everything there was some breeding going on in that state of captivity, and it worked out just fine.

Mr. SCHWAAB. I must say, sir, that is a different Noah.

The CHAIRMAN. The time of the gentleman has expired. The gentleman from Florida.

Mr. RIVERA. Thank you, Mr. Chairman. I recognize as well the importance of preserving wildlife for future generations of Americans. However, I also believe there are some areas in the Endangered Species Act that need to be enhanced and perhaps improved upon, so I thank the Chairman for holding this important hearing. My statement and my questions will be directed to Director Ashe.

I am honored to represent Everglades National Park along with Big Cypress National Preserve in my congressional district. The concern I have heard from some in my district and particularly conservationists is that the U.S. Fish and Wildlife Service is more focused on individual species management as opposed to multispecies management and that the Service has been practicing what I have heard referred to as defensive management out of fear of litigation, which often occurs, and let me provide you just an example of that.

Behind me we have the Everglades snail kite on the left and the Cape Sable Seaside sparrow on the right. Both are endangered species which live within the Everglades. The kite eats snails obviously and requires high water flows for its food source to flourish. However, the sparrow needs low water flows during its nesting season. The management of the habitat for these two endangered species is very complicated because the species have competing needs.

Efforts to assist the sparrow have dramatically reduced the snail kite's primary food source in its critical habitat, the Florida apple snail. As a result, I have been informed that the population of the snail kite has reduced from 3,400, approximately in 1999, to approximately 660 now, but the sparrow is currently not in its traditional grounds, which no longer exists, having moved into areas near the kite. Conflicting lawsuits have resulted, slowing down progress in Everglades restoration projects that will assist other endangered plants and wildlife.

So I support preserving the sparrow, but we shouldn't be creating a false habitat when it imperils other endangered species and the overall ecosystem of the Everglades. The priorities should be trying to restore balance to the native environment through multispecies management and where possible restore the habitat and numbers of the sparrow.

So I want to ask, first of all, are there other instances among terrestrial or marine listed species with similar conflicts, and if so, how has the Service resolved these conflicts?

Mr. ASHE. We do deal, Mr. Rivera, and I know you meet a lot of people, but I remember meeting you out on the Tamiami Trail with Senator Salazar, and in the Everglades in particular, we have dozens of listed species, and so what we are trying to do is restore a system that has been greatly modified by human activities, and so the restoration of that ecosystem is made difficult by the fact that we have many listed species, some of whom can compete for the same habitat.

So I agree with your objective that what we need to do is we need to restore an Everglades ecosystem that has balance and wherein we can do the best job that we can do to ensure the survival and recovery of a diversity of species, including the two that you mentioned. It is a difficult task, as you know.

We have a similar situation, I know Chairman Hastings is familiar with it, with the spotted owl. You mentioned the barred owl. They are not two listed species, but we have a listed species which is declining and a species that is moving into its territory and competing with it for the available habitat, and so increasingly we are seeing these kind of what we would call intraspecific competitions

between species. They make our job more difficult, but the task remains.

Mr. RIVERA. One other difficult issue that we have in the Everglades is also regarding the Burmese python, a snake that you will see behind me measured 17 feet long, and an analysis performed on the stomach contents of this nonnative snake found the remains of various endangered birds and mammals native to the Everglades. How does the Service handle the preservation of the native system when these invasive species are present?

Mr. ASHE. Thank you. I think the Burmese python is indicative of the great challenges. The Service of course has proposed a rule to list the Burmese python as an injurious species under the Lacey Act, which would prevent its further importation into the United States. We are working in partnership with the State of Florida to control the existing populations of Burmese python. It is a great challenge, but your question has underscored two of the great challenges that I mentioned before in endangered species conservation, which is the habitat and managing and restoring the habitat and controlling exotic species invasions. Those are two of the greatest challenges that are facing us today, and the Burmese python is indicative of that.

Mr. RIVERA. Thank you very much. And, Mr. Chairman, just finally I would like to let you know that several of my Florida colleagues and I recently wrote to the Administration requesting that they finalize their listing of nine species of large constrictor snakes as prohibited injurious species under the Lacey Act, and I would like to ask unanimous consent to allow that letter to be submitted for the record.

The CHAIRMAN. Without objection, it will be part of the record. [The letter submitted for the record by Mr. Rivera follows:]

THOMAS J. ROONEY
16th District, Florida

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Congress of the United States
House of Representatives
Washington, DC 20515-0916
November 22, 2011

COMMITTEE ON AGRICULTURE
CHAIRMAN — SUBCOMMITTEE ON
LIVESTOCK, DAIRY AND POULTRY
COMMITTEE ON ARMED SERVICES
SELECT COMMITTEE ON INTELLIGENCE

The Honorable Barack Obama
President of the United States
The White House
1600 Pennsylvania Ave, N.W.
Washington, DC 20515

Dear Mr. President,

We respectfully request that you direct the Office of Management and Budget (OMB) to release a long-standing proposal by the U.S. Fish and Wildlife Service to list nine species of large constrictor snakes as prohibited "injurious species" under 18 USC § 42 better known as the Lacey Act. The nine snakes we are seeking to have listed are the Burmese python, northern African python, southern African python, reticulated python, green anaconda, yellow anaconda, Beni or Bolivian python, DeSchauensee's anaconda, and boa constrictor. Time is of the essence and this rule needs to be finalized immediately.

South Florida has been invaded by non-native wildlife, which disturbs our fragile ecosystem and preys on native species. The Burmese Python is one of the most dangerous examples of a non-native predator that has established a thriving breeding population in Florida. It preys on native wildlife, many of which are threatened or endangered. In addition to the safety threats and havoc the snakes are inflicting, there is a very real economic impact of their invasion. We are spending billions of dollars to restore the Everglades and if additional invasive snakes are allowed to establish themselves, the native wildlife will be decimated. Our local water management district, the State of Florida, the U.S. Fish and Wildlife Service and the Everglades National Park have already dedicated time and resources to eradicating these invasive snakes. Their funding and ability to continue eradication programs, while still performing their core missions, would be unsustainable.

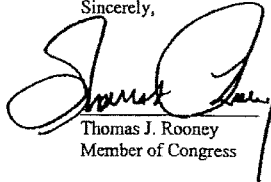
Unfortunately, the threat these snakes pose goes beyond our environment and wildlife. There have been numerous preventable human deaths and injuries caused by large constrictor snakes that are kept in captivity. These are dangerous predators that are not domesticated pets; they can grow to over 20 feet in length and weigh over one hundred pounds. They are aggressive hunters and unfortunately we have all seen the news of preventable deaths of both children and adults caused by these snakes.

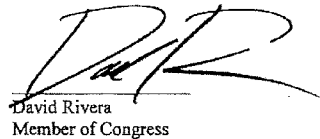
After five years of study, preparation and analysis, the proposed rule would prohibit the private importation of these nine deadly snakes and remove them from interstate commerce. Listing the snakes will allow for the continued use for display, research and educational purposes with a Fish and Wildlife Service permit.

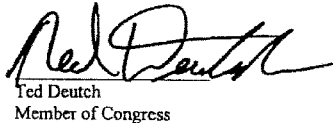
The threat of further introduction and establishment only increases the longer we await the listing. In 2009, three years after the rulemaking was initiated, evidence began to surface that the northern African rock python was establishing in South Florida. State and Federal agencies are already working with limited resources to control the existing populations. By listing the nine species we can begin to tackle the problem from the source of introduction.

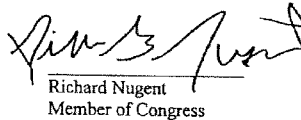
In accordance with all applicable rules and regulations, we urge OMB to promptly release USFWS's proposed rule on large constrictor snakes. Thank you for your kind consideration and we look forward to your timely response.

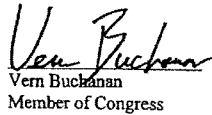
Sincerely,

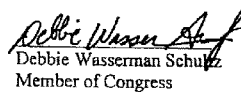

Thomas J. Rooney
Member of Congress

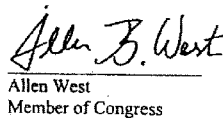

David Rivera
Member of Congress


Ted Deutch
Member of Congress


Richard Nugent
Member of Congress


Vern Buchanan
Member of Congress


Debbie Wasserman Schultz
Member of Congress


Allen West
Member of Congress

The CHAIRMAN. I thank the gentleman. The time of the gentleman has expired, and the Chair recognizes the gentleman from New Jersey, Mr. Runyan.

Mr. RUNYAN. Thank you, Mr. Chairman. Gentlemen, thank you for your testimony.

In Fiscal Year 2011, the Fish and Wildlife Service indicated that it spent 75 percent of its budget for resource management allocation for critical habitat in listing on, and I quote, "substantive actions required by court-ordered or settlement agreements resulting from litigation." Mr. Schwaab, can you identify what percentage of the NMFS's budget was spent on the same actions related to court-ordered settlements and litigation?

Mr. SCHWAAB. Thank you, Mr. Runyan. I can give you some data. Most of our listing activity has been not driven by court-ordered action. However, they have originated from external petitions. I can tell you that in Fiscal Year 2011 we expended about \$8.8 million on listing activities, \$34 million on interagency consultations and \$37 million on recovery planning and implementation. Many of those expenditures had some relationship to ongoing court challenges, but what I can't do is parse them out very explicitly in relation to particular challenges or in any more detail than that.

Mr. RUNYAN. So you are saying it is not possible to extract those numbers?

Mr. SCHWAAB. Well, so, for example, when we are involved in an interagency—there are many interagency consultations that we are engaged in that are either driven by or affected by some kind of litigation activity, and the challenge would be in trying to sort of—most of that activity would occur in some fashion anyway. There may be additional activities that are required as a result of court action or there is activities that might be directed in a certain way, but to parse them out in that way would be hard.

Mr. RUNYAN. Well, how about just directly from a court-ordered litigation?

Mr. SCHWAAB. Mr. Runyan, we could go back and try to see if there were a way to parse that out, but I don't think as I sit here today I could give you a correct answer.

Mr. RUNYAN. I would appreciate it if you would try and submit that to the Committee because, that being said, obviously at the bottom of all this is if you have a true stock assessment it is really hard to argue anything, and I think that is kind of what is going on here today is we are putting a lot of money and paying out litigations and not having the solid science to really fend off a lot of that stuff, and I think this Committee has dealt with that a lot throughout this year.

Mr. SCHWAAB. So just to clarify, you know, most of the court-related listing activity is really about schedule and adhering to timeframes. Most of the recovery planning activity and more explicitly some of the consultations that relate to other agency actions ultimately become the focal point of some court action, but only to drive one outcome versus another, and it involves particularly that sort of negotiation if you will and interagency discussion around reasonable and prudent alternatives, which does take into account a lot of socioeconomic factors.

Mr. RUNYAN. And I understand that, but I think in a way I am kind of saying it is kind of a diversion of funds if you kind of catch where I am coming from, but I also had another question dealing with the Atlantic sturgeon along the entire East Coast. You have never truly, and I know you will rebut, you have never truly conducted a fishery stock assessment, and I know you did a survey in 2007, but there were no true stock data inputs, and I just want to see your justification for proposing the sturgeon to be on there even though you didn't bother to check this since the last time you decided not to list it in 1998.

Mr. SCHWAAB. Thank you, Mr. Runyan. So I am not suggesting that we have done a complete stock assessment on Atlantic sturgeon. When we receive a listing petition we undertake that evalua-

tion based upon the best scientific and commercial information available. We did find there was reasonable merit in going through a full listing evaluation. That listing evaluation then entails putting together a team of interagency scientists to look at the best available information. They did use the two available population estimates, one for the Hudson River population from 1998 from the New York Department of Environmental Conservation and one from the Altamaha River from 2006 by scientists at the University of Georgia. They ultimately formed the primary pieces of information that were used in proposing a listing decision, which was put out for public comment and is still under review pending final action within the Agency.

Mr. RUNYAN. Thank you for that.

The CHAIRMAN. The time of the gentleman has expired.

I just want to say I think the line of questioning that Mr. Runyan is pursuing is very, very important to the decision we are making because the title or the purpose of this hearing was to look at litigation and the costs associated with that as it relates to the Endangered Species Act. Congress obviously sets the policy and the Executive Branch carries it out, and part of our oversight is to see how well that is being done.

So I think the line of questioning that Mr. Runyan is suggesting is very important and, Mr. Schwaab, you respectfully said you would try to do that. I would ask you to do that, and if you cannot, be open and transparent with us where the problems are and we will try to work with you to get those answers because I think that is very important.

This will conclude the first in a series that we will take a long and hard and fair look at the Endangered Species Act because we want to see how well it is working, where it is failing and where it is falling short.

I want to emphasize this point. It has been over two decades or nearly two decades since we last reauthorized the Endangered Species Act, and to use an analogy I used earlier, if you walked out to any main street in America and said that there is an Act on the books that has not been reauthorized for 20 years, should that Act still be in place, and I bet you would get well over 95 percent of the people say, for goodness sakes, if it is not reauthorized, why is it on the books?

Now the obvious answer to that is the process by which we have done every year and kicked the issue ahead. I totally recognize that. But this is a common sense issue and common sense I think answers that the American people want when we look at these acts that have a lot of controversy in certain parts of the country, and that is what we are endeavoring to look at when we have these hearings here.

So, with that, I want to thank the witnesses, and Mr. Schwaab, again, in your opening statement, your last line was an open invitation. Believe me, you will have that invitation in the future, and I appreciate your volunteering for service again, and, Director Ashe, you may be in that same thing.

So, with no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 1:35 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows:]

**Statement of The Honorable John Fleming, a Representative in Congress
from the State of Louisiana**

Mr. Chairman, I want to thank you for starting this thoughtful conversation about the positive and negative features of the Endangered Species Act. It is particularly appropriate that today we will be discussing the impact that litigation has had on what many consider the most powerful environmental law in this nation.

It has been more than 18 years since the authorization for the Endangered Species Act expired. During the past two Congresses, there wasn't a hearing on how to improve this Act.

Based on this lack of attention, you would expect that the Act was working perfectly and the U. S. Fish and Wildlife Service and the National Marine Fisheries Service were making great strides in meeting the fundamental goal of this law which is to recover listed species.

While there are a number of non-governmental organizations who love the Endangered Species Act because they are able to receive millions of dollars by filing hundreds of lawsuits against the Federal government, it has been a failure for the species they have petitioned to list.

Let's examine the record. There are now 1,383 species in the United States that have been listed as threatened or endangered. Of that total 21—let me repeat—only 21 species have been declared recovered and removed from protection under the Act. That is a recovery rate of 1 percent. By any objective standard, the Endangered Species Act is failing to meet its statutory obligations and a modernization of this Act is long overdue.

Before coming to Congress, I had a family medical practice in Minden, Louisiana. If after more than 30 years of practice, only 1 percent of my patients had recovered from their illnesses or injuries, then I would have lost my medical license long ago. Yet, we continue to spend millions of tax dollars year after year, ignoring the problems and ignoring the fact that federal courts have been running the Endangered Species Act Program for nearly twenty years.

I want to compliment Chairman Doc Hastings for his leadership and for his commitment to carefully examine this program in the coming months. Even Secretary of the Interior Ken Salazar has stated as recently as July 6th that: "We need to have an endangered species program that does in fact work. There are changes and improvements that can be made to how we deal with endangered species."

I am prepared to work with my colleagues on both sides of the aisle to closely examine the Endangered Species Act and make common sense improvements.

What I am not prepared to do is continue to ignore the problems and defend the indefensible. The Endangered Species Act was designed to do more than just list species—its fundamental goal is to recover species so they can thrive in the future and coexist with humankind..

Statement of Felice Pace, Coordinator, Access for All

On Tuesday December 6th the Resources Committee of the US House of Representatives held the first in a series of hearings on the Endangered Species Act. While this hearing was intended to focus on ESA litigation, testimony, questions and answers included a wide range of issues related to—and even some extraneous too—the announced subject matter. The hearing record remains open until December 16th. This testimony is submitted for the hearing record.

Because I am a university trained economist (BA, Yale University, 1969) and because Chairman Hastings said in his opening statement that he "wants to hear more about how the ESA is impacting. . . job creation and economic development," I will focus these comments on the question of economic impacts of the ESA.

The question of the ESA's economic impacts came up during the hearing in three key statements:

In his opening remarks, Chairman Hastings said:

The litigation mindset that is consuming the Endangered Species Act has had significant job and economic impacts throughout the West—unnecessarily pitting people against species. During these challenging economic times, America cannot afford runaway regulations and endless lawsuits.

In the Pacific Northwest, the ESA-related litigation touches nearly everyone—be it through federal judges determining the fate of irrigated agriculture and clean renewable hydropower dams, the impact of the listed spotted owl on timber communities and jobs, the fear of litigation that has

blocked renewable wind projects, or uncertainty of whether predatory wolves are endangered on one side of a highway but not the other.

During the question and answer period Chairman Hastings spoke about the economic impact of the ESA. He reached back to the 1990s and the Northern Spotted Owl conflicts. Chairman Hastings claimed that the Northern Spotted Owl ESA listing had devastated Northwest economies and led to the “destruction” of the timber industry in the region.

The third major reference to the ESA’s economic impact came from the testimony of Attorney Karen Budd-Fallen. Ms Falen’s statement included this:

Contrary to some belief, the implementation of the ESA has real impacts on real landowners, ranchers, farmers, businesses, employers and others who are a vital part of America’s present and future. Rather than saving species and conserving their habitats, the ESA is used as a sword to tear down the American economy, drive up food, energy and housing costs and wear down and take out rural communities and counties.

In the testimony below I examine each of the three claims:

1. “The ESA has had significant job and economic impacts throughout the West”

I have examined the economic literature on the subject of the economic impacts of the ESA. The overwhelming preponderance of extant studies has found either no significant impact or a positive relationship between ESA listings and standard measures of economic development.

One of the most on point studies is one conducted by MIT professor Timothy Meyer in 1995. Meyer examined “The Economic Impact of the ESA on the Agricultural Sector” and concluded:

The key observation from the tests is that all three time periods suggest a positive relationship between endangered species listings and state economic performance in the agricultural sector. Each additional listing of species is associated with an increase in agricultural gross state product during the period of roughly 0.05% to 0.09%. Even if it were real this effect is so small that it is of no policy interest. Moreover, the statistics suggest we would be wise to assume that no systematic relationship exists at all (i.e., the results are statistically insignificant). Nevertheless, this is strong evidence that the functional relationship between endangered species listings and agricultural performance cannot be negative as the opponents of the Endangered Species Act claim.

In 2006 Tim Kroeger and Frank Casey published “Economic Impacts of Designating Critical Habitat under the U.S. Endangered Species Act: Case Study of the Canada Lynx (*Lynx Canadensis*)” and concluded:

The agencies implementing the ESA generally do not quantify the benefits of designation in their economic analyses, arguing that uncertainties associated with monetary quantification of benefits are too large. We examined that argument in a case study of critical habitat designation for the Canada lynx. We found that well-established valuation methodologies allow quantification of many of the benefits of designation. We further found that expected benefits of designation surpass expected costs in seven of our eight scenarios. This underscores the importance of including benefits in economic analyses of critical habitat designation. Otherwise, conservation decisions tend to be dominated by cost considerations, which may result in sub-optimal choices for society.

The inescapable conclusion from examination of the economic literature is that—at the level of states, regions and the nation as a whole—rather than being the job-killer which opponents claim, the Endangered Species Act has either had no significant economic impact or has had a positive impact. Based on the empirical studies in the literature, many of this nation’s independent economists have concluded that the ESA is a job creator.

2. The Northern Spotted Owl’s ESA listing “devastated” the Pacific Northwest and “destroyed” the timber industry in the region.

The claim that the ESA “destroyed” the timber industry in the Pacific Northwest is, of course, hyperbola. The timber industry remains a major industrial sector in the Northwest and Northern California. But the general claim of negative impacts to the economy is also not backed up by economic data. While jobs were lost in the timber industry, the region’s economy diversified and is now more resilient to changes in the broader economy.

I’ve lived, worked and raised a family in Northwest California within the range of the Northern Spotted Owl since 1975 and I have studied the region’s economy

in depth. In the twenty years before restrictions on federal land in response to the Owl's listing, unemployment in rural Northwest California counties was consistently double the rate for California as a whole. Employment was erratic as timber dependent economies weathered boom and bust housing markets. Since protection for the Owl reduced logging on the region's national forests, however, rural county unemployment rates have averaged only 50% above the state rate. . .not the 100% that was experienced previously. This indicates that these economies are better off now relative to the state as a whole and also that rural Northwest California communities are now much less impacted by boom and bust changes in housing markets.

From an economic perspective, the Northern Spotted Owl was a catalyst for economic diversification and increased economic resiliency, i.e. for positive economic developments within Northwest and Northern California communities.

Of course, the fact that the Northern Spotted Owl was a catalyst for positive economic developments—i.e. for the diversification of economies which were over dependent on a single, unsustainable, boom-bust industry—does not mean that there were no negative economic impacts. Indeed there were negative impacts. I've had friends and neighbors who are loggers and who have had a harder time finding work since federal timber sale levels were reduced. And I know mills and mill owners who went out of business because they were over-dependent on federal timber or could not afford to retool their plants for the second growth economy.

That said, the negative economic effects attributed to the Northern Spotted Owl ESA listing were not what the Timber Industry and many politicians claimed and still claim they were. Furthermore, these changes were going to come anyway once the Old Growth was liquidated. Finally, negative impacts were and are dwarfed by the durable positive economic impacts that resulted.

Unfortunately, positive economic news does not really matter much if yours is the job that was lost or if yours was the mill which closed. It remains a fact of life, however, that the closing of one Simplot potato processing plant in Idaho—not to mention the decision of a timber corporation to ship logs to China—causes more economic dislocation and more job losses than the Northern Spotted Owl caused on balance.

3. Budd-Falen claims

In her testimony and in her regular memos and guest opinions attacking the ESA Karen Budd-Falen repeats time and again that the ESA is devastating rural America. When, as in her testimony, Ms. Budd-Falen says that "*the ESA has real impacts on real landowners, ranchers, farmers, businesses, employers and others who are a vital part of America's present and future*" I can agree with her.

If the ESA is being implemented properly, those who own or control land which contains critical habitat for an ESA-listed species could have to change some of their practices to accommodate the species. I would argue that if we are going to have a healthy environment capable of sustaining economic well being maintaining and restoring the habitat on which biodiversity depends is a basic landowner responsibility. It is up to Congress, however, whether or not to provide compensation to those who shoulder this responsibility.

I do, however, reject the assertion that the ESA is putting a significant number of folks out of business and I challenge Ms. Budd-Falen to present the actual cases where her clients have been put out of business as a result of the ESA. Where is the data; where even are the case histories? Nowhere in her testimony—and nowhere in the hearing or in the hearing records that I've seen—is there one shred of evidence to back up Ms. Budd-Falen's claims of economic devastation.

What is true is that—in the rural West where Ms. Budd-Falen and I live—there is great fear of the ESA. This fear has been nurtured and encouraged by the Farm Bureau Federation, Ms. Budd Falen and others—including many of the West's rural legislators—for the past 30 years or so. The shrill claims of devastating economic impacts repeated over and over for so many years have had an impact.

Yes, many rural westerners do believe that the ESA is a job-killer and many fear the ESA coming to bear on them, their jobs and their property. But the fear is not reality-based. Furthermore, I think it is clear that those who would demonize the ESA for political or economic gain are responsible for ESA fear. If these folks really care about rural westerners they should not be cynically creating and manipulating these folk's fear.

I would like to also address the testimony submitted by Doug Miller, General Manager, Public Utility District No. 2, Pacific County. Mr. Miller described his district's experience with the ESA. I do not doubt or question his experience. I would ask, however, what was his expectation going in and was that realistic?

The agencies responsible for implementing the ESA have sufficient management tools in the ESA toolbox and they have additional tools which can be used to protect habitat and preclude the necessity for listings. But the existence of tools is no guarantee. Indeed tools can be used well or poorly with predictable results. Two key factors usually define the difference between effective and unsuccessful use of ESA planning and management tools:

- A conservation management plan is likely to fail if you try to use it to get around the law. It is ESA law—as passed by Congress and in accord with regulations adopted to implement the law—which remains the yardstick. If you don't meet the letter and spirit of the law, it is the obligation of the agencies to reject your plan and it is the mission of some other citizens to challenge that plan.
- If you don't have the right people in the room, you are asking for trouble. Attempts to get around the ESA law and the citizen groups which are dedicated to enforcing it have a high probability of failure; adopt such strategies at your own risk. If you want success in managing ESA species for which you have responsibility as a company or landowner, work with the organizations which are dedicated to preserving those species. Most of those organizations are ready and willing to work with you IF you are in good faith and intend to meet your legal obligations.

In conclusion, I would like to take note of the response of FWS Director Don Ash to a question from a member of the committee. When asked about his biggest challenge in implementing the ESA, Director Ash told the committee that habitat loss to development—not litigation—is the single greatest challenge facing the Service. Mr. Ash also defended the citizen suit provisions of the ESA stating that citizen enforcement holds government to the “highest standards.”

We—the American People—and you—our elected representatives—have a choice. We can continue the “War for the West”—including creating, encouraging and whipping up folks fears with wild and unsubstantiated claims of “devastation” at the hands of the ESA or “immanent extinction” for species. That would be the easy path we have come to know so well. Or we can choose to work together, using all the tools in the toolbox in good faith, to allay fears and work out solutions on the ground.

The ESA is a good law and it can work tolerably well for everyone if we—and by “we” I mean those both inside and outside of Congress—are willing to get out of the way and let it work.

On behalf of the Access for All network, I thank the Committee for the opportunity to submit testimony.

The following documents submitted for the record have been retained in the Committee's official files:

1. Budd-Falen, Karen, Owner/Partner, Budd-Falen Law Offices, L.L.C., Attachment, U.S. District Court “Stipulated Settlement Agreement.” (25 pages)
 2. Sucking, Kieran, Executive Director, Center for Biological Diversity, PowerPoint presentation (14 pages)
 3. Tutchton, Jay, General Counsel, WildEarth Guardians, Santa Fe, New Mexico, Eight documents submitted for the record (44 pages)
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**Statement submitted for the record by Alliance for Justice;
Center for Justice & Democracy at New York Law School;
Center for Law and Social Policy; Consumer Action; Con-
sumer Watchdog; and Sargent Shriver National Center on
Poverty Law**

During the House Committee on Natural Resources' recent hearing, "The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts," some members voiced concern over the awarding of attorneys' fees under the Equal Access to Justice Act (EAJA). EAJA, which was signed into law by President Carter and permanently funded by President Reagan, awards limited attorneys' fees and costs of litigation when a citizen, non-profit organization, or small business wins a case involving the federal government and can show that the federal government's position was not "substantially justified." We write to emphasize the importance of awarding attorneys' fees in ensuring that all litigants have access to justice. Without the ability to recoup such fees, parties who otherwise lack the means to challenge government abuse might not assert their rights, potentially leading to specific harms like senior citizens not receiving their Social Security benefits, veterans not receiving their disability benefits, more dangerous highways, and dirtier air and water. We urge Committee members to defend EAJA and protect everyone's right to access justice.

Sincerely,

Alliance for Justice

Center for Justice & Democracy at New York Law School

Center for Law and Social Policy

Consumer Action

Consumer Watchdog

Sargent Shriver National Center on Poverty Law

[A letter submitted for the record by the Natural Resources Defense Council and The Wilderness Society follows:]



December 7, 2011

The Honorable Doc Hastings
Chairman, House Committee on Natural Resources
1324 Longworth House Office Building
U.S. House of Representatives
Washington, DC 20215

The Honorable Edward Markey
Ranking Member, House Committee on Natural Resources
1329 Longworth House Office Building
U.S. House of Representatives
Washington, DC 20215

Dear Mr. Chairman and Ranking Member Markey:

On behalf of the Natural Resources Defense Council and The Wilderness Society we are writing to express our support for renewable energy development done right. Consistent environmental review and thoughtful planning are essential to successfully permitting new infrastructure on the land, including the deployment of renewable energy to scale. Meeting our country's energy needs with clean, renewable energy will require significant investments in generation and transmission, but these investments need not jeopardize our nation's commitment to conserve its incomparable natural heritage, including the protection of irreplaceable species under the Endangered Species Act (the Act).

The Act provides a strong framework to ensure that decisions regarding the conservation of ecosystems upon which threatened and endangered species depend are made with the highest quality information, and with public input from experts, concerned individuals and affected communities. The Act and other wildlife conservation laws are used by federal agencies to collect important data regarding habitat conservation and species early in the life of the project. In particular, the Act requires consultation with the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration regarding threatened and endangered species, as well as measures to protect these species and their habitats. Recognizing and planning for species concerns is a path toward meeting legal obligations and forestalling controversy.

The Act is one of several landmark environmental laws that, if used correctly, can yield a roadmap to the best places to site utility-scale projects. Early assessment of sensitive resources saves the government money by identifying resource conflicts early, which not only leads to fully informed decisions but also enhances the likelihood that the projects with the greatest viability will receive the bulk of the government's resources. Central to this notion of permitting projects 'smart from the start' is a commitment to a) taking stock in the early stages of a proposed action of the pros and cons of alternatives on sensitive species; b) proceeding with projects likely to emerge successfully from permitting; and c) settling on a final project design that gets to the best result with the least conflict and controversy. That is what Congress recognized when it passed statutes like the Act and the National Environmental Policy Act (NEPA), and that is the role they are serving and should continue to serve.

Efforts are underway to develop conservation plans that specifically allow for renewable energy development in the right places, while protecting sensitive habitat. For example, almost two years ago, the State of California initiated work on the Desert Renewable Energy Conservation Plan which aims to identify public and private lands for renewable development – solar, wind and geothermal – in the Mojave and Colorado Deserts of the state, public and private lands that need to be protected from such development and a comprehensive mitigation strategy for both kinds of lands. This plan, which is being developed through a multi-stakeholder process under the joint auspices of both the state and federal governments, will function as a habitat conservation plan (HCP) under the Act and a natural communities conservation plan under California law and will allow "take" of covered species in accordance with its terms. Similarly, a group of 19 wind energy companies is putting together a proposed Great Plains HCP under the Act in coordination with the FWS to address the potential impacts of wind energy development on several threatened and endangered species in the central US.

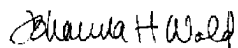
Those who suggest we must choose between protecting our public trust resources or building renewable energy quickly are putting forward a false choice. More specifically, the charge has been made that environmental requirements are restricting the pace and advancement of renewable energy projects. We know that this is not true; of the nine solar energy projects permitted in 2010, the average time for environmental review was 527 days, or 1.4 years, even though neither the regulators, the developers nor the public had experience with the construction or operation of the technologies and scale involved. In fact, the Department of the Interior has stood up wind and solar development on public lands in a way that no administration has done before, and we applaud these efforts. Now is the time to find ways to support progress already made so that these burgeoning industries can work within a consistent regulatory framework and grow.

We believe that Congressional involvement to promote renewable energy development would be best directed toward removing real roadblocks by ensuring that federal financing tools will be predictably available. Time and again, energy companies have testified that financing is their major hurdle, including in testimony before this committee. If we are to reach our common goal of successfully and efficiently meeting our country's energy needs with clean renewable energy, we must focus our attention on the true barriers to renewable energy deployment, such as financing and technology. Our conservation organizations understand these critical needs, and to that end we have aggressively supported financial and tax incentives that would secure a

predictable growth path for renewables. Programs such as the 1603 Treasury Grant Program and the Production Tax Credit for wind need continued support to remain consistent drivers in creating a strong renewable energy industry. Significant, targeted investments in this industry will leverage private equity, produce new megawatts of power, put Americans to work, and strengthen our competitiveness in the global marketplace for renewable energy technologies.

Far from putting up roadblocks, bedrock environmental statutes like the Act continue to serve as roadmaps. More can be done to improve the efficiency and effectiveness of implementation by establishing a predictable approach to avoiding and managing impacts to sensitive species. Our organizations remain fully committed to working with you to make our national environmental laws like the Endangered Species Act, facilitate smarter permitting of renewable energy projects. Thank you for your consideration of this statement.

Respectfully submitted,



Johanna Wald
Director, Western Renewables
Natural Resources Defense Council



Chase Huntley
Director, Renewable Energy Policy
The Wilderness Society

[A letter submitted for the record by Mark N. Salvo, Acting Wildlife Program Director, WildEarth Guardians, follows:]



December 20, 2011

Honorable Doc Hastings
Chairman, Committee on Natural Resources
U.S. House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

Honorable Edward J. Markey
Ranking Member, Committee on Natural Resources
U.S. House of Representatives
1329 Longworth House Office Building
Washington, D.C. 20515

RE: Committee on Natural Resources Hearing on the Endangered Species Act: Response to Representative Lamborn

Dear Chairman Hastings and Ranking Member Markey:

I am writing on behalf of WildEarth Guardians to respond to comments that Representative Doug Lamborn made during the Committee on Natural Resources hearing, "The Endangered Species Act: How Litigation is Costing Jobs and Impending True Recovery Efforts," on December 6, 2011. Please include this letter and attachment in the record for the hearing.

At the hearing, Representative Lamborn contended that the U.S. Fish and Wildlife Service erred in listing the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) as "threatened" under the Endangered Species Act because it is not a distinct subspecies from the Bearlodge meadow jumping mouse (*Zapus hudsonius campestris*). Although there were many conflicting reports in the news media about the differences between the Preble's and Bearlodge meadow jumping mouse—resulting in much confusion among the public on the issue—the science is settled that the Preble's and the Bearlodge are genetically distinct subspecies.

Biodiversity Conservation Alliance, a conservation organization in Laramie, Wyoming, recounted the purported controversy over the science on the Preble's meadow jumping mouse in its autumn 2011 newsletter (attached). As their newsletter describes, the controversy ended when a scientific panel convened by the Fish and Wildlife Service found errors in the only study that had concluded the Preble's is not distinct from Bearlodge meadow jumping mouse. In fact, once the errors were removed, the contradictory research agreed with other studies that concluded that the Preble's meadow jumping mouse is a distinct subspecies.

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I am pleased to provide references or answer any questions concerning the foregoing information. I may be reached at 503/757-4221 or msalvo@wildearthguardians.org. Thank you for this opportunity to submit comments for the record.

Sincerely,

Mark N. Salvo
(Acting) Wildlife Program Director

